IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 50

Civil Appeal No 191 of 2014

Between

(1) ACTATEK, INC
(2) WAN WAH TONG THOMAS

… Appellants

And

TEMBUSU GROWTH FUND LTD

… Respondent

JUDGMENT

[Tort]—[misrepresentation]—[fraud and deceit]

[Contract]—[contractual terms]—[implied terms]

[Contract]—[breach]

ACTAtek, Inc and another
v
Tembusu Growth Fund Ltd

[2016] SGCA 50

Court of Appeal — Civil Appeal No 191 of 2014
Sundaresh Menon CJ, Tay Yong Kwang JA, Steven Chong J
25 February 2016

17 August 2016 Judgment Reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 This appeal arises out of two convertible loan agreements ("CLAs") which had been entered into between the first Appellant and the Respondent. The first of these was in 2007 ("the 2007 CLA") while the second was in 2012 ("the 2012 CLA"). Under the terms of the CLAs, the Respondent was to lend certain amounts of money to the first Appellant which were then to be repaid by the issuance of shares in the first Appellant upon its intended listing on the New Zealand ("NZ") stock exchange. However, the envisaged plan did not come to fruition. In May 2012, the Respondent declared an event of default under the 2012 CLA in that the first Appellant had misapplied the loan proceeds, on the basis of which the Respondent also contended that a cross-default under the 2007 CLA had been triggered. The Appellants, for their part, contended that there had been no misapplication of the loan

proceeds under the 2012 CLA; and therefore that the Respondent had improperly declared an event of default under the 2012 CLA and, consequently, that no cross-default under the 2007 CLA had been triggered. The Appellants also brought a counterclaim for damages suffered by reason of the fact that the Respondent's act of wrongly declaring the event of default had resulted in the first Appellant's planned listing on the NZ stock exchange being aborted.

2 At the trial below, the judge ("the Judge") found in favour of the Respondent and dismissed the counterclaim advanced by the Appellants. It is against this that the present appeal has been brought. Apart from the factual intricacies it engages, an interesting point of law is presented: what are the legal consequences that flow if an event of default is found to have been wrongly declared and damages are suffered as a result?

Facts

Parties to the dispute

3 The Respondent, who was the plaintiff in the suit below, is Tembusu Growth Fund Ltd, a venture capital fund incorporated in Singapore which invests in medium sized start-up companies with growth potential. It is managed and owned by Tembusu Partners, a professional fund manager. For convenience, we refer to both Tembusu Growth Fund Ltd and Tembusu Partners as "Tembusu". Tembusu's chairman, Andy Lim ("Andy"), and two other key employees, Mahim Chellappa ("Mahim") and Lee Renhui ("Renhui"), played a key role in the events leading up to the dispute.

4 The first Appellant is ACTAtek, Inc, a company incorporated in the Cayman Islands, which provides identification management solutions

("ACTAtek") and the second Appellant is its CEO, Wan Wah Tong Thomas ("Thomas"). They were the first and second defendants respectively in the suit below and are referred to collectively as "the Appellants".

5 ACTAtek operates through various wholly-owned subsidiaries active in diverse parts of the world and, together, they form a group of companies known as the ACTAtek Group. Thomas established the ACTAtek Group with his business partner, Paul Hung ("Paul"). Apart from Paul and Thomas, there was another director of ACTAtek, Daniel Wong ("Daniel"), who also played a prominent role in the negotiations that are relevant to the dispute.

6 For context, it would also be helpful to identify the third to fifth defendants in the suit below although the claims brought against them were dismissed by the Judge and no appeal has been brought against that.

7 The third defendant was ACTAtek Pte Ltd, a wholly owned subsidiary of the ACTAtek, which was incorporated in Singapore. The fourth defendant was Hectrix, Inc ("Hectrix"), a Cayman Islands company which holds 80.68% of the shares in ACTAtek. The fifth defendant was Thomrose Holdings (BVI) Ltd ("Thomrose"), a company incorporated in the British Virgin Islands. Thomas owns and controls Thomrose as his personal investment. Together, Thomrose and Paul own 100% of Hectrix.

Events leading to the dispute

The 2007 CLA

8 In 2007, Tembusu was introduced to ACTAtek and Thomas. The parties entered into negotiations for Tembusu to extend a loan of US$1.5m to fund ACTAtek's research and development with a view to its initial public

offering ("IPO"). This led to the signing of the 2007 CLA. Its main terms are as follows:

(a) Tembusu had the option either (i) to demand repayment of the loan with interest at 10% per annum at any time before 31 March 2008 or (ii) to convert the loan into equity in ACTAtek at any time before its IPO (cl 5).

(b) ACTAtek was prohibited from using the funds advanced for any purpose other than those stipulated in Schedule 3 of the agreement, unless Tembusu gave its consent in writing (cl 3).

(c) Tembusu had the right to declare an event of default if any ACTAtek Group company defaulted on the repayment of any other indebtedness or if any obligation falling upon any ACTAtek Group company to repay any other indebtedness was accelerated by reason of an event of default being declared (cl 10.1.10).

(d) If an event of default occurred, Tembusu had the option to declare the whole of the loan extended under the agreement immediately due and payable (cl 10.3).

9 In accordance with the 2007 CLA, Tembusu disbursed the loan of US$1.5m to ACTAtek but chose not to exercise its right to demand repayment on or before 31 March 2008. As a result, Tembusu was locked into its investment in ACTAtek unless the loan was converted into equity upon ACTAtek's IPO or if an event of default occurred.

Discussions on further investment

10 Between 2009 and 2011, ACTAtek and Tembusu engaged in discussions over the possibility of a further investment being made by Tembusu but nothing came of this.

11 Sometime between March and April 2011, ACTAtek informed Tembusu that it was negotiating with Ingram Micro ("Ingram"), the world's largest distributor of computer and technology products, for Ingram to be a promoter and distributor of the ACTAtek Group's products. Tembusu was also informed that for ACTAtek to successfully leverage upon this opportunity, it would require further funding. Following this, in September 2011, negotiations resumed and Thomas asked Mahim to consider whether Tembusu would be willing to make a second investment in the sum of US$500,000. On 3 October 2011, Thomas emailed Mahim to inform him that of the sum of US$500,000 being sought, US$400,000 would be used for "inventory financing" and US$100,000 would be used for "sales/marketing related expenses".

12 After further discussions, Tembusu sent a Summary of Indicative Key Terms & Conditions ("the Termsheet") to ACTAtek on 8 November 2011. This was immediately rejected by Thomas on the basis that the proposed terms were too onerous.

13 Subsequently, on 10 November 2011, Thomas invited Andy, Mahim and Renhui to attend a meeting with representatives of Investment Research Group Limited ("IRG"), the listing sponsor for ACTAtek in New Zealand. The purpose of the meeting was for the IRG representatives to explain the IPO

process to Tembusu's directors. Little emerged in the evidence as to what transpired at the meeting.

14 A few days later, on 18 November 2011, Thomas emailed Andy to arrange a meeting to discuss a further proposed investment from Tembusu in the sum of between S$1m and S$1.5m.

15 On 25 November 2011, Mahim asked Thomas for a breakdown as to how ACTAtek intended to apply the proceeds of the proposed investment. Mahim also asked for a set of detailed financial projections so that the proposal could be put before Tembusu's investment committee for approval. In response, Daniel sent a forecast on 14 December 2011 to Mahim and Renhui. The forecast contained a note that outlined the anticipated use of proceeds as follows:

> Note:
>
> Utilisation of proceed: SGD1.5mil
>
Sales & Marketing Expenses	SGD 500k
R&D expenditure	SGD 300k
IPO	SGD 200k
Working Capital	SGD 500k
	SGD 1.5mil

16 After the forecast was sent, Tembusu conducted a due diligence exercise in the course of which it learnt of certain liabilities of ACTAtek to its shareholders and directors. These included unpaid salaries due from ACTAtek to its directors and shareholder loans which had been extended to ACTAtek. As part of the due diligence process, Renhui emailed Thomas, on 19 December 2011, to clarify certain aspects of ACTAtek's forecast. On the same day, Daniel replied to Renhui's email, with a copy to Thomas, to address

the various queries raised by Renhui. Two of the questions posed, as well as the corresponding replies, are of particular significance in this case. First, the forecast indicated a "Long Term Loan" in the sum of US$716,888. Renhui asked what this was. Daniel replied that US$578,000 represented salaries that were overdue and outstanding to Thomas and Paul for more than a year whereas the remaining US$138,888 was a bank loan. In a subsequent email which was sent from Daniel to Renhui on 22 December 2011, it was clarified that the liability of USD$578,000 pertained only to salaries owing to Thomas and Paul from 2008 to 2010. In that same email, it was noted that there were also salaries due to Thomas and Paul in respect of their work in 2011 which amounted to US$138,769 and US$269,249 respectively. Second, Renhui asked for the details of all shareholder loans that were outstanding and for details on the planned capitalisation of all such loans. Daniel furnished the requested details of the outstanding loans and also stated that these would not be converted into equity, but would be "repaid by cash as most of them are outstanding salary accrual to direct/indirect shareholders". The shareholder loans were broken down into three categories: (a) USD$768,479 owing to Thomas; (b) USD$464,249 owing to Paul; and (c) USD$292,252 owing to Hectrix. The amount of USD$768,479 which was reflected as owing to Thomas by way of "shareholder loans" comprised his accrued salaries from 2008 to 2011 as well as a short term loan from Thomas to the company. As for the "shareholder loans" owing to Paul, it would appear that the sum of $464,249 consisted entirely of his accrued salaries from 2008 to 2011. We pause to note here that from the correspondence between the parties, they were not always consistent in their usage of the term "shareholder loans". At times, it would be a reference simply to the cash loans provided by the shareholders while at other times, it would be a reference to both the cash loans *and* accrued salaries due to the shareholders. For clarity, unless otherwise stated, a

reference to "shareholder loans" in this judgment pertains only to the cash loans and *not* the accrued salaries.

17 A due diligence call was then conducted between the parties on 21 December 2011. There are differing accounts as to what precisely transpired during the call although what is undisputed is that the subject of converting the shareholder loans and accrued salaries into equity was discussed. However, no agreement was reached on this point.

18 The principal difficulty in this regard centred on the fact that Thomas insisted upon the issuance of penny warrants to him and Paul as part of the terms of conversion, which would grant them the option to acquire additional equity in the company upon its listing at a nominal price. Mahim, on the other hand, refused to agree to this because he was concerned this would dilute Tembusu's shareholding after the IPO which was expected shortly. On 5 January 2012, Mahim emailed Thomas asking if he would be amenable to having the shareholder loans converted at certain valuations with the remaining Accounts Payable remaining as debt "with free cash flow used to pay them down". It is not disputed that the Accounts Payable referred to the unpaid but accrued salaries. Thomas replied on the same day expressing his unhappiness at the fact that Mahim was insisting on a simple conversion without any other form of compensation (*ie*, through the issuance of penny warrants to him and Paul). Thomas then suggested deferring this issue "until IPO time". This was accepted by Mahim and on this basis, the parties proceeded to finalise the 2012 CLA. We pause to make a couple of brief observations. It is evident that as at 5 January 2012, a day before the 2012 CLA was entered into, Tembusu's position as reflected in the email from Mahim was that it would not find it objectionable for the Appellants to use "free cash flow" to pay off accrued and/or overdue salaries. What Mahim also

made clear was that from Tembusu's perspective, the shareholder loans, which in this context clearly did not include overdue salaries, were to be dealt with as part of the equity conversion that was anticipated at that time. This in turn was precisely how the Appellants saw it at this stage as seen from Daniel's email to Renhui on 19 December 2011, just two weeks earlier, which we have referred to at [16] above. In that email, Daniel had specifically intimated that the salaries would be paid from cash. It is beside the point that no agreement was concluded as such at this stage and that the parties decided in effect to defer the issue of equity conversion; what is material is that both parties were operating on the basis that salaries could be paid from available cash.

The 2012 CLA

19 The 2012 CLA, dated 6 January 2012, provided that Tembusu would lend ACTAtek S$1.5m. The salient terms of this agreement are as follows:

(a) The loan was convertible into shares in ACTAtek upon its IPO at a 50% discount to the issue price of ACTAtek's shares or, if there was no IPO, at a 50% discount to the value of the shares assessed by two independent accountants (cl 5).

(b) It was a condition precedent to the disbursement of the loan amount that ACTAtek deliver to Tembusu details of how it intended to use the loan proceeds and an execution plan for its expansion (cl 3.1(d)(ii)).

(c) It was a condition precedent to the disbursement of the loan amount that the parties execute a supplemental agreement to vary the maturity date contained in the 2007 CLA to 31 December 2013 ("the Variation Agreement") (cl 3.1(f)).

(d) Tembusu would have the right to declare an event of default if ACTAtek was in material breach of any of its obligations under the agreement and, provided that the breach was capable of remedy, if ACTAtek failed to remedy that breach within 30 days (cl 8.1(e)).

(e) As soon as an event of default occurred, ACTAtek would immediately come under an obligation to repay the S$1.5m loan amount together with interest on it at 15% per annum (cl 8.2).

Of significance is the fact that the 2012 CLA *did not* contain an express provision, equivalent to cl 3 of the 2007 CLA, which obliged ACTAtek to use the 2012 loan proceeds only for specified purposes (see [8(b)] above).

20 On 6 January 2012, Tembusu sent an execution copy of the 2012 CLA to Thomas for signature. In order to satisfy the condition precedent referred to at [19(b)] above, Thomas prepared a single page document bearing the title "Use of Proceeds" ("the UOP") which stated four categories of use ("the Four Categories"). The UOP provided as follows:

Use of Proceeds

Sales & Marketing Expenses	SGD 300k
R&D expenditure	SGD 300k
IPO	SGD 200k
Working Capital	SGD 900k
	SGD 1.5 mil

21 It should be noted that the Four Categories were essentially derived from the forecast sent on 14 December 2011 (see [15] above), although some changes were made to the values indicated. However, the amendments

resulted in a calculation error. When the four figures in the UOP are added up, they amount to S$1.7m instead of S$1.5m.

22 Thomas attached a physical copy of the UOP to the 2012 CLA, signed the CLA, and returned it to Tembusu. Tembusu then proceeded to disburse the loan amounts and nominated one Daniel Lee ("Lee") to ACTAtek's board of directors, as it was entitled to do under cl 6.2 of the 2012 CLA.

Events after the execution of the 2012 CLA

23 Subsequently, on 5 April 2012, the parties reached an agreement as to terms on which the outstanding shareholder loans and accrued salaries would be converted or repaid. The shareholder loans were to be converted into equity, while the accrued salaries were to be treated as term loans to be repaid over two years.

24 Shortly after this, in May 2012 Tembusu received ACTAtek's income statement for the first quarter. The parties' relationship deteriorated in the aftermath of this. From this income statement, it came to Tembusu's attention that a sum of about US$260,000 had been paid to Hectrix, (which was the holding company of ACTAtek and was effectively owned by Thomas and Paul) between 11 January 2012 and 1 February 2012. We pause to note that this was just after the exchange of emails that we have referred to at [18] above and the execution of the 2012 CLA and well before the agreement that had been reached in April 2012. Tembusu registered its unhappiness over this payment and sought clarification from Thomas as to the nature of this payment. Daniel replied that this amount, which was owing to Hectrix had been inadvertently omitted from the earlier computation of the shareholders' loans and accrued salaries and, therefore, ACTAtek had decided to repay a

part of the outstanding due to Hectrix. Daniel suggested that the payment could be reversed and be converted into equity. While we have endeavoured to set out what was stated in the emails that were exchanged between the parties, it is not clear to us whether the computation referred to by Daniel is one that was put forward prior to the execution of the 2012 CLA, which appears to us to have included most if not all of Thomas's accrued salaries, or some other computation that was put forward at the time of the agreement that was reached in April 2012.

25 Tembusu did not respond to this proposal. Instead, on 16 May 2012, Tembusu's solicitors wrote to ACTAtek declaring an event of default under the 2012 CLA and demanding repayment of the principal amount of the loan together with an amount for interest calculated at 15%, which was charged pursuant to cl 8.2 of the 2012 CLA. It should be noted that the basis on which the event of default was declared was that there had been a material breach of the 2012 CLA in the way in which the funds had been applied. It was only later that Tembusu added a claim against the Appellants on the basis of the tort of deceit. We elaborate on this below.

26 Following these developments, on 24 May 2012, Lee commissioned a special audit which revealed that the 2012 CLA proceeds had been used to pay, among other things, S$74,128.80 worth of the Thomas' credit card debts and a total of S$171,084, which had been drawn down by Thomas in various smaller sums. These amounts did not come directly from ACTAtek but were instead drawn from Hectrix *after* ACTAtek had made the loan repayment in this amount to Hectrix. Tembusu commenced suit on 2 August 2012.

27 ACTAtek contends that the amount which was repaid to Hectrix was in fact accrued salaries that were owed to Thomas for 2011 ("the 2011 Accrued

Salaries"). This contention was only advanced after Tembusu had initiated proceedings. Tembusu on the other hand, claimed that this was nothing more than "explanations and excuses raised after the misuse was discovered". According to Tembusu, Thomas was effectively using the funds of ACTAtek as an overdraft facility for his personal needs. This, however, was not borne out on the evidence. The Judge took the Appellants' case at its highest, namely that the payment to Hectrix was in fact used to pay the 2011 Accrued Salaries. At the hearing before us, Tembusu proceeded on the same basis. We too therefore proceed on this basis.

The parties' pleaded case

Tembusu's case

28 At the trial, Tembusu sought repayment of the loan proceeds under *both* the 2007 and 2012 CLAs with interest.

29 There were two aspects to Tembusu's claim and these may be summarised as follows:

(a) With respect to the 2012 CLA, Tembusu's claim rested on its contention that ACTAtek committed a material breach of the 2012 CLA by misusing the proceeds under the agreement and this constituted an event of default under the 2012 CLA. The validity of this claim depended entirely on Tembusu establishing that it was an express, alternatively an implied, term of the 2012 CLA that the proceeds of the loan could only be applied in accordance with the UOP *and also that* using the proceeds to repay accrued and overdue salaries would be a breach of such a term.

(b) As alluded to above, Tembusu also brought a separate claim against the Appellants (including Thomas) for the tort of deceit. This was in some senses separate from the question of whether the UOP had contractual force. It was a standalone claim in which Tembusu contended that Thomas and ACTATek had induced it to enter into the 2012 CLA by a fraudulent misrepresentation. It is important to note that Tembusu was not seeking to rescind the 2012 CLA on this basis but to make Thomas and ACTATek liable in damages.

30 As for the 2007 CLA, Tembusu argued that the event of default under the 2012 CLA triggered a cross-default under the 2007 CLA.

The Appellants' case

31 The Appellants contended that ACTAtek did not breach the 2012 CLA as the proceeds had been used for purposes contemplated under the agreement. Secondly, they submitted that, even if there had been a breach of the 2012 CLA, this was not *a material breach* such as would justify Tembusu declaring an event of default under the 2012 CLA; and on this basis, there would have been no cross-default under the 2007 CLA. On the view we have taken of the case, the second issue namely whether the breach, if any, was material does not arise and we say no more on this.

32 The Appellants also submitted that there had been no fraudulent misrepresentations that induced Tembusu to contract with ACTAtek.

33 The Appellants in turn counterclaimed losses they suffered as a result of ACTAtek being unable to list on the NZ stock exchange. The counterclaim was based on the following causes of action:

(a) Tembusu had wrongfully repudiated the 2007 and 2012 CLAs which resulted in ACTAtek not being able to be listed on the NZ stock exchange.

(b) Tembusu had breached an implied term of both the 2007 and 2012 CLAs requiring it to act in good faith, to not act recklessly or negligently, and to take reasonable care and skill when taking any steps so as to enable the ACTAtek to proceed to listing.

(c) Tembusu breached a tortious duty of care owed to the Appellants in similar terms as stated at (b) above.

(d) Tembusu and its officers were liable in the tort of conspiracy by unlawful means for conspiring to prevent ACTAtek from listing.

The Judge's decision

34 With respect to Tembusu's claim in tort, the Judge found that the Appellants *were* liable under the tort of deceit. This was on the basis of two statements which had been made by Thomas ("the Statements"):

(a) The first statement (see above at [11]) was the email of 3 October 2011 which represented that ACTAtek required funds to invest in "inventory" and "sales/marketing" in order to take full advantage of the opportunity to work with Ingram ("the First Statement").

(b) The second statement (see above at [15]) was the statement in the forecast sent on 14 December 2011 which suggested that the 2012 CLA proceeds would be applied to the Four Categories of expenses ("the Second Statement").

35 According to the Judge (at [45] of the Grounds of Decision ("the GD")), the Statements conveyed a single fact: that the Appellants had an actual intention, genuinely held at the time the Statements were made, *to use the 2012 CLA proceeds only in accordance with the specified purposes in the Statements.* The Judge found that this representation was falsely made because Thomas had always intended to use the loan proceeds to pay the outstanding salaries, a purpose which fell outside the ambit of the Four Categories (at [65]–[68] of the GD). Having further found that this representation had induced Tembusu to enter into the 2012 CLA, the Judge concluded that the tort of deceit had been established.

36 As for Tembusu's claim for breach of contract, the Judge held that although there was no express term in the 2012 CLA which limited the use of the proceeds, there was an implied term to that effect (at [72]–[76] of the GD). By making payment to Hectrix to enable it to repay the 2011 Accrued Salaries, ACTAtek had used the proceeds outside the ambit of the Four Categories and had therefore breached this implied term (at [101] of the GD).

37 The Judge then found that the breach amounted to a material breach of the 2012 CLA (at [105] of the GD), which entitled Tembusu to declare an event of default under the 2012 CLA. The Judge consequently held that the acceleration of the ACTAtek's indebtedness under the 2012 CLA, before its maturity, triggered a cross-default under cl 10.1.10 of the 2007 CLA.

38 The Judge dismissed the entirety of the counterclaim brought by the Appellants.

39 This led the Appellants to bring the present appeal against the whole of the Judge's decision. No cross-appeal was brought by Tembusu.

The parties' arguments

Appellants' arguments

40 With respect to the main claim, the Appellants raise a multitude of arguments in its grounds of appeal in support of its contention that the Judge had erred in his decision. These are effectively directed at making good the following two contentions:

(a) that the Judge erred in finding that the tort of deceit had been established; and

(b) that the Judge erred in finding that there was an implied term restricting the use of proceeds in the 2012 CLA.

41 As for its counterclaim, the Appellants submit that the Judge had erred in dismissing the grounds outlined at [33] above. The Appellants maintain that Tembusu's wrongful conduct resulted in ACTAtek's failure to list on the NZ stock exchange and they therefore seek an award for the damages which flowed from this.

42 The Appellants also raise an additional ground in the appeal, for their counterclaim. They contend that Tembusu should be held liable for fraudulent misrepresentation in inducing ACTAtek to enter into the variation agreement. This argument, however, was not pleaded and had not been considered by the Judge below. We therefore decline to consider it.

Respondent's arguments

43 Tembusu in response submits that the Judge was correct to find that there was an implied term in the 2012 CLA restricting the use of the loan

proceeds and that this had been breached. Tembusu also seeks to uphold the Judge's finding that Thomas had fraudulently induced Tembusu to enter into the 2012 CLA. In addition, Tembusu contends that the Judge should have found that the UOP was in fact an *express* term which restricted the use of proceeds to the Four Categories. This last point sought in essence to reverse the Judge's finding in this issue; but as no cross-appeal was filed by Tembusu, we consider that seeking to reverse the Judge's holding on this point was not a course that was open to Tembusu (see *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 331 ("*Peter Lim*") at [26] and [28]; and *Chiam Heng Hsien (on his own behalf and as partner of Mitre Hotel Proprietors) v Chiam Heng Chow (executor of the estate of Chiam Toh Say, deceased) and others* [2015] 4 SLR 180 ("*Chiam Heng Hsien*") at [100]). We elaborate on this at [70]–[73] below.

44 Alternatively, Tembusu submits that even if it was not entitled to declare an event of default, the Appellants' counterclaim would fail because a wrongful declaration of an event of default would not amount to a breach of the 2012 CLA. Further, it contends that the Appellants failed to establish any of the other grounds for their counterclaim.

Our decision

45 We first address the Judge's determination of Tembusu's claim which gives rise to two issues:

(a) whether the tort of deceit had been made out as against the Appellants; and

(b) whether there was an express or implied term restricting the use of proceeds in the 2012 CLA.

The tort of deceit

46 The elements for establishing the tort of deceit were accurately summarised by the Judge in the GD at [42] (see also *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]):

(a) The Appellants must have made a representation of fact by words or conduct.

(b) The Appellants must have made the representation with the intention that Tembusu should act upon it.

(c) Tembusu must have acted upon the representation.

(d) The Appellants must have made the representation: (i) knowing that it is false; (ii) without any belief in its truth; or (iii) recklessly, without regard to whether it is true or not.

(e) Tembusu must have suffered damage by acting upon the misrepresentation.

47 In our judgment, the Judge was incorrect in finding that the elements of the tort had been fulfilled with respect to the two Statements. We consider them in turn.

The First Statement

48 An actionable misrepresentation rests upon a statement of past or present fact. An assertion as to the existence of a particular intention or state of mind would amount to a statement of fact. It follows that a *misstatement* of the existence of such a state of mind or intention would amount to a misrepresentation of fact (see *Tan Chin Seng and others v Raffles Town Club*

Pte Ltd [2003] 3 SLR(R) 307 ("*Tan Chin Seng*") at [12], citing with approval the observations of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 ("*Edgington*") at 483).

49 With respect to the First Statement, in our judgment, this could not amount to a representation of fact as to the Appellants' intention in relation to the use of proceeds under the 2012 CLA. This is because the First Statement was made at a time when negotiations for the 2012 CLA had not yet even commenced. To fully appreciate the context in which the First Statement was made, it would be helpful to set out the relevant chronology of the events and the emails that were exchanged between the parties.

50 On 28 June 2011, Mahim emailed Daniel and Renhui, copied to Thomas stating: "I think we should consider doing a pre-IPO raise for Actatek, as that is likely the best way to position the company for a listing that will trade well for late next year or early 2013". Nothing much transpired after this until 29 September 2011, when Thomas met Mahim and Renhui at an industry dinner where discussions took place between them. The following day, Renhui sent an internal email to Mahim in which he said:

> Mahim,
>
> Here's what I gathered from my conversation with Thomas during the SVCA dinner yesterday:
>
> …
>
> 2. Business with Ingram Micro is going well, with Thomas travelling to Thailand to meet the Thai head of Ingram Mircro to introduce their company. He expects that the different geographies will sign up with ACTAtek once they tie up the agreement with Ingram Micro USA. However, he needs capital in order to execute the expansion plan with Ingram, which brought us to the topic of his audit.

51 A few days later, on 3 October 2011, Thomas emailed Mahim to ask whether Tembusu would be interested to make a further investment so that ACTAtek could take steps to leverage upon Ingram's network:

> Further to our short conversation during the SVCA dinner, to assist me to come up with a forecast, is Tembusu ready to invest USD750k or other amount to ACTAtek?
>
> … The fact that we need the cashflow for inventory, sales/marketing investment has been mentioned. *All we need now is the fund to leverage upon Ingram Micro's network. So our plan is based on cash available.*
>
> [emphasis added]

52 After further correspondence between the two, Thomas then sent the email which contained the First Statement:

> Mahim,
>
> As mentioned, the USD500k is mainly for inventory financing USD@400K, and USD100K for sales/marketing related expenses to drive the add-on sales from Ingram and other distributors.

53 On 8 November 2011, Tembusu sent a proposed Termsheet to the Appellants for the proposed investment, which was swiftly rejected by Thomas as being "akin to [a] distress loan" and stating that "ACTAtek [was] not that desperate". On 10 November 2011, Thomas invited Tembusu's directors to attend a meeting with IRG so that the anticipated listing process could be explained to them (see above at [13]). It should be noted that the listing process remained an issue in which Tembusu retained a vital interest given that in the circumstances that prevailed at that time, the expected listing represented Tembusu's only realistic option for exiting from its investment in ACTAtek (see [9] above). It also does not appear to be the case that the meeting with IRG had anything directly to do with ACTAtek's potential tie-up

with Ingram, which was the subject matter of discussions between the Appellants and Tembusu at the time.

54 On 18 November 2011, *fresh* discussions commenced between the parties when Thomas wrote to Andy to ask whether Tembusu would be willing to agree to a "proposed investment of SGD 1 to 1.5 million" based upon certain terms. In the course of these fresh discussions, on 14 December 2011, the Second Statement was made to Tembusu. These discussions culminated in the signing of the 2012 CLA (see above at [15]–[18]).

55 It is evident that the context in which each of the First and Second Statements was made was markedly different. While the Second Statement was made during the negotiations which led to the signing of the 2012 CLA, the same cannot be said of the First Statement. During the discussions in the course of which the First Statement was made, the focus was on ACTAtek getting funds to leverage upon Ingram's network for expansion and in conjunction with this to finance inventory build-up and related sales and marketing. In our judgment, those discussions came to an abrupt end when Thomas rejected Tembusu's Termsheet on 8 November 2011.

56 This difference in context is further reflected in the fact that when new discussions commenced on 18 November 2011, there was a substantial increase in the amounts being sought. Where the initial discussions had revolved around a potential investment of US$500,000 or US$750,000 the subsequent discussions involved a range that was double these amounts. In fact, by the time the Second Statement was made, the loan amount being discussed was S$1.5m and the *categories* of expenses to which the funds were projected to be applied had also developed significantly. As noted above, during the negotiations for the First Statement, the anticipated purposes for the

loan were "inventory financing" of around US$400,000 and "sales/marketing related expenses" of around US$100,000, both of which appeared to be related to the anticipated tie-up with Ingram. At the time the Second Statement was made, these had changed to consist of "Sales & Marketing Expenses", "R&D expenditure", "IPO" and "Working Capital" (*ie*, the Four Categories). The only common item was "Sales & Marketing" but this was stated to be for a *lower* indicated sum in the UOP than in the context of the First Statement. It is not evident that any of these categories related to Ingram.

57 In our judgment, at its highest, one might consider that the negotiations surrounding the First Statement provided some context for the subsequent discussions in the course of which, the Second Statement was made and which led to the signing of the 2012 CLA. However, we cannot accept that the First Statement represented a statement of intention on the part of the Appellants in relation to how the proceeds of the 2012 CLA were going to be utilised.

The Second Statement

58 Turning to the Second Statement, we proceed on the basis that this did amount to a representation of fact insofar as it was an assertion as to the Appellants' state of mind at that point. In *Edgington*, the directors of a company issued a prospectus inviting subscriptions for debentures stating that the funds raised against the debentures would be applied to complete alterations to the company's buildings, to purchase horses and vans, and to develop the trade of the company. In fact, the real object of the loan was to enable the directors to pay off pressing liabilities. The plaintiff brought a claim against the directors for the tort of deceit. In finding that there was an actionable representation of fact, Bowen LJ made the following observations (at 483):

> A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact: but the 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. Having applied as careful consideration to the evidence as I could, I have reluctantly come to the conclusion that the true objects of the Defendants in raising the money were not those stated in the circular. I will not go through the evidence, but looking only to the cross-examination of the Defendants, I am satisfied that the objects for which the loan was wanted were misstated by the Defendants, I will not say knowingly, but so recklessly as to be fraudulent in the eye of the law.

59 *Edgington* aids Tembusu in as much as it explains why a statement as to one's intention may amount to a statement of fact. But that is as far as it goes. In an action founded on the tort of deceit, it must be shown not only that such a statement of fact was made but that it was *falsely* made *and the maker must have known this to be so or been indifferent to the truth*. The Judge found that Thomas had made the representation knowing it to be false on the basis that he had always intended to use the 2012 CLA proceeds to pay the accrued salaries of ACTAtek's directors. We begin by observing that even if Thomas did have the intention to use the 2012 CLA proceeds to pay the overdue and accrued salaries, this does not answer the questions whether at the time the material alleged misrepresentation was made, he and ACTATek: (a) knew they were not entitled to do this; (b) knew that Tembusu did not know of this intention; and (c) misled Tembusu into thinking that the 2012 CLA proceeds would not be used for this purpose. Once these points are appreciated, it becomes clear in our judgment that that the Second Statement neither was untrue nor failed to reflect the true intent of the Appellants at the time it was made. It bears emphasis that the anterior question is whether Thomas knew or *subjectively* believed that the payment of such accrued salaries fell *outside* the

Four Categories as stipulated in the Second Statement. As was noted 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 [37], "it is *the representor's own (subjective) belief* that is crucial" [emphasis in original].

60 In our judgment, Thomas *in fact believed* that the payment of the accrued salaries fell *within* the ambit of "working capital". In the GD (at [65]), the Judge reasoned that because all the items of expenditure referred to in the Second Statement related to the future, Thomas must have known that "working capital" did not encompass the payment of accrued salaries. We are unable to see the basis on which the Judge arrived at this conclusion and on our consideration of the material that was adduced in the trial and before us, we do not agree with his conclusion.

61 In this regard, we begin with an email exchange which occurred in June 2010, some time before the events that are directly material to the issues in this case, which we consider to be significant. On 23 June 2010, Mahim had inquired why, in ACTAtek's cash flow statement, a payment of $43,839 to the "Immediate Holding Company" had been reflected. Mahim asked specifically if this was a payment to Hectrix and why it was categorised under "working capital". Daniel replied as follows:

> Hi Mahim,
>
> We transferred funds to Hectrix and then Hectrix will make payment on behalf of ACTAtek.
>
> We categorized under working capital according to Auditor's Practice.

62 Mahim then asked what the payment "on behalf of ACTAtek" was for. Daniel replied that it was "salary for ACTAtek staff". Upon receiving this response, Mahim replied:

> Hi Daniel,
>
> Ok. Thanks. The way it is written, it looks like it is a repayment of the Holdco Loan. Are you stating that this is not the case? Given that the Company is looking to IPO in the next 1 to 2 years, any holdco/shareholder loans should not be repaid until the IPO, as institutional shareholders would not find that a good precedence.

63 Although it is not clear whether the "salary for ACTAtek staff" pertained to accrued or on-going salaries, Tembusu never sought to clarify this. The only concern that is alluded to in the email exchange is with the treatment of the repayment of *shareholder loans* as "working capital". Once Daniel clarified with Mahim that this was not the case and that what had been described as the "repayment of holding company loan" in fact related to the paying of *salaries*, Mahim no longer had any objections to this. Therefore, it appears to us that, since 2010, the understanding between the parties was that the repayment of shareholder loans could not be properly characterised as "working capital" but that this did not extend to the repayment of salaries.

64 It falls on Tembusu in these circumstances to show that this understanding had changed by the time of the Second Statement such that the repayment of accrued salaries also was excluded from the ambit of "working capital". Tembusu contends that during the negotiations for the 2012 CLA discussions, it became clear to both parties that the loan proceeds should not be used to pay off *either the shareholder loans or accrued salaries*. The evidence, however, does not bear this out. In fact, we are satisfied, on careful consideration of the evidence, that by the time these negotiations were concluded, the position was that both parties appeared to accept that the available cash could be used for the payment of accrued and overdue salaries but not for shareholder loans and we find it especially significant that this is precisely how they had understood the position in 2010 as set out in the

immediately preceding discussion. Moreover, it seems that this was also within the ambit of "working capital" as far as these parties were concerned. We return here to the email sent on 19 December 2011 in response to certain questions posed by Renhui in the course of the due diligence exercise. Daniel informed Tembusu that overdue salaries were to be repaid in cash (see above at [16]). We pause to note that this was the communication closest in time to the making of the Second Statement on 14 December 2011. According to Mahim, a due diligence call took place subsequently on 21 December 2011, in the course of which he informed Thomas that he did not want the proceeds of the 2012 CLA to be used to pay off either the shareholder loans or the accrued salaries. Instead, he wanted these sums to be converted into equity after ACTAtek had been listed. As we have noted above, it was far from clear just what had transpired during that call. However, even assuming we were to accept Mahim's account of the events, this alleged communication took place *after* the Second Statement was made and therefore cannot be relied upon to show that *at the time* the Second Statement was made, the Appellants:

(a) intended to use a part of the proceeds of the 2012 CLA to pay overdue salaries; and

(b) knew that this was outside the ambit of the four permitted categories of expenses.

65 Quite apart from Thomas' state of mind at the time he made the Second Statement, we do not accept that the parties ever had a common understanding that the accrued salaries were *not* to be repaid using the 2012 CLA proceeds. Instead, as we have noted at [18] above, it appears to us that the parties had differentiated between shareholder loans on the one hand and the accrued salaries on the other. We return here to the email that was sent on

5 January 2012 from Mahim to Thomas, some two weeks after the disputed due diligence call and immediately before the 2012 CLA was executed, which supports this conclusion, as evident in this extract:

> *Shareholder Loans on Balance Sheet of $464,070 (under Accounts Payable) and $292,252 under Current Liabilities of Amount due to Holding will be converted to equity.* We can go with the valuations you suggested before ($9mm as of end of 2008; $10mm as of end of 2009; $11mm as of end of 2010). So a total amount of $756,322 will be converted to equity.
>
> *The remaining amount of Accounts Payable will remain on the balance sheet, with free cash flow used to pay them down, as we discussed."*
>
> [emphasis added]

It should be noted that the "Shareholder Loans" referred to in the email did not include the accrued salaries owing to Thomas and Paul. Rather, these accrued but overdue salaries fell within the ambit of the "remaining amount of Accounts Payable". This was affirmed by Mahim himself in his affidavit of evidence-in-chief. As for the "Current Liabilities of Amount due to Holding", this was understood to be a loan which was owed to Hectrix. According to Thomas, this amount owing to Hectrix was in fact cash advances which had been made by him.

66 As noted at [18] above, it appears to have been common ground that no agreement was reached on the subject of the equity conversion because of a difference over whether the conversion would incorporate some form of compensation for the shareholders who had financed the group during this time. It was eventually left on the basis that while the shareholder loans would be converted to equity, the precise terms of the conversion would be re-visited closer to the time of the listing. But we reiterate that as far as the salaries were concerned, the position was somewhat different. This is evident from the extract from the email of 5 January 2012 that we have reproduced in the

previous paragraph. As noted above, Mahim accepted that the reference to "remaining amount of Accounts Payable" which was to be paid using "free cash flow" included the accrued salaries. Hence he accepted that the Appellants were entitled to repay these sums. His issue was with the source of the funds from which such repayment could take place. He contended that "free cash flow" meant "spare cash which had been generated as a result of the Company's operation – new retained profits" and was not meant to refer also to the cash injection from the 2012 CLA. While that might have been *his* interpretation of "free cash flow", there is nothing in the contemporaneous evidence to show that this was the common position taken by both parties at that time. Furthermore, it is unclear to us why the Appellants would ever have needed Mahim's or the Respondent's agreement to use "new retained profits" to pay off overdue and accrued salaries. In our judgment, the better view on the evidence is that, if anything, the parties were agreed that *any* available cash could be used to repay the accrued overdue salaries. Hence, there is simply no basis for concluding that the Appellants did not believe they were entitled to use any available cash to pay overdue salaries; or that they set out to mislead Tembusu to think that they would not use the 2012 CLA proceeds for this basis. In fact it is clear that this was a live discussion and despite this, Tembusu never sought nor obtained any assurance from the Appellants that they would not do this. On the contrary, the parties appear to us to have proceeded on the basis that the payment of these salaries could fall within the ambit of "working capital" even assuming this was a term of the 2012 CLA. We are therefore unable to see how it can then be said that they were fraudulently misled to enter into the 2012 CLA on a mistaken premise.

67 We turn to consider an argument advanced by Tembusu that the subsequent conduct of the parties evinces their common understanding that the

2012 CLA loan proceeds would not be used to repay either the shareholder loans or the accrued salaries. This argument was based on the fact that in April 2012, after the execution of the 2012 CLA, the parties reached an agreement for the repayment terms of *both* the shareholder loans and the accrued salaries, and according to the Respondent, this included the 2011 Accrued Salaries ("the April 2012 Agreement") (see [23] above). The argument proceeds on the basis that it would be inconsistent for the Appellants on the one hand to maintain that they were entitled to repay the accrued salaries with fresh cash and on the other hand to then agree subsequently for these to converted into a loan which would be payable within two years of the IPO. In our judgment, this is flawed for at least two reasons. First, as noted above, in January 2012, there had been a suggestion on the part of Mahim to leave the accrued salaries "on the balance sheet" with "free cash flow used to pay them down". It was therefore entirely reasonable for the Appellants to have believed that they could use available cash to pay off at least *some part* of the outstanding salaries. It would not be inconsistent with this for them to have then agreed for the rest to be settled by the repayment terms agreed upon in the April 2012 Agreement. Second, even if we were to accept that ACTAtek had embarked upon a seemingly inconsistent course of conduct by agreeing to the repayment of the accrued salaries on the terms stated in the April 2012 Agreement if their position was that they had been entitled to pay these from the available cash, there remain other possible explanations for the subsequent conduct of a party that might seem at odds with what it contends is its entitlement under a contract. This is one of the reasons we have been and remain cautious in looking to subsequent conduct when construing the terms of an earlier agreement (see, *eg*, *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 at [73]–[74]; and *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 at [56]). The Appellants contend, first, that

whatever might have been the position under the April 2012 Agreement, this did not extend to the 2011 Accrued Salaries. Whether that is so or not, it seems to us that the more fundamental point is that by April 2012, the parties were anticipating an imminent listing and this might well have weighed in the balance from the Appellants' perspective. In other words, the parties might well have been willing to take a position that was not in accordance with their strict rights given that the end of the road seemed to be in sight. The April 2012 Agreement cannot, in our judgment, be relied upon to establish any common understanding between the parties at the time the 2012 CLA was entered into. This is especially so given, as we have already noted above, that if anything was agreed on this issue at the time of the 2012 CLA, it was that any available cash that ACTATek had could be used for the payment of salaries but not of other loans. The April 2012 Agreement is therefore neutral at best, if it extends so far as to suggest that there was an absence of an agreement even on the issue of salaries at the time of the 2012 CLA. It therefore cannot be the basis for contending that the Second Statement was falsely or dishonestly made.

68 In the circumstances, we are satisfied that the judge erred when he held that the tort of deceit had been made out against the Appellants. We summarise our key findings on this issue:

(a) The First Statement was not causally connected to the 2012 CLA and therefore could not be relied on as a basis for contending that that agreement had been entered into in reliance upon a fraudulent misrepresentation. In the circumstances there is no need for us to consider other issues such as whether this was an actionable statement or fact and whether it was falsely made.

(b) As to the Second Statement, we consider that the Statement was not made with the knowledge or belief that it was false. This is so for the following reasons:

(i) The Appellants believed that the payment of accrued salaries was within the ambit of "working capital. This was a reasonably held belief having regard to the earlier interactions between the parties.

(ii) In the discussions leading to the conclusion of the 2012 CLA, the parties agreed to defer the matter of converting the outstanding shareholder loans to equity until closer to the time of the anticipated IPO.

(iii) This however did not apply to accrued salaries generally, or the 2011 Accrued Salaries specifically. The contemporaneous documents suggest that the accrued salaries could be paid from surplus cash and there was nothing to suggest that such surplus cash could not include the loan proceeds.

(iv) While the April 2012 Agreement for the repayment of outstanding sums to the First Appellant's shareholders did apply to shareholder loans as well as to accrued salaries, Tembusu's reliance on this fact to suggest that the 2012 CLA prohibited the use of the loan proceeds for either of these purposes simply does not follow. At the time of the 2012 CLA, there was no agreement on conversion to equity for the shareholder loans. Nor is the fact that such an agreement was reached in April 2012 determinative of (a) whether the Appellants could use the loan proceeds to pay the accrued

> salaries; or (b) whether they in fact believed they could not do so at the time the Second Statement was made. On the contrary we are satisfied that they reasonably believed they could and this precludes any finding of a fraudulent misrepresentation.

The Judge's finding on this issue must therefore be reversed.

Term restricting the use of proceeds in the 2012 CLA

69 We turn to consider whether there was an express or, alternatively, an implied term restricting the use of the 2012 CLA loan proceeds to the Four Categories.

Express Term

70 A preliminary question is whether Tembusu is able to canvass the argument that there was an express term which restricted the use of proceeds. As noted above at [36], the Judge had specifically considered this issue and concluded that no such express term existed in the 2012 CLA. Although Tembusu did not file a cross-appeal to contest this finding of the Judge, it argues that O 59 r 9A(5) of the Rules of Court allows it to raise this issue in the present appeal. Pursuant to O 59 r 9A(5), a Respondent may contend on appeal that "the decision of [the lower Court] should be varied in the event of an appeal being allowed in whole or in part, or that the decision of that Court should be affirmed on grounds other than those relied upon by that Court." The question then arises whether Tembusu is indeed seeking to vary or affirm a "decision" of the Judge.

71 The ambit of O 59 r 9A(5) was considered in *Peter Lim* where we interpreted the word "decision" to refer a finding of law or fact. In *Peter Lim*,

a case which concerned defamation, the judge at first instance made three findings which resulted in the appellant's claim being dismissed at trial: (a) the relevant extracts in question were defamatory of the appellant; (b) they were published on an occasion of qualified privilege; and (c) the appellant had failed to prove that the respondents were actuated by malice and therefore the defence of qualified privilege succeeded. On appeal, the respondents sought to rely on O 59 r 9A(5) to argue that the judge should have found that the extracts were not defamatory to begin with – the respondents took the position that such reliance was justified because they were seeking to affirm the "decision" of the judge to dismiss the appellant's claim. We rejected the respondents' argument and held that each of the three findings referred to above constituted a distinct "decision" of the judge (*Peter Lim* at [27]). The dismissal of the appellant's claim was not a separate and independent decision; it was merely a consequence of the judge's finding that there was no malice which meant that the defence of qualified privilege succeeded. Accordingly, it could not be said that that the respondents were seeking to vary or affirm any of the judge's three "decisions". Instead, the respondents were in effect trying to reverse decision (a) of the judge (*ie*, that the extracts were defamatory). This was held (*Peter Lim* at [28]) to be impermissible under O 59 r 9A(5).

72 In short, the word "decision" in O 59 r 9A(5) refers not to the judge's final determination of the claim as a whole but to each of the discrete findings which supports his overall determination. We reconsidered the operation of O 59 r 9A(5) in our subsequent decision in *Chiam Heng Hsien* and at [100] affirmed the observations we had earlier made in *Peter Lim*.

73 On that basis, Tembusu is not entitled to pursue the argument that there had been an express term in the 2012 CLA restricting the use of proceeds. It is

effectively seeking to reverse the Judge's decision on this issue and should have filed a cross-appeal if it wished to do so.

74 In any event, in our judgment, there is no merit to the argument that there was such an express term in the 2012 CLA. Tembusu argues that from the UOP, a specific express term can be found, which was to the effect that the use of proceeds would be restricted to the Four Categories, and if ACTAtek wished to apply the proceeds to any other purpose, prior authorisation would have to be obtained from Tembusu. In our judgment, the fact that the UOP was annexed to the 2012 CLA does not have the effect of creating an express term with the meaning and effect that was urged upon us by the Respondent. This is so for several reasons.

75 First, there is nothing in the way of *any* written communications by which Tembusu had informed ACTAtek or its representatives that the use of proceeds was to be restricted to the Four Categories. This simple fact was neither refuted nor contradicted by Tembusu before us.

76 Second, the way in which the alleged express term was supposed to operate was shrouded with uncertainty. This militates against finding that the parties had intended that the UOP gave rise to an express obligation. For example, if ACTAtek was to spend more than the stipulated amount under the category of "working capital", would that amount to a breach of such an express term even if it was compensated by a reduction of the amount indicated for some other purpose? Counsel for Tembusu, Mr Daniel Chia, argued that this would not be a breach of the express term because the values that were identified under each category were meant to be flexible and the UOP only obligated ACTAtek to spend the loan proceeds within the Four Categories. We could not see anything in the UOP that would sustain such a

creative and flexible interpretation. Certainly none of this was ever discussed between the parties.

77 Given that Tembusu's primary case was that the UOP gave rise to the express term, it would have meant, on the face of the UOP, that both the *categories and the values* stated would be subject to the obligatory limits stated therein. This, however, was not tenable, as was demonstrated when we queried Mr Chia as to whether it would be a breach if all of the loan proceeds were spent on "working capital" and none on the other three categories (*ie*, "sales &marketing expenses", "R&D expenditure" and "IPO"). In such a scenario, ACTAtek would not have applied any of the proceeds outside of the Four Categories. Mr Chia initially thought the fact that all the proceeds were applied within one or some of the Four Categories would be critical. But we pointed out that on this basis, it would mean that there would have been no breach of the term he was contending for even if *none of the proceeds* were spent towards the listing of ACTAtek. Mr Chia accepted the difficulty in this construction and did not belabour the point.

78 It should also be noted that these were not purely theoretical concerns. As a matter of fact, part of the loan proceeds had been used to pay off a loan owed by ACTAtek to DBS, another of the group's bankers. Tembusu knew this but did not regard it as a breach of the asserted express term despite the fact that such repayment did not fall within any of the Four Categories, (at least based on Tembusu's interpretation of the UOP). Faced with this, Tembusu argued that there was no breach because prior approval had been sought and given for the repayment of the DBS loan. However, it could not point to any request made by ACTAtek for such permission; nor could it identify any corresponding approval which it had allegedly given. It was only able to direct us to an *internal email* in which Renhui had stated the following:

"*[w]e expect the Company to use our new capital to repay the trade payables, and continue to repay the DBS Bridge loan monthly instalments*". However, all this does is to demonstrate Tembusu's awareness of certain facts and its assumption as to what the Appellants were likely to do. It was simply not evidence that such approval had been sought by or communicated to ACTAtek.

79 Our third reason for concluding that the UOP was not intended to create an express term is the seemingly inconsequential manner in which the parties treated it. As noted above at [21], the summation of the values in each of the Four Categories amounted to a figure greater than S$1.5m. When the UOP with this miscalculation was sent to Tembusu, it paid no regard to this and proceeded to disburse the loan proceeds anyway. One would have thought that if the UOP was meant to be a document that created strict obligations for the parties, greater care and scrutiny would have been applied to ensure it was a workable document in keeping with the parties' intent.

80 Fourth, reference to the 2007 CLA reveals a further flaw in the Respondent's case. Clause 3 of the 2007 CLA provides as follows:

> The use of the Convertible Loan shall be in accordance with Schedule 3 only. Any other use(s) of the Convertible Loan shall require the prior written approval of the Lender.

The presence of this clause in the 2007 CLA and its corresponding absence in the 2012 CLA is significant. It demonstrates that when the parties intended to have an express restriction on the use of proceeds, they knew perfectly well how to reflect this in this agreement. Both parties were represented by lawyers when drafting both the 2007 and 2012 CLAs and they could easily have inserted a clause in similar terms to cl 3 of the 2007 CLA into the 2012 CLA had that been their intention. While this is not conclusive, the lack of any

plausible explanation or for the difference is notable. When we queried Mr Chia on this, his only response was that the arrangement was understood between the parties in the way he was contending it should be but there was no evidence of any such understanding.

81 Finally, we consider Tembusu's reliance on *Sheng Siong Supermarkets Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 ("*Sheng Siong*"). In *Sheng Siong*, the plaintiff entered into negotiations to establish a supermarket and a food court in a building owned by the defendant. The parties eventually signed a main term sheet ("the MTS") which stated in cl 10 that "Tenant usage comprises supermarket, wet market, thematic F&B, offices and others". The MTS was supposed to be incorporated into the standard tenancy agreement to form the final tenancy agreement. However, cl 10 of the MTS was omitted from the final version of the standard tenancy agreement. Nevertheless, Annex 1 of the standard tenancy agreement included a plan of the premises which depicted a supermarket. Andrew Ang J held that the plan of the premises in Annex 1 constituted an express provision which made the agreement conditional on permission being granted for the premises concerned to be used as a supermarket. Tembusu contends that the present case is on all fours with *Sheng Siong* and on this basis submits that the UOP should be interpreted as if it gives rise to an express obligation constraining the Appellants' ability to apply the proceeds of the 2012 CLA.

82 In our judgment, Tembusu's reliance on *Sheng Siong* is misplaced as there are marked distinctions between that case and this one. In *Sheng Siong*, Ang J had noted (at [43]–[49]) that correspondence exchanged between the parties had expressly stated that if approval was not obtained from the relevant authorities for the plaintiff to establish its supermarket and food court operations on the premises in question, it would no longer rent the premises.

Such communications are wholly absent in this case as noted at [75] above. Further, in *Sheng Siong* (at [61]), the only conceivable purpose of annexing the plans of the premises was to reflect "what they were envisioned to look like after the requisite A&A works had been done to convert them into premises capable of being to be used as a supermarket". This supported Ang J's conclusion that the attachment of the plan did reflect an express term of the contract. In the present case, as noted by the Judge (at [75] of the GD), the UOP served as the Appellants' act of compliance with the condition precedent to Tembusu's obligation to disburse the loan proceeds under clause 3.1(d)(ii) (see [19(b)] above). The attachment of the UOP to the agreement merely served to record the fact that in accordance with the condition precedent, the Appellants had intimated their intended application of the proceeds. But the Appellants' *intention* to apply the proceeds in this way cannot, without more, become an *obligation* that constrains the Appellants' ability to use it for some other purpose. We therefore do not consider that *Sheng Siong* aids the Respondent.

83 Hence, we agree with the Judge that the UOP did not amount to an express term restricting the use of the loan proceeds.

Implied Term

84 We turn to consider whether there was an implied term to similar effect in the 2012 CLA.

85 In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"), we held that for a term to be implied, a three-step process must be fulfilled (at [101]):

(a) The first step is to ascertain whether there is a gap in the contract and if so, how it arose. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap ("the First Step").

(b) The court then considers whether it is it is *necessary* in the business or commercial sense to imply a term in order to give the contract efficacy ("the Second Step").

(c) Finally, the court considers the specific term to be implied. This must be one which the parties would have responded "Oh, of course!" had the proposed term been put to them at time of the contract ("the Third Step").

(1) The First Step

86 As to the First Step, it bears emphasis that not all gaps in a contract are "true" gaps in the sense that they can be remedied by the implication of a term. It is only where the parties *did not contemplate the issue at all, and so left a gap*, that it would be appropriate for the court to even consider implying a term into the parties' contract (*Sembcorp Marine* at [94]–[95]).

87 The Judge found that the gap had arisen because the parties "never contemplated the possibility that [ACTAtek] would not comply with the UOP" (the GD at [80]). This finding led the Judge to conclude that there was a gap which could be remedied by an implied term. In our judgment, this was an erroneous application of the First Step. For one thing, it assumes that the parties assumed that the UOP would not be deviated from and so never thought that they needed to make such provision. This reasoning seems to us to be faulty for at least three reasons. First, agreements are drafted from the

premise of what the parties wish to secure rather than from the premise of subjectively assessing what the other party is or is not likely to act in a certain way. Second, this also seems to run contrary to the fact that the parties made no express provision restricting the use of the proceeds, a finding that the Judge also made. In this light, it seems unclear why the parties would have assumed that the Appellants would not deviate from a course that they were not expressly obliged to pursue in the first place. Finally, they had in fact already made such a provision in the 2007 CLA; this tends to militate against the premise of the Judge's reasoning on this.

88 More fundamentally, in order to answer the question whether the parties had contemplated the particular issue or had left a gap because they missed the point altogether, the court must first consider what the alleged gap is. In the present case, the gap may be characterised as the absence of an express restriction on the use of proceeds. Therefore, the question to be asked is—did the parties overlook the issue of whether to place a restriction on the use of proceeds? It is only if this is answered in the affirmative that that there can be said to be a "true" gap which might then, in appropriate circumstances, be plugged by the implication of a term. On the present facts, it is undisputed between the parties that restrictions on the use of proceeds had indeed been *in their contemplation* although, as elaborated above (at [65]), the evidence shows that there was no common understanding or agreement as to the ambit of this restriction. The fact that they never reached an agreement was not because they overlooked the issue but rather because they did not come to an agreement for whatever reason. This is precisely the sort of situation where it would be inappropriate for the court to complete the task which the parties had commenced but could not conclude.

89 This is sufficient for us to reverse the Judge's decision that a term could be implied; we nevertheless consider whether the Second Step was fulfilled.

(2) The Second Step

90 In *Sembcorp Marine*, we summarised how the business efficacy and officious bystander tests are meant to operate. There is no need to repeat that analysis here save to highlight a few salient points. First, the business efficacy and officious bystander tests are meant to be used complementarily and in conjunction with each other. Second, in a commercial arrangement, the basis on which the court will determine whether a term must be implied is the need to give the contract business efficacy. Third, and most significantly, the threshold for implying a term is a high one—the term will only be implied if it is *necessary* (*Sembcorp Marine* at [98]–[99]).

91 In the recent decision of the UK Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and another* [2015] 3 WLR 1843 ("*Marks and Spencer*"), Lord Neuberger observed (at [21]) that "necessity for business efficacy involves a value judgment" and that the test is not one of "absolute necessity". Rather, a term will be implied if "without the term, the contract would lack commercial or practical coherence".

92 In the present case, the Judge found that it was necessary in the business sense to imply the term into the 2012 CLA on the basis that it would provide greater commercial justification to the conditions precedent (*ie*, cl 3 of the 2012 CLA). Specifically, he said at [81]:

> 81 … it makes no commercial or business sense for a loan agreement to require a borrower, as a condition precedent to

> the lender's obligation to lend, to draw up a list detailing how it intends to use the money being lent but not to bind the borrower in any way to complying with it.

93 In our judgment, this analysis was erroneous. The correct question to be asked is whether *the contract or agreement* would lack commercial or practical coherence if a term was not implied and not whether a particular express *term* in the contract would be accorded greater commercial sense with the implication of the term.

94 The short point is that with the benefit of hindsight there will often be room to think one can improve a contract. That, however, is emphatically not the test for implication. There is simply no reason to think that the 2012 CLA would lose commercial or practical coherence if such a restriction on the use of proceeds were not included. At its core, the 2012 CLA effectively remained a loan agreement. The primary business consideration which undergirded the loan agreement, from Tembusu's perspective, was the generation of returns on the loan. From the structure of the 2012 CLA, it is evident that even if ACTAtek had failed to list, Tembusu would nonetheless have been able to generate returns. Pursuant to cl 5 of the 2012 CLA, if ACTAtek failed to complete an IPO before 30 June 2013, Tembusu would have the option to convert the loan into fully-paid shares of ACTAtek at a 50% discount to the price of each share which was to be ascertained pursuant to an independent valuation. Additionally, cl 3.1(f) of the 2012 CLA, read with the Variation agreement, also had the effect of amending the maturity date contained in the 2007 CLA to 31 December 2013 (see above at [19(c)]). Therefore, under the 2012 CLA, regardless of whether the ACTAtek did successfully list, Tembusu would have been able to derive positive returns on its investments made in 2007 and 2012 and this would have remained so even if there were no restriction on the use of proceeds.

95 In this regard, the observations of Lord Neuberger in *Marks and Spencer* are apposite:

> 21 … a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term.

96 To say that a term should be implied in this case would require us to rewrite the 2012 CLA in terms which we might consider to be reasonable or better. But, we reiterate, that is not the appropriate approach to be taken to implying a term and, in our judgment, the high threshold of necessity was not met in the present case.

97 We therefore reverse the Judge's finding that there was an implied term in the 2012 CLA restricting the use of proceeds on this ground also.

Breach of term restricting use of proceeds

98 It follows from this that ACTAtek did not breach the 2012 CLA by using the loan proceeds to pay off the 2011 Accrued Salaries. We would add, however, that even if there had been a term restricting the use of proceeds to the Four Categories, this term would probably not have been breached given our earlier observation that the payment of such salaries would likely have fallen within the ambit of "working capital" (see above at [61]).

99 Tembusu was therefore not entitled to call an event of default under the 2012 CLA or the 2007 CLA. We therefore set aside the judgment of the court below.

The Appellants' counterclaim

100 This requires us to consider the counterclaim for damages advanced by the Appellants. As noted above (at [33]), the Appellants' counterclaim rests on four legs. We first consider whether Tembusu committed a repudiatory breach of the 2012 CLA by wrongfully calling an event of default.

Repudiatory breach of the 2012 CLA

101 Tembusu argues that even if it had wrongly declared an event of default, this did not amount to a repudiatory breach of the 2012 CLA. Rather, the consequence of a wrongful calling of an event of default was simply that the notice asserting such event of default would be considered invalid. In this respect, Tembusu relies heavily on the decision of the House of Lords in *Concord Trust v The Law Debenture Trust Corporation* [2005] 1 WLR 1591 ("*Concord Trust*") and the decision of the English Court of Appeal in *Jafari-Fini v Skillglass Ltd and others* [2007] EWCA Civ 261 ("*Jafari-Fini*"). It is therefore necessary for us to consider these cases carefully.

(1) *Concord Trust*

102 In *Concord Trust*, certain bonds were issued by a finance company. The terms of the bond were set out in a trust deed between the finance company and the trustee. Under those terms, where requested by bondholders of at least 30% of the principal amount outstanding of the bonds, the trustee would be obliged (subject to it being indemnified to its satisfaction) to give notice to the finance company that the bonds are immediately due and payable upon the occurrence of an event of default. Subsequently, the bondholders' nominated board member was removed and this led to a committee of bondholders, representing 40% of value, contending that an event of default

had occurred and they directed the trustee to give notice of this to the finance company. The trustee was informed by the finance company that it disputed the event of default and that an invalid notice of acceleration would cause it substantial losses by the effect it would have on third parties with whom they had, or might have, dealings. This led the trustee to seek an indemnity of up to €1b from the bondholders. Dissatisfied with this, the bondholders commenced proceedings against the trustee seeking a declaration that the trustee was required to issue a notice of default to the finance company. The House of Lords had to consider whether the trustee was entitled to insist on an indemnity to cover its possible exposure to an action by the finance company for damages if the event of default was found to have been called incorrectly.

103 The House of Lords held that the trustee could not reasonably insist on an indemnity to cover the risk of possible liability to the finance company unless the risk was more than a merely fanciful one. Four possible causes of action were identified by the trustee in the event the default was found to have been called incorrectly: (a) breach of an express or implied term of the contract; (b) breach of a tortious duty of care; (c) conspiring with the bondholders to cause the finance company injury by unlawful means; and (d) interfering by unlawful means with the finance company's business. The identified causes of action in *Concord Trust* are similar to those pursued by the Appellants in their counterclaim.

104 The House of Lords found that there was no express or implied term in the trust deed which would be breached if the trustee made an unjustified assertion of an event of default. Lord Scott of Foscote, in delivering the judgment of the court, made the following observations:

> 36 *Breach of contract.* The act that would have to constitute the breach of contract is the giving of an invalid

> notice of acceleration, or, perhaps, having regard to the claims apparently made in arbitration, the unjustified assertion of the occurrence of an event of default. There is nowhere in the trust deed any express undertaking by the trustee not to do either of those things. So a suitable term would have to be read into the trust deed.
>
> 37 Various tests for the implication of terms into a contract have been formulated in various well known cases. In particular, a term will be implied if it is necessary to give business efficacy to the contract: *The Moorcock* (1889) 14 PD 64, 68. The proposed implied term cannot satisfy this test. The trustee deed works perfectly well without the implied term. It is open to [the finance company] to challenge the existence of an alleged event of default or the validity of a notice of acceleration. If the challenge succeeds neither the alleged event nor the invalid notice will be of any contractual significance. … The implied term is not necessary to give business efficacy to the trust deed. Nor are any of the other tests that have from time to time been formulated for the implication of terms into a contract any more apt. In my opinion, it is not reasonably arguable that the unjustified assertion by the trustee of an event of default or the giving by the trustee of an invalid notice of acceleration exposes the trustee to the risk of being found liable in damages for breach of contract.

(2) *Jafari-Fini*

105 *Concord Trust* was applied in the subsequent English Court of Appeal decision of *Jafari-Fini*. There, the claimant alleged that the defendant had committed a repudiatory breach of the facility agreement by wrongfully calling an event of default. The claimant's arguments were rejected by the Court of Appeal with heavy reliance placed on the authority of *Concord Trust* (per Lord Justice Moore-Bick):

> *(ii) The effect of an unauthorised notice of default*
>
> 112 … It was Mr Jafari-Fini's case that in those circumstances by serving the October notice Skillglass repudiated the Facility Agreement, thereby discharging PAL from all liability under it and him from any liability under his guarantee.

> 113 This submission raises the question whether on the true construction of the agreement the service of an unauthorized notice of default would constitute a breach of contract at all. Most commercial loan agreements under which the principal is repayable by instalments contain a provision of some kind permitting the lender to accelerate the debt in the event of a default by declaring the whole of the outstanding amount repayable on demand. However, they do not normally contain either an express or implied obligation on the lender to refrain from giving a notice of default that is premature or invalid for some other reason. If a notice of default is given before one of the stipulated events has occurred the notice is simply invalid and of no effect: see *Concord Trust v The Law Debenture Trust Corporation plc* …
>
> 114 The judge held that there was nothing to distinguish the Facility Agreement from the terms of the bonds considered in the *Concord Trust* case and that therefore Skillglass did not in any event commit a beach of the agreement by giving the October notice and making the December demand. Mr Beazley submitted, however, that the judge was wrong so to hold because the expression "… the Lender shall not be permitted to …" in the proviso to cl 23.2 imposed a positive obligation on Skillglass not to give notice of default until the expiry of the Certain Funds Period unless there was a continuing Major Default.
>
> 115 I am unable to accept that submission. I recognize, of course, that each agreement must be construed in accordance with its own terms, but the principles identified by Jonathan Parker LJ in the *Concord Trust* case apply generally to instruments of this kind. They provide a degree of certainty and a clear point on departure for those embarking on transactions of this type. The parties are free to depart from that position, if they wish to do so, but if that is their intention they can be expected to make it clear. In my view neither the language of the proviso nor any wider commercial considerations support Mr Beazley's argument. … The argument can only succeed, therefore, if the agreement imposes on Skillglass an implied obligation to refrain from giving notice of default when no event of default has occurred, a proposition which I am unable to accept in the light of the decision in the *Concord Trust* case.

106 The Appellants submit that there is a key distinction between the factual matrices that were presented in *Concord Trust* and *Jafari-Fini*, and in the present case. In the former cases, the lenders did not have any continuing

obligations under the contract—they had already provided the loan and therefore the wrongful calling of an event of default could not amount to a breach of the contract. The Appellants argue, however, that in the present case, Tembusu's obligations under the 2012 CLA had not yet ceased. They rely on cl 5.1 of the 2012 CLA which provides that in the event that ACTAtek completes an IPO or RTO before 30 June 2013, Tembusu "shall, immediately prior to the completion of the IPO or RTO, unconditionally convert the Loan into fully-paid shares … of [ACTAtek] at a fifty per cent. (50%) discount to the Issue Price". According to the Appellants, by calling the event of default wrongfully and asking for the loan amounts to be repaid immediately, Tembusu had evinced an intention not to comply with this continuing obligation under the 2012 CLA. The Appellants therefore seek to rely on an *anticipatory repudiatory breach* of the 2012 CLA.

107 In our judgment, assuming, without deciding, that *Concord Trust* and *Jafari-Fini* were correctly decided, a point to which we shall return shortly, the fact that there was nothing left to be performed by the party that was purportedly acting wrongfully in those cases is a significant distinguishing factor. Unlike those cases, the lender's (*ie*, Tembusu's) obligation under the 2012 CLA did not cease with its disbursements of the loan proceeds. Pursuant to cl 5.1 of 2012 CLA, Tembusu was still under the *express* continuing obligation to convert the loan into equity upon the successful IPO. In this regard, the 2012 CLA was an executory contract and differs from *Concord Trust* and *Jafari-Fini* in which, by the time the event of default was purportedly declared, the contracts had already been wholly executed on the part of the lenders.

108 In Edwin Peel, "No liability for service of an invalid notice of 'event of default'" (2006) 122(Apr) LQR 179 ("Edwin Peel"), the learned author notes

(at p 182) that in *Concord Trust*, the bondholders were not relying upon the event of default "to withhold performance of any of its obligations" and that the outcome would be different if in calling the event of default, there was *non-performance* in the form, for example, of the lender refusing payment of an instalment which is due or if security was enforced pursuant to what turned out to be an invalid notice (see Edwin Peel at pp 182–183 and *Concord Trust* at [41]–[42]). The significant question is therefore whether the wrongful calling of an event of default is accompanied by an element of non-performance.

109 Similarly, in Qiao Liu, "Inferring Future Breach: Towards a Unifying Test of Anticipatory Breach of Contract" (2007) 66 Cambridge LJ 574, the learned author explains that there was no anticipatory breach in *Concord Trust* (at pp 588–589) because the manifestation of an intention not to be bound by the contract in that case did not entail future non-performance of the contract.

110 We are satisfied that a key premise undergirding the decisions in *Concord Trust* and *Jafari-Fini* was that there was no element of non-performance or future non-performance of the contracts when the event of default was wrongfully declared and in that sense, it could not be said that the lender was repudiating the contract simply because there was no obligation under the contract to be repudiated. Because of that, to find a breach of contract, it seems to have been thought that it had to be established that there was either an express or implied term *not* to wrongfully call an event of default. We are not faced with the same constraints on our facts since the wrongful declaration of the event of default was accompanied by Tembusu's manifestation of its refusal to comply with cl 5.1 of the 2012 CLA. In our judgment, this suffices to constitute an anticipatory breach of the 2012 CLA.

111 Having therefore found that Tembusu had breached the 2012 CLA, it is not necessary for us to consider the other heads of counterclaim relied upon by the Appellants.

112 We pause to make one observation picking up on the reservation we made at [107]. In both *Concord Trust* and *Jafari-Fini*, the courts proceeded on the basis that it was not a breach for a lender to accelerate the repayment of a loan contrary to the agreed terms for repayment or to assert an event of default without basis. It has not been necessary for us to reach a conclusion on this because, as we have noted, it is possible to distinguish the present case from both those cases. We therefore leave open for decision on another occasion whether such conduct if wrongly done would amount to a breach of the implicit obligation to act in accordance with explicit obligations that have been undertaken in the contract.

The claimable losses

113 All that remains to be ascertained is the losses which flowed from Tembusu's breach. Since full arguments have not been canvassed before us on this point, we remit the matter back to the trial Judge for an assessment of damages. For the avoidance of doubt, we should state that our judgment does not preclude points being taken as to the causation or quantification of the losses and damages flowing from Tembusu's breach.

114 For example, we note that in relation to the major head of damage being claimed for by the Appellants, *ie*, the loss of capitalisation of ACTAtek shares which would have accrued to them upon the successful IPO, Tembusu objects to this head of claim based on the listing structure of ACTAtek which was to proceed in the following steps:

(a) First, a company with no assets and liabilities would be incorporated in NZ by IRG and named ACTAtek Limited ("ACTNZ"). This step was completed by the Appellants.

(b) Second, ACTAtek would then sell all its subsidiaries (*ie*, the ACTAtek Group) to ACTNZ which was valued by Thomas at NZ$30,548,000.

(c) Third, ACTNZ would pay for these subsidiaries by issuing 121,400,000 shares to the Appellants.

(d) Fourth, ACTNZ (now with putative assets of NZ$30,548,000) would then be listed on the NZ stock exchange.

Tembusu contends that, based on the above, although the listing did not materialise, the Appellants still retain the benefit and value of ACTAtek's business. Therefore, Tembusu maintains that the Appellants had in fact suffered no loss in relation to the failure to list or at least not the entire loss of the anticipated capitalisation.

115 Whether or not there is legitimacy in this is a matter for the assessment at which the parties will have to persuade the Judge on matters of causation and quantification so that he may assess precisely the losses which flowed from Tembusu's breach of the 2012 CLA.

Conclusion

116 In summary, we allow the appeal in CA 191/2014. With respect to the main claim, we overturn the Judge's findings that the Appellants were liable in the tort of deceit and that the Appellants had breached an implied term of the 2012 CLA. As for the counterclaim, we find that the wrongful declaration of

the event of default did amount to a breach of the 2012 CLA. The matter is remitted to the Judge for an assessment of damages.

117 The Appellants are to have their costs here and below which are to be taxed if not agreed. We also make the usual consequential order for the security to be released to the Appellants.

Sundaresh Menon	Tay Yong Kwang	Steven Chong
Chief Justice	Judge of Appeal	Judge

S Magintharan, Liew Boon Kwee and Vineetha G (M/s Essex LLC) for the Appellants;
Daniel Chia Hsuing Wen, Chua Hun Yuan, Kenneth, Stephany Aw Shu Hui and Ker Yanguang (MorganLewis Stamford LLC) for the Respondent.