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

[2022] SGHC 207

Suit No 535 of 2019

Between

(1) Low Eng Chai
(2) Low Eng Chuan

… *Plaintiffs*

And

(1) Ishak bin Mohamed Basheere
(2) Neil Hutton

… *Defendants*

JUDGMENT

[Contract — Misrepresentation — Damages]
[Contract — Misrepresentation — Fraudulent]
[Contract — Misrepresentation Act]
[Evidence — Adverse inferences]
[Tort — Conspiracy — Unlawful means conspiracy]
[Damages — Measure of damages — Loss of chance]

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Low Eng Chai and another
v
Ishak bin Mohamed Basheere and another

[2022] SGHC 207

General Division of the High Court — Suit No 535 of 2019
S Mohan J
21–24, 29 September 2021, 25 February, 11 March 2022

29 August 2022 Judgment reserved.

S Mohan J:

1 This is a case of investments turning sour. The plaintiffs are investors in Asia Strategic Mining Corporation Pte Ltd ("ASMC"). They were guaranteed monthly payments representing returns on their investment over a period of five to eight years. In late 2018, less than two years after their initial investment, these monthly payments ceased. The plaintiffs have lost a not insignificant sum of money and cry foul. They accuse the defendants of, *inter alia*, perpetrating a fraudulent investment scheme which induced them to invest and when things took a turn for the worse, fraudulently inducing them to refrain from taking or prosecuting legal proceedings while the alleged perpetrators diverted or dissipated funds away from the plaintiffs' reach.

2 The plaintiffs commenced proceedings against, *inter alia*, ASMC in a separate suit (HC/S 189/2019) and have since obtained summary judgment against ASMC for the full sum that is owed to them amounting to S$616,700.

In the present action, the plaintiffs seek to recover a similar sum from the second defendant, who was ASMC's Manager of Public Relations and Customer Services at the material time. In essence, the plaintiffs' case theory is that the second defendant was responsible for making various misrepresentations to the plaintiffs (as part of an unlawful means conspiracy with the first defendant), which in turn caused the plaintiffs to forbear from commencing legal action against ASMC and/or taking other legal or investigative steps, and which ultimately facilitated the dissipation of money from ASMC to other parties.

3 While there are currently two defendants named in the action, the first defendant, Mr Ishak Bin Mohamed Basheere, failed to file his and his witnesses' Affidavits of Evidence-in-Chief ("AEICs") within the timelines stipulated by the Assistant Registrar at the pre-trial stage. Accordingly, pursuant to the Assistant Registrar's peremptory order made at a pre-trial conference hearing on 26 August 2021, the first defendant's Statement of Defence has been struck out in its entirety with the plaintiffs entitled to enter final judgment against the first defendant.[1] Accordingly, the first defendant did not appear at the trial and took no part in it. In this judgment, I therefore deal only with the plaintiffs' claims against the second defendant.

Facts

4 The first and second plaintiff are brothers.[2] The first defendant was at all material times, the sole director and shareholder of ASMC, and also its

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1 Notes of Evidence ("NEs"), 26 August 2021, p 2 lines 14–17.

2 Affidavit of Evidence-in-Chief ("AEIC") of Low Eng Chuan dated 6 August 2021 ("P2AEIC"), paras 3–4 (Plaintiffs' Bundle of AEICs ("PBAEIC") Vol 1, p 14).

Managing Director.[3] The second defendant was employed by ASMC from around August 2018, until his resignation from ASMC in December 2019.[4] As noted above at [2], the second defendant worked in ASMC at the material time as a Manager of Public Relations and Customer Services. To be precise, when the second defendant first joined ASMC, his job title was not Manager of Public Relations and Customer Services; instead, e-mails sent by him would simply be signed off as "Customer Services ASMC Singapore".[5] According to the second defendant, the change in job title took place sometime after 23 November 2018 and was merely for ASMC's convenience in dealing with customers. It did not entail any increase in the second defendant's job scope or responsibilities.[6] The first defendant was the second defendant's immediate superior in ASMC.[7]

5 According to the second defendant, ASMC is a company involved in mining activities and the trading of steam coal and nickel.[8] As ASMC had limited funds for its trading activities, ASMC invited investors (known as "funders") to co-invest in ASMC's steam coal and nickel trading activities. In return, the funders were promised a fixed return on their investment over a fixed period of time.[9]

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3 Statement of Claim (Amendment No. 3) dated 19 November 2021 ("SOC") para 3; Defence of the 2nd Defendant (Amendment No. 2) dated 3 December 2021 ("Defence") para 3; AEIC of Neil Hutton, para 15.

4 AEIC of Neil Hutton, para 6; Plaintiffs' Closing Submissions ("PCS") para 5.

5 PBAEIC Vol 1 p 208.

6 Defence para 4.

7 AEIC of Neil Hutton, para 15.

8 AEIC of Neil Hutton, para 7.

9 AEIC of Neil Hutton, para 6.

6 The first and second plaintiffs are two such funders. Between November 2016 and June 2017, the first plaintiff entered into five funding agreements with ASMC for the purchase of steam coal and nickel, as follows:[10]

(a) On or around 15 November 2016, the first plaintiff entered into funding agreement number ASFE975SG with ASMC, for the purchase of steam coal from Indonesia (the "First Steam Coal Contract").

(b) On or around 13 December 2016, the first plaintiff entered into funding agreement number ASFE1023SG with ASMC, for the purchase of steam coal from Indonesia (the "Second Steam Coal Contract").

(c) On or around 13 December 2016, the first plaintiff entered into funding agreement number ASFE1024SG with ASMC, for the purchase of steam coal from Indonesia (the "Third Steam Coal Contract").

(d) On or around 15 January 2017, the first plaintiff entered into funding agreement number ASFE1077SG with ASMC, for the purchase of steam coal from Indonesia (the "Fourth Steam Coal Contract").

(e) On or around 9 June 2017, the first plaintiff entered into funding agreement number ASFF0074SG for the purchase of nickel from Indonesia (the "Nickel Contract").

I will refer to the funding agreements described above collectively as the "Contracts", and to each individually as a "Contract".

7 Under each Contract, the first plaintiff agreed to pay a principal sum to ASMC, which would be utilised by ASMC to purchase steam coal or nickel. In

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10 SOC para 5.

return, ASMC was obliged to pay the first plaintiff a stipulated sum on a monthly basis, and in accordance with a payment schedule annexed to each of the Contracts. The funding periods for the Contracts ranged from five to eight years. Each of the Contracts contained a clause that permitted the first plaintiff, in the event that ASMC breached the terms and conditions of the respective Contracts (each, a "Refund Clause"), to obtain a full refund of the principal sum paid to ASMC and a sum equivalent to all of the monthly payments that the first plaintiff would have received during the funding period.[11] Further, under the provisions of the respective Contracts, the first plaintiff was entitled to request an early redemption of the principal sum upon payment of a fee, following which the first plaintiff would receive a portion of the principal sum paid to ASMC, plus the monthly payments accrued at the time of redemption.[12]

8 The plaintiffs claim that they had agreed among themselves that the Contracts would be concluded by the first plaintiff on behalf of both plaintiffs, and that the second plaintiff would be a co-investor.[13] To that end, each of the Contracts stated that the monthly payments would be credited to the second plaintiff's designated bank account.[14] It is not disputed that the first plaintiff was not involved in managing the plaintiffs' investment with ASMC, and that it was the second plaintiff who served as the primary liaison between the plaintiffs and ASMC.[15]

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11 P2AEIC paras 24–28, 32–36, 40–44, 48–52, 56–60. (PBAEIC Vol 1 pp 22–32).

12 See *eg,* PBAEIC pp 171–172.

13 P2AEIC para 17 (PBAEIC Vol 1 p 20).

14 P2AEIC para 18 (PBAEIC Vol 1 p 20); PBAEIC Vol 1 pp 134, 150, 166, 182 and 199.

15 Defendant's Closing Submissions ("DCS") para 18.

9 ASMC initially made monthly payments to the second plaintiff pursuant to the Contracts, but these payments ceased from September 2018.[16] From October 2018 to around September 2019, the second plaintiff received various e-mails sent by the second defendant, which provided, *inter alia*, updates on when ASMC was expected to make the outstanding payments. The majority of these e-mails were mass e-mails sent out to all of ASMC's funders, on which the second plaintiff was copied. These e-mails form the mainstay of the plaintiffs' claim against the second defendant. During this period, the second plaintiff also attended meetings with the first and/or second defendant, to discuss, among other things, an early redemption of the Contracts and alleged difficulties faced by ASMC in making payments to funders.[17]

10 Concurrently, on 10 January 2019, the first plaintiff's former solicitors sent a letter of demand to ASMC demanding payment of S$616,700, being the full sum that ASMC was allegedly obliged to pay pursuant to the Refund Clauses in the respective Contracts.[18] As the demand was not met, on 15 February 2019, the first plaintiff in the present suit (*ie*, Mr Low Eng Chai) commenced HC/S 189/2019 against ASMC claiming this sum of S$616,700.[19] On 31 July 2019, the first plaintiff applied for summary judgment of his claim in HC/S 189/2019, pursuant to O 14 r 1 of the Rules of Court (2014 Rev Ed).[20] Summary judgment was granted in favour of Mr Low Eng Chai on 6 December

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16 PCS para 10; DCS para 22.

17 P2AEIC paras 67 and 105–106 (PBAEIC Vol 1 pp 34 and 45–46).

18 PBAEIC Vol 1 pp 221–226.

19 P2AEIC para 123 (PBAEIC Vol 1 p 51); 2nd Defendant's Bundle of Documents Relating to HC/S 189/2019 p 2.

20 PBAEIC Vol 1 p 294.

2019.[21] To date, this judgment has not been enforced by the first plaintiff.[22] It is not disputed that since the cessation of monthly payments in September 2018, the plaintiffs have not received or recovered any further sums from ASMC.

The parties' cases

The plaintiffs' case

11 The plaintiffs' case against the second defendant centres on their claims for (a) misrepresentation; and (b) unlawful means conspiracy. In respect of the plaintiffs' claim for misrepresentation, Mr Clarence Lun, counsel for the plaintiffs, argues that the second defendant made various false representations in his e-mails to the second plaintiff from October 2018 to July 2019, as well as at a meeting between the second plaintiff and second defendant at Concorde Hotel, Singapore on 28 October 2018 (the "Concorde Hotel meeting").[23] The plaintiffs allege that the misrepresentations made by the second defendant are as follows:[24]

(a) Banking issues had resulted in payment delays.

(b) All outstanding payments would be made from 9 November 2018.

(c) ASMC is in good overall financial health.

(d) ASMC is in possession of the requisite funds and is ready and willing to make all payments.

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21 PBAEIC Vol 1 p 294.

22 DCS para 107.

23 PCS para 27.

24 SOC para 76.

I refer to the above representations collectively as the "Representations".

12 The Representations were made over 16 occasions (comprising the Concorde Hotel meeting and e-mails, as mentioned at [11] above), which are set out in full at **Annex A** of this judgment. The plaintiffs contend that as a result of the Representations, they forbore from commencing legal proceedings against ASMC, entering summary judgment against ASMC expeditiously, commencing investigations and/or taking necessary legal action to prevent the dissipation of funds by ASMC. According to the plaintiffs, their forbearance began in October 2018 and continued at least until 31 July 2019 (which was the date on which the first plaintiff applied for summary judgment in HC/S 189/2019, as noted at [10] above).[25] The plaintiffs submit that a claim for fraudulent and/or negligent misrepresentation is made out on the present facts, as the Representations were made by the second defendant with the knowledge that they were wilfully false and/or in breach of a duty of care he owed to the plaintiffs.[26]

13 Consequently, the plaintiffs' pleaded case is that they are entitled to damages in the sum of S$616,700, being the full sum owed by ASMC to the first plaintiff under the respective Contracts.[27] That being said and as I elaborate further at [66] below, this was subsequently recast by Mr Lun as a claim for damages for the *loss of a chance* to commence legal proceedings expeditiously against ASMC. In the alternative, the plaintiffs claim that they are entitled to damages to be assessed, or damages under s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("Misrepresentation Act"), although I note that the

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25 SOC paras 79 and 79(n); PCS paras 27 and 37.

26 PCS para 7.

27 SOC para 101.

claim under the Misrepresentation Act was not pursued in the plaintiffs' closing submissions.

14 For the avoidance of doubt, I note that the Statement of Claim also alleges that the second defendant made false statements in e-mails sent to the second plaintiff on 1 August 2019, regarding an alleged transfer of ASMC's funds from a bank in Malta to Singapore (the "1 August 2019 e-mails"), and which the plaintiffs appear to contend they also relied on.[28] However, the plaintiffs *did not* specifically plead that the 1 August 2019 e-mails induced them to continue to forbear from commencing and/or prosecuting legal proceedings against ASMC beyond 31 July 2019; no particulars were pleaded of any act(s) of forbearance on the part of the plaintiffs from 1 August 2019 onwards.[29] Nor did the plaintiffs refer to the 1 August 2019 e-mails in their closing submissions in seeking to establish their claims in misrepresentation.[30] I therefore proceed on the basis that, notwithstanding the haziness of the plaintiffs' pleading in this regard, it is *not* the plaintiffs' case that any of the Representations were made or continued to be made in the 1 August 2019 e-mails, or that the plaintiffs also forbore beyond 31 July 2019 as a consequence of the 1 August 2019 e-mails. Having said that, the 1 August 2019 e-mails are not without any relevance at all. They appear to still be relevant to the plaintiffs' claim for unlawful means conspiracy.

15 The thrust of the plaintiffs' case in unlawful means conspiracy is that the second defendant, together with the first defendant, knowingly perpetrated a fraudulent investment scheme on the plaintiffs. The plaintiffs allege that the

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28 SOC para 79(q) and (r).

29 SOC para 79(r).

30 PCS paras 27 and 37.

first defendant dissipated ASMC's funds, while the second defendant made various misrepresentations to the plaintiffs (a) on the occasions set out in **Annex A**; (b) in the 1 August 2019 e-mails; and (c) in an e-mail sent on 2 September 2019 that stated that ASMC was in the midst of transferring funds from Indonesia to Singapore (the "2 September 2019 e-mail").[31] For ease of reference, the 1 August 2019 e-mails and the 2 September 2019 e-mail are set out in **Annex B** to this judgment. The purpose of these misrepresentations was, according to the plaintiffs, to allay any suspicions on the part of funders like the plaintiffs.[32] The plaintiffs claim that ASMC was a fraudulent business, and that there were no purchases of commodities or investments underlying the Contracts to begin with.[33] The essence of the plaintiffs' pleaded claims is encapsulated in paras 7A and 7B of the Statement of Claim (Amendment No. 3) ("Statement of Claim"), which bear reproducing below:

> 7A. It was never intended that ASMC would perform its payment obligations towards the Plaintiffs in full. The Five Contracts formed part of the fraudulent investment scheme procured by the First Defendant by way of various false representations made to the Plaintiffs, the details of which are set out in Section IV of this Statement of Claim. ASMC is and was at all material times a mere corporate vehicle through which the fraudulent investment scheme was perpetrated by the First Defendant, and subsequently, the Second Defendant as a co-conspirator after he joined ASMC in August 2018.
>
> 7B. Pursuant to the fraudulent investment scheme, the Defendants' modus operandi was as follows. Pursuant to the First Defendant's misrepresentations, the funder would first provide his investment capital known as the 'funding sum' to ASMC at the commencement date. Monthly repayments by ASMC would then be made to the funder from the time of commencement up to sometime in late 2018. Thereafter, payments would cease entirely, and the Plaintiffs would never receive full repayment of their principal investment sum and promised returns. When pressed for clarification, the Second

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31 SOC paras 89(a) to 89(e).

32 SOC paras 87–88; PCS para 76.

33 Plaintiffs' Reply Submissions ("PRS") para 29.

> Defendant would respond in a highly evasive and/or dishonest manner, citing multiple vague and dilatory excuses pertaining to banking issues and unforeseen circumstances, whilst at the same time supplying additional false and/or misleading information to the funders to dissuade them from commencing legal proceedings and/or taking out such other proceedings to prevent the dissipation of funds and investigations into the relevant parties to take out such proceedings as necessary. This is to buy time so that the monies could be dissipated out of ASMC, paid to other investors and/or transferred to ISK Capital Pte Ltd's bank account in Malta.

16 For completeness, among the reliefs sought by the plaintiffs in the Statement of Claim is what can only be described as a curious claim for a "Performance bond by BNP Paribas to be issued by ASMC in favour of the Plaintiff" (the "BNP Paribas Performance Bond").[34] This claim was also not pursued in the plaintiffs' closing submissions, nor was any attempt made to explain the plaintiffs' entitlement to this relief.

The second defendant's case

17 In respect of the plaintiffs' claim for misrepresentation, counsel for the second defendant, Mr Devadas Naidu, does not dispute that the second defendant made the statements set out in **Annex A** and on the dates listed therein.[35] Neither is it seriously disputed that the statements set out in **Annex A** contain the Representations alleged by the plaintiffs. However, Mr Naidu argues that (a) the plaintiffs have not proven the falsity of the Representations; and/or (b) the Representations are statements of future intent and are therefore not actionable.[36]

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34 SOC para 100.

35 Defence, paras 17A–17C.

36 DCS paras 69–70.

18 Further, Mr Naidu argues that at all material times, the second defendant was a junior employee in ASMC and had only been a "conduit" through which his superiors in ASMC conveyed information to funders. The second defendant had no reason to doubt the truth of the statements he communicated to the second plaintiff.[37] Mr Naidu also contends that the plaintiffs did not rely on the Representations and that they have not adduced evidence of any loss suffered as a result of the Representations.[38] Accordingly, the plaintiffs have not established their claim for misrepresentation.

19 As for the plaintiffs' claim for unlawful means conspiracy, Mr Naidu argues that the plaintiffs have not adduced evidence to prove the existence of a conspiracy between the first and second defendants, or that any loss was suffered as a result of the alleged conspiracy.[39] Similar to his arguments in respect of the plaintiffs' claim for misrepresentation, Mr Naidu also maintains that all statements communicated by the second defendant to the second plaintiff were made in good faith and on instructions from the second defendant's superiors. The second defendant did not have any intent to injure or cause damage to the plaintiffs.[40] The plaintiffs' claim for unlawful means conspiracy is therefore also not made out.

Issues to be determined

20 Based on the background facts set out above and the pleadings, the following issues arise for my determination:

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37 DCS para 17.

38 DCS paras 76 and 83.

39 DCS paras 99 and 103.

40 DCS para 102.

(a) Have the plaintiffs established their claim for misrepresentation ("Issue 1")?

(b) Have the plaintiffs established their claim for unlawful means conspiracy ("Issue 2")?

(c) Are the plaintiffs entitled to the BNP Paribas Performance Bond ("Issue 3")?

Issue 1: Have the plaintiffs established their claim for misrepresentation?

21 The legal principles governing a claim for misrepresentation are not in dispute. As set out in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14], the five cumulative elements required for a claim in fraudulent misrepresentation to succeed are as follows:

(a) a false representation of fact by words or conduct;

(b) the representation must be made with the intention that it should be acted upon by the plaintiff, or a class of persons which includes the plaintiff;

(c) the plaintiff acted upon the false statement;

(d) the plaintiff suffered damage by so doing; and

(e) the representation must be made with the 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.

22 Following *Yong Khong Yoong Mark and others v Ting Choon Meng and another* [2021] SGHC 246 at [91] (see also *IM Skaugen SE and another v MAN Diesel & Turbo SE and another* [2018] SGHC 123 at [121]), the elements required for a successful claim in negligent misrepresentation are as follows:

(a) the representor made a false representation of fact to the representee;

(b) the representation induced the representee's actual reliance;

(c) the representor owed the representee a duty to take reasonable care in making the representation;

(d) the representor breached that duty of care; and

(e) the breach caused damage to the representee.

23 For completeness, the pleaded reliefs in the Statement of Claim also include a claim for damages under the Misrepresentation Act (as noted at [13] above). Section 2 of the Misrepresentation Act provides:

> **Damages for misrepresentation**
>
> **2.**—(1) ***Where a person has entered into a contract after a misrepresentation has been made to him*** by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.
>
> (2) ***Where a person has entered into a contract after a misrepresentation has been made to him*** otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.
>
> …
>
> [emphasis added in bold italics]

24 As is clear from the wording of s 2 of the Misrepresentation Act, the provisions therein only apply to cases where a person enters into a contract *after* a misrepresentation has been made to him. In the present case, it is not in dispute that the Representations were made from October 2018 to July 2019, well *after* the Contracts were entered into by the first plaintiff. Moreover, the plaintiffs' pleaded case is that the Representations induced the plaintiffs to forbear from commencing or prosecuting legal action expeditiously, and *not* that the plaintiffs were thereby induced to enter into any Contract. Accordingly, it is clear that s 2 of the Misrepresentation Act has no application in the present case.

25 I therefore focus my analysis on the plaintiffs' claims for fraudulent and negligent representation at common law. As can be seen from [21]–[22] above, there are several elements common to a claim in fraudulent misrepresentation and a claim in negligent misrepresentation, namely: (a) there must be a false representation of fact; (b) the plaintiff relied on the representation; and (c) the plaintiff suffered damage as a result of such reliance. I will address these common elements first before turning to the elements that differentiate both claims.

26 However, before doing so, I first address the preliminary issue of whether the Representations are actionable to begin with.

Are the Representations actionable?

27 As noted above at [17], the second defendant contends that some of the Representations are statements of future intent and therefore not actionable. For ease of reference, the Representations are as follows:

(a) Banking issues had resulted in payment delays (the "First Representation").

(b) All outstanding payments would be made from 9 November 2018 (the "Second Representation").

(c) ASMC is in good overall financial health (the "Third Representation").

(d) ASMC is in possession of the requisite funds and is ready and willing to make all payments (the "Fourth Representation").

28 As the plaintiffs themselves acknowledge,[41] it is clear that some of the Representations are statements of future intent. The plaintiffs' case in relation to the Second Representation is that it was made in an e-mail sent by the second defendant on 31 October 2018.[42] The Second Representation is therefore a statement of future intent, since it represents that payment will be made in future (*ie*, from 9 November 2018). Likewise, to the extent that the Fourth Representation is contained in e-mails that state that ASMC *expected* to make payment in accordance with some future timeline (see S/Nos 4–7 and 9–16 of **Annex A**), the Fourth Representation is also a statement of future intent.

29 Nonetheless, as the plaintiffs observe, a statement of future intention is still actionable if it can be re-characterised as a statement implying (a) that the maker of the statement in fact honestly believed that the event would happen in the future; or (b) that the maker of the statement in fact had reasonable grounds for making such an assertion: *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 at [96], followed in *KLW Holdings Ltd v Straitsworld Advisory Ltd and another* [2017] 5 SLR 184 at [31].

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41 PCS para 24.

42 PCS para 27.

30 In the present case, I note that the second defendant admits that at least some of the e-mails he sent to the second plaintiff (*ie*, the e-mails sent by the second defendant from October 2018 until 12 February 2019) carried the implied representation that (a) he honestly believed that the future events discussed in the e-mails would happen as represented; and (b) he had reasonable grounds for making such assertions in his e-mails.[43] In any case, I am prepared to find that both the Second and Fourth Representations can be re-characterised as statements containing such implied representations, given that it is the second defendant's own case that the Representations were made in his capacity as Manager of Public Relations and Customer Services of ASMC.[44] The Representations can therefore be taken to imply the second defendant's genuine belief in a certain state of ASMC's affairs at the material time. I therefore find that the Second and Fourth Representations are actionable.

31 I now turn to consider the first element of the plaintiffs' claim for fraudulent or negligent misrepresentation, which is whether the Representations are false.

Are the Representations false?

32 In my judgment, the plaintiffs have not adduced sufficient evidence to discharge their burden of proof that the Representations were false at the time they were made. I address each of the Representations in turn.

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43 Defence para 20 read with SOC para 54 and 78A.

44 DCS para 17.

The First Representation

33 The plaintiffs argue that there were no banking delays as represented by the second defendant. This is because based on the bank statements for ASMC's DBS bank account number 033-9053-899 (the "DBS Account") for the months of March 2019 to September 2019, there was "a clear movement of monies in and out" of the DBS Account.[45] Moreover, the plaintiffs highlight that a "substantial" amount of money was transferred by ASMC's associated companies to the DBS Account during the months of March 2019 to May 2019.[46] The plaintiffs argue that the fact that none of these funds were used to settle outstanding payments owed to the plaintiffs shows that the purported banking issues were fictitious.[47]

34 I disagree with the plaintiffs that such a conclusion can be reached, based solely on the movement of funds in and out of the DBS Account. To begin with, it was not raised with the second defendant in cross-examination, that the movement of funds in the DBS Account necessarily showed that the banking issues were non-existent. Neither is it the plaintiffs' case that the banking issues, which the second defendant represented had caused payment delays, pertained *solely* to the DBS Account. Based on the e-mails from the second defendant which the plaintiffs rely on for their misrepresentation claim (as set out at **Annex A**), none of these e-mails expressly states that the purported banking issues related specifically and only to the DBS Account.

35 On the contrary, I note that the second defendant's e-mail of 15 May 2019 stated that "I can state with confidence that the funds will clear within our

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45 PCS para 40.

46 PCS para 41.

47 PCS para 44.

Singapore *UOB* account soon" [emphasis added].[48] Likewise, the second defendant's e-mail of 10 June 2019 stated that "ASMC funds are to be transferred from *London to Malta*", following which "funds will be cleared in batches in *Ishak's* Singapore bank account" [emphasis added].[49] In the circumstances, I cannot see how it is relevant that there was a "a clear movement of monies in and out" of the *DBS* Account for the months of March 2019 to September 2019, or how the DBS Account statements for this period necessarily show that the First Representation was false at the time it was made.

36 While the plaintiffs complain that the second defendant has not adduced documentary evidence to prove the alleged banking issues,[50] the legal burden of proving the falsity of the Representations ultimately falls on the plaintiffs. Given that the only evidence the plaintiffs rely upon is the DBS Account statements, I find that the plaintiffs have not discharged their burden of proving that the First Representation was false at the time it was made.

The Second Representation

37 As I concluded at [30] above, in order for the Second Representation to be actionable, it must be re-characterised as an implied representation that the second defendant honestly believed a future event would occur or had reasonable grounds for making such an assertion. Accordingly, the relevant question is: when the second defendant made the Second Representation in his e-mail of 31 October 2018, did he honestly believe that all outstanding payments would be made from 9 November 2018, and/or have reasonable grounds for saying so?

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48 S/N 14 of Annex A.

49 S/N 15 of Annex A.

50 P2AEIC para 150 (PBAEIC Vol 1 p 67).

38 In this regard, the only argument put forth by the plaintiffs is that the Second Representation must be "unequivocally false", because no payments were ultimately made by ASMC to the plaintiffs.[51] In my view, this argument does not advance the plaintiffs' case. The fact that no payments were *ultimately* made to the plaintiffs says nothing about what the second defendant's honest beliefs were *at the time* the Second Representation was made – as would be evident from the question posed at [37] above, that is the relevant query. Quite clearly, the second defendant could *still* have had an honest belief in the truth of the Second Representation at the time it was made, even if the future events promised by the Second Representation failed to materialise. These two states of affairs are not mutually exclusive.

39 Moreover, I accept the second defendant's evidence that he genuinely believed the truth of the Second Representation, at the time it was made to the plaintiffs. In cross-examination, the second defendant's evidence was that in respect of *all* the communications he had made to the plaintiffs, he had made these communications on behalf of his superiors and/or as part of his duties as ASMC's Manager of Public Relations and Customer Services, or in the second defendant's words, as "the customer services guy".[52] For instance, in relation to the mass e-mails sent out to funders, the second defendant testified that these e-mails would be drafted by the first defendant, before being amended by ASMC's CEO, Dr Willem Smuts ("Dr Smuts") and/or another senior manager in the company, Ms Surina Binte Awang.[53] The second defendant's role was to then proofread the e-mails for grammatical or spelling errors before sending out the e-mails. In addition, the second defendant explained that he had believed the

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51 PCS para 38.

52 NEs, 23 September 2021, p 110 line 19.

53 NEs, 29 September 2021, p 2 lines 15–20.

truth of the communications he sent out on behalf of his superiors. This was because he had, for example, been reassured by Dr Smuts at the material time that ASMC was "doing perfectly well" and that the company just had "some temporary payment issues". The second defendant had no reason to doubt this reassurance, as he trusted Dr Smuts and his qualifications as a geologist.[54] He also did not doubt the assurances given by his immediate superior, the first defendant, of ASMC's financial health.[55] Additionally, after the second defendant joined ASMC, he had been told by the finance team that funders had successfully obtained early redemptions of their investments up until April 2018, and he also personally knew of at least one funder who had successfully redeemed his investment.[56] The second defendant therefore believed that ASMC would make payment to its funders as promised.

40 In my judgment, I find the second defendant's explanation to be credible. I accept that he did have a reasonable basis for making the Representations, including the Second Representation. I therefore find that the plaintiffs have not proven the falsity of the Second Representation.

The Third and Fourth Representations

41 While the plaintiffs' pleaded case is that the Third and Fourth Representations were false at the material time,[57] it appears to me that the plaintiffs have conceded in their closing submissions that the Third Representation and at least part of the Fourth Representation were *true*. For one, the plaintiffs made no submission in their closing submissions on why the Third

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54 NEs, 23 September 2021, p 90 lines 10–14.

55 AEIC of Neil Hutton para 15; NEs, 24 September 2021, p 95 lines 10–15.

56 NEs, 23 September 2021, p 93 lines 23–28.

57 SOC paras 77, 80 and 85.

Representation was false at the time it was made. Moreover, in relation to the alleged falsity of the Fourth Representation, the plaintiffs submitted that *"[w]hile ASMC was in good financial health and in possession of the requisite funds*, ASMC was never, at all material times, ready nor willing to make all payments due to the [plaintiffs]" [emphasis added].[58] Likewise, the plaintiffs state as follows in their further submissions:[59]

> … As evinced by ASMC's DBS bank account statements ***between the months of October 2018 to September 2019, it is clear that ASMC's financials were in good health and that substantial amounts of funds were available and transacted at all material times.*** …
>
> [emphasis added in bold italics]

42 Based on the submission above, it is clear that the plaintiffs now in fact accept that the Third Representation and part of the Fourth Representation (*ie*, that ASMC possessed the requisite funds) were true at the material time. The plaintiffs therefore have no basis to allege that these Representations constituted misrepresentations.

43 As for the remainder of the Fourth Representation (*ie*, that ASMC was ready and willing to make all payments), I have also concluded at [30] above that in so far as the Fourth Representation pertains to statements that ASMC expected to make payments *in future*, these statements have to be re-characterised as implied representations that the second defendant honestly believed a future event would occur or had reasonable grounds for making such assertions, in order for that Representation to be actionable. The relevant query is therefore whether at the time the second defendant sent out e-mails to the second plaintiff stating that ASMC planned on making payment, he honestly

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58 PCS para 45.

59 Plaintiffs' Further Submissions dated 11 March 2022 ("PFS") para 10.

believed that these projected payments would occur or had reasonable grounds for saying so.

44 In my judgment, the available evidence shows that the second defendant honestly believed in the truth of the Fourth Representation at the material time. As I have stated at [40] above, I accept the second defendant's evidence that he did not doubt the truth of the statements he made to the plaintiffs, as he had received reassurances regarding ASMC's financial health from Dr Smuts as CEO and the first defendant as Managing Director. Further, as I explain below, I am unconvinced by the arguments made by the plaintiffs as to why the Fourth Representation must necessarily have been made by the second defendant without any honest belief on his part or any reasonable grounds.

45 The first argument made by the plaintiffs is that if it is found that the First Representation was false (*ie*, that the purported banking issues were non-existent), then the only reasonable conclusion to be drawn is that there was similarly never any intention on the part of ASMC and the second defendant to make payment to the plaintiffs.[60] Consequently, the second defendant could not have had an honest belief that payments would be made by ASMC. For the reasons detailed above at [33]–[36], I have found that the plaintiffs have not adduced sufficient evidence that the First Representation was false at the material time. I therefore reject this argument.

46 Next, the plaintiffs take issue with two specific e-mails sent out by the second defendant. I address each of these in turn:

(a) First, in relation to the e-mail sent out by the second defendant on 12 December 2018 (S/N 7 of **Annex A**), the plaintiffs argue that the

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60 PCS para 49.

second defendant did not have an honest belief that ASMC would obtain a performance bond from BNP Paribas, as the second defendant never had any dealings with BNP Paribas.[61] This is, in my view, a *non sequitur*. I do not see how the absence of direct communication between the second defendant and BNP Paribas necessarily means that he acted without an honest belief that ASMC would procure a performance bond. I accept that the second defendant honestly believed the contents of the e-mail sent on 12 December 2018, given that it was drafted by the first defendant (*ie*, the second defendant's superior at the material time).[62]

(b) Second, in relation to the e-mail sent out by the second defendant on 12 February 2019 (S/N 10 of **Annex A**), the plaintiffs contend that the second defendant did not honestly believe the representation therein that ASMC planned on making payments to the funders from 20 February 2019 onward. The plaintiffs argue that in cross-examination, the second defendant admitted that when a draft settlement deed was circulated to the plaintiffs in January 2019, he knew that "it wasn't possible for those [settlement] payments to be made".[63] Consequently, the second defendant could not have believed that the payments promised in the e-mail sent on 12 February 2019 would be made. In my view, this is a misunderstanding of the second defendant's testimony. The relevant parts of the cross-examination of the second defendant are reproduced below:[64]

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61 PCS para 52.

62 NEs, 23 September 2021, p 118 line 32 to p 119 line 1.

63 PCS para 53.

64 NEs, 23 September 2021, p 149 lines 17–23, p 150 lines 21–23, p 150 line 29 to p 151 line 6.

> Q Well, to any layman, Mr Hutton, 'settlement' means to say you settle the contract and payments are made and people walk off.
>
> A Okay, yeah, we didn't---we were---ASMC were not able to make payments to terminate the contracts. We tried to---we come up with the---we came up with the settlement agreement called the 'settlement deeds', but my understanding is that those payments were not---***it wasn't possible for those payments to be made***.
>
> …
>
> Q Now, Mr Hutton, let me just get this clear. Earlier on, we established that ASMC had the funds and it's in a healthy robust company position. You do not seem to suggest that ASMC never was able to make payments to any of the funders.
>
> A ***No, I'm saying that now.*** But now we are on the, what, 23rd of September 2021, now I know that clients didn't---we were not able to return the funds that we wanted to [*sic*] clients or that ASMC intended to pay back to clients. …
>
> …
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> A When we went through the settlement deeds here, I don't know that any of these were paid to clients. But we did our---and ***at the time, I believed we would. But now I know because I'm sat in Court on 23rd of September 2021 that we were not able honour that. But that doesn't mean at the time that I thought that we were not able to at the time.*** I was being told very firmly that this process was necessary because we now wanted to return the money that we owed to clients and---and---and I believed my boss and the finance team when they told me that we were in a position to do that; and that's why I went through this process. I wouldn't have done it if I thought it was a frivolous and not waste of everybody's time.
>
> [emphasis added in bold italics]

It is clear from the second defendant's answers in cross-examination that he meant that *on hindsight*, it was not possible for the payments promised under the settlement deeds to be made, and not that he was aware at the material time that ASMC would not make the promised payments. I therefore reject the plaintiffs' argument in this regard.

47 Finally, the plaintiffs complain that the second defendant has not adduced documentary evidence to corroborate his testimony that he was acting on the instructions of his superiors at the material time. This was in fact a constant theme of Mr Lun's cross-examination of the second defendant. The absence of such evidence, the plaintiffs contend, goes to show that the second defendant lied about receiving instructions from his superiors and was effectively making up stories to shore up his defence, when in fact he had no reasonable grounds for representing that ASMC would make payment.[65]

48 I do not accept this argument. The second defendant testified that he was unable to retrieve certain documents or e-mails for the purposes of this suit, as he had unexpectedly lost access to his e-mail account with ASMC and the documents stored at ASMC's premises when the landlord evicted ASMC from its offices.[66] The second defendant had, in any event, left ASMC around December 2019.[67] While the second defendant conceded during cross-examination that he had at least three opportunities prior to that to collate the documents he would need for his defence of the present suit (which was commenced in May 2019),[68] the second defendant explained that he did not do so as he did not expect to lose all access to ASMC's office premises and its records.[69] Having seen and observed the second defendant during cross-examination, I find this to be a reasonable explanation and therefore accept it.

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65 PCS paras 54 and 58.

66 NEs, 24 September 2021, p 6 lines 26–30.

67 NEs, 24 September 2021, p 4 lines 1–5.

68 NEs, 24 September 2021, p 14 lines 4–8.

69 NEs, 24 September 2021, p 6 lines 8–10.

49 In any case, as I have observed above at [36], the burden of proving the falsity of the Representations falls on the plaintiffs. In the absence of any other evidence supporting the plaintiffs' case, I find that the plaintiffs have not proven on a balance of probabilities that the Fourth Representation is false. Following from this finding, the plaintiffs have not, in my judgment, established the first element of their claims for fraudulent or negligent misrepresentation. Accordingly, I would dismiss the plaintiffs' claims on this basis alone.

The plaintiffs did not rely on the Representations

50 Nonetheless, I turn to consider the next element of the claims for fraudulent or negligent misrepresentation, which is that the plaintiffs relied on the Representations. In my judgment, the plaintiffs have also not succeeded in proving that they did so.

51 As noted above at [12], the plaintiffs' pleaded case is that as a result of the Representations, they forbore from commencing or prosecuting legal proceedings against ASMC, entering summary judgment against ASMC expeditiously, commencing investigations and/or taking necessary legal action to prevent the dissipation of funds by ASMC. In this light, I find it striking that nowhere in the plaintiffs' pleadings, AEICs or closing submissions, is it stated *what* precise legal action or investigations the plaintiffs forbore from commencing. In his oral submissions before me, Mr Lun submitted that but for the Representations, the plaintiffs would have "considered filing an injunction to freeze [ASMC's] monies [to prevent them] from being dissipated".[70] Yet crucially, this was *not* the evidence of the first or second plaintiff, either on affidavit or in cross-examination. In fact, Mr Lun's oral submissions were the

[70] NEs, 25 February 2022, p 29 lines 1–3.

first (and only) instance in which it was suggested that the plaintiffs had specifically refrained from applying for a Mareva injunction against ASMC, as a result of the Representations made by the second defendant.

52 In addition, the plaintiffs' pleaded case is that the Representations caused the plaintiffs to forbear from commencing legal proceedings from October 2018 to 31 July 2019. Yet, there is no evidence before me to suggest that the plaintiffs were indeed prepared to commence legal action against ASMC from as early as October 2018. Again, the first and second plaintiff did not give evidence to this effect in their AEICs or in cross-examination. Indeed, in his oral submissions, Mr Lun candidly conceded that it was not evidence put forth by either party that the plaintiffs were ready to sue ASMC in October 2018.[71]

53 In my judgment, the available evidence demonstrates that the plaintiffs did *not* rely on the Representations. First, I note that the plaintiffs' own evidence suggests that the Representations did not operate on their minds in late 2018. For one, the second plaintiff deposed in his AEIC that it "became clear" to him in late 2018 that ASMC and/or the defendants were unlikely to make full repayment of the principal sum the plaintiffs had invested, as well as payment of the promised returns under the five Contracts.[72] In the circumstances, it does not stand to reason that the second plaintiff would believe or rely on the Second and Fourth Representations that payment would be made as promised, and that ASMC was ready and willing to make payment. In a similar vein, I note that while the second plaintiff claims that the Third and Fourth Representations were made to him by the second defendant at the Concorde Hotel meeting (S/N 1 of

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71 NEs, 25 February 2022, p 32 lines 1–3.

72 P2AEIC para 84 (PBAEIC Vol 1 p 40).

Annex A), the second plaintiff's evidence is also that he rejected all proposals made to him at the Concorde Hotel meeting as he "just wanted [his] monies back".[73] In my view, this suggests that the second plaintiff had in fact placed *no* reliance on the representations made to him at the Concorde Hotel meeting.

54 Next, I agree with the second defendant that the fact that the plaintiffs commenced various legal proceedings against ASMC in 2019 goes to show that they were not induced by the Representations during this period.[74] As noted above at [10], the first plaintiff sent a letter of demand through his former solicitors to ASMC on 10 January 2019, and subsequently commenced HC/S 189/2019 against ASMC on 15 February 2019. In cross-examination, the second plaintiff was not able to credibly explain how he (or the plaintiffs collectively) could have been induced by the Representations into forbearing from commencing legal action, despite the commencement of HC/S 189/2019 by the first plaintiff. In this regard, the second plaintiff's evidence was that he was still "affect[ed]" by the Representations, as the commencement of HC/S 189/2019 did not mean that the defendants would "settle with [him] on what [he] claim[ed] against them".[75] That is clearly not the same as *forbearing* from commencing or prosecuting legal proceedings or taking investigative action. In the circumstances, I find the commencement of HC/S 189/2019 to be cogent evidence that the plaintiffs were not induced by the Representations to refrain from commencing or prosecuting legal proceedings or taking investigative action in February 2019.

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73 P2AEIC para 67 (PBAEIC Vol 1 p 35).

74 DCS para 76.

75 NEs, 21 September 2021, p 59 lines 18–23.

55 In so far as there was then a lapse in time between the commencement of HC/S 189/2019 in February 2019 and the application for summary judgment on 31 July 2019, I do not find that this necessarily shows that the plaintiffs had been induced by the Representations into sitting on their hands in any way. I find some force in the second defendant's argument that the intervening period was caused by various interlocutory applications filed by the parties, such that the defendants in HC/S 189/2019 only filed their Statement of Defence on 11 July 2019.[76] In any event, I also note that the *present suit* was commenced on 30 May 2019. As a matter of logic and common sense, given that the plaintiffs allege in the present suit that the defendants had, *inter alia, unlawfully* conspired to perpetrate a *fraudulent* investment scheme upon the plaintiffs (see above at [15]), I find it unbelievable and somewhat incredible that the plaintiffs would continue to place any reliance on the Representations that emanated from the second defendant *after* commencing the present suit (namely, S/Nos 15 and 16 of **Annex A**), and consequently continue to forbear from taking any form of legal or investigative action.

56 Ultimately, the bulk of the plaintiffs' arguments pertain to allegations that the second defendant had held himself out as a "key personnel and important member of ASMC['s] management team", such that the plaintiffs were induced into placing reliance on the Representations.[77] In support of this argument, the plaintiffs highlight that the second defendant (a) utilised first-person pronouns in his e-mails and signed off using his name; (b) sent out e-mails using the <management@asmc.com.sg> e-mail address (the "ASMC management e-mail address"); (c) communicated with ASMC's legal and

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76 DCS para 84.

77 PCS para 13.

finance team; and (d) had a personal assistant during his time at ASMC.[78] The plaintiffs also point out that the second defendant stated in cross-examination that his role in ASMC was to "assure clients".[79]

57 These allegations are ultimately ancillary and of little assistance to the plaintiffs' case, given that the plaintiffs have failed to prove that they *did* rely on the Representations and forbore from, *inter alia*, commencing or prosecuting legal action as a result (as I have explained at [50]–[55] above). In any case, I do not think that the various *indicia* raised by the plaintiffs, whether taken singly or together, necessarily show that the second defendant was an important member of ASMC's management team or that he held himself out as such. In my view, the plaintiffs' case on the second defendant's role is somewhat exaggerated and countered by the evidence of the second defendant, which I set out below.

58 In cross-examination, the second defendant explained that he utilised first-person pronouns in his e-mails as he felt that it would be "negligence of [his] duties" not to take ownership of the communications sent out to funders, given his role as Manager of Public Relations and Customer Services at ASMC.[80] Accordingly, the second defendant avoided wording his e-mails in a way that suggested he "[did not] work at ASMC".[81] For instance:

(a) The second defendant explained that he had phrased his e-mail of 8 January 2019 as "*I* have some information from the BNP Bank"[82]

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78 PCS para 13.

79 PCS para 35.

80 NEs, 24 September 2021, p 16 lines 28–30.

81 NEs, 24 September 2021, p 22 line 24.

82 PBAEIC Vol 1 p 229.

[emphasis added] as he felt he had to take ownership of the communications sent to funders, in his capacity as the "customer services guy".[83]

(b) The second defendant chose to use the phrase "I invite you to meet me to go through the outstanding payments …" in his e-mail of 14 January 2019,[84] rather than state that Dr Smuts or the first defendant wanted to organise a meeting, as he felt that he ought to present ASMC as a "united front" to its funders.[85]

(c) The second defendant stated in his e-mail of 12 February 2019 that "I have met many clients and settled many contracts",[86] as he felt that he had to "involve [himself] in the communications with customers", in his capacity as the "customer services guy".[87]

59 In so far as the second defendant signed off an e-mail he sent out on 11 April 2019 in the first person (namely, that "I look forward to returning after Easter to a less challenging time … [a]nd to a happy group of clients who have received the due payments"[88]), the second defendant explained that he was due to return to England to spend time with his children during the Easter holidays and merely thought that "it was a nice way to sign off a letter".[89] At the time, the second defendant genuinely expected and hoped that the funders would be

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83 NEs 24 September 2021, p 16 line 28 to p 17 line 2.

84 PBAEIC Vol 1 p 236.

85 NEs 24 September 2021, p 22 lines 12–17.

86 PBAEIC Vol 1 p 238.

87 NEs, 23 September 2021, p 139 lines 11–15.

88 PBAEIC Vol 1 p 244.

89 NEs, 23 September 2021, p 161 lines 9–12, p 162 lines 1–7; NEs, 24 September 2021, p 30 lines 20–24.

paid after the Easter holidays as he was dealing with several "unhappy customers" who wanted to "shout and scream" at him.[90] All in all, the second defendant candidly testified that when he communicated to ASMC's customers using first-person pronouns, he did so in his capacity as the customer services representative of ASMC.[91]

60 As for the fact that certain e-mails were sent to the second plaintiff by the second defendant using the ASMC management e-mail address, the second defendant highlights that these e-mails were mass e-mails to funders. The second defendant explained that the first defendant had instructed him to use the ASMC management e-mail address to send out mass e-mails,[92] as he was initially unable to send out mass e-mails using his personal e-mail account.[93] While he subsequently found a way to send out mass e-mails from his personal account, this was a "painstaking long process" as he had to manually copy and paste the funders' e-mail addresses. This was therefore only done when ASMC's IT staff was out of Singapore.[94] In so far as the second defendant's designation in ASMC was a "manager", the second defendant also clarified that this was not an indicator that he was part of ASMC's management team. Instead, the word "manager" had simply been inserted into the second defendant's job designation to overcome the problem of funders demanding to speak with a "manager", rather than with the second defendant.[95] The second defendant's

90 NEs, 23 September 2021, p 163 lines 21–23.

91 NEs, 24 September 2021, p 22 lines 15–17.

92 NEs, 24 September 2021, p 72 lines 12–17.

93 NEs, 29 September 2021, p 3 lines 10–11.

94 NEs, 29 September 2021, p 3 lines 10–18.

95 NEs, 29 September 2021, p 3 line 25 to p 4 line 5.

evidence was that his monthly salary for most of the time he was with ASMC was S$2,400.[96]

61 In relation to the fact that the second defendant had a personal assistant during his time at ASMC, the second defendant explained that his personal assistant was the only other person on ASMC's customer services team, who helped to manage the flow of calls from funders.[97] Accordingly, the fact that he had a personal assistant did not necessarily go to show that he was an important figure within ASMC.

62 In my judgment, and again, having observed the second defendant during the course of his rigorous cross-examination by Mr Lun, I accept the explanations given by the second defendant at [58]–[61] above on a balance of probabilities. I do not find it out of the ordinary that in communicating with ASMC's customers in writing, a customer services manager would seek to "assure clients" in the first person as part of his role. Even if the second defendant conceded in cross-examination that on hindsight, some of his e-mails to ASMC's funders could have been worded more clearly[98] or that he could have used a different choice of words,[99] I do not agree that this shows that the second defendant had therefore necessarily sought to hold himself out as a senior member of ASMC's management at the material time. In my view, it is clear from the second defendant's explanations that he had addressed ASMC's funders in the first person simply out of a desire to provide what, to his mind,

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96 NEs, 23 September 2021, p 146 line 6.

97 NEs, 23 September 2021, p 146 lines 3–4 and 18.

98 NEs, 23 September 2021, p 160 lines 1–3.

99 NEs, 24 September 2021, p 31 lines 9–11.

would constitute "good" customer service, and not because he was (or held himself out to be) a part of ASMC's management.

63 Nor do I find it out of the ordinary that a customer services manager would need to have regular contact or be in communication with the legal or finance team within the company. In my judgment, I also find that the second defendant's explanations as to why he had used the ASMC management e-mail address, or why he had a personal assistant, are not fanciful or outside the realm of reality. In the circumstances, I disagree with the plaintiffs that the second defendant was a key member of ASMC's management or held himself out as such, because of the *indicia* raised at [56] above.

64 Finally, the plaintiffs claim that it was not put to them in cross-examination that they had not placed any reliance on the Representations.[100] This is not true. As I noted at [54] above, the second plaintiff was cross-examined on how he could have relied on the Representations, when legal proceedings were commenced against ASMC in February 2019. Further, I reject the argument made by Mr Lun in the course of oral closing submissions that the second defendant is precluded from arguing that the plaintiffs placed no reliance on the Representations, because this was not expressly pleaded in the Statement of Defence ("Defence").[101] The Defence does plead that the plaintiffs are "put to strict proof" that they relied on the Representations, and thus, the parties did join issue on the question of the plaintiffs' reliance.[102] In any event, it is the plaintiffs' burden to prove reliance on the Representations, which for the reasons set out at [50]–[55] above, I have found that the plaintiffs have failed to

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100 PRS para 46.

101 NEs, 25 February 2022, p 71 lines 4–9.

102 Defence para 21.

do. The second defendant was fully entitled to test the plaintiffs' case and evidence on reliance without having to assert a positive case of his own.

65 Accordingly, in addition to my conclusion that the plaintiffs have not proven that the Representations are false (see [32] above), I also dismiss the plaintiffs' claims for fraudulent and negligent misrepresentation on the basis that they have not established, on a balance of probabilities, that they relied on the Representations.

The plaintiffs have not proven any loss suffered as a result of the Representations

66 In the event that I am wrong in my findings on the falsity and reliance elements of the misrepresentation claim, I go on to consider the third element, which is that the plaintiffs must have suffered damage as a result of the Representations. As noted above at [13], in their pleaded case and written closing submissions, the plaintiffs had initially characterised their loss as the sum of S$616,700 owed to the first plaintiff under the Contracts.[103] However, during oral closing arguments, Mr Lun reframed the plaintiffs' claim as one for the loss of an opportunity to commence legal action expeditiously.[104] At the conclusion of oral arguments, Mr Lun sought leave to file further submissions on the appropriate measure of damages for the loss of an opportunity caused by forbearance on the part of the plaintiffs, as a result of reliance on the Representations. I permitted the parties to address me on this point by way of further written submissions.[105]

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103 SOC para 101; PCS para 85.

104 NEs, 25 February 2022, p 82 lines 19–22.

105 NEs, 25 February 2022, p 93 lines 7–13.

67 As a preliminary point, I note that the second defendant contends in his further submissions that the plaintiffs' pleaded claim was not for damages for the loss of a chance, and that the plaintiffs are therefore barred from raising this as the measure of their loss. I address this argument first.

68 The general rule is that parties are bound by their pleadings and that the court is precluded from deciding on a matter that the parties themselves have decided not to put into issue: *iVenture Card Ltd and others v Big Bus Singapore City Sightseeing Pte Ltd and others* [2022] 1 SLR 302 ("*iVenture Card*") at [36]. This is illustrated by the case of *Columbia Asia Healthcare Sdn Bhd and another v Hong Hin Kit Edward and another and other suits* [2014] 3 SLR 87 ("*Columbia Asia*"), which concerned the purchase of shares in a company ("UMPL") by the first plaintiff ("Columbia"). Under the sales contract, the defendant vendors had warranted that the tax liabilities of UMPL's wholly owned subsidiary had been fully discharged. It was later discovered that this was in fact not the case and that Columbia had been exposed to potential future tax liabilities as a result. Columbia therefore claimed against the defendants for, *inter alia*, damages for a loss of chance to negotiate a lower purchase price for the shares, in view of the potential future tax liabilities it was exposed to (at [147]–[148] and [193]).

69 Woo Bih Li J (as he then was) rejected the claim for damages for the loss of a chance, noting as follows:

> 201 In the first place, the statement of claim did not plead damages by way of a loss of chance. In my view, ***a general plea for damages is different from damages for loss of a chance. The latter has to be clearly pleaded.***
>
> [emphasis added in bold italics]

70 Accordingly, *Columbia Asia* demonstrates that a party will likely be precluded from claiming damages for the loss of a chance, if its pleaded case is one for a general claim for damages. However, I also note that the court *may* depart from the general rule that a party is bound by its pleadings, in very limited circumstances and where no prejudice is caused to the other party in the trial or where it would be clearly unjust for the court not to do so: *iVenture Card* at [36].

71 This, in my view, is illustrated by the case of *Tembusu Growth Fund Ltd v ACTAtek, Inc and others* [2018] 4 SLR 1213 ("*Tembusu Growth Fund*"). In that case, the plaintiff ("Tembusu") had invested in the first defendant ("AI") through a convertible loan agreement. In separate litigation, it had been found that Tembusu had committed an anticipatory breach of the loan agreement by prematurely declaring that AI had breached the loan agreement (at [3]). AI claimed for damages arising out of Tembusu's anticipatory breach. In this regard, AI's pleaded case was, *inter alia*, that Tembusu's breach had derailed AI's planned initial public offering ("IPO"), which caused AI to lose the "benefit" of the IPO (at [5] and [95]). If the IPO had succeeded, AI claimed that it would have obtained shares valued at NZ$30.5 million in a listed company. However, AI subsequently modified its claim to one for the loss of *a chance* to obtain shares in a listed company worth NZ$30.5m (at [95]). Vinodh Coomaraswamy J noted the general rule that parties are bound by their pleaded cases (at [93]–[94]), but nonetheless went on to observe that AI's loss of chance claim "[drew] on the same body of evidence adduced at trial" in support of its pleaded claim (at [95]). As such, the Judge found that Tembusu's ability to respond to AI's loss of chance claim was not significantly prejudiced and proceeded to consider the merits of AI's loss of chance claim.

72 In the present case, the plaintiffs' pleaded case is that in reliance on the Representations, the plaintiffs had forborne from commencing or prosecuting legal action expeditiously, and are therefore entitled to either the full sum of S$616,700 owed under the Contracts or damages to be assessed for misrepresentation.[106] In my view, the present case is unlike *Columbia Asia*, where Columbia had pleaded a general claim for damages without more. In this case, I find that it is at least implicit in the plaintiffs' pleaded case that their claim is one for a loss of chance. To begin with, the very meaning of forbearance is that the plaintiffs had (allegedly) opted *not* to seize a chance to commence and/or prosecute legal action (and thereby secure recovery of their claim), when they otherwise would have but for the Representations.

73 Further, based on the plaintiffs' pleaded case alone, it is clear that the key issues arising from it would include: (a) whether the plaintiffs *in fact* would have commenced and/or prosecuted legal proceedings expeditiously, had the second defendant not made the Representations; and (b) had the plaintiffs commenced and/or prosecuted legal proceedings against ASMC expeditiously, how much (if any) they would have recovered from ASMC. As will be clear from my analysis at [76] below, these are essentially the same issues that would have arisen if the plaintiffs had pleaded their claim as one for a loss of chance. Moreover, the fact that these issues arose from the plaintiffs' pleaded case did not escape the second defendant. For instance, in his closing submissions (which were filed *before* the plaintiffs reframed their claim as one for a loss of chance), the second defendant argued that the plaintiffs have "mischaracterised their loss" as the full sum due under the Contracts. The proper characterisation of the plaintiffs' loss, the second defendant submitted, should be the difference between the sum that the plaintiffs would have recovered had they taken legal

106 SOC paras 79, 101 and 102.

action expeditiously, and the sum the plaintiffs would have recovered from taking legal action later on, which the plaintiffs have not proven.[107] In my view, this argument goes toward issue (b) above (on whether the plaintiffs have proven how much they would have recovered from commencing legal proceedings expeditiously), and is also an argument relevant to determining whether the plaintiffs' claim for loss of chance has any merit, as I elaborate on at [78] below.

74 In the circumstances, the second defendant has not been significantly prejudiced in his ability to respond to a claim for loss of chance. The present case more closely resembles *Tembusu Growth Fund* where the plaintiffs' loss of chance claim "draws on the same body of evidence adduced at trial". Accordingly, I hold that the plaintiffs are not barred from recharacterising their loss as a loss of chance. I thus return to the main issue at hand – have the plaintiffs proven their loss?

75 In their further submissions, the plaintiffs argue that the relevant test for whether a loss of chance has been proven can be found in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602 ("*Allied Maples*") (followed in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and another* [2005] 1 SLR(R) 661). In *Allied Maples,* Stuart-Smith LJ noted that where a plaintiff's case is that the loss of chance arises out of something that the plaintiff *himself* would otherwise have done, had the defendant not breached his obligations, then the plaintiff must prove this on a balance of probabilities. However, where the plaintiff's claim depends on the hypothetical actions of a third party, then the plaintiff does not need to prove on a balance of probabilities that the third party would have acted a certain way,

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107 DCS para 106.

but only needs to show that there was a substantial (rather than speculative) chance that the third party would have acted as such (at 1610–1611).

76 In the present case, the plaintiffs claim that they lost the chance to commence and/or prosecute legal action against ASMC expeditiously, which prevented them from obtaining repayment of the sums due under the Contracts in October 2018.[108] The plaintiffs' claim thus depends on both the actions of the plaintiffs themselves (*ie*, that they would have taken/prosecuted legal action if not for the Representations) and the actions of a court hearing any application or proceedings brought by the plaintiffs in October 2018. I therefore agree with the plaintiffs that they have to prove that: (a) on a balance of probabilities, but for the Representations, the plaintiffs would have commenced/prosecuted legal action against ASMC in October 2018; and (b) upon doing so, there was a real or substantial chance that the court hearing the proceedings would have allowed the plaintiffs to recover the full amount due under the Contracts, or part thereof.[109] Moreover, given the plaintiffs' claim that they lost the chance to *obtain repayment* from ASMC, they would also have to show (c) that on a balance of probabilities, they would have enforced any judgment granted against ASMC; and (d) that there was a substantial chance that the plaintiffs would be successful in their enforcement efforts.

77 In my judgment, the plaintiffs have failed to discharge this burden of proof. Let me explain why I have come to this conclusion. As I have noted above at [52], there is no evidence before me to suggest that the plaintiffs were ready to commence legal proceedings in October 2018, and Mr Lun conceded as much in oral closing submissions. Neither have the plaintiffs adduced any evidence

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108 PFS paras 9 and 10.

109 PFS para 7.

on whether there is a real or substantial chance that they would have been granted judgment for any proceedings commenced in October 2018, and if so, that they would have successfully enforced such a judgment against ASMC. The plaintiffs assert in their further submissions that they "would have recovered the full amount [they were] entitled to under the [Contracts]" as ASMC's financials were in "good health" from October 2018 to September 2019.[110] This submission is problematic for a number of reasons. First, as I have noted above at [41], it suggests that the Third Representation is *true* and therefore contradicts the plaintiffs' case that this representation by the second defendant constitutes a misrepresentation. Second, the plaintiffs did not in any case adduce any evidence on the state of ASMC's financial health during the material time and in fact, throughout the course of the trial, appeared to *dispute* that ASMC was in good financial health at the material time. This vacillation on the part of the plaintiffs only serves to accentuate the difficulties with their case against the second defendant. Moreover, the fact that the first plaintiff obtained summary judgment against ASMC in HC/S 189/2019 on 6 December 2019, but has not enforced this judgment to date, casts doubt on the suggestion that the plaintiffs would have expeditiously enforced any judgment obtained against ASMC by way of proceedings commenced in October 2018.

78 As noted at [73] above, the second defendant also raises a potentially interesting point on whether the plaintiffs' loss should properly be characterised as the *difference* between the sum that the plaintiffs would have recovered via proceedings commenced in October 2018, and the sum that the plaintiffs would recover by taking action later. Had the plaintiffs proven that they would in fact have commenced legal proceedings in October 2018 but for the Representations, I would have considered this point to be potentially relevant in

110 PFS para 10.

assessing the sum of damages that the plaintiffs are entitled to. However, given that the plaintiffs have failed to prove their loss, this point has been rendered academic and I say nothing more about it.

79 In sum, I find that the plaintiffs have not proven that they suffered any loss as a result of reliance on the Representations. Accordingly, in addition to my conclusions at [32] and [65] above, this forms a further basis for my decision to dismiss the plaintiffs' claims in fraudulent and negligent misrepresentation.

The plaintiffs have not proven that the second defendant knew the Representations were wilfully false

80 It is not strictly necessary for me to deal with the remaining elements of the claim for fraudulent or negligent misrepresentation. Nonetheless, for completeness, I make some observations about the final element of the plaintiffs' claim for fraudulent misrepresentation, which is that the second defendant made the Representations in the knowledge that they were wilfully false, or in the absence of a genuine belief that they were true.

81 In my judgment, the plaintiffs have also not established this element of their claim on a balance of probabilities. I have accepted the second defendant's evidence (see [40] above) that he genuinely believed the truth of the Representations at the material time; it therefore follows that the second defendant did not make the Representations in the knowledge they were wilfully false.

82 In addition, I am unpersuaded by the plaintiffs' arguments that the Representations must have been made by the second defendant fraudulently. One of the key arguments advanced by the plaintiffs is that an adverse inference should be drawn from the second defendant's failure to disclose the following

bank statements, despite an order for discovery (granted by consent in HC/ORC 6308/2020) ordering their production:

(a) bank statements for the DBS Account (referenced above at [33]) for the months of May 2017 to February 2019 and October 2019 to December 2019;[111] and

(b) bank statements for DBS bank account number 003-938983-3 (the "Second DBS Account"), for the months of May 2018 to December 2019.[112] The plaintiffs claim that the Second DBS Account belongs to ASMC Pte Ltd, an associated company of ASMC.[113]

83 The plaintiffs contend that in relation to the bank statements for the Second DBS Account, the second defendant was identified as a signatory to the Second DBS Account in a letter from his solicitors to the court dated 10 February 2021 (the "10 February 2021 letter").[114] The second defendant's failure to disclose the bank statements for the Second DBS Account means that "the only inference to be drawn" is that if the bank statements were before the court, "the evidence would unequivocally show the dissipation of funds" by ASMC and its associated companies. This, in turn, would prove that the second defendant had wilfully made misrepresentations to the plaintiffs, to facilitate the dissipation of funds by ASMC.[115]

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111 PCS para 64(a).

112 PCS para 64(b).

113 PCS para 64B.

114 PCS para 14.

115 PCS para 65.

84 I do not accept the plaintiffs' argument that an adverse inference should be drawn. In the first place, the second defendant has explained that the 10 February 2021 letter is erroneous in referring to him as a signatory, as he was never a signatory to the Second DBS Account.[116] The second defendant also testified that he was not involved in the drafting of the 10 February 2021 letter, and that it was the first defendant (rather than himself) who was involved in consenting to discovery of the bank statements.[117] While it was not subsequently clarified in re-examination how the alleged error in the 10 February 2021 letter came to be, I note that reading the 10 February 2021 letter in context, it is at least ambiguous whether the identification of the second defendant as a signatory to the Second DBS Account was a typographical error. The relevant portion of the 10 February 2021 letter is as follows:[118]

> 5. After our aforesaid enquiries the 1st Defendant again took time off work to attend at DBS Upper Thomson Branch on 9 February 2021 as he was in the area for deliveries. … At this time, the 1st Defendant was informed for the very first time that DBS could not in any event release the bank statements for DBS Bank Account No. 003-938983-3 ***as he (2nd Defendant) was a signatory to that account.*** This was the first time that the 1st Defendant had been informed of such a restriction as no such warning had been given to him by the Bank officer at the DBS Marine Parade Branch.
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> [emphasis added in bold italics]

85 There is no other mention of the second defendant in the 10 February 2021 letter, which suggests to me that the inclusion of the second defendant may well have been an error. I also note the second defendant's suggestion that this may have been an erroneous reference to Dr Smuts, who was initially the second

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116 NEs, 24 September 2021, p 45 lines 23–24.

117 NEs, 24 September 2021, p 34 lines 18–19; p 50 lines 21–31.

118 PBAEIC Vol 2 p 314 para 5.

defendant in this suit but was subsequently removed as a defendant by the plaintiffs.[119]

86 In any event, even if I were to accept that the second defendant was a signatory to the Second DBS Account in February 2021, I do not think that this fact alone indicates that the second defendant was necessarily concealing the dissipation of funds from ASMC, or that he had wilfully made false representations to the plaintiffs to facilitate the same. I stress that the plaintiffs' case against the second defendant for fraudulent misrepresentation (and indeed, for unlawful means conspiracy, as I have noted at [15] above) hinges on their allegations that the second defendant had knowingly helped to dissipate funds from ASMC by giving false hopes or reassurances to investors like the plaintiffs to induce them to forbear from taking legal action. If, as the plaintiffs claim, the account statements for the DBS Account and Second DBS Account are the so-called "smoking gun" that would prove the alleged dissipation of funds from ASMC, I would have expected the plaintiffs to utilise all the procedural weaponry available to them in their legal arsenal, including applying for discovery against DBS to obtain disclosure of the relevant bank statements. Yet, notwithstanding that it was apparent from at least February 2021 that the defendants faced difficulties disclosing the bank statements (or, based on the plaintiffs' own case, that the second defendant refused to disclose them), and despite several hints by this court during the trial,[120] the plaintiffs inexplicably chose not to make such an application. Whether an adverse inference should be drawn in any given case ultimately depends on the circumstances of the case: *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [60(a)]. Based on the circumstances set out above, I do not find it appropriate

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119 NEs, 24 September 2021, p 55 lines 23–29.

120 NEs, 24 September 2021 p 57 lines 21–26.

to permit the plaintiffs to prove their case by the drawing of an adverse inference, when the plaintiffs themselves have not attempted to obtain the crucial piece of evidence they (allegedly) need to discharge their evidential and legal burden of proof. I therefore decline to draw any adverse inference against the second defendant, despite the plaintiffs' exhortations otherwise.

87 Next, the plaintiffs argue that the second defendant's "careless choice of words" in his e-mails proves that he made the Representations in the knowledge that they were wilfully false.[121] In this regard, the plaintiffs highlight that in relation to two e-mails sent on 12 and 28 February 2019, the second defendant conceded in cross-examination that the e-mails could have been worded in a clearer manner. In my view, the fact that the second defendant agreed *ex post facto* that he could have worded his e-mails differently or better simply does not evidence that he, in his role as the customer services representative of ASMC, disbelieved the truth of the Representations at the material time.

88 Finally, in so far as the plaintiffs claim that the falsity of the Representations show that the second defendant knowingly misled the plaintiffs,[122] I have found at [32] above that the plaintiffs have not discharged their burden of proving that the Representations are false. I therefore reject this argument.

89 For the reasons given in this section, I find that the plaintiffs have not proven that the second defendant made the Representations in the knowledge that they were wilfully false. As such, even if the plaintiffs had established the

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121 PCS para 63.

122 PCS para 61; PRS para 24(c).

other elements of their claim for fraudulent misrepresentation, the plaintiffs' claim would in any event fail on this ground.

Issue 2: Have the plaintiffs established their claim for unlawful means conspiracy?

90 I turn to the plaintiffs' alternative claim for the tort of unlawful means conspiracy. It is common ground between the parties that the elements for a tort of unlawful means conspiracy are set out in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112], and are as follows:

(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.

91 For the reasons set out below, I find that the plaintiffs have not established their claim for unlawful means conspiracy, on a balance of probabilities.

No evidence of a combination to do unlawful acts

92 As observed in *Visionhealthone Corp Pte Ltd v HD Holdings Pte Ltd and others and another appeal* [2013] SGCA 47 at [46], the requirements of a "combination" and "unlawful act" in practice often have to be considered together, because proof of an agreement among the alleged conspirators is often

gathered from the unlawful act committed. I will therefore address the elements of a "combination" and "unlawful act" jointly.

93 In my view, the plaintiffs have not established either of these elements. While the plaintiffs vehemently argue that the defendants conspired to dissipate moneys from ASMC, I do not think that the evidence marshalled by the plaintiffs supports this claim.

94 First, the plaintiffs contend that the defendants acted unlawfully by dissipating certain funds that were supposed to be transferred from Malta and paid to ASMC's funders.[123] On 8 June 2019, the first defendant had represented to the plaintiffs (among other funders) that ASMC would transfer funds from London to Malta between 10 and 14 June 2019, and that the funds would be "cleared" in the first defendant's Singapore bank account from 17 June 2019. The plaintiffs allege that subsequently, the *defendants* (collectively) caused the second plaintiff to receive a screenshot depicting a transfer of €5m from an account with the Bank of Valletta, Malta, to a UOB bank account belonging to ISK Capital Pte Ltd, a company purportedly controlled by the first defendant in Singapore (the "BOV Screenshot").[124] This screenshot was shared in a chat group comprising a number of ASMC investors.[125] Further, in the 1 August 2019 e-mails, the second defendant represented to the plaintiffs that "the money is in Malta".[126] However, the plaintiffs argue that this sum must eventually have been dissipated, as ASMC subsequently suspended repayments to its funders.[127]

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123 PCS para 82.

124 SOC para 79(p); PCS para 82; P2AEIC para 116 (PBAEIC Vol 1 p 49).

125 NEs, 22 September 2021, p 30 line 25 to p 31 line 2.

126 PBAEIC Vol 1 p 258.

127 PCS para 82.

95 To begin with, I do not think that the plaintiffs have even established that moneys were *in fact* successfully transferred from Malta to Singapore (*eg*, by adducing the relevant statements for ASMC's bank accounts). In so far as the plaintiffs rely on the BOV Screenshot as proof that funds *were* transferred from Malta to Singapore (before being allegedly dissipated), I note that there is a striking dearth of evidence as to the provenance of this screenshot. In cross-examination, the second plaintiff testified that the BOV Screenshot was allegedly sent by one Koh Seng Hwang (also known as "Phyllis") to a chat group,[128] but that he did not actually know who the maker of the screenshot was.[129] Neither did the plaintiffs seek to call Phyllis as a witness or adduce any evidence of the exchanges within the chat group that may have cast some light as to who the BOV Screenshot was allegedly obtained from. Significantly, Mr Lun conceded in oral submissions that there is no evidence showing how or from whom Phyllis received the BOV screenshot and more importantly, that the BOV screenshot even emanated from the *second defendant* or had anything to do with him.[130] In the circumstances, I find that the BOV Screenshot does not carry much probative value, let alone prove the plaintiffs' pleaded allegation that the first and second defendants caused the BOV Screenshot to be disseminated to the second plaintiff.

96 In any case, even if ASMC had successfully transferred funds from Malta to Singapore, the plaintiffs have also not established that these funds were "dissipated" in the sense that they were applied to an improper purpose (and not to legitimate business expenses). For example, the plaintiffs' pleaded case (see [15] above] is that part of the objective of the fraudulent scheme was to allow

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128 NEs, 22 September 2021, p 30 line 12 to p 31 line 2; p 38 line 11.

129 NEs, 22 September 2021, p 32 lines 25–26.

130 NEs, 25 February 2022, p 81 lines 10–17.

ASMC's funds to be paid to *other* investors – implicit in that objection was that these other investors were paid *instead* of the plaintiffs. Yet there is nothing in the evidence before me to suggest that the plaintiffs were entitled to expect to be paid before or instead of any other investors. It is not the plaintiffs' case that the second defendant (or the first defendant, for that matter) represented to the plaintiffs that they would be accorded any priority or preference in terms of being paid from any incoming funds that may have been forthcoming. I therefore disagree that the funds must necessarily have been dissipated, simply because ASMC stopped repaying its funders or because other funders may have been paid instead of the plaintiffs. Similarly, in so far as the plaintiffs have pleaded that the funds were dissipated from ASMC and paid to the second defendant *personally*, no evidence was adduced by the plaintiffs to make good this assertion that the second defendant had received any moneys improperly.[131]

97 Moreover, even if the plaintiffs had established that moneys were *in fact* improperly dissipated from ASMC, the question that remains is whether the second defendant had combined or reached an *agreement* with the first defendant to dissipate money from ASMC. Based on the events described above at [94], I cannot see how this sequence of events alone necessarily shows that the first and second defendants had agreed to dissipate funds from ASMC. The overall picture that emerges from the evidence adduced at trial simply does not match the pleaded conspiracy scenario painted by the plaintiffs, as summarised in their Statement of Claim (see [15] above). Further, in so far as the plaintiffs rely on (a) the Representations; (b) the 1 August 2019 e-mails; and (c) the 2 September 2019 e-mail as instances where the second defendant made false statements to allay the plaintiffs' suspicions, I accept the second defendant's defence that he was simply acting on the instructions of his superiors in

131 SOC para 89(a).

conveying these representations for the reasons stated at [39]–[40] above.[132] In any event, the second plaintiff also conceded in cross-examination that he has no evidence that the representations contained in the 1 August 2019 e-mails were false at the time they were made by the second defendant.[133] Thus, even if I were to assume that funds *had* been improperly dissipated from ASMC, the fact that the second defendant made representations to the plaintiffs on various occasions does not, in my view, go to show that he was party to an unlawful agreement or that he acted unlawfully in combination with the first defendant to dissipate funds from ASMC.

98 For similar reasons, I find it to be of limited relevance whether ASMC in fact had underlying investments. The plaintiffs allege that ASMC's underlying investments must have been "bogus", as limited documentation evidencing ASMC's sale and purchase of steam coal and nickel was disclosed in the present suit.[134] Even if it is indeed established that ASMC's underlying investments are non-existent (although, to be clear, I make no finding on this), this alone does not prove that the second defendant had combined with the first defendant to injure the plaintiffs. On the contrary, the second defendant testified that he had always believed that ASMC was a legitimate business. He had gone on a "due diligence" trip to Indonesia at the start of his employment with ASMC, where he visited a nickel mine with other sales representatives and funders.[135] He had also undertaken further trips to the mines with funders after ASMC had defaulted on its payments and a number of funders wanted to see

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132 Defence paras 32(b) and 32(c).

133 NEs, 22 September 2021, p 27 lines 11–15 and 26.

134 PRS para 26 and 29.

135 NEs, 24 September 2021, p 122 lines 22–28; NEs, 29 September 2021, p 7 lines 5–16.

for themselves that ASMC had operations in Indonesia.[136] The second defendant's testimony in this respect is uncontradicted and I see no reason to doubt his explanation. I also note that it was not part of the plaintiffs' pleaded case that ASMC had no underlying investments – in any case, it would be difficult to sustain such a case since the plaintiffs concede that they did receive their monthly payments timeously until about September 2018 when the payments stopped. I therefore decline to place any significant weight on the contention that the second defendant has not adduced evidence of ASMC's underlying investments.

99 For completeness, I note that the second plaintiff alleges in his AEIC that the conspiracy between the first and second defendants is also evidenced by a message emanating from Dr Smuts.[137] The second plaintiff refers to a screenshot of exchanges in a Whatsapp chat group that the first plaintiff was part of, and which depicts a message purportedly from Dr Smuts, stating as follows:[138]

> I hope I can count on some people with integrity to support me in this effort to stop [the first defendant] …
>
> Stu, again I appreciate you doing the honourable thing - and you are right I was trying to build a real company giving investors real benefits but this guy was never on that same agenda. The only way to get some capital back is to track down ***where the missing money has been squirrelled to***.
>
> …
>
> [emphasis added in bold italics]

100 No evidence was adduced as to the provenance of this Whatsapp message. This message was *not* posted by Dr Smuts directly to the Whatsapp

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136 AEIC of Neil Hutton para 25.

137 P2AEIC para 131 (PBAEIC Vol 1 p 61).

138 PBAEIC Vol 2 pp 276–277.

chat group, but was rather posted by one Mr Stuart Smith, who was sharing with the chat group members an exchange he purportedly had with Dr Smuts over the LinkedIn portal. The plaintiffs did not call Dr Smuts or Mr Stuart Smith as witnesses at the trial. The fact that Dr Smuts may have said that moneys were "squirrelled" away is clearly hearsay evidence, and *prima facie* inadmissible for present purposes. Even if it were admissible, I do not see how the message sent by Dr Smuts necessarily demonstrates a conspiracy between the first and second defendants, especially since Dr Smuts does not even mention the second defendant in his message. I therefore would not accord Dr Smuts' message any significant weight.

101 To summarise the foregoing, the evidence adduced by the plaintiffs does not, in my judgment, prove on a balance of probabilities that moneys had been dissipated from ASMC, much less that the second defendant *combined* or reached an agreement with the first defendant to do the same. To the extent that the plaintiffs allege that the second defendant is wilfully withholding disclosure of bank statements to conceal the defendants' dissipation of ASMC's funds, I have already explained at [86] above why I decline to draw any adverse inference in the present case. Accordingly, I find that the plaintiffs have failed to establish that there was a combination between the first and second defendants to unlawfully dissipate funds from ASMC.

No intent to cause injury or loss suffered

102 Following from my conclusion at [101] above, the plaintiffs have failed to establish their claim for unlawful means conspiracy. As an alternative basis for my conclusion, I make a few brief observations about the remaining elements of the plaintiffs' claim.

103 In my judgment, the plaintiffs have also not established that there was any intent to cause injury on the part of the second defendant. The plaintiffs claim that the second defendant's intent to cause injury is apparent from the fact that his e-mails were "calculated to convey a particular meaning and impression" to the plaintiffs.[139] In my view, I do not see how the phrasing of the second defendant's e-mails alone can prove malice on his part. This is especially so when, as I have accepted at [39] above, these e-mails were sent on instructions from the second defendant's superiors and at times, drafted by persons *other* than the second defendant. I have also found that the plaintiffs have not proven that the e-mails sent by the second defendant contained false representations (at [32] above). Accordingly, I disagree that any intent to cause injury can be discerned from the e-mails sent by the second defendant.

104 As for the loss allegedly suffered by the plaintiffs, I note that the plaintiffs have not specified anywhere in their pleadings or closing submissions *what* relief is sought in respect of their claim for unlawful means conspiracy. In any case, proceeding on the assumption that the relief sought by the plaintiffs is the sum of S$616,700 owed by ASMC under the Contracts, the plaintiffs would then have to prove that they had been deprived of the full sum due to them under the Contracts, *as a result of* the conspiracy to dissipate ASMC's funds. This would require the plaintiffs to show, for instance, that ASMC would have had sufficient funds to make payment to the plaintiffs pursuant to the Contracts, but for the dissipation of funds. The plaintiffs have not adduced any evidence in this respect. Accordingly, I find that the plaintiffs have also failed to prove that they suffered a loss as a result of the alleged conspiracy.

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139 PCS para 78.

105 In sum, in addition to my conclusion at [101] above, the plaintiffs have not established that the second defendant intended to injure them, or that they suffered a loss as a result of the alleged conspiracy. The plaintiffs have therefore not established their claim for unlawful means conspiracy, and I also dismiss this claim accordingly.

Issue 3: Are the plaintiffs entitled to the BNP Paribas Performance Bond?

106 For completeness, I address the plaintiffs' pleaded request for relief in the form of the BNP Paribas Performance Bond. This claim can be dealt with in fairly short order. Apart from the fact that the pleaded relief is somewhat incomprehensible (see [16] above), the plaintiffs have not led any evidence, made any submissions or otherwise demonstrated why they are entitled to claim the BNP Paribas Performance Bond from the second defendant. As I mentioned above, this part of the claim was not pursued with any vigour nor articulated in any way. To the extent that the plaintiffs allege that the second defendant fraudulently and/or negligently misrepresented in his e-mail of 12 December 2018 (S/N 7 of **Annex A**) that ASMC would be procuring a performance bond from BNP Paribas, I have already dismissed the plaintiffs' claims for misrepresentation at [79] above.

107 I find that there is no basis in law or fact to allow this claim and therefore also dismiss it accordingly.

Conclusion

108 ASMC has effectively ceased operations and is clearly in a financially parlous state. The first defendant is, according to court records, presently an

undischarged bankrupt[140] and therefore unlikely to be able to satisfy any judgment obtained by the plaintiffs against him. The plaintiffs, for reasons unknown and which they did not wish to reveal, discontinued this action against Dr Smuts. That left the second defendant in the plaintiffs' crosshairs. While I sympathise with the plaintiffs' predicament and the significant sums they have lost as a result of their investments having turned sour, I am simply not satisfied that the very serious claims made by the plaintiffs against the second defendant have been made out.

109 For the reasons set out in this judgment, I dismiss all of the plaintiffs' claims and this action against the second defendant.

110 I shall hear the parties separately on the question of costs.

S Mohan
Judge of the High Court

Clarence Lun Yaodong, Wong Changyan Ernest, Chua Qin En and Leng Ting Kun (Fervent Chambers LLC) for the plaintiffs;
The first defendant absent and unrepresented;
Naidu Devadas and Jonathan Sam Weiyi (Metropolitan Law Corporation) for the second defendant.

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140 HC/B 159/2020 (HC/ORC 415/2021) dated 22 January 2021.

Annex A: Occasions on which the Representations were allegedly made to the plaintiffs[141]

S/N	Date / Reference in Statement of Claim ("SOC")	Representation made (First, Second, Third or Fourth)	Details [emphasis added in bold italics]
1	28 October 2018 SOC para 79(b)	Third and Fourth	At the Concorde Hotel meeting, the second defendant represented that that ASMC was in the midst of going public. He proposed to the second plaintiff that instead of making an early redemption request, the plaintiffs could make a pre-IPO placement of ASMC shares. In the alternative, the second defendant proposed that the plaintiffs could reinvest their principal sum into another investment by ASMC or opt to be paid in gold bars equivalent to the redemption sum.
2	31 October 2018[142]	Second	In a mass e-mail to ASMC's funders, the second defendant stated: "... For those people who are awaiting payment, I can assure you that ***all***

141 PCS para 27.

142 PBAEIC Vol 1 p 207.

	SOC paras 54(b) and 79(c)		***outstanding payments will be made from the 9th November 2018***. It may take up to 10 working days to clear the payments, but all payments due up to that point will be made. ... ASMC continues to grow and diversify and we can ***assure our clients that all returns will be paid***, and the profit share scheme in Nickel and PGM is as secure as it always has been ..."
3	2 November 2018[143] SOC para 79(d)	Third and Fourth	In response to the second plaintiff requesting an early redemption of the Contracts, the second defendant stated in an e-mail: "I suggest you wait for the call back. ***It's free and I don't think it will take any longer***." A "call back" referred to the process of ASMC terminating a contract with a funder.[144]
4	5 November 2018[145] SOC para 79(d)	Third and Fourth	In response to a query from the second plaintiff on when the call back would take place, the second defendant replied by e-mail: "I expect

143 PBAEIC Vol 1 p 207.

144 NEs, 29 September 2021, p 4 lines 25–30.

145 PBAEIC Vol 1 p 206.

			it to be at the end of Nov, with a cheque dated in December."
5	19 November 2018[146] SOC paras 54(c) and 79(e)	Third and Fourth	In a mass e-mail to ASMC's funders, the second defendant stated: "... We appreciate your patience with the payment of the returns. The delayed payments are to be brought up to date as soon as possible. We had hoped that the payment would be made already. However, it is still pending. The memo that we issued stated that the payment would be made within 10 working days of 9th November. This takes us up to 23rd November. Despite that, we are working to ensure that the ***payments are to be made as soon as possible***…"
6	23 November 2018[147] SOC paras 54(d) and 79(f)	First, Third and Fourth	In a mass e-mail to ASMC's funders, the second defendant stated: "... We understand the delayed payments continue to cause concern. We are ***trying to resolve the matter***

146 PBAEIC Vol 1 p 210.

147 PBAEIC Vol 1 p 213.

			and in the interim, to keep all parties informed. The most recent update we have is that the ***funds are in our ASMC bank account pending final approval from the bank***. The payments will be released once we have satisfied the banking requirements ..."
7	12 December 2018[148] SOC paras 54(e) and 79(g)	First, Third and Fourth	In a mass e-mail to ASMC's funders, the second defendant stated: "... In the interim, we are attempting to provide supporting data or literature to explain that the overall health of ASMC remains robust, and that we have the funds ready to make the required payments once we overcome these ***temporary logistical banking issues***. It may take a little while to process all of the payments due to the ***unforeseen and purely administrative hurdles***, but we are in a position to reassure all of our valued clients that payment will be made.

148 PBAEIC Vol 1 p 216.

			To this end, ASMC is ***arranging for a Bank Performance Bond through BNP PARIBAS before end of this year. This performance Bond will guarantee payment to clients of the capital and outstanding returns.*** We believe that ***this alternative will obviate the administrative issues***. Please note that BNP PARIBAS by issuing the aforesaid Bank Performance Bond is in effect acknowledging that ***ASMC is in possession of the requisite funds and is indeed ready and willing to make all payments***. ..."
8	8 January 2019[149] SOC paras 54(f) and 79(h)	First and Third	In a mass e-mail to ASMC's funders, the second defendant stated: "... The memos that we last issued stated that the ***payment would be made in November then end of December***. We sent those memos out in good faith and based on what we believed to be reliable information. We shared those timescales because

[149] PBAEIC Vol 1 p 228.

			we were informed that we could make the payments within those timescales. We sincerely ***apologise that the payments are still outstanding***. Over the Christmas period, some ***banking processes can slow down owing to the Bank Holiday*** etc. since the Christmas break, we are concentrating our efforts on discovering why the ***banking issue was not resolved*** in the way that we were told it would be and on making the payment as soon as possible. Prior to the festive break I liaised with clients and explained that we would be producing some supporting data, to reassure clients. Information related to the BNP bond and the overall health of ASMC and our mining and refining operations. I have some information from the BNP Bank, but as I am sure you can imagine, ***correspondence relating to our internal banking issues*** are usually confidential and it would not

			be standard practice to just issue copies of our internal correspondence freely by e-mail..."
9	14 January 2019[150] SOC paras 54(h) and 79(j)	First, Third and Fourth	In a mass e-mail to ASMC's funders, the second defendant stated: "... all the ***logistical banking issues that had caused delays have now been surmounted***. We are ***looking to make all payments for Nickel investments by bank TT transfer very soon***. We shall be contacting you in due course regarding the protocol and specific timing of the payments. ... ASMC is now looking to focus on ***our biggest and most successful ongoing projects, namely our nickel mining*** and smelting and our refinery. ASMC can state with confidence that ***these projects are healthy, and robust and exclusive to ASMC***. ..."

150 PBAEIC Vol 1 p 235.

10	12 February 2019[151] SOC paras 54(i) and 79(j)	Fourth	In a mass e-mail to ASMC's funders, the second defendant stated: "We have the ***clearance to initiate payments from Wednesday, 20th February 2019***."
11	28 February 2019[152] SOC paras 59(a) and 79(l)	Third and Fourth	In a mass e-mail to ASMC's funders, the second defendant stated: "We will continue to work through the call back meetings to produce settlement deeds, and ***we expect this matter to be finally concluded within the next 4 weeks***. In the mean time we appreciate your ongoing patience."
12	11 April 2019[153] SOC paras 59(b) and 79(l)	First, Third and Fourth	In a mass e-mail to ASMC's funders, the second defendant stated: "... [The SWIFT code] will validate that ***ASMC has the funds to pay clients***, and will reinforce that ***we also have the intention to settle***, as soon as clearance is given by the bank. The Swift code and clearance that we are awaiting relates to the

151 PBAEIC Vol 1 p 238.

152 PBAEIC Vol 1 p 240.

153 PBAEIC Vol 1 p 243.

			Performance Bond from BNP Paribas Bank. You may already be aware that a Performance Bond is used to offer assurances that a company (in this case ASMC) ***can deliver on the service that we have undertaken. It confirms that ASMC will use these funds to fulfil our commitment to pay clients***. ..."
13	30 April 2019[154] SOC paras 59(c) and 79(l)	First, Third and Fourth	In a mass e-mail to ASMC's funders, the second defendant stated: "After several negotiations, we were informed by the bank that the ***funds that we intend to use to pay our clients can be cleared to pay clients in 2 weeks.*** It is important to clarify ***ASMC has continued with its mining operations and to generate revenue despite the difficulties that we experience*** with the process of clearing the funds. We expect that the ***matter will be resolved very soon***, and are awaiting

[154] PBAEIC Vol 1 p 246.

			for clearance to begin making the payments."
14	15 May 2019[155] SOC paras 59(d) and 79(l)	First, Third and Fourth	In a mass e-mail to ASMC's funders, the second defendant stated: "Since my last memo, ***the timescale that I offered of 2 weeks now feel*** **[sic]** ***ambitious in hindsight, and the information that I have now suggests that the payments can begin at the end of May***. The information is a mixed blessing. I can state with confidence that the funds will clear within our Singapore UOB account soon. ***The transfer of funds to our account would be made in batches and so would the payments to clients. Batch one could be as soon as the end of May and batch 2 would be mid June***."
15	10 June 2019[156] SOC paras 59(e) and 79(p)	First, Third and Fourth	In a mass e-mail to ASMC's funders, the second defendant reiterated representations made during a meeting held on 8 June 2019, as follows:

155 PBAEIC Vol 1 p 249.

156 PBAEIC Vol 1 p 203.

			"Mr Ishak Basheere the owner of ASMC met with clients at 12pm on Saturday 8th June 2019. At that meeting Ishak addressed a crowd of funders from Singapore and Malaysia. ... The meeting developed into a Q & A session and various actions / outcomes were agreed upon: 1. ***Ishak made it explicitly clear that he can and will pay all clients 100% of what is owed to them within 3 months.*** 2. Ishak explained that Dr Smuts is no longer working at ASMC. ***3. ASMC funds are to be transferred from London to Malta between June 10th – 14th June 2019.*** ***4. June 17 onwards funds will be cleared in batches in Ishak's Singapore bank account. This is expected to take 3 days.*** ***5. Ishak estimates the amount to be around 5 million Euros per batch.*** ***6. June 21 we can begin to process the payments.*** ... ***9. All dividends will be calculated up until end of June 2019.***

			10. Schedule of payment will be worked out by June 14 based on the percentage payout scheme."
16	5 July 2019[157] Not pleaded	First, Third and Fourth	In a mass e-mail to ASMC's funders, the second defendant stated: "***Mining operations and all other business continues as normal.*** ... ***2. Please note that such breaches will not only jeopardise the company's business operations but it will also negatively effect*** **[sic]** ***the company's ability to honour its financial obligations for all funders.*** ... ***The last memo set out a timeline for the payments, and whilst we still feel confident that payments can be completed within 3 months as previously stated, the first payment is delayed.*** We are still working to bring the funds from Malta in to Singapore, so that we can pay clients from our Singapore account."

Annex B: Further occasions on which the second defendant allegedly made false statements to the plaintiffs in furtherance of an unlawful

[157] PBAEIC Vol 1 p 254.

means conspiracy

S/N	Date	Relevant extracts of the e-mails sent by the second defendant
1	1 August 2019 12.03pm[158]	"1. The money is in Malta 2 and 3. The money was held at Malta due to a breach of P and C by a client and we are working to get the funds released very soon. We expect the funds to be in Singapore and cleared by MAS within a few working days."
2	1 August 2019 3.30pm[159]	"1. A bank will freeze the account pending an investigation. 2. I am not prepared to give out any more information about the bank, we do not want a repeat of the current problem. 3. We need wait for the bank to complete their investigation/compliance process. 4. We are transferring funds from Indonesia too. I do not know what stage that transfer is at but it is imminent, MAS will hold the funds for up to 24 hours before they release or return the funds."

158 PBAEIC Vol 1 p 258.

159 PBAEIC Vol 1 p 257.

3	2 September 2019[160]	"My last memo in June explained that funds were to be transferred to Singapore from Malta and that we could pay a percentage of what we owe clients in June and the full amount by mid to late September (3 months from when we met). … However, ASMC had to change the route through which we transfer funds into Singapore, due to a serious breach of privacy and confidentiality by a client. Therefore, as a result of the said breach of confidentiality we were unable to meet those timeframes. Since that time, the company has had to rearrange the transfer of funds through Indonesia, which unfortunately incurred more administrative costs. These unexpected delays/costs have also compounded ASMC's problems and subsequently further delayed payments whilst we rectify the breach of confidentiality issue in Malta. … However, we now have funds awaiting clearance into our Singapore account. The transfer is from our nominated business account in Indonesia. The transfer instructions have been sent and we do not anticipate any further problems as clearance has been approved on both countries. The transfer of foreign currency takes a little longer than initially anticipated but we are confident that the funds will clear in due course subject

[160] PBAEIC Vol 1 pp 268–269.

		to banking regulatory and administrative requirements. The delays have caused problems for all parties, including clients, agents and ASMC. Once the first transfer clears we can then settle some immediate payments and we can also begin to settle what we owe to clients. Therefore, due to the said delays ASMC will now have to share in additional legal and administration fees to process repayments."