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

[2022] SGHC 23

Suit No 242 of 2016

Between

Uday Mehra

… *Plaintiff*

And

(1) L Capital Asia Advisors
(2) L Capital (HK) Limited
(3) Ravi Thakran
(4) Nauman Hasan

… *Defendants*

JUDGMENT

[Contract — Contractual terms — Express terms]
[Contract — Termination — Termination under terms of contract]
[Employment Law — Contract of service — Breach — Implied term of mutual trust and confidence]
[Tort — Misrepresentation — Fraud and deceit — Inducement]
[Tort — Conspiracy]
[Tort — Confidence]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Uday Mehra
v
L Capital Asia Advisors and others

[2022] SGHC 23

General Division of the High Court — Suit No 242 of 2016
Vinodh Coomaraswamy J
27-28 January, 2-5, 9-10, 16-19 February, 12 July, 3 August 2021

28 January 2022 Judgment reserved

Vinodh Coomaraswamy J:

Introduction

1 The plaintiff is a former employee of the first and second defendants. His employment was terminated summarily in June 2015. The grounds for terminating his employment were his alleged acts of insubordination and misconduct. His case is that his employment was terminated in breach of contract in order to suppress his attempts to expose internal wrongdoing.

2 The plaintiff now brings this action against the defendants seeking damages for: (a) failing to pay him his profit share in breach of his employment contract; (b) inducing him to enter into his employment contract by fraudulent misrepresentation; (c) terminating his employment in breach of contract; (d) conspiring to injure him by unlawful means, *ie* by terminating his employment in breach of contract; (e) failing to pay him a post-termination

monthly indemnity in breach of contract; and (f) the stigma loss he has suffered arising from the manner in which his employment contract was terminated.

3 I dismiss all of the plaintiff's claims. The first claim is dismissed because it is based on a fundamental misunderstanding of the relevant provision of his employment contract. The second claim is dismissed: (a) because the plaintiff has either fabricated or misunderstood the misrepresentations he alleges were made to him; and (b) because even the plaintiff does not believe the allegations of fraud on which this claim rests. The third claim is dismissed because the plaintiff was indeed guilty of insubordination and misconduct justifying summary termination of his employment. The fourth claim is dismissed because it is bereft of particulars and evidence and is completely baseless. The fifth claim is dismissed because the plaintiff failed to comply with an express contractual condition precedent for him to receive the post-termination monthly indemnity. The sixth and final claim is dismissed because there was no breach of any implied term of mutual trust and confidence in the plaintiff's employment contract.

4 The defendants bring a counterclaim against the plaintiff seeking relief for his breach of his obligations of confidentiality. I have allowed the counterclaim but have ordered the plaintiff to pay only nominal damages of $1,000 for his breach.

5 I now set out my reasons in full.

The parties

6 The plaintiff was born in India, is a citizen of the Netherlands and resides in the United Kingdom.[1]

7 The first defendant is the holding company of a group of companies in the business of raising, investing and managing private equity funds. I shall refer to that group of companies as "the LCA Group". The LCA Group has its head office in Singapore and is managed from Singapore. Member companies of the LCA Group are incorporated in several other jurisdictions, including Mauritius and Hong Kong. The first defendant is incorporated in Mauritius.

8 The second defendant is a wholly owned subsidiary of the first defendant and therefore a member of the LCA Group. The second defendant is incorporated in Hong Kong.

9 The third defendant is the founder of the LCA Group. He was, at all material times, the managing partner and chairman of the LCA Group and the managing partner of the first defendant.

10 The fourth defendant was, at all material times, a senior human resources executive in LVMH Moët Hennessy Louis Vuitton SE ("LVMH"). LVMH is a very large and very successful multinational luxury goods conglomerate headquartered in France.[2]

1 The plaintiff's affidavit of evidence in chief ("Plaintiff's AEIC") at para 1.

2 Plaintiff's AEIC at para 7.

LVMH and the LCA Group

11 LVMH is the sole shareholder of the first defendant. It is therefore the ultimate holding company of the LCA Group and its ultimate owner. LVMH is also a sponsor of the LCA Group's private equity funds and an investor in those funds.[3] LVMH therefore has a multi-tiered economic interest in the performance of the LCA Group and its funds.

12 LVMH therefore has significant involvement in the LCA Group's management. That is how the fourth defendant finds himself a defendant in this action. He was never a director or even an employee of the LCA Group. But as a senior human resources executive at LVMH, he participated in the LCA Group's decision to terminate the plaintiff's employment. The plaintiff therefore claims that the fourth defendant is a conspirator who participated in a plot to injure the plaintiff by terminating his employment in breach of contract.

Discussions with the LCA Group in June 2011

13 The possibility of the LCA Group employing the plaintiff arose for the first time in June 2011. That was when an executive search consulting firm known as Spencer Stuart & Associates (Singapore) Pte Ltd ("Spencer Stuart") approached the LCA Group on behalf of the plaintiff. The plaintiff and the third defendant already knew each other as former colleagues.[4] Spencer Stuart's approach led to a meeting between the plaintiff and the third defendant in Mumbai.[5]

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[3] Plaintiff's AEIC at para 7.

[4] Third Defendant's AEIC at paras 15 to 17.

[5] The third defendant's affidavit of evidence in chief dated 7 November 2020 ("Third Defendant's AEIC") at paras 14.

14 As a consequence of this meeting, the plaintiff met a senior LVMH executive, also in Mumbai.[6] This senior executive was Mr Daniel Piette, a member of LVMH's Executive Committee. Part of Mr Piette's role at LVMH was to oversee LVMH's direct investment in funds, including those managed by the LCA Group. Mr Piette was therefore the LVMH executive to whom the third defendant then reported. The third defendant then held a position in LVMH concurrently with his position in the LCA Group, as LVMH's Group President for Southeast Asia.[7]

15 These meetings led to the LCA Group making a formal offer in June 2011 to employ the plaintiff as its Regional Managing Director of Operations.[8] The plaintiff did not ultimately accept this offer. Instead, in July 2011, he accepted an offer of employment in India with a men's fashion internet start-up called Zovi.com.[9]

Discussions with the LCA Group in February 2012

16 Discussions about the plaintiff's possible employment with the LCA Group resumed in January and February 2012, while plaintiff was still employed by Zovi.com. The result of these discussions was that the LCA Group once again made a formal offer to employ the plaintiff.[10] This time, the plaintiff accepted.

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6 Third Defendant's AEIC at para 18; 10 February 2021 Transcript p 23 line 9 to p 24 line 18; CB 233–242A.

7 Statement of Claim (Amendment No. 2) dated 12 October 2020 ("SOC") at para 5.

8 CB 243–248.

9 CB 256.

10 Third Defendant's AEIC at para 33; Gibert Ong's affidavit of evidence in chief dated 2 January 2020 ("Ong's AEIC") at paras 30 to 31.

17 In February 2012, the plaintiff ceased to be an employee of Zovi.com and became an employee of the LCA Group. He remained employed by the LCA Group until June 2015 when, as I have mentioned, his employment was terminated summarily.

18 Three different members of the LCA Group employed the plaintiff in turn from February 2012 to June 2015 under three different contractual arrangements. Apart from his primary place of work, the material terms of the plaintiff's employment, including his remuneration package, remained unchanged despite these changes of employer. Given that I have dismissed all of the plaintiff's claims, it is immaterial which company in the LCA Group was his employer at any given time. For convenience, therefore, I shall refer to the plaintiff's employer throughout the entire period from February 2012 to June 2015 simply as "the LCA Group".

The employer/employee relationship breaks down

19 The third defendant was the plaintiff's immediate superior officer throughout the plaintiff's employment by the LCA Group. Their relationship was initially uneventful,[11] apart from the inevitable minor issues.

20 In August 2014, their relationship came under serious strain. That was when a dispute arose between the plaintiff and the LCA Group about the correct construction of the formula in the plaintiff's employment contract by which to calculate his entitlement to a share of the profit on the next fund which the LCA Group raised. The dispute festered from August 2014 to May 2015. By June 2015, there had been a complete breakdown in the relationship between employer and employee and between immediate superior and subordinate.

[11] Third Defendant's AEIC at para 58.

21 As a result, the LCA Group terminated the plaintiff's employment summarily for insubordination and misconduct on 29 June 2015. The LCA Group took this step with the knowledge and support of LVMH.[12]

The plaintiff commences this action

22 The plaintiff now brings this action seeking the following relief against the defendants:

(a) Damages for the LCA Group's breach of contract in failing to pay him his share of the next fund which it raised. The plaintiff values this claim at US$37.5m.[13]

(b) Damages for the LCA Group's fraudulent misrepresentation, being the value of the share options at Zovi.com which the plaintiff gave up in order to accept employment with the LCA Group. The plaintiff values this claim at US$75m[14] or US$3m.[15]

(c) Damages for terminating the plaintiff's employment in breach of contract. The plaintiff values this claim at just under US$112,000, being the salary he would have earned during his six-month notice period.[16]

(d) Damages for conspiring to injure the plaintiff by unlawful means, *ie* by terminating the plaintiff's employment in breach of contract. The plaintiff values this claim at US$80.99m, being the total

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12 CB 2712–2715.

13 Plaintiff's closing submissions dated 19 April 2021 ("PCS") at paragraph 326(e).

14 PCS at paragraph 326(f).

15 Plaintiff's reply closing submissions dated 12 May 2021 ("PRCS") at paragraph 180.

16 PCS at paragraph 326(a).

of the sums claimed under[22(a)] and [22(c)] above and [22(e)] and [22(f)] below.[17]

(e) Damages for failing to pay the plaintiff a post-termination monthly indemnity due to him under his employment contract. The plaintiff values this claim at just over US$78,000.[18]

(f) Damages for the stigma which is now attached to the plaintiff in the employment market by reason of the LCA Group's termination of his employment in breach of the implied term of mutual trust and confidence. The plaintiff values this claim at US$43.3m.[19]

23 The LCA Group rejects all of the plaintiff's claims in their entirety. I now deal with each of the plaintiff's claims in turn.

Claim 1: the plaintiff's profit share

24 The plaintiff's first claim is that the LCA Group has failed to pay him his share of the profit on the next fund raised by the first defendant, calculated in accordance with the formula set out in his employment contract. The parties have referred to that next fund as "Fund II". I shall do the same.

25 I note in passing that the plaintiff commenced this action even before the LCA Group was obliged to calculate and pay to him his share of Fund II's profit. In that sense, although the plaintiff does not plead it in this way, his first claim is in substance a claim that the LCA Group committed an anticipatory breach of his employment contract when it refused to accept his construction of

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[17] PCS at paragraph 326(b).

[18] PCS at paragraph 326(c).

[19] PCS at paragraph 326(d).

the contractual formula. As nothing turns on this point, I need not analyse it further.

Factual background

26 When the plaintiff commenced his employment in February 2012, the LCA Group had just started raising funds from investors for Fund II. Fund II closed in June 2014 with US$980m raised.[20]

27 In August 2014, the plaintiff queried the construction of the formula by which his share of the profit on Fund II was to be calculated. The dispute over the proper construction of that formula is the root cause of all of the unhappy events which followed, including this litigation. It is therefore necessary to consider now in more detail the three sets of contractual arrangements under which the LCA Group employed the plaintiff.

28 From February 2012 to May 2012, the first defendant employed the plaintiff as its Managing Director. I shall refer to this employment contract as "the February 2012 Contract". From May 2012 to June 2014, the LCA Group's member company in Mumbai[21] employed the plaintiff. Concurrently, the LCA Group's member company in Mauritius[22] paid the plaintiff part of his remuneration package under a consultancy agreement with him. I shall refer to these contracts collectively as "the May 2012 Contract". From June 2014 to June 2015, the second defendant employed the plaintiff as its Managing

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20 The defendants' closing submissions dated 19 April 2021 at para 31.

21 CB 398–402.

22 CB 365.

Director, Operations. I shall refer to this employment contract as "the June 2014 Contract".

29 The formula by which the plaintiff's share of the profit on Fund II was to be calculated was set out expressly in cl 3.1 of the February 2012 Contract.[23]

> You will be entitled to receive a gross basic remuneration of USD 400,000.00 per annum paid monthly in arrears, in 12 equal instalments. You will be eligible for an annual performance bonus targeting 100% of your gross annual base salary subject to individual performance and business results … We also wish to confirm that *you will be awarded 2.5% carry for the next fund raised by [the first defendant].*"
>
> [Emphasis added]

It is not disputed that Fund II is "the next fund raised by [the first defendant]" within the meaning this clause.

30 From May 2012, the contractual formula by which the plaintiff's share of the profit on Fund II was to be calculated is set out in a letter ("the May 2012 Letter") which accompanied the May 2012 Contract.[24] The language of the May 2012 Letter is identical in all material respects to cl 3.1 of the February 2012 Contract:

> Dear Uday
>
> You will be awarded *2.5% carry* for the next Fund raised and managed by [the first defendant].
>
> The carry shares will be allocated to you in accordance with the carried interest scheme of the next Fund.
>
> (Emphasis added)

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23 Ong's AEIC at para 46; CB 263 and 355.

24 CB 418; DCB 84.

31 The June 2014 Contract is silent on the plaintiff's entitlement to a share of the profit on Fund II. However, the LCA Group does not argue that the June 2014 Contract extinguished whatever contractual effect the May 2012 Letter might have had with regard to the plaintiff's share of the profit on Fund II. I therefore proceed on the basis that the May 2012 Letter remained in force as a term of the plaintiff's employment contract throughout his employment under the June 2014 Contract.

The parties' cases

32 The critical phrase in both the February 2012 Contract and the May 2012 Letter is the phrase "2.5% carry". The plaintiff's case is that this phrase must be construed in the context of the parties' prior negotiations and shared understanding at the material time to "represent 2.5% of gross profits".[25]

33 In response, the LCA Group raises three broad points:

(a) The May 2012 Letter is not enforceable: (i) because it was at most a mere agreement to agree;[26] (ii) because it lacks sufficient certainty;[27] or (iii) because it was subject to conditions precedent which were never fulfilled.[28]

(b) Even if the May 2012 Letter is enforceable, the plaintiff's construction of its contractual effect is wrong. The phrase "2.5% carry"

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25 SOC at paras 16(a) and 19(a); DWS at paragraph 83.

26 DWS at paras 60 to 63.

27 DWS at paras 64 to 69.

28 DWS at paras 70 to 72.

refers to 2.5% of the LCA Group's share of the profit on Fund II and not to 2.5% of what the plaintiff calls the "gross profits" of Fund II.[29]

(c) Even if the plaintiff's construction is correct, Fund II failed to generate sufficient returns over its lifetime to yield any profit at all, thereby leaving the plaintiff with at best only a claim for nominal damages for breach of contract.[30]

34 It is convenient to take the final point first.

Fund II did not yield a profit

35 The plaintiff and his expert both accept[31] that Fund II lost substantial money for its investors. Its net internal rate of return from inception to September 2020, just a few months before trial, was *negative* 11% per annum.[32] As things stand, it is virtually impossible for Fund II, given the limited time remaining of its lifespan, to recover these losses and generate a profit for investors and the LCA Group. The plaintiff and his expert all but accept this.[33]

36 I therefore take it that the plaintiff's share of the profit on Fund II, by whatever formula it may be calculated, is zero. As such, even if I were to decide this first claim entirely in the plaintiff's favour, he would be entitled only to

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29 Defence and Counterclaim (Amendment No. 2) dated 26 October 2020 ("D&CC") at paras 7–9.

30 DWS at paras 111 to 114.

31 3 February 2021 Transcript at p 99 line 9 to p 101 line 8; 4 February 2021 Transcript at p 155 line 21 to p 157 (line 11).

32 AB 5731.

33 3 February 2021 Transcript at p 99 line 9 to p 101 line 8; 4 Febrary 2021 Transcript at p 155 line 21 to p 157 line 11.

nominal damages. In that sense, determining the first claim could be said to be of little substantive importance.

37 Despite this, I will proceed to determine the proper construction of the phrase "2.5% carry". I do this for two reasons. First, that issue of construction is fundamental to the resolution of the plaintiff's remaining claims. It is impossible to assess the quality of the parties' conduct after August 2014 without forming a view on whose position on the construction of "2.5% carry" was correct. Second, even if it is correct that the plaintiff is entitled only to nominal damages, that would still mean a victory for him on this claim, albeit a technical one. That could have a significant bearing on the award of the costs of this claim, and perhaps even of the entire action.

38 I therefore analyse the first claim only in order to determine the proper construction of the phrase "2.5% carry". In my view, for the reasons which follow, the LCA Group's construction is undoubtedly correct and the plaintiff's is fundamentally wrong. The phrase "2.5% carry" means 2.5% of the LCA Group's share of the profit on Fund II and not 2.5% of the "gross profits" on Fund II.

The contextual approach

39 The parties are in agreement that I must construe the phrase "2.5% carry" using the contextual approach. The contextual approach requires me to ascertain the parties' objective intention at the time they entered into the contract, taking as my starting point the parties' text and construing that text in light of its context, provided that that context is clear, obvious and known to both parties: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128]–[129]; *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at [104].

The text

40 I start with the text, *ie* the phrase "2.5% carry". Construing this phrase requires me to construe its three aspects: (a) the meaning of "2.5%"; (b) the meaning of "carry"; and (c) the arithmetic relationship between "2.5%" and "carry".

2.5%

41 There can be no dispute as to the meaning of "2.5%". It is a fraction expressed as a percentage. Expressing a fraction as a percentage is a device to make it easier to compare fractions with different denominators. The symbol "%" indicates merely that the figure preceding it must be divided by one hundred to arrive at the decimal equivalent of the fraction. Expressing 2.5% as a decimal therefore simply requires dividing 2.5 by 100. Thus, 2.5% can be expressed as a decimal and then as an irreducible fraction as follows: $\frac{2.5}{100} = 0.025 = \frac{1}{40}$.

Carry

42 On the meaning of "carry", the expert evidence on both sides was consistent. "Carry" or "carried interest"[34] means 20% of a fund's profit. A fund's profit is what remains after its costs have been paid, after investors have received their capital back and after investors have received an agreed rate of return on that capital. The carry (C) of a fund with profit (P) can therefore be expressed as follows: $C = \frac{20}{100} \times P = 0.2 \times P = 20\% \times P$.

[34] Goodson's Expert Report at para 15, para 20; Jonathan Robinson's Expert Report dated 6 November 2020 ("Robinson's Expert Report") at para 21; 19 February 2021 Transcript at p 5 line 24 to p 6 line 3; 4 February 2021 Transcript at p 33 lines 3–12 to p 40 lines 3–10, p 47 lines 9–14, p 99 lines 19–24, p 173 lines 1–5.

43 To make the analysis which follows easier to understand, it is useful now to postulate a highly simplified example adopting the customs and practices in the private equity industry as established at trial by the expert evidence on both sides.

44 Assume the following. A fund manager proposes a private equity fund to investors. The fund is to have a lifespan of exactly one year. The fund manager is entitled to retain 20% of the fund's profit at the end of that year. But the fund manager will have no right to retain that 20% unless investors are first repaid 100% of their capital plus a rate of return on that capital at 8% per annum over the lifespan of the fund.

45 Now assume that the fund manager receives capital of $100 on 1 January 2022 from investors. He invests the $100 on the same day in a single investment. From 1 January 2022 to 31 December 2022, the investment generates no income and the fund manager makes no distributions to investors. On 31 December 2022, the fund manager sells that single investment for $238. The fund's total costs over its one-year lifespan amount to $30, all of which are unpaid. That $30 includes the fund manager's fees and expenses and the costs of acquiring, holding and selling that single investment.

46 On 1 Jan 2023, therefore, the fund manager holds $238. He distributes that $238 as follows. First, he pays the fund's costs of $30. That leaves $208. Second, he returns to the investors $100, being the capital they paid in at inception. That leaves $108. Third, he pays investors $8.00, being the agreed rate of return over the one year on their capital of $100. That leaves $100. Out of that $100, the fund manager pays $80 to investors as their agreed share of the fund's profit. The fund manager retains the remaining $20 as the fund manager's agreed share of the fund's profit.

47 In this example, the total amount which investors receive from the fund on 1 January 2023 is $188 ($100 + $8 + $80). That is equivalent to investors earning a return of 0.88 times their initial investment of $100. This fund would then be said to have generated a multiple of 1.88x for investors. That means that its investors' total pay-out at the end of the fund's lifespan ($188) is 1.88 times the capital they paid in on the fund's inception ($100).

48 The 20% share of the fund's profit which the fund manager retains in the final step is what is known in the industry as the "carry" or the "carried interest". The 8% rate of return which the fund manager had to earn for investors in order to be entitled to the carry is known as the "hurdle rate". These two rates – 8% for the hurdle rate and 20% for the carry – are industry standards.

49 The fund in this example would be said to have generated a carry of $20 for the fund manager. It is customary in the industry in certain contexts to view and refer to the carry as a "carried interest pool" comprising 20 points. In my example, therefore $1 of carry in the fund manager's hands represents $1 out of $100 or 1% of the fund's profit. The same $1 is also viewed as representing one point out of 20 points in the carried interest pool, or 5% of the carry. This is what gives rise to the factor of five between the parties' competing constructions of the phrase "2.5% carry".

Arithmetic relationship between "2.5%" and "carry"

50 All that remains now is to construe the arithmetic relationship between "2.5%" and "carry" expressed by the phrase "2.5% carry". The plaintiff submits that the relationship is one of *division.* The LCA Group submits that the relationship is one of *multiplication*. The plaintiff's construction would, in my example, entitle him to $2.50, leaving $17.50 in the carried interest pool. The

LCA Group's construction, in my example, would entitle him only to $0.50, leaving $19.50 in the carried interest pool.

51 I have no hesitation in rejecting the plaintiff's submission. It is a disingenuous and contrived submission, completely divorced from basic arithmetic.

52 Expressing the plaintiff's construction as an arithmetic formula yields the following: $\frac{2.5}{100} \div \frac{20}{100} = \frac{2.5}{100} \times \frac{100}{20} = \frac{250}{2000} = 0.125 = 12.5\%$. On this basis, the plaintiff claims that the phrase "2.5% carry" entitles him to 12.5% of the carry on Fund II. Going back to my example, $2.50 is 2.5% of $100, but is 12.5% of $20.

53 The LCA Group submits that the plaintiff's arithmetic is fundamentally flawed in that it is meaningless to calculate the plaintiff's share by using a ratio of percentages, *ie*, $2.5\% \div 20\%$ or $\frac{2.5\%}{20\%}$.[35] I accept this submission. In fact, the plaintiff's arithmetic contains three fundamental and related errors, which amount in combination to arithmetic sleight of hand. The first fundamental error is that the operation of multiplication is associative but the operation of division is not. The second fundamental error is that the 20% or $\frac{20}{100}$ by which the plaintiff divides 2.5% or $\frac{2.5}{100}$ in his arithmetic is not an abstract figure but is a percentage of another number. That in turn implies a multiplication operation which is missing in the plaintiff's arithmetic. Because division is not associative, that missing multiplication operation means that it is arithmetically wrong as a first step to divide $\frac{2.5}{100}$ by $\frac{20}{100}$. The third fundamental error is that that missing number

[35] 4 February 2021 Transcript at p 113 line 25 to p 115 line 24.

which is to be multiplied by $\frac{20}{100}$ is Fund II's *profit* (P), and not Fund II's *carry* (C).

54 Therefore, even if I were to accept the plaintiff's submission that the phrase "2.5% carry" implies the arithmetical relationship of division between "2.5%" and "carry", the correct formula to express that construction (bearing in mind that division is not associative and that "carry" is 20% of profit) is $\frac{2.5}{100} \div \left(\frac{20}{100} \times P\right) = \frac{2.5}{100} \div \left(\frac{20 \times P}{100}\right) = \frac{2.5}{100} \times \frac{100}{20 \times P} = \frac{2500}{2000 \times P} = \frac{5}{4 \times P}$. As the LCA Group submits, this is arithmetic nonsense. This is also commercial and contractual nonsense. More importantly, this is not the result which the plaintiff himself advocates: $\frac{12.5}{100} \times C$ or $\frac{2.5}{100} \times P$

55 The plaintiff's submission in fact amounts to equating the industry term "carry" ($20 in my example) with what he calls "gross profits" (GP) ($100 in my example). That would be expressed arithmetically as follows: $2.5\% \times C = 2.5\% \times GP = \frac{2.5}{100} \times GP$. But that is not how the plaintiff puts his case: his case is that the arithmetic operation between "2.5%" and "carry" (which he construes to mean "gross profits") is division, not multiplication. Further, insofar as this submission construes "carry" as being equivalent to "gross profits", or what I have called simply profit, the expert evidence on both sides is consistent that that is not the meaning of "carry" in the private equity industry. "Carry" means the fund manager's share of a fund's profit, customarily 20%, and not the entirety of the fund's profit.

56 The alternative is that the plaintiff's submission amounts to construing the symbol "%" as meaning "points of" such that "2.5% carry" means "2.5

points of carry". There is no basis for construing the symbol "%" in this way. It denotes, without any ambiguity, a fraction or a ratio and not an absolute number.

57 In my view, "2.5% carry" is the linguistic equivalent of "2.5% *of* carry". The natural reading of the phrase "2.5% carry" is that it holds the word "of", unstated but understood, between "2.5%" and "carry". That unstated preposition indicates to me nothing but the arithmetic relationship of multiplication. Thus, in my view, the phrase "2.5% carry" properly construed means that the plaintiff was entitled contractually to 2.5% *of* the carry on Fund II. That is the arithmetic equivalent of 0.5% of Fund II's profit: $\frac{2.5}{100} \times C = \frac{2.5}{100} \times \frac{20}{100} \times P = \frac{50}{10000} \times P = \frac{0.5}{100} \times P = 0.5\% \times P = 0.5\% \, of \, P$. Thus, in my example, the plaintiff's share of the carry on this construction would indeed be $0.50, as the LCA Group submits, and not $2.50 as the plaintiff submits.

The expert evidence

58 The plaintiff called two expert witnesses on different aspects of the private equity industry: Mr Peter Goodson and Mr Frank Carr. Although both experts claimed to support the plaintiff's arithmetic, both were unable to justify that support under cross-examination. Mr Goodson agreed that, in my example, the phrase "50% carry" would mean $10 and that the phrase "10% carry" would mean $2. He then had to accept that the phrase "2.5% carry" had to mean $0.50 and not $2.50 because "2.5% carry" had to be less than "10% carry".[36] Mr Carr accepted that, in my example, "2.5% carry" would be $0.50 out of the $20 and that $2.50 out of the $20 would be "2.5 points of carry" and not "2.5% carry".[37]

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36 4 February 2021 Transcript at p 113 line 25 to p 115 line 24 and p 118 lines 4–23.

37 4 February 2021 Transcript at p 149 line 1 to p 150 line 17.

59 The plaintiff's case amounts to construing the phrase "2.5% carry" as meaning "2.5% of the profit" or "2.5 points out of the carry". For the reasons I have given, I am satisfied that the text of that phrase construed in accordance with the customs and practices of the private equity industry does not support the plaintiff's construction. I therefore now turn to consider the context.

The context

60 There is equally nothing in the context which supports the plaintiff's construction. Indeed, in my view, the context in fact supports the LCA Group's construction.

The June 2011 estimate

61 The LCA Group's construction of the phrase "2.5% carry" is consistent with an estimate of the plaintiff's share of the carry of Fund II which Mr Gilbert Ong sent to Spencer Stuart by email in late June 2011. Mr Ong was the LCA Group's Chief Financial Officer at the material time. Mr Ong's email is the earliest occasion in the evidence before me on which any of the parties used the phrase "2.5% carry".

62 In his estimate, Mr Ong assumed that Fund II, like its predecessor Fund I, would raise US$635.5m from investors and would generate a multiple of 2.5x or 250%. That means that Fund II would earn enough to return 100% of the investors' capital to them plus an additional 150% of their capital. On those assumptions, he projected that "2.5% carry" would translate to US$4.77m for the plaintiff:[38]

> 2.5% carry on next Fund. Based on current Fund size and projection of returns, it will be worth US$4.77m. We are

[38] CB 259; Ong's AEIC at paras 20-21.

> expecting to raise a larger fund in the next round and hence the number is expected to be larger."

63 Mr Ong does not set out in this email how he arrived at the estimate of US$4.77m as the plaintiff's share of the carry on Fund II. But Mr Ong was a witness at trial and explains his working in his affidavit of evidence in chief. A 2.5x fund which raised US$635.5m in investors' capital would leave the fund manager holding 2.5 times US$635.5m or US$1,588.75m at the end of the fund's lifespan. On Mr Ong's assumptions, the investors' capital of US$635.5m is first returned to investors out of that sum. That leaves US$953.25m, being 1.5 times US$635.5m. The fund's costs and hurdle rate have been accounted for in the selection of 2.5x as the multiple and need not be deducted separately. The carry would therefore be 20% of US$953.25m or US$190.65m. The plaintiff's share, being "2.5% carry", would be 2.5% of US$190.65m or US$4,766,250. Rounded off to two decimal places, that is Mr Ong's figure of US$4.77m.

64 The plaintiff's own expert, Mr Carr, accepted that, on these assumptions, the estimate of US$4.77m in Mr Ong's email was an estimate of 2.5% of the carry on Fund II and not an estimate of 2.5% of the "gross profit" or the profit of Fund II.[39]

65 Mr Ong's email legitimately forms part of the context against which the phrase "2.5% carry" is to be construed. Although this email was not addressed to the plaintiff, he accepts that he saw this email at that time.[40] It was therefore known to both parties. I further accept that the plaintiff knew Fund I's size in or around June 2011. The third defendant testified at trial that he had told the

[39] 4 February 2021 Transcript at p 151 line 12 to p 153 line 24.

[40] CB 259; 27 January 2021 Transcript at p 33 lines 8–10, p 36 lines 6–11, p 41 line 25 to p 42 line 4.

plaintiff of Fund I's size.[41] I accept also that third defendant gave the plaintiff the "full background" on Fund I before the meeting between the plaintiff and Mr Piette in June 2011.[42]

66 Mr Ong's estimate of "2.5% carry" and the assumptions underlying it were therefore known to both the LCA Group and to the plaintiff as early as June 2011. All of this is inconsistent with the plaintiff's case as to context and a "shared understanding" of the meaning of the phrase "2.5% carry" in the May 2012 Letter.

Industry norms

67 I am also satisfied that an award to the plaintiff of a share of the carry on Fund II of 12.5% would have been wholly contrary to industry norms. The plaintiff's case is that his share of the carry on Fund II was worth US$37.5m. Alternatively, calculating the plaintiff's share of the carry according to the plaintiff's formula but based on Mr Ong's assumptions in his June 2011 email would yield five times Mr Ong's US$4.77m figure or US$23.83m. The evidence before me establishes that it would have been wholly contrary to industry norms for the LCA Group to have awarded a share of the carry of that order of magnitude to someone with the plaintiff's experience in private equity and for someone performing the plaintiff's role in the LCA Group.

68 The plaintiff had no private equity experience when he accepted employment with the LCA Group. It is true that he is highly educated and holds a Masters in Business Administration from Insead, a leading international

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41 10 February 2021 Transcript p 40 line 23 to- p 41 line 3, p 43 lines 16–17, p 169 line 14 – p 170 line 4.

42 CB 229.

business school. It is also true that he had held very senior executive positions before joining the LCA Group. But it is equally true that his exposure to the private equity industry before then was either purely academic (as part of his business school curriculum) or from the other side (as a senior executive of a private equity fund's investee company).[43] Further, he had no experience in investing and deal-making.

69 Further, once the joined the LCA Group, the plaintiff was primarily an operations professional, albeit the most senior one. He had only limited involvement in portfolio management. He was not a sponsor, a founder or an investment professional.

70 Persons of the plaintiff's experience and involvement do not customarily receive awards of carry of the order of magnitude of 12.5%. The plaintiff's expert, Mr Carr, is an expert on executive compensation in the private equity industry. His expert report cites and exhibits a paper by Ms Amanda Persaud, a partner in the asset management group of a Wall Street law firm. The title of Ms Persaud's paper is "Private Equity Carried Interest Arrangements: A Business Perspective". Both Mr Goodson and Mr Carr were cross-examined on Ms Persaud's paper. Her paper contains a statement of industry norms for the allocation of a share of carry to a list of recipient classes. Each recipient class in her list typically deserves and receives a smaller share of the carry than the class above it. Operations professionals such as the plaintiff are in the lowest

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[43] 27 January 2021 Transcript at p 34 lines 6–16 and p 35 lines 11–24.

class. The plaintiff was at best in the lower tier of the second recipient class or, more likely, in the third recipient class. As Ms Persaud says:[44]

> Recipient Classes
>
> At the top are founders, many of whom have extensive deal networks, are responsible for investor relationships and serve as chairpersons or CEOs of the sponsor. Founders tend to take a sizeable portion of carried interest relative to others, and in the case of sponsors with multiple founders who are actively involved in the business, this can sometimes amount to over 50% of total carried interest.
>
> Senior investment professionals of a sponsor actively source, manage and sit on the boards of portfolio companies. These individuals take the next largest share of the carried interest pool. Other investment professionals, such as vice presidents and associates, who assist in analyzing and managing deals, generally receive smaller shares of carried interest.
>
> Today, many sponsors also set aside carried interest for senior operations professionals, such as the general counsel, chief operating officer and chief financial officer. As sponsors fundraise and operate in a more regulated environment, it is not uncommon for the head of investor relations and the chief compliance officer to also receive a share of carried interest.

Mr Goodson's evidence is consistent with this.

71 The LCA Group's expert on executive compensation in the private equity industry is Mr Jonathan Robinson. He produced a report on the norms for executive compensation for Asian private equity funds.[45] I accept that evidence. According to Mr Robinson's report, the norm is 1.4% to 5.1% for someone with the plaintiff's experience and performing the plaintiff's role.[46] That range is perfectly consistent with a 2.5% share of the carry. The plaintiff's claim to a 12.5% share of the carry is outside the range by an order of magnitude.

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[44] CB 3285-3289; Frank Carr's Expert Report dated 6 November 2020 ("Carr's Expert Report") at para 58(d) and p 391 (Exhibit P).

[45] CB 3566–3672 and 3778–3793.

[46] Robinson's Expert Report at paras 42–43.

72 None of this evidence was satisfactorily addressed by the plaintiff's expert witnesses. Mr Goodson was not an expert on executive compensation and did not address the issue at all. Mr Carr included market data from a different market with different norms, *ie*, North America, and addressed the issue from the perspective of a loss of compensation. In any event, Mr Carr's market data on compensation in the Asia Pacific region does not support a share of the carry of the order of magnitude of 12.5%.[47]

73 I also accept the LCA Group's submission that the plaintiff's claim of a 12.5% share of the carry is extremely high, given that three sponsors and 14 or 15 executives in recipient classes higher than the plaintiff's were all awarded a share of Fund II's carry.[48] This makes it implausible that the LCA Group would have awarded the plaintiff as much as 12.5% of the carry on Fund II.

74 I therefore accept the LCA Group's submission that it would have been completely contrary to industry norms for the LCA Group to have awarded 12.5% of the carry on Fund II – or anything of that order of magnitude – to the plaintiff.

The plaintiff's preference for security over risk

75 Finally, it is not in dispute that the plaintiff told the third defendant during the precontractual negotiations over his remuneration package that he valued security of future income most. He therefore preferred a higher base salary and a higher bonus target over a higher share of carry. That is why cl 3.1 of the February 2012 Contract weighted the plaintiff's remuneration package towards salary and bonus rather than carry, giving him a fixed salary of

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47 CB 3418–3445;/ Carr's Expert Report at p 891 (Exhibit W).

48 Robinson's Expert Report at paras 46–47; CB 793–795 at paras 4.1 and 4.3.

US$400,000 per annum and an annual performance bonus targeting 100% of his fixed salary (see [29] above). The evidence at trial established that the plaintiff's base remuneration placed him as high as the 75th percentile for executives in the private equity industry in the Asia Pacific region.[49]

76 All of this is entirely consistent with an award of 2.5% of the carry on Fund II and entirely inconsistent with an award of 12.5% of the carry on Fund II.

No shared understanding

77 Part of the plaintiff's case as to the context for interpreting the phrase "2.5% carry" rests on an understanding said to be shared by him and the LCA Group that that phrase would mean "2.5% of the gross profits" of Fund II. As evidence of that shared understanding, the plaintiff points to four representations which the LCA Group made to the plaintiff in 2011 and 2012.

78 These representations are also central to the plaintiff's claim in fraudulent misrepresentation. For the reasons set out at [87]–[121] below, I find that the plaintiff misunderstood two of the representations and has testified falsely that the other two representations were made. As those representations were either misunderstood or never made, they are incapable of giving rise to any shared understanding between the plaintiff and the LCA Group which forms any part of the context for construing the phrase "2.5% carry".

[49] CB 3566–3672, Robinson's Expert Report at Annex C, Tab 1

Conclusion on the first claim

79 For all of these reasons, I reject the plaintiff's case on the proper construction of the phrase "2.5% carry". The construction which the LCA Group advances is the correct construction, being consistent with both the text and the context and with industry usages and norms. That being so, there is no scope for the plaintiff to rely on the *contra proferentem* rule.[50]

80 The plaintiff had no entitlement under his employment contract to 2.5% of the "gross profits" of Fund II, to 12.5% of the carry on Fund II or to 2.5 points out of the carried interest pool generated by Fund II. That finding suffices to dismiss the plaintiff's first claim entirely. I therefore need not analyse or determine the first and third of the LCA Group's three broad points (see [33] above).

Claim 2: fraudulent misrepresentation

81 The plaintiff's second claim is that the LCA Group induced him to enter into his employment contract by making fraudulent misrepresentations to him. For the plaintiff to succeed in this claim, he must establish: (a) that the LCA Group made representations to him of fact; (b) that the LCA Group made the representations intending that the plaintiff should act upon them by accepting the LCA Group's offer of employment; (c) the representations actually induced the plaintiff to accept the LCA Group's offer of employment; (d) the plaintiff suffered loss and damage as a result of accepting the LCA Group's offer of employment; and (e) the LCA Group made the representations fraudulently, *ie*, knowing that they were false or in the absence of genuine belief that they were

[50] PCS at para 217.

true: *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14].

The parties' cases

82 The plaintiff's case on fraudulent misrepresentation is as follows. The LCA Group made four representations to him while he was still employed by Zovi.com that, if he accepted employment with the LCA Group, he would be awarded "2.5% of the gross profits of Fund II". Two of these representations were made in writing and two were made orally:[51]

(a) First, in a phone call in or around June 2011, the third defendant: (i) told the plaintiff that Mr Ong's email projecting the plaintiff's share of the profit as US$4.77m (see [62] above) had "misunderstood the plaintiff's carried interest entitlement"; and (ii) "confirmed that the plaintiff's carry interest entitlement was 2.5% of the gross profits of Fund II".[52]

(b) Second, in an email in July 2011, the third defendant told the plaintiff that "[a]nyone joining [Fund II] prior [to the second half of 2012] will get entitled to carry interest from [the] very beginning."[53] The plaintiff "took this to mean that his carry interest entitlement would be a percentage of gross profits of Fund II".[54]

(c) Third, in February 2012, the LCA Group sent the first defendant a draft of his employment contract containing a term providing that he

51 SOC at para 57.

52 SOC at para 57(i) read with para 56.

53 CB 280.

54 SOC at para 57(i).

would be "awarded 2.5% carry for the next fund raised by the company". The plaintiff "took this to mean that his carry interest entitlement would be 2.5% of the gross profits of Fund II".[55]

(d) Finally, when Mr Piette interviewed the plaintiff in February 2012, he represented orally to the plaintiff "that the carried interest would be 2.5% of the gross profit, which on his calculation would amount to USD 37.5 million".[56]

83 The plaintiff's case continues as follows. The plaintiff relied on these representations when he gave up his employment at Zovi.com and accepted employment with the LCA Group. If the plaintiff has to rely on his misrepresentation claim, that means that the LCA Group's representations have been falsified in that the plaintiff has been found not to be entitled to "2.5% of the gross profits of Fund II" but only to 2.5% of the carry on Fund II. The first defendant made these representations fraudulently, knowing them to be false, or recklessly, not caring whether they be true or false. As a result of relying on the first defendant's misrepresentations, the plaintiff suffered loss and damage in the sum of either US$75m[57] or US$3m,[58] being the value of the share options he would have been awarded at Zovi.com if he had not given up his employment there in order to accept employment with the LCA Group.

84 In response, the LCA Group's case is as follows. The representations are not actionable, being statements of future intent rather than representations of past or present fact. Even if they are actionable, the representations were never

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55 SOC at para 57(ii) read with para 56.

56 SOC at para 57(iii).

57 PCS at paragraph 326(f).

58 PRCS at paragraph 180.

made or are true. Even if the representations were made and are false, the representations did not induce the plaintiff to give up his employment with Zovi.com and to accept employment with the LCA Group. And, even if the representations did induce the plaintiff to do so, he did not suffer any loss or damage as a result, because his share options at Zovi.com were and are worthless.

85 For the reasons which follow, I reject the plaintiff's case in fraudulent misrepresentation in its entirety for the following reasons: (a) the written representations were made but are not false; (b) the oral representations were never made, the plaintiff's account of them being false; (c) the plaintiff's claim that the LCA Group was fraudulent is contrary to facts he believes to be true; (d) the representations did not induce the plaintiff to give up employment with Zovi.com and to accept employment with the LCA Group; and (e) the plaintiff has failed to establish that he suffered any loss as a result of giving up his employment with Zovi.com to accept employment with the LCA Group.

The representations are either true or were not made

86 I start by analysing the plaintiff's pleaded case that the LCA Group made the four representations to him (see [82] above). I deal with the two written representations first before dealing with the two oral representations.

The plaintiff fundamentally misunderstood the two written representations

87 Given that they are in writing, there can be no doubt that the LCA Group made the two written representations to the plaintiff. But I accept the LCA Group's submission that the plaintiff fundamentally misunderstood the written representations. Correctly understood, the written representations are not false.

88 The first written representation simply refers to the plaintiff's entitlement to "carry" on Fund II from its inception.[59] This representation says nothing about the quantum of his share of the carry. The second written representation says simply that the plaintiff will be "awarded 2.5% carry" on Fund II. It says nothing about what "2.5% carry" means or how it is to be calculated.

89 The plaintiff claims that he understood both written representations to mean that the LCA Group would award him some part of the "gross profits" of Fund II, not of its "net profits". According to the plaintiff's use of the terms "gross profits" and "net profits", the fund in my example (see [44]–[46] above) generated "gross profits" of $100 and "net profits" of $20. The plaintiff's case is therefore that he understood the two written representations to mean that he was entitled to 2.5% of the $100 ($2.50) and not to 2.5% of the $20 ($0.50).

90 But neither of the written representations uses the words "gross" or "profits" or the phrase "gross profits". This is an objective fact. The plaintiff had no alternative but to accept this fact in cross-examination. He further accepted: (a) that the LCA Group never used any of these words at the material time, whether orally or in writing; and (b) that his pleaded term "gross profits" is merely his own *ex post facto* subjective and self-engendered understanding of the words which the LCA Group did use, which were "carry" or "carried interest entitlement":[60]

> "Q: And there was no representation that there would be a 2.5 payment based on gross profits.
>
> A: Your Honour, the terms "gross" and "net" were never mentioned to me at the material time.

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[59] CB 280; SOC at para 57(i).

[60] 27 January 2021 Transcript at p 140 line 12 to p 141 line 17.

> Q: "At the material time" meaning when?
>
> A: Recruitment, employment, and until the August…
>
> …
>
> Q: Mr Mehra, if the concept of gross profit was not mentioned to you, why do you state so in paragraph 354(d) of your AEIC?
>
> A: Sorry, 354(d)?
>
> Q: Yes: "The carried interest allocated to me would be 2.5 per cent of the gross profit…"
>
> A: Your Honour, because these are all alien terms now, and subsequently, since the dispute, I have realised that we need to further define what the verbal explanation to me was. And the way to define what 2.5 per cent means is to further clarify gross profit, but the actual word "gross" was not used."

91 The phrase "gross profits" is crucial to the plaintiff's case both in contract and misrepresentation. But his cross-examination revealed the phrase to have no basis in the facts. It is merely a self-serving term which the plaintiff has adopted after the fact for the purposes of pleading and presenting his case.

92 Further, the concept of "gross profits" was not something which the plaintiff himself understood during the pre-contractual discussions, whether in the sense which he now claims to understand it or in any other sense. As the plaintiff himself candidly accepts, he had no understanding of the deductions that are made by a private equity fund manager "*in arriving from gross to net*" profits. The plaintiff further accepts that his state of ignorance continued even up to the point when he sat down to draft his affidavit of evidence in chief for this action.[61]

93 The plaintiff's use of "gross profits" in pleading and presenting his case is contrived and incorrect. The experts are agreed that it is customary in the

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61 28 January 2021 Transcript at p 18 lines 10-16, p 142 line 23 to p 143 line 10.

private equity industry to refer to what the fund manager retains after he has paid 80% of a fund's profits to investors as "the carry" or "the carried interest". These were the only terms which the LCA Group used in its written representations to the plaintiff.

94 At best, all that the LCA Group represented to the plaintiff in the two written representations is that he would be entitled to 2.5% of the carry on Fund II. At best, and correctly understood, the two representations did not mean that the plaintiff would be entitled to 2.5% of the "gross profits" on Fund II, as the plaintiff has pleaded. Given the plaintiff's concessions in cross-examination (see [90] and [92] above),[62] he had no basis at that time to understand the written representations as meaning that the LCA Group would pay him 2.5% of Fund II's profit ($2.50 in my example) and not merely 2.5% of the carry ($0.50 in my example).

95 I therefore accept the LCA Group's submission that it was the plaintiff's own *ex post facto* misunderstanding of the content of the written representations which has led him to take from these written representations the meaning that he now pleads. That is not the meaning which the representations objectively bear. That objective meaning is the only meaning which the LCA Group intended at the time.

96 The two written representations, correctly understood, are consistent with my finding as to the proper construction of the phrase "2.5% carry". The two written representations were therefore not false. They are not misrepresentations.

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[62] 28 January 2021 Transcript at p 17 line 18 to p 18 line 2, p 60 line 22 to– p 62 line 21.

The LCA Group did not make the oral representations

97 The plaintiff's case is that the LCA Group represented to him orally on two occasions that he would be entitled to 2.5% of Fund II's "gross profits".[63] The first occasion was allegedly in a phone call with the third defendant which took place in or around June 2011.[64] The second occasion was allegedly at a meeting with Mr Piette in February 2012.[65]

98 Both the phone call with the third defendant and the meeting with Mr Piette did take place. But both the third defendant and Mr Piette categorically deny making any such representation to the plaintiff on those occasions, or indeed on any other occasion. The third defendant's evidence is that it is commercial nonsense to promise anyone a share of a private equity fund's "gross profits".[66]

99 I accept the LCA Group's evidence. For the reasons which follow, I find that neither of them made the alleged oral representations to the plaintiff.

(1) The third defendant did not make the oral representation

100 In his statement of claim, the plaintiff's pleaded account of the third defendant's oral representation is as follows:[67]

> After [the third defendant] received a copy of Gilbert Ong's email dated 27 June 2011, [the third defendant] then reassured the plaintiff over the phone, in or around June 2011, that Gilbert Ong had misunderstood the plaintiff's carried interest

63 SOC at para 19(a).

64 SOC at para 57(i) read with para 56.

65 SOC at para 10.

66 10 February 2021 Transcript at p 50 lines 1–19; 18 February 2021 Transcript at p 30 line 12 to p 31 line 5.

67 SOC at para 56(ii).

> entitlement. In the same phone conversation, [the third defendant] also confirmed that the plaintiff's carry entitlement was 2.5% of the gross profits of Fund II.

101 In his affidavit of evidence in chief, the plaintiff's account of this oral representation is as follows:[68]

> [The third defendant] reassured me that L Capital Asia's offer of "2.5% carry" referred to 2.5 points out of 20 points and further clarified that it was 12.5% of the total carried interest pool available to management.

102 I reject the plaintiff's evidence. The third defendant did not make this representation. I arrive at that finding for five reasons.

103 First, in connection with the oral representations, the plaintiff accepted in cross-examination once again (see [90] above) that the third defendant, as well as Mr Piette for that matter, had never spoken to him of "gross profits". The plaintiff also accepted once again that the term "gross profits" is merely his own subjective and self-engendered understanding of what the third defendant had actually said:[69]

> Q: Now, let's look at paragraph 56 [of the statement of claim]… Focus on the last sentence "…the third defendant also confirmed that the plaintiff's carry interest entitlement was 2.5% of the gross profits of [the fund]." You will agree that this statement is incorrect?
>
> A: I apologise for the confusion, your Honour. The statement is not a quote of [the third defendant's], so in that sense it is incorrect. It is just intended to be a position that's stated based on the phone call and the understanding I gained from that phone call. So that is correct, your Honour. He did not use these words, specifically.
>
> Q: It is based on your own understanding of the phone call and not by reason of [the third defendant] telling you that it is 2.5 per cent of the gross profits of the fund. Agree?

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68 Plaintiff's AEIC at para 343.

69 28 January 2021 Transcript at p 17 line 18 to p 18 line 2, p 60 line 24 to p 62 line 21.

> …
>
> Q: "Yes" or "no"?
>
> A: Yes, yes, yes, yes.
>
> …
>
> Q:…Your case, number 1, is that neither Daniel Piette nor … the third defendant spoke about gross profits. Am I correct?
>
> A: That is correct, your Honour.
>
> Q: So if they did not speak about gross profits, they could not have told you that your package would include 2.5 per cent of the gross profits. A simple proposition. You can agree or disagree.
>
> A: I disagree, your Honour.
>
> Q: All right, you disagree. I find it quite alarming that you could disagree to such a simple proposition, but I'll move on.
>
> …
> Court: --what Mr Tan is driving at is the gap between the words you claim were used by the defendants and Mr Piette and the understanding you subjectively had of the meaning of those words…I would need to understand and I will need to make a finding whether these specific word[s] were spoken to you by any of the defendants. "2.5 per cent of gross profit", were those actual words spoken to you and, if so, is that false?
>
> A: …Those actual words were not spoken, your Honour. And if I might elaborate, the confusion between even me and my lawyers in trying to explain these terms had come down to a point where then we agreed "2.5 per cent gross profits" would be the appropriate term to use and try to describe these in legal documents…
>
> Court: So what you have pleaded is not what you are going to be asking me to decide the defendants actually said in those words; instead what you have pleaded is what you understood their words to be. Is that right?
>
> A: That is correct. That is correct, your Honour."

104 Second, this alleged oral representation is of critical importance, not only to the plaintiff's case in misrepresentation but also to his case in contract. That is because he relies on it not only as a fraudulent misrepresentation but also as evidence of a shared understanding forming part of the admissible context

for construing the phrase "2.5% carry". On the plaintiff's case, this phone call was the earliest time that anybody on behalf of the LCA Group made the specific representation to the plaintiff on which his entire misrepresentation case rests. One would expect it to be the cornerstone of the plaintiff's positive case on both misrepresentation and breach of contract.

105 Despite this, the plaintiff did not plead this representation anywhere in his original statement of claim. The plaintiff pleaded it belatedly in his reply, and even then only to meet the LCA Group's plea in its defence and counterclaim that Mr Ong's June 2011 email and other contemporaneous documentary evidence showed that the first defendant promised the plaintiff nothing more than "2.5% carry".[70] It was only then that the plaintiff incorporated this alleged representation by amendment into his statement of claim as part of his positive case.[71]

106 Indeed, if the third defendant had in fact made this representation, one would have expected the plaintiff to have drawn it to the LCA Group's attention as soon as the dispute arose in August 2014, long before he commenced this action in March 2016. He did nothing of the sort. From in or around June 2011 (when the third defendant allegedly made this representation) to June 2015 (when the plaintiff's employment was terminated) all the way up to July 2016 (when the plaintiff first pleaded this representation in his reply and then incorporated it by amendment into his statement of claim), he had made no reference whatsoever to this representation, whether by himself, through his

70 Reply dated 11 July 2016 at paragraph 6(2).

71 Statement of claim (Amendment No. 1) dated 22 July 2016 at paragraph 56(ii).

solicitors or through Spencer Stuart, his interface with the LCA Group in 2011, and whether informally in correspondence or formally in his pleadings.[72]

107 Third, the plaintiff's account of this representation shifted significantly and materially. His pleading asserts that the third defendant "confirmed that the plaintiff's carry entitlement was 2.5% of the gross profits of Fund II".[73] The plaintiff embellished this account in his affidavit of evidence in chief. His evidence was that the third defendant positively "reassured [the plaintiff] that… "'2.5% carry' referred to 2.5 points out of 20 points" and clarified that the plaintiff's share of Fund II's profit was to be "12.5% of the total carried interest pool available to management".[74]

108 It is of course arithmetically true that 2.5 points out of 20 points is 12.5% of the 20 points. That is because $\frac{2.5}{20} = 0.125 = \frac{12.5}{100} = 12.5\%$. But the plaintiff's affidavit of evidence in chief does not simply assert this equation as a matter of arithmetic. It asserts as a fact that the third defendant *in this phone call* and *in or around June 2011* expressly stated this equation to the plaintiff in order to disavow Mr Ong's email and as reassurance to the plaintiff about the meaning of "2.5% carry". These embellishments appear nowhere in the plaintiff's original or even amended pleadings. It emerged for the very first time in his affidavit of evidence in chief, filed almost five years after he commenced this action. It is clear to me this aspect of the plaintiff's evidence is an afterthought, put forward falsely merely to advance his case.

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72 27 January 2021 Transcript at p 96 lines 13–20.

73 SOC at para 56(ii).

74 Plaintiff's AEIC at para 343.

109 Fourth, the plaintiff's account is contrary to the inherent probabilities. The plaintiff's case is that he relied on the oral representation which the third defendant made in or around June 2011 when he accepted the first defendant's written offer of employment in February 2012.[75] That would mean that the plaintiff accepted the remuneration package in that offer – including the award of "2.5% carry" in those very words – even though he knew: (a) that the third defendant had, more than six months earlier, expressly disavowed Mr Ong's written representation that the plaintiff would be entitled to "2.5% carry" estimated to be worth US$4.77m; and (b) that that disavowal was purely oral and was not in writing or even evidenced by writing. There is no record of the plaintiff making any attempt to have the third defendant's earlier representation recorded in the LCA Group's written offer of February 2012 or indeed anywhere else in writing before he accepted the offer. There is also no record of the plaintiff himself restating the third defendant's representation in any pre-contractual correspondence.

110 In fact, in July 2011, the plaintiff informed Spencer Stuart that the first defendant's package was acceptable, making no mention whatsoever of this alleged oral representation.[76] It appears therefore that the plaintiff would have been happy, if he had been minded to accept the LCA Group's offer in July 2011, to proceed on the basis that Mr Ong's July 2011 email was the definitive word on the plaintiff's share of Fund II's carry.[77]

111 If the third defendant had indeed made the representation, these failures and omissions would be entirely contrary to the inherent probabilities. As I have

[75] CB 258.

[76] CB 258.

[77] CB 257–258.

mentioned, the difference between the parties' positions is not trivial: it is a factor of five.

112 Fifth, I accept the defendant's submission that there was no rational commercial reason for the third defendant to promise the plaintiff in June 2011 that his share of the carry would be five times that which I have found would have been commensurate with the plaintiff's experience and role (see [67]–[74] above). A share of the carry on Fund II of this order of magnitude is all the more uncommercial given the plaintiff's case that he was not expected to invest any of his personal funds in Fund II. As the LCA Group puts it, that means that the plaintiff's case today is that it agreed in February 2012 that the plaintiff should bear none of the risks of Fund II and reap only the rewards of Fund II. That is contrary to the inherent probabilities.

113 The plaintiff says that the third defendant offered him a share of the carry of this order of magnitude in July 2011 because he wanted the LCA Group's offer to be competitive with Zovi.com's offer. That offer included participation in an employee's share option plan. On this point, I accept the defendant's expert witnesses' evidence: a share of the carry of a fund to be launched and managed by a well-established and successful private equity fund manager, such as the LCA Group, carries far less risk, and is therefore far more valuable, than an option to be awarded shares in a start-up company with no track record and with no certainty that the shares can ever be monetised, let alone that the shares will have value or appreciate in value over time.[78] What the plaintiff had on offer from Zovi.com was substantially more risky and substantially less valuable than the LCA Group's offer of 2.5% of the carry on Fund II.[79] There

[78] 19 February 2021 Transcript at p 69 lines 9–14.

[79] CB 249 and 251.

was no commercial reason for the third defendant to offer the plaintiff 12.5% of the carry on Fund II to be competitive with Zovi.com's offer.

114 For all of these reasons, I find that the third defendant did not make the alleged oral representation as alleged or at all.

(2) Mr Piette did not make the oral representation

115 The plaintiff also alleges that Mr Piette represented orally to the plaintiff at an interview in February 2012 "that the carried interest would be 2.5% of the gross profit, which on his calculation would amount to USD 37.5 million".[80]

116 I reject the plaintiff's evidence. I find that Mr Piette did not make this representation for four reasons.

117 Once again, the plaintiff's case on this representation is contrary to the inherent probabilities. After Mr Piette interviewed the plaintiff in Delhi in February 2012, Mr Ong send a revised draft employment contract to the plaintiff. The draft continued to provide that the plaintiff would be entitled to "2.5% carry" on Fund II. The plaintiff signed the employment contract without demur.[81] That would be contrary to the inherent probabilities if Mr Piette had indeed made this oral representation to the plaintiff.

118 Once again, there was no commercial reason for Mr Piette to promise the plaintiff in February 2012 a profit share of the order of magnitude of US$37.5m. The plaintiff's bargaining position in early 2012 was no better than it had been in June 2011. In fact, his bargaining position by this time was, if

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[80] SOC at para 57(iii).

[81] CB 372–378.

anything, worse. I accept the LCA Group's submission that the plaintiff initiated the discussions with the LCA Group in early 2012 because he had by then been asked to leave Zovi.com (see [138] below).[82]

119 Once again, the plaintiff's account of this representation shifted significantly and materially. His statement of claim pleads that Mr Piette represented to the plaintiff that: "The carried interest allocated to the plaintiff would be 2.5% of the gross profit, or 2.5 carry points, which would amount to USD 37.5 million…, or 12.5% of the carried interest pool...".[83] This is consistent with an email which the plaintiff sent in or around August 2014, soon after the dispute first arose.[84] The plaintiff's affidavit of evidence in chief confirms this account in two places.[85]

120 In cross-examination, however, the plaintiff resiled from this account in two critical respects. First, he conceded that Mr Piette had never used the phrase "gross profits". He therefore conceded that Mr Piette did not tell the plaintiff that he would be entitled to "2.5% of gross profits" as the plaintiff had pleaded and affirmed.[86] Second, he conceded that Mr Piette did not tell the plaintiff that he would be entitled to "12.5% of the carried interest pool".[87]

121 The plaintiff accepted in cross-examination the possibility that he had added to his account in this way self-servingly and with the benefit of hindsight. Thus, the plaintiff accepted that he might have inserted the word "gross" before

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82 Third Defendant's AEIC at para 32.

83 SOC at para 10.

84 CB 1278.

85 Plaintiff's AEIC at paras 354(d) and 407(d).

86 28 January 2021 Transcript at p 17 line 18 to p 18 line 2, p 60 line 24 to p 62 line 21.

87 27 January 2021 Transcript at p 113 line 18 to p 115 line 5.

"profits" even though nobody had used the word "gross" at the time "on his own behalf because, in two or three years of being in the business…it might have been something [he] had heard".[88] Particularly egregious is the plaintiff's attempt in his pleading to put the words "12.5% carried interest pool" into Mr Piette's mouth. When asked why he pleaded and affirmed in his affidavit of evidence in chief that Mr Piette had used those words when Mr Piette had not, the plaintiff said that "it's meant to signal an inference that [Mr Piette's] explanation was aligning with [the third defendant's] explanation".[89] I do not accept the plaintiff's explanation for putting words into Mr Piette's mouth that the plaintiff himself accepts Mr Piette did not say. It is a clear attempt to tailor his evidence to advance his case.

122 For all of these reasons, I find that Mr Piette did not make the oral representation as alleged or at all.

Conclusion

123 I am satisfied that the plaintiff subjectively misunderstood the written representations, and that they were objectively true. I am also satisfied that the third defendant and Mr Piette did not make the oral representations as alleged or at all. I am also driven to the conclusion that the plaintiff's evidence of the oral representations is not the result of a mistake. It is deliberately false, contrived in hindsight and deliberately tailored to advance his case rather than to speak the truth.

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88 28 January 2021 Transcript at p 17 line 18 to p 18 line 2.

89 27 January 2021 Transcript at p 114 line 23 to p 115 line 5.

The LCA Group was not fraudulent

124 In any event, I find also that the plaintiff's case on fraud is entirely without basis. I explain first why fraud is of fundamental importance to the plaintiff's claim before explaining why there is no basis for fraud.

A representation as to future intent is actionable only if fraudulently made

125 To be actionable, a misrepresentation must be a false statement of a past or present fact (*Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 at [20]-[21]). This excludes statements as to the future. A representor's statement that a state of affairs will come about in the future is either a promise or a prediction. It is a promise when that state of affairs is within the promisor's control. It is a prediction when that state of affairs is outside the promisor's control. Neither a promise nor a prediction is a statement of past or present fact. Therefore, neither a broken promise nor a failed prediction is actionable as a misrepresentation.

126 The plaintiff's case is that the LCA Group represented to him that, if he became an employee of the LCA Group, the LCA Group would award him "2.5% of the gross profits of Fund II".[90] For the purposes of this section of my analysis, I will assume, contrary to the plaintiff's concession and my findings, that the LCA Group actually did make this representation to him in writing and orally.

127 This representation is not a statement of fact. It is in substance a promise. That is because it is a statement by the LCA Group that it would bring about in the future a state of affairs. That state of affairs is that the LCA Group would

90 SOC at para 57.

pay the plaintiff "2.5% of the gross profits of Fund II". If falsified, this representation will amount to broken promise. It cannot be a failed prediction. That is because what the LCA Group pays to the plaintiff out of the profits of Fund II in the future is not outside the control of the LCA Group. I therefore need say nothing further about failed predictions.

128 A broken promise gives rise to a viable claim in fraudulent misrepresentation only if the representor had no intention of fulfilling the promise at the time he made it. This is not an exception to the rule that an actionable misrepresentation must be a statement of fact. That is because, in truth, it is not the broken promise which is the actionable misrepresentation. The actionable misrepresentation is the implicit representation which accompanies every promise: that the promisor genuinely intends to honour his promise. If the promisor has no such intent, the promise is made fraudulently. That is because the implicit representation which accompanies the promise is false. That is so even if, by some happenstance, the subject of the promise ultimately eventuates. Another way of putting the same point, albeit somewhat inaccurately, is that a broken promise is actionable in misrepresentation if and only if the representor makes the promise having no intention of fulfilling it, and the representor is in that sense fraudulent.

129 Therefore, contrary to the LCA Group's submission, classifying the alleged representation as a promise rather than a statement of fact is not in itself a ground on which to dismiss the plaintiff's claim in fraudulent misrepresentation. All that that means is that this claim cannot succeed simply by the plaintiff showing that the LCA Group has broken its promise. The plaintiff can nevertheless succeed by proving fraud, *ie* that the LCA Group represented to the plaintiff that it would pay him"2.5% of the gross profits of Fund II" with no intention of keeping the promise.

The plaintiff's own case is that the first defendant was not fraudulent

130 The plaintiff's own evidence is fatal to his plea of fraud. He readily accepted in cross-examination that the third defendant and Mr Piette fully intended that the LCA Group would keep its promise to pay the plaintiff "2.5% of the gross profits of Fund II" when they made the representations to him in June 2011 and February 2012. That necessarily means that he accepts that the implicit representation which accompanied this alleged promise (see [128] above) was true at the time the LCA Group made this promise.

131 As the plaintiff explained in cross-examination, the only case he advances on fraud is that the third defendant and Mr Piette changed their mind in August 2014 and decided to cause the LCA Group to break the promise to pay him "2.5% of the gross profits of Fund II". The plaintiff asserts further that they did so in order to put pressure on him because they were unhappy about his whistleblowing:[91]

> Q: …When you said that you realised in August 2014 that what [the third defendant] said was false, what is it that he said, prior to August 2014, that was false and had induced you to join L Capital and terminate your employment with Zovi.com?
>
> A: Yes…
>
> Court: What's the answer?
>
> A: The answer is that I believe [the third defendant's] communication of my carried interest in 2011 and [Mr Piette's] explanation in 2012 were true at the time. In August, they restated that position, and when we go further into my whistleblowing, I can explain the context and why I believe that's so. So I don't believe that there was anything false mentioned in 2011 and 2012. I think there was a reinterpretation in 2014 on the basis of the events that took place just prior.

[91] 28 January 2021 Transcript at p 78 line 11 to p 79 line 22.

> Q: We know that [the third defendant's] interpretation is as stated in the email by Gilbert Ong on 22 August, and that is the position [the third defendant] maintains. Is it your evidence that at the time he communicated with you in July 2011, he did not believe in this interpretation that he gave you on 22 August 2014?
>
> A: Yes, your Honour, that is correct. That is what I am trying to say.
>
> Q: So your case is [the third defendant] had deliberately misled you as to the interpretation of "2.5 per cent carry" in July 2011?
>
> A: No, your Honour, that's not what I'm saying. I'm saying in July 2011, he was earnest in telling me what my carry was. Come August 2014, and again when we discussed the whistleblowing, I think it will be clearer, he changed his position, and I perceived that as he wanted to put pressure on me.

132 In order to be fair to the plaintiff, I wanted to be sure that he had not misspoken and that I had not misunderstood his case on fraud. I therefore gave him an opportunity to address the fundamental issue of fraud squarely, putting the issue to him neutrally and in layman's language. In response, he again disavowed the fundamental element of fraud:[92]

> Court: …Mr Mehra, what Mr Tan is saying is: from what I understand of your evidence, you are saying that you accept that in 2011, the third defendant was telling you the truth as to his future intention, and in 2014, he was lying to you about what he had told you in 2011. If he was telling you the truth in 2011 and you joined L Capital in 2012, and then he lied after you had joined, then you would not have been induced to join by a lie.
>
> A: Your Honour, that is absolutely correct.
>
> Court: All right, thank you.

133 The plaintiff's answers in cross-examination are not admissible evidence on whether the third defendant and Mr Piette made the pleaded

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92 28 January 2021 Transcript at p 93 lines 11–21.

representation fraudulently. That question turns on whether the third defendant and Mr Piette intended at that time to cause the LCA Group to keep its promise to pay the plaintiff "2.5% of the gross profits of Fund II". The plaintiff is not, of course, a mind reader. He can therefore have no personal knowledge of their state of mind at the material time. He is therefore incapable of giving direct evidence as to the third defendant's and Mr Piette's state of mind at the material time within the meaning of s 62(1) of the Evidence Act (Cap 97, 1997 Rev Ed).

134 But the plaintiff is not merely a witness in this litigation. He is also one of the litigants. I must take it that he presents his case to the court as an honest litigant. It is therefore not open to the plaintiff to advance a position in this action – whether in his pleadings, in his affidavit of evidence in chief, in his counsel's cross-examination of the defendants' witnesses or in his submissions – which is contrary to facts which the plaintiff accepts to be true. That is so even if the plaintiff himself is unable to give admissible evidence as to the truth of those facts, for example, as in this case, because they are outside his personal knowledge.

135 The passages from the plaintiff's cross-examination which I have cited at [131] and [132] above show that the plaintiff believes to this day that the third defendant and Mr Piette made the representation to him honestly, not fraudulently. The plaintiff therefore could not have hoped to succeed in his plea of fraud. He should have never made the plea, let alone pursued it at trial in an attempt to secure judgment.

The plaintiff was not induced by the representation

136 I also do not accept that the first defendant's alleged representation induced the plaintiff to leave his employment with Zovi.com and take up employment with the first defendant. Again, for the purpose of this analysis, I

assume that the LCA Group did make a misrepresentation to the plaintiff as alleged.

137 First of all, in the passage from his cross-examination which I have cited at [132] above, the plaintiff himself accepted that he was not induced to accept employment with the LCA Group by any pre-contractual deception by the LCA Group. That is fatal to the plaintiff's case in inducement.

138 Second, I accept LCA Group's case that the plaintiff was asked to leave Zovi.com in early 2012 and that that was why he reinitiated the discussions with the LCA Group about potential employment. The evidence before me shows that the plaintiff was, by early 2012, in "settlement" negotiations with Zovi.com. The negotiations were over a "severance package" of six months' salary with the possibility of extension if he had been unable within those six months to find employment or to start a business of his own.[93] The plaintiff accepted in cross-examination that a "severance" package implies an involuntary termination of employment and is rarely offered to an employee who resigns voluntarily.[94] Further, the plaintiff expressed concern in contemporaneous emails to Zovi.com about how his departure would be publicised. That would have been an unlikely concern if he were leaving voluntarily for a better employment opportunity.

139 I therefore find that the plaintiff accepted the LCA Group's offer of employment in February 2012 because that was the best alternative he then had, after having been asked to leave Zovi.com. As such, I find that he would have

93 CB 380–381

94 27 January 2021 Transcript at p 88 lines 2–21.

accepted the LCA Group's offer of employment with or without the alleged representation.

140 Finally, returning to my actual findings thus far, insofar as the plaintiff was induced by anything to accept the first defendant's offer of employment, the true and operative inducement was, at best, his own misunderstanding of what the phrase "2.5% carry" meant. That misunderstanding did not originate from any act or omission on the part of the LCA Group or its representatives. Nor was it a reasonable misunderstanding of the representations which the LCA Group actually made to him. His misunderstanding was entirely subjective, entirely self-engendered and entirely unreasonable. The LCA Group cannot bear any responsibility in fact or in law if the plaintiff was induced to accept the LCA Group's offer of employment by his own subjective, self-engendered and unreasonable misunderstanding of the terms of his remuneration.

141 For all of these reasons, I find that the plaintiff has failed to establish the element of inducement.

The plaintiff has not proven that he suffered any loss

142 Finally, I accept the LCA Group's submission that the plaintiff has failed to prove that he suffered any loss as a result of the alleged misrepresentations.

143 The plaintiff claims that his reliance on the first defendant's misrepresentation caused him to suffer loss of US$75m or US$3m. That is the value which the plaintiff ascribes to the shares in Zovi.com which he would have received under its employee stock option plan ("ESOP") if he had

remained with Zovi.com instead of accepting employment with the LCA Group in February 2012.[95]

144 I reject the plaintiff's case on loss for three reasons.

145 First, I have already accepted that the plaintiff was asked to leave Zovi.com in early 2012 (see [138] above). Therefore, with or without the first defendant's alleged misrepresentation, and with or without his alleged reliance on it to accept employment with the LCA Group, the plaintiff was going to lose any entitlement to participate in Zovi.com's ESOP.

146 Second, the plaintiff has failed to prove that he in fact lost any ESOP shares or that he even had a chance to be allotted ESOP shares. As the LCA Group points out, the plaintiff accepted that he was not a participant in any ESOP at Zovi.com.[96] He also confirmed that Zovi.com had not allotted any shares to him under its ESOP, vested or unvested, when he accepted employment with the LCA Group.[97]

147 Third, the US$75m figure which the plaintiff originally ascribed to this claim is wholly speculative and devoid of any substance. It assumes that Zovi.com would achieve a valuation of US$1bn within five years.[98] Not only is there no evidence that this was more probable than not in 2012, there is evidence that this was impossible by 2016. That is when Zovi.com was wound up.[99] There

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95 SOC at para 64(ii).

96 27 January 2021 Transcript at p 69 lines 20–25).

97 27 January 2021 Transcript at p 70 lines 1–3.

98 SOC at para 64(ii).

99 27 January 2021 Transcript at p 70 lines 4–6, p 71 lines 4–12.

is also no evidence to support the alternative figure of US$3m which the plaintiff advances in his reply closing submissions.

Conclusion

148 The plaintiff's own evidence cited at [131]–[132] above makes clear that his true complaint against the LCA Group in his misrepresentation claim is not that it deceived him. His true complaint is the LCA Group broke its promise to pay him 2.5% of the "gross profits" of Fund II. Protecting the plaintiff's interest in that promise, assuming for the moment that it was made, is entirely and properly the domain of the law of contract. I have already rejected the plaintiff's contractual claim for 2.5% of Fund II's gross profits as wholly misconceived. It would subvert the law of contract to allow the plaintiff to pursue, let alone succeed, in an alternative claim in tort based on the LCA Group's breach of the very same promise. His true complaint is not even actionable in tort.

Claim 3: termination in breach of contract

149 The plaintiff's third claim is a claim that the LCA Group terminated his employment in breach of contract.

The law

150 The applicable law is not in dispute. An employment contract is treated in Singapore law like any other contract. Therefore, either party to an employment contract may terminate it: (a) in accordance with its express terms; or (b) for a repudiatory breach by the other party: *Piattchanine, Iouri v Phosagro Asia Pte Ltd* [2015] 5 SLR 1257 ("*Piattchanine (HC)*") at [117].

151 Furthermore, whether a party is entitled to terminate an employment contract for repudiatory breach of that contract is determined on the ordinary

test which applies to all contracts as set out in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 ("*RDC Concrete*"), *ie* the innocent party will be entitled to terminate the contract for breach: (a) where the contract provides expressly that a breach of that term will entitle the innocent party to terminate the contract; (b) where one party clearly conveys to the other that it will not perform its obligations under the contract at all, thereby renouncing it; (c) where the intention of the parties was to designate the term that has been breached as one that is so important that any breach of that term, regardless of its actual consequences, would entitle the innocent party to terminate the contract; or (d) if the breach gives rise to an event which will deprive the innocent party of substantially the whole of the benefit that the parties intended it should obtain under the contract (*RDC Concrete* at [91]–[99] and [113]; *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 ("*Piattchanine (CA)*") at [52] and [54]–[55]).

152 Turning now to the specific context of an employment contact, an employee commits a repudiatory breach of his employment contract if he is guilty of misconduct. Misconduct is conduct which destroys the relationship of trust and confidence which underlies a contract between employer and employee and which thereby renders the employment relationship untenable (*Piattchanine (HC)* at [253]–[254] and [260]; cited with approval in *Piattchanine (CA)* at [50] and [53]). One type of conduct which will have this effect is insubordination. Insubordination is the wilful disobedience of a reasonable and lawful command from a superior officer (*Piattchanine (CA)* at [52(b)], [55]). Disobedience is wilful if it is done "intentionally, knowingly and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently."[100]

[100] P's closing submissions at para 89(b).

The LCA Group's case

153 The LCA Group's primary case is that: (a) the plaintiff's conduct from October 2014 to June 2015 constituted breaches of the express and implied terms of his employment contract;[101] and (b) the LCA Group terminated the plaintiff's employment on 29 June 2015 in accordance with its rights and obligations under his employment contract. The LCA Group's alternative case is that the same conduct of the plaintiff amounted to a repudiatory breach of the plaintiff's employment contract – because it evinced his intention no longer to be bound by its terms – which the LCA Group accepted on 29 June 2015, thereby terminating the contract.[102]

154 In its letter dated 29 June 2015 terminating the plaintiff's employment, the LCA Group justified the termination on six grounds:

> (a) The plaintiff had been guilty of insubordination by failing or refusing to attend meetings.
>
> (b) The plaintiff had been guilty of insubordination by remaining in India, without approval from the LCA Group's management, instead of reporting to his primary place of work under the June 2014 Contract, which was Hong Kong, or reporting to Singapore as instructed by the third defendant.
>
> (c) The plaintiff had actively undermined the third defendant, his immediate superior officer within the LCA Group, by alleging that the third defendant had harassed the plaintiff in retaliation for the plaintiff's whistleblowing.

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101 CB 2712–2715; D&CC at para 46.

102 D&CC at para 67.

(d) The plaintiff had destabilised the LCA Group by alleging internal wrongdoing to senior management of LVMH, despite the fact that the plaintiff had by then been told to direct these allegations only to the third defendant.

(e) The plaintiff had disrupted the LCA Group's operations by challenging the LCA Group's summary of its meetings with the plaintiff in May 2015 to discuss the conditions of his continued employment and by relying on points of contention after the meetings which he did not raise at those meetings.

(f) The plaintiff had unreasonably challenged the LCA Group on his bonus and share of the carry on Fund II which caused a breakdown in the relationship of trust and confidence between the LCA Group and the plaintiff.

155 In this action, the LCA Group also seeks to justify its termination of the plaintiff's employment on an additional ground not set out in the termination letter. That additional ground is that, between March 2015 and June 2015, the plaintiff used his LCA Group email account to send emails containing material confidential to the LCA Group to his personal email account without the LCA Group's consent. The LCA Group did not include this ground in the termination letter because it discovered the underlying facts only afterwards, in April 2016.

The plaintiff's case

156 In response, the plaintiff asserts that the LCA Group terminated his employment in breach of the June 2015 Contract on two grounds:

(a) First, none of the conduct which the LCA Group now complains of amounts to a breach of his employment contract at all.

(b) Second, even if he was in breach of his employment contract, the LCA Group failed to issue him a written notice of deficiency and failed to allow him an opportunity to cure the breach as it was required to do by the express terms of his employment contract.

157 The gist of the plaintiff's case is that the LCA Group has contrived the allegation of insubordination in order to hide its true reason for terminating the plaintiff's employment: to "suppress the plaintiff's whistleblowing and [to] cover up [Mr] Piette's mistake of informing the plaintiff that he would be entitled to US$37.5 million" as his share of the carry on Fund II.[103]

158 For the reasons which follow, I find that the plaintiff was indeed in breach of the express and implied terms of his employment contract or in repudiatory breach of his employment contract by reason of his conduct from August 2014 to June 2015, and that this conduct amounted to wilful insubordination. I find also that the LCA Group terminated the plaintiff's employment in accordance with the express terms of his contract and also at common law.

159 Much of the plaintiff's case on this claim rests on his allegation that he was a whistle-blower. I therefore deal first with the that aspect of the plaintiff's case before turning to consider the LCA Group's grounds for the termination.

The plaintiff's whistleblowing

160 The plaintiff's case is that, in the course of his employment by the LCA Group, he learned of serious wrongdoing within the LCA Group in connection with seven potential investments which the LCA Group made between February

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[103] DWS at para 86.

2012 and June 2015.[104] I reject the plaintiff's case. His allegations of wrongdoing are exaggerated, contrived and self-serving.

161 As the LCA Group points out, it proceeded to make only two of these seven investments. It did not make any of the other five investments, partly as a result of concerns with the plaintiff raised.[105] The plaintiff suggests that the LCA Group owed a duty to investors or its regulators to account for the reasons for not making these investments. There is no basis for this suggestion.

162 As for the remaining two investments, the plaintiff raised his concerns about those potential investments in 2012 and remained silent thereafter.[106] He returned to his allegations about these two investments only in April 2015, when his dispute with the LCA Group about the proper construction of the phrase "2.5% carry" arose was well advanced.[107] The inference is irresistible that he did so purely for tactical reasons.

163 The plaintiff asserts that he discovered criminal wrongdoing, including "corruption", by senior executives within the LCA Group, including the third defendant:[108]

> …possible breaches of penal provisions in applicable legislations [*sic*] (involving offences such as cheating, dishonestly or fraudulently making a false statement, criminal breach of trust, corruption, etc) … [which] … "may also involve statutory and civil wrongs like misrepresentation, breach of fiduciary duty, conspiracy to inflict wrongful acts etc.

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104 Plaintiff's AEIC at paras 103–191

105 Plaintiff's AEIC at paras 138–180; 2 February 2021 Transcript at p 139 line 25 to p 140 line 12.

106 Plaintiff's AEIC at paras 103–125

107 CB 1887–1886.

108 Plaintiff's AEIC at para 18; CB 1665.

His case is that he owed a fiduciary duty to investors and regulators to escalate and to expose this wrongdoing: what he calls "whistleblowing". It is also his case that his whistleblowing resulted in a "massive clean-up" where "virtually everybody…cited in [his] whistleblowing emails has been exited" from the LCA Group.[109]

164 Not for the first time, the plaintiff's account is wholly exaggerated. The truth is far more mundane. The plaintiff accepted, when I sought clarification, that by "corruption" he did not mean bribe-taking.[110] And by "massive clean up", he did not mean the prosecution, or even the summary dismissal of employees found guilty of criminal wrongdoing. Those employees, including the third defendant, remained with the LCA Group and left for unrelated reasons several years after the plaintiff's whistleblowing.[111] And, as the LCA Group points out, the third defendant continues to work closely with the LCA Group even after he ceased his employment and relinquished his executive positions within it.[112]

165 In any event, to the extent that there was any plausible substance to the plaintiff's whistleblowing at all, I accept the LCA Group's evidence that both the LCA Group and LVMH took his allegations seriously and did not engage in a cover up or try to suppress the plaintiff. Arising from the plaintiff's allegations, LVMH appointed KPMG to conduct an internal review. KPMG

[109] 2 February 2021 Transcript at p 135 line 22 to p 136 line 18; Plaintiff's AEIC at para 101

[110] 3 February 2021 Transcript at p 128 line 18 to p 129 line 24.

[111] 2 February 2021 Transcript at p 135 line 22 to p 139 line 3.

[112] 10 February 2021 Transcript at p 8 line 24 to p 9 line 12.

found no wrongdoing.[113] The plaintiff's whistleblowing was entirely without merit. Further, I accept that the whistleblowing was a mere contrivance, designed to create leverage to be deployed in his dispute over his share of the carry on Fund II.

166 In any event, the plaintiff's whistleblowing is and was, both factually and legally distinct from his obligations under his employment contract in three senses. First, his status as a whistleblower gave him no legal basis on which to disregard his contractual obligations under his employment contract and gave him no legal excuse for any breach of his employment contract. Although the plaintiff asserted this legal proposition in his cross-examination, his submissions cite no authority for it. Second, I accept the fourth defendant's evidence that the LCA Group kept entirely separate the plaintiff's performance or non-performance of his contractual obligations under his employment contract from the action it took to investigate his allegations of wrongdoing.[114] Finally, I also accept that the LCA Group's decision to terminate the plaintiff's employment was not in any way motivated by a desire to suppress his whistleblowing or to retaliate for it. Indeed, that aspect of the plaintiff's case is quite illogical: terminating the plaintiff's employment would not in any way prevent him from continuing to blow his whistle.[115]

The root cause of the plaintiff's conduct

167 The root cause of the rupture in the employer/employee relationship was the plaintiff's unhappiness over the LCA Group's refusal to agree with him that

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[113] The fourth defendant's affidavit of evidence in chief dated 9 October 202 ("Fourth Defendant's AEIC") at para 34.

[114] 16 February 2021 Transcript at p 115 line 15 to p 116 line 16; Fourth Defendant's AEIC at para 34; CB 2043, CB 2126A, CB 2150, CB 2152, CB 2596

[115] 3 February 2021 Transcript at p 28 line 9 to p 30 line 7.

he was entitled to 12.5% of the carry on Fund II. The plaintiff himself accepted this.[116]

168 A turning point in the employer/employee relationship took place in October 2014, shortly after the dispute had arisen. The LCA Group arranged a face-to-face meeting in London between the plaintiff, the third defendant and Mr Piette. One Mr Raj Mitta was also in attendance.[117] Mr Mitta was and still is a consultant to the LCA Group and a member of its Strategic Advisory Board.[118] The LCA Group arranged the meeting in an effort to correct the plaintiff's mistaken understanding of the phrase "2.5% carry" and to draw a line under the dispute so that both parties could move forward.[119] The plaintiff, however, saw the meeting as a negotiation to resolve a *bona fide* dispute over the meaning of "2.5% carry". The plaintiff's approach was fundamentally mistaken.

169 The LCA Group's evidence, which I accept, is that the plaintiff was insubordinate and rude to Mr Piette at this meeting.[120] The meeting concluded with the plaintiff declaring himself to be a "demotivated" employee and threatening to stop work unless the LCA Group agreed to pay him 12.5% of the

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[116] CB 1674–1684.

[117] D&CC at paras 54 to 56.

[118] Mitta Rajsekar's affidavit of evidence in chief dated 7 November 2020 ("Mitta's AEIC") at para 3.

[119] Day 3 Transcript at p 153 lines 3–5, p 149 lines 11–13.

[120] Day 9 Transcript p 19 (lines 14-18), p 20 (line 14) – p 21 (line 12); Third Defendant's AEIC at paras 82–83; Day 11 Transcript p41 (lines 8-23); Day 7 Transcript p 18 (line 21) – p 19 (line 17), p 52 (lines 5-25); Mitta's AEIC at paras 12, 14–15 and 18–22; Daniel Piette's affidavit of evidence in chief ("Piette's AEIC") at paras 24–25

carry on Fund II.[121] The LCA Group never agreed. As I have found, the LCA Group was correct not to agree.

170 From October 2014 onwards, as the plaintiff foreshadowed, he proved himself to be a thoroughly demotivated employee. As a result, in February 2015, Mr Piette and Mr Mitta[122] recommended to the third defendant that the LCA Group part ways with the plaintiff. But the third defendant was reluctant to do, preferring to try and maintain continuity in the management team by remotivating and retaining a demotivated senior executive.[123]

171 I now consider in turn the plaintiff's insubordination and misconduct from February 2015 to June 2015.

Disobeying instructions to meet in Singapore

172 In early February 2015, the third defendant instructed the plaintiff to report to Singapore for a meeting on 13 March 2015.[124] The plaintiff agreed to do so.[125]

173 It is common ground that, on 3 March 2015, the plaintiff learned that the LCA Group was considering terminating his employment.[126]

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[121] Mitta's AEIC at para 18; Piette's AEIC at para 25; Third Defendant's AEIC at para 83.

[122] Piette's AEIC at paras 29–30; Mitta's AEIC at paras 24–27.

[123] Third Defendant's AEIC at paras 91–95.

[124] CB 1467.

[125] CB 1467.

[126] Plaintiff's AEIC at para 323

174 On 4 March 2015, the third defendant supplemented his initial instruction by asking the plaintiff to stop work on all matters in order to report to Singapore latest by 9 March 2015 and to stay in Singapore for about a week after the meeting on 13 March 2015.[127] The third defendant intended to use these two weeks to assign the plaintiff a new work location and work scope.[128]

175 The plaintiff did not obey this instruction. This was even though he had by then already agreed to report to work in Singapore for the meeting on 13 March 2015.[129] Instead, the plaintiff replied on 6 March 2015 to query the third defendant's instruction to stop work and to query the third defendant's instruction to remain in Singapore for a two-week period around the 13 March 2015 meeting. In the same email, the plaintiff alleged that he would face "serious personal difficulties in travelling to Singapore in the short term"[130] because both his children were visiting him in India and because both his parents were terminally ill and required his presence.[131] In cross-examination, the plaintiff gave a different reason for not complying with this instruction. He testified that he was reluctant to meet the third defendant in Singapore because he feared that the third defendant would ask him to terminate his employment with the LCA Group.

176 The third defendant then withdrew his instruction for the plaintiff to report to work in Singapore for those two weeks around 13 March 2015. He

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[127] Day 9 Transcript p56 (line 11) - p57 (line 12); Third Defendant's AEIC at paras 96–97

[128] Day 9 Transcript at p35 (line 3) - p36 (line 5); Third Defendant's AEIC at para 95. See also AB 3588.

[129] CB 1467.

[130] Plaintiff's AEIC at para 28.

[131] CB 1667; Plaintiff's AEIC at para 28.

instead instructed the plaintiff to report to Singapore for a single day, just to attend a meeting with the third defendant and Mr Piette. The third defendant rescheduled the meeting from 13 March 2015 to 16 March 2015.[132]

177 The plaintiff now sought legal advice.[133] He then replied to the third defendant by email on 12 March 2015, with a copy to the fourth defendant, saying that it would not be fruitful to meet unless the LCA Group was prepared to undertake serious discussions about the plaintiff's whistleblowing and about the size of his profit share.[134]

178 On 13 March 2015, the third defendant reiterated his instruction that the plaintiff report to Singapore for the meeting on 16 March 2015.[135] The plaintiff ignored this instruction until 16 March 2015 itself. On that day he sent an email to the third defendant declining to report as instructed,[136] saying that a meeting was pointless if the LCA Group was not prepared to acknowledge the validity of the plaintiff's whistleblowing. He added that "any continued attempt at intimidation will only serve to embolden [him] further and strengthen [his resolve]".[137] The LCA Group characterise his email as insolent and threatening. I agree.

179 On 6 April 2015,[138] the third defendant instructed the plaintiff to report to Singapore for a meeting for 24 April 2015 "to discuss all pending issues and

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132 AB 4908.

133 AB 4908; 3 February 2021 Transcript at p 35 (lines 7–17), p 38 (lines 7–20).

134 CB 1665–1666; Plaintiff's AEIC at paras 30 and 34.

135 CB 1664–1665,

136 Day 4 Transcript p 38 (lines 3-11).

137 CB 1664,

138 CB 1877–1878,

[the plaintiff's] role going forward".[139] The plaintiff ignored this email. On 14 April 2015,[140] the third defendant sent the plaintiff a reminder about the meeting on 24 April 2015. The plaintiff ignored the reminder.

180 On 21 April 2015,[141] the plaintiff informed the third defendant that he was unable to meet him in Singapore on 24 April 2015. The reason he gave was that the plaintiff had to accompany his parents for medical treatment in Mumbai on 23 April 2015 and 24 April 2015. The third defendant immediately offered, as an indulgence warranted by the circumstances, to travel to Mumbai on 30 April 2015 to meet the plaintiff.[142] The plaintiff ignored this offer.

181 In the meantime, the plaintiff was actually in Singapore on a personal trip from 4 April 2015 to 9 April 2015.[143] He could easily have made arrangements to meet the third defendant in Singapore on a mutually convenient date during this period. But the plaintiff deliberately did not inform the third defendant or the LCA Group that he was in Singapore for this trip.[144]

182 On 23 April 2015, the third defendant changed the date of the meeting from 24 April 2015 to 12 May 2015 and changed the venue of the meeting from Mumbai to Singapore. Both changes were necessary because the third defendant wanted the fourth defendant to attend the meeting in order to avoid any misinterpretation of the discussions.[145] The plaintiff ignored the third defendant.

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139 CB 1877–1878.

140 CB 2164.

141 CB 2163.

142 CB 2163.

143 CB 2212 and 2216; Third Defendant's AEIC at para 107.

144 3 February 2021 Transcript at p 67 (lines 7–18), p 70 (line 12) to p 71 (line 3).

145 Plaintiff's AEIC at paragraph 37.

183 On 27 April 2015, the fourth defendant asked the plaintiff to confirm that he would attend the 12 May 2015 meeting. The plaintiff did not ignore the fourth defendant: he confirmed that he would attend.[146]

184 At trial, the plaintiff gave three reasons for refusing to obey the third defendant's instructions to meet in March 2015 and April 2015. First, he said that he had no obligation to obey the third defendant[147] because the third defendant was one of the "prime accused" in the plaintiff's whistleblowing.[148] When it was pointed out that the plaintiff had at the time cited personal reasons as his justification for not obeying the third defendant's instructions, the plaintiff maintained that one of his reasons at that time for not obeying the third defendant's instructions was because the third defendant was the subject of the plaintiff's whistleblowing.[149] Second, he said that he did not obey the third defendant's instructions to meet because there was a possibility that the LCA Group would terminate his employment at the meeting. Third, he said that obeying the third defendant's instructions would compromise his "fiduciary duties" to the LCA Group and to the investors in its funds.

185 It is insubordination to refuse to obey a reasonable and lawful instruction from a superior officer. The third defendant's repeated instructions to the plaintiff to meet in Singapore in March and April 2015 were both reasonable and lawful. It is equally insubordination to attach unreasonable and irrelevant conditions precedent to obeying a reasonable and lawful instruction from a superior officer. The plaintiff had no basis in law to attach conditions precedent

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146 P's AEIC at para 38.

147 3 February 2021 Transcript at p 36 lines 1–8.

148 3 February 2021 Transcript at p 26 line 14 to p 28 line 1, p 27 line 20 – p 28 line 7, p 38 lines 12–20 , p 78 line 23 to p 79 line 16.

149 3 February 2021 Transcript at p 31 line 5 to p 34 line 21.

to his attendance in Singapore on 16 March 2015. The plaintiff cites no authority for his proposition that an employee ceases to be bound by his contractual obligation to obey a reasonable and lawful instruction from a superior officer if the employee has accused that superior office of wrongdoing. The plaintiff cites no authority for the proposition that he somehow owed fiduciary duties directly to the LCA Group's investors, let alone that those fiduciary duties somehow excused him from obeying his superior officer's reasonable and lawful instructions.

186 The plaintiff's conduct in relation to the third defendant's instructions to meet in Singapore was wilful insubordination and misconduct.

Remaining in Mumbai without approval

187 The plaintiff's primary place of work under February 2012 and the May 2012 Contracts was Mumbai. The plaintiff's parents live in Mumbai. They were then aged, and the plaintiff's father was terminally ill.[150] He wanted to work from Mumbai to care for them.

188 Under the June 2014 Contract, his primary place of work was Hong Kong.[151] Further, the plaintiff accepts that the second defendant had the right to redesignate the plaintiff's place of work under this contract.[152] In February 2015, the plaintiff sought and was granted permission to travel to Mumbai on 27 February 2015 and to work from there until 10 April 2015.[153] But the plaintiff

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150 Plaintiff's AEIC at para 41.

151 CB 1236.

152 16 February 2021 Transcript at p 86 lines 17–25.

153 CB 1469; Plaintiff's AEIC at para 50; Chee's AEIC at para 28; Ong's AEIC at para 70.

remained in Mumbai after 10 April 2015 without the LCA Group's approval and despite the third defendant's repeated requests to meet in Singapore.

189 The plaintiff's conduct in absenting himself after 10 April 2015 from his primary place of work under the June 2014 Contract is a *prima facie* breach of that contract. The plaintiff gives several reasons why his decision to stay on in Mumbai after 10 April 2015 was not a breach of his employment contract.[154]

190 First, he claims that the third defendant gave him blanket approval in 2013 to work from Mumbai as and when the plaintiff considered it necessary in order to care for the plaintiff's parents.[155] The third defendant denies ever giving any such blanket approval. I accept the third defendant's evidence. The plaintiff's evidence is contrary to the inherent probabilities. No superior officer would give a subordinate blanket approval to absent himself from his primary place of work as and when the employee chose to do so. That is especially the case when the other place of work is not just in another city but in another country. In the absence of specific approval from the LCA Group, it was a breach of contract for the plaintiff to remain in Mumbai beyond 10 April 2015. The plaintiff does not allege that there was any such specific approval.

191 Second, the plaintiff alleges that he understood the third defendant's offer to meet the plaintiff in Mumbai on 24 April 2015 as an instruction that the plaintiff should remain in Mumbai until 24 April 2015.[156] That is disingenuous and a pure contrivance. The third defendant's offer to the plaintiff to meet him in Mumbai was purely an indulgence to the plaintiff. It came only after the

[154] Plaintiff's AEIC at paras 43–53.

[155] Plaintiff's AEIC at paras 43–44; Plaintiff's FBPs to the SOC (see SDB at p 367).

[156] Plaintiff's AEIC at para 48.

plaintiff had refused to obey the third defendant's instruction to meet in Singapore and as an effort to accommodate the plaintiff's personal circumstances with his parents' illness. The plaintiff had no basis to read the third defendant's offer as an instruction to remain in Mumbai after 10 April 2015.

192 Finally, the plaintiff alleges that the LCA Group told him, in response to his query, that he did not require approval to postpone the date of his return from Mumbai to Hong Kong from 10 April 2015 to 29 April 2015.[157] His case is that this amounts to approval for him to remain in Mumbai after 10 April 2015. This is another disingenuous contrivance. The plaintiff's query was in substance about the LCA Group's travel and expenses policy about the cost of postponing his flight. It was not a query about extending his approved absence from his primary place of work. Further, the person who told him that no approval was required for the date change because there was no cost difference was a junior member of the LCA Group's administrative staff.[158] She had no authority to extend the LCA Group's approval of the plaintiff's absence from his primary place of work. The plaintiff himself must have known this.

193 The plaintiff absented himself from his primary place of work under the June 2014 Contract after 10 April 2015 without the approval of the LCA Group and without a contractual defence. He was therefore in breach of his contract.[159] This breach amounts to misconduct. Absenting oneself in this way from one's primary place of work is conduct which destroys the relationship of trust and

157 Plaintiff's AEIC at para 49.

158 Plaintiff's AEIC at para 46.

159 26 February 2021 Transcript at p 86 lines 17–25.

confidence which underlies a contract between employer and employee and which renders the employment relationship untenable.

Whistleblowing to LVMH

194 In March 2015, the plaintiff began to make his allegations of internal wrongdoing within the LCA Group directly to LVMH. He began on 18 March 2015 when he emailed the third defendant[160] more allegations of wrongdoing and forwarded a copy of that email to Mr Antonio Belloni.[161] Mr Belloni was a member of LVMH's board of directors and the Group Managing Director of LVMH. Mr Belloni was, in addition to Mr Piette, a senior executive of LVMH to whom the third defendant reported. The plaintiff also provided to Mr Belloni further details about his dispute with the third defendant over the meaning of "2.5% carry".

195 On 7 April 2015,[162] the plaintiff raised more allegations of wrongdoing, even while he continued to ignore the third defendant's instruction to meet him in Singapore. The plaintiff forwarded these emails to Mr Belloni[163] and to one Ms Chantal Gaemperle.[164] Ms Gaemperle is a member of LVMH's Executive Committee and the Executive Vice President of Human Resources and Synergies of LVMH. The fourth defendant reported to Ms Gaemperle.

160 CB 1704.

161 CB 1674–1676.

162 CB 1986–1991.

163 CB 1897.

164 CB 1887.

196 Given that I have found the plaintiff's whistleblowing to be baseless and to be a contrivance, the plaintiff's conduct in this regard also amounts to wilful insubordination and misconduct.

The plaintiff stopped work from March 2015

197 The plaintiff accepts that from March 2015, he ceased doing any work at all for the LCA Group. His entire time after that point was spent on compiling a whistleblowing report.[165] Despite this, he continued to receive and accept his full salary from the LCA Group.

198 The plaintiff's justification for this is that he read the third defendant's 4 March 2015 email (see [174] above) as the third defendant's instruction to stop work.[166] This is yet another contrivance. The thrust of this email is that the plaintiff should stop work until he reported to the third defendant in Singapore for the third defendant to assign the plaintiff a new place of work and a new scope of work. The plaintiff cannot choose to follow the third defendant's instruction to stop work and disregard the third defendant's instruction to report to Singapore to set the conditions for resuming work.

199 I accept the LCA Group's submission that the plaintiff in substance refused to work from 4 March 2015 onwards.[167] This too is wilful insubordination and misconduct.

165 3 February 2021 Transcript at p 69 line 13– to p 70 line 3; Plaintiff's AEIC at para 52.

166 3 February 2021 Transcript at p 65 (line 4) to p 66 line 19. See also p 42 line 23 to p 43 line 1.

167 Third Defendant's AEIC at para 45 and87; 16 February 2021 Transcript at p 84 lines 4–7.

Meetings in May 2015

200 After ignoring the third defendant's instructions to meet in March, April and May 2015, the plaintiff finally responded to the fourth defendant's query whether the plaintiff intended to attend the meeting on 12 May 2015.

201 This meeting was attended by the third and fourth defendants and the plaintiff.[168] The fourth defendant led the discussion. Accounts differ about what happened at this meeting. For reasons I have already given, the plaintiff showed himself throughout his testimony to be a witness more interested in advancing his case than in assisting the court. I therefore accept the third defendant and the fourth defendant's account of this meeting as being more accurate, insofar as it differs from the plaintiff's account. Their account is also consistent with contemporaneous emails which they wrote to more senior LVMH executives summarising what transpired at this meeting.

202 At this meeting, the fourth defendant left the plaintiff in no doubt that he was on the brink of being dismissed summarily for insubordination. He told the plaintiff that his insubordination had to cease and that he could no longer expect to receive a salary despite absenting himself from his primary place of work in Hong Kong, ignoring his immediate superior's instructions and doing no work.[169] The plaintiff indicated that he wanted his employment with the LCA Group to continue. The fourth defendant told him that that could happen only if the plaintiff agreed to abide by certain conditions.[170] The plaintiff appeared chastened and cooperative. He agreed to accept the third defendant's authority

168 SOC at para 41.

169 Fourth Defendant's AEIC at para 40; Exhibit D1 Tab 1.

170 Fourth Defendant's AEIC at paras 38–45; Third Defendant's AEIC at paras 109–113; 16 February 2021 Transcript at p 142 line 5 to p 143 line 3.

over him as his manager and agreed to respect the manager-employee relationship in order to salvage his employment.[171]

203 As for the plaintiff's whistleblowing, the fourth defendant told the plaintiff that he, the fourth defendant, was to be the designated point of contact at LVMH for the plaintiff to raise any further allegations of wrongdoing.[172] The fourth defendant also told the plaintiff that LVMH would commission an independent investigation into the plaintiff's allegations.[173]

204 The third defendant and the fourth defendant believed the meeting went well.[174]

205 On 13 May 2015, the third defendant met the plaintiff without the fourth defendant. At this meeting, the third defendant set out the three conditions for the plaintiff's continued employment. First, Singapore was now to be the plaintiff's primary place of work, with his scope of work focusing on operations and portfolio management. Second, the plaintiff had to accept that he was entitled only to 2.5% of the carry on Fund II. Finally, the plaintiff had to agree to draw a line under the past and to perform his contractual obligations going forward in a cooperative and responsive manner.[175] It was clear that failure to accept these three conditions would lead to termination of the plaintiff's employment.[176] The plaintiff appeared to accept these three conditions.

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[171] Exhibit D1 Tab 1; 16 February 2021 Transcript at p152 lines 12–21; Fourth Defendant's AEIC at para 42; Third Defendant's AEIC at paras 111–113.

[172] Exhibit D1 Tab 2 at point 1; 2 February 2021 Transcript at p 93 lines 2–9.

[173] Exhibit D1 Tab 1 at points 1 and 4.

[174] Exhibit D1 Tab 1 at points 4 and 5; CB 2596.

[175] Third Defendant's AEIC at para 114; Fourth Defendant's AEIC at paras 46–47; 17 February 2021 Transcript at p 48 lines 2–23.

[176] 17 February 2021 Transcript at p 36 lines 1–23.

206 These conditions were then recorded formally in a letter dated 28 May 2015 issued by the LCA Group to the plaintiff.[177] The LCA Group asked the plaintiff to accept these conditions formally by 3 June 2015.[178]

207 The plaintiff refused to accept the conditions. On 3 June 2015,[179] he asserted that he had not been guilty of insubordination and that the LCA Group had no basis to require him to accept the conditions for his employment to continue.

208 The plaintiff then resumed his insubordination. Most notably, on 12 June 2015,[180] he made further allegations of wrongdoing directly to Ms Gaemperle. This was despite the fourth defendant having instructed the plaintiff at the 12 May 2015 meeting that the plaintiff should channel all future whistleblowing to the fourth defendant.[181]

Termination of the plaintiff's employment

209 On 29 June 2015, the LCA Group summarily terminated the plaintiff's employment.[182] I accept that the plaintiff's conduct which I have outlined above amounts not only to a breach but to a repudiatory breach of the express and implied terms of his employment contract.[183] The plaintiff's insubordination had caused, by 29 June 2015, an irretrievable rupture in the relationship of

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[177] CB 2636–2637.

[178] CB 2636–2637.

[179] CB 2678–2680; D&CC at paras 63(b) to 63(c).

[180] CB 2702.

[181] Fourth Defendant's AEIC at paras 49–50; 16 February 2021 Transcript at p 158 lines 15-20.

[182] CB 2712–2715.

[183] CB 1237.

mutual trust and confidence that must subsist between and employer and an employee (*Piattchanine (HC)* at [253]-[254] cited with approval in *Piattchanine (CA)* at [50]).

Notice of deficiency

210 The plaintiff next complaints that the LCA Group breached its contractual obligations to him when it terminated his employment because it failed to comply with cl 5.5 of the June 2015 Contract. That clause requires the LCA Group to give the plaintiff written notice of any deficiency in his performance of his obligations under the contract and appropriate time to correct the deficiency before terminating his employment:[184]

> 5.5. If at any time during your employment by [the second defendant], you shall be guilty of any serious default or grave misconduct or shall neglect to give such of your time or personal attention to the business of [the second defendant] as may reasonably be required or shall disobey or neglect any lawful orders or directions given to you or shall be guilty of breach of non-observance of any of the obligations on your part as the Employee herein contained or as defined in the agreed job description, [the second defendant] will provide you with a written notice of such deficiency. If after appropriate time you have not corrected the deficiency, [the second defendant], at its sole discretion, may terminate your employment.

211 I do not accept that the LCA Group failed to comply with cl 5.5 of the June 2014 Contract. Clause 5.5 does not stipulate any specific form for the written notice of deficiency which it obliges the LCA Group to provide to the plaintiff. The contractual intent of cl 5.5 is to afford a measure of employment fairness to the plaintiff. It ensures that the plaintiff has a chance to redeem himself before the LCA Group can take the final and irreversible step of terminating the employer/employee relationship. It further ensure that that

184 SOC at para 47(b).

termination will not come as a surprise to the plaintiff. Thus, the LCA Group must not only give the plaintiff notice that he is at risk of termination but must also tell him what deficiency has caused that risk to arise and allow him an appropriate amount of time to correct the deficiency. The contractual intent in requiring the notice of deficiency to be in writing is to enhance the protection which cl 5.5 affords to the plaintiff by minimising the scope for miscommunication or misunderstanding the contents of the notice and by alleviating problems of proving that notice was or was not given. The contractual intent of cl 5.5 is served so long as the LCA Group gives the plaintiff notice in writing of the deficiencies in his performance and allows him an opportunity to correct those deficiencies. So long as the plaintiff understands the significance of the notice and the seriousness of the consequence that may ensue if he does not take advantage of the opportunity afforded to him to correct his deficiencies, the precise form of the notice is irrelevant to the contractual intent of cl 5.5.

212 The LCA Group gave the plaintiff many such notices and opportunities. It is immaterial that none of them were headed "Notice of Deficiency" or made express refence to cl 5.5 of the June 2014 Contract. These notices of the plaintiff's deficiencies include the following:[185]

(a) An email from the third defendant to the plaintiff on 13 March 2015[186] warning the plaintiff not to make allegations of wrongdoing without proof.

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[185] D&CC at paras 64(a) –64(d).

[186] CB 1664–1665.

(b) An email from the third defendant to the plaintiff on 6 April 2015[187] notifying the plaintiff that he had a "*habit of slinging mud at others*" and that he "*ignored various directives asking [him] to report*". The email also reiterated the third defendant's instruction to meet in Singapore given that the plaintiff was ignoring them.

(c) The 28 May 2015 letter (see [206] above) which informed the plaintiff that he had been guilty of insubordination and invited him to accept the conditions for his continued employment by 3 June 2015.[188]

213 It is true that the fourth defendant in cross-examination ventured an opinion as to whether certain written communications from the LCA Group to the plaintiff were or were not notices of deficiency within the meaning of cl 5.5.[189] I give no weight to his opinion. Whether or not a particular written communication which the LCA Group issued to the plaintiff is a notice of deficiency within the meaning of cl 5.5 is a question of law. It is an issue for the court to decide. It cannot be the subject of evidence, particularly from a witness of fact such as the fourth defendant. Furthermore, the June 2014 Contract is expressly governed by Singapore law. The issue cannot therefore even be the subject of expert evidence. The fourth defendant's opinion on the issue, coming from a witness of fact and moreover on a matter of Singapore law, is quite irrelevant to my determination of the proper construction of cl 5.5 and its application to the LCA Group's communications with the plaintiff. Nothing which the fourth defendant said in cross-examination has the slightest effect on

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187 CB 1877–1878.

188 CB 2636.

189 16 February 2021 Transcript at p 147 line 21 to p 148 line 4, p 149 lines 1–5.

my finding that the LCA Group did comply with cl 5.5 of the June 2014 Contract, properly construed.

214 The LCA Group did not terminate the plaintiff's employment in breach of contract.

Claim 4: conspiracy to injure

215 The plaintiff's fourth claim is a claim that some combination of the defendants and non-parties conspired to terminate his employment by unlawful means, *ie* in breach of contract, in order to suppress his whistleblowing.[190] In his written submissions, the plaintiff belatedly adds a second purpose for the conspiracy: to cover up Mr Piette's promise to the plaintiff to pay him US$37.5m as the plaintiff's share of the carry on Fund II.[191]

216 I reject the conspiracy claim for six reasons.

217 First and foremost, as I have found, the LCA Group terminated the plaintiff's employment in accordance with its express and implied rights and obligations under the June 2014 Contract. The result is that the only unlawful means on which the plaintiff relies for this conspiracy did not take place.

218 Second, I have also held that the plaintiff's whistleblowing was baseless and that the plaintiff's evidence is false that Mr Piette promised to pay US$37.5m to the plaintiff as his share of Fund II's profit. Those findings mean that there is no conceivable motive remaining for any conspiracy to terminate the plaintiff's employment by unlawful means.

[190] SOC at para 49; PCS at para 166.

[191] PCS at paras 169(b) and 181 to 189.

219 Third, the plaintiff's case as to when the conspirators combined to terminate his employment in breach of contract was constantly shifting. His pleadings assert that by early 2015, he "apprehended that concerted efforts were being made to force him out" of the LCA Group.[192] This is inconsistent with his evidence at trial. At first, he said in cross-examination that he realised in early August 2014 that there was a plot to cause him harm.[193] But less than half an hour later in his cross-examination, he said: "… from the discovery documents that I have read subsequent to my termination, it seems that that [the] plot was hatched sometime between December 2014 and February 2015".[194] The plaintiff's closing submissions argue that the combination took place "as early as February 2015",[195] which presumably mean no earlier than that. Three paragraphs later, his closing submissions assert that the plaintiff's "repeated whistleblowing … on corporate governance issues as early as 2012 made him a constant thorn in the Defendants' side, prompting them to devise a "game plan" to get him fired".[196] The plaintiff's case as to when this combination took place is a complete contrivance.

220 Fourth, the plaintiff's case as to identity of the conspirators was also constantly shifting. His pleaded case is that the conspirators were the third defendant, the fourth defendant, Mr Piette, Mr Belloni and Ms Gaemperle.[197] His affidavit of evidence in chief adds two further conspirators: Mr Mitta and

192 SOC at paras 38 to 39.

193 2 February 2021 Transcript at p 23 lines 15–22.

194 2 February 2021 Transcript at p 34 lines 19–24.

195 PCS at para 168.

196 PCS at para 171.

197 SOC at para 50.

one Mr Gujral.[198] Mr Gujral was, at that time, the Regional Managing Director India and Structuring & Risk for the LCA Group. But in the plaintiff's cross-examination, he disavowed any intention to allege that Mr Gujral was a conspirator.[199] But he added for the first time another LVMH human resources executive, one Mr Nicolas Calemard, as a conspirator.[200] Mr Calemard was involved in the drafting the 28 May 2015 letter (see [206] above). In his closing submissions, for good measure, the plaintiff adds the first defendant and the second defendant as conspirators.[201] The plaintiff's case on the identity of the conspirators is a complete contrivance.

221 If the plaintiff is held to his pleadings, and if his case is indeed that the combination between the conspirators had already taken place by early 2015, it is impossible for any of the LVMH executives to be conspirators. All of them became aware of the plaintiff's whistleblowing only after 4 March 2015.[202] This is reason enough for the plaintiff's claim against the fourth defendant to be dismissed.

222 Fifth, there is no evidence before me that any of the alleged conspirators combined to terminate the plaintiff's employment in breach of contract. All of the contemporaneous correspondence and the oral evidence shows that it was the LCA Group's and the LVMH's intention to terminate the plaintiff's employment strictly in accordance with his contract so as to part ways lawfully with a demotivated and disruptive employee who was demanding the wholly

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198 Plaintiff's AEIC at para 331.

199 2 February 2021 Transcript at p 5 line 16 to p 15 line 15.

200 2 February 2021 Transcript at p 51 lines 5–11, p 53 lines 19–21, p 56 lines 5–11.

201 PCS at para 163.

202 CB 1665–1666, 1674–1676, 1887–1896, 1931–1985 and 2043–2062

unreasonable share of 12.5% of the carry on Fund II without any legal justification.

223 Sixth, the plaintiff's case is contrary to the inherent probabilities. It was always open to the LCA Group to terminate the plaintiff's employment in accordance with the June 2014 Contract, by giving him six months' notice.[203] There was no need for any of the alleged conspirators to combine to do so in breach of contract. The fact that the LCA Group chose to terminate the plaintiff's employment summarily rather than on notice indicates to me that the LCA Group and the senior LVMH executive involved genuinely believed that the plaintiff had been guilty of misconduct warranting summary termination, not that they were conspiring to injure him by any means, lawful or unlawful.

224 What actually happened is that the LCA Group found themselves dealing in 2015 with an employee who was making completely unreasonable and legally baseless demands for money and who, when those demands were rejected, became thoroughly demotivated, thoroughly recalcitrant and thoroughly disruptive. The situation could not be allowed to continue and the plaintiff could not continue to be paid for doing nothing productive and for doing many things counterproductive. As a result, the LCA Group with the support of LVMH eventually resolved to terminate the plaintiff's employment in accordance with his contract of employment. And, as I have found, they succeeded in doing so.

225 The plaintiff's conspiracy claim is misconceived and is dismissed.

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[203] 2 February 2021 Transcript p 132 line 12 – p 133 line 11.

Claim 5: monthly indemnity

226 The plaintiff's fifth claim is that the LCA Group failed to pay him a post-termination monthly indemnity which was due to him under cl 9 of the June 2014 Contract.

227 Clause 9 of the June 2014 Contract[204] is a non-compete clause. It obliges the plaintiff not to be engaged in or by any business competing with the LCA Group for six months after his employment with the LCA Group ceases. As consideration for this non-compete obligation, if the plaintiff is unable to find suitable alternative employment during this six month period, the LCA Group is obliged to pay the plaintiff an indemnity equivalent to 70% of his monthly basic salary for every month of the six-month non-compete period.

228 The plaintiff's case is that he was unable to find suitable alternative employment and that he duly observed his non-compete obligation for the full six-month non-compete period. He therefore claims the monthly indemnity for six months, *ie* from 29 June 2015 to 29 December 2015, amounting to $78,321.25.[205]

229 Clause 9 of the June 2014 Contract expressly provides that the LCA Group is obliged to pay the plaintiff the monthly indemnity only if the plaintiff either: (a) informs the LCA Group in writing every month during the six-month period of the name and address of his current employer; or (b) confirms to the LCA Group that he is unemployed. Clause 9 goes on to provide expressly that failure to provide this information or confirmation "will result in the suspension of the payment of the monthly indemnity".

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[204] CB 1238.

[205] PCS paragraph 259.

230 The plaintiff accepts that he was bound by the non-compete clause. But it is common ground that the plaintiff did not provide the information or confirmation to the LCA Group which cl 9 makes a condition precedent to his right to receive the monthly indemnity.[206] This claim therefore fails.

231 Clause 9 also gives the LCA Group the right unilaterally to denounce its obligation to pay the monthly indemnity to the plaintiff in writing "at the time the termination notice is given or payment in lieu [of notice] is made…". It is common ground that the LCA Group did not denounce cl 9 in writing at the time it issued notice of termination to the plaintiff on 29 June 2015. Instead, the LCA Group denounced cl 9 in writing only by a separate email sent on 16 July 2015.[207] The LCA Group relies on this notice as a valid denunciation of cl 9. Given my finding that the plaintiff failed to fulfil the condition precedent to his right to receive the monthly indemnity, it is not necessary for me to decide whether this written notice in July 2015 does or does not amount to a valid denunciation of the LCA Group's obligation under cl 9.

232 The plaintiff argues that the LCA Group's email of 16 July 2015 was an invalid denunciation and amounted itself to a breach of contract, thereby releasing him from any obligation under cl 9 to provide the information or confirmation about his employment status in order to be entitled to receive the monthly indemnity.

233 This argument is misconceived. The provisions in cl 9 relating to denunciation do not oblige the plaintiff to denounce cl 9. They merely provide that if it chooses to do so, it must do so in writing and, on the plaintiff's case,

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[206] 3 February 2021 Transcript at p 126 line 18 to p 128 line 10.

[207] CB 2725; 3 February 2021 Transcript at p 125 line 25 to p 126 line 4.

on 29 June 2015. Even if the plaintiff is correct that the 16 July 2015 email is not a valid denunciation within the meaning of cl 9, that invalidity is its only consequence. The failed attempt to denounce cl 9 on 16 July 2015 does not put the LCA Group in breach of contract or even in anticipatory breach of contract. The effect of the invalid denunciation is that cl 9 simply continues to bind the parties in accordance with its terms. The plaintiff continued to be entitled to receive the monthly indemnity from the LCA Group. But the express condition precedent to be fulfilled month by month to receive the monthly indemnity continued to bind the plaintiff. That condition precedent was never fulfilled during the six month non-compete period.

234 The plaintiff's claim for the monthly indemnity fails.

Claim 6: stigma loss

235 The plaintiff's sixth claim is that the LCA Group terminated his employment contract in breach of contract and in breach of the implied term of mutual trust and confidence in the contract, thereby attaching a stigma to him in the employment market by reason of which he has to date been unable to find any employment.

236 I assume, without deciding, that there is an implied term of mutual trust and confidence in every employment contract governed by Singapore law (*Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357 ("*Wee Kim San*") at [24]). I also assume, without deciding, that the decision of the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1988] AC 20 ("*Malik*"), approved *obiter* in *Wee Kim San*, represents the law in Singapore. I also assume in the plaintiff's favour, contrary to my finding, that the LCA Group terminated the plaintiff's employment in breach of contract and, more specifically, in breach of this implied term.

237 Even with the benefit of all these assumptions, this claim is misconceived. As the LCA Group points out, if all that an employer does is to terminate an employee's employment in breach of the implied term of mutual trust and confidence, "the only damages recoverable by the employee will be damages for premature termination losses flowing from the employer's failure to give proper notice or pay salary in lieu of notice" (*Wee Kim San* at [34] and [36]). There is in this situation no scope for the employee to recover "stigma loss".

238 The plaintiff's case is simply that the LCA Group committed a breach of the implied term of mutual trust and confidence when it terminated his employment on 29 June 2015. The plaintiff does not allege that the LCA Group breached the implied term in any other way. Thus, for example, it is not the plaintiff's case that the LCA Group engaged in corrupt business practices which caused a stigma to attach to its employees, as in *Malik*.

239 Therefore, even if the LCA Group had terminated the plaintiff's employment in breach of the implied term of mutual trust and confidence, there would be no scope for the plaintiff to recover any damages under the rule in *Malik*. The result is *a fortiori*, given that I have found that the LCA Group committed *no* breach of contract whatsoever in terminating the plaintiff's employment. It was the plaintiff who breached the contract by his sustained and wilful insubordination and misconduct from February 2015 to June 2015.

240 The claim for stigma loss is dismissed. There is no breach of the implied term to sustain such a claim.

241 That suffices to dispose of the entirety of the plaintiff's six claims against the defendants. I now turn to consider the LCA Group's counterclaim against the plaintiff.

The LCA Group's counterclaim

242 The plaintiff does not seriously dispute the facts underlying the LCA Group's counterclaim. From March 2015 to June 2015, the plaintiff forwarded 24 emails[208] from his work LVMH email account to his personal Hotmail account.[209] He had received these emails at his LVMH email address in the course of and for the purposes of his employment. He forwarded these emails to his Hotmail account without the LCA Group's knowledge and without its consent.[210] His purpose in forwarding these emails was to supply these emails to his lawyers in order to seek legal advice on his claims against the LCA Group[211] and to preserve and protect those claims.[212]

243 The LCA Group's counterclaim alleges that the plaintiff dealt with these 24 emails (and the information contained in them and attached to them) in breach of an obligation of confidence which he owed to the LCA Group in equity (*LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 ("*LVM*"); *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130 ("*I-Admin*"))[213] and in breach of a contractual obligation of confidentiality that

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208 DCS at para 213; Chee's AEIC at para 48 and Exhibit CYL-16..

209 Chee's AEIC at para 45; 3 February 2021 Transcript at p 83 lines 4–7; Reply at para 20.

210 D&CC para 87 read with para 68(b).

211 3 February 2021 Transcript at p 92 line 10 to p 93 line 18; Plaintiff's AEIC at paras 90 and 419.

212 Plaintiff's AEIC at paragraph 90; PRCS at para 186.

213 DCS at para 212; D&CC paras 84 to 87 read with para 68.

he owed to the LCA Group under the express and implied terms of his employment contract. The LCA Group accordingly seeks: (a) damages; (b) an account of the profits the plaintiff has made and of the payments he has received by reason of his breach of confidence; and (c) a permanent injunction against the plaintiff restraining him from using or disclosing the emails and requiring him to deliver up the emails and all copies of them.[214]

244 I deal with the plaintiff's alleged obligation of confidence in equity before considering his alleged contractual obligation of confidentiality.

Obligation of confidence in equity

The law

245 In considering the law on the obligation of confidence in equity, it is useful to keep separate three conceptually distinct questions: (a) the circumstances which give rise to the obligation of confidence; (b) the conduct which amounts to a breach of the obligation of confidence; and (c) the nature and the extent of the remedy to be granted for the breach. A subsidiary issue on each of these three questions is the allocation of the burden of proving the factual predicates relevant to each question.

(1) The three questions

246 On the first of the three questions, two Court of Appeal decisions in 2020 have established that a person (X) will owe an obligation of confidence in equity

214 D&CC prayers (1), (2), (4), (5) and (6) read with the Schedule.

to another person (Y) in relation to certain information if and only if two factual predicates are proven:

(a) The information has the necessary quality of confidence about it (*LVM* at [15(a)] and [16]; *I-Admin* at [20], [43] and [61]).

(b) Y imparted the information to X in circumstances importing an obligation of confidence binding upon X's conscience in equity (*LVM* at [15(b)] and [17]; *I-Admin* at [20(b)], [43] and [61]). This predicate will be satisfied even if Y did not, on the facts, voluntarily and consciously make the information known to X (in the ordinary sense of the word "impart") so long as X first accessed or acquired the information from Y by surreptitious means, *ie* without Y's knowledge or without Y's consent (*I-Admin* at [61]; *Vestwin Trading Pte Ltd v Obegi Melissa* [2006] 3 SLR(R) 573 at [45]–[50]; appeal allowed on other grounds in *Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR(R) 540).

247 On the second question, it is obviously a breach of the obligation of confidence for X to misuse the information to Y's detriment (*I-Admin* at [50]). But it is equally a breach of the obligation: (a) for X to create a real and sensible possibility that he will misuse the information (*LVM* at [15(c)] and [20]–[21]); and (b) for X improperly to threaten the confidentiality of the information (*I-Admin* at [51] and [54]). Thus, X can breach the obligation even if his conduct causes no harm or damage (in the ordinary sense of the word "detriment") to Y (*I-Admin* at [50]–[51]). In particular, X's conduct in surreptitiously accessing or acquiring Y's confidential information without Y's knowledge or Y's consent can both give rise to an obligation of confidence and also amount to a breach of the obligation of confidence (*I-Admin* at [61]).

248 On the third question, because the obligation arises in equity, only equitable remedies are available as relief. And the available remedies being equitable, they are granted only in the discretion of the court, not as of right (*I-Admin* at [67]). The available remedies include a final injunction. The injunction can be granted in prohibitory form, either to bring an end once and for all to an ongoing breach of the obligation or *quia timet* to prevent a future breach of the obligation. The injunction can also be granted in mandatory form, to require X to deliver up or to permanently erase the information in order to eliminate any possibility of X misusing the information or to eliminate any improper threat to its confidentiality (*I-Admin* at [68]). The available remedies include the court's power to grant damages in lieu of an injunction under paragraph 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), read with s 18(2) of that Act (*I-Admin* at [77]). Finally, the available remedies include the court's power to order an account of profits and to award equitable compensation (*I-Admin* at [72]).

(2) The burden of proof

249 One each of these three questions, the burden of proof is allocated as follows.

250 Y bears the legal burden of proof on both of the factual predicates necessary to establish that X owes Y an obligation of confidence (*LVM* at [23]).

251 There is a division of opinion as to who bears the burden of proof on the issue of breach. The Court of Appeal's decision in *LVM* proceeded on the basis that the burden rests on Y to prove the breach (*LVM* at [23]). However, a differently constituted coram of the Court of Appeal held in *I-Admin* that the burden rests on X to establish that his conduct has left his conscience unaffected (*I-Admin* at [61]). Allocating the burden of disproving the breach to X in this

way, the Court of Appeal held in *I-Admin*, vindicates the full extent of Y's interest in the information which equity protects: (a) the interest in preventing X from making a wrongful gain or profit from Y's confidential information (*I-Admin* at [50]); and (b) Y's interest in avoiding the threat of X inflicting a wrongful loss on Y by creating an improper threat to the confidentiality of Y's information (*I-Admin* at [53]–[55] and [59]).

252 One way of reconciling the division of opinion in *LVM* and *I-Admin* is by noting that in *LVM*, X was a law firm and first acquired the confidential information in the course of representing Y's *opponent* in litigation *against* Y. Y therefore knew full well that X was acquiring the information when X first acquired it. And Y's consent to that acquisition was irrelevant because Y had no contractual or other nexus to X. In *I-Admin*, on the other hand, X first acquired the confidential information surreptitiously, without Y's knowledge and without Y's consent. And X did so in a situation where X was an employee of Y, thereby establishing the necessary nexus between them to make both Y's knowledge and Y's consent relevant.

253 On the issue of remedies, there is no division of opinion: the legal burden of proof in relation to the factual predicates relevant to persuading the court to exercise its discretion to grant one of the remedies available rests on Y (*LVM* at [23]. This includes satisfying the court as to the appropriate nature and extent of the remedy. That does not, however, preclude the evidential burden of proof shifting to X on any particular aspect of Y's case (*LVM* at [24]; *I-Admin* at [69]).

The law applied to the facts

(1) The plaintiff owed an obligation of confidence to the LCA Group

254 The plaintiff owes an obligation of confidence in equity to the LCA Group because both factual predicates necessary for the obligation to arise are satisfied. On the first (see [246(a)] above), he concedes that the emails include at least some information which has the necessary quality of confidence about it.[215] On the second (see [246(b)] above), he does not argue that the LCA Group sent the emails to him in circumstances which did not import an obligation of confidence.

255 As a result, the plaintiff came under an obligation of confidence to the LCA Group from the date on which he received each email. The obligation of confidence did not arise on the date on which he forwarded that email to his Hotmail account. This is so even though the plaintiff's conduct in forwarding each email was surreptitious conduct, undertaken without the LCA Group's knowledge or consent. That type of surreptitious conduct is capable, in itself, of satisfying the second factual predicate for an obligation of confidence to arise (see [246(b)] above). But the critical point in this case is that the plaintiff had, at the time he forwarded these emails, already acquired these emails with the LCA Group's knowledge and consent. That occurred when the LCA Group sent each of the emails to the plaintiff's LVMH account, with the plaintiff as an addressee, as a cc party or as a bcc party. This is not a case where, for example, the plaintiff gained unauthorised access to *another* employee's emails and forwarded them to his personal Hotmail account. Therefore, it is not the plaintiff's surreptitious conduct in forwarding these emails to his Hotmail account between March and June 2015 which gave rise to his obligation of

[215] 3 February 2021 Transcript at p 86 line 24 – p 87 line 8.

confidence. The obligation arose and bound him from the time he first acquired the emails.

(2) The plaintiff breached his obligation of confidence

256 The burden of proving a breach of the obligation of confidence rests on the LCA Group. This is because the plaintiff first acquired the emails with the LCA Group's knowledge and consent. This case is in that sense more akin to *LVM* rather than to *I-Admin*. There is therefore no burden on the plaintiff to disprove breach.

257 The plaintiff breached his obligation of confidence to the LCA Group. He did so when he forwarded the emails from his LVMH email account to his personal Hotmail account between March and June 2015. He did this without the LCA Group's knowledge and without its consent. The LCA Group did not discover his conduct until April 2016,[216] a month after the plaintiff commenced this action. The plaintiff's conduct is the virtual world's equivalent of taking physical documents which the LCA Group had given to the plaintiff for the purposes of his employment, duplicating the documents, leaving the originals in the office and taking the copies home. The effect of the plaintiff's conduct was twofold: (a) he deprived the LCA Group of the exclusive power in a practical sense to control access to and prevent disclosure of the information contained in the emails; and (b) he acquired for himself an unrestricted power in a practical sense to have access to the information contained in the emails and to disclose it for his own purposes. His conduct was a direct infringement of the LCA Group's wrongful loss interest identified in *I-Admin* (at [53]–[55]). That

216 Chee's AEIC at para 45.

interest is engaged even outside the paradigm situations of unauthorised use or disclosure of the information (*I-Admin* at [60]).

(3) The plaintiff's grounds for denying the breach

258 The plaintiff denies that he breached his obligation of confidence on two grounds. Neither ground negates his breach.

259 First, he asserts that it was common practice in the LCA Group for employees to forward confidential material to their personal email addresses.[217] He also asserted,[218] but abandoned in his closing submissions,[219] an allegation that the LCA Group's information technology staff had approved this practice on previous occasions. That may well be true. But the evidence before me suggests that the LCA Group condoned this practice only for work-related purposes. The plaintiff had no work-related purpose for forwarding these emails to his Hotmail account. This alleged common practice, even if established, would not negate his breach.

260 Second, the plaintiff submits that it is not a breach of an obligation of confidence for X to copy and disclose confidential information to X's solicitors and to the court in order to establish or protect his legal rights in litigation against Y or to defend himself in litigation by Y. For this proposition, the plaintiff relies on *Leong Hin Chuee v Citra Group Pte Ltd* [2015] SGHC 30 ("*Leong Hin Chuee*") at [228]–[229].[220]

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[217] Reply at para 20; Plaintiff's AEIC at para 88; 3 February 2021 Transcript at p 88 lines 19–20.

[218] Reply at para 20; Plaintiff's AEIC at para 89.

[219] Defendants' reply closing submissions dated 12 May 2021 at para 101(c).

[220] PRCS at para 187.

261 In *Leong Hin Chuee*, Tan Siong Thye J held (at [228]) as follows:

> 228 I find that while the information and documents are confidential, there was no breach of confidence by the plaintiff. The duty to maintain confidentiality is not an unqualified one and the scope of confidence is not so wide such that the confidential information cannot be used for the purposes of establishing one's claim. …
>
> 229 Balancing the rights of the plaintiff and [the defendants] I find that the balance lies with the plaintiff. Disclosing the confidential information for the purposes of legal proceedings is necessary for the plaintiff to have access to justice and establish his legal rights. They were disclosed in the interests of justice and to enable the truth to be elucidated, facilitating the litigation process. Therefore, there was no breach of confidentiality by the plaintiff.

262 The plaintiff's reliance on *Leong Hin Chuee* is misplaced for two reasons.

263 First, *Leong Hin Chuee* was decided five years before the decisions in *LVM* and in *I-Admin*. *LVM* and *I-Admin* are both Court of Appeal decisions and are therefore, of course, binding on me. Both of those decisions now recognise that the full extent of Y's legitimate interest in confidential information goes beyond simply preventing detriment in the sense of misuse or disclosure and extends to eliminating a real and sensible possibility that the information will be misused and eliminating an improper threat to the confidentiality of the information (see [247] above). Conduct by X which infringes upon Y's legitimate interest amounts to a breach of confidence, whether or not it is undertaken in the context of litigation against Y. The plaintiff's conduct infringed both interests.

264 Second, the proposition from *Leong Hin Chuee* on which the plaintiff relies (see [260] above) is against the weight of authority. There is English authority that it is a breach of confidence for an employee to forward emails

containing information confidential to his employer to his personal email account in order to deploy that information in litigation by or against an employer. As the English authorities recognise, the proper course for an employee in that position is not to breach his obligation of confidence but to honour the obligation and to use the proper procedural machinery to compel disclosure of the confidential material from the employer, *ie* by seeking pre-action or in-action discovery or by administering interrogatories (Toulson & Phipps on Confidentiality 4th Ed. (Sweet & Maxwell, 2020) at [13-012]; *Brandeaux Advisers (UK) Limited v Chadwick* [2010] EWHC 3241 at [23]; *Tokio Marine Kiln Insurance Services Ltd v Yang* [2013] EWHC 1948 at [20]; *Farnan v Sunderland Association Football Club Ltd* [2015] EWHC 3759 at [77]).

265 The tenor of the English authority must be correct as a matter of principle. If the law were otherwise, it would amount to granting a licence to every disgruntled employee contemplating a claim against his employer or fearing a claim by his employer to duplicate and appropriate reams of confidential information of potential relevance to the claim. That would not only be employment law anarchy, it would also eviscerate the additional legitimate interest which the employer has in its confidential information which *I-Admin* has now explicitly recognised.

266 I therefore do not accept that copying and disclosing the emails to the plaintiff's solicitors or to the court for the purposes of establishing or protecting his legal rights as against the LCA Group in any way negates the plaintiff's breach of his duty of obligation.

267 I also do not accept that assessing whether a breach of confidence has taken place is a discretionary balancing exercise (*cf Leong Hin Chuee* at [229]).

(4) Remedy

268 I now turn to the question of remedy. Despite my finding that the plaintiff owed an obligation of confidence to the LCA Group and breached it, I decline to exercise my discretion in favour of granting the LCA Group any of the equitable remedies it seeks. I arrive at that conclusion for four reasons.

269 First, the LCA Group adduced no evidence: (a) that the plaintiff had any purpose in forwarding the emails to himself other than disclosing them to his lawyers; (b) that the plaintiff made any use of the emails other than disclosing them to his lawyers and the court; (c) that the plaintiff is likely to misuse or disclose the emails in the future; (d) that the plaintiff made or is likely to make any electronic or physical copies of the emails; (e) that the plaintiff's breach has caused the LCA Group any loss or damage (despite a bare plea to that effect); or (f) that the plaintiff's breach yielded him any profits or other gains. I therefore accept the plaintiff's evidence: (a) that the only purpose for which he forwarded these emails to his Hotmail account was to disclose them to his lawyers in order to seek legal advice; and (b) that the only use he has made of the emails was to disclose them to his lawyers for the purpose of seeking legal advice and to the court for the purpose of this litigation.

270 Second, the LCA Group does not suggest that it would not have disclosed the emails itself in discovery in this action in any event, *ie* even if the plaintiff had not forwarded them to his Hotmail account. And the LCA Group has indeed disclosed the emails in this action, albeit subject to redaction. Therefore, the plaintiff's lawyers and the court would have come to know the contents of the emails with or without the plaintiff's breach of confidence. The plaintiff's conduct merely accelerated the disclosure.

271 Third, the emails and the information contained in them and in their attachments are now at least seven years old. The LCA Group does not suggest that their contents are so confidential that they are worthy of protection by a *quia timet* or mandatory injunction to this day.

272 Fourth, insofar as it is considered desirable or necessary for the court to mark its disapproval of the plaintiff's breach, I point out that the primary purpose of a remedy, even in equity, is to protect or compensate the party who has been wronged and not to mark disapproval or to punish the wrongdoer. In any event, my finding of breach has exposed the plaintiff to a *prima facie* liability for costs. So in that sense, the LCA Group will *prima facie* be compensated for the only actual loss which the plaintiff's breach of confidence has caused it: the costs of this counterclaim.

273 I therefore do not accept that the grant of any of the remedies which the LCA Group claims for the plaintiff's breach of confidence is warranted.

Contractual obligation of confidence

274 As for the contractual obligation of confidence, the plaintiff admits that he owed that obligation to the LCA Group in respect of the emails under the express and implied terms of his employment contract.[221]

275 His only defence to this aspect of the LCA Group's counterclaim to is to deny that his conduct amounted to a breach of this obligation.[222] His grounds for denying breach are the same two grounds I have analysed and rejected at

221 D&CC para 85 read with R&DCC para 24; D&CC para 68(b) and para 87 read with R&DCC para 25.

222 R&DCC para 25.

[258]–[266] above. I reject them again in the context of his contractual obligation of confidence for the same reasons. In any event, liability for a breach of contract is strict. It therefore matters not why the plaintiff breached his contractual obligations, even if it was for the purest of motives. The plaintiff does not suggest that either of his two grounds affords any contractual defence, *eg* by becoming incorporated as a terms of his employment contract or by giving rise to an estoppel.

276 The plaintiff is therefore *prima facie* liable to the LCA Group for breaching his contractual obligation of confidence. As a remedy for this breach, however, I decline to award the LCA Group any form of permanent injunction or substantive damages. That is for the same reasons set out above at [268]–[273]. Quite simply, the LCA Group has failed to show that it has suffered any loss or damage or will suffer any loss or damage by the plaintiff's breach of contract. But that does not suffice to negate the LCA Group's right to recover damages from him. Simply by virtue of his breach of contract, the plaintiff's employer at the time of the breach is entitled to an award of nominal damages against the plaintiff. I assess those nominal damages at $1,000. The plaintiff's employer between March and June 2015 was the second defendant under the June 2014 Contract. The plaintiff will therefore have to pay $1,000 as nominal damages to the second defendant for breach of his employment contract.

Conclusion

277 The plaintiff mounted an elaborate, contrived and exaggerated claim in every respect. It has failed in every respect. He showed himself to be an employee with a vastly inflated sense of his own skills and worth. He showed himself to be a litigant and a witness with only a loose relationship with the truth.

278 For all of the foregoing reasons, I dismiss all of the plaintiffs' claims. I also allow the second defendant's counterclaim. I therefore enter judgment against the plaintiff in favour of the second defendant on the counterclaim for $1,000.

279 The only remaining matter to deal with are the costs of the claim and the counterclaim. I now invite the parties to ascertain the other party's position on costs and to reach agreement on costs as far as possible. To the extent that no agreement can be reached, the parties are to file and serve, within three weeks of the date on which this judgment is handed down, written submissions on costs not exceeding 7,500 words (excluding title page and footnotes).

280 Each party's written submissions should address: (a) who should pay and who should receive the costs of the claim and the counterclaim, or any part thereof; (b) whether those costs should be awarded on the standard basis or the indemnity basis; (c) whether those costs should be taxed or fixed; and (d) in the latter event, the quantum of those costs.

281 Further, each party is to justify its submissions on the quantum of costs by reference to: (a) the costs schedules which have been filed, including the costs schedule filed by that party itself; (b) the applicable costs guidelines in Appendix G of the Supreme Court Practice Directions entitled "Guidelines for Party-and-Party Costs Awards in the Supreme Court of Singapore"; (c) any formal offers to settle or offers of compromise without prejudice save as to costs which have been made and which carry costs consequences; and (d) any taxation precedents which may be comparable and relevant. The written submissions should also address any interlocutory matters for which costs were

not fixed but were ordered instead to be in the cause, to be reserved or to be a particular party's costs in any event.

Vinodh Coomaraswamy
Judge of the High Court

Roderick Martin SC, Rajaram Ramiah, Senthi, Dayalan, Nandhu, Gideon Yap, Eugene Tan (RHTLaw Asia LLP) for the plaintiff;
Tan Chee Meng SC, Jenny Tsin, Alma Yong, Chang Qi-Yang, Koh Jiawen, Ephraim Tan (Wong Partnership LLP) for the defendants.
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