Xia Zhengyan *v* Geng Changqing
[2015] SGCA 22

Case Number	: Civil Appeal No 86 of 2014
Decision Date	: 10 April 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Quentin Loh J
Counsel Name(s)	: Chia Boon Teck, Wong Kai Yun and Ang Hou Fu (Chia Wong LLP) for the appellant; Ng Kim Beng and Cynthea Zhou Jingdi (Rajah & Tann Singapore LLP) for the respondent.
Parties	: Xia Zhengyan — Geng Changqing

Contract – Contractual terms – Express terms – Interpretation of term

Contract – Misrepresentation

10 April 2015 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal from the decision of the High Court Judge ("the Judge") whose written grounds of decision are published as *Xia Zhengyan v Geng Changqing* [2014] SGHC 152 ("the GD"). As we shall see in a moment, the issues are straightforward and the applicable legal principles are also generally clear. However, the difficulty lies in the application of the legal principles to the *facts* of the case and, in relation to the issue of contractual interpretation, the (simultaneous) need to bear in mind the precise *context* from which the relevant agreement arose.

2 In brief, this appeal concerns the Appellant's purchase of part of the Respondent's interests in a chain of private children's education centres operating under the "Apple Plus" name. The Appellant was the plaintiff below and she put forward two types of claims. One claim was for breach of contract, and the other was for fraudulent misrepresentation. Both of these claims failed wholly before the Judge. There was also a counterclaim put forward by the Respondent which the Judge allowed. Before us, the Appellant challenges the dismissal of her claims for breach of contract and misrepresentation as well as the Judge's decision allowing the Respondent's counterclaim.

3 In so far as the Appellant's claim in contract is concerned, the issue is simply the scope of the Respondent's shares and interests which parties agreed would be transferred to the Appellant. The Respondent contends that what was to be transferred was no more than her shares in what might roughly be called the head or master company of the Apple Plus School business. The Appellant's case, on the other hand, is that this was not the only thing that the Respondent was contractually obliged to transfer to her. She says that the Respondent was *also* obliged to transfer half of her other shares and interests in the various companies and entities within the Apple Plus business.

4 In so far as the claim in misrepresentation is concerned, the Appellant alleged that the Respondent made no fewer than 22 misrepresentations to her over a period of approximately ten months, and that these misrepresentations were made fraudulently. According to the Appellant, the

broad effect of all these false representations was to convince her that the Apple Plus business had enjoyed success in Singapore and Malaysia and had genuine plans to expand further, not only in these two countries but also in other parts of South-East Asia and beyond, *eg*, Australia and Dubai. She says that she was thus induced into agreeing to purchase the Respondent's shares and interests in the business.

5 In so far as the Respondent's counterclaim is concerned, this is in relation to an amount of $300,000 which was placed by the parties into a time deposit joint account and which was transferred to the Appellant's personal account a year later on maturity of the time deposit. The Respondent's case is simply that the Appellant may not keep the $300,000 for herself but is contractually obliged to transfer it back to the joint account.

Background facts

Structure of the Apple Plus business

6 As the Judge noted in the GD (at [4]), the Appellant is a Singapore permanent resident from China. She is a homemaker with a background in business and teaching, and holds a master's degree in education from the University of Cardiff.

7 The Respondent was a Singapore permanent resident from China until she became a Singapore citizen in late 2012. She is the founder of the Apple Plus business. The business operates on a franchising model under which the head or master company is Apple Plus School International Pte Ltd ("the Company"); that is to say, the Company enters into franchise agreements with other companies under which it grants them the right to use the name "Apple Plus School" and provides them with teaching and operational support and teaching materials. In return, the companies pay the Company franchise fees, royalties and materials fees. We will refer to these companies with which the Company has franchise agreements as "Franchisees". The Company does not own any shares in the Franchisees.

8 As at 22 September 2011, the Company had franchise agreements with four Franchisees in Singapore and one in Malaysia. This date is important because it is when the Appellant and Respondent first discussed with any seriousness the possibility of the Appellant investing in the Apple Plus business, and it is when the Respondent is alleged to have begun her campaign of misrepresentations. Each of the four Franchisees in Singapore operated a school under the Apple Plus brand name and the Franchisees were named according to the locations of the respective schools, as follows:

(a) Apple Plus School (Bukit Timah) Pte Ltd, registered on 8 March 2010;

(b) Apple Plus School (Telok Kurau) Pte Ltd, registered on 20 May 2010;

(c) Apple Plus School (Tampines) Pte Ltd, registered on 26 May 2010; and

(d) Apple Plus School (Serangoon) Pte Ltd, registered on 12 January 2011.

9 The Franchisee in Malaysia went by the name Apple Plus Sdn Bhd. The agreement between the Company and this Malaysia Franchisee was made on what the Respondent calls an "area franchise" basis. In contrast to the Singapore Franchisees which proceeded on a "single unit franchise" footing, meaning that each Franchisee could operate only one school, the Malaysia Franchisee was at liberty to run multiple schools within a specified area and it was also free to enter into sub-franchise

agreements with third parties.

10 As at 22 September 2011, the Respondent was the sole shareholder of the Company. Although, as we have mentioned, the Company did not own shares in the Franchisees, the Respondent herself held shares in all but one of the Franchisees described above and her shareholdings were as follows:

(a) 26% in Apple Plus School (Bukit Timah) Pte Ltd;

(b) 25% in Apple Plus School (Tampines) Pte Ltd;

(c) 25% in Apple Plus School (Serangoon) Pte Ltd (subsequently sold by the Respondent to a third party on 22 October 2012); and

(d) 50% in Apple Plus Sdn Bhd.

11 It should also be noted that the Respondent is the sole proprietor of an unincorporated entity known as Apple Plus School. We shall refer to this as "the Sole Proprietorship". As the Judge noted in the GD (at [7]), the Sole Proprietorship was the registered proprietor of the "Apple Plus School" and "Monkey Abacus" trade marks in Malaysia while the Company was the registered proprietor of these trade marks in Singapore.

Initial contact

12 The initial contact between the Appellant and the Respondent's Apple Plus business occurred on 8 September 2011. According to the Appellant, she attended the "Franchising & Licensing Asia" exhibition held on this particular day at Marina Bay Sands with the intention of looking for a suitable business to invest in, and she came across the Respondent's booth. She left her contact details and about a week and a half later, a franchise consultant sent her an e-mail inviting her to an "Apple Plus Discovery Day" to be held at the Serangoon school on 22 September 2011.

13 Thus, on 22 September 2011, the Appellant attended this "Apple Plus Discovery Day" and spoke to the Respondent. The Appellant indicated that she was not interested in participating as a shareholder in just another Franchisee; instead, she wanted to invest in the Company itself. The Appellant alleges that, in the course of this discussion, the Respondent made seven oral misrepresentations relating to the Company in order to entice her into investing in it. We will describe these seven alleged misrepresentations later in this judgment together with the other 15 misrepresentations that were alleged to have been made.

Early enquiries

14 Thereafter, the Appellant returned to China and consulted her family about investing in the Apple Plus business. She returned to Singapore sometime in the middle of October 2011. She met the Respondent on 17 October 2011 to discuss the form as well as the terms of the proposed investment in the business. The following day, the Appellant sent the Respondent an e-mail requesting (i) the Company's general operation profile, (ii) the patents and qualifications held by the Company, (iii) the Company's current financial report, and (iv) the Company's business plan for the coming years.

15 The Respondent replied two days later, on 20 October 2011. She told the Appellant that it was difficult for her to produce the materials sought because the Company was "still in a loss-making state". However, she was able to attach "a report of the development and current status" of the Company. Much of this report was taken up by descriptions of the Respondent's plans to increase the

extent of the Apple Plus Schools' collaboration with government-linked entities in Singapore and to expand into various overseas markets. The Appellant alleges that this report gave rise to three misrepresentations, as we shall elaborate on later. Having received this report from the Respondent, the Appellant wrote back the following day. She told the Respondent that she had "read through [the] report carefully", and continued by saying, "There is no relevant data and the situation is somewhat special. You [*sic*] sincerity is appreciated and your enthusiasm has been infectious."

Negotiations between the parties

16 As the Judge noted in the GD (at [12]), there were conflicting accounts as to what happened next. The Respondent says that on 1 November 2011, she agreed to sell half her shares in the Company to the Appellant for $1.5 million. The Appellant says that, in mid-November 2011, the Respondent represented to her that, with the Company's global expansion plans, half of the shareholding in the entire group of Apple Plus entities – that is, shareholding not only in the Company but also in the Franchisees – would be worth $1.5 million. This, the Appellant says, was a misrepresentation.

17 In the meantime, three more Franchisees were registered in the middle of November 2011, bringing the total number of Singapore Franchisees to seven. These were the (i) Redhill, (ii) Thomson, and (iii) West Coast franchises.

18 By 29 November 2011, the negotiations between the Appellant and Respondent were sufficiently advanced for the Respondent to send the Appellant a memorandum of understanding ("MOU") and a draft sale and purchase agreement. The MOU was drafted by lawyers instructed by the Respondent, but the sale and purchase agreement appears to have been drafted without assistance from lawyers.

19 Approximately half a month later, on 15 December 2011, the Respondent sent the Appellant an e-mail, through her administrative manager Yan Yuan, which simply stated "Indonesia MOU for your reference" and which attached an unsigned MOU stated to be between the Indonesian Ministry of Education and the Company. The Appellant alleges that this amounted to a false representation that the Company was going to sign this particular MOU with the Indonesian authorities around this date, in order to make her believe that the Company's expansion plans were going well.

20 Moving into the following year, on 2 January 2012, the Respondent sent the Appellant an SMS which said, amongst other things, that "letters of intent for sole agency in Vietnam and Indonesia have been signed". The Appellant's story is that, around the time that this SMS was sent, the Respondent told her over the telephone that representatives from Vietnam and Indonesia had signed agreements with the Respondent to expand the Apple Plus group of companies in Vietnam and Indonesia. What the Respondent allegedly stated over the telephone was, in the Appellant's view, a misrepresentation.

21 On 6 January 2012, the Respondent sent the Appellant a message which read as follows: "I was calling you because of the matter regarding Indonesia. I am talking to them now." The Appellant alleges that this amounted to a false representation that the Respondent was engaging in talks with representatives from Indonesia to set up Apple Plus Schools in Indonesia.

22 That same day, the Respondent sent the Appellant another draft sale and purchase agreement which proposed different payment terms. On the next day, 7 January 2012, the Appellant responded with a draft agreement of her own.

23 On 10 January 2012, the Respondent sent an SMS to the Appellant which read as follows: "I will be going to Malaysia in awhile, and discuss about the school lecture matters. Do you have the permit? We can go there together." The Appellant states that this SMS, together with what the Respondent said to her over the telephone around this time, amounted to a misrepresentation that the Respondent was negotiating with some parties in Malaysia to open Apple Plus Schools in a few other countries.

24 A few days later, on 13 January 2012, the Respondent sent the Appellant an SMS which read as follows: "I am going to Malaysia, to discuss about the agent in Dubai and Philippines, this is second discussion, my husband will bring me there, I will return tonight." The Appellant's case appears to be that this SMS, together with telephone calls around this period, amounted to a misrepresentation that the Respondent was, in Malaysia, engaged in a second round of talks with representatives from Dubai and the Philippines to open Apple Plus Schools in these two countries.

Signing of the sale and purchase agreement

25 On 17 January 2012, the Appellant and Respondent signed a Chinese version of a sale and purchase agreement ("the Agreement"). Two days later, the Appellant alleges, the Respondent brought her to see a geomancer and she was told by the geomancer that (i) she was suited to investing in education-related businesses, (ii) the success of her investment depended totally on the Respondent, and (iii) the Respondent excelled at running the business and she should not interfere in the Respondent's running of the business. The Appellant's position is that these were all false representations and were a result of collusion between the Respondent and the geomancer.

26 The following day, on 20 January 2012, the Appellant and Respondent signed an English translation of the Agreement. As the Judge did in the GD (at [13]), we shall set out a substantial part of the Agreement in full:

> Both parties have, upon consultation, entered into the following agreement in respect of the transfer of shares in Apple Plus School International Pte Ltd (hereinafter referred to as Company).
>
> 1. Pursuant to the terms of this Agreement, [the Respondent] shall transfer the 50% share in Apple Plus School International Pte Ltd (specifically including 50% share in Apple Plus School International Pte Ltd, 50% share in Apple Plus School including trade mark and patent of Apple Plus School and Monkey Abacus, 12.5% share in Apple Plus School (Tampines) Pte Ltd, 13% share in Apple Plus School (Bukit Timah) Pte Ltd, 12.5% share in Apple Plus School (Serangoon) Pte Ltd, 12.5% share in Apple Plus School (Thomson) Pte Ltd and 25% share in Apple Plus School (Malaysia)) held by her to [the Appellant] in accordance with the provisions of the law.
>
> 2. [The Appellant] agrees to accept the shares to be transferred, the transfer price shall be SGD1,500,000 (Singapore Dollar one and a half million), [the Appellant] shall, upon the successful transfer of the shares, enjoy the corresponding rights and interests accorded to a shareholder under the transferred shares and shall assume the corresponding obligations.
>
> 3. Mode of payment, time and supplementary notes: [The Appellant] to pay in cash (by cheque) in 3 installments, specific dates as follows:
>
> > (1) Before 31 January 2012, SGD500,000 (Singapore Dollar half a million) (of which SGD200,000 shall be placed in the Company's account and to be used for the Company's operations; payment of SGD100,000 to be made on the date of signing of the Agreement).

(2) Before 30 April 2012, SGD500,000 (Singapore Dollar half a million).

(3) Before 30 June 2012, SGD500,000 (Singapore Dollar half a million) (of which SGD300,000 is to be deposited into a bank account that requires the joint signatures of [the Respondent] and [the Appellant] for withdrawals. And if within 2 years from the effective date of this Agreement, (January 2012 to January 2014), total bonus received by [the Appellant], excluding salary, exceeds SGD500,000, all monies in the joint account shall be given to [the Respondent] unconditionally; if within 4 years from the effective date of this Agreement, (January 2012 to January 2016), total bonus received by [the Appellant], excluding salary, does not exceed SGD500,000, all monies in the joint account shall be given to [the Appellant] unconditionally).

4. Creation of Shareholder: Upon [the Appellant's] payment of the 2nd instalment to [the Respondent], i.e. after 30 April 2012, [the Appellant] shall be accorded the status of a shareholder and shall become an official shareholder of the Company. The relevant formalities for registration of changes shall be completed within 15 days.

5. Rights and obligations

(1) Within 6 months from the date of signing this Agreement, [the Respondent] shall be responsible for the Company's major decisions while [the Appellant] shall participate in its management; after the 6-month period, [the Respondent] and [the Appellant] shall be jointly involved in the Company's decision-making process and management.

(2) [The Appellant] shall from the day she becomes the Company's shareholder, be jointly responsible with [the Respondent] for the Company's profits and losses.

6. Warranties, Undertakings and Force Majeure

(1) [The Respondent] warrants that she has full disposition rights in respect of the transfer of the Company's shares (no mortgage, pledge or security created and exempted from any 3rd party claims), otherwise, all liabilities arising thereof shall be borne by [the Respondent].

(2) A franchisee currently in operation shall continue to operate as per the agreement entered into with the Company, the signing of this Agreement shall in no way affect the operations of the franchisee.

…

7. Dispute Resolution

...

(2) Both parties agree that for the period between the signing of the Agreement to the time [the Appellant] becomes a shareholder officially, if [the Respondent] refuses to transfer the shares to [the Appellant], [the Respondent] must return all monies paid by [the Appellant] within 1 month and to pay [the Appellant] a sum of SGD100,000 in penalty.

…

27 We would reiterate that, as at 20 January 2012, the Respondent was the sole shareholder of

the Company. In addition, she owned the Sole Proprietorship and was also a shareholder in four Singapore Franchisees and one in Malaysia in the following manner:

(a) 25% in Apple Plus School (Tampines) Pte Ltd;

(b) 26% in Apple Plus School (Bukit Timah) Pte Ltd;

(c) 25% in Apple Plus School (Serangoon) Pte Ltd (subsequently sold by the Respondent to a third party on 22 October 2012);

(d) 25% in Apple Plus School (Thomson) Pte Ltd; and

(e) 50% in Apple Plus Sdn Bhd.

28 In essence, the Appellant's claim in contract rests on the contention that the words in cl 1 of the Agreement contained in parentheses and starting with "specifically including…" obliged the Respondent to transfer not only half of her shares in the Company but *also* half of all her interests in the Franchisees and the Sole Proprietorship. The Respondent's position, however, is that her obligation under cl 1 was to transfer half of her shares in the Company and nothing more than that.

Events subsequent to the signing of the Agreement

29 From January 2012, the Appellant was involved in the Apple Plus business. It is not disputed that she had performed at least some administrative tasks, but, by and large, parties differ on the extent of the Appellant's participation in the business. The Appellant claims that she was marginalised by the Respondent and given only menial tasks, and that the Respondent secretly diverted business away from the Company to other entities which she controlled in order to reduce the value of the Appellant's stake in the Company. The Respondent, on the other hand, states that she viewed the Appellant as a business partner, except that the Appellant was neither committed nor competent and thus created trouble for the business instead.

30 The Appellant also alleges that, even after the English version of the Agreement was signed on 20 January 2012, the Respondent continued to make misrepresentations to her. Five such misrepresentations were alleged to have been made up until June 2012, and we shall describe them later.

31 What is clear is that in October and November 2012, the parties began to speak about the possibility of one of them buying over the other's shares. These discussions did not come to fruition and eventually the Appellant commenced the present action against the Respondent.

Facts relating to the Respondent's counterclaim

32 On 4 July 2012, the parties opened a joint time deposit bank account into which they deposited $300,000 for a term of 12 months. A year later, on 4 July 2013, this sum of $300,000 was credited into the Appellant's account on maturity of the time deposit. The Appellant declined to transfer it back to the joint account as requested by the Respondent.

The alleged misrepresentations

33 This is a convenient point at which to set out all 22 misrepresentations that the Respondent is alleged to have made to the Appellant. In the course of narrating the facts of this case, we have already mentioned some of these misrepresentations. Nonetheless, we shall list all of them here in

order that they might be assigned letters of the alphabet which we will hereafter use to refer to them. We shall adopt what was set out by the Judge in his GD (at [27]):

(a) The Respondent owned a company which was the "headquarters of six franchised companies" which operated the Apple Plus School as at 22 September 2011;

(b) The Respondent owned shares in three of the said six franchised companies (*ie*, the Franchisees) as at 22 September 2011;

(c) The Respondent had two Apple Plus Schools in Malaysia as at 22 September 2011;

(d) The Respondent was in the midst of negotiating with Indonesian parties to open Apple Plus Schools in Indonesia as at 22 September 2011;

(e) Apple Plus Schools produced their own children's textbooks as at 22 September 2011;

(f) Apple Plus Schools owned the patent and trade mark of the unique nine-beaded "Monkey Abacus" system as at 22 September 2011;

(g) The Respondent was the sole controller of the entire group of Apple Plus companies and schools as at 22 September 2011;

(h) The Respondent had collaboration with four public and three private kindergartens, as stated in her report of 20 October 2011;

(i) The Respondent had expansion plans in Singapore, Malaysia, Indonesia, Australia, China and the Philippines, as stated in her report of 20 October 2011;

(j) The Respondent was in the process of registering a patent for her "Monkey Abacus" system in four countries, as stated in her report of 20 October 2011;

(k) With the Respondent's grand plans for expansion in the near future, half of her shares in all her Apple Plus School companies would be worth $1.5 million as of November 2011;

(l) The Company was signing an MOU with Indonesia's Ministry of Education around mid-December 2011;

(m) As of 2 January 2012, representatives from Vietnam and Indonesia had signed agreements with the Respondent to expand the Apple Plus group of companies in Vietnam and Indonesia;

(n) As of 6 January 2012, the Respondent was engaging in talks with representatives from Indonesia to set up Apple Plus Schools in Indonesia;

(o) As of 10 January 2012, the Respondent was negotiating with some parties in Malaysia to open Apple Plus Schools in a few other countries;

(p) As of 13 January 2012, the Respondent was in Malaysia engaged in a second round of talks with representatives from Dubai and the Philippines to open Apple Plus Schools in these two countries;

(q) On 19 January 2012, the Respondent's geomancer colluded with the Respondent to advise the Appellant that she should not interfere in the Respondent's running of the business;

(r) Throughout February 2012, the Respondent was very busy opening new offices and classrooms, and tying up with various kindergartens;

(s) In early May 2012, the Respondent was negotiating with interested parties in China to open an Apple Plus School there;

(t) On 23 May 2012, the Respondent had signed an agreement to open five to six PAP Community Foundation kindergartens in Jurong;

(u) As of late May 2012, four clients from Batam were confirmed to be setting up at least two Apple Plus Schools in Batam in mid-June 2012; and

(v) As of June 2012, there was a company which would connect the Apple Plus group of schools to Government primary schools, and there were business plans on how to charge the students and methods to ensure the Apple Plus Schools' monopoly of the market.

34 The Judge referred to these alleged misrepresentations as statements (a) to (v) and we shall do likewise. At the hearing before us, we asked Mr Chia Boon Teck ("Mr Chia"), counsel for the Appellant, whether it was possible to narrow the scope of the appeal by identifying the key or essential misrepresentations. Mr Chia suggested that nine of them might be thought to be the main ones, namely, statements (a), (c), (f), (h), (i), (l), (m), (n) and (p). Looking at the statements, we agree with Mr Chia's assessment, but we would go further and say that, in our view, there is controversy only in relation to *two* of them and we further confine the scope of the inquiry accordingly (see below at [86]). In the circumstances, we do not wish to lengthen this judgment unduly by giving the others any detailed treatment.

The decision in the court below

35 As we have mentioned, the Judge dismissed entirely the Appellant's claims in both contract and misrepresentation. In so far as the claim in contract was concerned, he held that, construing the Agreement as a whole, the Respondent was not obliged under cl 1 to transfer anything more than her shares in the Company to the Appellant. In other words, the Judge held that the Respondent was not obliged to transfer her shares and interests in the Franchisees and the Sole Proprietorship. The Judge thought that the Appellant's interpretation of cl 1 was to be rejected for a few reasons: (i) it did not make sense to speak of transferring half of the Respondent's shares in the Sole Proprietorship, (ii) since the Respondent was only a minority shareholder in the Franchisees, she would have been unable to compel each Franchisee's board to register a transfer of shares to the Appellant, (iii) cl 4 of the Agreement provided a timeline for the transfer of the Respondent's shares in the Company but not her other shares and interests, suggesting that only the shares in the Company were to be transferred, and (iv) the warranty of full disposition rights in cl 6 covered only the Respondent's shares in the Company.

36 In so far as the claims in misrepresentation are concerned, we do not propose to delve into his reasoning on each of the 22 alleged misrepresentations. We shall summarise his reasoning, as follows. First, misrepresentations (q) to (v) could not have induced the Appellant into entering the Agreement since they were made after she had signed it. Secondly, there was no, or insufficient, evidence to demonstrate that representations (b), (c), (g), (m), (n), (o) and (p) were false to begin with. Thirdly, representations (a), (e) and (h) were too vague or ambiguous and hence could not be said with certainty to be false. Fourthly, the Respondent might inadvertently have used the Chinese term for "patent" when she meant "trade mark" in representations (f) and (j), and, in any event, the Appellant

must have known that the Respondent could not have meant "patent". Fifthly, representations (d), (i) and (l) were statements as to future intention and there was insufficient evidence that the Respondent did not genuinely harbour those intentions at the time. Sixthly, and finally, representation (k) was mere "puff" that no reasonable person would have taken seriously.

37 Finally, the Judge allowed the Respondent's counterclaim. He held that, with reference to cl 3.3 of the Agreement, the $300,000 which had found its way into the Appellant's personal account ought to be transferred back to the joint account owned by both parties.

Our decision

The Appellant's claims in contract

Interpretation of cl 1 of the Agreement

38 The determination of this particular issue turns wholly on the interpretation of cl 1, which we reproduce again for convenience, as follows:

> Pursuant to the terms of this Agreement, Party A [*ie*, the Respondent] shall transfer the 50% share in Apple Plus School International Pte Ltd *(specifically including 50% share in Apple Plus School International Pte Ltd, 50% share in Apple Plus School including trade mark and patent of Apple Plus School and Monkey Abacus, 12.5% share in Apple Plus School (Tampines) Pte Ltd, 13% share in Apple Plus School (Bukit Timah) Pte Ltd, 12.5% share in Apple Plus School (Serangoon) Pte Ltd, 12.5% share in Apple Plus School (Thomson) Pte Ltd and 25% share in Apple Plus School (Malaysia))* held by her to Party B [*ie*, the Appellant] in accordance with the provisions of the law. [emphasis added]

39 It might be helpful to note what the parties do *not* dispute. First, they do not dispute that cl 1 requires the Respondent to transfer 50% of her shares in the Company to the Appellant and that the Respondent had in fact effected the said transfer in June 2012.

40 Secondly, it appears that the parties do not dispute the Judge's finding (see the GD at [23]) that the Appellant is entitled *at least* to 50% of the *beneficial* interest of *the Respondent's* shares in the Sole Proprietorship as well as the various Franchisees (both these sets of shares which belong to the Respondent are hereafter referred to collectively as "the Remaining Shares"). However, even if there was a dispute on this point, we are of the view that the Judge's finding in this regard is nevertheless correct, inasmuch as the Respondent's obligation under cl 1 *at least* encompassed the duty to transfer the beneficial interest.

41 Not surprisingly, however, the Appellant maintains that she was entitled to have the *legal interest* transferred to her *as well*, and this was the material issue. Put simply, the parties *dispute* whether cl 1 *also* requires the Respondent to *transfer* (*in addition to* 50% of the shares in the Company, which had in fact been done) *50% of the Remaining Shares themselves* to the Appellant. In particular, the issue of contractual interpretation turns on the words in parentheses in cl 1 (as italicised above at [38]). The Appellant argues that the Respondent was contractually obliged to transfer 50% of the Remaining Shares to her and that, in failing to do so, the Respondent had acted in breach of cl 1. This alleged breach triggered, the Appellant further argued, cl 7.2 of the Agreement, which reads as follows:

> Both parties agree that for the period between the signing of the Agreement to the time [the Appellant] becomes a shareholder officially, ***if*** *[the Respondent]* ***refuses to transfer the shares***

to [the Appellant], *[the Respondent]* ***must return all monies paid*** *by [the Appellant] within 1 month* ***and*** *to pay [the Appellant]* a sum of *SGD100,000* ***in penalty*** . [emphasis added in italics, bold italics and underlined bold italics]

42 The Appellant submits that the effect of cl 7.2 was that the Respondent, not having transferred "the shares" to the Appellant (which she argued included 50% of the Remaining Shares, with only 50% of the shares in the Company having hitherto been transferred to her), would have (within one month) to return all the monies she (*ie*, the Appellant) had paid to the Respondent (*viz*, $1.5 million) *and* also pay the Appellant an *additional* $100,000.

43 Not surprisingly, the Respondent argues to the *contrary*. In particular, she argues that she was – pursuant to cl 1 – only contractually obliged to transfer 50% of the shares in the Company and not 50% of the Remaining Shares. As she had in fact transferred 50% of the shares in the Company, she had fulfilled her contractual obligations in this particular regard and hence cl 7.2 did not apply (in this last-mentioned regard, the phrase "the shares" in cl 7.2 referred *only* to 50% of the shares in the Company and *not* to these shares *as well as* 50% of the Remaining Shares).

44 As we have already noted, the Judge accepted the Respondent's arguments. At this juncture, it might be appropriate to set out the Judge's reasoning on this particular issue in full (see the GD at [22]–[26]), as follows:

> 22 Whether the [Respondent] had breached the Agreement depends on how clause 1 of the Agreement should be interpreted. The [Appellant] contended that the provision contained in parentheses ("specifically including … Apple Plus School (Malaysia)") clearly provided for the transfer of 50% of the Defendant's shares in [the Sole Proprietorship] and the Franchisees.
>
> 23 In my judgment, however, this provision was ambiguous and did not clearly state that the shares in [the Sole Proprietorship] and the Franchisees had to be transferred to the [Appellant]. If the [Appellant] were correct, then it would have made more sense for those shares to be set out individually in clause 1 as shares to be transferred, instead of being encapsulated in parentheses and described as being "included" as part of the [Respondent's] 50% shareholding in the Company. In my view, clause 1, although clumsily drafted, was more consistent with the Defendant's account that the parties had intended for the [Respondent's] 50% shareholding in the Company to also include 50% of her *beneficial* interests in the Franchisees and the trademarks, without the need for those shares to be transferred to the [Appellant].
>
> 24 Moreover, it is trite that a contract should be interpreted in a holistic manner having regard to the document as a whole: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029* at [131]. The interpretation of clause 1 contended for by the [Appellant] was simply inconsistent with the rest of the Agreement:
>
> (a) First, clause 4 only provided a timeline for the transfer of the shares in the Company to the [Appellant]; no provision was made for the transfer of the shares in the Franchisees.
>
> (b) Second, the warranty of full disposition rights in clause 6.1 only covered the [Respondent's] shares in the Company, and not her shares in the Franchisees.
>
> If the parties' intention was for the shares in the Franchisees to be transferred to the [Appellant], then surely clauses 4 and 6.1 would have referred to the shares in the Franchisees as well.

> 25 There was also other evidence indicating that the parties did not intend for an actual transfer of shares in [the Sole Proprietorship] and the Franchisees to be effected. First, as [the Sole Proprietorship] was a sole proprietorship, it made no sense to speak of the [Respondent] transferring 50% of her shares in [the Sole Proprietorship] to the [Appellant]. Second, since the [Respondent] was only a minority shareholder in the Franchisees, she would have been unable to compel the board of each Franchisee to register a transfer of shares to the [Respondent].
>
> 26 Thus, I preferred the [Respondent's] interpretation of clause 1 and found that she was not in breach of it.

45 It is apparent that the Judge's decision in this regard was based on a close scrutiny of the actual language used in cl 1, as well as a consideration of which interpretation cohered better with the other clauses in the Agreement, in particular, cll 4 and 6.1. These are the usual means by which lawyers and judges seek to ascertain the meaning of legal documents such as contracts, and thus one can understand why the Judge had recourse to them. *However*, it is equally imperative, in our view, to pay heed to the *context* in which the Agreement was made and which, with respect, was *not* considered by the Judge.

46 There are two key aspects to this context. First, the Agreement was in *Chinese*, although the Judge was (understandably) looking at the English *translation* – as we also did. Secondly (and in a closely related vein), the Agreement was in fact *drafted* by *the parties themselves (with no legal advice as such)*. What is of crucial significance in this regard is that, as a result of what we have just noted, the terms of the Agreement in general and cl 1 thereof in particular ***cannot*** be read *as if they had been* ***drafted by lawyers*** *who were*, ex hypothesi, ***aware*** *of* ***the legal significance*** *of the relevant language of the terms of the Agreement itself*. Indeed (and this brings us back to the first point noted at the outset of this paragraph), given that the Agreement was drafted in Chinese, even the *English translation* of the relevant terms of the Agreement cannot be analysed and interpreted in the manner that laypersons whose *first language was English* would be accustomed to.

47 With respect (and as we shall elaborate upon below), it appears to us that the Judge interpreted the Agreement in general and cl 1 thereof in particular as if it had been drafted originally in the *English language by parties whose first language was English* ***and*** as if it had been drafted by *lawyers*. Understandably, this (erroneous) approach with regard to the context in which the Agreement was made coloured the legal lenses through which he analysed the terms of the Agreement in general and cl 1 thereof in particular. In our opinion, this was *the* essential error of the Judge, and this will be a central theme throughout our analysis on the contract point.

48 Whilst we agree with the Judge that cl 1 is "ambiguous" (see the GD at [23]), such ambiguity stems from the fact that the Agreement as a whole was not originally drafted in English and was in fact drafted by laypersons (instead of lawyers); neither was there any input from any lawyer. With respect, however, the Judge appeared to construe the ambiguity engendered in cl 1 *without* bearing the aforementioned context in mind. Hence, his observation that, if the Appellant were correct, "it would have *made more sense* for [the Remaining Shares] to be *set out individually* in [cl 1] as shares to be transferred, ***instead of being encapsulated in parentheses and described as being "included"*** as part of the [Respondent's] 50% shareholding in the company" (see the GD at [23]) [emphasis added in italics and bold italics]. The Judge then proceeded to observe that "[cl 1], although clumsily drafted, was more consistent with the [Respondent's] account that the parties had intended for the [Respondent's] 50% shareholding in the Company to also include 50% of her *beneficial* interests in the Franchisees and the trade marks, without the need for those shares to be transferred to the [Appellant]" (see the GD at [23]) [emphasis in original]. In our view, to hold – as the Judge did – that the parties had intended that there be no transfer of 50% of the Remaining

Shares to the Appellant, whilst *simultaneously* holding that the parties had nevertheless intended the Appellant to obtain the *beneficial* interest in these very same shares appears, with respect, to attribute to the parties (who, it will be recalled, were *laypersons* whose first language was *not* English) *legal* knowledge as well as acumen which they were unlikely to have possessed.

49 In this respect, however, there is, admittedly, a certain degree of uncertainty in so far as it is unclear whether the Judge had intended to use "beneficial interests" in the sense which any lawyer with a background in equity and trusts would be familiar with (*ie*, an *equitable* interest, as opposed to a *legal* interest) *or* in the lay sense as referring loosely to some form of benefit. It bears noting that the Judge also allowed the Respondent's claim for rectification of cl 1, as follows (see the GD at [58]):

> Pursuant to the terms of this Agreement, Party A [*ie*, the Respondent] shall transfer the 50% share in Apple Plus School International Pte Ltd (specifically including 50% share in Apple Plus School International Pte Ltd, 50% ~~share~~ of the benefit of her personal interest in Apple Plus School including trade mark and patent of Apple Plus School and Monkey Abacus, 12.5% share in Apple Plus School (Tampines) Pte Ltd, 13% share in Apple Plus School (Bukit Timah) Pte Ltd, 12.5% share in Apple Plus School (Serangoon) Pte Ltd, 12.5% share in Apple Plus School (Thomson) Pte Ltd and 25% share in Apple Plus School (Malaysia) held by her to Party B [*ie*, the Appellant] in accordance with the provisions of the law.

This suggests that the Judge may, in his usage of the term "beneficial interests", have been referring to a benefit *per se*, as opposed to an equitable interest in the sense which lawyers understand but which laypersons may not. That having been said, it is our view that, even if that was the case, the *(corresponding) legal position*, as opposed to the practical effect of cl 1, would still need to be determined by the court, and that would still entail having regard to both the legal *as well as* the equitable interests in the Remaining Shares. Put simply, the Agreement in general and cl 1 in particular were intended to reflect *the legal position between the parties*.

50 At bottom, our view is that the Judge's interpretation would have had much more legal traction had the Agreement in general and cl 1 in particular been drafted by *lawyers* instead (or were at least drafted with the benefit of legal advice). If this had been drafted by *lawyers* (or was at least drafted with the benefit of legal advice), it would have been much more persuasive to state that the placement of the material words *in parentheses* suggests that a distinction was intended to be drawn between the shares in the Company on one hand and the interest in the Sole Proprietorship and shares in the Franchisees on the other – the distinction being that legal ownership of the former *but not of the latter* was to be transferred. However, as we have already emphasised, this was *not* the correct context. With respect, the infelicitous (or, as the Judge put it, clumsy) drafting can be explained by the fact (as already noted above) that the Agreement in general and cl 1 in particular were drafted in Chinese by parties whose first language was not English *and* who were laypersons acting without the benefit of legal advice. In our view, this context requires that we eschew a strict construction of the structure and language of cl 1, and adopt instead a more common-sense approach that considers the reasonable and probable expectations that parties would have had.

51 Looking at the Agreement as a whole, it seems to us more likely than not that the Appellant, as a layperson, was (as she had claimed) expecting to receive the *entire* interest in the Remaining Shares (and this included not only the beneficial interest (as the Judge found) *but also* the *legal* interest as well, with the latter entailing a *transfer* of the actual shares themselves). We say this for a number of reasons. First, it was not disputed that *the Appellant* had taken over the drafting of (and had, in fact, drafted) the final version of the contract between the parties, *viz*, the Agreement. It is hardly likely that she would have drafted the Agreement in a manner that was in fact *less*

advantageous to her (compared to the earlier draft agreements, which we will consider below), and it is equally unlikely that the Respondent would have understood her to have done so.

52 Secondly, some weight ought to be given to the fact that parties *even mentioned the Remaining Shares at all* in cl 1, and, more than that, prefaced such mention with the emphatic words "specifically including". Where it is stated that a party "shall transfer X (specifically including Y)" – as it is stated in cl 1 – we think that the most natural understanding of this to a layperson would be that the obligation to transfer X attaches equally to Y. Otherwise, why make reference to Y at all? *If* the Remaining Shares had been owned by the Company, the argument could perhaps be made that the allusion to the Remaining Shares within parentheses was designed to do no more than to make it clear that ownership of the Company's shares would necessarily be accompanied by the acquisition of some sort of interest in the Remaining Shares by virtue of the Company's ownership of those shares. But this was not the case – the Remaining Shares were owned by the Respondent and not the Company. In these circumstances, the most plausible reason why the Remaining Shares were even mentioned at all was that parties contemplated that half of the Remaining Shares would also be transferred to the Appellant.

53 Thirdly, and finally, the Appellant was paying the Respondent a very substantial sum of money (*ie*, $1.5 million) for the shares that she was purchasing. It seems improbable to us that she would have agreed to part with this amount had she not understood that she would receive 50% of *all* of the Respondent's shares in the *entire* Apple Plus business. It is noteworthy that the Respondent herself accepted in her affidavit of evidence-in-chief that the price of $1.5 million "reflected the value of not only half [her] shares in the Company, but also half of what [she] owned in the Franchisees". The Respondent did explain further that the agreement between parties was that the shares in the Franchisees would not actually be transferred "so as not to disrupt the management and operations of the Franchisees", but we would venture to state that we think that this was inherently improbable. In the first place, transferring shares in the Franchisees to the Appellant would make her nothing more than a shareholder, and she would have nothing more than the limited management powers of an ordinary shareholder. Moreover, the Respondent was only a *minority shareholder with a 25% or 26% stake* in the Singapore Franchisees. If the Respondent transferred half her shares in the Singapore Franchisees to the Appellant, they would each hold a *mere 12.5% or 13% stake* – it is difficult to see how the Appellant would be in a position to exert any substantial control in the management and operations of these Franchisees.

54 Returning to the Judge's interpretation of the other terms of the Agreement, as we have noted above (at [45]), the Judge also referred to cl 4 as well as cl 6.1 of the Agreement (see the GD at [24]). With respect, the infelicitous drafting can be explained, once again, along the lines already noted above – in particular, that the Agreement in general and these clauses in particular were drafted in Chinese by parties whose first language was not English *and* who were laypersons acting without the benefit of legal advice. Lawyers, of course, would be aware (or would be expected to be aware) that legal documents have to be interpreted in a holistic manner, so that the drafting of one part of it might affect the meaning to be ascribed to another part. However, the same is not true of laypersons. It would hardly be surprising if laypersons perceived cll 4 and 6.1 as points of peripheral importance relative to cl 1, which sets out *the* obligation of the Respondent under the Agreement, and hence did not devote much attention to them. With this in mind, given the context in which the Agreement was drafted, we think that cll 4 and 6.1 are of little probative value in determining the correct interpretation of cl 1.

55 We also note that the Judge had pointed to "other evidence indicating that the parties did not intend for an actual transfer of shares in [the Sole Proprietorship] and the Franchisees to be effected" (see the GD at [25]). As the Judge observed (see *ibid*):

> First, as [the Sole Proprietorship] was a sole proprietorship, it made no sense to speak of the [Respondent] transferring 50% of her shares in [the Sole Proprietorship] to the [Appellant]. Second, since the [Respondent] was only a minority shareholder in the Franchisees, she would have been unable to compel the board of each Franchisee to register a transfer of shares to the [Respondent].

56 With respect, we are unable to agree with the observations by the Judge quoted in the preceding paragraph. In so far as the first observation is concerned, whilst it is true that it made no sense, in strict *legal* terms, to speak of a transfer of *shares* in respect of *a sole proprietorship*, this must be considered against the relevant context, *ie*, the fact that the Agreement in general and cl 1 in particular were drafted in Chinese by parties whose first language was not English *and* who were laypersons acting without the benefit of legal advice. It is most probable that laypersons such as the Appellant and the Respondent would not have appreciated the conceptual differences between a sole proprietorship and a company. Therefore, the mere fact that a supposed obligation to transfer a thing is legally impossible because of the nature of the thing itself does not mean that parties did not genuinely intend that there should be an obligation to transfer that very thing.

57 And, in so far as the Judge's second observation is concerned, context is again all-important; it is unlikely that the parties would have been aware of the legal requirements for registering a transfer of shares. Further, even on its own terms, there is, with respect, a potential difficulty in any event with this second observation.

58 A quick perusal of the constitutional documents of the Franchisees suggests that there is no specific requirement for the board to approve any transfer of *fully paid up* shares. For instance, the relevant provisions concerning the transfer of shares *vis-à-vis* Apple Plus School (Bukit Timah) Pte Ltd, one of the Franchisees listed within the parentheses of cl 1, state as follows:

> 20. Subject to these Regulations, any member may transfer all or any of his shares by instrument in writing in any usual or common form or in any other form which the directors may approve. ...
>
> 21. The instrument of transfer must be left for registration at the registered office of the company together with such fee, not exceeding $1 as the directors from time to time may require, accompanied by the certificate of the shares to which it relates and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer, and thereupon the company shall subject to the powers vested in the directors by these Regulations register the transferee as a shareholder and retain the instrument of transfer.
>
> 22. The directors may decline to register any transfer of shares, not being fully paid shares to a person of whom they do not approve and may also decline to register any transfer of shares on which the company has a lien.

59 It is not disputed that the relevant shares in the Franchisees were fully paid up and were not subject to any lien. Therefore, Art 22 (reproduced in the preceding paragraph) would not be applicable. In the circumstances, there would have been no need for the Respondent to seek board approval for the transfer of any shares to the Appellant.

60 In our view, therefore, we agree with the Appellant's interpretation of cl 1 and there is, in the circumstances, *no need* to consider the Appellant's reliance on the *prior drafts* of the Agreement. The Appellant's argument in this respect was simply that the way in which the drafts developed and were refined demonstrates that the Respondent's obligation under cl 1 must have been to transfer *legal ownership* of the shares in *all* the relevant entities in the Apple Plus business. Indeed, it was by no

means clear that such reliance on prior drafts would be permitted as a matter of course. However, as parties made detailed reference to some of these prior drafts on appeal, we will make some observations thereon.

Reliance on prior drafts of the Agreement

61 As just mentioned, the Appellant relied heavily on the earlier draft agreements in support of her argument that the parties had also intended an actual transfer of 50% of the Remaining Shares. These were draft agreements sent by the Respondent to the Appellant on 29 November 2011 and 6 January 2012. The material parts of these drafts read, respectively, as follows:

> WHEREAS:
>
> The [Respondent] is the registered and beneficial owner of the whole Company of Apple Plus School International Pte. Ltd. (the "Company").
>
> The [Appellant] has expressed a desire to purchase and the [Respondent] has expressed a desire to sell 50% *of the Company Shares stated in Part A* .
>
> …
>
> Upon signing of this agreement, the [Appellant] shall pay the [Respondent] a non-refundable down payment of … (SGD $100,000/-) being part of S$1,500,000/- non refundable deposit for to purchase 50% of the Company shares stated in Part A
>
> Set as Part A
>
> Company Shares owner of [the Respondent]: …

-Apple Plus School International Pte Ltd [*ie*, the Company]	100%
-Apple Plus School [*ie*, the Sole Proprietorship]	100%
-Apple Plus School (Tampines) Pte Ltd	25%
-Apple Plus School (Bukit Timah) Pte Ltd	26%
-Apple Plus School (Serangoon) Pte Ltd	25%
-Apple Plus School (Thomson) Pte Ltd	25%
-Apple Plus School (Malaysia)	50%

> …
>
> [emphasis added in underlined italics]

If, in fact, the Agreement had used the language in these drafts, the Appellant would (leaving aside the analysis which we have already proffered above) have had a very strong case for arguing that the Respondent was also obliged to transfer her shares in the Sole Proprietorship and the Franchisees. The drafts quite unambiguously indicate that *all* the shares listed in "Part A" – in the Company as well

as the Sole Proprietorship and the Franchisees – are to be transferred.

62 Unfortunately, both the Appellant and the Respondent failed to make *any* submissions on whether these draft agreements, which fall under the broader category of *pre*-contractual negotiations, are, as a matter of *law*, admissible and relevant for the purposes of contractual interpretation. Without entering into a comprehensive discussion on the issue of whether pre-contractual negotiations ought to be wholly excluded from the domain of contractual interpretation, it bears noting that this court had made the following observations in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [75]:

> Before leaving this issue, we make one final observation. Asst Prof Goh has, after a comprehensive survey of the historical literature on the law governing the *admissibility of prior negotiations*, argued that the seemingly blanket exclusionary rule against the admissibility of prior negotiations was a product of a historical misstep by the courts and is inconsistent with the EA [*ie*, the Evidence Act] ... *We prefer to leave for another occasion the consideration of whether this argument is to be accepted in principle; and if so, whether evidence of prior negotiations should nonetheless be excluded as irrelevant or unhelpful for the policy reasons set out by Lord Hoffmann in* Chartbrook *... or on the ground that it may amount to parol evidence of subjective intent and not fall within ss 97 to 100 of the EA*. Whichever way that may eventually be resolved, any future attempt to rely on such material should be made with full consciousness of the concerns already expressed and in compliance with the pleading requirements we have just prescribed. [emphasis added]

Hence, the issue of whether evidence of prior negotiations should be included under Singapore law remains *open*. This court's earlier *rejection* of a *blanket* prohibition on all evidence of pre-contractual negotiations (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [132(d)]) is also a significant departure from the English position set out in the leading House of Lords decisions of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("*ICS*") and *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] 1 AC 1101 ("*Chartbrook*").

63 In any event, it should be noted that this court in *Zurich Insurance* laid down three requirements to govern the admissibility of such extrinsic evidence (assuming that there was no overriding objection in principle to admitting such evidence in the first place). First, the evidence had to be relevant. Secondly, the evidence had to be reasonably available to all the contracting parties. Thirdly, the evidence had to relate to a clear and obvious context.

64 In so far as the first requirement is concerned, this court, in *Zurich Insurance* (at [125]), endorsed Lord Hoffmann's view in *ICS* at 913 – as clarified by Lord Hoffmann himself in the subsequent House of Lords decision of *Bank of Credit and Commerce International SA v Ali and others* [2002] 1 AC 251 at [39] – that extrinsic evidence is admissible in so far as it would affect the way in which the language of the document would have been understood by a reasonable person. Turning to the facts of the present appeal (and assuming, for the moment, that it is potentially possible to admit the earlier draft agreements as evidence in the first place), although it could be argued that this first requirement has not been satisfied inasmuch as the earlier draft agreements are substantially different from the (final) Agreement entered into by the parties and that, in those circumstances, the draft agreements cannot be said to have affected the way in which the language of the (final) Agreement would have been understood by a reasonable person due to the significant differences in wording, this particular argument assumes, once again, that the draft agreements as well as the Agreement itself were originally drafted in the English language by lawyers or at least with the benefit of legal advice. As we have underscored at many points in this judgment, this assumption is a mistaken one. The

draft agreements as well as the Agreement were in fact drafted in *Chinese and* were drafted by *laypersons without* the benefit of any *legal* advice. Looked at in this light, a reasonable person might, in fact, have come to the *opposite* conclusion and have concluded, instead, that there was somehow a proverbial slip between the cup and the lip when what was eminently clear in the earlier draft agreements was not (clearly) set out in the (final) Agreement. Further, the Appellant had drafted the (final) Agreement and it could not reasonably have been contemplated by anyone that she intended to make the final version less advantageous to her than the earlier drafts – a point we have already referred to above (at [51]).

65 In so far as the third requirement is concerned, this court, in *Zurich Insurance* (at [129]), observed that it was necessary and desirable to set out the threshold requirement that the context of the contract should be clear and obvious in order to "achieve the right balance between commercial certainty and the imperative of giving effect to the objective intentions of the contracting parties". In our view, this consideration coheres with the English courts' reluctance to admit evidence of pre-contractual negotiations. In most circumstances, the reliance on draft agreements, without more, cannot amount to a clear and obvious context in so far as the court is very much left in the dark with regard to the actual bargaining process undertaken by the contracting parties in the course of negotiations. The addition, removal, or variation of any contractual term is, more often than not, the result of bargains and exchanges struck between the parties. It is a dynamic process and the surrounding context is likely to be as important as, if not more so than, the actual words found in the draft agreements. Furthermore, the court is not likely to be acquainted with such evidence as these bargains and exchanges are often oral in nature. Therefore, any reliance on these draft agreements alone, without more, may give rise to the risk of construing these documents *out* of context.

66 In this regard, in the House of Lords decision of *Prenn v Simmonds* [1971] 1 WLR 1381, Lord Wilberforce, in delivering the judgment of the court, made the following cautionary remarks (at 1384–1385) on why evidence of past negotiations ought not to be received:

> There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in clause 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience, (though the attempt to admit it did greatly prolong the case and add to its expense). ***It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back: indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to.*** ... [emphasis added in bold italics]

67 Of course, this is *not* to say that *all* pre-contractual negotiations would fall foul of the requirement for a clear and obvious context. An example of when this requirement would have been met can be found in the House of Lords decision of *A & J Inglis v John Buttery & Co* (1878) 3 App Cas 552 ("*Inglis*"). This case concerned a contract for works on a ship for a fixed sum of £17,250. In the draft contract (or memorandum of agreement) circulated between the shipbuilders and the shipowners, the following provision on iron work was set out as follows:

> Iron work. – The plating of the hull to be carefully overhauled and repaired, *but if any new plating is required the same to be paid for extra.* ... [emphasis added]

In the course of negotiations between both parties, the agent for the shipowners wrote to the shipbuilder as follows:

> ... The memo. of agreement appears all in order, but in the specification, under the heading 'iron work,' we must ask you to *erase all the stipulations after the word 'repaired.'* We have all throughout understood, and your memo. of agreement before us clearly stipulates, that the sum of £17,250 covers lengthening, new engines, &c., and all repairs and alterations necessary to class the steamer A1 100 at Lloyds. [emphasis added]

The shipbuilder subsequently agreed to the deletion proposed by the agent for the shipowners. Before the contract was signed, the stipulation was deleted by an ink line across it, which left the words still visible. The ink line was authenticated by a marginal note which stated "fourteen words deleted". The marginal note was also signed by both parties. A dispute then arose between the parties as it turned out that a substantial part of the ship's plating had to be renewed before it could be classed. V K Rajah JA, writing extra-judicially in V K Rajah, "Redrawing the Boundaries of Contractual Interpretation" (2010) 22 SAcLJ 513, made the following instructive observations at para 26:

> If prior negotiations were admissible, the dispute in *Inglis v Buttery* could have been very easily resolved. The stipulation which was deleted with the parties' consent made abundantly clear that the parties understood "new plating" to fall within the compass of "overhauling and repair". There was nothing unreliable about it – it was formally deleted by consent from the document which, a short while after, became the formal document recording the agreement between the parties. It was fortified, if indeed fortification was needed, by the exchange, quoted above, between the parties a few days before the contract was signed. The case, in my view, is one which clearly demonstrates the usefulness of prior negotiations.

We should clarify that the court in *Inglis* itself held that evidence of prior negotiations was *not* admissible for the purpose of aiding the process of contractual interpretation. Indeed, such evidence of prior negotiations would have been excluded by the English courts in line with the general exclusionary rule set out in *ICS* and *Chartbrook*. But our point is simply that the evidence would most likely be admissible *locally* given the flexible approach adopted by this court in *Zurich Insurance*. The evidence of prior negotiations in *Inglis* serves as an example of when the three requirements set out in *Zurich Insurance* might indeed have been met.

68 Turning to the facts of the present appeal, we are of the view that, notwithstanding some possible arguments to the contrary (which we shall deal with in a moment), the evidence of the prior drafts preceding the Agreement is *consistent with* the main analysis set out above – which analysis was in fact sufficient, in and of itself, to resolve the issue being considered in the present part of this judgment (centring around the interpretation of cl 1). Looked at in this light, the evidence of the prior drafts perform more of a *confirmatory* (and, hence, supplementary) function compared to situations where the evidence of prior negotiations plays a pivotal role.

69 However, as already noted above (at [62]), whether or not there should – in the Singapore context – be a principle that evidence of prior negotiations ought to be generally admissible is a legal issue that is still an open question and that caution should therefore be exercised in this particular regard (and see the quotation from *Sembcorp Marine* set out above, also at [62]). The precise legal status (in particular, the limits (if any) and/or safeguards) of a situation involving evidence of prior negotiations remains to be worked out in a future case (when full argument has been heard), although there ought, in our view, to be no difficulty in satisfying the three requirements set out in *Zurich Insurance* where the situation concerned (such as that in *Inglis*) is extremely clear *and*, in any event, in a case such as the present, the evidence of prior negotiations merely serves as a *confirmatory*

(and, hence, complementary as well as subsidiary) function. Much would, of course, depend very much on the precise facts before the court.

70 Returning once again to the facts of the present appeal, we should, however (in fairness to the Respondent), point to possible arguments which militate against our finding (above at [68]) with regard to the confirmatory function performed by the evidence of the prior agreements in the context of the present appeal. First, it bears noting that there was an earlier draft MOU dated 28 November 2011 which suggested that the parties had, instead, only intended to transfer the shares in the Company, as opposed to those of the other entities (*viz*, the Remaining Shares). The material part of the MOU reads as follows:

> **WHEREAS:**
>
> 1. The [Respondent] is the registered and beneficial owner of the whole of the issued share capital of Apple Plus School International Pte. Ltd. (the "Company")
>
> 2. The [Appellant] has expressed a desire to purchase and the [Respondent] has expressed a desire to sell 50% *of the issued share capital of the Company*.
>
> …
>
> [emphasis added]

However, this appeared to be the only differing version compared to the other prior drafts to which we have already referred above. More importantly, it *pre-dates* the other prior drafts, and so it is entirely plausible that the MOU reflected the *earlier* intentions of the parties which were subsequently *superseded*, in which event it would be of no assistance at all in interpreting cl 1.

71 Secondly, the Respondent also pointed to an e-mail which was purportedly sent by her to the Appellant on 19 November 2011 to support her (the Respondent's) case in relation to the present issue. That particular e-mail stated as follows:

> 1. To sell 50% of the shares held in the name of [the Respondent] to [the Appellant] (include: 50% each head office and apple plus school/ Tampines 25%=12.5%/ Btm26%=13%/ Serangoon25%=12.5%/ Thomson 25%=12.5%/ Malaysia 25%. *The above shares will not be reflected on the business licence of every company* . This contract shall be the basis.)
>
> …
>
> [emphasis added]

The Appellant, however, took the position that she had not received the abovementioned e-mail – she claimed that it was a "fabricated" e-mail because the sender's and recipient's e-mail addresses were identical. The Respondent's evidence, on the other hand, was that this particular e-mail address was used by multiple persons, including her, and that they would communicate with each other by using that address to send an e-mail to the exact same address. The Judge did not make a finding on whether the Respondent's evidence was to be believed. In any event, as with the MOU, this e-mail *pre-dates* the prior drafts which support the Appellant's case, and hence it might also reflect intentions or positions that were subsequently superseded. The sequence of the documents was as follows: first this e-mail, and then the MOU drafted by lawyers in which it appeared that *only* the Respondent's shares in the Company were to be transacted; but the two aforementioned documents

were thereafter followed by the two draft agreements prepared by the Respondent in which it was stated that *all* the Respondent's shares – the shares in the Company and the Remaining Shares – were to be transacted, and finally the Agreement. Given this sequence, it does appear that there might have been an *evolution or development* in the parties' understanding of what was to be transferred, from the starting point that this concerned only the shares in the Company to the final consensus that it included also the Remaining Shares. We need not make a definitive finding on this; it suffices to say that, in these circumstances, this e-mail is, at best, neutral in so far as the interpretation of cl 1 is concerned.

72 For completeness, it is noted that the Respondent had, in the course of the present appeal, also sought to rely on the Appellant's *subsequent* conduct in support of the argument that the parties had intended to transfer only the shares in the Company. In essence, the Respondent pointed out that, even though only the shares in the Company were transferred to the Appellant, the Appellant did not complain that the Remaining Shares had not been transferred. This, argued the Respondent, suggests that the understanding all along was that only these shares should be transferred.

73 Similar to the case of pre-contractual negotiations, this court, in *Zurich Insurance* also refused to lay down an absolute or rigid prohibition against evidence of subsequent conduct in the context of contractual interpretation. The court however observed (at [132(d)]) that "the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture".

74 In our view, even if it were accepted that there was no blanket prohibition against the admissibility of such evidence, the Respondent's reliance on subsequent conduct in the present case was largely without merit. This is because it was likely that the Appellant had not been advised on her strict legal rights during the period when she did not complain about the non-transfer of the Remaining Shares. Thus that failure to complain may have been a result of ignorance of the legally-prudent course she should take, and not an understanding that there was no obligation on the part of the Respondent to transfer the Remaining Shares. It is, in short, entirely equivocal and hence of little use to refer to subsequent conduct in the present context. It is further noted that the Respondent did not raise any arguments concerning estoppel by convention in response to the Appellant's alleged failure to enforce her strict legal rights.

75 To summarise, we are of the view that *the Appellant's* interpretation of cl 1 ought to prevail for the reasons we have set out above, with the result that cl 7.2 is triggered. And it is to this last-mentioned clause that our attention must now turn in order to ascertain the precise *remedy* the Appellant is entitled to.

The Appellant's remedies under cl 7.2

76 For convenience, we shall reproduce cl 7.2 here:

> Both parties agree that for the period between the signing of the Agreement to the time [the Appellant] becomes a shareholder officially, if [the Respondent] refuses to transfer the shares to [the Appellant], [the Respondent] must return all monies paid by [the Appellant] within 1 month and to pay [the Appellant] a sum of SGD100,000 in penalty.

77 This clause comprises, on its face, two limbs (or, rather, obligations). Having arrived at the conclusion that "the shares" referred to in cl 7.2 refer not only to the shares in the Company but also the Remaining Shares, it is clear that the Respondent, having only transferred the shares in the Company to the Appellant and having simultaneously *refused* to transfer the Remaining Shares to the

same, "must return all monies paid by [the Appellant] within 1 month". Put simply, the Respondent must repay the $1.5 million which the Appellant had paid to her. The only possible difficulty lies with the *second* limb of cl 7.2 which states that the Respondent is *also* required "to pay [the Appellant] a sum of SGD100,000 *in penalty*" [emphasis added]. As a preliminary matter, we are of the opinion that it is possible to divide cl 7.2 into two separate obligations such that, if one obligation is found to be a penalty but not the other, the latter may be enforceable even if the former is not; that was the approach of Ralph Gibson LJ in the English Court of Appeal decision of *Oresundsvarvet Aktiebolag v Marcos Diamantis Lemos (The "Angelic Star")* [1988] 1 Lloyd's Rep 122 at 127, and this approach was cited without disapproval by Christopher Clarke J in the English High Court decision of *Dalkia Utilities Services plc v Celtech International Ltd* [2006] 1 Lloyd's Rep 599 at [123], although Clarke J thought that severance was not possible *on the facts* of the case before him.

78 Counsel for the Respondent, Mr Ng Kim Beng ("Mr Ng"), argued that, even if his client had to repay the $1.5 million which the Appellant had originally paid her, payment of the additional sum of $100,000 was *not enforceable as it was a penalty (as opposed to being liquidated damages (which are*, ex hypothesi, *a genuine pre-estimate of loss)).* The law in this regard is still basically embodied within the following principles laid down by Lord Dunedin in the seminal House of Lords decision of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 ("*Dunlop*"), as follows (at 86–88):

> 1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found *passim* in nearly every case.
>
> 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda* [[1905] AC 6]).
>
> 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner v. Hills* [[1906] AC 368] and *Webster v. Bosanquet* [[1912] AC 394]).
>
> 4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> (*a*) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank Case*. [[1905] AC 6])
>
> (*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble v. Farren* [(1829) 6 Bing 141]). This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable,–a subject which much exercised Jessel M.R. in *Wallis*

v. Smith [(1879) 21 Ch D 243]–is probably more interesting than material.

(*c*) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" (Lord Watson in *Lord Elphinstone v. Monkland Iron and Coal Co*. [(1886) 11 App Cas 332]).

On the other hand:

(*d*) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (*Clydebank Case*, Lord Halsbury [[1905] AC 6]; *Webster v. Bosanquet*, Lord Mersey [[1912] AC 394]).

Indeed, as one leading local commentator has observed, "[a]lthough [the above] principles were set out near the beginning of the last century, they constitute the backbone of all analysis on this topic and continue to be applied to this day" (see Tham Chee Ho, "Non-compensatory Remedies" in ch 23 of *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*Tham*") at para 23.015).

79 Applying those principles to cl 7.2, it is clear, in the first instance, that whilst the word "penalty" is used, this is not dispositive of the specific issue before us. Whether or not the sum stipulated in a particular clause (such as cl 7.2) is classified as liquidated damages or as a penalty is an intensely fact-centric one (see also *Tham*, *ibid*). In our view, this payment of $100,000 stipulated in cl 7.2 cannot be characterised as liquidated damages. We cannot see how it might be a genuine pre-estimate of loss. As the Respondent points out, a failure to transfer shares may occur in a variety of ways – in this case the Remaining Shares were not transferred, but it might have been that both the Company's shares and the Remaining Shares were not transferred, or it might have been that the shares in only one Franchisee were not transferred. Such differences may affect the quantum of loss suffered by the Appellant: for instance, on the assumption that all of the various companies and entities declared dividends during the period when the Appellant was not shareholder when she should have been, the total amount of dividends she should have received but did not would depend on whether all or some of the shares had not been transferred. Yet, under cl 7.2, the same amount is payable whatever the circumstances.

80 Thus, the conclusion we are led to, is that the second limb of cl 7.2 is a penalty clause. The amount of $100,000 stated therein is, in the words of Lord Dunedin in *Dunlop* (at 86), "a payment of money stipulated as *in terrorem* of the offending party" (here, the Respondent). The consequence of this is, as Prof Tham correctly notes, "[w]here the clause in question [here, the second limb of cl 7.2] is found to be a penalty, the clause will be struck down and will be legally unenforceable" (see *Tham* at para 23.020).

81 It is clear, however, that the obligation in the first limb of cl 7.2 must nevertheless be fulfilled. In our view, the obligation in the first limb of cl 7.2 may be regarded as an express provision for the contract to be rescinded (or, to put it another way, unwound) in the event that the Respondent refuses to transfer the shares to the Appellant. As discussed above (at [77]), the first limb exists as a separate obligation from that in the second limb, which, as we have found above, is a penalty clause. In the circumstances, the only way to give effect to the first limb of cl 7.2 would be to order the Respondent to "return all monies paid by [the Appellant]" and for the Appellant to return the shares in the Company to the Respondent. This would, in effect, place all parties in the position that they would have been had the contract not been entered into.

82 In summary, the Appellant succeeds on this particular issue to the extent that she is entitled to repayment of the sum of $1.5 million by the Respondent. However, for the reasons set out in the preceding paragraphs, she is *not* entitled to the additional payment of $100,000 from the Respondent. The Appellant will also have to return the shares in the Company to the Respondent.

83 Let us now turn to the second main issue in this appeal, *viz*, the Appellant's claim in *misrepresentation*.

The Appellant's claim in misrepresentation

84 It should be noted, at the outset, that the Appellant's claim was premised on *fraudulent* misrepresentation. Mr Chia also clarified that, although 22 misrepresentations were allegedly made by the Respondent to the Appellant, the claim for *fraudulent* misrepresentation was based on the *cumulative* effect of *all* 22 alleged misrepresentations viewed as a whole.

85 As we have said (above at [36]), the Judge dismissed the Appellant's misrepresentation claim in its entirety. With the exception of two statements made by the Respondent (which we will deal with in a moment), we do not see sufficient basis to disturb the general reasons given as well as the findings of the Judge, and we therefore agree with him that fraudulent misrepresentation has *not* been established by the Appellant against the Respondent in respect of those alleged misrepresentations. We say no more about them.

86 In our view, there are only two statements in relation to which there might plausibly exist some ground for interfering with the Judge's decision, and they are statements (i) and (l). For convenience we shall reiterate here the contents of these statements. Statement (i) was that the Respondent had expansion plans in Singapore, Malaysia, Indonesia, Australia, China and the Philippines, while statement (l) was that the Company was signing an MOU with Indonesia's Ministry of Education around mid-December 2011.

87 Turning first to statement (i), we note that this statement was contained in a report sent by the Respondent to the Appellant on 20 October 2011. We expressed the view during oral submissions that the report was vague, bereft of detail as well as repetitive. Indeed, the Judge expressed similar views, as follows (see the GD at [32(b)]):

> The [Respondent's] alleged expansion plans were backed up by shoddy proposals that amounted to about four pages each. The proposals for each country were identical in every aspect, with no effort made to distinguish or cater to different markets. Further, the [Respondent] had tried to support her claim of expansion plans in the Philippines with an email exchange with a Filipino party that only started on 3 July 2012, nine months after the [report of 20 October 2011].

88 Mr Ng claimed that this dearth of content was due to the fact that the Respondent had no concrete data to share at that particular point in time. Whilst this may be literally true, we had the impression that it was arguable that the Respondent was attempting to impress upon the Appellant the fact that such expansion plans across so many countries had been conceived, without any sincere belief that they were or would be. If this were so, the Respondent would have been *misrepresenting* her *state of mind* – and that would have been a *misrepresentation* of *fact*. In the famous and oft-cited words of Bowen LJ in the English Court of Appeal decision of *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483:

> There must be a misstatement of an existing fact: *but the state of a man's mind is as much a fact as the state of his digestion*. It is true that it is very difficult to prove what the state of a

> man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the *state of a man's mind* is, therefore, a misstatement of *fact*. [emphasis added]

89 The Judge below was alive to this notion that the Respondent's statements as to her future plans and intentions might carry within them a statement of fact to the effect that she did actually have such plans. In other words, he did not err in his appreciation of the applicable legal principles. But ultimately he thought that there was insufficient evidence *on the facts* to prove that the Respondent had misrepresented her state of mind as at 20 October 2011. He observed thus (see the GD at [33(b)]):

> For statement (i), this was a statement as to the [Respondent's] future intention, and for it to be actionable as a misrepresentation, the [Appellant] must show that the Defendant had no honest belief in the statement: *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 at [83]. But the fact that the [Respondent's] expansion proposals were shoddy and lacking in details did not mean that they were a sham. The [Appellant] had failed to provide any evidence to show that the [Respondent] did not have the genuine intention to carry out her plans at the time statement (i) was made. While the [Respondent] might have been overly optimistic in her projections and targets, that does not mean that she had committed misrepresentations in communicating her business plans to the [Appellant].

90 Given the utterly vacuous nature of the report itself, we are, with respect, a little surprised at the Judge's findings as set out in the preceding paragraph; as we have said, it was at least arguable that it appeared not to emanate from someone (here, the Respondent) who had a good faith belief in what she promised. That having been said, a plausible hypothesis in the Respondent's favour would be that she *did* genuinely harbour an intention to expand into multiple countries, except that these plans were at a very preliminary stage as at 20 October 2011. Unlike the Judge, we did not have an opportunity to receive (at first hand) the relevant testimony. This is an important point because the evidence on the state of the Respondent's mind was *oral* rather than documentary in nature, the documents going only so far as to show that the Respondent's business plans did not appear to have been thought through with any rigour. We are therefore not in a position to come to a different view on the facts even though Mr Chia raised some doubt as to the soundness of the Judge's findings. This is even more so because the Appellant had alleged fraud on the part of the Respondent, and proof of fraud entails a relatively high standard of proof (see, for example, the decision of this court in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [30]).

91 Turning to the second statement which we had some difficulty with, this was what the Judge described as statement (l) – the Respondent was alleged to have represented to the Appellant that the Company was signing an MOU with Indonesia's Ministry of Education around mid-December 2011. In this regard, the Judge elaborated upon this particular issue, as follows (see the GD at [36]):

> The [Respondent] had sent the [Appellant] an email on 15 December 2011 attaching a three-page draft MOU (which was unsigned) between the Company and Indonesia's ministry of education for the Company to provide training for abacus teachers in Indonesia. The draft MOU was stated to run for five years starting from 17 December 2011. The [Appellant] said that this amounted to a misrepresentation because it would have been impossible for the draft MOU – which the [Respondent] admitted under cross-examination to be "just at the planning stage" – to be ready to be signed within two days. The [Appellant] thus submitted that the MOU was a sham meant to entice her to entering into the Agreement.

92 The Judge then proceeded to render his decision, as follows (see the GD at [37]):

> I disagreed. The [Respondent] did not represent to the [Appellant] that she had reached agreement with the Indonesian party or that an agreement was close at hand. The MOU was clearly stated to be a draft and it would have been understood by the [Appellant] that it was subject to further changes and that it might not even be signed in the end. This therefore did not constitute a misrepresentation by the [Respondent].

93 The e-mail which the Respondent (or, more accurately, someone on her behalf) sent to the Appellant on 15 December 2011 said only this: "Indonesia MOU for your reference. Thanks!" As the Judge described, this MOU was unsigned, but it also stated: "This MOU shall enter in force upon signature by both Parties and remains in force for a period of FIVE (5) years from December 17th 2011 to December 16th 2016…". The Appellant's contention is that stipulating the start date as 17 December 2011, just *two days* from the date on which the e-mail attaching the MOU was sent, amounted to a representation that the MOU was going to be signed within the next few days.

94 Thus, although the relevant MOU was (again, *literally*) unsigned, the issue arises (once again) as to whether or not the Respondent misrepresented her state of mind in that she represented that the MOU would be signed within the next few days without a *bona fide* belief that this would be so. We thought that the circumstances in which this e-mail was sent on 15 December 2011 were such as to arouse a degree of suspicion: the evidence was that there was little contact between the parties in the month of December 2011, such that the e-mail might be described as having arrived somewhat out of the blue. Why would the Respondent send it, and what could her purpose have been?

95 The Appellant's case was essentially as follows. In sending her the MOU, the Respondent created the impression that the signing of the MOU was imminent, and this must have been in order to induce the Appellant into investing in the Apple Plus business. The MOU was not, in fact, eventually signed. The inference from all this was that the Respondent had knowingly and falsely stated that the MOU was soon to be signed.

96 However, in our view, the inference urged by the Appellant was not an inexorable one. It might well be that the Respondent was guilty of nothing more than excessive optimism in believing that the MOU would be signed shortly – this possibility could not be dismissed out of hand. Once again it comes down to this: as we did not have an opportunity to receive the relevant testimony first hand, we are not in a position to interfere with the Judge's findings of fact on this point.

97 It follows that the Appellant's claim for *fraudulent* misrepresentation must fail. We point out for completeness that, had we found that misrepresentations had been made, the nature of the misrepresentations – fraudulent, negligent or innocent – would have to be examined because different consequences would follow. Misrepresentations that are *not fraudulent* in nature would entitle her to *rescind* the Agreement *as well as* to claim damages (if the misrepresentations fall within the ambit of s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("Misrepresentation Act") and/or are negligent under the common law) *or* an indemnity (if they are wholly innocent in nature). Section 2(2) of the Misrepresentation Act also furnishes the representee (here, the Appellant) with the additional option of claiming damages in lieu of rescission in the context of wholly innocent misrepresentations. If, of course, the statements in question are found to be *fraudulent* misrepresentations, then the Appellant would be entitled to claim all loss that flowed directly from the entry into the Agreement, regardless of whether or not such loss was foreseeable, and the damages awarded would include all consequential loss as well (see the House of Lords decision of *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, the principles of which were endorsed by this court in *Wishing Star Ltd v*

Jurong Town Corp [2008] 2 SLR(R) 909 at [21]–[26] as well as in *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2014] SGCA 62 at [81]–[82]).

98 But for the reasons set out above, despite some reservations with the Judge's findings in relation to two of the statements, the question as to whether the misrepresentations were fraudulent in nature does not even arise because we are unable to find that the Respondent made any actionable misrepresentation to the Appellant. The appeal with regard to the issue of misrepresentation fails.

99 Before we leave this issue, we wish to emphasise that trial judges dealing with misrepresentation claims need to analyse the facts carefully, going through the process of considering such matters as (i) whether the representations were made, (ii) what the representation in question was exactly, (iii) whether it was untrue or not, (iv) if untrue, how on the evidence it may be characterised (*ie*, as innocent or negligent or fraudulent), and/or (v) whether there was reliance – although this list is obviously by no means exhaustive. While in a given case a trial judge may decide that it is not necessary to do that, in general this discipline enables the appellate court to analyse the case appropriately. In this case, the Judge, with respect, did not always approach the case in this way and this hampered our ability somewhat to deal with the issues raised in the present appeal.

100 To be fair to the Judge, though, his task was not made easier by the fact that no fewer than 22 alleged misrepresentations had been put forward by the Appellant. We would observe that it is not necessarily beneficial for a litigant to adopt what is, in effect, a scatter-shot or kitchen-sink approach of this sort: there is a risk that the truly material facts and evidence will be lost in, or at least be diluted by, the morass of relatively peripheral matters. In the present case, several of the alleged misrepresentations contended for by the Appellant were clearly of a rather trifling nature; the wisdom of pursuing such points with any vigour may well be doubted. It is of course the prerogative of parties to advance their case as they see fit, but it is salutary to remember that one's prospects of success do not always increase in proportion to the number of claims or allegations that one makes.

The Respondent's counterclaim

101 The Respondent's counterclaim may be shortly disposed of given our decision on the contract point. The $300,000 which the Respondent claims the Appellant should return to an account held jointly by them was part of the total price of $1.5 million that the Appellant had paid to the Respondent under the Agreement. This $300,000 had been paid into the joint account pursuant to cl 3.3 of the Agreement. Since we have found that the Respondent's breach of cl 1 means that cl 7.2 is triggered so that the Respondent is obliged to return $1.5 million to the Appellant, it follows that this $300,000 belongs to the Appellant and is hers to keep. The Respondent has no right to that sum and her counterclaim therefore fails. It should be noted, however, that because this $300,000 is already in the hands of the Appellant, what is left for the Respondent to do is to transfer $1.2 million to the Appellant.

Conclusion

102 For the reasons set out above, the appeal is allowed based on our decision with regard to the Appellant's claims in contract (albeit not in relation to her claims in misrepresentation). We order that the Respondent transfer $1.2 million to the Appellant, and that the Appellant be permitted to keep the $300,000 that came from the joint account she held with the Respondent. The Appellant is also to transfer her shares in the Company back to the Respondent. The usual consequential orders will apply.

103 The parties have two weeks from the date of this judgment to make written submissions with regard to the costs that ought to be awarded with regard to this appeal as well as in the court below.