IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 277

Suit No 129 of 2011

Between

ONG GHEE SOON KEVIN

… Plaintiff

And

HO YONG CHONG

… Defendant

JUDGMENT

[Conflict of Laws] — [Choice of law] — [Tort]
[Damages] — [Mitigation] — [Tort]
[Tort] — [Misrepresentation] — [Negligent misrepresentation]
[Tort] — [Negligence] — [Duty of care]

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v
Ho Yong Chong

[2016] SGHC 277

High Court — Suit No 129 of 2011
Belinda Ang Saw Ean J
15, 19–22, 26–29 April, 30–31 August 2016; 24 October 2016

16 December 2016 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff's claim in this action relates to the purchase of 200,000 shares in Amaru Inc ("Amaru"). The plaintiff says that he was induced to invest in Amaru by reason of misrepresentation or misstatement on the part of the defendant. The value of the shares in Amaru ("the Amaru shares") is far below the total price of US$655,000 that the plaintiff paid for the purchase of the shares, and in this action, the plaintiff seeks to recover the acquisition sum of US$655,000.

2 This judgment examines, amongst other things, whether the defendant, a bank employee who is sued in his personal capacity, is liable for negligent misrepresentation in respect of the purchase of the Amaru shares. For the various reasons in dispute, the defendant asserts that the tort was committed in Switzerland, and claims, in addition, the benefit of the contract between the

bank and the plaintiff in order to assert that the dispute between the plaintiff and defendant is governed by Swiss law, and is not actionable under Swiss law. This assertion raises a novel point for Singapore's private international law as to whether reference in a contractual document, to a foreign law includes the foreign legal system's private international law or only its domestic law.

Background facts

Parties and relationships

3 The plaintiff is a Malaysian citizen and was at all material times a private banking customer of the Singapore branch of Crédit Agricole (Suisse) SA ("the bank"). The defendant is a Singapore citizen who is, and was at all material times, an employee of the bank.

4 The plaintiff was educated in the United States and is a trained architect holding three degrees: a Bachelor of Environmental Design, a Master in Architecture and a Master in Design Studies. From the end of 2001 onwards, the plaintiff was residing in Vancouver, Canada. He returned to Malaysia in 2008. In 2005, the plaintiff was in Singapore during the following periods:

(a) 4 to 5 February 2005;

(b) 2 to 5 March 2005; and

(c) 4 to 9 December 2005.

The plaintiff's claims that it was during this second trip to Singapore that he had a meeting with the defendant and that it was on that occasion that the series of representations set out in [21] below were made.

5 The plaintiff opened an account with the bank in November 2000 ("the Account"). It is common ground that the Account was booked and domiciled in the Republic and Canton of Geneva, Switzerland. Apart from being a Swiss-booked account, the Account was an execution-only account where with regard to which the bank's role was confined to executing orders on behalf of the customer, as opposed to advisory or discretionary accounts. Put simply, the plaintiff did not grant advisory or management mandates in favour of the bank.

6 It is also common ground that in the bank's General Conditions (Version 10.03), clause 7.29 (which is the contractual choice of Swiss law in issue as confirmed by both parties at trial) provides as follows:

> 7.29 APPLICABLE LAW, PLACE OF EXECUTION AND JURISDICTION
>
> *All relations between the Bank and its client are subject to Swiss law, especially all matters connected with their performance, interpretation, validity or execution.* The place of execution of all obligations, the place of debt collection proceedings (the latter only for clients domiciled abroad) and the place of exclusive jurisdiction in all proceedings is in Switzerland at the domicile of the Bank's office conducting the business relationships with the client. However, the Bank is entitled to institute proceedings at the client's domicile or before any other competent court. The client elects domicile at the aforesaid entity of the Bank for the serving of all legal instruments and procedural documents. [emphasis added]

7 At all material times, the defendant was designated as the officer to liaise with the plaintiff on his Account. The plaintiff, however, chose to liaise with Tiang Lay Nguk ("Ellen"), the Managing Director of the Private Banking

Desk, who headed a team of private bankers that included the defendant. The Private Banking Desk is a unit of the bank that handles high net worth individuals while servicing their banking needs, and Ellen's team services about 350 customers. It is common ground that the plaintiff had more extensive contact with Ellen due to their friendlier and closer relationship, and communicated only occasionally with the defendant. Chia Sze Foh ("Yvonne") is Ellen's service assistant.

8 In the bank's "Know Your Client" form, the plaintiff described himself as a "property and equity investor" who "on his own trades new economy stocks on NASDAQ". [1] During cross-examination, the plaintiff confirmed that he had been trading "new economy" shares such as "IT shares" and "dotcom shares" since the late 1990s and had thereby made around US$1 million in profits. He also traded in US equities through accounts maintained with Prudential Securities and Charles Schwab. His investment preference was for, and his experience was in, US technology and internet counters. The plaintiff is familiar with trading "over-the-counter" ("OTC") shares listed on the Pink Sheets Electronic Quotation System ("Pink Sheets") and on the "Over the Counter Bulletin Board" ("OTCBB"). The data compiled by the defendant's expert witness, Mr David Symons ("Mr Symons"), from the plaintiff's trading activities from 2000 to 2006 shows that the plaintiff traded a total of seven OTC shares in his Prudential and Charles Schwab accounts from 2000 to 2006. The plaintiff's expert witness, Mr Kevin Gin ("Mr Gin"), testified that Pink Sheet shares are highly illiquid and, hence, are risky trades. OTCBB shares are also risky investments. All in all, the plaintiff, at all material times, was and is familiar with trading OTC stocks listed on Pink Sheets and on

[1] 1AB55.

OTCBB. In addition, the plaintiff has also demonstrated a high risk appetite in the foreign exchange market.

The purchase of Amaru shares

9 Amaru is a company incorporated in Nevada, United States of America in September 1999, which is in the business of providing content for broadband media entertainment-on-demand and other related services through its various subsidiaries under the M2B brand in different jurisdictions such as California, Australia, and Singapore. Amaru's corporate offices are located in Singapore. At the beginning, Amaru was a dormant listing vehicle and had no operating business until about 25 February 2004 when it acquired M2B World Pte Ltd ("M2B World"), a company incorporated in Singapore on 3 April 2003. M2B World's business involved online entertainment, education, subscriptions, advertising and branding.

10 Amaru was first listed on Pink Sheets under the symbol "AMRU" on 12 November 2004, and then on OTCBB in the United States, an interdealer quotation system, under the same symbol on 19 January 2007. The plaintiff's pleaded case is that the Amaru shares are of no value. The last share price for the Amaru shares in evidence is US$ 0.03 as of 20 March 2015. The plaintiff's point is that given the "low volume and value of trades", there would be "no possibility" of disposing off the shares on the market at all and, hence, the Amaru shares would be "effectively valueless"; and even more so, when taking into account any transactional fees and costs. To the plaintiff, the full sum of the acquisition price of US$ 655,000 would be the relevant loss suffered.

11 The plaintiff's purchase of Amaru shares was carried out over three periods:

Date of instruction	**Date of acquisition**	**No. of shares**	**Cost price per share (US$)**
4 March 2005	1 April 2005	100,000	3.00
23 March 2005	18 April 2005	50,000	3.00
9 January 2006	13 February 2006	50,000	4.30

12 The plaintiff does not dispute that these purchases were authorised by him, but alleges that he made the investments in reliance on a series of representations which were made negligently by the defendant. As a result, he issued three separate letters of instruction for the above-mentioned 200,000 Amaru shares. It is the plaintiff's case that the representations were made at a meeting on 4 March 2005 that took place at the bank's offices where the plaintiff, defendant and Ellen were present.

13 For the first tranche, the plaintiff's instruction to the bank was by way of a letter of instruction dated 4 March 2005 ("the Letter of Instruction No 1"). The Letter of Instruction No 1 states:[2]

> 4 March 2005
>
> Ms. Jane Ho
> Credit Agricole Indosuez (Suisse) SA

[2] 2AB 745.

> Geneva
> SWITZERLAND
>
> Dear Sirs,
>
> 1277950
>
> Please accept this letter as your authority to sell the equities in my subject account to purchase 100,000 M2B shares at US$3 per share and custodies the shares in subject account accordingly.
>
> Should the equity sale proceeds be insufficient, please debit the shortfall from the Canadian $161,233 fiduciary placement accordingly.
>
> Thank you.
>
> Very truly yours,
>
> -Sgd-

14 As for the second and third tranches of purchase, letters of instruction dated 23 March 2005 and 9 January 2006 ("the Letter of Instruction No 2" and "the Letter of Instruction No 3" respectively)[3] were faxed to the bank's Singapore branch and addressed to the bank in Geneva. The bank's Singapore branch transmitted the two instructions to the bank's head office in Geneva, Switzerland before the respective orders were executed. Unlike the Letters of Instruction Nos 2 and 3, the Letter of Instruction No 1 had no fax markings on it.

15 For reference, the Letter of Instruction No 2 reads:

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[3] 2AB 759.

23 March 2005

Ms Jane Ho
Credit Agricole (Suisse) SA
Geneva
Switzerland

Dear Sirs

1277950

1) Please accept this letter as your authority to debit the above account, and purchase 50,000 M2B shares at USD3.00 per share and custodise the shares in subject account accordingly.

2) The shares are to be registered in the name of [the plaintiff.]

Thank you

Very truly yours

-Sgd-

16 The Letter of Instruction No 3 is as follows:

9 January 2006

Credit Agricole (Suisse) SA
4 Quai, General Guisan
CH 1211, Geneva 3
Switzerland

Dear Sirs

1277950

Please accept this letter as your authority to debit USD215,000 from the subject account, for the purchase of 50,000 Amaru Inc shares at USD4.30 per share and custodise the shares in subject account accordingly.

Please register the shares in the name of [the plaintiff].

Thank you

Very truly yours

-Sgd-

17 Despite initial challenges from the plaintiff, it is quite clear from the evidence that the Amaru shares were purchased from existing shareholders and not acquired through private placement of shares. On or around 16 May 2006, a 1-for-4 stock split of the Amaru shares was conducted and this resulted in the plaintiff's shareholding increasing to 800,000 shares.

The pre-litigation communications

18 On 17 March 2010, at least four years after entering into the Amaru transactions, the plaintiff first officially complained to the bank about the Amaru transactions by way of a letter addressed to the Chief Executive Officer ("CEO") of the bank's Singapore branch. On 28 May 2010, the bank's legal department responded by emphasising that his Account was execution-only, that the bank had not acted as his financial advisor and that he had made the decision on his own to invest or stay invested in Amaru shares and had clearly instructed the bank to purchase those shares.

19 The plaintiff then sent a second complaint letter on 26 June 2010 to one David Tan, the head of the legal department in the bank's Singapore branch upon referral by one Madeline Koh of the Consumer Issues Division of the Monetary Authority of Singapore ("MAS"), copying MAS in the complaint. In its response dated 14 July 2010, the legal department maintained its position as reflected in its previous letter dated 28 May 2010 and repeated that no refund could be envisaged.

20 When there was no response to the plaintiff's letters of demand, the plaintiff filed this action against the bank and the defendant on 28 February 2011. On 15 September 2011, the plaintiff discontinued his action against the Bank.

The misrepresentation claim

The representations as pleaded

21 The representations the defendant is alleged to have made to the plaintiff on 4 March 2005 took place at a meeting at the bank's Singapore offices where the plaintiff, defendant and Ellen were present ("the 2005 March meeting") in the "late morning"[4] for "approximately an hour".[5] The plaintiff claims that the defendant advised him to purchase shares in Amaru by making the following representations which induced the plaintiff to invest US$655,000 in the purchase of the Amaru shares:[6]

(a) The Amaru shares would be listed on the United States NASDAQ Stock Market ("NASDAQ") within a time frame of 12 to 18 months of purchase of the shares (this estimate was subsequently revised to a time frame of 9 to 12 months approximately three months after 4 March 2005);

(b) The Amaru shares could be sold immediately upon listing;

(c) The Amaru shares would eventually be worth US$15 to US$20 per share;

(d) A "safe point of exit" would be between US$11 to US$12 per share at a purchase price of approximately US$3 per share; and

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[4] Plaintiff's AEIC at para 27.

[5] Plaintiff's first affidavit at para 26.

[6] Statement of Claim (Amd No 1)("SOC") at paras 8 to 10

(e) "Alternatively", the purchase of the Amaru shares would be a good investment and would yield the plaintiff a profit as described above from (a) to (d).

22 The basis on which the breach of duty and the loss is pleaded in the amended Statement of Claim is negligent misstatement. The duty of care arose from the professional relationship between the defendant and the plaintiff coupled with the manner in which the above representations (a) to (e) were made. In particular, the defendant owed the plaintiff: (i) a duty of care not to render advice or make representations to the plaintiff regarding investments unless properly verified; (ii) a duty of care not to render such advice or make such representations recklessly and without regard to their accuracy or truth; and (iii) a duty of care in matters involving his handling or dealing with the plaintiff's Account or monies which would lead to any loss caused to the plaintiff. The above representations (a) to (e) were untrue and induced the plaintiff to make the purchase of 200,000 Amaru shares. The representations were made without basis or without reasonable basis as at the time the representations were made, Amaru either could not have met the conditions for its listing on NASDAQ or was unlikely to do so and the defendant knew or ought to have known or could have discovered this with reasonable diligence. Notably, the plaintiff's quantum of claim (*ie*, US$655,000) represents the alleged loss derived from the decision to purchase rather than from the consequence of the investment decision which is more extensive in terms of the heads of loss.

23 An aspect of the plaintiff's case is that he believed the defendant's representations as he was told at the 2005 March meeting that the defendant had a close relationship with one Binny Colin St Gerard ("Mr Binny"), who

was at all material times the CEO of Amaru. When the plaintiff had asked during the 2005 March meeting how he was privy to the information conveyed, the defendant had said that he enjoyed a close relationship with Mr Binny. It is the plaintiff's case that the defendant and Mr Binny had served military service together in the Singapore Armed Forces, that they had been friends probably since 2002 and definitely before February 2004, and that the defendant was involved in M2B World from that period. One Tang Kok Kong ("Mr Tang") testified on the defendant's relationship with Mr Binny. The plaintiff also refers to the defendant's wife and brother having Amaru shares prior to February 2004 and the fact that the defendant's wife was a co-director in another company with two other members of Amaru's senior management as links to demonstrate that the defendant was "involved" in Amaru, knew Mr Binny before the 2005 March meeting and was involved in the promotion of Amaru shares to customers of the bank.

24 The plaintiff also led evidence from one Ho Ban Sin ("Mr Ho"), another customer of the bank to whom similar representations were allegedly made to him regarding Amaru shares. Mr Ho is Mr Tang's brother-in-law. The plaintiff relies on Mr Ho as an independent party who does not know the plaintiff, and submits that based on Mr Ho's evidence and the fact that there are at least a total of nine other customers of the bank other than the plaintiff and Mr Ho who are known to have purchased Amaru shares, an inference should be drawn from such an "unusually high concentration of purchases" that there might have been the promotion of the Amaru shares to them.[7]

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[7] Plaintiff's Closing Submissions ("PCS") at paras 74–75.

25 The defendant denies making the pleaded representations and further denies meeting the plaintiff on 4 March 2005. It is the defendant's case that he and the plaintiff communicated on Amaru only after the latter had purchased a total of 150,000 Amaru shares in the first two tranches. In that first conversation on Amaru, the plaintiff disclosed that he was intending to purchase a third lot of 50,000 Amaru shares since his uncle had bought more shares.[8] The defendant further argues, in the alternative, that the representations outlined above are statements of opinion. In addition, the plaintiff was not induced into investing in Amaru by the defendant as he had already made up his mind to invest in Amaru after learning that his uncle, one Victor Ngo ("Mr Ngo"), had invested a substantial sum in Amaru. The defendant further argues that it completely beggars belief that the plaintiff would liquidate what he called his "life savings" to invest in a stock that he had before the 2005 March meeting not heard of, after just a short meeting with a bank officer with whom he had barely any contact with since he had primarily liaised with Ellen. The defendant submits that the plaintiff's reference to "life savings" was an exaggeration since his equity portfolio was very small as compared to the rest of his investment portfolio which comprised 80–90% real property.

The relevant principles on misrepresentation

26 It is useful to start with the Court of Appeal's guidance in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 (at [99]) on handing misrepresentation claims, which is instructive:

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[8] Defendant's AEIC at para 81.

> … 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
>
> (a) whether the representations were made,
>
> (b) what the representation in question was exactly,
>
> (c) whether it was untrue or not,
>
> (d) if untrue, how on the evidence it may be characterised (ie, as innocent or negligent or fraudulent), and/or
>
> (e) whether there was reliance
>
> – although this list is obviously by no means exhaustive…

27 Statements of fact must be distinguished from statements of opinion, which do not give rise to actionable misrepresentation unless the person expressing the opinion did not hold it, or could not, as a reasonable man having his knowledge of the facts, honestly have held it (see *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2002] SGHC 278 at [22]–[23]). Thus, a statement of opinion may in certain circumstances involve a statement of fact that may be actionable in a misrepresentation claim, where the representor either did not hold that opinion or did not have reasonable grounds for supporting that opinion.

28 As for the plaintiff's claim for negligent misstatement and the duty of care pleaded in the Statement of Claim, the universal test laid down by the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") must be satisfied to establish a duty of care in negligence actions. The question of whether a tortious duty of care has arisen must be assessed by reference to the sequence of relevant facts and events up to the time the alleged duty is said to have been breached: *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4

SLR 886 at [22]. Under the *Spandeck* framework, a threshold requirement of factual foreseeability must be met before a two-stage enquiry comprising proximity and policy considerations is applied (see *Spandeck* at [115]).

29 The plaintiff relies on the concept of assumption of responsibility as the basis of a sufficient proximate relationship to meet the first stage, citing the case of *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 ("*Go Dante Yap*"). In this case, the plaintiff's contention is that the defendant voluntarily assumed a responsibility to take reasonable care in advising him to purchase shares in Amaru and that he relied reasonably on the defendant's advice.

30 The twin factors of voluntary assumption of responsibility and reliance that could satisfy the proximity stage, where the facts support them, is supposedly found in a situation where "A voluntarily assumes responsibility for his acts or omissions towards B, and B relies on it, [such that] it is only fair and just that the law should hold A liable for negligence in causing economic loss or physical damage to B" (*Spandeck* at [81]). At first blush, the situation as described seems to fit with the plaintiff's contention in [29] above; but one has to apply this with the appellate court's clarification in *Go Dante Yap* at [39] in mind, namely, that the requisite assumption of responsibility and reliance established by *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 is an assumption of responsibility to take care in the giving of information or advice or the performance of a service, and reliance by the plaintiff on such being taken, and not an assumption of responsibility by the tortfeasor to do specific acts (such as to give investment advice, as alleged in *Go Dante Yap*) and the reliance by the other on those acts. To satisfy the sufficiency of the legal proximity test, crucially, the plaintiff must establish

that the 2005 March meeting took place and that the representations were indeed made by the defendant to the plaintiff in the specific manner as alleged.

31 On the question of reliance, there will be reliance only if the representation acts upon the will of the representee such that it influences or leads the representee to *change* his or her behaviour. Reliance and inducement are thus two sides of the same coin, and the Court of Appeal 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 [43]) opined as such:

> … Reliance is the logical end of inducement, but viewed from a different vantage point. The question of inducement is approached from the perspective of the representor… The question of reliance is approached from the perspective of the representee…; in particular, reliance looks at the actions of the representee arising from a state of mind or will engendered by the representation concerned. The *Oxford English Dictionary* (Clarendon Press, 2nd Ed, 1989) defines inducement in the following way:
>
> > **1.** *trans.* To lead (a person), ***by persuasion or some influence*** or motive that ***acts upon the will,*** to some action, condition, belief, etc.; ***to lead on, move, influence, prevail upon*** (any one) to ***do*** something.
>
> [emphasis in original judgment]

32 With these principles in mind, I now turn to the factual disputes.

The 2005 March meeting

33 The pleaded representations are said to have been made orally at a meeting at the bank's offices on 4 March 2005. This factual issue is critical in that if no meeting had taken place, the plaintiff's case on the representations made orally at that meeting falls apart from the outset.

34 The plaintiff's account of the 2005 March meeting was that it took place in the "late morning" of 4 March 2005 in Ellen's room in the offices of the bank,[9] and that the plaintiff, the defendant and Ellen were present at the meeting.[10] It was a verbal one-way presentation from the defendant mostly where he made the pleaded representations, with Ellen present throughout the meeting although she did not say much and was instead busy fiddling with her computer.[11] According to the plaintiff, the defendant described Amaru and handed the plaintiff "three or four articles about the company, one of which was about Mr Binny, and bare background on him, and what he was planning for the company."[12] The plaintiff claims not to have heard of the name of the company prior to the 2005 March meeting, and that he decided to buy into Amaru shares by "liquidating everything" after the defendant's presentation during that meeting.[13] After the defendant's "sales pitch", Ellen called Yvonne into the room and Yvonne was instructed to draft the Letter of Instruction No 1 which Yvonne promptly drafted and brought back into the room five minutes later.[14]

35 Ellen corroborated the defendant's evidence that there was no meeting with the plaintiff on 4 March 2005. The defendant and Ellen gave evidence that their activities on 4 March 2005 were outside the offices of the bank and the table below sets out their activities for almost the entire working day:

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[9] Plaintiff's AEIC at para 27.

[10] Transcript dated 19 April 2016 at p 40.

[11] Transcript dated 19 April 2016 at pp 55 &56.

[12] Transcript dated 19 April 2016 at para 56.

[13] Transcript dated 19 April 2016 at p 70

[14] Transcript dated 19 April 2016 at p 71.

Time	Activity	Documentary Evidence Tendered
Morning	Ellen and the defendant left the bank's office at Robinson Road and drove to Liang Court shopping mall to purchase fruits for an Indonesian client at Meidi-ya supermarket.	-
11.57am	The defendant drove to the car park at Ascott Service Apartments on Scott Road (now Scotts Square Condominium) and entered the car park at 11.57am; went up with Ellen to the said Indonesian client's serviced apartment to drop the fruits off; and then went to meet another client for lunch.	Car park receipt indicating entering of car park at 11.57am and leaving at 4.15pm on 4 March 2005.
Around 12.34pm	Ellen and the defendant had lunch with a Singaporean client at the Mezza9 restaurant at Grand Hyatt hotel.	Claim form for meal with receipt indicating lunch ordered at around 12.34pm and payment made at around 1.12pm.
After 1.12pm	Thereafter, Ellen and the defendant went back to see the Indonesian client at the service apartment.	-
Around 4.15pm	Ellen and the defendant left the Scotts car park.	Car park receipt as above.

36 Counsel for the plaintiff, Mr Alvin Tan ("Mr Tan"), is aware that there is no witness to the representations for the plaintiff other than the plaintiff's own recollection of events that happened many years ago. It is conceivable that any finding of primary fact would be based on the credibility or reliability of the plaintiff's oral evidence. Thus, part of Mr Tan's approach was to persuade the court to make findings of fact on other matters in the plaintiff's favour so as to use the factual findings as a basis to draw inferences that it was more probable than not that the representations were made orally at a meeting in the bank's offices on 4 March 2005. The other matters relate to the defendant's connections with Mr Binny and Amaru (see [23] – [24] above).

37 Counsel for the defendant, Mr Lai Yew Fei ("Mr Lai"), points to several other reasons why the 2005 March meeting probably did not take place and that the plaintiff's recollection of relevant events given the inconsistences and contradictions were unreliable. Ultimately, Mr Lai submits that the overall circumstances mean that the misrepresentation claim must fail for lack of proof that the meeting took place at all, and thus, lack of proof that the defendants made the representations relied on. I will now examine the veracity of the plaintiff's testimony and the weight of the evidence adduced on behalf of the plaintiff, and the defendant's countervailing evidence and reasons given in his attempt to refute the plaintiff's assertions.

38 In this particular case, the court will have to reach conclusions of primary fact based partly upon the view which the court will form of the oral evidence of the witnesses, and partly from an analysis of the limited documents disclosed. Primarily, there is no record of or reference to any arrangement for a meeting on 4 March 2005, nor mention of the 2005 March meeting in any contemporaneous document – nor even in any non-

contemporaneous document created before this action was begun. Some findings of primary fact will be the result of direct evidence whereas others will depend upon inference from direct evidence of such facts. Mr Tan has approached the matter (as described in [36] above) by seeking to prove the 2005 March meeting and representations by weighing up a series of factors mentioned earlier. Notably, the inquiry the court is invited to embark upon is not just concerned with conclusions of primary fact as described; it involves making findings and then evaluating a number of different factors from the available evidence which have to be weighed against each other before drawing inferences from those factors. In the present context, the inference here is not a simple matter of fact because it involves a process of evaluating circumstantial evidence. There is also the civil standard of proof that has to be discharged by the plaintiff.

The timing and duration of the 2005 March meeting and the reconciliation of the chronological accounts

39 The plaintiff had deposed in an earlier affidavit in 2011 that the subject meeting was in the "late morning" and that it lasted for approximately an hour. The common understanding of "late morning" is 11.00 am to 12.00 noon. This same meaning was adopted in the plaintiff's Further & Better Particulars dated 29 May 2012 wherein he pleaded that the 2005 March meeting "started in the late morning and ended just before lunch as it was timed so that parties could proceed to lunch after the meeting".[15] Come 13 January 2016, the plaintiff took a different position. His Affidavit of Evidence-in-Chief ("AEIC") made no reference to the plan to lunch together. As the defendant points out, the plaintiff would have seen the defendant's documents disclosed at discovery

[15] Plaintiff's FNBP dated 18 May 2012 at p 3.

and that showed that the defendant and Ellen were elsewhere in Grand Hyatt having lunch with another bank customer. The defendant suggests, and I am inclined to accept, that in order to skirt around this piece of evidence, the plaintiff changed his evidence, in his AEIC, to state that the "meeting was in the late morning and I recall that the meeting ended just before lunch".[16]

40 In cross-examination, the plaintiff explained that as he gets up at "5.00 to 6.00 am every morning", his idea of "late morning" is "10.00 am to 10.30 am onwards".[17] At the trial, the plaintiff changed the duration of the meeting from "approximately an hour" to "30 to 45 minutes". When asked about the change, the plaintiff tried to rationalise this by saying that the 45 minutes, once the additional five minutes that Yvonne took to prepare the Letter of Instructions No 1 was added (for a total of 50 minutes), was "close to an hour".[18] It is telling that the plaintiff himself somewhat admits that he refrained from further mention of his first estimate of the meeting lasting an hour *after* documents later surfaced that pointed to the defendant being somewhere else:[19]

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[16] Plaintiff's AEIC at para 27.

[17] Transcript dated 19 April 2016 at p 72.

[18] Transcript dated 19 April 2016 at p 43.

[19] Transcript dated 19 April 2016 at p 45.

> Q: I put it to you that you took out the sentence, "The meeting took approximately one hour", because by this time of the filing of the [Affidavit of Evidence-in-Chief], documents had surfaced that pointed to [the defendant] being somewhere else. Do you agree or disagree?
>
> A: I think to some degree, yes.

41 The evidence is that the defendant and Ellen entered the car park of the Scotts Serviced Apartments ("Scotts car park") at 11.57 am. Even on the plaintiff's revised estimate of the duration of the meeting lasting 50 minutes starting from 10.30 am, the meeting would have ended at 11.20am. The defendant testified that it would have taken him and Ellen more than 37 minutes to get from the bank's offices at Capital Tower to Liang Court (where they had to pick up some fruits and have them gift wrapped for an Indonesian client)[20] and thereafter to reach to the Scotts car park; thus it would not have been possible, on the plaintiff's revised estimate, for the defendant and Ellen to have arrived at the Scotts car park at 11.57am.

42 The plaintiff's inconsistent evidence and shifts from his earlier positions as described are unsatisfactory and they undermined his account of the relevant events. The impression that is left is that the plaintiff is an unreliable witness in more ways than one. To further demonstrate the unreliability of the plaintiff's oral evidence, the defendant challenged as erroneous the plaintiff's recollection of a lunch meeting at a Chinese restaurant within walking distance from the bank's office between him, the defendant and Ellen in Singapore sometime between 4 and 9 December 2005 during his third and last trip to Singapore in 2005 (see at [3] above) prior to the purchase of the third tranche of shares, at which he "made a request to

[20] Transcripts dated 22 April 2016, p 58.

purchase a further batch" of Amaru shares.[21] Ellen's evidence is that she was overseas in Hong Kong and Macau from 5 to 10 December 2005 and she produced her passport to support her testimony. It was pointed out that the defendant and Ellen would not have met the plaintiff for lunch on 4 December 2005 because the plaintiff himself arrived in Singapore on a long-haul flight from Vancouver, Canada on 4 December 2005; and 4 December 2005 was a Sunday and that bank's offices were closed. The plaintiff does not address or refute the defendant's position in his closing submissions.

The state of the defendant's documentary evidence

43 The plaintiff takes issue with the defendant's limited documentary evidence that did not include parking receipts from Liang Court's car park and receipts from the Meidi-ya supermarket. Ellen and the defendant were able to provide satisfactory explanation for the "missing" receipts. I accept as plausible their explanation that only car park receipts in respect of visits to the Indonesian client were kept as a form of proof that they were spending their time out of office on work-related matters, as opposed to accounting how much was spent on car park fees with a view to seek reimbursement from the bank. Ellen explained that the Indonesian client had been admitted to the National University of Hospital ("NUH") and there were daily car park receipts adduced by the defendant for the period from 1 to 5 March 2005 (the first one being at NUH, and the rest at the Scotts car park). Next, although it may seem generous of Ellen to have not kept the receipts and claimed for the various food items (which ranged from expensive Japanese fruits to pastries and porridge) which she bought for the Indonesian client in those few days

[21] Plaintiff's AEIC at para 49.

when they visited him, I do not doubt Ellen's explanation that she was very fond of the Indonesian client, who was an elderly man, and would spend her own money on him instead of going through the administrative inconvenience of seeking pre-approvals for expenditure above $200. In Ellen's words, this was a client whom she "genuinely love[d]"[22], and this personal affection explained why she would be willing to pay for the gifts herself. Consistently with this professed affection, Ellen testified that she had once flown to Jakarta on her own expense to visit the client after he had sustained an injury in a golfing accident. I do not find any of this implausible given Ellen's evidence that she shared a close and personal relationship with this client, one which had spanned "almost three decades of more" in which the same client had "followed [her] to the various institutions" which had employed Ellen during this period.[23]

44 I find that there is nothing in the overall evidence to suggest that Ellen's testimony corroborating the defendant's evidence that there was no 2005 March meeting was designed to help a colleague. Ellen testified that she found out about the plaintiff's instructions to purchase Amaru shares when Yvonne called to notify her that the bank had received the plaintiff's Letter of Instruction No 1. Ellen was still out of the office with the defendant when Yvonne contacted her. It seems to be inherently unlikely that Ellen as the defendant's superior would have quietly sat in the room and allowed her officer to give investment advice knowing full well that the plaintiff's Account was an execution-only account where the bank's role was confined to executing orders on behalf of the plaintiff.

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[22] Transcript dated 27 April 2016 at p 69.

[23] Transcript dated 27 April 2016 at p 66.

The correspondence before and after 2005 March meeting

45 The plaintiff testified that his trip to Singapore was unplanned, but that he had subsequently extended his stay in Kuala Lumpur and then arrived in Singapore on 2 March 2005 until 5 March 2005. Yet, there was no record of or reference to any arrangement for a meeting on 4 March 2005. In contrast, there were records of an e-mail exchange between Ellen and the plaintiff on 31 January 2005 suggesting that they catch up in Singapore sometime between 5 and 25 February 2005. Nothing was ultimately arranged on that occasion as their schedules clashed. No meeting was suggested in March 2005.

46 The bank's records also do not contain any record/memoranda of a meeting between the plaintiff, the defendant and Ellen on 4 March 2005. The reliability of the plaintiff's evidence is further undermined by the fact that the 2005 March meeting or the representations were not mentioned in any subsequent correspondence after the date of the 2005 March meeting. The e-mail exchanges between the plaintiff and Ellen (with Yvonne copied) on 8 March 2005 did not refer to such a meeting or any of the alleged representations, a fact that the plaintiffs admits.[24] There was equally no reference at all to the 2005 March meeting in the four subsequent letters of complaint sent by the plaintiff or his lawyers to the bank between 17 March 2010 and 25 March 2011. In fact, the 2005 March meeting was not pleaded in the Statement of Claim filed on 10 August 2011 and the particulars of the same were only given in the Further and Better Particulars filed May 2012. I do not accept the plaintiff's answer that he only realised the importance of the 2005 March meeting when he filed in first affidavit in these proceedings on 11

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[24] Exhibit D3, Exhibit D4; Transcript dated 19 April 2016 at pp 77&78.

October 2011. The plaintiff himself indicated that he would be building his case carefully and with "as much details" as possible, and the omission of a crucial meeting in his complaint letters to the bank, the first of which was sent in March 2010, was more consistent with the defendant's contention that there was no meeting on 4 March 2005.

47 The plaintiff maintains that the reference to a "2nd 50K shares" in his e-mail dated 8 March 2005 to Ellen is a reference to the shortfall of 50,000 shares discussed at the 2005 March meeting.[25] In his AEIC, the plaintiff states that he was informed by Ellen that there were only 100,000 shares available at that time and he would be notified when a further 50,000 became available. However, I am not persuaded that this reference in the e-mail can *only* be explained by accepting the plaintiff's version of what transpired on 4 March 2005. Without more, it is entirely plausible that the plaintiff was simply seeking to acquire another lot of 50,000 Amaru shares.

The preparation of Letter of Instruction No 1

48 According to the plaintiff, the Letter of Instruction No 1 was prepared by Ellen's assistant, Yvonne. Notably, the plaintiff's AEIC was affirmed on 13 January 2016 and it does not indicate which of the bank's staff had prepared the Letter of Instruction No 1. In the Further and Better Particulars filed on 29 May 2012, the plaintiff indicated that he "*does not know which employee prepared the letter of instruction* as it was not done in his presence" [emphasis added]. However, on the first day of trial on 15 April 2016, the plaintiff informed the court that he wished to supplement his AEIC by adding that Yvonne was called into the office and *Ellen had instructed Yvonne to draft the*

[25] PCS at para 106.

letter of authority for him to sign, and that Yvonne "went away for a few minutes and came back with that letter of authority which [the plaintiff] signed in front of the Defendant and his colleagues".[26] The plaintiff has not given any reason for his better recollection in 2016 as opposed to 2012.

49 Ellen testified that she did not instruct Yvonne to prepare an authorisation letter for the plaintiff to sign on 4 March 2005. Yvonne, who was called as a witness for the defendant, testified that there was no 2005 March meeting; that she had not received instructions from Ellen to prepare an authorisation letter for the plaintiff, and that she had not typed out the Letter of Instruction No 1. In any case, she explained that the letter was not in her usual style of writing[27] and, furthermore, she did not know about "M2B", which was the term used in the Letter of Instruction No 1. Instead, she had heard of "Amaru", possibly because she had processed purchases of Amaru shares for other clients before.[28]

50 I pause here to refer to Yvonne's evidence in answer to Mr Tan's questioning on the letters of instruction. Her evidence is that she prepared Letter of Instruction No 3 dated 9 January 2006 and that was done after "they met" the plaintiff.[29] In re-examination, Yvonne was asked to elaborate and she explained that she, Ellen and the defendant met the plaintiff in Kuala Lumpur for lunch on 5 January 2006 and the Letter of Instructions No 3 was prepared thereafter.[30] The defendant was able to produce a receipt for that lunch. I make

[26] Transcript dated 15 April 2016 at p 9.

[27] Yvonne's AEIC at para 8.

[28] Transcript dated 26 April 2016 at p 40.

[29] Transcript dated 26 April 2016 at p56; correction at p 124 lines 17-21.

[30] Transcript dated 26 April 2016 at p 125.

reference to this lunch meeting and Yvonne's preparation of the Letter of Instruction No 3 only because it sounds rather similar to the plaintiff's narrative of Yvonne's involvement in the 2005 March meeting, and, given the unreliability of human memory, it is possible for the plaintiff to have mixed up the events since his oral evidence is based on the plaintiff's recollection of events which occurred years ago.

51 Returning to the 2005 March meeting, the plaintiff contends that the 2005 March meeting must have occurred as the defendant has not satisfactorily explained why the plaintiff was not informed in writing that the reference to "M2B" in the Letter of Instruction No 1 ought to be corrected to "Amaru". The plaintiff is simply being argumentative there.

52 First, I do not think that the absence of a correction from "M2B" to "Amara" is crucial for it is not indicative that the 2005 March meeting *must* have occurred, contrary to what the plaintiff submits. Yvonne and Ellen testified that Yvonne had called on 4 March 2005, when Ellen was still out of the office, to inform Ellen that the plaintiff had sent an instruction to purchase "M2B" shares as stated in the letter, and it was then that Ellen told Yvonne over the phone that the plaintiff meant "Amaru" shares. Looking at how Yvonne consistently refers to "Amaru" instead of "M2B" in her e-mail to the plaintiff[31] and in her handwritten notes on the instruction letters,[32] while the plaintiff refers to "M2BW"[33] or "M2B"[34] in his e-mails to Ellen, the defendant and Yvonne from March to May 2005 *after* the Letter of Instruction No 1 on 4

[31] 1DB 102.

[32] 2AB 748-749.

[33] 2AB 758.

[34] Exhibit D3; 2AB 793.

March 2005, it is clear that "M2B" was the term used by the plaintiff and that Yvonne would not refer to Amaru as "M2B". It is significant that even after Yvonne described the shares to be Amaru shares in her e-mail to the plaintiff on 7 March 2005 confirming sale of equities pursuant to the instruction letter, the plaintiff continued to refer to the shares to be purchased as "M2BW" or "M2B" in his e-mail communications on 21 March 2005[35] and 24 May 2005.[36]

53 Second, the plaintiff's argument that there was no need for Yvonne to speak to the plaintiff to confirm which portfolio shares were to be sold and hence suggesting that Yvonne was not being truthful in insisting there was a need to speak to the plaintiff is directly contradicted by Yvonne's e-mail dated 8 March 2005[37], which refers to her phone conversation with the plaintiff pursuant to which she confirmed the order to sell one of three shares held in his Account. The plaintiff's attempt to cast doubt on Yvonne's credibility is groundless.

54 The plaintiff relies on the fact that the Letter of Instruction No 1 has no fax markings on it (as opposed to the Letters of Instruction Nos 2 and 3) and is addressed to one Jane Ho, a person whom he has never known, in support of his account (see the letter as reproduced above at [13]). He also cites the reference to the figure of Canadian dollars ("CAD") 161,233 inserted in the letter, which was his exact balance of his fixed deposits then. He claims that he would not have known that figure since he had a "hold mail" arrangement with the bank where he would have to either go to the bank's branch to collect

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[35] 2AB 758.

[36] 2AB 793.

[37] 2AB 753.

his mail (which would include his portfolio valuation statements) or have a bank's employee hand-carry his mail to him.[38]As of 28 February 2005, which was the date of the latest Portfolio Valuation of the Account, the plaintiff's portfolio with the bank contained, *inter alia*, fixed fiduciary deposits valued at CAD 161,233.

55 Although there are certain matters that cannot be reconciled from gaps in the evidence, such as the manner in which the Letter of Instruction No 1 was delivered to the bank if it was not faxed, or how exactly the exact figure of CAD 161, 233 in the Letter of Instruction No 1 came about, the burden of proof is on the plaintiff to prove that the 2005 March meeting took place and that the defendant's representations were made there. In any case, I do find plausible Yvonne's suggestion that the plaintiff could have called in to check on the fixed deposits in CAD in his Account, having regard to Yvonne's manner of dealing with clients where clients such as the plaintiff would ring up for information on their accounts. On the whole, the plaintiff has not persuaded this court through the evidence adduced that it was Yvonne who drafted the Letter of Instruction No 1.

The relevance of Mr Ho's evidence

56 It is the plaintiff's pleaded case that the bank was involved in the promotion of shares in Amaru to customers of the bank, and this provided the basis and explanation for the defendant's representations to the plaintiff and other customers of the bank. The plaintiff called another customer of the bank, Mr Ho, who claims that the defendant made similar representations to him sometime in 2004 or 2005 through telephone calls that Amaru was going to be

[38] Transcript dated 21 April 2016 at p 127.

listed on NASDAQ and that upon listing he would be able to realise a "very substantial profit".[39] Mr Ho also claims that the defendant kept "pestering" him to buy Amaru shares.[40] The plaintiff relies on Mr Ho as an independent party who did not know the plaintiff, and submits that based on Mr Ho's evidence and the fact that there are at least a total of nine other customers of the bank other than the plaintiff and Mr Ho who are known to have purchased Amaru shares, an inference should be drawn from such an "unusually high concentration of purchases" that there might have been the promotion of the Amaru shares to them.

57 In order to succeed on the representations (a) to (e), the plaintiff must establish the precise representations as pleaded were in fact made by the defendant to him. Therefore, Mr Ho's evidence on any representations made to *him* does not in any way prove that the pleaded representations were made by the defendant to the *plaintiff*. It would be a stretch to draw an inference that the pleaded representations were made from the mere fact that other customers of the bank other than the plaintiff had bought into the Amaru counter. In any case, Mr Ho is not a totally disinterested party when he himself had suffered losses due to his Amaru investments and was admittedly "obviously unhappy".[41] More importantly, Mr Ho's claim that representations were made to him "sometime in the year 2004 or 2005"[42] clearly contradicts the time of his purchase of Amaru shares in his (joint) account with the bank. There were no purchases of Amaru shares in the account in those years,[43] and the first

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[39] Mr Ho's AEIC at paras 4 -5.

[40] Transcript dated 20 April 2016 at p 126.

[41] Transcript dated 20 April 2016 at p 126.

[42] Mr Ho's AEIC at para 4.

instruction that he gave to the bank to purchase Amaru shares was only much later in July 2006.[44] At trial, Mr Ho claimed that his purchase of shares in 2006 was his second purchase and that he had first purchased Amaru shares through the bank in 2004.[45] However, the documentary evidence of his portfolio valuations clearly reflects otherwise. I thus reject Mr Ho's evidence as it appears unreliable and, which even if true, is irrelevant to the plaintiff's own claim.

The defendant's involvement with Amaru

58 The plaintiff submits that the defendant was involved in Amaru and had a close relationship with Mr Binny, the CEO of Amaru, and points out that his wife and brother had Amaru shares prior to February 2004. The plaintiff subpoenaed Mr Tang to testify that the defendant and Mr Binny were friends and that he had seen the defendant in Mr Binny's office on many occasions. Furthermore, the defendant's involvement with Amaru went beyond the bank's promotion of the shares in Amaru to the bank's customers. It appears that his brother and wife held shares in Amaru and that the defendant's wife was a co-director in another company with two other members of Amaru's senior management. The plaintiff attempts to use these facts as links to demonstrate that the defendant was "involved" in Amaru, The defendant's attempt to disassociate himself from his wife's and brother's investments in Amaru was unconvincing. However, their investments in Amaru prior to the 2005 March meeting do not go towards establishing the plaintiff's claim in misrepresentation. Neither would the defendant's wife co-directorship with

[43] 1DB 4-97, 105-110, 159-170, 176-214.

[44] 1DB 244.

[45] Transcript dated 20 April 2016 at pp 105 & 106.

Amaru's senior management make a difference. The link which the plaintiff wishes the court to draw is too tenuous and speculative.

59 Mr Binny had testified that the bank was not instructed to promote Amaru to its customers, and that the defendant was not helping him push up the share price. His denial confirmed what Mr Tang acknowledged in court that he had assumed that the defendant was used to "push up the share price". [46] Mr Binny also testified that there were never plans to list Amaru on NASDAQ. Amaru's plans were always to upgrade from Pink Sheets to American Stock Exchange ("AMEX"). Furthermore, Mr Binny said that he was never a client of the bank and that he had first met the defendant "sometime [in the] middle to end of 2005", which was after the 2005 March meeting. As for Mr Tang, Mr Binny clarified that he knew Mr Tang professionally in that Mr Tang is the real estate agent who helped broker the lease of Amaru's office. The plaintiff has not been able to rebut Mr Binny's testimony.

60 In sum, the defendant's involvement with Amaru via his brother and wife is one factor but it is not enough on its own, when weighed against other countervailing evidence, to discharge the plaintiff's burden of proof.

Other evidential challenges to the pleaded representations

61 There are further challenges to the pleaded representations on a variety of grounds both legal and evidential. Broadly, there is no representation in that the words said and the contemporaneous action of the plaintiff do not match. (It should be noted, too, that what was actually said is conflicting on the

[46] Transcript dated 21 April 2016, pp 13 & 14.

plaintiff's pleadings and evidence.) In addition, the legal element of inducement has not been made out.

Representation (a) that the Amaru shares would be listed on NASDAQ and representation (b) that they could be sold immediately upon listing

62 In the Statement of Claim and his AEIC, the plaintiff alleges that the defendant represented at the 2005 March meeting that the Amaru shares would be listed on NASDAQ within 12 to 18 months of purchase of the shares and that they could be sold immediately upon listing.[47] He then claims that the defendant revised this time frame to "9 to 12 months of purchase" in an alleged telephone conversation approximately three months after 4 March 2005 (*ie* June 2005).[48]

63 Previously, though, before he brought this action, the plaintiff in his first complaint to the bank dated 17 March 2010 referred to a listing of the Amaru shares on NASDAQ "within months",[49] and in his subsequent letter to the bank through his solicitors dated 18 August 2010, the time period of the supposed represented listing on NASDAQ was "within the next few months". When asked at trial how there were different versions of what was said to him at the 2005 March meeting, his excuse was that he "must have overlooked this" when he did not include the figure of 12 to 18 months in the two letters prior to his Statement of Claim and AEIC. This answer is not acceptable. A "few" months plainly would not mean 12 to 18 months, or even 9 to 12 months.

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[47] SOC at para 8. Plaintiff's AEIC at para 29.

[48] Plaintiff's FBP dated 11 May 2012 at para 5(c) and (d).

[49] 3AB 1402.

64 Related to these two representations was the plaintiff's e-mail to Yvonne dated 24 May 2005[50] where he had expressed his hope that he could sell the Amaru shares "soon" so that he could perhaps buy a property, and went on to say that he was "dead if cannot sell for 1–2 years". Assuming a time period of 12 to 18 months was indeed represented, the listing would be estimated to take place sometime between March and September 2006. Yet, in May 2005 about a year before this period, he was for some reason expressing a view that he wished to liquidate his Amaru shares. This e-mail contradicts the words used in the representations. When pressed on this point at trial, the plaintiff could only reply that when he mentioned "soon", he was "thinking of 12 to 18 months", which is effectively 1–1.5 years.[51] If he had indeed received the alleged representation that the shares would be listed in 12 to 18 months then, and could only be sold upon listing, he would not have expressed a wish to liquidate the Amaru shares "soon" in May 2005, just 2 months after his purchase of the first two tranches of Amaru shares in March 2005. Nor would he be referring to a period of 1–2 years which was different from the period of 1–1.5 years that he is now alleging was represented.

65 Further, the plaintiff has also not produced any contemporaneous correspondence between him and any of the bank's officers that referred to a NASDAQ listing, which is at the heart of the plaintiff's claim. It is similarly odd that there has been no evidence of any protest written or otherwise from the plaintiff to the defendant or any officers of the bank mentioning the fact that a NASDAQ listing of the Amaru shares was represented.

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[50] 2AB 793.

[51] Transcript dated 19 April 2016 at p 123.

66 A related point is the question whether of the Amaru shares could have been listed on NASDAQ within the time frame as alleged. The plaintiff submits that the defendant had no reasonable basis for making the representations (a) and (b). Mr Gin, the plaintiff's financial expert witness, was called to demonstrate that Amaru could not have met the conditions required for its listing on NASDAQ within the represented time frame.

67 In his Opening Statement, the plaintiff characterises Mr Gin's opinion as being that it was "impossible"[52] for Amaru to list within 9 to 12 months or even 12 to 18 months (the revised time frame) after 4 March 2005. However, Mr Gin's report is less categorical; he states that in his professional opinion, Amaru "could not have or was unlikely to have"[53] met the conditions required for a NASDAQ listing. Nonetheless, the factual question the court is asked to consider is not whether it was possible or likely that Amaru would have achieved a NASDAQ listing in the stated time frame (with the benefit of hindsight), but instead whether the defendant had any reasonable grounds for holding the opinion that the Amaru shares would be listing on NASDAQ within the stated time frame *at the material time of the alleged representations*. This distinction is important.

68 Thus, Mr Gin's views about there being no evidence showing fulfilment of the rules that had to be satisfied for initial NASDAQ listing *at the time of initial inclusion* are beside the point. For example, the fact that Amaru had not yet appointed any market makers as required by the NASDAQ Listing Rules by 4 March 2005 did not necessarily mean that they were not

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[52] Plaintiff's Opening Statement at para 26.

[53] Mr Gin's report (Exhibit KG-1 of Mr Gin's affidavit dated 19 August 2015) at para 13.

going to do so within the stated time frame. The minimum bid price requirement of US$4 per share that is also a requirement *at the point of listing* is also not key to the court's inquiry. Similarly, Mr Gin's argument about there being no evidence that Amaru engaging necessary professionals to prepare the company for listing is moot, considering that such evidence of filings on engagement of such professionals would only be at the *point of listing or post-listing*, as Mr Gin himself agreed during cross-examination.[54] A simplistic equation of the qualitative assessment of whether a business is sustainable for the purposes of listing on NASDAQ to whether the net cashflow from operating activities in the company's financial statements is positive or negative in his report should also be further questioned. Mr Gin admitted at trial that he would not rule out a possible NASDAQ listing for companies with negative cashflows,[55] and that he was not privy to evidence from other factual witnesses when he wrote his report about whether there was a "buzz" around Amaru then.[56] He also admitted that if one used profits instead as a criterion for valuation or indicating sustainability, Amaru had a "fair chance" at listing on NASDAQ.[57] In fact, Mr Gin in his report (at para 29) admits that if he disregards the requirement of having registered and active market makers, Amaru would have "technically qualified" for NASDAQ listing. As Mr Gin acknowledges, Amaru could and would have satisfied NASDAQ listing requirements based on its amount of stockholders' equity, length of operating history, and so on.[58]

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[54] Transcript dated 29 April 2016 at p 59.

[55] Transcript dated 29 April pp 54&55.

[56] Transcript dated 29 April 2016 at pp 56-57.

[57] Transcript dated 29 April 2016 at p 58.

[58] Mr Gin's report at para 29.

69 On Mr Gin's expertise, he admits that he had "never actually [been] involved in an actual application being made to NASDAQ for a listing"[59] and that his interpretation of the NASDAQ Listing Rules is reached based on "impressions on reading" Singapore and Hong Kong stock exchange listing manuals and what he has done in the past with regard to listing on stock exchanges in these two jurisdictions. His unfamiliarity with the NASDAQ Listing Rules is also apparent when he admits that he misinterpreted certain limbs of a rule to be read conjunctively instead of disjunctively[60] and also erroneously read into one rule a condition (of sustaining a certain requirement for 90 days prior to applying for listing) which in truth only applied to a different rule.[61]

70 On the whole, the plaintiff's attempt to show that the defendant's representation about a NASDAQ listing within the stated time frame had no reasonable basis is unsatisfactory as it is mostly argued with the benefit of hindsight looking at listing requirements the fulfilment of which can only be evidenced by documentation near or at the point of listing. These do not go towards showing that the defendant if he had indeed made the alleged representations did not have any reasonable basis for doing so.

Representation (c) that the Amaru shares would eventually be worth US$15 – US$20 per share and (d) that a "safe point of exit" would be US$11 – US$12 per share at a purchase price of approximately US$3 per share

71 Like representations (a) and (b), the plaintiff has not produced any contemporaneous correspondence mentioning any projections of Amaru share

[59] Transcript dated 29 April 2016 at p 7.

[60] Transcript dated 29 April 2016 at pp 83&84.

[61] Transcript dated 29 April 2016 at pp 38-40.

prices. All these figures in representations (c) and (d) were never mentioned in any of the four complaint letters or letters of demand to the bank prior to this action being brought. When pressed for an explanation in cross-examination, the plaintiff's excuse was that "if [he] had remembered it, then [he] would have included it"[62] and that "[he] can't be reasonably expected to remember everything".[63] He claims that with the benefit of hindsight, he would have raised and mentioned these points in his complaint letters which were sent three years after he first asked the bank to whom he could address his complaint in 2007. I find the plaintiff's answers unacceptable. Representations (c) and (d) are material matters that formed the basis of the inducement to invest in Amaru. In fact, in the plaintiff's e-mail to his uncle on 21 September 2007 (before he sent the first complaint letter in 2010) wherein he discussed his possible legal action with his uncle, he mentioned to his uncle that he had told Yvonne that he would "continue to work on drafting [his complaint] letter *carefully* and with *as much detail as [he] can include*" [emphasis added]. The plaintiff was and is clearly aggrieved by this saga, and it would be inconceivable to leave out such important details in his complaint letters – details that are crucial to his claim of misrepresentation, if he was indeed building his case up as carefully as he has indicated to his uncle.

Representation (e) that "alternatively", the purchase would be a good investment and yield him the profit aforesaid

72 As for representation (e), the plaintiff's evidence at trial was that he was *not* told that the Amaru shares would be a "good investment and yield him the profit aforesaid" in this exact form or in those exact words, but that this

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[62] Transcript dated 20 April 2016 at p 7.

[63] Transcript dated 20 April 2016 at p 9.

representation was alluded to be based on the "tone" of the content of what the plaintiff was allegedly talking about.[64] As the plaintiff's pleaded case is that the defendant had told him this representation orally, without any qualification that the plaintiff had used words to this effect, the plaintiff has not discharged the proof that is required of him. Representation (e) is a non-starter any way: the crux of representation (e) hinges on the earlier four representations. After all, the plaintiff's case is that the various specific representations made him "excited about [Amaru's] prospects" as an "extremely profitable investment opportunity".[65]

Proof of reliance and inducement

73 Reliance is a necessary ingredient in any misrepresentation action. As stated, reliance and inducement are two sides of the same coin (see [31] above).

74 The burden of proof is on the plaintiff to establish on the balance of probabilities that his decision to purchase the Amaru shares was induced by the defendant's representations. The causal link between the representations and the loss of US$655,000 is the decision to purchase the Amaru shares as a result of the defendant's inducement.

75 There are several factors in this case that militate against the plaintiff's misrepresentation claim by undermining his attempts to prove on the balance of probabilities the ingredient of reliance/inducement (on the assumption that

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[64] Transcript dated 19 April 2016 at pp 51&52.

[65] SOC at para 30.

the representations were made). I will elaborate on these factors which are to be taken cumulatively.

(1) The uncle's substantial investment in Amaru

76 The plaintiff's case is that before the 2005 March meeting, he did not know the name of the company and had no idea what business it was dealing in,[66] except for the fact that his uncle had bought a "hot stock" or a "good investment"[67] and had made money. It was because his uncle had told him about this "hot stock" that he extended his stay in Singapore and called Ellen about it, prior to the 2005 March meeting. The plaintiff departed from his AEIC and claimed in the witness box that it "all originated from [his] uncle telling [him] that there was hot stock",[68] and at the time he and his uncle spoke, his uncle had not invested in the counter. His uncle only mentioned that he had made a "substantial investment" in Amaru "on a later date".[69]

77 Although the plaintiff disagrees that his uncle was the "driving force" behind his investment, the plaintiff accepts that he was partially influenced by his uncle's investment in Amaru when he decided to "liquidate all [his] holdings with [the bank] in order to buy whatever [his] uncle bought":[70]

> Q: You thought it was such a good investment by your uncle that you thought nothing would go wrong if you followed suit.
>
> A: Partly true.

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[66] Transcript dated 19 April 2016 at p 35.

[67] Plaintiff's AEIC at para 26.

[68] Transcript dated 19 April 2016 at p64.

[69] Transcript dated 19 April 2016 at p 36.

[70] Transcript dated 20 April 2016 at pp 95&96.

> Q: Why is it partly true?
>
> A: I usually trust his opinions since he's so successful.
>
> Q: It was such a good investment by your uncle that you were prepared to even liquidate all your holdings with [the Bank] in order to buy whatever your uncle had bought. Partly true?
>
> A: Yes.
>
> …
>
> Q: … Which part of it is true?
>
> A: Based on his reputation.
>
> Q: And him being a very successful businessman; correct?
>
> A: Correct.
>
> [emphasis added]

78 The plaintiff's readiness to extend his stay in Singapore is consistent with the plaintiff's desire to follow-up on his uncle's tip on a "hot stock". It is inherently likely that the plaintiff was keen to follow his uncle's investment decision because not only was his uncle a very successful businessman and the plaintiff held him in high regard, his uncle had made money on this investment. As the plaintiff admits: "*I usually trust his opinions since he's so successful"* [emphasis added].

79 There is further evidence of the plaintiff's willingness to follow his uncle's lead on Amaru and this is to be gleaned from Yvonne's e-mail to Ellen dated 31 August 2005. To set this e-mail in context, it was sent before the third tranche of purchase of Amaru shares in early 2006. The plaintiff had called Yvonne to express interest in purchasing more Amaru shares and Yvonne then wrote:[71]

[71] 2AB 836.

> [The plaintiff] will be in KL for the next 3 to 4 weeks and wanted to talk to you or [the defendant]. *His uncle told him how much he has* and now [the plaintiff] *wants more*... [emphasis added]

80 Another fact pointing to the plaintiff' wanting to acquire more shares as his confidence was boosted by the size of his uncle's stake and not by the representations as alleged is the fact that even after he became aware in September 2005 that Amaru was not going to be listed on NASDAQ, he still gave instructions to acquire the last lot of 50,000 shares in January 2006. The details of the events in September 2005 are discussed in [84] below. In addition, the plaintiff acquired other shares without the bank's involvement in 2006 (see [86] below).

(2) The plaintiff's decision to liquidate his portfolio right immediately after a 45-minute meeting

81 The plaintiff's case that he was ready to liquidate what he himself termed his "life savings" after 35 to 45 minutes of "sales pitch" on a stock that he had apparently not heard of prior to 4 March 2005 is unconvincing when compared to his evidence that he was a "thoughtful investor" who would "typically" do his own research before investing into a counter,[72] and that for large investments he would consult others before investing.[73] The plaintiff's explanation during cross-examination was weak; it failed to shed light on why his purchase of Amaru was so atypical of his usual, thoughtful approach to investment decisions:[74]

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[72] Transcript dated 19 April 2016 at p 65.

[73] Transcript dated 19 April 2016 at p 66.

[74] Transcript dated 19 April 2016 at pp69&70.

Q: …your case is that after a one-hour presentation, you decided to liquidate everything to buy into Amaru shares?

A: Thirty-five to 40. Thirty-five to 40 minutes.

Q: You said it was closer to 45; correct?

A: Correct.

Q: You didn't take time to consider whether to buy into Amaru shares?

A: I didn't feel I needed to. The representations made were extremely enticing.

Q: That is your case; right?

A: Yes. I trusted my bankers.

Q: You had not heard about the company?

A: No, I had not.

Q: You have not done your own research like you said you typically would?

A: Are you referring to this date at the meeting?

Q: Yes.

A: I wouldn't have had the time to do research.

Q: Precisely.

A: Right.

Q: You didn't do any research, as you typically would, before you make an investment?

A: Right.

[emphasis added]

82 As can be seen from this exchange, the plaintiff's only explanation for his atypical behaviour was that "[t]he representations made were extremely enticing". This is not a sufficient explanation given that this was supposedly an investment of his "life savings" and it is nowhere suggested that he was unable to, or was pressured against, doing his own research or taking other advice.

(3) The plaintiff's conduct even after the NASDAQ listing did not materialise

83 Apart from the fact the plaintiff admits that he does not think the defendant was "guarantee[ing]" the future expected price of Amaru shares, the plaintiff's conduct after realising that the Amaru shares were not going to be listed on NASDAQ reveals that the listing was not as material to the plaintiff as he claims in this action. Let me elaborate.

84 On 8 September 2005, the plaintiff acknowledged receipt of an update on Amaru forwarded to him by Yvonne on 7 September 2005[75] which stated that Amaru was "underway to move the company to AMEX … [t]he goal remains to move Amaru/M2B to the AMEX Board in the US". In the plaintiff's response to this update, he asked "So it sounds like the only reason for the delayed listing is still in meeting the 400 shareholder requirement?" His response contains no hint of surprise that the listing was to be on the then-American Stock Exchange (which has since been acquired and is now known as the NYSE MKT LLC) and not NASDAQ as he claims was represented. When questioned on this, the plaintiff agreed that his e-mail did not express any surprise, that he would have expressed surprise and that "the AMEX is still a reputable exchange".[76] He further expressly admits that the change in the listing "wasn't a big deal" and that he "was more concerned about the price". Clearly, then, the importance of a NASDAQ listing was not as material to him as the plaintiff makes it out to be.

85 On the plaintiff's claim that he had called the defendant in early January 2006 to enquire about the NASDAQ listing, during which call the

[75] 2AB 838.

[76] Transcript dated 19 April 2016 at p 112.

defendant allegedly told the plaintiff that the plan had changed to listing on AMEX instead of NASDAQ,[77] I agree with the defendant that this seems like a convenient excuse made up on the spot, considering that: (a) this conversation was never pleaded; (b) there was no mention of the conversation in the plaintiff's AEIC; and (c) the plaintiff already knew through Yvonne, in September 2005 about the planned AMEX listing (see above at [84]).

86 Despite there being no NASDAQ listing within 12 to 18 months (a time frame later allegedly revised to 9 to 12 months), on at least four other occasions in 2006 (the plaintiff's three e-mails to Ellen, and one e-mail to Yvonne), referred to purchase of *more* Amaru shares outside of the bank.[78] Not only is it telling that there was no written protest from the plaintiff regarding the fact that there had been no NASDAQ listing of the Amaru shares, his conduct of buying even more shares after becoming aware of that fact contradicts his case that the representation of a NASDAQ listing was so important to him.

87 For the various reasons stated, the evidence before the court is not sufficient to properly draw the inference that the plaintiff was as a matter of fact induced by the defendant to purchase the Amaru shares. In other words, the plaintiff has not established that the effective cause affecting his decision to purchase the Amaru shares was the representation as pleaded.

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[77] Transcript dated 19 April 2016 at pp 103&104.

[78] 2AB 917, 960, 992, 999.

Conclusion on misrepresentation claim

88 For the various reasons stated and on the overall evidence, I find that the misrepresentation claim must fail from lack of proof that what was said to have been made probably did not take place. I further find, from lack of proof, that there was no meeting between the plaintiff, the defendant and Ellen on 4 March 2005.

89 Having rejected the misrepresentation claim, it is not necessary to consider the defendant's plea of mitigation of his loss of US$655,000.

The Swiss law issue

90 The Swiss law issue is not a discrete point. The Swiss law defence arises only if it is adjudged that the pleaded representations were made. Essentially, it was raised as a defence to the liability issue, namely, that the claim for misrepresentation (whether negligent or reckless) is not actionable under Swiss law. Since the plaintif cannot prove that the pleaded representations wre made, it is not strictly necessary for me to comment on the Swiss law point; however I propose to do so as a matter of completeness.

91 In order to invoke Swiss law, the defendant argues that he is entitled to rely on the governing law clause in the contract between the plaintiff and the bank. Alternatively, Swiss law governs the tort as it was committed in Switzerland. Each side adduced evidence from an expert on Swiss law. For the reasons stated, the defendant fails to make good his case based on Swiss law. I will deal with some selected broad points in turn.

The governing law clause in the contract between bank and plaintiff

The principle of stipulation pour autrui *does not apply*

92 The choice of law clause to be examined is clause 7.29 of the bank's General Conditions (version 10.03) as reproduced above at [6]. Swiss law is the express governing law in the first stage of the three-stage framework used to determine the governing law of a contract (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [36]) and it is settled law that contractual clauses should be construed according to the governing law of the contract (see *The "Jian He"* [1999] 3 SLR(R) 432 at [10]). According to both experts, Article 18 of the Swiss Code of Obligations of 1912 ("SCO") stipulates that Swiss law's interpretation of contractual provisions is an objective search for the true and common intention of the parties with the Swiss courts also taking into account the overall context in which the contract was entered into. The English translation of Article 18 states:

> When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement.

93 The main issue surrounding the interpretation of clause 7.29 is whether the governing law clause applies to the plaintiff's claim in *tort* against the *defendant* under the Swiss principle of *stipulation pour autrui* (or translated to "stipulation to the benefits of the third party") as provided for under Article 112 of the SCO:

> 1 A person who, acting in his own name, has entered into a contract whereby performance is due to a third party is entitled to compel performance for the benefit of said third party.

> 2 The third party or his legal successors have the right to compel performance where that was the intention of the contracting parties or is the customary practice…

94 Both the defendant's Swiss law expert, Mr Carlo Lombardini ("Mr Lombardini") and the plaintiff's Swiss law expert, Mr Gerald Page ("Mr Page") agree that Article 112(1) envisages a third party being able to enjoy the benefit of the contract provided that there is some form of an agreement between the plaintiff and bank that the performance of the contract is for the benefit of the third party. Both experts also agree that the intention to benefit the third party need not be expressly provided for in the wording of the contract, and could be implied. As for Article 112(2), both experts agree that it effectively requires a higher standard of proof for contracting parties to *agree* that there is a *transfer of rights to the third party*, with Article 112(1) being an exception to the privity of the contract and Article 112(2) being an "exception to the exception" as it "adds" the transfer of rights to the third party, making it even more necessary for the two original parties to the contract to really agree that there must be a transfer of that right.

95 Mr Lombardini argues that a customer of the bank reading clause 7.29 would simply understand exactly what the clauses state: that Swiss law applies to all matters arising out of his banking relationship with the bank and this banking relationship necessarily involves the bank's employees. However, this leapfrogs a principled analysis of Article 112. The defendant's reference to mandate documents which refer to the bank being "represented by any of its officers as designated at any time by the Mandatory" to execute the instructions of the bank's clients is unsurprising. The plaintiff's banking relationship with the bank necessarily involves the bank's employees. However, in an action against the defendant in his *personal capacity*, I am not

persuaded that the plaintiff and the bank had either expressly or impliedly intended for the contract to benefit the defendant pursuant to Article 112(1) where any form of performance was due to the defendant, or had intended for the defendant to compel performance of obligations under the contract between the bank and the plaintiff pursuant to Article 112(2). I agree with the plaintiff's submission that the mere fact that the bank acts through its officers does not mean that its officers are intended, without more, to automatically claim the benefit of the contract between the bank and the customer. Based on the express wording of clause 7.29, (*viz*, that "[a]ll relations between the Bank and its client are subject to Swiss law"), there is no indication that it was intended to apply to anyone other than the direct parties of the contract.

96 There is also the limb concerning "customary practice" in Article 112(2). In Mr Lombardini's AEIC, he presents the view that it is common practice for Swiss banks to choose Swiss law to govern the relationship with the bank and its employees as they like to take advantage of Swiss laws relating to banking secrecy and this is also the reason why customers of foreign branches of Swiss banks typically have their accounts booked in Switzerland. However, neither party eventually argued or submitted based on this limb of Article 112(2); thus, I shall leave this point as it is.

97 Mr Lombardini also cites Swiss Supreme Court case 4A_44/2011, where the *stipulation pour autrui* principle was used to extend the scope of an arbitration provision to a party that had not formally accepted arbitration to support his view that an employee of the bank can take the benefit of a governing law clause between the bank and a client. However, as Mr Page points out, the facts in 4A_44/2011 and the Swiss court's reasoning in the case distinguishes the case and its usefulness from the present facts. Put simply,

case 4A_44/2011 is an example of the Swiss courts granting jurisdiction by applying the principle of *stipulation pour atrui,* and is helpful only in so far as the facts of that case allowed the court to determine the *intent* of the contracting parties to allow the third party to have the benefit of the arbitration clause, due to the contracting parties' own admission during court proceedings. In the present case, I agree with Mr Page that such an intention cannot be inferred in this action. Since Mr Lombardini agrees that intention of a "transfer of that right" by the contracting parties is paramount, it follows that the defendant cannot take the benefit of clause 7.29.

The scope and validity of clause 7.29

98 The plaintiff's position in any case is that: (a) clause 7.29 is inapplicable or invalid because parties cannot validly agree to a choice of law for torts before the occurrence of the damaging event, pursuant to Article 132 of the Swiss Private International Law Act of 1987 ("PILA"); and (b) the plaintiff is a "consumer" who is not bound by choice of law agreements pursuant to Article 120 of PILA.

99 Mr Lombardini cites a Swiss Supreme Court decision on Article 22 of the Federal Law on Jurisdiction of 2008 which is *in pari materia* with Article 120 of PILA. The decision states that a private banking client is usually not deemed to be a "consumer" under the Federal Law on Jurisdiction if the services provided are beyond those of the ordinary need of life. As Mr Page already agreed at trial that the plaintiff would not be a consumer based on the Swiss statute, I need not deal with this argument.

100 As a preliminary point, I agree with Mr Lombardini that clause 7.29 is phrased broadly enough for its scope to apply Swiss law to tortious actions:

"*all relations* between the [bank] and its client are subject to Swiss law, especially *all matters connected* with their performance, interpretation, validity or execution" [emphasis added]. Mr Page relied on the Swiss principle of *vertrauenstheorie* to interpret any ambiguous wording against the drafter of the contract and not against the recipient, especially if the contract is a pre-existing standard form; however, this principle would only be relevant if the relevant clause was ambiguous. Based on the express wording of clause 7.29, I do not find any patent ambiguity that would engage such an interpretative maxim to exclude non-contractual disputes from the clause.

101 The English translation of Article 132 of PILA is as follows:

> The parties may agree any time after the event causing damage has occurred that the law of the forum shall be applicable.

102 The plaintiff argues that the effect of Article 132 is that a contractual choice of law for torts can *only* be made *ex post*, after the event causing damage has occurred and not *ex ante*, before the event. Both a limitation in time as well as a limitation of choice of law of forum (Switzerland) are thus in place. On the other hand, the defendant argues that Article 132 is only *permissive* due to the use of the word "may" and the omission of the word "only".

Relevance of Swiss private international law rules in reference to Swiss law as proper law of contract

103 Nonetheless, without deciding on the correctness of these positions, I note that Article 132 of PILA is a Swiss *private international law rule* that would be applied by the Swiss courts when private international law issues arise. Although the interpretation of clause 7.29 is governed by Swiss law as

the proper law of the contract between the bank and the plaintiff, it is arguable that this should be confined to Swiss domestic (contract) law and does not extend to Swiss private international law rules. Whether a contractual choice of law clause for torts would be given effect in Singapore courts would depend on Singapore's private international law rules. As the approach of the Singapore courts to this has yet to be tested, and the point is not needed for the determination of this present action, I am reluctant to do more than make a few provisional comments. When the conflict rules of Singapore law, as the *lex fori*, requires that a foreign law, in this case Swiss law, be applied (here, to the issue of interpretation of clause 7.29), what is the content of that foreign law? Do Singapore's private international law rules refer to simply the domestic Swiss law of contract, or do they also refer to the whole of Swiss law, including Swiss private international law rules?

104 There are three possible ways to deal with this. First, courts could adopt a blanket policy of always only referring to the foreign domestic law, or of always including the whole of the foreign law, including its private international law rules. Second, courts could decide on either position based on the category of law engaged. Third, courts could decide on a case-by-case approach whether to include or exclude foreign private international law rules by evaluating policy considerations. There is also the further complication of whether an accepted reference to foreign private international law rules includes that foreign legal system's own attitude towards the first overarching question of what is the content of foreign law that could be subsequently referred to based on that foreign legal system's private international law rules.

105 The third approach was advocated in *Dornoch Ltd and others v Westminster International BV and others (The "WD Fairway") (No 3)* [2009]

EWHC 1782 (Admlty) by Tomlinson J. Whether reference to a foreign law would include or exclude reference to private international law rules of that system of law would depend on what is consistent with the objective of the choice of law rule making the reference to the foreign law, *ie,* policy considerations of the forum and foreign law rules. Thus, in that case, Tomlinson J decided that reference to Thai law as the *lex situs* in deciding the issue of proprietary interests in a vessel only included a reference to the domestic law and did not include reference to Thai private international law; there was no principle in Thai private international law application of which would better serve the object of the English conflicts rule than would application of Thai law (see [4] of the judgment). However, the question was said to be academic: if the Thai rule of private international law were to be applied, a Thai court would nonetheless apply Thai domestic law to determine the incidence of proprietary interests in the said vessel. However, in *Blue Sky One Ltd and others v Mahan Air and others* [2010] EWHC 631 (Comm), Beatson J (at [185]) rejected such an approach on the basis that leaving it to a case-by-case analysis depending on the identification of the policy behind the private international law of another country would produce a "very uncertain legal regime" and hence opined that it was undesirable to adopt such a rule. Rightly so, for such an approach would be frustrating for practitioners and commercial parties.

106 Generally, it would seem that English common law (before any relevant statutory enactments) adopted the second approach, and there have been observations made that in contract cases, references to foreign law as the proper law of the contract would *not* include any reference to foreign private international law rules. In the House of Lords case of *Amin Rasheed Shipping Corporation v Kuwait Insurance Co (The "Al Wahab")* [1984] AC 50, Lord

Diplock opined (at 61–62) that the proper law of a contract is the substantive law of the country referred to, excluding any reference to private international law or conflict rules. Lord Brandon and Lord Brightman also concurred wholly in Lord Diplock's judgment. Many textbook authors thus accept this as the position in English law in the field of contract. However, there is also *dicta* in an earlier Privy Council decision of *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 by Lord Wright (at 291) that appears to take the other position. In the Western Australian case of *Peter O'Driscoll v J Ray McDermott, SA* [2006] WASCA 25, McLure J also seemed to be prepared to accept that the principle that a reference to foreign law *included* its private international law rules was applicable to contracts, and suggested that this could also apply to "other sources of conflict". The court considered how a Singapore court would have handled the contract claim which was governed by Singapore law as the proper law of the contract, and applied Singapore private international law rules that classified limitation statutes as procedural. Walsh J in *Kay's Leasing Corp v Fletcher* (1964) 64 SR (NSW) 195 (at 207) also took this position. However, considering that Australian law has developed rather distinct rules in this area (see generally *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54, for example), such authorities would have to be treated with caution. I also note that Article 20 of the Rome I Regulation (EU Regulation No 593/2008), as well as Article 15 of its predecessor the 1980 Rome Convention on the law applicable to contractual obligations excludes the applicability of the *renvoi* doctrine in the field of contract. Similarly, Article 8 of the Hague Principles on Choice of Law in International Commercial Contracts 2015 excludes reference to private international law rules unless parties expressly provide otherwise. Of course, these statutory provisions and non-binding principles do not apply in the present case.

Singapore's position on recognising contractual choice of law clauses for tortious actions

107 As for whether Singapore private international law rules would give effect to contractual choice of law clauses for tort, there is scant authority on this issue which is still an open one. In *The "Rainbow Joy"* [2005] 3 SLR(R) 719, a contractual choice of law clause applied to a tort committed on board a vessel in an exceptional case where the tort occurred in high seas. The general proposition that the law of the flag country (in that case Hong Kong law) should apply in relation to a tort committed on board a vessel which was then on the high seas is displaced where in the relevant contract the parties specified the governing law; the contract term prevails. Chao Hick Tin JA thus held (at [36]) that "[t]he fact that the appellant has also sued in tort does not mean that the forum selection clause set out in the … contract should no longer apply". Although the case seems to state that effect should be given to a contractual choice of law clause for tortious obligations, one view is that the case can be distinguished and is confined to carriage of goods cases since the court did not engage in any substantive discussion of this issue.

108 Giving effect to party autonomy by recognising a contractual choice of law to govern non-contractual obligations, including tortious ones, is argued by Professor Yeo Tiong Min to be "a development that will support Singapore's vision of developing itself as a hub for cross-border litigation and other methods of dispute resolution" in "The Effective Reach of Choice of Law Agreements" (2008) 20 SAcLJ 723 at para 37. Professor Yeo also noted that there may already be indications towards the development of recognising contractual choice of law clauses that encompass tortious causes of action, considering that the Court of Appeal has in past cases given weight to the relevance of underlying contractual relationships between parties when it

comes to non-contractual obligations in restitution and equity. The Court of Appeal in *Rickshaw Investments and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 held that the appellants' equitable claims centring around allegations of breach of fiduciary duty as well as breach of confidence arose from a legal relationship established by an employment contract and were hence governed by the law of the underlying contract (German law), and in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 referred to the rule that where a restitutionary obligation arises in connection with a contract, the proper law of the restitutionary obligation is the proper law of the contract. Extra-judicially, V K Rajah JA in "International Trade in Hong Kong and Singapore – An Indivisible Link" (2010) 40 HKLJ 815 at 822 also notably stated that "A strong argument can be made that, when the relationship between the parties is primarily contractual, causes of action relating to the contract should also be governed by the proper law of the contract."

109 Legislative reforms have been undertaken in other jurisdictions to expressly give effect to party autonomy in choice of law for non-contractual obligations (see for example Article 6 of the Dutch Torts Act and Article 48(1) of the Austrian International Private Law Act), with some only allowing *post*-dispute choice of law agreements (*ie ex post* agreements, after the relevant injury/damage or event occurred) (such as Article 101 of the Belgian Private International Law Code, Article 44 of the People's Republic of China's Application of Laws to Foreign-Related Civil Relations, Article 42 of the German EGBGB, and Article 21 of the Japanese Act on the General Rules of Applications of Laws) and others limiting such agreements further to *only* choosing the law of the forum (such as Article 33 of the South Korean Conflict of Laws Act, Article 1219.3 of the Russian Civil Code, and

presumably Article 132 of the Swiss PILA (see [101] above)). Under the European regime with the enactment of Article 14 of the Rome II Regulations, the compromise reached was that parties can specify the applicable law for non-contractual obligations for both pre- and post-dispute agreements, but with additional requirements of parties "pursing a commercial activity" and having a "freely negotiated agreement" for the former situation under Article 14(1)(*b*).

110 Singapore has just recently ratified and implemented the Hague Convention on Choice of Court Agreements 2005 with the enactment of the Choice of Court Agreements Act 2016 (No 14 of 2016). A recent development from the Hague Conference on Private International Law is the Hague Principles on Choice of Law in International Commercial Contracts 2015 ("the Principles"), which is an advisory non-binding set of principles. The Principles are intended, as mentioned in the preamble, to be used as a model for national, regional, supranational or international laws. Interestingly, Article 9(1)(*g*) of the Principles extend the scope of the chosen law to govern "pre-contractual obligations", which could arguably be non-contractual in origin. It remains to be seen how large an impact the Principles will have.

111 Returning to the present case, even though clause 7.29 is drafted widely enough to encompass tortious obligations and even if I am minded to give effect to an *ex ante* choice of law clause that covers tortious obligations, I have concluded that the defendant, as a third party to the contract, cannot rely on and take the benefit of clause 7.29 under the Swiss principle of *stipulation pour autrui* in Article 112 of the SCO. It is thus unnecessary for me to go further than the provisional views expressed above.

The place of the tort

112 This area of dispute, which concerns the place of the tort, is independent of any reliance on clause 7.29. The defendant submits that the place of the tort is Switzerland which was where the alleged misrepresentation crystallised, namely, when the bank operated the plaintiff's Swiss-booked Account in Geneva to purchase the Amaru shares in accordance with the plaintiff's instructions. Under the double actionability rule, the alleged tort would not be actionable in Singapore as the alleged wrong, so the defendant's argument develops, is not actionable under the *lex loci delicti*. In response, the plaintiff submits that the place of the tort is Singapore which was where the plaintiff received, relied on and acted on the representation.

113 It is not necessary to dwell on the issue of the place of the tort given the findings in this action. I will simply make the following observations. I agree with the Assistant Registrar's reasons for refusing the defendant's application to stay the present action in favour of the courts in Geneva in Summons No 4090 of 2011 on 10 January 2012. The Assistant Registrar applied the "substance test" (see *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [90], citing the House of Lords decision of *Distillers Co (Biochemicals) Ltd v Laura Anne Thompson* [1971] AC 458 at 468) and concluded that the place of the tort was Singapore being the place where the pleaded representations were received and acted upon. Notably, the "substance test" is a general test applicable to all torts, and each tort must be considered for its own factors and considerations. For misrepresentations, the place of the tort is in general the place where the representation is "received and acted upon". The ingredient of reliance would be crystallised in Singapore when the plaintiff communicated his instructions via the Singapore branch of the bank,

and when the Singapore officers conveyed his letters of instruction to Switzerland in accordance to their normal chain of communication. The operation of the plaintiff's instructions with regard to the Swiss-booked Account was administrative in nature, *after* the transmission of his instructions through the Singapore branch that he dealt with mainly. Thus, Singapore is both the place of receipt and the place of reliance on the pleaded representations. The Assistant Registrar's decision was subsequently affirmed on appeal in Registrar's Appeal No 22 of 2012 on 9 March 2012.

Whether the alleged tort was actionable under Swiss law

114 Again, I will simply observe that a cause of action in negligent misstatement is actionable under Swiss law. I will give my brief comments. The defendant submits that the alleged misrepresentation is not actionable under Swiss law, while the plaintiff takes the opposite position. The parties' experts agree that the starting point is Article 41 of the SCO which governs civil tortious actions under Swiss law:

> 1 Any person who *unlawfully* causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation.
>
> 2 Any person who wilfully causes loss or damage to another in an immoral manner is likewise obliged to provide compensation.
>
> [emphasis added]

115 The dispute between the experts narrows into disagreement over the interpretation of the term "unlawfully", which is not statutorily defined. Mr Lombardini, the defendant's expert, states that Swiss case law has established that an act or an omission is deemed to be unlawful under two circumstances: (a) when an act or omission violates an absolute right of the party suing for damages; or (b) when an act or omission is contrary to a specific rule of law,

which can be either written or unwritten and which has been enacted to protect the interest of the party suing for damages. Mr Page, the plaintiff's expert, accepts this and adds that the rule of law under scenario (b) can be derived from criminal law, private or public law. Both experts agree that the plaintiff's cause of action has not breached any "absolute rights" under the first scenario, and their main disagreement thus lies in whether Swiss criminal codes are relevant under the second scenario so as to constitute the requisite *unlawfulness* under Article 41(1). The defendant takes the view that communication of false information is considered under Articles 146, 151 and 252 of the Swiss Criminal Code of 1937 as an illicit act and also cites several Swiss cases that established unwritten rules of law concerning the *communication of false information outside of a contractual relationship*, where liability would be based on the fact that the false information generated a "justified trust" of the party deceived, with this "trust" being a civil law concept akin to the "duty of care" concept in the Anglo-Saxon legal systems.

116 On a closer look at the Swiss criminal provisions cited by Mr Page, they do not seem to be on point with the plaintiff's cause of action in the present case. None of the criminal provisions cited apply. An Article 146 action concerns fraud and requires the additional element of a person who has a view to securing an unlawful gain for himself. Similarly, Article 151 of the Swiss Criminal Code concerning "maliciously causing financial loss to another" does not apply to the present case as the plaintiff's action here does not involve the element of malice that is established by the representor having a "view to gain" through his misrepresentations. Lastly, Article 252 is also irrelevant as it concerns communication of false information through the falsification of documents or certificates, which is not alleged to have occurred here.

117 On the other hand, it is clear from the Swiss case cited by Mr Page that even without reference to specific written criminal provisions to establish civil tortious liability under Article 41, there are "unwritten" rules of law against negligent misstatements. The Federal Supreme Court of Switzerland in the case of BGE 57 II 81 on 17 February 1931 awarded damages for economic loss to a party that relied on inaccurate information regarding what turned out to be a losing business, and hence failed to sell shares in time notwithstanding rumours about the bad financial situation of the company.

118 Switzerland is a civil law jurisdiction and Swiss law on tortious liability does not allow a categorisation under the title of "law of negligence" *per se*. However, I am satisfied that the plaintiff's claim in negligent misrepresentation/misstatement would be actionable under Swiss law, which has established principles that give rise to civil liability for such wrongdoing based on the *alleged* elements in the plaintiff's claim. Under Swiss law, the plaintiff would, as I understand it, plead that the defendant actively communicated false information to the plaintiff in order to induce him to purchase the Amaru shares, that based on the "trust" he had in the defendant who was a bank officer, and that the plaintiff was convinced to buy those shares and hence suffered financial losses. I am satisfied that should such elements be factually made out, the defendant may be liable under Swiss law for providing false representations.

119 Thus, even if I had found that Swiss law is relevant to the dispute, I would have found the plaintiff's cause of action to be actionable under Swiss law. The conduct *as complained of* by the plaintiff would have given rise to civil liability under Swiss law. In the final analysis, though, the claim would fail for factual reasons regardless of whether Swiss law applies, as the plaintiff

has failed to establish that the 2005 March meeting took place or that any of the pleaded representations were made.

Conclusion

120 For all the reasons stated above, the plaintiff's action against the defendant is dismissed with costs to be taxed if not agreed.

Belinda Ang Saw Ean
Judge

Alvin Tan and John Loh (Wong Thomas & Leong) for the plaintiff;
Lai Yew Fei and Lee Hui Yi (Rajah & Tann Singapore LLP) for the defendant.