IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 47

Civil Appeal No 154 of 2019
(Summons Nos 138 of 2019 and 150 of 2019)

Between

IPP Financial Advisers Pte Ltd

… *Appellant*

And

Saimee bin Jumaat

… *Respondent*

Civil Appeal No 159 of 2019

Between

(1) Moi Kok Keong
(2) Quek Miaw Sian Alice

… *Appellants*

And

Saimee bin Jumaat

… *Respondent*

JUDGMENT

[Civil Procedure] — [Limitation]
[Tort] — [Vicarious liability]
[Tort] — [Misrepresentation] — [Negligent misrepresentation]

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v
Saimee bin Jumaat and another appeal

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Court of Appeal — Civil Appeal No 154 of 2019 (Summons Nos 138 of 2019 and 150 of 2019) and Civil Appeal No 159 of 2019
Steven Chong JA, Belinda Ang Saw Ean J, Woo Bih Li J
6 March 2020

13 May 2020 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 When does a cause of action for the tort of negligent misrepresentation accrue? It seems reasonably well-settled that it would accrue upon proof of damage in reliance on the negligent misrepresentation. This deceptively simple inquiry is often obfuscated by disputes over when exactly such damage is said to be established.

2 These appeals concern a claim by an investor against his financial advisers in misrepresenting the risks involved in certain investments, and against their corporate employer in vicarious liability. However, the investment risks did not in fact materialise until some time later. The dispute over the accrual of the cause of action is further compounded by the fact that the parties entered into settlement agreements which were subsequently defaulted on.

3 Under such circumstances, did the actual damage occur upon investing or upon non-payment on maturity of the investments or upon default under the settlement agreements? Clearly, the determination of this issue will have a pivotal bearing on the time-bar defence. This vexed area of law is the subject of many conflicting authorities. The core area of dispute is typically focused on the proper assessment of true nature of the damage. Does the damage occur upon the mere entry into the risky investments *per se* or upon the risks materialising or some other event? The courts have attempted to distinguish and reconcile the differing treatments of this issue by categorising the damage inquiry into flawed transaction, no transaction and contingent liability cases. In this respect, it bears emphasis to note that "contingent liability cases" are typically cases where loss and damage would not be suffered until certain events transpire in a particular way and actual detriment occurs thereafter. This judgment will thus examine the differing approaches in order to arrive at a principled basis to determine when damage could be said to have occurred in the specific context of claims for negligent misrepresentation.

4 In the court below, the first ("Moi") and second ("Quek") appellants in Civil Appeal No 159 of 2019 who were the financial advisers pleaded that the claims were time-barred and that time started to run when the respondent ("Saimee") invested his funds into the risky investments. However, the High Court judge below ("the Judge") found that time only started to run upon default of the settlement agreements since that was the date "it could be said with certainty that [Saimee] suffered actual loss as a result of [Moi and Quek's] negligent misrepresentations" and accordingly the claims were not time-barred. Arising from this finding on a point which was neither pleaded nor argued below, we will also examine the question of burden of proof in relation to limitation defences. Once a limitation defence is pleaded, is the burden on the

defendant to prove that the claims are time-barred as pleaded or is the burden always on the plaintiff to prove that the claims were brought within the applicable limitation period?

Background

5 IPP Financial Advisers Pte Ltd ("IPP"), the appellant in Civil Appeal No 154 of 2019, is a financial advisory company approved by the Monetary Authority of Singapore to carry out the following business activities:

(a) Advising on the following investment products: life policies, securities, collective investment schemes and structured deposits;

(b) Marketing of any collective investment scheme; and

(c) Arranging of any contract of insurance in respect of life policies.

6 Moi was the managing partner of the Vineyard Group at IPP, which was one of the advisory groups at IPP. Moi had a team of financial services consultants working under him, and Quek was one of them. Financial services consultants were to advise clients on insurance, unit trust products and estate planning.

7 Sometime in 2004, Saimee, then a professional horse jockey, consulted one Candice Lee ("Lee") from Prudential Insurance Company ("Prudential") with a view to purchasing insurance cover for himself. In 2005, when Lee left Prudential, she became a financial adviser on behalf of IPP. Saimee thereafter procured insurance policies through IPP. After Lee left IPP's employ in 2009, Moi and Quek took over Saimee's portfolio with IPP from Lee.

8 Around the time of the handover of Saimee's portfolio, Moi and Quek also advised Saimee to make changes to some of his policies and investments. Saimee's evidence was that he "trusted their opinions and advice", and "took their advice on moving funds around when necessary".

The SMLG Investment

9 Sometime in January to April 2011, Moi and Quek suggested to Saimee the possibility of investing in the foreign exchange market. Moi and Quek advised him to sell his shares in various companies, and to invest in the foreign exchange market through a trading account with a company known as SMLG Inc ("SMLG").

10 This was referred to in the proceedings below as the "SMLG Investment". More specifically, the trading account was based on an "algorithm trading system" operated by SMLG, and investors using the SMLG trading system would transfer the desired capital into their online trading account. The trading system would thereafter perform automated trades.

11 Saimee alleged that Moi and Quek made the following representations:

(a) Within a year from the date of investment, SMLG would pay Saimee the principal amount invested along with a profit of 40%.

(b) The SMLG Investment was safe and capital guaranteed.

(c) Moi and Quek had recommended the same to all of their clients.

12 On 11 April 2011, Moi introduced one Seeni (not called as a witness in the trial below) to Saimee. Saimee was told that Seeni was the Fund Manager

for SMLG. This meeting was held outside IPP's premises, at a hotel café. After the meeting, Saimee, on the advice of Moi and Quek, opened a trading account with FX Primus Ltd ("FX Primus") for the purposes of the SMLG Investment.

13 Moi assisted Saimee in registering with SMLG and opening the online trading account with FX Primus. According to Moi, FX Primus was the online trading broker who held the online trading account on behalf of Saimee. The relationship between FX Primus and SMLG was not explored in any detail in the trial below. According to Moi, the setting up of these online accounts was all that was needed to complete the sign-up process, after which the investor could transfer funds to his online trading account for trading to commence.

14 Thereafter, Saimee transferred a total of US$620,900 into a bank account (held by FX Primus) in Mauritius, in three tranches:

(a) US$80,300 on 27 April 2011;

(b) US$240,300 on 17 June 2011; and

(c) US$300,300 on 3 February 2012.

15 Unbeknownst to Saimee at this point, Moi and Quek had also invested in SMLG, in the amount of US$49,701.12 and US$21,023.84 respectively. In fact, they had invested in SMLG prior to recommending the SMLG Investment to Saimee.

16 Sometime in May 2012, after payment for the first tranche of US$80,300 plus profits became due to Saimee, Moi and Quek told Saimee that SMLG was unable to pay, due to a "technical glitch". According to Moi's evidence, he first knew about the technical glitch in March or April 2012 and it caused "the whole

[of Moi's] account [to] be wiped out", and Saimee's and Quek's account were similarly affected at around the same time. Moi was, however, unable to explain exactly why this happened. He was also unclear whether the accounts of other clients of SMLG were also affected. Moi and Quek thereafter told Saimee that SMLG required a loan of US$200,000 before SMLG could begin trading again, so that it could make the repayment to Saimee, and that SMLG would repay the loan within two months. At this point, Moi and Quek also disclosed to Saimee for the first time that they too had invested in SMLG. Hence, according to Moi and Quek, the loan to SMLG was essential to recover all their investments.

17 Thereafter, Saimee gave SMLG the US$200,000 loan. On 17 May 2012, on Moi and Quek's advice, Saimee signed a "Term Loan Guarantee" with Moi, witnessed by Quek. The Term Loan Guarantee provided that Moi would guarantee the repayment of the US$200,000 loan to Saimee. In addition, the Term Loan Guarantee stated that:

> (a) The US$200,000 loan to SMLG was for a period of two months, starting from 25 April 2012.
>
> (b) Moi would guarantee that Saimee receive an interest of 15% on the loan at the end of the two-month period, ending on 24 June 2012.

18 On 24 June 2012, *ie*, two months later, the loan was not repaid. From June to September 2012, Saimee continuously asked Moi and Quek for repayment of his moneys, *ie*, the US$200,000 loan and the SMLG Investment. On 17 September 2012, on Moi and Quek's advice, Saimee entered into three separate settlement agreements with SMLG ("Settlement Agreements"). These Settlement Agreements provided that SMLG would pay Saimee US$84,000, US$252,000 and US$375,000 respectively, a total of US$711,000 ("the

Settlement Sum”), by 21 September 2012 as the full and final settlement of all claims against SMLG in relation to the SMLG Investment.

19 As it turned out, Moi and Quek had themselves signed their own settlement agreements with SMLG for their invested sums. Their settlement agreements were all dated 11 September 2012.

20 On 21 September 2012, however, no sums were repaid to Saimee. Thereafter, from November 2012 to December 2013, each time Saimee (repeatedly) asked about the Settlement Sum, Moi would reassure him that it would be paid shortly.

21 On 2 December 2013, Saimee and Moi had a Whatsapp conversation in which Moi again reassured him that his investment would be repaid. In addition, Moi informed Saimee for the first time that the SMLG Investment was not offered by IPP. Prior to this message, and at all material times, it was Saimee’s evidence that he was under the impression that the SMLG Investment was “approved” by IPP. Saimee’s response to Moi’s text is quite telling – he had asked Moi: “Why would you advise me to invest in FX when it’s not approved by IPP”. Moi understood “FX” to mean “foreign exchange”. Moi did not respond to Saimee’s message.

22 The loan of US$200,000 was eventually repaid in Singapore dollars – S$50,000 paid on 16 October 2012 and S$240,000 a year later – although the promised interest of 15% was never paid.

Commencement of this action

23 On 1 August 2014, Saimee's legal advisers at the time, Stamford Law Corporation, issued a letter of demand to all three appellants on Saimee's behalf. After further correspondence ending with a reply from the appellants' solicitors (who was then representing all three appellants) on 3 September 2014, there was no further action from Saimee.

24 On 21 July 2018, about four years later, Saimee filed a writ of summons claiming for the sum of US$711,000 against Moi and Quek on the grounds of fraudulent or negligent misrepresentation, and against IPP on grounds of vicarious liability.

Decision below

25 After a trial, the Judge issued a written judgment – *Saimee bin Jumaat v IPP Financial Advisers Pte Ltd and others* [2019] SGHC 159 – that allowed Saimee's claim for US$620,900 against the appellants.

26 The Judge found that Moi and Quek owed Saimee a duty of care. The Judge accepted that they had made the representations at [11(a)] and [11(b)] above as alleged by Saimee, that these representations were false, that Saimee had relied on them, and that their breach had resulted in damage to Saimee. In this respect, the Judge accepted Saimee's evidence that he did not have sufficient knowledge of investment principles to understand the risks involved in a foreign exchange algorithm trading platform such as that used in the SMLG Investment. Moi and Quek were therefore jointly and severally liable to compensate Saimee the sum of US$620,900 under the tort of negligence. The Judge also found that vicarious liability should be imposed on IPP.

27 For completeness, the Judge dismissed Saimee's fraudulent misrepresentation claim against Moi and Quek, because the element of fraudulent intention was not established. The Judge found that Moi and Quek's personal investment in SMLG suggested a lack of any fraudulent intention. Further, the evidence also did not suggest that Moi or Quek knew that the SMLG Investment was not capital guaranteed, or that it was unable to yield the promised 40% annual returns.

28 The Judge further held that Saimee's claim against Moi and Quek was not time-barred. He held that Saimee's cause of action accrued at the point when Saimee could say with certainty that he had lost his invested sum of US$620,900. It was only on 21 September 2012, when Saimee did not receive any of the Settlement Sum (see [20] above) under the Settlement Agreements, that it could be said with certainty that he suffered actual loss as a result of Moi and Quek's negligent misrepresentations. Therefore, the Judge held that the latest date that Saimee could have pursued his tortious claim was 21 September 2018. As he had filed his writ on 21 July 2018, his claim was not time-barred.

The appeals

29 On appeal, IPP, Moi and Quek argue that the claims against them are time-barred. IPP further argues that it should not be vicariously liable for Moi and Quek's tort in any event.

IPP's reliance on the limitation defence and Summons 138

30 Before turning to the substantive appeals, we address a preliminary matter. Although the Judge's finding in respect of the time bar issue only related

to Moi and Quek, IPP argues on appeal that it should likewise be allowed to raise the limitation defence.

31 First, IPP argues that the limitation defence was adequately pleaded in its Defence. Second, IPP filed an application (*vide* Civil Appeal Summons No 138 of 2019 ("SUM 138")) for leave to amend its Defence to specifically plead the defence of limitation "out of an abundance of caution".

32 IPP, in its Defence, pleaded as follows, adopting those defences of Moi and Quek which were relevant to it:

> 14. … In addition, insofar as the defence(s) of [Moi] and/or [Quek] are relevant to and/or support the defence(s) of IPP, IPP adopt[s] such defence(s) of [Moi] and/or [Quek].

33 Moi and Quek, in their Defence, explicitly pleaded the defence of limitation, on the basis that the three tranches of payment were made more than six years prior to the commencement of the action, and therefore s 6(1)(*a*) of the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act") applied to render the claim time-barred. Their Defence is reproduced as follows:

> 24. … [T]he Plaintiff's cause of action did not accrue within 6 years before the commencement of this action.
>
> <u>Particulars</u>
>
> The sums of US$80,300.00, US$240,300.00 and US$300,300.00 were apparently paid by the Plaintiff on 27 April 2011, 17 June 2011 and 3 February 2012 respectively, more than 6 years prior to the commencement of this action on 21 July 2018.
>
> 25. The 2nd Defendant and the 3rd Defendant [*ie*, Moi and Quek respectively] will accordingly rely on Section 6(1)(a) of the Limitation Act (Cap 163) at the trial of the Suit herein.

34 There was no dispute, and it was indeed indisputable, that the burden is on the defendant to plead the defence on limitation. Section 4 of the Limitation

Act provides that a limitation period will operate as a bar to a claim only if the Limitation Act is "expressly pleaded as a defence".

35 In this case, we are of the view that IPP's pleadings as regards the time bar defence were adequate, albeit sloppy. They were adequate because they adopted the defence, which was specifically pleaded by Moi and Quek, for IPP. We note that IPP had not made the limitation argument in its written closing submissions and written reply closing submissions in the trial below. Nonetheless, as the limitation defence was raised at the pleading stage, Saimee would have been put on notice that evidence would have to be adduced at the trial to establish that his claim was brought within time. Further, as vicarious liability is a form of secondary liability, there would be no difference in the manner in which the defence of limitation applied to the appellants, as co-defendants. There was no element of surprise caused to Saimee and indeed Saimee did not suggest that IPP was precluded from relying on the defence. In these premises, IPP is entitled to rely on the limitation defence at the hearing of its appeal. We thus make no order as to SUM 138, which is unnecessary. We add that Saimee also did not suggest that Moi and Quek were precluded from relying on the limitation defence even though their pleading relied on s 6(1)(*a*) of the Limitation Act, when, as we elaborate below, the correct provision is s 24A(3)(*a*).

Pleadings and burden of proof

36 Once the defence of limitation is pleaded, and the plaintiff joins issue, the next question then is who bears the *burden of proving when the action accrued* such that time starts to run.

37 One might be tempted to conclude, intuitively, that the burden of proof falls on the defendant, given that the limitation issue is raised by him as his defence. However, more fundamentally, the burden is always on the plaintiff to prove its case. McGee, *Limitation Periods* (Sweet & Maxwell, 8th Ed, 2018) ("*McGee*") at paras 21-002 and 21-014 states as follows:

> The plea of the Limitation Act should be raised expressly and unambiguously. However, it is sufficient to state the fact of raising the plea – *the burden of proof on this point will then normally be transferred to the claimant to show that the action is not time-barred.*
>
> …
>
> … It must be correct to say that the burden is initially on the defendant to plead limitation *but thereafter it is for the claimant to show when time began to run*, either by reference to the date when the cause of action accrued, or … by reference to a disability of his or to fraud, concealment or mistake. …
>
> [emphasis added]

Therefore, the correct view is that the moment a limitation defence is raised by the defendant in pleadings, the plaintiff's burden is to prove that its claim fell within the limitation period.

38 We note that this is the approach taken in the UK as well. The English Court of Appeal case of *London Congregational Union Inc v Harriss & Harriss (a firm)* [1988] 1 All ER 15 ("*London Congregational*") provides further illustration. In that case, the lower court had held that given the limitation defence was being put forward by the defendants, the burden of proof was accordingly on them. On appeal, Gibson LJ held that the judge below had erred. He held instead that the burden of proof was on the plaintiff. He cited (at 29g–30e) the case of *Cartledge and others v E Jopling & Sons Ltd* [1962] 1 QB 189 ("*Cartledge (CA)*") with approval, where Harman LJ held (at 202) that "[w]here … the defendant raises the statute of limitations it is … for the plaintiff to show

that he is not within it and not for the defendant to prove the opposite". Pearson LJ (at 208) agreed with Harman LJ, stating that:

> … Where there is a joinder of issue on a defendant's plea of the Statute of Limitations (now the Limitation Act, 1939), the *burden of proof is on the plaintiff to show that his cause of action accrued within the six years* or whatever is the relevant period for the purposes of the statute … [emphasis added]

39 In the appeal of *Cartledge (CA)* to the House of Lords in *Cartledge v E Jopling & Sons Limited* [1963] AC 758 ("*Cartledge (HL)*"), the appellants did not challenge the Court of Appeal's decision on the issue of the burden of proof. In his speech, with which Lord Reid, Lord Evershed, Lord Morris and Lord Hodson agreed, Lord Pearce at page 784 observed:

> I agree with the judgments of the Court of Appeal … I would only wish to add a gloss to what was said on the onus of proof in the case of the plaintiff South. *I agree that when a defendant raises the Statute of Limitations the initial onus is on the plaintiff to prove that his cause of action accrued within the statutory period. When, however, a plaintiff has proved an accrual of damage within the six years … , the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the causes of action accrued at an earlier date.* … [emphasis added]

40 Gibson LJ applied the approach as set out in *Cartledge (HL)* to the facts in *London Congregational*. As the plaintiff failed to show on the balance of probabilities that the damage was caused within six years from the writ, it therefore failed to prove that its cause of action had accrued within the relevant period and, consequently, the defendants succeeded on this part of the appeal (at 30d–j).

41 Furthermore, as the plaintiff's burden is to prove that its claim is within the limitation period, the corollary is that the plaintiff's burden does not merely extend to disproving the pleaded limitation defence (*ie*, that the action accrued

on the date alleged by the defendant). In other words, it is not necessarily sufficient for the plaintiff to prove that the date of accrual of the cause of action is different from the pleaded date of the defence. It also has to prove that the date of accrual is within the limitation period. This is because it is open to the court to find that the cause of action had accrued on a date that is different from that pleaded by the defendant. Indeed, this is what the Judge below did when he found that the action accrued on 21 September 2012.

When the limitation period commenced

42 Section 6(1)(*a*) of the Limitation Act states:

> **6.**—(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:
>
> (*a*) actions founded on a contract or on tort;
>
> …

43 However, s 24A(3)(*a*) of the Limitation Act is the applicable provision in the present case, not s 6(1)(*a*). Section 24A(1) sets out the scope of the section as follows:

> **24A.**—(1) This section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under any written law or independently of any contract or any such provision).

44 As this court held in *Lian Kok Hong v Ow Wah Foong and another* [2008] 4 SLR(R) 165 ("*Lian Kok Hong*") at [14] and *Yan Jun v Attorney-General* [2015] 1 SLR 752 at [61]–[62], s 6(1)(*a*) and s 24A of the Limitation Act do not apply concurrently; instead s 24A applies to all claims in tort, whether or not the tort is a strict-liability tort or a fault-based tort.

45 The provision setting out the limitation period involving an action in tort, like the present case, is s 24A(3) which provides:

> (3) An action to which this section applies, other than one referred to in subsection (2), shall not be brought after the expiration of the period of —
>
> > (*a*) 6 years from the date on which the cause of action accrued; or
> >
> > (*b*) 3 years from the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, if that period expires later than the period mentioned in paragraph (*a*).

46 As will be elaborated at [57]–[59] below, because Saimee acquired the requisite knowledge for bringing an action more than three years prior to the commencement of the present action, s 24A(3)(*b*) will not assist him. Thus, the focus is on s 24A(3)(*a*), under which, for actions framed in tort which require proof of damage, the cause of action accrues *when damage occurs*: *Lian Kok Hong* at [24].

47 In the course of the trial and the appeals, several competing accounts were given as to when the damage occurred, such that the cause of action accrued to Saimee. These were as follows:

(a) 21 September 2012, being the date on which the Settlement Sum was due but not paid;

(b) 24 June 2012, being the date on which the US$200,000 loan was due but not repaid;

(c) 27 April 2011, 17 June 2011 and 3 February 2012, being the dates on which the SMLG Investment was made via three tranches of payment; and

(d) 27 April 2012, 17 June 2012 and 3 February 2013, being the dates on which each of the SMLG Investment sums became due for repayment.

Due date for payment of the Settlement Sum

48 The Judge held that 21 September 2012 was when the action accrued, because this was when it could be said with certainty that Saimee suffered actual loss as a result of Moi and Quek's negligent misrepresentations. The Judge also found that Moi and Quek had owed Saimee a continuing duty of care throughout the entire period when the investments were not repaid. Exactly what role this "continuing duty" had in determining the expiry of the limitation period was not explicitly stated. On appeal, in support of 21 September 2012 being the date on which the action accrued, Saimee argues that Moi and Quek made "continued negligent misrepresentations" when they continued to promise him that he would receive his pay-outs.

49 It seems to us that the Judge had conflated a continuing duty with continuing damage. While Moi and Quek might have a continuing duty of care, the breach of that duty had already occurred. There was neither any pleading nor suggestion of another fresh breach causing loss thereafter. The initial breach eventually caused damage (which we elaborate on later). The damage might have been continuing but that is different from a continuing duty or even a continuing breach.

50 Furthermore, as Gibson LJ explained in *London Congregational* (at 30f–g), the continued existence of damage or its consequences should not be confused with accrual of damage, which is the coming into existence of damage.

51 As for Saimee's allegation of "continued negligent misrepresentations" by Moi and Quek, Saimee did not elaborate as to whether there was a discrete repetition of the initial representations or how he had acted upon it. It appears that he was conflating the continuing effect of the initial representations with a fresh representation.

52 We note that the argument – that the action accrued on 21 September 2012 – was not pursued by Saimee or any of the parties in the proceedings below. The court below did not have benefit of parties' submissions on this point prior to making its finding. In our view, although it is always open for the court to find an accrual date which is different from that pleaded as observed at [41] above, it would have been preferable if the parties were invited to submit on this alternative accrual date prior to making such a finding.

53 In our view, the Judge erred in finding that the action accrued on 21 September 2012. First, the determination of when the loss is caused must necessarily be *with reference to the pleaded cause of action*. In this case, the pleaded loss would be that caused by Moi and Quek's negligent misrepresentations regarding the *SMLG Investment* and not under the Settlement Agreements.

54 Second, even if Moi and Quek owed a continuing duty to Saimee, it is only relevant if the breach of such a duty caused the loss in question. This is clearly not the case here – the relevant breach of duty already occurred at the

time of the negligent misrepresentations. As held by the majority of the Privy Council in *Maharaj and another v Johnson and others* [2015] UKPC 28 ("*Maharaj*") at [35], if such an "artifice" of a continuing duty were relied on, the continuing duty might have endured for very many years, contrary to the public policy against the ventilation of ancient claims.

55 Third, when the Judge said that it could not be said with certainty that Saimee had suffered actual loss until 21 September 2012, the Judge had conflated the recovery of any loss with the existence of the loss. For example, when a debtor makes a proposal to make payment of a debt which is already due for payment, the creditor has already suffered a loss. What is uncertain is whether the creditor will recover any part of that loss.

56 Indeed, if the Judge was correct to say that loss is only suffered (and a cause of action only accrues) when it is certain *from Saimee's perspective* that loss is caused, and given that Moi's assurances of repayment continued until around December 2013 (see above at [20]–[21]), taking this to its logical conclusion, the cause of action would only accrue when those assurances ceased and Saimee knew that his loss was a certainty. The Judge's position is therefore untenable, especially if one further considers the possibility of promises of repayment being made repeatedly and indefinitely.

57 The harshness of the rule that time begins to run under s 24A(3)(*a*) of the Limitation Act even without the plaintiff's knowledge of loss being caused is however ameliorated by s 24A(3)(*b*) of the same, which provides for an alternative limitation period starting only on the date of the plaintiff's acquisition of "knowledge required for bringing an action for damages". As per s 24A(4)(*d*), such knowledge under s 24A(3)(*b*) includes knowledge:

> (*d*) of material facts about the injury or damage which would lead a reasonable person who had suffered such injury or damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

Hence, if a plaintiff does not have such requisite knowledge at the time the action accrues, time runs afresh under s 24A(3)(*b*) for a further 3 years, subject of course to s 24B of the Limitation Act stipulating the overriding time limit of 15 years from the negligent act to which the damage in question is alleged to be attributable.

58 As then-Minister for Law Prof Jayakumar explained at the Second Reading of the Limitation (Amendment) Bill which introduced ss 24A, 24B and 24C of the Limitation Act (*Singapore Parliamentary Debates, Official Report* (29 May 1992) vol 60 at cols 31–32):

> This amendment is necessary because under the present law, the limitation period for legal actions runs from the time the damage actually occurred *even if the plaintiff did not know or could not reasonably have known about the damage. This can, of course, cause injustice and problems*, especially in building construction cases where latent defects may not be discoverable until after the limitation period has expired. In such cases, the plaintiff, or the aggrieved party, is then left without any legal recourse.
>
> …
>
> Sir, the Bill before us amends the Limitation Act along the lines of the United Kingdom Limitation Act 1980 and the United Kingdom Latent Damage Act 1986. What it does is to *extend the limitation periods for personal and non-personal injury claims by providing an* alternative *starting date for the limitation period*, ie, the date the aggrieved person has knowledge of the damage. The limitation period would be computed from the date that expires later. …
>
> [emphasis added]

59 In other words, the law has made provision for a situation when an investor like Saimee only discovers that he has a claim some time after the negligent misrepresentation. In such a situation, he has the option of calculating the limitation period with reference to the date of his discovery except that the limitation period would be three years from the date of discovery instead of the usual six years under s 24A(3)(*a*). Unfortunately for Saimee, even s 24A(3)(*b*) does not assist him in the present case since Saimee would have discovered that some of his SMLG Investment was not repaid on the first anniversary of the first tranche of payment (*ie*, 27 April 2012). The claim was thus clearly made outside the three-year period under s 24A(3)(*b*). Indeed, Saimee does not rely on that provision.

Date of default of loan

60 On appeal, Moi and Quek advanced the argument that Saimee's loss occurred on 24 June 2012. According to Moi and Quek, when the US$200,000 loan remained unpaid despite becoming due, Saimee should have known that the SMLG Investment was in jeopardy, or knew that "something was seriously wrong" with it.

61 For the same reasons as given above, this argument fails: Saimee's knowledge or suspicion of the loss suffered is irrelevant to the inquiry of when loss *in fact* occurred.

Date the SMLG Investment was entered into

62 The primary argument of Moi, Quek and IPP is that the cause of action accrued the moment the transaction was entered into and three tranches of payment were made – on 27 April 2011, 17 June 2011 and 3 February 2012.

63 Whether damage can be said to occur at this point is a vexed issue, not just in Singapore, but in other Commonwealth jurisdictions as well. Given that parties have cited and relied on foreign case law extensively in their submissions, it is necessary to examine them in some detail.

The decisions in England and Australia

64 We begin with a line of English cases, consisting of what are regarded as some of the first modern authorities on the issue in England (*McGee* at para 5-030).

65 First is the case of *Forster v Outred & Co* [1982] 1 WLR 86 ("*Forster*"). In 1973, the plaintiff entered into a mortgage of her house, on the defendant-solicitors' advice, to secure the debts of her son's business. In fact, her son was not a good businessman, and subsequently became a bankrupt. The plaintiff repaid the loan in 1975 following a letter of demand from the bank. Thereafter, she issued a writ against the defendants in 1980 for the negligent advice in failing to explain the full implications of executing the mortgage. The defendants pleaded limitation, and the issue was whether the cause of action accrued in 1973 when she entered into the mortgage or only in 1975 when she repaid the loan. The English Court of Appeal held that the plaintiff had suffered actual damage through her solicitors' negligence the moment she entered into the mortgage deed, whereby her property was encumbered with a legal charge and she was subjected to a liability which might mature into a financial loss. Therefore, her cause of action accrued in 1973 notwithstanding that she did not actually become liable for repayment of the loan until the demand was made in 1975. Dunn LJ (at 99F–100C) drew a distinction between cases of economic loss and those involving physical and material damage; in the former case, the damage crystallised and the action accrued at the date on which the plaintiff, in

reliance on the negligent advice, acted to his detriment. The difference between holding the property free of encumbrances and holding the property subject to a mortgage was a quantifiable loss. Even though the actual quantum of damages would depend on events between that and the date when damages finally fell to be assessed, the action accrued when the mortgage was executed, without proof of special damages.

66 Next is the case of *D W Moore & Co Ltd and others v Ferrier and others* [1988] 1 All ER 400 ("*Moore*") where the defendant solicitors negligently prepared and advised the execution of an agreement containing a limited restrictive covenant against competition. The covenantee was taken in as a shareholder and director of the plaintiff after signing the agreement containing the limited covenant. The covenantee later resigned as a director but remained a shareholder and set up a rival business. It was only then did the plaintiff realise that the restrictive covenant was enforceable against the covenantee only if he ceased to be a shareholder as well. Notwithstanding the contingent defect, the Court of Appeal followed *Forster*, and held that the cause of action accrued when the defective contract containing the limited covenant was executed. Neill LJ (at 408g and 410b) and Bingham LJ (at 410j) explained that it was at the moment of execution that the plaintiffs obtained a valueless invalid covenant, as opposed to a valuable valid restrictive covenant.

67 *Bell v Peter Browne & Co* [1990] 3 WLR 510 ("*Bell*") followed *Forster* and *Moore*, but in the context of a negligent omission instead of negligent advice. Following a breakdown of the marriage, the husband consulted with his solicitors (the defendants) regarding the matrimonial home, which was held jointly with his wife. It was agreed that he would transfer his share to his wife, and that it should be sold following which he would receive 1/6 of the sale

proceeds. His continuing interest in the home was to be protected by a trust deed or a mortgage. He executed a transfer of his share in September 1978, but the defendants failed to protect his 1/6 share in omitting to procure the wife's execution of a trust deed or mortgage. Years later, the ex-wife sold the house and spent all the proceeds, thereby depriving the husband of his 1/6 share. The Court of Appeal held that the husband suffered damage in tort at the time the property was transferred without any trust deed or mortgage, because he suffered prejudice in entering into the transfer without the benefit of any protection. The loss was, according to the court, actual and not potential (at 522G and 526A).

68 In *Knapp and another v Ecclesiastical Insurance Group plc and another* [1997] All ER (D) 44 ("*Knapp*"), the defendant brokers, in arranging renewal of insurance for the plaintiffs' outbuildings, carelessly failed to disclose material facts to the insurers. Sometime later, the outbuildings were damaged in a fire, and the insurers elected to avoid the policy on grounds of non-disclosure. The court held that the plaintiffs had suffered actual damage at the time of renewal of the insurance policy, and the claim was therefore time-barred.

69 At this juncture, we turn to the decision of the High Court of Australia in *Wardley Australia Ltd and another v State of Western Australia* (1992) 109 ALR 247 ("*Wardley*"), which concerned an indemnity executed by the respondent in favour of a bank on account of misleading and deceptive conduct on the part of the appellant. Under the relevant provisions of the indemnity, before the bank could call on the indemnity, the primary debtor must have first failed to satisfy its liability. The High Court of Australia in *Wardley* held as follows (at 252, 254–255):

The indemnity was ***not one of a kind which generates an immediate non-contingent liability to pay*** upon execution of the instrument. It was neither a promise to meet a liability of the promisee to make a payment nor a promise to pay a debt owing by a third party to the promisee. In our view the indemnity, on its true construction, was one which created a liability on the part of the respondent to the bank to make payment if and when the bank's relevant "net loss" was ascertained and quantified, subject to the making of a demand for payment by the bank. The liability was, therefore, in conformity with the opinion of the Full Court, contingent and executory. ***The likelihood, perhaps the virtual certainty, that there would be a loss, in the light of Rothwell's actual financial position as it stood when the indemnity was executed, did not transform the liability into an actual or present liability at that time.*** …

…

Economic loss may take a variety of forms and, as Gaudron J noted in *Hawkins v Clayton*, the answer to the question when a cause of action for negligence causing economic loss accrues may require consideration of the precise interest infringed by the negligent act or omission. The kind of economic loss which is sustained and the time when it is first sustained depend upon the nature of the interest infringed and, perhaps, the nature of the interference to which it is subjected. With economic loss, as with other forms of damage, there has to be some actual damage. Prospective loss is not enough.

When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. *But, as will appear shortly, detriment in this general sense has not universally been equated with the legal concept of "loss or damage".* … ***In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust***. Moreover, it would ***increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to***

> ***established events***. In such a situation, there would be an ***ever-present risk of undercompensation or overcompensation, the risk of the former being the greater***.
>
> [emphasis added in italics and bold italics]

Therefore, it was held that no loss would be suffered until it was reasonably ascertainable that, by weighing the burdens and benefits of the transaction, the appellant was worse off than if he did not enter into the transaction. This was when the plaintiff in *Wardley* incurred an absolute liability to pay in discharge of its obligations under the indemnity. The court distinguished *Forster* on the basis that, upon the execution of the mortgage in *Forster*, there was an immediate effect on the value of the plaintiff's equity of redemption.

70 There were however other English cases which diverged from *Forster*, and were more aligned with the approach in *Wardley*.

71 In *UBAF Ltd v European American Banking Corporation* [1984] 2 All ER 226 ("*UBAF*"), the defendant invited the plaintiff, a bank, to participate in a syndicated loan to two companies. The plaintiff made the loan. The borrowers eventually defaulted, and the plaintiff sued the defendants for negligent misrepresentation of information in relation to the loan. The defendant successfully argued, in a striking out application before the first instance court, that the claim was out of time because the cause of action accrued at the time the contract was entered into (*ie*, when the plaintiff parted with its money and acquired claims for repayment of money lent to borrowers who had less ability to repay than represented). The Court of Appeal, in allowing the plaintiff's appeal against the striking out order, held as follows (at 234j–235a):

> … It is possible, although it may be improbable, that, at the date when the plaintiff advanced its money, the value of the

> chose in action which it then acquired was, in fact, not less than the sum which the plaintiff lent, or indeed even exceeded it.
>
> This must depend on the evidence. *The mere fact that the innocent but negligent misrepresentations caused the plaintiff to enter into a contract which it otherwise would not have entered into does not inevitably mean that it had suffered damage by merely entering into the contract.* …
>
> [emphasis added]

Hence, the court held that a trial would be necessary to determine when the damage was suffered. The court further distinguished *Forster* on the basis that in executing the mortgage deed, the plaintiff suffered damage when she encumbered her freehold interest and reduced the value of her property.

72 Two other cases fall into this category – *First National Commercial Bank plc v Humberts (a firm)* [1995] 2 All ER 673 ("*Humberts*") and *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305 ("*Nykredit*"). The latter is relied on by IPP in support of its submissions, and the former is discussed in *Nykredit* itself. These cases involved similar facts – both involved claimant lenders who lent money on security of commercial property, which in fact had been negligently overvalued by the defendant surveyors.

73 In *Humberts*, the overvaluation of the security meant that the value of the property was not significantly in excess of the loan amount, but at the time the loan transaction was entered into, the value of the property was nonetheless sufficient to fully secure the loan amount. Accordingly, it was held that the plaintiffs did not suffer any damage when they entered into the loan transaction. It was only sometime after that the plaintiffs' outlays plus the loan amount exceeded the value of the security, and this is when damage was caused (at 678–679).

74 In *Nykredit*, the extent of overvaluation was such that the value of the security was in fact lower than the loan amount from the outset. The loan was disbursed on 12 March 1990. The borrower defaulted on the first repayment date, which was in June 1990 (see the lower court decision at *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd; United Bank of Kuwait plc v Prudential Property Services Ltd; Nykredit Mortgage Bank plc v Edward Erdman Group Ltd; BNP Mortages Ltd v Key Surveyors Nationwide Ltd; BNP Mortgages Ltd v Goadsby & Harding Ltd; Mortgage Express Ltd v Bowerman and Partners (a firm)* [1995] QB 375 at 425), at which time it became apparent that the valuation of the security was excessive. The lenders argued that they would never have lent money on the security if they had known the true position. It was held that, for the purposes of calculating when the cause of action accrued, the loss in such a case would be the loan less any recovery there might be. It was held that loss would only be suffered when the loan plus other outlays exceeded the value of the security. On the facts, the court held that the *borrower's covenant was worthless*, as the borrower had defaulted "at once" since the amount lent *at all times* exceeded the true value of the property. Therefore, the cause of action arose "at the time of the transaction (12 March 1990) or thereabouts" (at 312j). In short, the approach in *Nykredit* is to draw a comparison between the value of what the lender has at any given time (*ie*, the security on the property and the borrower's personal covenant) and the amount outstanding on the mortgage. If the former in fact exceeds the latter, damage is caused.

75 We turn to three 21st century English cases which have been relied on by the various parties. In *Law Society v Sephton & Co (a firm) and others* [2006] UKHL 22 ("*Sephton*"), the Law Society brought an action against its accountants for their negligent audit of the accounts of a solicitor for the purpose

of his annual report to the Law Society. The solicitor had misappropriated money from client accounts, and various claims from former clients of the solicitor were thereafter made against the Law Society. The Law Society was consequently compelled to make payments out of its compensation fund. The House of Lords held at [30]:

> … ***A contingent liability is not as such damage until the contingency occurs.*** The existence of a contingent liability may depress the value of other property, as in *Forster v Outred & Co* [1982] 1 WLR 86, or it may mean that a party to a bilateral transaction has received less than he should have done, or is worse off than if he had not entered into the transaction (according to which is the appropriate measure of damages in the circumstances). But, standing alone in this case, the contingency is not damage. [emphasis added in bold italics]

76 On the facts, the solicitor's misappropriations gave rise to the mere possibility of liability to pay out of the compensation fund, contingent on the misappropriation not being otherwise made good by the errant solicitor and a claim being made to the fund. Hence, until a claim was made against the Law Society such that it became bound to exercise its statutory discretion to make a payment, no loss or damage had been sustained and no cause of action had accrued. Lord Hoffman stated that he was in "complete agreement" with *Wardley*'s distinction of *Forster* (at [18]), but noted at [28] that it is often the case that a plaintiff, who has plainly suffered some damage, is obliged to commence proceedings before the full effect of his injury can be known, such as in actions for personal injury.

77 Lord Hoffman further commented on the *Nykredit* approach, and distinguished *Nykredit*-type cases as "transaction cases", and not "pure contingent liability cases" (at [20]–[22]):

> 20 The [*Nykredit*] case therefore decides that in a transaction in which there are benefits (covenant for repayment

and security) as well as burdens (payment of the loan) and the measure of damages is the extent to which the lender is worse off than he would have been if he had not entered into the transaction, the lender suffers loss and damage ***only when it is possible to say that he is on balance worse off***. It does not discuss the question of a purely contingent liability.

21 Next, there are a number of cases in the Court of Appeal which involve transactions, with both benefits and burdens, into which the plaintiff entered as a result of the negligence or breach of contract of the defendant. None of these cases concerned purely contingent obligations. It is only necessary to observe that in such bilateral transactions ***the answer to the question of whether damage has been suffered may be different*** according to whether the liability is for the consequences of the defendant not performing his **duty** ***or (as is usual in claims for misrepresentation) the consequences … of the plaintiff entering into the transaction***. If the liability is for the difference between what the plaintiff got and what he would have got if the defendant had done what he was supposed to have done, it may be relatively easy …[(as noted in *Moore*)] to infer that the plaintiff has suffered some immediate damage, simply because he did not get what he should have got. … On the other hand, if the damage is (as it was in [*Nykredit*] and [*Humberts*]) the difference between the defendant's position after entering into the transaction and what it would have been if he had not entered into the transaction, the answer may be more difficult. ***Despite the breach of duty, the transaction may on balance have originally been advantageous to the plaintiff and some evidence may be necessary to show when he was actually in a worse position***. …

22 Thus cases like [*Bell*] and [*Knapp*] are readily explicable as cases in which the damage was the difference between the plaintiff's position as it was and as it would have been if the defendant had performed his duty and in which it was possible to infer that the plaintiff's failure to get what he should have got from a bilateral transaction was quantifiable damage, even though further damage which might result from the flaw in the transaction was still contingent.

[emphasis added in bold italics]

78 The *Sephton* distinction between "pure contingent liability cases" and "transaction cases" was followed in *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863 ("*Shore*"), which is relied on by Moi and Quek. There,

the plaintiff's pension was initially under one "Avesta" scheme, where he was entitled to a gross annual pension of about £34,300 to £39,900. On the defendants' advice, he transferred his accrued benefits into another "PFW" scheme. Under the PFW scheme, Mr Shore would be entitled to a *higher* maximum gross annual pension of £46,643, but this amount was subject to certain risks. Mr Shore was in fact better off for some years under the PFW scheme, and received the maximum income until May 2000 when those risks materialised and his income was reduced to £32,570 per annum. The plaintiff then brought a claim against the defendants for breach of duty in failing to advise him about the different schemes' advantages and disadvantages.

79 The court held that *Shore* was *not* a pure contingent liability case, but a "transaction" case, because the PFW scheme gave him certain rights including the right to withdraw income, but it imposed no liability on him (at [32]). The plaintiff suffered damage as soon as he switched to the PFW scheme from the Avesta scheme, because it was riskier, and *this was less advantageous from the plaintiff's perspective* because *he wanted a secure scheme* (at [37]). Under the PFW scheme the plaintiff obtained a bundle of rights which, from the outset, was less advantageous *to him* than the benefits enjoyed under the Avesta scheme (at [48]). It was the "possibility of actual financial harm that constitute[d] the loss" (at [42]). Dyson LJ (at [43]) declined to apply the *Nykredit* approach (which would entail an *objective* valuation and comparison of the rights under the Avesta and PFW schemes), and distinguished it on its facts (at [47]–[48]):

> 47 … Where (as in *Nykredit*) the complaint is that money was lent on mortgage in reliance on a negligent valuation of property, there may be cases, as Lord Hoffmann said at p 1639B, in which it is possible to demonstrate that the claimant suffers loss immediately upon the loan being made. The lender may be able to show that the rights that he has acquired as lender are worth less in the open market than they

> would have been if the security had not been overvalued. But that would be difficult to prove in a case in which the lender's personal covenant still appears to be good and interest payments are being duly made. It all depends on the facts.
>
> 48 The PFW scheme was a different kind of transaction from the advance of a loan on the security of a mortgage on property. … On the facts of this case, it was not necessary to wait to see what happened to determine whether Mr Shore was financially worse off in the PFW scheme than he would have been in the Avesta scheme. …

80 The final case is *Maharaj* ([54] *supra*) (relied on by Moi and Quek), which discusses a further set of categorisation of cases set out in *Pegasus Management Holdings SCA v Ernst and Young* [2010] EWCA Civ 181, [2010] 3 All ER 297 at [28] ("*Pegasus*") and *Axa Insurance Ltd v Akther & Darby Solicitors* [2009] EWCA Civ 1166, (2009) 127 ConLR 50 ("*Axa Insurance*") at [71]. This was the categorisation of cases into "no transaction" and "flawed transaction" cases to decide the issue of when loss occurs. In *Maharaj*, the plaintiffs purchased a property in 1986 from one Mr Inniss who was operating under a power of attorney from the previous owner's widow, one Mrs Lambert. The plaintiffs completed the purchase on the advice of the defendant solicitors. In 2008, the plaintiffs had the opportunity to sell the property to a property developer. The developer's lawyers, however, had concerns about the plaintiffs' ability to provide good title to the property upon discovering that Mr Inniss lacked the power to deal with the property in 1986. The result was that the deal fell through. The plaintiffs brought proceedings against the defendants, alleging that their negligence in failing to advise them properly resulted in the failed sale to the developers. Lord Wilson, giving the majority opinion of the Board, stated (at [19]):

> It was Rimer LJ, in his judgment in *Pegasus* … at [28] who drew a distinction in cases of professional negligence between 'no transaction' cases and 'wrong transaction' cases. Perhaps the latter are even better described [in *Axa Insurance*] at [71] as

> 'flawed transaction' cases. In his dissenting judgment in the same case Lloyd LJ suggested (at [134]) that a focus on the distinction might be an unhelpful distraction. Although the Board considers that the distinction can represent a helpful signpost to the relevant principles, it is essential to bear in mind that the central concept behind the 'no transaction' and the 'flawed transaction' cases is different. ***For in the latter the claimant does enter into a 'flawed transaction' in circumstances in which, in the absence of the defendant's breach of duty, he would have entered into an analogous, but flawless, transaction. In the former, however, the claimant also enters into a transaction but in circumstances in which, in the absence of the defendant's breach of duty, he would have entered into 'no transaction' at all.*** The difference in concept dictates a difference in the inquiry as to whether and, if so, when, the claimant suffered actual or measurable damage. ***In the 'flawed transaction' case the inquiry is whether the value to the claimant of the flawed transaction was measurably less than what would have been the value to him of the flawless transaction. In the 'no transaction' case the inquiry is whether and, if so, at what point, the transaction into which the claimant entered caused his financial position to be measurably worse than if he had not entered into it***: see *Nykredit* … at 309 (per Lord Nicholls). *Nykredit* was a classic example of a 'no transaction' case in that the claimants, who had lent money on the security of a property which the defendant valuers had negligently overvalued for them, would have declined to make the loan if the valuation had not been deficient.
>
> [emphasis in original omitted; emphasis added in bold italics]

Besides classifying the case of *Nykredit* as a "no transaction" case, the Privy Council also classified *Moore* and *Knapp* as "flawed transaction" cases (at [23]–[24]).

81 The plaintiffs' contention in *Maharaj* was that it was a "no transaction" case, because the defendants' duty was to warn them that the execution of the deed of conveyance by Mr Inniss would fail to convey to them the legal interest in the property, and had they been so warned, they would have not proceeded with the purchase. The Privy Council rejected this argument, holding that it was

an obvious "flawed transaction" case because the defendants' duty was to take all reasonable care to *ensure* that legal and equitable ownership of the land became vested in the plaintiffs (at [21]–[22]):

> … On [the plaintiffs'] analysis a case of a 'flawed transaction' can *too easily be reconstituted as a case of 'no transaction' by contending, however artificially*, that a defendant has a duty to warn the claimant that, if matters were to proceed in a particular way, the transaction would be flawed and that, if so warned, the claimant would be likely to elect not to proceed with the transaction. [emphasis added]

82 The Privy Council further stated that it being a "flawed transaction" did not necessarily mean that the claimant suffered actual damage on entry into it. The particular facts should be examined to determine whether it could be inferred that the plaintiff has suffered some immediate damage: (at [26]). On the facts of *Maharaj*, the plaintiffs *had* suffered actual damage upon their execution of the deed in 1986. This is because (a) their failure to obtain a legal interest in the property subjected them to significant risks which were present from then onwards; (b) from the outset, their equitable interest was significantly less valuable to them than a legal interest would have been, such that they would have encountered the same obstacles in 1986 as in 2006 if they had tried to sell the land or mortgage it then; (c) the flaw could only be remedied with the participation of Mrs Lambert, and there were risks and costs involved in securing her participation to sign the deed of rectification (at [27]). Furthermore, the risks in *Maharaj* were not such as to render the loss "purely contingent", unlike *Sephton* ([75] *supra*). This was because the risks in *Maharaj* generated "an immediate and (no doubt with difficulty) a quantifiable reduction from the value of the asset which the [plaintiffs] should have received [in 1986] to the value of the asset which they did receive" (at [28]). In the result, the Privy

Council held that the cause of action arose in 1986 when the transaction was entered into.

The decisions in Singapore

83 In Singapore, in the case of *Wiltopps (Asia) Ltd v Emmanuel & Barker* [1998] 2 SLR(R) 778 ("*Wiltopps*"), Chao Hick Tin J (as he then was) cited with approval the words of Saville LJ in *Hopkins v Mackenzie* [1994] TLR 546 at [10] that, for the purposes of determining when a tort claim accrues, "what ha[s] to be shown [is] *actual loss or damage, not future loss or damage, however likely it was that that would occur*" [emphasis added]. Chao J further stated as follows (at [27]):

> In my judgment a good test to determine whether a cause of action in tort has accrued is to ask whether a plaintiff would have succeeded if he had sued at any time after the occurrence of the negligent act complained of. …

84 *Wiltopps* involved a plaintiff who had instructed the defendant firm as solicitors to institute admiralty proceedings to arrest any vessel belonging to one KDG, against whom the plaintiff had a claim. The defendant accordingly procured the arrest of a vessel belonging to KDG. KDG's solicitors filed a bail bond in court which provided for the plaintiff's claim. On the defendant's advice, the plaintiff accepted the bail bond and released the vessel in 1981. The admiralty action was heard in 1985 and dismissed in 1986. The plaintiff appealed against the decision, and the appeal (heard in 1992) was eventually allowed. The judgment sum and costs incurred by the plaintiff far exceeded the amount secured by the bail bond, and the plaintiff was unable to recover the balance from KDG. The plaintiff sued the defendant in tort for advising the plaintiff to accept the bond, but the defendant argued that the claim was time-barred.

85 The court in *Wiltopps* examined a number of English and Australian cases, and observed that there appeared to be a conflict between the Australian approach in *Wardley* ([69] *supra*) and the early English cases originating in *Forster* ([65] *supra*) as to whether the mere incurring of a contingent liability suffices to give rise to a cause of action (*Wiltopps* at [24]). The court also noted that other English cases, including more recent English cases (such as *Humberts*, [73] *supra*), appeared to veer in the direction of the Australian position (*Wiltopps at* [21]–[22]).

86 The court in *Wiltopps* also expressed its doubt regarding the approach in the *Forster* line of English cases (at [25]):

> In fact, I see force in the argument that in *Forster v Outred* the mother did not really lose anything when she executed the mortgage. Of course, she put herself at risk should her son default. *It was only on her son's default that she was called upon to make good. To say that upon execution of the mortgage she had suffered an actual loss seems to me quite artificial.* [emphasis added]

Eventually, *Wiltopps* was decided by distinguishing *Forster*. The court stated that in *Forster*, at the moment the mortgage was executed it could be said that the plaintiff lost something, though the extent of loss had yet to be ascertained. In *Wiltopps*, however, the indemnity would only become payable upon certain eventualities which may not occur. Until those eventualities occurred, it could not be said that the plaintiff suffered damage (at [26]). The argument that damage at the point at which the vessel was released could be measured by the difference between the value of adequate security and the allegedly inadequate security was rejected. This was because the bail bond was only a security, it was not something to benefit the plaintiff in *any* event. Until the plaintiff obtained a judgment which remained unsatisfied by the security, it would have suffered no damage (at [28]). Accordingly, it was held that the claim was not time-barred.

We note that ss 24A(3)(*a*) and 24A(3)(*b*) of the Limitation Act were in force by the time, but were not considered.

87 There are two more recent High Court cases in Singapore which appear to diverge from the approach in *Wiltopps* and are relied on by Moi and Quek in their submissions. The first was *Liew Soon Fook Michael and another v Yi Kai Development Pte Ltd* [2017] SGHC 88, a case involving negligent misrepresentation. The plaintiffs in that case claimed that the defendant developer had misrepresented to them that the unit they purchased would have a roof garden and a certain area, when in fact there were not. The sale and purchase agreement for the unit was entered into in July 2007. The sale and purchase agreement provided that should any shortfall in the area be discovered on completion of the title survey, the plaintiffs would have the right to a purchase price adjustment. Construction was completed in 2010, and the final strata title survey plan was approved. The plaintiffs commenced the action in 2016, and the defendant argued that the claim was time-barred. Hoo Sheau Peng JC (as she then was) held that the claim was time-barred because the damage occurred when the plaintiffs entered into the sale and purchase agreement. That was the point at which the plaintiffs became contractually bound to "overpay" for a property without a roof garden and less area (at [32]). *Wiltopps* was not referred to. Instead, Hoo JC relied on *Chitty on Contracts*, vol 1, (Hugh Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 28-034 for the proposition that in relation to the tort of negligent misrepresentation, failing other specific damages allegedly suffered, damage would occur when the contract is entered into. Further, she noted that in the English High Court case of *Green v Eadie and others* [2012] 2 WLR 510, where the plaintiff-purchaser brought a negligent misrepresentation claim against a vendor for having falsely represented that the property included a strip of land, the court

held that the damage occurred upon entering into the "flawed transaction" (at [31]–[32]).

88 The second case is *Koh Kim Teck and another v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 ("*Koh Kim Teck*"), which involved a plaintiff who brought an action against his bank, the defendant, in both contract and tort for breaching its duty of care in failing to advise him of the risks involved in certain financial products – knock-out discount accumulators and dual currency investments – that he purchased from the defendant. In essence, these financial products carried a chance of loss should certain risks materialise, but also a chance of profit. Under the knock-out discount accumulators, the plaintiff could purchase a pre-determined number of shares at a fixed discount, but would suffer loss should the market price fall below the fixed discounted price. Under the dual currency investments, the plaintiff deposited a principal sum in a selected investment currency with a bank for a fixed term. The bank would repay the principal with yield upon maturity, but has the option of repaying in an alternative currency at a pre-determined conversion rate. The result is that a loss may result if the investment currency is repaid in the alternative currency; the investor thus bears the risks of currency fluctuations.

89 As it turned out, the various risks materialised, leaving the plaintiff with heavy losses. Abdullah J observed, albeit *obiter*, that the limitation period for the plaintiff's claims started to run from the time that the plaintiff purchased each financial product, and not when the risks materialised. Again, *Wiltopps* was not considered. Instead, John Powell et al, *Jackson & Powell on Professional Liability* (Sweet & Maxwell, 8th Ed, 2017) at para 5-064, which refers to *Shore* ([75] *supra*) and *Sephton* ([75] *supra*), was cited with approval (at [109]):

> Consistently with the approach to claims against surveyors, solicitors and insurance brokers, a client of a financial adviser will suffer loss and damage when he makes an investment or otherwise acts to his detriment in reliance upon negligent advice. Where the complaint is that the breach of duty by the financial adviser caused the claimant to make an investment which carried a greater degree of risk than was appropriate, damage is suffered when that investment is made and the claimant is exposed to the risk, even if the risk does not materialise at that point and there is a chance that the investment actually made will outperform that which should or would have been made. So in *Shore v Sedgwick Financial Services Ltd* the claimant had transferred from his occupational pension scheme to a more risky scheme in reliance on the defendant's advice. Relying on the decision of the House of Lords in *Law Society v Sephton*, the claimant argued that mere exposure to risk was not itself loss, but was equivalent to the exposure to a contingency. Rejecting that argument, Dyson LJ, with whom the other members of the Court of Appeal agreed, held that the claimant had received an inferior scheme, because it involved a higher degree of risk which he did not want. This did not involve the application of a subjective basis of valuation, rather the Court valued the investment applying the investment criterion which the claimant had stipulated.

Our decision

90 From the various approaches adopted in the case law, it is easy to lose sight of the heart of the inquiry, being the determination of when the claimant suffers actual loss. In our view, the only relevant inquiry in this determination for purposes of the present appeals is *whether the loss is purely contingent*. It may not be entirely helpful or appropriate to categorise cases into "no transaction", flawed transaction" or "wrong transaction". We agree with Lloyd LJ's dissenting observation in *Axa Insurance* ([80] *supra* at [134]) that a focus on this distinction might be "an unhelpful distraction". There appears to be a conflict between the cases on this matter – whether purely contingent loss constitutes loss. In our view, purely contingent loss is not in itself damage until, and not before, the contingency occurred. We agree with the holding of the High Court of Australia in *Wardley* ([69] *supra*) that the mere likelihood that there

would be a loss from entering into a transaction does not equate to actual or present loss at the time the transaction was entered into, and agree with the court's reasons in *Wardley* as set out at [69] above. We should add that although the decision in *Forster* ([65] *supra*) has consistently been distinguished in all the authorities on the basis that upon the execution of the mortgage, there was an immediate effect on the value of the plaintiff's equity of redemption, we note that the House of Lords in *Sephton* at [30] nonetheless treated it as "a contingent liability". This might explain why Chao J in *Wiltopps* observed that the distinction was ultimately "quite artificial".

91 In essence, as rightly recognised in *Wardley*, to compel a plaintiff to institute proceedings before the ascertainable existence of at least some of his loss is unjust. In *Wardley*, it was only when the primary debtor failed to satisfy its liability could the bank call on the indemnity. In *Wiltopps* ([83] *supra*), the indemnity could only be invoked where two contingencies had come to pass: first, Wiltopps must have obtained a judgment or settlement in its favour, and second, KDG must be unable to satisfy it. Until then, Wiltopps could not possibly call on the bail bond, and whether the bail bond was inadequate would be indeterminate. In our view, the test set out in *Wiltopps* serves as an indicative litmus test to ascertain whether loss has occurred such that a cause of action has accrued – to determine whether a cause of action in tort has accrued is to ask whether a plaintiff would have succeeded if he had sued at any time after the occurrence of the negligent act complained of.

92 Insofar as the cases which appear to state otherwise, we respectfully disagree. Our discomfort with the various tests that have been employed is that in those cases it seems to us that they were employed in order to rationalise their respective outcomes, even though upon closer inspection, the losses in those

cases were indeed purely contingent. We focus on two cases to illustrate our point in particular, cases involving investments gone wrong – *Shore* ([78] *supra*) and *Koh Kim Teck* ([88] *supra*).

> (a) In *Shore*, before the risks materialised and his income under the PFW scheme fell, it is difficult to say that Mr Shore had suffered any loss. Mr Shore might not have obtained what he wanted – a secure scheme – but he was in fact initially entitled to an even higher gross annual pension payout under the PFW scheme than under the Avesta scheme, and was receiving such a higher payout for some years before the relevant risks materialised. In fact, it would not have been apparent at the time when the pension scheme was switched over that the payout under the new scheme would eventually be less.
>
> (b) Similarly, in *Koh Kim Teck*, the plaintiff stood a chance to profit from the financial products that he purchased, and was purchasing shares at a discount under the knock-out discount accumulators, and earning a yield on his fixed-term deposit under the dual currency investments. While it is true that the financial products carried higher risks, those increased risks may or may not eventually materialise and result in losses.

In these cases, it is clear that at the time the plaintiffs switched pension schemes, or purchased each financial product, the loss was contingent. The plaintiffs would make a loss *only if* the relevant risks eventuated. Before that, despite the breach of duty, it is not possible to say that the plaintiffs were, on balance, worse off from the moment they entered into the transactions, given the advantages enjoyed at that point. Pertinently, in those cases, it is difficult to see how the claimants could have succeeded in their claims had they decided to sue upon switching the pension scheme or upon purchasing the financial products *prior* to the risks materialising.

93 Furthermore, the fixation on further categorisations into "flawed transaction" and "no transaction" cases is apt to distract from the inquiry of when loss occurs. In fact, this can be seen from the ease in which a case of a "flawed transaction" was reconstituted by the plaintiffs as a case of "no transaction" in *Maharaj* ([54] *supra*). Although in *Maharaj*, it was clear on the particular facts that it was an obvious "flawed transaction" case because the defendants' duty was to take all reasonable care to ensure that legal and equitable ownership of the land became vested in the plaintiffs, the distinction might well be blurred in other instances. In our view, it is "unhelpful" to engage in this further categorisation.

94 The corollary of this is that we also reject the approach in *Nykredit* ([72] *supra*), which would have involved a determination of whether the value of what Saimee had obtained (*ie*, SMLG's covenant to repay) was exceeded by the quantum of the SMLG Investment at any given time in this case. The difficulties with the *Nykredit* approach are aptly enumerated in *McGee* at para 5-054, which states:

> … First … [the value of what the lender has acquired from the borrower] is … difficult to calculate, since [it is a matter] of judgment. Yet, the day-by-day calculation is necessary because [according to the *Nykredit* approach] the cause of action does not accrue until the first time when the lender's asset is worth less than the sum outstanding. Lord Nicholls [in *Nykredit*] seeks to dismiss these points as matters of evidence rather than of principle, *although it should be said that they are matters of evidence which are in danger of making the determination of the date of accrual almost impossible in some cases*. Secondly, it is *dangerous to assume that the relationship between the two figures can move only in one direction*. If the property market fluctuates, or if the borrower's circumstances improve, so that

> his covenant is worth more or so that he is able to make some repayments on the mortgage, then the position may change so that overall the lender is back in credit. Suppose that the position then deteriorates again, so that the lender is in debit overall. It is submitted that this cannot amount to the accrual of a fresh cause of action—the action must accrue once and for all when first the lender goes into debit. Yet this may produce the result that by the time of trial the lender is back in credit and has no right of recovery, yet is unable to sue again when the position later deteriorates. This problem appears logically insoluble, although it is an inevitable result of the decision in *Nykredit*. [emphasis added]

In fact, much like the cases of *Shore* and *Koh Kim Teck*, the damage in *Nykredit* at the time the loan agreement was entered into was purely contingent. Even though the value of the security was lower than the loan amount from the outset, the borrower was still under an obligation to repay the loan amount with interest. There would be no avenue to realise the (inadequate) security unless and until the borrower defaulted in June 1990, and prior to that, it could not be said that the lender had suffered a loss.

95 In the present case, at the time Saimee entered into the SMLG Investment, there was no actual loss incurred. When Saimee paid US$620,900 into FX Primus' bank account, what he obtained in return was SMLG's covenant for repayment plus some (unknown) percentage of profits in return, and a risk of losing his investment. What Saimee did not get was security on this investment and an assured profit of 40%, which he thought he had arising from Moi and Quek's negligent misrepresentations. Also, unlike *Humberts* ([72] *supra*) where for some time after the loan was made the value of the security exceeded the loan, in this case there was no security at all. However, at the time the investment was made, the increased risk due to the lack of security was also accompanied by a covenant to repay the invested sum *plus* profits. There is neither any suggestion, whether in the proceedings below or before us

on appeal, that the SMLG Investment was a total sham such that this covenant was worthless from the outset, nor is there any evidence to that effect. Instead, the loss was a contingent loss – Saimee would suffer actual loss *if and when* certain risks materialised, *ie*, when SMLG breaches its covenant for repayment. Before that risk materialised, Saimee in fact stood a chance at profiting from his investment, even if this was a chance fraught with risk.

96 We accordingly do not agree that the loss occurred at the time the investments were made, as it cannot be said that Saimee suffered actual loss at that time.

Date the payments became due

97 The final account of when the damage occurred is that the cause of action in respect of each of the three tranches of payment accrued one year after each of them were made (*ie*, when repayment of the sum plus profits became due) – *ie*, 27 April 2012, 17 June 2012 and 3 February 2013. This is Moi and Quek's second alternative argument on appeal.

98 Moi and Quek further argued that there were reasons for moving up the date of accrual of action in respect of the third and/or second tranches, such that the claim in respect of the whole investment sum was time-barred. In this respect, two separate arguments were made.

99 Moi and Quek first submitted that the first repayment date (*ie*, 27 April 2012) should be considered the date that all the relevant loss occurred (even though the repayment due dates for the other investment tranches were later) because Saimee would have known, when SMLG did not repay his first tranche investment, that there was "something wrong" with the whole SMLG

Investment, or that the repayments in respect of the second and third tranches were "in jeopardy".

100 Next, Moi and Quek submitted during the hearing of these appeals, that the cause of action in respect of the first tranche accrued on 27 April 2012, in respect of the second tranche on 17 June 2012, and in respect of the third tranche on 17 September 2012 (*ie*, the date of the Settlement Agreements). This is because even though the third tranche was due for repayment on 2 February 2013, the parties' conduct in entering into the Settlement Agreements suggested that they treated the third tranche as already lost.

101 In our judgment, Saimee's cause of action in respect of any and all losses arising from Moi and Quek's negligent misrepresentations accrued on 27 April 2012, but not for those reasons advanced by Moi and Quek. We reject Moi and Quek's argument based on Saimee's knowledge that his invested sum was in jeopardy because, as explained above, Saimee's knowledge is irrelevant to the determination of when a cause of action accrues under s 24A(3)(*a*) of the Limitation Act. Instead, since the loss suffered by Saimee at the time the SMLG Investment was made was a purely contingent loss, actual loss crystallised when, one year after the *first* principal was invested, no repayment was made by SMLG as promised.

102 We disagree with Moi and Quek's submission at the hearing that the cause of action in respect of the first, second and third tranches of payment accrued separately on 27 April 2012, 17 June 2012 and 17 September 2012 respectively. As counsel for IPP, Mr Jimmy Yim *SC*, emphasised at the hearing, (a) there was only a single negligent act which is the subject of the action, *ie*, Moi and Quek's negligent misrepresentations; and (b) 27 April 2012 was when

the negligent misrepresentations first became actionable due to some damage occurring as a result. As stated by Hobhouse LJ in *Knapp* ([68] *supra*):

> The inquiry which we have to undertake … *is one which asks when [the negligence in question] first became actionable*. It was at that moment that the cause of action accrued. It is immaterial that at some later time the damage suffered by the Plaintiffs became more serious or was capable of more precise quantification. Provided that some damage has been suffered by the Plaintiffs as a result of [the negligence] which was 'real damage' (as distinct from purely minimal damage) or damage 'beyond what can be regarded as negligible' that suffices for the accrual of the cause of action. … [emphasis added]

This passage was affirmed in *Khan v RM Falvey & Co* [2002] All ER (D) 361 (Mar) ("*Khan*") at [56]. The English Court of Appeal also held in *Khan* at [23] that "[a] claimant cannot defeat the statute of limitations by claiming only in respect of damage which occurs within the limitation period, if he has suffered actual damage from the same wrongful acts outside that period" (affirmed in *Polley v Warner Goodman & Streat (a firm)* [2003] EWCA Civ 1013 at [15]). Similarly, we note that in *Sephton* ([75] *supra*), although the claims were made against the Law Society by former clients of the solicitor over several months, the court stated that the action in tort accrued in the Law Society's favour when "it first received a claim on its fund from one of [the solicitor's] clients" (at [83]). In other words, as long as some damage is caused as a result of the negligence in question, the cause of action in relation to that negligence accrues at that point. Loss occurring after that, which is attributable to the *same* negligence in question, does not postpone the accrual date of the cause of action.

103 Although the cause of action accrues the moment some damage is caused as a result of the tort, compensation for loss resulting from that cause of action could extend to loss incurred after the cause of action accrued. As

James Edelman, *McGregor on Damages* (Sweet & Maxwell, 20th Ed, 2018) at para 11-024 (cited by Mr Yim *SC* during the hearing) states:

> The rule is that damages for loss resulting from a single cause of action will include compensation not only for damage accruing between the time the cause of action arose and the time the action was commenced, but also for the future or prospective damage reasonably anticipated as the result of the defendant's wrong, whether such future damage is certain or contingent. Perhaps the commonest illustration of the rule is an action for personal injuries where every day damages are awarded which take into account prospective pain and suffering, prospective loss of amenities of life, prospective medical expenses and prospective loss of earnings.

It is important to recognise that although the payment for the SMLG Investment was disbursed over three tranches, it does not change the fact that the SMLG Investment arose from a single act of negligent misrepresentation by Moi and Quek, and there is one actionable breach. Hence, since Saimee's cause of action against the appellants accrued on 27 April 2012 when he suffered actual loss of his first tranche of payment, he can claim damages in respect of his full claim of US$620,900 as long as he commenced the action against them by 27 April 2018. Unfortunately, Saimee failed to do so – the writ of summons was filed too late, on 21 July 2018. His claim is accordingly time-barred.

Vicarious liability

104 Given our findings above, it is no longer necessary for us to deal with the issue of IPP's vicarious liability. Nonetheless, we make several brief observations on this issue.

105 Moi and Quek were financial advisers tasked with selling and recommending IPP's financial products to Saimee, and acted as intermediaries between the clients and IPP. IPP's company brochure, which Moi had stated he

would have given to Saimee when they first met, states that the IPP financial consultant "studies your investment needs and can implement various programs to ensure you have the advantage of the best vehicles to meet your goals", and "will liaise with reputable private bankers, international fund managers, investment specialists, property brokers and recommend the appropriate financing, tax and investment product structures". While it is undisputed that Moi and Quek were not conferred the authority to market or advise Saimee in relation to investments on the foreign exchange market, including the SMLG Investment, there is evidence that Moi and Quek were advising Saimee on currency risk issues and leveraging. There is no dispute that Moi and Quek were acting within their authority in respect of such advice. As far as a layman client like Saimee is concerned, Moi and Quek would appear to be able to offer advice on foreign exchange products, such as the SMLG Investment.

Conclusion

106 In sum, we allow the appeals by IPP, Moi and Quek. Saimee's claims against the appellants are time-barred and must therefore fail.

107 We will hear parties on costs. Parties are to file their costs submission in respect of costs here and below limited to 10 pages each within 14 days from the date hereof.

Steven Chong Judge of Appeal	Belinda Ang Saw Ean Judge	Woo Bih Li Judge

Yim Wing Kuen Jimmy SC, Lee Soong Yan Kevin, Ang Si Yi and Manoj Belani (Drew & Napier LLC) for the appellant in Civil Appeal No 154 of 2019;
Josephine Chong and Navin Kangatharan (Josephine Chong LLC) (Instructed Counsel), Tan Teck Hian Wilson, Lee Ming Hui Kelvin and Ong Xin Ying Samantha (WNLEX LLC) for the appellants in Civil Appeal No 159 of 2019;
Uthayasurian Sidambaram (Surian & Partners) (Instructed Counsel), Vishnu Aditya Naidu (Phoenix Law Corporation) for the respondent in Civil Appeal Nos 154 and 159 of 2019.