

Ma Hongjin v Sim Eng Tong
[2021] SGHC 84

Case Number : Suit No 431 of 2019

Decision Date : 22 April 2021

Tribunal/Court : General Division of the High Court

Coram : Vinodh Coomaraswamy J

Counsel Name(s) : Derek Kang and Lucas Lim (Cairnhill Law LLC) for the plaintiff; Alvin Tan (Wong Thomas & Leong) for the defendant.

Parties : Ma Hongjin — Sim Eng Tong

Evidence – Witnesses – Corroboration – Weight of evidence where witness was shown pleadings

Tort – Misrepresentation – Fraud and deceit

Tort – Misrepresentation – Inducement

Tort – Misrepresentation – Negligent misrepresentation

[LawNet Editorial Note: The appeal in Civil Appeal No 53 of 2021 was dismissed by the Appellate Division of the High Court (“AD”) on 1 December 2021 with no written grounds of decision. The AD generally agreed with the reasoning and decision of the General Division of the High Court (“HC”). However, it disagreed with the HC on the issue of witnesses being shown parties’ pleadings before recording a witness statement or an affidavit of evidence-in-chief from them. It observed that one should be careful not to place too much weight on that fact, as “refreshing” a witness’ memory in that manner is a not uncommon step. However, bearing in mind other factors and reasons provided by the HC, the AD was not persuaded that the HC was plainly wrong in its findings of fact.]

22 April 2021

Judgment reserved.

Vinodh Coomaraswamy J:

Introduction

1 In 2015, the plaintiff advanced a total of \$6m by way of four loans to a company known as Biomax Technologies Pte Ltd (“BT”). Out of that \$6m, BT failed to repay \$5m. In 2016, the plaintiff sued BT in a separate action to recover the unpaid loans. In 2019, just before trial in that action, BT put itself into creditors’ voluntary liquidation. The plaintiff has been unable to recover any part of the unpaid loans from BT.

2 The plaintiff now brings this action against the defendant, the principal individual behind BT, seeking damages in tort arising from the unpaid loans. The plaintiff’s case is that the defendant fraudulently or negligently made certain misrepresentations to her about BT’s financial needs, business prospects and order books which induced her to extend the unpaid loans to BT.

3 The defendant's case is that he did not make the alleged misrepresentations to the plaintiff at all. In the alternative, the defendant submits that nothing he said induced the plaintiff to extend the unpaid loans to BT.

4 I dismiss the plaintiff's claim. The plaintiff has failed to prove on the balance of probabilities that the defendant made the misrepresentations to her. The plaintiff has also failed to prove on the balance of probabilities that anything the defendant did induced her to extend the unpaid loans to BT.

Background

5 The plaintiff is an investor. Her husband, Mr Han Jianpeng, is a businessman.^[note: 1] Both the plaintiff and Mr Han are citizens of the People's Republic of China ("the PRC") and permanent residents in Singapore.^[note: 2]

6 The defendant is a businessman and a director of all three companies in a group known as "the Biomax Group". The Biomax Group comprises SCP Holdings Pte Ltd ("SCP"), Biomax Holdings Pte Ltd ("Biomax Holdings") and BT. SCP is the ultimate holding company of the Biomax Group. Biomax Holdings is a wholly owned subsidiary of SCP and the intermediate holding company of the Biomax Group. BT is a wholly owned subsidiary of Biomax Holdings and the main operating company of the Biomax Group. BT's business includes manufacturing enzyme digester machines.

7 Mr Han came to know the defendant in December 2014.^[note: 3] He introduced the defendant to the plaintiff soon after that.^[note: 4] Mr Han and the defendant began discussions and eventually negotiations about a substantial investment in the Biomax Group. The plaintiff was present at some of these negotiations, but it was Mr Han who was the driving force behind them. Mr Han and the defendant eventually agreed terms on a series of investments in the Biomax Group.^[note: 5]

8 The plaintiff and Mr Han decided that the plaintiff would be the contracting party for this series of investments. It is not in dispute, however, that the money which the plaintiff lent to the Biomax Group ultimately came from Mr Han. It is for this reason that Mr Han frequently referred to the unpaid loans in his cross-examination as "his" money and to himself as the lender.^[note: 6]

9 As a result of the agreement which Mr Han reached with the defendant, the plaintiff entered into the following four agreements with SCP and BT in the first half of 2015:

- (a) a Convertible Loan Agreement in January 2015 with SCP under which the plaintiff lent SCP the sum of \$5m;
- (b) a Supplemental Agreement in April 2015 with SCP under which SCP agreed to pay an additional \$250,000 fee for the loan extended under the Convertible Loan Agreement;
- (c) a Shares Investment Agreement on the same day in April 2015 under which the plaintiff agreed to lend BT the sum of \$5m in exchange for 45% of the shares in a subsidiary of BT which was to be the listing vehicle for Biomax Holdings; and
- (d) a loan agreement ("the June Loan") in June 2015 under which the plaintiff lent BT the sum of \$1m for three months at 10% interest.

10 None of these four agreements are the subject matter of this action. The first two of these investments were the subject matter of an earlier action which the plaintiff brought against SCP and BT by way of Suit No 765 of 2016 ("S765") (see *Ma Hongjin v SCP Holdings Pte Ltd* [2018] 4 SLR 1276); *Ma Hongjin v SCP Holdings Pte Ltd and another* [2019] SGHC 277; affirmed on appeal in *Ma Hongjin v SCP Holdings Pte Ltd* [2020] SGCA 106). The plaintiff succeeded in the bulk of her claim against BT in S765. But, as I have mentioned, BT's supervening insolvency has meant that she has been unable to recover any of the unpaid loans from BT.

11 The third agreement has not given rise to any disputes between the parties. The plaintiff did not eventually advance the money to BT under the Shares Investment Agreement and the agreement was abandoned by consent.

12 The fourth agreement, the June Loan, also has not given rise to any disputes between the parties. The plaintiff duly advanced the June Loan to BT. BT duly repaid the June Loan in full with contractual interest when it fell due in September 2015.

The July 2015 meeting

13 In July 2015, just a month after the June Loan, the plaintiff and Mr Han invited the defendant and one Ms Chua Siok Lui to their home for a social visit and dinner. Ms Chua was a director of BT and the defendant's *de facto* personal assistant.^[note: 7] After dinner, Mr Han and the plaintiff discussed with the defendant the possibility of their making further loans to BT. Ms Chua was present at these discussions. The plaintiff's case is that the defendant made the following four oral representations ("the Representations") to Mr Han and to her during these discussions:

- (a) That BT required more money to manufacture enzyme digester machines ("the Funding Representation");^[note: 8]
- (b) That BT would use any money which the plaintiff and Mr Han lent to BT for the sole purpose of manufacturing enzyme digester machines ("the Sole Use Representation");^[note: 9]
- (c) That: (i) with additional money, BT would be able to manufacture a significant number of enzyme digester machines; (ii) BT had secured orders for enzyme digester machines but was unable to meet those orders only because it lacked money; and therefore (iii) BT could sell at least ten enzyme digester machines in 2015 ("the Sales Representation");^[note: 10] and
- (d) That BT was making profits and that its projected profits for 2016 would be even higher than its profits in 2015 ("the Profitability Representation").^[note: 11]

14 At trial, Ms Chua gave evidence for the plaintiff as to her recollection of what was said at the July 2015 meeting. She gave evidence under subpoena, but after having affirmed an affidavit of evidence in chief.^[note: 12]

15 The plaintiff initially pleaded that the defendant had made four additional representations. The plaintiff has clarified that these representations are pleaded by way of background and not as actionable representations in their own right. I shall therefore refer to them as "the Background Representations". Some of the Background Representations contain specific figures. For example, one of the Background Representations alleges that the defendant made a representation specifying the cost, sale price and manufacturing lead time of the enzyme digester machines.^[note: 13] Another Background Representation alleges that the defendant specified the interest rate that BT was willing to pay and the percentage of shares in BT that the Biomax Group would transfer to the plaintiff in return for additional loans.^[note: 14]

The loan agreements

16 In the months following these discussions, the plaintiff entered into four loan agreements with BT. These are the loan agreements which are the subject matter of this action:

- (a) In July 2015, the plaintiff entered into a loan agreement with BT under which she lent BT \$2m for two months at 20% interest ("the July Loan").
- (a) In August 2015, the plaintiff entered into a master loan agreement with BT under which she agreed to lend money from time to time to BT in consideration of BT's agreement to issue a specified percentage of its shares to the plaintiff before its initial public offering ("the Master Loan Agreement"). The Master Loan Agreement covered both the June Loan and the July Loan.^[note: 15]
- (b) On the same day in August 2015, pursuant to the terms of the Master Loan Agreement, the plaintiff entered into another loan agreement with BT under which she lent BT \$2m for two months at 20% interest.

(c) In October 2015, the plaintiff entered into the final loan agreement with BT (“the October Contract”) under which she lent BT \$1m for three months at 20% interest.

These three loans totalling \$5m are the three loans which the plaintiff alleges in this action that the defendant fraudulently or negligently induced her to extend to BT by making the Representations.

17 I should note at this point that the interest rates for all of the plaintiff’s loans to the Biomax Group are expressed in absolute rates, and not rates per annum. For example, under the July Loan, BT agreed to pay the plaintiff 20% of \$2m or \$400,000 for two months’ use of the \$2m principal.

The parties’ cases

18 As I have mentioned, the plaintiff’s claim in this action is that the defendant induced her to extend the unpaid loans to BT by making the Representations and by doing so fraudulently, alternatively negligently. On both alternatives, the primary relief which the plaintiff claims is damages equivalent in value to the unpaid loans.^[note: 16]

19 To succeed in fraudulent misrepresentation, the plaintiff must prove the following (*Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 (“*Panatron*”) at [14]):

- (a) That the defendant made a false representation of fact to her;
- (b) That the defendant made the representation with the intention that the plaintiff should act on it;
- (c) That the plaintiff acted in reliance on the representation;
- (d) That the plaintiff suffered damage by acting on the representation; and
- (e) That the defendant made the false representation knowing that it was false or in the absence of any genuine belief that it was true.

20 To succeed in negligent misrepresentation, the plaintiff must prove the following (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100; *IM Skaugen SE and another v MAN Diesel & Turbo SE and another* [2018] SGHC 123 (“*IM Skaugen*”) at [121]):

- (a) That the defendant made a false representation of fact to her;
- (b) That the representation induced her actual reliance;
- (c) That the defendant owed the plaintiff a duty to take reasonable care in making the representation;
- (d) That the defendant breached that duty of care; and
- (e) That the breach caused damage to the plaintiff.

21 The elements common to both of the plaintiff’s claims are: (a) making a representation of fact; and (b) inducement and actual reliance: *IM Skaugen* at [122]–[123].

22 The defendant confines his defence to an attack on only these two common elements. He submits that he did not make the Representations to the plaintiff at all. Alternatively, he submits that the plaintiff did not rely on the Representations when she decided to extend the unpaid loans.^[note: 17] The defendant’s defence does not attack any other element of the plaintiff’s

claim. Thus, for example, the defendant does not assert in the alternative that the Representations are not representations of present fact or are true. Nor does the defendant assert that he made the Representations innocently, rather than fraudulently. Nor does the defendant assert that he owed the plaintiff no duty to take reasonable care in making the Representations or that he exercised reasonable care in doing so.

23 To determine the plaintiff's claim, therefore, I need only analyse the two specific elements of the plaintiff's claim to which the defendant has confined his defence. It is therefore unnecessary, in the analysis which follows, to distinguish between fraudulent misrepresentation and negligent misrepresentation.

Did the defendant make the Representations?

24 The first element is whether the defendant made the Representations.

25 Under s 103 of the Evidence Act (Cap 97, 1997 Rev Ed), the plaintiff bears the burden of proving that the defendant made the Representations (see *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 at [29]). The plaintiff has no documentary evidence, contemporaneous or otherwise, that the defendant made any of the Representations. To discharge her burden of proof, therefore, she relies entirely on the credibility of her own oral evidence and the oral evidence of her two witnesses, Mr Han and Ms Chua. The plaintiff also submits that the defendant is not a credible witness and that I should therefore reject his oral evidence denying that he made the Representations.^[note: 18]

26 For the reasons which follow, I find that the plaintiff has failed to discharge her burden of proving that the defendant made the Representations.

The evidence of Ms Chua

27 The centrepiece of the plaintiff's case on the first element is the evidence of Ms Chua. The plaintiff submits that Ms Chua's evidence is entitled to great weight as it is the independent evidence of a disinterested witness.^[note: 19] That is of course true. The plaintiff, Mr Han and the defendant all have a direct pecuniary interest in the outcome of this action. They each therefore have every incentive, whether consciously or subconsciously, to give self-serving oral evidence. Only Ms Chua has no such incentive. I therefore begin my analysis of the oral evidence with Ms Chua's.

28 Ms Chua confirms in her affidavit of evidence in chief that the defendant made all four of the Representations and two of the four Background Representations. As for the other two Background Representations, she cannot remember: (a) what the exact rate of interest was in the Background Representation on interest payment; and (b) whether the defendant had made the fourth Background Representation.^[note: 20]

29 I reject the plaintiff's submission that I should give Ms Chua's evidence substantial weight as independent evidence supporting the evidence of the plaintiff and Mr Han. I come to that conclusion for four reasons.

30 First, I accept the defendant's submission that the way in which Ms Chua prepared her affidavit of evidence in chief confirming the plaintiffs' case that the defendant made the Representations reduces its evidential weight.^[note: 21] It is true that, as the plaintiff put it, Ms Chua does not in her affidavit "blindly corroborate" the plaintiff's and Mr Han's evidence as to the making and the content of the Representations.^[note: 22] Rather, her affidavit identifies which of the Representations she can recall and which she cannot.

31 The critical weakness in Ms Chua's evidence, however, is that she was shown the plaintiff's pleaded case on the Representations and then asked to comment on them in her affidavit of evidence in chief. Thus, para 15 of Ms Chua's affidavit cites verbatim para 16 of the plaintiff's statement of claim. That is the paragraph in which the plaintiff pleads in detail the Representations and Background Representations. It is only after citing para 16 of the statement of claim verbatim that Ms Chua comments on each Representation as the plaintiff has pleaded it.^[note: 23] As Ms Chua put it, she wrote in her affidavit "some of the things [in the statement of claim] that was shown to [her]". Ms Chua said that she "[tried] to the best of [her ability]" to recall what had been discussed on 5 July 2015.^[note: 24] The defendant submits that the statement of claim "shepherded" Ms Chua's thoughts towards the Representations.^[note: 25] I accept the defendant's submission.

32 Unlike a witness who is shown a contemporaneous document and asked to recall material events from her own memory, Ms Chua was shown a set of contentious and detailed assertions in a document which the plaintiff created after the fact, specifically for the purpose of advancing her case in this action. Ms Chua was then asked to confirm whether these assertions were true. I consider that affidavit evidence in chief which is elicited in this way is no different from oral evidence in chief elicited in the witness stand by means of impermissible leading questions. The manner in which the evidence is elicited diminishes much of the weight which can be attached to it as the product of Ms Chua's memory and her own recollection of events. It also diminishes much of the weight which can be attached to the claim that Ms Chua's evidence in chief is independent of the plaintiff's recollection, evidence and case in this action.

33 I therefore accept the defendant's submission that Ms Chua's evidence does not merit the substantial weight which would ordinarily be accorded to the independent recollection of a disinterested witness.

34 My finding is supported by observations on the memory of factual witnesses made in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 ("*Sandz*"). In *Sandz*, the Court of Appeal noted that witnesses are "particularly vulnerable and susceptible to suggestion and misinformation where the passage of time has allowed the original memory to fade" (at [54]). Information which is framed in a contentious manner and which is supplied to a witness after the events in question can make the witness more likely to recall key details of those events incorrectly.

35 To be clear, there is no allegation or finding of impropriety on the part of plaintiff's counsel in taking this approach. Neither is there any finding or suggestion that Ms Chua shaped her evidence consciously or unconsciously to be consistent with the plaintiff's pleaded case, let alone that she was lying. Rather, my point simply is that the approach taken in preparing Ms Chua's affidavit of evidence in chief diminishes significantly the weight which I can attach to her evidence on the two counts which I have mentioned (see [33] above).

36 Second, I find it wholly improbable that Ms Chua would have been able to remember the contents of one of many discussions in 2015 five years later in 2020 if she had not been primed by being shown the plaintiff's pleaded case. Ms Chua testified that business discussions often took place when she and the defendant met Mr Han.^[note: 26] So not only was Ms Chua trying to recall a discussion that had taken place five years before affirming her affidavit of evidence in chief, but she was also trying to recall the contents of one out of many business discussions which took place in 2015 and 2016.

37 Third, given the social setting of the discussions in July 2015, Ms Chua had no particular reason to pay close attention to the details of what was said. The discussions took place after a barbecue dinner and after touring the plaintiff and Mr Han's apartment and discussing the décor.^[note: 27] On Ms Chua's own evidence, she was not expecting this social occasion to turn into business discussions when she and the defendant went to the apartment.^[note: 28]

38 Finally, Ms Chua had no incentive to follow the contents of the parties' discussions closely. She was not involved in the discussions and had no reason to be concerned with what exactly the defendant was telling Mr Han or the plaintiff. Ms Chua describes herself as having "a more administrative as opposed to a managerial role in BT" and being "akin to a personal assistant of [the defendant]".^[note: 29] She "did not contribute to any of the substantive discussions in the negotiations" for the unpaid loans.^[note: 30]

39 For all of these reasons, I do not give Ms Chua's evidence any greater weight than the plaintiff's own evidence or Mr Han's. As the defendant submits, this action is therefore indistinguishable for practical purposes from a case where it is one person's word against another's.^[note: 31] In such a case, the court has little alternative but to weigh the evidence of each witness critically against the contemporaneous documentary and other evidence and the inherent probabilities. That is what I now do.

The terms of the Master Loan Agreement

40 I consider first the Master Loan Agreement.

41 The terms of the Master Loan Agreement are wholly inconsistent with the Sole Use Representation. That makes it less likely that the defendant made the Sole Use Representation at the discussions in July 2015. That in turn makes it less likely that the defendant made any of the other Representations on the same occasion. Although each representation may give rise to an independent cause of action, the Representations stand or fall together based on the credibility of the plaintiff's witnesses (see *Goldrich Venture Pte Ltd and another v Halcyon Offshore Pte Ltd* [2015] 3 SLR 990 ("*Goldrich Venture*") at [84]).

42 The Master Loan Agreement contradicts the Sole Use Representation in that two provisions of the agreement state a purpose for the loans which is broader than simply the manufacture of enzyme digester machines:

WHEREAS:

(A) The Lender has agreed to extend to the Borrower, loans *for the Borrower's expansion plans and working capital*.

...

1.1 On the terms of and subject to the conditions of this Agreement, the Borrower shall grant the Lender such sums of monies and from time to time as may be necessary *for the Borrower's expansion plans and working capital purposes* (the "**Loan**").

[emphasis added in italics]

43 As the defendant submits,^[note: 32] if the defendant did make the Sole Use Representation in July 2015, the inherent probabilities are that the Master Loan Agreement, signed less than a month later, would be consistent with that Representation. At the very least, the Master Loan Agreement would not contradict the Sole Use Representation. But that is precisely what it does. It is wholly inconsistent with the Sole Use Representation for the Master Loan Agreement to give BT the power to use the loans for wholly different purposes: for BT's expansion plans and working capital.

44 The course of dealings between the parties shows that they have in other contracts specified the use of loan monies. Specifically, section 2 of the Shares Investment Agreement, signed just four months before the Master Loan Agreement, recorded expressly the parties' agreement that that loan would be used to set up a recycling plant.^[note: 33] The inherent probabilities are that the parties would not have departed from that approach in drawing up the Master Loan Agreement. The plaintiff knows enough about business to understand the ordinary meaning of "working capital".^[note: 34] And I accept the defendant's submission that Mr Han is an experienced businessman. With their combined business knowledge and acumen, Mr Han was content to negotiate, and the plaintiff was content to sign, the Master Loan Agreement containing these two terms and with no mention of the contradictory Sole Use Representation. The inherent probabilities are that the Master Loan Agreement would have recorded the Sole Use Representation or that, if it did not, or if it contained contradictory terms, the plaintiff and Mr Han would have objected or even declined to execute it. None of that happened. That suggests to me that the defendant did not make the Sole Use Representation.

The evidence of the plaintiff and Mr Han

45 A witness's account may be assessed for internal consistency and external consistency with extrinsic evidence (*Haneda Construction & Machinery Pte Ltd v Huttons Asia Pte Ltd and another* [2015] SGHC 294 at [28]) and may be weighed in the light of opposing oral evidence and inherent probabilities (*Jasvinderbir Sing Sethi and another v Sandeep Singh Bhatia and another* [2021] SGHC 14 at [64]). The plaintiff's and Mr Han's evidence are inconsistent and contrary to the inherent probabilities in several ways. All of this counts against the credibility of their evidence and their case.

46 First, the plaintiff showed herself quick to disagree with inferences to be drawn from documentary evidence which were clear and which could not reasonably be contested. That diminishes her credibility. For example, in cross-examination, defendant's counsel referred the plaintiff to various documents issued by PRC authorities. This included a Red Notice issued by Interpol National Central Bureau in the PRC against Mr Han.^[note: 35] When asked if these documents suggested that Mr Han

"was accused of some wrongdoing", the plaintiff replied, "I totally disagree."^[note: 36] When confronted with documentary evidence, the plaintiff gave evidence that was simply not credible, even after allowing for the inevitable difficulties caused by translation of question and answer.

47 Second, the plaintiff was quick to disagree even with her own statement of claim. She disagreed with defendant's counsel when he informed her that her pleaded case was that the Master Loan Agreement applied to the loans granted in June and July 2015.^[note: 37] Even if she did not understand or remember her pleadings, her instinctive response suggests a willingness to give definite, defensive answers to bolster her case even when she was uncertain of the facts.

48 Third, the plaintiff gave evidence that, if believed, would render some of her past conduct inexplicable. In July 2015, Mr Han reported to the Chinese authorities in the PRC as he was required to do. On 12 October 2015, Ms Chua messaged the plaintiff asking after her and Mr Han. The plaintiff replied, "I'm quite alright, [Mr Han] did not say and I did not ask, believe he is more anxious than I, waiting." At trial, the plaintiff testified that this message referred not to any anxiety about how the PRC authorities would treat Mr Han, but to anxiety about the large investment she and Mr Han had made in the Biomax Group. She said that, as she and Mr Han "focused on each and every step of the business... [they] would more or less have worries about it".^[note: 38] But, as the defendant points out, if the plaintiff had been so worried on 12 October 2015 about the investment, she would not have proceeded to disburse the October Loan of \$1m on 29 October 2015.^[note: 39] There is no evidence that the plaintiff received any new information about BT between 12 and 29 October 2015 that might have reassured her that it was safe to increase her already large investment.

49 Finally, the plaintiff and Mr Han contradicted each other. Both testified that they had had a meeting with the defendant in January 2016 during which Ms Chua gave them a table forecasting how many enzyme digester machines BT would sell between 2016 and 2020. But their accounts of the meeting are inconsistent. For one thing, they gave different numbers for how many machines the defendant told them had been sold. The plaintiff testified that, at the meeting, she asked the defendant how many machines had been sold in 2015. She said that the number he gave would have been ten, consistent with the Sales Representation:^[note: 40]

Q ... did you ask how many machines were sold in 2015?

A Yes, I did.

Q And what was the answer?

A *It would be the same as the seven---the 5th of July 2015. Because on the---we asked him, he said that he had 10 orders in 2015. And we asked him how many machines he sold in 2015; he said 10.*

[emphasis added]

Mr Han testified that, at this meeting, he asked the defendant how many machines had been sold in 2015. In addition to giving a different number than that given by the plaintiff, Mr Han did not link the number to the Sales Representation:^[note: 41]

A Quite a few - seven to eight - and there were a few contracts to be performed.

Q So just to confirm, Mr Han, you were told that seven to eight machines had been sold at this meeting?

A I would think so.

50 The plaintiff and Mr Han also gave inconsistent accounts of what was discussed at the meeting. The plaintiff testified that she asked at the meeting for repayment of both interest and principal.^[note: 42] Mr Han contradicted this, saying that only interest was discussed at the meeting because the defendant was still using the principal.^[note: 43]

51 The plaintiff and Mr Han cannot both be correct on these points arising from their meeting with the defendant in January 2016. Yet they claim to recall correctly and clearly the contents of the Representations and the Background Representations, including several specific numbers, that the defendant allegedly made even earlier, in July 2015.

52 The plaintiff submits that these inconsistencies are minor and are explained by the passage of time between the meeting in January 2016 and the trial in November 2020. But what causes concern is that, despite the passage of time, the plaintiff and Mr Han confidently gave contradictory accounts of what the defendant had said at this meeting at which they allegedly confronted him about repayment. This undermines the credibility of their very specific and completely consistent account of the discussions in July 2015.

53 In light of the objective evidence from the terms of the Master Loan Agreement and the plaintiff's conduct, I find that the evidence of the plaintiff, Mr Han and Ms Chua does not suffice to discharge the plaintiff's burden of proof that the defendant made the Representations.

Pre-action correspondence and S765

54 In finding that the plaintiff has not discharged her burden of proof, I do not accept the defendant's argument on the solicitors' correspondence that led up to S765 and on the pleadings and affidavits in S765. As I have mentioned, S765 was the plaintiff's suit against BT and SCP seeking to recover the unpaid loans. The defendant argues that the plaintiff's failure to make any mention of the Representations in the pre-action correspondence in S765 and in the pleadings and affidavits in that suit show that the plaintiff's claim against the defendant personally on the Representations in this action is nothing but a contrivance and an afterthought.^[note: 44]

55 But, as the plaintiff points out, S765 concerned the plaintiff's claims against BT for breach of contract in failing to repay the unpaid loans.^[note: 45] Unlike *Sandz* ([34] *supra*), for example, where the alleged representation would have supported the alleged representee's position in pre-action correspondence (at [78(b)]), the Representations did not support the plaintiff's claim against BT in S765. Although the defendant submits that the plaintiff could have sued both BT for breach of contract and the defendant for misrepresentation in S765,^[note: 46] the fact that she chose to bring separate proceedings is of little weight in assessing the credibility of her evidence and of her case.

Mr Han's problems

56 My finding that the plaintiff has not proven that the defendant made the Representations raises an obvious question. Why did the plaintiff extend the unpaid loans to BT if the defendant did not make any representations to her? The defendant submits that the plaintiff extended the loans to BT because Mr Han had problems with the PRC authorities and wished to put the money out of the authorities' reach. The plaintiff says that this is illogical.^[note: 47] If that were the true reason for the plaintiff extending the loans to BT, she would, for example, have advanced the whole \$5m to BT before Mr Han returned to the PRC in July 2015.^[note: 48]

57 Whether or not Mr Han had any problems with the PRC authorities, refuting the defendant's alternative theory does not help the plaintiff to prove her positive case that the defendant made the Representations. It is the plaintiff's burden to prove that the defendant made the Representations. She cannot discharge that burden by showing that the defendant's alternative theory is less worthy of belief or less likely to be true than the plaintiff's: *Goldrich Venture* ([41] *supra*) at [75]–[78].

The evidence of the defendant

58 Similarly, the plaintiff cannot discharge her burden of proof by attacking the defendant's credibility. The plaintiff gives two main reasons why the defendant is not a credible witness and why I should therefore disbelieve him when he denies^[note: 49] making the Representations.

59 First, the plaintiff submits that the defendant is not a credible witness because he has shown himself willing to conceal evidence.^[note: 50] He instructed his solicitors in S765 to inform the plaintiff's solicitors that a requested category of documents did not exist,^[note: 51] even though a document within that category does exist and has been disclosed in this action.^[note: 52] But

the defendant explained at trial that he did not deliberately conceal the document. Instead, he did not disclose it in S765 because he did not then know that it existed, and that "sometimes [he] would hear many employees reporting work to [him], but sometimes [he] would forget about such documents".^[note: 53] I accept this explanation.

60 Second, the plaintiff submits that the defendant is not a credible witness because his evidence at trial contradicted his affidavits and pleadings in this action and S765 and another suit between the plaintiff and SCP, Suit No 13 of 2017 ("S13").^[note: 54] Some of the alleged inconsistencies can be reconciled, but there is one that cannot be. An affidavit by the defendant filed in S13 (the subject matter of which was the plaintiff's loan to SCP) suggests that he discovered that there was an Interpol Red Notice against Mr Han in or around July 2015.^[note: 55] At trial, however, the defendant testified that he found out about the Interpol Red Notice against Mr Han in 2016.^[note: 56]

61 This inconsistency in the defendant's evidence no doubt serves to diminish the defendant's credibility and to reduce the weight I can attach to his evidence. But, once again, proving that the defendant is not worthy of credit and that his denials ought to be disbelieved is no substitute for evidence discharging the plaintiff's burden of proof. It does not overcome the weaknesses in the evidence of the plaintiff's witnesses, especially when weighed against the objective facts and the inherent probabilities, and show that they should be believed.

62 For these reasons, I find that neither the relative likelihood of the defendant's alternative theory nor any lack of credibility on the defendant's part affects my finding that the plaintiff has failed to discharge her burden proving that the defendant made the Representations. That failure suffices to dismiss the plaintiff's claims in both fraudulent and negligent misrepresentation. But I also consider that, even if the defendant made the Representations, the plaintiff did not rely on any of them.

The plaintiff did not rely on the Representations

63 The plaintiff and Mr Han say in their affidavits of evidence in chief that they decided to grant the loans "in reliance on" the Representations.^[note: 57] In case I am wrong in my finding that the plaintiff has failed to discharge her burden of proving that the defendant made the Representations, I find also that the plaintiff has failed to discharge her burden of proving that she relied on any of the Representations when she extended the unpaid loans to BT.

64 In both fraudulent and negligent misrepresentation, the element of reliance requires that the misrepresentation play "a real and substantial" role in inducing the plaintiff to act, though it need not be the sole or decisive factor: *Panatron* ([19] *supra*) at [23]; *Fong Maun Yee and another v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751 at [52]. Reliance may be inferred from the materiality of a representation, where the natural and probable result of the representation is to induce the representee to act as she did: *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and others* [2007] 1 SLR(R) 196 ("*Raiffeisen*") at [56], citing Spencer Bower, Turner & Handley, *Actionable Misrepresentation* (Butterworths, 4th Ed, 2000) at para 126. But because this is only "a commonsense inference of fact", not a presumption of law, the court should not apply it without explaining why it is drawing the inference on the facts of the case at hand: *Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150 at [54] and [57]. Where materiality is in doubt, the plaintiff's burden of proof is "not easily discharged": *Raiffeisen* at [57].

65 The plaintiff submits that I should find that she relied on the Representations for two reasons: (a) she would not have extended the unpaid loans without some explanation from the defendant as to why BT needed the loans or some assurance from the defendant as to BT's ability to repay the loans;^[note: 58] and (b) the Representations were material because they related to how BT would use the loans to earn sizeable profits from the sale of the enzyme digester machines.^[note: 59]

66 The defendant submits, in response, that the plaintiff and Mr Han's conduct before and after 5 July 2015, including their history of lending large sums to the Biomax Group very soon after they met the defendant for the very first time,^[note: 60] shows that they did not rely on the Representations.

67 I address the plaintiff's alleged reliance on the Funding and Sole Use Representations first, before addressing her alleged reliance on the Sales and Profitability Representations.

The Funding and Sole Use Representations

68 The Funding Representation could not have played a real and substantial role in inducing the plaintiff to grant the unpaid loans. From a lender's point of view, a borrower's need for funds does not in itself give a lender a reason to grant a loan. The true logical link between BT's need for funds and the plaintiff's decision to make a loan lies in the Sole Use Representation.

69 As for the Sole Use Representation, its materiality is doubtful. Absent evidence to the contrary, whether the whole of the unpaid loans would be used solely for the production of enzyme digester machines or partly for other profit-generating purposes would not necessarily affect BT's ability to repay the unpaid loans to the plaintiff.

70 The defendant submits that, because of the terms of the Master Loan Agreement, the plaintiff could not have relied on the Sole Use Representation.^[note: 61] He cites the Court of Appeal's decision in *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 ("*Broadley*"). In *Broadley*, a subcontractor had difficulty paying its supplier because of the main contractor's conduct. To address this difficulty, the parties signed a tripartite undertaking authorising the main contractor to pay the supplier directly on the subcontractor's behalf. The undertaking also released the subcontractor from all liability to the supplier. Just before the parties signed the undertaking, the supplier told the subcontractor that, if the main contractor did not pay the supplier, the subcontractor would remain liable to the supplier. The subcontractor remained silent.

71 The Court of Appeal found that the supplier could not rescind the undertaking for fraudulent misrepresentation. Even if the subcontractor's silence amounted to a misrepresentation that it accepted that it would remain liable to the supplier if the main contractor failed to pay, any misimpression which the supplier was labouring under was corrected by the terms of the undertaking. Because the undertaking expressly provided that the subcontractor was released from liability, the supplier could not have been induced by the misrepresentation into signing the undertaking (at [32]). The Court held that a plaintiff "would not ordinarily be held to be induced by a misrepresentation if the express contractual terms, which the plaintiff placed importance on, read and signed, and which the defendant expected that the plaintiff would read and understand, contradict or correct the defendant's misrepresentation" (at [36]).

72 Recital A and cl 1.1 of the Master Loan Agreement correct the Sole Use Representation by stating that the unpaid loans will be for the broad purposes of BT's expansion plans and working capital (see [42] above). The plaintiff confirmed at trial that she read the Master Loan Agreement before signing it.^[note: 62] So she must be taken to have known that the loans may not be used solely to manufacture enzyme digester machines.

73 The plaintiff nevertheless seeks to distinguish *Broadley*. Whereas the parties in *Broadley* "knew and acted on the basis that the written Undertaking was meant to be the operative contract between them and not the oral agreement" (at [38]), the plaintiff and BT did not intend the Master Loan Agreement to contain their whole agreement as to the purpose of the loans. The plaintiff bases this contention on BT's understanding of the earlier Shares Investment Agreement.^[note: 63] The defendant testified that the funds to be disbursed under the Shares Investment Agreement could be used for cash flow and business expansion despite the clause in the Shares Investment Agreement specifying that the funds would be used to set up a recycling plant.^[note: 64]

74 The plaintiff argues, in other words, that this is not a case where the parties "placed importance on" (*Broadley* at [36]) the express contractual terms regarding the purpose of the unpaid loans. For three reasons, I reject the plaintiff's submission that *Broadley* does not apply.

75 First, I do not read *Broadley* as authority for the proposition that a plaintiff may be induced by a misrepresentation that is corrected by the express contractual terms where the plaintiff does not place importance on the contractual document. The reason the express terms of a contract preclude a finding of inducement by a prior misrepresentation is that the plaintiff is taken to have read the contract and to know from the express terms that the misrepresentation is false. The Court of Appeal in *Broadley* pointed out that parties to a contract are responsible for reading the contracts they sign (at [36]):

... it is a corollary of the basic principle of contract law that a person is bound by the terms of the contract he signs, notwithstanding that he may be unaware of its precise legal effect. Such a claimant should be taken to have actually read the contract and known the falsity of the earlier representation. To hold otherwise would undercut the basis of the conduct of commercial life – that businessmen with equal bargaining power would read their contracts and defend their own interests before entering into contractual obligations, and that they would rely on their counterparties to do the same.

76 Second, the evidence of the defendant's own understanding of the Shares Investment Agreement does not suffice to establish the parties' alleged intention that the Master Loan Agreement would not contain their whole agreement as to the purpose to which the unpaid loans could be applied. The plaintiff and Mr Han's own understanding that the unpaid loans would be used solely for enzyme digester machines does not suffice either.

77 Finally, whatever the parties' intention may have been, the question is whether the Sole Use Representation induced the plaintiff to extend the unpaid loans to BT. If the plaintiff chose to sign the Master Loan Agreement, despite Recital A and cl 1.1, on the assumption that the funds would be used only for the production of enzyme digester machines, then like the alleged representee in *Broadley* she was induced to enter into the contract not by any representation but by her own assumption. The plaintiff does not plead that the defendant made any representation, whether by words or conduct, as to the contents of the Master Loan Agreement or the effect of Recital A and cl 1.1. And if the plaintiff chose instead to sign the Master Loan Agreement without making any assumption as to the use of the funds, the truth or falsity of the Sole Use Representation was not important to her in the first place.

78 It is true that the Master Loan Agreement came after the July Loan, and so could not have corrected the Sole Use Representation in connection with the July Loan.^[note: 65] I nevertheless find that the plaintiff did not rely on the Sole Use Representation when she entered into the July Loan, as seen from her conduct when she signed the Master Loan Agreement. If the plaintiff had relied on the Sole Use Representation in July 2015, one would expect her to have sought clarification upon reading the terms of the Master Loan Agreement which contradicted the Sole Use Representation. She did not.

The Sales and Profitability Representations

79 The plaintiff's case is that the following parts of the Sales and Profitability Representations are actionable representations:

- (a) That BT had secured orders from prospective clients for enzyme digester machines but was unable to meet them only because it lacked money; and that at least ten enzyme digester machines could be sold in 2015; and
- (b) That BT was making profits.

80 Because the Sales and Profitability Representations concern BT's revenue and profitability, they have a direct effect on BT's ability to repay the unpaid loans. Therefore, it is at least conceivable that these Representations could have induced the plaintiff to grant loans to BT. But I decline to draw that inference for four reasons.

81 First, the plaintiff's evidence suggests that she did her own research and formed her own view that BT's business was profitable before deciding to extend the unpaid loans to it. When defendant's counsel put it to the plaintiff that she could have insisted that she would not lend money to BT unless she saw SCP's and BT's accounts showing their profitability, she said that the defendant refused to let her and Mr Han see the accounts but that they chose to invest because of other information:^[note: 66]

A We had always requested to look at the accounts from the start, but [the defendant] said that these are confidential and did not let us see.

Q Mdm Ma, I put it to you that as an investor, you can always say to [the defendant] that you will not lend money to the company unless you see---you are allowed to see the accounts, isn't that correct?

A ... *We did survey of---on this area of his business and we agree that it was very profitable, and we were willing to invest. And also when we went to his office, he showed us that he was on the Forbes Magazine, and he even gave us a copy of it. So he even gave us a copy of it. And he showed us the newspaper where he was a small medium--
-excellent small-and-medium entrepreneur. He was on the newspaper. I gave my lawyer these documents already. So under the impression of all these, we believed him.*

[emphasis added]

82 Second, the plaintiff and Mr Han's dealings with the defendant before July 2015 show how willing the plaintiff was to extend loans to BT even without the Representations. On the plaintiff and Mr Han's own account, the defendant had disappointed them in the months before July 2015 with a project that had failed, contrary to the defendant's expectations. Specifically, around the time the plaintiff entered into the Convertible Loan Agreement with SCP in January 2015, the defendant allegedly told Mr Han that he had a project in the US. The defendant allegedly said that the project would produce a result in one or two months such that, in Mr Han's words, "we can earn a lot of money". But one or two months later, the defendant told Mr Han that the project had failed.^[note: 67] As a result, the plaintiff and Mr Han "did not feel that SCP and/or BT had achieved the financial results which [the defendant] had claimed they would during that 2-month period".^[note: 68] The plaintiff and Mr Han were sufficiently disappointed that they amended the Convertible Loan Agreement in April 2015 to increase the quantity of shares to be transferred as repayment and to require SCP to pay an additional facility fee.^[note: 69]

83 Yet, on the very same day that the plaintiff and Mr Han amended the Convertible Loan Agreement with SCP, the plaintiff entered into the Shares Investment Agreement to lend \$5m to BT. Mr Han testified that the defendant made no representations to Mr Han or the plaintiff when the parties entered into the Shares Investment Agreement.^[note: 70]

Q ... You have alleged no representations that were made by [the defendant] to you or your wife before the signing of that agreement [*ie*, the Shares Investment Agreement].

A Indeed there was none when we signed the factory agreement on---in April 2015.

...

Q And you've already agreed that based on that, all that was said to you [before the Convertible Loan Agreement was signed on 6 January 2015], you and your wife decided to invest in SCP Holdings, correct?

A Yes.

Q *Now, after the 6th of January and before the 16th of April 2015, no new representations, no new persuasions were made by [the defendant] to you or your wife. You have already confirmed that, correct?*

A *Right.*

[emphasis added]

84 As the defendant points out,^[note: 71] even though the defendant's claims about the project in the US did not materialise and even though the defendant made no new representations between the execution of the Convertible Loan Agreement and the execution of the Shares Investment Agreement, the plaintiff willingly signed the Shares Investment Agreement and was prepared to lend BT \$5m under it. The loan envisaged was not ultimately extended only because its purpose could not be carried out. The plaintiff's conduct shows that it did not feel a need to rely on any representations by the defendant to lend \$5m to BT. This supports my finding that, in the following months, the plaintiff lent \$5m to BT without relying on the Sales and Profitability Representations.

85 Third, the plaintiff testified that the Convertible Loan Agreement was amended to require an additional facility fee because the defendant did not let her and Mr Han see SCP's or BT's financial reports but continued to claim that the companies needed more money: "So, [the plaintiff and Mr Han] were thinking [the defendant] might have been exaggerating and probably it [*ie*, the companies' financial results] was not so good after all."^[note: 72] I therefore do not accept that the plaintiff trusted the defendant and relied on the truth of his Sales and Profitability Representations a few months later.

86 Finally, the plaintiff and Mr Han's conduct after signing the Master Loan Agreement reinforces my finding that the plaintiff did not rely on the Sales and Profitability Representations. The July 2015 loan was rolled over in September 2015 and again in December 2015. According to Mr Han, on both occasions, the defendant informed him that buyers had not paid for machines

sold to them and that the defendant wanted to roll over the loans for cashflow.^[note: 73] If the Sales and Profitability Representations played a real and substantial role in the plaintiff extending the unpaid loans, one would expect the plaintiff or Mr Han to express concern and ask about the payment terms of the non-performing buyers. Sales of enzyme digester machines which resulted in bad debts would affect BT's profitability. What Mr Han did, however, was to agree readily to roll over the loans and merely to ask the defendant to recover payment for the machines as soon as possible.^[note: 74]

87 For these reasons, I find that the plaintiff and Mr Han's conduct before the defendant allegedly made the Representations and after the plaintiff signed the Master Loan Agreement shows that the plaintiff did not rely on the Representations.

Conclusion

88 For the foregoing reasons, I dismiss the plaintiff's claims in fraudulent and negligent misrepresentation. I shall hear the parties separately on costs.

[note: 1] Han Jianpeng's affidavit of evidence-in-chief ("AEIC") at [6].

[note: 2] Defendant's Closing Submissions ("DCS") at [2].

[note: 3] DCS at [4].

[note: 4] Han Jianpeng's AEIC at [6]–[7].

[note: 5] Han Jianpeng's AEIC at [16].

[note: 6]

[note: 7] Chua Siok Lui's AEIC at [1], [11].

[note: 8] Statement of Claim ("SOC") at [16(a)].

[note: 9] SOC at [16(b)].

[note: 10] SOC at [16(e)].

[note: 11] SOC at [16(f)].

[note: 12] Chua Siok Lui's AEIC at [6].

[note: 13] SOC at [16(c)].

[note: 14] SOC at [16(d)].

[note: 15] SOC at [23]; Defence at [27].

[note: 16] SOC at [46].

[note: 17] Defence at [22], [24].

[note: 18] Plaintiff's Closing Submissions ("PCS") at [20(c)–(e)].

[note: 19] PCS at [20(c)], [29].

[note: 20] Chua Siok Lui's AEIC at [16].

[note: 21] DCS at [98(c)].

[note: 22] PCS at [30].

[note: 23] NEs, 22 October 2020, at p 26, line 28 to p 27, line 20.

[note: 24] NEs, 22 October 2020, at p 27, lines 16–17.

[note: 25] DCS at [98(c)].

[note: 26] NEs, 22 October 2020, at p 28, lines 27–32.

[note: 27] NEs, 22 October 2020, at p 25, lines 4–9.

[note: 28]NEs, 22 October 2020, at p 25, lines 10–18.

[note: 29]Chua Siok Lui’s AEIC at [11].

[note: 30]Chua Siok Lui’s AEIC at [9], Exhibit CSL-3 at [5(c)].

[note: 31]DCS at para 35.

[note: 32]DCS at [61(f)]; Defendant’s Reply Submissions (“DRS”) at [7].

[note: 33]Agreed Core Bundle (“ACB”) at p 53.

[note: 34]NEs, 20 October 2020, at p 48, lines 4–8.

[note: 35]Agreed Bundle of Documents (vol 1) (“AB1V”) at p 113.

[note: 36]NEs, 20 October 2020, at p 18, lines 15–18.

[note: 37]NEs, 20 October 2020, at p 45, lines 12–28.

[note: 38]NEs, 20 October 2020, at p 23, lines 15–19.

[note: 39]DCS at [107].

[note: 40]NEs, 20 October 2020, at p 32, lines 24–30.

[note: 41]NEs, 21 October 2020, at p 21, line 25 to p 22, line 2.

[note: 42]NEs, 20 October 2020, at p 34, lines 21–24.

[note: 43]NEs, 21 October 2020, at p 22, lines 6–8.

[note: 44]DCS at [81]–[84]; DRS at [19]–[23].

[note: 45]PCS at [72]–[76].

[note: 46]DRS at [19]–[20].

[note: 47]PCS at [59].

[note: 48]PCS at [63].

[note: 49]Defendant’s AEIC at [9].

[note: 50]PCS at [58].

[note: 51]Agreed Bundle of Documents (vol 2) at p 135.

[note: 52]AB1V at p 521.

[note: 53]NEs, 23 October 2020, at p 53, lines 9–24.

[note: 54]PCS at [34].

[note: 55]Bundle of Court Documents Filed in HC/S 13/2017, Tab L, at [32].

[note: 56]NEs, 23 October 2020, at p 7, lines 17–24.

[note: 57]Han Jianpeng’s AEIC at [25], [29], [36]; Plaintiff’s AEIC at [19], [23], [29].

[note: 58]PCS at [98].

[note: 59]Plaintiff’s Reply Submissions at [6].

[note: 60]DRS at [27].

[note: 61]DCS at [58]–[59].

[note: 62]NEs, 20 October 2020, at p 51, line 31 to p 52, line 10.

[note: 63]PCS at [106]–[109].

[note: 64]NEs, 23 October 2020, at p 15, line 29 to p 16, line 14.

[note: 65]See PCS at [111].

[note: 66]NEs, 20 October 2020, at p 29, line 22 to p 30, line 9.

[note: 67]NEs, 21 October 2020, at p 39, line 16 to p 40, line 4.

[note: 68]Han Jianpeng's AEIC at [17]; Ma's AEIC at [11].

[note: 69]NEs, 22 October 2020, at p 2, line 26 to p 3, line 1.

[note: 70]NEs, 22 October 2020, at p 5, lines 6–10; p 5, line 28 to p 6, line 4.

[note: 71]DCS at [44].

[note: 72]NEs, 20 October 2020, at p 29, lines 3–18.

[note: 73]NEs, 21 October 2020, at p 13, lines 3–12; p 18, lines 17–25.

[note: 74]NEs, 21 October 2020, at p 18, lines 17–25.

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