IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC(I) 05

Suit No 9 of 2017

Between

HE & SF Properties LP

… Plaintiff

And

(1) Rising Dragon Singapore Pte Ltd
(2) Eric Alfred Schaer

… Defendants

And

Rising Dragon Singapore Pte Ltd

… Plaintiff in Counterclaim

And

HE & SF Properties LP

… Defendant in Counterclaim

JUDGMENT

[Trusts] — [Quistclose trusts]
[Restitution] — [Unjust enrichment] — [Failure of basis]
[Contract] — [Misrepresentation] — [Fraudulent]
[Tort] — [Conspiracy]

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HE & SF Properties LP
v
Rising Dragon Singapore Pte Ltd and another

[2019] SGHC(I) 05

Singapore International Commercial Court — Suit No 9 of 2017
Sir Henry Bernard Eder IJ
9 July 2018; 16–19 October 2018; 14 December 2018

3 May 2019 Judgment reserved.

Sir Henry Bernard Eder IJ:

Part 1: Introduction

1 The plaintiff, HE & SF Properties LP ("HE&SF") is an investment holding company registered in the USA. It is owned and/or controlled by Mr Peter Andreas Eyckeler ("Mr Eyckeler"). He is a wealthy individual with a strong financial background in banking. He resides in Germany but appears to have wide business interests around the world including the USA. Mr Eyckeler also owns and/or controls a company known as US Global Finance Corporation ("Global Finance") either on his own or together with his wife, Mrs Barbara Eyckeler ("Mrs Eyckeler"). Both Mr and Mrs Eyckeler gave oral evidence in the trial.

2 The first defendant, Rising Dragon Singapore Pte Ltd ("RDS") is incorporated in Singapore as a private investment company to hold interests in

investments in Asia which included investments in the technology, e-payments, real estate and mining sectors at various points in time. The second defendant, Mr Eric Alfred Schaer ("Mr Eric Schaer"), is a citizen of the Comoros Islands. He describes himself as being engaged in business consulting and other business interests including arranging financing and refinancing for various corporations and private companies. He is the chief executive officer ("CEO") of RDS. He is also the CEO of the MySquar Group of companies, which includes a company, MySQUAR BVI, that is incorporated in the British Virgin Islands and has been listed on the Alternative Investment Market (AIM) of the London Stock Exchange since 1 July 2015. Mr David Glenn Schaer ("Mr David Schaer") is Mr Eric Schaer's brother. He is an American citizen employed in the telecommunications sector. He currently resides in Malaysia and works frequently in Myanmar and Vietnam for various telecommunications businesses. In passing, I should mention that although Mr David Schaer is not a party to these proceedings, various allegations are made against him, and he is a defendant in parallel proceedings brought by HE&SF in Florida, USA. Both Mr Eric Schaer and Mr David Schaer gave evidence at the trial.

3 The present proceedings concern three main claims brought by HE&SF against the first and second defendants (hereafter referred to collectively as "the Defendants"), *viz*,

(a) A claim to recover the sum of US$300,000 remitted by HE&SF on 2 December 2014 to RDS to purchase shares in the MySQUAR Group (the "MySQUAR moneys"). As appears further below, that claim is advanced (i) against RDS on the basis of breach of trust, *Quistclose* trust, unjust enrichment and conspiracy; and (ii) against Mr Eric Schaer

personally on the basis of fraudulent misrepresentation, conspiracy and dishonest assistance.

(b) A claim to recover the sum of US$3,235,385 remitted by HE&SF on 20 July 2015 to RDS to purchase shares (whether directly or indirectly) in another start-up, Fastacash Pte Ltd (the "Fastacash moneys"). As appears below, that claim is advanced against both Defendants on similar grounds to the claim in respect of the MySQUAR moneys, *viz*, (i) against RDS on the basis of breach of trust, *Quistclose* trust, unjust enrichment and conspiracy; and (ii) against Mr Eric Schaer personally on the basis of fraudulent misrepresentation, conspiracy and dishonest assistance.

(c) A claim to recover the sum of US$1,500,000 remitted by HE&SF on 27 November 2015 to a subsidiary of RDS, Rising Dragon Pan-Asia Limited ("RDPA"). It is HE&SF's case that this was a bridging loan for Mr Eric Schaer, Mr David Schaer and RDPA (the "Bridging Loan"). The claim is advanced against Mr Eric Schaer personally on two main grounds, *viz*, fraudulent misrepresentation and conspiracy.

4 In addition, HE&SF seeks various orders that RDS holds the MySQUAR moneys and the Fastacash moneys (and any profit) on trust for HE&SF as well as other ancillary orders including orders for an account, damages, interest and costs.

5 The Defendants deny all these claims on various grounds. In broad terms, the Defendants say that in truth the case tells a story of failed investment ventures and missed investment opportunities in start-up companies, and that

the claims represent attempts by an investor to recoup its losses arising from bad investment decisions and to obtain the profits that it would otherwise have made from missed opportunities.

6 As a threshold point, the Defendants say that HE&SF has waived its right to make any claims against the Defendants, including the present claims in these proceedings, by virtue of the terms of Clause 3.3 of two Sale and Purchase Agreements ("SPAs") dated 26 April 2016 which provided in material part as follows:

> As of the date of this Agreement, each Party hereto shall be released from its obligations relating to the Company vis a vis any other Party to this Agreement. **The Parties agree that this Agreement fully and finally settles all disputes and claims between themselves (including their respective affiliates, related parties and officers) and no party to this Agreement (including its affiliates, related parties and officers) shall make any further claims against any other Party or its affiliates, related parties and officers for anything occurring before the date of this Agreement, whether relating to the Company, Fastacash or otherwise…** [emphasis added]

7 In summary, the Defendants say that the wording of Clause 3.3 in the two SPAs is of very wide ambit, *ie*, it expressly provides that (i) all disputes and claims between the contracting parties (including their affiliates, related parties and officers) are fully settled; and (ii) none of the contracting parties shall make any further claims against any other contracting party (or its affiliates, related parties and officers) for anything that occurred before the date of the Agreements (26 April 2016). Thus, it was submitted on behalf of the Defendants that Clause 3.3 was sufficiently wide to cover all disputes brought in the present suit and that, for this reason, the present claims are all doomed to fail in any event.

8 In addition, the Defendants advance a number of specific defences with regard to each of the various claims. In particular:

(a) With regard to the MySQUAR moneys, the Defendants say that, at the request of Mr Eyckeler, the sum claimed, *viz*, US$300,000 was returned to HE&SF sometime in July 2015.

(b) With regard to the Fastacash moneys, the Defendants say that the shares were, in effect, transferred pursuant to the SPAs.

(c) With regard to the Bridging Loan, Mr Eric Schaer denies that this was a bridging loan at all.

9 Further, it is RDS's case that if (contrary to the Defendants' primary case) Clause 3.3 of the SPAs does not operate as a bar to claims, it is entitled to counterclaim against HE&SF in respect of an alleged separate loan agreed orally on or about 15 July 2015 between Mr Eyckeler on behalf of HE&SF and Mr Eric Schaer on behalf of RDS in the sum of US$896,000. In addition, the Defendants say that the commencement and pursuit of these current proceedings in Singapore constitute a breach of Clause 3.3 of the SPAs for which they are entitled to damages.

10 Before turning to consider the facts and the various claims, it is convenient to mention a number of general points.

11 First, in the course of the trial and the parties' submissions, various points – both of law and fact – have been explored at some length and in considerable detail. I confess that I have not dealt with all these points. Instead, I have limited myself to addressing the points advanced by both parties which I consider are necessary for determining the relevant issues.

12 Second, this case involves serious questions concerning the credibility of the three main witnesses, *viz*, Mr Eyckeler, Mr Eric Schaer and Mr David Schaer. On a number of potentially important points, there is a complete clash of the oral evidence. For the most part, this is not a case where it might be said that such clashes can be explained simply on the basis of confusion or failure of memory: one or more of these three witnesses is – to a greater or lesser extent – deliberately lying on at least some of the points in issue.

13 Third, in these circumstances, the task of the Court is particularly difficult in assessing the truth. One of the difficulties is that the fact that a witness may lie in respect of one or more points does not necessarily mean that the rest of that witness's evidence is untrue or should be discounted or ignored. For example, a witness may lie to bolster or embellish what is otherwise true or to seek to increase the chances of success in the litigation. However, where a court concludes that a witness is lying on any particular point, great caution is required with the remainder of that witness's evidence; and, in appropriate circumstances, it may be that the entirety of that witness's evidence should be ignored unless substantiated by other evidence. In such circumstances, the question of burden of proof is – or at least may be – important. It is often said that the Court may be assisted by considering the "demeanour" of the witnesses. However, I recognise that reliance on demeanour also requires great caution because it is often misleading, for the reasons explained by Lord Bingham in his brilliant essay "The Judge as Juror: The Judicial Determination of Factual Issues" in T H Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000).

14 Fourth, I have serious doubts as to the credibility and reliability of the evidence of all three main witnesses with regard to at least certain aspects of their evidence.

15 As for Mr Eyckeler, he obviously has considerable experience in business and financial matters. He is somewhat older than either Mr David Schaer or Mr Eric Schaer. Although he appeared to give careful evidence, it seems to me that he was at times somewhat confused with regard to some events – although, in fairness, it may be that this was due to his recent illness. Moreover, certain of his explanations seemed, at least at first blush, inherently improbable and somewhat extraordinary – although, again in fairness, it may be that this was due to the obviously close relationship during the relevant period between Mr Eyckeler, Mr David Schaer and Mr Eric Schaer and the fact that during 2014, 2015 and at least the early part of 2016, he (Mr Eyckeler) plainly trusted both Mr David Schaer and Mr Eric Schaer implicitly. The close relationship between the three men during this period and before they fell out is illustrated by the fact that they often referred to each other as "brothers" or "bros" – even though Mr Eyckeler was not, of course, a true brother at all. Thus, in some of the messages passing between them, Mr Eyckeler is referred to as "Andy" or "Bro A", Mr David Schaer as "Bro B" and Mr Eric Schaer as "Bro C". (The evidence was that Mr Eric Schaer was "Bro C" because he was a citizen of the Comoros Islands.) My impression is that Mr Eyckeler was, at times, exceptionally naïve in the trust that he obviously placed in Mr Eric Schaer. But, this is perhaps less surprising given what seemed to me the dominating character of Mr Eric Schaer.

16 As for Mr Eric Schaer, he is obviously an extremely clever, accomplished and dominating operator with a seemingly charming manner and

most persuasive patter. He presented as a very confident individual. My impression was that he could probably run circles around any investor – and it seems to me that, at times, Mr Eyckeler must have been putty in his hands. His evidence might have been better if he had been able simply to answer the questions put in cross-examination rather than giving a number of speeches which were delivered at some speed and seemed to me to have been carefully rehearsed. Although he was (and is) the CEO of RDS, there were a number of important points which he sought to sidestep on the basis that they were matters of which he said he had no direct knowledge and which would be better answered by others including Mr Pham Dang Hung ("Mr Hung") and Mr Nicolas Kim-Hoang Nguyen ("Mr Nguyen"). The former was, according to Mr Eric Schaer, part of the MySQUAR Group's management team and also worked with him in RDS. The latter is an individual whose role in the present transactions and disputes is somewhat shadowy and uncertain. Mr David Schaer described him as a "representative" of RDS, while Mr Eric Schaer described him as a "colleague" who is experienced with setting up and managing special purpose vehicles for investments and was, at some stage, a director of Fastacash. As appears further below, he was also a named party to the SPAs and, apparently, the indirect owner of shares in Fastacash. (The evidence of Mr Eyckeler was that Mr David Schaer had told him that Mr Nguyen was holding shares of Fastacash for Mr Eric Schaer because of the status of Mr Eric Schaer's citizenship. However, Mr Eric Schaer's evidence was that his citizenship did not preclude him from holding shares in Fastacash or in any special purpose vehicle to invest and hold shares in other companies.) Mr Eric Schaer may be right that these individuals might have been better able to answer certain of the important points in the complicated jigsaw in this case. But they were not called.

17 Mr David Schaer was more modest in his manner and, to my mind, more straightforward in his evidence. To that extent, it seemed to me that his demeanour made him much more credible as a witness. On a number of important points, he sought to distance himself from certain of the main events – although this was perhaps explicable (at least in part) because he had no formal role at RDS and, to a certain extent, appears to have acted as a conduit between Mr Eric Schaer and Mr Eyckeler.

18 I regret to say that I also had some doubts about the reliability of certain aspects of the evidence of Mrs Eyckeler – although her evidence was somewhat limited and peripheral.

19 I have described briefly the demeanour (as it seemed to me) of the three main witnesses when giving evidence, *viz*, Mr Eyckeler, Mr Eric Schaer and Mr David Schaer – although I bear well in mind the cautionary words of Lord Bingham to which I have already referred. As he says in his essay, regard to what might be described as "inherent probability" and/or the contemporaneous documents is often the best (or at least better) way of testing the evidence and finding the truth. However, as to the latter, the difficulty in the present case is that there are very few contemporary documents which throw much light on certain of the important factual issues and that there are some important "gaps". Thus, on the side of HE&SF, Mr Eyckeler explained that he lost many documents when he was the victim of a robbery in (as he thought) autumn 2015. On the side of RDS, it is plain that various documents have not been disclosed although the reason for such failure is not clear.

Part II: Waiver of Claims

20 Against that introduction and although the events concerning the SPAs come much later in chronological sequence than the events concerning HE&SF's three main claims, it is convenient to deal first with the threshold issue raised by the Defendants, *viz*, that all of the present claims brought by HE&SF have been waived by virtue of Clause 3.3 of the two SPAs which I have already referred to above.

21 So far as that issue is concerned, it is necessary to sketch out at least some of the relevant background which culminated in the creation of the SPAs and which I would summarise as follows:

(a) Around May 2015, the Schaers asked Mr Eyckeler to participate in an investment in Fastacash, a global platform enabling payments across social media platforms. They claimed that they had plans to list Fastacash on the stock exchange of Singapore in the latter part of 2015.

(b) During May and June 2015, there were various meetings between Mr Eyckeler and the Schaers to discuss this possible investment in the course of which Mr Eyckeler was shown various promotional slides and videos. In particular, on 26 May 2015, Mr David Schaer, through Mr Eric Schaer, sent Mr Eyckeler an email with an attachment consisting of certain presentation slides that were being used to attract investors to invest in Fastacash. The presentation slides related to Fastacash's Series B shares and painted Fastacash in glowing terms as an investment opportunity, including its plans to list by the end of 2015 and the promise of a guaranteed 2x investment return and an additional 10% shares if the listing was delayed.

(c) On or about 24 June 2015, the Schaers told Mr Eyckeler over lunch that RDS was leading the US$15m Series B investment funding for Fastacash and they had control over any investment Mr Eyckeler made because both of them would be on the board of Fastacash. They also told him that the Fastacash IPO would take place no later than December 2015 and that if that did not happen for any reason, he would receive 10% more shares in Fastacash. After that lunch, the Schaers introduced Mr Eyckeler to various individuals who were assisting in the Fastacash IPO.

(d) On the following day, *ie*, 25 June 2015, Mr David Schaer provided Mr Eyckeler with a copy of the shareholders' agreement ("Shareholders Agreement") between the shareholders and Fastacash. The Shareholders Agreement showed that RDS had apparently subscribed for 3,459,125 Series B shares.

(e) On or about 7 July 2015, Mr David Schaer sent an important email to Mr Eyckeler (referring to him as "*Bro3*"*)*. Although Mr David Schaer was the named sender and signatory, there is no doubt that it was, in effect, sent on behalf of both himself and Mr Eric Schaer. In summary, the email set out the proposed structure of a potential investment in certain shares in RDPA. The covering email stated in material part:

> …The structure of the investment remains as outlined by Brian in Singapore.
>
> As a brief summary:
>
> Amount paid in: 5,176,616 USD (To be completed by 15/07/2015)
>
> Cash kept upfront: 1,941,231 USD (647,077 USD each shared in 3 equal parts).

> Cash invested: 3,235,385 USD.
>
> Number of RDPA/Fastacash shares purchased: 2,537,557 (Fastacash Series B price is 1.275 USD)

(f) The email attached (i) a share purchase term sheet (the "Share Purchase Term Sheet") summarising some of the main terms with respect to what was described as an intended purchase by an (unidentified) investor for 2,537,557 shares in RDPA; (ii) a copy of the proposed Share Subscription Agreement ("SSA") and (iii) bank transfer instructions. There was much controversy in the evidence at trial concerning this proposal. As submitted on behalf of HE&SF, it distinguished clearly between the amount that was to be "paid in" (US$5,176,616) and how much of that "payment in" was going to be "invested" (US$3,235,385) to "purchase" 2,537,557 shares. It described the shares that were going to be "purchased" as "RDPA/Fastacash shares". This phrase can be understood by referring to the Share Purchase Term Sheet which, in effect, explained that RDS held shares in RDPA (the number of those shares was not specified); that RDPA in turn held Series B preference shares in Fastacash (the number of those shares was again not specified); and that those were RDPA's sole assets. The Share Purchase Term Sheet set out that the investor would "purchase" 2,537,557 shares in RDPA from RDS. It reiterated that US$5,176,616 would be needed for 2,537,557 RDPA shares and stipulated certain "conditions precedent" including (i) the issue of 3,419,910 Series B shares in Fastacash in the name of RDPA and (ii) the execution of the SSA between Fastacash, the existing shareholders and the Series B shareholders.

(g) The email also referred specifically to the proposed SSA and stated that in that document there was a section on the "true-up process" by which RDPA's holdings in Fastacash would increase, and in that way investors in RDPA might benefit. Finally, the e-mail explained that RDPA would only hold Fastacash Series B shares that would be converted into Fastacash ordinary shares at IPO.

(h) The reference in the email to the "purchase" of 2,537,557 "RDPA/Fastacash shares" was ambiguous (and potentially confusing) because RDPA and Fastacash were, of course, two different entities. However, the e-mail in its entirety read together with the Share Purchase Term Sheet makes plain that this was a shorthand used to encapsulate that Mr Eyckeler would hold 2,537,557 shares in RDPA which in turn held (and only held) Series B Fastacash shares. Leaving aside that ambiguity, the number of shares (2,537,557) was unequivocal. The amount of the investment to be paid in (money in exchange for shares) was unequivocal – US$3,235,385 for 2,537,557 shares – the price per share worked out mathematically to US$1.274999931 and this matched the statement in the email "*Fastacash Series B price is 1.275 USD*".

(i) The evidence of Mr Eyckeler was that the proposal as summarised in the email was, in effect, a "scheme" (Mr Eyckeler's own word in evidence) proposed by the Schaers which would involve Mr Eyckeler raising the sum of approximately US$5.1m from third parties for shares worth only some US$3.2m with the difference of US$1.9m being pocketed equally between Mr Eric Schaer, Mr David Schaer and himself. In evidence, Mr Eyckeler explained that this would in effect

constitute a "kickback" which would be dishonest – at the very least, his evidence was that this would be "*dishonest to myself*".

(j) Any suggestion of dishonesty was hotly disputed in evidence by both Mr Eric Schaer and Mr David Schaer. In particular, Mr Eric Schaer gave certain explanations in evidence with regard to the nature and purpose of this proposal. However, such explanations were, in my view, disingenuous. To my mind, the suggested proposal certainly smacks of a scheme that was potentially if not actually dishonest, although I suppose that much might depend upon what the outside investor was – or was not – told.

(k) Be all this as it may, the evidence of Mr Eyckeler (which I accept) was that he did not agree to this proposal; that he was, however, prepared himself to invest US$3.2m for shares of that value; and that is what he told the Schaers.

(l) Thus, on or around 20 July 2015, Mr Eyckeler caused HE&SF to remit the sum of US$3,235,385 to RDS. The remittance form confirms that this money was for the 2,537,557 Series B shares in Fastacash. According to Mr Eyckeler this was to enable HE&SF or Global Finance or another entity related to or controlled by him to subscribe for the 2,537,557 Series B shares although, at the risk of repetition, such investment was intended to enable the purchase of such shares not directly but indirectly, through the purchase of shares in RDPA.

(m) In any event, the anticipated Fastacash IPO did not take place at that time although it is not clear why this was so. Equally, no shares in

RDPA or Fastacash were transferred to HE&SF or its nominee at that time. It is also unclear what happened to the sum of US$3,235,385. However, it is common ground that it was never returned to HE&SF or Mr Eyckeler.

(n) It appears that a further attempt to effect the Fastacash IPO was resurrected at some later stage in 2016 with a projected date of 16 May 2016 for listing on the Australian Stock Exchange.

(o) Some time in April 2016, the Schaers told Mr Eyckeler that some further documentation was needed so that the Fastacash IPO could happen. The evidence of Mr Eyckeler (which I accept) was that the Schaers told him that he had to sign sale and purchase agreements, *ie*, the SPAs, with two British Virgin Islands ("BVI") companies that belonged to Mr Nguyen. These two companies were Deal Plus Investments Ltd ("Deal Plus") and Pan-Asia Energy Ltd ("Pan-Asia"). Mr Eyckeler had met Mr Nguyen in the spring of 2015 during a visit with the Schaers to Myanmar. Mr David Schaer had told Mr Eyckeler that Mr Nguyen was holding shares of Fastacash for Mr Eric Schaer because of the status of Mr Eric Shaer's citizenship. The Schaers told him that the two BVI companies, *ie*, Deal Plus and Pan-Asia, together held Fastacash shares valued at slightly more than what he had previously remitted for the 2,537,557 Fastacash shares. They said that he had to sign the SPAs with the two BVI companies so that his Fastacash shares could be sold at the IPO without a holding period. They mentioned that there were some releases in the SPAs, and that these were needed to show the brokerage house that the stock was not restricted.

(p) On 25 April 2016, Mr Eyckeler sent an email to Mr David Schaer setting out his understanding of the proposed arrangements but received no reply. Notwithstanding that, after hearing the Schaers' explanation as to why the two SPAs were needed for the IPO, Mr Eyckeler signed them on behalf of HE&SF and Mrs Eyckeler signed them on behalf of Global Finance. They were then sent by Mr Eyckeler to Mr David Schaer under cover of an email dated 26 April 2016 and the originals were given to Mr David Schaer at Capri restaurant in West Palm Beach, Florida a day or two later.

(q) It is not entirely clear what exactly was happening with the intended Fastacash IPO at this time. For present purposes, it is sufficient to note that on 27 April 2016, Mr Eric Shaer resigned from the Board of Fastacash with immediate effect and that shortly thereafter, on 2 May 2016, it was announced that the Fastacash IPO had failed.

(r) To complete the story, according to Mr Eric Schaer:

(i) Due to the high operational costs of Fastacash, the company was bleeding money severely. With the failed IPO attempt, the funds of Fastacash started to dry up.

(ii) Sometime in September or October 2016, the management of Fastacash presented a rescue plan to shareholders, but the shareholders instead asked RDS to come up with another rescue plan. At an extraordinary general meeting on 24 October 2016, Mr Vince Tallent, the CEO and chairman of Fastacash, and Mr Peter Harkin, the chief financial officer,

were asked to resign from their positions and the shareholders voted to adopt RDS's rescue plan.

(iii) In or about the end of October and beginning of November 2016, Mr Tallent and Mr Harkin formally resigned. Mr Nguyen and Mr Eric Schaer then joined the board of Fastacash to implement the rescue plan. However, as the shareholders of Fastacash failed to provide the necessary funds to implement the rescue plans, Mr Nguyen and Mr Eric Schaer resigned from the board of Fastacash on or about 22 May 2017.

(iv) Sometime in or about January 2018, Fastacash was formally put into creditors' voluntary liquidation.

22 On its face, the first SPA concerned the sale of shares in Deal Plus, whose assets were described in the preamble as consisting solely of Fastacash shares, and the second SPA concerned the sale of shares in Pan-Asia, whose assets were similarly described in the preamble as consisting solely of shares in Fastacash. In both cases, Mr Nguyen was stated in the preamble to be the sole registered shareholder of Deal Plus and Pan-Asia respectively. Both SPAs contained an express choice of BVI law. In very broad terms, the terms of the SPAs provided – or at least envisaged – the sale by Mr Nguyen to "US Global Global Finance Corp." of all of the ordinary shares in Deal Plus and Pan-Asia respectively. (For completeness, I add that although the SPAs listed "US Global Global Finance Corp." as the purchaser, the parties did not dispute that this was a reference to Global Finance.)

23 I should emphasise that it was HE&SF's case that these SPAs were not binding upon HE&SF and/or it was entitled to "avoid" or "rescind" and had

validly avoided/rescinded them on the basis of various alleged misrepresentations and/or "sharp practice". In that latter context, I received submissions on behalf of the parties with regard to BVI law as to which there was broadly common ground.

24 As to the facts, there was much dispute in the course of the trial with regard to the true purpose of the SPAs and the circumstances in which the relevant drafts came into existence. In this context, the evidence was somewhat speculative and unclear.

25 In summary, one suggestion was that the SPAs came about or were substantially related to the Eyckelers' alleged marital problems. Another suggestion was that the IPO of Fastacash on the Australian Stock Exchange was scheduled to take place on 20 May 2016 and that the SPAs were necessary for the purposes of what was referred to as the "BVI flip".

26 On behalf of HE&SF, it was submitted that one of the real reasons why the Defendants wanted the two SPAs signed was because they hoped that the releases in Clauses 3.3 would "forgive" the significant amounts of money that were owed to HE&SF (or Global Finance). Alternatively (or perhaps additionally), it was submitted on behalf of HE&SF that another possible reason why the Defendants wanted the two SPAs to be signed before the targeted IPO was because they knew that as at April 2016, Pan-Asia and Deal Plus together held at most 1,400,741 Series B Fastacash shares and this was a shortfall of 1,136,816 shares compared to the offer made to Mr Eyckeler on 7 July 2015 to purchase 2,537,557 Fastacash Series B shares; the purpose underlying the SPAs was a plan to avoid having to repay the monies due to HE&SF and "mollify" Mr Eyckeler.

27 If these were the real reasons behind the SPAs, it was submitted on behalf of HE&SF that they support Mr Eyckeler's evidence that in April 2016, when the IPO was supposedly close, the Schaers wanted him to sign the two SPAs and they made various representations to him so as to induce him to do so. It was submitted on behalf of HE&SF that what they said to him was not completely true. In particular, it was HE&SF's case that the Schaers had told Mr Eyckeler that the two SPAs had to be signed so that the IPO could happen – which was, according to HE&SF, untrue; they also told him that the IPO was going to happen when (again according HE&SF) by the time the two SPAs were signed by the Eyckelers, *ie*, on 26 April 2016, the Schaers knew that the IPO was not going to happen or, at the very least, unlikely to happen.

28 In any event, it was submitted on behalf of HE&SF that, as a matter of construction, Clause 3.3 did not apply to bar the claims in these proceedings or at least some of them – in particular the proprietary claims arising from what were said to be *Quistclose* trusts or to the restitionary claims for unjust enrichment.

29 In my judgment, there is a short answer to this part of the Defendants' case, *viz*, the SPAs were not, and never became, agreements binding in law. I reach this conclusion for the following reasons.

30 The first drafts of the SPAs emanated from the Defendants' lawyers. They were what Mr Eric Schaer called "standard documents". The main change in the second draft compared with the first draft was that Recital (D), which set out how much money RDS had received from HE&SF, was added. After that, the only change seems to be that Global Finance was added as a party. As is common ground, the Eyckelers signed the two SPAs on 26 April 2016 – Mrs

Eyckeler on behalf of Global Finance and Mr Eyckeler on behalf of HE&SF – and sent them to Mr David Schaer that evening at 1838 hours – which would have been already in the early hours in Asia on 27 April 2016. However, as already stated, it is not clear as to what happened thereafter. It seems that in the lead up to what was supposed to be the Fastacash IPO, Mr Eric Schaer resigned as a director of Fastacash on 27 April 2016 by an email sent by him at 1916 hours and that what was referred to as the "book build" which took place on 26 and 27 April 2016 was unsuccessful. On behalf of HE&SF, it was submitted that there is no way in which Mr Eric Schaer, as a director of Fastacash, would not have known on 26 or 27 April 2016, when the "book build" was ongoing, that it was unlikely to succeed. This was strenuously denied by Mr Eric Schaer, but it seems to me that that was probably the case.

31 For present purposes, the important point is that the two SPAs were never returned to Mr or Mrs Eyckeler in a form signed by any of the other parties named in the SPAs – at least at that time or even shortly or within a reasonable time thereafter. It is noteworthy that, as I have already stated, Mr Nguyen did not give evidence himself and there was therefore no *direct* evidence from Mr Nguyen as to if and when he signed the SPAs. The only evidence is from Mr Eric Schaer who says that the SPAs were executed in counterparts on or about 26 April 2016 and he witnessed Mr Nguyen signing the SPAs on behalf of himself and RDS. Be that as it may, no signed copies were returned and no "acceptance" of the terms of the SPAs was ever communicated to Mr or Mrs Eyckeler at that time or at least shortly or within a reasonable time thereafter. According to Mr Eyckeler both Mr Eric Schaer and Mr David Schaer "went quiet" and that indeed seems to have been the case. No explanation – or at least no satisfactory explanation – has been provided as to why the counterparts of the two SPAs supposedly signed by Mr Nguyen were not at that stage returned.

However, in my view, it would seem that the likelihood is because the Fastacash IPO did not in fact proceed and, in such circumstances, the purpose or premise underlying the two SPAs was nullified.

32 Demands were subsequently made by the Eyckelers for the return of the sum of US$3,235,385 (which had, it will be remembered, been remitted to RDS the previous year in July 2015 at the time of the initial attempt to list Fastacash) in particular, in a text message in August 2016. But this produced no response – and that money has never been returned.

33 However, Mr Eyckeler did subsequently receive a letter from Mr Nguyen dated 19 September 2016. There was initially some uncertainty as to when this was received by Mr Eyckeler (Mr Eyckeler's original evidence being that he only first saw this letter after the commencement of the present proceedings) but it seems to have been received at some time shortly after that date. The letter is stated to be for the attention of "US Global Global Finance Corp." (which, as stated at [22] above, was not disputed to be a reference to Global Finance) and identifies the subject as the two BVI companies referred to in the SPAs, *viz*, Pan-Asia and Deal Plus. The letter stated in material part as follows:

> Following the purchase by [Global Finance] of the two BVI companies listed above, I would like to inform you that the above mentioned companies have been fully transferred to [Global Finance]. I am currently holding the respective company kits on your behalf and they are ready for your receipt should you request it.
>
> Also, you should change the principal client on record for these companies by providing the relevant contact details of the nominated person. The client on record is the person who instructs renewals in order to keep the company licensed and operational.

34 It is fair to say that Mr Eyckeler did subsequently receive counter-signed copies of the two SPAs but this was at a very much later stage *after* the present proceedings had commenced. In my view, the receipt of those counter-signed copies came far too late to have the effect of constituting the two SPAs agreements binding in law. As a matter of strict analysis, I would regard the draft SPAs signed by the Eyckelers as constituting contractual "offers" which would lapse unless there was a valid "acceptance" made and communicated promptly or at least within a reasonable time. Here, there was no acceptance made or communicated promptly or within a reasonable time and, in those circumstances, it seems to me that the "offers" contained in the two SPAs signed by the Eyckelers did indeed lapse and were no longer capable of being accepted. I recognise that there may be some debate as to what is meant by "promptly" or what would constitute a "reasonable time" for acceptance. In the circumstances which obtained in April 2016, it seems to me that any such period would be very short indeed and would certainly not extend beyond the time when it was plain that the Fastacash IPO would not proceed which was, even on the Defendants' case, in early May 2016. In any event, such period could not, in my view, extend much later – and certainly not to September 2016 (if that be relevant), still less to a time after the present proceedings had commenced.

35 For the sake of completeness, I should mention that a point was raised by counsel on behalf of the Defendants in the course of closing submissions that the argument that the two SPAs did not constitute binding agreements was not open to HE&SF because it had not been properly pleaded or, at least, had been expressly abandoned. In particular, it was submitted on behalf of the Defendants that although the point had originally been included in the agreed List of Issues, it had subsequently been deleted. How and why the point came to be deleted from the List of Issues is something of a mystery. However, as expressly

provided in the SICC Practice Directions Part XII at paragraph 80(4), the List of Issues is a document for use as a case management tool; it does not supersede the parties' pleadings in the case and, in the event of any conflict between the pleadings and the List of Issues, the pleadings shall prevail. Here, I am satisfied that the point was adequately pleaded. Moreover, the relevant facts were addressed by the witnesses in their witness statements. In addition, so far as may be material, I am also satisfied that no relevant prejudice has been suffered by the Defendants. In these circumstances, I do not accept the objection raised on behalf of the Defendants.

36 For all these reasons, it is my conclusion that the SPAs did not constitute agreements binding in law and that the defence advanced by the Defendants based on Clause 3.3 of the SPAs must be rejected. It also follows that the counterclaim advanced on behalf of RDS for breach of the SPAs must be rejected.

37 In addition, it follows that it is strictly unnecessary to consider the further submissions advanced in the alternative on behalf of HE&SF that (i) it is entitled to rescind the SPAs by reason of misrepresentation on the part of the Defendants and/or (ii) the Defendants cannot rely on the Clause 3.3 by reason of their "sharp practice". However, having regard to the extensive evidence which was adduced and the detailed submissions advanced on behalf of the parties with regard to these points, it is convenient to summarise briefly my conclusions on this alternative case, *viz*:

(a) With regard to HE&SF's case on misrepresentation, I accept the submissions as to BVI law which were agreed between the parties, *viz*, that HE&SF would be entitled to rescind the two SPAs if it proves on a

balance of probabilities that it was induced to enter into them on the basis of a statement of fact that was false irrespective of fault or intention on the part of the representor.

(b) Here, I am satisfied that Mr Eyckeler was indeed induced to sign the SPAs and enter into them (if, contrary to my earlier conclusion, the SPAs are otherwise agreements binding in law) on the basis of statements of fact which were false. For the avoidance of doubt, so far as material (and although this may not be strictly necessary under BVI law), it is also my conclusion that such statements of fact were intended to induce HE&SF to enter into the SPAs.

(c) In particular, I accept Mr Eyckeler's evidence that the following misrepresentations (at the very least) were made and induced him to sign the SPAs on behalf of HE&SF, *viz*:

(i) that the two SPAs had to be signed so that the Fastacash IPO could happen; and

(ii) that the Fastacash IPO was going to happen.

(d) I recognise that such misrepresentations were not contained in any written communications at that time. However, Mr Eyckeler's evidence was that such misrepresentations were made orally by either Mr Eric Schaer or Mr David Schaer at that time. I accept that evidence. Quite apart from the testimony of Mr Eyckeler, it seems to me that this is not only inherently probable but consistent with the structure and terms of the SPAs. It is fair to say that there was at least some uncertainty in Mr Eyckeler's evidence as to whether such misrepresentations were made by Mr Eric Schaer or Mr David Schaer. However, having regard

to the entirety of the evidence, I do not consider that this point is material. Whether the misrepresentations were made by Mr Eric Schaer or Mr David Schaer (and regardless of Mr David Schaer's precise role), I have no doubt that they were in effect made by or on behalf of the Defendants so as to induce Mr Eyckeler to sign the SPAs on behalf of HE&SF.

(e) As to the alleged falsity of the misrepresentations, I accept the submission on behalf of HE&SF that there was no need for the SPAs to be signed to enable the Fastacash IPO to happen. As submitted on behalf of HE&SF and as accepted (at least in part) by Mr Eric Schaer, the two SPAs were not part of the documents needed for the purpose of the Fastacash IPO and the absence of the two SPAs would not have derailed the IPO. Specifically, with regard to the second misrepresentation, I note that the evidence of Mr Eric Schaer was that it was not true to say that the Fastacash IPO was not going to happen and that, in any event, this was certainly not his view or belief at any relevant time. I do not accept that evidence. In my view, the overwhelming likelihood is that Mr Eric Schaer knew full well by 26 or at the latest 27 April 2016 that the Fastacash IPO was unlikely to succeed, if not doomed to fail.

38 In light of the above, it is unnecessary to consider the further alleged misrepresentations as pleaded by HE&SF. It is also unnecessary to consider the further submissions advanced on behalf of HE&SF to the effect that the Defendants cannot rely upon Clause 3.3 of the SPAs because of "sharp practice" or that Clause 3.3 is inapplicable as a matter of construction to at least certain of HE&SF's claims.

39 So I now turn to consider the three main claims advanced on behalf of HE&SF.

Part III: The MySQUAR moneys

40 The claims in respect of the MySQUAR moneys fall into two parts. First, there are various claims brought by HE&SF against RDS in relation to recovery of the sum of US$300,000. Such claims are advanced on the basis of breach of trust, express or resulting *Quistclose* trust, unjust enrichment and/or conspiracy. The second part concerns claims brought against Mr Eric Schaer personally in relation to the same moneys on the basis of fraudulent misrepresentation, conspiracy and dishonest assistance.

41 I propose to consider first the claims against RDS although much of the facts which I address in relation to such claims have an important bearing when I come to consider the claims against Mr Eric Schaer.

Part III(A): Claim against RDS

42 As I have already stated, it is plain that there was originally a close friendship between Mr Eyckeler, Mr Eric Schaer and Mr David Schaer. This started in about 2010 when Mr Eyckeler and Mr David Schaer first met as a result of the friendship between Mrs Eyckeler and Mr David Schaer's wife, Mae. Both Mr Eyckeler and Mr David Schaer travelled extensively and they would often meet and discuss various possible projects that they could work on together.

43 It was in early 2014 that Mr David Schaer first mentioned MySQUAR to Mr Eyckeler. In particular, Mr David Schaer told him that Mr Eric Schaer was a promoter and the CEO of MySQUAR and that this was a business

opportunity that Mr Eyckeler might want to look into. Thereafter, Mr David Schaer provided Mr Eyckeler with further information concerning MySQUAR. In particular, Mr David Schaer sent Mr Eyckeler a summary presentation of the MySQUAR business under cover of an email dated 15 February 2014. About a week later, on 22 February 2014, Mr David Schaer forwarded to Mr Eyckeler further information from Mr Eric Schaer of what he described as a more complete and detailed summary along with projected revenue/budget numbers.

44 By way of background, the MySQUAR Group is a group of technology start-ups focused on social media, entertainment and gaming platforms in Myanmar. It was one of the early movers in the technology scene in Myanmar in or about 2013 following the economic liberalisation of that country. According to Mr Eric Schaer, the MySQUAR Group uniquely offers local language and locally driven content and successfully captured a significant market segment of the smartphone users in Myanmar. The MySQUAR Group was founded in June 2013 by Ms Rita Nguyen and Ms Quynh Anh Nguyen. Mr Eric Schaer joined the board of Squar Pte Ltd ("SQUAR"), a Singapore incorporated company that is part of the MySQUAR Group, in about August 2013. At that stage he acted as an advisor to the MySQUAR Group. He took over as the CEO of the MySQUAR Group in about December 2014. In that capacity, he spearheaded the efforts to list the MySQUAR Group on the AIM which eventually took place on 1 July 2015.

45 As described by Mr Eric Schaer, the general structure of the MySQUAR Group is – or at least was at all material times – as follows:

(a) MySQUAR BVI, which is the ultimate parent company and whose shares are listed on the AIM of the London Stock Exchange;

(b) SQUAR, a wholly-owned subsidiary of MySQUAR BVI;

(c) SQUAR Company Limited, a Vietnam incorporated company, which is a wholly-owned subsidiary of SQUAR. The business activities of the MySQUAR Group are carried out mainly at this company which is the centre for technology, platform and product developments; and

(d) MySQUAR Limited, a Myanmar incorporated company, which is a wholly-owned subsidiary of SQUAR. This entity is responsible for front line activities including sales, marketing and business development.

46 In June 2014, Mr David Schaer introduced Mr Eyckeler to Mr Eric Schaer. Specifically, Mr and Mrs Eyckeler met Mr Eric Schaer over dinner at a restaurant in Singapore. At that dinner, Mr Eric Schaer explained that MySQUAR was a start-up which was a Myanmar-language social media and entertainment platform that would eventually be listed on the London Stock Exchange. Mr Eyckeler's evidence (which I accept) was that Mr Eric Schaer encouraged him to invest in MySQUAR. In the course of the next few months and in particular in October and November, there was a further meeting and some further discussions with regard to a possible investment in MySQUAR. According to Mr Eyckeler's evidence (which I accept), Mr Eric Schaer told him that the government in Myanmar was favourable to the MySQUAR platform and that MySQUAR was a great opportunity to make money.

47 Thereafter there was at least one further meeting between Mr Eyckeler and Mr Eric Schaer as well as further email exchanges and discussions with regard to the possibility of Mr Eyckeler (or one of his companies) investing in the MySQUAR Group through the purchase of shares in SQUAR, the Singapore

incorporated company. In particular, on 6 November 2014, Mr Eric Schaer sent an email to Mr Eyckeler attaching a document outlining the proposed IPO in 2015 at a possible US$20–25m valuation. That attached document is important because it summarises the proposal being put to Mr Eyckeler. It was signed by Mr Eric Schaer in his capacity as CEO of Rising Dragon Holdings Pte Ltd ("RDH") and set out further information for "consideration" by Mr Eyckeler with regard to a proposed investment of US$300,000 in the form of a sale by RDH to Mr Eyckeler or his nominee of some 12,774 shares based upon a valuation of US$7,000,000 (*ie*, 4.28% on a fully diluted basis). The document also stated:

> The valuation of US$7,000,000 being offered is well below the US$13 million valuation which the Company recently sold shares at. The company is working toward executing an IPO during 2015 at a tentative valuation of US$20-25 million…

48 Also on 6 November 2014, Mr Hung sent an email to Mr Eyckeler with copies to Mr Eric Schaer and Mr David Schaer attaching a Share Transfer Form (STF) which, he said, needed Mr Eyckeler's information to be filled in. The STF was partially completed with the consideration, *ie*, US$300,000, the name and address of the transferor, *ie*, RDH, the number of shares of SQUAR to be transferred *ie*, 12,774, at a stated price of US$23.485 per share. The email requested Mr Eyckeler to sign the STF and return it as a scanned copy attached with a scan of his passport (if the shares were to be registered under his name) or the company business certificate (if the shares were to be registered under Mr Eyckeler's company's name). The email ended by stating: "*For payment, please wire the amount to OCBC bank account (USD) of RD Singapore as in the attached file. We will forward to you an electronic share registration on ACRA afterward*." The evidence of Mr Eyckeler (which I accept) is that he did not sign

the copies of the STF immediately after he received them and that he took time to think further about the investment.

49 On 15 November 2014, Mr David Schaer sent an email to Mr Eyckeler referring to a conversation which he (Mr David Schaer) said he had had with Mr Eric Schaer briefly the previous day and asking Mr Eyckeler whether he had had a chance to review the emails previously sent and whether he still wanted to move forward on the stock purchase. Further, Mr David Schaer stated to Mr Eyckeler in that email:

> Otherwise, [Mr Eric Schaer's] looking to place it with an existing investor who's requesting to acquire additional shares. It's somewhat time sensitive as he's looking to increase the float prior to establishing the public offering.

50 On 28 November 2014, Mr David Schaer sent a further copy of the proposed STF to Mr Eyckeler partially completed with the same information as before save that the number of shares to be transferred was stated to be slightly higher, *ie*, 14,171 instead of 12,774, at a slightly reduced price, *ie*, US$21.17 instead of US$23.485. It is not clear to me how or why these changes in the figures came about.

51 The evidence of Mr Eyckeler is that he signed two copies of the STF on 29 November 2014; that he did so in the presence of a man called Paolo Porcelli, who witnessed and countersigned the forms; that additional manuscript was added by Mr Eyckeler in the middle of the copies of the STF stating "*Transferee: 29 day of November 2014*" with Mr Porcelli initialling that addition "P.P"; and that he (Mr Eyckeler) then handed the completed forms to Mr David Schaer when they met later that day at a sushi restaurant in West Palm Beach, Florida. As Mr Eyckeler explained in oral evidence, before handing the forms over to Mr David Schaer, he (Mr Eyckeler) told Mr David Schaer that he

did not like odd numbers and that they agreed to change the number of shares from what was already typed in the copies of the STF, *ie*, 14,171, to a "round" number of 14,500 shares. However, the increase in the number of shares to 14,500 is somewhat odd if only because the price per share (US$21.17 per share) and overall consideration (US$300,000) as stated in the document were unchanged. As such, the figures do not tally, *ie,* 14,500 shares at US$21.17 per share equals US$306,965, *not* US$300,000.

52 In any event, the evidence of Mr Eyckeler was that this change was then recorded in manuscript by himself and initialled by him following which he gave the two copies of the STF to Mr David Schaer. According to Mr Eyckeler, he and Mr David Schaer then shook hands on the transaction.

53 In evidence, Mr David Schaer accepted that he may well have met Mr Eyckeler about this time but he strenuously denied that Mr Eyckeler ever handed the completed copies of the STF to him, still less that he (Mr David Schaer) had had any discussion or had agreed to increase the number of shares to be sold to 14,500. In any event, Mr David Schaer was adamant that he would have had no authority and would not have been able to discuss or agree any change to the number of shares to be sold.

54 The evidence of Mr David Schaer is that Mr Eyckeler informed him that he was still considering which of his entities to transfer the SQUAR shares to; that he (Mr David Schaer) did not think too much of this then as Mr Eyckeler was often trying to structure his investments and dealings to minimise tax implications; and that he (Mr David Schaer) never saw these completed copies until these present proceedings.

55 I confess I have found considerable difficulty in resolving this clash of oral evidence between Mr Eyckeler and Mr David Schaer with regard to the completion of the copies of the STF and, according to Mr Eyckeler, the supposed handover of those documents to Mr David Schaer during their meeting. In particular, I recognise, on the one hand, that it is at least possible that Mr Eyckeler has invented what he said happened during this meeting in order to bolster his case; on the other hand, that it is at least possible that Mr David Schaer was not telling the truth with regard to what he said happened.

56 It is fair to say that Mr Eyckeler's version of events was supported in at least certain respects by the evidence of Mrs Eyckeler but, so far as relevant to this topic, her evidence was not first-hand and depended, in large part, on what Mr Eyckeler had supposedly told her. As such, it does not seem to me of much assistance, if any, in resolving the clash of evidence between Mr Eyckeler and Mr David Schaer.

57 On behalf of the Defendants, it was submitted that I should draw an adverse inference against HE&SF by reason of its failure to call Mr Paolo Porcelli. However, he was very much a third party and it seems unlikely that any evidence he might have been able to give would have assisted in resolving the central issues between Mr Eyckeler and Mr David Schaer in relevant respect.

58 In the event, save to say that it seems likely that (i) a meeting did take place between Mr Eyckeler and Mr David Schaer on or about 29 November 2014 and (ii) there must have been some discussion with regard to the transfer of shares, I feel unable to make any positive finding one way or another with regard to what allegedly happened or did not happen at the meeting.

59 On 2 December 2014, Mr David Schaer sent an email to Mr Eyckeler stating that Mr Eric Schaer had left early for London and that he (Mr Eric Schaer) was asking if Mr Eyckeler could let him know the name to which to issue the shares.

60 On the same day, *ie*, 2 December 2014, on the instructions of Mr Eyckeler, the sum of US$300,000 was debited from HE&SF's bank account with Stifel and wired to the bank account of RDS at OCBC. It is common ground that that money was received by RDS on that same day or shortly thereafter. I am sure that Mr Eric Schaer was aware of the receipt of that sum of money by RDS and that the purpose of such transfer was the purchase of the shares as stated in the draft STF referred to above.

61 On 8 December 2014, Mr David Schaer sent Mr Eyckeler a text message asking him whether he had determined the name for issuing the shares, *ie*, the name of the person or entity to whom the shares were to be transferred.

62 On 11 December 2014, Mr Hung sent an email to Mr Eric Schaer and Mr David Schaer emphasising the need to receive from Mr Eyckeler the documents to register his name for the US$300,000 investment and explaining the documents required. However, it does not appear that that email was ever forwarded to Mr Eyckeler. It is unclear why that did not happen or what actually happened after that date with regard to the intended sale and transfer of these shares. It is equally unclear what happened to the sum of US$300,000. RDS has not provided disclosure of its bank accounts for this period. Mr Eric Schaer accepted in evidence that these moneys were not segregated in any way – although he was emphatic that there was no requirement or need to do so. What happened to this money is a matter of speculation. However, two things are

clear. First, no shares were ever actually transferred to Mr Eyckeler or any company which he might have nominated. Second, the US$300,000 was not returned to Mr Eyckeler at least at this stage – nor, on RDS's case, until some time much later in July 2015.

63 As to this topic, the evidence of Mr Eyckeler is that he had transferred the sum of US$300,000; so far as he was concerned, he had done his part. In particular, he stated in evidence: "*Naturally, the rest was for [Mr Eric Schaer] (and his team) to take care of. I did not feel the need to press [Mr Eric Schaer] or [Mr David Schaer] for the shares as I considered them good friends of mine.*"

64 So far as the Defendants are concerned, their pleaded case was that "[*Mr Eyckeler] did not proceed with the transfer*." That plea is at least in part true because no shares in SQUAR were ever transferred to Mr Eyckeler. But, as already stated, there is no doubt that RDS received the sum of US$300,000 for the shares as Mr Eric Schaer well knew – and that money was never returned to Mr Eyckeler at least (on the Defendants' case) until sometime much later in July 2015.

65 Somewhat surprisingly, nothing then happened during the end of 2014 or the first half of 2015 or was apparently discussed during this period with regard to the transfer of these SQUAR shares to Mr Eyckeler or his nominee for many months. Mr Eyckeler did not press Mr Eric Schaer or Mr David Schaer for them; neither Mr Eric Schaer nor Mr David Schaer nor anyone else at RDS pressed Mr Eyckeler to complete the copies of the STF nor made any contact with Mr Eyckeler concerning the transfer of these shares despite the fact that, as stated above, RDS had received the sum of US$300,000 and (even on the Defendants' case) they had never received copies of the STF.

66 I remain puzzled as to why, if none of Mr David Schaer, Mr Eric Schaer or anyone at RDS ever received copies of the STF, they never pressed Mr Eyckeler further for them. It may be that they were simply content that they had the sum of US$300,000 and were keeping their options open. I do not know. It is all something of a mystery. Equally, I am puzzled as to why Mr Eyckeler never pressed for the shares. His explanation that he did not feel the need to because they were all "good friends" seems unbelievably naïve but, on the evidence, that seems the more likely explanation. Be all that as it may, I am satisfied that Mr Eyckeler honestly believed that he had, in effect, purchased (or at least agreed to purchase) the shares.

67 Meanwhile, in the early part of 2015, progress was being made with regard to the admission of MySQUAR BVI on the AIM, spearheaded by Mr Eric Schaer in his capacity as CEO of the MySQUAR Group. The evidence of Mr Eric Schaer is that Mr Eyckeler continued to show interest in investing in the MySQUAR Group.

68 On 24 May 2015, Mr David Schaer sent Mr Eyckeler an email attaching certain research material with regard to MySQUAR. On 29 June 2015, the MySQUAR Group AIM Placement/Admission document was published. Two days later, on 1 July 2015, MySQUAR BVI was floated on the AIM.

69 On the following day, *ie*, 2 July 2015, Mr David Schaer sent to Mr Eyckeler an email saying "*Hi Bro*" and confirming that the float had been successful with various weblinks concerning the float. Mr Eyckeler replied later that day, stating:

> "Good afternoon Bro…,
>
> …

> I did see the floating from Mysquar yesterday – congratulations to you, [Mr Eric Schaer] and the team.
>
> I am looking forward to the future.

This exchange of emails would seem to confirm that all three men were still on good terms at this stage.

70 According to Mr Eyckeler, the MySQUAR BVI stock performed well and immediately after the initial public offering produced a profit of approximately 200% for its promoters and pre-IPO shareholders. (For the avoidance of doubt, it is plain that Mr Eyckeler was not referring to an actual profit but a notional profit on a mark-to-market basis.) This was hotly disputed by Mr Eric Schaer in the course of one of his speeches in cross-examination. In particular, he was adamant that, contrary to Mr Eyckeler's evidence, the IPO was not a success and that, in his own words, "*the share price dropped precipitously*". There is no doubt that the market share price of MySQUAR BVI did indeed fall immediately after listing on the AIM on 1 July 2015. Thus, although the issue price of the MySQUAR BVI shares was 10 pence per share, the market share price of the MySQUAR BVI shares immediately after listing, *ie*, on 1 July 2015, was below that figure, *ie*, 9.875 pence per share. Thereafter, the market share price followed a general downward trend. To that extent, I accept the evidence of Mr Eric Schaer.

71 However, in my view, although Mr Eric Schaer is thus right in saying that the market price of MySQUAR BVI's shares did fall after the AIM listing on 1 July 2015, this does not mean that Mr Eyckeler was wrong in saying that the listing produced "an approximately 200% profit for its promoters and pre-IPO shareholders". This is because, as stated in the important document from Mr Eric Schaer attached to the email dated 6 November 2014 referred to above,

the price of the shares which were offered to Mr Eyckeler and which he thought he had bought for US$300,000 in November 2014 was based upon a valuation of US$7,000,000, *ie*, the proposal in that document was that he should buy 12,774 shares representing 4.28% (300,000/7,000,000) of the shares of SQUAR. The listing of MySQUAR BVI's shares on the AIM on 1 July 2015 was based on a much higher market capitalisation figure of US$18.5 million i.e. more than double the figure of US$7 million. Thus, although the market price of MySQUAR BVI's shares fell after the listing on 1 July 2015 and therefore anyone who bought shares in MySQUAR BVI at the placement price of 10 pence per share would (if they sold their shares) have lost money, that is not true of those who had, in effect, bought shares at a much lower price in SQUAR prior to the listing. In particular, at a market capitalisation of MySQUAR BVI of US$18.5 million based on a listing price of 10 pence per share, the value of 4.28% was approximately US$790,000, *ie*, well over 200% of the original investment of US$300,000. Thus, even after the fall in the market price of MySQUAR BVI's shares in the months following the listing on 1 July 2015, such investment would have shown a substantial mark-to-market paper profit.

72 In my view, the above is critical when considering the case advanced on behalf of the Defendants by way of defence to HE&SF's claim for the sum of US$300,000. I consider the Defendants' case by way of defence to such claim below. However, before doing so, I would simply note that the evidence of Mr Eyckeler is that, following the listing, he would, from time to time, look at how MySQUAR BVI was performing on the London Stock Exchange; that Mr David Schaer would also occasionally report to him on how the company and the stock were doing; that he was not otherwise kept abreast of what had been done with his investment; and that to date he had not received his shares in SQUAR nor

been repaid the US$300,000 that he had remitted to RDS on 2 December 2014 as instructed by Mr Eric Schaer.

73 I turn then to consider the Defendants' case which, as pleaded, is that the sum of US$300,000 was returned to Mr Eyckeler as part of a total sum of US$1,196,000 transferred to HE&SF in July 2015, which latter sum consisted of two tranches, *viz,* US$750,000 transferred to HE&SF on 15 July 2015 and a further US$446,000 transferred on 24 July 2015. As submitted on behalf of HE&SF, it is noteworthy that the Defendants' pleading does not say that it had ever been agreed with Mr Eyckeler that the US$300,000 should be returned. As set out in their final written submissions, the Defendants' explanation for these transfers was as follows:

(a) Sometime in or around early July 2015, Mr David Schaer met Mr Eyckeler at Café Sapori in Palm Beach, Florida.

(b) At that meeting, Mr Eyckeler requested a loan in the sum of US$1,150,000.

(c) Mr David Schaer then called Mr Eric Schaer to ask if RDS could return the sum of US$300,000 (*ie*, the MySQUAR moneys) to Mr Eyckeler and loan him an additional sum of US$850,000.

(d) In order for Mr Eyckeler to reflect the sum of US$1,150,000 as a loan in HE&SF's ledger, Mr Eyckeler asked for an additional US$46,000 to be loaned to him. This was to ensure that interest of 1% could be reflected in HE&SF's books.

(e) The total sum of US$1,196,000 (*ie*, US$300,000 + US$850,000 + US$46,000) was then transferred to HE&SF in the two tranches as

already referred to above. Of this sum, US$300,000 was the return of the MySQUAR moneys and the balance, *ie*, US$896,000, was a loan from RDS to HE&SF, the latter forming the subject matter of the counterclaim in these proceedings.

74 I do not accept the Defendants' explanation for a number of reasons.

75 First, the central plank (or at least one of the central planks) of such explanation is that the total sum transferred included the return of the MySQUAR moneys, *ie*, the sum of US$300,000. The evidence with regard to this aspect is, at best, somewhat sketchy. There are no contemporaneous documents to support at least this part of the Defendants' explanation. If, as the Defendants say, it was true that the original sum of US$300,000 was repaid, it seems odd that this was never documented or confirmed in writing at the time – even by a short email. The first time that there was any suggestion that there might have been any agreement to return the sum of US$300,000 was in Mr David Schaer's witness statement – although what he states there is somewhat opaque. He simply states: "*There was an understanding that part of the transfer of USD 1,196,000 was to return the sum of USD 300,000 (being the MySquar Monies) to the Plaintiff.*" Similarly, there is little, if anything, in Mr Eric Schaer's witness statement to explain the circumstances relating to the apparent decision (on the Defendants' case) to return the sum of US$300,000 in July 2015. However, the Defendants' case became much clearer during the cross-examination of Mr Eric Schaer. In particular, it was his evidence that it was Mr Eyckeler who asked Mr David Schaer following the IPO in July 2015 if he could "*go ahead and get the cash back because [Mr Eyckeler] did not want the shares, and he wanted to undo the transaction*". In an important passage in his cross-examination, Mr Eric Schaer then continued:

> And just to add to that -- your Honour, your comment yesterday as to why would anyone go ahead and sell shares that had gone up in value, it doesn't make sense, you're absolutely correct, it didn't -- it wouldn't make sense. But again public knowledge, the share price dropped.

76 In my view, the reasoning in this part of Mr Eric Schaer's evidence is fundamentally flawed. As appears from what I have already stated above, Mr Eric Schaer is right when he says that the share price dropped – provided such statement is understood as referring to a drop in the share price when measured against the listing price. But, as stated above, Mr Eyckeler had not bought shares at the listed price. On the contrary, he had bought shares (or at least he thought he had bought shares) well in advance of the listing at what was, in effect, a substantial discount to the listing price. And even after the drop in the market price, when measured against the listing price, any person in Mr Eyckeler's position was standing on a substantial paper profit. In such circumstances, the idea, as Mr Eric Schaer asserted, that Mr Eyckeler "*didn't want the shares*" and wanted to "*undo the transaction*" and simply seek the return of his original investment of US$300,000 when such investment was probably worth at least double that amount, *ie*, in excess of US$600,000, is not merely inherently improbable but, in my view, not credible. In my view, this is very powerful evidence which strongly supports Mr Eyckeler's own evidence that he never asked at that time for the return of the sum of US$300,000 and that the evidence of Mr Eric Schaer to the contrary must be rejected as a deliberate lie. (For the avoidance of doubt, Mr Eric Schaer's own evidence was that, had Mr Eyckeler held shares in SQUAR, those shares would have been converted into shares in MySQUAR BVI pursuant to a "BVI flip" upon MySQUAR BVI's listing on the AIM. It is clear to me that at the time, Mr Eyckeler must have been under the impression that his shareholding in SQUAR had been converted into shares in MySQUAR BVI. This is consistent with my finding at [66] above that Mr

Eyckeler had honestly believed that he had successfully purchased shares in SQUAR.)

77 Second, I am unpersuaded with regard to the Defendants' explanation concerning what they say was the balance of the total sum of US$1,196,000 transferred in July 2015, *viz*, the sum of US$896,000. At the risk of repetition, it is undisputed that RDS made two transfers to HE&SF, *viz*, a sum of US$750,000 and US$446,000 on 15 July 2015 and 24 July 2015 respectively. However, there is little documentation concerning the nature of or purpose concerning such transfers. In summary:

(a) The evidence of Mr Eric Schaer (and thus the case advanced on behalf of the Defendants) was that Mr Eyckeler asked him for a loan; that on or around 15 July 2015, a loan agreement was made orally between Mr Eyckeler on behalf of HE&SF and himself on behalf of RDS on terms that HE&SF would pay interest on the principal of US$896,000 at the rate of 12% per annum from 15 July 2015 and that HE&SF would repay the principal and interest within a year, *ie*, by 15 July 2016.

(b) The evidence of Mr Eyckeler (and thus the case advanced on behalf of HE&SF) was that in March/April 2015 the Schaers told him that they needed a loan to buy out some Taiwanese investors and to make the MySQUAR BVI stock flow better; that Mr Eyckeler agreed to make a loan to the Schaers in the sum of US$1.15m for that purpose; that Mr David Schaer instructed him to wire the money to a company called Savitar Phosphate Exploration Ltd ("Savitar"); that pursuant to such agreement and wiring instructions, this money was duly remitted on or about 14 April 2015; and that the entirety of the two transfers in July

2015 totalling US$1.196m was the repayment of that loan plus interest of US$46,000, *ie*, 1% per month for 4 months from April to July 2015.

(c) The latter was hotly disputed by, in particular, Mr Eric Schaer. In summary, his evidence (and thus the case advanced on behalf of the Defendants) was that the initial US$1.15m was not a bridging loan at all but a *payment* by Mr Eyckeler for *more shares in* SQUAR which were to be held by (in the event) some six nominees on his (*ie*, Mr Eyckeler's) behalf. According to the Defendants, these shares were to be held by the nominess for *Mr Eyckeler*; because the US$1.15m was transferred to RDS for the purchase of more SQUAR shares, it need not be and was never returned.

78 It is unfortunate (to say the least) that there are no documents recording (as Mr Eyckeler maintains) the terms of what he says was a loan or (as the Defendants maintain) that the transfer of US$1.15m was for the payment for more shares in SQUAR to be held by nominees on behalf of Mr Eyckeler. The absence of proper documentation concerning these payments in both April and July 2015 and the clash of evidence makes it particularly difficult to determine the true position. However, I have reached the clear conclusion that the Defendants' explanation must be rejected for the following reasons.

79 First, the Defendants' explanation is inconsistent – or at least difficult to square – with the conclusion which I have already reached with the supposed repayment of the sum of US$300,000 in respect of the MySQUAR moneys.

80 Second, there is no reason to indicate why Mr Eyckeler would have required any loan in or around July 2015. On the contrary, such evidence as exists would seem to indicate that Mr Eyckeler had sufficient funds.

81 Third, there is strong evidence to support Mr Eyckeler's explanation concerning what he said was the initial loan of US$1.15m from him. In particular:

(a) The payment instructions from Mr Eyckeler to the bank stated: "*Zeitraum: 14.04.2015 – 29.0.5.2015*". In context, I am satisfied that this is to be translated as "anticipated loan term".

(b) It is fair to say that the role played by Savitar is perplexing. Whether the initial transfer of the sum of US$1.15m was (as Mr Eyckeler maintains) by way of a loan to the Schaers or (as the Defendants maintain) to purchase shares on behalf of Mr Eyckeler in SQUAR, why was the initial sum of US$1.15m transferred in April 2015 to Savitar – a company which, at first blush, appears to be unconnected with any of the present parties? Mr Eyckeler's explanation was simply that this is what Mr David Schaer told him to do and that Mr David Schaer gave him wiring instructions on a piece of paper with the account name and bank details of Savitar so that the remittance of US$1.15m could be made. Although that piece of paper has apparently been lost, Mr Eric Schaer accepted that Mr David Schaer had told Mr Eyckeler to remit the US$1.15m to Savitar. In evidence, Mr David Schaer and Mr Eric Schaer denied that they controlled or were associated with Savitar. However, it appears that Mr Eric Schaer was the Managing Director, Advisory Services, at a place called Saigon Asset Management in at least 2012 and 2013; that Mr Hung also worked there; and that someone known as Kevin Flaherty was then the Managing Director of Energy and Natural Resources Investments at Saigon Asset Management. This same Kevin Flaherty was part of the key management of Savitar. Thus, even

> if Savitar was not controlled by the Schaers, it would appear that there must have been some connection of some kind between the Schaers and Savitar – and this would seem to be confirmed by the fact (as Mr Eric Schaer accepted) that Mr Eyckeler was told by Mr David Schaer to send the money to Savitar. Be all this as it may, it seems to me that the important point for present purposes is that if, as the Defendants say, the initial transfer was to enable Mr Eyckeler to buy more shares in SQUAR, the instructions given by Mr David Schaer to transfer the money to Savitar would appear to be difficult if not impossible to explain.

82 Fourth, I find the Defendants' explanation that Mr Eyckeler's plan was to buy the shares for himself through a number of nominees difficult, if not impossible, to accept for the following reasons:

> (a) In summary, Mr David Schaer's evidence was that the sum of US$1.15m was transferred by Mr Eyckeler for the purchase of shares in the MySQUAR Group (through his nominees) from other shareholders holding MySQUAR shares; that at least 8,467,609 shares in MySQUAR BVI worth the sum of US$1.15m were eventually transferred to individuals nominated by Mr Eyckeler, *viz*, Gabriele Altmann, Rosemarie Karin Eyckeler, Sabine Kreibeck, Wolfram Rehberg, Astrid Rehberg and Helen Graf; and that (as reflected in a pre-IPO shareholder list) these individuals were eventually issued approximately 15,565,180 in MySQUAR BVI. In support of that explanation, Mr David Schaer produced copies of the Orderly Market Agreement ("OMA") signed by each of these individuals as well as certain emails and two share transfer forms signed by two of them (Ms Kreibeck and Ms Altmann).

(b) Although the evidence was not entirely clear-cut, there is no doubt correspondence in May 2015 consistent with an intention to use the sum of US$1.15m to purchase MySQUAR shares, and I am prepared to proceed on the basis that these shares were indeed purchased in the name of these individuals as nominees.

(c) It is fair to say that Mr Eyckeler was heavily involved in identifying the individuals referred to above (or at least most of them) as potential nominees and arranging for them to sign the OMA in order to facilitate the MySQUAR IPO. So much appears from a series of communications including text messages in the course of, in particular, late April/May 2015. However, it does not necessarily follow that it was intended that these individuals would act as nominees and purchase these shares for and on behalf of Mr Eyckeler. For present purposes, that is the critical question.

(d) The evidence of Mr Eyckeler is that it was the Schaers who asked him to find six individuals who would be willing to be their nominees in order to "*spread the shareholdings out*" and "*circumvent the 1 year holding period for companies listed on the AIM*", and that each of the nominees was paid US$1,500 for allowing their names to be used. According to Mr Eyckeler, Mr Eric Schaer handed him an envelope of cash to pay the nominees' fees at Changi airport shortly before Mr Eyckeler caught his flight back to Frankfurt.

(e) In my view, the foregoing is supported by the contemporaneous evidence which strongly suggests that it was Mr Eric Schaer rather than Mr Eyckeler who wanted – if possible – to buy more shares; that it was Mr Eric Schaer himself who was seeking nominees to purchase and then

hold such shares on his behalf and not on behalf of Mr Eyckeler; and that Mr Eric Schaer sought the assistance of Mr Eyckeler with regard thereto. In particular:

(i) On 2 May 2015, Mr Eyckeler sent a text message to Mr David Schaer identifying three names and asking him "*will this work 4 [sic] now*". Shortly thereafter on 5 May 2015, Mr David Schaer responded by text asking Mr Eyckeler to request "*the trustee info exactly as shown on each passport. C [ie, Mr Eric Schaer] is looking to finalize today*".

(ii) On the following day, *ie*, 6 May 2015, Mr David Schaer sent a further text telling Mr Eyckeler: "*C [ie, Mr Eric Schaer] is asking if 2-3 more trustees are available*".

(iii) About 10 days later, there was an exchange of internal emails between Mr Hung and Mr Eric Schaer which focused on the allocation of shares – in particular, the identity of potential buyers. Specifically, there is an email from Mr Hung to Mr Eric Schaer dated 15 May 2015 which states: "*you can decide how many buyers to make the final shareholding below 3% threshold*". The latter appears to be a reference to the fact that there were certain regulatory restrictions on shareholders who held more than 3% of shares at the time of the IPO. According to Mr Eric Schaer's evidence, a buyer who had fewer than 3% of the total shares could go ahead and sell the shares quickly after the listing whereas a buyer with more than that would be "*locked up for one year*". In my view, the natural inference from this exchange of emails in May 2015 is that Mr Eric Schaer was

> looking for nominees in Europe who would be willing to hold shares on his behalf so that he could thereby evade the 3% restriction.

83 In considering the true position of the nominees, I bear well in mind the argument advanced on behalf of the Defendants that I should draw an adverse inference against HE&SF by reason of the fact that, as Mrs Eyckeler accepted, they were all individuals well known to her. In particular, as she confirmed, Ms Graf was her sister, Mrs Rosemarie Eyckeler was Mr Eyckeler's mother, Ms Altmann was a common friend whom she had known for 15 or 20 years and the other three individuals were known to her. None of these individuals provided an affidavit or were called to give evidence by HE&SF. Moreover, particular emphasis was placed by the Defendants on the fact that although HE&SF had indicated in October 2017 that they would call Ms Altmann as a witness, she was subsequently dropped from the list and Mr Eyckeler was unable to give an explanation during cross-examination as to why she was not called. However, the story regarding the role of the nominees did not appear from the pleadings and, on one view, might be said to be somewhat peripheral. Moreover, it might equally be said that an adverse inference should be drawn against the Defendants by reason of their failure to call certain witnesses – for example, Mr Hung or Mr Nguyen. Any adverse inferences that might be drawn one way or another seem rather fairly balanced. In any event, I do not consider that any adverse inferences that might be drawn against HE&SF would override the conclusions which I have reached on this particular topic.

84 Fifth, it appears from documents disclosed by HE&SF that the sum of US$46,000 (which, according to Mr Eyckeler, was interest received on the loan of US$1.15m) was reported on HE&SF's general ledger and similarly reported

on HE&SF's income tax return. This further supports Mr Eyckeler's explanation. When this figure is added to the original remittance by HE&SF on 14 April 2015 (*ie*, US$1.15m), the total figure, *ie*, US$1.196m is identical to the sum total of the US$750,000 and US$446,000 transferred back to HE&SF. Moreover, it is noteworthy that the latter transfers were made with the same reference as the original payment on 14 April 2015, *ie*, "Savitar Phosphate". In my view, the foregoing strongly supports HE&SF's case that such transfers back constituted repayment of the loan made on 14 April 2015 plus accrued interest.

85 Sixth, Mrs Eyckeler's evidence was that when she met Mr David Schaer in 2016, he confirmed to her that the original loan of US$1.15m had been repaid in two instalments. Although this was disputed by Mr David Schaer, I see no reason to reject Mrs Eyckeler's evidence at least on this point.

86 For all these reasons, I reject the case advanced on behalf of the Defendants that the sum of US$300,000, *ie*, the MySQUAR moneys, was paid back to Mr Eyckeler, and that the sum of US$896,000 was a loan to HE&SF. On the contrary, as submitted on behalf of HE&SF, it is my conclusion that the sum of US$300,000 was never repaid and remains outstanding; and that the entirety of the sum of US$1.196m constituted the repayment of the original loan made by HE&SF on 14 April 2015 with interest. It follows that the Defendants' counterclaim for the sum of US$896,000 must be dismissed.

87 It remains to consider the remedies available to HE&SF with regard to its claim concerning the MySQUAR moneys, *ie*, relating to the original payment of US$300,000. In so far as such claim might be advanced as a claim for damages for breach of contract, I readily accept that such claim would

potentially raise somewhat difficult issues. In theory, I suppose a claim might have been advanced on the basis of the difference between the market price at or immediately after the date of listing and the contract price, *ie*, US$300,000. For the avoidance of doubt, I fully recognise (as I have already noted) that the market price of the shares dropped after listing. However, I do not consider that this would necessarily be relevant to a claim for damages for breach of contract even in the absence of evidence from Mr Eyckeler that he would have gone out into the market and sold the shares at that time – or at any particular time thereafter. Be all this as it may, I did not understand HE&SF to be advancing a claim for damages for breach of contract on the basis stated above.

88 Rather, the two main claims advanced on behalf of HE&SF were as follows:

(a) RDS was the trustee of its moneys under an express or resulting *Quistclose* trust and that in breach of its obligations to HE&SF, RDS did not (i) apply the US$300,000 toward the purpose of acquiring shares in SQUAR; (ii) issue or transfer to HE&SF, or another entity nominated by Mr Eyckeler, shares in SQUAR; (iii) account to HE&SF for the use of the US$300,000; and/or (iv) return to HE&SF the US$300,000 or any part thereof that was not applied for the said purpose; and/or

(b) RDS has been unjustly enriched from its receipt of the US$300,000 because it failed to apply this sum towards the acquisition of shares in SQUAR and has not accounted to HE&SF for the sum.

89 With regard to the alleged express or resulting *Quistclose* trust, I was referred to a large number of authorities including the decision of Quentin Loh

J in *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [114] where it was stated:

> 114 Bearing the above in mind, the propositions of law which can be gleamed [*sic*] are as follows:
>
> (a) Whenever a donor transfers money to a recipient for a specified purpose, a *Quistclose* trust may arise. In a *Quistclose* trust, the donor possesses the beneficial interest in the money, but this is subject to a power or duty on the recipient's part to use the money for the specified purpose. If the recipient is unwilling or unable to use the money for the specified purpose, the money is to be returned to the donor. Such a trust may be either express or resulting.
>
> (b) For a *Quistclose* trust to arise, the twin certainties of subject matter and objects must be present. In particular, the purpose must be stated with sufficient clarity for a court to determine if it is still capable of being carried out or if the money has been misapplied.
>
> (c) For an express *Quistclose* trust, the settlor-donor must intend to constitute the recipient as a trustee, and confer a power or duty on the recipient-trustee to apply the money exclusively in accordance with the stated purpose.
>
> (d) For a resulting *Quistclose* trust to arise, the donor must have a lack of intention to part with the entire beneficial interest in the transferred money. The recipient must not have free disposal of the money … and must be under a power or duty to apply the money exclusively in accordance with the stated purpose …
>
> [internal citations omitted]

90 There was some debate between the parties as to these propositions and the application of such propositions to the facts of the present case. In particular, it was submitted on behalf of HE&SF that the question was whether there was an obligation on the part of RDS to segregate the US$300,000 from RDS's other funds and that, on the facts, there was here such an obligation, created by the knowledge of the purpose – and the admission of the purpose – of the original

remittance of the US$300,000. I readily accept that the sum of US$300,000 was transmitted to RDS for the purpose of purchasing the relevant shares. I also readily accept that in many IPOs or share purchase arrangements, there may be an express (or even an implied) agreement that the relevant funds must be segregated and placed in what is often referred to as some kind of "trust account". In such circumstances, I recognise that an express or resulting *Quistclose* trust will or at least may arise.

91 However, in my view, the facts in the present case do not support such a conclusion. In particular, I do not consider that there is any basis for concluding that there was any intention on the part of either Mr Eyckeler or HE&SF to constitute RDS as a trustee and confer a duty on RDS to apply the money exclusively in accordance with the stated purpose. Nor do I consider that there was a lack of intention on the part of Mr Eyckeler or HE&SF to part with the entire beneficial interest in the transferred money. Thus, in my view, the evidence falls far short of establishing either an express or resulting *Quistclose* trust or any other claim for breach of trust.

92 With regard to the claim for unjust enrichment, I was again referred to a large number of authorities including *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 where the relevant principles concerning "failure of basis" were summarised at [46]:

> [46] … The concept of failure of basis is succinctly summarised in Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) … at para 12–01, as follows:
>
> > … The core underlying idea of failure of basis is simple: a benefit has been conferred on the joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit. …

> The inquiry has two parts: first, what was the basis for the transfer in respect of which restitution is sought; and second, did that basis fail?

93 Applying those principles, it seems to me that there was here a failure of basis in respect of the MySQUAR moneys. In short, the money was paid to RDS to purchase shares; the purchase never materialised; and HE&SF is therefore entitled to the return of the sum of US$300,000 from RDS on that basis together with interest as may be appropriate.

94 So far as the claim for conspiracy against RDS is concerned, I propose to consider this at the same time as the claim for conspiracy against Mr Eric Schaer personally.

95 I turn then to consider the remaining claims in respect of the MySQUAR moneys against Mr Eric Schaer personally for (i) misrepresentation; and (ii) dishonest assistance. I will then consider the remaining claim against RDS and Mr Eric Schaer for conspiracy.

Part III(B): Misrepresentation claim against Mr Eric Schaer personally

96 On behalf of HE&SF, it was submitted (and I accept) that a useful summary of the principles regarding the law on misrepresentation may be found in Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) from paragraphs 14.002 — 14.031 ("*The Law of Torts*"). In addition, counsel on behalf of HE&SF referred me to a large number of cases. In broad terms, the necessary ingredients which must be established in order to succeed in a claim for fraudulent misrepresentation are set out in the decision of Aedit Abdullah JC (as he then was) in *Syed Ahmad Jamal Alsagoff (administrator of the estates of Shaikah Fitom bte Ghalib bin Omar Al-Bakri)*

and others v Harun bin Syed Hussain Aljunied and others and other suits [2017] 3 SLR 386 ("*Syed Ahmad Jamal Alsagoff*"), citing (at [47]) the decision of the Court of Appeal in *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435. Specifically, the cause of action requires: (i) a representation of fact made by words or conduct; (ii) such representation must have been made with the knowledge that it was false, or without any genuine belief that it was true; (iii) the representation must have been made with the intention that it should be acted upon by the plaintiff or by a class of persons which includes the plaintiff; (iv) the plaintiff had acted upon the false representation; and (iv) the plaintiff suffered damage by acting upon the false representation. Although the law has always been cautious in ascribing legal significance to a party's silence, silence can acquire a positive content and amount to a representation in certain circumstances, in particular where there is a duty to speak and the question as to whether there is a duty to speak must be decided having regard to the facts of the case at hand and the legal context in which the case arises: see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [65]; *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [28]; *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [58]–[61]. As summarised in *The Law of Torts*, silence may constitute a misrepresentation if there is "wilful suppression of material and important facts thereby rendering the statements untrue", assessed in light of the context and circumstances in which it occurred: *The Law of Torts* at paragraph 14.005. A representation may also be implied from the conduct of the defendant: *The Law of Torts* at paragraph 14.006. The test is "whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all circumstances necessarily have been informed of it": *The Law of Torts* at paragraph 14.006. As to the requirement that there must be a misrepresentation

of *fact*, the state of a man's mind "is as much a fact as the state of his digestion": *ACTAtek, Inc and another v Tembusu Growth Fund Ltd* [2016] 5 SLR 335 at [58], citing the well known judgment of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483.

97 I did not understand any of the foregoing to be in dispute as a matter of law although two main additional points or qualifications were advanced by Counsel on behalf of the Defendants, *viz*,

(a) As a general rule, statements as to intention are not actionable misrepresentations as a statement of intention is a representation of the speaker's present plan for his *future* conduct. However, a statement of a person's intent may also include a representation that the person does in fact hold that intent. Thus, a statement of intention only becomes an actionable misrepresentation if it can be shown that at the time the statement of intention was made, the person who made it had no intention of doing what he asserted he would do. In such a case, there would be a misrepresentation of that person's state of mind: *Tan Chin Seng v Raffles Town Club Pte ltd* [2003] 3 SLR(R) 307 at [12], citing *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483.

(b) To prove fraud, the law requires compelling evidence. While the usual civil standard of proof on a balance of probabilities applies, the strength and cogency of the evidence must be furnished before the court would conclude that such a serious allegation is established. Courts will not lightly draw inferences of fraud without sufficient proof: *Syed Ahmad Jamal Alsagoff* at [50].

98 Here, the specific representations said to have been made by Mr Eric Schaer and relied upon by HE&SF were as follows:

> (a) that "MySQUAR was a start-up Myanmar-language social media and entertainment platform which would eventually be listed on the London Stock Exchange";
>
> (b) that Mr Eric Schaer had "strongly encouraged Mr Eyckeler to invest in MySQUAR";
>
> (c) that if [HE&SF] put in money, it or an entity related to or controlled by Mr Eyckeler would then be given shares in the MySQUAR group.

99 As to (a), I have no doubt that Mr Eric Schaer did make such a representation at various times in the course of 2014. However, as to the first part of (a), the fact is that MySQUAR was indeed a "start-up Myanmar-language social media and entertainment platform" and any such representation was not false and could not therefore found a claim for misrepresentation.

100 As to the second part of (a), such representation looked to a future event. As formulated, the plea is defective because it does not make clear what is alleged to be the representation of fact and why such representation is allegedly false. For the avoidance of doubt, the allegation does not amount to a collateral warranty that such event *would* happen – and no such case is pleaded. In truth, it is, at best, an (implied) "representation" that Mr Eric Schaer thought and honestly believed that MySQUAR BVI would subsequently be listed on the London Stock Exchange – and, in my judgment, any such representation was probably true at the time it was made and at all material times thereafter or, at

least, there is no basis for reaching any contrary conclusion. Indeed, in evidence, Mr Eyckeler accepted that such alleged representation was not false.

101 As to (b), I accept that Mr Eric Schaer did indeed strongly encourage Mr Eyckeler to invest in the MySQUAR Group. However, as with the representation in (a), such "encouragement" could not be said to be and was not a false representation. Indeed, in evidence, Mr Eyckeler again accepted that such alleged representation was not false.

102 In truth, as pleaded, the main thrust of the case against Mr Eric Schaer for misrepresentation rested on the alleged misrepresentation in (c). As to this, I am satisfied on the evidence that Mr Eric Schaer did make such a representation and that HE&SF (through Mr Eyckeler) did rely upon such representation. However, it is important to emphasise that the claim advanced by HE&SF was (again) not one based upon any collateral warranty by Mr Eric Schaer but one of fraudulent misrepresentation and, in that context, the principal issue is whether Mr Eric Schaer did intend that if HE&SF put in money, it or an entity related to or controlled by Mr Eyckeler would then be given shares in the MySQUAR Group.

103 On behalf of Mr Eric Schaer, it was submitted that that was indeed his intention at all material times and that the contemporaneous documents show that he had every intention of procuring the transfer of shares from RDH to one of Mr Eyckeler's entities. In that context, counsel on behalf of Mr Eric Schaer relied heavily on the exchanges in the period 6 November 2014 to 11 December 2014 passing between Mr Eric Schaer, Mr David Schaer, Mr Hung and Mr Eyckeler. In summary, it was his submission that such evidence does not paint a picture of Mr Eric Schaer having no intention of causing RDH to transfer the

shares in SQUAR; that in fact it shows the contrary because Mr Eric Schaer specifically took steps to ask Mr David Schaer to follow-up with Mr Eyckeler on the status of the share transfer; and that therefore HE&SF has not discharged its burden of proving that at the time of the representation in (c) above, Mr Eric Schaer had no intention of transferring the shares in SQUAR to Mr Eyckeler and/or his entities.

104 As to such submissions, I readily acknowledge that the exchanges *prior to* 11 December 2014 are consistent with and certainly indicate an *apparent* or *outward* intention on the part of Mr Eric Schaer to transfer shares to Mr Eyckeler or one of his entities if the investment was made. I am also satisfied that Mr Eyckeler was certainly persuaded to cause HE&SF to hand over the sum of US$300,000 on the basis of what he was told by Mr Eric Schaer.

105 However, it does not follow that Mr Eric Schaer's representation as to what would happen reflected what was his *actual* intention at that time or at any time thereafter. On the contrary, having regard to the totality of the evidence, it is my conclusion that Mr Eric Schaer never did intend to cause the shares to be transferred to Mr Eyckeler or one of his entities and that his representation that such shares would be transferred was false. I reach that conclusion for reasons which I would summarise as follows.

106 First, notwithstanding that there remains (as I have already said earlier in this Judgment) some uncertainty as to whether Mr Eyckeler ever completed and returned the STF and I have been unable to conclude, one way or another, whether this did or did not happen, there is no doubt that Mr Eric Schaer was fully aware that HE&SF had paid the sum of US$300,000 and that such sum was for the purpose of acquiring the relevant shares.

107 Second, in such circumstances, if it had been the actual intent of Mr Eric Schaer at the time (or at any material time thereafter) to cause the shares to be transferred, any honest person in his position would, in my view, (i) have taken appropriate steps to cause the relevant shares to be transferred to HE&SF; or (ii) gone back to Mr Eyckeler, told him that such transfer could not or would not take place (if that were the case) and (at the very least) sought further instructions; or (iii) returned the sum of US$300,000 promptly or within a reasonable time.

108 Third, Mr Eric Schaer did none of those things. On the contrary, he pocketed the money which then apparently just disappeared. Other than to insist (negatively) that he had no obligation to segregate the money, he has not given any explanation as to what steps he took to cause the shares to be transferred or what happened to the money other than to advance a case in these proceedings that the money was returned as part of the two tranches paid to HE&SF in July 2015 at the request of Mr Eyckeler and on the basis, so Mr Eric Schaer says, of an alleged agreement with Mr Eyckeler at that time, *ie*, in July 2015, after the listing. I have already addressed that case earlier in this Judgment. For the reasons stated above and which I do not propose to repeat, it is my conclusion that Mr Eyckeler never asked for the money back at that time and the alleged agreement with Mr Eyckeler for the return of that money is a deliberate lie by Mr Eric Schaer designed to seek to conceal what amounts, in my view, to dishonest conduct on the part of Mr Eric Schaer.

109 Fourth, I also bear well in mind Mr Eric Schaer's evidence with regard to the six trustees/nominees which I have rejected. In my view that evidence was part of a dishonest attempt on the part of Mr Eric Schaer to obfuscate and to confuse the true position with regard to the SQUAR shares.

110 For the avoidance of doubt, I fully accept that (i) the burden of proving the fraudulent misrepresentation lies on HE&SF; (ii) while the standard of proof for fraud is the balance of probability, the law generally requires compelling evidence to prove fraud; and (iii) the case as pleaded and advanced by HE&SF for fraudulent misrepresentation under this head requires the Court to focus on Mr Eric Schaer's actual intention as at the date when Mr Eyckeler caused HE&SF to pay the sum of US$300,000. However, in considering what Mr Eric Schaer's actual intention was at that stage, it seems to me entirely legitimate to consider what steps he did or did not take to cause the shares to be transferred to HE&SF or one of Mr Eyckeler's entities and what happened to the money. As already stated, he apparently took no steps to cause the shares to be transferred and failed to take any of the other steps which, in my judgment, any honest person would have taken.

111 For these reasons, it is my conclusion that the claim for misrepresentation under this head succeeds against Mr Eric Schaer personally and that HE&SF is therefore entitled to recover against him personally the sum of US$300,000 together with interest as may be appropriate.

112 I should make plain that any recovery against RDS in respect of the MySQUAR moneys would obviously reduce the liability of Mr Eric Schaer *pro tanto* and *vice versa*, and the order of the Court to be drawn up following delivery of this Judgment must, of course, reflect that position.

Part III(C): Dishonest assistance claim against Mr Eric Schaer personally

113 On behalf of HE&SF, it was submitted that the elements of a claim in dishonest assistance are: (a) the existence of a trust; (b) a breach of that trust; (c) assistance rendered by the third party towards the breach; and (d) a finding

that the assistance rendered by the third party was dishonest: see *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*George Raymond Zage III*") at [20]. The Court of Appeal further held that for dishonesty in the context of knowing assistance, a defendant "must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them": *George Raymond Zage III* at [22].

114 As to the facts, it was submitted on behalf of HE&SF (and I accept) that Mr Eric Schaer knew the purpose for which HE&SF had remitted the sum of US$300,000, *ie*, to acquire shares in SQUAR.

115 It was also submitted on behalf of HE&SF that Mr Eric Schaer should have segregated the sum of US$300,000; that he should not have allowed RDS to use such money for other purposes; and that his failure to do so amounts to dishonestly assisting RDS in breaches of trust. I do not accept those submissions. In my view, it does not follow from the fact that Mr Eric Schaer knew the purpose for which HE&SF had remitted the sum of US$300,000 that he should have "segregated" such money, or that there was an intention to create any trust – whether express or resulting *Quistclose* trust or indeed any other trust – in respect of such money. On that basis, it is my view that, as formulated, this claim against Mr Eric Schaer must be rejected.

Part III(D): Conspiracy claim against RDS and Mr Eric Schaer personally.

116 I deal with this claim below together with a similar claim for unlawful conspiracy against both Defendants in respect of the Fastacash moneys.

Part IV: The Fastacash moneys

Part IV(A): Claim against RDS

117 I have already summarised certain important facts concerning the Fastacash moneys. In summary, the present claim concerns the sum of US$3,235,385 which, it is common ground, was transferred by HE&SF to RDS on or around 20 July 2015. In essence and at the risk of repetition, HE&SF's case is that this sum was transferred for the purpose of enabling HE&SF or its nominee to subscribe for 2,537,557 Series B shares in Fastacash (whether directly or indirectly) but that such shares were never issued or transferred to HE&SF or its nominee and the money has never been returned. In contrast, RDS's case is in essence that (i) the Fastacash moneys were transferred pursuant to an investment proposal to acquire Fastacash Series B shares indirectly through a BVI entity; (ii) the investments eventually culminated in the conclusion of the two SPAs dated 26 April 2016 as referred to above; (iii) as confirmed by Mr Nguyen in his letter dated 19 September 2016, the two BVI companies which supposedly held the relevant Fastacash shares were "*fully transferred*" to Global Finance, *ie*, HE&SF's nominee; and (iv) HE&SF's claim must therefore fail.

118 I readily accept that both the original investment proposal contained in the Share Purchase Term Sheet and the terms of the SPAs contemplated that the shares in Fastacash would in effect be held indirectly through shares in either RDPA (according to the former) or Pan-Asia and Deal Plus (according to the latter). To that extent, I accept that it appears that it was never intended that HE&SF or its nominee would receive shares directly in Fastacash. Indeed, Mr Eyckeler's own email dated 25 April 2016 indicates that he was (at least at that

date) aware of the intended arrangement albeit that his understanding appears to have been that this was for "*administrative purposes*".

119 Be that as it may, I have already concluded that the two SPAs did not constitute binding agreements and, in those circumstances, it seems to me that HE&SF is *prima facie* entitled to succeed in its claim for unjust enrichment and the return of the sum of US$3,235,385 on the same failure of basis as the MySQUAR moneys, subject to two important points raised by the Defendants.

120 First, as I have already indicated, it is RDS's case that as confirmed by Mr Nguyen in his letter dated 19 September 2016, the two BVI companies (*ie*, Pan-Asia and Deal Plus) which supposedly held the relevant Fastacash shares were "*fully transferred*" to Global Finance, *ie*, HE&SF's nominee; and that there was no failure of basis. However, in my view, RDS's case must be rejected for a number of reasons which I would summarise as follows, *viz*,

(a) First, on the basis (as I have concluded) that the SPAs were not agreements binding in law and/or have been validly avoided/rescinded, it seems to me that any purported transfer of shares in Pan-Asia or Deal Plus is legally irrelevant and/or does not preclude the claim for unjust enrichment on the failure of basis as stated above.

(b) Second, if, contrary to my conclusion, the SPAs were binding in law and/or have not been validly avoided/rescinded, the underlying premise of such SPAs was that the Fastacash IPO would take place. However, that never happened. On that basis as well, it seems to me that that there was a failure of basis. For this reason, I do not accept the submission advanced on behalf of the Defendants that to allow the unjust

enrichment claim would be tantamount to undermining what they described as the "*contractual allocation of risks*" in the SPAs.

(c) In any event, on a balance of probability, I am unpersuaded that the two BVI companies which supposedly held the relevant Fastacash shares were "*fully transferred*" to Global Finance either within a reasonable time or at all. The evidence with regard to this point (as to which the legal and evidential burden of proof lies on the Defendants) is at best sketchy. In truth, the high point is the assertion in Mr Nguyen's letter dated 19 September 2016. However, in my view, such assertion is not "evidence" at all and, in any event, falls far short of what would be necessary to establish, on a balance of probability such matters as a fact. Mr Nguyen did not give evidence at the trial and there is either no evidence or insufficient evidence to support the assertions made in the letter dated 19 September 2016. Moreover, there is some evidence which would seem to indicate that Pan-Asia and/or Deal Plus did not hold the requisite number of shares in Fastacash. Thus, according to investigations carried out by Mr Eyckeler, it appears from the Return of Allotment of Shares that Deal Plus and Pan-Asia had been allotted 627,451 and 645,950 shares in Fastacash respectively on 6 January 2016. Therefore, the total number of shares between them as at that date would seem to have been 1,273,401. That was 1,264,156 short of what Mr Eyckeler was told by the Schaers that the companies held. The Return of Allotment of Shares lodged on 5 April 2016 shows only an additional allotment of 62,745 Fastacash shares to Deal Plus and 64,595 Fastacash shares to Pan-Asia. As at 28 November 2016, search results show that Deal Plus and Pan-Asia had only 690,196 shares and 710,545 shares respectively in Fastacash. According to the Register of Members

> of Fastacash, as at 6 December 2017, Deal Plus had been allotted 627,451 ordinary shares and 62,745 preference shares in Fastacash and Pan-Asia had been allotted 645,950 ordinary shares and 64,595 preference shares in Fastacash.

121 Second, it was submitted on behalf of the Defendants that the claim by HE&SF for unjust enrichment for the Fastacash moneys must fail because it had not shown or proved that such moneys are a benefit to which it (*ie*, HE&SF) is "*legally entitled or which forms part of [its] assets*" and that, as held by the Court of Appeal in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [128], this is an essential matter to be established in order to prove that the benefit given to the recipient was "*at the expense of the claimant*". In this context, the Defendants relied, in particular, on an email from Mr Eyckeler dated 25 April 2016 where he stated *inter alia* that the original payment of US$3,286,138 was made "*by HE&SF Properties, LP (a U.S. limited partnership that I control) on behalf of US Global Finance Corp*". The Defendants also relied on certain parts of the oral evidence of both Mr and Mrs Eyckeler with regard to what was referred to as an "*internal asset allocation*" or "*internal asset relocation*" under which the funds transferred by HE&SF were supposed to be repaid not to HE&SF but to Global Finance. On behalf of the Defendants, it was submitted that the Eyckelers were unable to provide or to explain the precise mechanism under which this arrangement was effected, and that neither could give a coherent explanation as to what the internal asset allocation actually entailed. It is fair to say that the evidence on this topic was somewhat obscure. I suspect that it may relate in part to the division of marital assets between Mr Eyckeler and Mrs Eyckeler. I do not know. However, in my view, this is all something of a red herring. In short, there is no doubt that the Fastacash moneys were paid by HE&SF and, as such, it seems to me that it is

prima facie entitled to pursue any claim for unjust enrichment by way of failure of basis in its own name. Whatever "internal" arrangements might have existed between Mr and Mrs Eyckeler is, in effect, *res inter alios acta*.

122 For these reasons, it is my conclusion that HE&SF's claim under this head against RDS for unjust enrichment by way of failure of basis succeeds, and that therefore, RDS is liable to repay the Fastacash moneys to HE&SF together with interest as may be appropriate.

123 However, I reject the other claims under this head as advanced by HE&SF in respect of the Fastacash moneys on the basis of breach of trust or express or resulting *Quistclose* trust for similar reasons to those set out above in relation to the MySQUAR moneys. In summary, I do not consider that there is any basis for concluding that there was any intention on the part of either Mr Eyckeler or HE&SF to constitute RDS as a trustee and confer a duty on RDS to apply the money exclusively in accordance with the stated purpose. Nor do I consider that there was a lack of intention on the part of Mr Eyckeler or HE&SF to part with the entire beneficial interest in the transferred money.

Part IV(B): Misrepresentation claim against Mr Eric Schaer personally

124 I have already summarised the applicable legal principles in the context of the claim for misrepresentation in respect of the MySQUAR moneys.

125 As to the facts, it was HE&SF's pleaded case that the following misrepresentations were made by Mr Eric Schaer:

(a) that "Fastacash was a global platform enabling payments across social media platforms and had plans for an IPO in late 2015";

(b) that RDS had "led the US$15,000,000 Series B investment funding for Fastacash";

(c) that Mr Eric Schaer "was or would be a director of Fastacash";

(d) that Mr Eric Schaer and Mr David Schaer "together had control of the investment, whether directly or otherwise";

(e) that "the Fastacash IPO would take place no later than December 2015 and if that did not happen for any reason, Mr Eyckeler was to receive 10% more shares"; and

(f) that if HE&SF put in money, HE&SF or an entity related to or controlled by Mr Eyckeler would then be given shares in Fastacash.

126 In cross-examination, Mr Eyckeler conceded that the representations in (a), (b) and (c) above were true – as was indeed the case. So I say no more about them.

127 As to the alleged misrepresentation in (d), I do not accept that Mr Eric Schaer made any representation that Mr David Schaer had any "control" over the Fastacash investment. As to the alleged representation that Mr Eric Schaer represented that he had control of the Fastacash investment, the evidence was unclear. I am unable to make any positive finding to that effect. In any event, even if such a representation was made, I accept that, as submitted on behalf of Mr Eric Schaer, it was substantially true. "Control of the investment" referred to Mr Eric Schaer's ability to determine which groups of investors were able to buy into RDPA and thus, indirectly invest in Fastacash Series B shares. To that extent, it is true that Mr Eric Schaer had control of the investment and,

accordingly, there is no relevant misrepresentation. For these reasons, I reject the case advanced on the basis of this alleged misrepresentation.

128 As to the alleged misrepresentation in (e), I accept that Mr Eric Schaer probably did tell Mr Eyckeler at some stage that the Fastacash IPO would take place no later than December 2015, and that if that did not happen for any reason, Mr Eyckeler would receive 10% more shares. However, the difficulty with this allegation is to identify the nature of the alleged representation of fact. As formulated, this allegation relates to a future event or an alternative future event; as in the case of at least one of the alleged MySQUAR representations, the plea is defective because it does not make clear what is alleged to be the representation of fact – and why such representation is allegedly false. For the avoidance of doubt, the allegation does not amount to a collateral warranty that such event(s) *would* happen – and no such case is pleaded. In truth, this is, at best, an (implied) "representation" that, at the time the representation was made and (perhaps) at all material times thereafter, Mr Eric Schaer thought and honestly believed that the Fastacash IPO would take place no later than December 2015 and if that did not happen for any reason, Mr Eyckeler was to receive 10% more shares.

129 On behalf of Mr Eric Schaer, it was submitted that the alleged representation was not false. In support of that submission, reference was made to the Fastacash Register of Members dated 6 December 2017 which confirms that Deal Plus and Pan-Asia were each given 10% more shares on 5 April 2016. Further, it was submitted that this was in accordance with the Share Subscription Agreement dated 25 June 2015 which provided that if Fastacash did not consummate an underwritten public offering of ordinary shares on the AIM by 31 December 2015, Fastacash was to issue, at nominal consideration to each

subscriber, such number of Series B shares equal to 10% of the total number of Series B shares held by the subscriber as at 31 December 2015. The difficulty with such a submission is that it does not focus on the position – and Mr Eric Schaer's belief – at the time when the representation was made. Rather, it seeks to explain and justify the representation by subsequent events; and (although subsequent events may obviously be potentially relevant – as I have found in the case of the MySQUAR moneys) I am unpersuaded that, in the present instance, such alleged subsequent events necessarily prove the falsity of the representation (in the sense explained above) when it was made. In any event, there is no doubt that the burden lies on HE&SF to prove that the mirepresentation was false at the time it was made and at any material time thereafter, and I am unpersuaded that there is any sufficient evidence to that effect. For these reasons, I reject the case advanced on the basis of this alleged misrepresentation.

130 As to the alleged misrepresentation in (f), there is again some difficulty in identifying the nature of the alleged misrepresentation. Yet again, for the avoidance of doubt, the allegation does not amount to a collateral warranty that such event(s) *would* happen – and no such case is pleaded. Rather, as pleaded, it appears that the main thrust of the allegation is that the falsity of this statement lies in the fact that Mr Eric Schaer did not have the intention at the time of making the representation to give HE&SF (or an entity related to or controlled by Mr Eyckeler) Fastacash shares. As to the representation itself, HE&SF served particulars identifying two documents that were relied upon as evidence of the alleged "offer" to participate in an investment in Fastacash, *viz*, the email from Mr David Schaer dated 26 May 2015 and the further email from Mr Eric Schaer dated 7 July 2015.

131 I readily accept that, as submitted on behalf of Mr Eric Schaer, there was never any representation in these emails (or otherwise) that Mr Eyckeler (or a related entity) would receive any shares *directly* in Fastacash. Rather, the representation was that Mr Eyckeler (or a related entity) would receive shares *indirectly* in Fastacash. More fundamentally, I remain unpersuaded on the evidence that at the time these "offers" were made and at any material time thereafter prior to the transfer of the Fastacash moneys that Mr Eric Schaer knew or did not have a genuine belief that if HE&SF put in money, HE&SF or an entity related to or controlled by Mr Eyckeler would not then be given shares indirectly in Fastacash.

132 For all these reasons, it is my conclusion that HE&SF has been unable to discharge its burden of showing that any of the alleged representations were untrue or that they were made by Mr Eric Schaer with knowledge that they were false and/or in the absence of any genuine belief that they were true. It follows that HE&SF's claim for fraudulent misrepresentation against Mr Eric Schaer in respect of the Fastacash moneys must be rejected.

133 By way of postscript, I should perhaps say that I recognise that, at first blush, it might be thought that this conclusion appears to be somewhat inconsistent with – or at least stands in stark contrast to – my previous conclusion concerning HE&SF's claim for fraudulent misrepresentation against Mr Eric Schaer personally in respect of the MySQUAR moneys, in particular because they both fall into a similar pattern, *ie*, money is transferred to buy shares, the contemplated transaction is never consummated, the money is never returned and, on the contrary, appears to vanish. However, notwithstanding certain similarities, the fact is that the contemplated transactions in respect of, on the one hand, the MySQUAR moneys and, on the other hand, the Fastacash

moneys are different. In particular, the Share Purchase Term Sheet concerning Fastacash attached to the important email dated 7 July 2015 makes plain that the intended purchase was subject to certain conditions precedent and, unlike the MySQUAR IPO, the Fastacash IPO failed. Moreover, it is necessary to consider the particular allegations as pleaded separately and, whatever doubts I may have with regard to the conduct of Mr Eric Schaer, I have borne well in mind that the burden of proof lies on HE&SF to prove its case on a balance of probability with regard to each of the various claims. For the avoidance of doubt, my conclusion as stated above rejecting the claim against Mr Eric Schaer personally in respect of the Fastacash moneys is not to be read as meaning that I have concluded that Mr Eric Schaer was not guilty of fraudulent misrepresentation, but rather, that I am unable to conclude on a balance of probability that he was.

Part IV(C): Dishonest assistance claim against Mr Eric Schaer personally

134 In my judgment, this claim against Mr Eric Schaer fails for similar reasons to those which I have given in relation to the MySQUAR moneys. In summary, it does not follow from the fact that Mr Eric Schaer knew the purpose for which HE&SF had remitted the Fastacash moneys that he should have "segregated" such money or that there was an intention to create any trust – whether express or resulting *Quistclose* trust or indeed any other trust – in respect of such money. On that basis, it is my view that, as formulated, this claim against Mr Eric Schaer must be rejected.

Part IV(D): Conspiracy claim against RDS and Mr Eric Schaer personally

135 I deal with this claim below together with a similar claim for unlawful conspiracy against both Defendants in respect of the MySQUAR moneys.

Part V: Bridging Loan

136 In summary, the claim advanced by HE&SF under this head (supported by the evidence of Mr Eyckeler) is that in June 2015, the Schaers approached Mr Eyckeler for US$1.5m as a "bridging loan" to be made to the Schaers and RDPA; that Mr Eric Schaer and/or Mr David Schaer represented that the loan of US$1.5m would be repaid within a year, together with interest at the rate of 1% per month; that HE&SF (*ie*, Mr Eyckeler) relied on such a representation and on or about 27 November 2015, remitted the sum of US$1.5m to RDPA; and that the representations were false in that Mr Eric Schaer knew or was reckless as to whether the representations were true, at the time the representations were made, that the US$1.5m would be repaid at all. In effect, the claim against Mr Eric Schaer is one for fraudulent misrepresentation and/or conspiracy.

137 In considering this claim, it is important – and somewhat surprising – to note that there is no proper documentation containing the terms of this alleged bridging loan – although Mr Eyckeler seeks to rely upon the terms of a draft promissory note apparently prepared by him some months *after* the transfer of the sum of US$1.5m. So far as relevant, I deal with this further below. Further, the claim is not advanced (as it might have been) as a simple claim in contract against the "borrower" – whoever that might be. Nor is it advanced against RDS (or RDPA which company is, of course, not party to the present proceedings). Rather, it is a claim advanced only against Mr Eric Schaer personally on the basis of alleged fraudulent misrepresentation and/or conspiracy. (In passing, I should note that at a very late stage shortly before the commencement of the trial, HE&SF made an application to amend its Statement of Claim to include a

claim for breach of contract but on 25 September 2018, I disallowed the application for reasons which I need not repeat.)

138 As for the claim in fraudulent misrepresentation, I have already summarised the necessary elements which must be proved to establish such a claim. Here, it was submitted on behalf of Mr Eric Schaer that none of these elements had been satisfied.

139 There is no dispute that US$1.5m was indeed remitted by HE&SF to RDPA on 27 November 2015 but it is denied that this was a loan. On the contrary, on behalf of Mr Eric Schaer, it was submitted that this money was actually part of the US$5,176,616 that Mr Eyckeler was supposed to have brought in as suggested by Mr Eric Schaer in his 7 July 2015 e-mail concerning the (indirect) purchase of shares in Fastacash.

140 Moreover, Mr Eric Schaer denies making any representations at all. Indeed, his evidence was that he had "*never spoken to [Mr] Eyckeler about or made any request for such a loan*" to RDPA, Mr David Schaer or himself. I do not accept that evidence. In particular, it seems to fly in the face of the contemporaneous documents which, at the very least, support Mr Eyckeler's evidence that he was asked by the Schaers to provide a bridging loan. For example:

(a) On 26 August 2015, Mr David Schaer sent an e-mail to Mr Eyckeler stating: "*Also, would you be able to provide an update on the bridge? Shorter terms would work but we do need to close it out soon to maintain credibility.*" In evidence, Mr David Schaer agreed that the word "bridge" meant a loan but said that the e-mail was asking about a loan that Mr Eyckeler needed to take in order to raise the rest of the

US$5,176,616 needed for the investment in Fastacash. In my view, that explanation does not fit in well with the wording of this message and seems most unlikely. On behalf of Mr Eric Schaer, it was submitted that the email is irrelevant in the present context because it was sent not by him but by Mr David Schaer. It is true that the message was indeed sent by Mr David Schaer but, even so, it is in my view relevant because of its reference to "bridge" which, as I say, supports Mr Eyckeler's evidence.

(b) On 13 October 2015, Mr Eric Schaer sent a text message to Mr Eyckeler saying: "*David told me you would have everything finished up this week so I wanted to coordinate on that*". (For present purposes, I propose to ignore the suggested conversation between Mr David Schaer and Mr Eyckeler on or about 13 October 2015 as to which the evidence was somewhat vague and uncertain.) On its face, this message says nothing expressly about any loan, still less the quantum or period of the suggested loan or any form of interest payable. To that extent, it is neutral – although it seems to me at least consistent with a possible loan. The evidence of Mr David Schaer was that he had no recollection as to what this message was referring to. His only suggestion was that it could be a reference to Mr Eyckeler completing his "*obligation*" to put in the US$1.9 million. As I understand, that is a reference back to the investment proposal contained in the email dated 7 July 2015 concerning the (indirect) purchase of shares in Fastacash. However, as already stated above, I accept Mr Eyckeler's evidence that he rejected such a proposal; as such, I do not accept Mr David Schaer's evidence that he (Mr Eyckeler) had any "obligation" to put up US$1.9m.

(c) Between 22 and 27 November 2015, there were a number of text messages which are also consistent with Mr Eyckeler's evidence that it was the Schaers who needed a loan of US$1.5m. In particular, on 22 November 2015, Mr David Schaer sent a text message to Mr Eyckeler giving the "*xfer details*" setting out the bank account details of RDPA. There is no evidence that Mr Eyckeler was privy to the bank account information of RDPA and that is why Mr David Schaer had to give it to him if the Schaers wanted the money to go there.

(d) As submitted on behalf of HE&SF, no reason has been suggested as to why Mr Eyckeler would want the money to go to RDPA – he had never remitted money to RDPA before, he had always remitted money as instructed and (if the Defendants are to be believed that the US$1.5m was part of the US$5,176,616 for the Fastacash plan) then there was no reason why Mr Eyckeler would not remit the US$1.5mto RDS instead of to RDPA, particularly since he had the bank account details of RDS and he had already sent the US$3,235,385 for the Fastacash "plan" to RDS. At first, Mr David Schaer suggested in evidence that it could be that this was because Mr Eyckeler had spoken with someone else and that was why Mr Eyckeler then sent the money to RDPA. I do not accept that explanation if only because it is inconsistent with Mr David Schaer's own text message.

(e) Three days later, on Wednesday 25 November 2015, Mr David Schaer sent another text message which said, "*C [ie, Mr Eric Schaer] has a hard date of Nov. 30 to finalize, so I know he (we) really appreciates your coming through this week*". The next day, Thursday 26 November 2015, Mr David Schaer sent a further text message to chase

> Mr Eyckeler for the money Mr Eric Schaer needed stating: "*Eric asked if you might have a chance to check on the wire today as it doesn't yet show.*" The following day, Friday 27 November 2015, Mr David Schaer sent two handphone text messages to say the money had not arrived yet. Finally, later in the day on Friday 27 November 2015, Mr David Schaer updated Mr Eyckeler stating: "*Update – Fully funded.*"

141 In my view, these contemporaneous messages contradict the evidence of both Mr David Schaer and Mr Eric Schaer and strongly support the evidence of Mr Eyckeler that the Schaers were in urgent need of funds by end November 2015 and that, in order to assist them, Mr Eyckeler had agreed to provide such funds. At the risk of repetition, the evidence of Mr David Schaer was that Mr Eyckeler was being asked to honour his commitment to bring in US$5,176,616 and that US$1,941,231 was already overdue on that "plan". He said that all these text messages were his way of putting it nicely to Mr Eyckeler and that at this time, Mr Eric Schaer wanted to "*[close] out everything on the funding*". I do not accept that evidence. In particular, it does not fit in with the potential investment in the Fastacash IPO – both as a matter of substance and timing. To my mind, the entire thrust of the contemporaneous text messages (in particular, the statement in the message on 25 November 2015 that "*…he (we) really appreciates your coming through this week…*") is that Mr Eyckeler was helping and supporting the Schaers, and that the transfer of US$1.5m which Mr Eyckeler caused to be made on 27 November 2015 was indeed a "bridging loan".

142 That conclusion is also supported by the fact that Mr Eyckeler's written instructions to his bank to effect the transfer of US$1.5m stated: "*For your documentation, please use short loan as reason for payment.*" However, I

recognise that, as submitted on behalf of Mr Eric Schaer, this is, of course, an internal document and to that extent is, perhaps, of little weight.

143 In support of HE&SF's case, reliance was also placed on a draft promissory note prepared by or on behalf of Mr Eyckeler. It is unnecessary to set out the details of the document. For present purposes, it is sufficient to note that it seems to confirm that the prior transfer was a loan on terms substantially similar to what is now asserted by HE&SF – although there are differences (the Defendants would say important differences) with regard to certain details. However, it is common ground that this document was prepared (the Defendants say "fabricated") by or on behalf of Mr Eyckeler some time after the money was transferred. The exact date when the document was prepared is uncertain although I accept the evidence of, in particular, Mrs Eyckeler that she gave Mr David Schaer a copy of the unsigned promissory note on about 14 August 2016. Apparently, he told her that he did not know what she was talking about and referred her to Mr Eric Schaer; it is submitted on behalf of HE&SF that the Schaers then brushed them away. I accept that the foregoing can be said to support, to some extent, the case advanced on behalf of HE&SF that the transfer of US$1.5m was a bridging loan: on one view, it is perhaps inherently unlikely that Mr Eyckeler would have taken the trouble to prepare this draft promissory note if the position were otherwise. However, it can perhaps equally be said that Mr Eyckeler decided to arrange for the promissory note to be drafted in order to make good a hopeless case or at least bolster a weak case. To that extent, I accept that the foregoing does not go very far; as submitted on behalf of Mr Eric Schaer, the appropriate course is, in my view, to give this document little weight, if any at all.

144 For all these reasons, it is my conclusion that the transfer of the sum of US$1.5m on or about 27 November 2015 was a loan. To that extent, I accept the case as advanced on behalf of HE&SF. However, as already stated, this is not a simple claim against the borrower (whoever that may be) for return of the loan. Rather, it is a claim against Mr Eric Schaer personally for damages for fraudulent misrepresentation and/or conspiracy. In support of those claims, it was submitted on behalf of HE&SF that such a loan would not have been given but for the Schaers' "*promise*" to repay it within a year with interest at 1% per month; in so far as Mr Eric Schaer may have relied on Mr David Schaer to communicate to Mr Eyckeler their need for the money and their promises to repay it, Mr Eric Schaer must be taken to have adopted the representations and statements from Mr David Schaer. As formulated, I do not consider that this entitles HE&SF to recover against Mr Eric Schaer on the basis of fraudulent misrepresentation and/or conspiracy and, in my view, the evidence does not justify such a conclusion. I reach that conclusion for the following brief reasons:

(a) The evidence falls far short of any "promise" by Mr Eric Schaer personally that the sum of US$1.5m would be repaid.

(b) Even if there had been such a "promise", I do not consider that it could properly be characterised as an actionable representation. As stated above, it is an essential element of such a cause of action that the representation is a representation of fact or law. Any such "promise" would not amount to a representation of fact, and there is here no claim for breach of contract.

(c) Even if that is wrong, I do not consider that there is any sufficient evidence to support the conclusion that Mr Eric Schaer was guilty of any fraudulent or dishonest misrepresentation or conspiracy.

(d) For the avoidance of doubt and contrary to HE&SF's pleaded case, I also do not find that at the time the transfer was made, *ie*, 27 November 2015, there is any sufficient evidence that Mr Eric Schaer knew that the US$1.5m would (or even might) never be repaid or was reckless with regard thereto.

145 For all these reasons, I reject the case as advanced against Mr Eric Schaer with regard to the alleged bridging loan in the sum of US$1.5m. I recognise that this conclusion may be thought to be somewhat unsatisfactory because there is no doubt that (i) at the request of the Schaers, Mr Eyckeler caused HE&SF to transfer the sum of US$1.5m to RDPA and (ii) it has never been repaid and seems to have vanished. The result is that HE&SF appears to have lost a very large sum of money. However, on the basis of the case as pleaded and in light of the evidence before me, my conclusion is as stated above.

Part VI: Conspiracy claim against RDS and Mr Eric Schaer personally

146 It was common ground between the parties that the elements for a claim for unlawful means conspiracy were as follows: (i) there is a combination of two or more persons to do certain acts; (ii) the alleged conspirators have the intention to cause damage or injury to the plaintiff by those acts; (iii) the acts are unlawful; (iv) the acts are performed in furtherance of the agreement; and (v) the plaintiff suffers loss as a result of the conspiracy: *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112].

147 Each of these elements require careful consideration in any particular case and, in my view, should be pleaded with specificity. This is consistent with and reflected in *Singapore Civil Procedure 2018* vol 1 (Foo Chee Hock ed)

(Sweet & Maxwell, 2018) at 18/8/15 where various authorities are cited as well as the following quote: "*Since a conspiracy to defraud is a serious charge, it ought not to be countenanced by a court unless properly taken in a party's pleadings supported by full particulars and evidence is led in to prove the pleaded case.*" I agree.

148 However, in the present case all that is pleaded (in paragraphs 34 to 35 of the Statement of Claim) is the following:

> … [T]he Defendants and [Mr] David Schaer wrongfully and with intent to injure [HE&SF] and/or to cause loss to [HE&SF] by unlawful means conspired and combined together to defraud [HE&SF] and to conceal such fraud and the proceeds of such fraud from [HE&SF].
>
> … [T]he Defendants and [Mr] David Schaer caused [HE&SF] to remit a total of USD 5,035,385 to [RDS] and [RDPA] even though the Defendants knew that these monies would not be applied for the purposes they were remitted for and would not be repaid to [HE&SF] at all.

Paragraph 36 then sets out what appears to be a claim for damages as well as a claim for lost profit and interest.

149 As submitted on behalf of the Defendants, such a plea is defective. Indeed, in my view, it is seriously defective and most unsatisfactory. This is particularly so because one of the alleged conspirators (*ie*, Mr David Schaer) was not a named Defendant – although he was, of course, a witness. Moreover, the opening written submissions served on behalf of HE&SF provided no further assistance as to the factual case being advanced on behalf of HE&SF in this respect.

150 After the end of the evidence, Counsel on behalf of HE&SF served written submissions including a long section setting out its factual case against

the Defendants. These contained a detailed analysis of the evidence with regard to what inferences and conclusions should be drawn as a matter of fact with regard to the various elements of the claim for unlawful means conspiracy.

151 In my view, this is not the way to conduct modern commercial litigation. The gravamen of the complaint made by counsel on behalf of the Defendants is not simply a forensic pleading point. Ordinary principles of justice demand that a defendant is entitled to know the case being advanced by a plaintiff and, as already noted above, conspiracy is a serious charge which should be properly particularised. For the avoidance of doubt, I do not consider that it is relevant that some of the points relied upon by HE&SF were trawled (at least in part) in cross-examination or that the main thrust of the complaint can be rendered nugatory or less serious by any suggestion that the Defendants could have sought further particulars.

152 For these brief reasons, I accept the threshold objection raised on behalf of the Defendants with respect to HE&SF's claim for unlawful means conspiracy as set out belatedly in the final written submissions served on behalf of HE&SF. In my view, if such a case was to be advanced, it should have been pleaded with proper particulars to give the Defendants a fair opportunity to address the points raised. Accordingly, I would reject the claim advanced for unlawful means conspiracy on this basis.

153 Even if I am wrong in accepting the threshold objection advanced on behalf of the Defendants, I would in any event have rejected HE&SF's claim for unlawful conspiracy. In so doing, it seems to me that the crucial point is that, as pleaded, this claim rests on the assertion that the alleged unlawful means conspiracy was one which involved Mr David Schaer. Whatever doubts I may

have with regard to the part played by Mr Eric Schaer, there is no evidence or insufficient evidence which would justify a conclusion that Mr David Schaer was involved in any such a conspiracy. For this brief reason, I would reject HE&SF's claim for unlawful means conspiracy against the Defendants.

Part VII: Conclusions

154 For all these reasons, the following are my conclusions:

(a) I reject the threshold defence raised by the Defendants that HE&SF has waived any of its present claims or is otherwise barred from pursuing such claims.

(b) With regard to the MySQUAR moneys:

(i) HE&SF's claim to recover the sum of US$300,000 succeeds against RDS (on the basis of unjust enrichment) and Mr Eric Schaer personally (on the basis of misrepresentation) together with interest as may be appropriate.

(ii) I reject HE&SF's other claims against RDS (on the basis of breach of trust, *Quistclose* trust and conspiracy) and against Mr Eric Schaer personally on the basis of conspiracy and dishonest assistance.

(c) With regard to the Fastacash moneys:

(i) HE&SF's claim to recover the sum US$3,235,385 succeeds against RDS (on the basis of unjust enrichment) together with interest as may be appropriate.

(ii) I reject HE&SF's other claims against RDS (on the basis of breach of trust, *Quistclose* trust and conspiracy) and against Mr Eric Schaer personally (on the basis of misrepresentation, conspiracy and dishonest assistance).

(d) With regard to the Bridging Loan, I reject the claim against Mr Eric Schaer personally (on the basis of misrepresentation and conspiracy).

(e) I reject RDS's counterclaims.

155 Counsel are requested to seek to agree and draw up an order to reflect the terms of this Judgment. In so doing, I hope that the parties will be able to agree any outstanding issues including questions of interest and costs failing which I will hear further argument as necessary.

Sir Henry Bernard Eder
International Judge

Gan Kam Yuin and Timothy Quek (Bih Li & Lee LLP) for the plaintiff;
Kelvin Koh, Nanthini Vijayakumar and Nguyen Vu Lan (TSMP Law Corporation) for the defendants.