IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 327

Suit No 743 of 2012

Between

1. ONG HAN LING
2. ENNY ARIANDINI PRAMANA

… Plaintiffs

And

1. AMERICAN INTERNATIONAL ASSURANCE COMPANY, LTD
2. AIA SINGAPORE PRIVATE LIMITED
3. MOTION INSURANCE AGENCY PTE LTD

… Defendants

JUDGMENT

[Tort] — [Conspiracy]

[Tort] — [Vicarious liability]

[Tort] — [Negligence] — [Causation]

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[Agency] — [Third party and principal's relations] — [Tortious liability]

[Trusts] — [Quistclose trusts]

[Restitution] — [Unjust enrichment] — [Equitable set-off]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

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v
American International Assurance Co Ltd and others

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High Court — Suit No 743 of 2012
Belinda Ang Saw Ean J
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29 December 2017 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 This action stems from the alleged fraud of Sally Low ("Sally"), who was, at all material times, an insurance agent of the first defendant, American International Assurance Company Ltd, an entity incorporated in Hong Kong ("AIA"). The second defendant, AIA Singapore Private Limited ("AIA Singapore"), a Singapore incorporated entity, took over AIA's insurance business in Singapore together with all its rights and liabilities in 2012. As such, AIA Singapore is a nominal party in this action. For convenience, the first and second defendants are referred to collectively as "the AIA defendants".

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2 The plaintiffs are a wealthy elderly Indonesian couple, Ong Han Ling ("OHL") and Enny Ariandini Pramana ("Enny") (collectively "the Ongs"). The Ongs claim that from 2002 to 2008, Sally, as AIA's insurance agent, perpetrated an elaborate insurance fraud on them. The core of this fraud was her promotion of a fictitious "AIA Thank You Policy" ("AIA TYP"), which OHL paid a premium of US$5,060,900 to AIA to purchase. According to the plaintiffs, Sally's deception continued over the years. Unbeknownst to them, Sally misused the US$5,060,900 remitted for the AIA TYP to purchase different AIA policies purportedly for the plaintiffs and their young teenage daughter. When the plaintiffs stumbled upon the existence of some of these policies, Sally represented that the policies had been erroneously listed under the Ongs' names as the result of a series of computer crashes at AIA. She then induced them to surrender these "erroneous" policies and return the bulk of the surrender proceeds, amounting to S$6,288,058 and US$1,000,000, to Sally, in the belief that she would return the proceeds to AIA. However, Sally misappropriated the money to purchase stocks and properties in her own name. According to the plaintiffs, they only began to discover the falsity of Sally's representations in January 2008. Sally was suspended by AIA on 9 October 2009 and her contract with AIA was terminated on 11 December 2009.

3 Fraud in the life insurance industry is not unknown and AIA is aware of it. There are incidents of fraud on insurers by the insured and/or a third party, and fraud by insurance agents on policyholders and/or the insurers. Stories of crooked agents' misappropriation of premiums and sales of bogus coverage using a legitimate insurance company's name are not unheard of. The twist in this action is the plaintiffs' alleged complicity in the agent's fraud. The AIA defendants' denial of liability is essentially premised on the plaintiffs' falsity,

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with Sally being the key witness for their Counterclaim in conspiracy. It is common ground that Sally pleaded guilty to criminal charges of cheating the plaintiffs after testifying in this trial. Nevertheless, the AIA defendants maintain that the plaintiffs had agreed with Sally to defraud AIA by fabricating the bogus AIA TYP; that OHL was the mastermind behind a scam that involved Sally and OHL forging documents bearing AIA's letterhead; that the plaintiffs' complaint that they were duped into purchasing the AIA TYP was a mere pretence; so was their tale that the remittance of US$5,060,900 was, without their knowledge and authority, diverted by Sally to buy other policies. The objective of the trickery was for the plaintiffs to make use of Sally's fraud and the fictitious AIA TYP to mount a dishonest claim against the AIA defendants for compensation based on the stated principal sum and assured returns.

4 The AIA defendants depicted Sally as someone who was unwillingly dragged deeper into the fraud in the hands of the main fraudster and puppet-master, OHL. Yet the details of the agreement of conspiracy, astonishing in themselves and taken at face value, smacks of so foolish such as to suggest a work of fiction. The evidence led needs to be clear and convincing and it is for the AIA defendants in their Counterclaim to properly establish the alleged conspiracy to the requisite standard of proof. If the unlawful means conspiracy is made out, the plaintiffs' claim against the AIA defendants must fail. The various causes of action raised by the plaintiffs in the alternative will be considered in turn if the conspiracy plea fails. In this event, the presenting scenario is one where the plaintiffs and AIA were the victims of Sally's fraud and the question that arises is whether the AIA defendants are liable to the plaintiffs for Sally's fraud. The plaintiffs claim that the AIA defendants are contractually bound by the terms of the AIA TYP, including the sums promised

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by Sally upon its purported maturity, or alternatively that the AIA defendants are vicariously liable for Sally's fraud or were negligent in failing to detect it. The plaintiffs' action against the AIA defendants is also founded on trust and unjust enrichment. The plaintiffs were able to recover some money from Sally, having sued Sally personally in Suit No 179 of 2010 and obtained default judgment. Therefore, the plaintiff's fall back claim against the AIA defendants is to recover the balance of their loss in the sum of S$1,597,250.69 (excluding interest).

5 The plaintiffs have also sued the third defendant, Motion Insurance Agency Pte Ltd ("Motion"), who they claim was Sally's manager and was responsible for her training and supervision. The plaintiffs' case against Motion is based on vicarious liability and negligence. Motion was set up by one Rayner Lee ("Rayner"), who was Sally's manager and trainer, although the issue of whether he supervised Sally in his personal capacity or as Motion' agent is disputed. The plaintiffs' claim against Motion will also fail if the AIA defendants succeed in their Counterclaim. For ease of reading, the paragraphs dealing with the plaintiffs' various claims against Motion are found at [123]-[127], [196]-[206] (vicarious liability for Sally's' fraud), [221]-[222] (tortious liability under agency principles), and [249]-[251] (negligence).

6 The plaintiffs are represented by Ms Deborah Barker, SC ("Ms Barker"). The AIA defendants are represented by Mr Wendell Wong ("Mr Wong"). Mr Melvin Chan acts for Motion.

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The Policies

7 I propose to list the various life insurance policies I will refer to in this judgment. Apart from the AIA TYP, from 2002 to 2003, there were several other policies ostensibly purchased in the respective names of the plaintiffs. These were genuine life insurance products being offered by AIA at the material time, but the Ongs claim that they had not applied for some of them:

(a) Policy numbers L533717242 ("P01") and L533717239 ("P03") are policies applied for and authorised by Enny and OHL respectively, and will be collectively referred to as the "Authorised Policies".

(b) Policy numbers U021484689 ("P02"), L533718186 ("P04"), U021485248 ("P05") and L534479699 ("P06") are policies in Enny (P04, P05, P06) and OHL (P02)'s names which they claim they had not applied for, and will be referred to as the "Unauthorised Policies".

(c) The Authorised Policies and Unauthorised Policies will collectively be referred to as the "AIA Policies" as and when relevant.

(d) P02, P05 and P06 were surrendered by OHL (P02) and Enny (P05, P06) in 2005 and 2006 respectively and will be referred to as the "Surrendered Policies".

(e) Policy number L533717226 ("P07") was a pre-allocated policy number (see [102] below) cited for some of Enny's medical reports, but AIA has never received a policy application for P07 and the plaintiffs make no claim in respect of it. It will not be referred to in this judgment.

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(f) Policy number L534076568 ("P08") was a policy which the Ongs claim that they had not applied for, the policy application was not approved and the Ongs do not claim in respect of it.

Counterclaim of unlawful means conspiracy

8 I begin by considering the alleged conspiracy between Sally and the plaintiffs. It is appropriate to resolve this allegation of conspiracy first because if the AIA defendants' Counterclaim succeeds, it disposes of the entire case as the plaintiffs cannot succeed against all the defendants. On the other hand, if the conspiracy claim is not made out because Sally's evidence on the plaintiffs' complicity is rejected, Sally's fraud on the plaintiffs will serve as the *prima facie* factual foundation of the plaintiffs' case. This approach is supported by the particular circumstances of the case where the overall evidence would implicate Sally in the creation of false documents and the making of fraudulent statements to the plaintiffs and AIA, as well as exposing her false testimony in court.

The alleged conspiracy and the relevant law

9 The AIA defendants' plea in their Counterclaim is that the Ongs and Sally conspired to create the fictitious AIA TYP to defraud AIA. Sally and the Ongs would forge promotional documents on AIA's letterhead to give the impression that they were from AIA to create a paper trail for the AIA TYP. The AIA TYP was intended to be a life insurance policy which, upon a single premium payment, would guarantee a return of 6% per annum on the United States Dollar ("USD") component and 7.5% per annum on the Singapore Dollar ("SGD") component after a five-year maturity period. With the purported intention of purchasing the fictitious AIA TYP, the Ongs would remit

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US$5,060,900 to AIA. The money would then be used to purchase the AIA Policies with Sally's assistance. After the purported five-year maturity period for the AIA TYP, the Ongs would demand the principal sum and assured returns from AIA, disavowing knowledge of the Unauthorised Policies.

10 The AIA defendants bear the burden of proving the conspiracy. Cogent evidence commensurate with the seriousness of an allegation of fraud is required. AIA has to prove (as per *EFT Holdings Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112]):

(a) A combination of two or more persons to do certain acts;

(b) The alleged conspirators had the intention to cause damage or injury to AIA by those acts;

(c) The acts were unlawful;

(d) The acts were performed in furtherance of the agreement; and

(e) AIA suffered loss as a result of the conspiracy.

11 The AIA defendants also submit an alternative claim of lawful means conspiracy. If the conspiracy were to be carried out in the manner stated in paragraph [9] above, it would be fraudulent and clearly unlawful. I have thus not considered this alternative argument.

12 It is not disputed by the AIA defendants that the existence of a fictitious AIA TYP was constructed, that the Ongs had remitted money with the ostensible intention of purchasing the AIA TYP, and that this money was used

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to purchase or pay for the AIA Policies. The two key issues are: (a) whether Sally carried this out in concert with the Ongs, *ie*, whether the AIA defendants have proved an agreement between the Ongs and Sally to defraud AIA and the participation of the Ongs in this conspiracy; and (b) whether the AIA defendants have proved that they have suffered loss as a result of the alleged conspiracy.

Loss suffered by the AIA defendants

13 I start with the losses that the AIA defendants claim that they have suffered as a result of the conspiracy. It is not controversial that pecuniary loss is required to complete the tort of unlawful means conspiracy, as the tort is intended to protect a claimant's economic interests. Once proof of loss or damage is established to complete the tort, damages for conspiracy are at large (see *Noble Resources SA v Philip Seth Gross* [2009] EWHC 1435 (Comm) per Gloster J at [223]). This means that the court is not overly concerned to require a plaintiff to prove a precise quantification of its losses. However, unlike in *Li Siu Lun v Looi Kok Poh and another* [2015] 4 SLR 667, where the element of damage was admitted and the court had only to assess the quantum of damages, in this case, the AIA defendants bear the burden of proving that they have suffered loss from the conspiracy.

14 In my view, the AIA defendants have not proved that any loss or damage has been caused by the Ongs' conspiracy and this disposes of their Counterclaim. The AIA defendants claim that they have suffered loss in the form of costs involved in defending this action, reputational damage and the costs of investigating the conspiracy. First, the costs of defending this action is not loss for the purposes of the tort; they ought to be claimed as legal costs

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following the conclusion of this action, and not as damages. Second, reputational damage cannot constitute actual pecuniary loss unless the AIA defendants can tie it to a loss of business profits (*Lonrho plc and others v Fayed and others (No 5)* [1993] 1 WLR 1489 at 1509), which they have not done in this case. Third, in principle, the costs of investigation (and perhaps unwinding) the conspiracy can constitute a head of loss in a conspiracy claim so long as there is a causal link between the costs of investigation and the tort. The causal link is essential to establish the element of damage which is essential to the tort. If wasted staff time is claimed, it is necessary to first demonstrate with certainty and in detail that the time spent on investigating and/or mitigating the relevant tort, and hence the expenditure incurred, was directly attributable to the conspiracy (see Gloster J in *R+V Versicherung AG v Risk Insurance and others* [2006] EWHC 42 (Comm) at [77]). Evidence of some disruption to the business, *e.g.*, that the staff member had been significantly diverted from his usual activities has to be adduced. In this case, the AIA defendants have not sufficiently particularised or presented acceptable evidence of the pecuniary losses caused by the investigation of Sally's fraud, and I find that their Counterclaim fails for lack of proof of loss.

Agreement between Sally and the Ongs to injure AIA

15 Although I have found that the AIA defendants' Counterclaim fails because of the lack of proof of loss, the alleged agreement between the Ongs and Sally to defraud AIA is still important because the Ongs' complicity in any fraud would be fatal to their claims. I now deal with this.

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The Ongs' evidence on the AIA TYP

16 OHL testified that in 2002, Sally told the Ongs that AIA was offering a life insurance policy called the AIA TYP to selected policyholders with a guaranteed return. Sally represented that if the plaintiffs paid a single premium, AIA would provide life insurance coverage guaranteeing a return of 6% per annum for the USD component and 7.5% per annum for the SGD component on maturity five years later. Sally provided them with the benefit illustrations, contained in a folder on an AIA letterhead, and a memorandum signed by an AIA officer, which the Ongs produced in evidence. The Ongs claim that they found this policy attractive and decided to invest US$3,300,000 and S$3,000,000. OHL signed the AIA TYP application forms that Sally brought to him and underwent a medical examination for this purpose. He received a letter from Sally stating that his application had been approved, with AIA's account information and a remittance deadline for the premium. He then instructed his private bankers, JP Morgan and American Express Private Bank ("Amex Bank"), to transfer the requisite funds to AIA for the AIA TYP. Enny confirmed OHL's evidence in this regard. There is no dispute that AIA received the total sum of US$5,060,900. OHL subsequently received a confirmation letter dated 30 November 2002 approving the AIA TYP. Sally delivered a letter dated 19 February 2003 that congratulated policyholders who had taken up the AIA TYP. Sometime in 2003, Sally handed over the policy to OHL. I note here that whilst OHL signed the application form, the policy schedule named OHL as the life insured and Enny as the policy owner and beneficiary. The plaintiffs discovered the falsity of the AIA TYP in January 2008.

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Sally's evidence on the conspiracy

17 According to Sally, she was introduced to the Ongs in mid-2000. Through Sally, Enny acquired three AIA policies, two for her daughter and one for herself. These three policies are not the subject matter of this action. In the second half of 2002, Sally asked the Ongs to help her become AIA's top performing agent. OHL agreed but wanted Sally to assist him in defrauding AIA in return. In essence, Sally would recommend the fictitious AIA TYP to OHL. OHL would remit US$5,060,900 to AIA for the purchase of the AIA TYP. Sally would then use the money to purchase the AIA Policies in the couple's respective names. Upon maturity of the AIA TYP, OHL would claim that Sally had fraudulently sold him the AIA TYP and demand compensation from AIA, as well as disavow any knowledge of the Unauthorised Policies in their respective names. The plan was for the Ongs and Sally to share equally the profits received from AIA.

18 Sally stated that she was "blinded by ambition" and agreed to participate in OHL's scam. At OHL's request, she provided him with blank letters with the AIA letterhead and names of various appointment holders in AIA. She assisted in fabricating various letters from AIA regarding the AIA TYP, such as a letter from K L Tay, the vice-president of agencies, announcing the launch of the "AIA Thanks Program" to all its agents. Sally then recommended, and OHL authorised, the purchase of the AIA Policies on behalf of himself and Enny respectively. Sally assisted in filling up these policy application forms and left them with the Ongs to sign. AIA approved all the policies except P08 and the corresponding letters of confirmation were sent to the Ongs.

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19 In late 2004, OHL informed Sally that he wished to surrender P02 because its surrender value at that point was high. She prepared the paperwork and they went to AIA's customer service centre in January 2005 to hand in the surrender form. Sally received a cheque from AIA made out to OHL for S$6,176,058.18 representing the surrender proceeds. OHL informed her that he wanted to keep the sum of S$888,000.18 as it was a "nice number". The rest of the proceeds, amounting to S$5,288,058, were to be kept by Sally so that OHL could maintain the impression that he did not know about P02's existence. He instructed Sally to sign a letter acknowledging her receipt of the cheque. Sally claimed that she was told to bank in the cheque with Amex Bank in the name of a company incorporated in the British Virgin Islands and owned by her, and she did so accordingly. In September 2006, Sally claimed that the Ongs also wished to surrender P05 (dated 30 June 2003) and P06 (dated 23 September 2003). She accordingly prepared the paperwork for them, received two cheques for S$1,028,483.11 and US$1,057,200 as the surrender proceeds for P05 and P06 respectively, and passed them to the Ongs on the day of receipt.

20 Sally claimed that she started to regret taking part in the scam in March 2005. She suggested to OHL that she would help him with a personal child adoption issue and utilise the S$5,288,058 she received after P02's surrender to invest. If she could procure the same returns as OHL would have obtained from the bogus AIA TYP, OHL would abandon his scam. OHL agreed. Following the surrender of P05 and P06 in September 2006, Sally again asked for S$1m and US$1m (being the principal sums for P05 and P06) for further investments and these were transferred to her in November 2006. Sally made huge losses and OHL decided to carry on with his scam. In January 2008, OHL demanded repayment of his money. OHL agreed to give Sally more time for repayment if

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she executed a written agreement setting out a loan repayment scheme and staged a suicide. She did so. In September 2009, Sally attended meetings with AIA, where she heard of the alleged computer crashes and AIA letters that the Ongs claimed she had passed to them for the first time. As OHL had threatened to report her to the police if she did not confess to the fraud, Sally confessed to AIA that she had sold the fictitious AIA TYP to OHL.

Evaluation of Sally's account of the conspiracy

21 AIA's case on conspiracy is heavily dependent on Sally's evidence. A preliminary issue on the admissibility of Sally's evidence under s 10 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act") was raised in submissions. It is not necessary to decide on this issue. First, the plaintiffs did not challenge the admissibility of Sally's evidence. Second, Sally's evidence, in so far as it goes towards establishing the agreement to conspire between OHL and her, is admissible under the other provisions of the Evidence Act, such as being a fact in issue in the AIA defendants' claim of conspiracy (s 5 of the Evidence Act) (see Pinsler, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at p 69). The agreement was also a fact that, if proved, would be inconsistent with the Ongs being defrauded (which forms the basis of the Ongs' claim), and is admissible under s 11 of the Evidence Act.

22 Mr Wong submits that Sally's evidence is credible and must be believed. She agreed to testify in order to tell the truth; it had nothing to do with any ulterior motive to assist AIA. At one point in the witness box, Sally appeared resigned that her testimony would not be believed given the situation she found herself in. I did not ignore Sally's disillusionment; she was given every

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opportunity to testify and explain her evidence. I adopted the court's usual approach to assessing the credibility of a witness, which is to test her testimony for internal consistency and against the contemporaneous documents, other objective facts, the overall probabilities and the motives of those involved to ascertain the truth of each person's testimony. I find that Sally's account was internally inconsistent and illogical, and did not stand up to scrutiny in the face of all the other objective evidence. For the reasons explained below in this judgment, the AIA defendants have failed to prove the existence of an agreement to cause damage to AIA, and I so hold.

23 First, Sally did not impress with her selective memory during cross-examination, citing memory lapses over simple things such as office procedures which she ought to have known given the decade she had spent as an AIA insurance agent. Her standard answers to questions were that she did not know or remember, or that the questions should be directed to Motion, OHL, or Enny. She would also recite paragraphs from her Affidavit of Evidence-in-Chief ("AEIC") which did not answer the precise questions asked. This is detrimental to Sally's credibility as it gives the court the impression that she is unwilling to allow her testimony in her AEIC to be tested during cross-examination for the accuracy of her perception or to explain ambiguity or inconsistency.

24 Second, Sally's account of her agreement to conspire is completely fanciful and unconvincing. It defies common sense that Sally would have agreed to a conspiracy which success completely depended on her being exposed as a fraudulent agent, especially because her purported motivation for assisting OHL in this fraudulent scheme was to become AIA's top agent. Apart from the fact that she had admitted that the Unauthorised Policies "paid the lowest

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commission", it was certain that she would be the AIA agent fingered as having sold the fictitious AIA TYP to the Ongs. Even if AIA had chosen not to report her to the police, being accused of fraud would have been fatal to Sally's ambition, and thus at odds with her purported motivation for conspiring in the first place.

25 Third, Sally was clearly an interested witness as the success of the conspiracy claim against the plaintiffs was bound to have an effect on the criminal proceedings against Sally. Her AEIC was filed in November 2015 and she gave her oral testimony before this court in March 2016. Sally had testified and was released as a witness in this action before her criminal proceedings started in April 2016. On 5 May 2016, on the fourth day of the criminal proceedings, Sally pleaded guilty to the charges which included cheating OHL by making false representations as to the AIA TYP, dishonestly inducing OHL to deliver US$5,060,900 to AIA in November 2002, using as genuine a document which was false, and her subsequent transfer of S$5,288,058 to her account in Hong Kong. Sally also pleaded guilty to cheating Enny. She was sentenced to eight years' imprisonment: see *Public Prosecutor v Sally Low Ai Ming* [2016] SGDC 110.

26 Mr Wong, on behalf of the AIA defendants, made an oral application to recall Sally under s 140(4) of the Evidence Act as the AIA defendants wanted Sally to explain why she pleaded guilty. It was said that Sally's guilty plea was an unforeseen development. This court heard the application in August 2016. Ms Barker objected on the ground of relevance. A recall of Sally to explain her plea of guilt would not change the fact that Sally had pleaded guilty and was convicted. I agreed that the court is not concerned with the probative force of

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her conviction, and hence her recall to explain how and why she came to plead guilty would not assist this court.

27 Ms Barker relies on s 45A of the Evidence Act to support her argument that Sally should be taken to have committed the fraudulent acts as charged against the plaintiffs and that fact alone undermined the veracity of her account of the conspiracy and the Ongs' willing participation in the same. Mr Wong suggests that the presumption in s 45A(3) has been rebutted since Sally testified before this court first and prior to her guilty plea in May 2016. This reads:

> (3) A person proved to have been convicted of an offence under this section shall, unless the contrary is proved, be taken to have committed the acts and to have possessed the state of mind (if any) which at law constitute that offence.

28 It is not clear how the proviso in s 45A(3) is said to be rebutted because Sally gave her evidence in the civil trial first. The fact of the matter is that Sally's conviction *per se* is not conclusive evidence of the matters required to be proved in the conspiracy case against the plaintiffs. With this in mind, I have taken into account of the fact that Sally had been given a full opportunity to explain her version of the conspiracy, and had been extensively cross-examined when she was in this court on the exact same matters as those mentioned in the Statement of Facts. She had hence been given the fullest opportunity to state her testimony, and even then, she was evasive and uncooperative. She had also given reasons for her previous plea in December 2013 (namely that she had been advised by her lawyer to plead guilty; she was pressurised by her family into making her plea), and I had taken that into account. Before this court, Sally's evidence of the Ongs' complicity or agreement to defraud AIA was riddled with inconsistencies. Not only was the plot making up the conspiracy to defraud AIA

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bizarre (see [29] below), the Ongs' profile and objective behaviour which I will now turn to do not support the AIA defendants' alleged conspiracy.

29 Fourth, I find that the Ongs' profile is at odds with the picture of persons painted by Sally who schemed to perpetrate a fraud on AIA. The Ongs are high net-worth individuals who were already in their sixties in 2002, with a young daughter to care for. They are well educated with a career in academia and then business in Indonesia. The Ongs own and live in a penthouse in a condominium along Scotts Road, Singapore and had aspirations to apply for permanent residency in Singapore under the MAS Financial Investor Scheme for themselves and their daughter. Their application for permanent residency was made in November 2005 and the application was approved in April 2006. All these features do not sit well with common sense or reason for the Ongs to want to risk jeopardising themselves by perpetrating the fraud on AIA. There was no certainty in the plan's success and yet required the plaintiffs to first cough up a large amount of money to initiate the conspiracy. The funds would be out of the plaintiffs' reach for five years before a claim could be made against AIA. They might have needed to sue AIA, and the success of such a suit would have depended on AIA being held liable for Sally's wrongdoing. Further, it is unclear what the Ongs would have achieved financially from defrauding AIA when, as Sally claimed, half the profits of the fraud would go to her. As I will elaborate on shortly, the Ongs were earning at least 3% per annum on their money in private banks and would thus have obtained approximately the same financial return by leaving the money there as opposed to defrauding AIA. The AIA TYP aside, it is equally unclear what the Ongs would have achieved from Sally instructing AIA to use the funds to purchase the AIA Policies. It is not disputed by both parties that there are policy applications that were forged. Such policies

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are nullities and thus would not have been able to offer any returns for the Ongs. This purported scheme lacked any coherence or benefit of some certainty, making it difficult to believe as the truth.

30 Fifth, the Ongs' objective behaviour does not support the AIA defendants' allegation of a conspiracy. OHL's interactions with their private bankers prior to transferring the funds to AIA, namely enquiring with their banks to seek better returns, are inconsistent with a couple who had constructed a fictitious policy. OHL testified that he told his relationship managers from the respective private banks, Amy Low ("Amy") and Constance Lim ("Constance") that he intended to purchase the AIA TYP but that he would not take his money out from the banks if they could guarantee the same rate of return. OHL's account is corroborated by both Amy and Constance. Amy is the relationship manager assigned to the plaintiffs as private banking customers of JP Morgan. She testified that OHL had called her in 2002 to ask if JP Morgan could match a certain deposit rate. Amy checked with her supervisor, who said no. The funds in OHL's account were only receiving around 3% interest then. OHL then instructed Amy to remit the money to AIA. I find that Amy had little reason to lie about her interactions with OHL.

31 Constance, who was the relationship manager in Amex Bank assigned to the plaintiffs' account, gave similar evidence. Constance stated that she had lunch with OHL before remitting the funds to AIA. OHL asked her if Amex Bank could match a certain rate of return as a certain AIA policy. If so, he was prepared to leave his funds with Amex Bank. She discussed the matter with her superior and informed OHL that it was not possible to offer him investments with the same guaranteed returns. Although OHL's funds were invested in

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floating rate notes, which were giving him a 7-8% annual return, such returns were not guaranteed. Constance learnt from Sally that the "five-year policy for US$5m" OHL was referring to was the AIA TYP. She testified that Sally told her that the Ongs were going to invest in an "AIA [TYP]", which was a "US$5 million into a five-year AIA policy with guaranteed returns". Constance told Sally that she was interested in buying such a policy, but Sally said that it was only offered to "very good clients to thank them for their support and the minimum amount required was large". Although Sally denied this in cross-examination, I find that Constance had little reason to lie about her interactions with OHL or Sally.

32 Amy and Constance provided cogent evidence militating against the allegation of a conspiracy. Had OHL really intended to defraud AIA, he would not have asked two of his private banks whether they would be able to match the same rates. He would have drawn unnecessary attention to the AIA TYP by doing so. These were the actions of a customer who was not keen on moving his funds unless there was a clearly better offer elsewhere.

33 Further, had the Ongs wished to distance themselves from the Unauthorised Policies, it beggars belief that Enny would have asked Sally to provide a confirmation of the surrender value of one of them (P06) for her permanent residency application, as Sally alleges, especially when they held other policies with AIA at the material time. Equally, if the Ongs knew that the AIA TYP was fictitious, it would surely be risky for them to want to submit it for their permanent residency application. Enny testified that Constance, who was helping Enny with her application, asked the Ongs to obtain a letter from AIA to confirm the US$5m policy, and Constance confirmed that she was

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expecting such a letter. The Ongs asked Sally for such a letter and Sally subsequently passed them a letter from AIA, which OHL passed on to Constance with the envelope sealed. OHL testified that he was rushing to the airport and had simply handed over the letter without reading it. Constance confirmed receiving a sealed envelope from OHL and she further testified that although she noted that the letter did not relate to the AIA TYP but another policy, *ie*, P06, she assumed that the Ongs had simply chosen another policy and did not enquire further. All in all, the Ongs' objective behaviour does not support the AIA defendants' alleged conspiracy.

34 Finally, the AIA defendants have not been able to point to a credible reason why the plaintiffs would participate in a conspiracy to defraud AIA. I am satisfied that the Ongs had no incentive to orchestrate a scheme with uncertain and insignificant returns as compared to the risks of perpetrating a fraud. Having evaluated Sally's evidence, I was not persuaded that it was OHL who masterminded the conspiracy, and Sally's role a pawn in the Ongs' game.

Other evidence of a conspiracy from the AIA defendants

35 The AIA defendants submit that inferences of the existence of the conspiracy may also be drawn from certain objective facts outlined below. I am not persuaded that the inferences of a conspiracy that the AIA defendants invite this court to draw are made out, let alone assist them in proving to the requisite standard this serious allegation of conspiracy.

36 First, I start with the Ongs' signatures on the AIA policy applications. As part of police investigations against Sally, the Ongs' signatures on certain AIA policy applications and letters to AIA ("AIA signatures") were examined

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to determine if they were forged. The burden of proof is on the party alleging forgery of a particular document and more evidence is usually required because of the seriousness of the allegation: *Alwie Handoyo v Tjiong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [157] and [159]. Usually, one party alleges that a document has been forged and the other maintains that it has been validly signed. The AIA defendants do not dispute that these signatures were forged. In fact, their expert witness went further than the plaintiffs' expert witness and opined that all of the AIA signatures were forged. The AIA defendants rely on their expert's evidence to argue that the Ongs had intentionally provided the police with sample signatures which had not actually been signed by the Ongs to mislead the police. They also rely on their expert's evidence that the forgers of the AIA signatures were likely to have a "close relationship" with the Ongs, such as a familial relationship. They submit that this leads to the inference that the Ongs were involved in preparing the forged signatures and were intimately involved in orchestrating the conspiracy.

37 I will go into the forensic evidence in some detail as it is relevant to Sally's alleged fraud and the legal effect of forgery on the Unauthorised Policies. The plaintiffs and AIA defendants called one expert each. The plaintiffs' expert is Yap Bei Sing ("Mr Yap"), a Consultant Forensic Scientist with the Health Sciences Authority ("HSA"). Mr Yap's forensic analysis was part of the police investigation carried out against Sally in 2010. At no time were the Ongs under police investigation. Mr Yap's conclusions as to the AIA signatures that had been forged largely corresponded to the Ongs' evidence on the documents they had not signed. The AIA defendants' forensic expert is Daniel In-jea Wong ("Mr Daniel Wong"). Mr Daniel Wong concluded that all the AIA signatures had been forged.

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38 Mr Yap and Mr Daniel Wong were given three sets of signatures, all of which were purportedly the Ongs'. The first set contained signatures that the Ongs signed for the police as part of the investigation ("police signatures"). The second set contained the Ongs' signatures on letters to JP Morgan between 2006 and 2010 ("JP Morgan signatures"), which the Ongs had provided to the police. The third were the AIA signatures. Mr Yap was asked to examine if the author of the police signatures and the JP Morgan signatures was the author of the AIA signatures. His conclusions were:

(a) OHL was likely to be the author of the signatures on the P02 application forms, P02 surrender form, and P02 bond of indemnity;

(b) OHL was not likely to be the author of the signatures on the confirmation letter dated 26 April 2004, the 2004 Statement of Account (dated 26 April 2004), the main benefit illustration dated 28 November 2002, and the P02 counter-offer;

(c) Enny was likely to be the author of the signatures on the P05 and P06 surrender forms and bonds of indemnity, the P04 application form, and the P06 letter of authorisation; and

(d) Enny was not likely to be the author of the signatures on the P05, P06 and P08 application forms, the P04 counter-offer, four main benefit illustrations in 2002 and 2003, and a letter dated 9 June 2003 from AIA.

39 Mr Daniel Wong's conclusions differed from Mr Yap's. First, Mr Daniel Wong compared the police signatures and JP Morgan signatures and opined that both sets of signatures probably did not have the same author. Second, he

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compared the police signatures with the AIA signatures and opined that all the AIA signatures were not probably not signed by the author of the police signatures. Third, given the quality of forgery, Mr Daniel Wong opined that the forger of the AIA signatures was likely to have been well acquainted with the Ongs. He reached the same conclusions on OHL and Enny's signatures.

40 Thus, Mr Daniel Wong's view was that all the AIA signatures had been forged by someone well acquainted with the Ongs. Additionally, the police signatures and the JP Morgan signatures were not authored by the same person. He accepted that OHL and Enny were the authors of the police signatures, having personally signed it for the police during the investigation, thus implying that OHL and Enny were not authors of the JP Morgan signatures. Mr Daniel Wong did not compare the JP Morgan signatures with the AIA signatures as he had not been asked to do so and he had already concluded that OHL and Enny did not author the JP Morgan signatures.

41 A preliminary issue is whether the Ongs' JP Morgan signatures, having not been signed in the presence of anybody, should have been compared against the AIA signatures to determine whether the latter were forged (as Mr Yap did). A corollary is whether the police signatures (accepted by both parties as being the Ongs' genuine signatures) have the same authors as the JP Morgan signatures. If the answer is no, the AIA defendants invite me to infer that the Ongs provided forged signatures in the JP Morgan documents to "mislead the police". The AIA defendants submit that Mr Yap should not have accepted the JP Morgan signatures as they were "self-serving exemplars" provided by the Ongs. By this, the AIA defendants mean that they were volunteered by the Ongs even though such samples were not requested. Further, Mr Daniel Wong had

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concluded that the JP Morgan signatures and the police signatures were unlikely to be from the same author. Mr Yap had not specifically addressed his mind to this question in his report, as he received his instructions from the police in a context of an investigation against Sally and not the Ongs, where Sally was alleged to have forged the Ongs' signatures. The AIA defendants argue that this caused Mr Yap to ignore significant differences between the police signatures and the JP Morgan signatures indicating different authorship. As a result, (a) Mr Daniel Wong's evidence should be preferred, and (b) the inference to be drawn is that the Ongs submitted their forged signatures on the JP Morgan documents to the police.

42 In my view, the "self-serving exemplars" argument is misapplied. The plaintiffs' signatures on the JP Morgan documents were made between July 2006 and 12 May 2010, before the Commercial Affairs Department ("CAD")'s investigation into the forgery. CAD sent the JP Morgan signatures to Mr Yap on 20 May 2010. I agree with Ms Barker that the JP Morgan documents are not "self-serving exemplars" as they were not created after CAD's investigations into the forgery. Mr Yap was not wrong to have compared the JP Morgan signatures and the AIA signatures to conclude that some of the AIA signatures were forged (see [38] above). His conclusions largely corroborated OHL and Enny's testimonies as to which documents they had signed and which they did not sign. During the trial, Mr Yap testified to looking at and comparing the Ongs' signatures in both the police documents and the JP Morgan documents and finding them consistent with each other. He was able to further explain his position with specific references to the details of these signatures.

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43 I turn to another related point on the JP Morgan signatures. It is difficult to comprehend why the Ongs would have provided forged signatures on the JP Morgan documents, especially since they had already provided a set of personally signed signatures to the police. If they were involved in the conspiracy, their goal must have been to ensure that the signatures on the AIA documents were found to be forged, so that they could claim damages for fraud. But Mr Daniel Wong clearly testified that on a comparison between the Ongs' signatures on the police documents, which he accepted as genuine, and the AIA documents, all the signatures on the AIA documents were likely to have been forged. The Ongs' purportedly forged signatures on the JP Morgan documents would have added absolutely no value to their conspiracy, and may even have jeopardised the finding of forgery.

44 I now move on to the experts' conclusions on the forged signatures on the AIA documents. Mr Yap's analysis of the signatures (at [38] above) reveals two anomalies, namely OHL's signature on the P02 application form and Enny's signature on the P04 application form. OHL and Enny said they did not sign these but Mr Yap found that they were likely to have authored the signatures. Enny admitted in cross-examination that she could not tell whether the signature on the P04 application form belonged to her, but maintained that she did not sign such a form. OHL stated that the signature on the P02 application form was his but he had signed it for the AIA TYP and not P02. I find that they have not been able to prove that their signatures had been forged, but I accept that they did not intend to sign any application forms for P02 and P04. Their evidence was substantially consistent with Mr Yap's findings, militating against the existence of a conspiracy.

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45 As stated above, Mr Daniel Wong concluded that all the AIA signatures had been forged. The AIA defendants' attempt to explain away the forgeries as the Ongs being involved in the forgery is mere speculation. Their inference that the Ongs forged each other's signatures was drawn from another inference made by Mr Daniel Wong (at [39] above) that the forgers were likely to have had a "close relationship" with the Ongs. The quality of the forgeries does not justify an inference that the Ongs forged each other's signatures.

46 From the matters discussed above, I find that the Ongs did not fill in the policy applications for the Unauthorised Policies and P08, and their signatures on the application forms were either forged or intended for their AIA TYP application. All in all, the handwriting evidence does not assist the AIA defendants in their conspiracy claim. To summarise, the inferences they invite this court to draw regarding the Ongs are unsupported and make little sense in the context of this alleged conspiracy.

47 Second, the other group of objective facts the AIA defendants rely on to invite this court to make inferences of the conspiracy is the existence of "elementary blunders" in the documents prepared for the AIA TYP. The argument is that the "elementary blunders" point to the Ongs as forgers, and not Sally, as Sally could not have made such "elementary blunders" given her experience as an insurance agent. They point to the inconsistent names given to the AIA TYP ("AIA Thanks program", "thank you campaign", "AIA Thank You campaign"), the wrong uses of currency denominations, and the spelling and grammatical errors in the AIA TYP documents, *eg*, spelling "Alexandra" as "Alexander" in AIA's address. It is a leap of logic to say that because Sally is an experienced agent, her forgeries must have been better, and thus the Ongs

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must have forged the documents. It is not within Sally's job scope to draft policy documents or letters from high-ranking AIA employees to clients. The plaintiffs have also pointed to multiple instances where Sally had made spelling and grammatical errors in documents personally prepared by her. Sally had also personally gotten the AIA address wrong in a letter, addressing it to the "Alexander Service Centre".

48 The AIA defendants further argue that Ongs' failure to notice blatant errors was an "unconvincing [attempt]… to feign ignorance of the suspicious circumstances which… ought to have alerted them to Sally's deceit". The errors include the AIA TYP policy document erroneously indicating the policy owner as Enny and listing the interest rates for the maturity proceeds wrongly. I accept as plausible the Ongs' explanation, which I understand them as saying that they overlooked these errors in the AIA TYP documents having assumed and expected documentation from a reputable company like AIA to be error-free.

49 Third, the AIA defendants submit that another inference of the existence of a conspiracy is Sally's behaviour. Sally had many opportunities to misappropriate the Ongs' money but did not do so. She did not raise the computer crashes to the Ongs until 2004, even though the policies had been purchased in November 2002. Further, she did not abscond even after receiving large sums of money from the Ongs in 2005 and 2006 (S$5,288,058, S$1,000,000 and US$1,000,000 from the surrender of P02, P05 and P06 respectively). She had even returned various amounts after January 2008, when her fraud was discovered. Thus, the AIA defendants argue that "[t]he only reason why Sally did not escape abroad despite having plenty of time to do so is that she was engaged in a conspiracy with the Ongs".

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50 In reply, Ms Barker contends that had Sally made up the computer crash allegations in November 2002, the plaintiffs would have been suspicious of the connection between the money remitted for the AIA TYP premium and the sudden existence of the other policies. The fact of the matter is that all the inferences argued for by the AIA defendants were speculative as to Sally's motivations. Sally was not questioned on this and there are competing plausible explanations for her actions, thus failing to justify the inference of a conspiracy. The AIA defendants' arguments do not take into account a part of their case, which is Sally's evidence that she was "blinded by ambition" and had the Ongs purchase other polices to improve her chances of becoming AIA's top agent. She would not be looking to surrender the policies before the maturity of the AIA TYP; one of the measures of her performance was the persistency of the policies she had sold. It would have been detrimental to her performance if the policyholder surrendered the policy before the end of the maturity period or allowed it to lapse. Moreover, Sally may have been waiting for the returns from the surrender of the policies to rise; the surrender values of P05 and P06 in the first two years after purchase were relatively low. Sally's explanation of the computer crash only came after the Ongs had called the AIA customer service centre in August 2004 and discovered the existence of P02, P05 and P06, implying that Sally had not planned on asking the Ongs to surrender the policies even then. Sally was also not in Singapore for the better part of 2004 (as testified to by Rayner), possibly explaining why she did not handle the surrenders until 2005 and 2006. Finally, that Sally did not abscond even after receiving the money cannot itself justify an inference that she was colluding with the Ongs. There could be a number of reasons for remaining in Singapore. Even though she did not abscond, Sally took steps to secure the money she received from the

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Ongs. By March 2005, she had moved the S$5,288,058 out of the jurisdiction to her account in Hong Kong. In November 2006, Sally received US$1m and S$1m from Enny, and it is not disputed that in January 2007, Sally transferred US$1m to one Oei Harsono Wiryo.

51 Fourth, the AIA defendants submit that the Ongs' interactions with AIA were inconsistent with the behaviour of persons who had been defrauded. This included receiving correspondence from AIA about the Unauthorised Policies but failing to alert AIA that they had not applied for these policies. As I explain below (see [107]-[115]), I find that the AIA defendants have not been able to prove that they indeed sent a large amount of the correspondence they claim to have sent to the Ongs. For those that were sent, the Ongs' evidence is that they had not read these letters and were subjectively unaware of the existence of these policies. More to the point, their evidence is that they had simply relied heavily on Sally to keep tabs on the policies they bought. All said, any fault arising from their failure to read their mail would only be relevant for contributory negligence, and does not, in the light of all the other evidence, prove that they were engaged in a conspiracy with Sally and had kept deliberately quiet.

52 The AIA defendants also rely on the Ongs' refusal to extend documents relating to the AIA TYP to AIA at AIA's request and failure to instruct the AIA customer service officer (during the August 2004 call) to change the Cairnhill address listed for some of their policies even though the address did not belong to them. It was also contradictory of the Ongs to claim that they trusted Sally completely, yet contact AIA personnel beyond Sally. I find that the Ongs' behaviour was consistent with a couple who had, at the material time, relied on

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and trusted Sally to handle most of their matters relating to AIA, but contacted AIA directly when they had queries that they thought Sally would not be best-placed to address, such as a list of all their policies and OHL's urgency in securing his place for the AIA TYP 3 (see [61] below). When the fraud was discovered, the Ongs' unwillingness to turn over relevant documents was also understandable. In the preceding years they had been provided with letters and documents ostensibly from AIA. Some appeared to be personally signed off by high-ranking AIA officers. OHL was concerned with investigating the extent of the fraud, in particular whether it went beyond Sally, and was also frustrated at the lack of response and one-sided information he was getting from AIA. These are actions consistent with someone who had recently discovered that he had been defrauded over the last five years in his dealings with an agent that he considered to be the face of AIA. I do not find his lack of cooperation an indicator of his involvement in the conspiracy.

53 Finally, I come to the Ongs' retention of S$888,000.18 of the surrender proceeds of P02. The AIA defendants argue that OHL's acceptance of the money is evidence that he was engaged in the conspiracy for financial benefit. In my view, although it can be said that OHL, in accepting such a large windfall from the surrender of an erroneous policy, *ie*, P02, allowed greed to overcome his better judgment, it does not show him up as a knave, and there is nothing to warrant an inference that his acceptance of the money was consistent with his involvement in the alleged conspiracy. First, the AIA defendants cannot explain why OHL kept the money if he had wanted to deny the conspiracy altogether in the end. Sally's evidence is that OHL wanted to keep the money as it was a "nice number" and, at the same time, he wanted Sally to hold on to the S$5,288,058 in order to maintain the impression that he did not know about

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P02's existence. These two reasons are contradictory. OHL's retention of the surrender proceeds in the sum of S$888,000.18 would expose rather than distance him from P02. Sally's evidence on this narrow contention is clearly unsatisfactory and unreliable. Second, as I detail later (see [70]-[73] below), before surrendering P02 and retaining the money, OHL consulted a lawyer and eventually drafted an indemnity agreement (which he requested that Mark O'Dell and Sally sign) to protect his receipt of the windfall and the return of the balance proceeds to AIA via Sally. This behaviour is consistent with a person who was seeking to protect his position from Sally and AIA, as opposed to someone attempting to defraud AIA. My analysis similarly applies to Enny's retention of US$57,200 and S$28,483.11 from the surrenders of P05 and P06.

Conclusion on the conspiracy claim

54 I find that the AIA defendants have not made out their Counterclaim in conspiracy to injure by unlawful means as they have failed to prove to the requisite standard that there was an agreement between Sally and OHL to defraud AIA. Their case on conspiracy hinges on the veracity of Sally's evidence, which I find to be muddled, wanting in logic and credibility, with little support in the objective evidence. It follows that the AIA defendants are also unable to satisfactorily refute the plaintiffs' evidence of Sally's fraud against them. In addition, in [14] above, I explained that the AIA defendants have not proved that any loss or damage has been caused by the Ongs' conspiracy. Accordingly, the AIA defendants' Counterclaim is dismissed.

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Sally's fraud

Overview

55 I turn now to the plaintiffs' case. The factual foundation of the plaintiffs' claims against the AIA defendants is Sally's fraud. It must be remembered that the AIA defendants' case proceeds on the basis that the Sally's acts and representations constituting the fraud on the Ongs did occur, but that the Ongs were in cahoots with Sally to defraud AIA. Having dismissed the conspiracy claim, the overall evidence in court supports the plain situation of Sally's deceit against the plaintiffs. I find that her false representations relating to the AIA TYP fulfil the requirements for the tort of deceit as set out in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435. I have also found that the tort was complete when OHL remitted US$5,060,900 to AIA in late November 2002 (see [59] below).Without a third account of the fraud perpetrated by Sally against the Ongs, the plaintiffs' accounts will be my starting point, save for the parts patently unbelievable or directly contradicted by other objective evidence.

56 My key findings of fact on Sally's fraud (which I will elaborate on in the following paragraphs) are summarised as follows:

(a) Sally deceived OHL into remitting US$5,060,900 to purchase AIA TYP which was a fictitious policy. For this deception, Sally fabricated documents showing the existence of the AIA TYP and also AIA's approval of the AIA TYP application. The fake documents were to give the Ongs the false impression that the AIA TYP was real.

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(b) The Ongs were unaware that Sally had instructed AIA (ostensibly on behalf of the Ongs) to apply OHL's remittance (including the refund cheques) to the AIA Policies over the course of 2002 to 2006. As regards, the Unauthorised Policies, Sally forged or obtained forgeries of the Ongs' signatures on the policy applications and various other documents for this purpose.

(c) Sally induced the Ongs to surrender the Surrendered Policies by falsely representing that they had been erroneously listed in the Ongs' respective names, and further induced them to return the bulk of the surrender proceeds to AIA through her personally. Sally deceived the Ongs as described through documents from AIA that were faked by her.

57 The other implication of finding that Sally perpetrated the fraud as described by the Ongs is that she was also fraudulent as against AIA. Following OHL's remittance of US$5,060,900 to AIA, the latter, on Sally's instructions, applied the money to the Unauthorised Policies that Sally claimed the plaintiffs had applied for, and to premiums for the Authorised Policies. It is clear that although the plaintiffs claim that the AIA defendants are liable for Sally's fraudulent acts, whether in negligence or vicarious liability, they do not accuse AIA of deceit or knowingly assisting Sally in defrauding the Ongs. My key findings of fact on Sally's fraud on AIA are explained in [58]-[60] below.

58 AIA accepted Sally's instructions under a mistake of fact or in consequence of Sally's wrongful act. I accept that AIA had received the policy applications for the Unauthorised Policies and processed them without knowing

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that they were forged. Having been an AIA agent for some time, Sally was well-versed in the life insurance products offered by AIA. She was also familiar with AIA's practice of the day where the company would treat and accept the agent's word as instructions and authorisation from the prospective and existing policyholders. As the insurance intermediary, Sally used the practice in AIA to her advantage and benefit: she was able to successfully give instructions to AIA's staff on the Ongs' remittance to AIA via AIA's system of tagging the remittance to pre-allocated policy numbers, and on refund cheques (see [102] below).

59 Sally's fraudulent acts are all based upon the tort of deceit, but it would be inaccurate to consolidate all her acts into one tort. Her false representations spanned years and involved a multitude of lies to the plaintiffs, with the purpose of carrying on the fiction of the AIA TYP, concealing the existence of the Unauthorised Policies and obtaining the surrender proceeds for herself. For every misleading statement she made, with the knowledge that it was false, thus inducing the Ongs to either part with their moneys or lose the chance of discovering the fraud being perpetrated upon them, she committed the tort of deceit. For the purposes of legal analysis, however, I find that the first time the tort of deceit became complete was when OHL remitted the US$5,060,900 to AIA believing that it would be used to purchase the AIA TYP, as this was when the loss was occasioned. This is not, as the plaintiffs claim, because the money was at that point transformed into a debt owed by Citibank to AIA and not to the Ongs, but because the remittance sitting in AIA's account enabled Sally to gain "control" of the money by exploiting the practice in AIA, and I so hold. As the insurance intermediary between the AIA and the Ongs, AIA would have accepted (and did in fact accept) without verification all of Sally's instructions

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as to how to handle the money and all refund cheques that were issued to the plaintiffs would also have been handled by Sally. From that point on, Sally was able to continue her fraud by representing one thing to the Ongs and another to AIA, purportedly always on behalf of the other party, thus inducing both sides to handle the money in the manners she intended. The long period of time the fraud was sustained against both parties can be explained by a combination of the close relationship of Sally and the Ongs and AIA's reliance on Sally's representations as to the plaintiffs' instructions.

60 Enny gave evidence that she met Sally in early 2000 and Sally had been helpful and resourceful to the Ongs, who were relatively new to Singapore then. Sally befriended their young daughter, took her out shopping and to the movies, and would run errands for the Ongs. Sally also accompanied Enny to her routine medical check-ups and arranged for Enny to undergo an operation in 2000. The Ongs clearly relied on Sally who managed to gain the Ongs' trust. AIA also relied on Sally, who had contacts with high net-worth individuals (like the Ongs), to introduce non-traditional insurance plans that suited the needs of high net-worth individuals such as wealth preservation, estate planning and legacy enhancement. AIA also relied on Sally to liaise with the Ongs and obtain their instructions in respect of all the policies. She was tasked with delivering policies, some correspondence and cheques to the Ongs. The fact that Sally was a top agent in AIA gave her credence within the company and in her dealings with the staff of AIA, and I so hold.

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AIA policies, real and fictitious

61 I have already described the AIA TYP and Sally's representations earlier in this judgment (see [16] above). OHL remitted US$5,060,900 to AIA for the AIA TYP and did not know that the money was instead used for the purchase or payment of premiums for the AIA Policies. The AIA TYP was supposed to mature sometime in December 2007. A month or two prior, Sally asked the Ongs if they wished to extend the AIA TYP for another five years ("the AIA TYP 3"). OHL sent a letter in January 2008 directly to AIA in Hong Kong, addressed to one Edmund Tse, taking up this offer. AIA asked to meet him and it was there that OHL found out that the AIA TYP did not exist.

62 Leaving the AIA TYP aside, in 2002 and 2003, the AIA Policies (which AIA genuinely offered as insurance products) were purchased in the Ongs' names. As concluded in [46] above, the policy applications for the Unauthorised Policies were not filled in by the Ongs, and their signatures on the application forms were either forged or intended for their AIA TYP application. I accept that the Ongs were under the impression that their remitted funds were applied towards the fictitious AIA TYP, and I find that the Ongs never gave any instructions to apply these funds (including the refund cheques) to the AIA Policies.

63 It is important to be clear about what the Ongs specifically allege in relation to each policy. The Ongs accept that they applied for two (P01 and P03, the Authorised Policies) and adopted one (P04). They are only claiming for losses in respect of three policies (P02, P05 and P06, *ie*, the Surrendered Policies). This does not mean that the other policies (P01, P03 and P04) should

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be carved out from the narrative, as they are relevant to Ongs' knowledge and actions throughout the fraud and their claim in negligence. The AIA defendants also contend that the Ongs cannot pick and choose the policies that they wish to keep and those they wish to recover their losses from.

64 The Ongs applied for the Authorised Policies (P01 and P03). They complain that the money intended for the AIA TYP premium was used to pay the premiums of these policies without their authorisation, but the Ongs do not claim damages in respect of these policies (they still hold these policies with AIA). P01 was taken out by Enny and P03 was taken out by OHL. The Ongs applied for these policies in 2002 but were not approached for the yearly premium payments and assumed that the policies were not ready. I pause here to observe that their assumption is not misplaced given the wording of the standard insurance application form, namely "any insurance… applied for shall not take effect unless and until the relevant policy/policies is/are issued and delivered to [the proposer]". The Ongs received the policy documents for the Authorised Policies on 6 August 2004. Returning to the narrative, Enny subsequently received letters in January 2004 informing her that the Authorised Policies had lapsed and clarified this with Sally, who advised her to pay the premiums for 2003. Enny did so but received two AIA cheques from Sally in May 2004 refunding the premium payments. Sally then told Enny that she must have paid twice by mistake and Enny dropped the issue.

65 The Unauthorised Policies (P02, P04, P05 and P06) are policies that the Ongs had never bought and were unaware of until mid-2004. Out of these, the Surrendered Policies (P02, P05 and P06) are policies with single premium payments of S$5,000,000, S$1,000,000 and US$1,000,000 respectively which

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the Ongs surrendered in 2005 and 2006. P02 was bought in OHL's name and P05 and P06 were bought in Enny's name. The Ongs claim that Sally had forged their signatures on the policy application forms and instructed AIA to use the AIA TYP premium to pay the premiums of these policies in their respective names without their knowledge. When the Ongs learnt of the existence of these policies, Sally represented to them that there had been computer crashes at AIA which caused the policies to be erroneously reflected in their names. She then told the Ongs to surrender the policies and return the money under these policies to AIA to help AIA avoid trouble with the Monetary Authority of Singapore ("MAS"). Sally also told them to return the money to her directly, as she was authorised to collect money on behalf of AIA.

66 OHL surrendered P02 in January 2005. He received a cheque for the sum of S$6,176,056.18 from AIA ("P02 surrender cheque"), and issued a cheque to Sally for S$5,288,058. Sally had told him that AIA only wanted the latter sum as it was the principal sum and administration costs for P02. She told OHL that he could keep the difference, which was S$888,000.18, to compensate him for the mistaken use of his name and for helping AIA resolve the matter.

67 Enny surrendered P05 and P06 in 2006 for the same reasons. Upon surrender, Sally delivered two cheques from AIA for S$1,028,483.11 ("P05 surrender cheque") and US$1,057,200 ("P06 surrender cheque"). OHL instructed his bank to remit US$1,000,000 and S$1,000,000 to Sally's bank account in November 2006. The Ongs say that they were told that they could keep the remaining sums of US$57,200 and S$28,043.11 as Enny's name had been mistakenly used for the policies, and did so.

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68 The surrenders of P02 in 2005, and P05 and P06 in 2006, are similar in two ways. First, prior to the surrenders, Sally had passed the Ongs letters, purportedly from AIA officers, to convince them to surrender the policies. Prior to P02's surrender, Sally passed OHL a letter addressed to Sally from one Tay Cheng Han, Vice-President and Comptroller (AIA Singapore) and a letter addressed to OHL from one Mark O'Dell confirming the existence of P02 and the AIA TYP respectively. OHL also referred to a letter addressed to Sally confirming that Sally was an authorised representative of AIA. OHL claims that these led him to believe that P02 was erroneously reflected in AIA's system, and that he should help AIA by surrendering P02.

69 Prior to the surrenders of P05 and P06, Sally also passed the Ongs letters purportedly from Mark O'Dell. These letters listed all the policies in the Ongs' names, including P05, P06 and the AIA TYP, confirmed that Sally was authorised to collect money on AIA's behalf and this would be a discharge of the Ongs' obligations, confirmed receipt "in due course shortly" of at least S$6,288,058 and US$1,000,000, which OHL took to refer to his return of the sums from his surrender of P02 ($5,288,058), P05 (S$1,000,000) and P06 (US$1,000,000). It also asked OHL to "assist [them] in safeguarding… the AIA Name… [to] allow [them] all [his] support to make all things right and proper finally".

70 Second, after the surrenders but before the money was transferred to Sally, the Ongs took steps to safeguard their position. Before OHL returned the sums from P02's surrender, he asked for a clause to be inserted in Sally's letter of authorisation from Mark O'Dell (described at [69] above) stating that AIA authorised payments to be made to Sally directly as an unconditional and

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absolute discharge of the customer's obligations. OHL did this after consulting Mr Leon Yee, a lawyer that Sally had previously introduced OHL to and recommended that OHL ask for advice. Sally told OHL that Mark O'Dell was not agreeable to this and OHL wrote to AIA requesting that his surrender be cancelled. Sally eventually delivered the P02 surrender cheque together with a letter from Mark O'Dell incorporating the clause. OHL claims that in reliance of this letter, he wrote a cheque payable to Sally for S$5,288,058.

71 After the surrenders of P05 and P06, OHL requested that an indemnity agreement be signed between him, Mark O'Dell, and Sally before he returned the sums. The agreement specified that a previous payment of S$5,288,058 had been made to AIA through Sally in March 2005 (*ie*, following the surrender of P02) and that payment of the amounts of S$1,000,000 and US$1,000,000 was to be made to Sally who was authorised to collect it on AIA's behalf. Sally delivered the indemnity agreement on AIA's letterhead to OHL, which already had Mark O'Dell's signature. OHL signed and Sally countersigned it. OHL then returned Sally the sums, although this time he asked Sally to open a bank account in her name at the American International Group Private Bank ("AIG Private Bank") and transferred the money to that account. OHL claims that this was because he understood AIG to be AIA's parent company and thought that Mark O'Dell would be informed of the transfer, making the return more transparent and giving OHL "another layer of comfort".

72 P04 should be considered separately because although the Ongs had not applied for the policy, and Sally had also used the AIA TYP premium to pay for it, Enny agreed to accept P04 in April 2004 on Sally's representation that Sally had purchased it for the Ongs' daughter. Sally told Enny that the policy required

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five yearly premiums of S$243,090 and Sally had paid two premiums with her (Sally's) own money. Sally also claimed that she had deposited her own money for payment of future premiums for the policy and asked for the money to be withdrawn and returned to her. I digress to mention that Sally's story that she had purchased a policy for Enny's daughter using her own funds is classic insurance fraud. The Agent's Rule Book ("Rule Book"), which was part of the Agent's Disciplinary Guidelines published by AIA (subsequently renamed the Market Conduct Guidelines in December 2002) also prohibits the agent from advancing or financing a client's policy with or without the client's consent.

73 Returning to the narrative, Enny signed a form for the withdrawal and subsequently received a cheque for S$436,159.65 from AIA. However, Enny states that she did not reimburse this sum to Sally immediately as she had not received the policy document. Sally brought the Ongs to AIA headquarters to apply for a duplicate on 28 January 2005. Sally delivered the duplicate and Enny instructed Amex Bank to remit the sum of S$243,090 to AIA (the third year premium for P04). AIA wrote back on 13 July 2005 stating that they had received the remittance on 21 February 2005 and had issued a refund cheque to Sally to be delivered to Enny as they were "unable to keep the suspense in abeyance indefinitely". Sally told Enny that she would resolve the matter and subsequently delivered a letter from Mark O'Dell stating that P04 would be reinstated upon receipt of outstanding premium. Sally asked for a fourth payment for P04's premium. Enny remitted US$166,000 to AIA in August 2006 and Sally subsequently passed Enny a letter from Mark O'Dell acknowledging receipt and stating that S$243,090 would be applied towards the payment of P04 premium. The S$436,159.65 was never returned to Sally.

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The fraud from AIA's perspective

74 I will now briefly consider Sally's fraud as perpetrated against AIA. I have already accepted that the policy applications for the Unauthorised Policies and P08 were not filled in by the Ongs, and I find their signatures were either forged or intended for their AIA TYP application (see [46] above). I have also accepted that, as the Ongs were under the impression that their remitted funds were applied towards the AIA TYP, they never gave any instructions to apply these funds (including the refund cheques) to P01 to P08 (see [62] above). However, I accept that AIA received these applications and instructions (through Sally) without any subjective knowledge of their falsity, and it is in this context that I describe AIA's actions from 2002 to 2008.

75 AIA received the US$5,060,900 from OHL in November 2002 in five tranches. The remittances did not state which policies the funds should be applied to. Sandra Leing ("Sandra"), the deputy manager of the finance department, and Agnes Ng ("Agnes"), AIA's chief cashier, made enquiries and found that OHL's last two policy applications had not been approved. AIA then found out that Sally was the Ongs' current financial services consultant ("FSC") and waited for Sally to convey the Ongs' instructions.

76 On 30 November 2002, Sally gave AIA instructions on the use of the Ongs' funds. AIA executed these instructions accordingly:

(a) From the first and second tranches (US$3,200,000), S$5,000,000 was used as the single payment premium for P02. A refund cheque of S$616,991.38 was issued ("P02 refund cheque").

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(b) From the third tranche (US$258,000), US$47,070 was used as the first premium payment for P01 and US$27,216 was used as the first premium payment for P03. A refund cheque of US$183,714 was issued ("P01 refund cheque").

(c) The fourth tranche (US$1,306,900) was not used for any policy and refund cheques were issued (see [78] below).

(d) From the fifth tranche (US$296,000), S$243,090 was used as the first premium payment for P04 and a refund cheque of S$276,481.70 was issued ("first P04 refund cheque").

AIA issued P01, P02, P03 and P04 on 30 November 2002. The refund cheques were passed to Sally for delivery to the Ongs.

77 A few months later, in January 2003, AIA received another transfer of US$27,000 with no instructions. Sally did not provide any instructions and a refund cheque was issued on 17 June 2003 ("17 June 2003 refund cheque").

78 When Sandra did not receive any instructions for the fourth tranche, she alerted the compliance department. On 26 March 2003, Sally informed Sandra to set aside the money for the premium payments for P05 and P08. However, AIA did not approve these applications and refunded these sums to Enny ("P05 refund cheque" and "P08 refund cheque" for S$1,000,000 and US$740,000 respectively). Sally retained the P05 and P08 refund cheques. AIA subsequently issued a counter-offer for P05 which was purportedly accepted by Enny (this was forged) and on Sally's instructions, the S$1,000,000 represented by the P05 refund cheque was used to pay the first premium.

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79 AIA received Enny's application for P06 in September 2003. It also received a letter from Sally stating that the Ongs requested that the P01, P02, P06 and P08 refund cheques be used to pay the P06 premium for Enny. AIA did so save for the P02 refund cheque as this was in OHL's name. In the same month, AIA issued a refund cheque representing the excess of the sum from the first P04 refund cheque to Enny ("second P04 refund cheque"), which was S$142,218.34. The second P04 refund cheque was re-issued in February 2004 as Sally had lost the cheque ("re-issued P04 refund cheque").

80 The Ongs failed to pay the premiums due for P01, P03 and P04 and these lapsed on 1 December 2003. After some back-and-forth, Sally wrote a letter to AIA informing AIA that the Ongs wished to apply their balance funds (comprising the 17 June 2003 refund cheque, P02 refund cheque, and the second P04 refund cheque) to the premium payments for P01, P03 and P04, with the Singapore dollar balance to be left in the Future Premium Deposit Fund for P04, meaning that AIA would hold the money and apply it to future premium payments for P04. Agnes spoke to the head of the finance department, Tay Cheng Heng, on the same day, as the cheque in OHL's name would be used to pay for a policy in Enny's name. He allowed this but asked that letters be sent to the Ongs to inform them. The 17 June 2003 cheque was used up and the balance of the second P02 refund cheque and the re-issued P04 refund cheque, which amounted to S$435,449.81 was applied to towards P04's FPDF. Agnes sent letters to the Ongs on 8 March 2004, carbon copying Rayner. Agnes testified that this was mailed and not passed to Sally, although there is no mailing record. Both Rayner and the Ongs said that they did not receive this.

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81 The policies were not reinstated because Sally had not submitted the health certificates required by AIA for reinstatement. In a letter dated 11 March 2004 to Mr Tan Kian Loy ("TKL"), head of customer care, Sally requested a waiver. After some internal discussion, the policies were reinstated on 13 April 2004. Letters were allegedly sent by post to the Ongs to inform them of this.

82 On 14 April 2004, TKL sent a memorandum to Sally enclosing a Statement of Account ("2004 Statement of Account"). He requested Sally to return it with the Ongs' signatures and their confirmation that they had the refund cheques in their possession at all times and had instructed Sally to use part of these cheques to pay for the renewal premiums for P01, P03 and P04. The 2004 Statement of Account reflected the existence of P01 to P06 and the management of the Ongs' funds from 18 November 2002 to 2 April 2004. On 26 April 2004, Sally returned the signed 2004 Statement of Account and a confirmation letter regarding the handling of the refund cheques. There is no dispute that the Ongs' signatures on both these documents were forged.

83 On 5 January 2005, OHL and Sally went to AIA's customer service centre to surrender P02. OHL gave AIA a surrender form and a bond of indemnity (bonds of indemnity are required when the original policy document is not returned during the surrender). AIA processed the surrender and passed a letter regarding the surrender and the P02 surrender cheque to Sally for delivery to OHL. On 19 September 2006, AIA received the Ongs' documents for the surrender of P05 and P06. They processed the surrender and passed the P05 and P06 surrender cheques to Sally.

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84 The discovery of Sally's fraud started from January 2008 when the Ongs tried applying for the AIA TYP 3 (see [61] above). Following internal discussions, Alicia Chua ("Alicia"), AIA's head of service quality, met Sally who said that she was not aware of the AIA TYP or AIA TYP 3. On 21 January 2008, Alicia met the Ongs at AIA's office and told them that the AIA TYP did not exist. She also asked for documents named in the AIA TYP 3 letter. AIA continued to send requests for the documents over the next two months. On 6 March 2008, Alicia sent an email to OHL informing OHL that they had not received the documents and would cease investigations. AIA received an official letter of complaint from OHL on 7 September 2009.

The legal status of the AIA Policies

85 I now examine whether the AIA Policies, namely P01 to P06, are (or were at the material time) legally valid and binding between AIA and the Ongs. This is relevant to questions of loss and change of position and provide a good starting point. The AIA defendants also seek declarations that the Unauthorised Policies (P02, P04, P05 and P06) are or were valid contracts of insurance.

86 For the Authorised Policies, *ie*, P01 and P03, the Ongs admit that they applied for these policies and I find that there were valid and binding policies concluded between AIA and Enny (P01) and OHL (P03) respectively. As no nullity is in play, the unauthorised use of the Ongs' money does not affect the validity of the contract (see [90] below).

87 For P05 and P06, I find that the policies issued by AIA have no legal effect. Based on the expert evidence (see [38]-[39] and [46] above), I find that Enny's signatures were forged on these policy applications. Given that an

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insurance policy application usually acts as an offer to be accepted by the insurer (see *Law Relating to Specific Contracts in Singapore* (Michael Hwang SC, ed-in-chief) (Sweet & Maxwell Asia, 2016) ("*Law Relating to Specific Contracts in Singapore*") at [9.3.22]), the legal effect is that there was no proper offer made to AIA. The policies that AIA issued pursuant to these applications are also null and AIA was never truly at risk for these policies: see *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459 (at 476).

88 The AIA defendants argue that the Ongs had ratified Sally's unauthorised acts, namely the application of the AIA TYP funds to the premium payments of P01, P03 and P04 and the P04 policy application (since they are not making a claim in respect of these policies). They further argue that the Ongs cannot "cherry pick the fruits of crime" and by ratifying these acts the Ongs have effectively ratified all of Sally's unauthorised acts for P01 to P06.

89 I do not accept this submission. First, the fact that the Ongs are not making a claim for certain policies does not mean that they have ratified Sally's acts as a matter of law. Second, ratifying one or some of Sally's unauthorised acts does not automatically mean that all her unauthorised acts in respect of all the policies are ratified. Ratification always needs to be proved with reference to the specific act allegedly being ratified.

90 Third, it is important to identify whether these acts can actually be ratified in law. P01 and P03 can be distinguished in that the Ongs had actually applied for these policies and Sally's unauthorised act only pertained to the payment of the premiums. There were thus valid policies between AIA and the Ongs. The policy payments were directed by Sally purportedly on behalf of the

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Ongs, outside of Sally's authority, and could be ratified in a proper case. As neither the plaintiffs nor the defendants make any claim against the other for the P01 and P03 premium payments, arguably, a finding on whether the unauthorised payments have been ratified is academic, although my view is that the Ongs have ratified the payments by adopting them as their own in full knowledge of Sally's unauthorised acts upon discovery of the fraud in 2008. This category of unauthorised act, which can be ratified, is to be contrasted with the category of forgery where signatures are forged. Forgeries are an example of acts that are regarded as nullities. Therefore, transactions concluded with forged signatures cannot be ratified: *Northside Developments Pty Ltd v Registrar-General and others* (1990) 170 CLR 146 at 199. The forger does not profess to be an agent of the person whose identity he assumes when he commits the forgery, and thus the person whose signature is forged is in no position to ratify such an act: *Law Relating to Specific Contracts in Singapore* at [1.7.12]. Specifically, P05 and P06 were based on forged policy applications. As such, the P05 and P06 policy applications are devoid of any legal effect and cannot be ratified. The premiums were hence paid under effectively null contracts, and I so hold. The only way to "adopt" such an act would be if the Ongs could be said to have made a fresh offer to contract on the same terms as P05 and P06, or represented to AIA that the forged signatures were their own, such that they are now estopped from claiming that their signatures are forgeries: see *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 at 379. I find that no such offer or representation was made. The Ongs' applications to surrender P05 and P06 cannot be construed as such, as they had done so not with an intention to be bound by the terms of P05 and P06, but because they believed (because of Sally's lie) that the policy had simply been mistakenly reflected in their names.

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91 For P02 and P04, I have already found that the Ongs have not established that their signatures on the policy application forms were forged but I accepted their evidence that they did not intend to sign any application forms for P02 and P04 (see [44] above). Be that as it may, the P02 and P04 contracts were subsequently concluded based on the Ongs' purported acceptance of fresh counter-offers issued by AIA, and not AIA's acceptance of the Ongs' initial offers as represented by the policy applications. The Ongs maintain that they did not author the signatures on these counter-offers and these were also found by Mr Yap to be forged (see [38] above). I thus find that OHL's and Enny's signatures representing the acceptance of the counter-offers were forged and there was no valid acceptance of the P02 and P04 offers. My findings as to the legal effect of P02 and P04 are thus the same as that of P05 and P06 above.

92 However, P04 was subsequently "reinstated" as between AIA and Enny in May 2008 and the question is whether this amounts to a fresh and legally binding contract between AIA and Enny on the same terms as P04 (see [90] above). Enny accepts that she applied for P04's reinstatement and wanted to be legally bound by the policy, and AIA wants a declaration that P04 is a valid contract of insurance, but this is not the end of the matter. The reinstatement of a policy does not constitute a fresh contract but is merely an agreement to continue the existing (now lapsed) policy. As P04 was null at the outset, I hold that the reinstatement was also similarly null and of no legal effect. The upshot of this holding is that AIA and Enny may thus need to account to one another for the sums received and paid out under P04 separately. Notably, as no party is making a claim in respect of P04, I make no further comment and finding on this matter, save only to decline to give the AIA defendants the declaratory relief they seek (that P04 is a valid contract). P04 would already have reached its

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maturity date (1 December 2017). It appears from Ms Barker's letter dated 21 December 2017 that the maturity proceeds of P04 were received by Enny.

93 In summary, my findings are:

(a) P01 and P03 are legally valid and binding policies;

(b) P02, P05 and P06 were concluded pursuant to forged signatures and are thus nullities with no legal effect; and

(c) P04 was also concluded pursuant to a forged signature, and there can legally be no valid reinstatement of P04 which was a nullity at the outset.

Agents in the life insurance industry

94 The Ongs' claims in contract, vicarious liability and negligence are closely connected to the context in which the life insurance industry operates, in particular the relationship between insurance companies and their agents. I thus first make some findings of fact on AIA's business model and its relationship with its insurance agents arising from the evidence.

Contractual and statutory governance

95 It is a common understanding that life insurance companies carry out their business almost entirely through agents, who are authorised to procure policy applications on behalf of the insurance company they represent. The appointment is by contract and its terms and conditions govern the role and duties of the agents. These agents are paid on a commission basis and are not

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allowed to represent any other insurance company. They manage the relationship between the company and the policyholders even after the policies have been purchased. It is common for prospective and existing policyholders to deal exclusively with their agent, although they also receive correspondence from the company, usually through mail. A policyholder may choose to contact the company directly by telephone or email but most prefer the personal service of the insurance agent who is also the FSC.

96 Besides appointment by contract, the relationship between the insurance company, its agents, and its prospective and existing policyholders is also set against the wider legislative framework regulating the insurance industry, in particular the Insurance Act (Cap 142, 2002 Rev Ed) ("Insurance Act") and Financial Advisers Act (Cap 110, 2007 Rev Ed) ("FAA"). The Insurance Act regulates insurers (companies like AIA) and insurance intermediaries (insurance agents like Sally).

97 The FAA regulates persons providing financial advisory services (companies like AIA) and their representatives (insurance agents like Sally). Financial advisory services includes the arrangement of life insurance policies: s 2(1) read with para 4 of the Second Schedule of the FAA. Agents like Sally are FSCs and FSCs are regulated as "representatives" of financial advisers. A representative can only represent one principal at any given time: s 23G(1) FAA. Under ss 26 and 34 read with s 37 of the FAA, licensed financial advisers and their representatives are criminally prohibited from making any false or misleading statements and or representations with intent to deceive. MAS has also issued Guidelines on Standards of Conduct for Financial Advisers and Representatives (FAA-G04) ("FAA Guidelines") under s 64(1) of the FAA

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setting out conduct requirements for persons acting as financial advisers and their representatives. Section 64(4) of the FAA states that a failure to comply with any such guidelines can be relied on in civil proceedings "as tending to establish or negate any liability which is in question in the proceedings". The FAA Guidelines are thus relevant in helping to define the AIA defendants' duty of care in negligence.

AIA's business structure

98 I now examine AIA's general business structure, including the role of its insurance agents, its relationship with managers such as Motion, and Sally's specific role in AIA's business. I should mention at the outset that the AIA defendants accept that AIA's business model is to deal through agents.

Life cycle of a life insurance policy

99 The AIA defendants acknowledge that insurance agents form an integral part of the insurance industry, acting as intermediaries between the companies and policyholders to promote the company's insurance products and provide after-sale service. Insurance agents were authorised to procure policy applications on behalf of AIA. This included providing financial advice on behalf of AIA. Damien Tan (AIA's head of agency strategy and operations) ("Damien") and Margaret Chang (AIA's head of service quality) ("Margaret") accepted in cross-examination that AIA provided financial advice to prospective policyholders through its agents and FSCs.

100 A complete policy application included the policy application form, a benefit illustration, a personal financial review and an agent's report. TKL

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accepted that the agent completed the policy application form on behalf of the prospective policyholder. The prospective policyholder would then sign the form. The agent would also prepare a benefit illustration to project the benefits of the policy to be purchased. Medical reports would sometimes be required for risk assessment and the agent would arrange for the medical check-up. Prospective policyholders were allowed to reuse reports from medical tests performed within one year of the date of application for a new policy.

101 It was AIA's practice for the agent to deliver the policy application form with the necessary documents to AIA. It was also AIA's practice to accept one set of travel documents, large amount questionnaires, medical reports and personal financial review forms for multiple policy applications.

102 AIA also pre-allocated policy numbers to applications, regardless of whether AIA later decided to accept the risk and issue the policy. TKL explained that AIA produced folders with unique application numbers which it delivered to its agencies. When an agent was preparing a policy application, they obtained a folder with a policy number which they cited throughout the application process, *eg*, when sending the applicant for medical examination. If AIA subsequently decided to issue the policy, it would use this policy number, but the number would not be recycled if AIA declined to insure the applicant.

103 AIA's underwriting and issue department would process the policy application to determine if the policy should be underwritten. If the proposer's application was not acceptable to AIA, AIA would issue a counter-offer. The agent would deliver the counter-offer to the prospective policyholder and

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explain its terms to him. P02 and P04, for example, were issued pursuant to counter-offers by AIA.

104 Policy premiums were only payable, and were hence only applied towards a certain policy, when the policy application had been approved and the policy issued. However, when a prospective policyholder had funds with AIA, or remitted funds to AIA ahead of the approval, Agnes testified that AIA's cashier's department would "put" it into a certain policy being applied for even though the policy had not been issued. Sandra testified that the premiums were put through only after the policy application had been approved. AIA would then issue a refund cheque for any excess funds. It is common ground that the Ongs' funds were accordingly set aside and "tagged" to certain policies using their pre-allocated numbers in anticipation of the application and approval of future policies on Sally's instructions. Hence, for example, some funds from OHL's remittance was earmarked for P05 and P08 but refunded when the applications were not approved (see [78] above).

105 AIA's policy services department managed a policy after its issuance. This included dealing with all policy-related requests from policyholders, usually submitted through agents. A policyholder could surrender his policy by sending a surrender request to AIA. This could be done through the agent. Following verification of the request, AIA would issue a cheque for surrender proceeds to the policyholder. The method of delivery of the cheque and the surrender notification letter (by post, personal collection, or collection by the agent) was indicated by the policyholder on the surrender request.

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Correspondence with the policyholder

106 Although there were a variety of ways in which the policyholders could contact AIA, *eg*, through phone or the customer service centres, the main way for policyholders to convey their instructions or otherwise contact AIA was through their agents. I find that Sally was responsible for delivering numerous correspondence and documents from AIA to the Ongs, including refund and surrender cheques and receipts.

107 However, AIA claims to have sent numerous correspondence directly to the Ongs and not through Sally:

(a) Letters confirming the approval of the policy application and the issuance of the policy to the agent for delivery ("policy approval confirmation letters");

(b) Letters relating to a policy application, such as postponement, rejection, withdrawal or cancellation of applications ("policy application status letters");

(c) Semi-annual fund activity statements related to investment-linked policies, annual statements related to participative policies ("policy activity statements");

(d) Premium notices, notification of expiry of grace period for premium payments ("premium payment letters");

(e) Letters confirming the change in notification address for certain policies ("change in address confirmation letters");

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(f) Notifications of lapse of policies, reinstatement of policies and surrender of policies ("policy lapse letters")

(g) Notification of reinstatement of policies ("policy reinstatement letters");

(h) Notification of surrender of policies ("policy surrender letters");

(i) Letters confirming the credit of funds to the FDPF of certain policies ("future premium deposit letters");

(j) Letters confirming the issuance of refund cheques to the agent for delivery or enclosing the refund cheque ("refund cheque letters").

108 I find that AIA has not established that they had sent out letters in (a), (b), (c), (d), (e), (g), (h) and (j), *ie*, the policy approval confirmation letters, policy application status letters, policy activity statements, premium payment letters, change in address confirmation letters, policy reinstatement letters, policy surrender letters, and refund cheque letters). For many of these letters, the AIA defendants did not produce copies of the letters they claim were sent out to the Ongs. Of those that were produced, they were not able to show any mailing records stating that these letters had actually been despatched to the Ongs via post. This is unsatisfactory recordkeeping for a large organisation like AIA, especially when they accept that it is common for agents to hand-deliver letters and documents, but now allege that these letters were not sent through the agent but through ordinary mail. None of the witnesses produced by the AIA defendants had any personal knowledge that the letters had been mailed directly. No witness from AIA's mailing department was called.

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109 For the policy approval confirmation letters, TKL stated that AIA would send a confirmation letter directly to the proposer to inform him of the approval of the policy application, although the policy itself would be personally delivered by the agent. First, although TKL was able to produce copies of the confirmation letters from the Authorised Policies, he was not able to produce copies of the confirmation letters for the Unauthorised Policies. For these policies, TKL could only state that AIA "would have sent a letter directly by post". The Ongs point out that since the confirmation letters for P01 to P04 (two of the Authorised Policies and two of the Unauthorised Policies) would all have been printed out on the same date, it is unsatisfactory that the AIA defendants could not produce copies of the confirmation letters for P02 and P04. Second, although the confirmation letters for the Authorised Policies were available, the AIA defendants were unable to prove that the confirmation letters for the Authorised Policies had been sent out to the Ongs. TKL testified that the letters would ordinarily have been sent to an external vendor, DataPost, who would then print and send the letters via mail. He was unable to confirm from his personal knowledge or other records that this had been done for the letters relating to P01 to P06.There was also no documentary record of despatch whether maintained by AIA or DataPost.

110 For the policy application status letters, I find that at least until 2005, these were passed to the agents for delivery. This can be seen from an information sheet sent out by Theresa Nai, the vice-president and deputy general manager of the underwriting & issue department, which stated that all customers' copies of letters from the underwriting & issue department would, from 19 December 2005, be sent by ordinary mail to the policyholders, implying

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that they had not previously been sent in such a manner. TKL also conceded in cross-examination that the customer was not directly contacted for these letters.

111 For the change in address confirmation letters, TKL gave evidence that policyholders could inform the agent (orally or in writing) of any change of address, following which TKL claims that the confirmation in change of address would be sent by AIA directly to the policyholder at the old and new addresses. However, AIA was unable to even provide copies of the letters sent to the Ongs confirming their change of address for P02 and P06 and I find that they have not proved that these letters were sent to the Ongs.

112 For the policy activity statements, although AIA produced four fund activity statements for P05 in 2003 and 2004, and three for P02 in 2002 and 2003, which they had on file, there was no evidence that they had eventually sent it out, and I find that they have not established that these letters were sent to the Ongs. The same applies to the premium payment letters for the Authorised Policies and P04 (the Unauthorised Policies were single-premium policies and thus did not require regular premium payments). I also note that AIA could only produce copies of these letters from late-2005 onwards, and not before.

113 Similarly, I find that AIA cannot prove that they had sent out the policy reinstatement and policy surrender letters. AIA produced copies they had on file of three letters they claim were sent for the reinstatement of P01, P03 and P04 in 2004, but there are again no mailing records to prove this. Enny claims she did not receive these and I so find.

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114 For the refund cheque letters, TKL explained that AIA's practice was that where cheques were to be delivered to policyholders in relation to new policy applications, the cheques were delivered to the policyholder through the agent. For existing policies, cheques would be delivered to the policyholder at his local notification address unless otherwise indicated by the policyholder. Cheques related to policy reinstatement were delivered through the agent and a letter would typically be generated to accompany the delivery of the cheque. First, I find that almost all the refund cheques issued to the Ongs, certainly all the ones the Ongs claim that they did not receive, were passed to Sally for delivery rather than directly mailed to the Ongs. Neither TKL nor the other AIA witnesses identified the refund cheques that were purportedly sent directly by post to the Ongs. In a chain of internal AIA correspondence discussing Sally's performance, Agnes stated in a March 2004 email that "[a]ll the refund cheques [were] c/o to Low" and confirmed in cross-examination that her understanding was that these cheques were "care of", *ie*, entrusted to, Sally. Agnes further admitted that for a payment advice dated 22 September 2003 enclosing the second P04 refund cheque, she had cancelled out Enny's address and written "c/o Low SP/Motion" because Sally had requested that the cheque be passed to her. Second, I find that AIA's contention that letters confirming the issuance of the refund cheques (as opposed to the cheques themselves) were directly mailed to the Ongs to be lacking in certainty. The AIA defendants again have not been able to produce all the letters confirming the issuance of the cheques that they say were directly mailed to the Ongs. From the evidence, there appears to be only one such letter which Enny confirmed that she received. This was a 13 July 2005 letter stating that the P04 premium would be refunded (but that the cheque had been passed to Sally for delivery). I find that only this letter was sent. I add

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that I do not find it suspicious that Enny only received one such letter. This letter may only have been sent because of the change in AIA's policy in 2005 (see [110] above) to send a greater number of correspondence directly to the policyholders, which may have extended beyond the underwriting & issue department.

115 Conversely, I find that the letters in (f) and (i) (policy lapse letters and future premium deposit letters) were directly mailed to the Ongs, although without regularity. AIA again did not produce any mailing records and only produced copies of some of the letters they claim were sent. However, Enny gave evidence that she had received two letters in 2004 stating that the Authorised Policies had lapsed (although not the one for P04, which was sent on the same day), and a letter dated 22 April 2004 stating that funds had been credited to the FPDF for P01, and I accept that these letters went sent.

116 Finally, although the parties did not submit on s 16 of the Evidence Act, which provides that when there is a question of whether a particular act was done, the existence of any course of business according to which it naturally would have been done, is a relevant fact, I considered it for completeness of my analysis. In particular, illustration (a) to s 16 of the Evidence Act states that when the question is whether a particular letter was despatched, the facts that it was in the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place, are relevant. I find that for the letters above, the AIA defendants were unable to prove the existence of a course of business showing that such letters were sent to or generated by their external vendor and then mailed out, or otherwise directly mailed to the Ongs, other than TKL's assertion that it had been done or would

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have been done. It was insufficient for AIA to simply produce copies of letters that they said had been sent to the Ongs. Even after producing some copies, to fulfil this section, AIA needed to adduce evidence showing how these letters were eventually sent out. If they relied on an external vendor, as TKL claimed, then credible evidence would need to be adduced to show the work processes and mailing records of this external vendor. Without such evidence, and with evidence that Sally often handled and delivered documents and correspondence meant for the Ongs as part of the suite of personal services that were offered to the Ongs as high net-worth individuals, I find that the AIA defendants have not proved that they had sent out all the correspondence they claim to have sent to the Ongs.

117 All said, it must be remembered that the purpose of the AIA defendants' reliance on the AIA correspondence was primarily to support the Counterclaim in conspiracy and to defend the plaintiffs' claim in negligence. For the conspiracy claim, the AIA defendants used the various letters to show that the plaintiffs were aware of the existence of the Unauthorised Policies, and their failure to alert AIA that they had not applied for the Unauthorised Policies was consistent with the plaintiff's complicity and participation in the conspiracy. I have found that AIA did not adduce sufficient evidence to prove that many of these letters were sent, certainly not enough for the standard required to prove its claim in conspiracy, where evidence commensurate with the seriousness of the allegation is needed. Even if some of the letters regarding the Unauthorised Policies were indeed sent, I have accepted (at [51] above) the plaintiffs' evidence that although some letters regarding the Unauthorised Policies were sent to them, they did not read or were otherwise unaware of the existence of the Unauthorised Policies. The AIA defendants also used the Ongs' silence

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upon receiving the letters as a representation that they accepted the existence of these policies, thus estopping them from denying the existence of the Unauthorised Policies. I find that the plaintiffs' silence could not amount to a representation for the purposes of estoppel, as it was not deliberate, clear and unequivocal (see *Tacplas Property Services Pte Ltd v Lee Peter Michael (administrator of the estate of Lee Ching Miow, deceased)* [2000] 1 SLR(R) 159 at [62]).

118 Now that the conspiracy claim has been rejected, and the estoppel defence is unmeritorious, it is only necessary to consider the AIA defendants' reliance on the AIA correspondence in respect of negligence. For the claim in negligence, the AIA defendants rely on the correspondence not as evidence that the Ongs knew of the policies and were participating in the conspiracy, but as evidence that they took reasonable care in handling the plaintiffs' money by informing them of directly by post of certain transactions. They also allege that the Ongs were guilty of contributory negligence in not proffering reasonable explanation for not receiving letters sent from AIA directly by post to the Ongs' Scotts Road and Indonesian addresses. It was their wilful blindness to the existence of the Unauthorised Policies that allowed the continued existence and perpetuation of these policies. I will examine this later, but suffice to say for now that this claim has to be examined against the backdrop of the sustained fraud perpetrated by Sally. The AIA correspondence was the product of Sally's falsehood and was sent after the sum of US$5,060,900 was remitted to AIA in November 2002. The evidential value of the AIA correspondence is also limited as the Ongs only learnt about Sally's fraud in 2008.

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AIA's insurance agents

Outline of agency set up

119 AIA's insurance agents held contracts with AIA authorising them to procure and transmit insurance applications for AIA policies. From 2002, agents like Sally were known as FSCs, and were authorised to procure applications for certain financial products.

120 AIA operated a three-tiered agency structure. The first tier comprised agents or FSCs who held direct contracts with AIA. The second tier comprised managers or Financial Services Unit Managers ("FSUM") who would manage the agents. The third tier comprised directors or district managers, also known as Financial Services District Managers ("FSDM") who managed the agents and managers. They all held direct contracts with AIA. First tier agents were categorised into districts. The districts were not geographically demarcated, but named after third tier district managers, who were responsible for their training and supervision. Sally was part of the first tier of agents and belonged to the district "SP-Motion". "SP-Motion" referred to the agents under Rayner's supervision and was named after the company that Rayner had incorporated for the purposes of his insurance business, *ie*, the third defendant.

121 AIA also had a training scheme for its FSCs comprising courses on areas such as market conduct guidelines and compliance. Some of these were conducted by its compliance department and attendance was compulsory. Damien gave evidence that AIA had a training and competency plan ("T&C") that provided for agents' competencies in AIA products and ensured ethical competencies. The T&C plan was introduced in 2000 and contained initiatives

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AIA intended to undertake to enhance the sales advisory process and ensure that agents deliver quality advice. It however appears that this framework was pitched at less experienced agents; there was a section for agents more than one year into the job but the highest competency stage would be fulfilled once an agent completed three personal financial reviews. An agent like Sally would have thus been beyond this competency framework. Be that as it may, Sally was still required to be supervised, undergo training and observe compliance requirements. However, Rayner testified that Sally had absented herself from many supervisory meetings, training and coaching in 2004.

122 AIA agents were expected to abide by the Rule Book. It reminds agents that they are AIA's representatives and are expected to uphold the highest standards of business conduct and practices in four broad areas: (a) Duty to Insurance Profession; (b) Duty to AIA; (c) Duty to Customers; and (d) Duty to General Public. It is through the Rule Book that AIA exercises control over the agents. The Rule Book details the penalty for infringement of the rules. The penalty ranges from letter of warning, suspension or termination of contract.

Motion and Rayner

123 By and large, however, AIA entrusted the bulk of the training and supervision of its agents such as Sally to district managers. I will go into the relationship between Motion and AIA in some detail as the Ongs argue that Motion and AIA are dually vicariously liable for Sally's fraud.

124 Motion's main responsibility was to recruit, train, and supervise agents. It was contractually appointed as a General Agent of AIA on 2 April 1985 under a General Agent's Agreement, authorising it to recruit agents for AIA and train

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and supervise them. Motion's director, Rayner, was contractually appointed an AIA agent since 1966, and was authorised to procure insurance applications to AIA. Since 1970, he provided managerial services to AIA to recruit, train, and supervise AIA's insurance agents. In 1985, he set up Motion to facilitate his insurance business, including his role in managing agents.

125 The General Agent's Agreement at [124] above was terminated by AIA and ceased to have effect on 31 December 2002. Rayner personally entered into a Financial Services District Manager's Contract dated 1 January 2003 ("FSDM Contract") with AIA. Under the FSDM Contract, Rayner agreed to recruit, train and supervise FSCs for AIA. Insurance agent applicants would have to go through an agency manager of AIA (like Motion) to apply to AIA. If they were determined by Motion to be suitable, they would conclude FSC contracts with AIA and would be deemed to have been recruited by Motion. There would be no contractual relationship between Motion and the FSC. Following recruitment, Rayner supervised the agents, including Sally. The FSCs under his supervision were seated together in an office space at AIA Alexandra, which was also Motion's registered address. Rayner provided administrative support and also conducted monthly coaching sessions with the FSCs. The sessions covered compliance with AIA's rules, professional and ethical conduct, and "ways to be competitive". Rayner also held weekly meetings with the FSCs to share information sheets and compliance guidelines disseminated by AIA and monthly district meetings on issues such as training and competency.

126 Rayner also gave evidence that he had little involvement in the actual policy applications procured by his agents and eventually concluded with AIA, and "FSCs under [his] supervision would generally handle and service their

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cases and clients independent of [him] or Motion". Although he would sometimes assist in accompanying new agents to meet clients, or arrange for urgent medical examination, this was limited and his involvement would also largely end after the policy application had been submitted to AIA.

127 Sally had no contractual relationship with Motion but was supervised and trained by Rayner. Rayner witnessed the execution of the Agent's Contract and FSC Contract between Sally and AIA. He gave evidence that he similarly conducted monthly coaching sessions with Sally and she attended the district and weekly meetings together with the other FSCs.

Sally as AIA's FSC

128 Sally joined AIA as an insurance agent pursuant to an Agent's Contract signed between her and AIA dated 17 July 1998. On 1 December 2002, she also signed an FSC's Contract with AIA. The contracts stated that Sally was an agent and not an employee of AIA, and authorised Sally to procure applications from prospective policyholders for AIA insurance products and financial products. The contracts also limited Sally's authority. In particular, Sally had no authority to negotiate and enter into contracts on behalf of AIA, to receive moneys due to AIA, and was only to supply prospective policyholders with documents provided by AIA.

129 Sally performed well in AIA and was recognised as one of AIA's top agents. In 2002, she was awarded the regional top FSC and companywide first runner-up FSC (*ie*, she was second to all the other FSCs based in all the countries AIA was operating in). In 2004, AIA appointed Sally a "Consultant, Premier Financial Services" of AIA, a title accorded to agents who had

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performed well. By this appointment, she was allowed to sell certain special policies. It seems to me that she must have brought many applications of a "specialised type" to AIA to warrant her appointment in 2004 as a premier financial services consultant.

130 Sally performed these functions as an AIA insurance agent:

(a) Promoting and marketing AIA policies to prospective policyholders, including generating benefit illustrations and advising them on the most suitable insurance product for them;

(b) Filling in the policy application form on behalf of the prospective policyholder, ensuring that the form was complete with all relevant details and signatures, and delivering the form to AIA;

(c) Collecting the necessary policy application documents (see [101] above) and delivering the entire policy application to AIA;

(d) For the purpose of (c), arranging for prospective policyholders to undergo medical check-ups;

(e) Delivering AIA's counter-offer, if any, to the prospective policyholder and explaining its terms;

(f) Delivering the issued policy to the policyholder and explaining its terms;

(g) Dealing with any queries or concerns of the policyholder, and advising them on the status of their issued policies;

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(h) Conveying instructions from the policyholder to AIA in relation to, amongst others, where and how to apply remitted and/or excess funds, notification of change of address;

(i) Filling in various forms for the policyholder on their instructions, including, amongst others, forms for notification of change of address, surrender requests; and

(j) Delivering cheques to the policyholder.

131 The AIA defendants do not, in a factual sense, seriously challenge any of Sally's functions as detailed at [130]. Many are logical conclusions of the evidence given by witnesses produced by the AIA defendants. What they dispute are: (a) whether all such functions were performed by Sally in and within her authority as AIA's agent, thus binding AIA; and (b) even if so, whether Sally could still be said to be performing them on behalf of AIA if they were carried out in pursuit of her fraud.

132 The functions as described above are not coterminous with Sally's authority in her capacity as AIA's agent. Insurance agents often assume a dual role as the insured and insurer's agent in the performance of different functions. For example, an insurance agent filling in the prospective policyholder's details on the policy application form is an act on the behalf of the prospective policyholder, and not AIA, *ie*, Sally would be acting as the Ongs' agent when completing such forms: see *MacGillivray on Insurance Law* (Sweet & Maxwell, 12th Ed, 2012) ("*MacGillivray*") at [37-071]. This is however not the purpose of my inquiry at this point, which is to determine the functions Sally was performing as a matter of *fact*. The authority analysis is only relevant when

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deciding whether Sally's fraudulent acts were committed within the scope of the authority granted to her by AIA. These would be legal conclusions based on my findings of fact, and I will deal with them at the appropriate juncture.

Plaintiffs' claims against AIA

133 Having set out the factual findings regarding Sally's fraudulent acts, the framework of AIA's business model of which the insurance agents are an integral part, the practices in AIA in relation to prospective and existing insurance business as well as the various ways available to exercise control over the insurance agents, I now move on to determine whether the Ongs' claim can be made out. The Ongs argue that:

(a) The AIA TYP was a valid contract binding the AIA defendants because Sally was given actual authority to inform the Ongs that AIA had approved their application for the AIA TYP ("the Contract Issue");

(b) The AIA defendants and Motion are vicariously liable for Sally's torts of deceit because of an agency or employment relationship or a relationship akin to employment ("the Vicarious Liability Issue");

(c) The AIA defendants and Motion were negligent ("the Negligence Issue");

(d) The AIA defendants are holding the AIA TYP premiums on trust for OHL ("the *Quistclose* Trust Issue"); and

(e) The AIA defendants have been unjustly enriched by the receipt of the AIA TYP premium ("the Unjust Enrichment Issue").

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134 In the contractual claim, the plaintiffs are seeking expectation damages of the principal sum and the promised annual returns. In their other claims, the plaintiffs seek the balance of the US$5,060,900 remitted to AIA, after having given credit for the part of the money applied to P01, P03 and P04, and moneys recovered from Sally. It appears that the US$5,060,900 was sent to AIA on OHL's instructions. OHL stated in his AEIC that he remitted the money from his accounts with JP Morgan and Amex Bank. The remittance was also meant for *his* application for the AIA TYP, and not Enny's. This could potentially mean that any loss suffered would be OHL's alone and not Enny's.

135 However, in this judgment, I have evaluated the causes of action on the basis that the remittance had been advanced by both parties. First, the plaintiffs advance their causes of action in vicarious liability and negligence collectively (although not the claims in unjust enrichment and trusts), and often speak of their loss as a joint loss by both parties. Second, there is no clear evidence the remittance was from account(s) that belonged solely in OHL's name. It is unclear from the remittance details produced by AIA whether OHL was the sole beneficial owner of the remitting account. Constance also gave evidence that she was assigned to the *Ongs'* account, and not OHL's. Third, the plaintiffs have given credit for the sums recovered both by Enny (in relation to the policies under her name) and OHL in determining the quantum of their claim, suggesting that they see their loss as joint and/or are content for the sums recovered by one of them to be treated as sums recovered by the other. Fourth, the defendants have not taken issue with Enny's *locus standi* to sue in this action and do not argue that any loss would only belong to OHL. Finally, even if the remittance belonged solely to OHL, Enny would have to account for any judgment sum in her favour to OHL.

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136 Besides the issues outline above and the defences raised in connection thereto, the pleaded case and arguments presented on both sides touched on other subsidiary points. Many authorities have also been cited in closing submissions. I have however not found it necessary to refer to the subsidiary points and authorities in this judgment.

The Contract Issue

137 The plaintiffs argue that the AIA TYP is a valid contract binding on AIA as principal pursuant to the acts of its agent, Sally. I note that this issue is now scaled down and raised as an alternative submission in their closing submissions. I propose to deal with it first as it can be disposed of fairly quickly.

138 The plaintiffs are not relying on Sally's representations regarding the AIA TYP made prior to the Ongs' remittance of the money. They instead contend that Sally had the authority to make the representation that AIA had approved a policy application, which gave her at least ostensible authority to conclude a contract on AIA's behalf. The AIA defendants argue that the AIA TYP is not a validly constituted contract; they maintain that AIA did not accept any offer from OHL for such an insurance policy because Sally did not have the authority (actual or ostensible) to conclude the contract.

Wrong question asked

139 An important point to note is that Sally was never the person purporting to contract with OHL, and the parties' submissions, which focus largely on Sally's authority to conclude a contract on behalf of AIA, miss the point. Sally

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committed the fraud by fabricating documents showing that AIA had approved OHL's AIA TYP application, rather than personally concluding a contract with OHL ostensibly on AIA's behalf. Hence, it does not matter whether she had any authority to conclude the AIA TYP contract and bind AIA to its terms.

140 On the AIA defendants' argument that AIA did not accept any offer from OHL, as mentioned above at [87], an insurance policy application usually acts as an offer to be accepted by the insurer. OHL's application for the AIA TYP was an offer to be accepted by AIA. The printed text on OHL's application form for the AIA TYP, which was essentially a standard insurance application form, stated that "any insurance… applied for shall not take effect unless and until the relevant policy/policies is/are issued and delivered to [OHL]". In addition, the letter dated 2 November 2002 to OHL (which was addressed to OHL and signed off by Sally) ostensibly on behalf of AIA, confirming that his application was approved, stated that "life insurance coverage is subject to re-insurer's consideration" and "[they] would revert back to [OHL] soonest possible", and enclosed AIA's bank details for OHL's remittance. Even though the parties did not submit on the plain language outlined, it seems to be that at that point no contract had been concluded.

141 It appears that OHL only received the (forged) policy document for the AIA TYP sometime in 2003, and in any event the issue date was stated as 1 December 2002. This would explain why Sally gave OHL a letter dated 30 November 2002, this time addressed to OHL from AIA's underwriting & issue department (not Sally), stating that his application had been approved and his coverage would commence the next day, *ie*, 1 December 2002. However, this 30 November 2002 letter, being a forged document, is null and cannot be seen

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as a valid acceptance of OHL's application. The same reasoning applies for the policy document. Thus, no contract was formed between OHL and AIA. Sally had never (regardless of her authority) purported to conclude a contract with OHL on behalf of AIA. The contract issue is resolved outside agency principles.

142 For completeness, I will comment on some arguments on AIA's contractual liability on the terms of the AIA TYP using authority principles.

Sally's authority to conclude a contract

143 For an agent's acts to bind its principal, it must be shown that the agent had acted within his authority. There can be no self-authorisation by an agent and thus the agent's scope of authority can only be determined by the principal's actions and conduct: *Armagas Ltd v Mundogas SA* [1986] AC 717 ("*Armagas*"). For AIA to be bound by the terms of the AIA TYP, it must be shown that AIA gave Sally the authority to conclude insurance policies on behalf of AIA.

144 The plaintiffs do not argue that Sally was actually authorised to conclude the AIA TYP since it is clear from the terms of Sally's contract and the practice of sending policy application forms to AIA for its approval that Sally did not have the actual authority to conclude policies with her clients. Instead, the plaintiffs' argument is confined to Sally's *actual* authority to make the representation that policy applications had been approved by AIA to prospective policyholders. They contend that this gave her at least ostensible authority to enter into policies on behalf of AIA, and thus she was acting within her ostensible authority in concluding the AIA TYP with the plaintiffs. This is based on the Court of Appeal's comments in *Skandinaviska Enskilda Banken AB*

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(Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal [2011] 3 SLR 540 ("*Skandinaviska (CA)*") (at [59]):

> … if an agent has been conferred authority, whether actual or ostensible, to make the specific representation that his principal has approved a transaction…, he would also have been vested with at least ostensible authority to enter into the transaction on his principal's behalf…

145 This comment was made in the context of the Court of Appeal's response to the United Kingdom case of *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 ("*First Energy*"). The Court of Appeal found that the *First Energy* principle, namely that an agent who has no authority to conclude a particular transaction on his principal's behalf may nevertheless have apparent authority to represent that his principal has approved the transaction, was likely to be inconsistent with the principle established by *Armagas* that there can be no self-authorisation by an agent. It thus read *First Energy* to stand for the limited principle that if the court makes the finding that the agent had actual or ostensible authority to make the specific representation that his principal has approved a transaction, it would be akin to saying that he has the authority to enter into a transaction that binds his principal.

146 The question is hence whether Sally had the authority to make the specific representation that AIA had approved her clients' policy applications, and if so, whether this would imply that she had ostensible authority to conclude the AIA TYP with the plaintiffs. The plaintiffs do not specify where Sally's actual authority to make such representations is derived from. The authority to make the representation that one's principal has approved the transaction goes to the heart of the agency relationship: *Skandinaviska (CA)* at [59]. It must therefore be clearly vested in the agent by the principal.

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147 Sally had no actual authority to make the representation to prospective policyholders that their policy applications had been approved by AIA. First, Sally's contract did not give her authority to communicate policy approvals to customers. The Agent's Contract signed between her and AIA dated 17 July 1998 authorised her to procure and transmit to AIA applications for all forms of life assurance. She had no authority to negotiate, enter into contracts and/or agreements on behalf of AIA. Sally was not given authority to make representations as to policy approvals and it is also provided that "the Agent's powers shall extend no further than as expressly stated in this Agreement". More generally, Sally's primary obligation was to procure policy applications for AIA's approval, and not to enter into contracts. *MacGillivray* states at [37-057]-[37-058] that an insurance agent whose primary function is to introduce new business and forward proposals for approval does not without more possess implied or ostensible authority to contract on behalf of the company.

148 Second, the fact that Sally delivered counter-offers, letters, and policy documents from AIA to her clients, with AIA's acquiescence, does not mean that she had the actual authority to represent that AIA had approved her clients' policy applications. The plaintiffs rely on TKL and Damien's evidence that AIA's counter-offers and policy contracts were regularly delivered to the customer by the agent, and Rayner's evidence that the agent was responsible for informing the prospective policyholder of the approval of a policy application. Rayner also testified that as AIA's top 10 per cent of consultants, Sally had "direct access" to AIA and could "update [herself] on whether the case [was] settled". I do not agree that the evidence supports the plaintiffs' contention that Sally had the actual authority to find out if the application had been approved, and convey the outcome to the Ongs. It only shows that Sally regularly delivered

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letters and counter-offers from AIA to her clients. This is different from having the actual authority to represent to her clients, without more, that their policy applications had been approved by AIA. An agent in the position of Sally would only have such authority if she were able to represent to the third party without additional involvement by the principal that her principal had approved the transaction (and thus she was empowered to enter into the transaction with the third party on behalf of the principal). That Sally had to deliver letters which indicated the outcome of her clients' applications signed off by other AIA personnel, and not herself, in fact shows that she did not herself have the actual authority to represent that AIA had approved certain policy applications.

149 Third, even if Sally had the authority to make the representation that AIA had approved a policy application, her actual authority to do so would be nullified by her fraud. An agent's actual authority (express or implied), if any, is impliedly subject to a condition that it is to be exercised honestly and on behalf of the principal. Fraud would nullify the actual authority of the agent: see *Hopkins v TL Dallas Group Ltd* [2005] 1 BCLC 543 at [88] and Watts and Reynolds, *Bowstead & Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) ("*Bowstead & Reynolds*") at [8-218]. In this case, Sally's fraud in falsifying the AIA TYP documents and falsely representing to the plaintiffs that their application had been approved would have nullified any actual authority she may have had to make representations of such a nature.

150 Finally, although the plaintiffs did not make the specific submission that Sally had apparent (as opposed to actual) authority to make the representation of approval, I will briefly deal with it as apparent authority to represent a principal's approval to a transaction may also ground a finding that there was

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apparent authority to enter into the transaction on behalf of the principal (see [144] above). The fraud of an agent also does not necessarily nullify apparent authority: see *Bowstead & Reynolds* at [8-062].

151 As there can be no self-authorisation by an agent, any apparent authority vested in Sally (the agent) must be due to a representation made by AIA (the principal) as to the extent of Sally's authority. However, the plaintiffs have been unable to point to any representation made by AIA as to Sally's authority to represent that AIA had approved a policy application. As explained above, the fact that Sally delivered letters and policies to clients in fact militates against such authority, as it shows that only approvals and documents personally prepared by her principal, AIA, would be conclusive of the contract. Rayner's evidence that Sally had "direct access" to AIA and could find out the outcome of policy applications does not go very far. At no point did AIA represent to the Ongs that Sally had the authority to represent AIA's approval or conclude contracts on its behalf. Thus, I find that Sally also had no apparent authority to bind AIA to the AIA TYP.

The Vicarious Liability Issue

152 The plaintiffs argue that Motion and AIA are both vicariously liable for Sally's tort of deceit either as principal or employer as there is a close connection between Sally's fraud and the acts she performed for the defendants. Alternatively, they argue that Sally's tort was committed within the scope of her authority. In this part of the judgment, the AIA defendants' liability to the plaintiffs for Sally's fraud is analysed under the doctrine of vicarious liability.

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The law on vicarious liability

The two-stage test for the imposition of vicarious liability

153 I start with the test for the imposition of vicarious liability. The courts have recently been more willing to overtly embrace the policy justifications underlying the doctrine and adapt its reach to more complex present-day relationships. *Skandinaviska (CA)* identified two policy considerations underlying vicarious liability, namely effective compensation for the victim and deterrence of future harm by encouraging the employer to reduce the risk of similar harm in future. The concept of "enterprise risk" has also been fronting vicarious liability discourse. Essentially, an enterprise which engages agents to advance its interests (as is the case on the facts) and thereby creates, by virtue of their relationship, the risk of its agents committing wrongs against third parties should bear responsibility for the adverse consequences when such risks eventuate. The enterprise is also best placed to, and should be incentivised to, manage its own risks and prevent wrongdoing (see *Lister v Hesley Hall Ltd* [2002] 1 AC 215 ("*Lister*") at [80] and *Skandinaviska (CA)* at [76]-[80]. This was best expressed by Lord Nicholls in *Dubai Aluminium v Co Ltd v Salaam* [2003] 2 AC 366 (at [21]):

> The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged.

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154 A two-stage test for the imposition of vicarious liability was endorsed by our Court of Appeal in *Ng Huat Seng v Munib Mohammad Madni* [2017] SGCA 58 ("*Ng Huat Seng"*) (at [41] and [44]):

(a) The relationship between the tortfeasor and the defendant must be capable of giving rise to a finding of vicarious liability; and

(b) The tortfeasor's conduct must possess a sufficient connection with the relationship between the tortfeasor and the defendant.

155 The first stage (requiring a special relationship between the tortfeasor and the defendant) no longer restricts vicarious liability to employment relationships. Rather than identifying the precise type of relationship in question (*eg*, employment, agency, partnerships), the courts now look at whether the policy reasons that justify vicarious liability apply to the relationship between the tortfeasor and the defendant. Relationships which "possess the same fundamental qualities as those which inhere in employer-employee relationships" (*Ng Huat Seng* at [64]) or are "akin to that between an employer and employee" (*Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319 ("the *Christian Brothers* case") at [47]) can give rise to vicarious liability. Such relationships may possess the following qualities:

(a) The defendant is likelier to have the means to compensate the victim than the tortfeasor;

(b) The tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant;

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(c) The tortfeasor's activity is part of the defendant's business activity;

(d) The defendant, by employing or otherwise engaging the tortfeasor to carry on the activity, will have created the risk of the tort committed by the tortfeasor; and

(e) The tortfeasor will, to a greater or lesser degree, have been under the control of the defendant.

156 These factors blend the traditional tests for employment (*eg*, control and integration) with the policy aims underlying the doctrine (*eg*, compensation and risk management) and should be applied flexibly (*Cox v Ministry of Justice* [2016] 2 WLR 806 at [20]-[23]). The underlying principle is whether the policy aims of vicarious liability can be served by the imposition of liability, and can also be fairly balanced against the competing policy consideration of not imposing tort liability on a defendant who was not personally involved in or who is blameless for the tort. Ultimately, it must be fair, just, and reasonable to impose liability on the defendant.

157 The approach also does not impinge on the general rule that vicarious liability would not be imposed in respect of torts committed by independent contractors, who operate their own enterprises and should take ownership of their own risks: *Ng Huat Seng* at [64]. It may however offer a middle ground to the sometimes overly-categorical distinction between independent contractors and employees. This is especially so as organisations increasingly structure their legal relationships to avoid the implications of employment relationships, or simply for flexibility. This may result in cases where tortfeasors, in terms of

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remuneration or work arrangements, are not quite employees in the sense understood by the law and yet are so integrated in the defendant's enterprise such that they cannot fairly be called independent contractors. The distinction between independent contractors and employees would still be dispositive in most cases. However, in appropriate circumstances, rather than straitjacketing the tortfeasor into a category, it may be more conceptually satisfactory to acknowledge that such a categorisation may be artificial and unnecessary for the purposes of vicarious liability.

158 The second stage of the test requires a sufficient connection between the conduct of the tortfeasor and the relationship between the defendant and the tortfeasor, in particular whether the defendant has created or significantly enhanced, by virtue of the relationship, the very risk that materialised (*Ng Huat Seng* at [66]). This requires a consideration of the field of activities entrusted by the defendant to the tortfeasor and whether there was a sufficient connection between the tortfeasor's position and his wrongful conduct such as to make it fair, just and reasonable to impose vicarious liability on the defendant.

159 The Court of Appeal in *Skandinaviska (CA)* also held that in determining whether this connection existed, the court should consider whether the policy justifications of victim compensation and deterrence would be satisfied if liability were imposed, and endorsed five factors considered by the Canadian Supreme Court in *The Children's Foundation, the Superintendent of Family and Child Services in the Province of British Columbia and Her Majesty The Queen in Right of the Province of British Columbia as represented by the Ministry of Social Services and Housing v Patrick Allan Bazley* [1999] 2 SCR 534 ("*Bazley*")) (referred to as the *Bazley* factors). These are (with necessary

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modifications to accommodate all relationships capable of giving rise to vicarious liability):

(a) the opportunity that the enterprise afforded the tortfeasor to abuse his or her power;

(b) the extent to which the wrongful act may have furthered the defendant's aims (and hence be more likely to have been committed by the tortfeasor);

(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the defendant's enterprise;

(d) the extent of power conferred on the tortfeasor in relation to the victim; and

(e) the vulnerability of potential victims to wrongful exercise of the tortfeasor's power.

160 Thus, in summary, vicarious liability should be imposed where:

(a) The relationship between the tortfeasor and the defendant is capable of giving rise to vicarious liability, *ie*, there exists a special relationship between the defendant and the tortfeasor making it fair, just and reasonable to impose liability on the defendant for the wrongful acts of the tortfeasor. In employment relationships, there will be automatically be a special relationship. In non-employment relationships, the factors in the *Christian Brothers* case (at [159] above) can be considered to determine if the special relationship exists.

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(b) The conduct of the tortfeasor possesses a sufficient connection with the relationship between the tortfeasor and the defendant, particularly where the relationship materially increased the risk of the tort being committed, applying the *Bazley* factors where appropriate.

(c) Ultimately, vicarious liability should only be imposed when it is fair, just and reasonable to do so, having regard to the aims of effective victim compensation, deterrence of future harm, and in the light of the concept of enterprise risk. These aims should also be balanced against the competing public policy consideration militating against holding a person liable for another person's torts.

161 I make two last points. First, it is not always necessary to go through both stages of the test. Where there is an employment relationship between the tortfeasor and the defendant, such a relationship automatically fulfils the first stage of the test (see [154(a)] above) and the court needs only to consider the second stage, *ie*, whether there is a close connection between the tortfeasor's conduct and his or her relationship with the defendant. For instance, an employment relationship existed in cases such as *Lister* (staff warden in a boarding house), *Mohamud v WM Morrison Supermarkets plc* [2016] 2 WLR 821 (assistant at a petrol station), and *Bazley* (counsellor in a non-profit organisation), thus only requiring the court to consider the second stage of the test. Conversely, in *Christian Brothers* (members of a religious order), *Cox* (prisoners working in the prison kitchen) and *Ng Huat Seng* (contractor for demolition works), there was no employment relationship and the court had to first determine whether there existed a special relationship between the tortfeasor and the defendant capable of giving rise to vicarious liability. In *Ng*

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Huat Seng, having found that the tortfeasor was an independent contractor, the claim failed at the first stage of the test and there was no need to go any further.

162 Second, although a finding that a particular type of relationship is capable of giving rise to vicarious liability in the first stage of the test means that the same conclusion will generally apply to that type of relationship in future cases, the second stage of the test will always be applied on a case-by-case basis. It will depend on the particular features of the tortious conduct in question and its connection with the tortfeasor's relationship with the defendant. With this point in mind, Mr Wong's concern that the impact of vicarious liability on AIA for torts of its agents would open the floodgates is misplaced.

163 Finally, I note that in the plaintiffs' closing submissions, they contend that it does not matter whether Sally is an employee or agent because the legal test for vicarious liability for fraud in principal/agent relationships and employer/employee relationships is simply the close connection test established in *Lister*, namely whether the tortfeasor's conduct was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. It would be apparent from my analysis above that this argument is wrong because it ignores the requirement for the first stage of the test to be fulfilled, namely that a special relationship exists between the tortfeasor and the defendant. The plaintiffs argue that the Court of Appeal in *Skandinaviska (CA)* treated the terms of principal/agent and employer/employee as interchangeable (at [64]) and held that the close connection test should apply to determine the imposition of vicarious liability on a defendant for a tortfeasor's fraud, as opposed to the authority test. The plaintiffs have wrongly

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interpreted the Court of Appeal's decision in *Skandinaviska (CA)*, which dealt with vicarious liability in *employment* relationships, and thus was only concerned with the second stage of the test. It did not abolish the requirement that there ought nevertheless to be a special relationship between the tortfeasor and defendant before the close connection test can be applied. Although the terms of principal/agent and employer/employee were treated as interchangeable in the Court of Appeal's decision, this was because it was commenting on the narrow area of vicarious liability for fraud, where the employee was also acting as the agent of the employer, and thus a special relationship already existed by virtue of the employment relationship. My view is reinforced by the recent Court of Appeal decision in *Ng Huat Seng*, which stated (at [67]) that the "close connection" test in *Skandinaviska (CA)* was applied "in the context of a relationship of sufficient closeness between the defendant and tortfeasor having already been established". The plaintiffs are hence still required to prove that Sally and AIA shared a relationship that was capable of giving rise to vicarious liability, which would not be shown simply by making reference to their principal-agent relationship.

164 Holding that any agency relationship (regardless of whether there is a coterminous employment relationship) would be sufficient to fulfil the first stage of the test would not pursue the public policy aims of vicarious liability, and conflate two separate bodies of the law, namely vicarious liability and agency. First, agency relationships arise in a wide array of situations where a principal grants an agent authority to effect legal relations on his behalf. The authority test hence ensures that the principal's liability is confined to acts that have been authorised by him, as opposed to the close connection test, which encompasses a larger range of acts. Second, concepts in vicarious liability are

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not easily transposed into the agency context. The legal positions of an agent and an independent contractor are not mutually exclusive, yet vicarious liability does not generally attach to acts of an independent contractor: *Ng Huat Seng* at [64]. Finally, public policy justifications for vicarious liability are not as applicable to agency relationships. The principal's varying level of control over the agent and the independent environment the agent operates in may not permit the principal to adequately manage the risks of an agent's torts. To say that a principal would always, or even often, be better placed than its agent to effectively compensate the victim would also be an overgeneralisation.

AIA's vicarious liability for Sally's fraud

Relative fault as a precondition to vicarious liability

165 I now move on to the question of whether AIA is vicariously liable for Sally's fraud. The AIA defendants first argue that the plaintiffs have not fulfilled the precondition for the imposition of vicarious liability, namely that the plaintiffs must be less at fault than the blameworthy party (Sally) and/or the ultimate defendant (AIA): *Skandinaviska (CA)* at [78]. The AIA defendants contend that the Ongs were more at fault as compared to AIA, as they did not notice the suspicious circumstances that should have alerted them to Sally's fraud. Accordingly, vicarious liability should not be imposed.

166 There is no merit in this argument. Notably, the Court of Appeal in *Skandinaviska (CA)* did not make the lack of relative fault an absolute precondition to the imposition of vicarious liability. Its point was simply that where the victim is more at fault than the tortfeasor or defendant, the policy consideration of victim compensation as a justification for imposing vicarious

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liability loses much of its moral force. It went on to acknowledge that "the inapplicability of [victim compensation and deterrence] does not mean that the employer may not be made vicariously liable" (*Skandinaviska (CA)* at [81]). So the requirement of lack of relative fault is relevant to, but not determinative of, the policy consideration of effective victim compensation, which is in turn only one of the policy considerations determining whether vicarious liability should be imposed. Further, the Court of Appeal clearly did not intend to abrogate the general principle that vicarious liability is a form of strict liability. It affirmed that vicarious liability was imposed "without necessarily requiring any fault on the ultimate defendant's part" (at [78]). If the defendant is not at fault for the specific tort in question, any fault on the part of the victim, however little, would make the victim more at fault relative to the defendant, becoming a complete defence to vicarious liability and depriving the victim of compensation.

167 Thus, the relative fault as between the victim and the defendant is not a determinative factor for the imposition of vicarious liability. It can affect the question of whether it would be fair and just to impose vicarious liability on the defendant in a situation where the victim seeking compensation had the capacity to take precautions against risk of fraud by a tortfeasor but did not do so. In this case, I find that the Ongs were not more at fault as compared to AIA. As mentioned above, the tort was complete when OHL remitted the US$5,060,900. At that point, the Ongs could not be said to be at fault for trusting Sally's representations and fabricated promotional material regarding the AIA TYP.

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Existence of a special relationship

168 I now move on to the two-stage test for the imposition of vicarious liability. The first question is whether the relationship between Sally and AIA is capable of giving rise to a finding of vicarious liability. This is an inquiry into the relationship between Sally and AIA itself, without specific reference to the Ongs, although I will refer to some of Sally's interactions with the Ongs as examples of the functions Sally performed in relation to policyholders.

169 In my view, the relationship between Sally and AIA is capable of giving rise to vicarious liability, even though Sally may not be considered AIA's employee. It is in this limited sense that the plaintiffs' submission that it does not make a difference whether Sally is an agent or employee can be accepted.

170 Sally's contracts with AIA make it clear that both parties did not intend to be in an employment relationship. These contracts are important for ascertaining the actual intention of both parties although they are not conclusive: *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 21st Ed, 2014) ("*Clerk & Lindsell*") at [6-06]. Sally signed three contracts with AIA: the Agent's Contract in 1998, the FSC's Contract in 2002, and the PFS Agreement in 2004 (see [128] above). Two features of the contracts support the view that Sally was not AIA's employee. First, the contracts appoint her as an agent and expressly state that none of the contractual terms shall be construed to create an employment relationship. Second, they provide for commission-based remuneration tied to certain production targets.

171 However, as made clear at [155] above, an employment relationship is no longer necessary for vicarious liability to be imposed. The analysis also does

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not end at the contract between the parties, especially when third parties such as the plaintiffs are not privy to such contract. The question is whether, in substance, the relationship between Sally and AIA possesses certain qualities such that the relationship is capable of giving rise to vicarious liability. I find that regardless of whether Sally is AIA's employee, and in spite of the express provision that she is not an employee in her contracts with AIA, Sally is for all intents and purposes *not* an independent contractor and the relationship between Sally and AIA is capable of giving rise to vicarious liability.

172 First, the agents are AIA's representatives and the insurance business is operated almost entirely through agents. AIA relied on its agents to promote and market its policies to the general public. AIA's business model depended on the agents to bring prospective policyholders to AIA. The AIA defendants' argument that its agents are "simply one means of marketing the business of selling insurance", and that its product developers, underwriters and customer service officers are also involved in its insurance business, does not take them very far. The defendants' expert witness, Mr Mun Cheong Fai ("Mr Mun"), testified that the "the agency is… an integral part of the value chain of any insurance company". AIA's reliance on its agents to carry out its enterprise was accepted by other witnesses who testified on behalf of the AIA defendants, such as Agnes. I have found earlier (at [130] above) that Sally performed a wide range of functions as AIA's insurance agent. She promoted AIA policies to prospective policyholders, advised them on the insurance products that would be suitable for them, procured applications for such policies and delivered the policy application documents (travel documents, medical reports, personal financial reviews and large amount questionnaires) to AIA. There is no dispute that Sally was also responsible for handling AIA's relationship with the

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policyholder thereafter. This included delivering policies from AIA, advising the policyholder on their policies, and obtaining instructions from prospective and existing policyholders. AIA would also correspondingly accept policyholders' instructions from agents like Sally without further verification. Suffice to say for now that AIA has to fairly take the risk of its agents' torts. As AIA's agent, Sally was placed in proximity with policyholders such as the Ongs to advance the business of AIA and when coupled with AIA's practice of accepting policyholders' instructions from Sally without verification, the ensuing environment created risks of Sally's' fraud, *ie* inducing the Ongs to part with their money for a fictitious AIA TYP and then using such money to purchase other AIA policies.

173 Second, AIA has the power to select their agents and in various ways is able to exercise a measure of control over them. Sally was not allowed to represent any other insurance company. AIA's position over the agents enabled the former to furnish instructions to the agents and incentives with the objective of guiding their conduct. Sally was expected to meet AIA's high production targets and persistence requirements. Sally herself had committed four offences of failing to meet AIA's persistence requirements and was accordingly disciplined by AIA through censure letters and a notice of termination in October 2006 (which she successfully appealed). Although much of Sally's training was done through Motion, this was initiated by AIA. The training was structured with reference to AIA internal rules and regulations and was aimed at making Sally a more effective AIA representative. As an FSC, she was regularly coached on compliance with AIA's rules and regulations. Both Motion and Sally's offices were located in AIA. Further, like any other AIA agent, Sally was liable to disciplinary action, including suspension, for her breaches of the

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Rule Book (version 2002 was in use at the material time). Sally's PFS Agreement also provides that AIA maintained and contributed to an "Agent's Provident Fund" for its insurance agents. Where an agent contravened disciplinary guidelines or otherwise, this fund would be frozen by AIA. However, it is not known whether and to what extent the provision has been implemented. All in all, AIA's control over Sally was very similar to that of an employer training, managing, supervising and disciplining its employees.

174 Third, the life insurance industry is regulated in a manner that not only emphasises the closeness of the relationship between AIA and Sally, but expects AIA to take responsibility for management of its agents like Sally. The distinction and relationship between a financial adviser (*ie*, AIA) and its representatives (*ie*, Sally) is central to the regulatory framework. Under the FAA, only corporations with a financial adviser's licence, such as AIA, would be permitted to carry on a business providing financial services. Sally's ability to market insurance policies and solicit insurance was derived from her position as AIA's representative. She was not allowed to represent any other financial adviser or provide financial advisory services on her own account, and thus could not have been an independent contractor. The conduct expected of a financial adviser (*eg*, due care and diligence) is the same as that expected of its representatives. The FAA Guidelines further provide that a financial adviser should have adequate systems in place to ensure proper supervision its representatives and their activities, and should also provide its representatives with relevant training so as to enhance their competence. It is also AIA's responsibility, as the financial advisor, to take out professional indemnity insurance against liabilities arising from the performance of financial advisory services: s 10 of the FAA. There is no requirement for representatives to take

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out professional indemnity insurance. I agree with the plaintiffs that as the representatives act for the financial adviser in providing financial advisory services, the legislature intended that liabilities arising from the representatives' acts were to be covered by the professional indemnity insurance taken out by the financial adviser. Although no evidence was led as to the exact coverage of such insurance, this is an indication of the legislature's policy choice to make financial advisers accountable for the acts of its representatives. It would be inconsistent with such an allocation of risk to hold that AIA and Sally's relationship nevertheless cannot give rise to vicarious liability.

175 Overall, my view is that it is fair, just and reasonable to impose vicarious liability on AIA for the torts of its agents like Sally. Insurance agents like Sally are the lifeblood of the insurance company, seeking out prospective policyholders and managing the relationship between the company and the policyholders. In spite of the contractual arrangement between the two parties, to the public, the agents are seen as representatives of AIA who are sent and controlled by the insurance company they represent, and are essentially emanations of AIA's enterprise (see David Tan, "*Internalising Externalities*" (2015) 27 SAcLJ 822 at [44]). Further, a recognition of a special relationship between AIA and Sally is consonant with the regulatory framework governing the insurance industry, where insurance companies are increasingly expected to supervise and be responsible for their agents' acts.

Close connection between the tort and the relationship

176 The second question is whether there was a sufficient connection between Sally's fraud and her relationship with AIA. This involves an

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examination of Sally's fraudulent acts against the field of activities entrusted to Sally, with the significant consideration being whether AIA created and/or significantly enhanced the risk of Sally's fraud.

177 I begin with AIA's practice. It was AIA's practice back then to treat and accept without verification the agent's word as instructions and authorisation from the prospective and existing policyholders. As the insurance intermediary between the AIA and the Ongs, AIA did in fact accept (without verification) all of Sally's instructions as to how to handle OHL's remittances in 2002 and all refund cheques that were issued to the plaintiffs would also have been handled by Sally. In TKL's AEIC, he gave evidence that "it is industry practice for policyholders to seek advice from their agents and rely on their agents to submit their requests… to AIA. This practice has not changed in the 20 years that [he had] been employed with AIA". Sally was able to continue her fraud by representing one thing to the Ongs and another to AIA, purportedly always on behalf of the other party, thus inducing both sides to handle the money in the manners she intended. The fact that Sally was a top agent in AIA gave her credence within the company and in her dealings with the staff of AIA. In addition, AIA has a system that pre-allocates policy numbers (described at [102] above) as well as a Future Premium Deposit Fund ("FPDF") that allows prospective and existing policyholders the flexibility of paying in advance "premium[s] for the second year or third year at the point of new business application[s]." Sally was able to successfully give instructions to AIA's staff by using AIA's system of tagging the remittance to pre-allocated policy numbers. She also was able to retain the refund cheques without difficulty by using the design of the FPDF. As Mr Wong points out, OHL's funds would remain deposited in the FPDF and AIA would accept instructions via Sally to

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withdraw funds from FPDF. All Sally did was to hold on to the refund cheques and the funds would remain in the FPDF.

178 With the matters set out in [177] in mind, I find that a sufficient connection existed between Sally's fraud and her relationship with AIA on an application of the *Bazley* factors. First, AIA's business model afforded Sally the opportunity to abuse her functions as an insurance agent. Sally acted as the intermediary between AIA and the Ongs and performed tasks on behalf of both. She liaised with the Ongs, advised them on suitable insurance products, delivered letters and policies from AIA to them and conveyed instructions to AIA on their behalf. These specific functions that gave her the opportunity to perpetrate the fraud were advising the Ongs of the existence and suitability of an AIA TYP, delivering letters describing the AIA TYP, then conveying instructions to AIA, purportedly on the Ongs' behalf, to purchase the other AIA policies. Refund cheques to the Ongs were given to Sally to pass on to the Ongs but she retained the refund cheques to hide her fraud.

179 Sally had almost exclusive control over the AIA documents and information eventually received by the Ongs, thus enabling her to forge letters that requested the Ongs to return the proceeds through Sally, including the preparation of the indemnity agreement. By entrusting her with the ability to deliver policies, letters, refund cheques, and communications from AIA, AIA materially increased the risk of Sally's fraud by giving her the opportunity to forge documents from AIA and represent them as being as genuine as any other letter Sally had previously passed to the plaintiffs on behalf of AIA. To illustrate, OHL did not return the surrender proceeds immediately to Sally upon her request; he instead asked for certain measures to be taken to protect himself,

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such as a clause discharging his liability in the authorisation letter provided by Sally for P02 and also an indemnity agreement for P05 and P06 (see [70]-[71] above). Sally was able to convince OHL that these steps had been taken by forging documents such as letters from Mark O'Dell because she had been, till then, empowered by AIA to pass letters and cheques to the Ongs personally, thus allowing her to rely on a veneer of credibility.

180 Further, as an AIA agent, Sally also handled any surrender requests from the policyholders and had the authority to advise them to surrender or against surrendering certain policies. In AIA's surrender form for P02, the policyholder was asked whether he or she was advised by an FSC to withdraw this policy. Sally completed the FSC's acknowledgement explaining that she had advised the Ongs to withdraw the policy as "from 2002, there [was] a 26% growth and as [the] client [felt] that equity performance is uncertain in 2005, he [preferred] to cash out the policy". Margaret also affirmed this in cross-examination by testifying that an agent would talk to the policyholder whenever there was a surrender request. Sally's intimate involvement in the surrender process, including accompanying OHL to the AIA customer service centre and explaining the reasons for the surrender, allowed her to mislead the Ongs and maintain the fiction that she had constructed.

181 Second, Sally's conduct directly led to deceiving OHL into remitting money to purchase a non-existent insurance product and the purchase of the Unauthorised Policies with the Ongs' money, which fell squarely within AIA's aims of selling insurance policies via agents.

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182 Third, Sally's conduct was related to intimacy inherent in AIA's business model in that it was expected that agents would develop strong personal relationships with policyholders, especially high net-worth policyholders. The agents were effectively remunerated based on the number of policy applications procured and subsequently approved by AIA and they would also be penalised if these policies were prematurely cancelled or surrendered by the policyholders. Sally hence had a strong incentive to maintain a good relationship with policyholders. Sally's relationship with the Ongs also extended beyond simply providing policy services: she regularly took the Ongs' daughter out for movies and ran errands for the Ongs. Damien, AIA's head of agency strategy and operations, also acknowledged in cross-examination that AIA wanted their agents "to have a long-term relationship with the customer", and it was possible that the agents and clients would become close in the process. Further, Sally was in a unique position in so far as she possessed contacts with and serviced high net-worth individuals such as the Ongs. The AIA defendants' closing submissions in echoing Damien's evidence accepts that as AIA is in the business of selling insurance to high net-worth individuals like the Ongs, AIA's agents/FSCs have to service these individuals who "expect (at times demand) convenient and premium service from their FSCs." It follows that the AIA defendants' contention that whilst the Ongs had alternative means of contacting AIA, high net-worth individuals like the Ongs expect and demand personal service and the agent/FSC is the first point of contact.

183 I accept that the Ongs were not vulnerable consumers. They were wealthy and educated, and, although not familiar with the purchase of life insurance policies, regularly invested their money and had access to lawyers, bankers, and other advisors. However, considering all the factors above, I find

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that there was a sufficient connection between Sally's fraud and her relationship with AIA, such as to justify the imposition of vicarious liability.

184 Imposing vicarious liability in this context is also consistent with the public policy aims underlying the doctrine (namely effective compensation for the victim and deterrence of future harm by encouraging the employer to reduce the risk of similar harm in future) and enterprise risk. Sally's fraud was perpetrated within a framework where AIA had allowed and even encouraged its agents, especially its top-performing ones, to develop close relationships with high net-worth policyholders, with little intervention. These agents were given a wide range of responsibilities to act effectively as a one-stop shop to policyholders. They were remunerated based on the policy applications they procured and had to constantly maintain a good relationship with the policyholders. In addition, I considered the matters pointed out in [177] as AIA's practice – accepting its agents' instructions without verification, pre-allocated policy numbers and the FPDF – significantly enhanced the risk of Sally's fraud.

185 Further, unlike in *Skandinaviska (CA),* where the Court of Appeal found (at [91]) that it would not have been within the defendant's contemplation that there was a risk that its finance manager (the tortfeasor) might have defrauded a third party which he had no authority to deal with, Sally's fraud was of the type clearly within AIA's contemplation. The AIA defendants argue that AIA could not be expected to guard against Sally's "complex fraud and forgery", but its very own Rule Book had specifically warned agents against using marketing and promotional materials that had not been approved by AIA, making misleading statements regarding any insurance product, withholding delivery of

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policies to the policyholders, and forging the policyholder's signatures etc. In particular, Sally's actions in relation to P04, namely representing to Enny that she had used her own money to pay for two of the premiums for a policy for her daughter, although untrue, was explicitly prohibited in the Rule Book. As stated, it must be the existence of agents' fraud that result in the specifics being written into these guidelines.

186 AIA was also keenly aware that such fraud happened and persisted as a matter of fact. A set of 2006 internal presentation slides titled "Compliance and You" was disclosed in this action. Although Margaret and TKL testified that they did not know the context in which the slides were prepared and used, the slides were created by the compliance department and is evidence that AIA was aware of complaints against agents. 46% of the complaints alleged misrepresentation, 8% alleged criminal breach of trust, and 7% alleged forgery. The various types of complaints listed in the slide mirror the prohibitions found in the Rule Book. It is therefore evident that various forms of fraud by insurance agents existed, enough for AIA to expressly detail them in the Rule Book as attracting sanctions. To quote the language of the slide, "the need for higher standards of compliance [was] apparent". AIA was clearly aware of the risks arising from allowing their agents to act as intermediaries between AIA and its policyholders. Sally's fraudulent acts, such as making false representations about an AIA TYP, including forging and using promotional material for the AIA TYP, forging the Ongs' signatures on the applications forms for the Unauthorised Policies, and failing to deliver the policies for the Authorised and Unauthorised Policies to the Ongs, fell squarely within the contemplation of and was explicitly raised and prohibited by AIA.

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187 Thus, I find that AIA is vicariously liable for Sally's tort of deceit. I should add that this conclusion does not validate or invalidate AIA's business model (in terms of its reliance on agents and their agents' personal relationships with policyholders, or the practices of accepting its agents' instructions without verification, pre-allocation of policy numbers and future premium deposits). As stated above, it is simply that, having placed their agents in such a position to advance the aims of its business enterprise, AIA has to fairly take the risk of its agents' torts.

Losses flowing from Sally's fraud

188 AIA is thus vicariously liable for the losses flowing from Sally's tort of deceit. The aim is to put the Ongs in a position which they would have been in had the tort not been committed, and thus to compensate them for all direct and consequential losses caused by the transaction even if such loss was not reasonably foreseeable (*Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [21]) if the plaintiffs are able to prove such loss. Contributory negligence is also not a defence to the tort of deceit. The law remains the same even where vicarious liability applies to make one person liable for the tort of another, and as examined in [165]-[167] above, relative fault as between the victim and the defendant is not a determinative factor for the imposition of vicarious liability. Finally, the plaintiffs have a duty to mitigate when they discover the fraud. I find that they did not discover the fraud until at least January 2008.

189 OHL remitted the sum of US$5,060,900 to AIA in November 2002. The remittance was a direct consequence of Sally's tort of deceit. As stated, the loss crystallised when the remittance was completed on 27 November 2002.

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However, the Ongs make no claims in respect of P01, P03 and P04. They have also given credit for the various sums refunded from the FPDF accounts for P01, P03 and P04; the various sums retained by the Ongs from the Surrendered Policies; and other sums received from AIA.

190 The Ongs have also managed to recover the following amounts from Sally, and have deducted these sums from their claim (save for account for costs incurred in recovery of the sums):

(a) US$2,085,479 in an AIG stock portfolio;

(b) US$533,807 in a PT Valbury portfolio;

(c) S$392,000 in cash and bank transfer;

(d) S$8,545.90 recovered from a Garnishee Order in the suit against Sally from Standard Chartered Bank;

(e) S$617,063.59 recovered from a Garnishee Order in the suit against Sally from Oversea-Chinese Banking Corporation Limited; and

(f) S$130,798.43 recovered from a Garnishee Order in the suit against Sally from Unilegal LLC.

191 Thus, the Ongs essentially only claim for the losses they have not recovered from the application of his moneys to P02, P05 and P06 or otherwise remaining with AIA. The balance the Ongs claim as damages, loss and expenses that they have not recovered from the principal sum of US$5,060,900 is S$1,597,250.69, derived from the amended Tables 1 and 2 tendered on 11

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February 2016, which formed part of OHL's affidavit. The AIA defendants contend that the Ongs did not explain the basis for the exchange rates applied to convert sums in USD into SGD in the tables. Given that the AIA defendants did not cross-examine OHL on these rates, their complaint is somewhat late. The tables also provide some information as to where the exchange rates were derived, such as from bank rates for telegraphic transfers. In any event, in their closing submissions, the AIA defendants only specifically take issue with the exchange rate applied by the plaintiffs for the remittance of US$5,060,900. This exchange rate was the one applied by the AIA defendants themselves in the 2004 Statement of Account, and it is thus puzzling that the AIA defendants contest it. For the reasons stated above, I hold that there be judgment for the plaintiffs in the sum of S$1,597,250.69.

192 The AIA defendants argue that the Ongs' payment of S$6,288,058 and US$1,000,000 from the surrender proceeds of P02, P05 and P06 to Sally constituted an intervening act breaking the chain of causation. The balance of the amount paid out to Sally and not recovered by the Ongs is not recoverable against the AIA defendants. It is possible in principle for the Ongs' acts to constitute a wholly independent cause of their own loss breaking the chain of causation, but the threshold is high: damage directly flowing from the fraudulent inducement is recoverable "unless it is caused by the claimant behaving completely without prudence or common sense" (*Clerk & Lindsell* at [18-47]). Here, I find that the Ongs' act of paying the surrender proceeds out to Sally did not break the chain of causation as their acts were not wholly unreasonable given that they were still under the effects of fraud. They had even taken steps to ensure that Sally was authorised to collect money on AIA's behalf (see [70]-[71] above). If I am wrong on this, Sally's representations as to the computer

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crash, the surrender of the proceeds and payment of the bulk of the surrender proceeds to Sally on AIA behalf constituted another tort of deceit for which AIA would be vicariously liable for its consequences.

193 The Ongs also claim interest on the US$5,060,900 from 30 November 2002 to 19 December 2007 at 15.1% annually, which they claim is the profit they would otherwise have gotten from investing the money that they had remitted to AIA, or alternatively at 8% (compounded annually) or a simple interest at 5%. Although it is possible in principle to claim would-be profits from investments the plaintiff would have made but for being deceived to enter into a certain transaction, he must be able to show that he would have made such an investment or earned a certain amount of interest (*Clerk & Lindsell* at [18-43]). The Ongs would have needed to adduce evidence showing their general investment portfolio and/or evidence showing that they had investments opportunities between 2002 and 2007 but had to decline the opportunities with a return on investment at the rate of 15.1% annually having bought AIA TYP with a maturity period of five years. I find that they have not proved such loss.

194 The alternative claim of 8% by the Ongs is premised on AIA's default interest rate for late payment of premiums, but AIA's default interest for late payment has no correlation to the Ongs' losses. The same problem of the lack of proof applies to the Ongs' claim for 5% simple interest. Under s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed), this court has the discretionary power to award interest on damages from the date the cause of action arose, which was in November 2002. However, I decline to award interest from this date because whilst the remittance was in November 2002, and the fraud was discovered in

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January 2008, a period of slightly over five years, the Ongs nevertheless delayed suing the AIA defendants for the almost the same period of time. It was not until 5 September 2012 that the Writ of Summons was filed, but without the vicarious liability claim, which was only added in on 1 March 2013 when the plaintiffs amended their writ. As a matter of the court's discretion, I am minded to award interest on S$1,597,250.69 at the default rate of 5.33% per annum from the date of the (amended) Writ of Summons which is 1 March 2013 to date of payment.

195 Finally, the AIA defendants argue that Tito Isaac LLP is still holding the sale proceeds of a property belonging to Sally amounting to S$2,183,940.62 as a result of a Mareva injunction taken out by the Ongs against Sally and the Ongs should account for this sum in their claim. OHL has attempted to garnish the money but was disallowed from doing so by the court. I do not accept the AIA defendants' arguments. The Mareva injunction was taken out in the suit against Sally and cannot be set off as against the damages awarded in this particular suit.

Motion's vicarious liability for Sally's fraud

196 I move on to Motion's vicarious liability for Sally's fraud. The plaintiffs argue that Motion, through its agent Rayner, was responsible for managing and supervising Sally and thus is vicariously liable for Sally's fraud either as a principal, an employer, or because Motion and Sally were in a relationship akin to employment. I find that no such relationship existed.

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No existence of a special relationship

197 The first question is whether Sally and Motion have a special relationship such as to make it fair, just, and reasonable to impose vicarious liability. I find that no such relationship exists.

198 It is not disputed that Sally and Motion do not have any express contractual relationship, employment or otherwise. The lack of such a relationship is a clear decision by the parties to not undertake any mutual obligations towards one another, especially when viewed against the contractual matrix between AIA and Sally, and AIA and Motion:

(a) Sally concluded an Agent's Contract and FSC's Contract with AIA authorising her to procure and transmit insurance policy applications and financial product applications.

(b) Motion concluded a General Agent's Agreement with AIA in 1985 (see [124] above) authorising it to procure and transmit insurance policy applications, and to recruit agents for AIA and be responsible for their training and supervision thereafter.

199 By individually contracting with AIA rather than each other, Motion and Sally clearly saw their obligations as being owed to AIA and not between themselves. Motion's obligation to train and supervise Sally, in particular, was owed not to Sally, but AIA under the General Agent's Agreement. It was AIA who had the contractual right to sue Motion for any lack of performance on Motion's part. The decision not to have a contractual relationship between

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Motion and Sally is a strong indicator that they did not intend to be in a legally binding relationship, much less an employment one.

200 Although it is possible to infer an employment relationship in the absence of any written contract, I find that a relationship of employment or a relationship possessing the same fundamental qualities for the purposes of vicarious liability cannot be inferred or implied from these facts.

201 The first issue is whether Rayner's training and supervision of Sally could be attributed to Motion on the basis that Rayner was Motion's agent. Rayner was personally responsible for Sally's training and supervision. He conducted monthly coaching sessions with Sally and provided her with advice on how to approach prospective policyholders and manage relationships. Rayner and Sally's relationship is thus important in determining whether a factual relationship of employment existed. The plaintiffs need to show that Rayner provided this training in his capacity as a director and principal officer of Motion, *ie*, as Motion's agent. The plaintiffs argue that Sally was recruited under the General Agent's Agreement between Motion and AIA and thus Motion (through Rayner as agent) was the entity responsible for Sally's training and supervision. In support of this, the plaintiffs point to Sally's Agent's Contract, which states that her agency was "SP-Motion", and Sally's evidence that she was not recruited by Rayner and instead joined Motion in 1998 working under Rayner. Sally also acknowledged that Rayner was the "boss of Motion" and "[supervised] all the agents under Motion".

202 Motion argues that Rayner was simply fulfilling his obligations under an earlier District Manager's Contract dated 8 June 1982 concluded between

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AIA and Rayner in his personal capacity. This authorised Rayner to procure and transmit insurance policy applications, and to recruit agents for AIA and be responsible for their training and supervision thereafter. Rayner gave evidence that the General Agent's Agreement was never "activated or used" and Motion was strictly incorporated only to provide logistics, administrative and secretarial support. In response, the plaintiffs argue that the General Agent's Agreement superseded the District Manager's Contract. They point out that the two contracts are substantially similar. Clause 30 of the General Agent's Agreement was also pointed out to Rayner in cross-examination. It states:

> 30) This Agreement supersedes and determines any agreements previously entered into between the General Agent and [AIA], whether in its capacity as General Agent or otherwise, except such Agent's Contract as may have been entered into between the General Agent and [AIA] which Agent's Contract shall remain in full force and effect until terminated….

Rayner's response was that he did not look at the General Agent's Agreement because he "never [practised]" it, and Motion's job only related to the District Manager's Contract. Clause 30 provides that the General Agent's Agreement supersedes other agreements entered into between the General Agent and AIA "whether in its capacity as General Agent or otherwise". I accept that it is unclear what other capacity this refers to, as the contracting party here is Motion. However, as both contracts are substantially similar, Sally, Rayner and Damien's evidence was that Rayner was the main driving force behind Motion, Rayner entered into this General Agent's Agreement on behalf of Motion, and the clause references the Agent's Contract (Rayner had concluded such a contract with AIA on 20 June 1966), I find that the General Agent's Agreement was intended to supersede the District Manager's Contract.

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203 Even if the District Manager's Contract had not been superseded, I find that Rayner was acting as Motion's agent in discharging Motion's obligations under the General Agent's Agreement when training and supervising Sally. I base this on the following facts: (i) Sally's Agent's Contract states that her agency is "SP-Motion"; (ii) Sally testified that she was not personally recruited by Rayner but instead joined Motion and saw and represented herself as part of Motion, although working under Rayner; (iii) Motion (represented by Rayner) and AIA had agreed to a schedule of production incentives for the period of 1 December 2001 to 30 November 2002, showing that there was an intention to carry out this contract, and Rayner accepted in cross-examination that the commissions for P01 to P04 would come within the schedule (although he later retracted this with no explanation); and (iv) it would not make sense for Motion to enter into another agreement with AIA with legal consequences for the same obligations if Motion was only set up to facilitate the logistics of Rayner's personal business. I thus reject Motion's submission that Rayner was carrying out his obligations under the District Manager's Contract with no reference to the General Agent's Agreement.

204 However, the General Agent's Agreement ceased to have effect on 31 December 2002 following a letter of termination from AIA. Rayner then personally entered into a Financial Services District Manager's Contract with AIA dated 1 January 2003 ("FSDM Contract") that authorised him to recruit FSCs for AIA and be responsible for their training and supervision thereafter. I find that from 1 January 2003, Rayner's training and supervision of Sally was within his personal capacity in the fulfilment of his obligations under the FSDM contract, and not as Motion's agent. The change in contracting party shows that all parties intended that Motion would no longer have the contractual obligation

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to provide supervision and training. Rayner now took full legal responsibility for these obligations. This may have changed nothing in a factual sense, but the finding of an agency relationship is a legal conclusion attributing responsibility for an agent's acts to the principal, and the cessation of Motion's obligation and start of Rayner's personal obligation to provide such supervision and training must mean that Rayner was supervising Sally in his personal capacity.

205 The second issue is whether Motion had a special relationship with Sally that made it fair, just and reasonable to impose vicarious liability, taking into account Rayner's relationship with Sally as Motion's agent (up till 31 December 2002). I find that the plaintiffs have not shown this. The plaintiffs essentially rely on the Motion "brand", arguing that Motion had always presented itself and the agents it was responsible for training and supervising as a collective whole. This included the use of the Motion logo, the inclusion of Motion Insurance Agency on the name cards of its insurance agents, and the reference to Motion's goals, budget, and direction in regular Motion meetings. An employment relationship is more than just a constructed group identity or a group of people working towards a common goal. Motion and Sally never undertook any mutual legal obligations towards each other. It could not also be said that Motion "engaged" Sally to undertake any activity on its behalf; Sally represented AIA and sold AIA policies to receive her commission. Motion also never personally remunerated Sally for her procurement of insurance policy applications, which is key in an employment relationship. It was AIA who ultimately bore the contractual obligation of remunerating Sally if she met her production targets (again set by AIA). This is important considering that Motion and Sally were engaged in a commercial, profit-making enterprise. Further, there was scant evidence that Motion (even through Rayner) had a high level of control over

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Sally. On the whole, Motion's relationship with Sally was one where Motion acted as a team leader within an organisation, providing Sally with the facilities and guidance to help her at her job. This was before 31 December 2002 and it coheres with the three-tiered agency structure that was described at [120] above. This is qualitatively different from an employment relationship or a relationship akin to one.

206 Finally, I do not think that the policy aims underlying vicarious liability would be served by finding the requisite special relationship between Motion and Sally. Motion ultimately served and was bound by AIA's interests and rules. It recruited, trained and supervised agents based on internal regulations and guidelines provided by AIA. It disseminated information sheets and updates from AIA. Although its remuneration was tied to those of the agents it managed, and they would hence benefit if these agents performed well, this is very different from saying that Motion was carrying on an independent enterprise and engaged Sally to serve its interests in this enterprise. Motion and Sally are more accurately seen as part of AIA's enterprise and AIA would still be best-placed to put in measures to prevent Sally from committing torts.

Liability for Sally's fraud on agency principles

207 The plaintiffs argue in the alternative that even if the close connection test does not apply to determine the defendants' liability, they should be held vicariously liable on the basis that the acts constituting Sally's fraud was within her actual authority. The plaintiffs' argument is thus that the authority analysis is simply another way in which vicarious liability can be determined. I disagree.

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However, I accept that a principal can be held liable for its agent's tort on the application of agency principles, and AIA is also liable on this ground.

The law on agency and tortious liability

208 The starting point is that a principal is liable for its agent's acts when such acts are within its agent's actual or apparent authority. This extends to an agent's tortious acts, and may apply even when an agent is acting fraudulently for the agent's own benefit and not the principal's: *Lloyd v Grace, Smith & Co* [1912] AC 716 ("*Lloyd v Grace*"). *Colinvaux's Law of Insurance* (Robert Merkin ed) (Sweet & Maxwell, 8th Ed, 2006) at [16-004] helpfully states:

> The fact that the agent has been fraudulent will not affect the question of the scope of his authority. A principal is liable for the fraud, concealment, misrepresentation or wrong of his agent where the agent is acting, or purporting to act, in the course of a business such as he was authorised, or held out as authorised, to transact on behalf of his principal. It does not matter whether the act was intended for his principal's benefit or his own.

209 Unlike vicarious liability in employment relationships, a principal's liability for an agent's tort is primary and not secondary. Agency and vicarious liability are two separate concepts often canvassed before the court when determining whether a person should be held legally bound by, or otherwise responsible for, the acts of another person. An agency relationship arises where one party (the agent) acts on behalf of the other (the principal) on the principal's instructions or authority, the agent's acts thereby affecting the principal's legal relations with third parties. Agency principles are frequently applied in contract law to determine whether a principal is bound by a transaction the agent entered into, purportedly on the principal's behalf. The agent's powers – and the degree

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to which the principal is bound by the agent's acts – depend on the scope of the agent's authority. On the other hand, vicarious liability developed within tort law and was traditionally understood as an employer's liability for torts committed by his employee. Vicarious liability principles are applied in tort to determine whether it would be fair, just and reasonable for the employer to compensate a plaintiff for the consequences of his employee's torts.

210 Under both doctrines, a person can be held legally liable for the actions of another person because of the existence of a certain relationship between them. But a principal's liability for his agent's acts, when determined through the test of whether the agent was acting within his actual or apparent authority, is primary. Any act of the agent which is authorised by the principal is treated as the principal's own act. The legal conclusion is that the principal is being held liable for his own acts. An employer's liability for his employee's acts, on the other hand, is secondary or indirect, in the sense that the tortious act is the employee's alone, but the employer is vicariously liable for the tort. Thus a principal's liability for the acts of its agent, at least when established through the authority test, cannot be said to be truly vicarious (see Dal Pont, "Agency: Definitional challenges through the law of tort" (2003) 11 Torts Law Journal 68 at 77 and *Law Relating to Specific Contracts in Singapore* at [1.12.4]).

211 This conceptual distinction has been blurred in cases where an agent commits a tort when performing acts on behalf of his principal, particularly so when the agent is fraudulent. The first reason is that vicarious liability in employment relationships and liability based on agency principles have often overlapped in the past, especially where an employee also acts as the agent of the employer. This meant that there was no need to distinguish the basis on

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which the employer's liability was founded. The terminology of principal and agent, and employer and employee, hence tended to be used interchangeably and the question of whether an employer is directly or indirectly liable for his employee's acts in these contexts was often glossed over.

212 The second reason lies in the line of case law holding that an employer's vicarious liability for an agent's fraud is determined by agency principles, rather than the traditional course of employment test. The leading case is *Armagas*, where the House of Lords held that an employer's vicarious liability for an employee's fraud was determined using agency principles, *ie*, whether the employer had authorised the employee to make the fraudulent statements or had held its employee out as being authorised to make such statements. Lord Keith found that "the question of ostensible authority in the contractual field is closely intertwined with that of vicarious liability for the fraud of a servant", and "the attempted distinction" between acting within one's scope of authority and one's course of employment "has no validity in this category of case". He relied on *Lloyd v Grace* for the proposition that "the two expressions [mean] one and the same thing". There, a solicitor's managing clerk fraudulently induced a client to transfer her mortgage to him. The clerk then called in the mortgage and disposed of the property. In reaching its decision, the House of Lords used the terms of servant and agent interchangeably and found that the clerk was acting in the course of his employment and not outside the scope of his agency, thus making the principal liable. However, it was clear that the House of Lords applied traditional agency principles in determining the solicitor's liability, and did not ascribe a broader meaning to "scope of [one's] agency" beyond meaning that the tort should be within the agent's scope of authority, *ie*, his actual or apparent authority, in order to treat the fraud as that of the principal's. The

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clerk's role was to advise clients that came to the firm to sell property as to the best way to sell property and the necessary documents to execute, and he was acting within that authority when he fraudulently provided the plaintiff with documents that transferred the mortgage to himself. If agency principles are to determine a principal's responsibility for the tortious acts of its agent, such liability should be recognised as direct, rather than secondary and vicarious.

213 In *Skandinaviska (CA)*, the Court of Appeal found that when determining an employer's vicarious liability for an employee's fraud, the close connection test should be applied. The law in Singapore hence no longer follows *Armagas* in so far as *Armagas* holds that an employer's vicarious liability for an employee's fraud should be determined by the authority test. In my view, this development allows us to cleanly separate a principal's primary liability on agency principles and an employer's secondary or vicarious liability on the close connection test. It follows then that a principal's liability on agency principles should not be seen as another way by which vicarious liability can be imposed on a principal, and the tortious act has to specifically fall within an agent's authority before direct liability can be imposed. This is especially so given that the use of the authority analysis in *Armagas* was concerned with *restricting* the employer's liability in cases of an employee's fraudulent misrepresentation, and not with creating a general principle by which a principal may be vicariously liable for an agent's torts.

214 Finally, in determining a principal's liability for an agent's torts, the concepts of agency and authority need to be clearly defined, particularly because principles of agency were not developed for tort law. The classic definition of an agent is one authorised to create contractual relations with third

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parties on behalf of the principal. This specific authority is less relevant in tort as there are a multitude of ways that a person can commit a tort, ranging from misrepresentation to trespass. In such cases the concept of an agent, as it has been used in case law, is more amorphous. In the realm of tort, determining whether the tortfeasor was an agent is not a question of whether the agent had any capacity to create or affect the legal relations on behalf of a principal per se, but whether he had some form of authority or permission to act on his principal's behalf, and this would need to be closely examined.

215 Further, even if a relationship of agency is established, although the terminology of authority serves the contractual realm well, it runs into problems in tortious liability. One would be hard pressed to find a principal authorising tortious acts. Any grant of actual authority is also subject to an implied condition that it is to be exercised honestly and on behalf of the principal. The inquiry thus tends to end up in apparent authority, where the key question is what exactly the principal has represented or held out as to the agent's scope of authority such that it encompasses the tortious act. The precise class of acts that the principal has apparently authorised would need to be closely examined. Generally, for misrepresentation, the court would determine liability under an authority analysis, applying the general rule that an innocent principal is liable for an agent's misrepresentations if the misrepresentations fall within the general class of statements that the principal apparently authorised the agent to make.

AIA's liability for Sally's misrepresentations

216 Whether AIA is liable as principal for Sally's tort of deceit depends on whether Sally's misrepresentations were made within her actual or apparent

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authority as an agent: see *Bowstead & Reynolds* at [8-177]. The plaintiffs' submissions only concern Sally's actual authority as an AIA agent, but fraud negatives actual authority: see [149] above. Sally also clearly had no actual authority to make representations regarding fictitious insurance products that were not sold by AIA, or to receive surrender proceeds personally on behalf of AIA. AIA would hence only be liable for her fraudulent misrepresentations if these were made within her apparent authority, yet the plaintiffs have not made any submissions as to how AIA had held Sally out as having such authority. I will nevertheless examine whether Sally's representations to the plaintiffs were within her apparent authority. This involves determining what the specific misrepresentations relate to and whether they fall within a class of representations that Sally was held out as having the authority to make.

217 The application of agency principles here differ from the earlier analysis in contract (at [143]-[149] above). When determining whether AIA should be contractually bound by the terms of the AIA TYP, the question was whether a contract was concluded and thus whether Sally had the authority to conclude a contract on behalf of AIA. I found that she did not. When determining whether AIA is liable in tort for Sally's acts, however, the question is whether Sally's fraudulent misrepresentations, being the tortious acts in question, were made within her apparent authority. The plaintiffs simply have to prove that she had the apparent authority to make the relevant representations on behalf of AIA.

218 As regards representations relating to the existence the AIA TYP and the terms and benefits thereof, the AIA defendants claim that Sally was never held out as being able to make false statements about any insurance product, but the whole concept of apparent authority is to protect third parties who are not in

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a position to know the truthfulness of an agent's representations. The question is whether AIA held Sally out as being able to make representations as to AIA's insurance policies, such that third parties such as the Ongs were entitled to rely on Sally's representations as true. It is sufficient for the purposes of apparent authority that the principal places the agent in a position generally associated with the exercise of certain powers and functions. I find that AIA, by appointing Sally as its insurance agent, placed Sally in a position to canvass and solicit insurance proposals from members of the public, including the Ongs. It clothed her with the authority to make representations regarding insurance policies offered by AIA. Third parties like the Ongs were entitled to rely on and did rely on Sally's representations as to AIA's insurance policies not only as to its qualities but also to its existence, *ie*, that policies being promoted by Sally were indeed policies that were being offered by AIA. By being AIA's representative and the virtually exclusive means by which AIA marketed its insurance policies, AIA held its agents such as Sally out as marketing its policies, and if such agents fraudulently represented that AIA offered a certain policy which AIA did not in fact offer, AIA would still be liable for its agents' misrepresentations. On the facts of this case, I find that Sally's representations as to the existence and salient terms of the AIA TYP were made within her apparent authority, binding AIA.

219 Unlike Sally's representations as to the *existence and terms* of the AIA TYP, I find that her representation as to *AIA's approval* of the Ongs' AIA TYP application was not within her actual or apparent authority and thus AIA cannot be liable as principal for such a representation ([147] and [150] above). This is not fatal as the Ongs do not need to prove that Sally's representations as to the AIA TYP's existence and terms were the sole inducement for them to remit the

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money to AIA, but that they had played a real and substantial part and operated on their minds (*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 [94]). The fact that the Ongs were careless in failing to discover the falsity is also not a defence (*Clerk & Lindsell* at [18-37]). The question is thus whether Sally's representation that AIA had approved the Ongs' AIA TYP application superseded her prior representations as to the existence and terms of the AIA TYP such that her prior representations no longer operated on the Ongs' mind when remitting the money. My view is that such a finding would be artificial and would not truly reflect the state of the Ongs' minds in November 2002. Although the AIA TYP approval stated the basic terms of the AIA TYP and was probably a prerequisite to their eventual decision to remit the money, Sally's prior representations as to the terms of the AIA TYP, being what their understanding was founded on, still played a substantial part in their minds and had to be taken together with the approval in their decision to purchase the policy by remitting the money to AIA. Thus, AIA would be liable for the loss ensuing from the Ongs' decision to remit the US$5,060,900 to AIA.

220 In this judgment, the resolution of the AIA defendants' liability for Sally's tort of deceit was examined first under vicarious liability principles and separately under authority principles. The AIA defendants were not able to withstand liability under both approaches and tests.

Motion's liability for Sally's misrepresentations

221 I find that Motion is not liable as principal for Sally's tortious acts. As Motion and Sally have no contractual relationship, any relationship of agency

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would need to be implied from the facts. The plaintiffs argue that under the General Agent's Agreement, Motion was authorised to procure and transmit insurance policy applications and pay over premiums under existing contracts of insurance to AIA. As Motion could only carry out this function through its agents, Sally acted as Motion's agent and thus had actual authority to make representations when procuring and transmitting insurance policy applications and collecting and paying over premiums. Again, the plaintiffs do not make any submissions on apparent authority, and I find that Sally did not have actual authority to make fraudulent misrepresentations on Motion's behalf, but I will take the plaintiffs' case a step further to mean that by virtue of her position as Motion's agent in procuring and transmitting insurance applications, she had the apparent authority to make these fraudulent misrepresentations.

222 I find that apparent authority cannot be made out. Apparent authority requires a representation by the principal and reliance by the third party on that representation. First, there was no representation by Motion that Sally was acting on their behalf. OHL admitted in cross-examination that he had not dealt with Rayner or Motion until 2008. His only knowledge of Motion came from Sally's name card, which, although listing "Motion Insurance Agency Pte Ltd" at the top, stated that Sally was "representing / American International Assurance Co Ltd". I find that this does not constitute a representation that Sally was without more authorised by Motion to make representations on Motion's behalf as to the existence and terms of insurance policies offered by AIA. Second, even if such a representation could be made out, there was no reliance by OHL on such a representation. It was clear from cross-examination that he had consistently treated Sally as AIA's agent and not Motion's. When asked whether he had known that Motion was the agency that managed Sally, he

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replied that he "[hadn't] thought too much about it". His attempts to point to Motion's appearance on Sally name card or the fact that Motion and AIA were in the same building, and also his explanation that he considered Motion and AIA the same and thus relied on Sally as being both Motion and AIA's agent, appeared belated and were unconvincing as to his reliance on any representations. I thus find that Sally did not make the fraudulent misrepresentations within her apparent authority as Motion's agent and thus Motion is not liable for her representations.

The Negligence Issue

223 I move on to the plaintiffs' claim in negligence. The plaintiffs claim that both AIA and Motion acted negligently in accepting Sally's instructions and misapplying the US$5,060,900 remitted by OHL to the AIA Policies, *ie*, P01 to P06. This is a claim for pure economic loss but more specifically the loss of the opportunity to recover the amount that they had remitted to AIA. The plaintiffs do not argue that AIA's negligence had caused OHL to remit the money to AIA.

AIA's liability in negligence

Duty and standard of care

224 Generally, AIA owed a duty of care to the Ongs to act with reasonable care in handling the money remitted by them to protect them from pure economic loss. This duty arose when OHL remitted, and AIA accepted and processed, the US$5,060,900 to AIA in November 2002. I agree with the AIA defendants that the plaintiffs incorrectly framed AIA's duty of care by referencing a whole gamut of specific duties of care allegedly owed by the AIA defendants, contending that every suspicious circumstance gave rise to an

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independent duty of care. Unlike contractual duties of care, a tortious duty is simply a duty to take such care as is reasonable in the circumstances to protect the plaintiff from a certain type of loss (*Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [19]). Thus, I do not agree that AIA owes a specific duty to detect Sally's fraud. They may have failed to take reasonable care by not inquiring into Sally's actions or informing the plaintiffs when they were put on notice as a result of suspicious circumstances or irregularities, but this assessment is to be taken when considering whether there has been a breach of their general duty of care.

225 I apply the test in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 to determine whether a duty of care exists between AIA and the plaintiffs, namely (a) whether it was factually foreseeable that the plaintiffs would suffer loss from the defendant's failure to take reasonable care; (b) whether there was a relationship of proximity between the plaintiffs and defendant; and (c) if so, whether any policy considerations militated against a duty of care being imposed.

226 For (a), I find that, having received the US$5,060,900 remitted by OHL, which had not been expressly identified towards the payment of premium of any policy, and then applying it towards policies in the Ongs' respective names, it was clearly foreseeable to the AIA defendants that failure to take reasonable care in the handling of the money would cause the Ongs to suffer loss.

227 For (b), I find that there was a relationship of proximity between AIA and the Ongs as both prospective and existing policyholders from the time the US$5,060,900 was remitted to AIA and accepted by it for the purposes of the

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purchase of policies. In cases of pure economic loss, the two criteria of assumption of responsibility and reasonable reliance is often required, although relational or circumstantial, physical and/or causal proximity is also sufficient (*Anwar Patrick Adrian and another v Ng Chong & Hue LCC and another* [2014] 3 SLR 761 at [69] and [150]). I find that, upon receiving the Ongs' remittance of US$5,060,900, checking their policy records in AIA's database, finding out that the relevant FSC was Sally and holding on the remittance in anticipation of Sally's instructions and the Ongs' additional policy applications, AIA voluntarily assumed responsibility of the management of the Ongs' US$5,090,600 and the Ongs reasonably relied on the fact that AIA would apply the money to the policies they intended to purchase and refund them the excess. There was also relational proximity as the Ongs were also known to AIA; they had applied for and/or purchased policies from AIA in the recent past and thus AIA did not receive the funds from unknown individuals. They had dealt, and were dealing, directly and closely with AIA through its insurance agents. Further, even though some of the policies were null, they dealt with one another on the mistaken basis that they were in a contractual relationship, and in my view, the factual closeness of such a relationship would be sufficient to find proximity for the purposes of a claim in negligence. Finally, there is causal proximity as AIA's application and refund of the Ongs' money would clearly affect the Ongs.

228 For (c), there are no policy considerations militating against imposing a duty of care on AIA to take reasonable care in handling the Ongs' money such as to protect them against economic loss. The FAA expresses clear legislative intention to hold financial advisers (such as AIA) responsible for their conduct in dealing with prospective and existing customers. The FAA guidelines (see

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[97] above) state that a financial adviser is expected to act with due care and diligence in executing its clients' orders according to their instructions, supervise its representatives *etc*, with the clear aim of protecting customers.

229 I thus find that AIA, having received the Ongs' money, owed the Ongs a duty to take reasonable care in handling the Ongs' money to protect them from economic loss. The applicable standard of care is a reasonable insurer exercising ordinary care and skill during 2002 to 2007, and this can be gleaned from (a) the standard and practices of the industry based on expert evidence and (b) the statutory and regulatory framework, such as the Insurance Act and FAA. In addition to the FAA Guidelines, MAS also issued a set of guidelines on mitigating insurance fraud risk in November 2012 ("2012 MAS Guidelines"), which may be helpful but are less relevant as they were recently published.

230 On the issue of expert evidence, I preferred the evidence of Mr Mun, the AIA defendants' expert witness, who was able to provide a considered view in the light of the practice of the insurance industry during the material time. In contrast, I find that Mr Tan Kin Lian ("Mr Tan"), who was the plaintiffs' witness, often simply described his own experience at NTUC Income or what he personally thought should have been done without making reference to the wider insurance industry and its practices. Overall, Mr Mun was also more willing to make concessions, while Mr Tan appeared to take an overly consumer-friendly approach when giving concurrent evidence. In considering the evidence of the experts, it is necessary to bear in mind Mr Tan's remark that NTUC Income caters to the insurance needs of the masses in general. It is not disputed that AIA does service high net-worth individuals looking for non-traditional insurance plans that meet their desire for wealth preservation, estate

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planning and legacy enhancement, and the Ongs were such individuals. Therefore, Mr Tan's opinion evidence based on his experience as the former head of NTUC Income has limited bandwidth. Ultimately, reliance on expert evidence is minimal given the nature of the relevant duty of care under consideration. Breach of duty can be easily evaluated from objective evidence before this court.

Breach of duty

231 In their closing submissions, the plaintiffs allege six individual breaches by AIA, namely in (a) failing to ensure that certain documents were sent directly to the Ongs; (b) misapplying OHL's money by following Sally's instructions despite obvious suspicious circumstances; (c) operational lapses in underwriting and policy services; (d) failing to contact the Ongs directly when it was aware of the numerous suspicious circumstances surrounding the Ongs' funds and policies; (e) entrusting the 2004 Statement of Account to Sally, and (f) failing to supervise Sally in her role as a representative.

232 The real question that underlies the parties' wide ranging submissions is whether AIA, having developed an enterprise relying heavily on agents, and being aware of the risks of this extent of reliance, took reasonable care in maintaining and implementing controls and safeguards to ensure that its customers' moneys were protected and applied according to their instructions. It is not disputed that AIA relies primarily on its agents like Sally to act as intermediary to liaise and handle communications with the policyholders, and the use of agents fulfil the interests of personalised service of such a business model. AIA was clearly aware that a business model that relies heavily on

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agents carries risks. The Rule Book and presentation slides created by its compliance department showed that AIA knew that it was not uncommon for agents to perpetrate fraud on policyholders and on AIA itself, such as withholding policy documents, refund cheques, or purchasing policies in their customers' names with the agent's own money (at [185]-[186] above). Thus, although AIA claims that Sally's fraud was extreme and could not have been detected, the constituents of this fraud, such as forged documents and failing to pass policies and cheques to policyholders, were all familiar to AIA and provided for in the Rule Book.

233 Therefore, it would have been part of AIA's duty to take reasonable care in respect of their customers' money by implementing safeguards or checks-and-balances that were reasonable in the circumstances. One would expect to see safeguards aimed at training and supervising its agents to ensure that they would carry out their tasks, such as delivering documents or explaining policy terms to policyholders, as well operational procedures that would monitor whether such tasks were carried out or not.

234 AIA was unable to prove that its systems contained any such safeguards or checks, or even if it did, whether such safeguards or checks were indeed carried out in the Ongs' case. I accept that the Rule Book, which provided disciplinary guidelines and penalties in instances of breach, and the training provided to the agents, whether via AIA directly or through its managers (see [120]-[121]), was a way in which AIA through training and awareness could ensure that its agents performed their duties efficiently and honestly.

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235 However, beyond this, AIA was unable to show that it took reasonable care in handling its policyholders' money, such as the Ongs'. It allowed Sally, its agent, to send policy documents, refund cheques and other important documents to the policyholders without adequate safeguards. I accept that the refund cheques were made out in the policyholders' names and the moneys represented by these refund cheques could not have been misappropriated by Sally. The policy document itself would also be of little direct value to Sally. However, AIA was aware of the risks of its agents failing to transmit documents and cheques to policyholders and also misrepresenting policyholders' instructions. The Rule Book prohibits agents from withholding policy documents, with eventual penalties of suspension or termination of the agent's contract, and also from "[using] policyholder's cheque to pay for own or other policyholder". Barring the Rule Book, no evidence was led on what safeguards were in place to ensure that the policyholders did receive policies and refund cheques.

236 The experts agreed that it was industry practice to communicate directly with policyholders on important transactions by sending them correspondence by post. AIA's standard operating procedure ("SOP") is to send out confirmation letters and other letters for important transactions such as policy application approval, refunds, policy lapses, reinstatements, and surrenders *etc*, as can be seen from TKL's evidence. In this case, their breach stems from their failure to show that they had acted in accordance with their own stated SOP (see [108] and [115] above). The failure to send confirmation letters would not have automatically resulted in a breach if AIA had other safeguards in place. That said, no other safeguards arose from AIA's evidence. I note that Mr Tan's view that AIA's duty specifically requires it to directly ascertain that the policyholder

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had received the policy document by, for example, "[telephoning] the policyholder to check that the policy had been received", appears to require a large volume of calls on the part of the insurance company and would be somewhat intrusive for the policyholder. Mr Tan also did not claim that this was industry practice.

237 On the refund cheques of sizable amounts (see [242] below), they were handed to Sally, who did not pass them on to the Ongs. Consequently, the refund cheques remained unpresented for a long time. To name a few, the P01 refund cheque (see [76(b)] above), P02 refund cheque (see [76(d)] above), 17 June 2003 refund cheque (see [77] above), remained unpresented for at least ten months before AIA applied it based on Sally's fresh instructions. The AIA defendants argue that they carried out standard bank reconciliation procedures by generating lists of unpresented cheques, but none of the witnesses were able to state if any follow-up action was taken on these lists, either in this case or in the ordinary course of business. Agnes and Sandra both testified that they were not responsible for following up on unpresented cheques and Agnes testified that it was "not [their] practice" to ask policyholders why their cheques were unpresented. Mr Mun accepted in cross-examination that AIA should have at least sought clarification from Rayner and AIA had neglected to do what he would have expected them to have done. As stated above, although the refund cheques are made out in the policyholders' names and cannot be cashed out by the agent, there is still a need to implement a follow-up procedure for cheques which remained unpresented months after issue.

238 The AIA defendants argue that they had sought the Ongs' confirmation that all the refund cheques were in their possession and their instructions on

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applying the money represented by the unpresented refund cheques to premium renewal payments for P01, P03 and P04 in the 2004 Statement of Account (see [82] above). Sally returned the Ongs' signed confirmation and instructions (there is no dispute that these were forged) to AIA on 26 April 2004. However, as the Ongs submit, the P02 and P04 refund cheques were issued in November 2002 and had expired after six months without any action being taken by AIA.

239 Further, I find that it would have been reasonable for AIA, having already departed from its usual practice of accepting the agent's instructions without any written verification and instead seeking a written confirmation from the Ongs for the refund cheques and the 2004 Statement of Account, to go one step further and deal with the Ongs directly. Notwithstanding that they may not have suspected Sally of fraud per se, AIA was clearly concerned with the unusualness of the transactions and the unpresented refund cheques and took active steps to confirm that the plaintiffs had indeed given such instructions. By then AIA was querying Sally's actions vis-à-vis the refund cheques. Theresa Nai, the head of insurance operations at AIA, had written a note to TKL on 2 April 2004 that she was "not sure [that Sally's] action in not attempting to send refund cheque back to client [was] justifiable. In all the exchanges, [she had] not seen [the Ongs'] instruction about [the] use of refund cheque for renewal premiums". This showed AIA's knowledge that Sally may not have sent the refund cheques to the Ongs and there had been no express instructions from OHL regarding the use of the refund cheque. The second P04 cheque issued in September 2003 had also been re-issued in February 2004 because Sally had misplaced it, again showing that Sally had not been conscientiously forwarding the cheques onto the Ongs. Further, Sally was also asking for a waiver of health

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certificates for the reinstatement, which if granted would have obviated the need for the Ongs' involvement in the reinstatement at all.

240 In these circumstances, it was insufficient for AIA, having regard to the circumstances as at April 2004, to ask Sally to obtain the Ongs' confirmation of their possession of the refund cheques throughout and their instructions to use the funds for reinstatement, given that Sally had been responsible for delivering the cheques from the outset and that the instructions to use the funds represented by the unpresented cheques to reinstate P01, P03 and P04 were given by her (ostensibly on behalf of the Ongs). Had AIA exercised reasonable care, it should have sought confirmation of the Ongs' intentions from them directly, bypassing Sally. This also has to be seen in the light of the little effort AIA would have needed to expend in contacting the Ongs and verifying their instructions. In this regard, I agree with Mr Tan's evidence that AIA's continued reluctance to contact OHL and rely on Sally instead was difficult to understand. It would also have been reasonable for them to arrange a meeting with the Ongs in person, given that the 2004 Statement of Account contained a large amount of information (transactions reflecting the existence of P01 to P06 and the management of the Ongs' funds from 18 November 2002 to 2 April 2004) and would require explanation.

241 Further, even though AIA had sent Sally off to the Ongs with the 2004 Statement of Account and request for confirmation of instructions, it transpired that AIA had already executed Sally's instructions regarding the Ongs' funds without waiting for a response. Although the 2004 Statement of Account set out an option for the Ongs to either have any excess payments (after payment of the renewal premiums for P01, P03 and P04) refunded or deposited into the FPDF,

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Agnes testified that she deposited the money into the FDPF on 22 April 2004, four days before the 2004 Statement of Account was purportedly signed, in reliance on Sally's instructions in February and not the 2004 Statement of Account. Further, P01, P03 and P04 were reinstated on 13 April 2004 again on Sally's instructions and before the 2004 Statement of Account was returned. This shows that AIA was not truly seeking confirmation of the Ongs' intentions and was still content to rely on Sally's representations to handle the Ongs' money despite the state of affairs.

242 Thus, I find that AIA had breached its duty to take reasonable care of OHL's money. For completeness, I will now deal with the rest of the plaintiffs' submissions. First, I find that AIA was not in breach by not contacting the Ongs prior to this (except by not sending confirmation letters), namely in accepting Sally's instructions to apply the US$5,060,900 to the premium payments of the Authorised and Unauthorised Policies. OHL had remitted the money to AIA without providing any instructions either personally or together with the remittance and it was reasonable for AIA, after having found out that Sally was OHL's insurance agent, to have expected that OHL would provide his instructions through Sally. The Ongs claim that it was unusual to have such large excesses arising from the application of funds remitted to policies, and for large refunds to be issued. There were excesses of S$616,991.38 from the first two tranches, US$183,714 from the third tranche, US$740,000 and S$1m from the fourth tranche and S$276,481.70 from the fifth tranche. I accept Mr Mun's evidence that although large refund cheques were unusual (as there would usually be underpayment rather than substantial overpayment), they were not immediately suspicious. The remittance was quickly followed by the Ongs' applications for P01 to P04 (forged, but without AIA's knowledge) and any

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excess would have been returned to the Ongs anyway. It was not unreasonable to deliver refund cheques to the Ongs through Sally as these cheques were in the Ongs' names and could not have been misappropriated by Sally.

243 Second, the plaintiffs also claim that AIA breached its duty of care by failing to supervise Sally in her role as its representative under the FAA. They rely on *Straus v Decaire* [2012] ONCA 918, a decision of the Ontario Superior Court of Justice (affirmed on appeal), which held that a mutual fund dealer was liable in negligence for failing to train its sales representative, who promoted an unsuitable investment to the plaintiffs in that case. The plaintiffs point to Rayner's admission in cross-examination that he had difficulties managing Sally because she had spent a lot of time in Indonesia. However, I find that Rayner and AIA had given Sally the requisite training and supervision and she was clearly aware of the compliance standards she was required to adhere to as an insurance agent (see [121]-[127] above). Here, Sally sold a product that was not genuine, which is not the same thing as advising the prospective policyholder to buy an unsuitable product. In contrast, in *Straus v Decaire*, the sales representative had not been fully trained as to the industry compliance standards, in particular the limits on off book activities. Other than the two main breaches I have identified above, I find that AIA has not breached its duty by failing to train and supervise Sally.

244 Third, the plaintiffs also allege that AIA's operational lapses amounted to breaches of its duty. The plaintiffs only highlight two lapses, *ie*, their protocol in determining whether a policy applicant is in Singapore and AIA staff witnessing documents that they did not sign. The lapses have no bearing on the case as they are not anywhere near the realm of the duty to act with reasonable

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care in handling the money remitted by the Ongs to protect them from pure economic loss. For the former, I find that AIA's procedure of requiring a photocopy of a policy applicant's passport showing an entry stamp or social visit pass permitting the prospective policyholder to be in Singapore on the date of his signature on the application form is a reasonable way of ascertaining that the applicant was in Singapore at the time of application. For the latter, I find that even if one employee (*ie*, Ms Shirley Tan) had breached AIA procedure by signing as a witness for a signature she had not been present for, this would not amount to AIA having breached its duty unless the plaintiffs can prove that this was as a result of AIA's negligence. AIA cannot be liable in negligence for any small slip-up of their employees without more. Further, the documents the plaintiffs are referring to relate to the 2000 series of policies, which are not the subject of this action (see [17] above).

Causation and loss

245 The plaintiffs are not claiming that AIA's breaches resulted in OHL transmitting US$5,060,900 to AIA, but that AIA's breaches caused the Ongs to suffer loss at two stages. First, AIA failed to contact the Ongs to confirm their instructions in relation to the US$5,060,900 and applied it to the Authorised and Unauthorised Policies, depriving the Ongs the chance to be refunded the money. Second, AIA's failure to supervise Sally's conduct to minimise the foreseeable risk of fraud, detect Sally's fraud and/or contact the Ongs directly resulted in the delayed discovery of the fraud, depriving the Ongs of their chance of recovering the money. Only the second is relevant as I have already found that AIA's failure to confirm the Ongs' instructions in relation to the application of

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the US$5,090,600 to the Authorised and Unauthorised Policies was not a breach (see [242] above).

246 The Ongs' case is that had AIA contacted them directly, both AIA and the Ongs would have discovered the fraud and taken steps to stop it, thus allowing the Ongs to recover the money parked in the Authorised and Unauthorised Policies (and before the bulk of the surrender proceeds were paid out to Sally). This is not a claim for a loss of a chance as an independent head of loss, because the Ongs' loss depends on what the Ongs would have done, rather than the hypothetical actions of a third party (*JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR(R) 460 ("*JSI Shipping*") at [146]-[147]). Thus, to prove that AIA's failure to contact the Ongs caused the Ongs' loss, the Ongs need to prove on a balance of probabilities that had AIA in fact contacted them to follow up on the refund cheques and their instructions relating to them, they would have expressly informed AIA that they had not applied for any of the Unauthorised Policies and had never received the refund cheques, or otherwise uncovered Sally's fraud, and ultimately recovered their money.

247 I find that the plaintiffs have not discharged their burden of proving that they would have discovered the fraud and recovered their money on a balance of probabilities. The Ongs did not testify as to what they would have done had AIA contacted them to confirm the transactions in the 2004 Statement of Account and their corresponding instructions. The evidence led by Ms Barker during the trial focused on what AIA should have done and the steps AIA should have taken, without any evidence on the Ongs' follow-up actions. Ms Barker relies on ex post facto reasoning in her contention that if AIA called the plaintiffs for clarifications at any time, the Ongs "would have discovered

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[Sally's] fraud", and it was "clear… that the [Ongs] would have taken steps to recover their moneys from AIA and/or [Sally]". OHL also simply stated in his AEIC that had AIA bothered to contact him, "Sally's scam would have been revealed". This is insufficient. The Ongs' relationship of trust with Sally did not break down until very much later in the day. A good indicator of what they would have done would be their response to the telephone call with Ms Nadine Lourdes ("Nadine") from the AIA customer service centre in August 2004. OHL explained that he had called AIA to enquire about their policies after they had received the duplicates of the policies for P01 and P03 from Sally two years after the policies had been applied for. Even after learning from Nadine that there were policies in their name that they had not purchased or applied for, that the AIA TYP was not in AIA's records, and having received a fax from Nadine containing details of the Unauthorised Policies in their names, they sought an explanation from Sally and took her explanation of AIA's computer crashes at face value. During the telephone call, they did not mention to Nadine that they had not applied for the Unauthorised Policies and stated that they would talk to their agent first about the AIA TYP even though it could not be found in the system. They did not fax over any details or documents to AIA regarding the AIA TYP even when asked by Nadine to do so, and did not contact Nadine or anyone else from AIA after receiving the fax. They continued to rely on Sally to be the point of contact between them and AIA and trusted Sally to the point of surrendering P02, P05 and P06 and transferring the bulk of the surrender proceeds to Sally personally. Although they were under the impression that Sally was collecting it on behalf of AIA based on forged documents, this still showed that they trusted Sally enough to be the exclusive conduit of information between AIA and themselves. Further, even when Sally passed Enny refund

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cheques that Enny clearly paid towards P01 and P03, Enny did not suspect anything amiss and believed Sally's explanation that Enny must have mistakenly paid twice (see [64] above). Although I accept that a call to the customer service centre is different from an active attempt by AIA to contact the Ongs, this incident nevertheless casts doubt on the plaintiffs' claim that *any* direct contact from AIA regarding the Unauthorised Policies and its related refund cheques would have led them to investigate and discover the full nature of Sally's fraud and recover their money from AIA any earlier than before.

248 Another indication was the January 2008 meeting between AIA and the Ongs (see [84] above), where Alicia from AIA called OHL up to arrange a meeting at the AIA office and informed OHL that the AIA TYP and AIA TYP 3 did not exist. Even after this, OHL did not make a police report. He and Enny met AIA again in April 2008 to reinstate P04 for Enny and did not mention the computer crashes, the surrender proceeds paid back to Sally, or even that Sally had ostensibly applied for P04 on their behalf. This is somewhat similar to the facts in *JSI Shipping*. There, a company engaged an auditor to conduct three statutory audits of its accounts. The company sustained losses as a result of its director, Riggs, siphoning funds by misstating his remuneration, forging invoices and encashing unauthorised cheques. The Court of Appeal found that the auditor had breached its duty of care to the company only in failing to verify Riggs' entitlement to remuneration. However, this failure was not an effective cause of the company's losses from the forged invoices and unauthorised cheques (as opposed to the losses from over-remuneraton), as the company could not prove on a balance of probabilities that they would have launched a full investigation into the extent of Riggs' misfeasance and recovered all the money misappropriated by the fraudulently encashed cheques and forged

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invoices (at [155]). This was because the other director, Cullen, unreservedly trusted and relied on Riggs. When confronted with the allegations of fraud and misappropriation, Cullen did not immediately terminate Riggs' employment and take positive steps to report the matter to the authorities. In the same way, the Ongs appeared to have unreservedly trusted Sally. Without any other evidence from the Ongs personally as to what they would have done, I thus find that Ongs have not discharged their burden of proving that they would have taken the opportunity to investigate and discover Sally's fraud had AIA directly contacted them, and thus AIA's breaches did not cause the Ongs' loss.

Motion's liability in negligence

249 I find that the Ongs' claim against Motion for negligence fails at the first stage, *ie*, Motion does not owe the Ongs a duty of care to protect them from pure economic loss. I have found that Motion trained Sally and helped to transmit policy applications and it would be reasonably foreseeable that the Ongs would suffer economic loss if Motion did not take reasonable care. However, there is no proximity of relationship between Motion and the Ongs. The Ongs rely heavily on the General Agent's Agreement between Motion and AIA stating that Motion would be responsible for the training and supervision of the agents it recruited, which included "the extension of services to those policy-holders whose policies are written by [Motion] and/or its agents". They argue that this contract confers a benefit on a third party, namely the policyholders, and the ability of the policyholders to sue under the Contract (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ("CRTPA") satisfies the requisite legal proximity. I do not agree with this analysis. First, on a proper construction of the contract, I find that Motion and AIA could not have intended this term to be enforceable

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by the third party: s 2(2) of the CRTPA. Second, even if the Ongs could have enforced this clause against Motion under the CRTPA, for proximity to be present, assumption of responsibility and reasonable reliance are required. I have found that OHL did not rely on Sally as providing services on behalf of Motion as its agent or representative when interacting with her (see [222] above). The Ongs also did not interact with Rayner until January 2008 (even assuming Rayner attended the meeting as Motion's agent).

250 The Ongs argue in the alternative that Motion's actual knowledge of suspicious circumstances relating to the Ongs' money gave rise to a duty of care to supervise Sally's conduct, namely AIA's receipt of the US$5,060,900, the applications submitted by Sally in the Ongs' names, the use of different addresses for different policies, and OHL's large amount of excess funds in AIA's account. I find that these are still insufficient to give rise to a duty of care. These circumstances were not by themselves suspicious and did not point to Sally's fraud. They also did not have the effect of putting Motion and the Ongs in a proximate relationship.

251 In conclusion, I find that the Ongs' claim in negligence against the AIA defendants and Motion has not been made out.

The *Quistclose* Trust Issue

252 In their closing submissions, the Ongs claim that AIA is holding the US$5,060,900 on an express and/or resulting *Quistclose* trust for OHL as OHL had remitted the money for the specified purpose of paying the AIA TYP premium and this purpose had failed. Having found for the plaintiffs in vicarious

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liability, there is no need to deal with their claim in trust. In any case, I find that no express or resulting *Quistclose* trust arises on the facts of the case.

253 The Ongs rely on the features of a *Quistclose* trust as canvassed by the High Court in *AG v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 ("the *AHPETC* case") at [114]. Essentially, whenever a donor transfers money to a recipient for a specified purpose, a Quistclose trust may arise. An express *Quistclose* trust arises when the donor intends to constitute the recipient as a trustee and confers a power on the recipient to apply the money exclusively in accordance with the stated purpose. A resulting *Quistclose* trust arises when the donor has a lack of intention to part with the entire beneficial interest in the transferred money. The recipient must be under a power to apply the money exclusively in accordance with the stated purpose. In both *Quistclose* trusts, if the recipient is unwilling or unable to use the money for the specified purpose, the money is to be returned to the donor.

254 I find that no *Quistclose* trust arises. First, even if OHL had remitted the money with the specified purpose of purchasing the AIA TYP, AIA received the money unaware of this purpose as Sally was also perpetrating the fraud against them. Second, I find that OHL did not prove that he intended to subject the US$5,060,900 to a trust obligation (for an express *Quistclose* trust) or that he did not have the intention of passing the entire beneficial interest to AIA when remitting the US$5,060,900. It is insufficient that his purpose of remitting the money was so that he could purchase the AIA TYP. There was no arrangement or agreement with AIA that his remittance had to be specifically earmarked for and applied to the payment of the AIA TYP premium. There was also no evidence of actual segregation of OHL's remittance. It appeared that the

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remittance was transferred to and simply stayed in AIA's general account. Third, I considered and rejected the possibility that AIA itself impliedly declared a trust over OHL's remittance after receiving it by placing it in a separate account. However, even if OHL's remittance had been segregated (I found that it had not), this could simply have been good business practice, as opposed to a declaration of trust, especially because it was not done pursuant to a prior understanding with OHL.

The Unjust Enrichment Issue

255 The Ongs argue that AIA has been unjustly enriched by the receipt of the US$5,060,900 from OHL. Having found for the plaintiffs in vicarious liability, the unjust enrichment claim, which is advanced as a claim in the alternative, no longer arises for determination. Nonetheless, I propose to comment on the claim in restitution in light of the defence of equitable set-off raised in the AIA defendants' closing submissions.

256 As stated earlier, the plaintiffs and AIA defendants are victims of Sally's fraud and, albeit upon different bases, both have paid moneys in consequence of Sally's fraud. On the one hand, the Ongs have remitted US$5,060,900 for a fake policy and AIA, on the other hand, has issued three policies, P02, P05 and P06 under a mistake of fact and in consequence of Sally's fraud. I have found and held P02, P05 and P06 to be nullities (see [87] and [91] above). AIA paid the surrender values of P02, P05 and P06 ("Surrender Proceeds") in consequence of Sally's fraud. In response to the plaintiffs' claim in restitution, the AIA defendants' pleaded defence of equitable set-off, which is not tied to any independent claim in the Counterclaim, is incompetent. An equitable set-

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off presupposes that the AIA defendants have a claim that can be set-off against the plaintiffs' claim. To illustrate, in *Skandinaviska (CA),* when there were cross-payments between victims of the same fraudster, the appellate court held that the victims' claims should be tied together and set off against each other to determine the quantum of enrichment. That approach was possible because the victims had sued and made cross-claims against each other: *Skandinaviska (CA)* at [129]. The simple fact is that the AIA defendants did not claim against the plaintiffs in unjust enrichment or any other cause of action (other than conspiracy, which was dismissed). This is not surprising since their pleaded case is that P02, P05 and P06 are valid contracts, and payment of the Surrender Proceeds discharges their obligations to the Ongs.

257 Belatedly, the AIA defendants in closing submissions raised the following specific matters in argument: that the Ongs did not provide AIA with any consideration for AIA's payment of the Surrender Proceeds to the Ongs; that the Ongs received the benefit of the Surrender Proceeds at AIA's expense; and the receipt of the Surrender Proceeds was on the basis of AIA's mistake and/or a total failure of consideration. In addition, Sally did not receive the bulk of the Surrender Proceeds returned by the Ongs as agent for and on behalf of AIA. In closing submissions, the AIA defendants, with reference to an equitable set-off, alludes to the close connection between the Ongs' claim to recover the US$5,060,900 remitted to purchase the AIA TYP and the Surrender Proceeds. As P02, P05 and P06 are nullities, and leaving aside the sums of S$888,000.18, US$57,200 and S$28,483.11 (sums retained by the Ongs from the Surrender Proceeds) for a moment, the proper analysis is whether the AIA defendants have an independent claim against the Ongs for the bulk of the Surrender Proceeds taken by Sally. Whilst Sally did not receive the bulk of the Surrender Proceeds

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as agent for and on behalf of AIA, it does not follow that the Ongs are responsible for the loss arising from Sally's misappropriation of the money. It seems to me that the loss must lie where it falls, with the result that the AIA defendants have to look to Sally to make good their loss outside of this action. I note that the stakeholder money from the sale of Sally's property has not been disbursed.

258 As for the sums of S$888,000.18, US$57,200 and S$28,483.11, the practical effect arising from the Ongs giving credit for these sums as well as for the amounts relating to the Authorised Policies and P04 in reduction of the claim amount, simplifies matters and there is strictly no need to dwell on the elements of unjust enrichment and the quantum of enrichment, and the doctrine of counter-restitution.

Conclusion

259 In all the circumstances, the plaintiffs are entitled to judgment in the sum of S$1,597,250.69, with interest thereon at the rate of 5.33% per annum from 1 March 2013 to the date of payment, for their vicarious liability claim.

260 The AIA defendants' Counterclaim against the plaintiffs is dismissed.

261 The plaintiffs' claims against Motion are dismissed with costs.

262 I will hear the plaintiffs and the AIA defendants on costs of the main action and the Counterclaim. Although the plaintiffs eventually succeeded in their claim, and the AIA defendants' Counterclaim was dismissed, this may be a case where costs sanctions ought to be imposed on any party whose

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unreasonable trial conduct has contributed to prolonging the duration of the trial, caused additional expense and delay, not to mention burdening judicial time. The case was initially fixed for 20 days but eventually ballooned to 40 days. Parties were repeatedly reminded at trial to limit the scale and scope of questions, especially given the number of issues whether main or peripheral. It is hence disquieting that the parties continued to indulge in over-elaboration and excessive questioning of witnesses. Clearly, the resolution of the case was made difficult. This court to achieve justice will have to examine torrents of words, written and oral, in sieving out what is relevant and persuasive. Surely all this – the result of unreasonable trial conduct – must mean costs consequences for any defaulting party that would ultimately impact on the issue of recoverable costs.

Belinda Ang Saw Ean
Judge

Deborah Barker SC, Haresh Kandar and Ng Junyi (KhattarWong LLP) for the first and second plaintiffs;
Wendell Wong, Denise Teo and Priscylia Wu (Drew & Napier LLC) for the first and second defendants;
Melvin Chan and Justin Ee (TSMP Law Corporation) for the third defendant.

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