IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 16

Civil Appeal No 34 of 2017

Between

ERNEST FERDINAND PEREZ DE LA SALA

… *Appellant*

And

(1) COMPAÑIA DE NAVEGACIÓN PALOMAR, S.A.
(2) COSMOPOLITAN FINANCE CORPORATION [BVI]
(3) DOMINION CORPORATION S.A.
(4) JOHN MANNERS AND CO (MALAYA) PTE LTD
(5) PENINSULA NAVIGATION COMPANY (PRIVATE) LIMITED [BVI]
(6) STRAITS MARINE COMPANY PRIVATE LIMITED [BVI]
(7) EDWARD ROBERT PEREZ DE LA SALA
(8) JAMES MORGAN COPINGER-SYMES
(9) MARIA CHRISTINA COPINGER-SYMES

… *Respondents*

Civil Appeal No 35 of 2017

Between

(1) COMPAÑIA DE NAVEGACIÓN PALOMAR, S.A.
(2) COSMOPOLITAN FINANCE CORPORATION [BVI]
(3) DOMINION CORPORATION S.A.
(4) JOHN MANNERS AND CO (MALAYA) PTE LTD
(5) PENINSULA NAVIGATION COMPANY (PRIVATE) LIMITED [BVI]
(6) STRAITS MARINE COMPANY PRIVATE LIMITED [BVI]

… *Appellants*

And

ERNEST FERDINAND PEREZ DE LA SALA

… *Respondent*

Civil Appeal No 59 of 2017

Between

ERNEST FERDINAND PEREZ DE LA SALA

… *Appellant*

And

ROBERT PEREZ DE LA SALA

… *Respondent*

Civil Appeal No 60 of 2017

Between

ERNEST FERDINAND PEREZ DE LA SALA

… *Appellant*

And

(1) EDWARD ROBERT PEREZ DE LA SALA
(2) JAMES MORGAN COPINGER-SYMES
(3) MARIA CHRISTINA COPINGER-SYMES

… *Respondents*

In the matter of Suit No 178 of 2012

Between

(1) COMPAÑIA DE NAVEGACIÓN PALOMAR, S.A.
(2) COSMOPOLITAN FINANCE CORPORATION [BVI]
(3) DOMINION CORPORATION S.A.
(4) JOHN MANNERS AND CO (MALAYA) PTE LTD
(5) PENINSULA NAVIGATION COMPANY (PRIVATE) LIMITED [BVI]
(6) STRAITS MARINE COMPANY PRIVATE LIMITED [BVI]

… *Plaintiffs*

And

ERNEST FERDINAND PEREZ DE LA SALA

… *Defendant*

And

ERNEST FERDINAND PEREZ DE LA SALA

… Plaintiff in Counterclaim

And

(1) EDWARD ROBERT PEREZ DE LA SALA
(2) JAMES MORGAN COPINGER-SYMES
(3) MARIA CHRISTINA COPINGER-SYMES
(4) COMPAÑIA DE NAVEGACIÓN PALOMAR, S.A.
(5) COSMOPOLITAN FINANCE CORPORATION [BVI]
(6) DOMINION CORPORATION S.A.
(7) JOHN MANNERS AND CO (MALAYA) PTE LTD
(8) PENINSULA NAVIGATION COMPANY (PRIVATE) LIMITED [BVI]
(9) STRAITS MARINE COMPANY PRIVATE LIMITED [BVI]

… Defendants in Counterclaim

JUDGMENT

[Civil Procedure] — [Rules of court]
[Evidence] — [Admissibility of evidence] — [Without prejudice privilege]
[Tort] — [Misrepresentation]
[Trusts] — [Beneficiaries] — [Rights]

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Ernest Ferdinand Perez De La Sala
v
Compañia De Navegación Palomar, SA and others and other appeals

[2018] SGCA 16

Court of Appeal — Civil Appeals Nos 34, 35, 59 and 60 of 2017
Andrew Phang Boon Leong JA, Judith Prakash JA, Steven Chong JA
25 September 2017

22 March 2018 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 These appeals are very unfortunate. Substantively, they are unfortunate because they are the result of a dramatic breakdown in familial ties – which, as we shall see, has been exacerbated by the fact that the breakdown stretches across more than one generation. On the surface, the breakdown was caused by a dispute over money – in particular, the monies withdrawn by the defendant in Suit No 178 of 2012 ("S 178"), allegedly wrongfully, from the accounts of the six plaintiff companies ("the Companies"). But at a deeper level, the breakdown concerns control over the family's (material) fate and direction. It is regrettable that differences over what the family *owns* have come to so deeply compromise the wholeness of what a family *is*; a greater value has been sacrificed in service of a lesser one.

2 There is much to regret procedurally as well. In a dispute as large as this one, spanning many decades (and, for that matter, many years of litigation), engaging many issues, and involving large sums of money, it is particularly important that matters of procedure be carefully observed. In particular, the parties' pleadings play a crucial role in defining the scope of the dispute and the parties' positions. When parties enlarge the boundaries of a dispute by adducing evidence and making submissions on matters not originally within the scope of the dispute, *without amending the pleadings to reflect this*, the court is hobbled in its task of seeking the just and correct resolution of the dispute, and confusion can result. Sadly, that is precisely what has happened here.

3 Regardless of which party is ultimately held to prevail, one thing is clear – the wishes and hopes of the patriarch of the family will never be fulfilled, at least in their original form. The best that this Court can do is to decide which party or parties are legally entitled to the assets concerned and in what manner that legal entitlement can be enforced. As will become apparent in the course of this judgment, not every issue which was argued and/or decided below is, in our view, an appropriate one to be decided here given the parties involved and the way the cases have been pleaded. Given the long-drawn and acrimonious nature of this litigation (as well as the accompanying emotional and other fallout and stress that it has engendered), it is our hope that the parties will be able to find some other means of attaining closure on the issues which must for now remain unresolved. This is desirable, if nothing else, to honour the memory of the patriarch of the family.

4 The judgment of the High Court judge ("the Judge") is to be found in *Compania De Navegacion Palomar, SA and others v Ernest Ferdinand Perez De La Sala and another matter* [2017] SGHC 14 ("the Judgment"). It is a

meticulous and detailed judgment which sifts through a veritable mountain of both documentary as well as oral evidence and distils much of what is essential. Though we respectfully disagree with the Judge's conclusions in some crucial respects, we were much aided in our analysis by the clarity with which the Judge laid the foundation by setting out the basic structure and issues, as well as his own analysis, of what was by any account an extremely complex case. Indeed, we agree with many of the Judge's findings, particularly on the factual level. We mainly differ from the Judge in respect of two broad areas: first, the legal implications that follow from some of the facts, particularly those concerning beneficial ownership, and secondly, the impact of procedural issues such as the state of the pleadings.

5 The ultimate *effect* of the decision we have arrived at is, in substance, not dissimilar to that arrived at by the Judge. In brief, we find on the main claim that the Companies are the legal owners of the monies, that the defendant's defence (that he was the ***full*** *beneficial owner* of all the monies) was not made out, and that the monies should therefore be returned to the Companies. We do not agree, however, that the Companies own their assets absolutely; rather, they hold the assets on trust for two other companies, from which the assets were originally transferred for no consideration and not as gifts, and it appears that the defendant, his siblings and his mother's estate have beneficial interests in these two companies. With that said, the way the parties have pleaded their cases makes it unnecessary for us to make findings as to the precise proportions of the beneficial interests in the two other companies that are the source of the Companies' assets, nor does this need to be dealt with during the taking of accounts before the Judge subsequent to our judgment.

6 Having decided the main claim in that way, the issue of the non-party's

intervention (which is the partial subject matter of one of the appeals and the entire focus of yet another appeal) becomes moot. For general guidance for the future, however, we express our views on the Judge's order ordering the said intervention. With respect, we are of the view that, on the facts of *this* particular case, the Judge ought *not* to have ordered the intervention. We elaborate below.

7 We also differ from the Judge's holdings with regard to fraudulent misrepresentation and whether certain correspondence between the parties was covered by without prejudice privilege. In this last-mentioned regard, we should add that the admission of such correspondence did not, in fact, impact the substantive decision of this Court and, to that extent, is a damp squib.

8 We will begin by setting out the salient facts of the case, as well as the Judge's decision, so as to set the context for the present appeals, Civil Appeals Nos 34, 35, 59 and 60 of 2017 ("CA 34", "CA 35", "CA 59" and "CA 60", respectively).

Facts

Parties

9 S 178 is a dispute between two main factions of the De La Sala family over assets held by the Companies, which are:

(a) The first plaintiff, Compañia De Navegación Palomar SA ("PAL"), a Panamanian company incorporated in 1958 as a subsidiary of JMC;

(b) The second plaintiff, Cosmopolitan Finance Corporation ("CFC"), a British Virgin Islands ("BVI") company incorporated in 1995;

(c) The third plaintiff, Dominion Corporation SA ("DOM"), a Panamanian company incorporated in 1973, owned by Summit Finance Corporation SA ("Summit Corp"), which is in turn owned by PAL;

(d) The fourth plaintiff, John Manners & Co (Malaya) Ltd ("JMM"), a Singapore company incorporated in 1948 owned by Cambay Prince Steamship Co Ltd (BVI) ("Cambay BVI"), which is in turn owned by the fifth plaintiff, PEN Peninsula Navigation Company Private Limited ("PEN"), a BVI company incorporated in 1995; and

(e) The sixth plaintiff, Straits Marine Company Private Limited ("SMC"), a BVI company which is also owned by PEN. It was incorporated in 2008.

10 The Companies collectively held assets (including but not limited to cash, shares of other companies and bonds) worth over US$584m in 2012. According to the Companies' Statement of Claim, while the Companies used to be in the business of, among others, "shipping, marine engineering and supplies", the Companies' present activities are confined to "the holding and management of various investment assets (comprising principally cash, gold and shareholdings)". Ernest Ferdinand Perez De La Sala ("Ernest"), the defendant in S 178, also described the Companies as "holding vehicles with no day-to-day trading or operations except for any minor business that [JMM] may have had" in his affidavit of evidence-in-chief ("AEIC"). It should be noted that CFC owns all the shares in PEN, PEN owns all the shares in PAL, and PAL

owns all the shares in CFC. CFC, PEN, and PAL are organised in an "orphan" or circular structure, which is legal under Panamanian and BVI law but not under Singapore law. We will refer to CFC, PEN and PAL collectively as "the Orphan Companies". The structure that they exist in will be referred to as "the Orphan Structure".

11 The Judgment sets out the relationships in the De La Sala family in great detail (at [7]–[14]). Since many of these background facts are not disputed and not material for the purposes of the present appeals, we will not repeat them except to introduce the key members of the family who are involved in the present state of affairs:

(a) Robert Perez De La Sala Sr ("Robert Sr") and Camila Vasquez De La Sala ("Camila") were the patriarch and matriarch of the De La Sala family before their deaths in 1967 and 2005, respectively. Camila was the sole beneficiary of Robert Sr's will. Robert Sr was the reason for the family's tremendous wealth as he was a successful self-made businessman. He rose to become the chairman and majority shareholder of the shipping company John Manners and Company Limited (Hong Kong) ("JMC"), which was to be one of the key assets of the De La Sala family. Robert Sr also incorporated Lasala Investments Limited ("LIL") in 1939, which was an investment company under his control. LIL was renamed North Enterprises Limited ("NEL") some time after June 1959. In his later years, Robert Sr was preoccupied with reducing his exposure to estate duty as evidenced by his correspondence with his sons prior to his death. By the time of Robert Sr's death, he had long divested himself of his shareholdings in JMC and NEL, which held much of his wealth.

(b) Robert Sr and Camila had four children in the following order: Jerome Anthony Perez De La Sala ("Tony"), Ernest, Robert Perez De La Sala ("Bobby") and Isabel Brenda Koutsos ("Isabel"). Camila and the four children were known collectively as "JERIC". We will refer to Camila, Bobby, Isabel and Tony as "JRIC". Ernest, apparently the most commercially astute of the four children, took over the management of the family's business interests and assets after the death of Robert Sr, and was the *de facto* head of the De La Sala family after Camila's passing. Ernest was the one who was responsible for heavily restructuring the family's business interests and assets after Robert Sr's death. As *de facto* head of the family, he was based outside of Australia, unlike the rest of the family, for tax planning purposes, and disbursed funds to the rest of the family regularly. Ernest was married to Hannelore de Lasala-Debring ("Hannelore"), but they were divorced in May 1970. Hannelore gave evidence in S 178 and independently brought fresh proceedings in HCMP 1029/2013 against Ernest in Hong Kong ("the Hong Kong proceedings") on the basis that he had misrepresented to her during the divorce proceedings that a very large part of his assets were family assets held by him on trust. Ernest's witness statements in the Hong Kong proceedings are the subject of some summonses filed in these appeals (see [71] below).

(c) Edward De La Sala ("Edward") and Christina De La Sala ("Christina") are Bobby's children, and the nephew and niece of Ernest. Christina married James Copinger-Symes ("James"). They are the defendants in counterclaim in S 178 and will be referred to collectively as "ECJ". ECJ came to Singapore in 2004–2005, having allegedly been invited by Ernest to come here to join him in the management of the

Companies (and by extension, the De La Sala family's assets). The nature and effect of Ernest's representations to ECJ are issues on appeal.

12 The directors of the Companies are all members of the De La Sala family. ECJ, Isabel and Ernest are directors of CFC, PEN, PAL, DOM and SMC. ECJ and Ernest are the directors of JMM. Edward and James were also shareholders with 5,000 shares each in SMC, but they purportedly held these shares on trust for PEN pursuant to deeds of trust.

NEL and JMC and subsequent changes in structure

13 The corporate structure of the Companies today is a result of the various rounds of restructuring that have occurred since Ernest took over the reins of the family's business interests after Robert Sr's death in 1969. As we have noted above at [11], these business interests were concentrated in NEL and JMC at the time of Robert Sr's death, and Ernest accepted during cross-examination that his main assets as of 1970 were his shares in JMC and NEL. Therefore, the evidence strongly suggests that NEL and JMC are in fact the origins of the Companies' wealth that lies at the heart of the dispute in S 178.

14 There also appears to be a third possible source for the Companies' assets in dispute – a pool of assets called the "Five Stars", evidenced by the February 1984 Memorandum that traces the value of the assets from 1970 to 1983. It is not clear from the record what "Five Stars" relates to and what has happened to these assets. Since none of the parties have attempted an explanation, we shall not dwell on this point.

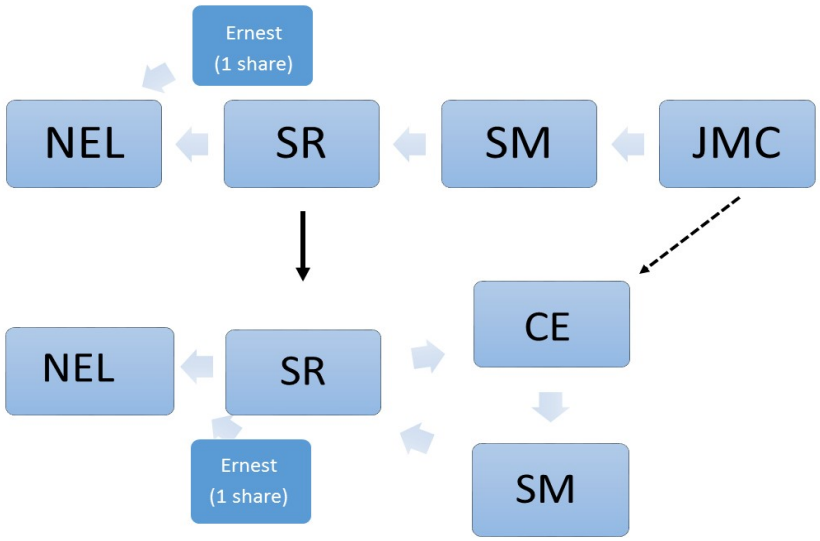
15 The various parties' interests in NEL and JMC right after Robert Sr's

death are salient to the dispute in S 178, as Ernest's claim to the Companies' assets rests principally on his assertion that he had bought out JRIC's shares in NEL and JMC after Robert Sr's death, and that JRIC therefore had no claim to the assets in the Companies. Therefore, we will set out the facts relating to the shareholdings of NEL and JMC.

16 It is undisputed that NEL's shareholders, at the time of Robert Sr's death, were JERIC in equal shares of 1,200 each (see the Judgment at [113]). On 26 August 1967, except for one share which Ernest retained, all of the 6,000 shares in NEL were transferred to San Roberto Steamship Company SA ("SR"), a nominee company under the control of Ernest. SR was wholly owned by San Miguel Navigation Company SA ("SM"), which was in turn owned by JMC. The reason for JRIC's transfer of their NEL shares to SR is a matter of dispute – Ernest claimed that he acquired JRIC's NEL shares using SR, one of his nominee companies, while the Companies and ECJ denied that such a sale ever occurred.

17 In so far as JMC is concerned, it is undisputed that at the time of Robert Sr's death, Ernest had a 37% stake in JMC, while JRIC held a 45% stake in JMC through their nominee company, Overseas Nominees Ltd. Overseas Nominees Ltd's 45% stake was subsequently transferred to Compass Enterprises Inc ("CE") on 1 September 1970. This stake in JMC remained with CE until 2011 at least.

18 In December 1969, what the Judge termed as "the first orphan structure" was created when JMC sold its shares in SM to CE, which was in turn wholly owned by SR. CE, SM and SR were thus held in a triangular structure, with SR owning all of NEL's shares except for one held by Ernest. We will continue to refer to this as "the first orphan structure", in contradistinction to the Orphan Structure which currently exists. The following is a pictorial representation of the first orphan structure:



19 The significance of this structure will become clear at [127] below.

Background to the dispute

20 ECJ had, until the breakdown of their relationship with Ernest in August 2011, been working under Ernest's direction in managing the assets held by the Companies. ECJ claim to have done so on the understanding that the Companies' assets were part of a De La Sala family trust, while Ernest claims that ECJ were helping him to manage what were ultimately his assets. Ernest

and ECJ's relationship broke down sometime in August 2011, when Ernest instructed ECJ to transfer various US dollar deposits held by PAL, CFC and SMC with UBS (Singapore) and HSBC Singapore to CFC's account with UBS (Vancouver). Ernest apparently asserted to Edward, for the first time, that the Companies' assets belonged to Ernest personally. This triggered a series of actions by ECJ to alter Ernest's role from sole signatory to the Companies' bank accounts to a joint signatory with Bobby and Isabel, although Ernest's sole signatory status was reinstated after Bobby and Isabel intervened. Disgruntled with this turn of events, Ernest transferred the assets in the Companies' bank accounts, worth a total of CAD 663,033,557.61 at the material time, into his personal account with UBS (Canada).

The disputes in S 178

21 As the issues crystallised through the pleadings are important to understanding why we differ from the Judge in respect of certain claims, we set out the parties' main pleadings in greater detail.

The Companies' claim

22 The legal basis for the Companies' claim in S 178 against Ernest is straightforward. The Companies, under the control of the majority directors ECJ, allege that Ernest had breached his director's duties as he had transferred the Companies' assets into his personal accounts without notifying or seeking the approval of the respective boards of the Companies. The Companies claim that:

(a) On or around 23 August 2011, Ernest gave UBS (Singapore) instructions to transfer approximately S$1,244,308.90 out of JMM's

account to an account in Ernest's own name, to close JMM's account, and to retain all mail until further instructions;

(b) On September 2011, Ernest gave UBS (Singapore) instructions to close two accounts, one in the name of PAL and the other in the name of CFC. The sums in PAL and CFC's accounts were likely diverted to Ernest or applied for Ernest's own benefit;

(c) On or around 7 October 2011, Ernest entered his name as transferee on the stock transfer forms of shares in SMC, so as to transfer all of SMC shares to himself. This was despite knowing that James and Edward each held 5,000 shares in SMC on trust for PEN, and had signed the stock transfer forms to facilitate PEN's dealing with SMC's shares. Ernest then passed written resolutions as the sole shareholder of SMC on 10 October 2011 to remove ECJ as directors of SMC with immediate effect, and to replace them with a person whom Ernest trusted, Christian Ostenfeld ("Ostenfeld").

23 In terms of relief, the Companies collectively sought a declaration that their assets enumerated in the Schedule to the Statement of Claim ("the Schedule") "belong *beneficially and absolutely* to the [Companies]" [emphasis added]. They also sought an order for Ernest to disclose to them all the correspondence with the banks in respect of the bank accounts identified in the Schedule, and an order to account to the relevant plaintiff where assets of the relevant plaintiff was found to have been disposed by Ernest. JMM, PAL and CFC also sought an order that Ernest account to each of them for the assets formerly standing to their credit in three accounts with UBS (Singapore), including what had become of the same, what interest had been earned thereon and what profits had been made with these assets, as well as an order that Ernest

repay the amounts due after the account. PEN sought a declaration that the purported transfers in 7 October 2011 of the SMC shares previously registered in Edward and James's names were void and of no effect, or alternatively, for rescission of the said transfers of shares in SMC.

Ernest's defence and counterclaim

24 Ernest's defence is also straightforward. He denied any breaches of director's duties on the basis that the Companies were his "personal investment holding companies used … to hold and invest his personal funds and assets".

25 Ernest first set out the background information explaining the source of what he claimed were his personal funds and assets. He averred that NEL was incorporated by Robert Sr in 1939, and came to own Robert Sr's shares in JMC. Ernest averred that in or around 1967, he purchased his siblings' and his mother's shares in NEL through SR. In August 1969, he incorporated CE, and through CE purchased JRIC's shares in JMC in 1970.

26 Ernest asserted that he was the sole beneficial owner of all the Companies because:

(a) He incorporated and/or acquired the Companies for his own use and thereafter exercised full and complete control over them and their assets and "employed them as his nominees or alter ego at all times" and "from time to time at his sole and unfettered discretion";

(b) The Companies were funded by him;

(c) He had sole signing rights to the bank accounts of the Companies and was able to transfer monies between these bank accounts at his sole and unfettered discretion;

(d) He appointed and removed directors of the Companies at his sole and unfettered discretion and dictated the actions of the directors that he appointed; and

(e) He "routinely" dealt with the Companies' assets as his own without regard to "corporate distinctions".

(f) In 2004, he set up a revocable trust called the REC–Hasta La Vista Trust ("the REC–HLV Trust") as a settlor, on terms that the funds put into the REC–HLV Trust would include the funds that he had put into the Companies, that he had sole and unfettered discretion to appoint and remove trustees and beneficiaries of this trust, and that he would continue to manage and invest the assets held by this trust.

27 Ernest admitted the Companies' allegations that he had taken various steps to close and transfer monies out of banks accounts in the names of the Companies. However, his defence was that his actions were not wrongful, that all of the assets of the Companies were beneficially owned by him such that the actions taken by him were necessary to protect his assets. Therefore, the Companies were not entitled to the damages and/or relief they sought. Ernest also denied that James and Edward held the 10,000 shares in SMC on trust for PEN, and instead averred that he was the sole and ultimate beneficial owner.

28 Pursuant to amendments, Ernest also averred in the alternative that even if the Companies were found to be absolute owners of the assets, he remains the

sole and beneficial owner of the Companies' shares. The basis for this claim is the same as the reasons he gave for asserting sole beneficial ownership over the Companies' assets, as well as his claims that ECJ had effectively admitted his ownership of the Companies through their actions. Ernest averred that ECJ were appointed directors of CFC, PAL, DOM, PEN, and JMM (save for PEN and CFC, of which Edward was already appointed a director around 1995-1996 on Ernest's instructions) so as to facilitate ECJ's assistance to Ernest in the management of his personal assets and funds.

29 Ernest's counterclaims were against the Companies and ECJ. Ernest in his counterclaim averred that ECJ knew of his sole beneficial ownership of the Companies and the Companies' assets, and owed him fiduciary duties. He catalogued actions by ECJ which he claimed were done with the purpose of taking control of his personal assets. He therefore counterclaimed against ECJ for breach of trust and breach of fiduciary duties in failing to comply with his instructions regarding the management of his personal funds and assets, which were held through the Companies, and for procuring the Companies to institute S 178 as well as the applications thereunder.

30 Ernest counterclaimed against PAL, CFC and SMC for breach of trust in respect of their refusal to comply with and/or delay in complying with Ernest's instructions to transfer funds and assets beneficially owned by him to an account held by CFC with UBS (Vancouver), and against ECJ for dishonestly assisting in PAL, CFC and SMC's said breaches of trust. Ernest also counterclaimed against the Companies for breach of trust by instituting S 178 and the attendant applications against him, as well as against ECJ for their knowing assistance in the Companies' said breaches.

31 Pursuant to amendments, based on the same facts relied upon for his counterclaims of breach of trust, breach of fiduciary duties, dishonest and/or knowing assistance, Ernest also counterclaimed against ECJ for conspiring to injure him *via* lawful means and/or unlawful means.

32 In terms of relief, Ernest sought, among others:

(a) A declaration that he is the sole beneficial shareholder of the Companies, or in the alternative, of the Orphan Companies;

(b) A declaration that he is entitled to exercise all shareholder rights of the Companies, or in the alternative, of the Orphan Companies;

(c) A declaration that the assets of the Companies are, and were at all material times, beneficially owned by him, and that the Companies hold the assets on trust solely for him;

(d) Damages for ECJ's breach of trust, breach of fiduciary duties, dishonest assistance, and/or conspiracy to injure;

(e) A declaration that the shareholder resolutions of SMC passed on 10 October 2011 were valid; and

(f) An order that ECJ execute and deliver to Ernest letters of resignation from the boards of the Companies.

The Companies' reply and defence to counterclaim

33 The Companies in their reply averred that Ernest's defence that he was the sole beneficial owner of the shares and/or assets of the Companies was no answer to the fact that the Companies' assets did not belong to the (legal or

beneficial) shareholders of the Companies as a matter of law, and that even if the Companies' assets were held on trust for Ernest, the assets still had to be handled by the Companies as trustees. Therefore, Ernest was "not entitled in any event to deal with or dispose of the assets without the approval of the [Companies]".

34 The Companies denied Ernest's claim to sole beneficial ownership of the Companies' shares and assets in any event. This denial was premised on the Companies' denial of Ernest's claim that he had bought out JRIC's shares in NEL, or that he had become the sole beneficial owner of JMC through buying out the previous shareholders.

35 The Companies averred that NEL was incorporated to hold Robert Sr's assets, and that "Robert Sr had transferred all interests in his assets to [NEL] in exchange for shareholding in [NEL]". The Companies did not dispute that Robert Sr transferred all his shareholdings in NEL to JRIC and Ernest in equal proportions in late 1958. The Companies averred that 5999 NEL shares (beneficially owned by Ernest and JRIC) were transferred to SR shortly after Robert Sr's death in 1967, and SR was in turn owned by SM. The Companies denied that Ernest bought out JRIC's shares in NEL and averred that both SR and SM were mere nominees for Ernest and JRIC. The Companies also denied that Ernest bought out JRIC's interests in JMC, and averred that JRIC held 3600 shares (or 45%) of the shares in JMC through CE.

36 The Companies averred that they were each "the legal and/or beneficial owner" of their assets identified in the Schedule, and that even if they were not, Ernest was not the sole beneficial owner of these assets. In the alternative, they averred that the assets were to be managed for the purpose of preserving the De

La Sala family's wealth and not for a single individual. The Companies denied that Ernest dealt with the Companies' affairs and assets as if they were his own; for instance, Ernest's powers to operate the Companies' bank accounts were powers granted by the Companies for the purpose of managing the Companies' funds and assets on behalf of the Companies. The Companies averred that the REC–HLV Trust was "set up and was a mechanism developed for the purpose of passing the assets and/or funds to future generations of the De La Sala family".

37 The Companies denied Ernest's counterclaims for breach of fiduciary duties and/or breach of trust. The Companies averred that they were fully entitled to commence S 178 so as to protect their assets, and even if they held the assets on trust for Ernest in whole or in part, the Companies were still entitled to act as they did. The Companies also averred that they were not obliged to comply with Ernest's instructions as to how to invest the Companies' assets, as the assets belonged to the Companies legally and/or beneficially.

ECJ's defence and counterclaim

38 ECJ's defence to Ernest's counterclaim was where the distinction between the ownership of the Companies, and the ownership of the Companies' assets, was initially mentioned.

39 ECJ denied all of Ernest's counterclaims. ECJ's case, simply put, was that they were acting *bona fide* in the belief that the Companies were beneficially owned by JERIC and the descendants of Robert Sr, pursuant to a family trust established by Robert Sr. ECJ averred that even if there was no family trust established by Robert Sr, the beneficial ownership of the Companies did not belong solely to Ernest but to JERIC and Robert Sr's

descendants, or, alternatively, JERIC.

40 In so far as the ownership of the Companies' assets was concerned, ECJ averred that, at all times, ECJ did not believe that Ernest was the beneficial owner of the Companies' assets, as they believed that the Companies were the legal and beneficial owner of their assets. Even if their belief was not true, JERIC and/or the descendants of Robert Sr were the beneficial owners of those assets, not Ernest alone. ECJ also took the position that even if some of the Companies' assets were held on trust for Ernest or for others, the assets should still be handled by the Companies as trustees. Ernest was not entitled to deal with the Companies' assets without the approval of the Companies, acting through their respective boards.

41 ECJ also counterclaimed against Ernest for fraudulent misrepresentation, in the event that the court found that Ernest was the sole beneficial owner of the Companies and/or its assets. Those pleadings are canvassed in detail at [166] below. ECJ averred that they had relied on Ernest's misrepresentation and therefore suffered detriment and loss, and hence sought damages as well as interest.

Registrar's Appeal No 352 of 2014

42 The Judge also dealt with Registrar's Appeal No 352 of 2014 ("RA 352") in the Judgement. Ernest obtained leave to appeal against the Judge's decision in RA 352 on 22 March 2017. This is the subject matter of CA 60. We will set out the salient facts surrounding RA 352, although, as we noted in the introduction, the outcome of this particular appeal is ultimately inconsequential to the main issues in dispute.

43 RA 352 was an appeal from the senior assistant registrar's ("SAR") decision to allow Ernest's application to produce as evidence (i) a letter from Mr Ian Winter QC ("Mr Winter"), addressed to Ernest's lawyer, Mr Harpreet Singh SC, dated 27 November 2013 ("the IW Letter"); and (ii) a letter from James to Isabel dated 27 November 2013 ("James's E-mail").

44 The IW Letter was prepared on James's instructions approximately a month before the parties exchanged AEICs. The IW Letter, which comprised 11 pages and was marked "without prejudice", was sent on James's behalf. On the same day, James e-mailed Isabel informing her that he had sent the IW Letter to Ernest. James's E-mail was to the effect that James was informing Isabel that there was a letter from Mr Winter to Ernest, which could be of interest to her.

45 No response was received from Ernest, Isabel, or their lawyers. After almost 10 months, on 3 October 2014, and after most of Ernest's witnesses had given evidence at trial, Ernest filed a Supplementary List of Documents disclosing James's E-mail and the IW Letter. This was challenged by ECJ on the basis that they were inadmissible as they constituted "without prejudice" communications. The Judge directed Ernest to file a formal application to affirm the production of the documents (see the Judgment at [485]). Summons No 5023 of 2014 ("SUM 5023") was filed pursuant to O 24 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC") on 9 October 2014, and the matter was heard by the SAR on 17 October 2014.

46 On 20 October 2014, the SAR allowed the production of both documents. Her reasons were, in short, that (i) the IW Letter did not contain any admission against James's interests and (ii) even if an admission was not

necessary, the IW Letter was not written with the genuine purpose of reaching a settlement as it only pointed out alleged weaknesses in Ernest's case and the consequences of proceeding to trial.

47 ECJ then filed RA 352 against the SAR's decision. The parties agreed that to avoid delays to the trial, they would address RA 352 in the closing submissions for the trial. Ernest was allowed to cross-examine James on the two documents, and ECJ was allowed to call Mr Winter to give evidence in respect of his instructions for the preparation of the IW Letter. The parties were also in agreement that the Judge could refer to the two documents in the context of deciding the issue of admissibility (see the Judgment at [486]).

Decision below

48 Two issues were identified by the Judge as being at the heart of S 178 (see the Judgment at [60]):

(a) Whether Robert Sr had set up a family trust before he died; and

(b) If not, whether all the assets in the Companies belonged to Ernest.

The Judge answered both questions in the negative. Given the many issues engaged in this dispute, it is necessary for us to set out the Judge's reasoning on the two main issues, as well as the other disputed issues, in some detail.

There was no family trust set up by Robert Sr before his death

49 Although the issue as to whether there was a De La Sala family trust set up by Robert Sr took up a substantial portion of the Judge's deliberations below,

the Judge's findings in this regard have not been contested on appeal. We will thus summarise the Judge's findings in this respect briefly (in so far as these findings, such as on the witnesses' credibility, are relevant to other aspects of this appeal).

50 The main witnesses in S 178 were Ernest, Tony, Isabel and Bobby, whom the Judge commented were the only surviving people who knew the truth (at [63] of the Judgment).The Judge was of the view that Ernest, along with Tony and Isabel who testified in line with his position, were not truthful because of their potential exposure to liability to the Australian tax authorities. It should be noted that Tony and Isabel disavowed any interest in the Companies' assets in dispute at the time of the trial (although they appear to have altered their positions in their affidavits filed on 20 June 2017, which purport to reserve their rights to seek an account of their interests in the assets from Ernest). The Judge found that Bobby, who testified in line with ECJ and the Companies' positions, was the most reliable witness of the four siblings (at [158]). Bobby, on his part, chose not to bring a claim in the proceedings, but maintained his position that Ernest held the shares and assets of the Companies for the benefit of the De La Sala family and that Ernest had never bought over Bobby's share of the family's assets. Bobby's position was aligned with ECJ's and so it would appear that he took the view that his interests were adequately protected by his supporting their case.

51 The Judge considered the various letters written by Robert Sr to various members of the family prior to his death and found that there was no family trust. While there were letters suggesting that a trust was set up, there were also others, later in time, indicating that there was no such trust or that he had never treated LIL's assets as such. There was some use of precatory words by

Robert Sr, such as "it is my wish", in describing the management of the family assets (at [95]). The Judge noted that it was odd that other than on one occasion, Robert Sr had never described LIL as a family trust, given how well versed he was with various business and corporate structures (at [133(b)]). On balance, the Judge found that the letters from Robert Sr did not show that a family trust had been created by Robert Sr for all his descendants, nor did they evince an intention to do so (at [137]).

52 The Judge found that all the children of Robert Sr knew it was their father's intent that NEL would remain a guarantee for the well-being of all his descendants, and though Robert Sr did not set up a formal and legal trust, his wishes were known and a corporate structure was in place when he died (at [388]). The Judge was of the view (at [124]) that if Robert Sr did not institute a family trust as ECJ claimed, then the transfer of the NEL (then named LIL) shares from Robert Sr to JERIC would have resulted in the full legal and beneficial ownership of NEL being transferred to JERIC.

Ernest was not the sole beneficial owner

53 The Judge was of the view that contrary to Ernest's claims, there was no documentary evidence of Ernest having bought out the shares of JRIC in NEL and JMC (at [393]), and Ernest's claim was in fact contradicted by documentary evidence and tape recordings.

54 Ernest's final position regarding JRIC's shares in NEL and JMC was that he had bought out JRIC's shares in NEL and JMC through SR and CE, respectively, but had not paid them at the time of purchase, *ie*, in August 1967 and September 1970, respectively. Instead, he had paid the purchase price over time out of dividends that were declared by NEL and JMC subsequently. He

termed this "vendor financing". Ernest claimed that Tony and Bobby were fully paid the sums owed to them by 1987, evidenced by a memorandum of 6 April 1987 ("the 1987 Memo") signed by Bobby, Tony and Ernest describing "Five Stars" as "alias 'JERIC'" and stating that Tony and Bobby's shares of the assets of "Five Stars" had been distributed to them in cash. Camila was said to have been paid her proceeds by the time of her death in 2005. Ernest also explained for the first time in his AEIC that JRIC had sold their shares to him because they had no experience in the shipping business and had not wanted to be subject to the vagaries and risks of the shipping business (at [184]). The Judge took the view that this explanation was contradictory; it was difficult to understand why JRIC would be willing to be paid out of dividends from NEL and JMC if the point of their purported sale was so that they would not be subject to the risks of the business that NEL and JMC were in.

55 The Judge noted the number of changes in Ernest's claims regarding how he acquired JRIC's shares in NEL and JMC without explanation, the lack of documentary evidence supporting Ernest's case, and took the view that Ernest was a "totally unreliable" witness (at [192] and [234]).

56 In particular, the Judge noted the following pieces of objective evidence:

(a) Ernest had sent documents, letters, micro-cassettes regarding the 20% shares that JRIC had in the funds and business ventures that Ernest managed, and large sums of money to his siblings and their children (at [195])

(b) Ernest's evidence in two unrelated proceedings prior to this dispute directly contradicted his current case. In his divorce proceedings

from Hannelore, he had said that he was merely the custodian of the family wealth (at [201]). He disputed Hannelore's allegation that all of JERIC's shareholdings in NEL was transferred to SR for US$10m (at [213]). Ernest made similar statements in proceedings brought in Alaska by Bertram Stanley Mitford, the trusted accountant of JMC, against Ernest and 22 companies seeking to enforce certain terms of his employment ("the Mitford Alaska proceedings"). In these proceedings, in a deposition taken in 1984, Ernest stated on oath that he was the trustee of family assets (at [224]), and denied personal ownership of any of the companies including JMC and its subsidiaries, NEL, SR, SM, and CE (at [233]).

(c) A journal voucher of SM dated 27 January 1977, from which the Judge inferred that CE continued to hold a 45% stake in JMC on behalf of JRIC (at [231]–[232]).

(d) In so far as the 1987 Memo was concerned, the Judge was of the view that it did not show any connection to JRIC's alleged sale of NEL and JMC shares to Ernest, and hence was not probative of Ernest's claim that Tony and Bobby had received the sale proceeds due to them from their sale of NEL and JMC (at [440]). In any event, it appeared that Bobby and his children had continued to receive large sums of money from Ernest from 1989–2008 (at [442]).

(e) A memorandum dated 31 July 2006 from Edward and James to Ernest, recording that Ernest tasked them to suggest ways of "passing on the baton" and maintaining the current "critical mass" to provide for future generations (at [461]).

(f) The REC–HLV Trust was more consistent with ECJ's case that Ernest was managing assets on behalf of the family. There was an e-mail from Ernest which suggested that some of Camila's assets were held within the REC–HLV Trust (at [456]), and it was not apparent that the Companies' assets were all held within the REC–HLV Trust either. Other than Edward's evidence that the REC–HLV Trust was settled with a nominal sum of S$5m, and the trust document indicating that only US$10 was settled under the trust (though further property and investments could be added to the trust fund at any time (see cl 1(k)(ii)), there was no other evidence of how much money was placed into the REC–HLV Trust. The correspondence with the bank leading up to the revocation of the REC–HLV Trust on 25 June 2009 also suggested that Ernest's concern was that the Companies and its assets should be preserved and grown for future generations of the De La Sala family (at [460]).

(g) The memorandum accompanying Ernest's final (but ultimately unexecuted) draft of the trust or settlement termed the Safe Straits Settlement ("SSS"), which spoke of the De La Sala family's legacy and Ernest working to preserve it (at [462]).

57 The Judge also did not believe the testimony of Ernest's witnesses, Tony and Isabel. He was of the view that Isabel was not an independent witness since she was the sole beneficiary of Ernest's will and was financially provided for by Ernest. He was also of the view that Tony's evidence was affected by witness coaching, especially due to the discovery of exhibit D3, a document titled "Possible Questions" ("D3"), which recorded a series of answers to questions which might be asked in cross-examination.

JERIC were to have beneficial interests in SM, CE and SR

58 The Judge formed the view that the members of JERIC were intended to have an equal interest in SM, based on a memorandum of 15 December 1967 by Ernest ("the 1967 Memo"), the minutes of CE from 22 December 1969 ("the 1969 CE Minutes") and an undated note entitled "San Miguel Navigation Co S.A." ("the Mitford Note") (at [401]–[402]). The 1967 Memo stated that SM had acquired all of SR's shares and that SM shares were to be issued equally to JERIC. The 1969 CE Minutes showed that CE had purchased from JMC the entire issued capital of SM, thereby forming a triangular structure in which CE owned SM which owned SR, which in turn owned CE. The 1969 CE Minutes stated that Ernest had the power of authority to notify CE to transfer the shares in SM, and that Ernest had exercised this power of appointment in favour of JERIC for them to claim 20% of SM each. This was explained in the Mitford Note.

59 The Judge reasoned that that having found that SM was beneficially owned by JERIC, it must follow that JERIC had a beneficial interest in the other two entities, SR and CE, which were owned in an orphan structure with SM, and with SR owning NEL, and CE owning 45% of the shares of JMC. This was supported by the fact that journal vouchers record JRIC as continuing to receive dividends from JMC after 1970. These dividends were credited into their current accounts with SM (at [406]).

The Companies are not the beneficial owners of their shares and assets

60 The Judge applied BVI and Panamanian laws, and determined that Ernest was the beneficial owner of the *shares* of the Orphan Companies as he

had incorporated them and had always exercised full and complete control over the Orphan Companies and their affairs (at [476]).

61 However, the Orphan Companies were not beneficial owners of their *assets*, because while they had considerable assets, they had nominal or insubstantial paid-up capital and no apparent trading operations. It was therefore obvious that the assets were being held for someone else. Since the Companies' assets were put into them by Ernest, it appeared that Ernest was the "putative beneficial owner" of the assets, but because some of the assets put in by Ernest stemmed from the pool owned by JRIC, he held a corresponding part of the beneficial interest in the shares and assets of the Companies on trust for his siblings and Camilla's estate (at [477]). The Judge did not attempt to determine what proportion of the shares and assets that would be, leaving that inquiry for the assessment/accounts stage.

Ernest was the putative owner of the Companies' assets as he held part of them on trust for his siblings and his mother's estate

62 The Judge held that:

(a) The Companies did not beneficially own their assets; Ernest was the beneficial owner of all the assets held by the Companies, and was therefore entitled to call for ECJ to effect transfers of shares as he directed and was also entitled to call for ECJ's resignation from their directorships and appoint new directors (at [499]);

(b) However, Ernest had mixed the assets belonging to his siblings and Camila's estate with his own assets into the pool of assets held by the Companies. Therefore, he held a part of the Companies' assets on

trust for his siblings and Camila's estate, less any payments made by Ernest over the years to them (at [500]);

(c) Camila's estate had not been fully or properly distributed or accounted for, and so Ernest was liable to account for the due administration and distribution of Camila's estate (at [501]); and

(d) Bobby was at liberty to apply to intervene in the proceedings and apply for Ernest to account for Bobby's share of the assets belonging to him less what he had been paid (at [503]).

Ernest fraudulently misrepresented to ECJ that there was a family legacy

63 The Judge framed the main misrepresentation as being that "there was a family legacy instituted by Robert Sr which Ernest was looking after as custodian for the De La Sala family" (at [507] of the Judgment). This has to be read together with the Judge's more detailed findings elsewhere in the Judgment (which we paraphrase for the sake of brevity) that Ernest had represented to ECJ:

(a) That he was acting as custodian of the De La Sala family businesses, which were Robert Sr's and/or the family's "legacy", and that this had been a "burden" on him (at [384(a)]);

(b) That ECJ would eventually take over his role and would then manage the De La Sala "legacy" for the benefit of the whole family (at [378] and [384(b)]);

(c) That ECJ would be well-rewarded financially for assisting him (at [384(c)]); and

(d) That ECJ's efforts would increase the value of the De La Sala family assets and thus benefit the whole family including their children, as they were all descendants of Robert Sr and Camila and were beneficiaries of the "legacy" (at [384(d)–(e)].

64 The Judge found that no "family legacy" existed, that Ernest had known that "Robert Sr had not … set up any family trust and/or family legacy", and that the misrepresentations had induced ECJ to incur detriment in moving to Singapore and giving up career opportunities (at [507]–[508] of the Judgment). In particular, the Judge noted that "what counted with them was that they were serving the family interests in taking up this role" (at [508] of the Judgment). On that basis, the Judge allowed ECJ's counterclaim.

ECJ did not breach their fiduciary duties to Ernest nor did they render dishonest assistance

65 The Judge's reasoning with regard to Ernest's counterclaims was brief, comprising only one paragraph, which mirrors the lack of importance placed on these counterclaims by Ernest in the conduct of the trial. The Judge found that "ECJ had acted on their *bona fide* belief that the [Companies] were holding assets which belonged to the family legacy", and was of the view that this was a reasonably held belief that was perpetuated by Ernest's representations. The Judge therefore rejected Ernest's claim that ECJ was "in breach of their fiduciary duties owed to the [Companies] as directors or had dishonestly assisted in breaches of trust or took part in a lawful or unlawful conspiracy to injure Ernest." The Judge found that "Ernest was in a large part responsible … for the state of affairs in which ECJ acted, in my view, in accordance with their fiduciary duties as directors to protect the [Companies] when Ernest removed funds from them into his personal accounts" (at [506] of the Judgment).

66 Therefore, the Plaintiffs' claims against Ernest were dismissed in part, Ernest's counterclaims against ECJ were dismissed and ECJ's claim in misrepresentation was allowed.

The IW Letter was protected by without prejudice privilege

67 The Judge observed that there were two prerequisites before without prejudice privilege may be invoked in respect of communications between the parties. First, "the communications (in respect of which privilege is claimed) must arise in the course of genuine negotiations to settle a dispute", and second, "the communication must constitute or involve an admission against the maker's interest" (at [489]).

68 In so far as the first requirement was concerned, the Judge was of the view that the IW Letter was a genuine invitation by James to negotiate a settlement between the parties. This was the consequence of a number of findings. First, the Judge found that the IW Letter at paras 5, 9 and 52–55 demonstrated James' desire for the parties to settle (at [491]). Second, while the Judge accepted that the bulk of the IW Letter emphasised the weaknesses of Ernest's case and the potential consequences of the matter being litigated in open court, the Judge took the view that it did not undermine James's genuine intention to negotiate a settlement. The Judge relied on the English High Court decision of *Schering Corporation v CIPLA Ltd and another* [2004] EWHC 2587 (Ch) ("*Schering*") in arriving at his conclusion. In that decision, in respect of the same issue of whether a particular letter was protected by without prejudice privilege, Laddie J observed, at [19] and [21], that it was common in correspondence between parties facing potential litigation that "the author maximises the strength of his case", or "for one party to assert that its confidence is so great in the correctness of its position, that it feels that it is safe to proceed

without regard to the other side's position if negotiations are not entered into and resolved satisfactorily*"*. Third, the Judge also took the view that the contents of the IW Letter did not amount to "threats", drawing a distinction between "highlighting to the other party the potential risks of proceeding with litigation, which may include investigations by the relevant authorities, and threatening to report the other party to those authorities unless the other party settled" (at [492]). The Judge was of the view that the IW Letter had made it explicit that James had no intention of sending any material or information to the authorities that might subject Ernest or Isabel to investigations. Fourth, the Judge accepted Mr Winter's evidence that there was no intent to communicate threats in the IW Letter. Finally, the Judge observed that neither Ernest nor his lawyers had raised any objections to the IW Letter until 10 months after it was sent, and he was therefore of the view that the IW Letter had arisen in the course of genuine negotiations (at [492]).

69 In so far as the second requirement was concerned, the Judge accepted ECJ's submission "that a genuine invitation to negotiate a settlement is sufficient, in and of itself, to constitute an admission against interest" (at [494]).

70 The Judge omitted to state his reasons for accepting that James's E-mail was clothed by without prejudice privilege. It would appear that he agreed with the SAR that James's E-mail was to be treated in similar fashion to the IW Letter, and since he found that the IW Letter was privileged, so was James's E-mail.

The appeals and summonses

71 As there are a number of appeals and summonses filed by the parties, it may be helpful for us to provide an overview of the issues at stake in the following table:

Case	Appellant/ Applicant	Respondent	Details
CA 34	Ernest	Companies	Appeal against the Judge's finding that Ernest held part of the Companies' shares and assets on trust for JRIC.
		ECJ	Appeal against the Judge's finding of Ernest's fraudulent misrepresentation to ECJ. Appeal against the Judge's dismissal of Ernest's claims of breach of fiduciary duties, dishonest assistance and conspiracy *via* unlawful and/or lawful means against ECJ.
		None (Bobby is not a party to CA 34)	Appeal against the Judge's decision that Bobby was at liberty to apply to intervene in the proceedings to apply for Ernest to account for Bobby's share of the assets and/or funds belonging to him.
SUM 88	Companies	Ernest	Summons for leave to adduce further evidence in the form of (a) Ernest's witness statement dated 24 February 2017 and (b) a supplemental witness statement dated 18 May 2017 and the exhibits to these statements. Both statements were filed in the Hong Kong proceedings involving Hannelore.
SUM 92	ECJ	Ernest	Summons for leave to adduce further

			evidence – a torn share transfer form dated 3 August 1956 ("the 1956 Form") annexed to the second affidavit of Edward marked EDLS-2.
CA 35	Companies	Ernest	Appeal against (a) the Judge's dismissal of their claim for a declaration that assets in their name belong absolutely to each of the respective Companies; (b) the Judge's declaration that Ernest was entitled to transfer to himself the Companies' assets; and (c) the Judge's declaration that Ernest is entitled to direct ECJ to transfer the Companies' shares to him, and is entitled to call for ECJ's resignations and appoint new directors.
SUM 87	Companies	Ernest	Summons for leave to adduce further evidence – the same documents as in SUM 88.
CA 59	Ernest	Bobby	Appeal against decision on 22 March 2017 in SUM 662 of 2017 ("SUM 662") granting leave for Bobby to intervene in the proceedings.
SUM 85	Bobby	Ernest	Summons for leave to adduce further evidence – the same documents as in SUM 88.
CA 60	Ernest	ECJ	Appeal against the Judge's decision allowing the appeal in RA 352.

72 We note that ECJ in their CA 34 Respondent's skeletal submissions devoted a section (at paras 36–43) to arguing that the three certainties required to create an express trust were fulfilled by Robert Sr. This appears to challenge a critical finding by the Judge, that Robert Sr did not create a trust over the

family's assets. Since ECJ did not file an appeal against this aspect of the Judge's decision, they should not be allowed to use their Respondent's skeletal submissions to mount a back-door appeal. This is also not a case in which they are seeking to affirm the Judge's decision on different grounds (which is permissible as part of a response to the other side's appeal: see the decision of this Court in *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] 1 SLR 312 at [65]), since finding the existence of a trust by Robert Sr would lead to the substantial reversal of many of the Judge's orders. We will therefore not consider these arguments any further. The Judge found that Robert Sr had not set up a trust before his death, and that finding must stand.

73 Summonses Nos 85, 87, 88 and 92 of 2017 ("SUM 85", "SUM 87", "SUM 88" and "SUM 92", respectively) were filed by the Companies and ECJ to adduce fresh evidence in the appeals, in the form of two sets of documents – the statements filed in proceedings in Hong Kong involving Ernest and his ex-wife, Hannelore, as well as the 1956 Form. Ernest stated that he had no objection to admitting the fresh evidence (though he was contesting its relevance and the weight to be given to it), and so we allowed the four summonses by consent by the end of the oral hearing.

74 At this juncture, we first consider the 1956 Form that is the subject of SUM 92, as it is connected to ECJ's arguments regarding the existence of the family trust. Edward deposed in his second affidavit dated 21 July 2017 that the 1956 Form, a torn document which was allegedly signed by both Bobby and Ernest, and shows Bobby transferring his NEL shares to Ernest to hold in his capacity as "Trustee of the Jeric Foundation", is relevant to CA 34. Edward asserts that though the purported "Jeric Foundation" was never been put into effect, the 1956 Form shows that family members "had been contemplating trust

arrangements over the [NEL] shares since at least 1956", and is therefore consistent with ECJ's belief that Robert Sr "established a sacred trust over [NEL]". We place no weight on the 1956 Form for the same reason stated at [72] above – there is no appeal by ECJ against the Judge's finding that Robert Sr did not establish a trust over the family's assets. In any event, the 1956 Form preceded many of the key events in dispute in CA 34 by many years and is therefore of little relevance.

75 We will deal with the relevance and weight of the statements filed in proceedings in Hong Kong involving Ernest and Hannelore that are the subject of SUM 85, SUM 87 and SUM 88 at the appropriate junctures in this judgment, as they relate to a number of the appeals.

The issues

76 The following issues arise for determination:

(a) In CA 34 and CA 35, who has the beneficial ownership of the Companies' shares and assets, and if it is Ernest, whether he is entitled to transfer the assets and shares to himself;

(b) In CA 34, whether ECJ owed and/or were in breach of their fiduciary duties to Ernest, or had dishonestly or knowingly assisted the Companies in their alleged breaches of trust;

(c) In CA 34, whether Ernest made fraudulent misrepresentations to ECJ regarding the family legacy;

(d) In CA 34 and CA 59, whether the Judge erred in finding that Bobby could intervene in the proceedings, and/or in granting leave for Bobby to intervene ("the Bobby Decision"); and

(e) In CA 60, whether the two documents in RA 352 were subject to without prejudice privilege.

Since the point of CA 60 is to have evidence admitted which may be pertinent to the substantive appeals, we begin by considering that particular appeal.

The IW Letter and James's E-mail in RA 352

Ernest's arguments

77 In CA 60, Ernest challenges the Judge's findings that the IW Letter and James's E-mail satisfied the two requirements (see [67] above) for the documents to be protected by without prejudice privilege. Ernest submits that both documents are relevant to considering whether Ernest's counterclaims against ECJ should be allowed, as they indicate that ECJ were not acting *bona fide* in instigating the Companies in bringing their unmeritorious claims.

78 In so far as the first requirement of having to show a genuine invitation to negotiate is concerned, Ernest makes three key arguments regarding the IW Letter.

79 First, he highlights the importance of construing the documents as a whole in the context of the factual circumstances and argues that even if without prejudice privilege does *prima facie* apply in the present case, the letters fall into the "unambiguous impropriety" exception set out in the English Court of Appeal decision of *Unilever Plc v The Procter & Gamble Co* [2000] 1 WLR

2436, which decision has been endorsed by this court in *Quek Kheng Leong Nicky and another v Teo Beng Ngoh and others and another appeal* [2009] 4 SLR(R) 181 at [23]. Ernest cites the English Court of Appeal decision of *Jonathan Ferster v Stuart Ferster and others* [2016] EWCA Civ 717 ("*Ferster*"), which examined whether certain without prejudice communications fell within the unambiguous impropriety exception, and argues that the IW Letter was drafted in a manner similar to the communications in *Ferster*, which were found to fall within that specific exception. In particular, that the IW Letter communicated myriad threats of serious criminal action as well as tax investigations to Ernest, his loved ones and witnesses. Ernest sets out in his submissions a table of the various purported threats made in the letter.

80 Second, he contends that the qualifiers in the IW Letter do not preclude the letter from being improper, drawing an analogy to *Ferster*, where, despite the emphatic and unequivocal statement by the respondents' solicitors that their client did not know "and to be clear does not make any threats as to what will happen if the parties do not reach a settlement agreement", the English Court of Appeal still affirmed the lower court's view that the message in the solicitors' letter in question went beyond what was reasonable in the pursuit of civil proceedings. Ernest argues that adding the qualifiers "simply makes an open threat a veiled threat". Ernest contends that objectively, taken as a whole, the IW Letter "clearly sought to improperly pressure Ernest and his witnesses to settle / to deter witnesses from testifying on his behalf at trial."

81 Third, the IW Letter being authored by a Queen's Counsel does not make the communications permissible, even though a Queen's Counsel is not bound by the Law Society's Practice Directions regarding communicating

threats of criminal proceedings. Ernest suggests that it is precisely because Mr Winter would not be bound by the local practice directions that James instructed Mr Winter to draft the letter.

82 In so far as James's E-mail is concerned, Ernest argues that the said e-mail, taken together with the IW Letter, is improper because the e-mail and the letter "violate the law against communicating threats to witnesses". In this regard, Ernest submits that it is "incredible" that James would take the position in cross-examination that he had not intended that Isabel be given a copy of the IW Letter by Ernest, despite expressly identifying her in the IW Letter, and also drawing her attention to the existence of the IW Letter. James's E-mail was sent to Isabel three weeks before the parties were due to exchange their AEICs, and therefore the intention behind the e-mail was clearly to "cause her to fear testifying and/or to testify in a defensive fashion".

83 In so far as the second requirement of having to contain admissions against interest is concerned, Ernest argues in relation to James's E-mail that it does not contain any admissions against interest, and that Isabel is not a party to the dispute in any event. There is also no intimation of any offer to settle or to mediate in James's E-mail. As for the IW Letter, while Ernest acknowledges the applicability of the principle stated in *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433 ("*Sin Lian Heng*") by Sundaresh Menon JC (as he then was), that a genuine invitation to negotiate a settle is sufficient, in and of itself, to constitute an admission against interest, Ernest contends that this principle had to be considered along with the context of the letter. Ernest points out that James's own affidavit evidence was that the IW Letter was meant to showcase the strength of ECJ's case and the problems in Ernest's case, and contends that this intent was confirmed during the cross-

examination of Mr Winter. Mr Winter's testimony indicated that the letter was not drafted to contain any concessions but to emphasise the disastrous consequences for Ernest. Taking the entire letter in context, there was no admission against James's interest.

ECJ's arguments

84 ECJ contend at the outset that the timing of the IW Letter was chosen because it was perceived to be likely to save significant time and costs if the dispute could be settled before AEICs were exchanged. A settlement was also more likely to occur before the parties committed themselves to full-blown trial preparation. Since the IW Letter is explicitly marked "without prejudice", Ernest bears the burden of showing that these words should not be given their intended legal effect.

85 ECJ make three key points in support of their position that both documents are subject to without prejudice privilege.

86 First, they contend that the documents were genuine invitations to negotiate and contained admissions against interest. They argue that it is not necessary for a document to identify weaknesses in the case of the party on whose behalf it is sent, in order for there to be an admission against interest; the broader purpose of without prejudice privilege is to provide parties with a general freedom to negotiate, and therefore things which go beyond admissions against interest should be capable of being protected. An invitation to negotiate or an offer to resolve a dispute is in and of itself sufficient to constitute an admission against interest, based on the holding of Menon JC in *Sin Lian Heng*, which approved what is called the "first shot principle". That principle was formulated in the English Court of Appeal decision of *South Shropshire District*

Council v Amos [1986] 1 WLR 1271, which states that documents which initiated negotiations, whether or not they were themselves offers, could be privileged. ECJ also relies on *Schering* in pointing out that the key is for the document to invite negotiations; it is not uncommon for the author of the correspondence to emphasise the strength of its case, but that does not detract from the overall message of being willing to negotiate. In this regard, ECJ argues that both documents are clear invitations to settle or mediate; the IW Letter was captioned "Settlement proposal letter" and its contents made James's intent to mediate clear, while James's E-mail was "to facilitate possible settlement negotiations by inviting Isabel to discuss with Ernest the contents of the IW Letter".

87 Second, ECJ argue that there is no basis for the privilege to be lifted, because a high threshold must be met in order to satisfy the unambiguous impropriety exception, and it is not met in this case. It has to be shown that the exclusion of the communications from the evidence would act as a cloak for perjury, blackmail, *etc*, and the unambiguous impropriety exception should be applied only in "the clearest case of abuse of a privileged occasion". ECJ distinguish *Ferster* on the basis that the e-mail in *Ferster* was demanding extra payment for no justification and was therefore an attempt at blackmail. ECJ also distinguish *Ferster* as an exceptional case, because threats of criminal action and of publicity of allegations were made, and adverse implications for the recipient's family were caused as a result. ECJ contend that the IW Letter was different in that it highlighted certain objective risks that Ernest and the De La Sala family could be exposed to if the matter proceeded to trial. ECJ also point to the lack of affidavit evidence by Ernest or Isabel indicating how they perceived the two documents at the time of receipt and whether they saw the documents as not being sent for the genuine purpose of settlement.

88 Thirdly, ECJ submit that the "inordinate and unexplained lateness" of Ernest's attempt to produce the two documents should be a factor weighing against allowing the two documents into the evidence. ECJ point out that these documents have no bearing on the substance of the dispute in S 178 and suggest that this was Ernest's "tactic to distract James and obstruct ECJ's preparation of their case". ECJ argue that Ernest's decision to produce the documents at such a late stage is procedurally irregular, and that he has not deposed a supporting affidavit to explain his inordinate delay in seeking to admit the documents as evidence. The only explanation was an oral comment during trial by one of his lawyers that they had been "grappling with the document for some time". ECJ rely on the Singapore High Court decision of *Lim Eng Beng alias Lim Jia Le v Siow Soon Kim and others* [2003] SGHC 146 ("*Lim Eng Beng*") to submit that Ernest should not be permitted to rely on the two documents given the delay.

Our decision

89 We agree with the legal principles identified by the Judge, but we are of the view, with respect, that he had erred in the application of these principles to the facts of the present case. In our judgment, neither the IW Letter nor James's E-mail was a communication made with the purpose of inviting negotiations for a settlement.

90 We first consider the IW Letter. In our view, the contents of the letter do not indicate that James desired to negotiate a settlement agreement. While we agree with ECJ that it is not uncommon for parties to emphasise the strength of their own cases, and that it is not necessary for the parties to identify weaknesses in their own cases, it is also important to read such communications in context as well as for their cumulative effect. The court must navigate between Scylla and Charybdis: it cannot be overzealous in searching out hints of an ulterior

purpose (and, after all, a communication may have more than one purpose), but it also cannot end its inquiry at *any* reference, however half-hearted or perfunctory, to "settlement" or "negotiation". Finding this middle path is no easy task, for it is the rare course of settlement negotiations which will not at various points involve one party making robust assertions of the weakness of the other's case. It is also not unusual for a party, although genuinely desiring a settlement, to be shy about acknowledging its own vulnerabilities even in a purportedly "without prejudice" communication. (On these points, see the court's astute observations in *Schering* at [19] and [21], cited in the Judgment at [491].) The court cannot, therefore, simply conclude that *because* a party attacked the other side's case and made no explicit concessions, that party necessarily *lacked* an intention to negotiate a settlement. However, the court also cannot always *take at face value* a declared intention to negotiate a settlement when the dominant sense of the communication contradicts it. The inquiry must be an objective one based on the whole content and circumstances of the communication.

91 One example – and it is only an example – of when the court might be prepared to disregard a purported desire to negotiate a settlement is when a party's exclusive emphasis on the other party's legal weakness and precarious position is made so strongly, and at such great length, that a reasonable observer would find it hard to understand why the first party would be willing to accept anything short of acquiescence or to offer any concession of its own. The court *may* – if it is appropriate *on the specific facts of the particular case* – then be prepared to infer that the references to negotiation or settlement were fig leaves for a communication the only *real* purpose of which was to pressure the other party into acquiescing (in the whole claim or on a particular point or course of action).

92 In our view, the IW Letter was such a communication. It was cleverly drafted, and certainly avoided the thinly veiled threats that were present in the letter in *Ferster*; in particular, Mr Winter was careful to add a number of qualifiers that James was not intending to report Ernest's allegedly illegal actions to the authorities (see paras 7, 9 and 18). However, the rest of the IW Letter was focused not only on the weaknesses in Ernest's case, but also on the potential criminal consequences of him going to trial and losing the case. The IW Letter was also worded so as to imply that there was *in fact* criminal wrongdoing in that Ernest had misappropriated monies from the Companies. The IW Letter states (at paras 22–23):

> … the only question is whether your client was dishonest when he did so. The use of semi-completed stock transfer forms in these circumstances plainly gives rise to reasonable grounds to suspect that your client's conduct was dishonest. He knew that he had no authority to transfer the shares and used forms that had been created for this purpose to effect the transfer. There is as a result a grave risk that these matters will come to the attention of the Singapore police in the course of the public hearing of this case.
>
> Your client is reminded that judges in Singapore are entitled to refer matters to the police should they see evidence of criminality in civil cases tried by them. Given the publicity this case is likely to engender there is plainly a risk that the police will be spurred into action as a result of the attention given to your client's evidence and in particular his cross-examination by the media.

93 If the above paragraphs were the only such mention of criminal consequences for Ernest, we might not have thought them unusual in a letter concerning settlement negotiations. However, *practically the entirety* of the letter's 11 pages, comprising 55 paragraphs, was devoted to an analysis of various aspects of Ernest's wrongdoing, and replete with statements of the above nature, save for the qualifying statements that James was not intending to report the purported illegalities of Ernest to the police. Further, the IW Letter

also emphasised the potential criminal implications for Ernest's witnesses, singling out Isabel, "the sole beneficiary of [Ernest's] will", in particular (at para 30), and claiming that there would be "obvious and grave repercussions" for her.

94 Taking the 11-page letter as a whole, it conveys little in the way of an invitation to negotiate a settlement. To the contrary, the distinct impression gained from the letter as a whole is that its author was trying to *exert pressure* on the recipient *to acquiesce in* the maker's demands. In our judgment, the IW Letter failed to meet the threshold requirement of being a genuine invitation to negotiate a settlement, and the Judge had therefore erred in finding that it was protected by without prejudice privilege.

95 The Judge's approach to the inquiry was to first consider whether the IW Letter made reference to settlement negotiations, and second, whether the IW Letter did or did not contain improper threats. We agree with the Judge that the IW Letter did make references to settlement negotiations and did not contain improper threats – or, rather, we do not think it would be fair to Mr Winter, or to James, to infer from these ambiguous words and facts that a threat had been intended or would have been received as such. However, in our judgment, the Judge, with respect, misdirected himself when he overlooked the point that it is not *necessary* for the extraneous purpose of a communication to be *specifically* ***that of a threat, let alone an improper one,*** in order for it to *fail to meet the* ***threshold*** *requirement of indicating a* ***genuine intention to negotiate a settlement.*** Take, for example, a letter which simply stated, "Please consider settlement. Your case is hopeless and you will surely lose and be ruined as a result. We cannot think of a single fact or point of law in your favour, nor can we imagine any way by which our client could lose." Absent special facts, we

do not think there would be anything *improper* about such a letter, blunt though it may be, nor do we think that it could be said to contain a *threat*. Yet, it would be artificial to state that it evinces a genuine intention to negotiate a settlement, as opposed to an intention to induce acquiescence. That is precisely the sort of letter which we find the IW Letter to be.

96 In so far as James's E-mail to Isabel is concerned, we are also of the view that it is not protected by without prejudice privilege. We reproduce the e-mail's contents as follows:

> Dear Isabel
>
> This letter is to inform you that counsel Mr Ian Winter Q.C. has today sent a detailed letter to Mr Ernest De La Sala the contents of *which might affect you and your interests*. Whilst the correspondence is privileged such that I am not at liberty to forward you a copy of it you may consider it to be in your interests to discuss its contents with Mr De La Sala.
>
> Yours,
>
> James Copinger-Symes
>
> [emphasis added]

97 This Court held in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [28], that the common law as embodied in the English House of Lords decision of *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 ("*Rush & Tompkins*") governs the application of without prejudice privilege in relation to third parties. In *Rush & Tompkins*, it was held that without prejudice privilege operated to shield communications between the plaintiff and first defendant, which resulted in a settlement, from the second defendant, who was in a separate dispute with the plaintiff. However, in our judgment, *Rush & Tompkins* is not directly applicable here because Isabel is not in an extant legal dispute with James.

98 In so far as third parties not in an extant dispute are concerned, we hold that the purpose of the communication to the third party is crucial in determining whether the communication ought to be protected by without prejudice privilege. In the Singapore High Court decision of *Krishna Kumaran s/o K Ramakrishnan v Kuppusamy s/o Ramakrisnan* [2014] 4 SLR 232 ("*Krishna*"), the e-mail in question setting out a spreadsheet was sent by the plaintiff to a third party because communications had broken down between the plaintiff and defendant, who were brothers. The third party was another brother. The court was of the view that the underlying policy objective behind *Rush & Tompkins* was to encourage litigants to settle their differences, and so it was important to consider if the e-mail was nevertheless made in an attempt to settle a dispute. The court held (at [15]) that without prejudice privilege arose in *Krishna* because the third party was being used as a conduit through whom a communication made for the purpose of settlement was passed from the plaintiff to the defendant, and so the plaintiff could assert without prejudice privilege over those communications. We agree with this approach.

99 However, in our judgment, James's E-mail, which was brief and factual, was *not* directed at having Isabel act as a conduit to pass on a message to Ernest regarding settlement. Instead, having regard to the contents of the IW Letter, and in particular the phrase "which might affect you and your interests", we are of the view that it was an attempt to draw Isabel's attention to potential adverse consequences that *she* could face, as a non-party to S 178, as a result of her participation as Ernest's witness. There was no intimation that James was willing to discuss a settlement with Ernest at all in James's E-mail, nor was there any admission made against James's interest. Further, James's E-mail was not stated to be "without prejudice", unlike the IW Letter. In our judgment, a plain reading of James's E-mail would *not* indicate that it was made for the

purposes of negotiating a settlement with Ernest through Isabel. It seems to us that James was motivated by a desire to encourage Isabel to act or refrain from acting in a certain manner through this e-mail, but this was *not* done with a settlement with Ernest in mind. Therefore, in our judgment, the Judge had, with respect, erred in finding that James's E-mail was privileged.

100 Given that the two documents simply do not evidence a genuine intention to negotiate, we do not find it necessary to rule on where precisely the line of "unambiguous impropriety" as an exception to "without prejudice privilege" should be drawn in Singapore, whether as a matter of general principle or on the present facts. It is a vexing question. On the one hand, the integrity of the legal profession, and fairness to the parties with whom solicitors deal, requires that no amount of ingenuity of language be permitted to cloud the court's view of what is, in substance, an improper threat or other improper communication. On the other hand, it may be unduly stifling to free and robust negotiation between disputants if *any mention* of possible criminal or reputational consequences could defeat "without prejudice" privilege. Without intending any disrespect to the efforts of counsel, the present appeals do not, having regard to our findings and decision just set out above, justify the detailed analysis that ought necessarily to be devoted to this issue, given its broader significance. Since it need not be decided for the purpose of disposing of CA 60, we prefer to revisit it in an appropriate case with the benefit of fuller arguments. Suffice it to state that wherever the line is drawn, James's E-mail and the IW Letter come very close to the line if they do not cross it, and such communications are, at the very least, to be strongly discouraged.

101 We recognise that Ernest's delay in seeking to produce these documents was regrettable, but given that the parties consented and were able to cross-

examine the relevant witnesses on these documents, we see little prejudice resulting to ECJ and the Companies from the late production of these documents. We allow CA 60 although – as will be apparent from our analysis in the subsequent sections of this judgment – the evidence admitted has little impact on our decision. In fact, these two documents are only of some (marginal) relevance to Ernest's counterclaim against ECJ (see [163] below).

102 We turn now to the more substantive aspects of the present appeals.

Whether the Judge erred regarding the beneficial ownership of the Companies' shares and assets

Ernest's arguments

103 The main point of Ernest's appeal in CA 34 is against the Judge's dismissal of Ernest's counterclaims to the effect that he was the sole beneficial owner of the Companies' shares and assets. Ernest contends that the Judge overlooked the objective documentary evidence in Ernest's favour and, instead, placed too much emphasis on the oral testimony and credibility of the witnesses, which is not (he contends) the correct approach for a case involving events dating so many years back. We note that Ernest does not, in fact, challenge the Judge's findings based on the objective documentary evidence discussed in the Judgment (see [56] above); he focuses, instead, on arguing that the Judge had failed to take into account other pieces of evidence in the Judgment.

104 In this regard, Ernest argues in his Appellant's Case that the Judge had failed to take into account the following points:

(a) It was undisputed that he was the one who had set up the Orphan Structure and that he had consistently referred to the Companies as his

nominees and envelopes – for instance, in three contemporaneous letters written from 1995 to 1996 – without contradiction. The contents of these three letters, the first dated 4 March 1995 to Isabel, the second dated 21 June 1995 to Isabel, Tony and Bobby and the third dated 26 January 1996 to Ostenfeld and copied to at least Isabel and Edward, were reproduced at length in the Judgment at [412]–[414]. Ernest argues that the Judge had no basis for finding that the contemporaneous letters were part of a paper trail intended to defraud the tax authorities, because ECJ had never pleaded that these were a fraud, and it was never put to Ernest that it was a fraud. In absence of a plea of fraud, it was not open to the Judge to find that these letters were a fraud, and this finding must therefore be set aside.

(b) The REC–HLV Trust memorandum made it clear that Ernest was the "settlor" and "the entire trust fund was held for Ernest's sole benefit during his lifetime". When ECJ started work on a structure to pass on the Companies' assets in the form of the SSS trust, the various iterations of draft trust documents which were produced showed that Ernest was the settlor who had sole and absolute control to choose beneficiaries and dictate their entitlements. The Judge was wrong in inferring from these documents that Ernest was a mere custodian managing family assets.

(c) In 2011, Ernest was able to unilaterally gift parcels of land in Canada that were part of the Companies' assets (more specifically, held by PAL through SR) to Edward's children without consulting any of the Companies' directors or JRIC. Such an act is indicative of Ernest's sole ownership of the Companies and their assets;

(d) Prior to the dispute, the family members had accepted Ernest's claim of ownership over the Companies. ECJ did not challenge Ernest's authority to deal with the Plaintiffs' assets in their draft e-mail dated 5 August 2011 of which Ernest was the intended recipient. This e-mail betrayed their real concern was for their own roles and not Ernest's ownership claim; it ended with "Is there another role you have for us or is the 'permanent holiday' you mentioned to say are we redundant?" Similarly, in the conversation between James and Ernest around the same period, James did not dispute Ernest's claim to ownership. Ernest argues that the same could be said of the siblings' correspondence in the period leading up to the dispute, including (i) Ernest's angry e-mail to Isabel and Bobby claiming that the assets were his, and Isabel sending Edward an e-mail asking him to immediately reinstate Ernest's sole signatory rights and claiming that the money was Ernest's; (ii) Bobby instructing ECJ to restore Ernest's sole signatory rights; (iii) Bobby's letter to Ernest on 13 August 2011 stating that Isabel and he were "shell-shocked" by ECJ's actions; (iv) Isabel's letter to Bobby and Terrill on 26 August 2011, where she stressed that it was "[Ernest's] own money and accounts" ("the 26 August 2011 letter"); and (v) the recording of Ernest and Bobby's meeting on 14 December 2011.

105 In so far as the oral testimony of the witnesses is concerned, Ernest contends that:

(a) Little weight should be given to the oral testimony because so much time has passed, and many important witnesses and documents are no longer available, citing this Court's observations in *Sandz Solutions*

(Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others [2014] 3 SLR 562 ("*Sandz*") at [50] in support;

(b) His recollection of certain events had been faulty because of the passing of time, and was jolted by subsequently disclosed documents. The case concerns complex corporate structures which had been restructured several times over the years. Therefore, the Judge's conclusion of dishonesty against Ernest was not warranted; and

(c) The Judge had also erred in his approach towards Isabel's and Tony's evidence when he compared their positions in their affidavits filed in 2012 in support of Ernest's position regarding the injunction and their AEICs filed for trial. He should not have disregarded Isabel's evidence in the light of her contemporaneous conduct in the 26 August 2011 letter supporting Ernest's claim to the assets. In so far as Tony's evidence was concerned, Ernest argues that Tony's evidence should not have been disregarded as a result of the discovery of D3; it was illogical to suggest that D3 was a script because it was prepared after Tony's evidence had already been finalised and, hence, D3 contained Tony's own evidence.

106 Finally, Ernest goes as far as to submit that, as a result of a fundamental error in the Judge's overall approach to the evidence and his wrong assessment of the oral testimony, "the Judge *became polarised*" [emphasis added]. Before turning to summarise the Companies' arguments, we feel compelled to address this curious and suggestive phrase. To say that a *person* has become polarised is, we take it, to say that he has gravitated toward one of two poles. On one level of meaning, this is precisely the task of a judge: to decide which of two positions should prevail. On another level, however, to become polarised could mean to

become attached to one of two *camps* or *agendas*. Ernest appears to intend the phrase in the latter sense, and is therefore using "polarised" as a euphemism for "biased". This interpretation is confirmed by the fact that Ernest goes on to request that any taking of accounts or assessment of damage be done *before a different judge*. We have no hesitation in rejecting this thoroughly baseless accusation. What the Judgment demonstrates is a judge who had carefully considered the evidence and the parties' respective demeanour and, based on his own understanding of it, had come to reasonable conclusions as to the various parties' truthfulness and motivations. Even if the Judge had erred, such errors should not lightly be spun into allegations of bias. In the rare event that such accusations must be made, they should be made openly and adjudicated upon in a recusal application, not smuggled into an appeal under the cover of "polarisation". This is an unmeritorious and spurious allegation.

The Companies' arguments

107 CA 35 revolves around the Companies' argument that the structure of the Orphan Companies is valid and capable of existing without a natural ultimate beneficial owner ("UBO"). The Companies claim that they were to apply their assets for the purposes they were set up, *ie*, to manage the assets and distribute them to descendants of Robert Sr.

108 The Companies first dispute Ernest's claim of beneficial ownership of their shares, as they point out that it is not true that Ernest incorporated all of them; PAL was incorporated in 1958 as a subsidiary of JMC. They also contend that the Judge had erroneously equated beneficial ownership with control; in general, directors have full and complete control over the affairs of companies but that does not mean that they are the beneficial owners. The Companies also argue that Ernest has not proven that he was the owner of the first orphan

structure of CE, SM and SR, which is related to the present Orphan Structure, and point out that Ernest had disavowed any interest in CE, SM, JMC, SR and NEL in the Mitford Alaska proceedings.

109 The Companies then contend that even if Ernest were the beneficial owner of the Companies' shares, he has failed to show that he is the beneficial owner of the Companies' *assets*. In this regard, they rely on the doctrine of separate legal personality and argue that ownership of the shares of a company do not translate to ownership of its assets. They also contend that the fact that they have nominal or insubstantial paid-up capital or no apparent trading operations is not inconsistent with their beneficial ownership of the assets. Given that there is no suggestion of an express trust or constructive trust over the assets, Ernest's claim must be premised on there being a resulting trust over the assets, *ie*, one arising because Ernest had transferred his assets into the Companies with no intention to benefit to the Companies. The Companies argue that Ernest has failed to show that the Companies hold the assets on a resulting trust for him, since he cannot remember when and how exactly he put his assets into the Companies, and has also failed to show that these transfers were made without an intention to benefit the Companies. There is also no evidence that Ernest had transferred any of his own assets into the Companies to begin with. The Companies argue that Ernest is unable to recall when he did so simply because the assets originated substantially from NEL and JMC, and not from Ernest himself.

110 As an alternative argument, the Companies contend that even if it is accepted that Ernest had a partial beneficial interest in the Companies' assets, Ernest is not entitled to transfer the Companies' assets to himself, call for the registered shareholders to transfer shares in the Companies to him, or call for

the resignation of the other directors. They point out that the BVI and Panamanian law expert evidence adduced at trial related to how the sole UBO could procure for himself the shares and assets of a company, but the evidence was not applicable in Ernest's case because Ernest is not the sole UBO. The Companies cite *Lewin on Trusts* (Sweet & Maxwell, 19th Ed, 2015) for the proposition that a beneficiary can only be said to be an equitable owner of a trust asset if the asset is sufficiently ascertained and he is the only beneficiary interested in it. However, if the beneficiary's rights or the assets in which they are to be enjoyed are not sufficiently ascertained, his equitable proprietary interest in the assets only allows him to require the trustee to administer the assets, but he cannot claim ownership over a specific asset. Given the Judge's conclusion that the exact proportion of Ernest's beneficial interests in the assets is unascertainable, Ernest has no basis to assert equitable ownership over the assets.

111 The Companies also contend that under the well-known rule in *Saunders v Vautier* (1841) 4 Beav 115 ("*Saunders v Vautier*"), the consent of all the beneficiaries of a trust is required before they can require the trustee to return to them assets held beneficially for them under a trust. Since the Judge found that Ernest is not the sole beneficial owner, and that Camila's estate and Bobby also have an interest in the Companies' assets, Ernest cannot transfer the Companies' assets to himself without first obtaining the approval of the other beneficiaries.

112 In any event, even assuming that Ernest is able to overcome all the above legal obstacles, the fact remains that Ernest has to comply with the corporate formalities, such as passing appropriate resolutions, prior to transferring assets from the Companies to himself.

113 Ernest's response to these arguments is that the Companies have wrongly characterised the Judge's findings as a finding that Ernest, Camila's estate and Bobby are co-beneficial owners. Rather, the Judge found that Ernest held part of the shares and assets of the Companies on a sub-trust for Camila's estate and Bobby. Therefore, assuming the Judge's decision is upheld, as between the Companies and him, the former cannot withhold its assets from the latter, because he is the "full beneficial owner at 'the first layer'". Ernest cites the English Court of Appeal's decision in *Nelson v Greening and Sykes (Builders) Ltd* [2007] EWCA Civ 1358 at [56]–[58] as support for this argument.

114 Ernest argues that he is entitled to transfer the Companies' assets to himself even though he would hold part of it on sub-trust for his siblings and Camilla's estate.

Our decision

115 In our view, the central issue for determination in S 178 is this: who owned the assets which Ernest removed from the control of the Companies? In answering this deceptively simple question, it is important to remember the positions of the parties in these proceedings and the evidential consequences that flow from them. The Companies of course bear the legal burden of proving their case. They are claimants with a simple claim: they are the legal owners of their assets, and Ernest had no authority from the Companies to transfer them to himself. *Prima facie*, on the unrebutted evidence which the Companies have adduced, this is undoubtedly correct. Ernest's defence is that the *prima facie* position is misleading – he was and is the sole beneficial owner of the assets, and therefore was entitled to deal with them as he pleased. Alternatively, he was and is the sole beneficial owner of the Companies' *shares*, and this entitled him

to remove the Companies' assets. The crucial point is that if Ernest fails to make out either of these defences, then the Companies – having decisively proven that they are the legal owners of their assets, and thus ordinarily entitled to recover the assets or their worth – must succeed.

116 Viewing the evidence in the round, we are unable to agree with Ernest's submissions. We find that the Companies are the legal owners of their assets and that Ernest is not the sole beneficial owner of the assets; rather, the assets are held on trust for NEL and JMC, for reasons we shall elaborate upon below. Moreover, even if Ernest were the sole beneficial owner of the assets, this would not have entitled him to deal with those assets in the manner in which he did. Further, we find that Ernest's alternative defence that he is the sole beneficial owner of the *shares* of the Companies, even if he were not the sole beneficial owner of the Companies' *assets*, also fails. We therefore allow CA 35 to that extent.

The significance of the fresh evidence adduced on appeal

117 As a preliminary point, it should be said that we did not find ourselves aided, in determining the issues in CA 35, by the evidence sought to be adduced by way of SUM 87 and SUM 88. While the applications on their face appeared to concern Ernest's two witness statements filed in court after the release of the Judgment, in the Hong Kong proceedings brought by Ernest's ex-wife Hannelore to set aside her divorce settlement from Ernest, the real focus of the arguments is on a particular note disclosed in these statements – a record made by Ernest's lawyer, Robert E Low, of a conversation on 19 September 1975 with Hannelore's lawyer Brian Tisdall ("the Low Note"), where Brian Tisdall apparently stated that Ernest could not have been worth more than HKD$16m at the time of the divorce proceedings in 1969–1970, based on what Brian

Tisdall was told by another of Ernest's lawyers, Mr Raymond Moore. The Companies rely on it to argue that Ernest is not the beneficial owner of the family's assets, because he had (through agents) represented to others in the 1970s that he was worth much less than the family's assets. James points out in his supporting affidavit dated 13 July 2017 that if Ernest was correct in his argument that he was the sole owner of the family's assets by that particular point in time, then contrary to what was recorded in the Low Note, Ernest would be worth much more than HKD$16m.

118 In our judgment, the Low Note suffers from a lack of reliability, as it merely records a hearsay statement made by Brian Tisdall. Nor is it apparent that Robert E Low, as Ernest's lawyer, responded and confirmed the contents of the note. We therefore gave no weight to the Low Note in our deliberations. In any event, the point for which the Low Note is relied upon is repetitive of the point which has already been made on the back of affidavits filed by Ernest's own lawyers in the divorce proceedings and subsequent related proceedings, and which the Judge had duly considered (see [197] *et seq* of the Judgment).

Ernest did not buy out JRIC's interests in NEL's and JMC's shares

119 At the outset, we note that the key premise of Ernest's case, that there was a full buyout of JRIC's *shares* in NEL and JMC, would not *ipso facto* have given Ernest ownership of NEL's and JMC's *assets*. A beneficial interest in a company's *shares* does not imply a beneficial interest in the company's *assets*. On a simple application of the doctrine of separate legal personality, shareholders *qua* shareholders have no proprietary interest in the company's assets (see the decision of this Court in *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 at [71] as well as Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy

Publishing, 2015) ("*Corporate Law*") at paras 06.007−06.011 and 06.078). Instead, the benefits which shareholders derive from their shares ordinarily come in the form of dividends (if paid out), an entitlement to distribution of the company's assets in the event of winding up, and the ability to sell their shares to others. Of course, it is possible for a company to hold its assets on trust for others (including, potentially, its shareholders), but such a trust must arise in the usual ways in which trusts arise; it does not occur as a *necessary incident* of shareholding as such: see, for example, Lord Sumption JSC's observations on this topic in the UK Supreme Court decision of *Prest v Petrodel Resources Ltd and others* [2013] 2 AC 415 at [8]–[9] (the central point in this particular decision dealt, of course, with the quite separate issue of corporate veil-piercing (engendering much legal literature in the process)). Lord Sumption proceeded in that case to analyse (at [46]–[51]) *the precise circumstances* (which arose in the case before him) in which the companies concerned had come to hold the assets allegedly beneficially owned by their shareholder/controller, and rightly noted (at [52]) that "[w]hether assets legally vested in a company are beneficially owned by the controller is a highly fact-specific issue" to be determined by application of the usual principles of equity, "especially those relating to gifts and resulting trusts". We are unable to see anything whatsoever in the evidence before us that suggests that any such trust had arisen in favour of JERIC in respect of the assets held by NEL and JMC.

120 Hence, in order to make legal sense of Ernest's entire case, we must understand it in the following terms:

(a) NEL's and JMC's assets were transferred to and through various corporate vehicles, eventually ending up in the hands of the Companies.

(b) Those corporate vehicles, including the Companies, gave no consideration, were aware that the assets belonged to NEL and JMC, and the transfers were not intended as gifts.

(c) The Companies therefore held the assets on trust for NEL and JMC.

(d) Since Ernest was the sole beneficial owner of NEL and JMC, he was entitled to deal with NEL's and JMC's assets as he pleased even though he did not own those assets.

(e) Ernest also transferred some of his personal assets into the Companies, and the Companies hold those assets on trust for him directly.

121 The first three parts of Ernest's case above appear to us to have been well established. No party seriously disputes that the intricate series of restructuring arrangements and transfers which Ernest had implemented over the years were not meant to reflect real changes in interests as such, but, rather, to conceal where the true interests lay. To what extent this was for a legitimate purpose (*eg*, tax *avoidance*) and to what extent it was for an illegitimate purpose (*eg*, tax *evasion* or deception of Hannelore and the court in the divorce proceedings) is immaterial to the question before us. Ultimately, it is clear that the Companies' assets did not appear out of thin air, but must have arisen from some source.

122 In so far as this particular point is concerned, the Companies assert in their arguments for CA 35 that they had "trading operations" which generated profits for them. We are unable to accept both the correctness and the relevance

of this assertion. First, a perusal of the List of Assets appended to the Companies' Statement of Claim indicates that their substantial assets take the form of gold, shares of other companies, bonds and treasury bills. PEN is the exception as its sole asset is allegedly its beneficial interest in SMC shares. CFC owns the most assets of all, in the range of US$358m. This breakdown of the Companies' assets supports the Judge's finding that the Companies have no apparent operations of their own. Secondly, even if the Companies were able to grow their assets through "trading operations", they would have required seed funds to start with. If such seed funds had been provided to them for the purpose of investing them *for the originator's benefit*, then the profits would not have been (beneficially) the Companies' either. What is *conspicuously missing* is an explanation of how the Companies came by such substantial funds when their paid-up capital was insubstantial.

123 We also note the multitude of gratuitous transfers, in various currencies and often amounting to millions of dollars, among the Companies from 1998 to 2011, as recorded in Exhibit D8, which together suggest that each Company was treated as an interchangeable *repository* for assets, rather than a trading company with its own revenue-generating activities. These transfers were acknowledged by James, who was a director of all of the Companies. He conceded in cross-examination that large sums of money were routinely transferred from the accounts of one of the Companies to another, and no accounts were kept to monitor how much each company owed the others as a result of these transfers. He accepted that, for instance, if PAL used funds received from CFC to buy shares and dividends were declared on those shares, the dividends would be left in PAL. The assets of the Companies were effectively treated as a common pot or pool. Admittedly, this could simply indicate that the Companies were run as a group, such that their controllers'

concern was the overall health of the Companies and not of any specific company among them. However, it could also suggest that the Companies were holding their assets on trust for someone else, and that *that* was the reason why the lack of clarity as to the true state of each company's finances did not trouble the persons managing them. These facts on their own would not be conclusive, but they reinforce our earlier point that there was no explanation as to how the Companies could have acquired their assets other than by gratuitous transfers (whether of the whole of their assets, or of seed money which the Companies then invested) from NEL and JMC.

124 For these reasons, we agree with the Judge that the Companies were *not* the absolute owners of their assets. The substantial source of their assets appears to have been NEL and JMC, flowing from our discussion at [13] above. Since it has not been shown that NEL's and JMC's assets were transferred for consideration or as gifts, the presumption of resulting trust applies, and that resulting trust would remain imprinted on those assets as they passed from corporate vehicle to corporate vehicle.

125 The difficulty in so far as Ernest's case is concerned arises at the fourth and fifth stages of Ernest's case (set out at [120] above). Under [120(d)] above, Ernest must show two things: first, that he in fact bought out JRIC's interests in NEL and JMC, and, second, that this entitled him to transfer the assets to his personal accounts. Under [120(e)] above, Ernest must adduce evidence to show that he did transfer his personal assets into the Companies.

126 We discuss [120(e)] first as it can be quickly disposed of. We agree with the Judge that Ernest had given vague, unsatisfactory, and even evasive answers when cross-examined on this particular issue, and we find that he has not shown

that any such injections of assets in fact occurred. When he was asked what assets he had put into CFC (and when), his answer was that he could not precisely recall, but that "whatever assets it held were [his]". It was substantially the same story when it came to the assets in PAL, DOM and SMC. In so far as JMM was concerned, Ernest initially said that he did not put any other assets into JMM after it was acquired, but on re-examination claimed he could not remember whether he had transferred any of his personal funds into JMM. This was not convincing testimony, to say the least. Of course, the court must take a realistic view of human memory. It cannot expect a witness, especially one of advanced years, to recall – decades after the fact – the precise day and the hour in which one out of many transfers was made. But it would be surprising for a witness not to be able to recall, *even in general terms*, the *source* (*eg*, personal savings, or an inheritance, or profits made on the sale of a property) of a significantly large transfer or series of transfers, and the *range* (of months or years) within which they were made. This is all the more incredible when one considers the fact that Ernest is, by all accounts, a careful and astute man who took his father's business empire from strength to strength. It is difficult to imagine that a man with so keen a commercial mind could be so careless or forgetful with regard to such critical matters of finance. We therefore reject Ernest's bare assertion that part of the Companies' assets came out of other unspecified personal assets of his.

127 Turning to the buyout issue in [120(d)], we find that Ernest fails on the crucial point as to whether there was a buyout. (It will therefore not be necessary for us to consider whether and how the buyout of the *shares* in NEL and JMC would have entitled Ernest to transfer the *assets*, held on trust *for NEL and JMC*, to *himself* directly.) As the Judge correctly noted, there is no documentary evidence to show that there was a sale and purchase agreement between Ernest

and JRIC regarding NEL or JMC shares. Indeed, Ernest's defence is not only *un*supported by the documentary evidence, which received ample consideration by the Judge (at [392]–[463] of the Judgment), it is also *contradicted* in no uncertain terms by the documents. The following pieces of evidence illustrate our point:

(a) The 1967 Memo stated that SM had acquired all of SR's shares and that SM shares were to be issued equally to Ernest and JRIC. This suggests that Ernest and JRIC had (at least) a beneficial interest in SM. SM was subsequently part of the first orphan structure created in 1969, as evidenced by the 1969 CE Minutes, which showed that CE had purchased from JMC the entire issued capital of SM, thereby forming a triangular structure of CE owning SM which owned SR, which in turn owned CE. The 1969 CE Minutes stated that Ernest had the power of authority to notify CE to transfer the shares in SM, and that Ernest had exercised this power of appointment in favour of JRIC and himself to claim 20% of SM each. We agree with the Judge's findings (see [58]–[59] above) on these documents that having found that SM was beneficially owned by Ernest and JRIC, it must follow that they had a beneficial interest in the other two entities, SR and CE, which were owned in the orphan structure with SM.

(b) In a note made in 1969 (which was undated though the timing is not disputed), Ernest informed Bobby of what his share in NEL was, stating that "your shareholding is 20%, same as [Camilla], Tony, Isabel and myself". It will be recalled that at this juncture, JRIC no longer had any legal ownership of NEL shares (see [18] above). Yet the note informs Bobby that his share is the same as that of his siblings and his

mother. The irresistible inference, rightly made by the Judge, was that JRIC were still beneficial owners of NEL shares in 1969. This directly contradicts Ernest's claim that he bought out JRIC's interests in 1967.

(c) In what appear to be financial statements of SM from 1969–1971, sums were still attributed to "JERIC", despite SM being owned in the first orphan structure by this time (see [18] above). The logical inference is that JERIC had a beneficial interest in SM. Since SM was part of the three companies in the first orphan structure, the Judge reasoned – and we agree – that beneficial ownership of SM by a person falling outside of the first orphan structure (such as, by definition, any natural person) implied a commensurate beneficial ownership of the entire first orphan structure.

(d) A "scorecard" dated 29 May 1970 sent by Ernest to JRIC set out five different accounts with credit balances in SM and JMC. This suggests that these were Ernest's accounts kept on behalf of JRIC and himself. However, it should be recalled that at this point in time (see [17]–[18] above), SM was already part of the first orphan structure, and JRIC had no legal shareholdings in JMC or SM. The scorecard therefore suggests that JERIC and Ernest had *beneficial* ownership of JMC's and SM's *shares*, which entitled them to receive a share of the profits made by these companies.

128 These are all facts which are difficult to explain unless JRIC retained their beneficial interests in NEL and JMC past the point at which Ernest asserts that a buyout occurred, such that they were entitled to receive dividends or other benefits accruing from NEL's and JMC's profits. The list set out in the preceding paragraph does not exhaustively state *all* the facts which cast doubt

on Ernest's version of events (which the Judge considered meticulously and at greater length), but only what we consider to be the most glaring weaknesses in that version. The Judge considered the entirety of the evidence, including the siblings' correspondence with Ernest leading up to the dispute, ECJ's correspondence with Ernest, and the evidence regarding the REC–HLV Trust (see, *eg*, [15]–[28], [302]–[303], and [452]–[460] of the Judgment) in arriving at his conclusion that Ernest was not the sole beneficial owner of the Companies' assets.

129 Of course, not *every* fact raised by the parties was expressly discussed in the Judgment. That is inevitable: in a case such as the present one where the documentary evidence is voluminous, it is impractical for a judge to set out his findings in relation to *all* the evidence adduced without regard as to the materiality of those pieces of evidence; the judge would inevitably have to decide what was more important and present his findings on those: see, *eg*, the decision of this Court in *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [34]. The facts highlighted by Ernest as facts which the Judge allegedly overlooked are, we find, not decisive even assuming they were overlooked, for the following reasons:

(a) We agree with the Judge's finding that there is no concrete evidence on the record that the Companies' assets were subject to the REC–HLV Trust. The trust document only states that REC–HLV Trust was settled with US$10, which is a far cry from Ernest's claim that the said trust encompassed the Companies' assets. In any event, we are of the view that the REC–HLV Trust is of limited assistance in determining the beneficial ownership of Companies' assets because it was in existence from 2004 to 2009, and therefore did not assist in explaining

the status of the beneficial ownership of the Companies' assets in 2011, when Ernest's purportedly unauthorised actions occurred. Even if the Companies' assets were subject to the REC–HLV Trust at some point, the question remains as to the beneficial ownership of those assets after the trust was revoked.

(b) Ernest's ability to make a gift of the Abbotsford land with no objection from the directors of the Companies does not assist his case that he was the sole beneficial owner of the Companies' assets. We consider it to be neutral as it merely suggests that he had more control over the Companies' affairs than the other directors, which would still be consistent with the Companies' and ECJ's claims that Ernest was the custodian of the family's assets.

(c) In so far as the three contemporaneous letters of 1995–1996 raised in Ernest's arguments are concerned (see above at [104(a)]), it is not apparent that Ernest was claiming beneficial ownership of the Companies' assets through these letters. For instance, Ernest's letter of 4 March 1995 to Isabel only states that he had divested himself of most of his assets in his name, but not to whom he divested these assets. This letter certainly does not show a connection between Ernest's assets and the Companies' entire pool of assets. The letter in fact describes the capital assets of the Companies as trees and talks of preserving the trees and only distributing not more than 25% of the annual income from the capital assets, which is in fact more consistent with ECJ's position that Ernest merely managed the family's assets.

(d) As for Ernest's claims that the family members never contradicted Ernest's assertion that the Companies' assets belonged to

> him, Ernest appears to be indulging himself in cherry-picking. For instance, Ernest relies on the shock which Bobby expressed as to ECJ's actions in the letter of 13 August 2011, but ignores the other parts of the said letter which contradict Ernest's case. Specifically, Bobby refers to "the fruits of the Tree that [Robert Sr] had planted, but also those branches which [Ernest] had trimmed in order that the tree would continue to grow", to ECJ making Isabel and Bobby signatories to "safeguard the funds", and to ECJ "only seeking to protect" the funds. It is difficult to see how this could amount to an acknowledgment by Bobby that Ernest beneficially owned the Companies' assets; instead, it suggests that the Companies' assets were viewed as some form of common family property.

Thus, the documentary evidence alone provided ample reason to reject Ernest's defence.

130 The Judge did not, however, restrict himself to the documentary evidence – nor should he have. He *also* considered the testimony of the witnesses and, in a nutshell, found the Companies' witnesses to be generally convincing and Ernest's witnesses to be generally unconvincing. The net effect was that the Judge was fortified in his conviction that no buyout had occurred. Ernest argues that this was unwarranted, and that the Judge had placed undue weight on the witness testimony. He asserts that his poor recollection of the facts was due to the lapse of time and should not lead to the inference that he was being untruthful, and cites *Sandz* in support of this argument. However, the Court of Appeal's comments in *Sandz* were made in the context of the broader point (at [46]–[55]) that demeanour, behaviour and the witness's ability to recall events should seldom be the deciding factor in determining the credibility of a

witness and the veracity of his evidence. As this Court stated by way of summation at [56]:

> … the trial judge has to consider the *totality of the evidence* in determining the veracity, reliability and credibility of a particular witness's evidence. This *includes* contemporaneous objective documentary evidence. [emphasis added]

Clearly, the court should not ignore the objective evidence, nor should it place undue weight on oral testimony. However, that does not mean there cannot be cases in which, *on their specific facts*, the objective evidence is itself inconclusive, incomplete, or ambiguous, such that it falls to the oral evidence – imperfect though it may be – to guide the court to the best inferences that can be reached. If a witness's oral evidence is vague, contradictory, or ever-changing, then the court is entitled to *carefully consider the possible explanations* for these occurrences and to conclude, *where the surrounding circumstances justify it*, that the witness has been economical with the truth instead of being merely forgetful in the ordinary way.

131 Aside from arguing that the Judge should have been more focused on the objective evidence, Ernest also challenges the Judge's findings regarding witness credibility. This is an opportune moment to reiterate that the threshold for appellate intervention is a high one, and the appellate court "should be slow to overturn the trial judge's findings of fact, especially where they hinge on the trial judge's assessment of the credibility and veracity of witnesses": see the Singapore High Court decision of *Yap Giau Beng Terence v Public Prosecutor* [1998] 2 SLR(R) 855 at [24]. As V K Rajah JA held in the Singapore High Court decision of *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [68], *appellate intervention concerning, specifically,* ***assessments of witness credibility*** is justified in the following situations (among others):

> (a) cases where the primary judge's conclusion, although expressed in terms of credibility was "plainly wrong" as demonstrated by incontrovertible facts or uncontested testimony;
>
> (d) where the circumstances in which evidence was given, relevant to credibility, were unsatisfactory;
>
> (f) where the credibility determination leaves untouched other evidence which requires separate evaluation with no obstacle of a credibility finding; and
>
> (g) where, notwithstanding the credibility finding, *the "extreme and overwhelming pressure" of the rest of the evidence at the trial is such as to render the conclusion expressed at first instance so "glaringly improbable" or "contrary to compelling inferences"* of the case that it justifies and authorises appellate disturbance of the conclusion reached at trial and the judgment giving it effect.
>
> [emphasis added]

132 We find that there is nothing to demonstrate that the Judge's determination of the witnesses' credibility was so glaringly improbable or against the weight of the evidence so as to be plainly wrong. The Judge was entitled to find that Ernest was unreliable because of the various changes that he made to his case, some of which were fundamental, such as whether he had paid JRIC at the point of their sale of their shares in NEL and JMC, and whether this buyout occurred *before or after* Robert Sr's death (a simple and central fact which ought to have been easy to recall despite the passage of years). We share the Judge's view that Ernest's explanation of all these inconsistencies as errors due to age and poor memory or the lack of documentation, are, on balance, unsatisfactory – and, even if we did not share the Judge's view, we would not be prepared (and would not be entitled, under the principles of appellate intervention) to substitute our view for his on these facts. We do not think it necessary to go further to either agree or disagree with the admittedly harsh characterisation of Ernest at [195] of the Judgment. What matters for present purposes is *whether* the Judge was entitled to conclude that Ernest's testimony

was unreliable, regardless of whether its unreliability came from premeditated fabrication, free-flowing embellishment, simple confusion and poor recall, or some combination of these. The fact remains that Ernest's testimony *could not be relied upon* to prove the facts which he needed to prove in order to succeed in his defence.

133 In so far as Isabel's evidence is concerned, she was equivocal as to whether she was the sole beneficiary under Ernest's will (when in fact she was), and went so far as to say she did not know how, when or where she sold her interests in the shares of JMC and NEL to Ernest, which appears to be an incredible position. We are of the view that the Judge's finding in relation to her credibility is unimpeachable. While Ernest contends on appeal that the transfer of more than US$58m that the Judge said Ernest made to Isabel after the trial commenced did not in fact go through, questions still remain as to why he was trying to make these payments to her in the midst of this legal dispute, and whether she was sufficiently independent in the light of these sums that Ernest appeared willing to give her.

134 In so far as Tony's evidence is concerned, the Judge's assessment that Tony's evidence cannot be relied on and should be given little or no weight is also unimpeachable. Ernest's case on appeal in this regard rests on the Judge's treatment of D3 (which was a document consisting of what appeared to be a script, or transcript, containing certain questions and answers) and the application of the principles laid down in *R v Momodou and another (Practice Note)* [2005] 1 WLR 3442 at [62] ("*Momodou*"). The *Momodou* principles were formulated in the context of criminal proceedings in England, and they provide that it is important to ensure that the evidence given by a witness is the witness's own uncontaminated evidence, and that, consequently, the training or coaching

of witnesses – whether one-to-one or in a group – is impermissible. In this regard, Ernest is attacking a legal straw man when he contends that the Judge had erred in finding that it is conclusive in England that the *Momodou* principles apply to civil proceedings. Quite to the contrary, the Judge explicitly acknowledged that the application of the *Momodou* principles to civil proceedings "is currently the matter of some debate in the United Kingdom" (at [277]). The Judge in fact took a *qualified* view on the matter, which was that the principles of *Momodou* are applicable to civil cases, but "with more complex civil cases, *some* group discussion early on in evidence gathering is inevitable" [emphasis in original] (at [278]). It seems to us that the underlying concern in the cases mentioned in the Judgment and by the parties is with ensuring that a witness's evidence is his own. In our view, training or preparation sessions are *relevant* to assessing whether the witness's evidence at trial is his unvarnished as well as uncontaminated evidence, but they are not *determinative* as the credibility of a witness is ultimately a fact-sensitive issue.

135 In this regard, D3, on any reasonable view, casts serious doubt on whether Tony's evidence was his own. D3 is entitled "Possible Questions", which points towards it being a predictive script for Tony. The evidence of Elena Thasler ("Elena"), Tony's daughter, is crucial in this regard, as she worked for her father and was present at many of his training sessions. We reproduce Elena's evidence regarding the witness training sessions with Tony:

> Q: Right, so let's say for some reason a question was asked, what year did you sell the NEL shares, and the position in the affidavits is 1967, but your father said, oh, 1963, he just got it wrong, blurted out the wrong thing. Would you, in your note, put down 1963, which is the wrong answer, or 1967, which is the right answer?
>
> A: Well –
>
> Q: To jog his memory?

A: It wasn't quite like that. At the meeting, when the questions were done, if he did do a mistake – and *Mr Singh would call time on that and he would go through with him and discuss with him, then they would go back and do it again*. So there was no need to have to record the wrong one because it would have been done again in an instant like that with the date.

[…]

Q: The answer is: "I know that he divested 90% of his shares to Mummy and his children". The next question is "How many shares did you end up with?" And the answer: *"I can't remember the exact number, but my affidavit and supporting documentation evidence this*." *Now, if this is something to jog his memory, why is that recorded instead of the correct number of shares?*

A: Because at that meeting, I don't recall them even saying the correct number of shares and I always remember my father saying, "You know what, I can't recall the exact number of shares. Do I really have to know that?"

Q: […] So why isn't there some annotation to say Tony had X number of shares" to jog his memory?

A: It would possibly for him at this stage be just too confusing and too much information for him to remember.

Q: Right. And for him to remember, I see. Some of this information here isn't actually what happened at the meeting, I think [ECJ's counsel] established this. It was basically you and your father discussing possible questions and possible ways of answering those questions, right?

A: No. It was discussing possible questions and what his answers would be to those possible questions.

[…]

Q: *So it's a bit of a transcript and script*?

A: *Yes*.

[emphasis added]

136 Elena's concession that D3 was "a transcript and script", as well as her concession that if Tony made a mistake in his practice answer, he would be led

through it again to ensure that he answered the question correctly, raises a distinct possibility that Tony's evidence was contaminated through the witness training sessions. Without more, however, we might be prepared to accept this as perhaps an infelicitous (for Ernest) description of an ordinary and acceptable witness preparation exercise. There is nothing inherently wrong with a solicitor performing a "practice run", so to speak, with a witness, nor is there anything wrong with the solicitor informing the witness when he has given an answer which contradicts his affidavit evidence or other statements he has made. The crucial question is what happens after that point. One possible (and appropriate) response is for the solicitor to direct the witness to those contradictory statements and to *invite him to consider what* ***the true answer*** *is.* The witness may then realise that his memory has played a trick on him and that his earlier answer was correct; if so, there is, we think, usually nothing wrong in a record being made to remind the witness of the exchange that occurred on this point. Alternatively, the witness may realise that he had gotten it wrong on the earlier occasion, in which case the proper course would be (in the example of an affidavit) to amend the affidavit at the appropriate time. In either case, there is *also* nothing wrong with informing the witness of the questions which opposing counsel might then ask with regard to the possible inconsistency. The Judge recognised as much at [278]–[279] of the Judgment, and we do not think his view is at all unrealistic or detached from practice. The line that *must* ***not*** *be crossed* is this: the witness's evidence *must remain* ***his own***.

137 From this simple principle, at least three rules follow, the breach of which *may* – depending on all the circumstances – lead the court to accord less weight (or even no weight) to the resulting testimony. We emphasise that these are rules of thumb and not to be applied mechanistically. The ultimate question

is still whether the preparation has compromised the fundamental principle that the witness's evidence must be his own independent testimony.

138 First, and most obviously, the solicitor in preparing (not *coaching* or *training*) the witness must not allow other persons – including the solicitor – to *actually supplant or supplement* the witness's own evidence.

139 Secondly, even if the first rule is observed, the preparation should not be too lengthy or repetitive. As the Hong Kong Court of Appeal observed in *HKSAR v Tse Tat Fung* [2010] HKCA 156 at [73] (cited in the Judgment at [280]), the court must guard against "repetitive 'drilling' of a witness to a degree where his true recollection of events is supplanted by another version suggested to him by an interviewer or other party". Even if no one ever *tells* the witness to change his evidence, the exercise by its nature carries an inherent danger. Over time, oblique comments, non-verbal cues, and the general shape of the questioning (especially when reiterated) may *influence* the witness to adopt answers which he does not believe to be the truth, but which he has surmised would be more favourable to his case. Indeed, a witness may even come to convince himself, quite sincerely, that the more favourable answer is the true one.

140 Thirdly, witness preparation should not be done in groups. As the court in *Momodou* observed, group preparation or training exacerbates the risk that witnesses may change their testimony to bring it in line with what they believe the "best" answer to be (and, in particular, to make their testimonies consistent with each other). The same is true where a witness is prepared together with other involved persons, notwithstanding that they may not themselves be called as witnesses. Again, this may occur even if the solicitors and witnesses approach

the exercise with the purest of intentions. Human beings are social animals; all but the most contrarian of us naturally incline toward seeking agreement with others who are aligned with us. A witness, upon hearing the answer of another witness (or observing the other witness's reaction to the first witness's answer), may come to doubt, second-guess, and eventually abandon or modify an answer which was actually true. A case prepared in such a manner may come to resemble a thriving but barren plant: the fibres of (apparent) consistency, coherence, and plausibility may grow large and strong, but the fruit – *the truth of what transpired between the parties* – withers on the vine.

141 In the present case, we have serious concerns that both vine and fruit may, in fact, have been contaminated. As discussed earlier, the picture that emerges from the testimony of Ernest and his other witnesses is not a convincing one, even prior to examining the allegations of witness coaching. In so far as those particular allegations are concerned, the contents of D3, although highly ambiguous on their own, are surrounded by circumstances which cast *serious doubt* on the independence of Tony's testimony. To begin with, as the Judge noted, Tony's preparation sessions were attended at various times by Isabel, Elena, and occasionally Nicole Corbett (Isabel's daughter), all of whom were also witnesses concerned with the dispute. This is troubling and is a breach of the third rule set out in the preceding paragraph. Moreover, the fact that the solicitors would not only point out discrepancies, but also *reiterate* the questioning so as to allow Tony to practise giving the "right answer", created the danger outlined under the second rule (set out at [139] above). Finally, we also note that Tony's evidence appears to conflict with Elena's in that he characterises D3 as a transcript, stating that "I was there, my daughter was there, we just – Mr Singh was there, and what has transpired, I was just putting on record …". In other words, Tony claimed that D3 was simply a record of the

questions he *had been asked*, and the answers he *had given*, during the sessions, whereas Elena claimed that D3 was a curated selection of questions and answers to serve as a model of what Tony's answers *ought to be*.

142 In our judgment, the contents of D3, in the circumstances outlined above, cast *serious doubt* on whether Tony's evidence was his own. In so finding, we are not suggesting that any of the solicitors involved *knowingly* influenced Tony's evidence, nor that they intentionally arranged for other witnesses to be present in order to *create* opportunities for (or, rather, a risk of) contamination of witness testimony. There is insufficient evidence on record before us to conclude one way or another, and we therefore express no view whether these breaches may or may not have been innocent, as it were. However, the innocence of the breach would not mitigate the consequences in terms of how the court should *approach the evidence* once these serious doubts have been raised. The rules against witness coaching are prophylactic in nature. They of course prohibit *intentional wrongdoing* – and solicitors who are responsible for such wrongdoing may expose themselves to severe professional sanctions – which has clearly influenced a witness's testimony, but they apply *equally* to innocent breaches which *may or may not* have actually affected his testimony. The fact is that, in the present case, the *serious risks* which these circumstances created mean that the court *cannot trust that Tony's evidence was his own*, even as it recognises that Tony *may* have remained uninfluenced and that the solicitors *may* have acted in perfect good faith (albeit unwisely). The Judge's findings on Tony's credibility are thus unimpeachable as well. Moreover, they could with equal justification be extended to the other witnesses who were present at Tony's preparation sessions, because improper influence can be exerted (consciously or not) not only *by* the witnesses present at another witness's preparation session, but also *on* those witnesses, who may change

their testimony based on what they hear from the witness being prepared (see also [140] above).

143 For the reasons set out above, the Judge was justified in finding that Ernest's, Tony's and Isabel's evidence should be given little weight. We also emphasise that, even if the court were to focus exclusively on the objective documentary evidence, Ernest's case would still fail. The Companies have proven that they were the legal owners of the assets which Ernest appropriated. The evidential burden is therefore on Ernest to show that he was nonetheless entitled to deal with the assets as he pleased – specifically, on his case, because he had acquired JRIC's shares in NEL and JMC. Since what documentary evidence existed was at best inconclusive and at worst undermined Ernest's case entirely, Ernest's position would have been unsustainable even on that basis.

144 For these reasons, giving due weight to both the documentary evidence (which is incomplete and equivocal) and the oral evidence (which is flawed for the reasons we have outlined), we are not satisfied that Ernest has proven that the Companies' assets either *belonged to him alone* or *belonged to companies (NEL and JMC) which belonged to him alone*. The documentary evidence in this regard is fragmentary and in many ways unfavourable to Ernest, and Ernest's testimony is feeble at best. Rather, we find that the Companies' assets substantially derived from NEL and JMC and were (and are) held on trust for NEL and JMC, and that Ernest did not buy out JRIC's beneficial interests in those two companies.

Even if Ernest had been the sole beneficial owner of the assets, this would not have justified his removal of the assets from the Companies on the facts

145 For completeness, we note that even if we take Ernest's main case at his

highest and accept that he is the sole beneficial owner of the Companies' assets, Ernest had no right as a beneficiary to remove the Companies' assets from the Companies in the way he did. This flows from his position as a beneficiary. The learned authors of *Snell's Equity* (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") note (at para 2-002) that a beneficial interest differs from a legal interest in property even though the former interest confers the same incidents of beneficial enjoyment as the latter interest:

> The main difference is that the beneficiary's interest *does* ***not*** *give him beneficial rights directly enforceable against the property itself.* His beneficial rights derive from the trustee who owns the property and they are primarily enforceable against him. [emphasis added in italics and bold italics]

It is for this reason that beneficial "ownership" has been described as "a right against a right", *ie*, a right to constrain or control the way another person exercises *his* right to deal with a thing, rather than a right against the thing itself: see Ben McFarlane and Robert Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1.

146 The learned authors of *Snell's Equity* (at para 2-011) also note that while the beneficiary's right in the property has a proprietary character that entitles him to protect the property from wrongful interference by *third parties*, the beneficiary's interest *against the trustee* is to compel the trustee to perform the trust, and in the context of a trust of fund assets, the beneficiary has the right to make the trustee account for the benefits due to him from the fund assets. It is also trite that a beneficiary *cannot* control the trustee while the trust remains in being, although the beneficiary can put an end to the trust so long as he is entitled to the whole beneficial interest, pursuant to the rule in *Saunders v Vautier* (see also [111] above).

147 What this means for Ernest is that even assuming *arguendo* that Ernest is indeed the sole beneficial owner of the Companies' assets, he could not have appropriated the Companies' assets without putting an end to the trust arrangement under the rule in *Saunders v Vautier*. This, in our view, would at the very least have involved Ernest communicating to the board of directors of the Companies his assertion of the sole beneficial interest, and his desire to have the Companies return the trust property (*ie*, the assets) to him. We also agree with the Companies that the relevant corporate formalities would also have to be complied with under BVI and Panamanian law.

148 Therefore, on this analysis as well, Ernest's defence would fail and the Companies, as the legal owners of the assets, would be entitled to recover the assets from him. Of course, if Ernest was indeed the sole beneficial owner of the assets, he would then be free – on this alternative analysis – to procure the transfer of the assets to him in the proper way. Moreover, it may be that if Ernest showed that he would be entitled to have the assets immediately retransferred from the Companies to him pursuant to the necessary formalities, perhaps there could be an argument that the court would be acting in vain if it ordered the transfer of assets to the Companies. However, as we stated in the previous section, Ernest was and is *not* the *sole* beneficial owner of the assets on the facts before us.

Ernest is not the sole beneficial owner of the Companies' shares either

149 We turn now to Ernest's alternative defence. In the first place, it may not be the case that sole beneficial ownership of the Companies' shares if proven would, without more, defeat the Companies' claims. Legally, the doctrine of separate corporate personality means there is no contradiction in a company suing its sole beneficial owner for removing its assets. *Practical* considerations

are what make this scenario rare if not non-existent: ordinarily, the beneficial owner of a company would be in a position to prevent such an apparently absurd situation from arising, and an action would *typically* (but not invariably) lie against the nominees who procured a company to launch such a suit. But in any event, Ernest has, in our view, also failed to prove that he was the sole beneficial owner of the Companies' shares.

150 Neither Ernest nor the Companies have challenged the Judge's findings of fact on BVI and Panamanian law regarding the determination of the ultimate beneficial owner of shares of a company. We will proceed, therefore, on the basis of what the Judge found to be BVI and Panamanian law at [475] of the Judgment. This does not mean, however, that we must also accept the Judge's *application* of those findings to the facts.

151 In so far as Panamanian law was concerned, the Judge preferred the evidence of Ernest's expert, Mr Arthur Hoyos ("Mr Hoyos"), who was the former Chief Justice of the Supreme Court of Panama. Mr Hoyos opined that the ultimate beneficial owner of the shares of the companies held within the Orphan Structure had to be determined having regard to factors such as:

(a) Whether the company conducts real operational business or income producing operations;

(b) The person who set up the company;

(c) The person who gave instructions and paid the bills;

(d) The origin of the funds deposited in the company's accounts;

(e) The origin of the assets registered in the name of the company;

(f) The person who caused the appointment of directors of the company; and

(g) The person who exercised effective control of the company.

Mr Hoyos noted that this method of piercing the corporate veil and going beyond formal appearances to identify the ultimate beneficial owner of a corporation had been affirmed by the Supreme Court of Panama.

152 In so far as BVI law was concerned, the parties' experts were unanimous in their view that the identity of the ultimate beneficial owner of shares of the companies was a highly fact-sensitive inquiry for the court.

153 Without disturbing the Judge's factual findings with regard to the law of Panama and the BVI, we respectfully disagree with the approach taken by the Judge in applying those findings to the issue of the beneficial ownership of the shares in the Companies. The Judge essentially found that *because* Ernest was the person who had set up and/or acquired the Companies and had exercised control over the Companies, he was, *ipso facto*, the beneficial owner of the Companies' shares. In our judgment, this conclusion was, with respect, not based on a correct application of the expert evidence. The experts did not purport to set out ironclad legal rules which would determine who the beneficial owner was in every case (such as, to raise a simplistic hypothetical example, "He who sets up and controls a company which is owned in a circular structure is always its beneficial owner"). Even looking at the testimony of Mr Hoyos, what we see is a list of *commonly occurring relevant facts* which the court would look to when determining, *as a matter of fact*, the beneficial owner of shares held by a company.

154 Ultimately, the substance of the expert testimony was that beneficial ownership was a ***fact-sensitive inquiry*** that required an in-depth (as opposed to a superficial) analysis of all the relevant facts as well as context. It was not suggested that the person who satisfied some or all of the factors which Mr Hoyos listed would *invariably* be the beneficial owner. For instance, a trustee acting on behalf of the beneficiaries of a trust could incorporate a company on the beneficiaries' behalf and then and place trust assets in its name. The fact that the trustee was the (legal) source of those assets, and that the trustee incorporated and continues to control the company, would not mean (in and of itself) that the trustee would be the beneficial owner of the *shares* of the company, which was after all set up within the context of an existing trust. The Judge does not, with respect, appear to have considered that possibility in determining the question of the ownership of the Companies' shares. Instead, he concluded, on the basis of Ernest's incorporation and control of the Companies, that Ernest was the "putative beneficial owner" (at [476] of the Judgment). We respectfully take the view that by ignoring the other surrounding circumstances which cast doubt on that conclusion, the Judge decided the issue against the weight of the evidence. What is critical to disposing of the issue of the beneficial ownership of the Companies is *not* ***only*** *what* ***actions*** *Ernest had taken* in setting up or acquiring the Companies (although those were, to some extent, disputed), but also *his* ***purpose*** *for so acting* ***and*** the ***capacity*** *in which he had acted*. Having regard to the entirety of the circumstances – including our findings that Ernest is not the sole beneficial owner of the assets, that he had not bought out his siblings' and mother's interests in the family's assets, and that he had generally represented himself as managing the assets for their collective benefit – we are not persuaded that Ernest had set up and/or acquired the Companies and put them into the present structure for his own purposes.

Conclusion

155 For the foregoing reasons, we allow CA 35 in part. Since Ernest's defences based on sole beneficial ownership of the shares and/or assets of the Companies fail, the Companies, which have legal title, succeed in their claim for breach of fiduciary duties against Ernest. CA 35 is allowed to that extent. Ernest therefore must account to the Companies regarding the assets and what profits were made on them (if any), and return the assets to the Companies after the account has been taken. However, we find that the Companies are *not* the absolute owners of the assets and that they take these assets subject to a resulting trust in favour of NEL and JMC.

156 We make no finding as to the precise distribution of beneficial interests in the Companies and their assets. That is unnecessary for the purposes of the present proceedings. Given, for instance, the fact that JMC was also legally owned by other entities outside the De La Sala family, the exercise of untangling the precise beneficial interests may not be straightforward. We also observe that, although the non-parties Isabel and Tony have now intimated that they may attempt to enforce their own rights in the disputed assets and/or shares if Ernest is not successful here, they may face some difficulties given the stance they have consistently taken in the present proceedings. These are, however, all matters to be taken up in separate proceedings if those concerned see fit to do so.

Whether the Judge erred in dismissing Ernest's counterclaims against ECJ

Ernest's arguments

157 Ernest's CA 34 Appellant's Case (which contains, among other things, his arguments for making ECJ bear the Companies' legal costs) discloses another ground of appeal, which is against the Judge's finding that ECJ did not breach their fiduciary duties as directors of the Companies. In Ernest's CA 34 skeletal submissions, Ernest argues that "ECJ have breached their duties to Ernest and/or are liable on the various torts pleaded by Ernest on conspiracy *etc*". Ernest argues that ECJ owe fiduciary duties *to him*, given that they are his nominees and control the Companies, which hold assets on trust for him. Ernest argues that ECJ had breached their duties by instigating the Companies' claims against Ernest without any evidence. In particular, Ernest argues that the IW Letter and James's E-mail (which, in CA 60, we have decided are not privileged and are therefore admissible) support his claim, because these documents:

> … make it clear that ECJ were not acting *bona fide* in instigating the Plaintiffs to bring the clearly unmeritorious No Human Owner Claim. Instead, they had contrived a claim which sought to deprive Ernest of ownership and control of his assets and companies, and then sought to pressure him to settle the dispute by communicating very serious and improper threats of, *inter alia*, criminal proceedings, including against his sister and key witness, Isabel.

ECJ's arguments

158 ECJ submits that Ernest had failed to show that ECJ knew that the assets belonged to him but had acted in breach of fiduciary duty, dishonestly, or predominantly to injure Ernest; ECJ states that at all times they believed that Ernest was the *custodian* of family assets. ECJ argues that their actions were

never consistent with the belief that Ernest was the *owner* of the assets; instances where they failed to challenge e-mails from Isabel or Ernest's banker from Canada (claiming that the monies belonged to Ernest) were because they knew that it was not critical as Isabel and Ernest's banker would obviously be on Ernest's side. ECJ's reversal of their resolutions (requiring Ernest to obtain joint authorisation with Bobby and Isabel before making payment out of the Companies' accounts) were merely steps taken in order to defuse the dispute with Ernest as a result of Bobby and Isabel's intervention. Further, ECJ also submit that Ernest's counterclaims against ECJ were premised on him being the *sole* beneficial owner of the Companies and their assets, which Ernest had failed to show.

Our decision

159 The lynchpin of Ernest's claims against ECJ is his ownership of the Companies' shares and/or assets. Without that, the factual basis for a fiduciary relationship falls away. Since Ernest has failed to prove that the Companies' assets belonged to him, his claims must fail for that reason alone. For completeness, however, we shall also analyse the position if Ernest had succeeded in proving that crucial fact.

160 In our view, Ernest's arguments about ECJ's breaches of trust or fiduciary duties or their conspiracy to injure him hold no water even in that hypothetical scenario. Prior to the Judgment, it was not apparent that Ernest was the "putative beneficial owner" of the shares and assets of the Companies. Therefore, it was perfectly reasonable for ECJ as directors of the Companies to have sought to recover what appeared to be sums paid out of the Companies' accounts without justification.

161 More fundamentally with regard to Ernest's claim based on beneficial ownership of the *assets*, while it is not clear how Panamanian law operates in relation to directors' duties, it is trite that pursuant to BVI law (which operates similarly to English law) and Singapore law, directors owe their duties to the company (see, *eg*, s 170(1) of the United Kingdom Companies Act 2006 (c 46), *Percival v Wright* [1902] 2 Ch 421 and *Dynasty Line Ltd (in liquidation) v Sia Sukamto and another* [2013] 4 SLR 253 at [50]), and not to individual shareholders (beneficial or otherwise). Therefore, absent proof that ECJ had specifically undertaken to act for the benefit of Ernest, it is difficult to see how ECJ in their positions as directors of the Companies would owe fiduciary duties or be in a position of trust *vis-à-vis* Ernest.

162 We also fail to see how the conspiracy to injure claim could be allowed. In the context of such claims, the injury to Ernest must have been intended as a means to an end or as an end in itself: see the decision of this Court in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [101].

163 It was argued by Ernest that the IW Letter and James's E-mail play a decisive role in demonstrating that ECJ did possess such intent. We do not agree. At their highest, these two documents demonstrate that ECJ (assuming James's and Mr Winter's words reflect ECJ's shared intention) wished to improperly pressure Ernest into settling and Isabel into not testifying. That is not significantly probative of whether ECJ lacked *bona fides* when they took the actions complained of. An analogy may be drawn with the facts in the Singapore High Court decision of *Tong Seak Kan and another v Jaya Sudhir a/l Jayaram* [2016] 5 SLR 887 (affirmed on appeal without written grounds). In that case, the defendant argued that his pleadings alleging that the

plaintiff had criminally harassed him in order to pressure him into performing an illegal and/or sham agreement were relevant to his defence and should not be struck out. The court observed (at [33]) that those allegations were not relevant because:

> … *If proven, the harassment would show only that the plaintiffs* ***had wished to exert pressure*** *on the defendant to perform his purported obligations.* Such a conclusion was *equally consistent with the Impugned Documents being legal.* The alleged harassment was irrelevant to the defendant's position that the Impugned Documents formed a sham. [emphasis added in italics and bold italics]

This is a sensible observation. A person may decide to pursue a claim *in which he genuinely believes* through improper means, just as he might pursue a *frivolous* claim through (technically) *proper* means. The fact that improper means were used reflects poorly on a party, and may of course be taken together with other circumstances to form a *consistent pattern of impropriety* as part of, for instance, an assessment of credibility. On the present facts, however, a simpler and more innocuous possibility has stronger explanatory value: tensions were running high, ECJ (understandably) wished to avoid litigation if possible and would rather have had Ernest acquiesce than fight on, and their desire for a favourable resolution overcame their sense of propriety. To suggest, further, that the two documents demonstrate that ECJ *knew that the Companies' claim was bad* is, in our view, far too speculative. We are particularly hesitant to accept that speculation given that, although the Companies have failed to show that they own their assets *absolutely*, they have, in the appeal, *partially succeeded* in their claim (as analysed at [115]–[155] above). This would tend to suggest that ECJ's belief that the Companies had a good claim was not as unreasonable as Ernest implies.

164 In our view, absent the ambiguous implications of the IW Letter and James's E-mail, there is no evidence on record to demonstrate that ECJ had acted with any intention to harm Ernest, whether as a means to an end or an end in itself. Simply put, if the assets did not belong to Ernest, he would not, without more, suffer any injury if they were to be taken out of his hands. We find that ECJ were acting in their honest belief that the Companies' assets were part of a family trust (broadly speaking) when they directed the Companies to bring the claims against Ernest. They therefore did not act with the intention to harm Ernest by depriving him of assets which were rightfully his. For completeness, we observe that since we have found that Ernest must return the assets and was wrong to transfer them to his personal accounts, it is unlikely that Ernest would, in any event, be able to prove that he has any recoverable losses.

165 For these reasons, Ernest's counterclaims, which were not seriously pursued either during trial or on appeal, were rightly dismissed by the Judge. CA 34, in so far as it relates to Ernest's counterclaims against ECJ, is dismissed.

Whether Ernest made fraudulent misrepresentations to ECJ regarding the family legacy

166 The representations which ECJ relied on as giving rise to their counterclaim for fraudulent misrepresentation were pleaded as follows:

> (a) the Majority Directors [*ie*, ECJ] would assist EFL, and eventually take over EFL's role as custodians of the De La Sala family legacy, which was constituted by the Companies and/or the Family Companies;
>
> (b) the Majority Directors would earn substantially more than what they were earning and/or would earn in their current and/or previous jobs if they relocated to Singapore to assist EFL in the management of the

> Companies and the investment of the Companies' assets;
>
> (c) by managing the Companies and investing their assets, the Majority Directors would be increasing the value of the Companies for the benefit of the De La Sala family members; and
>
> (d) the Majority Directors' children would benefit from the management, protection, preservation and enhancement of the Companies, as the Majority Directors' children were amongst the descendants of Robert Snr and [Camila] and the members of the De La Sala family who were beneficiaries of the family legacy.

167 The Judge considered that the core representation which had been made was that "there was a family legacy instituted by Robert Sr which Ernest was looking after as custodian for the De La Sala family" (at [507] of the Judgment). This has to be read together with the Judge's more detailed findings, which we paraphrased above at [63].

Ernest's arguments

168 Ernest's arguments are threefold: first, that "family legacy" and other terms used by Ernest accurately described the assets managed by Ernest; second, that even if the terms were not accurate, Ernest had no fraudulent intention in so describing the assets; and, third, with regard to Ernest's representations as to his *intention* to allow ECJ to take over as future custodians of the "legacy", ECJ had failed to show that this was false and fraudulent. Ernest also raises a procedural point with regard to pleading: ECJ failed to plead the sense in which they understood the term "family legacy", and their case should fail, if for no other reason than that.

ECJ's arguments

169 ECJ reiterate the facts relied upon by the Judge regarding the detriment suffered by ECJ. They also argue that the representation as to the "family legacy" was false because there is a great difference between a trust for a defined purpose and/or beneficiaries on the one hand, and a pool of assets which an individual owner might choose to apply for the benefit of others on the other. In so far as the pleadings are concerned, ECJ submit that their pleadings sufficiently define "family legacy".

Applicable legal principles

170 Fraudulent misrepresentation as a tortious claim is another label for the tort of deceit. Its elements were summarised by this Court in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435, at [14], as follows:

> … First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Third, it must be proved that the plaintiff had acted upon the false statement. Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

Implicit in the first element is the requirement that the representation was false.

171 Three further observations are relevant in the context of the present appeal.

172 First, some complications arise with regard to statements as to future events or conduct. A representation as to the future is not, in itself, an actionable

misrepresentation. However, it can *imply* an actionable misrepresentation in at least two ways:

(a) A person who makes a statement as to the future (whether of intention or otherwise) may, in doing so, make an implied representation as to an existing fact. For example, a statement that certain costs *would* be paid out of a particular fund was found to imply a representation that such costs *were payable* out of that fund, and a statement as to the likely output of a mine was found to imply a representation as to the *present state and capacity* of the mine: see, respectively, the English decisions of *Mathias v Yetts* (1882) 46 LT 497 at 503 and *Gerhard v Bates* (1853) 2 E & B 476, discussed (along with other examples) in K R Handley, *Spencer Bower, Turner and Handley: Actionable Misrepresentation* (Butterworths, 4th Ed, 2000) ("*Spencer Bower*") at para 27.

(b) A person who states an intention as to the future implicitly represents that he in fact has that intention at the time of making the statement: see the decision of this Court in *Tan Chin Seng v Raffles Town* Club Pte Ltd [2003] 3 SLR(R) 307 at [12], citing the famous dictum of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483.

173 Secondly, in order for a representation to be false, it must be *substantially* false. It need not be false in every respect, nor is it invariably sufficient if it is false in a single respect. As Justice Handley aptly put it in *Spencer Bower* at para 70:

> … Truth is not mathematical truth. In the context of communications between men for the purpose of influencing conduct, there are degrees of truth and falsity. The facts may correspond with the statement entirely, partially, or not at all. The important features may be correctly described, whilst the unimportant details are misstated, or vice versa. Since the law

> must distinguish between the two categories of falsity and truth, some criterion, other than the scientific, must be adopted for deciding the character of a particular representation. That criterion is the effect of the statement on the mind of the representee.

Specifically, the test of substantial falsity is whether "the discrepancy between the facts as represented and the facts as they existed would have reasonably influenced the mind of a normal representee, in considering whether to alter his position as he did" (*Spencer Bower* at para 70). On a related note, it should also be pointed out that, although the court does not consider the *representor's* perspective in assessing substantial falsity, the court *does* take into account the *representee's* perspective. Hence, as pointed out by Prof Pearlie Koh in her chapter in *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*The Law of Contract*") at para 11.013, "[t]he question as to the *meaning* of a particular representation is tested from the perspective of a reasonable person in the position of the representee, and 'in the light of the circumstances pertaining at the time'" and that "[t]he question is what the representee understands by the words used", with "[t]his [being] generally assessed objectively and the factual context or matrix within which the communication was made is of crucial importance" [emphasis in original].

174 Finally, where a representation can be interpreted in a number of ways, a plaintiff is required to establish (and to plead) the sense in which he understood the representation at the time it was made, and it is in that sense which it must be established to be false: see the Singapore High Court decision of *Goldrich Venture Pte Ltd and another v Halcyon Offshore Pte Ltd* [2015] 3 SLR 990 ("*Goldrich*") at [119], citing the Singapore High Court decision of *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 at [63(a)].

Our decision

175 In the present appeal, the second, third, and fourth elements of the tort are not in serious dispute. Ernest does not challenge the second element (intention that the representation be acted upon), and indeed it is obvious, given that the representations were made in the course of Ernest's attempts to persuade ECJ to assist him, that the representations were intended to be acted upon. In so far as the third and fourth elements (reliance and loss) are concerned, the only mention made of them in Ernest's submissions is the following sentence: "Indeed, how could ECJ prove reliance or loss without proof of Ernest's fraud in relation to their prospective custodianship role?" The logic of this rhetorical question is specious. A person may rely on a representation, and incur loss as a result of that reliance, without the representation being fraudulent. This often happens in contractual disputes. On the evidence, it is clear to us that the third and fourth elements are satisfied; ECJ would not have taken up Ernest's proposal but for those representations, and it does appear that they suffered at least some detriment (in the form of opportunity costs) in doing so.

176 The issue turns, instead, on the first and fifth elements: specifically, what were the representations and how were they understood by ECJ and Ernest; were the representations false; and if so, were they fraudulently made? We find that, properly understood, the representations were not false, and this suffices to defeat ECJ's claim. Let us elaborate.

The relevant representations

177 The key representation is the representation that there *was* a "family legacy" in existence. As a preliminary point, Ernest argues that ECJ have failed to plead the sense in which they understood the term "family legacy", and that

their claim therefore fails pursuant to the principle stated in *Goldrich*. We note, first, that the actual words "family legacy" do not appear to have been used in the discussions between the parties. Instead, it appears from ECJ's defence to Ernest's counterclaim that "family legacy" is a shorthand used by ECJ (and then adopted by the Judge) to refer to:

> … the wealth of the De La Sala family that had been built up by Edward and Christina's grandfather, Robert Snr, was held by certain companies, as part of a family legacy which was to be managed, preserved and protected for future generations.

The representations pleaded in the counterclaim portion of that same pleading must be read together with the explanation reproduced above at [166]. Taken together, we find that this is a sufficient pleading of the sense in which ECJ understood the representation. Thus, *Goldrich* is not necessarily fatal to ECJ's counterclaim. However, we agree with Ernest that the "family legacy" was not pleaded as having been understood to mean, specifically, a trust in favour of all members of the De La Sala family. ECJ's pleadings make only one passing reference to a "trust", and there is nothing else to clearly state or imply that "family legacy" was intended to be synonymous with "trust" in the legal sense.

178 Moving on from the pleading point, Ernest accepts the Judge's finding that he did represent that a "family legacy" existed, although he disputes the Judge's interpretation of that term. Specifically, Ernest argues that the Judge unjustifiably narrowed the meaning of "family legacy" to that of "family trust". We do not agree. The Judge's findings were that Ernest had represented that there was a "family legacy" (at [507] of the Judgment) and that he had known that Robert Sr had not "set up any family trust *and/or family legacy*" [emphasis added] (at [508] of the Judgment). The Judge's findings make it clear that "family legacy" is a term distinct from, and seemingly broader than, the term

"family trust". The Judge found that a "family legacy" had been represented to exist, and that this was false because neither a "family trust" nor a "family legacy" existed.

179 The central questions that follow are: what did ECJ understand the "family legacy" to be, what did Ernest intend it to mean, and what was the true state of affairs?

180 It is convenient to begin with what the term (which, we reiterate, is a shorthand applied after the fact, and not a term which the parties appear to have actually used in their discussions) *cannot* mean. We do *not* think the evidence supports Ernest's suggestion that:

> … it could equally mean that the shares and Assets ultimately trace their origin to Robert Sr's work and that, *in honour of Robert Sr's wishes, Ernest intended* to make provision for members of the De La Sala family, present and future. … [emphasis added]

This interpretation would have failed to provide ECJ with a realistic incentive to accede to Ernest's proposals. The mere *origin* of the assets would not, without more, have been of interest to ECJ; ECJ's real concern would have been with the *current status* of the assets and the *future implications* of that status – specifically, for whose benefit they were being managed. On the interpretation which Ernest primarily suggests, any benefit to ECJ and the other family members would have been purely at Ernest's whim: if he decided to "honour … Robert Sr's wishes", the family would benefit, but he could equally decide not to honour them and to keep all the benefits for himself. This would have militated against the long-held expectations of the family and would been an objectively alarming situation for all concerned, except Ernest. It would thus not have made sense for him to attempt to convey this meaning, and it is

implausible that ECJ would have received this meaning without protest.

181 It is equally clear to us that ECJ's argument that "family legacy" was understood to refer specifically to a trust in favour of JERIC and their descendants is also insufficiently supported by evidence. Ernest's e-mails appear to us to be deliberately vague as to the precise mechanism by which benefits were to flow to the family. ECJ on their part did not assert in their AEICs that they understood the "family legacy" to take the form of a trust or any other specific form, and the word "trust" was never used in its legal sense as a term of art in any of their AEICs. James's testimony at trial makes the vague nature of ECJ's understanding at the relevant time even more obvious. Mr Singh, in cross-examination, asked James at what particular point in time he had come to the conclusion that there was a "family trust", and the following exchange ensued:

> Q. So give me a date. Did you come to that conclusion before the action started or after the action started?
>
> A. By the "action started", do you mean the 5th --
>
> Q. The filing of the writ.
>
> A. The filing of the writ.
>
> Q. On 5 March 2012.
>
> A. *I don't think I had a firm conclusion by then.* As I say, the injunction affidavit, what we're seeking to show is that the assets belonged to the companies. So we didn't really delve into particularly. The only reason that there was vague mention of NEL in the first -- the injunction affidavits, was with regard, we were trying to show where the original source of wealth was. *It wasn't a question of trust or otherwise.* We said there's a family legacy, it seems to have come from there, but I can't recall exactly when it was.
>
> [emphasis added]

182 In other words, even at the time the action was commenced, ECJ had not formed the specific view that there was a trust. *A fortiori*, they could not have had that understanding at the time the representations were made. This was confirmed when Mr Singh next sought to clarify the effect of James's answer:

> Q. So that we are clear about your evidence, Mr Copinger-Symes, when the writ was filed on 5 March 2012, did you believe in your mind that Robert Sr had created a family trust over the NEL shares in favour of all his descendants? "Yes" or "no"?
>
> A. Your Honour, that's hard to say exactly. *I had a belief at the time that there was a family legacy*, and I thought there was some indication that it had come from Robert Sr via NEL for all my descendants, and indeed I believe in the first affidavit we did make reference to that, *but it wasn't specifically to say there's a trust* …
>
> [emphasis added]

183 In our judgment, the totality of the evidence, including the testimony quoted above, shows that Ernest as well as ECJ had substantially the same understanding of the representations as to the "family legacy", and the more important features of that understanding were as follows:

(a) ***The "family legacy" was a pool of assets held by various corporate vehicles which were, in general terms, meant to benefit JERIC and their descendants.*** It did not appear that the family had any express agreement or understanding as to the nature or extent of Ernest's obligations or his powers in relation to these assets, beyond an expectation that they would be applied for the benefit of those persons.

(b) ***There was no representation or understanding as to the precise legal structures or mechanisms by which the benefits were to flow to the family members.*** In addition to the points discussed above (at [181]–[182]), it appears never to have been discussed whether JERIC and their

descendants had or were to have a direct (or even an enforceable) right to receive benefits from the "family legacy".

(c) ***The custodian or custodians of the "family legacy" were to receive greater rewards than the rest of the family.*** This was implicit in Ernest's references to "worthy [and] capable successors to carry the burden and enjoy what comes in abundance with success" and to his offer as "the opportunity of a life time which the multitude can only dream of". These phrases imply a degree of benefit beyond that which the rest of the family – who were not involved in managing the assets – could expect to passively receive.

(d) ***Ernest intended to pass on the custodianship to ECJ in due course, subject to their proving worthy.*** This is apparent from Ernest's use of the words "*my **hope** is that I can secure* worthy [and] capable successors" [emphasis added in italics and bold italics], which, on ECJ's own evidence, they all understood to mean that they would have to prove themselves to be "worthy and capable" in order for Ernest's intention, expectation or hope to be realised.

184 We turn next to consider whether Ernest's representations, so understood, were false and, if so, whether they were also fraudulent.

Whether the representations were false

185 In so far as this particular point is concerned, we respectfully disagree with the Judge and find that the representations have *not* been proven to be *false*. As a preliminary point, we note that despite the Judge's observation that Ernest's representation was "false on a number of bases" (at [507] of the

Judgment), the only basis that matters at this stage of the inquiry lies in the facts *as found* (by the Judge, or by this Court to the extent that we overturn his findings), and not the facts as alleged by Ernest or ECJ (except to the extent which they are accepted by the court). This is because the question is whether the representation was at variance from the reality as it in fact is (*ie*, as the court finds it to be), and not whether it was at variance with what the representor *thought* to be the reality: see *The Law of Contract* at para 11.056. This implies, among other things, that a rogue who sets out to deceive will not be liable (at least in misrepresentation) if the lie he intends to tell turns out, fortuitously, to be the truth. This conclusion is not as startling as it may first seem. It rests on the simple proposition that a representee *who was in fact told the truth* has suffered no wrong even if the representor intended to tell a lie.

186 Turning, then, to the representation that a "family legacy" existed, the question is whether the objective facts substantially differ from the representation. As earlier elaborated upon (at [126] *et seq* above), we are of the view that Ernest has not demonstrated that he has beneficial ownership of *all* the Companies' assets; precisely who else has a beneficial interest in them, and what is the nature and proportion of that interest, are questions which do not properly arise to be decided in these proceedings. What is clear is that a significant portion of the pool of assets existed for the benefit of JRIC. This arrangement was sufficiently close, in substance, to the loose understanding of a "family legacy" which ECJ had. It was never part of ECJ's understanding that they had or would have a *direct* or even an *enforceable* entitlement to benefit from the assets. That had been left intentionally vague by Ernest and ECJ had never sought to clarify the matter. Given this loose understanding, we find that JRIC's persisting interest in part of the pool of assets managed by Ernest meant that it was not substantially false that ECJ's efforts would benefit JRIC and their

descendants. Edward and Christina stood to gain through their father Bobby, and James, although not a descendant, stood to gain as Christina's husband. Consequently, it cannot be said that the representations were false. This is so *even if* Ernest's own – incorrect – understanding was that the assets were his to use as he pleased.

187 For completeness, we note that even if it could be said that there was some discrepancy between Ernest's representations (summed up as amounting to a representation that there was a "family legacy") and the reality that we have described, it would not be a substantial difference. Practically speaking, what acted on *ECJ's* minds was the belief that their work for and with Ernest would benefit the family as a whole, and obliquely, themselves. Whether this was to occur through one specific mechanism or another (so long as it was to be an enforceable one, and not distribution at Ernest's whim and fancy) would not, we think, have influenced the decision of a reasonable representee in these specific circumstances. Thus, applying the test set out in *Spencer Bower* (see [173] above), the representation was not *substantially* false, if it was false at all.

188 This leaves Ernest's representations as to the rewards for the custodians of the "family legacy". The simple point to be made here is that (as discussed at [172] above) statements as to the *future* are *not in themselves actionable*. The relevant question is whether the statements *implied* false representations as to (then) present fact. Here, one implied representation was that a "family legacy" existed – otherwise, there could be no custodian of it – but since this implied representation was in any case also expressly made and was not false, no more need be said of it. The other implied representation was that Ernest had a genuine intention, expectation, or hope of transferring custodianship to ECJ in the future. In that respect, there is no evidence to suggest that Ernest lacked such

an intention, expectation, or hope when he made the representations. On the contrary, his conduct subsequent to ECJ's acceptance of his offer showed that he genuinely considered them to be possible successors to his role. He sought their opinion on significant commercial matters, requested proposals from them on how to formalise their roles for the future (see [18] and [461] of the Judgment), and prepared draft memoranda which sketched the custodianship which he envisioned for them (see [462]–[463] of the Judgment). Less tangibly, it appears from the tenor of their interactions with him that their relationship was, at least initially, a positive and cordial one. It was only later, following certain disagreements, that Ernest *changed his mind* and decided that ECJ were not the worthy successors (by his lights) which he had taken them for. Thus, Ernest's representations as to his intentions were not false.

189 Since none of the relevant representations was substantially false, there is no need to consider whether they were fraudulently made. ECJ's counterclaim for fraudulent misrepresentation must fail, and we thus allow Ernest's appeal in CA 34 in respect of this particular issue.

Whether the Judge erred in finding that Bobby could intervene in Suit 178 and in granting leave for Bobby to intervene

190 This issue concerns the propriety of allowing Bobby's intervention. This and the attendant SUM 85 are rendered somewhat academic given our decision that the Companies' claim against Ernest succeeds and that Ernest has to account for and return to the Companies the assets that he removed from them. Simply put, we have overturned the findings which formed the basis for Bobby's intervention in the first place (*ie*, that Ernest holds the assets on trust, or sub-trust, for JRIC). Any remedy which ultimately flows to Bobby must therefore come from the relevant vehicles containing his beneficial interests in

NEL and JMC, and would have to be obtained by Bobby bringing claims directly against NEL and JMC (provided that these claims are not time-barred). Bobby's intervention and joinder is therefore no longer relevant to or necessary for the purposes of the present proceedings, if it ever was to begin with. Thus, even if the order to join Bobby had been properly made initially, it would be necessary for us to set it aside as a consequence of our decision with regard to the other issues. Nevertheless, as this is a significant and potentially confusing issue, we set out our analysis for future guidance.

Ernest's arguments

191 Ernest raises a number of arguments against the Judge's decision to allow Bobby to intervene, but the *gravamen* of his complaint is that the Judge should not have exercised his discretion so as to grant a remedy to a person who had not sought a remedy and who had not filed a statement of claim or given discovery, amongst other things. By doing so, the Judge had deprived Ernest of procedural safeguards to which he was entitled. Moreover, the Judge had not substantially considered Ernest's defences of limitation and laches, and whether Bobby had the standing to seek an account in respect of the claims of Camila's estate.

Bobby's arguments

192 Bobby argues that it was necessary for him to be joined to properly dispose of the dispute before the Judge, that Ernest had already had (in substance) the opportunity to test Bobby's claims during the course of the trial, that Ernest suffered no prejudice as a result, and that the Judge was therefore justified in exercising his discretion to join Bobby. On the remaining points regarding Ernest's potential defences, Bobby's arguments are the mirror image

of Ernest's.

Applicable legal principles

193 It is crucial to note that the joinder of Bobby in relation to the present case took place only *after* the Judgment was issued. The joinder was ordered on 22 March 2017, and the Judge stated his reasons for allowing the application as having been reflected in the Judgment itself. The joinder of a party post-judgment raises two distinct issues. First, under what circumstances will the court have the power to order such joinder? Secondly, what are the principles which guide the court in deciding whether to exercise the power?

194 The key provision here is O 15 r 6(2) of the ROC, the material part of which provides as follows:

> (2) Subject to the provisions of this Rule, at any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just and either of its own motion or on application —
>
> …
>
> (*b*) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon;
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

195 Both sub-paragraph (i) ("the necessity limb") and sub-paragraph (ii)

("the just and convenient limb") are controlled by a non-discretionary requirement that the joinder be done "at any stage of the proceedings"; the court has no power to order joinder after proceedings have concluded. After the court is satisfied that the proceedings are still afoot, and the power to order joinder thus *exists*, it will consider whether the power should be *exercised*. This second stage of the inquiry has both a non-discretionary and a discretionary element. We set out each of these in turn.

The existence of the power

196 The *locus classicus* is the English Court of Appeal decision in *The Duke of Buccleuch* [1892] P 201 ("*The Duke of Buccleuch*"). That was an admiralty case which turned on the interpretation of the phrases "at any stage of the proceedings" and "for the determination of the real matter in dispute". The owners of the ship in that case argued that because a final judgment had been given on liability, it was too late to substitute a new plaintiff (at 207). The logic of that argument was that, following that judgment on liability, there could be no "proceedings" or "matter in dispute" to speak of. Both the first instance judge and the English Court of Appeal rejected this argument because, in short, it could not be said that the proceedings had terminated so long as damages had not been assessed. The test, as articulated by Fry LJ (at 212), was simply whether "anything remain[ed] to be done in the case", the assessment of damages being one example of a thing remaining to be done.

197 *The Duke of Buccleuch* has been cited with approval in our courts in *Abdul Gaffar bin Fathil v Chua Kwang Yong* [1994] 2 SLR(R) 99 (reversed on appeal on the basis that the joinder was not necessary on the facts, but without casting any doubt on the principle itself), *Ling Kee Ling and another v Leow Leng Siong and others* [1995] 2 SLR(R) 36 (for the purpose of determining

whether an order was interlocutory or final, albeit in a context not concerning joinder), and (most recently) in *Syed Ahmad Jamal Alsagoff (administrator of the estates of Syed Mohamad bin Hashim bin Mohamad Alhabshi and others) and others v Harun bin Syed Hussain Aljunied and others* [2017] 5 SLR 299 (affirmed on appeal without written grounds being issued). The principle in *The Duke of Buccleuch* is supported as well by the Malaysian jurisprudence (specifically, *Hong Leong Finance Bhd v Staghorn Sdn Bhd* [1995] 2 MLJ 847 and *United Asian Bank Bhd v Personal Representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327) and by the academic commentary of Prof Jeffrey Pinsler SC in *Singapore Court Practice 2017* vol 1 (LexisNexis, 2016) at para 15/6/6.

198 We agree with the reasoning used in these authorities, and find that *The Duke of Buccleuch* does represent the current state of the law in Singapore in so far as the existence of the power to order joinder post-judgment is concerned – *viz*, it exists if and only if something remains to be done in the matter, such as the assessment of damages.

199 For completeness, we note that later English cases appear to have adopted a more liberal standard. In *C Inc v L* [2001] 2 Lloyd's Rep 459 ("*C Inc*"), the English High Court held (at [83]–[84]) that proceedings were to be considered ongoing (and thus joinder should still be available) so long as a judgment had not been *fully satisfied*:

> 83. In my view the word "proceedings" should be given a broad interpretation in CPR Part 19.4. It should embrace all stages of an action from the time it has been started until it becomes finally complete or moribund. *There are many "proceedings" in which a judgment is obtained but it is not satisfied.* ***At that stage further action may be needed in order to enforce the judgment. The "proceedings" have not finished at that point.*** *A claimant may wish to appoint a*

> *receiver by way of equitable execution to get in the assets of the defendant to satisfy the judgment. Or he may wish to obtain a freezing order in aid of execution. The "proceedings" must still be continuing in those instances.* In my view the "proceedings" against Mrs. L are still continuing.
>
> 84. So Mr. Wood's next argument has to be considered, which concerns CPR Part 19.4(2)(a). Are there "matters in dispute" in the proceedings? *He says that there cannot be because a judgment has been obtained against Mrs. L. In my view that interpretation of the wording is too narrow. The whole point about that rule is that it contemplates there being matters in dispute in the proceedings which affect the putative new party.* ***The rule does not say that the matter in dispute has only to be between the existing claimant and the existing defendant. As I read the wording the matter in dispute can be between any existing party and the new party.*** In this case the matter in dispute is whether the claimant can obtain a freezing order over the assets of Mr. L in aid of execution of the unsatisfied judgment against Mrs. L.
>
> [emphasis added in italics and bold italics]

200 Although this is still an inquiry as to whether "anything remains to be done in the case", it involves a much broader conception of what constitutes a *thing remaining to be done* than was contemplated in *The Duke of Buccleuch*. Under the rule in *C Inc*, proceedings would be considered to be ongoing *even after the assessment of damages* and, indeed, even after a final judgment had been extracted and attempts at enforcement had commenced. Joinder of new parties would, it seems, be possible *so long as* ***a single cent*** *of a judgment debt remained unpaid*. This bold proposition was endorsed by the English Court of Appeal in *Prescott v Dunwoody Sports Marketing* [2007] EWCA Civ 461 and was subsequently applied in a number of cases, including *Mediterranean Shipping Company v OMG International Limited & Ors* [2008] EWHC 2150 (Comm), *Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG & Ors* [2011] EWHC 3381 (Comm), and *JW v Kent County Council (SEN)* [2017] UKUT 281 (AAC).

201 For the reasons set out below, we are of the view that the present case falls within the orthodox *Duke of Buccleuch* principle, and we therefore do not need to decide in this appeal – nor did the parties address – whether an extension of the principle should be recognised in Singapore law. We only make two provisional observations on the more recent English cases. They were decided without consideration of *The Duke of Buccleuch*, which had addressed the very point in contention. Further, since the only end-point to the existence of the power provided in *C Inc* is the *full satisfaction of the judgment*, the broad interpretation may have troubling implications for finality in litigation. We therefore have some doubts as to the desirability of following the current English position. We leave these doubts to be more fully explored on an appropriate occasion.

The exercise of the power

202 Once the power has been determined to exist (*ie*, it has been shown that something still remains to be done in a case), the court must then decide whether the power should be exercised.

203 The first part of this inquiry is entirely non-discretionary. If the necessity limb is relied upon, the court must consider whether it is *necessary*, and not merely desirable, to order joinder. The question is, in essence, whether "there [is anything] to prevent the action … as originally drawn, from being effectually and completely determined" (*Abdul Gaffer bin Fathil v Chua Kwang Yong* [1994] 3 SLR(R) 1056 ("*Abdul Gaffer (CA)*") at [16]). The fact that a plaintiff might *wish* to bring a related claim against the third party would not satisfy the test of necessity. Such situations are more appropriately addressed under the just and convenient limb, which permits joinder where, in brief, there is as between the third party and any existing party some question or issue having a sufficient

relation to the main dispute, and the court thinks it would be just and convenient to decide it.

204 Even under the latter limb, however, it is not sufficient for there to be some factual overlap between the main dispute and the question or issue involving the third party. Rather, that question or issue must "relate to *an* ***existing question or issue*** *between the* ***existing parties***" [emphasis added in italics and bold italics]: *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) at para 15/6/8, citing *Spelling Goldberg Productions Inc v BPC Publishing Ltd* [1981] RPC 280 and *Abdul Rahman v MUIS* [1995] 2 SLR 705. The non-discretionary element here is the existence of a question or issue having the requisite relationship with the main dispute; the discretionary element is whether, "in the opinion of the Court", joinder for the purpose of deciding that question or issue would be just and convenient. If the court determines that the non-discretionary requirement is satisfied, it turns next to a discretionary assessment as to whether joinder should be ordered.

205 At the discretionary stage, the court's concerns are substantially similar whether the necessity limb or the just and convenient limb is relied upon. It should not be thought that where the necessity limb is successfully invoked, and the non-discretionary requirement is met, joinder will follow as a matter of course. Although the need to effectually and completely determine a dispute is in itself a strong reason for joinder, it is entirely possible for countervailing concerns of fairness (among other things) to override it. Either way, the court will consider all the factors which are relevant to the balance of justice in a particular case. In our judgment, the following – in no particular order of importance – are of particular relevance to the present appeal.

206 First, the court must consider the applicable limitation period to the potential claims arising from the joinder. Where the claim by or against the party sought to be joined is time-barred at the date of application, joinder will not be allowed: see the decisions of this Court in *Abdul Gaffer (CA)* at [16] and *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 4 SLR 351 at [18].

207 Secondly, the doctrine of *res judicata* and the related doctrine of abuse of process must also be considered. Where an applicant, who *chose* not to involve himself in the proceedings at an earlier stage, belatedly seeks to reopen matters already litigated, joinder should not be allowed: see the decision of this Court in *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272 ("*Family Food Court*") at [65].

208 Thirdly, the length of and explanation for the delay in seeking joinder is highly relevant. It is clear that an applicant's *disappointed expectation* that a case would be decided differently is *not* a good explanation for delay: see the New South Wales Court of Appeal decision of *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd and Another (No 2)* [2009] NSWCA 194 ("*White City Tennis Club*") (a case which we discuss in greater detail at [225] below). This principle, in addition to going towards the sufficiency of the explanation for delay, overlaps with the principle of *res judicata* discussed above.

209 Fourthly, procedural fairness and natural justice must be considered. Joinder cannot come at the expense of procedural unfairness or a breach of natural justice in respect of an existing party (unless that party takes no

objection). For instance, in the Canadian decision of *PA Wournell Contracting Ltd. & Anor v Allen* [1980] NSJ No 367 ("*PA Wournell*"), an appeal arose from the trial judge's decision to add, of her own motion, a party as plaintiff to the action and to award damages to the new plaintiff. The Nova Scotia Supreme Court Appeal Division was of the view (at [11]) that the trial judge ought to have made the new plaintiff file a statement of claim and given the defendant the right to contest the new claim (such as by filing defences, seeking discovery, and cross-examining witnesses) in the manner that it would have been entitled to had the new plaintiff been part of the proceedings all along. As this had not been done, the court found that the defendant had suffered an injustice when it was denied the right to make full answer and defence to the new claim by the new plaintiff. The court therefore set aside the trial judge's decision.

210 Fifthly, any other prejudice or inconvenience to any party should be considered. This would include the inconvenience of having to re-open pleadings, re-do cross-examination, and so on: see the decision of this Court in *Chan Kern Miang v Kea Resources Pte Ltd* [1998] 2 SLR(R) 85 at [23]–[24].

211 Finally, we note that since this is an exercise of discretion, this court will only interfere with the Judge's decision as regards the discretionary stage of the inquiry if one of the following grounds stated in the decision of this Court in *Hong Leong Bank Bhd v Soh Seow Poh* [2009] 4 SLR(R) 525 (at [45]) is present:

(a) The trial judge was misguided with regard to the principles under which his or her discretion was to be exercised;

(b) The trial judge took into account matters which he or she ought not to have or failed to take into account matters which he or she ought to have; or

(c) The trial judge's decision was plainly wrong.

Our decision

212 When the Judge allowed Bobby's application to be joined to the action, the assessment of damages had not been done. It is thus clear that on a straightforward application of *The Duke of Buccleuch*, the proceedings had not terminated, and the Judge was therefore entirely right to find that he did *have the power* to order joinder. The question is whether the power was *correctly exercised*.

The necessity limb was not satisfied

213 We find, with respect, that the power was not correctly exercised. To begin with, it could not be said that the joinder of Bobby was *necessary* to resolve the dispute before the Judge. The parties competing for the ownership of the Companies' assets were the Companies and Ernest; no other party had claimed ownership. Thus, the Judge need only have determined whether the Companies' claim of ownership over the assets transferred out by Ernest succeeded on a balance of probabilities. There was no need to join Bobby in order to give him a claim *instead of* the Companies. At best, his joinder as a party was *desirable*, not *necessary*. Thus, the necessity limb (O 15 r 6(2)(*b*)(i) of the ROC) cannot justify Bobby's joinder.

The just and convenient limb was not satisfied

214 This leaves us with the just and convenient limb (O 15 r 6(2)(*b*)(ii) of

the ROC). This limb was also not satisfied. Although we can well understand the concerns of substantive justice which the Judge surely had in mind, it is anomalous for a court in a civil case to award a remedy to a party notwithstanding that party's *denial of the very claim which forms the basis of that remedy*. Since Bobby had *expressly disavowed* any personal claim to the Companies' assets during the proceedings, it cannot be said that, as regards Bobby, there was or might be any "question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter" between the existing parties.

215 Further, even accepting *arguendo* that there *was* a live "question or issue" of the required type, we are, respectfully, of the view that the threshold for review, set out at [211] above, had been crossed. A number of factors, which the Judge appears not to have fully considered, weighed strongly against allowing Bobby to be joined at the late stage at which the application was brought.

216 First, joining Bobby in this manner resulted in procedural unfairness and a breach of natural justice. A defendant is entitled to be properly put on notice as to the claims against him in the form of pleadings, and thereafter to defend himself against, and to test the evidence for, the claims made against him. In the present case, the dispute over the Companies' assets below concerned *only* the Companies and Ernest. It was neither asserted nor pleaded by either party that some other party – including, in particular, Bobby – had an interest in the Companies' assets. Although Bobby was a witness at the trial of the proceedings, his evidence was in support of *the Companies' claim* to the assets. He never asserted a personal claim to the assets, nor was it put to Ernest that he was holding the assets on trust for Bobby. On these plain facts, it should not

have been open to the court to rule that some party who had made no ownership claims, owned the assets.

217 Recognising the difficulty created by granting relief to a non-party, the Judge granted leave of court on 22 March 2017 to allow Bobby to intervene in S 178. However, this judgment was delivered some two months *after* the Judgment of 27 January 2017 had awarded various remedies to Bobby, despite the fact that he had not been a party at the time when the judgment was delivered. To recapitulate, those remedies included:

(a) A declaration that Ernest held the mixed assets and funds on trust for his siblings and Camila's estate (at [500] of the Judgment);

(b) A declaration that Ernest was liable to account for the due administration and distribution of Camila's estate (at [501]);

(c) A declaration that the interests of Tony, Bobby, Isabel and Camila's estate were intricately intertwined with the issues in S 178 (at [502]); and

(d) An invitation to Bobby alone to intervene in S 178 in order for Ernest to account to Bobby for his share of the mixed assets and funds (at [503]).

Evidently, these remedies were awarded to Bobby without pleadings and without the benefit of submissions from the parties. This was wrong in principle (see *PA Wournell*, which was discussed at [209] above). In addition, this error in turn led, with respect, to a series of downstream errors.

218 One such error concerns the time bar issue, which is the second factor

weighing against allowing Bobby's joinder. As stated earlier, joinder will not be permitted if the claim by or against the party sought to be joined is time-barred at the time of the application for joinder. The Judge ordered Ernest to account to Bobby for his share of the Companies' assets from 27 May 1967 to the present. Based on this remedy, the claims would, *prima facie,* be time barred. It does not appear to us that Bobby can avail himself of either of the two relevant exceptions in s 22(1)(*a*)–(*b*) of the Limitation Act (Cap 163, 1996 Rev Ed) based on the available evidence on record.

219 Section 22(1)(*a*) of the Limitation Act provides an exception for fraud and fraudulent breach of trust. However, fraud must be expressly pleaded and proved. This was not done. It is clear that Ernest has acted improperly, at least with regard to the 2011 transfers, inasmuch as he was not entitled to deal with the Companies' assets as he did. It is also clear that the corporate structure set up by Ernest was designed to make it difficult to determine the ownership of the Companies' assets. However, that does not necessarily mean that Ernest had acted *fraudulently* in respect of Bobby in his dealings prior to the 2011 transfers. The very nature of such an assertion requires proper pleadings and proof, neither of which has been provided by Bobby.

220 Section 22(1)(*b*) of the Limitation Act, which provides an exception for actions to recover trust property or the proceeds thereof, also does not assist Bobby (again, based on the relevant evidence on record). As was observed in the Singapore High Court decision of *Ang Toon Teck v Ang Poon Sin* [1998] SGHC 67, there is a distinction between an action for an account and an action to recover trust property. An account is not, in itself, an *action to recover* trust property; it is a process which allows a beneficiary to *find out what has become of trust property*, and thereafter *possibly* – as a conceptually distinct step – to

seek remedies in respect of that property: see the decision of this Court in *Chng Weng Wah v Goh Bak Heng* [2016] 2 SLR 464 at [22] and the Singapore High Court decision in *Lalwani Shalini Gobind and another v Lalwani Ashok Bherumal* [2017] SGHC 90 at [26]. Section 22(1)(*b*) of the Limitation Act therefore cannot apply to Bobby's claim for an account, although it would apply if he were seeking to directly recover trust property or its proceeds which could be identified *without* taking an account. Lest this distinction be thought to be an overly artificial or technical one, we observe that as a matter of fairness to defendants, it is one thing to allow a plaintiff to *sue for the return* of trust property, and quite another thing to require a defendant – through the mechanism of an account – to provide a comprehensive explanation of transactions which could stretch back across an *indefinite and unlimited* period of time.

221 It bears mentioning that the characterisation of Bobby's claim as a claim for an account rather than to recover trust property does not originate from Ernest; rather, it is how the Judge framed Bobby's claim when he decided to grant Bobby reliefs which had not been asked for. Thus, it is clear to us that *that* claim (based on the relevant evidence on record) is one which is time-barred, although we do not rule out the possibility that Bobby's claim could be reframed and/or limited in its chronological scope such that it would not be time-barred. In any event, such a claim is not before us.

222 Another error which, with respect, arose as a result of the granting of relief to Bobby without proper pleadings or full argument concerns Bobby's standing to seek an account for the beneficial interest of Camila's estate. The Judge (who, it should be noted, did not have the advantage of full submissions and authorities to assist him on this point) appears to have assumed that Bobby

had standing. The true legal position is more complex. Under both Singapore law and Australian law, a personal representative (in this case, the executrix of Camila's estate) obtains absolute title to the deceased's assets, including assets falling within the residuary estate and assets which are subject to individual bequests: see the decision of this Court in *Seah Teong Kang (co-executor of the will of Lee Koon, deceased) and another v Seah Yong Chwan (executor of the estate of Seah Eng Teow)* [2015] 5 SLR 792 at [19] and [22] ("*Seah Teong Kang*") and *Commissioner of Stamp Duties (Queensland) v Hugh Duncan Livingston* [1965] AC 694 at 707 (a decision of the Privy Council on appeal from the High Court of Australia, discussed in *Seah Teong Kang* at [19]). Therefore, what a beneficiary obtains is not an equitable interest in any of the estate's assets, but a right to have the estate properly administered: see, for example, the recent Singapore High Court decision of *Fong Wai Lyn Carolyn v Kao Chai-Chau Linda and others* [2017] 4 SLR 1018 ("*Fong Wai Lyn*") at [7], citing this Court's decision in *Wong Moy (administratrix of the estate of Theng Chee Khim, deceased) v Soo Ah Choy* [1996] 3 SLR(R) 27 at [11].

223 As against the personal representative, a beneficiary also has, as a corollary to his chose in action to have the estate properly administered, the right to seek an account for a breach of duty which causes a loss of assets from the estate: see *Parry and Kerridge: The Law of Succession* (Sweet & Maxwell, 13th Ed, 2016) ("*Parry and Kerridge*") at paras 24–01 and 24–02. However, with regard to claims against third parties (including other beneficiaries other than the personal representative), the rights of a beneficiary are significantly more constrained. Ordinarily, claims to recover assets which should be part of the estate are for the personal representative to bring: see *Fong Wai Lyn* at [7]. However, a beneficiary may bring a claim in special circumstances including, but not limited to, a personal representative's default (*eg*, breach of trust or a

conflict of interest): see *Fong Wai Lyn* at [8]–[9]. Even when he does so, he does so on behalf of the estate, and not in his own right as a beneficiary. In only one circumstance may he bring a claim *in his own right* against a third party, and that is when the third party has wrongly received from the personal representative an asset which the claimant should have received, and the claimant has exhausted his primary remedies against the personal representative: see the English Court of Appeal decision of *Re Diplock* [1948] Ch 465 ("*Re Diplock*") at 502–505 (affirmed on appeal, in relevant part, by the House of Lords in *Ministry of Health v Simpson* [1951] AC 251); as well as *Parry and Kerridge* at paras 24-39 to 24-43. Such recovery is limited to the amount which the beneficiary is unable to recover from the personal representative: see *Parry and Kerridge* at para 24-43.

224 In the present case, it is arguable that even though Bobby can have no direct claim against Ernest as a beneficiary of Camila's estate, he may be able to bring himself within the special circumstances set out in *Fong Wai Lyn*. However, the Judge *did not consider* the question, nor does he appear to have dealt with the fact that Bobby's right to an account, if any, would not be his own entitlement, but one exercised on behalf of Camila's estate. We hasten to add that the error was, in large part, a result of the fact that the Judge did not have the benefit of the parties' submissions or their cited authorities to assist him on these (somewhat arcane, in the commercial context) points. This, together with the error relating to the time bar, illustrates the real prejudice which Ernest would, unfortunately, have suffered as a result of the way the Judge exercised his discretion.

225 The third factor weighing against Bobby's joinder is the lack of a good explanation for his excessive delay in seeking to intervene. In our judgment, the

New South Wales Court of Appeal decision of *White City Tennis Club* (see above at [208]) is illustrative of the difficulties with Bobby's intervention. In that case, the third party sought to intervene after the action had been disposed of on appeal. The third party's explanation for the delay in applying for joinder was that it had not seen a need to intervene until the outcome of the appeal was known, as the court below had made orders that were consistent with the third party's interest and the third party had not expected the final outcome to be as it was on appeal. The New South Wales Court of Appeal held at [40] that the third party's disappointed expectation was not sufficient to allow joinder. Simply put, a misprediction as to the outcome of a case is not an excuse for inaction. Parties with an interest in a dispute should involve themselves at the earliest opportunity in order to advance arguments in favour of the outcome they desire; they cannot wait and see how the court decides, and then expect to be allowed to intervene when the outcome is not to their liking. Here, Bobby's intervention was clearly very late. He had been an active participant in the proceedings, at least as a witness, and must have been keenly aware of how much the dispute affected his own interests. Yet, *had the Judge not granted Bobby leave to intervene* ***of the Judge's own motion****, Bobby* ***might never have attempted*** *to intervene at all.* Bobby's only explanation for his delay on appeal is that he had expected a different outcome, *viz*, the finding of a family trust. This is not an acceptable explanation. With the benefit of legal advice, he could and should have foreseen that the case might be decided differently, and accordingly intervened to advance his alternative case. It is too late for him to do so now.

226 For completeness, we should explain why the factor of abuse of process and *res judicata* is not engaged here despite its frequent overlap with the issue of delay. What Bobby is seeking to do is not to *relitigate* the issues below, but

rather to rely on the Judge's findings. The situation is therefore not analogous to the scenario discussed in *Family Food Court* at [65] (see [207] above), *ie*, where a third party sought to *challenge* findings that were made in his absence.

227 Given that the relevant factors substantially weigh against allowing the joinder, we find that the decision to allow Bobby to intervene was not warranted. We also find that the Judge's decision was, with respect, made on the basis of a misdirection as to the applicable principles. In effect, leave was granted to take effect retrospectively in that Bobby, a non-party, was first awarded various reliefs in the Judgment *before* those reliefs were, in a sense, regularised by inviting and allowing Bobby to intervene. The fact that the Judge certified that his grounds for allowing the intervention on 22 March 2017 had been set out in the Judgment confirms our understanding. In the result, the reasons for the granting of the leave were not separately analysed. Such a separate analysis was necessary, for the question of whether Bobby has an interest in the mixed assets and funds (which was examined in the Judgment) is distinct from the question of whether Bobby should be allowed to intervene and be joined.

228 Additionally, the decision to grant remedies to Bobby prior to his intervention appears to have contributed to a situation in which there was no consideration of the possible defences which Ernest would have raised, including laches and time bar, if Bobby had been a party to the proceedings from the outset. The notes of evidence for the hearing of SUM 662 (the leave application) and the Judgment itself do not mention these issues. It thus seems that the principles governing the exercise of discretion (which include consideration of any prejudice to the parties) in granting leave to intervene had, with respect, been inadvertently overlooked.

229 For these reasons, we find that the order to allow Bobby to intervene and be joined as a party was erroneous, and we allow CA 34 and CA 59 to the extent that they appeal against SUM 662 and against the portions of the Judgment concerning the joinder of Bobby.

Conclusion

230 We allow CA 59 and CA 60 in totality, and CA 34 and CA 35 in part, as detailed above. To reiterate what we said at the beginning of this judgment, although we ended up taking a different legal route, the ultimate *effect* of the decision we have arrived at is, in substance, not dissimilar to that arrived at by the Judge in the court below.

231 A few things remain to be stated with regard to the consequences of our decision. Since Ernest has been found to be in breach of his fiduciary duties as a director of the Companies, Ernest is to disclose to the Companies all the correspondence with the banks in respect of the bank accounts identified in the Schedule, and account to the relevant plaintiff where assets of the relevant plaintiff were removed by Ernest, including what had become of the same, what interest had been earned thereon and what profits had been made with these assets. Ernest is to repay to the relevant plaintiffs the sums due after the account. Pending Ernest's account to the Companies in relation to their assets, the injunctions currently in force shall remain. We also grant a declaration that the purported transfers on 7 October 2011 of the SMC shares previously registered in Edward's and James's names were void and of no effect.

232 We also set aside the order granting Bobby leave to intervene and joining him as a party.

233 Unless the parties are able to come to an agreement on costs, they are to furnish, within 14 days, written submissions limited to 15 pages each, setting out their respective positions on the appropriate costs orders, both here and below, in the light of the present judgment.

Andrew Phang Boon Leong	Judith Prakash	Steven Chong
Judge of Appeal	Judge of Appeal	Judge of Appeal

Harpreet Singh Nehal SC, Nish Shetty, Joan Lim-Casanova, Jordan Tan, Keith Han and Sarah Hew (Cavenagh Law LLP) for the appellant in Civil Appeals Nos 34, 59 and 60 of 2017 and the respondent in Civil Appeal No 35 of 2017;
Thio Shen Yi SC, Kelvin Koh, Niklas Wong and Benjamin Bala (TSMP Law Corporation) for the 1st to 6th respondents in Civil Appeal No 34 of 2017 and the appellants in Civil Appeal No 35 of 2017;
Cavinder Bull SC, Lim Gerui, Adam Maniam, Tan Yuan Kheng, Kelly Lua, and Sam Yi Ting (Drew & Napier LLC) for the 7th to 9th respondents in Civil Appeals No 34 of 2017, the respondent in Civil Appeal No 59 of 2017 and the respondents in Civil Appeal No 60 of 2017.