IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 24

Civil Appeal No 134 of 2020 and Summons No 13 of 2021

Between

(1) Dextra Partners Pte Ltd
(2) Bernhard Wilhelm Rudolf Weber

… *Applicants / Appellants*

And

Lavrentios Lavrentiadis

… *Respondent*

Civil Appeal No 143 of 2020

Between

Lavrentios Lavrentiadis

… *Appellant*

And

(1) Dextra Partners Pte Ltd
(2) Bernhard Wilhelm Rudolf Weber

… *Respondents*

In the matter of Suit No 106 of 2018

Between

Lavrentios Lavrentiadis

… *Plaintiff*

And

(1) Dextra Partners Pte Ltd
(2) Bernhard Wilhelm Rudolf Weber

… *Defendants*

JUDGMENT

[Courts And Jurisdiction] — [Appeals] — [Threshold for intervention]
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Court of Appeal — Civil Appeals Nos 134 and 143 of 2020, and Summons No 13 of 2021
Andrew Phang Boon Leong JCA, Belinda Ang Saw Ean JAD and Woo Bih Li JAD
4 February 2021

25 March 2021 Judgment reserved.

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

Introduction

1 These are appeals against the decision of the High Court judge ("the Judge") in *Lavrentiadis, Lavrentios v Dextra Partners Pte Ltd and another* [2020] SGHC 146 ("the Judgment"). The present case arises out of a number of transactions that Dextra Partners Pte Ltd ("Dextra") and Mr Bernhard Wilhelm Rudolf Weber ("Weber") undertook utilising funds held on trust for Mr Lavrentios Lavrentiadis ("Lavrentiadis"). Following discrepancies in the statements of accounts provided to him, Lavrentiadis commenced the suit below, arguing that a vast number of transactions had been entered into without his authorisation.

2 At the hearing before the Judge, parties had agreed that Dextra had in fact received the following sums for Lavrentiadis's account (see the Judgment at [37]):

(a) EUR 39,735,362.82 and USD 12.67m between 30 November 2011 and 4 January 2012; and

(b) USD 630,160.39 on 10 October 2014.

These amounted to a total of EUR 39,735,362.82 and USD 13,300,160.39.

3 Following the Judge's directions at a pre-trial conference on 16 September 2019, the parties prepared a table setting out how Lavrentiadis's monies had been applied and their respective positions on each item ("the Table of Parties' Positions"). The transactions that were undertaken using the funds above at [2] were highly disputed and set out in the Table of Parties' Positions (see the Judgment at [30]). In addition to these disputed transactions, the issues raised before the Judge also included the following (see the Judgment at [40]):

(a) Whether an investment swap on 30 September 2013 was entered into and was authorised ("the Investment Swap");

(b) Whether Dextra breached its duties as trustee;

(c) Whether Weber owed fiduciary duties to Lavrentiadis and whether he had breached the same;

(d) Whether Weber was liable for any losses caused by Dextra because Dextra was his alter ego; and

(e) Whether Weber had dishonestly assisted Dextra in its breaches of its duties.

4 The Judge helpfully summarised his findings in relation to Dextra at [229] of the Judgment. We adopt the Judge's terminology in relation to the disputed transactions, as well as the entities and persons involved. Further explanations on the disputed transactions and the entities and persons involved may also be found in the Judgment. For convenience, the summary, at [229] of the Judgment, is reproduced in full as follows:

> …
>
> (a) The Investment Swap was an afterthought and was not in fact entered into as the defendants have claimed.
>
> (b) The defendants' reliance on the 2012 Mandate was also an afterthought. The plaintiff did sign the 2012 Mandate but:
>
> (i) the 2012 Mandate did not authorise *Dextra* to make any investments on his behalf; and
>
> (ii) in any event, he did not authorise asset protection structures as an investment strategy under the 2012 Mandate, pursuant to which Straits Invest would then have full discretion as to what to invest in.
>
> (c) The Investment Swap, the Far West Loans, the Windris Loan and the sale of the JB Gold Fund units, ZKB ETF units and Geldbuchungem A951 securities were not authorised.
>
> (d) Dextra is to pay the plaintiff the following:
>
> (i) €13,315,749.42 in relation to the Investment Swap;
>
> (ii) €2,768,085.59 and US$824,542 in relation to the Far West Loans;
>
> (iii) US$29,500 in relation to the Windris Loan; and
>
> (iv) the value of the JB Gold Fund units, ZKB ETF units and Geldbuchungem A951 securities at their respective prices as at the date of this judgment (less the amounts for which they were sold, and which have been accounted for).
>
> (e) The payments to Carnelia for annual service fees were not authorised. The payments to Carnelia for set-up fees and other expenses incurred were also not authorised, save to the extent accepted by the plaintiff. Dextra is to pay the plaintiff the amounts of €644,448.88 and US$194,746.72.
>
> (f) Payments to Dextra in respect of its:

(i) invoices to Cruise for fiduciary and management fees were authorised;

(ii) invoices to Carnelia (in relation to the Amadeus Trust and the GG Trust) and Women Magazine (in relation to the phone charges) were not authorised. The payments in relation to Ressos' fees, secretarial fees and Women Magazine (service fee) were authorised. Dextra is to pay the plaintiff €14,516.65 (in relation to the Amadeus Trust), €13,023.74 (in relation to the GG Trust), and S$1,367.67 (in relation to the phone charges);

(iii) invoices to Orex were not authorised. Dextra is to pay €49,673.07 to the plaintiff;

(iv) invoices to Women Magazine were authorised except for the payments in relation to phone charges. Dextra is to pay the plaintiff the total amount of the phone charges.

(v) invoices to Chengdu Foundation and its entities were authorised;

(vi) invoices to Escalda Foundation and its entities were unauthorised save for the payments in relation to mobile phone services for the period from January to June 2015. Dextra is to pay the plaintiff:

(A) in respect of the invoices to Escalda Foundation, the sum of €17,894.18 (*ie*, the disputed amount of €19,474.85 less the total amount of €1,580.67 paid for mobile phone services for the period from January to June 2015); and

(B) €19,439.05, €19,439.05 and €39,404.16 in respect of the invoices to Sinam, Surataya and Fanaul respectively;

(vii) invoices to Mercury were not authorised. Dextra is to pay €19,440.35 to the plaintiff.

(g) The payment of €12,537.22 to Weber (director's fees for 2012) was authorised to the extent of Jade AP1's share of the fees proportional to its AUM. Dextra is to pay the plaintiff the amount of fees that are attributable to Jade Monega.

(h) The custody fees paid to DBS for the period after 8 September 2019 in proportion to the Jade AP1 Hellenic Bank shares were authorised. Dextra is to pay the plaintiff any custody fees paid by him that are not attributable to the Jade AP1 Hellenic Bank shares.

(i) In relation to Jade DCC:

(i) the payments amounting to €79,898.96 in connection with Jade Monega were not authorised. Dextra is to pay this amount to the plaintiff;

(ii) the payments of €781,058.57 and €38,309.88 to Pearl Investment for management fees in connection with Jade AP1 were authorised only to the extent of €50,000; however, Dextra is entitled to include the AUM in Jade AP1 in computing its fees under the 2012 Mandate. Dextra is to pay the plaintiff the total amount of €819,368.45 less (A) €50,000 and (B) Dextra's fees computed at 0.5% of the book value of the AUM in Jade AP1 (to the extent that such fees have not been invoiced for or paid);

(iii) the payment of €47,273.96 to Pearl Investment in respect of Weber and Chris were authorised to the extent of Jade AP1's share proportional to its AUM. Dextra is to pay the plaintiff the amount that is attributable to Jade Monega;

(iv) the payment of €21,272.83 to Kreis was authorised to the extent of Jade AP1's share proportional to its AUM. Dextra is to pay the plaintiff the amount that is attributable to Jade Monega;

(v) the payment of €9,000 to Dextra was not authorised but the payment of €12,516.43 to Weber was authorised to the extent of Jade AP1's share proportional to its AUM. Dextra is to pay the plaintiff the sum of €9,000 and such portion of €12,516.43 that is attributable to Jade Monega; and

(vi) the payment of €53,222.33 for miscellaneous expenses was not authorised. Dextra is to pay this amount to the plaintiff.

(j) The payments amounting to €486,006.05 to Ritter Attorneys were not authorised. Dextra is to pay this amount to the plaintiff.

(k) The payments to Straits Invest in respect of its invoices for management fees to Cruise (€10,428.59), Golden Moon (€15,292.60) and Dextra (€78,664.40) were not authorised. Dextra is to pay these amounts to the plaintiff.

(l) The payment in the amount of €9,989.10 to Wintrust in relation to Ambrosia Trust, Calmness Trust and Sea

> Diamonds Trust was not authorised. Dextra is to pay this amount to the plaintiff.
>
> (m) The payments amounting to €5,906.66 to HEP were not authorised. Dextra is to pay this amount to the plaintiff.
>
> (n) The payment of €187,303 to Bartha was authorised.
>
> (o) The payment of €100,000 as a fiduciary fee to a third-party nominee was authorised only to the extent of €50,000. Likewise, only half of the related bank charges of €922.50 was authorised. Dextra is to pay €50,461.25 to the plaintiff.
>
> (p) The payment of €3m to New Anchor should be charged to the plaintiff's account with Dextra. The payment of €22.22 as bank charges was not authorised. Dextra is to pay €22.22 to the plaintiff.
>
> (q) The ILC Dubai-Far West Loans and the Far West Loans breached the no-conflict rule.

5 The Judge also held that Weber was personally liable to Lavrentiadis to the same extent as Dextra because: (a) Weber had breached his fiduciary duties relating to the use of Lavrentiadis's assets; (b) Dextra was Weber's alter ego; and/or (c) Weber had dishonestly assisted Dextra in its breaches of trust (see the Judgment at [246]).

6 CA 134 of 2020 ("CA 134") is Dextra's and Weber's appeal against the bulk of the Judge's findings below. On the other hand, CA 143 of 2020 ("CA 143") is Lavrentiadis's appeal against several specific portions of the remainder of the Judge's decision.

Broad observations

7 Before turning to the respective appeals, we pause to make several interconnected observations on appellate intervention, which we hope will serve as a timely reminder for all. First, in relation to the *assessment of the evidence* – notwithstanding the staggering amount of evidence adduced by both sides, it

is immediately evident from the Judgment that the Judge had gone through the evidence with a fine-toothed comb. Each and every claim had been meticulously analysed and dealt with in a holistic and thoroughly commendable manner.

8 Secondly, it bears emphasising that a trial judge, unlike an appellate court, has the benefit of assessing the *credibility of witnesses* and their *versions of events*. For instance, in this case, the Judge had opined that Weber was not a credible witness, vacillating constantly on his classification of the various statements and his explanations (see [53]–[55], [67] and [96] of the Judgment). Such observations are accorded great weight by an appellate court, as rightly should be the case.

9 Thirdly, the principle that the *threshold* for appellate intervention is a *high one* appears to have been overlooked by parties in this case. We return to this point below, but it suffices at this juncture to note that an appellate court should be slow to overturn the trial judge's findings of fact. This is especially where the findings hinge on the trial judge's assessment of the credibility and veracity of witnesses (see, for example, the decisions of this court in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 at [131] and *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [18]).

CA/SUM 13 of 2021 and the illustrative charts

10 On 29 January 2021, Dextra and Weber sought leave to adduce further evidence in relation to CA 134, under CA/SUM 13/2021 ("SUM 13"). Specifically, leave was sought to adduce four Greek news articles reporting on Lavrentiadis's conviction and sentence in criminal proceedings in Greece. Two of the news articles are dated 8 January 2021 (reporting on conviction), while

the other two are dated 18 January 2021 (reporting on sentence). It was directed that SUM 13 was to be heard together with CA 134 and CA 143 due to the proximity to the hearing date on 4 February 2020.

11 On the day of hearing, however, counsel for Dextra and Weber, Mr Philip Fong ("Mr Fong"), indicated that SUM 13 was being withdrawn. The articles therefore have no further bearing, as a matter of substance, to the present appeals. Notwithstanding this, in our view, the very filing of SUM 13 was reproachable on several levels.

12 First, as a matter of *provenance*, these were newspaper articles that by their very nature are *secondary* sources of information. As experienced counsel, Mr Fong would have and should have been aware of this. Therefore, no attempt should have ever been made to introduce such evidence without first establishing its provenance.

13 Secondly, as a matter of *materiality*, it is unclear how the newspaper articles would have assisted in CA 134. Lavrentiadis's subsequent conviction and sentence would not have mattered to whether the sums were indeed misappropriated by Dextra and Weber. In our view, the fact that SUM 13 was *eventually* withdrawn without any substantive impact on the hearing bears out the point that it was, at best, a frivolous application.

14 Finally, as a matter of *timing*, it bears repeating that counsel should, where possible, avoid introducing evidence at such a late stage of the proceedings. While we appreciate that the newspaper articles only came into existence in January 2021, that does not detract from the fact that leave to adduce them as evidence was only sought six days before the substantive hearing. Due to this belated course of action, coupled with the questionable

provenance and materiality of the evidence, we find that Dextra and Weber must be liable for the additional costs of SUM 13.

15 For completeness, we note also that Dextra and Weber had sought to introduce a bundle of illustrative charts on 29 January 2021. On the morning of 1 February 2021, a revised bundle was filed. Following objections made by Lavrentiadis, a further revised bundle was filed in the evening on 1 February 2021 ("the Bundle of Illustrative Charts"). While counsel for Lavrentiadis did not object to most of the charts in the bundle, it bears noting that these illustrative charts did not, ultimately, prove useful or material for the appeals. Beyond the fact that they were again filed at an extremely late stage in the proceedings, we say no more on this issue.

CA 134 of 2020

Taking of accounts at trial

16 It is necessary to deal first with the question of whether the taking of accounts was appropriately done at trial. In our view, the Judge was entitled to have directed that it be done. There is no merit to Dextra's and Weber's objections that they had not been informed and had been prejudiced by a "premature" taking of accounts.

17 The starting point must be the fact that Dextra itself had accepted that it had a duty to account to Lavrentiadis. This was not a point that it disputed even before the Judge. The focus of Dextra's arguments in this regard was to demonstrate that it had discharged its duty to furnish accounts, and that the moneys were properly applied. In order to do so, as the Judge had noted, Dextra engaged Mr Abuthahir Abdul Gafoor ("Gafoor") as *its own expert* to "provide for [*sic*] an account of how [Lavrentiadis's] funds received were utilised by

[Dextra]" (see the Judgment at [29]). Lavrentiadis subsequently disputed a number of these transactions in the Gafoor account, and the differences between parties were set out in the Table of Parties' Positions (see the Judgment at [30]).

18 It is simply unbelievable that Dextra was labouring under some misapprehension that accounts would not be taken when it had accepted that it had a duty to account, devoted arguments to showing that it had discharged that duty and engaged an expert to support its case. It can also hardly be accepted that Dextra and Weber did not have sufficient opportunity to adduce documents for the Judge to arrive at his decision. In Gafoor's report dated 3 December 2018, he had specifically stated as follows:

> **1.4 Limiting Conditions and Qualifications**
>
> …
>
> 1.4.3 … The contents contained in this Report has been based on the information made available to us, although we have not undertaken any due diligence or audit of the information provided to us. *In instances where information and /or documents are not available, and where necessary, we have made assumptions to reach our conclusion for the preparation of this Report*. …
>
> …
>
> **2. Documents Reviewed**
>
> …
>
> 2.1.4 We have identified in the various sections below documents that we have sighted and/or reviewed to complement our findings, and *noted lack of documents*, if any.
>
> [emphasis added]

19 It is therefore clear that Gafoor had already noted the lack of documentary evidence in his report. Dextra and Weber would thus have been aware of this deficiency and the need to address it, if indeed there was documentary evidence that they had not shown to their own expert.

20 Despite this, Dextra and Weber elected not to provide any further documentation that might be relevant to the taking of accounts. In fact, this very point appears to have been canvassed before the Judge as follows:

> Mr Fong: Your Honour, just the point that we are making, where the authority has been given for particular transactions, then costs are incurred.
>
> Court: It doesn't mean that he cannot challenge the costs, whether they are properly incurred or not. Yes?
>
> Mr Fong: Yes, your Honour.
>
> Court: And your client clearly has to account for the use of monies. Are you telling me that all these details have not been given with supporting documents?
>
> Mr Fong: *There are supporting documents, your Honour. It's in the expert report.* …
>
> [emphasis added]

21 Counsel for Dextra and Weber had thus alleged that the necessary supporting documents were already available and had been included in the Gafoor report. In view of the fact that the documents were Dextra's and Weber's own documents, the onus would have been on them to produce the documents if necessary. It does not lie in their mouths now to allege that they had not been provided sufficient opportunity to adduce the documents they required.

22 More importantly, as the Judge noted, it is apparent that all parties were aware that trial would involve a taking of accounts. For instance, in Lavrentiadis's Statement of Claim, it was specifically provided as follows:

> AND THE PLAINTIFF CLAIMS AGAINST BOTH DEFENDANTS:
>
> …
>
> (2) An order for payment by the 1st and/or 2nd Defendants to the Plaintiff of all sums found to be due to the Plaintiff ~~under the Dextra Trust~~ on the taking of the account, including the sum of ~~€19,111,912.30~~ €12,071,800.11 being the value of the 115 Unauthorised Transactions wrongfully entered into by the

> 1st and/or 2nd Defendants, and the sum of €1,351,889.25 being the value of the payments wrongfully made by the 1st and/or 2nd Defendants between 13 August 2014 and 24 May 2018, and the sum of €14,000,000 in respect of the alleged loans to Orex Holding Ltd and Ruby International Ltd;
>
> (3) All necessary and consequential accounts, inquiries and directions;

23 We accept that the Statement of Claim viewed in *isolation* does not state *when* exactly the accounts would be taken. At minimum, however, it provided a clear indication to Dextra and Weber that Lavrentiadis had in mind the taking of accounts right from the outset. At that point, Dextra and Weber had neither raised any objections nor argued that accounts should only be taken at a later stage in the proceedings. In any event, their conduct of the proceedings demonstrate that they were providing accounts, for example, by relying on the Gafoor report themselves.

24 The indication that accounts would be taken at trial was also continued during a subsequent pre-trial conference. As seen from the notes of argument in the JPTC on 14 October 2019, the following exchange was recorded:

> PC : Applies to reverse order of witnesses – see *UVH v UVJ* – para 33 – accounting parties calls as witness first – facts within their knowledge.
>
> Court : Don't think that makes much difference in this case. Also, technically, this is a trial. Plaintiff to start.

25 If anything, this demonstrates that the issue of accounting taking place within the trial was specifically contemplated by the parties. Again, no objections had been raised by Dextra and Weber at this point. Dextra and Weber still did not raise any objections to the taking of accounts *during* the trial itself. As the Judge observed, the witnesses, *including Weber*, were cross-examined on the items dealt with in the Gafoor report.

26 It was only during their closing submissions that Dextra and Weber submitted that the taking of accounts was premature. We agree with the Judge that the objections were made far too late in the day and were simply inconsistent with their conduct throughout the trial.

27 At the hearing before us, Dextra and Weber argued that they had suffered prejudice as a result of the "premature" taking of accounts. They placed extensive focus on several, specific, expenses that the Judge had found that they had failed to account for. These expenses (and the relevant paragraphs in the Judgment) were listed in a chart, which was adduced as part of the Bundle of Illustrative Charts.

28 The crux of Dextra's and Weber's argument here appears to be that *because* the taking of accounts had been done prematurely, it affected: (a) Weber's ability to explain certain expenses; (b) the Judge's perception of Weber's credibility and truthfulness; and (c) the Judge's finding that the Investment Swap was not entered into.

29 In our view, this argument simply cannot stand. There was no prejudice that was suffered by Dextra and Weber. Dextra and Weber point specifically to a number of paragraphs of the Judgment as instances where the Judge had found their expenses as lacking in supporting documents only because they had been unable to adduce evidence. As we noted above at [18]–[21], however, they were given ample opportunity to produce such documents but had not done so. It is also noted that they have not demonstrated that such other evidence does exist. Further, these paragraphs should not be seen in isolation as they were *additional* observations made by the Judge in relation to the *state* of the evidence. These were not the *only* evidence that the Judge had relied on in coming to his conclusions. Indeed, as counsel for Lavrentiadis, Ms Sim Bock Eng

("Ms Sim"), pointed out, the crucial reason why the Judge held against Dextra and Weber was because they simply had not been *authorised* to carry out the transactions.

30 We deal with the Investment Swap below at [34]–[38]. Beyond that, however, there is also no basis for us to find that Weber's credibility and truthfulness were affected as a result of the taking of accounts. This harks back to our observations above at [8], that an appellate court should accord great weight to a trial judge's findings in relation to credibility, the latter having had the opportunity to directly observe the witnesses. Moreover, in this case, it is clear that the Judge had based his observations on credibility on a number of matters *quite apart* from the absence of sufficient supporting documents. In particular, he had observed that Weber vacillated constantly on his evidence, even on the most fundamental of points – for instance, the classification of the different types of statements provided by Dextra, which was a matter he should have been intimately familiar with.

31 Moreover, in relation to each of the specific expenses, we agree with Ms Sim that there is no basis to say that the Dextra and Weber were prejudiced as they had not produced sufficient supporting documents.

(a) In relation to the Payments to Carnelia for fees in connection with the Chengdu Foundation structure and Straits Invest's management fees, Dextra and Weber were unable to prove that they were authorised to make these payments.

(b) In relation to the phone charges paid to Carnelia, Dextra and the provision of mobile phone services, Dextra and Weber simply relied upon invoices *that they themselves had issued*. They could have, but did

not adduce the underlying phone bills issued, which they did in relation to other claims. As we note below at [47], invoices cannot be used to justify the very sum that they seek to charge.

(c) In relation to expenses with regard to Jade Monega, payment to Dextra for Jade AP1, as well as payment for miscellaneous expenses and Pearl Investment's Management Fees, Gafoor had specifically highlighted that there was an absence of documents, and we say no more on this issue.

(d) In relation to the loan to Windris International Ltd, Dextra's and Weber's own claim was that it was made by way of an *oral agreement*. It is difficult to see how they can now turn around and allege that documents would have been produced.

32 Finally, Lavrentiadis rightly points to the decision of the Hong Kong Court of Final Appeal in *Libertarian Investments Ltd v Thomas Alexej Hall* (2013) 16 HKCFAR 681 ("*Libertarian Investments Ltd*") for the proposition that it is unnecessary for a separate account to be conducted. The relevant portions from *Libertarian Investments Ltd* were cited by this court in *UVJ v UVH* [2020] 2 SLR 336 at [27] as follows:

> 27 We emphasise two further points. First, that following the taking of an account, the beneficiary is entitled to ask for an inquiry to discover what the trustee did with any money that was misappropriated. The taking of an account is merely a step in the process. ***Second, that while the beneficiary may elect whether to call for an account or further inquiry, it is the court which always has the last word***. As Lord Millett NPJ explained in *Libertarian Investments Ltd v Thomas Alexej Hall* (2013) 16 HKCFAR 681 ("*Libertarian Investments*") at [167]–[172]:
>
> > 167. It is often said that the primary remedy for breach of trust or fiduciary duty is an order for an account, but this is an abbreviated and potentially misleading

> statement of the true position. In the first place an account is not a remedy for wrong. Trustees and most fiduciaries are accounting parties, and their beneficiaries or principals do not have to prove that there has been a breach of trust or fiduciary duty in order to obtain an order for account. Once the trust or fiduciary relationship is established or conceded the beneficiary or principal is entitled to an account as of right. Although like all equitable remedies an order for an account is discretionary, in making the order the court is not granting a remedy for wrong but enforcing performance of an obligation.
>
> 168. In the second place an order for an account does not in itself provide the plaintiff with a remedy; it is merely the first step in a process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good. Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. …
>
> 169. *But the plaintiff is not bound to ask for the disbursement to be disallowed. He is entitled to ask for an inquiry to discover what the defendant did with the trust money which he misappropriated and whether he dissipated it or invested it, and if he invested it whether he did so at a profit or a loss.* If he dissipated it or invested it at a loss, the plaintiff will naturally have the disbursement disallowed and disclaim any interest in the property in which it was invested by treating it as bought with the defendant's own money. If, however, the defendant invested the money at a profit, the plaintiff is not bound to ask for the disbursement to be disallowed. He can treat it as an authorised disbursement, treat the property in which it has been invested as acquired with trust money, and follow or trace the property and demand that it or its traceable proceeds be restored to the trust *in specie*.
>
> 170. If on the other hand the account is shown to be defective because it does not include property which the defendant in breach of his duty failed to obtain for the benefit of the trust, the plaintiff can surcharge the account by asking for it to be taken on the basis of 'wilful default', that is to say on the basis that the property should be treated as if the defendant had performed his duty and obtained it for the benefit of the trust. Since

> *ex hypothesi* the property has not been acquired, the defendant will be ordered to make good the deficiency by the payment of money, and in this case the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss.
>
> …
>
> 172. At every stage the plaintiff can elect whether or not to seek a further account or inquiry. The amount of any unauthorised disbursement is often established by evidence at the trial, so that the plaintiff does not need an account but can ask for an award of the appropriate amount of compensation. Or he may be content with a monetary award rather than attempt to follow or trace the money, in which case he will not ask for an inquiry as to what has become of the trust property. ***In short, he may elect not to call for an account or further inquiry if it is unnecessary or unlikely to be fruitful, though the court will always have the last word.***

[emphasis in original; emphasis added in bold italics]

The substantive issues on appeal

33 We turn then to the substantive issues raised in this appeal. At the outset, we note that Dextra's and Weber's arguments suffer from three fundamental defects. First, these arguments had all been specifically considered by the Judge and rejected based on the totality of the evidence as well as based on observations of the various witnesses, including Weber himself. Secondly, the arguments often confuse the timings that are relevant for the transactions. Had Dextra and Weber appreciated this, these arguments should never have been raised on appeal. Thirdly, and in any case, the arguments raised here were supported neither by the documents nor by Weber's own evidence at the trial.

34 These fundamental defects seeped into the foundation of a number of arguments raised by Dextra and Weber in CA 134. As the *pièce de résistance* of their claims was the Investment Swap, we utilise this transaction to illustrate our point. First:

(a) In relation to the argument that the November 2014 Note made no reference to the Investment Swap, the argument raised that Weber had been caught off-guard had been specifically considered by the Judge. Even if Weber had been shocked by the accusations of Athanasiou, given the large sums within the Investment Swap, it would likely have been one of the key points he would have brought up to defend himself.

(b) In relation to the argument that there were sufficient funds to pay for the Investment Swap, Dextra and Weber again assert in their case that funds had come from Jade AP1, and any shortfall could be accounted for by gold funds held by Lavrentiadis in Jade AP1. This, however, fails to rebut the *multiple* observations on the inconsistencies in the claim and the contradictions that arise in relation to the use of any Jade AP1 funds. The acknowledgement that any prejudice would be suffered by "ILC Dubai's clients only" was *precisely* the point that the Judge made; any bald assertion that the risk faced was "virtually negligible" and "ultimately agreed" to should not be accepted.

35 Secondly, as noted by the Judge, and based on the appellants' own case, the Investment Swap was allegedly entered into on 30 September 2013. The arguments raised here are largely *ex post facto*. This was precisely the finding by the Judge that the Investment Swap was an *ex post facto* accounting fiction to account for misappropriated assets. For instance:

(a) In relation to the nature of the statements, Dextra and Weber acknowledge that Weber *at the time of trial* was unable to provide a convincing explanation of the various discrepancies in the statements. Their assertion that he was "ultimately able to identify and explain" was,

however, based on explanations that they put within the Appellants' Case itself and not based on Weber's evidence. If it were indeed true that the August 2014 EUR Statement and the Second November 2014 EUR Statement had intended to *exclude* the value of protective loans, there is no reason why Weber would not have been aware of this simple explanation and provided it at trial.

(i) In any case, the specific example that Dextra and Weber point to does not bear out their explanation. In the note accompanying the Second November 2014 EUR Statement, the sums that were deducted were for "Far West", "Rubber/Cocoa", "Filterjet" and "Bali", with a sum added back for "Miscellaneous". Save for Far West, and possibly Bali, none of the rest related to any investments purportedly made under the Investment Swap.

(b) At multiple points, the appellants attempted to explain the statements as having been "ported over" and then removed and replaced with consolidated entries in the May and July 2018 EUR Statements. However, this was the precise difficulty in the evidence pointed out by the Judge – that any evidence as to the relevant transactions under the alleged Investment Swap often arose only in the May and July 2018 EUR Statements. Contrary to expectations, there was simply insufficient documentary evidence evidencing the transactions under the Investment Swap as at, or shortly after, 30 September 2013, which was the time that it was allegedly entered into.

36 Thirdly, the arguments raised were simply unsupported either by the documents or by Weber's evidence. For instance:

(a) In relation to the discrepancies in the First and Second November 2014 EUR Statements, the explanation that the payments to ILC Dubai on 3 May 2012 were included in both, but with the details excluded in the Second November 2014 Statement, *runs counter* to the appellants' own earlier explanation that the *value of the protective loans was excluded* in the First November 2014 EUR Statement (as seen in the table in para 17 of the Appellants' Case).

(b) In relation to the discrepancies in the notes accompanying the First and Second November 2014 EUR Statements, the explanation of the aggregation of payment with Belle Vue Property 1 Ltd has no basis in any evidence produced at trial. Further, even assuming this to true, as the appellants themselves acknowledge, the figures still differ by a sum of EUR 1,373.60. While they explain that it was due to an inadvertent omission, there is no explanation how this omission arose and even then, what the payment related to.

(c) In relation to the explanation for the lack of contemporaneous records being to protect Lavrentiadis's confidentiality, again there is no basis for such a claim. If the protective structure involved, as Dextra and Weber claim, the use of companies and trusts to hold investments such that no one would know those belonged to Lavrentiadis, it would already inherently protect Lavrentiadis's identity. There was no further reason why these *companies and trusts* could not have any contemporaneous documents themselves. This was the point that the Judge also made in the Judgment.

37 In addition to this, we find that the Investment Swap was simply not authorised. We see no reason to disturb the Judge's finding in this regard.

Several further points should be noted. First, the interpretation that Straits Invest's decisions would involve Dextra and therefore the authority given to the former would vest in the latter has no basis either in law or in fact. Further, it would run against the plain and ordinary meaning of clause 4 of the 2012 Mandate, which requires W&M (or Straits Invest) to execute the investments. This is a clear example of the appellants attempting to twist the plain words of documents to suit their purposes. A further example is found in the assertion that the 2012 Mandate imposed no requirement for instructions in writing from Lavrentiadis when the 2012 Mandate in fact states:

> Instructions of LL (Lavrentiadis) to ILC/W&M *shall be given in writing*, whereas telex, fax and e-mail transmissions shall be considered as written instructions. … [emphasis added]

38 Secondly, even if the decisions made by Weber could have been made on behalf of Straits Invest, the pleaded case is that *Dextra* had made the investments. Thirdly, the attempt to argue that the amendment to the Defences was only a "technical deficiency" is wholly unconvincing. Given the importance of the argument, it should have been front and centre within the Defences. In any case, the fact that there were references within the 2018 documents also point to the fact that they were made *long after* the purported date of the Investment Swap in 2013 and does not in fact support Dextra's and Weber's case. Finally, even if it is accepted that the definition of asset protection is adaptable and can "morph" over time, there is no reason why these varying definitions could not have been clearly stated during the proceedings. The finding of the Judge was that the definitions given had changed *during* the hearing itself and were in fact inconsistent with each other.

39 This fact that Lavrentiadis had not authorised Dextra and Weber applies *mutatis mutandis* to *all* of the other issues raised in this appeal that relate to

authorisation. These include the following (adopting the terms of reference utilised by Dextra and Weber):

(a) The Far West Loans;

(b) The Windris Loan;

(c) The sale of the JB Gold Fund and ZJB ETF units;

(d) The payments to Carnelia, Straits Invest, Wintrust and the directors' fees to Weber for Jade DCC;

(e) The Straits Invest payments;

(f) The WinTrust payment;

(g) Certain payments to Dextra;

(h) Certain payments to Dextra relating to Jade DCC; and

(i) The payment to Lam beyond the EUR 50,000.

40 It is precisely against this backdrop of a lack of authorisation that the Judge had made his findings that the loans to Far West had breached the no-conflict rule, that Dextra was the alter ego of Weber, and that Weber should be liable for dishonest assistance. We therefore also see no reason to disturb his findings in this regard.

41 Accordingly, we dismiss Dextra's and Weber's appeal in its entirety. We turn then to our decision in CA 143.

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42 In relation to Lavrentiadis's appeal, we allow the appeal in respect of three out of the six points that are raised. We focus on these points before dealing with the others in brief.

43 First, we deal with the question as to whether Dextra's claim to fiduciary fees have been proven, and if so whether it should have been forfeited. Broadly, in our view, we find that the Judge was right to have allowed Dextra to claim its fees. The parties are consistent in one key aspect of their respective cases: that the question of forfeiture is one that must be considered in context of the entire engagement between parties. As Lavrentiadis acknowledges, it would be inequitable to forfeit all sums where the trustee had otherwise served the principal successfully in other aspects of the relationship. We also agree with Dextra and Weber that a large number of the transactions undertaken by Dextra on behalf of Lavrentiadis was in fact approved and authorised by the latter. Further, these authorised transactions concern a substantial part of the sums held by Dextra. Given that that portion of the work had been properly carried out, it would be highly inequitable to completely remove *all* the claims to its fees.

44 We also reject Lavrentiadis's argument that there was insufficient evidence of Dextra's calculation of the assets under management ("the AUM") and hence it should not be awarded its fees. The solution taken by the Judge to adopt the book values was one based on practicality, as it was precisely the case that it was unclear whether the market values were available. In such circumstances, the Judge had rightly weighed the equities between depriving Dextra of the full sum against a rough estimation that would likely have been less than half of the 1% allowed under the 2012 Mandate. It is rightly pointed out that Lavrentiadis had never disputed the aforementioned calculations.

45 However, we find that the Judge should not have allowed the quantum to include the AUM of assets that have been misappropriated through unauthorised transactions. These were the transactions in which the breaches had permeated the relationship between parties. Even where the sums had been returned, the fact is they had been misappropriated in the first place, when the fees to Dextra were paid for a proper application of the funds.

46 Secondly, in relation to the various fees and expenses charged by Dextra against the trust, we find, with respect, that the Judge was incorrect in accepting that Dextra was entitled to charge a 5% secretarial fee for services rendered in April, September and November 2012. The reason for his holding was that Weber was not cross-examined on this issue (see the Judgment at [141]). Where a beneficiary falsifies an entry in the account, however, it is he who challenges or disputes the alleged use of his funds. The burden then falls on the trustee to prove that the disbursement was authorised (see the Singapore High Court decision in *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2019] 4 SLR 714 at [78]). In this case, the burden fell on *Weber and Dextra* to *prove* that the 5% secretarial fee was authorised. It was simply insufficient for Dextra and Weber to argue that they had issued invoices for the fees for this would essentially be seeking to pull oneself up by one's bootstraps. Borrowing the Judge's reasoning in relation to the telephone charges in relation to Carnelia, the invoice cannot be used to justify the very sum it seeks to charge.

47 In respect of the related charge of the director's fees charged by Dextra, however, we find that the Judge was correct in allowing such payments. Jade AP1 was inherently related to Jade DCC (being one of its three cells) and Pearl Investment (acting as fund manager of Jade DCC). The directors' fees were expenses necessary to operations of Jade DCC, and therefore to Jade AP1.

48 Thirdly, in so far as the amount of EUR 50,000 due to Jade AP1 was concerned, Lavrentiadis had been asked a series of questions on Jade AP1 as a Brunei Fund. His evidence was that he had an "agreement that it would be a flat cost of 50,000 for the Brunei fund". In submissions, Lavrentiadis had accepted liability for EUR 50,000 for this item. The Judge had inferred that this submission meant that Lavrentiadis was agreeing to an *additional* EUR 50,000. However, there was, with respect, no evidence to support this inference. In the circumstances, Lavrentiadis's appeal on this sum is allowed.

49 As for the remaining issues raised on appeal, we find no reason to disturb the Judge's findings in relation to the following:

(a) On the application of a common account, there was no need to apply a roving inquiry as the parties were agreed as to *which* transactions had to be accounted for and the relevant amounts. In the few instances where the Judge found that Dextra/Weber was entitled to fees or payment, the relevant question was only whether the application of monies was authorised. Further, Lavrentiadis had expressly accepted in its written case that it would have made no difference in *most* instances in this case as follows:

> In most instances, this made no practical difference to the judgment sum awarded to the Appellant, because the Trial Judge found that the Respondents had not proved that the transactions were authorised, even on the lower standard of proof applicable to a common account. Moreover, as the transactions were unauthorised to begin with, the fact that the transactions were also in breach of fiduciary duty would not entitle the Appellant to additional compensation. …

This was also candidly accepted (correctly, in our view) by counsel for Lavrentiadis, Ms Sim, at the hearing before us.

(b) On the inclusion of the Jade AP1 within the AUM calculated, the 2012 Mandate clearly included *all* investments and legal advice. The plain meaning of this would include Jade AP1. In line with [45], however, this calculation should still be subject to only items that had been authorised by Lavrentiadis.

(c) On the duty to act in the best interests of Lavrentiadis, we find that this had not been expressly pleaded and the Judge was correct in declining to deal with the arguments there.

50 Accordingly, we allow CA 143 in part.

51 We note that in the course of their written and oral submissions, neither party had provided any method of calculating the quantum of the fiduciary fees that were being disputed. As a result, we directed parties to write in after the hearing to provide their views on the proper method to be adopted. This is relevant to our finding above at [45] that the Judge should not have allowed the quantum to include the AUM of assets that have been misappropriated through unauthorised transactions.

52 Having perused the differing methods proposed by both sides, we are of the view that Lavrentiadis's proposed method is the fairer way of calculating the fiduciary fees that Dextra and Weber had charged on the assets misappropriated through authorised transactions. The calculation proceeds by taking the misappropriated sums, multiplied by 0.5% per annum, multiplied by the period over which Dextra and Weber had charged their fees. For these purposes, however, Lavrentiadis was prepared to accept that the value of the misappropriated sums was EUR 16,694,830.53, instead of the Judgment Sum of EUR 17,229,512.81. Lavrentiadis was also prepared to accept that the

misappropriation had commenced from 2013 to 2017, for a period of five years, instead of commencing from 2012. The total quantum of the fees, charged by Dextra and Weber, to be disallowed is therefore EUR 417,370.76.

Concluding remarks

53 In summary, we dismiss the appeal in CA 134 in its entirety. As for CA 143, we allow the appeal in part, in relation to the following:

(a) The quantum of the AUM upon which Dextra calculated its services fees should not have included the AUM of assets that have been misappropriated through unauthorised transactions (above at [45]). The total quantum of the fees charged by Dextra to be disallowed is EUR 417,370.76 (as above at [51]–[52]).

(b) Dextra is also not entitled to charge a 5% secretarial fee for services rendered in April, September and November 2012, as it had not proven that the secretarial services (and the attendant fees) were authorised (as above at [46]).

(c) Lavrentiadis had not agreed to pay an additional EUR 50,000 to Jade AP1 (as above at [48]). Dextra's and Weber's claim for this additional sum is therefore also disallowed.

54 We return to the point on arguments raised on appeal and the standard of appellate intervention, as noted above at [9]. Both appeals in large parts turned on questions of fact that had been examined at great length by the Judge. The situation in respect of CA 134 was particularly unsatisfactory as the arguments submitted were largely *identical* to those made before the Judge. Indeed, as we observed above at [33], most of these arguments had been *raised,*

considered and *rejected* by the Judge, only for them to be resurrected on appeal often accompanied with the bare assertion that the Judge had arrived at an incorrect result. That is not the purpose of an appeal.

55 Finally, having regard to the respective parties' cost schedules, we award Lavrentiadis costs in the sum of $65,000 (all-in) for both appeals and for SUM 13. There will be the usual consequential orders.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

Philip Fong Yeng Fatt, Koh Xian Wei Jeffrey and Kevin Koh Zhi Rong (Harry Elias Partnership LLP) for the appellants in Civil Appeal No 134 of 2020 and the respondents in Civil Appeal No 143 of 2020;
Sim Bock Eng, Tan Kia Hua and Lee Yu Lun Darrell (WongPartnership LLP) for the respondent in Civil Appeal No 134 of 2020 and the appellant in Civil Appeal No 143 of 2020.