IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 45

Suit No 129 of 2019

Between

Acute Result Holdings Limited

… *Plaintiff*

And

CGS-CIMB Securities (Singapore) Pte Ltd (formerly known as CIMB Securities (Singapore) Pte Ltd)

… *Defendant*

JUDGMENT

[Trusts — Resulting trusts — Whether an equitable mortgagee or equitable chargee is a trustee]
[Tort — Negligence — Duty of Care]

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Acute Result Holdings Ltd
v
CGS-CIMB Securities (Singapore) Pte Ltd (formerly known as CIMB Securities (Singapore) Pte Ltd)

[2022] SGHC 45

General Division of the High Court — Suit No 129 of 2019
Vinodh Coomaraswamy J
13–17, 21–24, 27–30 July, 17, 19 November 2020

28 February 2022 Judgment reserved.

Vinodh Coomaraswamy J:

1 In 2017, the plaintiff transferred two tranches of shares into brokerage accounts with the defendant. The defendant then carried out certain transactions with the shares on the instructions of one of the defendant's customers. The plaintiff has established in separate legal proceedings in another jurisdiction that the defendant's customer thereby misappropriated the shares. The customer has been unable to return the vast majority of the misappropriated shares to the plaintiff or to compensate the plaintiff for the loss of the shares. The plaintiff now brings this action against the defendant seeking compensation for its loss.

2 The first tranche of shares comprised 57.08m shares. The plaintiff transferred these shares into a brokerage account with the defendant in the defendant's customer's name. The plaintiff's case is that the customer therefore held these shares on a resulting trust or an express trust for the plaintiff and

thereafter misappropriated the shares in breach of that trust. The plaintiff seeks to hold the defendant liable for the customer's misappropriation: (a) in equity for knowing receipt of the shares[1] or dishonestly assisting the customer in misappropriating the shares;[2] or (b) in tort for breaching a duty of care which the defendant owed to the plaintiff in receiving the shares.[3] One of the customer's acts of misappropriation was selling 30m of these shares to the defendant. The plaintiff therefore advances in the alternative a proprietary claim against the defendant alleging that the defendant received these 30m shares from its customer as a constructive trustee for the plaintiff.[4]

3 The second tranche of shares comprised 21m shares. The plaintiff transferred these shares into a brokerage account with the defendant in the plaintiff's own name. The defendant then transferred the shares out of the plaintiff's account on the instructions of the defendant's customer. The plaintiff's case is that the customer at no time had any authority to instruct the defendant to carry out those transfers. The plaintiff seeks to hold the defendant liable to the plaintiff for the loss of these shares because: (a) the defendant transferred the shares out of the plaintiff's account in breach of contract, *ie* on the customer's instructions and without the plaintiff's authority; or (b) the defendant breached a duty which it owed to the plaintiff concurrently in contract and in tort to act with reasonable care and diligence in operating the plaintiff's account.[5]

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1 Statement of Claim (Amendment No. 2) dated 3 April 2020 ("SOC A2") paras 33 to 37.

2 SOC A2 paras 39 to 42.

3 SOC A2 paras 42A to 42B.

4 NE 19 Nov 2020, p53 line 6 to p54 line 10.

5 SOC A2 paras 52A to 54; paras 58 to 61.

4 The plaintiff accordingly seeks the following relief against the defendant:[6]

(a) an order declaring that the defendant holds the 78.08m shares on trust for the plaintiff and obliging the defendant to transfer the shares to the plaintiff;

(b) alternatively, an order that the defendant account for the 78.08m shares as a constructive trustee either on the ground of knowing receipt or on the ground of dishonest assistance;

(c) further or in the alternative, an order that the defendant account to the plaintiff for all profits it has earned attributable to the 78.08m shares; and

(d) further or in the alternative, an order that the defendant pay to the plaintiff damages at common law or compensation in equity for its losses.

5 Having considered the evidence and the parties' submissions, I now dismiss the plaintiff's action in its entirety. These are the grounds for my decision.

The parties

6 The plaintiff is a company incorporated in the British Virgin Islands.[7] It is the beneficial owner of just over 36% of the shares in a company known as

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6 SOC A2 at p 29; SDB at p 188.

7 NSK para 4.

Cabbeen Fashion Limited ("Cabbeen").[8] Cabbeen is a company incorporated in the Cayman Islands. It has its principal place of business in Hong Kong.[9] Shares in Cabbeen are listed on the main board of the Hong Kong Stock Exchange. The 78.08m shares which the defendant's customer misappropriated are shares in Cabbeen.

7 As at 1 January 2018, Cabbeen's share capital comprised just over 667.3m issued and paid up shares.[10] The 78.08m shares which form the subject matter of this action amounted to almost 12% of the shares in Cabbeen and almost one third of the shares in Cabbeen which the plaintiff owned. From November 2016 to July 2017, Cabbeen's shares traded at prices ranging between HK$2.05 and HK$2.15.[11] The 78.08m shares were therefore worth at that time about HK$164m or about $28m. Out of those 78.08m shares, the plaintiff has recovered only 2.26m shares worth about HK$4.7m or $0.82m.[12]

8 The plaintiff's sole director and shareholder is Mr Yang Ziming ("Mr Yang").[13] Mr Yang is Cabbeen's founder, one of its directors and the chairman of its board.[14] Mr Yang is a resident of Hong Kong. He has a beneficial interest in 64.9% of Cabbeen's shares, which he holds through three corporate

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8 NSK para 5.

9 NSK p 262.

10 NSK p 179.

11 NSK para 140, p 1791; JP at "JP-2", expert report para 66.

12 NSK para 182.

13 NSK p106.

14 NSK para 6; p 244 and 255.

vehicles.[15] One of those vehicles is the plaintiff. As such, Cabbeen's annual reports identify Mr Yang as Cabbeen's ultimate controlling party.[16]

9 Mr Yang delegates the day-to-day management of the plaintiff to Mr Ng Siu Keung ("Mr Ng"). Mr Ng is an executive director of Cabbeen and was its chief executive officer from July 2011 to 12 March 2020.[17] Mr Ng is a resident of Hong Kong.

10 The defendant is a duly licensed broker of shares and other financial products, including contracts for differences ("CFDs"). The defendant is incorporated in Singapore and carries on business in Singapore.[18]

11 The defendant's customer who has been found to have misappropriated 78.08m shares is a company called Lioncap Global Management Limited ("Lioncap Global"). Lioncap Global is affiliated to a company called Lioncap Asia Limited ("Lioncap Asia"). Both Lioncap Global and Lioncap Asia participated in the misappropriation of the plaintiff's shares. Both are now defunct.[19] They were incorporated in Hong Kong and had their principal place of business there. Although the two companies are affiliated, it is not necessary for present purposes to determine the nature of their affiliation or even to distinguish between them.[20] I shall therefore use the term "Lioncap" from time to time to refer to both companies collectively.

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15 NSK p 279.

16 NSK p 389.

17 NSK para 6.

18 SOC A2 para 3.

19 NSK para 11.

20 NE, 13 July 2020, lines to 7.

12 The discussions between the plaintiff and Lioncap and the true nature of their wider dealings are inextricably intertwined with the plaintiff's case against the defendant in this action. But Lioncap is not a party to this action. And no witness from Lioncap gave evidence at trial to corroborate the plaintiff's account of their discussions and dealings. The defendant was not a party to those discussions and dealings and is therefore not in any position to challenge that account with positive evidence of its own. The defendant therefore makes the point, quite fairly, that the only evidence I have before me of these discussions and dealings is the plaintiff's own self-serving account. But in the absence of any contrary oral evidence, I must proceed on the basis that the plaintiff's account is true save insofar as it is inconsistent with the independent evidence before me or the inherent probabilities.

13 On that basis, the plaintiff's dealings with Lioncap were those of a debtor and a secured creditor. In November 2016, Lioncap Asia extended a loan facility to the plaintiff. As security for that facility, also in November 2016, the plaintiff created a security interest in the first tranche of 57.08m shares in favour of Lioncap Global. In July 2017, in the context of ongoing negotiations for a further loan facility from Lioncap Asia, the plaintiff transferred the second tranche of 21m shares to the plaintiff's account with the defendant as a sign of goodwill.

14 I shall analyse and determine the plaintiff's case against the defendant on each of the two tranches in turn.[21]

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[21] SOC A4 para 4.

The first tranche of 57.08m shares

The facts

The loan facility agreement and the security agreements

15 In November 2016, the plaintiff entered a suite of interrelated agreements with Lioncap:

(a) A loan facility agreement[22] and an addendum[23] to it under which Lioncap Asia extended a HK$120m loan facility to the plaintiff.[24]

(b) Two security agreements[25] and two supplementary agreements by which the plaintiff created a security interest in 130m Cabbeen shares in favour of Lioncap Global as security for: (i) the HK$120m loan facility which Lioncap Asia had extended to the plaintiff; and (ii) a HK$2m loan facility which Lioncap Asia had separately and earlier extended to an associate of Mr Yang.[26]

16 The following three provisions of the security agreements are relevant for present purposes:[27]

(a) Clause 2.01 created in favour of Lioncap Global "a first legal charge" in the shares upon completion;

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22 NSK p 623.

23 NSK p 649.

24 SOC A2 para 5; Core Bundle vol 1 ("1CB") at p 93.

25 NSK p 652.

26 CB 69, 89, 19 and 49.

27 NSK p 652.

(b) Clause 3.01 of the security agreements obliged the plaintiff, by way of completion, to deliver the 130m shares either to Lioncap Global or to a brokerage account designated by Lioncap Global; and

(c) Clause 2.05 provided that Lioncap Global would acquire "all the legal beneficial titles and interests" in the shares upon, amongst other things, an event of default under the loan facility agreement.

17 This suite of interrelated agreements is expressly governed by Hong Kong law. Furthermore, the laws of several other jurisdictions are potentially engaged. The plaintiff is a Cayman company. Cabbeen is a BVI company. The instruction letters by which the plaintiff transferred the 57.08m shares to Lioncap Global's account with the defendant are governed by Indonesian law.[28] But neither party called any expert evidence on any foreign law at trial. The parties are therefore content to have this action determined on the basis that all of these foreign laws are identical in all material respects to Singapore law.[29] I therefore do not refer to or apply any law other than Singapore law in the remainder of this judgment.

The plaintiff transfers the shares out of its brokerage account in Hong Kong

18 In November 2016, pursuant to cl 3.01 of the security agreements, Lioncap Global directed the plaintiff to open a dedicated brokerage account with PT CIMB Securities Indonesia ("CIMB Indonesia") in the plaintiff's own name and to transfer the 130m shares into this account.[30] CIMB Indonesia is a member of the same group of companies as the defendant but is a separate legal entity

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28 AB 1353.

29 DCS para 77.

30 NSK para 21; NE 13.07.2020 p 81:17-82:9

incorporated and carrying on business as a brokerage in Indonesia. CIMB Indonesia is not a party to this or any other action by the plaintiff.

19 In December 2016, as directed, the plaintiff opened the dedicated brokerage account with CIMB Indonesia.[31] At that time, the plaintiff held its Cabbeen shares in a brokerage account with China Merchant Securities (HK) Co Ltd ("CMS"), a brokerage in Hong Kong.[32] In January and February 2017, the plaintiff transferred 144m shares from its account with CMS into its account with CIMB Indonesia.[33] The plaintiff thereby appropriated these shares to Lioncap Global's security. It is not clear why the plaintiff transferred 144m shares instead of 130m as envisaged by the security agreements. The discrepancy is ultimately immaterial.

The instruction letters

20 Lioncap Asia failed to advance any part of the HK$120m loan facility to the plaintiff as it was obliged to under the loan facility agreement.[34] It appears that Lioncap Asia had difficulty raising funds to lend the plaintiff.

(1) The plaintiff rejects a draft instruction letter

21 In February 2017, Lioncap Global presented to the plaintiff a draft letter of instructions. Lioncap Global asked the plaintiff to sign the draft and issue it to CIMB Indonesia.[35] The draft informed CIMB Indonesia: (a) that Lioncap Global had an intention to borrow the 144m shares; and (b) that the plaintiff

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31 NSK para 21.

32 NSK para 4.

33 NSK paras 30 to 32; SOC A2 paras 11 to 12; 8 AB 4517.

34 NSK para 33; 6 AB 3312.

35 NSK para 40; p 850.

irrevocably instructed CIMB Indonesia to transfer the 144m shares from the plaintiff's account with CIMB Indonesia to Lioncap Global's account with the defendant. The draft included language (italicised below) asserting that the shares would not thereby be owned by Lioncap Global:[36]

> Dear Sir/Madam,
>
> We refer to the request of Lioncap Global Management Limited as the Plegdee [sic] in relation to the Facility Agreement in the amount of HK$120,000,00 from Lioncap Asia Limited as set forth in the following documents:
>
> 1. Loan Facility Agreement …;
> 2. Share Pledge Agreement …:
> 3. Power of Attorney …;
>
> whereby Lioncap Global Management Limited has an intention to borrow shares owned by Acute Result Holdings Limited *for the avoidance of doubt not to be owned by Lioncap Global Management Limited*) [sic] with the following details:
>
> …
>
> In accordance to the above-mentioned, we hereby irrevocably instruct you:
>
> 1. To transfer the Shares borrowed by Lioncap Global Management Limited to the account with the following details:
>
> Acc. Number : …
>
> Beneficiary : Lioncap Global Management Limited
>
> [emphasis in original omitted; emphasis in italics added]

22 Lioncap Global's request caused concern to the plaintiff for two reasons. First, Lioncap Global had never before mentioned any need for any

[36] NSK p 876.

such transfer.[37] Second, the wording of the letter did not adequately protect the plaintiff's ownership of the shares.[38]

23 In order to protect the plaintiff's ownership, the plaintiff instructed its solicitor to propose amendments to the draft. She suggested several amendments. Only one of those amendments is material. That amendment was the express proviso italicised below, stipulating that "the legal and beneficial ownership of the shares" was to remain with the plaintiff:[39]

> Dear Sir/Madam
>
> We refer to the request of Lioncap Global Management Limited as the ~~Plegdee~~ Pledgee in relation to the Facility Agreement in the amount of HK$120,000,000 from Lioncap Asia Limited as set forth in the following documents:
>
> 1. Loan Facility Agreement …;
> 2. Share Pledge Agreement …:
> 3. Power of Attorney …;
>
> whereby Lioncap Global Management Limited has an intention to borrow shares from you which are owned by Acute Result Holdings Limited for the avoidance of doubt not to be owned by Lioncap Global Management Limited~~)~~ with the following details:
>
> …
>
> In accordance to the above-mentioned, we hereby ~~irrevocably instruct~~ do not object you:
>
> 1. To ~~transfer~~ lend the Shares ~~borrowed by~~ to Lioncap Global Management Limited ~~to the account with the following details~~ *however the legal and beneficial ownership of the Shares remain with us*:
>
> Acc. Number : …
>
> Beneficiary : Lioncap Global Management Limited

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37 NSK para 41.

38 YZ para 27; NSK para 45.

39 NSK para 54; p 876.

> [emphasis in original omitted; amendments indicated by double strikethrough and double underlining; emphasis in italics added]

24 Lioncap Global rejected some of the plaintiff's proposed amendments but did not reject the proviso.[40] Lioncap Global instead proposed further amendments to the draft, apparently originating from CIMB Indonesia.[41] Among other things, these amendments reinstated the language framing the letter as the plaintiff "irrevocably instructing" CIMB Indonesia to carry out the transfer rather than merely acquiescing to the transfer ("do not object").

25 In any event, the plaintiff decided that it would not sign the draft, even with the proviso. It was concerned because a number of months had elapsed since the plaintiff executed the loan facility agreements and security agreements and Lioncap Asia had failed to lend any money to the plaintiff. Further, the plaintiff wanted to reduce the loan quantum and secure the release of some of the 144m shares held in the plaintiff's account with CIMB Indonesia.[42]

26 In March 2017, the plaintiff informed Lioncap Global that it would not sign the draft.[43] As a result, the next day, Lioncap declared an event of default under the November 2016 agreements.[44] The plaintiff denied any default. It asserted that it had fulfilled all of its contractual obligations to Lioncap and that it was in fact Lioncap Asia who was in breach of its obligation to lend money to the plaintiff under the loan facility agreement.[45]

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40 NSK para 55.

41 NSK para 58.

42 NSK para 59.

43 NSK para 59.

44 NSK para 60; 2 AB 941.

45 NSK paras 62 to 63; 2 AB 945.

27 Later on in March 2017, with Lioncap Global's consent,[46] the plaintiff instructed CIMB Indonesia to transfer 30m of the shares back to its account with CMS. CIMB Indonesia duly carried out the transfer.[47] This left 114m shares in the plaintiff's account.

(2) The plaintiff and Lioncap Global enter into an addendum

28 On 20 April 2017, the plaintiff's representatives met Lioncap's representatives in an attempt to resolve matters.[48] Lioncap continued to insist that the plaintiff transfer the shares to Lioncap Global's account with the defendant. To reassure the plaintiff, Lioncap represented expressly that the plaintiff would remain the legal and beneficial owner of the shares even after the transfer and that the shares could not leave Lioncap Global's account without instructions from the plaintiff.[49]

29 The plaintiff and Lioncap reached an agreement at this meeting. As a result, at the conclusion of this meeting, they executed an addendum. Their intention was for the addendum to supplement and vary the November 2016 agreements.[50] Therefore the addendum contained the following express provisions (a) that the terms of the addendum amend the November 2016 agreements; (b) the terms of the addendum are to be treated as if they had been included in the November 2016 agreements; and (c) all other provision of the November 2016 agreements are to remain in full force and effect.[51]

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46 NSK para 34; SOC A2 para 18.

47 NSK para 39.

48 NSK para 69.

49 NSK para 70(c) and 70(d).

50 NSK para 72; p 910 to 917.

51 NSK p 910.

30 The contractual effect of the April 2017 addendum was threefold. First, the addendum reduced the quantum under the loan facility agreement from HK$120m to HK$50m.[52] Second, the addendum released 56.92m shares from Lioncap Global's security interest as no longer being needed, given the reduced quantum of the loan facility. Third, and most importantly, the plaintiff undertook an obligation to transfer 47.08m shares from its account with CIMB Indonesia to Lioncap Global's account with the defendant.

31 The plaintiff and Lioncap performed their obligations under the April 2017 addendum immediately upon executing it. Thus, they executed two further documents together with the addendum. These two documents were attached *pro forma* to the addendum.

32 First, the plaintiff signed a letter dated 20 April 2017 addressed to CIMB Indonesia instructing it to transfer 47.08m shares from the plaintiff's account with CIMB Indonesia to Lioncap Global's account with the defendant.[53] I shall refer to this letter as the "20 April 2017 instruction letter".

33 Second, the plaintiff and Lioncap Global signed a joint letter of instructions also dated 20 April 2017 addressed to CIMB Indonesia instructing it to transfer 56.92m shares from the plaintiff's account with CIMB Indonesia to the plaintiff's account with CMS.[54]

34 The joint letter of instructions is immaterial for present purposes and I need say no more about it. It suffices to note that, on 24 April 2017, CIMB

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52 NSK p 911.

53 NSK para 72(b), p 919 to 922; 1CB at p 123, 138.

54 NSK para 72(c), p 924.

Indonesia transferred the 56.92m shares back to the plaintiff's account with CMS.[55] This transfer left 57.08m shares in the plaintiff's account with CIMB Indonesia. It is these 57.08m shares which Lioncap Global went on to misappropriate from the plaintiff.

(3) The 20 April 2017 instruction letter

35 The 20 April 2017 instruction letter retained the language asserting that the shares would not, by reason of the instruction letter, be owned by Lioncap Global (see [21] above) as well as the proviso inserted by the plaintiff's solicitor (see [23] above):[56]

> Dear Sir/Madam,
>
> We refer to the request of LionCap Global Management Limited as the Pledgee in relation to the Facility Agreement in the amount of HK$50,000,000 from LionCap Asia Limited as set forth in the following documents:
>
> 1. Loan Facility Agreement …;
> 2. Share Pledge Agreement …;
> 3. Power of Attorney …;
>
> whereby LionCap Global Management Limited has an intention to borrow shares from you, which are owned by Acute Result Holdings Limited and *who will remain the beneficial owner* with the following details:
>
> …
>
> In accordance to the above-mentioned, we hereby do not object:
>
> 1. To lend the Shares borrowed to LionCap Global Management Limited *however the legal and beneficial ownership of the Shares remain with Acute Result Holdings Limited*
>
> Acc. Number : …
>
> Beneficiary : LionCap Global Management Limited

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55 SOC A2 para 20; 1CB at pp 270 to 273.

56 NSK para 72(b), p 919 to 922; 1CB at p 123, 138.

[emphasis in original omitted; emphasis in italics added]

36 CIMB Indonesia declined to act on this instruction letter. Its principal objection was that letter was framed as the plaintiff acquiescing to lending the 47.08m shares to Lioncap Global rather than irrevocably instructing CIMB Indonesia to transfer the 47.08m shares to Lioncap Global.[57] CIMB Indonesia, quite understandably, insisted that the plaintiff amend the letter so that it was – in accordance with CIMB Indonesia's standard form instructions for share transfers – framed as the plaintiff's irrevocable instructions to CIMB Indonesia to transfer the shares to Lioncap Global.

(4) The first instruction letter

37 By 24 April 2017, the plaintiff and Lioncap Global had resolved their issues with CIMB Indonesia about the wording of the 20 April 2017 instruction letter. On that day, the plaintiff issued a revised letter instructing CIMB Indonesia to transfer 47.08m shares from the plaintiff's account with CIMB Indonesia to Lioncap Global's account with the defendant.[58] I shall refer to this letter as the "first instruction letter".

38 The first instruction letter was in substantially the same terms as the 20 April instruction letter save that it addressed the principal issue that CIMB Indonesia had raised.[59] This letter was now framed expressly as the plaintiff's irrevocable instructions to CIMB Indonesia to transfer the 47.08m shares to Lioncap Global. Despite this, the first instruction letter retained the language asserting that the shares would not, by reason of the transfer, be owned by

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57 NSK p 920.

58 NSK para 82.

59 NSK para 85, p 983; YZ para 43; 1CB 430.

Lioncap Global (see [21] above) as well as the proviso inserted by the plaintiff's solicitor (see [23] above).

39 The first instruction letter was in the following terms:

> Dear Sir/Madam
>
> We refer to the request of Lioncap Global Management Limited as the Pledgee in relation to the Facility Agreement in the amount of HK$50,000,000 from Lioncap Asia Limited as set forth in the following documents:
>
> 1. Loan Facility Agreement …;
> 2. Share Pledge Agreement …:
> 3. Power of Attorney …;
>
> whereby Lioncap Global Management Limited has an intention to borrow shares under the your [*sic*] custody, which are owned by Acute Result Holdings Limited and *who will remain the beneficial owner of the shares* with the following details:
>
> …
>
> In accordance to the above-mentioned, we hereby irrevocably instruct you:
>
> > To transfer the Shares to Lioncap Global Management Limited, *however the legal and beneficial ownership of the Shares remain with Acute Result Holdings Limited*:
> >
> > Acc. Number : …
> >
> > Beneficiary : Lioncap Global Management Limited
>
> [emphasis in original omitted; emphasis in italics added]

40 On 28 April 2017, pursuant to the first instruction letter, CIMB Indonesia duly transferred the 47.08m shares to Lioncap Global.[60] This transfer left 10m shares in the plaintiff's account with CIMB Indonesia.

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60 DCS para 45.

41 On 16 May 2017, Lioncap Asia credited HK$45m, or about $7.8m, to the plaintiff's bank account, being the amount drawn down by the plaintiff under the loan facility agreement.[61] The loan was to mature in 36 months' time, on 15 May 2020. In the meantime, the plaintiff was to pay interest to Lioncap Asia at 6.65% per annum, quarterly in advance. The plaintiff paid the interest up to November 2018 (see [52]–[53] below).[62]

(5) The second instruction letter

42 On 18 May 2017, at Lioncap Global's request, the plaintiff signed and issued a second instruction letter to CIMB Indonesia.[63] This letter instructed CIMB Indonesia to transfer the remaining 10m shares in the plaintiff's account with CIMB Indonesia to Lioncap Global's account with the defendant. The second instruction letter is in terms virtually identical to the first instruction letter, save that it instructs CIMB Indonesia to transfer 10m shares instead of 47.08m shares.[64]

43 Pursuant to the second instruction letter, CIMB Indonesia duly transferred 10m shares to Lioncap Global on 31 May 2017.[65] This left zero shares in the plaintiff's account with CIMB Indonesia and 57.08m shares in Lioncap Global's account with the defendant.

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61 NSK para 88, pp 995 to 1005.

62 LMP para 88.

63 NSK para 90 to 91.

64 NSK p 1153 to 1155.

65 NSK para 95; LBK para 100.

Lioncap Global instructs the defendant to deal with the shares

44 In May and June 2017, Lioncap Global instructed the defendant to deal with the 57.08m shares as follows:[66]

(a) On 2 May 2017, the defendant opened 30m CFD positions on the shares with Lioncap Global as counterparty.[67] To cover these CFD positions, also on 2 May 2017, the defendant bought 30m out of the 57.08m shares from Lioncap Global for HK$79.08m,[68] or about $13.6m. This left 27.08m shares in Lioncap Global's account with the defendant.

(b) On 5 June 2017, the defendant delivered 17.08m Cabbeen shares to a company called Five T Investment Management Ltd ("Five T") against Five T's payment of HK$11.6m,[69] or about $2m. This left 10m shares in Lioncap Global's account with the defendant.

(c) On 19 June 2017, the defendant transferred 10m shares to Five T free of payment.[70] This left zero shares in Lioncap Global's account with the defendant.

45 The HK$45m which Lioncap Asia remitted to the plaintiff on 16 May 2017 (see [41] above) was part of the HK$79.08m proceeds of sale which Lioncap Global received from the defendant for the 30m shares (see [44(a)] above).

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66 SOC A2 para 29.

67 LBK para 86.

68 LBK para 87.

69 TCS paras 81 and 82; LBK paras 88 and 93.

70 TCS para 90; LBK para 105.

The plaintiff discovers the misappropriation

46 In August 2017, the plaintiff failed to receive dividends which Cabbeen had declared on the 57.08m shares.[71] From August 2017 to November 2017, the plaintiff put pressure on Lioncap Global to explain the failure. In November 2017, as a result of this pressure, Lioncap Global returned 2.26m shares to the plaintiff.[72] Lioncap Global failed to return any more of the shares.

47 The plaintiff ceased to engage Lioncap Global and instructed solicitors.[73]

48 At this point, the plaintiff was unaware of the dealings between the defendant and Lioncap and, in particular, of the matters set out at [44] above.

The first Hong Kong action

49 In April 2018, the plaintiff commenced action against Lioncap Global in Hong Kong to recover the missing shares.[74] Lioncap Asia was not a defendant to this action. In July 2018, the plaintiff secured a default judgment against Lioncap Global. The judgment declared Lioncap Global liable to procure the return of the missing shares to the plaintiff and to account to the plaintiff for the dividends paid on those shares.[75]

50 In the course of discovery in this action, the plaintiff secured disclosure of documents from CIMB Securities Ltd ("CIMB HK"). CIMB HK is a member of the same group of companies as the defendant but is a separate legal entity

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71 NSK para 144.

72 NSK para 182.

73 NSK para 186.

74 LMP para 76.

75 LMP para 78.

incorporated and carrying on business as a brokerage in Hong Kong. CIMB HK is not a party to this action.

51 As a result of the documents obtained from CIMB HK, the plaintiff discovered the dealings between the defendant and Lioncap and, in particular, the matters set out at [44] above. As a result of what it discovered, the plaintiff now brings this action in Singapore against the defendant.[76]

The second Hong Kong action

52 Up to August 2018, the plaintiff had duly paid Lioncap Asia the quarterly interest due on the HK$45m loan which it had drawn down under the loan facility agreement in May 2017 (see [41] above). In August 2018, in view of the default judgment against Lioncap Global, the plaintiff stopped paying interest. Lioncap Asia then declared an event of default under the loan facility agreement.[77] As a result, the plaintiff paid Lioncap Asia under protest the interest due for the quarter ending November 2018, while continuing its attempts to recover the missing shares and dividends.

53 In November 2018, Lioncap Asia demanded the next interest payment due on the loan. By this time, the plaintiff had failed to recover anything from Lioncap Global, despite the default judgment in the first Hong Kong action. The plaintiff therefore refused to pay any further interest to Lioncap Asia. Instead,

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76 LMP para 81 to 86.

77 LMP para 89.

it commenced action against both Lioncap Global and Lioncap Asia to have the November 2016 agreements rescinded.[78]

54 In May 2019, the plaintiff secured a default judgment in the second Hong Kong action against Lioncap Global and Lioncap Asia. The default judgment:[79]

(a) declared the loan facility agreement, the security agreements, the April 2017 addendum and both instruction letters voidable and rescinded;

(b) declared the plaintiff to be the beneficial owner of the 57.08m shares together with their traceable proceeds and all dividends paid on them; and

(c) required Lioncap Global to transfer the 57.08m shares to the plaintiff and to pay all sums due to the plaintiff, against which the plaintiff was to return to Lioncap Asia the HK$45m which it had lent the plaintiff (see [41] above), provided that Lioncap Asia refunded the interest which the plaintiff had paid it.

The parties' cases

55 The plaintiff's case on the first tranche is as follows. The plaintiff's intention in entering into the security agreements and transferring the shares to Lioncap Global was not to benefit Lioncap Global but merely to create a security interest in the shares in favour of Lioncap Global.[80] Therefore, Lioncap

78 LMP para 90 to 91.

79 LMP para 96.

80 PCS para 63 to 64.

Global held the 57.08m shares on resulting trust for the plaintiff. Alternatively, if the effect of the first and second instruction letters was to transfer legal title to the shares to Lioncap Global, it held the shares on an express trust for the plaintiff.[81] In either event, Lioncap Global misappropriated the shares in breach of trust.[82] The defendant knew that Lioncap Global was dealing with the shares in breach of trust.[83] The defendant therefore: (i) received the 30m shares from Lioncap Global with knowledge of the breach of trust; (ii) holds the 30m shares on constructive trust for the plaintiff;[84] (iii) dishonestly assisted Lioncap Global in its breach of trust in respect of all of the shares;[85] or (iv) breached a duty of care in tort by transferring the shares out of Lioncap Global's account so as to render Lioncap Global the beneficial owner of the shares.[86]

56 The defendant's case in response is as follows. Lioncap Global was not any sort of trustee for the plaintiff at any time, either by reason of the plaintiff's intention in entering into the November 2016 agreements or by reason of the transfers of the shares in April and May 2017.[87] Even if Lioncap Global was a trustee of some sort, the plaintiff has failed to discharge its burden of proving that Lioncap Global acted in breach of the alleged trust.[88] Even if Lioncap Global did act in breach of trust, the defendant was not dishonest and did not know that Lioncap Global was dealing with the shares in breach of trust.[89] As

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81 PCS para 98.

82 PCS para 108.

83 SOC A2 para 32.

84 SOC A2 paras 35 to 37; PCS paras 296 to 305.

85 SOC A2 para 39 to 40; PCS paras 57 to 295.

86 SOC A2 para 42A; PCS paras 308 to 370.

87 DCS paras 69 to 149.

88 DCS paras 150 to 160.

89 DCS paras 161 to 285.

for the plaintiff's claim in negligence, a financial institution (*ie* the defendant) owes no duty to a third party (*ie* the plaintiff) to take reasonable care to protect that third party from a fraud perpetrated by one of the financial institution's customers (*ie* Lioncap Global). Any attempt to impose such duty would be contrary to principle, precedent and policy.[90]

57 With specific reference to the 30m shares which the defendant purchased from Lioncap Global (see [44(a)] above), the defendant's case is as follows. The plaintiff's pleaded case against the defendant asserts liability only for dishonest assistance and knowing receipt. These are forms of liability in equity which are purely personal liability. The plaintiff's pleaded causes of action can therefore yield only personal remedies in equity, not proprietary remedies.[91] The plaintiff's prayer for a declaration that the defendant holds the 30m shares on trust for the plaintiff and an order requiring it to transfer the shares to the plaintiff is therefore not tethered to any pleaded cause of action. In any event, the defendant acted in good faith in accordance with the instructions of its customer, Lioncap Global, in opening the 30m CFD positions and in purchasing the 30m shares from Lioncap Global to cover the positions.[92] The defendant was therefore a *bona fide* purchaser for value of the 30m shares without notice of any alleged beneficial interest which the plaintiff may have had in them.[93]

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90 DCS para 286 to 292.

91 DSC para 281; DRS paras 100 to 101.

92 Defence A2 para 12(2); Transcript, 24 July 2020, p 119:4 to 7.

93 DCS para 281; Defence A2 para 16B.

Establishing a trust is essential to the plaintiff's case in equity

58 The essence of the plaintiff's case in equity is that Lioncap Global dealt with the shares in breach of trust or in breach of a fiduciary duty owed to the plaintiff.[94] The defendant is not in a position to deny this aspect of the plaintiff's case. All it can do is to put the plaintiff to proof.[95]

59 Proving that Lioncap Global held the shares on trust for the plaintiff is therefore absolutely essential to the plaintiff's claims in equity. A trust is the plaintiff's only basis for asserting that Lioncap Global owed a fiduciary duty to the plaintiff. Without an underlying fiduciary duty, a third party cannot be held personally liable for knowing receipt or dishonest assistance: *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 at [20] and [23]. Further, plaintiff's counsel confirmed that the constructive trust it asserts in this action is an institutional constructive trust and not a remedial constructive trust.[96] The proprietary base necessary for an institutional constructive trust to arise is absent unless Lioncap Global held the shares on trust for the plaintiff at the time the defendant purchased those shares.

Preliminary point on the pleadings

60 On the issue of whether Lioncap Global was a trustee for the plaintiff, the defendant takes the preliminary point that the plaintiff has impermissibly departed from its pleadings.[97] The defendant's argument on its preliminary point proceeds as follows. The plaintiff's statement of claim asserts that the source of

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94 SOC A2 paras 29 and 30.

95 D A2 paras 11 and 14.

96 Transcript, 19 November 2020, p 54:6 to 11.

97 DCS paras 72 to 74.

the trustee/beneficiary relationship lies in the contractual terms of the November 2016 agreements. Thus, the plaintiff pleads expressly that *because* no event of default ever occurred under the security agreements, the plaintiff was and is the beneficial owner of the shares.[98] By this plea, the plaintiff asserts that a trust arose because the contractual terms of the security agreements never operated to vest equitable title to the shares in Lioncap Global. If that is the plaintiff's case, the only intention of the plaintiff which is material is its intention as manifested in the November 2016 agreements. Its intention at any time *after* November 2016 is immaterial.[99] Its intention manifested *outside* the November 2016 agreements is equally immaterial. However, in its closing submissions, the plaintiff asserts that the trustee/beneficiary relationship arose when the plaintiff transferred the shares to Lioncap Global in April and May 2017. A resulting trust is said to have arisen upon those transfers because the plaintiff had no intention to benefit the defendant by the transfers.[100] Alternatively, an express trust is said to have arisen then because of the terms of the first and second instruction letters, by which the plaintiff expressly retained the beneficial interest in the shares.

61 The defendant also takes the further point on the pleadings that, although the plaintiff pleads expressly that it was and is beneficially entitled to the shares, it has nowhere pleaded that the legal basis for this plea is that Lioncap Global held the shares on trust for the plaintiff, let alone on resulting trust.[101]

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98 SOC A2 paras 26 and 27.

99 PCS para 66 and 68.

100 DCS paras 60 and 72.

101 DCS para 73.

62 In response, the plaintiff submits that it has sufficiently pleaded all the essential facts on which to now advance a case that Lioncap Global was a trustee of the shares for the plaintiff and also as to how and when it became a trustee. That is all that the plaintiff needs to do in order now to advance a case that Lioncap Global was either a resulting trustee or an express trustee for the plaintiff: *Lin Chao-Feng v Chuang Hsin-Yi* [2010] 4 SLR 427 at [15] and [19].[102]

63 I accept the defendant's submission that the plaintiff has changed its case between its pleadings and its closing submissions. However, I decline to reject the case which the plaintiff now advances on this technical point alone. I say that for three reasons.

64 First, I accept the plaintiff's submission that a pleader's duty is to plead facts not law. Once the material facts have been pleaded, the pleader can develop the legal consequences of those facts in submissions.[103] I would add only the proviso that the legal consequences which the pleader develops in submissions must not take the opposing party by surprise so as to cause it prejudice which cannot be remedied.

65 Second, I have found against the plaintiff on the case it now advances in its closing submissions. I must assume that, by advancing that case, the plaintiff has abandoned its pleaded case. I must also assume that the case which the plaintiff now advances is its best and final case against the defendant. Given my finding that the plaintiff fails even on its best case, it makes no difference whether that case was or was not adequately pleaded.

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102 PRS para 10.

103 PRS para 10.

66 Finally and most importantly, allowing the plaintiff to advance this case, even though it is a change from its pleaded case, causes the defendant no prejudice. The defendant was aware of the changed case from the time of the plaintiff's oral opening at trial. The changed case became clear as a result of plaintiff's counsel's responses to my questions on the very issue of the source of the trustee/beneficiary relationship.[104] Thereafter, defendant's counsel cross-examined the plaintiff's witnesses on the basis of the changed case as well as on the basis of the original pleaded case. There is also no suggestion that the defendant required any further discovery to deal with the changed case. That is why the defendant quite rightly does not suggest that it will suffer any prejudice if the plaintiff is permitted to advance the changed case.[105] That is also presumably why, as the plaintiff points out, the defendant did not take the pleading point at trial or pursue it with any vigour in submissions.[106]

67 I therefore examine on the merits the plaintiff's case that Lioncap Global was a trustee for the plaintiff by reason of the transfers. I first analyse the plaintiff's case of a resulting trust before analysing its alternative case of an express trust.

Lioncap was not a resulting trustee of the shares

A summary of the law relating to resulting trusts

68 A resulting trust arises when a transferor transfers property to a transferee lacking the intention to benefit the transferee: *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [35] ("*Lau Siew Kim*"); *Chan Yuen*

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104 Transcript, 13 July 2020, p 15:21 to 16:3; 18:8 to 20:20.

105 PRS para 21 to 22.

106 PRS para 8.

Lan v See Fong Mun [2014] 3 SLR 1048 at [43] ("*Chan Yuen Lan*"). The two factual elements which give rise to a resulting trust are therefore: (a) a transfer of property to a transferee; and (b) circumstances in which the transferor does not intend to benefit the transferee: *Moh Tai Siang v Moh Tai Tong and another* [2018] SGHC 280 at [72]; Robert Chambers, *Resulting Trusts* (Clarendon Press, Oxford 1997) ("*Chambers' Resulting Trusts*") at p 32, accepted in *Lau Siew Kim* at [35].

69 A transferor's lack of intention to benefit the transferee can be established in two ways: (a) by a failure to rebut the presumption of resulting trust which arises when a transferee of property does not provide the whole of the consideration for the transfer; or (b) by evidence of the transferor's intention with respect to the transfer. The court should not resort to the presumption if there is evidence which can prove the transferor's intention or from which that intention can be inferred: *Chan Yuen Lan* at [51] (broadly approving *Neo Hui Ling v Ang Ah Sew* [2012] 2 SLR 831 at [25]).

70 The primary case of both parties is that there is sufficient evidence to make a finding as to the plaintiff's intention at the material time. As such, I begin by analysing that evidence.

The time at which to ascertain intention

71 In the resulting trust analysis, the time at which to ascertain a transferor's intention is the time it transferred its property to the transferee. The transfers of the plaintiff's property to Lioncap Global took place on 28 April 2017 and 31 May 2017 (see [40] and [43] above). However, on the facts of this case, that is not the correct time at which to ascertain plaintiff's intention.

72 The correct time at which to ascertain the plaintiff's intention is 20 April 2017. I say that for three reasons. First, 20 April 2017 is when the plaintiff signed the April 2017 addendum and undertook a contractual obligation to transfer the shares to Lioncap Global's account with the defendant. Second, by signing and issuing the 20 April 2017 instruction letter in performance of this contractual obligation, the plaintiff evinced that it was ready, willing and able to do all within its power to transfer the shares to Lioncap Global. That is so even though this letter ultimately proved ineffective because CIMB Indonesia rejected it. Third, neither party suggests that the plaintiff's intention changed between: (a) the date it signed the addendum and the rejected instruction letter (20 April 2017) and the date it signed the first instruction letter (24 April 2017); (b) between the date it signed the first instruction letter (24 April 2017) and the date it signed the second instruction letter (18 May 2017); or (c) between the dates on which it signed each instruction letter (24 April 2017 and 18 May 2017) and the dates on which CIMB Indonesia actually transferred the shares to Lioncap Global (28 April 2017 and 31 May 2017).

73 I therefore analyse the evidence to ascertain the plaintiff's intention as at 20 April 2017.

The parties' cases as to the plaintiff's intention on 20 April 2017

74 The plaintiff's case as to its intention on 20 April 2017 is as follows. The plaintiff's only intention in November 2016 was to create a security interest in favour of Lioncap Global. The plaintiff therefore had no intention to benefit Lioncap Global in November 2016.[107] That intention remained unchanged between November 2016 and 20 April 2017. The plaintiff therefore continued

[107] PCS para 69 to 70.

to have no intention to benefit Lioncap Global on 20 April 2017.[108] On the authority of *Lau Siew Kim* and *Chan Yuen Lan*, Lioncap Global therefore became a resulting trustee of the shares for the plaintiff when it received the shares in April and May 2017.

75 The defendant's case as to the plaintiff's intention on 20 April 2017 is as follows. Even if it is true that the plaintiff's intention remained unchanged from November 2016 to 20 April 2017, its intention on its own case at all times was to create a security interest in favour of Lioncap Global. That intention is wholly incompatible with a resulting trust arising in the plaintiff's favour, before or after the transfer of the shares to Lioncap Global.[109] In the alternative, the plaintiff's intention on 20 April 2017 was to lend the shares to Lioncap Global as part of a share lending agreement, the very commercial purpose of which requires Lioncap Global to acquire the beneficial interest in the shares.

76 Before turning to analyse the evidence, I note at the outset that the plaintiff has been very careful to advance its case as to its intention on 20 April 2017 precisely as the lack of intention analysis of the resulting trust requires: by asserting that the plaintiff had no intention to benefit Lioncap Global when it transferred the shares to Lioncap Global.[110]

77 But that is not the plaintiff's case in substance. If that were indeed the plaintiff's case, it would simply adduce evidence from Mr Yang and Mr Ng that the plaintiff never formed any such intention on or about 20 April 2017. The plaintiff's case on its intention is not simply that it *lacked* an intention to benefit

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108 PRS paras 26 to 27.

109 DCS para 75.

110 PCS paras 70, 79; PRS para 13.

Lioncap Global. Its case goes well beyond that. Its case is that it had an *actual* intention *not* to benefit Lioncap Global. That is what the plaintiff is attempting to prove by relying on the express language of the security agreements, the express language of the instruction letters (see the two italicised phrases at [39] above) and the evidence of the plaintiff's witnesses at trial.

78 In that sense, and despite the very careful wording by which the plaintiff advances its case, its case on intention deliberately goes further than the lack of intention analysis in *Lau Siew Kim* and *Chan Yuen Lan* requires it to go. This has an important consequence. If the plaintiff fails in its attempt to establish a resulting trust on the basis that it had an *actual* intention *not* to benefit Lioncap Global on 20 April 2017, that leaves the plaintiff no forensic room to fall back on the presumption of a resulting trust or on an express trust.

The security agreements created only a security interest

79 For the reasons which follow, I accept the defendant's case and reject the plaintiff's case as to the plaintiff's intention on 20 April 2017.

80 The plaintiff and the defendant agree on three points. First, the security agreements are evidence of the plaintiff's intention in November 2016 to create nothing more than a security interest over the shares in favour of Lioncap Global.[111] Second, the security agreements did not transfer any property in the shares to Lioncap Global.[112] Third, even though the security agreements call themselves "Share Pledge Agreements", the security interest they created could not have been a pledge.[113]

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111 PCS para 64; DCS para 86; PRS para 24.

112 PCS para 65; DCS para 83(a).

113 NE 19 Nov 2020, p23 line 5 to 6; p39 line 3 to 4; DCS para 83; PRS para 28.

81 All three of these points are correct. The first two points are correct simply because that is what the security agreements expressly provide. The third point is correct because the only assets which can be the subject of a pledge are assets reducible to possession, *ie*, chattels or documentary intangibles. A share is not a chattel: it is a chose in action. It is also not a documentary intangible. A documentary intangible is an intangible asset represented by a document of title. Documents of title include bills of lading, bills of exchange and negotiable securities. A share certificate, at least in respect of a Singapore company, is not a document of title. Shares in a Singapore company (see [17] above) cannot therefore be the subject of a pledge: *Qilin World Capital Ltd v CPIT Investments Ltd* [2018] 2 SLR 1 at [4].

The security agreements created a charge

82 As to the true nature of the security interest which the plaintiff created in favour of Lioncap Global, the plaintiff's case is that the security interest was a charge.[114] The defendant's case is that cl 3.01 of the security agreements envisaged Lioncap Global taking either a charge or a mortgage. Which interest Lioncap Global actually took depended on how it exercised its right to require the plaintiff to appropriate the shares to the security under that clause.[115] If Lioncap Global exercised that right by requiring the plaintiff to transfer ownership of the shares to Lioncap Global, the security interest would be a mortgage. If Lioncap Global exercised that right so as to allow the plaintiff to retain ownership of the shares, it would be a charge.

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114 PCS para 65.

115 DCS para 83.

83 In my view, the plaintiff's analysis is correct but incomplete. The defendant's analysis is both correct and complete.

84 Leaving aside for the time being security interests which are created by or under statute, a security interest is simply a right which X grants to Y consensually, *ie*, by contract, for Y to exercise some sort of right over X's property upon X's default in performing an obligation. The obligation secured by the interest is typically a debt which X owes to Y. But it can be any type of obligation and can even be one which X owes, as in this case, to someone *other* than Y.

85 If the security interest includes Y's power to sell or compel a sale of the security, the security interest is either a charge or a mortgage. If, in addition, the security interest involves a transfer of ownership of the security or of some other property right in the security to Y, it is a mortgage. If the security interest does not involve any such transfer, it is a charge: *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd and another* [1985] Ch 207 at 227, cited in Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ("*Goode & Gullifer*") at para 1-55.

86 Creating a charge in favour of Y therefore transfers ownership of no existing property right in the security to Y. The charge merely creates a new proprietary interest in the security and vests it in Y: Hugh Beale *et al*, *The Law of Security and Title-based Financing* (Oxford University Press, 3rd Ed, 2018) ("*Security and Title-based Financing*") at para 6.52. That proprietary interest subsists as an incumbrance on the security, *ie* as a restriction on X's unfettered right as owner to deal with the security, until X discharges the obligation or the incumbrance is otherwise released in accordance with the parties' agreement.

87 On the facts of this case, the security interest which the plaintiff created in favour of Lioncap Global was a charge. That is because Lioncap Global's security interest attached to the shares without any transfer of ownership. Instead, under cl 3.01 of the security agreements, Lioncap Global directed the plaintiff to appropriate the shares to the security interest by delivering the shares to a dedicated account in the plaintiff's own name. Lioncap Global therefore acquired no ownership of or in the shares, and acquired only a right to have recourse to the shares in the event the plaintiff defaulted on its debt to Lioncap Asia: *Re Lin Securities (Pte) Ltd* [1988] 1 SLR(R) 220 at [19]–[21]. All of that makes Lioncap Global's security interest in the shares a charge, not a mortgage.

88 The plaintiff takes the position that it is not material for present purposes to characterise the true nature of Lioncap Global's security interest in the shares.[116] I disagree. A resulting trust is definitionally incompatible with a charge. That is the inevitable result of the defining characteristics of both a resulting trust and of a charge. One of the defining characteristics of a resulting trust is a transfer of ownership of the transferor's property to the resulting trustee (see [68] above). One of the defining characteristics of a charge is that it does not transfer any ownership of the security to the chargee (see [84] above). A transfer of ownership being essential for a resulting trust to arise, a charge can never give rise to a resulting trust. A transfer of property negating the creation of a charge, a resulting trust can never give rise to a charge. That is no doubt why the plaintiff no longer attempts to trace the origin of the resulting trust it relies on to the plaintiff's entry into the November 2016 agreements and the transfers of the shares into the plaintiff's account with CIMB Indonesia in January and February 2017 pursuant to those agreements (see [19] above).

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116 PRS para 28.

The security agreements created an equitable charge

89 Contrary to the plaintiff's submissions,[117] the charge which Lioncap Global took over the shares was not a legal charge but an equitable charge. It is immaterial that the recitals[118] and cl 2.01[119] of the security agreements describe the security interest as a "legal charge". The proprietary right created by a charge arises and is recognised only in equity, not at common law. All charges created by contract – as opposed to those created by statute – are therefore by definition equitable charges. That is so regardless of whether the subject-matter of the charge is property which is recognised at law or in equity.

The subject-matter of the charge was the plaintiff's equitable interest in the shares

90 The subject matter of the equitable charge which the plaintiff created in favour of Lioncap Global is the plaintiff's *beneficial* interest in the shares, not the *legal* interest. That is because the plaintiff never owned the legal interest in any of the shares. The legal interest in all shares traded on the Hong Kong Stock Exchange is vested permanently in a nominee designated by the exchange. Immobilising the legal interest in this way allows trades on the exchange to be settled scriplessly. Trades therefore settle without any conveyance of the legal interest, *ie* without the need to present share certificates and transfer forms to the company and without the delay, cost and paperwork that that entails. Trades on the exchange therefore involve a transfer of only the beneficial interest in the

117 PCS para 65.

118 NSK p 654, 680.

119 NSK p 657, 683.

shares traded. The only interest which the plaintiff ever had in the shares for present purposes was a beneficial interest.[120]

91 The plaintiff held the beneficial interest in the shares at the end of a chain of trusts. That chain started from the nominee in whom legal title to the shares was immobilised. That nominee held legal title to the shares on a bare trust. The beneficial interest under that trust ran through a chain of financial intermediaries, such as custodians and nominees, to the plaintiff. Each link in the chain held the bare equitable title to the beneficial interest in the shares on trust, or more accurately sub-trust, for the next link in the chain. The final link in the chain is the plaintiff, in whom is vested not bare equitable title but the entire beneficial interest in the shares:[121] Michael Bridge *et al*, *The Law of Personal Property* (Sweet & Maxwell, 2nd Ed, 2018) ("*Law of Personal Property*") at paras 6-050 and 6-051. The beneficial interest in the shares was the only property in the shares which the plaintiff owned and could charge to Lioncap Global.

92 Regardless of the true legal position, however, I will in this judgment ignore the chain of trusts by which the plaintiff as beneficial owner held these intermediated securities. I will treat the plaintiff as the absolute owner of the shares immediately before Lioncap Global's equitable charge attached to the shares upon delivery under cl 3.01 of the security agreements. When I refer to legal title to the shares in this judgment, I therefore refer in reality to the bare equitable title to the beneficial interest in the shares. If the plaintiff cannot succeed on this stylised analysis of the property rights in intermediated securities, it cannot succeed on any deeper analysis of the true legal position.

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120 DCS para 83(b).

121 Transcript, 19 November 2020, p 10:9 to 13.

The plaintiff intended to confer a benefit on Lioncap Global

93 It is not disputed that the first of the two elements necessary to give rise to a resulting trust (see [68] above) was satisfied when the plaintiff transferred the shares to Lioncap Global in April and May 2017.[122]

94 The plaintiff's case is that the second element necessary to give rise to a resulting trust was satisfied because the plaintiff's intention on 20 April 2017 remained the same as it was in November 2016: to do no more than create a security interest in Lioncap Global's favour.[123] The plaintiff's submission, in effect, is that an intention to create a security interest in favour of Lioncap Global negates any intention to confer a benefit on Lioncap Global and therefore satisfies the second element necessary for a resulting trust to arise.

95 As a matter of fact, as a matter of precedent and as a matter of principle, I do not accept the plaintiff's submission. An intention to create a security interest in favour of a transferee suffices, in itself, to prevent the second element necessary for a resulting trust to arise from being satisfied. The legal relationship between the grantor and the grantee of any type of security interest is fundamentally incompatible with the relationship of trustee and *cestui que trust* under a resulting trust.

(1) Fact

96 As a matter of fact, the plaintiff did intend to confer a benefit on Lioncap Global on 20 April 2017, when it entered into the April 2017 addendum. The benefit was the contractual obligation which the plaintiff undertook in the April

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122 Transcript, 19 November 2020, pp 10:25–11:2 (Acute), 88:16–18 (CIMB Singapore).

123 PCS para 70.

2017 addendum to transfer the shares to Lioncap Global. This was factually a benefit to Lioncap Global because Lioncap Global acquired a right which it did not have before 20 April 2017.

97 Further, the plaintiff actually conferred a benefit on Lioncap Global when it transferred the shares to Lioncap Global. Before the April 2017 addendum, Lioncap Global had only a charge over the shares, *ie*, a security interest in the shares *without* a transfer of ownership of any property in the shares. By transferring the shares to Lioncap Global, the plaintiff improved Lioncap Global's security interest in the shares. If, contrary to the plaintiff's case, it transferred the shares to Lioncap Global intending to convey with them the beneficial interest in the shares to Lioncap Global, the result is that the plaintiff converted Lioncap Global's charge into a mortgage. A mortgage is both *de facto* and *de jure* a stronger security interest than a charge. Transferring shares which are subject to a charge to the chargee so as to subject them to a mortgage is a *de facto* and a *de jure* benefit to the erstwhile chargee, and new mortgagee.

98 On the other hand, if the plaintiff transferred the shares to Lioncap Global intending *not* to convey the beneficial interest in the shares to Lioncap Global, as the plaintiff submits (and even if I accept that that intention operated in equity by itself to separate the bare equitable title to the shares from the beneficial interest in the shares) the transfer nevertheless conferred a factual benefit on Lioncap Global. That benefit was to strengthen Lioncap Global's control of the shares. Even on the plaintiff's own case, the transfer at the very least ceded control of the shares to Lioncap Global. Ceding control in this way (even if doing so did not involve a transfer of ownership of any property in the shares to Lioncap Global) improved Lioncap Global's existing charge in a

practical sense. If nothing else, it tightened Lioncap Global's existing encumbrance over the shares by giving Lioncap Global control over the shares.

99 In either event, I accept the defendant's submission[124] that an intention to confer a factual benefit by creating or improving a security interest suffices in itself to prevent the second element necessary for a resulting trust to arise from being satisfied (see [68] above). I do not accept the plaintiff's submission that only an intention to transfer the beneficial interest in the shares suffices to prevent the second element from being satisfied.[125] So long as a transferor intends a transfer of property to confer a factual benefit on a transferee, the transferee's conscience is unaffected by the transfer and equity does not intervene by separating legal title from beneficial interest by imposing a resulting trust.

100 As a matter of fact, therefore, the plaintiff had an actual intention to benefit Lioncap Global on 20 April 2017.

(2) Precedent

(A) MKC ASSOCIATES CO LTD V KABUSHIKI KAISHA HONJIN

101 As a matter of precedent, as the defendant correctly points out,[126] the relationship between the grantor and the grantee of a security interest is fundamentally and conceptually distinct from the relationship between a beneficiary and a trustee under a trust: *MKC Associates Co Ltd v Kabushiki Kaisha Honjin and others (Neo Lay Hiang Pamela and another, third parties;*

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124 Transcript, 19 November 2020, p 92:25 to 93:3; p 93:27 to 94:4; p 95:1 to 15.

125 Transcript, 19 November 2020, p 154:7 to 155:28.

126 DCS para 75.

Honjin Singapore Pte Ltd and others, fourth parties) [2017] SGHC 317 ("*MKC*") at [148]–[151]. A trust coexists with the security interest if and only if the instrument creating the security interest makes express provision to that effect: *MKC* at [152]–[153]. There is no provision, express or implied, in the security agreements or the April 2017 addendum which makes Lioncap Global a trustee for the plaintiff.[127]

(B) YUANTA ASSET MANAGEMENT INTERNATIONAL LTD V TELEMEDIA PACIFIC GROUP LTD

102 To meet this point of precedent, the plaintiff relies on *Yuanta Asset Management International Ltd and another v Telemedia Pacific Group Ltd and another and another appeal* [2018] 2 SLR 21 ("*Yuanta*"). In that case, X and Y were joint venturers. Y agreed with X to procure loans for their joint venture vehicle. The loans could be advanced either by Y or by a third party sourced by Y. X transferred certain shares to Y which Y was to use as security for the loans: at [53]–[54]. Y sold part of the shares for its own benefit, without X's knowledge or consent.

103 At first instance, Y and its sole director were held liable for selling the shares without X's authority and for making a secret profit from the sale. On appeal, the Court of Appeal held that the parties' contractual arrangements meant that X's transfer of the shares to Y transferred only legal title to the shares to Y. The beneficial interest in the shares remained with X despite the transfer. This separation of legal title to the shares from the beneficial interest in the shares meant that Y held the shares impressed with a trust in favour of X: at [40]. Y therefore had no right to dispose of the shares as their absolute owner: at [49].

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127 DCS para 84.

104 *Yuanta* does suggest *prima facie* that the plaintiff's transfer of the shares to Lioncap Global gave rise to a trust in favour of the plaintiff. As in *Yuanta*, the November 2016 agreements and the instruction letters manifest the plaintiff's intention that the beneficial interest in the shares should remain with the plaintiff unless and until there was an event of default. It could be said that the security agreements in particular manifest a shared contractual intention to separate legal title (or more accurately in this case, bare equitable title) from the beneficial interest in the shares, with the beneficial interest remaining with the plaintiff in the absence of an event of default.

105 As the defendant submits,[128] however, the result in *Yuanta* arose from the specific contractual arrangements between X and Y: at [45]. *Yuanta* is not authority for the broader proposition which the plaintiff seeks to extract from it: that a transfer of an asset to a transferee when the transferee intends only to create a security interest in that asset in favour of the transferee constitutes the transferee a trustee of the asset for the transferor.

106 In truth, the transaction in *Yuanta* did not create an immediate security interest in the shares in order to secure an existing obligation to lend. First of all, Y was under no obligation to lend any money to X when it received the shares from X: *Yuanta* at [13] and [54]. Further, under the agreements in *Yuanta*, X gave Y express authority to sell, trade or pledge the shares unilaterally, at Y's discretion: at [14]. Y was also entitled, upon X's discharge of the debt, either to return the shares to X or to pay X the value of the shares in cash. All of these rights are entirely antithetical to the equity of redemption, the defining characteristic of a security interest. The inclusion of these rights in the parties' bargain is therefore inconsistent with an intention to create an immediate

128 DRS para 36.

security interest. It is not therefore surprising that the Court of Appeal held that the parties' contractual arrangements made Y a trustee of the shares, which Y held as *potential* security for *future* loans: at [55(a)]. In other words, Y in *Yuanta* was not on the facts of that case ever a chargee or a mortgagee of the shares or obliged to become a creditor of X.

107 Lioncap was in a wholly different position. From January 2017 to April 2017, Lioncap Global was an equitable chargee of the shares. In April 2017, by reason of the transfers pursuant to the April 2017 Addendum, Lioncap Global became either a mortgagee of the shares[129] or a chargee with enhanced control of the shares. Y in *Yuanta* was never in the same position.

108 As a matter of precedent, therefore, Lioncap Global was not a trustee for the plaintiff by reason of the transfers.

(3) Principle

109 As a matter of principle, if Lioncap Global were a resulting trustee of the shares for the plaintiff on these facts, that would mean that every security interest would, in itself, always constitute the grantee of the security interest a resulting trustee of the security for the grantor, with all of the consequences that that entails in equity.

110 That proposition need only be stated to be rejected as completely contrary to principle. The proposition would defeat well settled and entirely reasonable commercial expectations in the marketplace for secured lending. It would also undermine the risk and pricing models of the participants on both sides of that vital marketplace, with wide ranging consequences.

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129 1CB at pp 51 and 122; 1CB at pp 25 and 99.

111 Furthermore, as a matter of principle, it is especially important that the proprietary consequences of a transfer of property are known with certainty at the time of the transfer. That is no doubt why the Court of Appeal warned against taking an unduly wide reading of the doctrine of resulting trusts: *Chan Yuen Lan* at [48]. A lavish approach to the second element would allow a transferor to transfer ownership of property to a transferee and then to claim a property interest in the property based purely on its unverifiable and unfalsifiable subjective intention at the time of the transfer, well after the fact and without complying with the three certainties necessary to constitute the transferee an express trustee of the transferred property.

Conclusion

112 In summary, I find that the plaintiff had an actual intention to confer a benefit on Lioncap Global when it transferred the shares to Lioncap Global. That benefit was improving Lioncap Global's security interest *de facto* or *de jure*. An intention to confer that benefit on Lioncap Global suffices in itself to negate the second element necessary to establish a resulting trust. This finding not only defeats the plaintiff's case on lack of intention, it also leaves no room for the presumption of a resulting trust to operate: *Chan Yuen Lan* at [51]. No resulting trust arose over the shares.

113 I now turn to consider the plaintiff's alternative case: that Lioncap Global was an express trustee of the shares for the plaintiff.

Lioncap was not an express trustee of the shares

114 The three certainties which must be established to constitute an express trust are set out in *The State-Owned Company Yugoimport SDPR (also known*

as Jugoimport-SDPR) v Westacre Investment Inc and other appeals [2016] 5 SLR 372 at [55]:

> 55 Under Singapore law, an express trust arises only when the three certainties are present: certainty of intention, certainty of subject matter and certainty of the objects of the trust. … [C]ertainty of intention … requires clear evidence of an *intention on the part of the alleged settlor to create a trust and to subject the trust property to trust obligations*, as opposed to creating any other form of binding legal relationship (for example, a contractual relationship). ...
>
> [emphasis added]

115 On the plaintiff's own case, its actual intention at all times was to create a security interest in favour of Lioncap Global. That intention is, for the reasons I have already given, incompatible with an intention not to confer a benefit on Lioncap Global for the purposes of the resulting trust analysis. It is equally incompatible with the certainty of intention to create a trust for the express trust analysis.

116 The rights of a grantee of a security interest are wholly inconsistent with the duties of an express trustee. The very purpose of the security interest is that the grantee should be able to act in its own interests upon default. Where a mortgagor transfers mortgaged property to the mortgagee or where a chargor cedes control of the charged property to the chargee, it is no doubt true that a dishonest mortgagee or chargee thereby acquires the power *de facto* to misappropriate the security even without a default or otherwise in breach of the parties' agreement. But all that that means is that a grantor of a security interest should choose its grantee with great care. That is not a basis on which to find certainty of intention to create a trust where there was an express intention to create a security interest.

117 I therefore hold that no express trust arose over the shares. It is therefore unnecessary for me to consider the defendant's alternative case, ie that the plaintiff's intention on 20 April 2017 was to lend the shares to Lioncap Global as part of a commercial share lending agreement.

Conclusion on the case against the defendant in equity

118 For all of the foregoing reasons, I hold that the 57.08m shares were not the subject of any trust, whether resulting or express. I have arrived at that conclusion on my analysis of the plaintiff's own case. It is therefore unnecessary for me to analyse the defendant's alternative case that the true reason for the transfer of the 57.08m shares was a share lending agreement, the commercial purpose of which is to vest title to the shares in Lioncap Global. There is no burden on the defendant to establish the plaintiff's intention on 20 April 2017.

119 Without a trust, there can be no fiduciary duty. Without a fiduciary duty, there can be no dishonest assistance or knowing receipt. That suffices to dismiss the plaintiff's claim against the defendant for dishonest assistance and in knowing receipt.

120 Further, the plaintiff's case for a constructive trust is that: (a) Lioncap Global misapplied trust property by selling the 30m shares to the defendant; and (b) that the defendant acquired the 30m shares with notice that they were subject to a subsisting trust. My finding that Lioncap Global was not a trustee of the shares for the plaintiff means that the shares were never trust property. The plaintiff's claim that the defendant holds 30m shares as a constructive trustee must also fail.

121 The plaintiff's claim in equity in respect of the 57.08m shares therefore fails in its entirety. That claim is dismissed.

The defendant is not liable to the plaintiff in negligence

122 In order to succeed in a claim in negligence, a plaintiff has to prove five elements (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") at [21]):

(a) that the defendant owed the plaintiff a duty of care;

(b) that the defendant breached that duty of care by acting (or failing to act) such that its conduct fell below the standard of care required of it;

(c) that the defendant's breach of duty caused the plaintiff damage;

(d) that the plaintiff's losses arising from the defendant's breach are not too remote; and

(e) that the plaintiff can adequately prove and quantify those losses.

Duty of care

123 A duty of care will arise in tort if: (a) it is factually foreseeable that the defendant's negligence might cause the plaintiff harm; (b) there is sufficient legal proximity between the plaintiff and the defendant; and (c) policy considerations do not militate against a duty of care: *Spandeck* at [73], [77] and [83].

124 I assume in the plaintiff's favour that there was factual foreseeability and move straight to the element of proximity.

125 The plaintiff submits that there was both causal and circumstantial proximity between the plaintiff and the defendant. I do not accept that the plaintiff has established either type of proximity.

126 The plaintiff submits that there was causal proximity between the plaintiff and the defendant for the following reasons. The plaintiff's first and second instruction letters expressly instructed CIMB Indonesia to transfer the shares to Lioncap Global's account without a change of beneficial owner.[130] This basis of transfer is abbreviated in the broking industry to "NCBO". However, CIMB Indonesia transferred the shares to Lioncap Global's account on the "CBO" basis. "CBO" is the abbreviation in the broking industry for "change of beneficial ownership". At the same time, Lioncap Global instructed the defendant to receive the shares in accordance with the plaintiff's instruction letters. The defendant had copies of the instruction letters. If the defendant had noticed the discrepancy between the plaintiff's instructions to CIMB Indonesia to transfer the share on the NCBO basis and CIMB Indonesia's instructions to the defendant, the defendant would have rejected the transfer. If it had done that, Lioncap Global could not have misappropriated the shares.

127 I do not accept this submission.

128 As the defendant submits, the act which the plaintiff complains the defendant carried out negligently is causally remote from the loss which the plaintiff suffered. The Court of Appeal held in *Spandeck* (at [78]) that causal proximity is the degree of "closeness or directness of the causal connection or relationship between the act and the injury sustained". The causal chain for the transfer of the shares was as follows. The plaintiff issued the first and second

130 SOC A2 para 42A; PCS para 322.

instruction letters instructing CIMB Indonesia to carry out the transfers on the NCBO basis. CIMB Indonesia instructed its custodian to debit the shares from CIMB Indonesia's sub-account with the custodian and to credit them to Lioncap Global's custodian for further credit of Lioncap Global's sub-account.

129 By coincidence, CIMB Indonesia's custodian and Lioncap Global's custodian was the same entity. By further coincidence, that entity was in fact the defendant itself. In carrying out the book entries necessary to give effect to this transfer, therefore, the defendant's customer for the debit was CIMB Indonesia and for the credit was Lioncap Global. The transfer of the shares to Lioncap Global was therefore directly caused by the defendant acting on CIMB Indonesia's instructions to the defendant. Yet, the plaintiff does not allege that the defendant breached any duty of care owed to the plaintiff by doing that.

130 I therefore do not accept that there was causal proximity as between the plaintiff and the defendant.

131 I also do not accept the plaintiff's submission that there was circumstantial proximity between the plaintiff and the defendant. The plaintiff was not the defendant's customer in connection with the transfer of the shares. The defendant's customers were CIMB Indonesia and Lioncap Global. As such, the defendant owed contractual obligations to both of them in carrying out the transfer. Further, the relationship between the plaintiff and Lioncap Global was that of a grantor and a grantee of a security interest, with their rights and obligations defined by contract in the November 2016 agreements as varied by the April 2017 addendum. The plaintiff and Lioncap Global each entered into those agreements in order to advance its own commercial, legal and economic self-interest. All of this negates circumstantial proximity.

132 The requisite element of proximity being absent, I accept the defendant's submission that the defendant owed the plaintiff no duty of care.

Causation

133 In any event, even if the defendant owed the plaintiff a duty of care and breached the duty, I accept the defendant's submission that the breach did not cause the plaintiff any loss.

134 Assuming the existence of a duty of care, the plaintiff must go on to establish that the defendant breached the duty of care and that breach was the factual cause of the plaintiff's loss. This requires the plaintiff to prove that, but for the defendant's breach, the plaintiff would not have suffered the loss that it did: *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("*Sunny Metal*") at [52].

135 The plaintiff's case on breach and on causation is as follows.[131] Lioncap Global directed the defendant to receive the shares from the plaintiff "in accordance with" the plaintiff's instructions to CIMB Indonesia. The plaintiff's instructions to CIMB Indonesia expressly stated that the beneficial interest in the shares was to remain with the plaintiff (see [39] and [42] above). The defendant knew that this was the plaintiff's intention because the defendant had copies of the instruction letters. The defendant therefore knew that it should receive the shares for Lioncap Global on the NCBO basis.[132] But CIMB Indonesia instructed the defendant to transfer the shares to Lioncap Global on the CBO basis. A reasonable brokerage in the defendant's position would have noticed the discrepancy in the instructions and would either have: (a) made

131 PCS para 367(a).

132 1CB at pp 285 and 461.

reasonable inquiries of CIMB Indonesia and Lioncap to resolve the discrepancy; or (b) would have declined to carry out the transfer.[133] If the defendant had done either, the transfer would have been stopped and Lioncap Global would never have been in a position to misappropriate the shares. Instead, the defendant transferred the shares to Lioncap Global without making inquiries and with a change of beneficial ownership. The defendant's breach of duty therefore caused the plaintiff's loss.

136 In my view, the plaintiff has failed to establish factual causation on the but-for test. As I have found, the plaintiff and Lioncap Global agreed by the April 2017 addendum that Lioncap Global should improve its security from a charge over the 57.08m shares to a mortgage over the shares or, at the very least, to couple Lioncap Global's existing charge with control of the shares. Further, that remained the case all the way up to the time CIMB Indonesia instructed the defendant to transfer the shares to Lioncap Global and the defendant received the shares for Lioncap Global. Therefore, if the defendant had indeed made inquiries with Lioncap Global and CIMB Indonesia, as the plaintiff submits it ought to have done to discharge its duty of care, I am satisfied that the plaintiff would have confirmed to the CIMB Indonesia that it intended to cede control of the shares to Lioncap Global. At best, the plaintiff would have bargained with Lioncap Global for greater contractual protection of its beneficial interest in the shares despite ceding control of them. But that protection would have been completely ineffective against a dishonest chargee like Lioncap Global once control was factually ceded. And, so Lioncap Global would still have been in a position to misappropriate the shares. The factual cause of the plaintiff's loss is therefore its own decision to cede control of the shares to Lioncap Global with

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133 PCS para 367(b).

measures which were ineffective in equity to retain its beneficial interest in the shares.

137 For these reasons, the plaintiff's claim in negligence fails. The plaintiff has failed to establish both the existence of a duty of care and the element of causation.

The second tranche of 21m shares

The undisputed facts

138 The following facts are not in dispute or not seriously disputed in relation to the plaintiff's claim for the 21m shares.

139 In May 2017, the plaintiff and Lioncap entered into negotiations about a further loan facility of US$25m. The loan was once again to be secured by a charge over shares which the plaintiff owned in Cabbeen. As a condition of continuing the negotiations, Lioncap Global asked the plaintiff to open a brokerage account with the defendant and to deposit 21m shares into the account.

140 In early July 2017, the plaintiff opened the account with the defendant as Lioncap Global had asked.[134] In late July 2017, the plaintiff transferred 21m shares into this account, again as Lioncap Global had asked.[135]

141 Lioncap Global immediately instructed the defendant to transfer the 21m shares out of the plaintiff's account with the defendant to Lioncap Global's account with the defendant. In early August 2017, the defendant carried out this

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134 DCS para 306.

135 SOC A2 paras 43 to 44.

transfer.[136] Neither Mr Ng nor Mr Yang gave the defendant specific authority to transfer these 21m shares to Lioncap Global at or about the time of the transfer.[137] Apart from 2.26m shares out of these 21m shares which Lioncap Global has returned to the plaintiff, this tranche of 21m shares has proven irrecoverable.[138]

The plaintiff's case

142 The plaintiff's case against the defendant is as follows. Lioncap Global had no authority from the plaintiff to instruct the defendant to transfer the 21m shares to Lioncap Global. During the account opening process, the plaintiff authorised only Mr Yang and Mr Ng to operate its account with the defendant.[139] Neither of them authorised the transfer of the shares. In the alternative, the defendant owed the plaintiff, as its customer, a duty of care not to carry out transfer instructions when there are reasonable grounds for believing that the instructions are an attempt to misappropriate its customer's shares.[140]

143 The plaintiff's claim in contract against the defendant in respect of the 21m shares fails for two reasons.

144 First, I find that Lioncap Global did have the plaintiff's actual authority to operate the plaintiff's account with the defendant. It was part of the plaintiff's pleaded case in the Hong Kong action that Lioncap Global was authorised to

136 SOC A2 para 46.

137 SOC A2 para 45.

138 SOC A2 para 51.

139 SOC A2 para 48.

140 SOC A2 paras 59, 60(g).

operate the plaintiff's account with the defendant without the plaintiff's consent or cooperation:[141]

> [The plaintiff's account with the defendant] may only be operated, and the [21m shares] may only be dealt with, either (1) by way of joint instructions and/or authorisation from both [the plaintiff] and [Lioncap Global] or (2) by way of instructions given by [Lioncap Global] alone.

145 Mr Ng verified the accuracy of this pleading, as is customary in Hong Kong. He also confirmed this critical point in three different paragraphs of his affirmation filed in the Hong Kong action. In the first of those paragraphs, he said:[142]

> Given that the [21m shares] were deposited into [the plaintiff's] account with [the defendant] on the understanding that [the further loan facility agreements] would be executed and signed, [the plaintiff's account with the defendant], whilst technically under the sole name of [the plaintiff], could only be operated either (1) by way of ***joint*** instructions and/or ***joint*** authorisation from both [the plaintiff] and Lioncap Global or (2) by way of instructions given by Lioncap Global alone.
>
> [emphasis original]

146 This is an admission by the plaintiff, as it goes directly against its interest. Mr Ng offered no convincing explanation in cross-examination for the contents of his earlier affirmation in the Hong Kong action. His explanation appeared to be that he meant only that the plaintiff could not have operated the account alone, *ie*, without Lioncap Global's consent. But that is not what the pleadings and Mr Ng's affirmation expressly and repeatedly say. Further, in giving this explanation, Mr Ng accepted that the plaintiff's account with the defendant was under Lioncap Global's *de facto* control.

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141 7 AB 3718.

142 7 AB 3806.

147 Second, the plaintiff found out in September 2017 that Lioncap Global had instructed the defendant to transfer the 21m shares out of the plaintiff's account with the defendant to Lioncap Global's account with the defendant. Yet, the plaintiff did not immediately complain about the defendant having breached its contract with the plaintiff by acting on Lioncap Global's instructions to transfer the shares out. It was only when the plaintiff faced difficulty in recovering shares from Lioncap Global that the plaintiff alleged, for the first time, that the defendant may have been at fault. Even then, it did not identify acting on Lioncap Global's instructions as the basis of the fault.

148 This conduct has a contractual consequence. There is a conclusive evidence clause in the terms and conditions governing the plaintiff's account with the defendant:

> **2C. Statements and Confirmations**
>
> The [plaintiff] shall verify all statements and confirmations sent by [the defendant] to the [plaintiff]. If no objection is raised in writing by the [plaintiff] within 7 Business Days of the date of such statements and confirmations, such statements and confirmations shall be deemed conclusive and binding against the [plaintiff], who shall not be entitled to object thereto. However, [the defendant] may at any time rectify any error or correct any omission on any entry, statement or confirmation.

149 In the absence of the bank's own fraud, a bank may rely on a conclusive evidence clause in its contract with its customer even if the bank has acted on an instruction without the customer's authority: *Tjoa Elis v United Overseas Bank Ltd* [2003] 1 SLR(R) 747 ("*Tjoa Elis*"); *Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA* [2015] 1 SLR 338 ("*Telemedia*"); *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246. This is so even if the bank is in breach of contract or failed to exercise reasonable case: *Tjoa Elis* at [97]–[99] and [110]. This is so even if the bank fails to heed alarm bells in acting on the instruction: *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR(R) 273

("*Pertamina*") at [1]. Conclusive evidence clauses are a reasonable risk allocation device where the customer is a commercial entity: *Pertamina* at [60]–[61].

150 I accept the defendant's submission that these principles apply not only to banks but to regulated financial institutions such as the defendant.

151 As the defendant points out, the plaintiff's case against the defendant does not allege that the defendant acted fraudulently in dealing with the 21m shares on Lioncap Global's instructions. The plaintiff's case against the defendant is only that Lioncap Global deceived the defendant into transferring the 21m shares and that Lioncap Global could and should have detected and avoided the deception by exercising reasonable care. Clause 2C therefore *prima facie* applies in the defendant's favour.

152 I find that cl 2C operates to preclude the plaintiff from now alleging that the defendant transferred the 21m shares to Lioncap Global's account without the plaintiff's authority. On 20 August 2017 the plaintiff received two transfer notes from the defendant. One was dated 31 July 2017 and recorded that the defendant had transferred the 21m shares *into* the plaintiff's account with the defendant. The other was dated 3 August 2017 and recorded that the defendant had transferred the 21m shares *out of* the plaintiff's account with the defendant. On 4 September 2017, a member of the plaintiff's administrative staff checked the online statements for the plaintiff's account with the defendant. She discovered that the 21m shares had been transferred out of the account.

153 This account was opened only for the purpose of receiving the 21m shares and demonstrating the plaintiff's good faith to Lioncap Global. The plaintiff could therefore not have failed to notice that the 21m shares were no

longer in the account. It had every opportunity to raise the alarm immediately. Mr Ng's explanation in cross-examination for not raising the alarm immediately is that these documents did not show to whom the 21m shares had been transferred. That is a *non sequitur*. As the defendant points out, the key point is that the shares were missing in circumstances where neither Mr Ng nor Mr Yang had given any instructions for the shares to be transferred out. To whom they had been transferred was quite irrelevant, if indeed only Mr Yang and Mr Ng had the authority to instruct a transfer.

154 The plaintiff did not raise any objection with the defendant within the time limit stipulated in cl 2C. I therefore accept the defendant's submission that cl 2C operates contractually to preclude the plaintiff from now asserting that the defendant transferred the 21m shares out of the plaintiff's account with the defendant in breach of contract.

Conclusion

155 For all of these reasons, I dismiss the plaintiff's action in its entirety.

156 The only remaining matter to deal with are the costs of the action. I now invite each party to ascertain the other party's position on costs and to reach an agreement on costs as far as possible. To the extent that no agreement can be reached, the parties are to file and serve, within three weeks of the date on which this judgment is handed down, written submissions on costs not exceeding 5,000 words (excluding title page and footnotes).

157 Each party's written submissions should address: (a) who should pay and who should receive the costs of this action, or any part thereof; (b) whether those costs should be awarded on the standard basis or the indemnity basis;

(c) whether those costs should be taxed or fixed; and (d) in the latter event, the quantum of those costs.

158 Further, each party is to justify its submissions on the quantum of costs by reference to: (a) the costs schedules which have been filed, including the costs schedule filed by that party itself; (b) the applicable costs guidelines in Appendix G of the Supreme Court Practice Directions entitled "Guidelines for Party-and-Party Costs Awards in the Supreme Court of Singapore"; (c) any formal offers to settle or offers of compromise made without prejudice save as to costs which carry costs consequences; and (d) any taxation precedents which may be comparable and relevant. The written submissions should also address any interlocutory matters for which costs were not fixed but were ordered instead to be in the cause, to be reserved or to be a particular party's costs in any event.

Vinodh Coomaraswamy
Judge of the High Court

Foo Yuet Min, Adwyn Chuang, Wilson Koh, Tan Yi Fan and Emmanuel Aw (Drew & Napier LLC) for the plaintiff;
Vincent Leow, Melissa Mak and Nicholas Kam (Allen & Gledhill LLP) for the defendant.