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

[2025] SGHC(A) 8

Appellate Division / Civil Appeal No 45 of 2024

Between

Robert Tantular

… *Appellant*

And

The Stephanie Karina
(administratrix of the estate of
Tan Ho Yung, deceased)

… *Respondent*

In the matter of Suit No 823 of 2020

Between

Robert Tantular

… *Plaintiff*

And

The Stephanie Karina
(administratrix of the estate of
Tan Ho Yung, deceased)

… *Defendant*

JUDGMENT

[Contract — Contractual terms — Express terms]
[Contract — Contractual terms — Implied terms]
[Contract — Formation — Capacity of parties]
[Equity — Fiduciary relationships — When arising]
[Limitation of Actions — Particular causes of action]
[Tort — Negligence — Duty of care]
[Trusts — Constructive trusts]
[Trusts — Express trusts — Constitution]
[Restitution — Unjust enrichment]

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Robert Tantular
v
The Stephanie Karina
(administratrix of the estate of Tan Ho Yung, deceased)

[2025] SGHC(A) 8

Appellate Division of the High Court — Civil Appeal No 45 of 2024
Woo Bih Li JAD, Debbie Ong Siew Ling JAD and Mavis Chionh Sze Chyi J
13 March 2025

1 July 2025 Judgment reserved.

Mavis Chionh Sze Chyi J (delivering the judgment of the court):

Introduction

1 Mr Robert Tantular (the "Appellant") and his brother-in-law, Mr Tan Ho Yung ("THY"), participated in an investment in a mixed-use residential and commercial development in Dallas, Texas, USA known as "The Centrum" (the "Investment"). The Centrum comprised residential condominium units, as well as retail and commercial units. The Investment formed the subject matter of the Appellant's claims in the underlying suit, HC/S 823/2020 ("S 823").

2 At the heart of S 823 is the Appellant's allegation that THY misappropriated the Appellant's stake in the Investment and the profits therefrom. The Appellant made claims in contract, tort, equity and unjust enrichment. THY was initially named as the defendant in S 823 but his wife, Ms The Stephanie Karina (the "Respondent"), was substituted as defendant in

her capacity as the administratrix of THY's estate, due to THY passing away prior to trial. The Respondent's case, in a nutshell, is that there was a consensual buy-out by THY of the Appellant's stake in the Investment sometime in 2005 or 2006.

3 The trial judge (the "Judge") dismissed S 823 in its entirety in an oral judgment dated 14 May 2024. The Appellant's appeal against the whole of the Judge's decision is before us.

4 We first set out the salient facts in the present case which are undisputed.

Facts

Background to the Investment

5 The structure of the Investment, as originally contemplated, is set out in Figure 1 below. Three corporate entities were involved at the initial stage: Centrum G.S. Ltd ("Centrum GS"), Goodyork Co. ("Goodyork") and Spurlington Inc. ("Spurlington BVI"). Centrum GS was to directly own The Centrum (*ie*, the mixed-use development that was the subject of the Investment), while Goodyork and Spurlington BVI would in turn hold 20% and 80% of the shares in Centrum GS respectively.

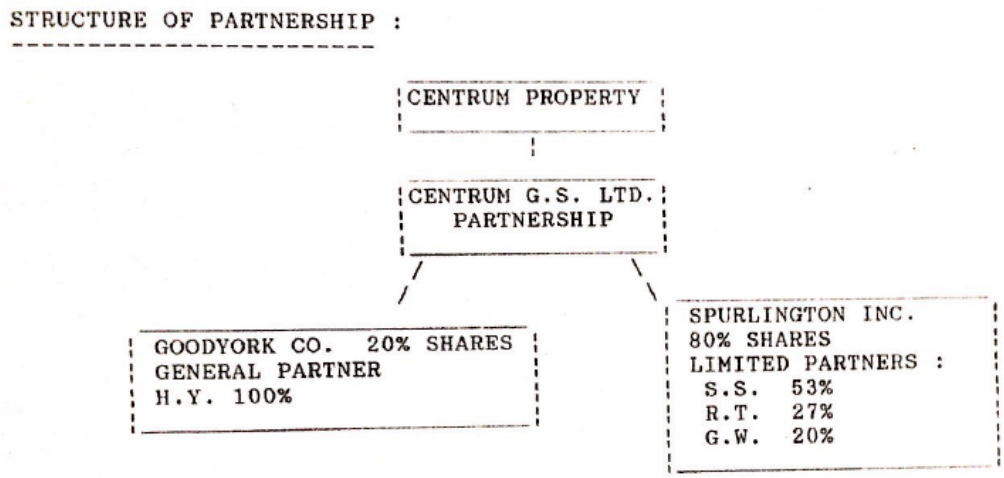

Figure 1: Original structure of Investment

6 The background relating to the establishment of these three entities is as follows:

(a) On 17 July 1991, Spurlington BVI was incorporated in the BVI. Going into the Investment, the Appellant ("R.T." in the above diagram) held a 27% interest in Spurlington BVI, and the remaining 73% was held by an Indonesian entity, PT Sinar Sahabat or "S.S." (53%) and another individual, George Wang or "G.W." (20%).

(b) On 5 December 1991, Goodyork was incorporated under the Texas Business Corporation Act, with THY as its sole shareholder.

(c) On 12 December 1991, Centrum GS was formed under the Texas Revised Limited Partnership Act.

7 Sometime prior to Centrum GS completing its acquisition of The Centrum, the Appellant and THY signed a document dated December 1991 that the parties refer to as the "Term Sheet". The Term Sheet sets out, among other things, the purchase price of The Centrum, the structure of the partnership

undertaking the Investment (reproduced in Figure 1 at [5] above), the cash contributions that the General Partner and Limited Partners were to make towards the Investment, and the arrangement for profit and loss-sharing between the General Partner and the Limited Partners. The Term Sheet was "signed by" "Tan Ho Yung G.P. of CGS" and "accepted and agreed by" "Robert Tantular (R.T.)". The signature blocks are reproduced in Figure 2 below.

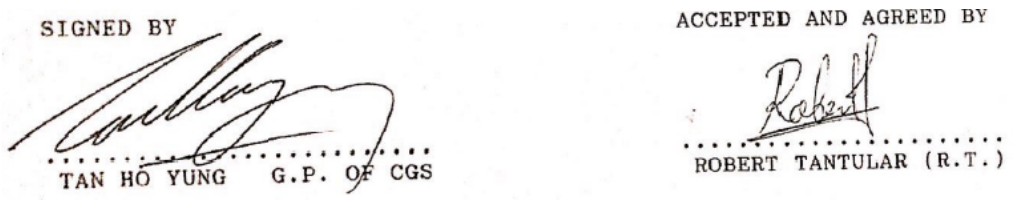

Figure 2: Signature blocks in Term Sheet

8 On or around 23 December 1991, Centrum GS received title to The Centrum.

Changes in corporate structure underlying the Investment

9 Sometime in or around 1992, THY informed the Appellant of revisions to the corporate structure underlying the Investment. In gist, Spurlington (USA) Incorporated ("Spurlington USA") replaced Spurlington BVI as the Limited Partner of Centrum GS. Spurlington USA, a Texas corporation incorporated on 12 December 1991, was wholly owned by Spurlington BVI.

10 In 2001, further changes to the corporate structure underlying the Investment were effected. Centrum GS conveyed the residential units to Centrum Towers Ltd ("Centrum Towers"), and the retail and commercial units to Centrum Plaza Ltd ("Centrum Plaza"). Centrum GS wholly owned Greenyork LLC and Capital Dalpac LLC, which in turn were the General

Partners of Centrum Towers and Centrum Plaza respectively. The updated corporate structure was as follows:

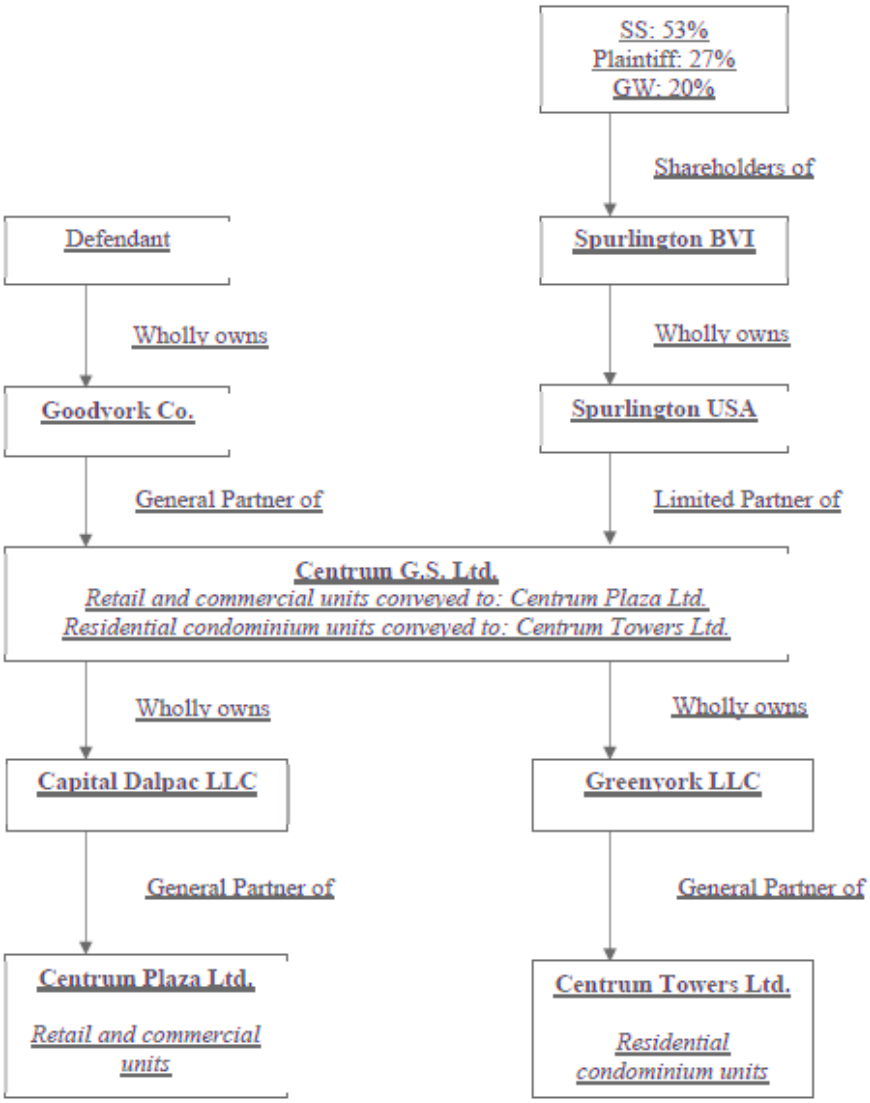

Figure 3: Revised structure of the Investment (2001)

11 Sometime before July 2005, Spurlington USA's 80% shareholding in Centrum GS rose slightly from 80% to 82.4562%, but none of the witnesses in the trial below could recall exactly when and how this came about.

Sale of residential units

12 On or around 5 August 2005, Centrum Towers sold the residential units in The Centrum (save for one unit, "Unit 1701") to GEM Centennial Centrum, LP.

The Appellant's receipt of US$2.7m

13 On or around 27 January 2006, THY remitted the sum of US$2.7m to the Appellant's bank account. As we discuss later, it is disputed whether this sum represented the Appellant's share of the proceeds from the sale of the residential units (as the Appellant alleged) – or whether it was the price paid pursuant to a buy-out of the Appellant's stake in the Investment by way of a redemption of Spurlington USA's shares in Centrum GS (as the Respondent alleged).

Compilation Reports

14 THY provided annual financial statements of Centrum GS to the Appellant, which the parties refer to as the "Compilation Reports". Of particular relevance to the present case are the 2004/2005 Compilation Report and 2005/2006 Compilation Report. We note from the Appellant's submissions in S 823 that he complained about a "lapse of time" in the provision of Compilation Reports "from *2002 to 2004*", which would appear to refer to delays by THY in providing the Compilation Reports for 2002/2003 and 2003/2004. However, he did not complain about a similar "lapse of time" in the provision of the 2004/2005 Compilation Report, which suggests that it was provided timeously sometime in 2006. As for the 2005/2006 Compilation Report, we refer to it further at [16] below.

Dissolution of Spurlington USA

15 On or around 29 November 2007, Spurlington USA filed its Articles of Dissolution.

The 2005/2006 Compilation Report and the Gain Calculation Document

16 Sometime in 2008, the Appellant obtained two crucial documents. First, THY provided the Appellant with the 2005/2006 Compilation Report. Second, the Appellant obtained a document titled "Centrum GS, Ltd Gain Calculation-Sale of Building and Land [f]or the year ended December 31, 2006" (the "Gain Calculation Document"), which sets out the "estimated gain" from the sale of the retail and commercial units and the "allocation of gain". We pause to note that the parties disagree as to whether THY was the one who provided the Gain Calculation Document to the Appellant. Nonetheless, *how* the Appellant obtained the document is immaterial. What is important is *when* the Appellant obtained the Gain Calculation Document; and the Appellant's own case is that he received it sometime in October or November 2008.

The Appellant's incarceration

17 From around 25 November 2008 to 27 July 2018, the Appellant was incarcerated in Indonesia. The Appellant does not dispute receiving both the 2005/2006 Compilation Report and the Gain Calculation Document prior to his incarceration.

Striking off of Spurlington BVI

18 On or around 1 May 2013, Spurlington BVI was struck off for the non-payment of annual fees.

Sale of retail and commercial units

19 On or around 23 December 2014, Centrum Plaza sold the retail and commercial units in The Centrum to AG-QIP Oak Lawn Owner, LP.

Events following the Appellant's release from incarceration

20 On or around 5 December 2018, there was a meeting between the Appellant, his son and THY. The Appellant claims that he inquired about the progress of the Investment and was told by THY that the Investment was making a loss and the Appellant's stake had been "reduced to zero", but the Respondent denies this.

21 Between 6 January 2019 and 25 March 2020, the Appellant and THY exchanged correspondence, in which the Appellant appeared mainly to be seeking clarification on the progress of the sale of the residential, retail and commercial units and his share of the proceeds therefrom.

22 On 2 September 2020, the Appellant commenced the suit below by way of S 823.

Sale of Unit 1701

23 On 31 August 2021, Unit 1701 was sold.

Summary of pleadings below

24 The Appellant's primary complaint in S 823 was that THY had misappropriated the Appellant's stake in the Investment and the profits therefrom, as the payment of US$2.7m to the Appellant was *not* made pursuant to a buy-out of the Appellant's stake in Centrum GS. Instead, the payment represented the Appellant's share of the proceeds from the sale of the residential

units. The Appellant claimed that THY was liable (a) for breaches of the contract in the Term Sheet; (b) for breaches of his "equitable duties of skill and care and/or tortious duties of care to [the Appellant]; (c) for breaches of fiduciary duties and/or duties as a trustee; (d) as a constructive trustee; and (e) in unjust enrichment.

25 The Respondent alleged that the payment of US$2.7m to the Appellant was pursuant to a buy-out by THY of his stake in the Investment, which buy-out was effected by way of a redemption of Spurlington USA's shares in Centrum GS. Further, the Respondent contended that the Appellant's claims were time-barred and/or barred by laches and/or acquiescence. In addition, the Respondent denied liability for the discrete causes of action relied on by the Appellant.

Decision below

26 The Judge dismissed S 823 in its entirety. In gist, his reasons as set out in the oral judgment were as follows:

> (a) While the Judge accepted that the Term Sheet was sufficiently certain to be an enforceable contract, he rejected the Appellant's claim in contract for five reasons. First, THY did not sign the Term Sheet in his personal capacity. Instead, he signed for and on behalf of Goodyork, which was the General Partner of Centrum GS. Second, Goodyork undertook no contractual obligations directly to the Appellant. Instead, the parties to the Term Sheet intended Goodyork's contractual obligations to be mediated through the corporate structure of the Investment. Third, the Appellant did not rely on any basis apart from the Term Sheet for his contractual claim.

Fourth, the Appellant failed to establish a breach of the Term Sheet. Fifth, the contractual claim was time-barred.

(b) The Judge found that the Appellant had no basis for his claim in negligence and that such a claim was in any event also time-barred.

(c) The Judge held that THY was not a trustee or fiduciary for the Appellant for six reasons. First, there was no intention to create an express trust and the parties' relationship was a purely commercial and contractual one. Second, there were no circumstances that rendered THY an *ad hoc* fiduciary for the Appellant. Third, THY was never a constructive trustee for the Appellant. There was no proprietary base to found an institutional constructive trust and also no basis to award a remedial constructive trust. Fourth, there was no basis for any claim of misappropriation, as Spurlington USA was dissolved and Spurlington BVI was struck off in accordance with the corporate law governing each company. Fifth, the Appellant's claims in equity were time-barred. Sixth, the Appellant could not rely on s 22 of the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act") to circumvent the time bar because he had not produced sufficiently cogent or convincing evidence of fraud. The Judge accepted that Spurlington USA's share in the Investment was bought out in 2005–2006.

(d) The Judge rejected the Appellant's claim in unjust enrichment for three reasons. First, lack of consent was not an established unjust factor in Singapore law. Second, THY was not enriched as the Appellant's interest in the Investment was bought out in 2005–2006. Third, any enrichment was not at the Appellant's expense, similarly because the Appellant's interest had been bought out.

(e) More generally, the Judge held that the Appellant's claims "in any branch of the law" were time-barred, as the Appellant had the requisite knowledge to commence a claim in 2008. The Judge also found the Appellant guilty of laches and acquiescence.

27 The Appellant appeals against the whole of the Judge's decision.

Issues to be determined

28 Arising from the above are two disputed factual issues for our determination:

(a) First, who were the parties to the Term Sheet? We note that the Respondent does not contest the Judge's finding that the Term Sheet constituted a valid and enforceable agreement. The main bone of contention between the parties is whether THY entered into the Term Sheet agreement in his personal capacity, or on behalf of Goodyork. We refer to this as the "Term Sheet Issue".

(b) Second, what was the 2006 payment of US$2.7m to the Appellant for? Specifically, the question is whether this sum was the Appellant's share of the proceeds from the sale of residential units, or whether it represented the agreed price for the buy-out by THY of the Appellant's stake in the Investment. We refer to this as the "US$2.7m Payment Issue".

29 Thereafter, we consider the discrete causes of action pleaded by the Appellant. We analyse them in the following order:

(a) whether the Appellant has a valid claim in contract;

(b) whether the Appellant has a valid claim in tort;

(c) whether the Appellant has a valid claim in equity; and

(d) whether the Appellant has a valid claim in unjust enrichment.

30 Finally, we consider whether any valid claim by the Appellant is precluded by a time bar or laches or acquiescence.

The threshold for appellate intervention

31 In respect of the two key factual issues in dispute, the threshold for appellate intervention is as follows.

32 Where *findings* of fact are concerned, the appellate court should be slow to intervene: *Dextra Partners Pte Ltd and another v Lavrentiadis, Lavrentios and another appeal and another matter* [2021] SGCA 24 at [9]. This is especially so where the findings of fact are premised on the trial judge's assessment of witness credibility, since the trial judge would have had the benefit of hearing the witnesses' evidence directly: *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 at [131]; *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 ("*Yong Kheng Leong*") at [18].

33 On the other hand, where *inferences* of fact are concerned and the material from which the inference is drawn is also before the appellate court, the appellate court is in as good a position as the trial judge to decide on the appropriate inference and "may intervene where the trial judge's finding is against the weight of the objective evidence": *Credit Suisse Trust Limited v Ivanishvili, Bidzina and others* [2024] 2 SLR 164 ("*Credit Suisse*") at [74].

34 In this case, while there are no written grounds of decision, it appears from the oral judgment that the Judge's findings were based on inferences drawn from the documentary evidence, rather than on his assessment of the witnesses' credibility. As such, this court is equally well-placed to evaluate the objective material and the Judge's findings of fact.

35 Bearing the above principles in mind, we consider first the Term Sheet Issue.

Term Sheet Issue

The Appellant's case

36 The Appellant argues that THY signed the Term Sheet in his personal capacity. First, the signature block of the Term Sheet stated "Tan Ho Yung G.P. of CGS"; it did not reflect that Goodyork was a party, or that THY was signing *on behalf of* Goodyork. Second, the Term Sheet identified THY as the General Partner and PT Sinar Sahabat ("S.S."), the Appellant ("R.T.") and George Wang ("G.W.") as the Limited Partners. Based on the plain text of the Term Sheet and its signature block, the parties' intention was for THY to personally undertake obligations to the Appellant. The Appellant further argues that the inclusion of corporate structures in the Term Sheet was for tax reasons and part of a "broader type of agreement" for the Appellant to entrust THY with structuring, managing and operating the Investment as a whole. Alternatively, the Appellant submits that Goodyork was the alter ego of THY.

The Respondent's case

37 The Respondent argues that THY signed the Term Sheet for and on behalf of Goodyork, which was the General Partner of the Investment. The

Appellant did not plead that the corporate veil should be pierced. Further, Goodyork was not the alter ego of THY.

Our decision

THY signed the Term Sheet in his personal capacity

38 The issue of whether THY signed the Term Sheet in his personal capacity is one of contractual interpretation. As a preliminary point, as neither party has pleaded the applicability of foreign law, Singapore law applies by default: *Ollech David v Horizon Capital Fund* [2024] 1 SLR 287 at [55].

39 Under Singapore law, an exercise in contractual interpretation involves a balance between the text and the context. The court has to ascertain, based on all the relevant objective evidence, the intention of the parties when they entered into the contract. As the Court of Appeal noted in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd*) [2015] 5 SLR 1187 ("*Soup Restaurant*", at [32]), "the text [of the contract] ought always to be *the first port of call* for the court" [emphasis in original] when it seeks to interpret the terms of a contract.

40 In his oral judgment, the Judge found that THY signed the Term Sheet on behalf of Goodyork. We respectfully disagree. In our view, THY entered into the Term Sheet agreement in his personal capacity; and it was to THY personally that the Appellant was to look for the fulfilment of the contractual obligations ascribed to the "General Partner" under the Term Sheet. We arrive at this view for the following reasons, taken together.

41 First, Goodyork's name did not appear anywhere in the signature block of the Term Sheet. We find the omission of Goodyork's name from the signature

block significant. In our view, there was simply no reason for this omission if Goodyork was in fact the contracting party, especially given that Goodyork had already been reflected on the first page of the Term Sheet as the 20% shareholder in Centrum GS.

42 Second, it is also significant that instead of Goodyork being identified in the signature block as one of the parties signing the Term Sheet, THY's name appeared in full in the signature block immediately before the description "G.P. [General Partner] of CGS [Centrum GS]". There was no indication that THY was signing the Term Sheet *on behalf of* Goodyork. If anything, the decision to include the words "G.P. [General Partner] of CGS [Centrum GS]" immediately after THY's name – on omitting any reference to Goodyork – suggests that as between THY and the Appellant, the intention was that THY himself was in substance the "General Partner" whom the Appellant was dealing with.

43 In short, therefore, the Term Sheet showed that as between THY and the Appellant, THY was entering into the Term Sheet agreement in his personal capacity. In our view, the references to the corporate structure of the Investment, and to Goodyork's position within that structure as the General Partner, merely indicate that THY had opted to participate in the Investment by using Goodyork as the corporate vehicle: they do not mean that as between THY and the Appellant, it was intended that the Appellant would contract with Goodyork under the Term Sheet. If that had been the case, as we have observed, it would have been simple to insert Goodyork's name in the signature block and/or to state that THY was signing on behalf of Goodyork.

44 This finding is bolstered by an examination of the relevant context. We noted earlier that Goodyork was incorporated on 5 December 1991 with THY as its sole shareholder. While the Term Sheet is not dated, the parties do not

dispute that it was signed sometime in December 1991 – in other words, very close in time to the incorporation of Goodyork. As such, Goodyork would have been a new company with no track record, and a relatively unknown entity to the Appellant. In the circumstances, we are of the view that THY and the Appellant did not enter into the Term Sheet agreement with the intention that the Appellant would look only to Goodyork for the fulfilment of any contractual obligations ascribed to the "General Partner" under the Term Sheet.

45 We note that in [2(b)] of the oral judgment below, the Judge held that while the contract in the Term Sheet was entered into between Goodyork *and the Appellant*, the parties intended the contractual obligations set out in the Term Sheet to be "mediated through [the] corporate structure of the investment". In other words, the Judge's view was that the Appellant himself was not entitled to sue for a breach of the Term Sheet, and that it would instead be Spurlington BVI or Spurlington USA that had the right to sue. We surmise that this was why the Judge went on to find that the Appellant "has not made out any basis for *reverse* piercing of the corporate veil of the limited partner … for [him] to have the benefit of a direct contractual obligation or right of action as against [THY]" [emphasis added].

46 With respect, we take a different view. The Appellant having contracted in his personal capacity (as the Judge also found), we find that there was nothing in the Term Sheet to suggest that the parties had intended the Appellant to surrender his rights to enforce the terms therein to the corporate entity through which he was participating in the Investment (whether that be Spurlington BVI or Spurlington USA). While the parties did set out in the Term Sheet the corporate structure underlying the Investment, they did not include any contractual term to suggest that all the rights and obligations arising therefrom were to be enforced by way of that corporate structure. In the circumstances, we

respectfully disagree with the Judge's finding that the Appellant had no direct right of action as against THY.

47 As a final observation, we note that the Respondent has pleaded that the Term Sheet was drafted without legal assistance, and the Appellant accepted this on the witness stand. In construing contracts drafted by laymen, the following approach applies (*Soup Restaurant* at [63]):

> … [T]he court ought to eschew a strict construction of the relevant language of the contract and adopt instead a more common-sense approach that considers the reasonable and probable expectations that the parties would have had. …
>
> [emphasis in original omitted]

Adopting a common-sense approach, we find that in signing the Term Sheet, THY and the Appellant would each have had the reasonable and probable expectation that the other was entering into the agreement in his personal capacity. In particular, we are of the view that so far as the obligations of the "General Partner" in the Investment were concerned, as between THY and the Appellant, it was understood that THY would be personally responsible for fulfilling these obligations.

48 Given the above conclusions, we do not find it necessary to make any finding on the Appellant's alternative argument that Goodyork was the alter ego of THY.

US$2.7m Payment Issue

49 The next factual issue for determination is whether the purpose of the payment of US$2.7m to the Appellant in 2006 was to distribute to the Appellant his share of the proceeds from the sale of the residential units, or to buy out his stake in the Investment.

The Appellant's case

50 The Appellant submits that his stake in the Investment was not bought out. He contends that the Judge's finding in this regard was against the weight of the evidence, particularly given the manner in which the Respondent's case theory morphed and shifted, the deficient state of the evidence from the Respondent, and the contemporaneous conduct of both THY and the Appellant. It is hard to believe that the Appellant would have agreed to give up his stake in the Investment merely for the return of his original investment sum.

The Respondent's case

51 The Respondent argues that the buy-out was documented by contemporaneous records, including the 2005/2006 Compilation Report, an unsigned Redemption Agreement dated 1 July 2005 between Centrum GS and Spurlington USA (the "Redemption Agreement"), an unsigned Purchase Agreement dated 28 December 2005 between Hypac Capital Corp. ("Hypac") and Spurlington USA (the "Purchase Agreement"), and Spurlington USA's income tax return for 2005. Further, it was supported by the evidence of Mr Jim Johnson ("Johnson"), the Investment's accountant at all material times.

Our decision

52 We respectfully disagree with the Judge's finding that the 2006 payment of US$2.7m was pursuant to a consensual buy-out of the Appellant's stake in the Investment by THY. Our reasons are as follows.

53 First, the contemporaneous evidence indicates that the Appellant understood the payment of US$2.7m to be his share of the proceeds from the sale of the residential units, rather than for the buy-out of his stake in the Investment:

(a) In an e-mail dated 15 September 2005 from the Appellant to one Mr Lim Chee Kong, the Appellant's banker, the Appellant wrote:

> Now *we sold already the condominium and after deducting the company tax, the company still have usd11mio where my portion is usd 2,75mio.*
>
> He is saying that if the company distribute the money to the shareholder then the company have to hold the 30% tax unless they pay to the HUNGARIAN company where they dont hv to pay tax.
>
> [emphasis added]

(b) In another e-mail dated 18 October 2005 from one Ms Juliana Ng, an employee of Ernst & Young, to the Appellant, the relevant background for the tax advice set out within stated:

> Mr. T [*ie*, the Appellant] (along with another partner) owns several building complexes in the US. He is not a US resident. The US properties are owned through US corporations that owns a Texas LP (the properties are held directly by the LP). The LP recently sold one of the buildings and after paying US corporate tax, there's cash of $15M sitting at the level of the US corps. The US corps are owned through BVI companies. There will be a further 30% US withholding tax in getting the $15M cash out and this is where Mr. T wants us to possibly advice on. This double layer US tax is inherent in the current structure *as there are two other buildings held through the same structure that Mr. T is looking to sell over the next couple of years*. [emphasis added]

The italicised portion demonstrates the Appellant's understanding that he maintained a stake in the Investment even after the condominium was sold and he received US$2.75m.

54 As an aside, we note that the Appellant also sought to rely on a letter allegedly written by him to THY in September 2013, in which he asked the latter if it was possible for Centrum GS to pay his wife a dividend. We do not place any weight on this letter, as there is no objective evidence to show exactly when and how this letter was sent to THY.

55 Second, we agree with the Appellant that it is unlikely that he would have agreed to forgo his stake in the Investment in 2006 (15 years into the Investment) solely for the return of his original investment sum of US$2.7m. This is especially so when one considers that (a) in 1998, the Appellant had written to THY during the Asian Financial Crisis, seeking the latter's assistance to procure a buyer for his stake within one week for US$5.3m; and (b) from 2002 to 2004, the net operating income – even after accounting for depreciation and amortisation as well as interest expense – was positive and in excess of US$1m. In contrast, from 1992 to 1997 (*ie*, the years preceding the Appellant's request for THY to sell his stake for US$5.3m), the net operating income after accounting for the same was consistently negative.

56 Third, when questioned by the Appellant about his share of the Investment, THY's explanation about the purported buy-out came rather belatedly. On 6 January 2019, the Appellant sent THY an e-mail with an attached list of questions on the Investment. The list included questions about the "actual selling price" of the residential, retail and commercial units as well as the Appellant's share of the proceeds therefrom. In the e-mail dated 14 January 2019 containing THY's response, THY did *not* state that the Appellant had been bought out in 2006. If a buy-out of the Appellant's stake had indeed occurred in 2006 – *ie*, before the retail and commercial units were sold in 2014 – any reasonable person in THY's position would have informed the Appellant that he was no longer entitled to information on, much less the proceeds from, the sale of the retail and commercial units. Instead, THY skirted the Appellant's questions, telling him that there had been no sale of the retail and commercial units. It was only some two weeks later, in an e-mail dated 28 January 2019, that THY asserted that he had "bought [the Appellant] out in 2005". Even then, this assertion was inconsistent with the Respondent's subsequent pleaded case that the buy-out occurred in 2006.

57 Fourth, THY's credibility on this issue is undermined by his untruthful denial of the sale of both the residential units and the retail and commercial units. This denial was contained in THY's e-mail dated 28 January 2019, and repeated in THY's letter to the Appellant's then solicitors on 25 March 2020. THY's letter was written in response to the letter of demand dated 20 March 2020 from the Appellant's then solicitors. In the 25 March 2020 letter, THY stated:

> (6) Your letter #(5), Your client investigation should yield the informations of the recorded property transaction in 2005 as your claimed #(2)g. Why you still ask me when the property sold? Your client found no property transaction recorded, means no sell on the property. Admit it has no property transaction. [*sic*]

58 For context, paragraph 2(g) of the letter of demand from the Appellant's solicitors stated that "[the Appellant] was given to understand that … the Residential Property was sold in or around 2005", and paragraph 5 of the same letter stated that the Appellant had discovered through preliminary investigations that "save for one unit in the Residential Property, the rest of the Property [defined in the letter to comprise the residential, retail and commercial units] has been sold". These statements were factually accurate: it is now undisputed that the residential units (with the exception of Unit 1701) were sold on or around 5 August 2005, while the retail and commercial units were sold on or around 23 December 2014. Yet THY maintained his denial of any sale of properties in the Defence and Defence (Amendment No. 1). It was only in the Defence and Counterclaim (Amendment No. 2) that THY admitted to the sale of the residential, retail and commercial units. We note, moreover, that in THY's 25 March 2020 letter, he claimed to have been given a "verbal" mandate by the Appellant and the Appellant's wife to "buy-out their share [*sic*]" "since 2000", and that he had eventually "exercised [this] option in the middle of 2006". This position is inconsistent with what was eventually pleaded in the

Respondent's Defence (Amendment No. 4), which made no mention of the "verbal mandate" given in 2000 and instead stated that THY had told the Appellant and his wife in "January 2006" about being "prepared to buy out the [Appellant's] share of the Investment for US$2.7 million".

59 Fifth, we are not persuaded by the Respondent's reliance on the Redemption Agreement and the Purchase Agreement. In brief, the Redemption Agreement between Spurlington USA and Centrum GS provided for Centrum GS to redeem from Spurlington USA 82% out of the total 82.4562% limited partnership interest that Spurlington USA owned in Centrum GS. The Purchase Agreement between Spurlington USA and Hypac – a company of which THY was the sole ultimate beneficial owner – provided for Hypac to purchase Spurlington USA's remaining interest in Centrum GS. However, the copies of the agreements which were produced in court were unsigned. Indeed, a perusal of these documents showed that the agreements contained therein were capable in any event of being executed without the Appellant's signature or consent. This is evident from the signature blocks of the agreements:

(a) The Redemption Agreement was to be signed by Goodyork, as the General Partner of Centrum GS, and Spurlington USA. The Appellant was not a director of either Goodyork or Spurlington USA.

(b) The Purchase Agreement was to be signed by Spurlington USA and Hypac. The Appellant was also not a director of Hypac.

60 We add that the Redemption Agreement and Purchase Agreement were only disclosed *after* THY's passing and about three years from the filing of S 823, by way of a supplementary list of documents filed by the Respondent on 14 July 2023 (at s/n 45 and 48 of the list). Only after the belated disclosure of these two agreements on 14 July 2023 was the Defence amended to state for the

first time that the buy-out of the Appellant's stake in the Investment had been done through a redemption of Spurlington USA's shares in Centrum GS.

61 Given the factors highlighted above, we do not find that the Redemption Agreement and the Purchase Agreement constitute credible evidence of a consensual buy-out of the Appellant's stake in the Investment.

62 Sixth, the Respondent's own narrative of the alleged consensual buy-out lacks clarity and consistency. As we alluded to at [56] above, there is uncertainty as to the precise date of the buy-out of the Appellant's stake:

(a) In THY's e-mail dated 28 January 2019, he alleged that he had "bought [the Appellant] out in 2005".

(b) In a subsequent letter dated 25 March 2020, THY stated that he "exercised [his] option [to buy out the Appellant] in the middle of 2006".

(c) In the Respondent's pleadings, it is stated that THY informed the Appellant that he was prepared to buy out the Appellant's stake in the Investment in or around January 2006.

(d) The Redemption Agreement is dated 1 July 2005. The closing dates of the Redemption Agreement and Purchase Agreement are 27 December 2005 and 28 December 2005 respectively. All these dates precede January 2006, which was pleaded as the date on which THY offered to buy out the Appellant.

(e) The 2004/2005 and 2005/2006 Compilation Reports indicated that as of 31 December 2005, Spurlington USA had no equity in Centrum GS. Spurlington USA's income tax return for 2005

indicated that the redemption took place on 21 December 2005 and that the sale took place on 31 December 2005. Again, these dates precede January 2006.

(f) Johnson's evidence was that THY made arrangements for the redemption shortly *after* the sale of the residential units in 2005, but the Redemption Agreement was dated 1 July 2005, *before* the residential units were sold on or around 5 August 2005.

63 Further, in respect of the mechanism of the buy-out, the Respondent did not plead, prior to the Defence and Counterclaim (Amendment No. 3), that the buy-out was done "by way of a redemption of Spurlington USA's shares in the Investment". At the point when this was pleaded, THY had already passed away. In other words, while THY was alive, he had never pleaded that his (purported) buy-out of the Appellant was effected by way of a redemption of Spurlington USA's shares in Centrum GS.

64 Having regard to the reasons set out above, it appears to us that the narrative of a consensual buy-out was an afterthought conceived by THY and then further developed by the Respondent following his passing. We are thus respectfully of the view that the Judge's finding of a buy-out of the Appellant's stake in the Investment was against the weight of the objective evidence. We find, instead, that the US$2.7m payment to the Appellant in 2006 represented his share of the proceeds from the sale of the residential units. On the evidence before us, we find it more likely than not that THY unilaterally brought an end to the Appellant's stake in the Investment by arranging for the redemption and sale of Spurlington USA's shares in Centrum GS without the Appellant's prior consent. For the avoidance of doubt, we make no finding as to the state of knowledge on the part of the other two shareholders of Spurlington BVI – "S.S."

and "G.W." – *vis-à-vis* the redemption and sale of Spurlington USA's shares in Centrum GS, there having been no evidence led as to their roles (if any) in the redemption and sale exercise.

65 We next examine the merits of each of the Appellant's pleaded causes of action, in the light of the above factual findings.

Whether the Appellant has a valid claim in contract

The Appellant's case

66 The Appellant's submissions on appeal in relation to the claim in contract largely mirror his pleadings in S 823. In summary, the Appellant's pleaded case was that:

> (a) THY signed the Term Sheet in his personal capacity. Alternatively, if Goodyork was the party to the Term Sheet, THY was nonetheless liable for breaches of the Term Sheet because Goodyork was THY's alter ego.
>
> (b) THY committed a breach of the express terms of the Term Sheet and/or a repudiatory breach of the Term Sheet. The express term pleaded was the obligation to distribute to the Appellant profits from the Investment. The repudiatory conduct relied on was THY's false claims from January 2019 onwards that he had bought out the Appellant's stake in the Investment.
>
> (c) THY also breached the implied terms of the Term Sheet. Three implied terms were pleaded:
>
> (i) The first, labelled the "No Misappropriation Obligation", was an implied term that THY "would not misappropriate the

assets that comprise the Investment and/or the [Appellant's] share of the Investment".

(ii) The second, labelled the "No-Dilution Obligation", was an implied term that THY "would not do anything to dilute or otherwise negatively affect the [Appellant's] share in the Investment without prior consultation with, approval from or notice to the [Appellant]".

(iii) The third, labelled the "Obligation to Account" was an implied term that THY "would provide an account of the Investment to the [Appellant] upon request".

(d) The above breaches of the Term Sheet were alleged to have caused the Appellant loss and damage.

67 As to the issue of time bar in respect of three heads of claim – (a) the Appellant's share of the sales proceeds from Unit 1701; (b) the Appellant's share of the sales proceeds from the retail and commercial units; and (c) the Appellant's share of the moneys in a bank account with BNP International Financial Services (Singapore) Ltd ("BNP IFS") – the Appellant argues that they are not time-barred, because S 823 was filed within six years of the operative dates for these heads of claim. The Appellant also disputes that his claim is barred by the doctrine of laches or acquiescence.

The Respondent's case

68 Aside from submitting that THY signed the Term Sheet on behalf of Goodyork and that Goodyork was not the alter ego of THY (see [37] above), the Respondent denies that THY breached the Term Sheet as the Appellant's share in the Investment was bought out sometime between 2005 and 2006. The

Respondent also contends that the Appellant's claim in contract is time-barred pursuant to s 6(1) of the Limitation Act and relies generally on laches and acquiescence to meet any claim of the Appellant.

Our decision

THY did not breach the express term on profit distribution

69 We begin with the express term pleaded. The Term Sheet provides for the Appellant to be entitled, *as a Limited Partner*, to share in 80% of the profits from the Investment. We reproduce below the relevant term:

> Limited Partners:
>
> *Limited Partners* will share 80% of profits/losses from partnership. Interest income on the deposit account with BNP IFS to be allocated *to the Limited Partners only*.
>
> [emphasis added]

70 The Appellant himself refers to the above as part of the "*Limited Partner* Terms". Given that the Appellant's entitlement to the profits of the Investment is premised on his status as a Limited Partner, if the Appellant ceases to be a Limited Partner for any reason (*eg*, he sells all his shares to a third party), he ceases to be entitled to share in the Investment's profits. Similarly, if the proportion of the Limited Partners' stake in the Investment changes such that it is no longer 80%, the Appellant ceases to be entitled to share in *80%* of the Investment's profits.

71 Herein lies the flaw in the Appellant's argument that THY breached the express contractual obligation to distribute to the Appellant profits from the Investment, *including any profits from the sale of the retail and commercial units in 2014 and the sale of Unit 1701 in 2021*. As the Appellant's stake in the Investment was brought to an end in 2005 or 2006 (there being uncertainty as

to the precise date – see [62] above), or by November 2007 at the very latest, when Spurlington USA filed its Articles of Dissolution, the Appellant had no contractual right under the Term Sheet to receive any share of the Investment's profits thereafter.

72 At this juncture, we note that the Appellant included in his pleadings a claim for the "balance proceeds of the sale of the residential units, which appears to at the minimum be US$999,000". As the residential units were sold in August 2005 before the Appellant lost his stake in the Investment (which occurred in January 2006 according to the Respondent's pleadings), it is *possible* that THY's purported conduct underlying this specific claim falls foul of the express profit-distribution term in the Term Sheet. We are unable, however, to accept the Appellant's computation of the losses allegedly flowing from any such breach. According to the Appellant's pleadings, he had derived the figure of US$999,000 from the 2005/2006 Compilation Report:

> The financial statements of Centrum GS for the year ended 31 December 2005 contained therein show a "[p]artnership distribution/redemption" of US$13,700,000 to Spurlington USA as at 31 December 2004. As the [Appellant] is entitled to 27% of any distributions to the limited partners [due to the Appellant's 27% stake in Spurlington BVI], if one were to take the figures of the financial statements as accurate, the [Appellant's] distribution ought to have been US$3,699,000 instead of US$2.7m i.e there was a shortfall of US$999,000 in the distribution remitted to him by the Defendant.

73 In fact, the discrepancy that the Appellant took issue with was largely explained by the payment of taxes. Johnson gave evidence that of the US$13.7m recorded in the 2005/2006 Compilation Report as a "[p]artnership distribution/redemption" to Spurlington USA, only US$11m was distributed to Spurlington USA, while the remainder was held back by Centrum GS to pay taxes on behalf of Spurlington USA. There is no basis for us to doubt Johnson's explanation. At trial, the Appellant's expert witness, Mr Todd Lester, accepted

that he had not considered the issue of tax. Mr Lester clarified that his position was simply that there was an "unexplained difference", rather than a "shortfall", in the recorded distribution of US$13.7m to Spurlington USA and the sum of US$2.7m received by the Appellant – the distinction being that there would be no shortfall if the difference was explained. More fundamentally, while we accept that there was still some difference between 27% of US$11m (*ie*, US$2.97m) and the US$2.7m that the Appellant in fact received, we note that the Appellant does *not* dispute that the *contractual* claim for the proceeds from the sale of the residential units is time-barred. We say this because in the Appellant's submissions on the issue of time bar, he has expressly identified three specific heads of claim which he argues are not time-barred, and all three pertain to moneys he was supposed to receive *after* he ceased to have a stake in the Investment (see [67] above).

There was no implied No-Dilution Obligation, No Misappropriation Obligation or Obligation to Account

74 Next, we consider the implied terms pleaded by the Appellant. They comprise the No-Dilution Obligation, the No Misappropriation Obligation and the Obligation to Account.

75 At the outset, we note that to preserve the concept of freedom of contract, the court will only imply terms rarely: *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 ("*Forefront Medical*") at [29]. In determining whether a term should be implied in fact, the particular factual matrix before the court is of paramount importance; the court is concerned with the presumed intention of the particular contracting parties involved: *Forefront Medical* at [41]. The exercise is therefore a highly fact-sensitive one.

76 The law on implied terms in Singapore was explained in further detail by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"). In gist, the implication of terms is an exercise in filling the gaps in a contract – but not all gaps in a contract are "true" gaps in the sense that they can be remedied by the implication of a term (at [93]–[94]). The only instance in which it would be "appropriate for the court to even consider if it will imply a term into the parties' contract" is the scenario in which the parties "did not contemplate the issue at all and so left a gap" (at [94]–[95]). In this connection, "the business efficacy and officious bystander tests used in conjunction and complementarily remain the prevailing approach for the implication of terms under Singapore law" (at [98]). Importantly, and consistent with the approach espoused in *Forefront Medical* (above), the Court of Appeal also emphasised that "the threshold for implying a term is necessarily a high one": a term will only be implied "if it is necessary" (at [100]).

77 The process for considering the implication of terms involves three steps (*Sembcorp Marine* at [101]). At the first step, the court ascertains how the gap in the contract arose. Implication will be considered only if the court discerns that the gap arose because parties did not contemplate the gap. At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy. Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract. If it is not possible to find such a clear response, the gap persists and the consequences of that gap ensue.

78 Applying the approach laid down in *Sembcorp Marine*, we decline to imply the No-Dilution Obligation, the No Misappropriation Obligation and the Obligation to Account.

79 In our view, the No-Dilution Obligation is sufficiently broad to encapsulate the No Misappropriation Obligation: both terms essentially entail the obligation on THY's part not to "steal" or "misappropriate" the Appellant's stake in the Investment. Conduct of this sort, however, would appear to sound in a tortious claim and/or a claim for breach of fiduciary duties. The Appellant's attempt to shoehorn the act of misappropriation into a contractual claim by way of implied terms cannot be countenanced on the basis of the factual matrix before us. This is because the absence of an express obligation not to misappropriate was attributable to the trust shared between the Appellant and THY, rather than the result of a "true" gap. The cross-examination of the Appellant at the trial below reflects this:

> Q Can you show the court which terms here and specify to the court, right, running this two-page term sheet, what are items that Mr Tan Ho Yung needs to come to you or which he doesn't need to when he can manage himself? …
>
> …
>
> Q So please explain to the court, *which are the terms that he needs to come to you to seek an agreement to amend this contract*, this term sheet that you say is a contract, and which he doesn't.
>
> A The purchase price, this one, the purchase price *and then the return one, 80 per cent.*
>
> …
>
> Q *And you communicated this to Mr Tan Ho Yung before you signed this term sheet?*
>
> A *Yes.*

> Q Did you specify this in writing at all to him?
>
> A No. He explained to me this one, then based on this, *there's the trust of the investment.*
>
> [emphasis added]

80 Based on the Appellant's evidence, prior to signing the Term Sheet, he had told THY that if the latter wanted to effect any changes to the Limited Partners' stake in the Investment, THY had to first seek the Appellant's consent for the Term Sheet to be amended. In other words, the parties to the Term Sheet contract *had* contemplated (*inter alia*) the issue of a dilution in the Appellant's stake in the Investment, but they did not reduce this to writing due to the subsisting relationship of trust. In the circumstances, the Appellant fails at the first step of the *Sembcorp Marine* test.

81 In respect of the Obligation to Account, we decline to imply it as a *contractual* term for the same reason that it is not clear to us that the omission arose from a "true" gap. The Appellant testified that the "deal from the beginning" was that he was to act as a "passive investor", and he understood this to mean that he would not be involved in operational elements and "only wait for the report". In other words, the Appellant had contemplated an entitlement to receive reports from THY, but did not demand express provision for this in the Term Sheet contract, presumably because he trusted THY.

82 That being said, as we explain below (at [103]–[111]), THY was an *ad hoc* fiduciary of the Appellant. There was thus an Obligation to Account on THY's part *qua* fiduciary. However, this is inconsequential as the Appellant has in fact already uncovered much of what had transpired in the Investment over the years; the issue is whether he can avail himself of any legal remedies. Ultimately, as we are of the view that the Appellant has a viable claim for breach

of fiduciary duty but that such a claim has become time-barred (see [123]–[140] below), the Obligation to Account is largely academic.

83 In the absence of compelling evidence to meet the high threshold set out in *Sembcorp Marine* for the implication of terms, it would go against the intention of the parties to pad the Term Sheet with a litany of undocumented terms. In this regard, as the Judge noted, the Appellant did not suggest that the Term Sheet was part of a partly written, partly oral contract. In the circumstances, we reject the implied terms proposed by the Appellant.

84 For completeness, we do not accept the Appellant's arguments in respect of repudiatory breach. Regrettably, the Appellant failed to pinpoint which of the four situations enumerated in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") he relied on. Having regard to the Appellant's reference to THY's "express statements and conduct" in his pleadings and his argument that THY's conduct evinced "an intention not to perform his obligations under the Term Sheet", the Appellant seemed to be referring to a situation of repudiatory breach by renunciation (*ie*, Situation 2 in *RDC Concrete* at [93]). However, the conduct by THY which the Appellant relies on is – according to him – the correspondence from THY from January 2019 onwards. In our view, this correspondence does not amount to an act of renunciation. A contract may be renounced "either in advance of the time when performance is due, or at such time as when the performance is due": *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at para 17.141. THY's communications in January 2019 took place long after the sale of the residential, retail and commercial units. Moreover, it is unclear what relief the Appellant is seeking via a claim in renunciation. He is not seeking to terminate the contract.

Conclusion on the claim in contract

85 In summary, while we accept the Appellant's submission that THY signed the Term Sheet contract in his personal capacity, the Appellant's claim in contract fails because THY did not breach the express term on profit distribution, and there was no implied No-Dilution Obligation, No Misappropriation Obligation or Obligation to Account.

86 Given our findings on the Appellant's claim for breach of contract, we do not find it necessary to deal with his submissions on time bar. There is also no need for us to consider the issue of whether the Appellant suffered any loss from breach of contract.

Whether the Appellant has a valid claim in tort

The Appellant's case

87 We next address the Appellant's claim in tort; specifically, the tort of negligence. The Appellant argues that THY owed the Appellant a "minimum duty of care", because it was factually foreseeable that THY's negligence would cause the Appellant to suffer harm, and sufficient legal proximity existed between the parties since THY had assumed the responsibility of managing the Investment. THY breached his duty of care and caused the Appellant's loss of his share of the Investment and its profits and dividends. As for the issue of a time bar, the Appellant relies on s 24A of the Limitation Act.

The Respondent's case

88 The Respondent argues that the Appellant failed to plead its claim of negligence and to particularise the alleged negligent act that caused the

Appellant harm. Further, the Respondent submits that the claim in tort is time-barred by s 6(1) of the Limitation Act.

Our decision

The claim in tort fails because it was inadequately pleaded

89 In our view, the Appellant's claim in tort is a non-starter. To begin with, we agree with the Respondent that the Appellant's pleadings were inadequate and confusing. A plaintiff claiming negligence has to state the relationship between the plaintiff and the defendant that would give rise to a duty of care, state that the defendant was negligent, and provide the particulars of the defendant's negligence in his pleadings: *Hyflux Ltd (in compulsory liquidation) and others v KPMG LLP* [2023] SGHC 270 at [5]. The Appellant's pleadings were deficient in all of these respects.

90 First, negligence was not expressly pleaded by the Appellant.

91 Second, while the Appellant pleaded that THY owed him "duties of care and skill in tort", this pleading was entirely too vague; indeed, amorphous. There was no elaboration in his pleadings as to the specific aspects of the parties' relationship which would have given rise to such duties and/or what these duties would have required of THY. Instead, the Appellant simply referenced the entirety of section 2 of his pleadings as the basis for claiming that THY owed him "duties of care and skill in tort". These included details such as the terms of the Term Sheet contract and the circumstances that were said to have given rise to fiduciary duties on the part of THY. Having referenced these matters, the Appellant failed to explain in his pleadings how they would give rise to "duties of care and skill in tort". We find this regrettably unhelpful, given that there are distinct legal tests to determine the existence of a principal-

fiduciary relationship and of a duty of care in tort. As we explain below (at [104]), fiduciary obligations arise where a fiduciary places himself in a position where the law can "objectively impute an intention on his or her part to undertake those obligations". On the other hand, the relevant test in relation to a duty of care is the two-stage test premised on proximity and policy considerations, preceded by a preliminary requirement of factual foreseeability: *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") at [73].

92 Third, there was also no proper pleading of the negligent act that caused the Appellant harm. In pleading that THY had breached his "tortious duties of care", the Appellant referenced an earlier section in his pleadings (section 6.1) that dealt specifically with THY's breach of his alleged duty as a trustee and/or fiduciary "by misappropriating assets that he held and managed on trust on behalf of [the Appellant]". Insofar as the Appellant appears to be suggesting that THY's tortious duty of care consisted of a duty to refrain from misappropriating the Appellant's property, we are unable to accept such a suggestion. As the Court of Appeal made clear in *Credit Suisse* (at [49]), the fiduciary duty to act in good faith is distinct from the non-fiduciary duty to act with skill, care and diligence: while both involve the court's scrutiny of the conduct of the person subject to the duty, "the duty of care measures their *performance* against an objective standard of reasonable behaviour, whereas the duty to act in good faith assesses their *state of mind* in performing" [emphasis in original]. If the gravamen of the Appellant's complaint is the misappropriation of his stake in the Investment, that should be a breach of fiduciary duty rather than a breach of a tortious duty of care.

93 For the reasons we have set out above, we uphold the Judge's dismissal of the claim in negligence.

Conclusion on the claim in tort

94 In summary, we find that the Appellant cannot succeed in his claim in negligence because it was inadequately pleaded. In light of this finding, it is not necessary for us to consider the issue of whether there was damage arising from the purported negligence.

95 For completeness, we note that the Appellant had included in his pleadings an alleged breach by THY of his "equitable duties of skill and care". Regrettably, the pleadings did not explain the content of these "equitable duties of skill and care". The Appellant did not pursue this point on appeal. In the absence of substantive arguments from the parties, we do not consider this issue.

Whether the Appellant has a valid claim in equity

The Appellant's case

96 We next address the Appellant's claim in equity. The Appellant submits that THY was an *ad hoc* fiduciary as he had voluntarily assumed the responsibility of managing the Investment. According to the Appellant, he and THY shared a relationship of trust and confidence; and he was vulnerable to any disloyalty by THY. Alternatively, the Appellant claims that pursuant to the Term Sheet, he and THY had created an express trust over his (the Appellant's) share of the profits from the Investment. By misappropriating the Appellant's share of the Investment, THY breached his duties as a fiduciary and/or as an express trustee.

97 Further and in the alternative, the Appellant argues that THY was liable to account to him as a constructive trustee, on the broad basis that THY had misappropriated his share in the Investment. We note that neither the Appellant's pleadings nor his submissions explain which of the established

categories of unconscionability he was relying on for his alternative claim of an institutional constructive trust.

98 In respect of the time bar issue, the Appellant relies on s 22(1)(*a*) of the Limitation Act.

The Respondent's case

99 For her part, the Respondent submits that THY was not an *ad hoc* fiduciary, having regard to the commercial and profit-making nature of his relationship with the Appellant and the latter's own background in managing funds. Next, the Respondent submits that there was no express trust between the Appellant and THY, as the parties clearly decided to participate in the Investment through a limited partnership arrangement. The Respondent also contends that the Appellant has not shown a breach of duty to justify a claim in equity.

100 In addition, the Respondent contends that the Appellant's claim for breach of fiduciary duty is time-barred under s 22(2) of the Limitation Act and that the Appellant's reliance on s 22(1) of the Limitation Act is misplaced.

Our decision

There is insufficient evidence to support the claim for an express trust

101 In respect of the Appellant's claim for an express trust, we find that there is insufficient evidence to support this claim. Three certainties are required for the creation of an express trust: certainty of intention; certainty of subject-matter; and certainty of the objects of the trust: *Guy Neale and others v Nine Squares Pty Ltd* [2015] 1 SLR 1097 ("*Guy Neale*") at [51].

102 The Appellant's claim of an express trust fails at the first hurdle because there was no "clear evidence of an intention to create a trust": see *Guy Neale* at [52]. The Appellant's intention had to be clear on two matters: (a) that he intended THY to "owe legally enforceable duties rather than duties of a merely social or moral nature"; and (b) that "if they intended to create a legal relationship, it was to involve trust duties as distinct from some [other] kind of legal relationship, such as a simple relationship of debtor and creditor": *Snell's Equity* (John McGee and Steven Elliott gen ed) (Sweet & Maxwell, 34th Ed, 2020) ("*Snell's Equity*") at para 22-013. In the present case, the Term Sheet was bereft of any language alluding to a trust structure; and the Appellant has failed to identify any other evidence of a clear intention to create a legal relationship involving trust duties.

THY was the Appellant's ad hoc fiduciary

103 The Appellant's failure to make out his claim of an express trust does not *per se* preclude him from making out his alternative claim that THY was his *ad hoc* fiduciary and owed him certain fiduciary obligations.

104 The hallmark of a fiduciary obligation is that the fiduciary is to act in the interests of another person: *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*") at [192]. The fiduciary undertaking "is voluntary in the sense that it arises as a consequence of the fiduciary's conduct, and is not imposed by law independently of the fiduciary's intentions" [emphasis in original omitted]: *Tan Yok Koon* at [194]. As the Court of Appeal made clear in the same passage in *Tan Yok Koon*, this is "not to state that the fiduciary must be *subjectively willing* to undertake those obligations; the undertaking arises where the fiduciary voluntarily places himself in a position where the law can objectively impute an intention on his or her part to

undertake those obligations" [emphasis in original omitted; emphasis added in italics]: *Tan Yok Koon* at [194]. Such a finding "will be arrived at by *objectively* assessing the conduct of the person who is said to be a fiduciary. The precise content of these duties are to be deduced from the surrounding circumstances, including, and especially, any relationship between the parties": *Tan Yok Koon* at [205]. It is worth noting that "the mere existence of a fiduciary relationship, without more, would not necessarily give rise to fiduciary duties… [T]he facts and circumstances are also of the first importance in order to ascertain whether or not a fiduciary duty ought to be imposed even where there already exists an established fiduciary relationship between the parties concerned" [emphasis in original omitted]: *Tan Yok Koon* at [207].

105 In considering the application of the above principles, it is helpful to consider the Court of Appeal's decision in *Tan Teck Kee v Ratan Kumar Rai* [2022] 2 SLR 1250 ("*Tan Teck Kee*"), which involved a factual matrix with some similarities to the present case. In *Tan Teck Kee*, the plaintiff ("Mr Rai") claimed that he had participated in an investment venture (the "Venture") over which the first and second defendants ("Mr Seah" and "Mr Tan" respectively) had oversight and control. The third defendant, a Cambodian company ("WBL"), was alleged to be the corporate vehicle of the venture. WBL purchased two plots of land adjacent to each other and entered into a joint venture agreement with another company to construct a mixed-use development, known as "The Bridge", on the land. The claim by Mr Rai against the defendants was for an account, following a press release stating that sales from The Bridge had garnered a "gross profit of S$140.8 million with a gross profit margin of 38%" (at [30]). The trial judge found that Mr Tan was a fiduciary to Mr Rai and ordered an account on the basis of wilful default. Mr Tan appealed both these aspects of the trial judge's decision. We focus on the

Court of Appeal's decision in respect of the first aspect (*ie*, the issue of whether Mr Tan was a fiduciary).

106 The Court of Appeal agreed with the judge that Mr Tan was a fiduciary to Mr Rai (at [79] and [88]). In making this finding, the Court of Appeal rejected the argument that in order to identify whether a putative fiduciary was in fact in an *ad hoc* fiduciary relationship with a supposed principal, a finding had to be made as to whether that putative fiduciary had undertaken to act exclusively in the interests of the supposed principal. The Court of Appeal reiterated that the relevant inquiry, as articulated in *Tan Yok Koon*, was whether the putative fiduciary had voluntarily placed himself in a position where the law could objectively impute an intention on his part to undertake fiduciary duties. This was a "notoriously open-ended" question, and thus in determining whether such an intention should be imputed, the court could "rarely be more precise – without being unduly dogmatic – than broadly examining and evaluating the specific nature of the role played by the putative fiduciary" (at [69]). Notably, while the Court of Appeal acknowledged that in a paradigm case, a fiduciary would have undertaken expressly to act only for the benefit of his principal to the exclusion of all others (including the fiduciary himself), it saw no reason to insist on "dogmatic adherence to this paradigm case", and certainly no reason to depart from the open-ended approached preferred in *Tan Yok Koon* (at [76]).

107 Applying this open-ended approach to the facts in *Tan Teck Kee*, the Court held that Mr Tan should be imputed with the intention to undertake fiduciary obligations to the investors. Of particular significance to its finding was the fact that the position which Mr Tan had voluntarily undertaken possessed a high degree of control in the handling of the investors' interest in the Venture: there was "little which the investors could do to protect their interest in the Venture" – in other words, they were "particularly vulnerable to

Mr Tan's exercise of power" (at [78]). This was most evident from the fact that Mr Tan could unilaterally decide to retain in WBL's possession monies received by WBL which Mr Tan himself admitted the investors had an interest in. In fact, it was shown that Mr Rai had not even known about the payment of such monies to WBL until the relevant documents were produced at trial pursuant to a subpoena.

108 The above reasoning reflected the approach adopted by the Court of Appeal in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 (a case which preceded *Tan Yok Koon* and which was also cited in *Tan Teck Kee*), in which it was held (at [41]) that the analysis adopted in the dissenting judgment of Wilson J in *Frame v Smith* [1987] 2 SCR 99 was helpful in identifying the common features of a fiduciary relationship. In gist, the analysis revealed that the following general characteristics would seem to be present in relationships in which fiduciary obligations have been imposed:

> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

109 Applying the principles established by the Court of Appeal in *Tan Yok Koon* and having regard to *Tan Teck Kee*, we find that THY was an *ad hoc* fiduciary to the Appellant. It will be recalled that in respect of the Term Sheet signed by THY and the Appellant, we have found that THY entered into the agreement therein in his personal capacity. As far as the Appellant was concerned, it was THY who would be responsible for managing the Investment; and prior to his incarceration in 2008, he would be updated verbally on the Investment once or twice a year by THY. THY would also provide him with

(*inter alia*) the Compilation Reports on such occasions. The nature of their respective roles in the Investment is admitted at least in part by the Respondent, who accepts that the Appellant was a "passive investor" while THY was to manage the Investment.

110 Pertinently, the Term Sheet does not contain any strictures on the manner in which THY was to manage the Investment. The Appellant has alleged that THY was able to unilaterally effect changes to the structure of the Investment – for example, by splitting up the ownership of the residential units and retail/commercial units – without reporting to the Appellant on when and how these changes were made, or at least, without having to obtain the Appellant's prior consent. There is some corroboration for this in the evidence of Johnson. Thus, for example, in his affidavit of evidence-in-chief ("AEIC"), Johnson stated that it was THY who restructured the Investment in 2001 by splitting up the ownership of the residential units and retail/commercial units. As another example, in respect of the sale of the residential units in August 2005, the Appellant's evidence was that he was told by THY in mid-2005 that THY intended to sell the residential units; and by the time he spoke with THY again in September 2005, THY simply mentioned that he was already in the midst of selling the residential units. This again coheres with Johnson's evidence: in his AEIC, Johnson stated that it was THY who "made the decision" to sell the residential units (save for Unit 1701) in 2005. In other words, therefore, the evidence indicates that THY took it upon himself to make the various decisions needed to manage the Investment; and conversely, the Appellant took no part in these decisions. Indeed, as the above evidence regarding the sale of the residential units in 2005 shows, even if THY chose to inform the Appellant of his plans, this was not done for the purpose of obtaining the Appellant's concurrence to those plans before THY proceeded with them. Similar to Mr Tan in *Tan Teck Kee*, THY evidently exercised a high degree of

control over the management of the Investment, and the Appellant was particularly vulnerable to THY's exercise of that control. Tellingly, Johnson testified that until the proceedings began, he thought that THY was the only partner in the Investment. It also appears that some payments to the Appellant on the investment were from THY's personal account.

111 In the circumstances, we find that THY did in fact voluntarily place himself in a position where the law can objectively impute an intention on his part to undertake fiduciary duties.

112 Having made this finding, we also accept that as *ad hoc* fiduciary to the Appellant, THY owed – at the very least – a duty to act honestly and in good faith in the best interests of the Appellant. In *Sim Poh Ping v Winsta Holdings Pte Ltd* [2020] 1 SLR 1199, the Court of Appeal held – citing Millett LJ's judgment in the English Court of Appeal decision of *Bristol and West Building Society v Mothew* [1998] Ch 1 – that the duty to act in good faith is a core fiduciary duty (at [253]). In *Tan Yok Koon*, the respondent TCS was found to be holding on trust certain shares transferred to her by her siblings. The Court of Appeal found that TCS owed her siblings a fiduciary duty to perform the trust honestly and in good faith for the benefit of each of them. Following upon this finding, the Court held that in refusing to convey the shares and in exercising her powers *qua* shareholder-director to carry out acts motivated by her self-interest, TCS was in breach of her fiduciary duty. In the present case, having regard to the evidence adduced, we find that THY's conduct in terminating the Appellant's stake in the Investment without the latter's prior knowledge or consent, and thereby disabling him from further access to any profits to be made from it, amounted to a breach of this duty to act in good faith in the Appellant's best interests.

113 Unfortunately for the Appellant, as we explain below, these findings do not ultimately assist him because on the evidence before us, the claim for breach of fiduciary duties is time-barred.

The claim of constructive trust is not made out

114 In the alternative, the Appellant seeks to rely on an institutional constructive trust. An institutional constructive trust arises where the defendant knows that the property in question has been dealt with in an unconscionable manner: *Guy Neale* at [124]. An allegation of unconscionability in the general sense does not suffice; the conduct must fall into an established category which equity has recognised as being capable of giving rise to an institutional constructive trust: *Peck Wee Boon Patrick and another v Lim Poh Goon and others* [2024] 5 SLR 1234 ("*Patrick*") at [150]. The categories in question are as follows (*Patrick* at [150], citing *Zaiton bte Adom v Nafsiah bte Wagiman and another* [2023] 3 SLR 533 at [107]):

(a) fraud;

(b) the retention of property acquired as a result of a crime causing death;

(c) a profit in breach of a fiduciary duty;

(d) the retention of property by a vendor after the vendor had entered into a specifically enforceable contract to sell the property;

(e) the changing of a will by the survivor of two persons who had entered into a contract to execute wills in a common form;

(f) the acquisition of land expressly subject to the interests of a third party; and

(g) the assertion of full entitlement to property after a common intention to share property had been formed (also known as a 'common intention constructive trust').

115 The pleadings of the Appellant did not specify which of the above categories the Appellant was relying on. At the hearing of the appeal, the Appellant's counsel verbally clarified that the Appellant was relying on the category of fraud, the argument being that THY had misappropriated the Appellant's property – namely, his stake in the Investment – without his prior knowledge or consent.

116 As a matter of general principle, it is true that one type of fraud which can give rise to an institutional constructive trust is fraudulent taking, which was explained in *Snell's Equity* as follows (at para 26-012):

> **Fraudulent taking**. A distinction must be drawn between fraud consisting in the *outright taking of a person's property, wholly without his consent*, and a transaction induced by a fraudulent misrepresentation. In the first case, it has been said that a thief who steals the property of another holds it on constructive trust for the claimant. The thief's possessory title is subject to the claimant's equitable entitlement to have the property specifically restored to him so that he holds it as a constructive trustee. … [emphasis added]

117 In his seminal judgment in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 ("*Westdeutsche*"), Lord Browne-Wilkinson explained at 716:

> … Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the *fraudulent recipient*: the property is recoverable and traceable in equity. … [emphasis added]

118 We make two points at the outset about the Appellant's attempt to rely on the category of fraud as the basis for his claim for an institutional constructive trust. First, the Appellant appears to have assumed that THY's failure to seek his consent to the termination of his stake in the Investment is to be equated automatically with fraud. Regrettably, neither the Appellant's written

submissions nor the oral arguments at the hearing before us engaged in any real analysis of this issue.

119 Second, and in any event, as is apparent from the above passages we have reproduced from *Snell's Equity* and *Westdeutsche*, the concept of fraudulent taking necessarily involves a proprietary element; specifically, a proprietary link between what is taken from the claimant and what is obtained or received by the defendant.

120 The operation of the above principle is illustrated in the case of *Yuanta Asset Management International Ltd and another v Telemedia Pacific Group Ltd and another and another appeal* [2018] 2 SLR 21. In that case, the first defendant Yuanta's sole director Mr Yeh (who was the second defendant) was an authorised signatory to the plaintiff TPG's account and had a mandate to singly operate the TPG account. *Inter alia*, Mr Yeh procured the transfer of 225 million shares (referred to as the "October 225 million shares") from TPG's account to an account of Yuanta's subsidiary, Fullerton. Fullerton then sold the shares, with the bulk of the sale proceeds being transferred by Fullerton to Mr Yeh. Citing the same passages from *Snell's Equity* and *Westdeutsche* that we have reproduced above, the Court of Appeal held that a constructive trust arose by operation of law as it would be unconscionable for Mr Yeh, having dishonestly taken and sold TPG's property and pocketed their proceeds of sale, to assert any beneficial interest in the shares or their proceeds of sale. As the Court of Appeal explained (at [115]–[116]):

> 115 Prior to Mr Yeh's dealings, the October 225 million shares remained the legal and beneficial property of, and in the possession of, TPG. When Mr Yeh transferred the shares to the Fullerton account, he evidently intended to interfere with TPG's beneficial ownership in the shares. This can be seen most clearly from the way he sold the shares and retained the proceeds for his own benefit immediately after the shares were transferred to the Fullerton Account. These actions showed that

> his removal of the shares from the TPG account was the first step in a chain of actions to misappropriate TPG's shares through Fullerton as an intermediary. Ultimately, Mr Yeh personally received from Fullerton the bulk of the proceeds of the 225 million Sale.
>
> 116 Thus we find that from the time of the dishonest taking of TPG's property, Mr Yeh (by his personal involvement from that time in transferring the shares to Fullerton, as well as through Fullerton's initial receipt and then through his own receipt of the sale proceeds) misapplied and/or held TPG's property on constructive trust for TPG. Mr Yeh is liable to account to TPG for its property. In lieu of restoring the shares *in specie*, Mr Yeh is to pay TPG substitutive equitable compensation quantified according to the value of the shares at the time they were removed from the TPG Account.

121 In pointing out that Mr Yeh's "removal of the shares from the TPG Account was the *first step* in a chain of actions to misappropriate TPG's shares" and that he ultimately "*personally received from Fullerton the bulk of the proceeds* of the 225 million Sale", the Court of Appeal was clearly conscious of the need to establish a proprietary link between what was taken from the plaintiff TPG and what was received by the defendant Mr Yeh. In contrast, in the present case, we agree with the Judge's observation that there was no proprietary base to found an institutional constructive trust. Our reasons are as follows:

(a) Spurlington USA's shares in Centrum GS did not belong to the Appellant *per se*. On the facts, the Appellant was two steps removed from ownership of the Centrum GS shares: while Spurlington USA held a stake in Centrum GS, the Appellant only held a minority stake in the company which owned Spurlington USA (*ie*, Spurlington BVI). As between a parent or holding company and its subsidiaries, the rights and assets of the related companies are treated as belonging to each discrete company, distinct from those of the other company: *Goh Chan Peng and others v Beyonics Technology Ltd and another*

and another appeal [2017] 2 SLR 592 at [71]. In other words, Spurlington BVI did not own the assets of Spurlington USA. Indeed, even if it could somehow be argued that Spurlington BVI owned the Centrum GS shares, the Appellant himself did not own the assets of Spurlington BVI.

(b) The Appellant has asserted that his "property" in the present case should be characterised as "the right to the opportunity to receive profits from the Investment", arguing that "even intangible assets such as a maturing business opportunity can form the basis of a constructive trust, for which an account of profits may be ordered: see, *eg*, *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 ("*Regal (Hastings) Ltd*") and *Innovative Corp Pte Ltd v Ow Chun Ming and another* [2020] 3 SLR 943 ("*Innovative Corp*")". In our view, however, the Appellant's reliance on both these authorities is misplaced. In both *Regal (Hastings) Ltd* and *Innovative Corp*, the subject of the constructive trust was the profits made by the errant directors from diverting corporate opportunities: see *Regal (Hastings*) *Ltd* at 149F; *Innovative Corp* at [123]. In contrast, what the Appellant claims to be held on constructive trust in this case is the "bundle of rights" arising from his shares in the Investment, which includes "the opportunity to receive profits from the Investment". The authorities he has cited therefore do not support his suggestion that "the right to the opportunity to receive profits from the Investment" can form the basis of a constructive trust.

(c) Even if we were to assume the plausibility of the Appellant's characterisation of the relevant "property" , THY did not personally receive either Spurlington USA's shares in Centrum GS or the rights

> in those shares. Instead, THY benefitted indirectly through an increase in the value of his shareholding in Goodyork and Hypac, given that they each owned a greater stake in Centrum GS. However, the mere rise in Goodyork and Hypac's share value does not establish the requisite proprietary link between THY and the Appellant.

122 For the reasons set out above, we find that THY was not a constructive trustee for the Appellant.

The claim based on breach of fiduciary duties is time-barred

123 While we find that THY was the Appellant's *ad hoc* fiduciary, the Appellant's claim for breach of fiduciary duties is time-barred pursuant to s 6(7) read with s 6(1) of the Limitation Act. We reproduce below the relevant provisions:

> **Limitation of actions of contract and tort and certain other actions**
>
> **6.**—(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:
>
> (*a*) actions founded on a contract or on tort;
>
> …
>
> (7) Subject to sections 22 and 32, this section shall apply to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

124 Pursuant to s 6(7) of the Limitation Act, the six-year time bar in s 6 applies to equitable claims for breach of fiduciary duties: *Dynasty Line Ltd (in liquidation) v Sukamto Sia and another and another appeal* [2014] 3 SLR 277 ("*Dynasty Line*") at [53]. Section 6(7) references s 22 of the Limitation Act, which applies to actions in respect of trust property, as an exception to the six-

year time bar. However, in the absence of an express trust on the facts, the Appellant cannot rely on s 22 because it only applies to actions "by a beneficiary under a trust": see *Red Star Marine Consultants Pte Ltd v Personal Representatives of the Estate of Satwant Kaur d/o Sardara Singh, deceased and another* [2019] SGHC 144 at [95]–[96].

125 Applying s 6 of the Limitation Act, the cause of action for breach of fiduciary duties accrues at the time of breach, albeit the quantification of liability occurs at the time of the court's judgment: *Re Medora Xerxes Jamshid (in his capacity as the private trustee in bankruptcy of Tan Han Meng) (Planar One & Associates Pte Ltd (in liquidation), non-party*) [2024] 5 SLR 1006 at [95], citing the House of Lords' decision in *Target Holdings Ltd v Redferns (a firm) and another* [1996] 1 AC 421 at 437. The breach here took place at the point in time when THY caused Spurlington USA to dispose of its shares in Centrum GS by way of the redemption by Centrum GS and sale to Hypac. The precise date on which this occurred is uncertain (see [62] above) but at the latest, the Appellant's stake in the Investment would have been brought to an end by the time Spurlington USA filed its Articles of Dissolution in November 2007. As the Appellant commenced S 823 in 2020, his claim is time-barred.

126 Apart from s 22, the Appellant also appears to have pleaded reliance on s 24A of the Limitation Act. Section 24A states:

> **Time limits for negligence, nuisance and breach of duty actions in respect of latent injuries and damage**
>
> **24A.**—(1) This section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under any written law or independently of any contract or any such provision).
>
> **…**

> (3) An action to which this section applies, other than one referred to in subsection (2) [which applies in cases of personal injuries], shall not be brought after the expiration of the period of —
>
> (*a*) 6 years from the date on which the cause of action accrued; or
>
> (*b*) 3 years from the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, if that period expires later than the period mentioned in paragraph (*a*).

127 We note that the Appellant did not specify in his pleadings the claim(s) in respect of which he was pleading reliance on s 24A. It was thus not expressly stated that he was relying on s 24A to argue that his claim *for breach of fiduciary duties* was not time-barred. Further and in any event, the Appellant has not explained his basis for suggesting that s 24A applies to his claims in equity. This is unfortunate because as the court in *Aljunied-Hougang Town Council and another v Lim Swee Lian Sylvia and others and another suit* [2019] SGHC 241 observed, whether s 24A applies to actions for breaches of fiduciary duties remains an open question (at [466]):

> … First, there is the question of whether a claim for breach of fiduciary duties (whether framed as a claim for equitable compensation or otherwise) is properly considered an action for "damages" under s 24A(1). Strictly speaking, equitable compensation (and, *a fortiori*, other equitable remedies) cannot be equated with damages: see [554] below. On the other hand, in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163, the High Court accepted, at least implicitly, that s 24A could apply to claims for breach of fiduciary duty (at, *eg*, [246]). Likewise, in *Sinwa SS (HK) Co Ltd v Nordic International Ltd and another* [2016] 4 SLR 320 ("*Sinwa*"), although the High Court rejected the submission based on s 24A, it was at least prepared to consider whether claims for, *inter alia*, an account of profits (see *Sinwa* at [10]) fell within the scope of s 24A(3)(*b*) (*Sinwa* at [41]–[46]). …

128 Nevertheless, since the Respondent has also not made any submission *resisting* the application of s 24A to claims in equity, we will deal with this provision in the interest of completeness on the *assumed premise* that it applies. In our view, (a) the claim for breach of fiduciary duties is time-barred under s 24A(3)(*a*); and (b) the Appellant cannot avail himself of s 24A(3)(*b*) because on the evidence, he had the requisite knowledge to bring a claim in 2008, but only commenced S 823 in September 2020. We explain.

129 For the reasons stated at [125] above, the Appellant's cause of action for breach of fiduciary duties accrued more than six years prior to the commencement of S 823. It is therefore time-barred under s 24A(3)(*a*).

130 In his submissions, the Appellant has sought to rely on the alternative limitation period provided for in s 24A(3)(*b*) of the Limitation Act, pursuant to which a three-year limitation period only starts to run from "the earliest date on which the plaintiff … first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action". The Appellant claims that he only had the requisite knowledge in 2019, following his investigations into the Investment.

131 Pursuant to s 24A(6)(*a*) of the Limitation Act, the knowledge in question includes knowledge that the plaintiff might reasonably have been expected to acquire from facts observable or ascertainable by him. Further, what is crucial is whether the plaintiff knew or might reasonably have known of the factual essence of his complaint; the plaintiff does not need to know the details of what went wrong: *Lian Kok Hong v Ow Wah Foong and another* [2008] 4 SLR(R) 165 at [42(a)].

132 We find that the Appellant cannot avail himself of s 24A(3)(*b*) of the Limitation Act. In our view, he had the requisite knowledge to bring a claim in 2008 or he could reasonably be expected to acquire the knowledge then if he had inquired or investigated further, whereas S 823 was commenced in September 2020. Three documents would have provided the Appellant with such knowledge: (a) the 2004/2005 Compilation Report; (b) the 2005/2006 Compilation Report; and (c) the Gain Calculation Document.

133 The following can be gleaned from the Statement of Changes in Partners' Equity contained in the 2004/2005 Compilation Report, which the Appellant received sometime in 2006:

(a) In 2004, there was a "[p]artner distribution/redemption" of US$13.7m to Spurlington USA.

(b) As of 31 December 2005, Spurlington USA held no equity in Centrum GS. Hypac was added as a Limited Partner which held equity in Centrum GS as at 31 December 2005.

134 The 2005/2006 Compilation Report, which the Appellant received sometime in 2008 before his incarceration, confirmed that Spurlington USA ceased to own shares in Centrum GS:

(a) Based on the Statements of Assets, Liabilities and Partners' Equity, as of 2006, there were no longer notes payable to partners.

(b) Based on the Statement of Changes in Partners' Equity:

(i) Consistent with the 2004/2005 Compilation Report, there was a "[p]artner distribution/redemption" of US$13.7m to Spurlington USA in 2004.

(ii) As of *both* 31 December 2005 and 31 December 2006, Spurlington USA had no equity in Centrum GS while Hypac owned some equity across both years.

135 The Gain Calculation Document, which was also received by the Appellant in 2008, contained calculations on the estimated gain from the sale of the retail and commercial units, before indicating that the "[a]llocation of [g]ain" was around 97.5% to Goodyork and around 2.5% to Hypac. In other words, there was no allocation of any proportion of the profits to Spurlington USA or the Appellant. This was despite the Term Sheet providing for the Limited Partners in the Investment to receive 80% of the profits from the Investment.

136 During the hearing of the appeal, the Appellant's counsel summarised the Appellant's position in respect of the documents as follows: (a) he did not read them at the material time; (b) even if he had read these documents at the material time, he would not have reasonably been put on notice that his stake in the Investment had been brought to an end, because after all, THY had previously also effected changes to the corporate structure underlying the Investment.

137 We are unable to accept the Appellant's claim that he did not read the documents at the material time, as his pleadings and AEIC suggest otherwise. The Appellant pleaded, in relation to the Gain Calculation Document, that he was "*unable to enquire* with [THY] about the quantum of distributions and/or Hypac at the material time" [emphasis added] because he was preoccupied with other matters and trusted THY to manage the Investment in his best interests. This was also his position in his AEIC. He also stated in his AEIC that he did not "go through [the 2005/2006 Compilation Report] *in detail*" [emphasis

added] for the same reasons. In our view, these statements were admissions by the Appellant that he *did* read the documents when he received them, albeit not in detail, and he noted that there were aspects of the documents that possibly warranted an enquiry. This would mean that by 2008 at the latest, when the Appellant received the 2005/2006 Compilation Report and the Gain Calculation Document, he was reasonably expected to have known that his stake in the Investment had been brought to an end. Alternatively, at the minimum, he would have known enough to "start an investigation into [the] possibility [that his stake in the Investment had been extinguished], which [s 24A] then gives him three years to complete": see *Haward and others v Fawcetts (a firm)* [2006] 3 All ER 497 at [90]. Unfortunately, the Appellant only began looking into the matter in late 2018.

138 It is expected that a reasonable person would read his correspondence: *Andrew Cole and others v Scion Ltd and others* [2020] EWHC 1022 (Ch) at [16(8)], citing *Webster v Cooper Burnett* [2000] PNLR 240 at 246C. The Compilation Reports and Gain Calculation Document were not voluminous documents, with the substantive contents of the documents totalling 13 pages. In addition, the 2004/2005 Compilation Report was provided to the Appellant in 2006, long before the Appellant purportedly became "pre-occupied with the financial crisis in Indonesia after the collapse of Lehman Brothers in 2008, which resulted in [his] incarceration" as he alleged. There was ample time and opportunity for the Appellant to look into Spurlington USA's divestment from Centrum GS, which the 2004/2005 Compilation Report recorded (and the 2005/2006 Compilation Report reaffirmed). In fact, there was reason for the Appellant to pay special attention to the financial documents which covered the years 2005 and 2006. Based on the Appellant's version of events, THY had informed him in 2005 that THY intended to sell the residential units so that the partners could be returned their original capital contribution. Therefore, when

the Appellant subsequently received US$2.7m in January 2006 – which would have indicated to him that the residential units had been sold – it would have been reasonable for him to ask THY about the sale price of the residential units and to check the financial documents of Centrum GS to ensure that he was getting his rightful share pursuant to the profit-sharing clause of the Term Sheet. This is especially so given that THY had – according to the Appellant – provided him with a one-page document in 2005 estimating that the residential units would be sold for US$15,516,004. The Appellant's proportionate share of this sum would have amounted to about US$3.3m, an amount considerably greater than the US$2.7m he received in January 2006.

139 We do not accept the argument that because THY had previously also effected changes to the Investment's corporate structure, this meant that the Appellant would not have reasonably been put on notice from reading the documents about the cessation of his stake in the Investment. At the trial below, the Appellant accepted during cross-examination that he had no interest in and no knowledge of Hypac. We note that the Appellant holds a Master of Business Administration and is the former chief executive officer of a bank. Given his background, coupled with the unmistakable indication in the Compilation Reports that Spurlington USA possessed *no* equity in Centrum GS as at 31 December 2005 and 31 December 2006, the Appellant was reasonably expected to appreciate from the documents that he no longer had a stake in the Investment by 2008. At the very least, given the considerable sum of money which he had invested, the Appellant ought to have questioned THY about Hypac and how the changes reflected in the documents affected his own stake in the Investment.

140 Accordingly, s 24A(3)(*b*) is of no assistance to the Appellant. On the assumption that s 24A is applicable to claims for breach of fiduciary duties, the Appellant's claim remains time-barred under s 24A(3)(*a*) of the Limitation Act.

Conclusion on the claim in equity

141 To sum up, the Appellant's claim in equity fails because THY was not an express trustee nor a constructive trustee for the Appellant; and the Appellant's claim in equity for breach of fiduciary duties is time-barred. The issue of damage is accordingly academic.

Whether the Appellant has a valid claim in unjust enrichment

The Appellant's case

142 We next address the Appellant's claim in unjust enrichment. The Appellant argues that the Judge erred in finding that lack of consent is not an established unjust factor in Singapore, that THY was enriched at the Appellant's expense because THY secured a transfer of the Appellant's stake in the Investment (and the entirety of its value) to himself, and that the enrichment was unjust because it was done without the Appellant's consent.

The Respondent's case

143 The Respondent argues that lack of consent has been rejected as an unjust factor in Singapore and that a novel unjust factor should not be recognised on the present facts. The Respondent also contends that no evidence has been adduced by the Appellant to prove that THY benefitted at his (the Appellant's) expense.

Our decision

144 We make two preliminary points in respect of the claim in unjust enrichment. First, claims in unjust enrichment do not fall within the ambit of the Limitation Act: *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 ("*Esben*") at [85]. Second, contrary to the Appellant's submission,

the factor of lack of consent is not recognised as an established unjust factor in Singapore. In *Esben*, while the Court of Appeal acknowledged (at [251]) that "[t]here is *in principle* no reason why lack of consent ought not to be recognised as an unjust factor" [emphasis in original omitted; emphasis added], the court also made clear that it was not conclusively deciding if the court should recognise lack of consent as an unjust factor (at [195]). The facts of the present case do not require us in any event to express a conclusive view on this issue, as the unjust enrichment claim cannot succeed even if lack of consent were to be recognised as an unjust factor.

145 Three elements are required to establish a claim in unjust enrichment: (a) the defendant has been benefitted or enriched; (b) the enrichment was at the expense of the plaintiff; and (c) the enrichment was unjust: *Esben* at [125], citing *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*") at [98]. Further, as the Court of Appeal made clear in *Esben*, a claim in unjust enrichment on the basis of lack of consent would not be available where there exists an alternative cause of action on the same facts: *Esben* at [195] and [241].

146 In this connection, we also agree with the observation by the High Court in *Ng Chee Tian and another v Ng Chee Pong and others* [2025] 3 SLR 235 ("*Ng Chee Tian*") that an unjust enrichment claim remains unavailable even where the alternative cause of action is time-barred, because suggesting otherwise "denudes the entire concept of limitation periods": as the court pointed out in that case, "[i]f it is accepted that the doctrine of unjust enrichment may be tasked to remedy a time-barred claim, this would lead to an unprincipled outcome where no such claim is ever truly time-barred": *Ng Chee Tian* at [64]. It is clear from *Esben* that restitutionary remedies serve a "gap filling and auxiliary role ... to avoid unjust results in specific cases": *Esben* at [247], citing

Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335 at [75]. While an unjust result may arise where a particular factual substratum fails to be addressed by any established cause of action, the unavailability of established causes of action *by reason of the claimant's delay in commencing proceedings* cannot in our view be said to be unjust and/or to justify the application of restitutionary remedies.

147 In this case, for the reasons we have explained, the claim for a breach of fiduciary duty was available to the Appellant, although it is now time-barred. The Appellant is thus unable to avail himself of a claim in unjust enrichment.

148 Further, we agree with the Judge that any enrichment of THY was not at the Appellant's expense.

149 The element of enrichment by a defendant at the expense of the plaintiff generally requires a direct transfer of value from the plaintiff to the defendant, which entails that "there should not be a third party interposed between the [plaintiff] and the defendant": *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [256]. English cases have accepted the possibility of exceptions to this general requirement of directness, such as agency, assignment, sham transactions, co-ordinated transactions and tracing: *Banque de Commerce et de Placements SA, DIFC Branch and another v China Aviation Oil (Singapore) Corp Ltd (Shandong Energy International (Singapore) Pte Ltd, third party; Golden Base Energy Pte Ltd, fourth party)* [2024] SGHC 145 at [217], referencing *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275 at [47]–[48] – although the status of these exceptions in Singapore law, save for tracing, is uncertain. In *Anna Wee*, the Court of Appeal recognised tracing as capable of creating a nexus between the plaintiff and the defendant, albeit in

obiter remarks (at [115]–[116]; see also *Compañia De Navegación Palomar, SA and others v Koutsos, Isabel Brenda* [2020] SGHC 59 at [122]):

> 115 In our view, there are two interpretations of the basis for this element [*ie*, benefit at the expense of the plaintiff]:
>
> (a) the defendant received an immediate benefit from the claimant, establishing a direct personal link; or
>
> (b) *the defendant received a benefit traceable from the claimant's assets*, establishing an indirect link through the value in the defendant's hands that once belonged to the claimant.
>
> 116 Both these interpretations would create a nexus between the parties satisfying the "at the expense of" requirement, either because the moneys could be traced into the pocket of the defendant or because there is a direct *in personam* transfer between the parties.
>
> [emphasis added]

150 In this case, there was no direct transfer between the Appellant and THY; the transactions took place only between Spurlington USA on the one hand, and Centrum GS and Hypac on the other. The Appellant failed to plead reliance on any of the exceptions alluded to above. As such, we do not find it appropriate to consider any of the exceptions. At the end of the day, the appellate court cannot be in the position of framing arguments to shore up the Appellant's case when he has failed to raise these arguments himself.

Whether the Appellant is guilty of laches

151 The findings we have set out above are dispositive of the present appeal. Nevertheless, given that this case involved considerable delay in the commencement of the proceedings, we state below our views on the application of the doctrines of laches and acquiescence for completeness.

The Appellant's case

152 The Appellant argues that he was not guilty of laches as he was justified in the belated commencement of S 823 and the Respondent was not prejudiced by the lapse of time.

The Respondent's case

153 The Respondent argues that the doctrine of laches should apply, given the significant delay by the Appellant in bringing his claims against THY, which delay has in turn caused prejudice and potential injustice to the Respondent. The single most prejudicial element in this case was the passing of THY.

Our decision

154 The principles relating to the doctrine of laches are set out in *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 at [46] (which the Court of Appeal affirmed in *Ong Chai Soon v Ong Chai Koon and others* [2022] SGCA 36 at [45]):

> Laches is a doctrine of equity. It is properly invoked where essentially there has been a substantial lapse of time coupled with circumstances where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver thereof; or, *where by his conduct and neglect he had, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted* …This is a broad-based inquiry and it would be relevant to consider the length of delay before the claim was brought, the nature of the prejudice said to be suffered by the defendant, as well as any element of unconscionability in allowing the claim to be enforced … [emphasis added]

155 While the extract above makes reference to the concept of "unconscionability", it is worth mentioning that the doctrine of laches does not

inflexibly require that the plaintiff be shown to have engaged in conduct rendering it unconscionable to allow his claim to proceed. The court takes a broad-based approach "directed at all the circumstances": *Re Estate of Tan Kow Quee (alias Tan Kow Kwee)* [2007] 2 SLR(R) 417 at [38], referred to by the Court of Appeal in *Dynasty Line* at [58].

156 We agree with the Judge that the Appellant is guilty of laches. As we have found (at [132]–[139] above), the Appellant was reasonably expected to have learnt of the termination of his stake in the Investment, or at least commenced investigations in this regard, by 2008. By reason of the Appellant's considerable delay in commencing S 823, the Respondent has been significantly prejudiced. A key witness, THY, has passed away. Documents relating to the Investment have also been destroyed due to the closure of the management office of the Investment in or around 2015 (after the retail and commercial units were sold) and the expiration of the document retention period observed by Centrum GS's accounting firm, BDO USA, LLP. The Respondent has been placed in the invidious position of having to defend a suit based on the limited documentary evidence that fortuitously survived the passage of over a decade, and evidence given by Johnson, whose memory of the material events has understandably faded over the years. For example, Johnson's response to whether he had seen a signed copy of the Redemption Agreement was that he "certainly can't recall".

157 Similar considerations were present in *Chng Weng Wah v Goh Bak Heng* [2016] 2 SLR 464. In that case, the appellant trustee ("Chng") and the respondent-beneficiary ("Goh") participated in a joint investment involving the purchase of shares in a Taiwanese company ("MTK"). The parties injected equal sums of money into their investment vehicle ("C&G") to purchase the MTK shares. Chng's position was that Goh's half of the MTK shares were

progressively sold over a few tranches between 1999 and 2000, such that Chng was no longer holding on to any MTK shares on behalf of Goh. Goh's position was that Chng continued to hold on to some MTK shares on his behalf, and there was some uncertainty as to whether he had been fully paid for the MTK shares that were sold. The trial judge preferred Goh's position and also declined to apply the doctrine of laches. Among other things, he ordered Chng to provide an account to Goh. On appeal, Chng challenged the trial judge's decision on the issue of laches.

158 The Court of Appeal held that Chng was entitled to rely on the doctrine of laches. It found that the length of delay in commencing proceedings was 13 years (at [47]) and that such a delay prejudiced Chng by limiting the available evidence (at [53]). In respect of the latter, the court held (at [54]):

> … [W]e are of the view that the Judge had placed too great an emphasis on the state of the *documentary* evidence and failed to consider the fact that had the documents been available, Chng (and other potential witnesses, including Goh) may very well not be in a position to *recall* the exact sequence of events that had taken place or to make sense of the documentary evidence available … [emphasis in original]

159 The present case involves a delay of a similar length (about 12 years). The prejudice suffered by the Respondent was arguably greater in this case, since this was a case not merely of witnesses' memories fading, but of a crucial witness becoming unavailable due to the passage of time. Accordingly, we are of the view that the defence of laches applies to the Appellant's claim for equitable relief: *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30 at [114]. For the avoidance of doubt, the doctrine of laches does not apply to a claim in unjust enrichment: *Esben* at [122].

Whether the Appellant is guilty of acquiescence

The Appellant's case

160 For the same reasons canvassed at [152] in relation to the doctrine of laches, and because the Appellant did not waive his right to claim for his rightful share of the Investment, the Appellant argues that the Judge erred in holding that he is guilty of acquiescence.

The Respondent's case

161 The Respondent argues that it is not relying on any specific waiver by the Appellant, but rather the fact that the Appellant stood by and watched THY deal with his stake in the Investment in a manner inconsistent with his rights.

Our decision

162 We respectfully disagree with the Judge that the Appellant is guilty of acquiescence. Acquiescence may be established where a person abstains from interfering while a violation of his legal rights is taking place, or where he refrains from seeking redress when a violation of his rights, which he was unaware of at the time, is brought to his notice: *Koh Wee Meng v Trans Eurokars Pte Ltd* [2014] 3 SLR 663 at [120]. It suffices for the defence of acquiescence that the plaintiff ought to have known of his rights: *Sumoi Paramesvaeri v Fleury, Jeffrey Gerard and another* [2016] 5 SLR 302 at [104]. However, acquiescence requires more than mere silence on the plaintiff's part; the defendant must show that the plaintiff has made some representation or given some indication that he does not intend to insist on his legal rights: *Eller, Urs v Cheong Kiat Wah* [2020] SGHC 106 at [106].

163 The 2004/2005 and 2005/2006 Compilation Reports, together with the Gain Calculation Document, brought the violation of the Appellant's rights to his notice by 2008. However, there was no indication from the Appellant that he did not intend to insist on his legal rights. We therefore do not find him to be guilty of acquiescence.

Conclusion

164 We dismiss AD/CA 45/2024 in its entirety. The Appellant is to pay the Respondent the costs of the appeal. We note that while the Appellant has failed in his appeal, we have rejected the Respondent's submissions on a number of issues, including the issues of whether THY signed the Term Sheet in his personal capacity, whether there was a consensual buy-out of the Appellant's stake in the Investment, and whether THY was an *ad hoc* fiduciary to the Appellant. In the circumstances, we fix costs in the amount of S$45,000 (all-in). The usual consequential orders will apply.

Woo Bih Li
Judge of the Appellate Division

Debbie Ong Siew Ling
Judge of the Appellate Division

Mavis Chionh Sze Chyi
Judge of the High Court

Joseph Tay Weiwen, Lin Ruizi, Sarah Chew Bee Lin and Mo Fei (Shook Lin & Bok LLP) for the appellant;
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