Guy Neale and others *v* Nine Squares Pty Ltd
[2014] SGCA 64

Case Number : Civil Appeal No 172 of 2013 and Summons No 2011 of 2014

Decision Date : 22 December 2014

Tribunal/Court : Court of Appeal

Coram : Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : Ang Cheng Hock SC, William Ong, Kristy Tan and Clara Tung (Allen & Gledhill LLP) for the appellants; Cavinder Bull SC, Kelvin Tan, Priscilla Lua and Lee Xin Jie (Drew & Napier LLC) for the respondent.

Parties : Guy Neale and others — Nine Squares Pty Ltd

Trusts – Beneficiaries

Trusts – Constructive Trusts

Trusts – Express Trusts – Certainties

22 December 2014 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 Ku de Ta is a well-known restaurant, bar and club in Bali ("Ku De Ta Bali") that has been owned and operated as a partnership ever since it was set up. The current members of the partnership ("the Partnership") are the six appellants in this appeal, Civil Appeal No 172 of 2013 ("this appeal"), who are also the appellants in the related appeal, Civil Appeal No 171 of 2013 ("CA 171"). Four of the appellants were involved in conceptualising, developing and eventually launching Ku De Ta Bali. Its success prompted one of them to pursue ventures under the name "Ku De Ta" ("the 'Ku De Ta' name"). (There are variants in the form and the font of this name, with all the letters capitalised in some instances; but nothing turns on this, and for convenience, we have generally adopted the spelling "Ku De Ta" in this judgment.) At some stage, two trade marks bearing the "Ku De Ta" name were registered in Singapore, with the respondent in this appeal, Nine Squares Pty Ltd ("Nine Squares"), named as the registered proprietor of these two marks ("the Singapore Marks"). Nine Squares subsequently licensed the use of one of the Singapore Marks to a third party, who in turn assigned his right to use that mark to the respondent in CA 171, Ku De Ta SG Pte Ltd ("KDTSG").

2 This appeal, which arises from Suit No 314 of 2011 ("Suit 314"), and CA 171, which arises from Suit No 955 of 2010 ("Suit 955"), are ultimately concerned with the ownership and the use of the Singapore Marks. CA 171 deals with the rights of KDTSG as the assignee of the licence for the use of one of the Singapore Marks. KDTSG's rights could be affected by our determination in this appeal because its rights may depend in the first place on the rights of its assignor, whose rights in turn depend on the rights of the licensor, Nine Squares. For this reason, although we heard this appeal and CA 171 together, we only deal with this appeal in this judgment. We have yet to determine CA 171, and we shall hear the parties to that appeal further, in the light of this judgment, before making our ruling there.

3 The central issue in this appeal is whether Nine Squares, the registered proprietor of the Singapore Marks, is in fact holding these marks on trust for the Partnership. If that is not the case, then a further issue arises as to whether the registration of the Singapore Marks should be invalidated. The judge in the court below ("the Judge") ruled that these marks were not held by Nine Squares on trust for the Partnership, and that their registration should not be invalidated. She thus dismissed the appellants' claim in Suit 314 (see *Guy Neale and others v Nine Squares Pty Ltd* [2013] SGHC 249 ("the 1st Judgment")). In view of her decision in Suit 314, the Judge also dismissed the appellants' claim against KDTSG in Suit 955 (see *Guy Neale and others v Ku de Ta SG Pte Ltd* [2013] SGHC 250 ("the 2nd Judgment")).

The background

4 It will be helpful if we begin with a brief history of the proceedings and the parties involved so as to understand the context of this appeal and CA 171 as well as the issues that they give rise to.

The parties

5 As mentioned earlier, the appellants in this appeal and CA 171 are the same. They are the current members of the Partnership. The original members of the Partnership were: (a) the first appellant, Guy Neale ("Neale"); (b) the second appellant, Aki Kotzamichalis ("Aki"); (c) the third appellant, Made Wiranatha ("Kadek"); and (d) the fifth appellant, Arthur Chondros ("Chondros"). The fourth appellant, White Horses Trading Company Limited ("WH Trading"), and the sixth appellant, White Horses Investments Limited ("WH Investments"), came into the picture only later.

6 Although Suit 314 and Suit 955 were brought in the name of the Partnership, Chondros is a dissenting partner in relation to the proceedings and he in fact gave evidence for Nine Squares at the trial. The submissions of the appellants in the court below and before us were accordingly made on behalf of only the first to the fourth and the sixth appellants (*ie*, Neale, Aki, Kadek, WH Trading and WH Investments), and we shall, for convenience, hereafter refer to them collectively (*excluding* Chondros) as "the Appellants". The Appellants and Chondros, as the current members of the Partnership, are also the current owners of Ku De Ta Bali.

7 Nine Squares, the respondent in this appeal, was set up by Chondros in January 2003 as a public company in the State of Victoria, Australia, but has since been converted into a private company. At all material times until 16 February 2010, Nine Squares had two equal shareholders and directors, Chondros and Daniel Ellaway ("Ellaway"). On 16 February 2010, Ellaway resigned as a director of Nine Squares; and at the time of the trial, he was no longer a shareholder, Chondros was a minority shareholder and there was a new majority shareholder.

8 KDTSG, the respondent in CA 171, is a Singapore company which uses the "Ku De Ta" name for the restaurant, bar, lounge and club which it operates at the Skypark at the Marina Bay Sands development ("Marina Bay Sands") in Singapore. We shall hereafter refer to this business as "Ku De Ta Singapore". KDTSG bases its right to use the "Ku De Ta" name on a licence agreement dated 29 June 2009.

9 Suit 314 and Suit 955 were heard together before the Judge, and the evidence adduced at the trial was admitted in both suits.

The material facts

10 The Judge set out the facts in detail in the 1st Judgment and we do not think it is necessary

for us to repeat all of them here. We refer only to the more important facts that are material to the issues raised in this appeal.

Setting up Ku De Ta Bali

11 The story began when Chondros located a site for development in Bali in April 1999. He thought this would be favourable for use as a high-end dining destination. He approached Kadek, a successful Indonesian businessman with an interest in the food and entertainment sectors including restaurants and clubs. Kadek helped Chondros to acquire the lease of the land. Chondros then sought two other investors. This is how Aki and Neale came to be involved. The "Ku De Ta" name was the brainchild of Chondros. A trade mark of that name was registered in Indonesia in Class 42 (restaurants, *etc*) on 20 March 2001 as Indonesian Trade Mark No 469240 ("the Indonesian Mark"), with Kadek named as the registered proprietor.

12 In February 2000, Chondros, Kadek, Aki and Neale (hereafter referred to collectively as "the Founders" where appropriate to the context) entered into an agreement entitled "Heads of Agreement" ("the 2000 HOA"). After some adjustments in 2001, the equity interest in Ku De Ta Bali was owned in the following proportions: Neale owned 31%; Kadek, 30%; Chondros, 26.5%; and Aki, 12.5%.

13 It was agreed, under the terms of the 2000 HOA, that Chondros would manage the daily operations of Ku De Ta Bali. In late 2002, Chondros enlisted Ellaway to assist him in this regard. As noted above, in January 2003, Chondros incorporated what later became Nine Squares. Subsequently, in July 2003, the Founders agreed that since Chondros was to continue acting as the manager of Ku De Ta Bali, he would be paid a management fee instead of a salary as had originally been agreed under the terms of the 2000 HOA. Although it was proposed by Chondros and Ellaway at various times that Nine Squares be engaged as Ku De Ta Bali's management company, Neale, Kadek and Aki (collectively, "the other Founders") refused. As far as they were concerned, Chondros would remain as the manager of Ku De Ta Bali, although they did not object to Chondros using Nine Squares to help him as he deemed fit in relation to the running of Ku De Ta Bali.

Registration of "Ku De Ta" trade marks

14 As mentioned above, on 20 March 2001, the Indonesian Mark was registered in Kadek's name.

15 Sometime around October 2002, Chondros asked Ellaway to register the "Ku De Ta" name as a trade mark in Australia. This was done on 17 October 2002 in both their names. On 29 January 2004, Chondros and Ellaway assigned that trade mark ("the Australian Mark") to Nine Squares. The other Founders claimed that they were not aware of these developments at the time and there is no reason to disbelieve them.

16 Various other "Ku De Ta" trade marks were registered overseas from 2004 onwards in the name of Nine Squares (these marks will hereafter be referred to as "Overseas Marks"). On 16 February 2004, on the basis of the Australian Mark, Nine Squares applied to the World Intellectual Property Organization for international registration of "Ku De Ta" as a trade mark, designating Singapore as one of the countries for registration. "Ku De Ta" was therefore registered in Class 43 (restaurants, *etc*) as Singapore Trade Mark No T0405181Z ("the 1st Singapore Mark") with effect from 16 February 2004, with Nine Squares reflected as the registered proprietor. Again, the other Founders said that they did not know about this at the time.

17 At some point before June 2007, Chondros separately told Aki and Kadek that he had registered

a number of Overseas Marks. Chondros also told Neale, sometime after 29 June 2007, that he had incurred expenses for the registration of these Overseas Marks.

18 On 30 June 2009, Ellaway caused Nine Squares to apply in Singapore to register "Ku De Ta" as a trade mark in Classes 9 (music) and 25 (apparel). This trade mark was subsequently registered as Singapore Trade Mark No T0907126DF ("the 2nd Singapore Mark") with effect from 30 June 2009, with Nine Squares named as the registered proprietor. The 1st Singapore Mark and the 2nd Singapore Mark collectively make up the Singapore Marks mentioned at [1] above. They are the subject matter of this appeal and are also part of the Overseas Marks.

Involvement of WH Trading and WH Investments

19 In the second half of 2008, a gentleman named Gary Collins ("Collins") agreed to purchase 10% of Ku De Ta Bali from Chondros for US$700,000. Collins made the acquisition through his corporate vehicle, WH Trading.

20 Before Chondros assigned a portion of his shares in Ku De Ta Bali to WH Trading, the Founders re-executed the 2000 HOA in April 2009 with some minor changes. This was done in order to spell out the Founders' rights to review the management of Ku De Ta Bali, capital expenditure in excess of US$10,000 and the hiring of expatriate staff. The shareholding stated in the re-executed agreement was the same as that stated in the 2000 HOA (see [12] above). Chondros subsequently assigned 10% of his stake in Ku De Ta Bali to WH Trading by way of a deed of assignment dated 7 April 2009.

21 In 2010, Collins paid US$600,000 to acquire a further 6.5% of Ku De Ta Bali from Chondros by way of a deed of assignment dated 20 August 2010. On this occasion, Collins used another corporate vehicle, WH Investments, to undertake the acquisition. WH Investments subsequently acquired a further 4% stake in Ku De Ta Bali from Chondros in August 2011 after he failed to repay a loan.

22 As a result of these changes, the ownership of Ku De Ta Bali as at August 2011 was as follows: Neale owned 31%; Kadek, 30%; Chondros, 6%; Aki, 12.5%; WH Trading, 10%; and WH Investments, 10.5%.

Breakdown of relations between Chondros and Ellaway

23 Sometime in 2009, the relationship between Chondros and Ellaway soured. Chondros suspected that Ellaway was siphoning money from Ku De Ta Bali through the alteration or forgery of suppliers' invoices. In May 2009, Chondros confronted Ellaway. Dissatisfied with the explanations that Ellaway put forward, Chondros told Ellaway that Nine Squares could not continue to be involved in managing Ku De Ta Bali if Ellaway engaged in such misconduct. (At the trial, Ellaway admitted that he had altered suppliers' invoices to show amounts that were more than what had actually been billed.)

24 On 24 June 2009, Chondros emailed Ellaway asking for various accounts and books relating to Nine Squares and Ku De Ta Bali, as well as a list of any obligations Ellaway had purported to enter into on behalf of Nine Squares. Chondros was insistent that Ellaway "should not enter into any agreements or incur any expenditure without [Chondros'] express written consent".

25 Five days later, on 29 June 2009, without Chondros' knowledge, Ellaway caused Nine Squares to enter into the licence agreement mentioned at [8] above with one Chris Au ("Au"), under which Nine Squares purported to license to Au the use of the 1st Singapore Mark within Singapore. Au was a businessman who intended to use the "Ku De Ta" name for a restaurant in Singapore. Subsequently, on 23 November 2009, Au assigned his rights under his licence agreement with Nine Squares ("the

Licence Agreement") to KDTSG, which currently operates Ku De Ta Singapore. Although Chondros only found out about the Licence Agreement in February 2010, he had already earlier suspected that Ellaway might have considered causing Nine Squares to enter into overseas ventures under the "Ku De Ta" name. Chondros had thus started sending letters to various personnel in Marina Bay Sands' Retail Development Unit ("MBS's personnel") and to Ellaway disputing the latter's right to cause Nine Squares to enter into such ventures. After Chondros found out about the Licence Agreement, he sent further letters to Ellaway and MBS's personnel expressing similar sentiments specifically in relation to the Licence Agreement. As mentioned earlier, Ellaway eventually resigned as a director of Nine Squares on 16 February 2010.

26 In April 2010, KDTSG and Au commenced legal proceedings in Victoria, Australia, against Nine Squares seeking, among other things, a declaration that the Licence Agreement was valid ("the Australian proceedings"). On 9 July 2010, the Australian proceedings were settled. The settlement deed between KDTSG, Au and Nine Squares, which was signed on Nine Squares' behalf by Chondros and Justin Todd ("Todd"), another director of Nine Squares, affirmed the Licence Agreement with slight variations. [note: 1]

Proceedings in Singapore by the Partnership

27 In September 2010, KDTSG opened Ku De Ta Singapore. In December 2010, the Partnership commenced Suit 955 against KDTSG for, among other things, an order to enjoin the latter from using "the name/mark 'Ku De Ta'" ("the 'Ku De Ta' name or mark") and damages for passing off. As mentioned earlier, this suit was dealt with by the Judge in the 2nd Judgment and is the subject matter of CA 171. In 2011, the Partnership started another action, this time against Nine Squares, by way of an originating summons that was subsequently converted to Suit 314. This suit, as we similarly noted earlier, was dealt with by the Judge in the 1st Judgment and is the subject matter of this appeal. In Suit 314, the Partnership sought a declaration that the Singapore Marks were held by Nine Squares on trust for the Partnership and should be transferred to it; alternatively, the Partnership contended that the registration of the Singapore Marks ought to be invalidated. Further, the Partnership sought an account of the profits made by Nine Squares from the use and/or the licensing of the use of the Singapore Marks. Nine Squares' defence was, in essence, that the Singapore Marks were beneficially owned by it and were not held on trust for the Partnership.

The Judge's decision

28 The Judge dealt with the issues in Suit 314 in the following manner:

(a) the ownership of the "Ku De Ta" name or mark prior to the registration of the 1st Singapore Mark;

(b) whether Nine Squares held the Singapore Marks on an express trust for the Partnership;

(c) If it did not, whether Nine Squares held the Singapore Marks on a constructive trust for the Partnership; and

(d) if it did not, whether the registration of the Singapore Marks should be invalidated under s 23 of the Trade Marks Act (Cap 332, 2005 Rev Ed) ("the TMA").

Ownership of the "Ku De Ta" name or mark

29 The Judge first considered the ownership of the "Ku De Ta" name or mark in the period between

1999 and 2004. It would be useful to digress at this point to clarify precisely what this means. A business will have a name and there can be goodwill in its name. Our attention was drawn to the observations of Laddie J in *Ball v Eden Project Ltd* [2002] 1 BCLC 313 ("*Ball v Eden*"), where he said at [20]:

> When a trader uses and exploits a trademark, whether registered or not, he may acquire goodwill in it. Whether that is so or not depends on the extent and nature of the use.

On facts that were somewhat similar to those in the present proceedings, Laddie J went on to observe at [24]:

> … [The defendant company's] corporate title contained the words "Eden Project". As to the future, goodwill in the name "Eden Project" would be generated by and on behalf of [the company]. Its business would become ever more tied to fame acquired by those words.

30 The Judge considered that the starting point for determining whether the Founders had "rights of ownership *inter se* in respect of the '[Ku De Ta]' name/[the] Indonesian Mark" was to be found in the terms of the 2000 HOA (at [52] of the 1st Judgment); but she also went on to consider the conduct of the Founders as she did not think that the 2000 HOA was a complete record of their agreement (at [59]). The Judge held that the 2000 HOA was meant to be the basis on which the Founders would form a partnership to carry out the business of constructing and operating a restaurant in Bali under the "Ku De Ta" name (at [54]). The "rights" of the Founders , as set out in cl 3(d) of the 2000 HOA, referred to "partnership property" and would cover "the name '[Ku De Ta]' plus any goodwill attached to the name as a result of the successful operation of [Ku De Ta Bali]" (at [55]). After all, the Judge reasoned, the "Ku De Ta" name and the goodwill attached thereto would be the most valuable asset of the Partnership after 20 years of successful operation of Ku De Ta Bali, by which time the lease of the land would have expired and become valueless (at [55]). This also meant that the Indonesian Mark was partnership property. Notably, the Judge wrote at [57]:

> I agree also with the [Appellants'] submission that it can be inferred from the conduct of the [F]ounders and the surrounding circumstances that they had agreed from the beginning that *the "[Ku De Ta]" name and goodwill, as it grew, would belong to the [P]artnership*. … [emphasis added]

The Judge thus rejected the assertions in Nine Squares' defence that (among other things): (a) "the name and the brand of [Ku De Ta Bali] should belong only to … Chondros"; and (b) the Founders were in a "business venture" rather than a partnership (at [57] and [61] respectively). The Judge found that the Founders were to operate Ku De Ta Bali as a partnership, and accordingly, Chondros owed fiduciary duties to the other Founders.

Establishing an express trust

31 The Appellants argued that the Partnership had the exclusive right to use and license the use of the "Ku De Ta" name. Therefore, Nine Squares must have registered the Singapore Marks for and on behalf of the Partnership, and thus held the Singapore Marks as well as the profits derived from their use and/or the licence of their use on an express trust for the Partnership. [note: 2] To make good this argument, the Appellants had to show that Nine Squares intended to hold the Singapore Marks on trust for the Partnership when the Singapore Marks were registered, and that the three certainties of intention, subject matter and objects of the trust were present.

32 As Nine Squares is the legal owner of the Singapore Marks, the Judge considered the question

of whether it had the intention to establish an express trust over these marks by considering the words and conduct of Ellaway and Chondros. The Appellants relied on the facts and circumstances listed at [75] of the 1st Judgment as their basis for arguing that an express trust over the Singapore Marks had been created. The Judge rejected this and held that the evidence was not sufficient to justify the conclusion that Nine Squares had an intention to create an express trust over the Singapore Marks (at [139]). The Judge's analysis of the evidence will be dealt with when we analyse the merits of the Appellants' submissions on this aspect of the 1st Judgment.

Establishing an institutional constructive trust

33 At the hearing below, the Appellants also argued in the alternative that the court should impose an institutional constructive trust in respect of the Singapore Marks as Chondros had breached the fiduciary duties which he, as a member of the Partnership, owed to the Appellants. Two grounds were relied on: that Chondros had usurped a corporate opportunity belonging to the Partnership, and that he had misappropriated partnership property.

34 The Judge found that Chondros had not misappropriated partnership property by causing Nine Squares to register the Singapore Marks in its name because Ku De Ta Bali had no goodwill in Singapore as at February 2004 when the 1st Singapore Mark was registered (at [161] of the 1st Judgment). While there was "*some* goodwill in Singapore on 30 June 2009 [the date of registration of the 2nd Singapore Mark] for Ku De Ta *as a restaurant*" [emphasis added], there was none for "Ku De Ta"-branded *apparel, jewellery or music* (the items in the two classes under which the 2nd Singapore Mark was registered) at that date (at [172]).

35 The Judge also found that Chondros had not usurped a corporate opportunity belonging to the Partnership as there was no "real or substantial possibility" of the Partnership setting up a "Ku De Ta"-named operation in Singapore when the 1st Singapore Mark and the 2nd Singapore Mark were registered in 2004 and 2009 respectively (at [181]).

36 Thus, the Judge found that the Appellants had failed to prove that an institutional constructive trust should be imposed in respect of the Singapore Marks as Chondros had not breached his fiduciary duties to the Appellants in procuring Nine Squares to register those marks in its name.

Invalidation of the registration of the Singapore Marks

37 Next, the Judge considered whether the registration of the Singapore Marks was to be invalidated on the grounds that there was an earlier trade mark, or that there was passing off, or that registration had been applied for in bad faith.

38 The Judge found that the Indonesian Mark was not well known in Singapore at the time of the registration of the Singapore Marks and could not be said to be an "earlier trade mark" within the meaning of the TMA (at [198] and [204] of the 1st Judgment). In respect of the claim based on passing off, the Judge held that it was unsustainable given her earlier finding that there was "no substantial goodwill" attached to the "Ku De Ta" name or mark in Singapore at the time the 1st Singapore Mark was registered in 2004, and only some goodwill (but limited to Ku De Ta Bali as a restaurant) at the time the 2nd Singapore Mark was registered in 2009 (at [212]). As for invalidation of the registration of the Singapore Marks on the basis that registration had been applied for in bad faith, the Judge held that bad faith had not been established in view of her earlier finding that: (a) there was no misappropriation of partnership property; (b) there was either no or, at best, only limited goodwill attached to the "Ku De Ta" name or mark in Singapore at the time the Singapore Marks were registered; and (c) Chondros had not breached the fiduciary duties which he, as a

member of the Partnership, owed to the Appellants (at [218]).

The Judge's ruling on Suit 314 and Suit 955

39 The Judge therefore dismissed the Partnership's claim in Suit 314. Given the nature of their submissions in that suit, the Appellants accepted that if that suit were dismissed, the Partnership would have no basis on which to proceed with its action in Suit 955. Hence, the Judge dismissed the Partnership's action in Suit 955 as well.

The Partnership's applications for leave to adduce new evidence on appeal

40 In connection with CA 172, Summons No 2011 of 2014 was filed by the Partnership for leave to adduce further evidence before this court. The evidence in question was the affidavit of Ho Ching Yi Elsa ("Ho") filed on 5 February 2014 in Suit No 153 of 2014 ("Suit 153"). In connection with CA 171, Summons No 2010 of 2014 was filed by the Partnership in relation to the same affidavit ("Ho's affidavit"). Both Nine Squares and the respondent in CA 171 (collectively, "the Respondents") objected to the Partnership's applications.

41 Shortly after signing the settlement deed in respect of the Australian proceedings, Chondros began divesting his shareholding in Nine Squares to a company called Templetrees Ltd ("Templetrees"). At the trial, Chondros testified that he sold 30% of his shares in Nine Squares to Templetrees for $500,000. In June 2011, Ellaway transferred his shares in Nine Squares to Templetrees. By 15 May 2012, Templetrees owned 79% of Nine Squares while Chondros owned 11%, with one of Chondros' companies owning the remaining 10%.

42 The Appellants believed or at least suspected that Au had offered Chondros a stake in KDTSG on the basis of which the Australian proceedings would be settled and Chondros would then throw in his lot with Au in the present proceedings. As part of this hypothesis, the Appellants believed that the people behind KDTSG had acquired the controlling stake in Nine Squares, and that Chondros had agreed that he would contend at the trial that the 1st Singapore Mark was not held on trust for the Partnership but was beneficially owned by Nine Squares. To establish this hypothesis, the Appellants sought to prove that the persons controlling KDTSG were also controlling Templetrees, which had become the majority shareholder of Nine Squares by the time of the trial.

43 According to Ho's affidavit, as at 29 January 2014, Chondros was holding a 2% beneficial interest in a company called Retribution Limited. In turn, Retribution Limited held a 72.5% share in Kudeta Limited, which fully owned KDTSG and Templetrees. Templetrees had a 79% share in Nine Squares. Therefore, Chondros had at least an indirect ownership interest in KDTSG through his interest in Retribution Limited and, in turn, Kudeta Limited. According to the Appellants, the inference to be drawn from Ho's affidavit was that Chondros had indeed been induced to join forces with Au and his associates following the settlement of the Australian proceedings, and to this end, he had swapped his interest in Nine Squares for an interest upstream in Retribution Limited, the majority shareholder of Kudeta Limited. As Kudeta Limited, which controlled KDTSG, also controlled Nine Squares (through Templetrees), this explained why Chondros, on behalf of Nine Squares, had stated in the present proceedings that the Singapore Marks were not held on trust for the Partnership despite having sworn an affidavit to the contrary in the Australian proceedings.

44 The admissibility of new evidence after a trial is governed by the well-known principles laid down in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*"). Based on these principles, in order for the Partnership to succeed in its applications for leave to adduce Ho's affidavit as new evidence, the Appellants have to prove that that affidavit: (a) could not have been obtained with reasonable

diligence for use at the trial; (b) would likely have had an important influence on the outcome of Suit 314 and Suit 955; and (c) is apparently credible even if it is not incontrovertible. Counsel for the Respondents, Mr Cavinder Bull SC (for Nine Squares in this appeal) and Mr Low Chai Chong (for KDTSG in CA 171), did not dispute that Ho's affidavit could not have been obtained with reasonable diligence for use at the trial, but took issue with the latter two limbs of the rule in *Ladd v Marshall* and challenged both the veracity as well as the relevance of Ho's affidavit.

45 We agree with the Respondents' objections to the admission of Ho's affidavit as new evidence for several reasons, which we shall turn to momentarily. In coming to this conclusion, we considered Ho's affidavit on its own rather than in the context of all the other evidence in the case. On this basis, we turn to our reasons. First, Ho's affidavit related to matters that, at best, reflected a position almost one and a half years after the trial, and thus, was not necessarily reflective of the status of the ownership of Nine Squares at the time of the trial. There was a significant gap in time between the new evidence set out in Ho's affidavit and the evidence adduced at the trial. The Appellants were seeking to infer from the new evidence in Ho's affidavit that (among other things) what Au and Chondros had said at the trial about their respective ownership interests in Templetrees (the majority shareholder of Nine Squares) and KDTSG was incorrect, but this required a significant leap, given the lack of evidence covering the gap in time.

46 Secondly, and more importantly, there were errors in Ho's affidavit that made it less credible. Ho's affidavit stated that as at 31 December 2013, the following individuals, through their respective shareholdings in Retribution Limited, had an indirect ownership interest in Kudeta Limited as follows: Au and Ho had a 45.5% interest; Chondros and Todd, a 5% interest; and a company, Rocky Cape International Limited, a 22% interest. Another company, Essence Investments Limited, owned the remaining 27.5% of Kudeta Limited. [note: 3] Chondros disputed his alleged interest in Retribution Limited as at 31 December 2013 on the basis that he had acquired that interest only in January 2014 in return for having earlier transferred his shares in Nine Squares to Templetrees. This was corroborated by Todd, who likewise stated that he had acquired an interest in Retribution Limited on the same basis. [note: 4] Both Chondros and Todd relied on a share certificate which showed that Templetrees had acquired shares in Nine Squares on 28 January 2014. [note: 5] The Appellants were unable to dispute this.

47 Thirdly, the veracity of the allegations contained in Ho's affidavit was challenged by the Respondents, who questioned whether Ho had personal knowledge of the matters deposed to, and hence, whether her affidavit satisfied O 41 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Moreover, shortly after Ho's affidavit was filed, Suit 153 was withdrawn, and as a result, the new evidence in that affidavit was never tested under cross-examination.

48 There was not much that Mr Ang Cheng Hock SC, counsel for the Appellants, could raise to rebut these points. In all the circumstances, we are satisfied that the new evidence in Ho's affidavit does not satisfy the second and third limbs of the rule in *Ladd v Marshall*, and we therefore dismiss both applications for leave to adduce further evidence. Against that background, we turn to the issues in this appeal.

The issues on appeal

49 In this appeal, the Appellants are challenging almost the entirety of the Judge's decision in Suit 314. We shall elaborate on the Appellants' arguments in the course of our discussion of the issues before us, which are as follows:

(a) whether Nine Squares held the Singapore Marks on an express trust for the Partnership;

(b) in the alternative, whether Nine Squares held the Singapore Marks on a constructive trust for the Partnership; and

(c) if (and only if) the first two issues are both answered in the negative, then whether the registration of the Singapore Marks should be invalidated under s 23 of the TMA.

Whether an express trust was established

Basic principles

50 We first set out the basic principles on the creation of an express trust. An express trust is created by the actual intention of the settlor; the intention may be apparent from the express use of the word "trust" in the relevant instrument or inferred from the settlor's words or conduct (see *Snell's Equity* (John McGee gen ed) (Sweet & Maxwell, 32nd Ed, 2010) ("*Snell's Equity*") at para 21-018).

51 Three certainties must be present for the creation of an express trust: certainty of intention; certainty of subject matter; and certainty of the objects of the trust.

52 The first certainty, that of intention, requires proof that a trust was intended by the settlor. The principle is that in what was said or done by the settlor, there must be clear evidence of an intention to create a trust (see *Paul v Constance* [1977] 1 WLR 527 ("*Paul v Constance*") at 531). No particular form of expression is necessary. In particular, *Snell's Equity* notes that it is unnecessary for the settlor to use the word "trust" before such an intention can be found (at para 22-013), and goes on to say in the same paragraph:

> … [T]he court construes the substance and effect of the words used, against the background of any relevant surrounding circumstances … [T]he settlor need not even understand that his words or conduct have created a trust if they have this effect on their proper legal construction. …

53 The same point was also made in *Tito v Waddell (No 2)* [1977] Ch 106 by Megarry VC at 211:

> … [I]t can hardly be disputed that a trust may be created without using the word "trust." In every case one has to look to see whether in the circumstances of the case, and on the true construction of what was said and written, a sufficient intention to create a true trust has been manifested.

Therefore, there have been cases where an express trust was created by means of an informal declaration (as in *Paul v Constance*), or inferred from the acts of the settlor or the circumstances of the case (see Geraint Thomas & Alastair Hudson, *The Law on Trusts* (Oxford, 2nd Ed, 2010) ("*The Law on Trusts*") at para 2.04; Alastair Hudson, *Equity and Trusts* (Routledge, 7th Ed, 2013) ("*Equity and Trusts*") at pp 94–95). We consider three decisions of the latter category in some detail below as the principles that emerge from them inform our analysis of the evidence in this case.

54 The first case is *Re Kayford Ltd* [1975] 1 WLR 279 ("*Re Kayford*"), which concerned a company that carried on a mail-order business where the customers either paid the full price in advance or paid a deposit. When the company faced financial difficulties, its solicitors advised it to set up a separate bank account into which all further moneys paid by customers for goods not yet delivered would be deposited and subsequently drawn from only when the goods had been delivered. The company accepted that advice and acted accordingly. Shortly thereafter, the company went into liquidation.

The question before the court was whether the moneys in the bank account were held on trust for the customers who had paid those moneys, or whether they formed part of the company's assets. Megarry VC had little difficulty in arriving at the conclusion that an express trust of the moneys in that bank account had been created. The advice to the company was to establish a separate account with its bank, and the purpose of doing so was to ensure that that the moneys deposited into that bank account remained in the beneficial ownership of the customers who had paid those moneys. Megarry VC noted that the customers were not creditors of the company as a trust had been created through the use of a separate bank account, the sole purpose of which was to hold the moneys paid by customers whose goods had yet to be delivered (at 282):

> No doubt the general rule is that if you send money to a company for goods which are not delivered, you are merely a creditor of the company unless a trust has been created. The sender may create a trust by using appropriate words when he sends the money (though I wonder how many do this, even if they are equity lawyers), or the company may do it by taking suitable steps on or before receiving the money. If either is done, the obligations in respect of the money are transformed from contract to property, from debt to trust. Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements.

The intention to create an express trust was inferred in *Re Kayford* from the acts of the company, which showed that it intended to hold the moneys in question for the benefit of the customers who had paid those moneys.

55 We note that the opposite result was reached on similar facts in *Re Farepak Food and Gifts Ltd (in liquidation)* [2010] 1 BCLC 444 ("*Re Farepak*"). The court's reasoning in that case was that applying a trust analysis in the context of an insolvent company would entail conferring upon the customers concerned a preference over other creditors. The express trust analysis in *Re Kayford* was neither referred to nor applied. However, the court in *Re Farepak* did consider what the intention of the company was. The court found that an express trust had not been created because of the preference that would otherwise arise in the context of insolvency, but also noted that the parties had not properly argued this issue before it (at [52]). We do not presently have to deal with a situation of trusts arising in the context of insolvency. The point to be made is that in both *Re Kayford* and *Re Farepak*, the court did not hesitate to consider whether an express trust had been created based on the intentions of the company as manifested in its conduct.

56 The next case is the English Court of Appeal's decision in *Re Chelsea Cloisters Ltd (In liquidation)* (1981) 41 P & CR 98. There, a company had an underlease of some land from the landlord. When the company faced financial difficulties, a receiver was appointed, and he took steps to ensure that future deposits paid by tenants to the company were kept in a separate bank account from which reimbursements could be made to tenants. When the company went into liquidation, the question before the court was whether a trust had been created over those moneys or whether those moneys formed part of the general funds of the company. The court considered the inference to be drawn from the nature of the transaction by looking at the evidence of the receiver's intentions in setting up the bank account and operating it in the manner that he did. The receiver made three statements in particular. First, he intended to keep the funds in that bank account separate from the general funds of the company. Second, he wanted to ensure that the tenants' beneficial interest in the moneys in that bank account was preserved. Third, he regarded that bank account as available only for repaying deposits of tenants. The court was mindful that this was not a case where the receiver had expressly stated that a trust would be created (*per* Denning LJ at 101, Bridge LJ at 103 and Oliver LJ at 104); however, all three judges came to the unanimous conclusion that what was

important was a close examination of the receiver's intentions and what he had done by setting up the bank account for a specific purpose. From the evidence, the court was satisfied that a trust had been created over the moneys in the bank account.

57 The last case of note is *Don King Productions Inc v Warren* [2000] Ch 291. There, two persons formed a partnership in which they agreed to share profits and losses as part of a business enterprise. It was not disputed that the partnership could enter into management agreements which would be partnership assets. The question before the court was whether management agreements entered into by one partner in his own name could be said to be held by that partner as a partnership asset. At first instance, Lightman J held that the *benefits* derived from the management agreements were held on an express trust for the partnership. The agreements themselves were non-assignable and thus could not have formed the subject matter of a trust. But, the court found, after construing the partnership agreements, that the parties intended the business of the partnership to include the exploitation of management agreements for the benefit of the partners, and that the parties had the freedom to contract to create trusts over the fruits of such agreements (at 316 and 321). Lightman J's decision was subsequently upheld on appeal (at 337–339).

58 The focus of the courts in the above cases was on whether it was possible and appropriate to infer an intention to create a trust by looking at evidence not only of the alleged settlor's words and conduct, but also of the surrounding circumstances and the interpretation of any agreements that might have been entered into.

59 The second certainty required for the creation of an express trust is certainty of subject matter. The trust must define with sufficient certainty the assets which are to be held on trust *and* the kind of interest that the beneficiaries are to take in them. The definition will be sufficiently certain if it enables the trustee or the court to execute the trust according to the settlor's intention (see *Snell's Equity* at para 22-016).

60 The third certainty is certainty in the definition of the objects of the trust. The intended beneficiaries must be identifiable so that it is possible to ascertain those who have the standing to enforce the trustee's duties under the trust (see *Snell's Equity* at para 22-021).

61 As to the three certainties in this appeal, the main contention between the parties before us lay in whether there was sufficient certainty of intention. The certainties of subject matter and of the objects of the alleged express trust were not in dispute: the subject matter was the exploitation of the "Ku De Ta" name through the registration of (among other Overseas Marks) the Singapore Marks, and the benefits to be derived from licensing the use of the Singapore Marks; while the objects of that trust were the members of the Partnership. The evidence adduced was directed essentially at proving or disproving that Nine Squares intended to hold the Singapore Marks and the benefits derived therefrom on trust for the Partnership. As Nine Squares acted through Chondros and/or Ellaway at the material times, the analysis centred largely on their words and actions.

62 Before we turn to analyse the evidence, we reiterate the fact that the Judge found that "the ['Ku De Ta'] name and goodwill, as it grew, would belong to the [P]artnership" (at [57] of the 1st Judgment). The question before the Judge was how this was affected, given the terms of the 2000 HOA; and as Ku De Ta Bali grew, how this applied in relation to (among other Overseas Marks) the Singapore Marks.

63 The Judge undertook a detailed analysis of the evidence adduced by the Appellants and concluded that it did not support the conclusion that there was a clear and express intention on the part of Nine Squares to hold the Singapore Marks on trust for the Partnership.

The Judge's findings

64 We have already noted that the Judge was presented with a large number of circumstances on the basis of which she was asked to infer that Chondros, who was the prime mover of Nine Squares at the material times, intended Nine Squares to hold the Singapore Marks on trust for the Partnership. It is not necessary for us to rehearse each of these circumstances in this judgment because they are collated at [75] and analysed in detail at [79]–[138] of the 1st Judgment. Presented with this evidence, the Judge analysed each of these circumstances as discrete events and found that none of them in and of itself could support the conclusion that the Singapore Marks were held on trust for the Partnership. She also considered that where a given circumstance could give rise to more than one possible inference, the Appellants would not be able to rely on that circumstance to prove that the Partnership was the beneficial owner of the Singapore Marks if that circumstance could equally be consistent with Nine Squares' beneficial ownership.

65 We shall turn to the details of the evidence shortly, but we pause to observe that, perhaps, the most difficult part of the evidence from Nine Squares' point of view was the testimony that Chondros had given in the Australian proceedings. The Judge found that Chondros had unequivocally asserted in those proceedings that the Overseas Marks, including the Singapore Marks, were intended to be held for the benefit of the Partnership (at [121] of the 1st Judgment). However, the Judge also found that Chondros' affidavit evidence in those proceedings as to the Partnership's "entitlement" to the benefits derived from the Overseas Marks had to be read in the light of Chondros' personal quarrel with Ellaway at that time and his sustained wish for the other members of the Partnership to continue investing in new "Ku De Ta"-named ventures outside of Bali (at [122]). The Judge therefore concluded that Chondros could have been speaking of a desire for the other members of the Partnership to have a chance to invest in new "Ku De Ta"-named projects while at the same time denying Ellaway any benefits arising from the Singapore Marks and Ku De Ta Singapore (at [127]–[128]). Furthermore, the Judge found that Chondros' usage of terms such as "trust", "vesting" and "beneficial ownership" was "hopelessly confused" and did not display a proper understanding of the concept of trusts (at [129]–[130]).

66 The Judge noted that Chondros subjectively believed that he was the owner of the "Ku De Ta" name, and that it was his efforts and ideas that had made Ku De Ta Bali successful; on this basis, he thought that he was entitled to keep the benefits of any "Ku De Ta"-named enterprise to himself, save to the extent that he wished and chose to share those benefits with others. On this basis, the Judge concluded that the statements made by Chondros in the Australian proceedings were not sufficient to evidence the intention to create an express trust over the Singapore Marks.

67 While the Judge's analysis of the evidence might fairly reflect one view of how Chondros' evidence in the Australian proceedings could be interpreted, in our judgment, it is necessary to go further and examine, in the light of all the circumstances, which of the following scenarios is more probable:

(a) that Chondros was being truthful in the statements which he made in the Australian proceedings at a time when he was locked in a battle with Au and KDTSG, who were seeking to enforce the Licence Agreement against Nine Squares; or

(b) that Chondros was being truthful in the proceedings before the Judge, and satisfactorily and candidly explained why he had said the opposite in the Australian proceedings.

68 Against that background, we turn to the crux of the Appellants' case as to whether Nine Squares held the Singapore Marks on an express trust for the Partnership. We set out our further

analysis in four sections as follows:

(a) the 2000 HOA;

(b) the events after 2003;

(c) the email memorandum of 6 July 2007 ("the Email Memorandum") and the surrounding circumstances; and

(d) the Australian proceedings.

69 In analysing these matters, the question, as we have already said, is whether, on the totality of the evidence, it was clear that Nine Squares intended to hold the Singapore Marks on trust for the Partnership.

Our analysis

The 2000 HOA

70 We begin with the 2000 HOA. At the time this agreement was signed, the only members of the Partnership were the Founders. We shall thus refer specifically to the Founders in this section of our judgment, but it should be remembered that we are referring to them collectively as the Partnership as it stood at that time.

71 Clause 13 of the 2000 HOA provided that it was governed by the laws of the State of Victoria, Australia, and all the parties accepted that this was its proper law. The Appellants' Victorian law expert, Mr Raymond A Finkelstein QC ("Mr Finkelstein"), testified that the 2000 HOA was an incomplete record of the Founders' rights and obligations, and it was therefore necessary to consider the conduct of the Founders and all the surrounding circumstances. Where the written agreement was not a complete record of what had been agreed, the court would have to infer whether and, if so, what other terms had been agreed to by the Founders based on their conduct. The Judge accepted this and went on to examine the Founders' conduct, and eventually held, as we have noted above, that although it was not stated in the 2000 HOA as a term, the "Ku De Ta" name and the corresponding goodwill were the property of the Founders (as the members of the Partnership) in the period from 1999 to 2004 (at [57] of the 1st Judgment).

72 The 2000 HOA defined "The Business" in cl 1(1) to mean "the restaurant business named 'Ku De Ta' to be carried out in Bali, Indonesia". On the basis of those clauses in the 2000 HOA which referred to "the business", it seems clear that the term "the business" pertained to the setting up and operation of Ku De Ta Bali specifically, and not explicitly to other "Ku De Ta"-named ventures that might be established. This is unsurprising since in 2000, there was not yet a specific expectation to expand "the business" overseas. But, this is not decisive of the issue.

73 Mr Finkelstein said in his second affidavit filed on 28 June 2012 that a business was rarely static, and that certain aspects of the business, including the types of activities undertaken, might change and so vary the partnership agreement setting out the basis on which the relationship between the owners of that business was to be regulated. [note: 6] Hence, while the 2000 HOA was not entered into with a specific intention that extended beyond Ku De Ta Bali, this did not preclude the prospect of the Founders either explicitly or implicitly extending the coverage of the 2000 HOA or even varying it. It is true that the 2000 HOA was updated in 2009 without any change in the definition of "the business", but this does not preclude the conclusion that the Founders intended

that there would be shared involvement in any new "Ku De Ta"-named ventures and that they would all benefit from the exploitation of the "Ku De Ta" name in the future. Mr Finkelstein's evidence was to the effect that it would be necessary to consider the sequence of events from 2000 onwards to see whether the Founders contemplated that the scope of the rights and obligations under the 2000 HOA would extend to any new "Ku De Ta"-named ventures, or whether there was a separate or supplemental agreement.

The events after 2003

74 The Judge referred at [79]–[83] of the 1st Judgment to various discussions which one or more members of the Partnership and/or Ellaway had with third parties between 2003 and 2009 concerning the possibility of establishing businesses using the "Ku De Ta" name in various other locations. (The Partnership likewise consisted of only the Founders during this period.) The Judge concluded that these discussions were ultimately irrelevant to the Appellants' case because:

(a) most of the discussions were conducted by Chondros or Ellaway, with the other Founders being largely unaware of the discussions;

(b) Nine Squares represented itself as the owner of the Overseas Marks (including the Singapore Marks) in these dealings with outsiders;

(c) Chondros and Ellaway only kept the other Founders informed or involved if one of the other Founders had referred the business prospect to them; and

(d) Chondros in any event always kept in mind that the other Founders were prospective investors for future possible "Ku De Ta"-named projects.

75 At [135]–[138] of the 1st Judgment, the Judge also touched on the behaviour of Nine Squares in so far as it consistently told third parties that it was the owner of the Overseas Marks. She noted that the Appellants could have disputed Nine Squares' assertion of ownership, but had not done so.

76 We consider the significance of these events in the context of the next section.

The Email Memorandum of July 2007 and the surrounding circumstances

77 The Overseas Marks were mostly registered by Nine Squares in the period between 2004 and 2007. On 25 May 2007, Ellaway sent an email to the other Founders, copied to Chondros. [note: 7] In that email, Ellaway sought to clarify "rumours" that there would be a "Ku De Ta"-named business opening in Singapore, and went on to state that Overseas Marks had been registered by Nine Squares in more than 35 countries, but that no rights of usage had been given "to any other person or entity whatsoever". Sometime before June 2007, Chondros separately told Aki and Kadek that he had registered a number of Overseas Marks. Neale was told of this by Chondros sometime after 29 June 2007.

78 Ellaway was asked at the trial why he had bothered to clarify these "rumours" with the other Founders if, as he maintained at the trial, they had no ownership interest or entitlement to equity participation in other "Ku De Ta"-named operations at all. Ellaway's answer was that he wanted to keep the other Founders informed in case there was a chance for them to invest in such ventures. This seems odd because he would then not be clarifying the "rumours" at all, but would instead be setting out a business proposal for the other Founders' consideration and this would in fact have nothing to do with any "rumours". It is also significant that the opening paragraph of Ellaway's email

of 25 May 2007 contained the following sentence:

> … Just to clear the picture, some of the rumours are in fact true, but then some have been misinterpreted.

And the closing paragraph read as follows:

> I hope this clears up some of *your concerns*. Please feel free to call if you wish to discuss this matter in greater detail. [emphasis added]

79 In our judgment, this email was nothing but an attempt to assuage any concerns which the other Founders might have had at that time about how Ellaway and Chondros were dealing with the Overseas Marks. Ellaway ultimately failed to answer the fundamental question of why he had bothered to provide the other Founders with any information and deal with any concerns they might have had by "responding to recent rumours" if, in fact, he believed that they did not have any interest in the use of the "Ku De Ta" name and that it was Nine Squares instead who had the exclusive interest therein. [note: 8]

80 Neale called for a partnership meeting in the light of Ellaway's email of 25 May 2007 and the allusions therein to "preliminary discussions" about commencing a "Ku De Ta"-named operation in Singapore. On 29 June 2007, the other Founders attended the partnership meeting at Ku De Ta Bali's premises. Neale claimed that he had notified Chondros of this meeting, but the latter did not turn up. Chondros, on the other hand, explained that he had not attended because he had not been invited to the meeting. Whether or not Chondros had in fact been invited to that meeting, there is no dispute that the matters which appear to have been discussed and agreed on by the other Founders at the meeting were later set out in the Email Memorandum which Neale sent to all the Founders, including Chondros, on 6 July 2007, and that Chondros received that email. Amongst other things, the Email Memorandum stated that: [note: 9]

> Any use of the Ku [De] Ta name by any partner for whatsoever reason must be approved by all partners. Any subsequent agreement must then be governed by a license agreement which details, inter alia, what royalties are to be paid to Ku [De] Ta Bali. Currently, no such arrangement is in force[.]

81 In our judgment, given the context of the partnership meeting on 29 June 2007, it is clear that the other Founders took the position that it was the Partnership as a whole (which, at that time, still consisted of only the Founders), rather than Nine Squares or Chondros alone, that owned the right to decide on the use of the "Ku De Ta" name in any future ventures, and that all the members of the Partnership had an entitlement to benefit from any arrangement that might be concluded to permit the licensing of the use of the "Ku De Ta" name. In our view, this was the point at which the issue of the beneficial ownership of the Overseas Marks (including the Singapore Marks) crystallised among the Founders. Whatever might have transpired up to that point might arguably have been equivocal; indeed, it did not appear that the other Founders even knew about the steps that had been taken to register the Overseas Marks until mid-2007. Once the issue surfaced, however, there is no mistaking the position which the other Founders took. The question then is how Chondros and Ellaway, as the then directors of Nine Squares, responded to this since it would shed light on their true intentions and their understanding of the actual position as to the beneficial ownership of the Overseas Marks.

82 Significantly, Chondros in fact *never replied to object* to the contents of the Email Memorandum, *or to assert* that he alone would have the right to use the "Ku De Ta" name and/or that Nine Squares was both the legal and beneficial owner of the Overseas Marks. The Judge held

that silence might not connote a positive representation. This is true; but, with respect, it misses the point. The real question here is: what was the inference to be drawn from Chondros' silence in these circumstances? The short answer to this is that his silence was inexplicable if his assertion as to Nine Squares' legal *and beneficial* ownership of the Overseas Marks is correct or to be believed.

83 Chondros testified that when he received the Email Memorandum, he went to ask Kadek about it, and that Kadek told him not to worry about it but to continue with his work. The Judge did not find it necessary to make an express finding on Chondros' silence regarding the Email Memorandum, but she did say that she had "some doubts about the veracity of Chondros' account of his conversation with Kadek" (at [90] of the 1st Judgment). In our judgment, Chondros' explanation for his failure to respond to the Email Memorandum was not consistent with his assertion of Nine Squares' beneficial interest in the Overseas Marks and the Judge was entirely correct to harbour doubts as to his veracity. Chondros initially said that he had "hardly even read" the Email Memorandum. [note: 10] He also said that he did not agree that royalties for the use of the "Ku De Ta" name would have to be paid to the Partnership, but this, of course, would raise the question as to why, then, he did not refute the assertions in the Email Memorandum. Chondros further testified that he did not recall telling Kadek that Nine Squares was the owner of the "Ku De Ta" name or saying anything in detail to Kadek. Chondros then said that Kadek "probably didn't understand" the words in the Email Memorandum, [note: 11] and when he was probed further, he began to embellish his evidence: [note: 12]

Court:	If you think he didn't understand the e-mail, he didn't understand half the words in the e-mail, how could you have accepted his reassurances?
A:	He understood the points of the e-mails, yes.
Court:	How did you know that?
A:	Because I discussed it with him. I said --
Court:	All these points?
A:	I just said, "Everything that's in this e-mail, is there anything I should worry about?" He said, "No".
Court:	But he didn't understand half of it, you say.
A:	Well, some of the words, maybe not, but the points, I'm sure.
Court:	How do you know if you didn't discuss the points with him?
A:	I did -- I did, I said all these points in this e-mail, is there anything to worry about, in general.
Court:	Did you bring the points up one by one?
A:	Not individually, no. No, your Honour.

84 In short, Chondros variously maintained that:

(a) he had hardly read the Email Memorandum;

(b) he had said nothing in detail to Kadek about the Email Memorandum;

(c) Kadek had not understood "the words" in the Email Memorandum;

(d) Kadek had understood "the points" in the Email Memorandum; and

(e) he had discussed the Email Memorandum with Kadek (in which case, we note that he must have read it).

85 Kadek, on his part, denied having had such a meeting or conversation with Chondros. In our judgment, Chondros' evidence on this point was inconsistent and self-evidently not credible.

86 On 21 November 2007, Ellaway sent an email to the other Founders, again copied to Chondros, informing them of a potential expansion opportunity:

> As previously mentioned, there will be the opportunity for all founding KDT partners to invest in any new venture undertaken based on total project cost as well as the commencement of discussions regarding the matter of royalties due & payable.

The Judge appeared to think that Ellaway's email of 21 November 2007 was sent in reply to the Email Memorandum, and this was not disputed by Nine Squares on appeal other than to state that Ellaway did not receive the Email Memorandum directly from Neale. What is to be made of Ellaway's email?

87 Ellaway's version of the events was that Nine Squares beneficially owned the Overseas Marks at all times, and that his reference to "royalties" in his email of 21 November 2007 was a reference to royalties that would have to be paid to Nine Squares in the event that the "Ku De Ta" name was used for any new ventures, and not the other way round in the sense of royalties that would have to be paid to the Partnership. In our judgment, this was wholly untenable. In the first place, if the potential "new venture" mentioned in that email were a project being promoted by Nine Squares, in respect of which "all founding KDT partners" were merely being given the opportunity to "invest in … based on total project cost", there would be no question of any royalties having to be paid at all because Ellaway's position was that Nine Squares absolutely owned the Overseas Marks. If, on the other hand, the idea was that a third party would license the use of the "Ku De Ta" name and/or any of the Overseas Marks and pay royalties to Nine Squares, then the question of royalties would be wholly irrelevant to the Partnership and there would have been no reason for Ellaway to mention it at all. Indeed, on this hypothesis, the Partnership would not even be able to participate in the third party's "Ku De Ta"-named venture unless the third party consented.

88 Secondly, regardless of whether or not Ellaway's email of 21 November 2007 was a direct reply to the Email Memorandum sent by Neale some months earlier, it could not be considered in isolation without regard to that earlier document. There is no dispute that Ellaway was aware of the Email Memorandum. The central assertion of the Email Memorandum was that the "use of the Ku [De] Ta name" had to be approved by "all partners" and had to be governed by a licence agreement that detailed "what royalties are to be paid to Ku [De] Ta Bali". Ellaway's email of 21 November 2007 not only did not refute these basic and pointed assertions; on the contrary, on its plain terms, it conveyed the sense that not only would all the members of the Partnership have the opportunity to invest in any new "Ku De Ta"-named venture, but there would also be the commencement of discussions "[a]s previously mentioned … regarding the matter of royalties due & payable". This could only be a reference to those royalties mentioned in the Email Memorandum, which were payable to the Partnership.

89 In our judgment, the natural interpretation of Ellaway's email of 21 November 2007 was that Ellaway accepted the need for Nine Squares to discuss the payment of royalties to the Partnership for the licensing of the use of the "Ku De Ta" name and/or the Overseas Marks for future ventures, and this was simply and wholly inconsistent with any assertion that the rights pertaining to the use of the

"Ku De Ta" name and the Overseas Marks vested beneficially in Nine Squares rather than in the Partnership. Unfortunately, this email was not considered in much detail by the Judge in her analysis of the Email Memorandum and Ellaway's earlier email dated 25 May 2007.

90 Hence, to return to the observation we made earlier, when the other Founders asserted their position and understanding in the Email Memorandum that the Overseas Marks were being held for the benefit of the Partnership as a whole, Chondros never responded to object to this at all, while Ellaway in fact seemed to acquiesce in this position.

91 The Judge accepted that Ellaway told third parties that Nine Squares owned Ku De Ta Bali as well as the Overseas Marks and the Indonesian Mark. However, this could not possibly have any probative effect on the question of who, as between Nine Squares and the Partnership, had the beneficial interest in those marks because the latter was not privy to those communications. Indeed, in his discussions with the Partnership, Ellaway was seemingly always careful not to challenge the other Founders' position that it was the Partnership that owned Ku De Ta Bali and the rights in relation to the use of the "Ku De Ta" name and (among other registered "Ku De Ta" trade marks) the Overseas Marks. The one email from Ellaway that might have seemed to assert Nine Squares' beneficial ownership of the Overseas Marks (namely, that of 25 May 2007) was firmly refuted by the other Founders via the Email Memorandum, and their position was left unrebutted by Ellaway in his subsequent email of 21 November 2007.

92 We digress to note that there had been an earlier exchange of emails to a similar effect. In September 2005, Ellaway had sent an email to one Anthony Saatchi ("Saatchi"), copying Kadek, demanding that Saatchi cease the use of "Ku De Ta" images as well as the "Ku De Ta" name and logo in an inflight magazine. Kadek replied to this, copying Chondros and Aki, stating that he had, as a "shareholder", authorised Saatchi to do so. Ellaway did not then or subsequently dispute Kadek's right to authorise the use of the "Ku De Ta" name and logo. If Nine Squares was not the beneficial owner of the "Ku De Ta" name and logo as at September 2005, there is nothing to suggest that it somehow acquired that interest after September 2005 and before 6 July 2007, when the Email Memorandum was sent.

93 In coming to a conclusion on the facts, it is essential to have regard to:

(a) the fact of the Email Memorandum;

(b) Chondros' lack of response to this;

(c) Chondros' ill-conceived attempt to take refuge for his lack of response behind an imaginary conversation with Kadek;

(d) Ellaway's email of 21 November 2007; and

(e) Ellaway's ill-conceived attempt to place an untenable construction upon that email.

94 In the Email Memorandum, Neale had also written:

> It was noted that the use of an unauthorized and unapproved name (Nine Squares) appears on the Ku [De] Ta website which is owned collectively by the partners. Any such use must be approved by all partners and is therefore to be removed.

This statement was made in the context of the fact that at that time, Ku De Ta Bali's website

contained the statement "Ku De Ta is a registered TM of Nine Squares Pty Ltd". [note: 13] The Email Memorandum thus asserted in no uncertain terms that Ku De Ta Bali's website belonged to the Partnership and not Nine Squares, and that all references to Nine Squares on the website should be removed.

95 After the Email Memorandum was sent, the references to Nine Squares on Ku De Ta Bali's website were not removed. Nine Squares contended that the other Founders should have noticed this and should have told Nine Squares to comply with the terms of the Email Memorandum if, indeed, they considered that the Partnership was entitled to control the use and the contents of Ku De Ta Bali's website. This seemed to weigh on the Judge, who said that the other Founders should have disputed Nine Squares' assertion of its absolute ownership of the Overseas Marks to the world at large (at [138] of the 1st Judgment). However, in our judgment, this was one instance where silence could not have amounted to acceptance or acquiescence. Once the Email Memorandum had been sent, the other Founders had put forward their position and had asserted the Partnership's right to control the use of the "Ku De Ta" name. In those circumstances, it was for Nine Squares to respond directly. Ellaway and Chondros both contended that they disagreed with the assertions of the Partnership's rights that were contained in the Email Memorandum. Yet, Ellaway did not dispute those assertions in the email of 21 November 2007 which he sent subsequent to the Email Memorandum, and Chondros did not respond to that document at all. In any event, it is unclear what the other Founders could have done in the circumstances since Nine Squares, and more specifically, Ellaway, managed Ku De Ta Bali's website at that time. [note: 14] Finally, the references to Nine Squares on the website were equivocal about the beneficial (as opposed to the legal) ownership of the Overseas Marks. Hence, the Judge, with respect, may have been overstating the position in viewing these references to Nine Squares as an assertion by Nine Squares to the world at large of its absolute ownership of the Overseas Marks.

The Australian proceedings

96 The most important part of the Appellants' case on appeal in relation to the express trust point centred on the Judge's treatment of the evidence given by Chondros in the Australian proceedings on behalf of Nine Squares. Particular reliance was placed on an affidavit dated 14 May 2010 made by Chondros, as the sole director and the holder of half of the shares in Nine Squares as at that date, in which he said that Nine Squares was holding the Overseas Marks on trust for the Partnership. The Judge considered this to be the strongest support for the Appellants' case that an express trust had been created over those marks.

97 We pause to recall that the Australian proceedings involved KDTSG and Au suing Nine Squares and seeking, among other things, to uphold the validity of the Licence Agreement for the use of the 1st Singapore Mark that Ellaway had caused Nine Squares to enter into just days after Chondros had confronted Ellaway over his alleged defalcations and misdeeds and told him that he was not to enter into agreements or incur expenditure without Chondros' consent (see [23]–[25] above).

98 The specific reference in Chondros' affidavit to the Partnership's beneficial ownership of the Overseas Marks was as follows: [note: 15]

> 4 5 . *It was never my intention that [Nine Squares] would be the beneficial owner of the trademarks* [*ie*, the Overseas Marks]. In that regard, I note that [Nine Squares] had no involvement in the registration of the name of [Ku De Ta Bali]. Whilst the concept of the [r]estaurant was mine, *I have three other partners (Kadek, Neale and [Aki]) who are owners of the [r]estaurant and who have an entitlement to be part of any benefits that were derived as a*

result of the use of the trademarks. It was always my intention that the partners of the [r]estaurant would be included as recipients of any benefits received from the use of the trademarks[;] however as no concluded contracts were entered into[,] we had never discussed the extent of our entitlement.

46. Ellaway is aware that I dispute that [Nine Squares] is the beneficial owner of the trademark. He is aware from discussions that we have had that *the partners in the [r]estaurant will have to be included as beneficial owners of the trademarks*.

[emphasis added]

99 In addition, Nine Squares, in the defence dated 11 June 2010 which it filed in the Australian proceedings, asserted at para 6 that the 1st Singapore Mark (the subject matter of the Australian proceedings) was held beneficially for all the Founders. [note: 16]

100 On a plain reading of Chondros' affidavit and Nine Squares' defence in the Australian proceedings, there is no escaping the fact that Chondros had expressly stated that the Overseas Marks were registered by Nine Squares in its name, but were held on trust for the Partnership as a whole; and further, that all the members of the Partnership were entitled to the benefits flowing from the use of those marks. This is consistent with the position taken by the other Founders in the Email Memorandum in respect of licensing the use of the "Ku De Ta" name. At the trial of the present proceedings, Chondros confirmed that the contents of his affidavit in the Australian proceedings were true and accurate, and that he had taken legal advice when it was drafted. [note: 17]

101 Nine Squares' position was that this evidence had to be seen in the context of the dispute that was then raging between Chondros and Ellaway. It contended that Chondros had in fact always intended the Overseas Marks, and specifically, the Singapore Marks, to be owned beneficially by Nine Squares. The Overseas Marks had all been registered well after Ku De Ta Bali had been established. Moreover, Chondros had come up with the name and the concept for Ku De Ta Bali. On the other hand, as far as the other members of the Partnership were concerned, Chondros had needed their investment to realise his vision. The Appellants contended that the right to exploit the "Ku De Ta" name, including the registration of Overseas Marks and the benefits that were subsequently derived from doing so, vested in the Partnership collectively. If Nine Squares' position were correct, then it would be necessary to find that as between Chondros personally and the other members of the Partnership, Chondros alone had that right; and that either Nine Squares was to be treated as the *alter ego* of Chondros, or Chondros had transferred his alleged right to Nine Squares.

102 Seen in this light, it becomes evident that Chondros, in his affidavit in the Australian proceedings, had gone against *both* aspects of what Nine Squares had to prove in the present proceedings since he had maintained there that: (a) he never intended to vest any beneficial interest in the Overseas Marks in Nine Squares; and further, (b) he did not hold the beneficial interest in those marks solely, but with the other members of the Partnership. Taking Nine Squares' position in the present proceedings to its logical conclusion, we were being asked, in essence, to conclude that Chondros was lying in the Australian proceedings in order to try to defeat the claim that was pursued there; and that he was not lying in the present proceedings in order to try to defeat the claim that the Partnership was pursuing here. To put it another way, we were being asked to ignore the fact that if the Australian proceedings had not been settled and if Chondros' testimony in those proceedings had been accepted, Nine Squares' defence in the present proceedings would have been severely compromised, if not altogether doomed.

103 The Judge found that Chondros considered himself in the present proceedings to be the owner

of the "Ku De Ta" name or mark from its conception. However, this is not what Chondros had said at paras 45 and 46 of his affidavit in the Australian proceedings. It is also not what he had caused Nine Squares to state in its defence in those proceedings. In both documents, Chondros had accepted that the other members of the Partnership were *also* beneficial owners of the Singapore Marks and the other Overseas Marks. Chondros had two explanations for this inconsistency between his evidence in the Australian proceedings and his evidence in the present proceedings: first, in his affidavit in the Australian proceedings, he had wanted to make the point that Ellaway could not use (among other Overseas Marks) the 1st Singapore Mark without his permission; and second, he had mentioned the other members of the Partnership as having a beneficial ownership in the Overseas Marks because he wanted to maintain professional ties with them and involve them in "Ku De Ta"-named ventures outside of Bali. [note: 18] In our judgement, these explanations do not sit well at all with the statement in Chondros' affidavit in the Australian proceedings that the other members of the Partnership:

> … are owners of the [r]estaurant and … *have an entitlement to be part of any benefits that were derived as a result of the use of the trademarks*. … [emphasis added]

104 Chondros also said in the present proceedings that he in fact never doubted that Nine Squares was the rightful owner of the Overseas Marks, and that he had affirmed the Licence Agreement on Nine Squares' behalf after the Australian proceedings were settled because the 1st Singapore Mark was owned by Nine Squares. [note: 19] This is utterly unbelievable since he had adopted the contrary position in the Australian proceedings by vigorously contesting the enforcement of the Licence Agreement until the matter was settled.

105 As to the first of the two explanations mentioned above, the thrust of Chondros' attack in the Australian proceedings, as noted by the Judge (at [126] of the 1st Judgment), had been directed at Ellaway, who was no longer a director of Nine Squares by that time. [note: 20] But, given that Chondros' purpose was to defeat Ellaway's alleged right to cause Nine Squares to enter into the Licence Agreement with Au, then it seems to us that the clearest way for him to do so was to state that he alone was and had always been the beneficial owner of the Overseas Marks. There was no need to mention the other members of the Partnership as being fellow beneficial owners. In fact, if Chondros truly believed that he alone had the beneficial interest in the Overseas Marks, then it seems to us inconceivable that he would have said on oath in the Australian proceedings that he shared that interest with the other members of the Partnership. Indeed, in para 46 of his affidavit in those proceedings, Chondros alleged that in his discussions with Ellaway, it had been made clear that the other members of the Partnership had a share in the Overseas Marks. Chondros never explained this anomaly in his testimony in the present proceedings.

106 Chondros' second explanation for what he had said in his affidavit in the Australian proceedings was that while he was keen to involve the other members of the Partnership in any future "Ku De Ta"-named projects, any member who wanted to participate in such new projects would have to contribute monetarily. But, this neither explains nor detracts from the position stated in his affidavit in the Australian proceedings that the Overseas Marks were beneficially owned by the Partnership as a whole, and not just by him. Any substantial commercial development of the "Ku De Ta" name that was undertaken might well have required additional capital from all the members of the Partnership. Therefore, saying that the members of the Partnership were expected to contribute monetarily to any new "Ku De Ta"-named ventures was irrelevant to the question of whether the Partnership had beneficial ownership of the Overseas Marks.

107 It is immediately apparent from the affidavit which Chondros filed for the trial below that there

were obvious contradictions between his evidence in that affidavit as compared to his evidence in the Australian proceedings. Notably, Chondros could not give a plausible explanation for these contradictions.

108 Further, Chondros' testimony below was not credible for another reason: his position on the beneficial ownership of the Singapore Marks (among other Overseas Marks) constantly shifted. In the present proceedings, he variously stated that *he* owned the Overseas Marks and all the other registered "Ku De Ta" marks as well as the "Ku De Ta" name; and also that *Nine Squares* owned the same rights and that those rights had been vested in Nine Squares by him. At the trial, Chondros also said that he was part of Nine Squares. [note: 21] He then said, after some prevarication, that Nine Squares was holding the Singapore Marks (among other Overseas Marks) on trust for him alone, [note: 22] even though Nine Squares was, at the time of the trial, owned by him and Templetrees, the new majority shareholder (see [7] and [41] above). This was not readily reconcilable with either Nine Squares' contention that Chondros intended it to be the beneficial owner of the Singapore Marks, or Ellaway's evidence that the Singapore Marks were beneficially owned by Nine Squares. [note: 23] Nor, for that matter, did any of this square with what Chondros had said in his affidavit in the Australian proceedings.

109 The Judge concluded that Chondros was "hopelessly confused" when it came to what a trust and beneficial ownership of the Overseas Marks entailed (at [129] of the 1st Judgment). We would respectfully disagree. There is a line between a witness who gives confusing answers because he is confused on the one hand, and a witness who gives confusing answers because he is prevaricating on the other. When Chondros' evidence is read in its context, it is clear, in our judgment, that he fell into the latter category and was being evasive when answering questions about the beneficial ownership of the Overseas Marks and the "Ku De Ta" name. There is no question, in our judgment, that Chondros was clear in the Australian proceedings that Nine Squares did not have the beneficial interest in either the "Ku De Ta" name or the Overseas Marks.

110 The Judge also concluded that the defence filed by Nine Squares in the Australian proceedings did not reflect the true position of Nine Squares at that time because the equal shareholders of the company were then locked in a dispute (at [134] of the 1st Judgment). With respect, even though the equal shareholders of Nine Squares were engaged in a bitter quarrel at the time of the Australian proceedings, this does not detract from the fact that a defence *was* filed on behalf of Nine Squares and it took a position that was adverse to one of the equal shareholders (namely, Ellaway) and favourable to the other (namely, Chondros). Moreover, it must have been Chondros who had given the instructions for Nine Squares' defence since by the time that defence was filed on 11 June 2010, Ellaway had already resigned as a director of the company on 16 February 2010, leaving Chondros as the sole director in control (Todd became a director of Nine Squares only after that defence was filed). Nor was it evident if, at the time of the Australian proceedings, Ellaway disputed the affidavit which Chondros had filed on behalf of Nine Squares. The Appellants were also correct in pointing out that Chondros had obtained legal advice at the material times.

111 In addition, letters sent by Chondros in the period leading up to the commencement of the Australian proceedings further evidenced the point that he viewed all the members of the Partnership as fellow beneficial owners of the 1st Singapore Mark. Unfortunately, those letters were not examined in detail by the Judge in the 1st Judgment. It is true that in one letter dated 2 March 2010 from Chondros' solicitor, Tony Hargreaves ("Hargreaves"), to MBS's personnel, it was said that *Nine Squares* owned the "trademark in the brand name Ku De Ta". [note: 24] But, against this, there was a string of earlier letters in which the position taken was similar to that eventually taken in the Australian proceedings, namely, that Nine Squares was not the beneficial owner of the Overseas

Marks, and that either the Overseas Marks were held on trust for the Partnership or there was an ongoing dispute over their ownership. These letters stated as follows:

(a) In a letter dated 24 September 2009, Hargreaves wrote to MBS's personnel stating that there was a dispute between the directors of Nine Squares over "the use of the brand name, Ku De Ta, in restaurants outside of Indonesia". [note: 25]

(b) In a letter dated 30 September 2009, Hargreaves wrote to Ellaway stating that Nine Squares had no proprietary interest in Ku De Ta Bali and held "(on behalf of [Ku De Ta Bali] and its owners) the trademarks for the brand name Ku De Ta in countries other than Indonesia". [note: 26] Ellaway's solicitor replied in a letter dated 22 October 2009 noting that Chondros was "now claiming that the intellectual property owned by [Nine] Squares [was] not its property", and that it "[was] actually owned by another entity ([the Partnership])". [note: 27]

(c) In a letter dated 4 November 2009, Hargreaves wrote to MBS's personnel stating that there was a dispute in relation to whether Nine Squares "own[ed] the trademarks to the ['Ku De Ta'] name". [note: 28]

(d) In a letter dated 19 February 2010, Hargreaves wrote to Ellaway's solicitor stating that Ellaway had acted completely contrary to the interests of Chondros and the owners of Ku De Ta Bali, who "maintain[ed] that they [had] an undefined beneficial interest in the ownership of the ['Ku De Ta'] trademarks". [note: 29]

(e) In a letter dated 19 February 2010, Hargreaves wrote to MBS's personnel stating that there was a dispute in relation to the beneficial ownership of the 1st Singapore Mark, which Nine Squares had purported to license to Au via the Licence Agreement. [note: 30]

112 There are significant discrepancies between what was said in some of these letters and Chondros' explanation in the present proceedings for the contents of these letters. First, to explain the contents of Hargreaves' letter dated 19 February 2010 to Ellaway's solicitor, Chondros said that he was embarrassed that Ellaway had licensed the 1st Singapore Mark to Au at a time when he was trying to persuade the other members of the Partnership to invest in what he termed "the Dream Project" (as elaborated at [113] below). [note: 31] This, however, did not explain why Hargreaves had not merely said that Chondros alone had the beneficial interest in the 1st Singapore Mark. There was simply no need for Hargreaves to go further to say that the "Ku De Ta" name was beneficially owned by Chondros and other individuals. Chondros then said that he had told Hargreaves that he saw the other members of the Partnership as *potential* investors in the Dream Project; that what Hargreaves had written in his earlier letter of 30 September 2009 to Ellaway (see [111(b)] above) was inaccurate; [note: 32] and that even the reply from Ellaway's solicitor dated 22 October 2009 noting that Chondros had said that the Partnership had an interest in the Overseas Marks was also incorrect. [note: 33] We find it inconceivable that Chondros' own solicitor would have been mistaken and that Ellaway's solicitor would likewise have been similarly mistaken, with Chondros not taking any steps at any point in time to correct these alleged mistaken impressions. Instead, after the aforesaid letters were exchanged, the position that the Partnership as a whole beneficially owned the Overseas Marks was set out even more explicitly by Chondros on oath (in an affidavit) and also in the defence filed on behalf of Nine Squares in the Australian proceedings.

113 There is yet a further twist to this. Chondros had also sent an email to Neale on 5 November 2009 attaching the two letters sent by Hargreaves to MBS's personnel on 24 September 2009 and

4 November 2009. In the email, Chondros said that Kadek had told him that Neale should represent the Partnership and send a letter to MBS's personnel disputing the opening of Ku De Ta Singapore. [note: 34] Shortly thereafter, on 19 November 2009, Neale sent an email to MBS's personnel on behalf of all the members of the Partnership stating that Ellaway had no connection with Ku De Ta Bali and had not received authorisation to enter on its behalf into negotiations with any personnel from Marina Bay Sands. [note: 35] Chondros eventually accepted in cross-examination that the Partnership could only complain about the opening of Ku De Ta Singapore if it thought that it owned the rights to the "Ku De Ta" name. [note: 36] However, he disputed that this email was an acknowledgement that the Partnership beneficially owned the 1st Singapore Mark, and said that it should be read in the context of the Dream Project, [note: 37] under which the 1st Singapore Mark would be transferred by Chondros (as the beneficial owner) to a holding company which the other members of the Partnership would be part of and would invest in. [note: 38] Given that the Dream Project was not mentioned in Chondros' email of 5 November 2009 to Neale and had yet to be accepted by the other members of the Partnership at that time, it was, in our judgment, premature for Chondros to have told Neale to represent all the members of the Partnership as the beneficial owners of the 1st Singapore Mark if Chondros had indeed been thinking of beneficial ownership through the holding company which would be involved in the Dream Project. Moreover, Neale's letter of 19 November 2009 to MSB's personnel, which was sent at Chondros' invitation, expressly asserted that it was the Partnership, and not Ellaway, who had the right to license the use of the "Ku De Ta" name.

114 As noted above at [111], Hargreaves' letter to MBS's personnel dated 2 March 2010 did state that Nine Squares owned the "trademark in the brand name Ku De Ta". But, that letter was sent prior to the filing of Chondros' affidavit and Nine Squares' defence in the Australian proceedings on 14 May 2010 and 11 June 2010 respectively, where the position taken was plainly to recognise the beneficial interest of all the members of the Partnership in the Overseas Marks. Moreover, that letter in any case said nothing as to the *beneficial* interest in the Singapore Marks (the specific Overseas Marks which were the subject matter of that letter), unlike Hargreaves' earlier letters at [111(d)]–[111(e)] above. In addition, that letter on its own could not explain away all the other evidence that pointed explicitly to the contrary conclusion that Nine Squares was *not* the beneficial owner of the Overseas Marks.

115 In our judgment, Chondros' affidavit in the Australian proceedings, together with Nine Squares' defence therein and the related evidence discussed above, showed that Chondros had in fact always viewed and understood the right to use the "Ku De Ta" name as belonging to the Partnership as a whole and not just to him alone, and that as a result, he had always intended the Singapore Marks to be held on trust by Nine Squares for all the members of the Partnership. His efforts in the present proceedings to explain away what he had said in his affidavit in the Australian proceedings as well as the other pieces of evidence discussed above were not consistent with the objective evidence.

116 The Australian proceedings were only expressly concerned with the 1st Singapore Mark as that was the mark which was licensed to Au under the Licence Agreement. The 2nd Singapore Mark was only registered by Nine Squares a day *after* that agreement was entered into, and we note that there is scant evidence relating to the beneficial ownership of the 2nd Singapore Mark. Despite this, our conclusion on the 1st Singapore Mark must extend as a matter of logic to the 2nd Singapore Mark. In the absence of evidence that showed a special arrangement to the contrary for the 2nd Singapore Mark, we see no basis for not concluding that it too was held by Nine Squares on trust for the Partnership as a whole. The reason for this is that all the Overseas Marks were registered in an attempt to exploit the success of Ku De Ta Bali and expand the use of the "Ku De Ta" name, which belonged to all the members of the Partnership collectively. The evidence given in the Australian

proceedings is part of the material that goes to show what the real intentions of the parties were.

Our decision on the express trust point

117 In broad terms, the objective evidence pertaining to the matters we have considered at [71]–[115] above and the matters considered by the Judge in the 1st Judgment may be categorised as follows:

(a) communications from the other members of the Partnership to Chondros and/or Ellaway;

(b) communications from Chondros and/or Ellaway to the other members of the Partnership; and

(c) communications by Chondros and/or Ellaway with third parties.

118 The communications in the first category consisted mainly of assertions by the other members of the Partnership of the Partnership's beneficial interest in the "Ku De Ta" name and the Overseas Marks, coupled with references of leads to third parties on the possibility of overseas expansion initiatives. With regard to the second category of communications, as we have seen, not only was there no demurrer by either Chondros or Ellaway to these assertions by the other members of the Partnership of the Partnership's beneficial interest in the Overseas Marks, in some respects, those communications appeared to implicitly accept the correctness of the position taken by the other members of the Partnership. As to the third category of communications, they were either ambivalent or inconclusive as to whether Nine Squares was indeed wholly and beneficially entitled to the Overseas Marks. In the case of the testimony given by Chondros in the Australian proceedings, as well as in the case of his correspondence with the other members of the Partnership and with third parties preceding those proceedings, Chondros positively affirmed the correctness of the position taken by the other members of the Partnership.

119 In our judgment, there are three strands of evidence that have to be taken together in weighing the probabilities of what Chondros intended when he caused Nine Squares to register the Overseas Marks in its name:

(a) the collective effect of the various events which we have summarised at [74]–[75] above;

(b) the Email Memorandum and the surrounding circumstances which we have addressed at [77]–[95] above; and

(c) Chondros' testimony in the Australian proceedings and the surrounding circumstances, which we have discussed at [96]–[115] above.

120 Given all these circumstances, we are satisfied that the Judge erred in concluding that the Singapore Marks were not held on trust for the Partnership as a whole. From the evidence, we are satisfied that Chondros knew that the exploitation of the "Ku De Ta" name in any overseas ventures would be by and for the Partnership collectively. It is true that under the 2000 HOA, the Partnership (at that time, the other Founders and Chondros) had initially focused on Ku De Ta Bali. But, what was the basis on which Chondros and Ellaway had taken steps to register the Overseas Marks in Nine Squares' name? While the evidence for the period up to 2007 could be said to be equivocal and inconclusive, in our judgment, the cumulative effect of the evidence of the events from mid-2007 onwards – when the other Founders (the other members of the Partnership apart from Chondros at that time) first became aware of the steps that had been taken to register the Overseas Marks – until

the time the present disputes broke out is to lead inexorably to the conclusion that in causing Nine Squares to register the Overseas Marks in its name, Chondros intended Nine Squares to hold (at least) the Singapore Marks on trust for the Partnership as a whole. Any exploitation of the Singapore Marks, such as through licensing, would thus also have been for the benefit of all the members of the Partnership, and the profits derived from such exploitation would have been held on trust for all of them by Nine Squares.

121 Before ending our discussion of the express trust point, we make one further observation. The difficulty in this case stemmed from the fact that Chondros sought to resile from the position which he had clearly and repeatedly taken in the period between 2007 and 2010. The Judge thought that his conduct during that period could be explained away by the fact that he was then preoccupied with his quarrel with Ellaway. In our judgment, this was ultimately not convincing for the reasons we have articulated above. Rather, it was Chondros' settlement of the Australian proceedings that provides the more complete and convincing account for his abrupt volte-face in the present proceedings. In our judgment, this was a turnaround that was unprincipled and without basis in law or in fact.

122 This is sufficient to dispose of this appeal, but as substantial arguments were put forward on the Appellants' alternative ground that the Singapore Marks were held by Nine Squares on an institutional constructive trust for the Partnership, we now turn to this.

Whether an institutional constructive trust should be imposed

123 The Appellants argued that if an express trust over the Singapore Marks was not found, an institutional constructive trust should alternatively be imposed over those marks from the time of their registration. As noted by the Judge, the submissions made below on the constructive trust point were raised belatedly. Indeed, it appeared that they were only seriously taken up on appeal.

When an institutional constructive arises

124 An institutional constructive trust arises by operation of law. Generally speaking, it is imposed whenever the defendant knows that the property in question has been dealt with in an unconscionable manner. The court declares its existence based on facts that have arisen (see *Equity and Trusts* at p 551). Millett LJ ventured to offer a general definition of the doctrine of an institutional constructive trust in *Paragon Finance plc v DB Thakerar & Co* [1991] 1 All ER 400 ("*Paragon Finance*") at 409:

> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. …

125 The liability of the constructive trustee is predicated on his knowing of some factor that affects his conscience. This is because the equitable jurisdiction to impose trusts depends on the conscience of the holder of the property concerned (usually, of the legal interest therein) being affected. Absent this, an institutional constructive trust cannot arise (see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 WLR 802 ("*Westdeutsche Landesbank*") at 828–829; *Equity and Trusts* at pp 556–557; *The Law on Trusts* at para 27.01). Where such a trust arises, the beneficiary acquires proprietary rights in the property, except in cases where the defendant is made personally liable to account on grounds of knowing receipt or dishonest assistance (see *Westdeutsche Landesbank* at 829; *The Law on Trusts* at para 27.10).

126 The basis for arguing that an institutional constructive trust should be imposed in the present circumstances is more specific and arises in a class of its own – namely, where there has been an abuse of a fiduciary position. The principle underlying the imposition of an institutional constructive trust in these circumstances is that a person must not use his position to gain a benefit for himself when he owes obligations of the utmost good faith and loyalty to another. This area of the law is not without controversy, and much ground has been traversed in England both in judicial and academic discourse.

127 In the recent decision of the UK Supreme Court in *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45 ("*FHR European Ventures*"), Lord Neuberger of Abbotsbury PSC set out to clarify the law in this regard. The case concerned the question of whether a bribe or secret commission received by an agent was held by him on trust for his principal, or whether the principal was confined to a claim for equitable compensation of a sum equal to the value of the bribe or secret commission. The former results in the principal having a proprietary claim to the bribe or secret commission, while the latter results in the principal having only a personal claim for equitable compensation. To answer the question, it was necessary for the UK Supreme Court to consider why, when and how an institutional constructive trust would arise in the event of a breach of fiduciary duties.

128 Lord Neuberger began (at [5]) with three principles that are well-established in the case law:

(a) First, an agent owes a fiduciary duty to his principal because he has undertaken to act for or on behalf of his principal in a particular matter in circumstances which give rise to a relationship of trust and confidence.

(b) Second, an agent must not make a profit out of his trust. This is part of the wider rule that an agent must not place himself in a position in which his duty and his interest may conflict.

(c) Third, a fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of his obligation of undivided loyalty because he has put himself in a position where his duty to one principal may conflict with his duty to the other.

129 When an agent receives a benefit in breach of his fiduciary duty, another well-established principle is that the agent is obliged to account to his principal for that benefit and to pay, in effect, a sum equal to the benefit by way of equitable compensation. On the other hand, some cases show that where an agent has acquired a benefit which came to him as a result of his fiduciary position or pursuant to an opportunity which results from his fiduciary position, the equitable rule is that he is to be treated as having acquired the benefit on behalf of his principal such that it is beneficially owned by the principal. In such cases, the principal has a proprietary remedy in addition to his personal remedy against the agent, and the principal can elect between the two remedies (at [6]–[7]). In *FHR European Ventures*, the UK Supreme Court was concerned with whether this equitable rule would apply to all benefits received by an agent in breach of his fiduciary duty, including bribes and secret commissions.

130 After a survey of various cases, including the significant decisions of the House of Lords in *Tyrrell v Bank of London* (1862) 10 HL Cas 26 and the English Court of Appeal in *Lister & Co v Stubbs* (1890) 45 Ch D 1 and *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453, and after noting the inconsistencies in the law that these three cases produced, Lord Neuberger eventually concluded (and in doing so, departed from the House of Lords decision and overruled the two English Court of Appeal decisions) that the equitable rule applied to *all* unauthorised benefits which an agent received. This was justified, Lord Neuberger explained, on the basis that equity did

not permit an agent to rely on his own wrong to retain a benefit: as the agent acquired the benefit in question as a result of his agency and in breach of his fiduciary duty, he would be taken to have acquired that benefit for his principal (at [30]). Thus, any benefit acquired by an agent in the course of his agency and in breach of his fiduciary duty would be held on trust for his principal (at [35]); and in all cases where an agent was obliged to account for any benefit received in breach of his fiduciary duty, his principal could also claim the beneficial ownership of the benefit (at [36]). A bribe or secret commission received by an agent would thus be caught by this rule. Lord Neuberger gave various reasons for this (at [35]–[45]), which we presently do not need to go into. In the event, the UK Supreme Court approved the earlier Privy Council case of *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 (which this court also approved in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 at [56]–[59]). What is relevant for present purposes is the holding in *FHR European Ventures* that a principal is entitled to all the benefits acquired by a fiduciary in the course of the fiduciary acting in breach of the duties which he owes to his principal. In order to give legal effect to this, specific property can be ordered to be delivered up to the principal.

The alleged breaches of fiduciary duty in this case

131 In the present case, it was undisputed that Chondros, as a member of the Partnership, owed fiduciary duties to the other members of the Partnership (see [66] of the 1st Judgment). The Appellants argued that the facts demonstrated that Chondros had breached his fiduciary duties either by misappropriating partnership property or by usurping a corporate opportunity that belonged to the Partnership. [note: 39] Applying the legal principles stated above, the Appellants advanced two bases which, they contended, would result in the Partnership as a whole owning the Singapore Marks and any benefits accruing from their use.

132 The first basis rested on the assumption that the goodwill in the "Ku De Ta" name in Singapore belonged to the Partnership and was property that belonged to the Partnership. [note: 40] The second basis, which was also the Appellants' main contention, rested on the assumption that the opportunity to develop the "Ku De Ta" name was a corporate opportunity that belonged to the Partnership, and the act of registering the Singapore Marks in Nine Squares' name, if it had been done for Chondros' benefit to the exclusion of the other members of the Partnership, was a usurpation of that corporate opportunity.

Usurpation of a corporate opportunity

133 As we have just mentioned, the main contention advanced by the Appellants was that Chondros had usurped a corporate opportunity that rightfully belonged to all the members of the Partnership collectively. Under Victorian law, the legal test to determine whether Chondros had breached his fiduciary duty in such a manner was whether he, as the alleged usurper, had taken a corporate opportunity which there was a "real or substantial possibility" of the Partnership pursuing, having regard to its existing business activities and its stated aspirations. The arguments before the Judge centred on the possibilities of that occurring. The Judge found that the evidence did not show that the Partnership would have set up a "Ku De Ta"-named operation in Singapore either in 2004 or 2009 when the 1st Singapore Mark and the 2nd Singapore Mark respectively were registered, and dismissed the Appellants' constructive trust claim on that basis.

134 In our judgment, given the Judge's finding that the "Ku De Ta" name and goodwill as it grew belonged to the Partnership to a whole, and given that the opportunities to develop the "Ku De Ta" name outside of Bali stemmed directly from the success of Ku De Ta Bali, the inquiry should not have been directed at or confined to whether the Partnership would itself have set up a "Ku De Ta"-named

operation in Singapore, whether in 2004 or 2009 when the 1st Singapore Mark and the 2nd Singapore Mark respectively were registered. There are a number of reasons for this.

135 First, while Mr Finkelstein had said that the Appellants had to show that the opening of a "Ku De Ta"-styled restaurant was seriously considered and that a reasonably likely location for that new restaurant was Singapore, he had gone on to elaborate at para 123 of his first affidavit filed on 20 June 2012 that: [note: 41]

> For the purposes of this case what is important is the *discussions between the parties about the expansion of the business*. The undoubted expectation of the parties was that the matters raised in those discussions, and any agreement that may have been arrived at, required each of them to have regard to their joint interests, not their separate personal, interest[s]. [emphasis added]

136 It is also significant that what Chondros had done through Nine Squares was not to procure Ku De Ta Singapore for Nine Squares, but to affirm the licensing of the use of the 1st Singapore Mark to Au (as mentioned at [26] above, Chondros and Todd affirmed the Licence Agreement in the settlement deed which they signed on Nine Squares' behalf in respect of the Australian proceedings). The corporate opportunity for the expansion of the "Ku De Ta" name was thus concerned not directly with the establishment of a fully-fledged "Ku De Ta"-named operation in Singapore, but rather, with licensing the use of the "Ku De Ta" name to third parties such as Au who might be interested in setting up a "Ku De Ta"-named operation in Singapore. This made the inquiry much more specific.

137 Second, the Judge had analysed the possibility of the Partnership pursuing a corporate opportunity to develop the "Ku De Ta" name in Singapore as at the dates of registration of the 1st Singapore Mark and the 2nd Singapore Mark in 2004 and 2009 respectively. However, this suggests, incorrectly in our judgment, that the prospect of licensing the use of the Singapore Marks had to be assessed at the time of their registration. Mr Finkelstein's evidence on this point was as follows: [note: 42]

> Court: All right. Supposing at the time that [registration is] done there is not yet a business opportunity, it's just a safeguard against a possible future business opportunity, and so it's done on 1 January and nothing arises thereafter, say, for 12 months, during that 12-month period what is the situation?
>
> A: *The position -- what the Australian cases say is if licensing is a likely thing that the firm would do -- not guaranteed or not for sure -- but it's the kind of thing that you would expect serious consideration to be given … to doing it, then, if one of the partners says, well, forget the firm, I'll do it for myself, that will be constructive trust for that.* But it depends on how far the business has developed and whether the act of obtaining a mark is the kind of -- and also in the place in which the registration takes place, because I think that's probably important, whether that's a likely venture that the firm would want to pursue. … So you have to look at whether there's a causal connection or relationship between the place where it happens and what the firm is doing and where it's doing it and so on, and it can depend -- each city or each holiday resort, you might get a different answer.
>
> …

A: … *[W]hen you look at the impugned conduct, it has to be at the time of the impugned conduct, whether it's registration of a mark or licensing somebody else to use the name*, you have to ask the question is the place of registration or the activity -- whatever it happens to be -- is that depriving the firm of [a] likely activity that it would have entered into had it have appreciated the opportunity or would have moved to in the ordinary course of events …

Court: *So, basically, you're saying that in 2004, if nobody was interested in Singapore, just registering was okay, but in 2010, if by that time people were very interested in doing it and you took up the opportunity, then you may be in breach.*

A: Correct. That's making the profit, but there is a point in time when -- what you are looking at is looking to see whether fiduciary has misconducted himself …

…

Court: Let's assume that the date the mark is registered … there's no possibility moving, because they have enough on their plate running Bali.

A: Yes.

Court: … Then you come five years later … but the mark has already been registered at a time when it wasn't a breach to do it.

A: Yes. The way that I would put it, by reference to equitable obligations, is *a real substantial possibility doesn't mean you have to do it tomorrow or today. It might mean there's preparation involved, and part of the preparation might be registering trademarks* to make sure that competitors don't come into the area where there's a possibility you will move. … [I]f you have to do preparatory steps, and it might take some time to do … *that doesn't stop it being a real and substantial possibility*, but presumably the longer out the venture is likely to be to get off the ground, then the harder it would be to say that at the relevant day there's a real and substantial possibility of setting up there.

[emphasis added]

138 Mr Finkelstein had thus testified that it was *not* necessary to base the finding of a real or substantial possibility of the Partnership signing a licensing agreement for the use of the "Ku De Ta" name on the circumstances prevailing at the time of the registration of the Singapore Marks. The passage of a distinct period of time between the registration of these marks and the signing of a licensing agreement would not preclude the finding of such a real or substantial possibility so long as the registration at the earlier date could be regarded as a preparatory step that was taken in contemplation of the Partnership pursuing a future corporate opportunity. As it happened, this was precisely what transpired here. As noted by the Judge, Chondros procured the registration of the Overseas Marks through Nine Squares at various times after the Australian Mark was registered. The 1st Singapore Mark was registered on 16 February 2004, but was not used until the Licence Agreement was signed on 29 June 2009. In our judgment, in assessing the possibilities, regard should also be had to what the other members of the Partnership in fact said or did when they learnt about the registration of the 1st Singapore Mark (among other Overseas Marks) in mid-2007 after Ellaway and Chondros told them about it.

139 The real question, therefore, was whether there was a real or substantial possibility that the

Partnership as a whole would have entered into a licence agreement for the use of the "Ku De Ta" name in Singapore in or around 2009, when the discussions which culminated in the eventual signing of the Licence Agreement began. This question has to be considered in the context of: (a) the registration of the 1st Singapore Mark and the 2nd Singapore Mark on 16 February 2004 and 30 June 2009 respectively; and (b) what transpired when the other members of the Partnership were informed about the registration of the Overseas Marks in mid-2007. In our view, three factors are significant in this regard.

140 First, after Ellaway and Chondros informed the other members of the Partnership about the registration of the Overseas Marks in mid-2007 (see above at [77]), the other members (at that time, the other Founders) specifically mentioned their interest and, indeed, the right of the Partnership as a whole to license the use of the "Ku De Ta" name and receive royalties. Hence, the other Founders, by this stage, plainly contemplated that benefits would accrue from the expansion of the "Ku De Ta" name into new "Ku De Ta"-named ventures and intended the Partnership to pursue these benefits through licensing agreements and negotiations for the payment of royalties. It was not necessary that there had to be a specific country in mind; but it was made clear that should any member of the Partnership intend to use the "Ku De Ta" name in another place for a venture similar to Ku De Ta Bali, that member had to secure the agreement of all the other members of the Partnership (including Chondros) on the terms of such use and licensing.

141 Second, there had been discussions between Chondros and Ellaway about opening a "Ku De Ta"-named outlet in Singapore in 2005 and 2007 with different investors. The Judge found that these discussions did not show that the Partnership would have set up a "Ku De Ta"-named operation in Singapore. In our judgment, these discussions were indicative that there was significant interest by Chondros and Ellaway at that time in opening a "Ku De Ta"-named outlet in Singapore as it was a suitable venue, and the question was the more specific one of whether there would have been real interest on the part of the other members of the Partnership in causing the Partnership to enter into a licence agreement to that effect if they had been told about the aforesaid discussions.

142 Third, although Chondros had said that he preferred a "build and operate" model of business in which he retained control over the development of new "Ku De Ta"-named ventures, he in fact decided (after the Australian proceedings were settled) to affirm the Licence Agreement, which allowed him significantly less control (as compared to the "build and operate" model) over the business operations of Ku De Ta Singapore. Therefore, since Chondros, who had the greatest objections to entering into a licence agreement for the use of the "Ku De Ta" name, had gone ahead, it could be inferred that the other members of the Partnership would have been much more willing to cause the Partnership to enter into such an agreement if they had been informed about the opportunity for the Partnership to do so. This, again, is borne out by the position which the other Founders (the other members of the Partnership at that time) took in the Email Memorandum of July 2007.

143 In our judgment, there was a real or substantial possibility that if the opportunity to license the use of the 1st Singapore Mark had been brought to the attention of all the members of the Partnership in or around 2009, *ie*, when the discussions which culminated in the signing of the Licence Agreement began, they would have caused the Partnership to take up this opportunity. In this regard, we only need to point to the fact that the Partnership's position had been made clear on this issue from as early as mid-2007 when the other members of the Partnership first became aware of the registration of (among other Overseas Marks) the 1st Singapore Mark.

144 We are therefore satisfied that if Chondros had caused the Singapore Marks to be registered in Nine Squares' name for the purpose of exploiting these marks for his own benefit, then he would have

acted in breach of his fiduciary duties by usurping, through Nine Squares, a corporate opportunity that belonged to the whole of the Partnership.

Misappropriation of partnership property

145 The Appellants' second basis for arguing that an institutional constructive trust should be imposed was that the goodwill in the "Ku De Ta" name belonged to the Partnership and had been misappropriated by Nine Squares in registering the Singapore Marks. The Appellants relied heavily on the decision of Laddie J in *Ball v Eden* to support this head of their constructive trust claim. In our judgment, there may well be limits to the applicability of that decision because of the Judge's finding that there was no goodwill in the "Ku De Ta" name in Singapore for the relevant classes at the relevant times of registration (see [34] above). As it is not necessary for us to decide this issue, we say nothing more on this.

146 Given our views on the aforesaid matters, we also do not need to consider the Appellants' arguments in relation to invalidation of the registration of the Singapore Marks under the TMA.

Conclusion

147 For these reasons, we are satisfied that Nine Squares created an express trust over both of the Singapore Marks for the Partnership as a whole from the respective dates of registration of these two marks. Further, any benefits that may have been derived from the exploitation of the Singapore Marks are also held on trust for the Partnership, including but not limited to the profits from the Licence Agreement as varied and affirmed by Nine Squares on 9 July 2010 when the settlement deed in respect of the Australian proceedings was signed.

148 Had it been necessary for us to decide the constructive trust issue, and had we found that Chondros had caused Nine Squares to register the Singapore Marks in its name in contemplation of using them for a private venture to benefit himself, we would also have found that Chondros had breached the fiduciary duties which he owed to the other members of the Partnership, in that by causing Nine Squares to register the Singapore Marks for that purpose, he would have usurped a corporate opportunity that belonged to the Partnership collectively. On this basis, an institutional constructive trust would have arisen over both of the Singapore Marks from their respective dates of registration as well as over the profits derived from their exploitation.

149 We thus declare that the Singapore Marks are held on an express trust by Nine Squares for the Partnership in accordance with each partner's interest in Ku De Ta Bali, and order that Nine Squares transfer the registration of these marks to the Partnership and that the necessary rectifications be made with the Registry of Trade Marks. Further, we order that Nine Squares is to account, by way of a taking of accounts, for the profits derived from the exploitation of the Singapore Marks, including what has accrued or may accrue from the Licence Agreement. We shall hear the parties on the scope and the period to be covered in the taking of accounts, and we note that these parameters may also be dependent on the orders that we may in due course make in CA 171.

150 We shall hear the parties on any other matters arising from this appeal including costs, and shall also hear the parties in CA 171 in due course.

[note: 1] 14 AB, pp 5610-5619.

[note: 2] Suit 314, Statement of Claim (Amendment No 2), paras 16, 28.

[note: 3] Elsa Ho's Affidavit, 5 February 2014, p 4.

[note: 4] Justin Todd's Affidavit, 12 May 2014, paras 15-18.

[note: 5] Justin Todd's Affidavit, 12 May 2014, JT-2.

[note: 6] Mr Finkelstein's affidavit, 28 June 2012, para 85-86; NE 23/7/12, p 95.

[note: 7] 4 AB, p 1714.

[note: 8] NE, 1 Aug 2012, pp 63-66.

[note: 9] 4 AB, p 1766-1767.

[note: 10] NE, 27 July 2012, p 73.

[note: 11] NE, 27 July 2012, p 79.

[note: 12] NE, 27 July 2012, pp 79-80.

[note: 13] CA 172, Respondent's Core Bundle, pp 139–144.

[note: 14] Ellaway's AEIC, 21 May 2012, para 90.

[note: 15] 14 AB, pp 5476-5477.

[note: 16] 14 AB, pp 5595.

[note: 17] NE, 24/7/12, p 128-130.

[note: 18] Chondros' Affidavit, 21 May 2012, paras 291-294.

[note: 19] Chondros' Affidavit, 21 May 2012, para 295.

[note: 20] Respondent's Closing Submissions, para 439.

[note: 21] NE, 25/7/12, pp 29-32.

[note: 22] NE, 25/7/12, p 33.

[note: 23] Ellaway's AEIC, 21 May 2012, para 226.

[note: 24] 9 AB 3657-3658.

[note: 25] 13 AB, p 5112.

[note: 26] 13 AB, p 5177.

[note: 27] 13 AB, pp 5415-5416.

[note: 28] 8 AB, p 3452.

[note: 29] 8 AB, p 3569.

[note: 30] 8 AB, p 3574.

[note: 31] Chondros' Affidavit, 21 May 2012, para 285.

[note: 32] NE, 25/7/12, pp 41-42.

[note: 33] NE, 25/7/12, p 51.

[note: 34] 8 AB, p 3450.

[note: 35] 8 AB, p 3462.

[note: 36] NE, 25/7/12, p 69.

[note: 37] NE, 25/7/12, p 69.

[note: 38] NE, 25/7/12, p 80.

[note: 39] Appellants' submissions, 7 August 2013, pp 6-7.

[note: 40] Appellants' submissions, 7 August 2013, p 6.

[note: 41] Mr Finkelstein's affidavit, 20 June 2012, para 123.

[note: 42] NE, 24/7/12, pp 65-66; 84-85; 87-88.

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