IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 13

Civil Appeal No 90 of 2015 (consolidated with Civil Appeal No 229 of 2015)

Between

TAN YOK KOON

… *Appellant*

And

(1) TAN CHOO SUAN
(2) AFRO-ASIA SHIPPING COMPANY (PRIVATE) LIMITED

… *Respondents*

Civil Appeal No 91 of 2015 (consolidated with Civil Appeal No 228 of 2015)

Between

(1) TAN CHIN HOON
(2) TAN CHOO PIN

… *Appellants*

And

(1) TAN CHOO SUAN
(2) AFRO-ASIA SHIPPING COMPANY (PRIVATE) LIMITED

… *Respondents*

Version No 2: 27 Oct 2020 (22:40 hrs)

Civil Appeal No 92 of 2015 (consolidated with Civil Appeal No 227 of 2015)

Between

TAN CHOO HOON @ TAN CHENG GAY

… *Appellant*

And

(1) TAN CHOO SUAN
(2) NG GIOK OH
(3) AFRO-ASIA SHIPPING COMPANY (PRIVATE) LIMITED

… *Respondents*

Civil Appeal No 93 of 2015 (consolidated with Civil Appeal No 230 of 2015)

Between

TAN CHOO SUAN
(in her personal capacity and as executrix of the estate of Tan Kiam Toen, deceased)

… *Appellant*

And

(1) TAN CHIN HOON
(2) TAN CHOO PIN
(3) TAN YOK KOON
(4) TAN CHOO HOON @ TAN CHENG GAY
(5) AFRO-ASIA SHIPPING COMPANY (PRIVATE) LIMITED
(6) AFRO-ASIA INTERNATIONAL ENTERPRISES PTE LIMITED

… *Respondents*

Civil Appeal No 95 of 2015

Between

NG GIOK OH

… Appellant

And

(1) TAN CHIN HOON
(2) TAN CHOO PIN
(3) TAN YOK KOON
(4) TAN CHOO HOON @ TAN CHENG GAY

… Respondents

In the matter of Suit No 570 of 2010

Between

(1) TAN CHIN HOON
(2) TAN CHOO PIN
(3) TAN YOK KOON

… Plaintiffs

And

(1) TAN CHOO SUAN
(2) NG GIOK OH
(3) AFRO-ASIA SHIPPING COMPANY (PRIVATE) LIMITED

… Defendants

And

(1) TAN CHOO SUAN

(2) NG GIOK OH

… Plaintiffs in Counterclaim

And

(1) TAN CHIN HOON
(2) TAN CHOO PIN
(3) TAM YOK KOON
(4) TAN CHOO HOON @ TAN CHENG GAY
(5) AFRO-ASIA INTERNATIONAL ENTERPRISES PTE LIMITED

… Defendants in Counterclaim

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Tan Yok Koon
v
Tan Choo Suan and another and other appeals

[2017] SGCA 13

Court of Appeal — Civil Appeals Nos 90, 91, 92, 93 and 95 of 2015
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Judith Prakash JA
11 July 2016

21 February 2017 Judgment reserved.

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

Introduction

1 These are appeals against the decision of the High Court judge ("the Judge") in *Tan Chin Hoon and others v Tan Choo Suan (in her personal capacity and as executrix of the estate of Tan Kiam Toen, deceased) and others and other matters* [2015] SGHC 306 (which was reported in part in [2016] 1 SLR 1150) ("the GD"). These appeals – wherein sibling is pitted against siblings – are very unfortunate. They are the result of a total breakdown in familial ties between the eldest sibling, on the one hand, and her four other siblings, on the other. Both sides have advanced diametrically opposed versions of what their late father – the patriarch of the family – had desired. Only one thing is sure – regardless of which party is ultimately held to prevail, their late father would have been profoundly disappointed (perhaps

even heartbroken) at this litany of litigation (as well as the accompanying emotional fallout and stress that it has engendered). As we shall see, this is wholly contrary to the spirit in which he had envisaged the family in general and the family business in particular ought to have developed and, indeed, flourished.

2 The other difficulty with regard to the present appeals is the fact that there is – leaving aside the (naturally) biased testimony of the various parties and their respective witnesses – a dearth of clear and objective evidence. This is due, in part, to the more informal manner in which the family business was run and, in part, to the very lengthy period of time during which the events germane to the present appeals occurred. The result is that parties have latched on to whatever evidence (in particular, documents) that appears to support their respective cases (on occasion, without sufficient regard to the *context* in which this evidence ought to be viewed and the *overall* context that would aid in elucidating their late father's intentions).

3 Given the crucial importance of the facts in the context of the present appeal and (in particular) the detailed analysis that follows, it would be helpful to first set out a table of contents to guide the reader, as follows:

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Chronology of Shareholdings in AAS **Annex A**

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Facts

4 The facts have been very comprehensively set out at [7]–[130] of the GD. Here, we will just set out some essential facts.

The parties

5 The dispute concerns the legacy of the late Mr Tan Kiam Toen ("TKT"), patriarch of the Tan family. His widow is Mdm Ng Giok Oh ("NGO"). The couple had five children – three sons and two daughters:

(a) Dr Tan Choo Suan ("TCS"), born in 1944 (in these proceedings, TCS is party both in her personal capacity and as the sole executrix and trustee of TKT's estate under a will executed jointly with NGO on 6 February 2008 ("the 2008 Joint Will"));

(b) Mr Tan Choo Hoon @ Tan Cheng Gay ("TCG"), born in 1947;

(c) Mr Tan Yok Koon ("TYK"), born in 1948;

(d) Mdm Tan Choo Pin ("TCP"), born in 1950; and

(e) Mr Tan Chin Hoon ("TCH"), born in 1951.

6 There are essentially two camps in these appeals. One camp comprises NGO and TCS, while the other comprises TCS's siblings (whom we will call "the four siblings" or "the plaintiffs"). Essentially, the four siblings claimed that they owned, in equity, certain assets owned at law by either TCS or NGO. TCS claimed, however, that the bulk of assets belonged, in equity, to TKT and therefore fell to be distributed to charity under the 2008 Joint Will. The assets in dispute below included the following:

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(a) 2,542,590 shares in Afro-Asia Shipping Company (Private) Limited ("AAS") now registered in TCS's name, comprising approximately 47.78% of its issued and paid up share capital ("the AAS Shares");

(b) 2,660,850 shares in AAS now registered in NGO's name (and previously transferred from the Bajumi family), comprising 50% of its issued and paid-up share capital ("the Bajumi Shares");

(c) 1.75m shares in Afro-Asia International Enterprises Pte Limited ("AAIE") now registered in TCS's name, comprising 35% of its issued and paid-up share capital ("the AAIE Shares");

(d) funds from various Tan family sources which the family entrusted to TCS over time and which the plaintiffs refer to collectively as the "Tan family funds", including, *inter alia*:

(i) the proceeds of sale of two properties along Cluny Park Road ("the Cluny Park Properties") which had been owned by AAS ("the Cluny Park Proceeds"); and

(ii) funds in an account, into which rental income from a property at No 2 East Coast Terrace ("the Katong Property") had been paid ("the No 2 Account"); and

(e) 1.419m shares in EnGro Corporation Limited now registered in TCS's name ("the EnGro Shares") (a claim to which was asserted in the plaintiffs' closing submissions but was not pleaded).

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7 Following this, the four siblings also alleged that TCS and NGO had breached their duties (either fiduciary duties or trustee's duties) as trustees of assets which they say belonged beneficially to them.

The factual background

8 The facts in this section relate largely to the history of the family and the beneficial ownership of the assets.

The patriarch's beginnings

9 TKT was born in 1919 in China. However, he left China for Indonesia, where he set up a successful business despite a lack of formal education. He married NGO in 1943 and TCS was born a year later. The family of three then moved to Singapore, where the four siblings were born between 1947 and 1951. In the 1950s, TKT shifted the focus of his business from Indonesia to Singapore. Among other businesses, he traded and exported commodities through a sole proprietorship called Thai Lee & Company ("Thai Lee").

The Katong Property

10 On 31 January 1952, TKT purchased the Katong Property and decided to register it in NGO's name. It was used as the family home until 1969 (when the family moved into the Cluny Park Properties). In 1974, NGO transferred it to TCS, who has since been its registered owner. Since the 1980s, it has been earning rental income which was deposited into the No 2 Account – we will return to this bank account later. This property was the sole subject-matter of Suit No 170 of 2011 ("S170") (which the four siblings had commenced against TCS in 2011). The Judge dismissed the four siblings' claim in S170 that they owned the Katong Property in equity.

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Facts relating to the AAS Shares and the Bajumi Shares

11 In 1961, TKT incorporated AAS as a vehicle for his enterprise. This is the family company into which TKT's children (save for TCS) directed their efforts for most of their adult lives.

12 By way of context and overview, how the shares in AAS were allotted and transferred over the years is relevant to the issue of their beneficial ownership (for a tabulation of chronological changes in shareholding, see Annex A). There were two main groups of shares – those held by the Tans, and those held by the Bajumis from 1968 to 2004. For the former group, the transfers generally took place over two time periods – up to 1985, when the shareholding of the five siblings increased gradually over time, and between 1986 and 2008, when most of the shares of the five siblings were transferred to TCS's name. For the latter group, the Bajumis enjoyed a shareholding that increased to about two-thirds in 1975 before being equalised in 1981; they were bought over by the Tans in 2004 as part of a litigation settlement (more to come on this) and were transferred to NGO as a result of this settlement.

(1) The birth of AAS, the siblings' increasing involvement in AAS and TKT's exit in 1985

13 AAS was first owned by TKT through two nominees ("NPE" and "NKC") who each held 50% of AAS for him and who were directors alongside him. In 1962, AAS allotted and issued 380 shares to NGO as TKT's nominee, but these shares were transferred within the same year to TKT. By 1967, TKT's two director-nominees resigned and transferred their 20 shares to NGO, who held the shares on trust for TKT. During this time, AAS made two significant purchases. In 1965, it bought a building which is now known as the Afro-Asia Building ("AAB") and, in March 1967, TKT used AAS to acquire

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the Cluny Park Properties, drawing for this purpose the necessary funds from Thai Lee. In 1969 (and as already noted above at [10]), the Cluny Park Properties replaced the Katong Property as the family home.

14 In 1968, TKT brought his children in as shareholders. He caused AAS to allot 40 fresh shares to each of his five children for a stated consideration of S$1,000 per share. However, none of TKT's children actually gave any consideration for their shares; TKT drew the capital for these shares from Thai Lee. In that same year, TKT vested 300 shares in the family of Bajumi Wahab; they were registered in the name of the eldest daughter. This was the beginning of the Tans' business relations with the Bajumis.

15 In October 1973, TKT caused AAS to issue bonus shares, which resulted in each share becoming six. It was around this time that the Tan siblings began getting involved in AAS. TKT, as patriarch, desired that the Tans control the family business and take ownership of the family assets. This manifested itself in his expectation that his children – especially his sons – enter the family business. This they did, with the exception of TCS. Briefly, this is how each of TKT's children was involved:

(a) TCS read Mathematics and Economics at university and graduated in 1969. Although TKT brought her into AAS and appointed her as a director in October 1973, she left in 1974 for further studies abroad. Shortly after she left, TKT instructed her to step down as director. She was conferred a doctorate and worked in Australia and, later, for the World Bank in the United States. In 1993, she moved to Hong Kong (where her parents were at that time).

(b) TCG is the eldest son. He read Engineering in the UK and worked for General Electric until October 1973, when he left to join

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AAS. TKT appointed him as a director of AAS. TCG was instrumental in growing the family business, especially AAS and EnGro. Between 1995 and 2004 (when TCS replaced him), he was AAS's chairman.

(c) TYK read law in London and graduated in 1971. He qualified as a barrister in England in 1972. He then received an MBA from Columbia University in 1974, after which he returned to Singapore at TKT's request. TKT appointed TYK as a director of AAS. TYK spent his first years back in Singapore practising law and helping TKT run Thai Lee, AAS and the other family businesses. Eventually, however, he gave up his legal career for the family business.

(d) TCP returned to Singapore in 1973 with a Chemistry degree. She started work in AAS and its subsidiary, Oil Mills Factory Pte Ltd. TKT appointed her as AAS's company secretary in 1973 and director in 1974. She worked in AAS until 2010, when TCS terminated her employment.

(e) TCH, being less academically inclined, was brought into AAS in 1970 (after secondary school) to do odd jobs. From 1974 to 1976, TCH pursued studies abroad. Upon his return, TKT appointed him as General Manager in 1976 and as director in 1977. He became managing director in 1997 and, as such, oversaw the business, affairs and operations of AAS, its subsidiaries and related companies. However, he was replaced by TCS as managing director in 2007 by the board of directors at TCS's instigation and, in 2010, was removed from office entirely.

16 In so far as NGO was concerned, she was never involved in the family business even though she was appointed as a director between 1962 and 1981.

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17 By the mid-1970s, TKT had withdrawn from an active role in AAS. In late 1974, TKT and NGO moved permanently to Hong Kong. TKT left the day-to-day running of AAS to the four siblings, but continued to be updated and was consulted on major decisions.

18 In March 1985, TKT resigned as a director of AAS. Up to this point in time, he had increased (and later decreased) the Bajumis' shareholding; and he had increased the shareholdings of his children. To recapitulate, after the 1973 bonus share issue, each of the five siblings held 240 shares, TKT held 2,280 shares and NGO held 120 shares (*ie*, the Tan family held 3,600 shares, or two-thirds of AAS's paid-up capital) while the Bajumis held 1,800 shares (or one-third of AAS's paid-up capital). The changes in shareholdings were as follows:

(a) In 1975, TKT transferred 190 shares each to TCG and TYK, and 1,840 shares to the Bajumis. This increased the Bajumis' shareholding from 33.3% to 67.4%. TKT's own shareholding dropped from 2,280 shares to 60 shares.

(b) Between 1979 and 1981, TKT equalised the Tans' and Bajumis' shareholding and increased his sons' shareholdings by buying shares for them from the Bajumis (the consideration for which came from Thai Lee):

(i) In 1979, the Bajumis transferred 80 shares each to TCG, TYK and TCH at S$100,000 for each transfer.

(ii) In 1980, the Bajumis transferred 130 shares each to TCG and TYK at S$169,000 for each transfer, and 140 shares to TCH for S$182,000.

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(iii) In 1981, the Bajumis transferred 100 shares each to TCG, TYK and TCH at S$130,000 for each transfer. (This served to equalise the Tans' and Bajumis' shareholdings.)

(c) In 1983–1984, a mixture of bonus share issues and capital reduction exercises led to each share effectively becoming 328.5 shares.

(d) In 1985, TKT divested all of his remaining shares to TCH (this had been 60 shares in 1975 but, after the changes in capital structure, became 19,710 shares) for a stated consideration of S$394,200.

As a result, the shareholdings as at 1985 were as follows. (The four siblings alleged, and the Judge found, that each of the Tans was the absolute owner of the shares in AAS registered in his/her name as set out in the table. This proportion (disregarding the Bajumis' shareholding for this purpose) shall hereafter be referred to as the "1985 Percentages".)

Share-holder	**Number of Shares**	**Percentage of shareholding**	
		Generally	**Among Tans *inter se***
NGO	39,420	2.22%	4.44%
TCS	78,840	4.44%	8.89%
TCG	243,090	13.70%	27.41%
TYK	243,090	13.70%	27.41%
TCP	78,840	4.44%	8.89%
TCH	203,670	11.48%	22.96%
Bajumis	886,950	50.00%	

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Total	**1,773,900**	**100.00%**	**100.00%**

(2) Post-1985 transfers to TCS from the four siblings

19 Between 1986 and 2008, there were transfers in shares from the four siblings to each other as well as to TCS. The net result was that TCS became the sole registered shareholder of approximately 47.78% of AAS by 2008 (while, as a net result of the Bajumi litigation (discussed below) and of her 2.22% shareholding, NGO became the other shareholder with a shareholding of approximately 52.22%). The four siblings alleged, and the Judge found, that these subsequent transfers conveyed only a bare legal title to the transferee. The transfers and changes in capital structure leading to the situation just mentioned were as follows:

(a) In 1986, TYK transferred all 243,090 of his shares to be held jointly by TCS and TCG, before he left for the United States to pursue business opportunities. No consideration was provided for the transfer. However, TYK continued to hold office as a director and he returned to Singapore in 1995.

(b) In 1991, TCH transferred all 203,670 of his shares to be held jointly by TCS and TCG for no consideration. He says that he did this as he was entering a business venture with his friends and did not want to jeopardise the AAS Shares.

(c) In 1994, AAS issued bonus shares, with the result that each share became three shares.

(d) In 1997, TCG transferred all his shares in his sole name to TCS, TYK and TCH for no consideration. TCS received 727,270

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shares, while TYK and TCH (who had earlier divested themselves of their own shares) each received 1,000 shares. Also, the 1,340,280 shares transferred from TYK and TCH and held jointly by TCG and TCS were transferred into TCS's sole name. TCG says that he transferred the shares in order to prevent them from being drawn into his matrimonial dispute, and that the transfer of shares to TYK and TCH was to confer the status of shareholders in connection with the Bajumi litigation (discussed below at [20] *et seq*). The stamp duty for this transfer appears to have been paid by TKT.

(e) In 2006 and 2008, TYK and TCH, respectively, transferred the 1,000 shares (which TCG had transferred to them in 1997) to TCS.

(f) In 2008, TCP transferred all 236,520 shares to TCS for no consideration and, apparently, by way of gift. However, she secretly executed a statutory declaration the day before the transfer ("TCP's 2008 SD") stating that the transfer was null and void.

(3) The Bajumi litigation and the transfer of the Bajumi Shares to NGO

20 In 1994, relations between the Bajumis and Tans began to fray. The dispute began over the ownership of an Indonesia-incorporated company (an investment vehicle for a rubber plantation) called PT Bumi Rambang Kramajaya ("PT BRK"). In 1995, the Tans did not re-elect two of Bajumi Wahab's sons as AAS's directors. This triggered winding up and minority oppression proceedings in 1996, in which the Bajumis sought to have AAS wound up and to have the Indonesian rubber plantation transferred to them.

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(A) SETTLEMENT – THE BAJUMI SHARES TRANSFERRED TO NGO

21 The Bajumi litigation was settled in 2004 by an agreement recorded in a consent order. Amongst the settlement terms was that the Tans would pay S$7.6m to the Bajumis to acquire their 50% shareholding in AAS.

22 About a month after the settlement of the Bajumi litigation, TKT called a family meeting ("the 2004 Family Meeting"). While TKT was neither a shareholder nor a director at this particular point in time, the children attended the meeting out of respect for TKT as their father and as AAS's founder. One undisputed outcome of that meeting was that the Bajumi Shares would be transferred to NGO. Taken with her existing shareholding of 2.22%, she became (and, until the decision below, remained) the registered owner of 52.22% of AAS's shares.

(B) BAJUMI LITIGATION SETTLEMENT FUNDED BY THE DBS TERM LOAN

23 The immediate source of funds for the S$7.6m settlement was a term loan ("the DBS Term Loan") in that amount in 2004 from the Development Bank of Singapore ("DBS"). Only NGO, TCS, TCP and TCH were recorded as borrowers.

24 As security, DBS took a mortgage over the Katong Property (this property was the subject-matter of the dispute in S170) as well as a charge over a cash deposit of US$2.8m placed by TCS with DBS. The funds for this cash deposit came from a loan taken by Balmain Industries Limited ("Balmain"), another Tan family vehicle (the directors of which were TKT, NGO and TCS), from the Hong Kong branch of Barclays Bank ("the Balmain Deposit"). After Barclays Bank released the proceeds of the loan to TCS's account with DBS, she placed that sum on fixed deposit with DBS.

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25 DBS debited the monthly interest on the DBS Term Loan from a joint account with DBS held by TCS and TCH, *ie*, the No 2 Account. This account had been opened in the 1970s as a joint account held by TCS and TCH. Until 1991, TCH was authorised to be its sole signatory. Thereafter, TCS left signed blank cheques with AAS staff to be used to pay for expenses. Funds from this account were used for a wide spectrum of purposes, from personal expenses to paying for TKT and NGO's living expenses to servicing the monthly interest on the DBS Term Loan. In most cases, the four siblings would keep TCS informed if they used money from the No 2 Account for their own purposes.

26 In 2005, TCS arranged for a total of S$7.657m to be paid to DBS in order to discharge in full the DBS Term Loan. This sum comprised the US$2.8m (*ie*, S$3.776m) Balmain Deposit together with dividends of S$3.881m which AAS had declared a few days earlier ("the 2005 AAS Dividends").

(C) THE 2005 TRUST DEED

27 On 31 May 2005, NGO executed a trust deed in favour of TCS ("the 2005 Trust Deed"). In the 2005 Trust Deed, NGO declared that she held the Bajumi Shares on trust for TCS. TCS's position, however, was that NGO owned the Bajumi Shares absolutely. TCS therefore renounced all her right to and interest in the Bajumi Shares in 2010, shortly before Suit No 570 of 2010 ("S570") commenced.

The sale of the Cluny Park Properties and the AAS Shareholder Loans

28 To recapitulate, the Cluny Park Properties were purchased by AAS in 1967 (*ie*, before the Bajumis became shareholders). The Cluny Park Properties were sold in 1993 for about S$39m. The Cluny Park Proceeds are relevant in

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two ways. First, the shares in AAIE and EnGro in TCS's name were said to have been funded ultimately by the Cluny Park Proceeds. Second, part of the funds on which the DBS Term Loan (which went towards paying for the Bajumi Shares) had been secured was said to have come from the Cluny Park Proceeds as well.

29 The Tans had been concerned that the Bajumis would use their shareholding in AAS to lay claim to the Cluny Park Properties or (later, as relations deteriorated) the Cluny Park Proceeds despite not having contributed to the purchase. Thus, TKT procured a written declaration from the Bajumis acknowledging that they had no interest in the Cluny Park Properties in 1992. To ensure that the Bajumis could not stake a claim to the Cluny Park Proceeds, the Tan family decided to extract it by way of shareholder loans ("the AAS Shareholder Loans"). In 2002, AAS remitted just under S$39m, comprising the Cluny Park Proceeds, to TCS's personal bank accounts in Hong Kong. In the last quarter of 2003, AAS remitted a further US$2.35m (approximately S$4.04m) ultimately to TCS's personal bank accounts in Hong Kong. These remittances were recorded as loans extended to each Tan family shareholder in proportion to his/her shareholding (ignoring the Bajumis' shareholding for this purpose). TCS held the proceeds of these loans and used them in accordance with TKT's directions.

30 By late 2008, the AAS Shareholder Loans had been substantially paid off *via* various methods. Between 2005 and 2008 (*ie*, after the Bajumi litigation had been settled), AAS declared four rounds of dividends. TCS received the Tan family's dividends and used them to pay off the shareholder loans. In 2005, TCS also remitted part of the unused proceeds of the two loans to the accounts of her siblings, who then remitted the same to AAS to pay off the debt to AAS. This exercise was repeated six times. AAS's accounts for the

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year ended 31 December 2009 reflect that the shareholder loans owed by TYK, TCP and TCH had been repaid in full, while NGO and TCS owed AAS approximately S$1.37m and S$13m respectively.

Facts relating to EnGro and AAIE

31 EnGro is a listed company which is largely owned by three parties for present purposes: AAIE, TCS and AAS. The parcel of EnGro shares in dispute comprised the 1.419m shares, which were registered in TCS's name and the bulk of which the four siblings claimed to own in equity.

32 EnGro started life in 1973 as a tripartite joint venture between Ssangyong Cement Industrial Company Limited ("Ssangyong"), AAS and DBS. TCG and an officer of DBS were its two subscribing shareholders. In 1975, AAS appointed TCG as its representative in EnGro. A few years later, TYK also became involved in EnGro's business. The two brothers were later appointed directors of EnGro. In 1982, TCG was appointed EnGro's chief executive officer and in 2002, he was appointed chairman. He continued to hold both positions. AAS continues to hold the shares which it did not transfer to the Bajumis as part of the litigation settlement.

33 We now turn to AAIE's ownership of EnGro shares. AAIE is a pure investment holding company with three shareholders. TCS and TCP each hold 1.75m shares, or 35% of its issued and paid-up capital. A third party unrelated to the litigation holds the remaining 1.5m shares, or 30% of its issued and paid up capital. The plaintiffs claim to own, in equity, the bulk of the 35% of the AAIE Shares registered in TCS's name. AAIE's only real asset is its shares, a shareholding of about 38% in EnGro, and its only real source of income is the dividend stream from EnGro. It had purchased those shares from Ssangyong,

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which wanted to sell down its stake in EnGro. The Tan family and the third party advanced 70% and 30% of the requisite funds respectively. While TCS was the immediate source of the Tan family's contribution, the ultimate source of funds was the Cluny Park Proceeds channelled to TCS via the AAS Shareholder Loans in 2002 and 2003. These advances amounted to about S$22.1m as at 31 December 2003 and were recorded as loans in equal amounts from TCS and TCP each to AAIE ("the AAIE Loans"). AAIE repaid the AAIE Loans over time from the Tan family's share of the EnGro dividend stream; TCS alone received and held AAIE's repayment.

34 Finally, we turn to TCS's ownership of EnGro shares. In 2007, Ssangyong wanted to sell down its stake in EnGro further. Over two months, through several market transactions, a total of 1.419m shares were purchased in TCS's name. The parties disputed the circumstances surrounding the purchase of these shares. The four siblings stated that the purchase was financed by what they call the Tan family funds, drawn from the No 2 Account as well as from funds held in Hong Kong, and that TCS therefore held these shares as a nominee for the Tan family. TCS, on the other hand, asserts that the funds used to pay for these shares belonged to TKT, who had gifted the shares to her.

Trouble brews, and the disputes begin

35 The facts set out above form the background of the four siblings' claim that they beneficially owned the various parcels of shares and, in particular, that TCS and NGO were holding the AAS Shares on trust for them. The facts in this section relate largely to the four siblings' allegations that TCS and NGO had breached their fiduciary duties or trustee's duties.

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TCS begins to exert influence and control in AAS

36 To recapitulate, TCS had been absent from the family business since 1974. After the Bajumi litigation ended in 2004, however, TCS began to exert greater control over AAS and greater influence over her parents. It was also in 2004 that TCG and TYK withdrew from AAS to focus their efforts on developing EnGro, leaving a vacuum in AAS.

37 In January 2007, TCS proposed to TKT that TCH should resign as AAS's managing director (he had held this office since 1997). TCH was powerless in the face of this proposal. On 25 January 2007, AAS's board of directors replaced TCH with TCS as managing director. However, TCH continued to perform largely the same duties. On 25 February 2008, after a hiatus of over 20 years, TKT and NGO were re-appointed as directors of AAS. The Judge found that TCS was behind their desire to be re-appointed.

TKT passes away

38 TKT passed away on 15 November 2008. After his death, relations amongst the Tan siblings deteriorated sharply.

39 In August 2009, TCH wrote to TCS to demand that she return the AAS Shares which TCG, TYK and he had transferred to her in the past. In November 2009, TCP issued her own separate demand for the return of the shares which she had earlier transferred to TCS. TCS refused to comply with both demands, stating that the four siblings had held the AAS Shares merely as TKT's nominees, and that, after the transfers, she held the shares on trust for TKT's estate to be dealt with under the 2008 Joint Will.

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40 In January 2010, TCH proposed that TCG be re-appointed as a director of AAS. TCP issued a notice as company secretary convening a directors' meeting on 29 January 2010 to consider such a resolution. TCS objected to this and sent a curt email to TCP and TCH stating that TKT's wish was that TCG was not to be involved in AAS's business. TCS also demanded that TCP withdraw the notice, failing which TCS would convene an extraordinary general meeting ("EGM") of AAS in Hong Kong to remove TCP and TCH from office. She also told her (TCP) that the proposed resolution would never be passed because NGO and TCS would vote against it and because TCS held the casting vote as chairperson.

41 TCS made good on her threat after TCP and TCH refused to comply with her demand. TCS issued a notice on 27 January 2010 for an EGM of AAS to be held on 28 January 2010, one day before the directors' meeting which TCP's notice had convened, to remove TCH and TCP from office. TCS issued an ultimatum on 28 January 2010, demanding that TCP and TCH withdraw their notice by 10.30am that day; however, they refused. TCS's EGM went ahead. TCP and TCH were removed as company secretary and director, and TCS and an external accountant were, respectively, appointed in their stead. (The four siblings took the position that these resolutions were invalid, as TCS and NGO held their shares in AAS on trust for them and therefore had no right to exercise the votes attached to those shares so as to remove them from office.) On 9 February 2010, TCH instructed his solicitors to write to TCS to demand that she take immediate steps to reinstate him as a director of AAS. She refused.

42 This episode catalysed the commencement of S570 on 4 August 2010, in which the four siblings sought a declaration that they were the beneficial owners of the AAS Shares in the 1985 Percentages.

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43 Even after proceedings were commenced, TCG received a letter on 9 October 2010 informing him of a directors' resolution excluding him from AAS's premises. TCG's letter dated 29 October 2010 asking for an explanation received no reply. Subsequently, TCS barred TCP, TCH and TCG from entering AAS's premises, even to remove their personal belongings. It was only after solicitors had intervened and conditions had been imposed that TCS relented and allowed the plaintiffs to enter AAS's premises to remove their personal belongings. This impasse continued throughout the proceedings below.

The litigation below

The claims

44 S570 was commenced by TYK, TCP and TCH against TCS, NGO and AAS. TCG and AAIE (along with TYK, TCP and TCH, the plaintiffs) were made defendants in the counterclaim by TCS and NGO. In their action, the plaintiffs sought declarations that they were the owners in equity of certain assets (see above at [6]), while the defendants sought a determination that the assets in issue in S570 belonged ultimately either to TKT or to NGO.

45 S170 was commenced on 15 March 2011 by TCH, TCP, TYK and TCG against TCS as the sole defendant, claiming that they were the owners, in equity, of the Katong Property.

46 The trial of S570 commenced in June 2011. During the trial, the parties reached an oral agreement to compromise their disputes ("the Compromise"). Attempts to reduce the Compromise to writing and execute it ultimately failed by November 2011; and the condition precedent which had been imposed by TCS *qua* executrix of TKT's estate (*ie*, that the Attorney-General ("the AG")

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as guardian of charities grant his consent) went unfulfilled after the AG declined to give his consent in July 2012. Originating Summons No 921 of 2012 ("OS921") was therefore commenced by TCH, TCP, TYK and TCG against TCS, NGO, AAS and AAIE on 24 September 2012 in an attempt to uphold the Compromise as binding on the parties.

The Judge's decision

OS921

47 The Judge found the Compromise to be valid and binding, but that the obligation as to performance was not triggered because the condition precedent (*ie*, that the Attorney-General consent to the Compromise) was not fulfilled (see the GD at [24]). Rectification was refused as there was no operative mistake and, in any event, was unavailable as the Compromise was never reduced to writing (see the GD at [24]). The other prayers for relief were dismissed after the trial; the Compromise had come to an end without liability on anyone's part when the AG declined to consent to the Compromise (see the GD at [26(a)] and [315]). The plaintiffs were to pay the defendants' costs of and incidental to OS921, to be taxed if not agreed (see the GD at [316]). The plaintiffs' appeals against these findings in Civil Appeals Nos 94 and 96 of 2015 were subsequently withdrawn.

S570

(1) General observations

48 The Judge made some general observations of fact.

49 He found that TKT had laid the foundation of the family business but had passed the day-to-day management to TCG and, to a lesser extent, TYK

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(see the GD at [174]). He was an autocratic patriarch who expected and received utmost respect from his wife and children and he drew no distinction between the assets of his family members and those of his companies (see the GD at [173] and [176]). This, however, meant that it was unsafe to draw inferences about the parties' rights from their conduct in deferring to TKT's wishes from time to time (see the GD at [179]). They had done so out of respect (see the GD at [173], [179] and [208]). TCS, in cross-examination, conceded that she had simply *assumed* that the four siblings had abided by TKT's wishes as he was the beneficial owner, and that the four siblings would have done so in any event (see the GD at [180]).

50 The Judge also found that TCS saw herself as alienated from the family – as the "black sheep" of the family – and that this rankled her (see the GD at [181]–[182]). He also found that TKT and NGO gradually fell under TCS's influence over the years, but could not decide whether this was due to a deliberate plan or as a natural consequence of the large amount of time which TCS spent taking care of TKT and NGO when they were most in need (see the GD at [183]). That said, she played a significant role in influencing TKT's and NGO's decisions after the Bajumi litigation ended in 2004, and this included at least liaising with as well as giving directions to solicitors, helping TKT assemble documents and information for preparing his statutory declarations, and giving details of share transfers between the family members (see the GD at [185]).

(2) Beneficial ownership of the assets

51 In so far as S570 was concerned, the Judge largely allowed the plaintiffs' claims and dismissed the defendants' counterclaims (see the GD at [26(b)]).

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(A) THE AAS SHARES

52 In so far as the **first** set of transfers (*ie*, until 1985) was concerned, the Judge held that each registered shareholder of the AAS Shares was the absolute owner of those shares which he or she held in 1985 as TKT had gifted those shares to them (see the GD at [221]–[226] and [238]). A presumption of resulting trust arose because the four siblings did not provide consideration for the share transfers, and because there was no direct evidence of TKT's intent at that point in time (see the GD at [228]). *However*, the presumption of resulting trust was *rebutted* by direct evidence that TKT had intended to allot or transfer shares to his children as *gifts* (see the GD at [234] and [237]). TKT had transferred shares to incentivise them to work hard in AAS (see the GD at [231]) and it was also not by coincidence but by TKT's design that, as at 1985, the transfers and allotment led to his three sons holding the bulk of the shares that the Tan family had in AAS (see the GD at [232]–[233]). In the *alternative*, the presumption of resulting trust was *rebutted* by the *counter-presumption of advancement* that arose by virtue of the father-child relationship that subsisted between TKT and each transferee (see the GD at [235]).

53 In so far as the **second** set of transfers was concerned, the Judge held that TCS held the shares transferred to her after 1985 by the four siblings on a resulting trust for each of them in the 1985 Percentages (see the GD at [239] and [244]). There was direct evidence that that the four siblings did *not* intend to transfer shares to TCS as gifts. In so far as TCP's transfer of shares in 2008 was concerned, it was clear from TCP's 2008 SD that she did not intend to gift the shares to TCS (see the GD at [240]). In so far as TCG, TYK and TCH's transfers were concerned, these were effected as part of preparatory steps to establish a family trust (which, however, ultimately fell through) and were not

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intended as gifts as such (see the GD at [241]). In any event, the presumption of resulting trust arose in relation to each transfer because TCS provided no consideration for them (see the GD at [242]). TCS could neither rebut the presumption of resulting trust nor rely on the presumption of advancement as this did not apply in a sibling relationship (see the GD at [242]–[243]).

54 The parties (in particular, TCS) had relied on *subsequent conduct* to rebut the presumption of advancement. However, the Judge held that subsequent acts and declarations in favour of a party making them were inadmissible for this purpose based on the House of Lords decision of *Shephard v Cartwright* [1955] AC 431 ("*Shephard*") (see the GD at [191]–[195]). Thus, he held that:

> (a) The subsequent declarations by TKT *against* his interest (to the effect that by 1996 TKT did not consider himself to be the owner of any shares in AAS at law or in equity) were admissible and – even after factoring the self-serving purpose for which the statements were made – deserving of great weight. The statements were made as solemn, sworn declarations on oath, subject to penalties for perjury, and TKT was not shown to be dishonest (see the GD at [201]–[205]).
>
> (b) However, the other subsequent declarations by TKT (and relied on by TCS) were inadmissible or not deserving of weight. They were too far removed in terms of time from the transactions in question, highly self-serving, made after TCS had spent more time with NGO and TKT and exercised influence over them. They were also unreliable because an adverse inference was drawn for not calling the lawyers who had prepared the documents (see the GD at [196]–[199]).

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55 Both the defences of limitation and laches were also rejected by the Judge (see the GD at [247]–[256]). They are not before us and we need not dwell on them further.

(B) THE BAJUMI SHARES

56 The Judge held that NGO was presumed to hold the Bajumi Shares on resulting trust for each of the Tans in the 1985 Percentages (see the GD at [267] and [272]–[273]).

57 The focus was on who assumed the liability for the S$7.6m DBS Term Loan, because repayments were irrelevant without an agreement on it when the asset was acquired. It was unlikely that the Tans intended any of the four named borrowers (*ie*, NGO, TCS, TCP and TCH), especially NGO, to be personally responsible for the loan; instead, the loan would probably be repaid from the fruits of the Tan family's shares in AAS. The same reasoning applied to the funds borrowed by Balmain which comprised the Balmain Deposit and which went towards paying the principal sum of the DBS Term Loan; Balmain was a mere proxy. Thus, the consideration for the Bajumi Shares was attributable collectively to the beneficial owners of the Tan family's shares in AAS (see the GD at [266]).

58 However, the beneficial owners of the Tan's family half of AAS had no intention to benefit NGO when they agreed that the Bajumis should transfer the Bajumi Shares to NGO (see the GD at [272]). First, NGO's claim (that the Bajumi Shares were at her request gifted to her for her contributions toward her family) was a mere afterthought; it was improbable that the plaintiffs would transfer the Bajumi Shares to her at their own cost and it was also an unpleaded position (see the GD at [270]). Further, it would be strange to let NGO have majority control in the family business in which she had never

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been involved (see the GD at [271]). It was more probable that the parties had intended simply that NGO should hold the shares temporarily, without affecting the parties' underlying beneficial interests (see the GD at [272]).

59 For completeness, the Judge held that the plaintiffs' argument based on a common intention constructive trust failed because NGO never shared a common intention to hold the Bajumi Shares on trust for them (see the GD at [260]). NGO's argument that she was entitled to the Bajumi Shares as they were matrimonial assets also failed (see the GD at [261]). For the same reasons as those in relation to the AAS Shares, the defences of limitation, laches and estoppel failed (see the GD at [274]).

(C) THE AAIE SHARES

60 The parties were agreed that the persons who had advanced funds to AAIE for its acquisition of EnGro shares would be the beneficial owners of the AAIE Shares.

61 The Judge held that the ultimate source of the consideration for AAIE's EnGro shares was the Tan family's 50% shareholding in AAS, to which the entirety of the Cluny Park Proceeds was attributable. The proceeds of the AAS Shareholder Loans funded by the Cluny Park Proceeds therefore belonged in equity to the beneficial owners of the Tan family's shares in AAS in the same proportions in which they owned the beneficial interest in that block of shares. The consideration paid for AAIE's EnGro shares was attributable to the Tan family members in those same proportions. The beneficial interest in the AAIE Shares therefore resulted back to them in those same proportions on a presumed resulting trust (see the GD at [280]).

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(D) THE ENGRO SHARES

62 The Judge held that the plaintiffs' claim to the beneficial interest of the EnGro Shares failed (see the GD at [287]). They had failed to prove that the consideration for those shares was attributable to them; it was fatal to their case in this particular regard that they were unable to state the source of the consideration, apart from attributing it to the loose concept of the "Tan family funds". The shares had been purchased using funds from either the No 2 Account (which belonged to TCS) or Hong Kong (which belonged to TKT) (see the GD at [285]).

63 Ordinarily, the presumption of resulting trust (*ie*, that TCS held the EnGro Shares on trust for TKT in the same proportion that TKT's funds bore to total acquisition cost) would be rebutted by the counter-presumption of advancement from father to child. However, as TCS *disclaimed* any interest in it, the EnGro Shares beneficially belonged to TKT (see the GD at [286]).

(E) THE TAN FAMILY FUNDS (INCLUDING THE CLUNY PARK PROCEEDS)

64 The Judge found that no Tan family trust ever came into existence, and the plaintiffs never enjoyed proprietary rights in any Tan family funds. While there was an intention to form a family trust and to accumulate funds for that purpose, these were mere concepts that operated on the minds of the parties and affected their dealings with each other. TCS and NGO were therefore only trustees for the specific assets that they held on resulting trust for the plaintiffs (*ie*, the AAS Shares, the Bajumi Shares and the AAIE Shares) as well as the fruits of those shares from the time the respective resulting trusts arose (see the GD at [290]–[293]).

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65 The exception was that TCS had to account for the Cluny Park Proceeds. This was a natural consequence of the earlier finding that TCS held the proceeds of the AAS Shareholder Loans made in 2002 and 2003 on resulting trust for the Tan family members in proportion to their beneficial interest in the Tan family's total block of shares in AAS in 1985 (see the GD at [296]–[298] and [323]).

(3) Whether TCS/NGO, as resulting trustees, owed and breached fiduciary duties

66 The Judge held that TCS did not act in breach of trust by removing TCH as a director, by asking the plaintiffs to vacate AAS's premises or by depriving TCG of office space. Although TCS was holding the AAS Shares on resulting trust for the four siblings, the resulting trusteeship did not carry all the duties of an express trustee. TCS was merely a bare trustee of the AAS Shares and the AAIE Shares; her obligation was simply to transfer the trust property to the beneficial owner when called upon to do so, and to account for dividends/income received in respect of those shares during her trusteeship (see the GD at [301]–[302] and [324]).

(4) Costs

67 In so far as the parties' costs of and incidental to the claim and counterclaim in S570 were concerned, TCS was to pay (a) one-third of TCP and TCH's costs; (b) one-third of TYK's costs; and (c) one-third of TCG's costs ("the ⅓ Costs Order"). Each set of costs was to be taxed on an indemnity basis with a certificate for more than two solicitors, if not agreed (see the GD at [327]). The Judge felt that it was appropriate to make these orders as to costs because TCS had not pursued the fundamental core of her defence and counterclaim in a *bona fide* manner but, instead, dishonestly and unreasonably

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and for ulterior motives. S570 was also sufficiently complex, both in law and fact, to warrant a certificate for more than two solicitors. However, it was not reasonable for the plaintiffs to be represented by three sets of solicitors. Given the difficulties associated with a single set of costs, the closest convenient proxy was an order for one-third of the costs of each set of plaintiffs (see the GD at [328]–[330]).

68 The Judge made no order that TCS was to bear the plaintiffs' costs of pursuing their claim against NGO or of defending NGO's counterclaim. NGO was capable of making decisions for herself and, therefore, TCS did not wield any unwanted or undue influence over NGO. The plaintiffs' voluntary choice to forgo their right to recover costs from NGO did not entitle them to visit those costs upon TCS (see the GD at [331]–[332]).

69 The Judge also made no order that TCS was (as the plaintiffs argued) to bear the costs personally rather than out of TKT's estate, as the plaintiffs, having no interest in TKT's estate, had no standing to seek such an order. However, that did not operate to permit TCS to reimburse herself these costs out of TKT's estate (see the GD at [333]).

S170

70 In so far as S170 was concerned, the Judge dismissed the plaintiffs' claims and allowed TCS's counterclaim (see the GD at [26(c)] and [317]). He found that TCS was the absolute owner of the Katong Property (see the GD at [317]). The plaintiffs were to pay TCS's costs of and incidental to S170, to be taxed if not agreed (see the GD at [318]). No appeal lies against this particular decision.

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The parties' positions and arguments on appeal

71 These appeals raise a number of issues, many of which overlap. In order not to miss the wood for the trees, we will set out the issues, the parties' positions and (brief) arguments at this particular juncture.

72 To recapitulate, Civil Appeal No 93 of 2015 and Civil Appeal No 95 of 2015 are appeals by TCS and NGO, respectively, against the Judge's findings with regard to the beneficial ownership of the AAS Shares, the Bajumi Shares, the AAIE Shares and the EnGro Shares. Common to the Bajumi Shares and the AAIE Shares is the subsidiary issue of the beneficial ownership of the Cluny Park Proceeds and the proceeds of the AAS Shareholder Loans (which were the ultimate and penultimate sources of finance for both these classes of shares). Civil Appeals Nos 90, 91 and 92 of 2015 are appeals by TYK, TCH/TCP and TCG, respectively, against the Judge's decision that TCS, as a bare trustee, owed none of the fiduciary duties that she was alleged by the four siblings to have owed. In all the appeals *save for* Civil Appeal No 95 of 2015, the parties also take issue with the ⅓ Costs Order made by the Judge in the court below. The issue of costs was not raised in any of the notices of appeal, but all the parties concerned engaged this issue at length in *both* their *appellant's and respondent's* cases and there can be no prejudice if we were to decide this issue. AAS and AAIE are nominal parties to these appeals and take no position herein.

Respective positions on main issue 1: Beneficial ownership of the assets

73 TCS argues that the AAS Shares were beneficially owned by TKT's estate because, first, TKT had never intended to gift the AAS Shares to his children in the first place and, second and in any event, his children's subsequent conduct evinced an intention to relinquish the beneficial interest in

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these shares in TKT's favour. The four siblings – not surprisingly – argue the opposite. TCH and TCP argue, in addition, that the Judge's decision can also be justified on the basis of proprietary estoppel, but TCS (again, not surprisingly) disputes this.

74 NGO and TCS argue that the Bajumi Shares were owned by NGO absolutely, because TKT had beneficially owned the Bajumi Shares as the person from whom the consideration for the Bajumi Shares was to flow and did ultimately flow, and because TKT later relinquished his beneficial interest in NGO's favour. The four siblings argue, on the other hand, that the Judge was correct because the consideration for the Bajumi Shares came from a loan for which the Tan family members as a whole (as shareholders in AAS) were intended to be responsible, and, therefore, NGO held the shares on trust for them in the 1985 Percentages. Their subsequent conduct in allowing the shares to be transferred to NGO did not necessarily mean that they had gifted the shares to NGO, and, in any event, even if TKT was the beneficial owner, the evidence demonstrated that his intent was to settle the shares on trust with NGO for the benefit of his children.

75 TCS argues that the AAIE Shares were beneficially owned by TKT's estate because, first, the consideration had ultimately flowed from the Cluny Park Proceeds (which she alleges were beneficially owned by TKT) and, second and in any event, the four siblings never considered themselves owners of the AAIE Shares in the 1985 Percentages to begin with. The four siblings argue, on the other hand, that the Cluny Park Proceeds were beneficially owned by them as AAS's shareholders and that TCS, not having pleaded her position with regard to this particular point in the court below, could not now make such an argument on appeal. In any event, the four siblings argue that

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they regarded themselves as the owners of the AAIE Shares and that they did not relinquish the beneficial interest in these shares in TKT's favour.

76 TCS argues that the EnGro Shares were owned by her absolutely because she enjoyed the benefit of the presumption of advancement and she had not disclaimed any interest in them thereafter. TYK simply states that TCS has no basis to make this particular argument.

Respective positions on main issue 2: Liability of TCS and NGO for breach of trust

77 The four siblings argue that TCS (and, in the case of TCG's appeal, NGO as well) owed a duty to them to perform the trust in good faith and honestly for the benefit of the beneficiaries. Such a duty arose *either* as a fiduciary duty and by virtue of knowledge of the separation of legal and beneficial ownership, *or* as a (possibly non-fiduciary) duty that was so fundamental that it was "core" to the trust, and that this duty enjoined her from denying the four siblings' beneficial ownership in the shares in AAS, and from exercising the legal rights attached to those shares (whether directly *qua* shareholder or indirectly *qua* director) to act in a way adverse to the four siblings' legal or practical interests. They say that she therefore breached this duty and caused various heads of losses to them.

78 TCS and NGO, on the other hand, both argue that there was no basis in law to impose such a duty on resulting trustees such as them. Even if such a duty were possible, TCS argues, further, that she neither owed nor breached such a duty. NGO argues that she was an innocent recipient and that therefore no duty arose.

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Respective positions on main issue 3: Costs order against TCS below

79 This part of the appeals does not concern NGO.

80 The four siblings argue that, as against TCS, each of them should have been awarded one set of costs, as the three-factor test in the decision of this court in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 4 SLR(R) 155 ("*Ng Eng Ghee*") at [24] (*viz*, the degree of the community of interests between parties; the size of the disputed sum or the importance of the disputed interest; and the degree of overlap in pre-hearing preparations and conduct of proceedings) pointed in their favour, and also because the ⅓ Costs Order unfairly prejudiced TCH/TCP, whose counsel did more work. TYK argues that, in any event, TCH/TCP and TYK should at least have been awarded one set of costs to be allocated in the proportion of 2:1, and that TCG should have been awarded a separate set of costs. This last-mentioned argument is made on the basis that TCG was an unwilling litigant.

81 TCS, on the other hand, argues that the four siblings should only be jointly entitled to one set of costs because co-plaintiffs and co-defendants are entitled to only one set of costs and the circumstances do not justify a departure from this norm. In any event, TCS argues that if separate sets of costs are ordered, a two-thirds discount should be awarded to account for the duplication of work.

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Our decision

Analysis of main issue 1: Beneficial ownership of the assets

Issue 1A: The AAS Shares

82 On appeal, the arguments pertain to the following three legal questions:

(a) first, whether TKT gifted the AAS Shares to his children in the period between 1968 and 1985;

(b) second, on the basis that TKT had gifted the AAS Shares to the children, whether the children's conduct from 1985 to 2008 evinced an intention to relinquish the beneficial interest in TKT's favour; and

(c) third (and in any event), whether the children were entitled to the AAS Shares by virtue of proprietary estoppel.

(1) Whether TKT gifted the AAS Shares to his children in the period between 1968 and 1985

83 We mentioned above at [2] that the parties have latched on to whatever evidence that appears to support their respective cases without sufficient regard to its context. This particular difficulty was especially evident in the context of this issue, which was the most heatedly argued in the present appeal. Lest we lose sight of the purpose of this exercise, it is important to bear in mind – especially when assessing more recent pieces of evidence – that what we are trying to assess, *objectively*, is TKT's *subjective* intention at the time of the share transfers up to 1985.

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(A) TKT'S BELIEFS AND DESIRES

84 The evidence surrounding TKT's beliefs and desires is the first piece of the puzzle, and it provides a clear context against which to assess TKT's intentions when he transferred the AAS Shares to his children. It is clear to us that TKT gifted the AAS Shares out of his fatherly love, because he considered them his successors in AAS and because he wanted to encourage and incentivise his children to invest their efforts in AAS.

85 **First**, the parties' testimony was consistent on this point. In this regard, NGO testified that TKT's initial transfers were gifts while he transferred more shares subsequently as he was a loving father and considered them his successors at AAS. TCS accepted that, in the 1970s–1980s, TKT wanted his children to own a stake in AAS and participate in its management. Further, the four siblings were *ad idem* in claiming that TKT had taught them from young that AAS was a "yeast" which they should cultivate, and that AAS was a family company in which everyone was going to work and have a stake. Indeed, one of the most natural ways to incentivise the children to work hard at AAS was to have them internalise the risks and rewards of ownership.

86 **Second**, all three sons devoted their careers to AAS, and two did so at TKT's behest and at great personal cost. In late 1973, TCG gave up his job at General Electric at TKT's insistence, after having spent a little more than a year there. It was also in February 1974 that TYK returned to Singapore, having graduated in London. He spent his first years after his return doing his pupillage and then practising law out of a nominal office within Thai Lee's premises. However, most of his time was spent helping TKT run Thai Lee, and he eventually gave up his legal career for the family business – a point already noted at [15(c)] above. TCH, too, was made to work in AAS

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immediately after secondary school as he was less academically-inclined. As TCG points out, all this indicates that TKT intended that his children were not to be mere pawns but to have actual management rights in AAS instead. We are unimpressed by TCS's argument that the degree of involvement by TKT's children in AAS did not determine the shareholdings. It is true that the four siblings learned not to be motivated by, speak of, or even question the shareholdings but, instead, to work for AAS regardless of their shareholdings, and it is true too that TCS was not asked to return her shares despite having left the family business in 1974 and having been removed as director. But, in our judgment, these shed little light on the intention of TKT as *transferor*. As the Judge quite correctly observed at [173]–[179] of the GD, it was unsafe to draw inferences about the children's rights simply from their deference to TKT's wishes alone, as TKT was an autocratic patriarch who demanded and generally received utmost respect from them and drew no distinction between the assets of his family members and those of his companies. More importantly, we observe (and TCS conceded, correctly in our view, on appeal) that there was some correlation between the *degree* of involvement and shareholding in AAS – this is a point we will return to later at [90]. We are also unimpressed by TCS's argument that TKT was supportive of his sons' *other* business ventures and even disclaimed his interest in them. The simple reply is that, in the 1970s and 1980s, the sons remained very much involved in AAS and most of these ventures *postdated* – and were *never contemplated at the time of* – the transfers.

87 **Third**, TKT's letters to TCG in the late 1970s and early 1980s took an encouraging (as opposed to imperative) tone in discussing both matters of business as well as family (in particular, the discipline of TCH), suggesting that TKT had, in fact, taken a back seat. While these letters made only oblique

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references to AAS, the position is clarified in a letter from TKT to TCH in 1978, which demonstrated that TCH was responsible for AAS's daily affairs but that he had to submit to TCG and TYK's oversight. TCS argues that TKT could simply have written in his many letters that AAS now belonged to the children but failed to do so. This is unsurprising to us. TKT must have felt ambivalent about handing the company to his sons – on one hand desiring to retain control (or at least influence) in the affairs of AAS as its founder and as the patriarch of the family, and, on the other hand, recognising ultimately that he was past the retirement age of that era, that he had been away for health reasons, and that he had to cede control to the next generation if AAS was to be the lasting legacy that he surely wanted it to be. For this reason, TKT's letter to TCH is as clear an indication as one could expect that TKT had *given* AAS to his children.

(B) THE MANNER IN WHICH SHARES WERE TRANSFERRED FROM 1968 TO 1985

88 The second piece of the puzzle concerns how we should characterise the share allotment in 1968 and the three (sets of) share transfers between 1968 and 1985, namely: (i) the share transfer from TKT to TCG and TYK in 1975; (ii) the equalisation of shareholdings between the Bajumis and Tans in 1979–1981; and (iii) the share transfer from TKT to TCH in 1985. In our judgment, these were not piecemeal and sporadic or random (still less, arbitrary) transfers (as TCS generally claims), but are best explained by TKT's *design* to *gift* his shares to his children, and to reflect his expectations of how AAS should be run.

89 **First**, it seems unlikely that TKT intended to allot shares to his children and have them hold the shares on trust for him. We see little reason for TKT to have his shares held by *so many nominees*. We also see little

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reason for TKT to have made a trustee of TCH, since he was still a minor – 17 years old – when the shares were first allotted in 1968.

90 **Next**, the transfers led to shareholdings which correlated with the children's participation in AAS and with TKT's expectations of how the family business should be owned. The ***first*** set of transfers from TKT to TCG and TYK, which took place in March 1975, not only coincided with TKT's move to Hong Kong but was also shortly after TCG and TYK started taking an active role in AAS. It will be recalled that TCG started working in AAS in late 1973 while TYK started in 1974. The ***second*** set of transfers took place between 1979 and 1981, from the Bajumis to the three sons. These took place after TYK and TCG had asked TKT about equalising the Tans' and Bajumis' shareholdings to ensure that it was worth their while to devote their efforts to AAS. Further, it is more probable that TKT intended the shares to be a gift (rather than a transfer on trust) because he took the trouble to provide his sons with the requisite consideration – he liquidated Thai Lee, paid the proceeds into his sons' bank accounts and the Bajumis were then paid from those accounts. The ***final*** transfer was in 1985, when TKT gave the last of his shares to TCH. TCS accepts that this was to "close the gap" between TCH's shareholding and TCG/TYK's shareholding. In our judgment, this reflected TKT's design. He had, in a letter to TCG dated 22 February 1980, expressed an intention to give his sons 75% in a new family company that was being contemplated. It is not a coincidence that the shareholding of the three sons in AAS in 1985 (disregarding the Bajumis' shares for this purpose) was 77.8%, with TCG and TYK – the two eldest sons – having the larger shares. As we mentioned above at [86], the size of each sibling's shareholdings corresponded to his/her degree of management control. We also note that TKT was 66 years

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old by this time – he was more than 10 years past the then-prevailing retirement age.

91 Again, we reject TCS's argument that the transfers could be explained by TKT's move to Hong Kong and by the Bajumis' participation in AAS, and that TKT was merely using his children as nominees. As TCH/TCP argues, it would also be puzzling why TKT needed to reorganise the shareholdings in light of the Bajumis' participation if he regarded himself as the beneficial owner of the AAS Shares. There would also have been no need to "close the gap" between TCH's shareholdings and TCG/TYK's shareholdings if the children were mere nominees.

(C) TKT'S CONTINUED INFLUENCE OVER AAS AND HIS CHILDREN'S DEFERENCE TO HIM

92 The next piece of the puzzle concerns what we should make of the fact that TKT continued to have influence and control over AAS and its shareholding after he left for Hong Kong in 1974. In so far as the shareholding is concerned, TKT not only orchestrated the changes to AAS's shareholding between 1979 and 1985, but also continued to have access to and ask for the AAS share certificates out of what TCG described as "an old man's habit". Even from 1985 to 2008, the four siblings apparently deferred to TKT's instructions to transfer their shares in AAS to TCS. In so far as AAS's affairs were concerned, TKT expected to be regularly updated and to have his approval sought. He continued to direct family business through and outside of AAS – he invested in Newton Engineering in 1978 against TYK's advice, invested in PT BRK with the Bajumis, and discussed with TCH the sale of assets by an AAS subsidiary in 2006. TCH and TCP sought and followed TKT/NGO's instructions for the sale or redevelopment of AAB in 2006 and TKT's directions on payments of directors' fees and staff bonuses as late as

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January 2008. TCH and TYK kept TKT updated on the financials of AAS and its subsidiaries as late as January 2008. In 2006, TKT even appointed a property investment firm to handle a proposed redevelopment of AAB without consulting TCG (who was then AAS's *de facto* chairman).

93 We emphasise once again that TKT generally received utmost respect from his children. In so far as to the incidents of ownership were concerned, it is crucial that TCS conceded that the four siblings would have deferred to TKT's instructions even if they beneficially owned the shares. We agree with TCG – and TCS conceded likewise (correctly, in our view) – that it was unsurprising that TKT's input was sought and followed out of respect in the light of his children's upbringing. This analysis also applies to the incidents of management (which, we note, is less probative of the beneficial ownership than the manner in which the parties dealt with their shares). Although TKT's input was often sought, it is also telling that he did not have the final say when there were disagreements borne out of the waning respect that his children had for him. In this regard, TKT had consulted TCG and TYK on the Bajumi litigation and regarded TCG's settlement in 2004 as binding even though he was disappointed with the result; this suggests that he did not regard himself as owner and controller of AAS. In 2006, in relation to the proposed divestment of EnGro shares, TCG told TKT that there was no room for discussion and offered to meet for one hour only, citing a difference in views.

(D) PLANS FOR A TAN FAMILY TRUST

94 The fourth piece of the puzzle relates to the plans the Tans had for a family trust to accumulate assets for future generations. This was first mooted by TYK in 1979, having sensed since 1975 that TKT had been concerned about potential in-fighting amongst the siblings over their ownership in AAS,

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and the discussions that followed mainly involved TKT, TCG and TYK. Eventually, the Tans made plans to consolidate their shares in AAS in TCS's hands as a first step to setting up a Tan family trust.

95 One argument by TCS is that the discussions about a family trust were inconsistent with TKT's intention to gift the AAS Shares to his children. If TKT had gifted the AAS Shares (or had meant to do so in the near future), then he should have had no reason to worry about potential in-fighting. TCS also argues that it is strange for the four siblings to have (or to retain) beneficial ownership of the shares if TCS was meant to settle the assets in the family trust.

96 In our view, TCS's submissions fail to appreciate the ***context*** of these facts. **First**, the mere fact that the children discussed or even intended to set up a family trust does *not necessarily* lead us to the conclusion that they never owned (or that they relinquished ownership of) the AAS Shares. **Second**, TCS wrongly assumes that the risk of litigation would be substantially reduced if the AAS Shares were gifted. As we have seen, TKT conducted his affairs without much regard to the proprietary consequences, and he left little clear and objective evidence about his intentions. **Third**, to the extent that the children transferred their shares in AAS to TCS in deference to TKT's instructions, we agree with the Judge that it is unsafe to draw inferences about the parties' proprietary rights because they could have deferred not because they acknowledged that TKT beneficially owned those shares but because they obeyed TKT's wishes *as filial children*. **Fourth**, we find a letter written in December 1993 by Deacons (a law firm) to TCS giving advice about setting up a family trust to be illuminating. This letter was prepared following a meeting between TCS and Deacons four days prior, and demonstrates that TCS had instructed Deacons to advise her on the basis that there were five

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individual family members "who between them own[ed]" 50% of a company, and that they would "contribute their shares" to the trust. Tellingly, TCS did not say that TKT was the sole beneficial owner. We are not convinced by TCS's explanation that she was describing a purely "hypothetical situation"; we think it more likely that she was giving Deacons a situation that best represented the prevalent reality or what was expected to prevail in the near future. After all, she admitted to having instructed Deacons on "the most crucial and fundamental points". We also reject TCS's claim that Deacons did not treat all the siblings as beneficial owners of the AAS Shares, and that that understanding was embodied in a draft trust deed that did not name TYK or TCH as the unit holders then. At this point in time, there were four registered shareholders within the Tan family – NGO, TCS, TCG and TCP – and this was duly reflected in the draft trust deed. More importantly, TCS admitted that TKT "wanted a family trust where the five children would be involved somehow". All this suggests that TKT had relinquished beneficial ownership in the AAS Shares in favour of his children.

(E) THE 1986 TRUST LETTER AND THE 1990 TRUST LETTER

97 The penultimate strand of evidence we consider comprises two trust letters allegedly written by TCS (the authenticity of which she disputes). They are dated 8 October 1986 ("the 1986 Trust Letter") and 28 December 1990 ("the 1990 Trust Letter") and are addressed to TYK and TCH respectively. Their purport is that TCS would hold the AAS Shares transferred to her by TYK and TCH on trust for each of them respectively. These letters are more relevant to the next sub-issue as to whether TYK and TCH relinquished their beneficial ownership in TKT's favour when they transferred their shares to TCS but, at this juncture, their relevance is in demonstrating that TCS, TCH

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and TYK were in agreement that the beneficial ownership of the shares vested in the children rather than in TKT.

98 These two trust letters are significant principally because they received absolutely no mention by the Judge even though they were the most direct – perhaps the *only* – pieces of evidence on which the four siblings' case centring on an express trust rested and even though both TYK and TCS engaged this point in closing submissions below. Evidently, the Judge preferred not to make a positive finding either way, preferring, instead, to rest his decision on a resulting trust analysis. Parenthetically, the Judge's GD could explain (at least partly) why the four siblings primarily relied on a resulting trust analysis on appeal even though they had argued a case of express trust below.

99 Allegations of forgery or fraud are serious and, as such, require a high amount of proof (see, *eg*, the decision of this court in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [158]–[161]). We now explain why, in our judgment, TCS had failed to discharge her burden of proving that these letters were forged.

100 First, TCS's expert, Paul Westwood ("Mr Westwood"), gave evidence that the paper used in the 1986 Trust Letter was "security paper" of high cotton fibre content, and of a quality often used by banks and governments. At that particular point in time, TCS was working in the World Bank in Washington DC. The paper was also letter-sized; such a paper size would have been common in the United States but rare in Singapore. Mr Westwood's conclusions were largely tentative due to constraints on time and access to the letters. He found "similarities and no significant differences" between the signatures on the trust letters and other specimen signatures; he could not conclude whether the signature on the 1986 Trust Letter was genuine and he

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expressed a highly qualified but positive conclusion that the signature on the 1990 Trust Letter was genuine. These signatures were, however, unusual in that the signature on the 1986 Trust Letter bore a relatively faint appearance and left no detectable embossments that would indicate pen pressure, while the signature on the 1990 Trust Letter had been printed and superimposed on the document. However, he conceded that the type of ink could cause the signature on the 1986 Trust Letter to fade. In so far as the 1990 Trust Letter was concerned, it would be a leap of logic to conclude that it had been forged just because the signature had been superimposed. It could have been the case that the letter was written by TCS but that her signature – for reasons best known to herself – was printed by her rather than handwritten.

101 Second, TCS is not aided by Mr Westwood's claim that he was unable to analyse the documents in greater detail. Her application to send the letters overseas for examination was dismissed and she did not appeal this decision. Further, Mr Westwood conceded that the Health Sciences Authority ("HSA") had the requisite technology to do the same analyses that he proposed to perform. For whatever reason, TCS chose not to apply to have the documents examined by the HSA.

102 Third, the allegations of forgery were belated. It is true that the trust letters were not referred to in pre-litigation correspondence, but the 1986 Trust Letter was first raised in these proceedings when TYK appended it to his 3rd Affidavit in August 2010, and listed it in a List of Documents dated 21 March 2011. Mr Westwood's report was dated 28 June 2011. While TCS filed a Notice of Non-Admission on 12 April 2011, she never alleged forgery in her affidavits, even though she has filed at least 25 affidavits in these proceedings. In fact, it was not until February 2013 (*ie*, about 20 months after Mr Westwood's report) that she alleged forgery for the first time (in an

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application to send the letters overseas for examination). It is true that TYK never referred to the 1986 Trust Letter in his correspondence with TCS, but we are not minded to hold this against TYK. On the assumption that this letter was authentic, it would have been over 20 years old and may not have surfaced until TYK had begun to review his documents in preparation for litigation. Perhaps the most suspicious circumstances surrounding these letters is the fact that, allegedly, a copy of the 1986 Trust Letter which TYK had given to TCG had been destroyed by termites while the 1990 Trust Letter had gone missing until two weeks before trial, and the fact that these documents are at odds with the general tendency of the Tans *not* to use formal documentation. However, in our judgment, these facts, even taken in conjunction with the unusual signatures, are insufficient to tilt the balance in favour of a finding of forgery.

103 Fourth, the 1986 Trust Letter is not inconsistent with a letter from TYK to TKT dated 24 July 1986 to the effect that, for tax reasons, TYK wanted to divest himself of the legal title of his AAS Shares *by settling them on trust*. TCS's complaint that this letter was equivocal and that it was not addressed to her is, in our view, unpersuasive, given that it was disclosed by her only during discovery. TCS next points to an apparent contradiction between the 1986 Trust Letter and the share transfer memorandum dated 30 December 1986, the latter of which stated that the transfer of TYK's shares to TCS (and TCG) was by way of gift. However, this can, in our view, be explained on the basis that TYK (like his father) executed official documents which were not representative of reality to save on stamp duty, and that it was precisely because he declared the transfer to be a gift that he felt the need to procure from TCS a document to the opposite effect.

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104 In the premises, we accept that the trust letters were genuine and that they detract from the hypothesis that the shares were beneficially owned by TKT during that period.

105 We note, however, that *TCG and TCP* did *not* procure similar trust letters from TCS. TCG had only contended that he transferred his shares to TCS for two reasons. First, he was, at the time, undergoing a divorce, and had wished to avoid complications arising out of the division of matrimonial assets by alienating his shares in AAS with the knowledge and consent of his wife. Second, he wanted to avoid any potential conflict of interest that may arise between AAS and EnGro, as he was the chief executive officer of the latter and as such responsible for developing it. However, underlying these was TCG's understanding that the shares would eventually be settled in the Tan family trust. TCP has only contended, by way of pleadings and affidavit evidence, that their (*ie*, TCP's and TCG's) transfers to TCS were on the basis and understanding that she would hold the shares on trust for them pending the formalisation of the family trust arrangements. In so far as TCP's transfer of shares to TCS in 2008 was concerned, she says that it was by way of gift but that she secretly executed a statutory declaration (*ie*, TCP's 2008 SD) the day before declaring such a gift to be void. In this regard, TCS contends that both TCG and TCP actually transferred their shares to TCS to be held on trust *for TKT*. In these circumstances, we are not prepared to find that TCS *undertook* to hold those shares *on express trust for TCG and TCP* (as opposed to, say, an express trust *for TKT* or a *Quistclose* trust to settle the shares into the Tan family trust). TCG and TCP, accordingly, fail to prove a case of express trust and are only able to prove a case of resulting trust.

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(F) THE PARTIES' SUBSEQUENT DECLARATIONS

106 The final pieces of evidence concern a series of subsequent statements and documents executed by the parties. Given that some are favourable while other are adverse to their respective makers, a point of principle that parties disputed before the Judge (and before us) is whether subsequent evidence on the transferor's intentions is admissible as evidence.

107 The rule in *Shephard* represents the classic state of the law. The principle, as encapsulated in Viscount Simonds's speech at 445–446, is that subsequent conduct *in the actor's favour* is inadmissible as evidence to rebut the presumption of advancement, except for conduct that is so closely connected in time to the original act (*ie*, the transfer) as to be part of the same transaction. In contrast, conduct *against an actor's favour* (*eg*, demonstrating that the transferor intended to gift the asset or that the transferee acknowledged receiving the asset as trustee) fall outside the scope of the general rule. The concern, as expressed in the decision of this court in *Teo Siew Har v Lee Kuan Yew* [1999] 3 SLR(R) 410 at [34], was that a party could advance his own case by making unilateral statements.

108 An ostensibly more progressive approach was advocated in the Singapore High Court decision of *United Overseas Bank Ltd v Giok Bie Jao and others* [2012] SGHC 56 ("*Giok Bie Jao*"). There, Belinda Ang Saw Ean J stated (albeit in *obiter*) at [16]:

> … However, in the latest edition the authors of *Snell's Equity* (32nd Ed, 2010) suggested that such evidence should not be excluded but left to the court to decide on the weight to be given to it (see emphasis in bold below). Para 25-013 states:
>
> > *Contemporaneous and subsequent conduct.* The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in

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> evidence either for or against the party who did the act or made the declaration. It has been held that subsequent acts and declarations may only be admissible as evidence against the party who made them, and not in his favour. ***The preferable approach nowadays may be to treat the parties' subsequent conduct as admissible even in their own favour, and to leave the court free to assess its probative weight. This approach would be consistent with the looser significance attached to the presumptions of resulting trust and of advancement in the modern authorities.***
>
> …
>
> While local courts have previously expressed approval of the rule originally cited in *Shephard v Cartwright*, the new approach seems eminently sensible. However, it is unnecessary for me to express a formal view on the matter to dispose of this case and I leave it to another forum to ponder on the new approach.
>
> [emphasis in original]

109 The Judge ultimately declined to positively endorse the new approach as set out in the preceding paragraph on the basis that any subsequent evidence in the maker's favour would be given little or no weight at all (see the GD at [196]). However, he did state (at [195]):

> 195 Ang J's observation that the new approach is "eminently sensible" is, as she herself acknowledges, *obiter*. The present case too does not require me to conclude whether the rule in *Shepard v Cartwright* continues to apply. To my mind, the new approach is not inconsistent with the general rule insofar as it accommodates the caution with which a court must approach subsequent self-serving declarations, because of the risk of a party using post-transaction declarations with hindsight to recast their initial intent in order to bolster the case they now advance. The principle that self-serving evidence is of little probative value underpins both the established approach which excludes it entirely and the new approach which makes its self-serving potential ultimately a matter of weight.

110 In our view, the policy reasons in favour of relaxing the rule in *Shephard* are strong. **First**, it has been argued that *Shephard* is an

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anachronistic application of the rule against hearsay in the old common law, which has since been modified by the Evidence Act (Cap 97, 1997 Rev Ed), and is an anomaly today (Eugene Fung, "The Scope of the Rule in *Shephard v Cartwright*" (2006) 122 LQR 651 at pp 686–688). **Second**, England and Canada have adopted this approach: see the English Court of Appeal decision of *Lavelle v Lavelle and others* [2004] EWCA Civ 223 ("*Lavelle*") at [19] *per* Lord Philips MR and the Supreme Court of Canada decision of *Michael Pecore v Paula Pecore and Shawn Pecore* [2007] 1 SCR 795 ("*Pecore*") at [59] *per* Rothstein J (delivering the judgment of the majority of the court). *Giok Bie Jao* is the first step our courts have taken in a similar direction and we are inclined to approve of it. The same trend is observed in the field of contract law – our courts have expressed the view that there should be no absolute bar on the admissibility of subsequent conduct in the interpretation of written contracts although, admittedly, the precise parameters have still to be worked out (see, *eg*, the decisions of this court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132(d)]; *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [34]–[75] (focusing on admissibility of pre-contractual negotiations); *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 at [72]–[74]; see also *Leong Hin Chuee v Citra Group Pte Ltd and others* [2015] 2 SLR 603 at [91] *per* Tan Siong Thye J; V K Rajah JA (writing extra-judicially), "Redrawing the Boundaries of Contractual Interpretation: From Text to Context to Pre-text and Beyond" (2010) 22 SAcLJ 513 at para 48). **Third**, and finally, the new approach would allow the court to consider the parties' intentions more holistically and achieve a fairer result especially in complex cases where parties' intentions are not readily apparent. Empirically speaking, there is often relevant subsequent conduct in property disputes involving a deceased transferor. It would be more

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satisfactory for the court to take a broad view of admissibility but carefully ascribe the precise *weight* to the evidence rather than impose a strict (or blanket) bar without more, thus enabling a more nuanced inquiry in the process.

(I) TKT'S BAJUMI LITIGATION AFFIDAVIT

111 The first of these declarations is an affidavit affirmed by TKT in December 1996 for the purposes of the Bajumi Litigation. As the Judge observed at [201] of the GD, there, TKT unequivocally denied having any interest, whether legal or beneficial, in AAS's shares. TKT stated that he had no more say in matters concerning AAS as he was no longer a shareholder and had ceded management to his children. We set out the salient extracts below, as follows:

> 33. After I resigned as Chairman [on 15 March 1975], **my children, who were then already in full control of [AAS]**, on behalf of the Tan family, out of respect for their elders, invited [Bajumi Wahab] to take the seat of chairman. …
>
> …
>
> 40. Sometime in 1989, SGB asked TCG to look at a piece of land near Palembang which he was interested in developing into a rubber plantation. … TCG indicated … he and his siblings were keen on investing in the project … **I told TCG that I would leave the children to make all decisions whether to invest in the rubber plantation**.
>
> 41. Soon after this, [Bajumi Wahab] paid me a visit in Hong Kong] … He told me that he hoped that the Tans and especially TCS, with her experience in this field, would consider participating in the project. **I then told him that I was no longer involved in the running of the Company and that therefore, he should instead speak to my children about it.**
>
> …
>
> 54. … [Bajumi Wahab] then suggested that, given the present breakdown in relations, the families should split ways in [AAS] as well.

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> 55. My reply was that **I no longer had any say in the matter as <u>I was no longer, and had not been a shareholder in [AAS] for a long time</u>.** …
>
> …
>
> 59. … throughout the meetings, [Bajumi Wahab] kept trying to get me involved in the discussion. **I repeatedly told [him] that I was in no position to speak since <u>I was no longer a shareholder of [AAS]</u>**. [He] then threatened me, saying that I would suffer losses if he took action against me, and that it would be too late then to regret my past actions. **I replied that <u>any losses would not be mine, rather, they would be my children's instead</u>.**
>
> [emphasis added in bold and underlined bold]

112 In our judgment, the Judge was correct to have admitted the affidavit into evidence since it clearly falls outside even the strict rule in *Shephard*. More importantly, the Judge was also correct, in our view, to have accorded great weight to this affidavit. As he noted, its contents were unequivocal statements in solemn, sworn declarations that were subject to penalties for perjury. Even though this affidavit was self-serving in the context of the Bajumi Litigation and TKT was not cross-examined on it, TKT was not shown to be dishonest. In particular, TCS failed to explain why TKT, who was not named as a party to the Bajumi litigation, had to lie about not having shares in AAS. In addition, we observe that this affidavit was filed relatively close in time to the transfers in question.

113 TCS repeats her arguments that it is unrealistic to rely on an isolated aspect of TKT's evidence since it related to his recollection of what he told Bajumi Wahab. However, she cannot escape the core consequence of her submission – that her father must have been lying. For a daughter who claims to be doing all that she can to uphold her father's wishes to the letter, this submission of hers is a starkly dissonant one and we accordingly reject it.

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(II) THE 2006 WILL AND THE 2006 JOINT STATEMENT

114 The second set of declarations relied upon by the four siblings comprises a will by TKT and an accompanying statement made by TKT and NGO on 21 April 2006 ("the 2006 Will" and "the 2006 Joint Statement"), which confirmed in very clear language that no assets were *held on trust for* them. The relevant part of the 2006 Will reads as follows:

> 6 For the avoidance of doubt, I declare that I have no assets which are held by my daughters or by any other person in trust for me and that all the assets previously belong [*sic*] to me or financed by me which are currently held by my daughters and [*sic*] are not held in trust for me.

The relevant part of the 2006 Joint Statement reads as follows:

> We, Tan Kiam Toen … and Ng Giok Oh … wish to state that we have no assets which are held by our daughters or by any other person in trust for either or both of us. We wish to further state that all the assets previously belong [*sic*] to any or both of us or financed by any or both of us which are currently held by our daughters are beneficially owned by our daughters and are not held in trust for any one or both of us.
>
> I, Ng Giok Oh, wish also to put on record that the shares in [AAS] which are registered under my name belong absolutely to my daughter, Tan Choo Suan … and I had executed a Trust Deed in favour of [her] accordingly.
>
> We make this statement in order to avoid any doubt that our other family members may have as regards the assets currently owned or held by our daughters.

115 To this end, it is helpful to consider the evidence of Mr Hoon Tai Meng ("Mr Hoon"), the lawyer who assisted in drafting the 2006 Will and the 2006 Joint Statement. Although Mr Hoon did not receive specific instructions on the AAS Shares, he testified that he had visited TKT about four to five times and engaged in lengthy discussions. He was instructed that a large part of TKT's assets were no longer in his name or held on trust for him as he had given them to his children as outright gifts. This evidence is also reliable

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because Mr Hoon is a disinterested third party with no incentive to lie, and his evidence (unshaken under cross-examination) corroborates TKT's evidence in the Bajumi litigation affidavit.

(III) STATEMENTS & DOCUMENTS EXECUTED BY TKT AND NGO FROM 2006 TO 2008

116 The final set of declarations comprises a series of documents executed in and after late 2006, which suggest that TKT's apparent intent of gifting the shares to his children had taken a 180-degree turn in his last years. The documents were described by the Judge (at [187(b)], [187(d)]–[187(f)] and [187(h)]–[187(i)] of the GD). They are:

(a) A letter of undertaking executed by TCP and TCS dated 21 December 2006 ("the 2006 LOU"). In it, they undertook to distribute the AAIE shares in their names to their siblings and to NGO in certain proportions set out therein.

(b) A deed of gift executed by TKT dated 31 January 2008 ("the 2008 DG"). In it, TKT declared that he had gifted the Bajumi Shares to NGO after the 2004 Family Meeting, and that she was holding the other 2.22% of shares in AAS on his behalf and that he gifted them to her absolutely.

(c) Two statutory declarations executed by TKT on 31 January 2008 ("the 2008 SD1") and the second on 8 May 2008 ("the 2008 SD2") (collectively "the 2008 SDs"). In the 2008 SD1, TKT recites his life story and states that he retained beneficial ownership of all the assets which he had transferred to the four siblings, and that NGO and TCS held the AAS Shares for him as nominee. In the 2008 SD2, TKT explained the circumstances of the execution of the

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2006 Will and why it did not reflect his intentions. Specifically, he says that he never intended to make a will, that he did not realise the nature of the document he had signed, and that it was "completely incorrect" to say that no assets were held on trust for him.

(d) The 2008 Joint Will executed by TKT and NGO on 6 February 2008, in which TCS was named as the sole executrix and trustee. Under its terms, all the income of the assets of the one who predeceased the other would be used for the benefit of the survivor for the rest of his or her life and, after the survivor's death, the bulk of the estate would be devoted ultimately to various charitable causes.

(e) A letter of offer from TKT and NGO to the four siblings dated 16 August 2008 ("the 2008 Offer"), and a reply to them from their sons dated 12–13 October 2008 ("the 2008 Counter-Offer"). In the 2008 Offer, TKT stated that he wished to distribute the EnGro shares held by AAIE among the family, to give sole ownership of a company to TCG and the profits of S$600,000 in another company to TCH. In so far as the AAS Shares were concerned, TKT stated that "AAS is the fruit and crystallization of the hard work of your mother and myself" and that, therefore, "it is only your mother and myself, not any third party, who have a say in AAS matters, including its future development and the use of its assets". The 2008 Counter-Offer made some alternative proposals as to the EnGro shares, but did not address the ownership of the AAS Shares.

(f) A draft deed of family arrangement and release by TKT and NGO ("the 2008 Draft DFA") that was circulated to the siblings at the reading of the 2008 Joint Will on 2 April 2009. This was signed by

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> NGO and TCS on 3 August 2009 and circulated for signatures (although, in the event, the other siblings never signed it). Its purport was that TKT always had beneficial ownership of the AAS Shares and 70% of the AAIE Shares (*ie*, those held by TCS and TCP) and would make *inter vivos* gifts of the AAIE Shares to the three sons and various charitable organisations, and that the 52.22% of AAS held by NGO would be held absolutely.

117 In our view, these subsequent declarations should be given *virtually no weight* for the reasons given by the Judge. **First**, it must be borne in mind that the present exercise is that of ascertaining TKT's objective intention *between 1968 and 1985*. Look at in that light, we agree wholly with the Judge's observation at [196] of the GD that these declarations are too far removed in terms of time and cannot be plausibly said to have formed part of the transactions in question. They are also an about-turn or *volte-face* from TKT's position as expressed in the Bajumi Litigation affidavit, the 2006 Will and the 2006 Joint Statement. **Second**, these statements are highly self-serving. If TKT had indeed alienated his shares earlier, what he says subsequently cannot change that fact. As Viscount Simonds stated in *Shephard* at 450, "[h]e may well have changed his mind at a later date, but it was too late". **Third**, these declarations were executed after TCS began spending more time with TKT and NGO and came to exercise influence over them. Many were executed in 2008, just a few months before TKT passed away and when he was in poor health. TCS herself says that TKT's growing dissatisfaction with his sons was due to his disappointment that his children were no longer as welcoming and deferential and that they hardly visited him in Hong Kong. This means that TKT had become disillusioned with the four siblings in his later years, and TKT's subsequent declarations here evidence his intentions *then* and *not* his

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intentions in *1985*. TCS also disputes the Judge's finding that she had orchestrated the litigation out of historic sibling rivalry. We do not find it crucial to resolve the issue as to whether TCS had actively encouraged TKT's perception and what motivations she has in the present litigation. It suffices to note that she admitted to having been the "black sheep" of the family (see the GD at [182]) and that she had in fact came to exercise significant influence over TKT and NGO. For these reasons, we find the contents of their subsequent declarations unreliable.

118 Apart from these general observations, we note further that the 2008 SDs were very problematic. **First**, they were disclosed belatedly – on 23 March 2011, just a few months before the trial was scheduled to commence. TCS never mentioned them in her many previous affidavits. **Second**, TCS's affidavit of evidence-in-chief had curiously omitted to mention the circumstances under which the 2008 SDs were prepared and executed. **Third**, the doctors who examined TKT on 31 Jan 2008 (*ie*, the day he executed the 2008 SD1 and the 2008 DG and shortly before he executed the 2008 Joint Will) had recorded in their medical reports that TKT was going to make a will but not that he was going to execute a statutory declaration. One of the doctors who re-examined him on 8 May 2008 (*ie*, the day he executed the 2008 SD2) noted that TKT was going to sign a "supplementary legal document" but not the 2008 SD2 specifically. Neither doctor was called to explain these facts. **Fourth**, despite having had many opportunities, TCS did not call as witnesses the lawyers who prepared the 2008 SDs – John Brewer and Hwang Sok Inn. TCS's plea of privilege was not only unsubstantiated but was also is at odds with her stated intention of giving effect to TKT's wishes.

119 In these circumstances, we do not give any weight to these documents.

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(IV) SUBSEQUENT CONDUCT BY TYK AND TCG

120 We now turn to certain depositions by TYK and TCG in legal proceedings in which they were involved, which TCS says is proof that they did not consider themselves owners of any discrete portion of the AAS Shares.

121 TYK failed to declare his interest in the AAS Shares while involved in divorce and bankruptcy proceedings in the United States, despite filing documents in the bankruptcy proceedings in 1994 and divorce proceedings in 1996. TCG, in his divorce proceedings, had filed an affidavit of means in 1998 stating that the AAS Shares did not belong to him at that particular point in time. He filed a further affidavit of his assets in November 2000 stating that he considered the AAS Shares to be owned by the family as a whole and that their apportionment "may be decided at some future time … in consultation with [his] parents".

122 In our judgment, it is inappropriate to place great weight on TYK's and TCG's failure to declare an interest in the AAS Shares. **First**, we find the evidence of TKT's declarations – especially his 1994 Bajumi Litigation affidavit – to be more compelling. His declarations are more probative of his intentions as *transferor* – and this is key – whereas TYK's and TCG's declarations are probative of their frame of mind as transferees. Also, if TKT was ever in "litigation mode" in a commercial dispute with the Bajumis, we think this euphemism must apply with even greater force to TYK and TCG, who were then embroiled in bankruptcy and matrimonial proceedings. **Second**, it would have been quite natural for TYK and TCG to be hesitant about affixing a definite percentage to their shareholding in AAS. They had been brought up to not be calculative. Moreover, the Tan family trust was being contemplated at that time, and TCG felt bound not to deal with the

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shares freely but to vest the ownership of the shares in the trust at TKT's directions when such a trust was formed. TYK's understanding of who had the beneficial interest in the shares that had belonged to him was unclear – on one hand he claimed that he was the beneficial owner on the basis of the trust letter, but on the other hand he claimed that the beneficial ownership of the shares vested in the beneficiaries of the family trust (of which trust he might be a beneficiary in an unspecified percentage) until such time when the trust failed. At any rate, however, it was clear to us that he did not think that the beneficial interest vested in or remained with TKT.

(G) CONCLUSION

123 In conclusion, the evidence points towards – or at least is not inconsistent with – the view that TKT had gifted the AAS Shares to his children. In our judgment, the direct evidence clearly rebuts the presumption of resulting trust, and we agree with the Judge's conclusion at [238] of the GD that each of the Tans therefore was the absolute owner of the AAS shares which he or she held in 1985.

124 At this juncture, we make one more observation. At the hearing, counsel for TCS urged upon us the twin points that the four siblings did not know how many shares in AAS they were each entitled to, and essentially that the Judge's focus on the 1985 Percentages was artificial and undue. In our view, these are mere distractions. It is one thing to be unaware, as a matter of *arithmetic*, of the exact percentage of shareholding one has been *given* in a company. That is different from not knowing the legal events which gave rise to that shareholding. We therefore do *not* infer that the four siblings' cases were afterthoughts. As for the focus on the 1985 Percentages, this has come about because, as it so happens, the relevant transfers can be neatly segregated

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into two sets in a chronological manner. The first set – from 1968 to 1985 – end with TKT's exit from AAS and carry proprietary consequences to the effect that the beneficial ownership of the shares vest in the members of the Tan family. The second set – from 1986 to 2008 – is disregarded by equity because the transfers were all on trust. The 1985 Percentages are therefore not merely the most stable, but the most *recent and relevant* shareholdings for the purposes of determining beneficial ownership, and the parties are deemed by law to have transacted on that basis.

(2) Whether the four siblings, by their conduct, relinquished the beneficial ownership in the AAS Shares in TKT's favour

125 We now consider whether the four siblings, by transferring the shares they held to TCS between 1986 and 2008 or by their other conduct, relinquished the beneficial ownership in their shares in AAS in TKT's favour.

126 **First**, we have already noted above at [92]–[96] that it is unsafe to draw inferences about the parties' proprietary rights from the fact that the children often deferred to TKT's wishes out of respect for him as the patriarch of the family. **Second**, we agree with the Judge that TCP had, in her statutory declaration (*ie*, TCP's 2008 SD), sufficiently denied any intention to relinquish the beneficial ownership of her shares, while TCG, TYK and TCH had sufficiently explained that their transfers were pursuant to a plan to consolidate the shares in TCS's name as the first step to establishing a Tan family trust. As explained above at [96], TCS was actively seeking legal advice on how to set up such a trust. More specifically, we have explained at [99]–[104] why we think that the two trust letters addressed to TYK and TCH were genuine and therefore demonstrated that TCS held the shares on trust for them. We have also explained our views at [120]–[122] with regard to TCG's and TYK's failure to declare their ownership of the AAS Shares between 1996

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and 1998. **Finally**, we also agree with the Judge's conclusion at [242]–[243] of the GD that, in any event, a presumption of resulting trust would arise because TCS provided no consideration for any of these transfers, and the counter-presumption of advancement would not apply in a sibling relationship.

127 In conclusion, we agree with the Judge's conclusion at [244] that TCS held the AAS Shares on resulting for her siblings in proportion to his or her percentage of the Tans' total block of shares in AAS in 1985.

(3) Whether the four siblings were entitled to the AAS Shares in any event by operation of proprietary estoppel

128 In light of the above findings, there is no need for us to address TCH/TCP's arguments on proprietary estoppel and we therefore say no more with regard to this particular issue.

Subsidiary issue – the Cluny Park Proceeds

129 At this juncture, we digress to address the subsidiary issue as to who was beneficially entitled to the Cluny Park Proceeds because – as it turns out – this has a bearing on the issue of beneficial ownership of both the Bajumi Shares and the AAIE Shares.

130 Essentially, TCS argues that TKT was the beneficial owner of the Cluny Park Proceeds. The four siblings argue, on the other hand, that TCS is impermissibly making a fundamentally different case on appeal, and that, in any event, that the Cluny Park Proceeds belong in equity to the Tan family members in the 1985 Percentages.

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(1) Whether TCS may argue on appeal that TKT was the beneficial owner of the Cluny Park Proceeds

131 We are less than impressed with TCS's argument before us that TKT was the beneficial owner of the Cluny Park Proceeds. In our view, TCS cannot do so because she neither pleaded nor argued this below; in fact, she took the opposite position on this issue. She said that the proceeds of the AAS Shareholder Loans were beneficially owned by TKT because the *Cluny Park Proceeds were beneficially owned by AAS*, and that AAS itself was in turn beneficially owned by TKT. TCS and NGO have not demonstrated any exceptional circumstances which would warrant this court granting leave to argue this point on appeal and to permit them to do so at this stage of the proceedings (without having afforded the four siblings the opportunity to adduce the relevant evidence in the court below to demonstrate the contrary) would, in our view, result in prejudice to the four siblings that could not be compensated for by an appropriate order of costs. Accordingly, their only recourse is to make good the argument that TKT was the beneficial owner of the Cluny Park Proceeds because AAS was beneficially owned by TKT, but this they have failed to do.

(2) Whether, in any event, TKT beneficially owned the Cluny Park Proceeds

132 Even if we permit TCS to argue on appeal that TKT was the beneficial owner of the Cluny Park Proceeds, such an argument would not persuade us.

133 There is a fair amount of evidence to support the hypothesis that the Cluny Park Properties had been beneficially owned by AAS, apart from the fact that TCS herself had argued before the Judge that this was the correct position.

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134 **First**, in the Bajumi litigation, TKT filed an affidavit on 5 March 1998 stating that he intended to benefit the Tan family by causing the Cluny Park Properties to be held by AAS. He had written as follows:

> 6. … I had informed [Bajumi Wahab] that any purchase of shares in [AAS] would be on the understanding that the Cluny Park properties would not form part of the assets of the Company. Instead, they were to be treated at all times as the sole property of the Tan shareholders. In other words, the only shareholders who were entitled to these properties were the Tans.

Indeed, it appears to us that TKT wanted to inject more of his assets into AAS and that is why he put money from Thai Lee into AAS to enable AAS to buy the Cluny Park Properties when he could have bought them in his own name. We are not convinced by TCS's argument that TKT was the beneficial owner of the Cluny Park Properties simply because he had provided the consideration that ultimately came from Thai Lee, because that assumes (incorrectly, in our view) that TKT did not have an intention to confer upon AAS the beneficial ownership of this sum of money.

135 **Second**, AAS's auditor, Dan Ng, testified in these proceedings that the Cluny Park Properties and the Cluny Park Proceeds had always been regarded as *AAS's* absolute asset. In fact, it was TCG and TCH who had decided on the sale of the Cluny Park Properties. TKT never asked for the sale proceeds to be accounted to him; in fact, he even suggested using approximately S$22.1m of the proceeds to purchase the EnGro Shares through AAIE. It was also the Tan family (and not just TKT) who agreed with TYK's suggestion that the purchase be made in TCS's and TCP's names to be held on trust.

136 **Third**, this hypothesis is not defeated by the fact that the Bajumis never laid claim to the Cluny Park Properties or the Cluny Park Proceeds but, instead, allowed the remittance of the Cluny Park Proceeds. The Cluny Park

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Properties were bought in 1967, before the Bajumis became shareholders. When the Bajumis became shareholders in 1968, they did so on the understanding that the Cluny Park Properties belonged to the Tan family. This appears to be why the Bajumis signed a declaration dated 18 January 1992 stating that the Cluny Park Properties "shall remain the property of Tan Kiam Toen Family". This was signed by TKT, TCG, TCH and TCS on behalf of the Tan family. In our view, this is strong evidence that TKT considered that the Cluny Park Properties belonged *not to himself* but to the family members through AAS. It would have been only too easy for him to state, for example, that he was the sole owner of the Cluny Park Properties in equity. And, if AAS was holding the Cluny Park Properties on trust, it would have been quite unnecessary to extract a declaration from the Bajumis. TCS takes objection with this on the basis that not all the Tans were party to the statement – in particular TYK and TCP, who at the time were shareholders of AAS. However, this objection is, with respect, pedantic because the point is not whether TYK or TCP were bound to recognise the manner in which the Cluny Park Properties were owned. The twin points are that the *Bajumis* accepted that they had no claim over the Cluny Park Properties, *and* that TKT did not assert that the Cluny Park Properties were beneficially owned by him.

137 **Finally**, we reject the alternative hypothesis that AAS held the Cluny Park Properties (and the Cluny Park Proceeds) on trust either for TKT or for the Tan family members. The ***first*** difficulty in this particular regard is that TCS had failed to plead this hypothesis, but argued the exact *opposite* in the court below. The ***second*** difficulty is that the Cluny Park Proceeds were extracted from AAS in a highly roundabout fashion. Such would not have been the case if the Cluny Park Proceeds were regarded as being held on trust for certain beneficiaries. In this regard, we have difficulty seeing what the

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supposed "tax reasons" were such that the Tan family members had to be named as borrowers of the AAS Shareholder Loans. The ***further*** difficulty with the hypothesis that AAS held the Cluny Park Properties on trust for the Tan family is that TKT allotted the shares in AAS to his children at the same time as he allotted shares in AAS to the Bajumis; it is hard to explain the basis on which the Cluny Park Properties were held on trust for the Tan family members.

138 In conclusion, we take the view the Cluny Park Properties and, later, the Cluny Park Proceeds were owned in equity by *AAS*.

Issue 1B: The Bajumi Shares

139 The next asset we will consider is the Bajumi Shares. This is the parcel of 2,660,850 shares in AAS (representing 50% of the shareholding) that were originally held by the Bajumis and later, under the settlement agreement in the Bajumi litigation, transferred to NGO in consideration for S$7.6m. It is common ground that NGO did not provide any consideration to the Bajumi family for the Bajumi Shares.

140 TCS argues that the four siblings failed to prove that the Bajumi Shares were beneficially owned by the Tan family members in the 1985 Percentages. Her argument proceeds in two stages: first, that it was TKT (rather than the beneficial owners of the Tans' shares in AAS) who intended to and did in fact provide the consideration for the Bajumi Shares; and, second, that the beneficial owner (*ie*, TKT) intended to make a gift of the shares to NGO. The questions, which the Judge correctly identified, are whether a resulting trust arose over the Bajumi Shares in favour of the person(s) who provided the

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consideration, and whether such person(s) intended to make a gift of the shares to NGO.

(1) Who provided the consideration for the Bajumi Shares?

141 It is common ground that the S$7.6m that was paid to the Bajumis came from the proceeds of the DBS Term Loan. At this juncture, the question is who should be treated as the source of this payment.

142 In a resulting trust analysis, the loan repayments are relevant only in so far as there is an agreement on how the loan is to be repaid at the time the asset is acquired: see the decision of this court in *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 ("*Lau Siew Kim*") at [116]–[117]. We agree with the Judge that the focus should therefore generally be on who took on liability for the DBS Term Loan. What this refers to is whether there was any agreement, at the time the loan was taken, as to the *ultimate source* of the funds that would be used to repay the loan. As this court recently cautioned in *Su Emmanuel v Emmanuel Priya Ethel Anne and another* [2016] 3 SLR 1222 ("*Su Emmanuel*") at [90], the persons who took on the liability is only one piece of evidence in the puzzle, and subsequent conduct may also be relevant insofar as it is proof of the agreement made at the date of the loan:

> 90 Many factors are engaged in the determination of the precise agreement or understanding between the parties as to who would repay the mortgage. **The focus should not lie exclusively on who took on *liability* for the mortgage as against the bank.** Often such liability will be joint because the bank would like to have the widest choice of the parties against whom it can enforce the liability under the mortgage. Rather, the question will turn on what the operating agreement was between the co-owning parties at the time the loan was taken out. In this regard, **subsequent conduct may be relevant to the extent that it sheds light on such an agreement (if any) between the co-owners.** … [emphasis in original in italics; emphasis added in bold]

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(A) HOW WAS THE DBS TERM LOAN ACTUALLY REPAID?

143 It is common ground that the Bajumi Shares were transferred to NGO in consideration for S$7.6m, which were the proceeds of the DBS Term Loan, in respect of which NGO, TCS, TCP and TCH were named as borrowers.

144 The DBS Term Loan was secured by a mortgage over the Katong Property and a charge over the Balmain Deposit. The loan was to be further secured essentially by a mortgage over AAB, although in the event this security was never provided. Clause 3 of the offer letter provides as follows:

> **3. SECURITIES**
>
> The following securities are to be provided for the Term Loan and all other moneys and liabilities (whether actual or contingent) which may be owing or payable to us from time to time:
>
> (a) **Existing all-monies first legal mortgage over** [**the Katong Property**] together with a deed of confirmation from the parties to the said mortgage that the said mortgage secures the Term Loan; and
>
> (b) **Charge on US$2.8 million to be deposited in a Fixed Deposit account with us by Mdm Tan Choo Suan**. In this connection the Charge on All Sums in Fixed Account in such form and substance acceptable to us, shall be duly executed by Mdm Tan Choo Suan.
>
> The following securities mentioned in Clauses 3(c) and 3(d) below are to be provided within 9 months from the Drawdown Date for the Term Loan and all other moneys and liabilities (whether actual or contingent) which may be owing or payable to us from time to time to replace the securities mentioned in Clauses 3(a) and 3(b) above:-
>
> (c) An **all-monies first legal mortgage over** the leasehold land and building at 63 Robinson Road, Singapore [*ie*, **AAB**]; and
>
> (d) An **assignment of all the rights and benefits arising from the tenancy agreements and insurance policies in relation to** [**AAB**].
>
> [emphasis added]

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145 The DBS Term Loan was available for drawdown on 30 September 2004; interest was paid monthly until the principal sum was repaid on 29 July 2005. The payment of the principal sum, the interest and the early repayment fee totalled S$7,857,594.20.

146 The interest which accrued from 30 September 2004 to 29 July 2005 totalled S$200,594.20 and was paid monthly from the No 2 Account (to recapitulate, this was a DBS account holding the rental proceeds from the Katong Property, and from which funds were further drawn through an overdraft facility serviced by TCS).

147 The principal sum of S$7,600,000 and the early repayment fee of S$57,000 were paid from TCS's DBS SGD Fixed Deposit account on 29 July 2005. The route by which these sums reached this account was by no means straightforward, but the short point is that we find that the ultimate source of that money was the Cluny Park Proceeds. The details are as follows:

> (a) The immediate source of S$3,776,000 was the Balmain Deposit. Balmain had taken out a loan of US$2,800,000 from the Hong Kong branch of Barclays Bank. On 28 September 2004, this sum was remitted first to TCS's DBS Account in Singapore and, on 29 September 2004, this sum was in turn remitted to a new USD Fixed Deposit Account which TCS had opened with DBS – this is the account in which the Balmain Deposit was placed. Of this US$2,800,000, US$2,250,000 went towards repaying the principal sum of the DBS Term Loan. US$500,000 (or S$845,200) was directly transferred to TCS's DBS SGD Fixed Deposit Account on 7 July 2005, while the other US$1,750,000 (or S$2,930,800) was routed to TCS's

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DBS Current Account on 30 June 2005 before being transferred to TCS's DBS SGD Fixed Deposit Account on 1 July 2005.

(b) The source of the other S$3,881,000 was the 2005 AAS Dividends. On 20 July 2005, AAS remitted a total of S$5,108,832 in dividends to its registered shareholders. All we need to be concerned with here is the S$5,106,912 given to NGO, TCS and TCP, who received S$2,667,945.60, S$2,211,907.20 and S$227,059.20, respectively (TCH and TYK received S$960 each). TCS's share of the dividends was remitted to her DBS Current Account. NGO and TCP remitted their share of the dividends to TCS's DBS Current Account on 21 and 22 July 2005 respectively, and TCS remitted from her DBS Current Account to her DBS SGD Fixed Deposit Account S$4,879,953 on 21 July 2005 and a further S$227,059 on 22 July 2005.

148 Two matters tie these sums to the Cluny Park Proceeds. The first is TCS's unprompted, unequivocal testimony in cross-examination that the DBS Term Loan had been repaid using the Cluny Park Proceeds. The second is a spreadsheet, authored by TCS and sent to her siblings, indicating the uses to which the Cluny Park Proceeds had been put. One category of items was the "BRK Court Settlement of S$7,600,000.00". This undoubtedly refers to the payment for the Bajumi Shares. This category comprised three entries – a payment of US$1,837,785 on 27 January 2005, a payment of US$582,320 on 28 September 2005, and a payment of US$2,554,752 on 28 September 2007. It is not clear how these monies travelled, but we draw the inference that the two payments in 2005 went towards the 2005 AAS Dividends while the payment in 2007 went towards repaying the loan taken out by Balmain from Barclays Bank, the proceeds of which had been used as security for the DBS Term

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Loan. It is true that the numbers do not add up neatly, but we do not make very much of it. First, neither the funds nor the accounts were neatly segregated, and this may explain why the sums transferred did not always add up in a precise fashion. The Cluny Park Proceeds were used for many other purposes as well. Second, the USD-SGD exchange rate would have changed noticeably between 2004 and 2007, and this would have contributed to the difference in the some of the amounts transferred.

149 Ultimately, we take the view that the DBS Term Loan was repaid from the Cluny Park Proceeds and the No 2 Account.

(B) WHAT WERE THE PARTIES' INTENTIONS AS TO THE REPAYMENT OF THE DBS TERM LOAN?

150 We now turn to the question that is not only more difficult, but also more immediately relevant to the determination of the beneficial ownership of the Bajumi Shares. This relates to the parties' intentions as to how the DBS Term Loan was to be repaid.

151 In our view, the Judge was correct to say that it was *highly unlikely* that any of the four named borrowers (*ie*, NGO, TCS, TCP and TCH) was intended to be personally responsible for the loan. ***First***, the loan was intended to be bridging finance. TCS testified that the loan was necessary because the Tan family could not utilise the Cluny Park Proceeds until they received the Bajumi Shares because the Cluny Park Proceeds were on AAS's books and were as such susceptible to a claim by the Bajumis. ***Second***, as the Judge observed, it was highly unlikely that NGO expected personally to repay even a fraction of the loan, especially when she had no independent income or capital. ***Third***, there would have been no reason for TCH to assume joint and several responsibility as one of the borrowers when he was not named as a

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defendant in the Bajumi litigation in the first place. His explanation, which we accept, is that he stood as borrower (alongside NGO, TCS and TCP) because they were the shareholders of the company.

152 This reveals the crux of the difficulty that we faced: how, then, was the DBS Term Loan to be repaid? The parties do not seem to have arrived at a clear agreement as to the ultimate source of funds which would be used to repay the DBS Term Loan. It is true, as TCS and NGO point out, that the four siblings did not plead any discussion (much less agreement) as to how the DBS Term Loan would be repaid, much less that it would be repaid from the fruits of the Tans' shares in AAS. TCG had said that TCS was in charge of repayment and he assumed that she would use the Tan family funds to repay the loan; TYK simply asserted that the loan had obviously been repaid using the Tan family funds; TCP did not discuss the repayment of the loan in her affidavit of evidence-in-chief; and TCH confirmed on the stand that he did not know how the loan was repaid.

153 The court, however, has, necessarily, to draw an inference as to the parties' agreement or, failing that, intention as to how the DBS Term Loan was to be repaid. We do not agree with TCS in so far as she appears to argue that it is necessary to have an agreement as to how a loan is to be repaid for the purpose of determining beneficial ownership of the asset acquired using that loan. An agreement is one of the clearest pieces of evidence and it will be strongly determinative of parties' rights. However, if the objective evidence does not demonstrate that parties reached a clear agreement, a court would not be precluded from determining the parties' rights based on some common intention or understanding. Unreciprocated, unilateral beliefs and intentions, however, will not suffice.

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154 In our judgment, the Judge was *generally* correct to find that the parties intended that the loan be repaid from the fruits of the Tan family's shares in AAS. However, the Judge, with respect, erred in so far as he did not take into account the fact that the loan was also secured by a mortgage over the Katong Property and that the interest on the loan was paid using funds from the No 2 Account. In our view, the Judge should have found that the parties had intended that the loan was to be repaid from the fruits of the Tan family's shares in AAS *and the funds from the No 2 Account*.

155 We commence by referring more specifically to the **2005 AAS Dividends**. ***First***, we find the use of these dividends to repay the loan consistent with the fact that AAB, which was AAS's largest asset, was meant to be further security for the loan. TCS argues that the DBS Term Loan was meant to be (and was in fact) repaid within nine months of the specified drawdown date and therefore AAB was never really intended to become (and never did become) security. However, the point is that, had push come to shove, AAB would have been next in line to satisfy any default. ***Second***, we also note that the borrowers of the DBS Term Loan were the then-registered shareholders of AAS. The exception is TYK, who, despite holding 1,000 shares at that point in time, was not named as a borrower. The simple explanation for this anomaly is that he had been in the United States for the past eight years, and would only return in 2005. ***Third***, the undertakings in the loan required the borrowers to undertake that *AAS* (as opposed to certain named individuals) would comply with certain obligations. ***Finally***, we reject TCS's argument that the 2005 AAS Dividends were not direct contributions as there was no evidence that the family had contemplated that dividends would be declared to extract AAS's expiring tax credits. This, in our view, is a red herring. The Cluny Park Proceeds had already been extracted from AAS

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through the AAS Shareholder Loans in 2002 and 2003 – the 2005 AAS Dividends were among the dividends declared for the purpose of paying off the shareholder loans. The Cluny Park Proceeds could not have been used directly because at the time the Bajumis were still shareholders in AAS. The four siblings may not have been aware of the specific mechanism by which funds were raised, but they had all proceeded on the basis – and correctly so – that those funds were, notionally speaking, part of the Cluny Park Proceeds.

156 We now turn to the **Balmain Deposit**, which presents, in our view, an equally clear picture. Essentially, TCS's and NGO's argument is that the four siblings did not know of Balmain's existence and role until the suit was commenced. Balmain was essentially TKT's vehicle to generate income for TKT/NGO to pay their medical and living expenses, and that moneys in that account belonged to TKT. However, this objection falls away once the fact that Balmain was a mere proxy is recognised. The ***first*** – and most important – fact is the spreadsheet sent by TCS to her siblings (discussed above at [148]) detailing the uses to which the Cluny Park Proceeds had been put. ***Second***, as TCG points out, the offer letter did not mention Balmain; what DBS required was a US$2.8m deposit to be placed in an account with it. ***Third***, TCS provided no evidence as to how the loan from Barclays Bank (which eventually became the Balmain Deposit) was secured. This has to be juxtaposed against the fact that the four siblings had left their proceeds of the AAS Shareholder Loans with TCS, that Balmain was incorporated in August 2002 (*ie*, shortly after the first drawdown of the AAS Shareholder Loans had been made), and that the four siblings had left TCS to arrange for the repayment of the DBS Term Loan. These facts lead us to infer that Balmain was simply a proxy through which the Cluny Park Proceeds had been channelled. ***Finally***, the fact that the part of the Cluny Park Proceeds that went

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towards the Balmain Deposit was apparently applied only much later on – *ie*, in September 2007 (see above at [148]) – is in our view adequately explained by the fact that the Cluny Park Proceeds had already been extracted from AAS through the AAS Shareholder Loans and the subsequent dividends were meant to pay down that loan. Our observations in respect of the Balmain Deposit in fact reinforce our view that the fruits of the AAS Shares, including the 2005 AAS Dividends, were meant to go towards repaying the DBS Term Loan.

157 We also take the view that the **funds in the No 2 Account** were intended to be used to repay the DBS Term Loan. As is the case with AAB and the dividends from AAS, we find the use of the funds in the No 2 Account consistent with the fact that the Katong Property (the rental income from which flowed into the No 2 Account) was put up as *primary* security for the loan.

158 We accept TCS's unrebutted testimony that TKT had been unhappy about the settlement terms of the Bajumi litigation, and that he had immediately made it clear that he (and not TCG) would pay, and to that end he asked TCS to arrange the funds to pay, for the Bajumi Shares. However, it would, in our view, be a leap of logic for TCS and NGO to then say that the agreement was that the loan would be repaid using funds which *TKT ultimately owned or was entitled to use*. ***First***, TKT said that he would pay *immediately* after TCG told him about the settlement. This was almost a month before the DBS Term Loan was taken out. By the time the loan was taken out, TCH and TCP would have had more than an inkling what the arrangement was going to be. ***Second***, it is clear that TKT still wielded a lot of influence and his family was deferential to him. Even if TKT may have made the decisions to utilise *specific* funds to repay the loan, his family members

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acquiesced in it. At the very least, the Tan family members proceeded on that assumption (which turned out to be correct) that the loan would be ultimately repaid from the Cluny Park Proceeds.

159 In these circumstances, we take the view that the parties had intended that the loan was to be repaid from the fruits of the Tan family's shares in AAS and the funds from the No 2 Account.

160 There appears to have been no agreement or common intention on the specific proportion of contributions from each of these sources of funds. However, we take the view that the actual repayment was the manifestation of the parties' intention as to the extent to which each source of funds was to be used to repay the loan. The interest payments were made wholly and systematically from the No 2 Account while the principal sum and early repayment fee were wholly paid from TCS's DBS SGD Fixed Deposit account, and the funds used traced back to the Cluny Park Proceeds. Parenthetically, we note that there is no distinction between payments toward capital and payments toward interest: see *Su Emmanuel* at [102].

161 Since the money in the No 2 Account belonged beneficially to TCS (see the GD at [285]) and this finding has not been appealed, TCS was the beneficial owner of the Bajumi Shares in the proportion of the interest repayments (S$200,594.20) to the total payments made (S$7,857,594.20). The remainder of the Bajumi Shares were beneficially owned by the Tan family members in the 1985 Percentages.

162 For completeness, it was suggested that there was also non-cash consideration of about S$42.4m paid in the form of AAS's shares in PT BRK and EnGro. However, there is in our view no substance to these claims. First,

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the Judge found that the terms of settlement were S$7.6m in exchange for the Bajumi Shares and this was not appealed. Second, the consent order signed showed that the S$7.6m cash consideration pertained to the Bajumi Shares while the reference to PT BRK and EnGro shares and dividends pertained to the settlement of other disputes. Third, there was hardly any basis to say that the valuation was S$42.4m because no valuation was done and the only basis for this figure seems to have been premised on the difference between S$7.6m (the cash consideration) and S$50m (which TCS roughly estimates was the total value of the consideration given in settlement of the Bajumi litigation).

(2) Did the beneficial owner of the Bajumi Shares intend to make a gift of them to NGO?

163 On the basis that (broadly speaking) the Tan family members were the beneficial owners of the Bajumi Shares at the date of the transfer, we take the view that they did *not* intend to make a gift of them to NGO.

164 NGO argues that she became the absolute owner of the Bajumi Shares because her children acceded to TKT's intention for the shares to be gifted to NGO. However, we take the view that this is without basis and removed from reality. It would have been quite improbable – and, indeed, there was hardly any evidence to this effect – that the four siblings wanted to make a gift of the Bajumi Shares to NGO, as opposed to merely "placing" those shares with NGO. The four siblings would not have flippantly ceded their majority interest to NGO, who was a housewife and who had nothing to do with AAS's business.

165 NGO argues that, in any event, the Bajumi shares could not be beneficially owned by the Tan family members in the 1985 Percentages. This was because the four siblings pleaded that the Bajumi Shares had been bought

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with Tan family funds, and any "intention" as to how the DBS Term Loan was to be repaid could not be that monies would come from 2005 AAS Dividends only. Since there was no definite evidence as to how the Tan family funds were supposed to have been split amongst the Tan family members, the resulting trust must at best be presumed in favour of the supposed beneficial owners of the Tan family funds (*ie*, in equal shares to TKT, NGO and each of the five children).

166 We do not think this argument brings NGO very far. Although the four siblings pleaded that the Bajumi Shares had been bought with Tan family funds, they similarly pleaded that the Cluny Park Proceeds were part of the Tan family funds. The finding that the Cluny Park Proceeds were beneficially owned by the Tan family members in the 1985 Percentages must mean that it is possible for NGO to hold the Bajumi Shares on trust in those same percentages.

167 Accordingly, we are of the view that the Tan family members did not intend to gift the Bajumi Shares to NGO.

168 In conclusion, our view is that the consideration for the Bajumi Shares (save for the portion from the No 2 Account) flowed from the Cluny Park Proceeds, which were beneficially owned by the Tan family members in the 1985 Percentages. Thus, the Bajumi Shares were beneficially owned by the Tan family members, who had no intention of making a gift of them to NGO.

Issue 1C: The AAIE Shares

169 We now turn to the third parcel of shares – the AAIE Shares. To recapitulate, the parties were agreed in the court below that the beneficial owner(s) of the AAIE Shares were the person(s) who provided the

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consideration for the EnGro Shares, and that the consideration was derived from the proceeds of the AAS Shareholder Loans.

170 On the basis that the Cluny Park Proceeds and the proceeds of the AAS Shareholder Loans belonged in equity to the Tan family members in the 1985 Percentages, TCS's argument that she holds the AAIE Shares on trust for TKT's estate does not even take off from the legal launchpad.

171 However, she makes three further arguments that support the fact that the four siblings have never believed that they were the owners of the AAIE Shares in the 1985 Percentages. The four siblings dispute this, and state instead that TKT never regarded himself as the owner of the AAIE Shares. We will briefly address each argument in turn.

172 Turning to the **first** argument, TCP and TCS stated in the 2006 LOU that they were the beneficial owners of the shares in AAIE held by them, and that they would distribute some of these shares to NGO and their brothers. This, it was submitted, contradicted the four siblings' case that they were the beneficial owners of the AAIE Shares in the 1985 Percentages. TKT had also given directions to TCP and to his lawyers as to how the AAIE Shares were to be dealt with. The simple point to note is that these facts are hardly probative of the claim that the four siblings never (or no longer) regarded themselves as the beneficial owners of the AAIE Shares. In addition, Mr Hoon testified that the 2006 LOU first began life as a draft deed of settlement before becoming a letter of undertaking, upon being instructed by TKT that the AAIE Shares *had been given away* and *were not beneficially owned by him anymore*. We accept TCH and TCP's submission that Mr Hoon's evidence was consistent and unequivocal and that he had no reason to distort the evidence, being a neutral

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third party. We also do not think, contrary to what TCS submits, that Mr Hoon's memory has failed him in any material way.

173 **Second**, TCS relies on the 2008 Offer and the 2008 Counter-Offer (described above at [116(e)]). In the 2008 Offer, TKT expressed his wish to make an *inter vivos* gift of the shares in EnGro held by AAIE to his children. TCS submits that her brothers' response in the 2008 Counter-Offer contained no objection save that TCP not be given any portion of the EnGro Shares, and that this therefore demonstrated their acceptance that it was for TKT to decide on the distribution of the AAIE Shares. We reject this submission. In the 2008 Counter-Offer, the EnGro Shares therein were referred to as shares which "we own now" or which "we currently hold". It must be remembered that the Tan siblings were loath to make explicit statements about their ownership in property, and that they remained generally deferential to TKT – even if this deference had waned somewhat during TKT's last years. The claim in the 2008 Counter-Offer is as good evidence as any other that TCG, TYK and TCH considered the EnGro Shares to be beneficially theirs.

174 **Third**, TCS says that TCG and TYK never declared any deemed interests in EnGro from 2004 to 2009 (as evidenced in EnGro's Annual Reports) and that TYK's explanation that he thought TCS would make the necessary declarations is feeble. We agree that this *prima facie* appears quite remarkable considering that TCG and TYK were the two directors who signed the Director's Report in the Annual Reports. However, in our judgment, the declarations which TCS has made show that she did not consider herself to be holding the shares on trust for TKT. From 2004 to 2009, she declared EnGro shares as part of *her* deemed interest (and not TKT's deemed interest). We therefore do not make too much of TCS's argument because the Annual Report could have simply reflected a matter of *legal* ownership. It was only in

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2009 that she declared both her and TCP's shareholding in EnGro as being held on trust for TKT's estate in Hong Kong probate proceedings. To us, this declaration seems belated. In May 2003, TCS wrote a note to one Adeline Gan instructing that the EnGro dividends were to be remitted to her personal account and that "it will be clear that it is on behalf of the Tan family".

175 In our judgment, TCS has failed to show that the Judge's finding was against the weight of the evidence; we take the view that the four siblings did not intend that their beneficial ownership of the shares be divested from them at any point in time. Accordingly, the AAIE Shares are beneficially owned by the Tan family members in the 1985 Percentages.

Issue 1D: The EnGro Shares

176 We turn, finally, to the EnGro Shares. The Judge found that TCS had disclaimed any interest in the EnGro Shares and that the shares belonged in equity to TKT (see the GD at [286]). Accordingly, he granted a declaration that they belonged beneficially to TKT.

177 In our judgment, the Judge had, with respect, erred with regard to this particular issue. TCS had not disclaimed her interest in those shares but had maintained, both in evidence as well as in closing submissions, that they had been given to her absolutely. In such a case, there is nothing to displace the presumption of advancement that operates in her favour. In the premises, we substitute the Judge's declaration with one that TCS is the absolute owner of the EnGro Shares.

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Analysis of main issue 2: Liability of TCS and NGO for breach of trust or breach of fiduciary duties

178 We turn to the next part of the appeals, which concerns the Judge's finding that TCS was a bare trustee of the AAS Shares and the AAIE Shares and, as such, owed only an obligation to, when called upon, transfer the trust property to the beneficial owner and account for dividends/income in respect thereof (see the GD at [301]).

179 Essentially, the four siblings allege that the Judge did not go far enough when he held that TCS was a bare trustee under a resulting trust and, as such, owed only a duty to transfer the trust assets when called upon to do so. TCH/TCP's, TYK's and TCG's arguments are phrased in slightly different ways, but, in substance, they submit that TCS (and, in TCG's submissions, NGO as well) owed a duty to perform the trust honestly and in good faith for the benefit of the beneficiaries. This duty is said to be in the nature of a fiduciary duty that arises as an incident of TCS and NGO's resulting trusteeship (by virtue of their conscience being affected by knowledge of such trust), *or* of a non-fiduciary duty that is so fundamental to a trust that it forms part of its core, irreducible obligations. TCS takes issue with the four siblings' submissions on three levels: first, that that the duty she is alleged to owe as a resulting trustee has not been pleaded (since the pleadings were on the basis of an express trust); second, that she did not owe any such duty since it was supported neither by authority nor by principle; and third, that in any event she did not breach any such duty. NGO also argues that she did not owe any similar duty.

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Whether, in the light of the pleadings, the Judge was entitled to find a breach of trust

180 TCS argues that the duty of honesty and good faith was not pleaded below. She also says that the four siblings' cases was based on an express trust but TYK's case had evolved on appeal to one based on resulting trust, while TCH/TCP's case became one of resulting trust or common intention constructive trust. She thus complains that she was never given an opportunity to address their respective cases, that the four siblings should have particularised any claims of dishonesty, improper motive and *mala fides* and that they should now be bound by their pleadings.

181 In our view, the Judge was entitled to find a breach of trust.

182 The four siblings pleaded that TCS had acted in breach of her duties as trustee when she "refused to acknowledge" their respective beneficial interests in the AAS Shares, "failed, refused, or neglected to return and transfer" to each of them their respective portions of the AAS Shares and "exercised all the rights and powers attached to the [AAS Shares] against the Plaintiffs' wishes and/or their interest and to their detriment". In addition, TCH and TCP pleaded that TCS had acted in breach of trust by wrongfully removing TCH and TCP from AAS. In our view, the duty of performing the trust honestly and in good faith for the benefit of the beneficiaries has been commonly understood in the law of equity and trusts to arise as an incident of express trusteeship, and TCS could not credibly assert that she did not know that this was an argument she might have to meet. Accordingly, the fact that such a duty had not been explicitly pleaded should not be held against the four siblings.

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183 We also find it difficult to sympathise with TCS's complaint that the case had evolved from one based on express trust to one based on a resulting or constructive trust. The four siblings' pleadings did not clearly distinguish between the different types of trust. As we discussed above at [97]–[98], TYK and TCH had pleaded a case of express trust on the basis of the 1986 Trust Letter and the 1990 Trust Letter (both of which went completely unmentioned in the GD) while TCG and TCP pleaded a case of express trust on the basis of an oral understanding in terms similar to those found in the two trust letters. In our judgment, given the Judge's finding of a resulting trust, it is fair and certainly understandable for the four siblings in this appeal to have proceeded on the basis of a resulting trust, and use the 1986 Trust Letter and the 1990 Trust Letter as evidence of a lack of intention to benefit the recipient rather than as evidence of the three certainties required to prove an express trust. It would have been open, even prudent, for TCS to address the four siblings' arguments on the basis of a resulting trust analysis. In any event, we are of the view that TYK and TCH are entitled to rely on an express trust even though TCG and TCP are not (see above at [97]–[98] and [105]). More fundamentally, we do not think that TCS was prejudiced or embarrassed by the pleadings.

184 In these circumstances, we take the view that the four siblings' pleadings do not preclude them from arguing that TCS owes a duty of honesty and good faith *that arose as an incident of trusteeship*. As we shall see, the four siblings' arguments on appeal do tread within these boundaries as far as TCS is concerned.

185 Where NGO is concerned, however, we note that TYK, TCH and TCP have failed to plead a breach of trust on her part. TCG argued on appeal that NGO could not have genuinely believed herself to be the beneficial owner of

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the Bajumi Shares at the time she received the shares. This is, in our view, a rather surprising argument, considering that he alludes to the very opposite in some parts of his pleadings – he pleaded that NGO was at all material times a housewife, had never been involved in AAS's business, and could not understand the English language. TCG also did not explicitly allege a breach of trust on NGO's part (in contrast to his allegations against TCS). Her supposed *volte-face* in July 2010 was attributed to TCS's influence. However, we will demonstrate below that NGO did not owe any duties as trustee.

Whether TCS/NGO owed any duty to perform the trust honestly and to act in good faith for the benefit of the beneficiaries

186 The most difficult legal question in these appeals is whether TCS or NGO owed any duty to the four siblings to perform the trust honestly and to act in good faith for the benefit of the beneficiaries.

187 At the outset, given that TCS holds the AAS Shares on express trust for TYK and TCH, she will owe, *as an express trustee*, a fiduciary duty to perform the trust honestly and in good faith for TYK and TCH's benefit. In the case of TCG and TCP (and in the case of TYK and TCH, should we be wrong in holding

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that they had proved a case of express trust), we will consider whether TCS owed any such duty *as a resulting trustee*. We will also consider whether NGO owed TCG any duty as a resulting trustee.

(1) The nature of a resulting trustee's duty in principle

188 As we mentioned above at [179], the arguments were phrased in various ways. TYK argues that the duty of good faith that was breached by TCS was in the nature of a fiduciary duty owed as a bare trustee, and was triggered by the fact that TCS's conscience was affected by her knowledge that she was not beneficially entitled to the trust property. TYK argues, in the alternative, that the duty arose as a core duty of trusteeship. TCH/TCP and TCG argue that the duty to act honestly and in good faith for their benefit, which duty TCS had allegedly breached, was fiduciary in nature and was part of the irreducible core of obligations that was fundamental to a trust. TCS's riposte is that all fiduciary relationships are voluntarily assumed and that resulting or constructive trustees, not having voluntarily taken the onerous office of an express trustee, "cannot, without fiction, be said to have assumed obligations of the utmost selflessness" and therefore cannot be subject to fiduciary obligations (citing Lionel Smith, "Constructive Fiduciaries?" in *Privacy and Loyalty* (Clarendon Press, 1997) (Peter Birks ed) ("*Constructive Fiduciaries?*") at pp 264–266).

189 Essentially, the four siblings' argument that the duty of good faith and honesty are part of the irreducible core obligations of a trust rests on the observations of Millett LJ (as he then was) in the English Court of Appeal decision of *Armitage v Nurse and Others* [1998] Ch 241 at 253G–254A:

> *… there is an* ***irreducible core*** *of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust.* If the beneficiaries have

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> no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. ***The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.*** … a trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term. [emphasis added in italics and bold italics]

190 In our view, this passage is of limited assistance to the four siblings. The main obstacle is that Millett LJ's observations were made in the context of *express* trusts, and, more specifically, in the context of *trustee exemption clauses*. As observed in Alastair Hudson, *Great Debates in Equity and Trusts* (Palgrave, 2014) at p 121, the idea of an "irreducible core content" of trusteeship is a recent one, tracing back to an essay by Prof David Hayton (see David Hayton, "The Irreducible Core Content of Trusteeship" in *Trends in Contemporary Trusts Law* (Oxford University Press, 1996) (A Oakley ed) at p 47). Prof Hayton's thesis was that there should be a line beyond which an arrangement created by parties should not be considered to be a trust (and, instead, considered something akin to a contract, an agency or a bailment arrangement). Without recourse to further authority or first principles, we are not prepared to extend this reasoning from express trusts (which are entered into *consensually*) to resulting or constructive trusts (which are *imposed by law*). Indeed, we do not think that a resulting or constructive trust ceases to be one simply because the trustee does not owe a duty to perform the trust honestly and in good faith for the benefit of the beneficiaries. That, in fact, is almost always the case. A resulting or constructive trust is very often a bare trust and, as such, only requires the trustee to convey the trust property when called upon to do so.

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191 Our other observation is that the duty to perform the trust *honestly* and *in good faith for the benefit of the beneficiaries* is perhaps more properly considered to be a fiduciary duty in the first place, and as constituting a subset of the obligation of loyalty. As explained in Malcolm Cope, *Equitable Obligations: Duties, Defences and Remedies* (Lawbook Co, 2007) at para 1.130:

> **Duty to perform trusts honestly and in good faith for the benefit of the beneficiaries**
>
> *Fiduciary duty of trustees in exercise of powers*
>
> [1.130] The overriding duty of trustees, including executors, in the performance of trusts is to perform the trusts honestly and in good faith for the benefit of the beneficiaries. This represents a standard of conduct which requires trustees to act without regard to self interest by considering what is in the best interests of the beneficiaries. It is ***generally described as the obligation of loyalty owed by someone designated as a fiduciary***. …
>
> [emphasis added in bold italics]

In our view, it is not inconsistent to say that such a duty is part of the irreducible core obligation of a trust, and to say that such a duty is fiduciary in nature. We also pause to note that it must also follow that it ought *a fortiori* to be the case that there is a duty *not* to perform in such a manner that *the trustee actually benefits instead*. That this point is significant in the context of the present appeal will be seen below (especially at [213]−[214] and [221]−[222]).

192 This brings us to the **first** important principle of fiduciary law, which is that the hallmark of a fiduciary obligation is that the fiduciary is to act in the interests of another person. A brief summary of what this entails can be found in Millett LJ's speech in the English Court of Appeal decision of *Bristol and West Building Society v Mothew* [1998] 1 Ch 1 ("*Bristol*") at 18A–18C:

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> … A fiduciary is someone who has undertaken to act for or on behalf of another in a particular manner in circumstances which give rise to a relationship of trust and confidence. *The distinguishing obligation of a fiduciary is the obligation of loyalty*. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. ***A fiduciary must act in good faith***; *he must not make a profit out of his trust*; *he must not place himself in a position where his duty and his interest may conflict*; ***he may not act for his own benefit or the benefit of a third person*** *without the informed consent of his principal*. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* …, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary. [emphasis added in italics and bold italics]

There are a myriad of situations in which fiduciary obligations can arise, but as Millett LJ observed, extra-judicially, in P J Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at p 222, the "common thread to the fiduciary obligations to which these different fiduciary relationships give rise … is the principle that a man *must not exploit the relationship for his own benefit*" [emphasis added]. This principle has been expressed in other ways, too. For example, it is often said that fiduciary duties are proscriptive and prophylactic, and seek to avert breaches of non-fiduciary duties (see Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non Fiduciary Duties* (Hart Publishing, 2010) at pp 61–63); in this sense, fiduciary duties are adjectival in nature.

193 The **second**, interrelated, principle of how fiduciary obligations are understood today is, as pointed out by Millett LJ in the passage in *Bristol* cited above (at [192]), neatly encapsulated in an observation made in the seminal treatise by Paul Finn, *Fiduciary Obligations* (The Law Book Company, 1977) at p 2. In essence, "the label 'fiduciary' is a *conclusion* which is reached only

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once it is determined that particular duties are owed" (see James Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302 ("*When do Fiduciary Duties Arise?*") at p 316 [emphasis added]). Prof Finn (as he then was) phrased it this way in his original text:

> 3. … it should be recognised today that Equity has established and formalised a new and coherent head of law. As will be seen, it has evolved a series of self-contained obligations — obligations which are themselves certain and distinct, and which individually define their own "fiduciary" for their own respective purposes. These obligations attribute no large significance to the term used to describe the persons to whom each individually applies. In some instances he is referred to as a fiduciary: in others as a confidant. **The term used is unimportant. It is not because a person is a "fiduciary" or a "confidant" that a rule applies to him. It is because a particular rule applies to him that he is a fiduciary or confidant *for its purposes.*** In this Equity has developed in a way somewhat similar to the law of torts, in that the particular obligations will be imposed upon particular persons because these persons are carrying on particular activities which require the law's regulation. To reflect this development this work has been entitled "Fiduciary Obligations" rather than "Fiduciary Relationships". [emphasis in original in italics, emphasis added in bold]

Given that a fiduciary obligation is a *conclusion* rather than a *premise*, the meaning of the term "fiduciary *relationship*" is naturally thrown into doubt. In this regard, we refer to the incisive observations by Justice James Edelman in The Hon Justice James Edelman, "The Role of Status in the Law of Obligations – Common Callings, Implied Terms, and Lessons for Fiduciary Duties" ("*The Role of Status in the Law of Obligations*") in ch 1 of *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) (Andrew S Gold and Paul B Miller eds) ("*Gold and Miller*"). At p 34, Justice Edelman observes that:

> … the *relationship will often provide crucial **context** for the **construction** of an undertaking.* For instance, in a case where the fiduciary duties are undertaken as part of a contract, the relationship will not be "superimposed" upon those duties.

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> Instead, it will inform their content. Often the relationship is the reason why undertaken duties are fiduciary. That is, *the relationship is the* ***reason*** *why a duty will be required to be performed in a manner which shows regard to the interests of the principal*. [emphasis added]

194 The **third** important principle for our purposes here is that *fiduciary obligations are* ***voluntarily*** *undertaken*. The precise import of this point will become apparent in the authorities that we discuss below, but it suffices for the present to state that the fiduciary undertaking is voluntary in the sense that it arises *as a consequence of the fiduciary's conduct*, and is not imposed by law independently of the fiduciary's intentions. This is not to state that the fiduciary must be subjectively willing to undertake those obligations; the undertaking arises where the fiduciary *voluntarily places himself in a position* where the law can ***objectively*** impute an intention on his or her part to undertake those obligations. The corollary of this principle is that not every duty owed by a fiduciary is *necessarily* a fiduciary duty. However, as we have discussed above at [191], the duty to perform a trust *honestly* and *in good faith for the benefit of the beneficiaries* is fiduciary in nature.

195 How do these principles apply in the context of resulting trusts? It suffices to recall that resulting trusts are imposed by law, and arise in two main ways – the transfer of property to another for no consideration, or the failure of an express trust to exhaust the entire beneficial interest. Of course, there are other trusts such as the *Quistclose* trust which are said to be, at least in some instances, resulting in nature. The juridical basis of the resulting trust has been considered in detail by this court in *Lau Siew Kim* at [34]–[38] and *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [38]–[48], where this court expressed a preference for Prof Robert Chambers's lack-of-intention analysis of the resulting trust, namely, that the resulting trust is a response to a lack of intention on the part of the person providing the purchase price to

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benefit the recipient. Often, it is the law that declares a person a resulting trustee, and clothes him with the duty to convey the trust property when called upon by the beneficiary of that trust.

196 When the attributes of a resulting trustee and a fiduciary are juxtaposed, one can very justifiably ask the question whether a resulting trustee is or can be a fiduciary. As a matter of principle, the idea that a fiduciary relationship is possible sits uncomfortably with the fact of a resulting trust. The latter is imposed by law whereas the former is voluntarily undertaken. It is certainly *not* the case that *every* resulting trustee is subject to a fiduciary relationship. However, in the rare case, it may well be that the *facts and circumstances* leading to the imposition of a resulting trust may also disclose an undertaking by the trustee – whether *express* ***or*** *implied* – to act in a certain way.

197 Indeed, the existing authorities do not foreclose the possibility that resulting trustees as such can owe fiduciary duties. In the English High Court decision of *Lonrho plc v Fayed and others (No 2)* [1992] 1 WLR 1 ("*Lonrho*") at 11H–12B, Millett J (as he then was) stated:

> … A contract obtained by fraudulent misrepresentation is voidable, not void, even in equity. *The representee may elect to avoid it, but until he does so the representor is not a constructive trustee of the property transferred pursuant to the contract, and no fiduciary relationship exists between him and the representee*: see *Daly v. Sydney Stock Exchange Ltd.* (1986) 160 C.L.R. 371 , 387–390, *per* Brennan J. It may well be that if the representee elects to avoid the contract and set aside a transfer of property made pursuant to it the beneficial interest in the property will be treated as having remained vested in him throughout, at least to the extent necessary to support any tracing claim. But the representee's election cannot retrospectively subject the representor to fiduciary obligations of the kind alleged. ***It is a [mistake] to suppose that in every situation in which a constructive trust arises the legal owner is necessarily subject to all the fiduciary***

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> ***obligations and disabilities of an express trustee.*** Even after the representee has elected to avoid the contract and reclaim the property, the obligations of the representor would in my judgment be analogous to those of a vendor of property contracted to be sold, and would not extend beyond the property actually obtained by the contract and liable to be returned. [emphasis added in italics and bold italics]

In our view, Millett J was making a very limited proposition, namely, that *not every* constructive trustee owes the fiduciary obligations undertaken by an express trustee. In fact, in the context of rescission for contractual misrepresentation, Millett J at 11H–12A appears to allude to the possibility that a fiduciary relationship arises (or could arise) at the point of the representee's election to avoid the contract, *ie*, when the representor's conscience is affected.

198 The next two relevant decisions come from England and Australia, and we will consider them together. The first is the seminal House of Lords decision of *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 ("*Westdeutsche*"). What is important for present purposes is Lord Browne-Wilkinson's statement of the law at 705C–706A, as follows:

> *The relevant principles of trust law*
>
> (i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).
>
> *(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e.* ***until*** ***he is*** ***aware*** ***that*** ***he is intended to hold the property for the benefit of others in the case of an express or implied trust****, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.*

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> (iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.
>
> (iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.
>
> These propositions are fundamental to the law of trusts and I would have thought uncontroversial. However, proposition (ii) may call for some expansion. *There are cases where property has been put into the name of X without X's knowledge but in circumstances where no gift to X was intended. It has been held that such property is recoverable under a resulting trust: Birch v. Blagrave* (1755) 1 Amb. 264; *Childers v. Childers* (1857) 1 De G. & J. 482; *In re Vinogradoff*; *Allen v. Jackson* [I9351 W.N.68; *In re Muller*; *Cassin v. Mutual Cash. Order Co. Ltd.* [1953] N.Z.L.R. 879. *These cases are explicable on the ground that, by the time action was brought, X or his successors in title have become aware of the facts which gave rise to a resulting trust; his conscience was affected as from the time of such discovery and thereafter he held on a resulting trust under which the property was recovered from him. There is*, so far as I am aware, ***no authority which decides that X was a trustee, and therefore accountable for his deeds, at any time before he was aware of the circumstances which gave rise to a resulting trust***.
>
> [emphasis added in italics, bold italics and underlined bold italics]

On Lord Browne-Wilkinson's statement in *Westdeutsche*, Robert Pearce, John Stevens & Warren Barr, *The Law of Trusts and Equitable Obligations* (Oxford University Press, 5th Ed, 2010) at p 876 explain that:

> While the precise import of this analysis is somewhat obscure, the best interpretation is probably that a person who receives property as a trustee *cannot be held liable* for any breach of trust, or breach of fiduciary duty, ***if he was unaware*** *of the fact that he was such a trustee,* ***or*** *of the circumstances making him a trustee.* … [emphasis added in italics and bold italics]

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That passage in *Westdeutsche* also received attention in the Australian decision of *Port of Brisbane Corporation v ANZ Securities* [2002] QCA 158 ("*Port of Brisbane*"). In that case, the plaintiff was defrauded of $4.5m by its employee, who siphoned the money into a Turks and Caicos Islands company of which he was the sole shareholder-director. That company appointed the defendant (ANZ) to provide custodian and nominee services in respect of securities which it held on trust for the company. ANZ, with the requisite authority, bought and sold shares on the company's behalf. By the time the fraud was uncovered and the defendant informed of it, much money had already been dissipated. In dismissing the plaintiff's claims against ANZ for breach of trust, the Queensland Court of Appeal cited *Westdeutsche* at 705D–705E and held that ANZ would never have been liable for breach of trust if the plaintiff never laid claim to the $4.5m; by the time the claim was made, the money had been received and disbursed in good faith without notice. However, McPherson JA (with whom Davies JA and Mullins J agreed) made some useful observations of principle at [31]–[32], as follows:

> [31] … [Lord Brown-Wilkinson's] formulation [in *Westdeutsche*] has been the target of a good deal of criticism by commentators for the reason that it is well settled by authority that a person may be subject to a resulting trust even though ignorant of its existence; for example, in the case of an infant, as in *R v Vinogradoff* [1935] WN 68. It is, however, reminiscent of what was said by Barwick CJ in argument with counsel in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 375:
>
> > "To whom did Consul become bound in conscience? … How can a person be bound in conscience to someone whose existence is not known at the date of purchase?"
>
> [32] A preferable view is said to be that *the resulting trust arises as soon as the property is transferred, but* ***the transferee does not become subject to a fiduciary duty, or liable for breach of trust, until he is aware of his position***: see Hanbury & Martin, *Modern Equity* (16th ed; 2001) at 239. This rationalisation has the support of Sir Peter Millett, and, indeed, may have been originated by him in a

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> paper published in (1998) 114 *LQR* 399, 408, where he said that:
>
> > "***If the trustee is to be treated as a fiduciary this must be because he knowingly subjected himself to fiduciary obligations.*** *These are not created by the separation of the legal and equitable titles, though they may be created by the same circumstances which give rise to the separation.* But where the only relationship between the parties, who may not even know of each other's existence, is that one holds the legal title and the other is the equitable owner, there can be no fiduciary relationship."
>
> A resulting trust, according to Sir Peter Millett, is not a fiduciary relation (114 *LQR* 399, 405). Whatever may be the correct resolution of these questions, it is in my opinion offensive to notions of equity and common sense to hold ANZ Securities liable for a supposed breach of trust as trustee for Port Corporation at a time when it had never undertaken and was not aware that any such obligation existed, but knew only that it had accepted appointment as express trustee for Windermere. As has been recognised by both Lord Browne-Wilkinson and Sir Peter Millett, the question is essentially one of semantics.
>
> [emphasis added in italics, bold italics and underlined bold italics]

We agree with TYK that *Westdeutsche* and *Port of Brisbane* support – or at least are not inconsistent with – the proposition that once the trustee is affected with *the knowledge* that he is not entitled to the beneficial interest in the property, his/her *conscience* is affected such that the equitable jurisdiction to enforce trusts *can* be invoked to impose *fiduciary duties* on him.

199 In fact, this court itself could be said to have gone further than the above cases. In 1994, the Court of Appeal, in *Goh Swee Fang and others v Tiah Juah Kim* [1994] 3 SLR(R) 556 ("*Goh Swee Fang*"), held that when an equitable interest in real property had arisen as a result of proprietary estoppel, the trustee (who was really a bare trustee) was in a fiduciary position in relation to the beneficiary's equity and owed certain fiduciary obligations to

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the beneficiary. In that case, a son agreed to transfer his share of a property to his mother, who was a tenant-in-common of that property, for a sum of money which was, in the event, unpaid. Later, the mother promised to pay her son half the proceeds upon the sale of the house. Several years later, the mother transferred the house at an undervalue without sharing the proceeds with her son. The court held at [32]:

> 32 In our judgment, the representation of the first appellant [the mother] and the reliance thereon by the respondent [the son] to his detriment gave rise to an equity in favour of the respondent, and that equity is the entitlement to a half share of the proceeds of sale if and when the first appellant sold the property. In our opinion, if she had sold the property and kept the entire proceeds of sale, the court would impose on her a *constructive trust* in respect of the respondent's half share of the proceeds. ***While the property remained unsold, she was in a fiduciary position in relation to the respondent's equity****, and* ***as a fiduciary she was obliged to sell the property at market price*** *and upon sale to pay the respondent half of the proceeds of sale.* She did not sell the property. In breach of her duty as a fiduciary she transferred the property to the second and the third appellants in consideration of a sum of $150,000, and did not pay the whole or any part of this sum to the respondent. *That transaction was not a true and genuine sale. In so acting as she did, she committed a blatant breach of her fiduciary duty to the respondent. She is therefore liable to account to the respondent.* [emphasis added in italics and bold italics]

TCS argues that the reference to "fiduciary" in *Goh Swee Fang* was made in the context of the view that the mother would be a *constructive* trustee of a half share of the sale proceeds. In her view, the duty to sell the property at market price and account for half the sale proceeds was a substantive duty that arose by reason of the constructive trust as imposed, and was not a fiduciary obligation. We take a slightly different view. In our view, the better analysis is that the substantive obligation was simply one of accounting for half the sale proceeds, and that the further qualification that the sale was to take place at market value was precisely what made this obligation fiduciary in nature.

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Also, it is notable that the fiduciary relationship arose *at the date the estoppel arose* and despite the fact that the mother did not explicitly undertake to sell the house *at the market value*. These facts demonstrate that the same set of facts which led to the estoppel (*ie*, injurious reliance on a representation) was capable of giving rise to an implied undertaking by the mother that was fiduciary in nature, that fiduciary duties can indeed arise in the context of trusts *imposed by operation of law at the time the trust crystallises*, and (not unimportantly) that the inquiry into whether a fiduciary duty was undertaken is *objective* in nature.

200 Indeed, several authors have even taken an even more robust view in suggesting, based on the above English authorities as well as on first principles, that some resulting trustees can owe fiduciary duties. One of the earliest and most extensive exegeses can be found in the seminal treatise by Robert Chambers, *Resulting Trusts* (Oxford University Press, 1997). Prof Chambers's thesis (which was also supported by the late Prof Peter Birks) on the potentially larger role of the resulting trust has not received acceptance in its entirety by the courts. Prof Chambers's comments on fiduciary obligations (at pp 196–200) nevertheless remain relevant and insightful. He wrote as follows:

> **3. Resulting Trustees**
>
> Although constructive trustees are in some circumstances subject to less onerous duties than express trustees, **the situation regarding resulting trustees is far from clear**. In most cases of resulting trust, the plaintiff is only seeking recovery in the second-measure of the surviving trust property and, therefore, the nature and extent of the resulting trustee's personal liability are rarely discussed. In some cases (discussed below), the fiduciary nature of the resulting trust has given rise to liability for breach of trust, evidentiary presumptions being made against the trustee, and awards of compound interest.

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…

As discussed in Chapter 6, one of the reasons the House of Lords rejected the resulting trust in *Westdeutsche* v. *Islington* was the concern that an innocent recipient of money should not be subjected to the onerous consequences of trusteeship. Both Lord Goff and Lord Browne-Wilkinson referred to a comment on the judgment of the Court of Appeal, in which Professor Burrows said:

> [I]f this analysis is correct, and Islington were, as Dillon L.J. insisted, resulting trustees of the £2.5 million paid by Westdeutsche, the consequences are dramatic. For, unless one somehow cuts back the normal incidents of trusteeship, it ought to follow that the trustee is personally strictly liable to account as a fiduciary for profits made from the trust property … Again, applying the normal trust rules, … if the payee fails to return the money when the payee demands it, on the ground that he has changed his position, this will still constitute a breach of fiduciary duty for which the payer can claim an account of loss or gain … Similarly, the application of normal trust rules would mean that there would be no limitation period applicable to the equitable action … In summary, the startling conclusion is that … the recipient of a mistaken payment is always a wrongdoer and the Birksian divide between unjust enrichment by subtraction and unjust enrichment by wrongdoing is shattered.

All of these concerns rest on the unexplored assumption that a resulting trust involves all the duties and consequences of an express trust. As noted above, it is recognized that **constructive trustees are not necessarily subject to the same fiduciary standards and there does not appear to be any basis for this assumption regarding resulting trustees**. Indeed, *Lonrho p.l.c.* v. *Fayed (No. 2)*, in which Millett J. said it would be 'a mistake to suppose that in every situation in which the constructive trust arises the legal owner is necessarily subject to all the fiduciary obligations and disabilities of an express trustee', might best be viewed as a case of potential resulting (rather than constructive) trust.

Resulting (and constructive) trusts create a problem for the imposition of fiduciary obligations. The recipient of the property is a trustee and therefore a fiduciary for its provider, but that trust arises by operation of law as a response to an event, rather than from a voluntary undertaking of that relationship. Although the resulting trust is accepted as a fiduciary relationship, it often

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appears to be more like a case of fiduciary obligations arising from an event rather than a relationship. Whether the resulting trustee is regarded as a 'status-based' or 'fact-based' fiduciary should depend on the situation giving rise to the resulting trust, as should the nature and degree of the obligations associated with it.

4. Scale of Resulting Trust Obligations

At the lower end of the scale are cases where the resulting trust arises in the absence of any pre-existing fiduciary relationship and without the knowledge of the resulting trustee. *Sinclair* v. *Brougham* was just such a case and, although it has been overruled with respect to whether a payment under a void contract gives rise to a resulting trust, it contains valuable insights into the consequences of resulting trusts in situations involving innocent recipients. In *Chase Manhattan Bank N.A.* v. *Israel-British Bank (London) Ltd.*, Goulding J. used *Sinclair* v. *Brougham* to support his conclusion that 'a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of the other is subject to a fiduciary duty to respect his proprietary right'. In other words, **an event gives rise to the recipient's fiduciary obligation to respect the provider's proprietary right.** As the Texas Supreme Court stated, the resulting trust is 'a fiduciary relationship … *insofar as the trust property is concerned*'. **The fiduciary obligations need not extend beyond those necessary to protect the provider's interest in that property. There is no reason to involve the strict duties of loyalty applicable to an express trustee.** In *Sinclair* v. *Brougham*, Viscount Haldane L.C. held that there had 'been no breach of fiduciary duty on the part of the society' even though the society had received the depositors' money on resulting trust and used it for its own benefit.

At the higher end of the scale are cases where the resulting trust arises on the failure of an express trust. The resulting trustee has agreed to obey strict rules of fidelity and exercise a certain standard of care as an express trustee and there is no reason for those obligations to cease when the express trust fails (unless the resulting trustee reasonably believes himself or herself to be entitled to the surplus). **The trustee is already in a fiduciary relationship when the resulting trust arises (albeit with the beneficiaries of the express trust and not the settlor). Although the resulting trustee is a fiduciary only 'insofar as the trust property is concerned', that must involve the same duties of loyalty and care he or she has previously consented to observe with respect to that**

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same property. As Ford and Lee state: 'Where the resulting trust arises in relation to an express trust the trustee's duties of administration under the express trust will be owed as much for the benefit of the person entitled under the resulting trust as for the benefit of any beneficiaries under the express trust'.

The resulting trust which arises when one person has contributed to the purchase of property in the name [of] another, with the knowledge of both parties, occupies the middle ground between fact-based and status-based fiduciaries. *Tricentrol Oil Trading Inc.* v. *Annesley* was just such a case and the Texas Supreme Court accepted that the 'resulting trust does not carry with it all of the duties of a trustee acting under an express trust'. The recipient's knowing acceptance of a contribution does not mean that he or she has consented to undertake the office of express trustee and all its duties of loyalty and care. Nevertheless, the provider of the property is vulnerable to the actions of the recipient as legal owner and is therefore placing some degree of trust and confidence in the latter. The willing acceptance of a contribution in that situation ought to lead to greater fiduciary obligations than those applied to the unwitting recipient.

Where one person has contributed to a purchase in the name of another, the arrangement is often intended for the mutual benefit of both parties. Therefore, the normal rules that trustees are not allowed to profit from their position or engage in conflicts of interest are somewhat inappropriate. A lesser degree of fiduciary obligations may be inherent in the relationship, which is somewhat akin to a partnership. However, it may be that the recipient is relieved of higher duties by the provider's consent to the arrangement. Although the distinction is fine and unlikely to have any practical effect, the 'partnership' analysis directs attention to the objective nature of the relationship between the parties, whereas the 'consent' analysis looks more to the subjective state of mind of the provider. It is therefore possible that the level of fiduciary obligations will not always be the same on each analysis.

Just as there is no uniform set of obligations applicable to all fiduciaries, there is no one set for all trustees or even all resulting trustees. The principle of resulting trust applies in such a wide variety of situations that it is impossible to deduce, solely from the classification of resulting trust, that any particular set of fiduciary obligations applies. If it is remembered that **a finding of resulting trust 'only begins analysis' into the level of fiduciary obligations involved**, many concerns about the greater role of the resulting trust, and its extension into commercial activities, will be alleviated.

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> [emphasis in original in italics; emphasis added in bold and in underlined bold]

201 Shortly after Prof Chambers's book was published, Millett LJ wrote an article in his extra-judicial capacity – P J Millett, "Restitution and Constructive Trusts" (1988) 114 LQR 399 ("*Restitution and Constructive Trusts*"). At pp 403–405, he observed as follows:

> It may seem heretical to suggest that the same is true in English law. Is not the trustee the paradigm example of the fiduciary? And are not all fiduciaries subject to fiduciary obligations? Each of these rhetorical questions is based on a different premise, and each of the premises is false. The paradigm example of the fiduciary is the express trustee, not the constructive trustee; and while all fiduciaries are subject to fiduciary obligations, they are not all subject to the same fiduciary obligations.
>
> It is necessary to begin with two elementary observations. The first is that a trust exists whenever the legal title is in one party and the equitable title in another. …
>
> But … Lord Browne-Wilkinson [in *Westdeutsche*] … clearly recognises, indeed insists, that the separation of legal and equitable ownership is insufficient to give rise to fiduciary obligations. …
>
> The second observation is that every fiduciary relationship is a voluntary relationship. No one can be compelled to enter into a fiduciary relationship or to accept fiduciary obligations, any more than he can be compelled to enter into a contract or to accept contractual obligations. This is not, of course, to say that every fiduciary is willing to accept his role or act in accordance with his fiduciary duty. A fiduciary relationship most commonly arises when one party voluntarily undertakes to act in the interests of another; but it can also arise where he voluntarily places himself in a position where he is obliged by equity to act in the interests of another.
>
> An express trustee is the paradigm example of the fiduciary. As Maitland explained, the relationship between the trustee and the settlor is one of trust and confidence, but the trustee owes no fiduciary duties to the settlor. There is no such relationship between the trustee and the beneficiaries. The ***fiduciary duties which an express trustee owes to the beneficiaries, therefore, are based, not on the relationship between them, but on his voluntary undertaking to the settlor to manage the trust property***

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> ***for their benefit and not his own.*** *To derive his fiduciary character from the trust, that is to say, from the separation of the legal estate and the beneficial interests, is simply nonsense. They both derive from the same source, that is to say the obligations which he undertook when he voluntarily accepted the office of trustee.*
>
> The same applies where the trust is implied. ***If the trustee is to be treated as a fiduciary, this must be because he has knowingly subjected himself to fiduciary obligations. These are not created by the separation of the legal and equitable titles, though they may be created by the same circumstances which gave rise to the separation.*** *But where the only relationship between the parties, who may not even know of each other's existence, is that one holds the legal title and the other is the equitable owner, there can be no fiduciary relationship.*
>
> It follows that, as in the United States, a constructive trust is not itself a fiduciary relation, although the circumstances which give rise to it will often, perhaps usually, subject the legal owner to fiduciary duties. ***In similar fashion a resulting trust is not a fiduciary relation, though the circumstances which give rise to it may, perhaps more rarely, be sufficiently known to the trustee to subject him to such obligations.***
>
> [original emphasis omitted; emphasis added in italics and bold italics]

202 More recently, Graham Virgo, *The Principles of Equity & Trusts* (Oxford University Press, 2012) also suggested (at para 15.2.1) that fiduciary duties can follow a resulting trust:

> **15.2.1 Recognized Categories of Fiduciary Relationship**
>
> …
>
> *Whether resulting and constructive trustees are subject to fiduciary duties is a matter of some controversy. The preferable view is that a trustee should be considered to be subject to these distinct fiduciary duties only if he or she voluntarily assumed the position of trustee.* It follows that a constructive trustee should not be considered to be a fiduciary, because there is no voluntary assumption of the position of trustee, so that the trustee has not knowingly subjected himself or herself to fiduciary obligations. This should be true of all constructive trustees, regardless of whether the constructive trust arises by

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> virtue of unconscionable conduct or common intention. *Whether a resulting trustee is a fiduciary would depend on the category of resulting trust that is involved.* ***If the resulting trust arises automatically from the failure of an express trust, it would be appropriate to treat the resulting trustee as a fiduciary since the trustee would already have owed fiduciary duties under the express trust that would have been voluntarily assumed.*** *Where, however, the resulting trust is presumed, there is no reason to impose fiduciary duties on the trustee because he or she has not voluntarily assumed the position of trustee.* [emphasis added in italics and bold italics]

203 John McGhee, *Snell's Equity* (Sweet & Maxwell, 33rd Ed, 2016), in reliance on the extracts in *Lonrho* at 11–12 (see above at [197]) and *Westdeutsche* (see above at [198]) at 705–706, as well as *Restitution and Constructive Trusts* at pp 405–406, made similar observations (at para 7.003):

> **2. Fiduciary Relationships**
>
> **7.003 (a) Fiduciary relationships and fiduciary duties.** A fiduciary "is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary". A fiduciary is someone who owes fiduciary duties, and a fiduciary relationship is a relationship between two or more persons in which one, the fiduciary, owes fiduciary duties to the other (or others).
>
> **(b) Settled categories of fiduciary relationship.** The paradigm example of a fiduciary relationship is the relationship between trustee and beneficiary: an express trustee owes fiduciary duties to his or her beneficiaries. *A resulting trustee or a constructive trustee may owe fiduciary duties to the beneficiaries of their respective trusts, but* ***only once his or her conscience is affected by the trust (which will normally only be once he or she is aware of the trust)****.* …
>
> [emphasis added in italics and bold italics]

204 Even the passage relied on by TCS by Prof Lionel Smith, *Constructive Fiduciaries?* (see above at [188]), does not assist her very much. One premise of Prof Smith's argument is that resulting and constructive trustees cannot be

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subject to fiduciary obligations because they do not voluntarily undertake to be trustees. This proposition was made on the authority of *Lonrho*, which, as we have discussed above at [197], does *not* foreclose the possibility that resulting trustees can owe fiduciary obligations. Indeed, he also accepts, without further comment, Prof Chambers's thesis that resulting trustees may have voluntarily assumed the office of trustee where the resulting trust arises on the failure of an express trust (at p 264, n 71).

205 A few points may be gleaned from the above analysis. **First**, there is no one set of obligations that pertains to all fiduciaries – not even persons who undertake those obligations in the course of an express trusteeship. This is *a fortiori* the case for resulting trustees, if they do indeed owe fiduciary duties at all. If we recall Prof Finn's observations (see above at [193]), the finding of a resulting trust is only part – in fact, the beginning – of the analysis as to *whether* and *what* fiduciary duties are owed. **Second**, these obligations are entered into *voluntarily* and such a finding will be arrived at by *objectively* assessing the conduct of the person who is said to be a fiduciary. The precise content of these duties are to be deduced from the surrounding circumstances, including, and especially, any relationship between the parties. **Third**, there is no doubt that *express* trustees owe fiduciary duties. The duty to perform the trust honestly and to act in good faith for the benefit of the beneficiaries is *at the same time* an irreducible core duty of the trust and a duty that is fiduciary in nature. In this context, the fiduciary duty arises not from the trustee-beneficiary relationship *per se*, but from the *voluntary undertaking to the settlor* to manage the trust property not for the trustee's own benefit but for the benefit of the beneficiaries. **Fourth**, the situation with regard to *resulting* trustees evidently poses more problems. Resulting trusts arise in at least two situations, possibly more. It can be seen, especially from Prof Chambers's

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work (see above at [200]), that resulting trustees can be located on a continuum. At one end are the innocent recipients of property, and at the other end are recipients of property which forms the subject of a failed express trust. It is therefore conceivable that a person who becomes a resulting trustee on the basis of a failed express trust may still owe fiduciary duties; we agree with Prof Chambers and Prof Virgo that it is generally difficult to say that that undertaking to act in another's benefit – or in more abstract terms the undertaking to act in self-denial – should cease when that express trust fails. However, it may well be the case that the precise obligations which are owed *to the settlor-beneficiary* in a resulting trust are different from (and almost invariably narrower than) those owed in respect of the beneficiaries in an express trust.

206 The real question, in our view, is whether, *objectively* speaking, the resulting trustee can be said to have undertaken (whether expressly or impliedly) to act in a particular way which is fiduciary in nature. In this regard, the knowledge that one does not hold the beneficial interest in the property is, while *not* a *sufficient* condition by itself, strictly *necessary* because the conscience cannot otherwise be affected in a way that equity can take cognisance of. The duties that are applicable to each resulting trustee will vary significantly, and are very ***fact-specific***. The duties owed by a resulting trustee to the settlor-beneficiary will, however, almost invariably be narrower than the duties owed by an express trustee in relation to the beneficiaries.

207 It should be noted that the fact that a fiduciary duty may be imposed on a *fact-specific* basis ought *not* to be perceived as being arbitrary in any way. In addition to the perceptive observations by Prof Finn (see above at [193]), the observations by Justice Edelman (see above at [193]) might also be usefully noted – at least in so far as both observations suggest that the mere existence

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of a fiduciary *relationship, without more,* would *not necessarily* give rise to fiduciary *duties*. As we shall see in a moment, the ***facts and circumstances*** are *also* of *the first importance in order to ascertain whether or not a fiduciary* ***duty*** *ought to be imposed* ***even where there already exists*** *an established fiduciary* ***relationship*** *between the parties concerned.* Let us elaborate.

208 In the English High Court decision of *Plowright v Lambert* (1885) 52 LT 646, Field J observed thus (at 652):

> … I need not say it is familiar to everybody who practises in this division that the fiduciary relation, as it is called, does not depend upon any particular circumstances. It exists in almost every shape. It exists, of course, notoriously in the case of trustee and *cestui que trust*; it exists in the case of guardian and ward, of parent and child, of solicitor and client. …

209 However, Field J's observations only tell part of the story, for as Fletcher Moulton LJ (as he then was) pertinently observed in the English Court of Appeal decision of *In re Coomber* [1911] 1 Ch 723 at 728−729:

> Under those circumstances what objection can be made to this transaction? It is said that the son was the manager of the stores and therefore was in a fiduciary relationship to his mother. *This illustrates in a most striking form* ***the danger of trusting verbal formulae****. Fiduciary relationships are of many different types;* they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. *Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference.* ***Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case,***

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> ***when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them***. In my opinion there was ***absolutely nothing*** *in the fiduciary* ***relations*** *of the mother and the son with regard to this house which in any way affected this transaction. …* [emphasis added in italics, bold italics and underlined bold italics]

210 Hence, even where there is an established fiduciary ***relationship***, the ***facts and context*** are *also of the first importance* in order to ascertain whether or not a *fiduciary* ***duty*** ought to be imposed on the trustee concerned. Indeed, as we have alluded to above at [193], Justice Edelman makes out a very persuasive case to the effect that whilst a status or office is an important and relevant factor, the main focus ought to be on whether there had been an *undertaking* (whether express or implied) on the part of the trustee concerned before a fiduciary *duty* would be imposed on him (see *The Role of Status in the Law of Obligations* and *When do Fiduciary Duties Arise?*). Whilst we find this particular thesis attractive, it is *not necessary* to arrive at a definitive conclusion in the context of the present appeal. Indeed, as Prof Paul B Miller correctly points out, "[t]he conventional wisdom of *judges* implies the *analytical priority* of *relationship* over duty in the structure of fiduciary liability" (see Paul B Miller, "The Fiduciary Relationship" in ch 3 of *Gold and Miller* at p 67 [emphasis added]), although the learned writer also suggests that "[i]n the rare case that a plaintiff is unable to prove a relationship of settled fiduciary status, she may argue either for a *de novo* extension of status or a one-off judgment that the relationship is fiduciary" and that in the latter instance, "*facts* rather than status drive the analysis" (*ibid* [emphasis added]). It may well be the case that there is a *presumption* that an established fiduciary *relationship* does give rise to fiduciary *duties*, which presumption may be rebutted on the ***facts and context*** of the particular case. However, as just mentioned, it is *unnecessary* to arrive at a definitive conclusion at the present

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time. What *is* important for the purposes of the present appeal is that it ***is possible*** for *fiduciary* ***duties*** to arise and that whether or not this is the case depends on *the* ***facts and context*** *before the court*.

211 With these principles in mind, we turn now to consider whether TCS and NGO had undertaken any obligations to the four siblings in the course of their trusteeship.

(2) Whether TCS and NGO owed any duties to the four siblings

212 In so far as TYK and TCH are concerned, we have found that TCS was an *express* trustee and it was accordingly clear that TCS owed TYK and TCH the fiduciary duty to perform the trust honestly and in good faith for the benefit of each of them.

213 In so far as TCG and TCP are concerned, we are of the view that, based on the relevant *objective* facts as well as circumstances, TCS impliedly undertook to act honestly and in good faith *at least to the extent that her conduct was not for her own benefit*. Before turning to both the general as well as specific evidence which supports the view we have arrived at, it should be noted that such evidence has already been canvassed in the present judgment. Turning to the evidence proper, the *general* evidence demonstrated that TCS *knew* that the beneficial ownership of the shares vested not in her or even TKT but in the four siblings. **First**, the 1986 Trust Letter and the 1990 Trust Letter written to TYK and TCH respectively (which we take to be authentic) marked the first of the many share transfers to TCS. **Second**, TCS's instructions to Deacons in 1993 hinted at the fact that she regarded all five siblings to be the owners of the AAS Shares for the purpose of setting up a family trust. **Third**, in the affidavits filed in the Bajumi litigation (in which TCS was also an active

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participant), TKT clearly disclaimed any interest in the AAS Shares. **Fourth**, in the few years leading up to TKT's passing, TCS was in very close contact with him, and she must have known that TKT had considered himself to no longer be the beneficial owner of shares in AAS in the 2006 Will and that he had changed his attitude after becoming disillusioned in his last years (even though this was legally impotent). Indeed, we are not surprised that the Judge found that "TCS pursued the fundamental core of her defence and counterclaim dishonestly and unreasonably" (see the GD at [328]). The *specific* evidence also demonstrated that TCS *knew* that the beneficial ownership of the shares transferred to her by TCG and TCP belonged to each of them respectively. In particular, in TCP's case, her transfer of shares was preceded by a series of e-mails discussing whether the transfer was to be by way of gift or purchase and, if it was to be by way of purchase, what the implications were if the consideration was stated to be a token sum.

214 In essence, TCG's and TCP's transfers were made on the assumption that they were pursuant to the family trust arrangements that never materialised in the end. If the correct legal analysis is that these transfers were pursuant to an express trust (or a non-charitable purpose trust) which subsequently failed, then TCS would be taken to have *undertaken* to TCG and TCP as settlors to administer the trusts in good faith for the benefit of whomever was to be the beneficiary of the trust and, at the very least, *not for her own benefit*. If the correct analysis, on the other hand, is that these transfers were simple transfers for no consideration, TCS was on the evidence *fully aware* of the transfers and that she was not meant to be the beneficial owner of these shares, and she did not give any indication that she was unwilling to be a trustee of those shares. At any rate and in any event, TCS was *far* from an innocent recipient of the shares.

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215 On the other hand, we do not take the view that NGO owed any duties to any of the four siblings. She was essentially an innocent recipient of the Bajumi Shares. It appears that NGO did not know that she was not the beneficial owner of those shares. The Bajumi Shares ended up in NGO's hands essentially by way of a transfer for consideration that did not come from NGO, and in fact the immediate arrangement through which the shares were paid for appeared considerably different from the ultimate beneficial entitlement of the shares. There was also some dispute as to whether TKT had told NGO "*pang*" (which means "place" in the Hokkien dialect) or "*pang hor le*" (which, in that same dialect, has the added meaning of "giving you"). Although many of the documents which NGO had executed from 2005 to 2008 suggested that she considered herself to have been given the beneficial interest in the Bajumi Shares, there does not seem to have been any suggestion by the four siblings that her position was taken dishonestly. In these circumstances, we take the view that NGO did *not* undertake any obligations to the four siblings that were fiduciary in nature.

Whether TCS breached her duties to the four siblings

216 We will now consider whether TCS breached her duties to the four siblings. In doing so, we have classified the alleged breaches into two broad categories – her denial of the four siblings' beneficial ownership of the AAS Shares and her exercise of the rights attached to those shares.

(1) Denial of the four siblings' beneficial ownership of the AAS Shares

217 In so far as the first category is concerned, the four siblings submit that TCS breached her duty of honesty/good faith by refusing to recognise the four siblings' beneficial ownership and refusing to convey the AAS Shares despite their demands. Instead, she commenced Probate Action No 87 of 2010 and

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attempted to dissipate the AAS Shares under the 2008 Joint Will by naming them as one of the assets in TKT's estate. TCS's response is threefold. First, she was discharging her duty as executrix of TKT's estate and it is unfair to criticise her for mounting such a vigorous defence. Second, there would be no breach until the court determined that she was resulting trustee. Third, she had transferred legal title to the shares to the four siblings soon after the Judge's oral decision.

218 In our view, TCS's argument fails for a few simple reasons. As we have held above, she owed a duty not to act in her own benefit *from the moment the shares were transferred to her*, and she would be liable for breaches of that duty from that particular point in time. Based on the relevant objective evidence that we have already canvassed above, she could not have reasonably or honestly believed that TKT was beneficially entitled to the AAS Shares. Further, even if she was the executrix of TKT's estate and as such could be excused for mounting a vigorous defence, it was no answer to the attempt to refute the four siblings' case by making false accusations and statements in the course of evidence and argument.

(2) TCS's exercise of the rights attached to the AAS Shares

219 The four siblings argue that TCS exercised the legal powers attached to her directorship and shareholding to their detriment. Specifically, she did the following:

(a) prevented TCG's re-appointment to the AAS board of directors;

(b) removed TCH as director;

(c) removed TCP as director and company secretary;

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(d) dismissed TCH and TCP from employment; and

(e) wrongfully removed and excluded the four siblings from AAS's office premises.

In particular, they argue that these acts were wrongful because there was no need for TCS to have removed TCH/TCP from AAS, and there was no credible explanation as to why TCG was removed since it was not in accordance with TKT's wishes and he did not even express such wishes in any of the documents relied on by TCS. They also argue that TCS was able to do these wrongful acts by reason of the shares transferred to her and to NGO.

220 TCS makes a few arguments in reply. First, NGO voted to prevent TCG's re-appointment because she was disillusioned with TCG. Also, it was not unjustifiable for TCS to have taken steps to exclude TCG, TCH and TCP since TCH and TCP were becoming increasingly disruptive whenever TCS was at the AAS office. Second, TCG failed to show that his eviction was due to TCS's exercise of rights *qua* shareholder since it was a decision *qua* director.

221 In our judgment, TCS did breach her fiduciary duty not to act in her self-interest. **First**, TCS admitted that she had removed TCP and TCH because, as employees and as the company secretary and director respectively, they were not giving her due respect as a director, chairman and shareholder. In our view, her removal of TCP and TCH was, in truth, a move calculated to provoke, intimidate and embarrass them. If TCH and TCP were really disruptive and had kept harassing TCS, it is regrettable but it remains their prerogative as the (beneficial) owners of the company to act according to their own lights within the boundaries of the law; TCS should have ceded control to

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them and not have ousted them from AAS. **Second**, even though TCS acted *qua* director and only as a 47.78% shareholder, she had influence over NGO (who controlled 52.22% of the shares) and she was able to maintain her directorship by virtue of these shareholdings.

222 In the circumstances, we are of the view that the refusal to convey the AAS Shares and TCS's exercise of her powers *qua* shareholder-director were acts that were motivated by and explicable only on the basis of *self-interest*. Accordingly, we find that TCS had breached the duty not to act in her self-interest that she had undertaken in relation to the four siblings.

Conclusion

223 For the reasons set out in the preceding paragraphs, we are of the view that the Judge was, with respect, wrong to have concluded that TCS owed no duties other than that to convey the trust property on demand. We therefore allow the four siblings' appeal on this particular point.

224 The four siblings pray for an assessment of equitable compensation for losses flowing from TCS's breach of duty. TCH/TCP claim that they were deprived of salaries and employment benefits from 1 November 2010 (*ie*, the date their employment was terminated) until 28 April 2015 (*ie*, the date on which they were reinstated), while TCG says that the losses he suffered included the cost of arranging the removal of his personal items from his office in AAS, the cost of alternative storage of those items, the cost of stock-taking, the cost of appointing a supervising solicitor and videographer to monitor and record the process of removal (and the costs of the solicitor's attendance), and the legal costs involved in negotiating the terms of attendance at AAS. TYK, however, simply asks for damages to be assessed arising from

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TCS's breach of fiduciary duty without particularising his losses. In these circumstances, we order that an assessment of equitable compensation be conducted in relation to the losses suffered by TCH, TCP and TCG (but not TYK) as detailed in this paragraph. We nevertheless pause to observe that, given the protracted nature of the legal proceedings up to this particular point in time, it would be preferable for the parties to arrive at an amicable settlement in relation to this particular issue. Despite the bitterness between the parties, a rapprochement even in this more limited regard would – if nothing else − nevertheless serve to honour the memory of their late father.

Analysis of main issue 3: Costs order against TCS below

225 We turn now to the final part of the appeals, which concerns only TCS and the four siblings. No appeal lies against the Judge's order that there be no order as to the costs of TCH/TCP, TYK and TCG's claim against NGO. In this part, we will treat TCH and TCP as one entity as they were at all material times represented by one set of solicitors.

Whether the Judge wrongly exercised his discretion in ordering that TCS pay one-third of the costs of each set of plaintiffs

226 TCH/TCP, TYK and TCG take the position that they should each have been entitled to one set of costs. Their primary argument is that, based on the test set by this court in *Ng Eng Ghee* at [24] (*viz*, the degree of the community of interests between parties; the size of the disputed sum or the importance of the disputed interest; and the degree of overlap in pre-hearing preparations and conduct of proceedings), all three factors favoured the four siblings. In particular, TCH/TCP also argue that the ⅓ Costs Order unfairly prejudiced TCH/TCP since more work was done by counsel for TCH/TCP. TYK also argues that TCS would *not* be unduly punished even if each set of plaintiffs

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had one set of costs, because TCS had pursued the fundamental core of her claim dishonestly and unreasonably.

227 TCS's primary position is that the four siblings should only have been jointly entitled to one set of costs. First, as a general matter, co-plaintiffs are entitled to only one set of costs except where leave is granted since plaintiffs should not be allowed to act separately and inconsistently, and co-defendants are entitled to the same except where justified by the circumstances of the case. Next, the three factors in *Ng Eng Ghee*, when ascribed their proper weight, favoured her on balance. She also argues that she conducted the proceedings reasonably (more on this below) and that, in any event, her conduct was relevant to the issue of (and punished by the order for) indemnity costs but was *irrelevant as to whether separate sets of costs should be ordered*.

228 Some of the parties also adopt alternative positions. TYK submits that that, in any event, TCH/TCP and TYK should have been entitled to at least one set of costs to be apportioned in a 2:1 proportion, and TCG should have been entitled to a separate set of costs. TYK and TCG argue that TCG was dragged unwillingly into the fray. To this, TCS's and NGO's replies are that TCG's participation was necessary and that, in the event, he went beyond mere passive participation. TCS takes the further position that if separate sets of costs are ordered, a substantial discount of about two-thirds should be awarded, because the four siblings ought not to claim for costs for similar work due to overlap, and to account for duplication.

229 The principles were set out by V K Rajah JA delivering the judgment of the court in *Ng Eng Ghee* at [24]:

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> 24 It is axiomatic that counsel, as officers of the court, ought not to unnecessarily consume judicial time (or, for that matter, the time of quasi-judicial or administrative tribunals) by repetitively covering the same ground. Each determination of whether to award more than one set of costs will necessarily have to turn on the facts of the case. The court ought to take into consideration **all relevant factors, including**: (a) the **degree of the community of interests** existing among the parties; (b) the **size of the sum** or the **importance of the interest** that is the subject matter of the dispute; and (c) the **degree of overlap** in the pre-hearing preparations and conduct of proceedings. *In general*, the greater the community of interests, the less inclined the court will be to grant separate costs for separate representation. *On the other hand*, the more important and **distinct the interests** which are the subject of the dispute, the more likely would an order for more than one set of costs be given. An order for more than one set of costs is also more likely where counsel have taken **efforts to avoid the duplication of effort**. Plainly, where there is an obvious community of interests between multiple parties on the same side, their counsel should try and agree, as far as possible, on the best approach towards advancing a unified case for their clients. That said, the court will also bear in mind the **need to not unduly deter persons from making reasonable efforts to protect or vindicate their rights** (see [1] above). Finally, for completeness, it should be noted that as this court recently indicated in *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR(R) 814 (at [201]–[202]), **the usual order where different parties with broadly similar interests are represented by different counsel is just one set of costs**. [emphasis in original in italics; emphasis added in bold]

As is evident, the test is open-textured and takes into account relevant factors including the degree of the community of interests among the parties; the degree of actual overlap in pre-hearing preparations and conduct of proceedings and efforts to avoid duplication of effort; and the size, importance as well as distinctness of the interests that are the subject of the dispute.

230 We agree with TCS that, as a matter of principle, the question of whether TCS acted dishonestly and unreasonably is not *relevant* to whether each of the plaintiffs should be entitled to a full set of costs. What that is

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relevant to is the basis on which costs are ordered to be taxed (*ie*, indemnity or standard). With that, we now turn to the relevant factors discussed in *Ng Eng Ghee*.

231 The **first** factor is the degree of the community of interests between parties; related to this is the distinctness of the interests in issue. This factor points in favour of TCS. The four siblings point out that TKT had given separate promises to each sibling and that they had acquired their shareholdings in different ways as well as for different reasons. However, as TCS points out, using this to justify separate sets of costs would be tantamount to hair-splitting. So too would be the suggestion that the only common thread was that each of them was laying claim to separate parcels of shares in the same company. In substance, the four siblings' positions on the issues in dispute were common. It is clear from the pleadings and arguments below (and even on appeal) that the four siblings were largely aiming for the same result; they made arguments on each other's behalf, and their stories had largely the same backdrop. We are also unimpressed with TCG's argument that he, unlike TCH/TCP, was no longer a director and therefore did not seek the same remedies of reinstatement. This means that the relief he sought was a subset of the relief that TCH/TCP sought. As TCS notes, the parties did not assert any conflict of interest or other circumstances that required them to deal at arm's length. In particular, TYK has not explained why he had sought to be separately represented by Michael Khoo & Partners after having been represented initially by TCH/TCP's counsel (*ie*, Wong Tan & Molly Lim LLC), and we are of the view that TYK had shown little reason to do so.

232 The **second** factor is the size of the sum or the importance of the interests in issue. We generally agree with TYK's submission to the effect that this factor favoured him. He would undoubtedly have placed emotional and

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sentimental attachment to the shares in AAS, since it represented his life's work and since he gave up his legal career for his family business. This reasoning also applies, broadly speaking, to TCP and TCH, who held senior positions in AAS and were directly involved in its business at the time they were removed from office, and to TCG, who not only gave up his engineering career but also held the apex office in AAS for several years. The size of the sum is also very large. AAS and AAIE held assets worth about S$245m in total and the value of their shares was very substantial (AAB, which was part of the subject-matter of the dispute, was worth S$145m). Also, the 50% share in EnGro was worth S$90m.

233 The **third** factor is the degree of overlap in pre-hearing preparations and conduct of proceedings, and the efforts taken to avoid duplication. In our view, this factor also favours TCS. The four siblings argue that each counsel cross-examined different witnesses on different subject matters. They also state that each of them had a different emotional and sentimental attachment and background story, and that the overlap in position with regard to the Bajumi Shares and the AAIE Shares should not by itself have deprived the parties of one full set of costs each. TCH/TCP also add that counsel took care to avoid unnecessary duplication of work. In our view, the overlap in the positions was substantial. Apart from the cross-examination of TCS, the four siblings did not assert that counsel had divided the work; in fact, all three sets of lawyers cross-examined many witnesses. It is true that each sibling had slightly different factual and legal points, but these differences were not major enough to justify separate representation.

234 In our judgment, while the size of the sum and importance of the interests are indisputably large, the balance of the three factors favours TCS. On the whole, it was not reasonable for the plaintiffs to have sought separate

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representation. We are certainly not minded to hold that the Judge should have ordered a separate set of costs for each of the plaintiffs. We are not even minded to order that TCH/TCP and TYK should share one set of costs in a 2:1 proportion while TCG should be entitled to a separate set of costs. Although TCG was forced to participate by being named a defendant in TCS's counterclaim, he was a necessary party based on the pleadings and we agree with TCS that it was manifestly reasonable to have joined him to the action. In the event, TCG went way beyond taking a neutral position (or even participating passively) in the suit. We observe that he is the only one to appeal against NGO in this court. More fundamentally, it was entirely open to TCG to have been represented by TCH/TCP's counsel (or, for that matter, TYK's counsel) and to have given, if necessary, a different set of instructions. We therefore accept TCH/TCP's argument that the ⅓ Costs Order unfairly prejudices them since considerably more work was done by their counsel and it was only later that TYK decided to seek separate representation. The fact that TYK and TCG chose to be represented separately was a matter quite out of TCH/TCP's control. In our view, the Judge should have taken this into account.

235 We therefore order that TCS is to pay 75% of TCP's and TCH's costs of and incidental to the claim and the counterclaim in S570 ("costs below") and 30% of TCG's costs below. As for TYK's costs below, in so far as it was in respect of work done pursuant to the retainers with Wong Tan & Molly Lim LLC and Michael Khoo & Partners, we order that TCS is to pay, respectively, 75% and 25% of those costs. We now turn to the basis of taxation.

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Whether TCS conducted her case dishonestly, irresponsibly or unreasonably such that indemnity costs should be awarded

236 TCS argues that the Judge should have ordered that costs be taxed on a standard basis. First, she had acted properly and *bona fide*. TKT had regarded the AAS Shares as his own and it was hardly inconceivable that TCS genuinely believed in TKT's entitlement and tried to give effect to TKT's wishes as the executrix of his will. Second, she never claimed that the four siblings intended to gift the AAS Shares to her but instead maintained that she held the AAS Shares on trust for TKT; it was hardly inconceivable that she genuinely believed that the four siblings did not retain any beneficial interest in the AAS Shares upon their transfer. The four siblings dispute this. They refer to TCS's evidence and say that she could not have honestly and reasonably pursued her defence and counterclaim to give effect to TKT's wishes.

237 In our view, the Judge was correct to find that TCS pursued the core of her claim dishonestly and unreasonably.

238 **First**, TCS refused to assist the court with material evidence which would have put the issue of TKT's intent to rest, but instead capitalised on the lack of evidence to construct a case for her own ends. In the case of the 2008 SDs, TCS had flatly refused to call the lawyers who prepared them (*viz*, John Brewer and Hwang Sok Inn) to give evidence on the ground of privilege. In the light of our conclusions on the 1986 Trust Letter and the 1990 Trust Letter (as well as the other documents such as the Bajumi litigation affidavits and the 2006 Will), logic compels us to the conclusion that TCS dishonestly denied having knowledge of her father's intentions and cast spurious allegations to advance a case she knew to be false. **Second**, she had a proclivity to take inconsistent positions which suited her ends and to divert the

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court's attention away from the true nature of the transactions which had taken place. Unfortunately, this is also the case on appeal. **Third**, TCS had exercised influence over NGO, and had a hand in preparing the documents such as the 2008 SDs, the 2008 DG, the 2008 Draft DFA, as well as conceiving the various theories on which she sought to explain the conduct of the parties. **Fourth**, TCS instigated and precipitated the litigation by removing TCH and TCP as director and company secretary. She unceremoniously removed them from AAS and subsequently drew her siblings into a long-drawn suit and subsequently even tried to reimburse her own costs from TKT's estate. **Fifth**, she was motivated by personal financial gain and/or a personal vendetta against the four siblings; over the course of trial she traduced her late father's name by calling him a liar and a coward, and sought to humiliate the four siblings by painting them as greedy children after their late father's estate.

239 In the circumstances, we take the view that the Judge was correct to have ordered that costs be taxed on an indemnity basis if not otherwise agreed. For the avoidance of doubt, TCH/TCP, TYK and TCG are still entitled to a certificate for more than two solicitors.

Conclusion

240 For the reasons set out above, we make the following decisions.

(a) In so far as the beneficial ownership of the various assets is concerned:

(i) The Judge was correct to hold that the AAS Shares belonged in equity to the Tan family members in the 1985 Percentages.

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(ii) The Judge was, with respect, wrong to hold that the entirety of the Bajumi Shares belonged in equity to the Tan family members in the 1985 Percentages. He should have held that TCS was the beneficial owner of the Bajumi Shares in the proportion that the interest payments bear to the total payments made under the DBS Term Loan, while the remainder belonged in equity to the Tan family members in the 1985 Percentages.

(iii) The Judge was correct to hold that the AAIE Shares belonged in equity to the Tan family members in the 1985 Percentages.

(iv) The Judge was, with respect, wrong to hold that the EnGro Shares were beneficially owned by TKT's estate. He should have either dismissed the four siblings' prayer for relief, or (as we have now done) held that the EnGro Shares were owned absolutely by TCS.

Civil Appeal No 93 of 2015 is allowed only in so far as the issues relating to the beneficial entitlement of the Bajumi Shares and the EnGro Shares are concerned while Civil Appeal No 95 of 2015 is dismissed.

(b) In so far as the issue of TCS's and NGO's duties as trustee are concerned, the Judge was, with respect, wrong to have concluded that TCS owed no duties other than that to convey the trust property on demand. He should have held that TCS owed the four siblings a fiduciary duty to perform the trust honestly and in good faith – at least to the extent that her conduct was not for her own benefit, and that she breached this duty by denying the four siblings' beneficial entitlement

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to the AAS Shares as well as exercising the rights attached to those shares for her self-interest and to the detriment of the four siblings. As TCH, TCP and TCG have specified losses flowing from the breach, an assessment of equitable compensation is ordered in respect of those losses. NGO, however, owed no fiduciary duty to the four siblings. Accordingly, Civil Appeals Nos 90 and 91 of 2015 are allowed while Civil Appeal No 92 of 2015 is allowed in part (that part of TCG's appeal relating to the fiduciary duties allegedly owed by NGO is dismissed).

(c) In so far as the issue of costs below is concerned:

(i) The Judge was, with respect, wrong to have ordered that TCS pay one-third of each set of solicitors' costs. He should have ordered that TCS pay 75% of TCP's and TCH's costs below and 30% of TCG's costs below. As for TYK's costs, in so far as it was in respect of work done pursuant to the retainers with Wong Tan & Molly Lim LLC and Michael Khoo & Partners, TCS should have been ordered to pay, respectively, 75% and 25% of those costs.

(ii) The Judge was correct to have ordered costs to be taxed on an indemnity basis.

241 Each party is to file, within two weeks of the date of this judgment, one set of written submissions (not exceeding 15 pages) in respect of the costs of

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the respective appeals before this court.

Chao Hick Tin	Andrew Phang Boon Leong	Judith Prakash
Judge of Appeal	Judge of Appeal	Judge of Appeal

Michael Khoo SC, Josephine Low and Ong Lee Woei (Michael Khoo & Partners) for the appellant in Civil Appeal No 90 of 2015, the third respondent in Civil Appeal No 93 of 2015 and the third respondent in Civil Appeal No 95 of 2015;
Molly Lim SC, Philip Ling and Kam Kai Qi (Wong Tan & Molly Lim LLC) for the appellants in Civil Appeal No 91 of 2015, the first and second respondents in Civil Appeal No 93 of 2015 and the first and second respondents in Civil Appeal No 95 of 2015;
Lok Vi Ming SC, Melissa Thng and Carren Thung (Dentons Rodyk & Davidson LLP) for the appellant in Civil Appeal No 92 of 2015, the fourth respondent in Civil Appeal No 93 of 2015 and the fourth respondent in Civil Appeal No 95 of 2015;
Ang Cheng Hock SC, Tan Xeauwei, Melissa Mak and Daniel Seow (Allen & Gledhill LLP) for the appellant in Civil Appeal No 93 of 2015, the first respondent in Civil Appeal No 90 of 2015, the first respondent in Civil Appeal No 91 and the first respondent in Civil Appeal No 92 of 2015;
Paul Seah, Keith Tnee, Lau Qiuyu and Leonard Loh (Tan Kok Quan Partnership) for the appellant in Civil Appeal No 95 of 2015 and the second respondent in Civil Appeal No 92 of 2015;
Desmond Ong and Alex Goh (JLC Advisors LLP) for the second respondent in Civil Appeal No 90 of 2015, the second respondent in Civil Appeal No 91 of 2015, the third respondent in Civil Appeal No 92 of 2015 and the fifth respondent in Civil Appeal No 93 of 2015.

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ANNEX A: CHRONOLOGY OF SHAREHOLDINGS IN AAS

Date	Event	NPE	NKC	TKT	NGO	TCS	TCG	TYK	TCP	TCH	Bajumis	Total
1961	TKT incorporates AAS, and held AAS through 2 nominee directors who each held 50% of AAS for him.	10	10	0	0	0	0	0	0	0	0	20
1962	AAS allotted 380 fresh shares to NGO (as TKT's nominee).	10	10	0	**380**	0	0	0	0	0	0	**400**
1962	NGO, acting on TKT's instructions, transferred the 380 shares to TKT.	10	10	**380**	**0**	0	0	0	0	0	0	400
1967	The 2 nominee directors resigned and transferred their shares to NGO.	**0**	**0**	380	**20**	0	0	0	0	0	0	400
1968	TKT caused AAS to allot and issue 500 shares in total to the Bajumi family through Asma Wahab (300 shares) and TKT's 5 children (40 shares each).	0	0	380 *(63.33%)*	20 *(3.33%)*	**40** *(6.67%)*	**40** *(6.67%)*	**40** *(6.67%)*	**40** *(6.67%)*	**40** *(6.67%)*	**300**	**900**
Oct 1973	TKT caused AAS to issue bonus shares in a 5:1 ratio.	0	0	2,280	120	240	240	240	240	240	1,800	**5,400**
1975	TKT transfers to TCG and TYK 190 shares each and to the Bajumis 1,840 shares.	0	0	**60** *(3.41%)*	120 *(6.82%)*	240 *(13.64%)*	**430** *(24.43%)*	**430** *(24.43%)*	240 *(13.64%)*	240 *(13.64%)*	**3,640**	5,400

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Date	Event	NPE	NKC	TKT	NGO	TCS	TCG	TYK	TCP	TCH	Bajumis	Total
1979–1981	Shareholdings between Tans and Bajumis equalised as follows: ▪ 1979: The Bajumis transferred 80 shares to each of TCG, TYK and TCH (for a consideration of S$100,000 for each transfer) ▪ 1980: The Bajumis transferred 130 shares to each of TCG and TYK (for a consideration of S$169,000 for each transfer) ▪ 1980: The Bajumis transferred 140 shares to TCH (for a consideration of S$182,000) ▪ 1981: The Bajumis transferred 100 shares to each of TCG, TYK and TCH (for a consideration of S$130,000 for each transfer)	0	0	60 *(2.22%)*	120 *(4.44%)*	240 *(8.89%)*	**740** *(27.41%)*	**740** *(27.41%)*	240 *(8.81%)*	**560** *(20.74%)*	**2,700**	5,400
1983–1984	As a result of bonus share issues and capital reduction exercises, AAS issued bonus shares in a 327.5:1 ratio (effectively).	0	0	19,710	39,420	78,840	243,090	243,090	78,840	183,960	886,950	**1,773,900**
1985	TKT stepped down as director of AAS; he transferred his shares to TCH for a stated consideration of S$394,200	0	0	**0**	39,420 *(4.44%)*	78,840 *(8.89%)*	243,090 *(27.41%)*	243,090 *(27.41%)*	78,840 *(8.89%)*	**203,670** *(22.96%)*	886,950	1,773,900
1986	TYK transferred his shares to TCS and TCG's joint names, before he left Singapore to pursue business opportunities in USA.	0	0	0	39,420	78,840 **243,090 (joint)**	243,090	**0**	78,840	203,670	886,950	1,773,900
1991	TCH transferred all his shares to TCS and TCG's joint names.	0	0	0	39,420	78,840 **446,760 (joint)**	243,090	**0**	78,840	**0**	886,950	1,773,900

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Date	Event	NPE	NKC	TKT	NGO	TCS	TCG	TYK	TCP	TCH	Bajumis	Total
1994	AAS issued bonus shares in a 2:1 ratio.	0	0	0	118,260	236,520 1,340,280 (joint)	729,270	0	236,520	0	2,660,850	**5,321,700**
1997	TCG transferred the 1,340,280 shares held jointly with TCS to TCS's sole name. Of the 729,270 shares in TCG's own name, 727,270 were transferred to TCS, and 1,000 to each of TYK and TCH.	0	0	0	118,260 *(4.44%)*	**2,304,070** *(86.59%)*	**0**	**1,000** *(0.04%)*	236,520 *(8.89%)*	**1,000** *(0.04%)*	2,660,850	5,321,700
2004	The Bajumi family transferred their 50% shareholding to the Tans as part of the settlement of the Bajumi litigation. Following the 2004 Family Meeting, these shares were transferred to NGO. The Tans paid S$7.6m to the Bajumis from the DBS Term Loan (NGO, TCS, TCP and TCH were named as borrowers). TCS arranged for S$7.66m to be paid to DBS to discharge the DBS Term Loan TCG and TYK withdrew from AAS to focus on EnGro. TCS replaced TCG as chairman of AAS.	0	0	0	**2,779,110** *(52.22%)*	2,304,070 *(43.29%)*	0	1,000 *(0.02%)*	236,520 *(4.44%)*	1,000 *(0.02%)*	**0**	5,321,700
2006	TYK transferred his 1,000 shares (which TCG had transferred to him) to TCS.	0	0	0	2,779,110 *(52.22%)*	**2,305,070** *(43.31%)*	0	**0**	236,520 *(4.44%)*	1,000 *(0.02%)*	0	5,321,700
2008	TCH transferred his 1,000 shares (which TCG had transferred to him) to TCS. TCP transferred all her shares to TCS.	0	0	0	2,779,110 *(52.22%)*	**2,542,590** *(47.78%)*	0	0	**0**	**0**	0	5,321,700

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