IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA(I) 03

Civil Appeal No 189 of 2016

Between

(1) Yuanta Asset Management International Limited
(2) Yeh Mao-Yuan

… Appellants

And

(1) Telemedia Pacific Group Limited
(2) Hady Hartanto

… Respondents

Civil Appeal No 1 of 2017

Between

(1) Telemedia Pacific Group Limited
(2) Hady Hartanto

… Appellants

And

(1) Yuanta Asset Management International Limited
(2) Yeh Mao-Yuan

… Respondents

In the matter of Singapore International Commercial Court Suit No 2 of 2015

Between

(1) Telemedia Pacific Group Limited
(2) Hady Hartanto

… *Plaintiffs*

And

(1) Yuanta Asset Management International Limited
(2) Yeh Mao-Yuan

… *Defendants*

JUDGMENT

[Contract] — [Breach]
[Equity] — [Fiduciary relationships]
[Equity] — [Remedies] — [Equitable compensation]
[Tort] — [Conspiracy]
[Tort] — [Inducement of breach of contract]
[Tort] — [Conversion]
[Trusts] — [Breach of trust]

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Yuanta Asset Management International Limited and another v Telemedia Pacific Group Limited and another and another appeal

[2018] SGCA(I) 03

Court of Appeal — Civil Appeal Nos 189 of 2016 and 1 of 2017 and Summons No 58 of 2016
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Sir Bernard Rix IJ
4 July 2017

20 June 2018 Judgment reserved.

Sir Bernard Rix IJ (delivering the judgment of the court):

Introduction

1 The genesis of this appeal and cross-appeal is a joint venture between Telemedia Pacific Group Limited ("**TPG**") and Yuanta Asset Management International Limited ("**Yuanta**"). Under the terms of this joint venture, TPG was to transfer shares owned by it in Next Generation Satellite Communications Limited ("**NexGen**") to Yuanta for the purpose of using the shares as collateral for loans to the joint venture company, Asia Energy Management Ltd ("**AEM**"). These loans could be advanced by Yuanta or a third party lender. The loans were to supply the funds for investments by AEM.

2 In the suit below ("**the Suit**") before the Singapore International Commercial Court, TPG and its director, Mr Hady Hartanto ("**Mr Hartanto**"),

were the plaintiffs while Yuanta and its sole director, Mr Yeh Mao-Yuan ("**Mr Yeh**"), were the defendants. As these are cross-appeals, to avoid confusion, we shall refer to the parties according to their capacities in the proceedings below. The parties brought competing claims that monies had been misapplied and that contractual, tortious and fiduciary breaches had been committed in the course of various dealings with the NexGen shares and joint venture monies.

3 The trial judge, Patricia Bergin IJ ("**the Judge**"), delivered her judgment on liability on 30 June 2016, finding partially in favour of the plaintiffs on their claims and dismissing the defendants' counterclaims in their entirety: see *Telemedia Pacific Group Ltd and another v Yuanta Asset Management International Ltd and another* [2016] 5 SLR 1 (the "**Judgment**"). The plaintiffs succeeded in their claims that, without authority, Yuanta had sold the NexGen shares which TPG had deposited into an account in Yuanta's name but which had not been pledged against a loan. The Judge found that by carrying out these sales, Yuanta had breached the parties' contract, committed the tort of conversion, and breached its fiduciary duty of honesty and the fiduciary no-profit rule. Mr Yeh was found liable for inducing Yuanta's breach of contract. Subsequently, the parties made submissions on the appropriate final orders in respect of quantum, interest and costs: the decision in respect of these issues may be found in *Telemedia Pacific Group Ltd and another v Yuanta Asset Management International Ltd and another* [2017] 3 SLR 47 (the "**Supplemental Judgment**").

4 In Civil Appeal No 189 of 2016 ("**the Appeal**"), the defendants appeal against the Judge's order at [78(b)] of the Supplemental Judgment for them to pay the plaintiffs $6,464,839.37 comprising the profits on, and proceeds of,

Yuanta's unauthorised sales of the unpledged NexGen shares. The defendants do not dispute the Judge's factual findings but contend that the Judge erred in law in finding that each cause of action alleged in respect of the sales had been established. Hence, the Appeal turns on the correct legal characterisation of Yuanta's sales of the NexGen shares and dealings with the proceeds thereof, in the light of the parties' contractual arrangements and joint venture relationship.

5 In addition, the defendants appeal against the Judge's dismissal of three of their counterclaims. In relation to one of their counterclaims, the defendants filed Summons No 58 of 2017 ("**CA/SUM 58/2017**") for leave to adduce fresh evidence. The defendants also applied in Summons No 55 of 2017 ("**CA/SUM 55/2017**") for the execution of the Judge's orders to be stayed. At the close of the oral hearing, we made no order on CA/SUM 55/2017 as the plaintiffs' counsel, Mr Paul Tan, confirmed that any payment of the amount set out at [78(b)] of the Supplemental Judgment could be made to the plaintiffs' solicitors, Rajah & Tann Singapore LLP, on terms that Rajah & Tann Singapore LLP undertook to hold such amount and not to pay it over to their clients pending further order of this court.

6 The cross-appeal, Civil Appeal No 1 of 2017 ("**the Cross-Appeal**"), concerns the plaintiffs' claims that failed before the Judge. The plaintiffs seek to recover compensation for (a) the loss of 765m NexGen shares which were placed in Yuanta's account, then further pledged by Yuanta to a third party lender, and never redeemed ("**the Re-Pledged Shares Loss**"); and (b) the loss suffered by TPG's wider portfolio of 2.6bn NexGen shares which plummeted in value allegedly as a result of the defendants' actions ("**the Portfolio Loss**"). The plaintiffs claim that the defendants are liable to pay equitable compensation for these losses because they flowed from defendants' breaches of fiduciary

duty. Further, the plaintiffs claim that they should have succeeded in their action for unlawful means conspiracy, which gave rise to these losses.

Background

7 Bearing in mind the overview above, we shall traverse only the facts essential to these appeals. A detailed recital of the facts may be found in the Judgment below at [8]–[157].

8 TPG is registered in the British Virgin Islands ("**BVI**") and operates a satellite communications business in Hong Kong. Mr Hartanto is the controlling shareholder and director of TPG. From 2008 to 2012, Mr Hartanto held a 75% stake in TPG while his then business partner, Mr Hardi Koesnadi ("**Mr Koesnadi**"), held the remaining 25% stake via his company, Telemedia Pacific International Inc ("**TPI**").

9 In August 2008, TPG acquired a 51% stake in NexGen (formerly known as Ban Joo & Company Limited), a company listed on the Singapore Exchange. At the same time, TPG acquired a number of warrants entitling it to purchase new NexGen shares for S$0.03 per share ("**Share Warrants**"). Sometime in 2010, Mr Koesnadi decided to part ways with Mr Hartanto and was offering TPI's 900m NexGen shares (amounting to 15% of NexGen's total issued share capital) for sale.

10 Yuanta was incorporated on 15 November 2010, around the time when the parties entered into a joint venture. It is also registered in the BVI and Mr Yeh is its sole director.

The joint venture agreements

11 Having been acquainted socially for several years, Mr Hartanto and Mr Yeh met between July and October 2010 to discuss their respective businesses and potential investment opportunities. In the course of these discussions, they decided to pool their connections and resources to embark on joint investments. In late 2010, the parties entered into a joint venture to carry out securities and other diverse investments via AEM, a special purpose vehicle registered in the BVI, using funds from loan facilities arranged by the defendants. These loan facilities were to be secured by shares held by TPG in NexGen. It was common ground that NexGen was on the watch list of the Singapore Stock Exchange ("**SGX**") and in danger of being de-listed, so it was potentially difficult to realise the value of these shares. The joint venture was structured to leverage on the plaintiffs' stock of NexGen shares on the one hand, and the defendants' allegedly good credit rating and reputation on the other hand, to obtain the loan facilities. At the material time, the plaintiffs were unaware that Yuanta was newly-incorporated and were under the impression that the defendants were related to a company named "Yuanta Financial Holdings", which the plaintiffs understood to be a large and reputable Taiwanese securities house.

12 To execute this joint venture, the parties entered into three agreements in Mandarin (collectively "**the Agreements**"), namely:

(a) a contract dated 14 November 2010 between Yuanta as Grantor and both plaintiffs as Grantee entitled "Non-Recourse Loan Agreement complete with Share Delivery, Securities, and Re-delivery Agreement, and Securities Co-operation Agreement" ("**the First Loan Agreement**");

(b) a contract dated 14 November 2010 between Yuanta and the plaintiffs entitled "Non-Recourse Loan Agreement complete with Share Delivery, Securities, and Re-delivery Agreement, and Securities Co-operation Agreement (2)" ("**the Second Loan Agreement**"); and

(c) a contract dated 15 November 2010 between Mr Yeh and Mr Hartanto entitled "Supplementary Agreement – Securities Co-operation Agreement" ("**the Supplementary Agreement**").

We shall refer to the First and Second Loan Agreements together as the "**Loan Agreement**".

13 Under the Loan Agreement, TPG was to transfer as collateral up to 3.6bn NexGen shares to a "Delivery Account" which was later specified to be Yuanta's account with the Singapore branch of "Crédit Agricole Corporate and Investment Bank". (This was a reference to Crédit Agricole (Suisse) SA, now known as CA Indosuez (Switzerland) SA, to which we shall refer as "**Crédit Agricole**".) The contractual limit of 3.6bn shares had been adjusted upwards from an initial limit of 200m shares. Upon receiving the shares, Yuanta was in turn to re-pledge the shares as security for loans that were either provided by Yuanta or procured from a third party lender using Yuanta's name. The quantum of the loan was to be based on 50–55% of the closing price of the NexGen shares. For the purposes of the Appeal, the parties dispute the construction of the terms governing Yuanta's right to deal with the shares transferred into its account.

14 The material terms of the Loan Agreement, as translated from the original Mandarin into English, provide as follows (with all references to Ban Joo & Company and Taisan Co being a reference to NexGen):

> This Agreement is made between [Yuanta] ("Grantor") and [Mr Hartanto]/(*[TPG]*) ("Grantee") on the 14th day of November, 2010 as follows:
>
> WHEREAS, the Grantee or the person so arranged owns *Ban Joo & Company (B07.S1)* Co. Ltd. [*sic*] ("Pledged Securities"), and is desirous of delivering the securities to the Grantor as pledge for a non-recourse loan; and
>
> WHEREAS, the Grantee agrees to deliver the aforesaid securities in compliance with the terms;
>
> Therefore, in consideration of the detailed contents of the bilateral agreement herein set forth, and in the spirit of goodwill and other desires deemed worthy of respect, the Parties agree as follows:
>
> **1. Collaterals/Debentures**
>
> a. The Grantee shall deliver as collateral to the Grantor or the person so arranged or its representative the Pledged Securities as follows:
>
> > A maximum of *200,000,000* shares for free trading; unpledged *TAISAN Co. (F2X-SIN)* ordinary shares for multiple-times fund raising amounting to US$*3,000,000.00* each time, with the price to be fixed after receipt of the pledged shares in accordance with Article 2 of this Agreement.
>
> b. The Grantee shall deliver ("Delivery Account") the Pledged Securities to: see Attachment A
>
> c. *The Grantee authorises the Grantor to sell, trade or pledge the said Pledged Securities at its discretion.*
>
> d. The Grantee authorises the Grantor to, in the following manner, hold or deposit with [*sic*]:
>
> (i) … any local or overseas depository institution or liquidation company or system that provides disposal, liquidation or custodian services.
>
> (ii) issuers of securities without certificates

(iii) custodians at any local or overseas bank or custodian centres

2. Terms

a. The total sum of the Loan shall be fixed in accordance with the Agreement and the computation based on the percentage of 50%-55% of the Pledged Securities transferred to the Grantor is as follows [*sic*]:

(i) average closing price *10* days before closing

(ii) average closing price *5* days before closing

(iii) average closing price of securities on the trading day before closing

…

c. In accordance with the provisions of the terms, the Grantor shall, upon receipt of the pledged shares as collaterals, grant the Grantee a non-recourse loan. …

…

4. Re-delivery of the Pledged Securities

a. In the event where the Grantee fails to pay the aforesaid amount on the *10th* day after the due date, the Grantor reserves the right to terminate the said Agreement and will have absolute ownership of the said Pledged Securities with full unrestricted rights.

b. In the event where the Grantee has complied with the Agreement, the Grantor agrees to return to the Grantee the relevant portion of the Pledged Securities or the relevant amount in Singapore/US dollars (at the discretion of the Grantor) within 25 banking days. …

c. *The Grantee confirms that the Grantor may carry out various trading and hedging strategies and that such trading and strategies may cause a delay in the immediate return of the said collateral towards the next repayment of the total Loan amount by the Grantee.* The Grantor shall conform to the serial numbers for the contractual obligations of the re-delivery of securities (or cash figures) within reasonable time as stipulated by contract.

…

e. In the event of re-delivery of cash in part or in full, the Grantor reserves the right to fix the re-delivery price (defined to be the share price applied to the computation of the cash portion in the re-delivery of the collateral) and the terms are as follows:

(i) the closing price on the trading day after receipt of notice

(ii) the closing price on the trading day before the date of re-delivery

(iii) the average closing price *5* trading days after receipt of notice

(iv) the closing price *5* trading days before the date of re-delivery

f. In the event where the Grantee has repaid the Loan amount in full, the Grantor will be responsible for returning to the Grantee *cash or shares* not exceeding the premium when the value of securities, based on the computation on the date of Loan settlement in the contract, exceeds the value of the Pledged Securities. *This may be done at the Grantor's discretion.*

5. Terms, Restrictions and Further Agreements

…

b. In the event where the Grantee violates the conditions stipulated in this Agreement, the Grantee will no longer be entitled to any rights, claims or benefits in relation to the said Pledged Securities. The following circumstances will automatically and irrevocably result in an Event of Default …

c. The Grantee represents and guarantees that:

(i) The Pledged Securities are fully owned by the Grantee

(ii) The Pledged Securities are free of encumbrances

(iii) The Pledged Securities are free of liens

(iv) The Pledged Securities may be freely traded

…

Attachment A

The Grantee will transfer to the Grantor's account the shares deposited into the separate private account he has opened with the Grantor's bank as arranged by the Grantor.

> The Grantor agrees and authorises the Grantee to deliver the securities to the following destination bank account:
>
> Name of Account: Yuanta Asset Management International Limited
>
> Bank/Agency: Crédit Agricole Corporate and Investment Bank, Singapore Branch
>
> …
>
> [emphasis added]

15 The Supplementary Agreement, executed the next day, clarified several other aspects of the joint venture relationship. It provided for the setting up of the joint venture company – eventually incorporated as AEM – as well as a joint venture account with a designated bank. The parties agreed that the profits and losses of the joint venture were to be split equally between them. The Supplementary Agreement also set out the terms of use of the loan monies obtained by Yuanta on the security of the NexGen shares. Besides being availed to AEM for the purpose of diverse investments, the loan monies were also to be used to exercise TPG's Share Warrants to acquire 300m new NexGen shares for the benefit of AEM. The amount purchasable under the Share Warrants was later reduced to 225m NexGen shares (the amount of warrants available to Mr Hartanto by virtue of his stake in TPG). The new shares obtained through the exercise of the Share Warrants were in turn to be pledged to obtain further loans for AEM.

16 The material terms of the Supplementary Agreement provide as follows:

> Party A: [Mr Hartanto]
>
> Party B: [Mr Yeh]
>
> Pursuant to a loan to be taken out, through friendly negotiations, by Party A from Party B or institutions by guarantee of or in co-operation with Party B, and a bank, to be secured by shares in Ban Joo & Company Ltd (B07.S1) held by Party A in the name of [TPG] with full control and discretion in

the pledge or transfer thereof, and the amount so available is to enable the Parties to carry out diverse investments, the division of work between the Parties is as follows:

1. Party A shall put forward a total of 3.6 billion shares to obtain a loan from Party B or institutions by guarantee of or in co-operation with Party B. Party B shall be responsible for securing a loan based on 50%-55% of the closing price for the day of Ban Joo & Company Ltd [shares] in Singapore (subject to the Loan Agreement). In the event of an increase in the share price, Party B shall increase the amount of the Loan, and the percentage of the Loan will also increase concurrently. The expenses shall not exceed 10% of the annual loan expenses, and shall be deducted at the time the funds are disbursed. Interest expenses of the loan shall be borne by the Parties in the proportion of the shares.

2. The Parties shall, with the total amount of the Loan taken, open a joint account with the designated bank of Party B, and jointly set up a BVI company to carry out securities and other investments. The Parties shall each be entitled to 50% of the profits thereof, net of expenses.

3. The Parties agree that part of the Loan may first be used to exercise the warrant to buy the 300 million shares of Party A's listed company B07.S1, and to convert [the shares] into tradable shares within 5 days. Thereafter, the shares shall be pledged and the funds thereby obtained shall be deposited into the joint account of the Parties for joint management and investment.

…

5. The Loan, to be taken by Party A from the institutions arranged by Party B and [secured] with the aforesaid shares held by Party A, may be utilised for other investments approved by the Parties, and the profits or losses arising therefrom shall be shared between the Parties in the same proportion: 50% each. …

6. Party A agrees to progressively increase the total cumulative value of the shares held so that the Loan shall not fall below US$50,000,000 by first utilising and subsequently increasing the limits. … A swap shall be carried out according to the shares and funds required by and agreed between the Parties after the shares have been transferred progressively into the bank account of Party B. …

> 7. Party A agrees to Party B's making arrangements for a loan secured with securities computed up to the limit of 50% to 55% of the share price, the funds so available shall be for carrying out securities and other investments, operating on the account to be signed by Party A and Party B on behalf of the Parties. …
>
> 8. The Parties agree that the Loan arranged by Party B shall be used, firstly, to exercise the warrant in the Company. (1) The acquisition at 0.3 [*sic*] per share; (2) the acquisition of 25% shares of Party A's original shareholders; (3) Market operations that will increase the company's market capitalisation to the mutual benefit of the Parties (variations and adjustments to the order of priority hereof may be made through consultation between the Parties).
>
> …

17 After signing the Agreements, TPG, Yuanta and AEM each opened accounts with Crédit Agricole. We shall refer to these accounts as the "**TPG Account**", the "**Yuanta Account**" and the "**JV Account**" respectively.

Transfers and disposals of NexGen shares

18 Between January and May 2011, TPG transferred 825m NexGen shares from the TPG Account into the Yuanta Account in the following three tranches:

(a) 300m shares on 21 January 2011 ("**January 300m shares**");

(b) 225m shares on 11 March 2011 ("**March 225m shares**"); and

(c) 300m shares on 4 May 2011 ("**May 300m shares**").

(Collectively, "**the 825m Shares**")

19 The January 300m shares and May 300m shares were indisputably transferred by TPG pursuant to its obligations to deliver up to 3.6bn shares to the Yuanta Account as security for loans. The March 225m shares were

ostensibly different, however, because the plaintiffs claimed that this was the parcel of 225m shares that was acquired through the exercise of the Share Warrants (see [15] above).

20 Mr Hartanto explained the context of the transfer of the March 225m shares as follows in his affidavit: between 15 February and 22 March 2011, S$6.75m was withdrawn from the JV Account "for the purpose of the exercise of the 225m Warrants". Further, the March 225m shares transferred from the TPG Account to the Yuanta Account "were to be treated as shares converted from the 225 million warrants". However, it appears that Mr Yeh was not of the same understanding because, as late as August to September 2011, Mr Yeh was still pressing Mr Hartanto for documentation that the 225m shares converted from the Share Warrants would be delivered to the Yuanta Account. Eventually, apparently on the premise that Mr Hartanto had not deposited the 225m shares converted from the Share Warrants, Mr Yeh, acting as signatory of the TPG Account, procured a transfer of a parcel of 225m shares directly from the TPG Account to an account of Yuanta's subsidiary (see the facts relating to the "October 225m shares" at [27] below).

21 With respect to the 825m Shares transferred to the Yuanta Account, Yuanta's dealings were as follows:

(a) 101.5m shares were sold in February–March 2011 and repurchased at a lower price between March to June 2011 ("**the 101.5m Sale & Repurchase**"), yielding a profit of S$1,774,733.20 which was paid to the defendants' associated companies, namely ThreeSix Five Capital Ltd, LG Legacy Capital Inc and Gift Capital Inc;

(b) 60m shares were sold in August 2011 ("**the 60m Sale**"), yielding proceeds of S$1,374,620.20 (later adjusted to S$1,383,509 at the quantification stage), out of which S$1,150,144.70 was distributed to Mr Yeh's business associates and relatives; and

(c) 765m shares (including the 101.5m shares described at [21(a)], upon being repurchased) were pledged to Equity First Holdings, LLC ("**EFH**") in several tranches. The pledges were made pursuant to a Master Loan Agreement and Master Pledge Agreement entered into between Yuanta as borrower/pledgor and EFH as lender on 21 December 2010 (the "**EFH Loan**" or the "**EFH Pledge**").

22 To avoid confusion with the contractual expression of "Pledged Securities" which in our view refers to all the shares in the Yuanta Account (see below at [52]), we shall refer to the 765m shares pledged to EFH as the "**765m Re-Pledged Shares**" or the "**765m Shares**" as the context requires.

23 On the security of the 765m Re-Pledged Shares, EFH advanced 10 loan tranches totalling S$14,374,331.68 to Yuanta. Of the 10 loan tranches advanced by EFH, S$12,936,898.51 (after deducting 10% for loan fees payable to Yuanta under the Loan Agreement) was due as loan funds to AEM. But Yuanta did not transfer the whole of this sum to the JV Account; this quantum of this shortfall was a subject of contention at the quantification stage below (see [78(a)] below).

24 The plaintiffs were not aware of the 101.5m Sale & Repurchase and the 60m Sale. They were also not aware that EFH was the lender to whom the 765m Re-Pledged Shares had been delivered, but were under the impression that Crédit Agricole was the lender. Mr Hartanto claimed to have heard that Yuanta was trading with the shares sometime in March 2011 and to have instructed

Yuanta to repurchase them. He also claimed to have instructed Yuanta to cease any further re-pledging to any lender in April 2011, but the defendants continued to re-pledge and trade shares behind his back. In June 2011, Mr Hartanto asked the defendants for documentary proof from the lender that it had received the re-pledged shares as custodian, but none was forthcoming. In August and September 2011, Mr Hartanto sought again to find out the whereabouts of the shares from Mr Yeh and Mr Yeh's appointed representative at Crédit Agricole, Mr Brian Goh ("**Mr Goh**"). On 17 August 2011, Mr Goh informed Mr Hartanto that the 765m Re-Pledged Shares were being held by the Bank of New York Mellon, Deutsche Bank and Morgan Stanley, even though this was not the case. On 12 September 2011, Mr Hartanto sought proof that 60m shares (which, unbeknownst to him, had already been sold in the 60m Sale) remained in the Yuanta Account and the 765m Re-Pledged Shares had been transferred to the three banks specified.

25 In September 2011, following the fall in value of NexGen shares, TPG received three margin call letters from Yuanta dated 9, 13 and 26 September 2011. Each notice referred to an "Event of Default" under cl 5(b)(i) of the First Loan Agreement and called for a deposit of a specified amount of additional cash or free-trading shares into the Yuanta Account within 3 business days. Mr Yeh gave evidence at the trial that he had copied EFH's margin call letters and issued them to TPG without references to EFH so that Mr Hartanto would not know that EFH was the lender. Operating under the impression that the margin calls had emanated from "the bank", Mr Hartanto responded by asking Mr Yeh for the bank's official letter and suggesting that the funds in the Yuanta Account be utilised to satisfy the margin calls. In response, Mr Yeh explained that under the Loan Agreement, it was for Yuanta, rather than the ultimate lender, to issue margin call notices to TPG. Mr Yeh refused to utilise the existing funds in the

Yuanta Account to satisfy the margin calls, allegedly because TPG had failed to deliver on certain other promises, the facts in relation to which are canvassed below.

26 On 3 and 4 October 2011, Mr Hartanto wrote to Mr Yeh demanding to find out who the true custodian of the 825m Shares was and whether either the custodian or Yuanta had been selling the 825m Shares. His concern, made clear in the correspondence, was that the price of NexGen shares had fallen, presumably because the banks to whom the shares had been re-pledged were selling the shares. He was also entertaining suspicions that Mr Yeh was concealing the true identity of the lender because Mr Yeh had not disclosed any proof of custodianship from the lender.

27 In October 2011, Mr Yeh, as signatory of the TPG Account, authorised TPG to transfer a separate and additional parcel of 225m shares ("**October 225m shares**") from the TPG Account into an account in the name of Fullerton Capital Enterprises Ltd ("**Fullerton**"), a subsidiary of Yuanta. This took place via two transfers of 112.5m shares on 10 and 14 October 2011. The October 225m shares were sold in that same month ("**the 225m Sale**"), yielding proceeds of S$1,992,341.50 which were paid into Fullerton's account ("**the Fullerton Account**"). (Based on the parties' agreed chronology of facts, the statement at [149] of the Judgment that half the proceeds were paid into the Yuanta Account appears to be a mistake.) Almost immediately upon receipt of the sale proceeds, Fullerton paid a total of S$1,798,050.96 to Mr Yeh and S$100,025.41 to one of Mr Yeh's business associates. It appears that Mr Hartanto only discovered that the October 225m shares had been removed from the TPG Account on 1 November 2011, when Crédit Agricole informed him that the TPG Account was to be closed because it had a zero balance.

28 It is not disputed that the margin calls from EFH were not cured and the EFH Loan was not repaid. Thus the 765m Re-Pledged Shares were never redeemed. Further, as the Judge noted, it seems that it was only during legal proceedings brought by the plaintiffs against Crédit Agricole between 2012–2014 ("**the Earlier Suit**") that the plaintiffs discovered that the loans had been provided by EFH and that the 765m Re-Pledged Shares had been re-pledged to EFH (see *Telemedia Pacific Group Ltd v Crédit Agricole (Suisse) SA (Yeh Mao-Yuan, third party)* [2015] 1 SLR 338 ("**the Earlier Suit's Judgment**")).

29 We now summarise the entire dealings with the NexGen shares which have been recounted above. A total of 1.05bn shares were transferred from the TPG Account, comprising the 825m Shares transferred to the Yuanta Account and the October 225m shares transferred to the Fullerton Account. Of these, the 765m Re-Pledged Shares – which included the 101.5m shares which were sold and repurchased – were further pledged to EFH and were never redeemed. The remaining 285m shares were sold via the 60m Sale in August 2011 and the 225m Sale in October 2011. We shall refer to the 101.5m Sale & Repurchase, the 60m Sale and the 225m Sale collectively as the "**Share Sales**". As the 386.5m shares involved in the Share Sales were all not re-pledged to EFH against a loan at the time of sale, we shall refer to these shares as the "**Unpledged Shares**" where the context requires.

Scorpio East and the $1.8m Transfer

30 Besides the parties' dealings with the NexGen shares, two other sets of transactions are relevant because of the defendants' counterclaims.

31 First, there is the acquisition of 37m shares in Scorpio East Holdings Ltd ("**Scorpio East**"), a company engaged in the business of film production and

distribution. In March 2011, TPG acquired 37m shares in Scorpio East for the price of S$4,179,829.95, purportedly as an investment on behalf of AEM. The purchase was funded using margin facilities that TPG had with a third party lender. On 29 April and 29 June 2011, S$1,200,024.50 and S$1,800,024.70 were withdrawn by TPG from the JV Account. According to TPG, this S$3m was purportedly a repayment to TPG for the use of its margin facilities to purchase the Scorpio East shares for AEM. The parties dispute whether the 37m shares in Scorpio East belong to AEM and thus whether the total of S$3m belonging to AEM was properly applied towards their purchase. This formed part of the defendants' wider allegation, in their defence, that the plaintiffs had utilised the joint venture funds for their own benefit.

32 Next, on 29 June 2011, Yuanta transferred S$1.8m from the Yuanta Account to the JV Account. On the same day, Mr Yeh, as authorised signatory of AEM, instructed Crédit Agricole to transfer S$1.8m from the JV Account to TPI's account with DBS Bank Ltd ("**the $1.8m Transfer**"). The parties dispute the purpose of this transfer and whether S$1.8m ought to be repaid to Yuanta. According to the plaintiffs, it had been earlier agreed that Yuanta or AEM would purchase Mr Koesnadi's stake in NexGen for S$45m, and TPG was to provide a bridging loan for the first tranche of payment for the purchase. Thus, the plaintiffs claimed that the $1.8m Transfer was a repayment to TPG of the bridging loan. In contrast, the defendants claim that it was a personal loan provided by Yuanta to Mr Hartanto, in consideration for which TPG was to provide 700m NexGen shares to Yuanta as collateral. As TPG failed to do so, Yuanta claimed that the consideration had failed.

Breakdown of the parties' relationship

33 It appears that Yuanta did not give official notice of termination of the Loan Agreement. However, the joint venture relationship had clearly broken down by November 2011 due to Mr Hartanto's unhappiness with Yuanta's dealings with the NexGen shares on the one hand, and disagreements over Scorpio East, the $1.8m Transfer and the Share Warrants on the other. Mr Yeh's misgivings were made clear in an email dated 28 September 2011, in which Mr Yeh alleged that Mr Hartanto had failed to keep his "promises". He also pointed out that Scorpio East was "still under investigations", though it is unclear from the email alone what link this had to AEM. The remainder of S$1.88m in the Yuanta Account was transferred to Mr Yeh on 8 November 2011, following which the Yuanta Account was closed.

34 The loans from EFH were terminated by the end of 2011 because of Yuanta's failure to meet EFH's margin calls and interest payments. The value of NexGen shares plummeted from S$0.06 per share in January 2011 to S$0.01 per share in November 2011.

35 On 9 May 2012, the plaintiffs brought the Earlier Suit against Crédit Agricole for acting without authority in transferring the October 225m shares out of the TPG Account. The plaintiffs' claims were dismissed by the High Court on 18 November 2014 (see Earlier Suit's Judgment; *supra* [28]).

36 The Suit below was commenced on 26 May 2014 and transferred by consent into the Singapore International Commercial Court on 15 April 2015.

Analysis of the parties' contractual arrangements

37 The critical question, anterior to all the issues of breach alleged in the trial below and in these appeals, is what rights, interests and obligations were created by the Agreements over the shares in the Yuanta Account; in particular, the parties dispute the extent of Yuanta's authority to deal with the shares in the Yuanta Account for its own profit. Before we discuss the parties' pleaded cases, we think it would be useful for us first to set out our *prima facie* analysis of the parties' contractual arrangements, so as to lay the groundwork for our subsequent discussion of the parties' arguments and the Judge's decision.

38 The parties' objective was to raise capital for AEM to enter into diverse investments for the parties' mutual benefit. This objective is evident in the Supplementary Agreement which sets out the terms of Mr Hartanto and Mr Yeh's cooperation which was to be operationalised through TPG and Yuanta. The preamble of the Supplementary Agreement states that the amount raised was "to enable the Parties to carry out diverse investments". Under cl 5 of the Supplementary Agreement, the parties were to share equally in the profits and losses of AEM's investments.

39 For the purpose of raising capital, TPG was to transfer up to 3.6bn NexGen shares into the Yuanta Account so that Yuanta could deal with them within the scope of its contractual power to raise funds for AEM's investments. In this way, the joint venture was structured to leverage on the plaintiffs' stock of NexGen shares and the defendants' allegedly good credit rating, reputation and connections to financial institutions.

40 TPG's transfer of the NexGen shares into the Yuanta Account placed the legal title in the NexGen shares in Yuanta's name, but it is critical to grasp

that under the Agreements, the beneficial interest in the shares clearly remained with TPG. With this split in legal and equitable ownership, Yuanta held the shares on trust for TPG, which never parted with its beneficial interest (at any rate until the sale of the shares in the open market, at which point TPG's beneficial interest would be translated into the sale proceeds in the Yuanta Account). We conclude so for the following reasons.

41 For a start, the shares transferred into the Yuanta Account were described as "Pledged Securities" in the contract. However, we consider this expression to be a misnomer. The concept of a pledge is not applicable to choses in action. As the Court of Appeal in *Qilin World Capital Ltd v CPIT Investments Ltd and another appeal* [2018] SGCA(I) 1 ("*Qilin World Capital Ltd (CA)*") reasoned in a somewhat similar factual context (at [4]):

> … The expression "Pledged Shares" is a misnomer. The process of pledging applies to choses in possession (see *Chase Manhattan Bank NA v Wong Tui Sun and others* [1992] 3 SLR(R) 436 at [24]). A share is a chose in action, not a chose in possession. While share certificates, which were once common, can be treated as choses in possession, there is no evidence that there were any share certificates involved here. By "Pledged Shares" the parties meant "shares used as security for the Loan". …

Considering that there was no evidence that any share certificates were involved in the parties' dealings with the NexGen shares, we reach the same conclusion as the court in that case. By "Pledged Securities", we understand the parties to mean that the shares were to be furnished as security for a loan to be arranged by Yuanta from itself or a third party lender (see cl 1 of the Supplementary Agreement which envisages that a loan would be obtained from Yuanta or "institutions by guarantee of or in co-operation with" Yuanta).

42 In line with this reading, cl 1(a) of the First Loan Agreement states that TPG would transfer the shares to Yuanta "as collateral" for "multiple-times fund raising". In considering the significance of providing property as collateral, it is helpful to refer to the decision in *Qilin World Capital (CA)*. In the High Court, Vivian Ramsey IJ in *CPIT Investments Ltd v Qilin World Capital Ltd* [2017] 5 SLR 1 ("*Qilin World Capital Ltd (HC)*") explained as follows at [71]:

> The deposit of shares or property as collateral is intended to provide security for the transaction, with rights of recourse against that collateral in the event that there is a default in respect of the transaction …

43 Ramsey IJ went on to reason that the essential question is whether the collateral was transferred to the lender so as to give the lender a limited security interest or whether there was an outright transfer under which the rights of ownership were transferred to the lender such that it was entitled to deal freely with the collateral from the moment of transfer. This was to be determined by the nature of the transaction and the terms of the agreement in question.

44 Construing the loan agreement before him, Ramsey IJ decided that the lender was granted only a limited security interest and not legal or beneficial ownership (*Qilin World Capital (HC)* at [72]). When the decision was appealed, it was not expressly challenged that the loan agreement in question did not transfer legal (or, we would add, beneficial) title to the pledged shares to the lender, but only a security interest in them as equitable mortgagee (see *Qilin World Capital Ltd (CA)* at [26] and [36]). The appeal concerned a subsequent transaction which passed legal title to the pledged shares to the lender, the material question being whether that transaction effected a transfer subject to the borrower's rights and equitable interest (which was permissible under the loan agreement) or a disposal of the entire legal and equitable ownership in the

shares (which was not permissible under the loan agreement). The Court of Appeal decided that the transaction was only a transfer of legal title to the lender which did not affect the borrower's equitable title in the shares (see *Qilin World Capital (CA)* at [47] and [49]–[50]). This was because the lender did not intend to acquire the whole legal and equitable title through this transaction. The inquiry into the lender's intention was conducted on the premise that the loan agreement did not authorise any disposal of the borrower's equitable title (*Qilin World Capital (CA)* at [27] and [49]).

45 For our purposes, the key and indeed fundamental point to grasp is that a transfer of legal title does not necessarily entail a transfer of the beneficial interest. In particular, where a transfer is only for the purposes of collateral or security, the transferor's beneficial title to the property remains intact. Exactly what rights and interests were conferred is a matter to be determined by the nature of the transaction and a construction of the parties' agreements. In our view, two things are clear from the Agreements in our case: first, that Yuanta did not acquire the beneficial ownership of the NexGen shares in the Yuanta Account, which remained beneficially owned by TPG; but secondly, that the effect of the delivery of the NexGen shares to Yuanta, however, was to transfer the legal (albeit not the beneficial) interest in the shares to Yuanta, to facilitate not merely their re-pledging to a lender, but also their sale. Plainly, without legal title, Yuanta could not have sold the NexGen shares.

46 First, the Agreements express a clear intention that Yuanta held the shares in the nature of collateral rather than as beneficial owner. The preamble of the First Loan Agreement states that the plaintiffs were "desirous of delivering the securities to [Yuanta] as pledge for a non-recourse loan". This shows that the parties did not intend an outright transfer of beneficial ownership

to Yuanta but only to pass a security interest in the shares to the lender of a non-recourse loan. It is well established that a recital in an instrument can assist in the construction of the substantive terms thereof, although it cannot override or control the operation of clear and unambiguous substantive terms (*MCST Plan No 1933 v Liang Huat Aluminium Ltd* [2001] 2 SLR(R) 91 at [7]). Further, cl 1(a) of the First Loan Agreement explicitly states that the shares were deposited in the Yuanta Account "as collateral" for the purpose of raising capital only. Further support is found in the preamble and cll 1 and 5 of the Supplementary Agreement. The preamble states that "a loan to be taken out" is to be secured by NexGen shares held by Mr Hartanto through TPG and that the "amount so available is to enable the Parties to carry out diverse investments". Clauses 1 and 5 make clear that the purpose of Mr Hartanto's putting forward shares was to collateralise loans to raise capital for the parties' joint investments:

> 1. [Mr Hartanto] shall put forward a total of 3.6 billion shares *to obtain a loan from [Mr Yeh] or institutions by guarantee of or in co-operation with [Mr Yeh]. [Mr Yeh] shall be responsible for securing a loan* based on 50%-55% of the closing price for the day of [NexGen shares] …
>
> 5. *The Loan, to be taken by [Mr Hartanto] from the institutions arranged by [Mr Yeh] and [secured] with the aforesaid shares held by [Mr Hartanto]*, may be utilised for other investments approved by the parties, and the profits or losses arising therefrom shall be shared between the Parties in the same proportion: 50% each. …
>
> [emphasis added]

47 Thus, there is no indication that TPG intended to transfer beneficial ownership in the shares to Yuanta. To the contrary, certain clauses in the First Loan Agreement positively show that Yuanta was not the beneficial owner of the shares in the Yuanta Account. Under cl 4(a) of the First Loan Agreement, Yuanta only acquires "absolute ownership of the said Pledged Securities with

full unrestricted rights" if TPG fails to pay the loaned amount on the tenth day after the due date. If this happens or if TPG breaches any of the other conditions in the contract, cl 5(b) of the First Loan Agreement states that TPG will "no longer be entitled" to any rights in the shares. The assumption underlying both clauses is that unless and until TPG breaches the contract or fails to repay the loan, Yuanta's interest in the shares is not absolute and its rights are restricted.

48 Against this, it may be said that under cl 4(b) of the First Loan Agreement, when TPG repays the loan, Yuanta has the discretion to choose whether to return TPG the shares themselves or an equivalent monetary sum. But in our view, this does not mean that Yuanta has acquired the beneficial interest in the shares in the Yuanta Account. Clause 4(b) simply gives practical effect to Yuanta's discretion to "sell, trade or pledge" the shares under cl 1(c). If the shares are sold, Yuanta can no longer return the shares *in specie* but is to return the cash in substitution to TPG instead. The discretion is in dealing with the shares, but not in the ultimate obligation to return shares or proceeds to their beneficial owner, TPG.

49 Finally, the manner in which the parties arranged for Yuanta to hold the shares confirms that Yuanta held the NexGen shares as trust property and did not have a right freely to dispose of the NexGen shares as its own beneficial property. Under cl 1(b) of the First Loan Agreement, TPG was obliged to deliver the shares to a Delivery Account specified in Attachment A. In turn, Attachment A stipulates that the shares are to be deposited into a "separate private account" opened by TPG with Crédit Agricole – this was the TPG Account. In turn, TPG was obliged to transfer the shares in the TPG Account into the Yuanta Account. It was only after the First Loan Agreement was signed that the parties opened both these accounts to hold the shares (Judgment at [23]).

That the shares were to be deposited in a separate account opened specifically for that purpose suggests that Yuanta did not hold the shares on its own behalf but segregated it as trust property.

50 It is true that under cl 1(d) of the First Loan Agreement, Yuanta was authorised to hold or deposit the shares in any local or overseas depository institution, in issuers of securities (even without certificates) and with custodians at any local or overseas banks. But this clause must be read together with cll 1(b) and 1(c) of the First Loan Agreement as well as the parties' intention that Yuanta could obtain a loan from any third party lender (cl 1 of the Supplementary Agreement). By allowing Yuanta to transfer custody of the shares to another institution or custodian, cl 1(d) facilitates Yuanta's exercise of its power in cl 1(c) to sell, trade or pledge the shares so as to monetise the shares for the benefit of capitalising the joint venture. This does not detract from the conclusion that Yuanta could not mix the shares with its own property.

51 Therefore, the whole structure of the parties' contractual arrangements was such as expressly to pass only legal title in the shares to Yuanta, with beneficial ownership remaining with TPG. TPG transferred the NexGen shares to Yuanta only as collateral or, to be precise, as *future* collateral for loans to be arranged by Yuanta. It follows from this separation of the legal and beneficial title that Yuanta held the shares in the Yuanta Account on trust for TPG. In our view, this distinction between the legal and equitable interests lies at the heart of the proper disposal of these appeals, and it is a distinction which, as will be seen, has been elided in the parties' arguments here and below.

52 While Yuanta held the NexGen shares in the Yuanta Account on trust for TPG, Yuanta was authorised to "sell, trade or pledge the said Pledged

Securities at its discretion" under cl 1(c) of the First Loan Agreement. This authority extended to all "Pledged Securities", which we interpret as *all* the NexGen shares delivered by TPG to the Yuanta Account. The term, "Pledged Securities", is defined in the following context in the preamble of the First Loan Agreement:

> WHEREAS the Grantee or person so arranged owns *Ban Joo & Company Ltd (B07.S1)* Co. Ltd ("Pledged Securities"), and is desirous of delivering the securities to the Grantor as pledge for a non-recourse loan …

While this definition is not entirely comprehensible, on a plain reading, "Pledged Securities" refers without any qualification to the shares owned by TPG in NexGen (previously known as Ban Joo & Company Limited; see [9] above) which were to be transferred by TPG into the Yuanta Account. This interpretation is supported by cll 1(a) and (b) of the First Loan Agreement, which describe the Pledged Securities as the NexGen shares to be delivered to a Delivery Account (later specified as the Yuanta Account). They provide:

> a. The Grantee shall deliver as collateral to the Grantor or the person so arranged or its representative the Pledged Securities as follows:
>
>> A maximum of *200,000,000* shares for free trading; unpledged [NexGen] ordinary shares for multiple-times fund raising amounting to US$*3,000,000.00* each time, with the price to be fixed after receipt of the pledged shares in accordance with Article 2 of this Agreement.
>
> b. The Grantee shall deliver ("Delivery Account") the Pledged Securities to: see Attachment A

Again, *all* the NexGen shares that TPG delivered to the Yuanta Account were described as "Pledged Securities". The contract does not distinguish between shares that have been further pledged by Yuanta against loans and those that have not been. As will be seen, the commercial purpose of this clause does not necessitate such a distinction either. It follows that although the shares in the

Yuanta Account were described as "Pledged Securities" or as "collateral", it would be more precise to describe them as *future* collateral for a loan that Yuanta was to arrange. Nonetheless, to avoid confusion with the contractual expression of "Pledged Securities", we refer to Yuanta's act of delivering the shares as security to a lender as a "re-pledge". For this reason, we also refer to the shares re-pledged to EFH as the "765m Re-Pledged Shares" (see [22] above).

53 The authority to "sell, trade or pledge" the shares was conferred upon Yuanta so that it could seek opportunities to promote the value of TPG's property by selling its shares, trading them (*ie*, selling and buying them back), and/or pledging them as collateral for loans, all to facilitate the capitalisation of AEM.

54 As can be seen from the structure of their contract as a non-recourse loan agreement, the parties envisaged that the primary means of raising capital would be through loans against the capital of the NexGen shares. However, Yuanta was granted flexibility as to the strategies it could use to raise capital. If Yuanta itself advanced the loan monies, it would have taken a security interest in the shares held against such a loan. If Yuanta chose to re-pledge the shares, the plaintiffs conceded in the court below that Yuanta had the authority to re-pledge the shares to any lender; it was not obliged to obtain a loan from Crédit Agricole specifically (Judgment at [372] and cl 1 of the Supplementary Agreement). Further, besides re-pledging the shares, cl 1(c) granted Yuanta authority to "sell [or] trade" the NexGen shares as well. This was reiterated in cl 4(c) wherein the plaintiffs explicitly "confirm[ed] … that [Yuanta] may carry out various trading and hedging strategies". The plaintiffs also guaranteed under cl 5(c) that the shares would be transferred to Yuanta free of encumbrances and could be

"freely traded". Read together, these clauses show that the parties intended Yuanta to have flexibility to adopt other strategies (besides re-pledging the shares to raise loans) so as to realise the value of the NexGen shares. Indeed, such flexibility was needed because the value of the NexGen shares, being shares watch-listed by SGX, were potentially difficult to realise.

55 Importantly, whatever strategies were adopted by Yuanta, it must be borne in mind that Yuanta would have been dealing with trust property beneficially owned by TPG. Thus, Yuanta would always have had to account to TPG for its dealings in the exercise of its authority under cl 1(c), in such a manner as follows:

(a) For as long as the shares had not been re-pledged against a loan, Yuanta held the shares on trust for TPG as potential collateral to secure a future loan for the joint venture, which Yuanta was to arrange in exchange for loan fees.

(b) If the shares were re-pledged by Yuanta to a third party lender against a loan, such loan monies were to be applied to capitalise AEM. If the loan was repaid and the security redeemed, the shares were to be returned to TPG; but this being a non-recourse loan, TPG also stood to lose the shares in the event of a default.

(c) If Yuanta traded the shares, the proceeds acquired through an initial sale were to be held in the Yuanta Account on trust for TPG, to provide capital for the shares' repurchase (the discretion to "sell [or] trade" signifies that a sale could be reversed by a repurchase, hence "trade").

(d) If Yuanta chose to sell the shares (*ie*, without a repurchase), the proceeds of sale were to be deposited back into the Yuanta Account. As this would be an authorised sale, TPG's equitable interest in the shares would be transferred into the cash proceeds in substitution. Such cash proceeds remained in the nature of collateral in which Yuanta had no beneficial interest; the beneficial interest remained in TPG. However, where the shares have been converted into cash upon a sale, it makes little sense to speak of the cash as collateral for a future loan. Although it was not expressly stated in the contract, bearing in mind that the parties' wider purpose was to raise capital for the joint venture, we believe that any cash proceeds of a sale of the shares could only be applied in two ways: (a) to repurchase the shares in exercise of its authority under cl 1(c) to "trade" the shares; or (b) as a capital infusion into AEM in the absence of a loan. The possibility that sale proceeds could go directly to the AEM account, in place of loan proceeds, was not, we think, expressly contemplated by the parties in their submissions. However, we think it a necessary corollary of the parties' contractual arrangements. Where capital was raised by a sale, there would be no need for those sale proceeds to form the collateral of a loan. Such capital would however remain beneficially TPG's since Mr Yeh only shared in half of AEM's profits or losses, but not its capital, under the Supplementary Agreement.

56 Indeed, during the hearing of these appeals, counsel instructed for the defendants, Ms Deborah Barker SC, accepted that while the Agreements gave Yuanta flexibility as to how to raise funds and how to collateralise the loans that Yuanta was to arrange, Yuanta did not have a "blank cheque". She accepted that however Yuanta dealt with the shares, the shares or the substitute assets into

which the shares had been converted had to be held for TPG in the Yuanta Account and remained in the nature of collateral or future collateral. Thus, any proceeds or profits were not beneficially the defendants'. She conceded that Yuanta would need to account to TPG for the proceeds of the 60m Sale and 225m Sale and the profits made on the 101.5m Sale & Repurchase.

57 These were important concessions that provided sufficient basis for the Appeal to fail. A month after the hearing, the defendants' solicitors, Joo Toon LLC, attempted to retract these concessions by letter. Their solicitors sought to clarify the defendants' position that in relation to shares over which Yuanta had a power of sale, Yuanta was to account for the share proceeds to AEM rather than to TPG. We were of the view that this was an impermissible attempt to furnish further arguments without the leave of the court. Accordingly, we disregarded these arguments and proceeded on the basis of the submissions as at the close of the hearing.

58 Thus, Yuanta was vested with legal title to the shares in the Yuanta Account for the purpose of monetising the shares to raise capital for AEM only. We consider that the Agreements provided for capital to be raised not only by loans against the capital of the NexGen shares, but also by injecting the capital raised through the monetisation of the NexGen shares into AEM in the absence of a loan. Yuanta's power to sell, trade or re-pledge the shares was to be applied for the purpose of preserving or maximising the value of the capital that could be raised using the shares. In no circumstances was Yuanta granted a free right to profit from its dealings with the shares for its own benefit. Indeed, giving Yuanta carte blanche over the shares or their proceeds of sale would make no commercial sense because the plaintiffs would have received no consideration at all for conferring such a benefit on Yuanta. Although it was the essence of

the defendants' case both at trial and, originally, on appeal, that somehow or other the right to sell or trade the NexGen shares translated into a right to keep or use the proceeds or profits for Yuanta's own benefit, that was an impossible premise, and one which was not maintained by Yuanta's counsel, Ms Barker, during her oral submissions before us.

59 In our view, properly analysed, the present case hinges on issues of property law arising from the distinction between legal and equitable interests in the NexGen shares in the Yuanta Account.

Parties' cases at trial

Plaintiffs' claims

60 At the trial below, the parties disputed the scope of duties they owed to each other. The plaintiffs contended that on a proper construction of the Agreements, Yuanta was not authorised to sell the shares unless Yuanta was the ultimate lender from whom the loan monies were disbursed, or unless the plaintiffs were in default. They also contended, seeing how the Agreements and the joint venture relationship were structured, that the parties owed fiduciary obligations to each other. These fiduciary duties included a duty to act in good faith and in the plaintiffs' best interests; to avoid conflicts of interest; to hold the NexGen shares in the Yuanta Account on trust for the plaintiffs and deal with the shares for the parties' joint benefit; to maintain a proper system of account in respect of the NexGen shares held on trust for the plaintiffs; and to exercise any purported right of sale of the NexGen shares in good faith.

61 The plaintiffs alleged the following breaches of duty in relation to Yuanta's dealings with the NexGen shares:

(a) First, in relation to the Share Sales, they alleged that it was a breach of contract and fiduciary duties (specifically, the fiduciary duty of good faith and honesty and the duty to avoid secret profits) for Yuanta to have disposed of the shares without authority and retained the proceeds of sale for its own benefit. It was pleaded that the defendants held the shares and the proceeds of any unauthorised sale on trust for the plaintiffs, although in closing submissions the plaintiffs argued that the defendants committed fiduciary breaches rather than breach of trust. It was also alleged that the Share Sales amounted to a conversion of the shares. As damages or equitable compensation (as the case may be), the plaintiffs sought the profits made on the 101.5m Sale & Repurchase and the proceeds of the 60m Sale and the 225m Sale.

(b) Second, in relation to the 765m Re-Pledged Shares, the plaintiffs claimed that it was a breach of contract and fiduciary duties for the defendants to have re-pledged the 765m Shares to EFH. The contractual claim was advanced on the premise that it was a fundamental term of the Agreements that Crédit Agricole was to be the lender to whom the NexGen shares were pledged and from whom loan funds were obtained. The claim for breach of fiduciary duties was founded on allegations that the defendants had deliberately encouraged the plaintiffs' mistaken belief that the Crédit Agricole was the lender and had deliberately concealed the identity of EFH as the true lender from the plaintiffs. The plaintiffs claimed that Mr Hartanto would not have offered TPG's NexGen shares as security if he had known that EFH was the true lender. Thus, the plaintiffs sought damages or equitable compensation for the value of the 765m Re-Pledged Shares, as part of their claim for an account for the value of the 1.05bn shares. (We refer to this head of loss as the "Re-Pledged Shares Loss" in the Cross-Appeal; see [6] above.)

62 Finally, several of the plaintiffs' claims were overarching ones in the sense that they concerned both the Share Sales and the 765m Re-Pledged Shares:

(a) First, the plaintiffs claimed that Mr Yeh was liable in tort for inducing Yuanta's breaches of contract, and in equity for dishonestly assisting Yuanta in its breach of trust and fiduciary obligations. However, it appears that the claim in dishonest assistance was dropped in their closing submissions.

(b) Second, the plaintiffs claimed that the Share Sales caused the price of NexGen's shares to fall drastically, leading to losses to TPG's wider portfolio of NexGen shares, which fell by 80% in value. Thus, if it was established that the Share Sales and the EFH Pledge were carried out in breach of fiduciary duty, the plaintiffs claimed compensation for losses caused to TPG's wider portfolio of NexGen shares. (We refer to this head of loss as the "Portfolio Loss" in the Cross-Appeal; see [6] above. It pertains to NexGen shares owned by TPG that were never transferred into the TPG Account or the Yuanta Account.)

(c) Lastly, the plaintiffs alleged in their reply to the defence that the defendants conspired to injure them by unlawful means.

Defendants' case

63 In their defence, the defendants contended that under the Agreements, Yuanta had unfettered discretion to deal with the shares during the term of the

Agreements. This included a discretion to sell or trade the shares. Further, the defendants contended that the parties did not owe each other any fiduciary obligations. They denied concealing the identity of EFH as lender and encouraging the plaintiffs' belief that the funds were from Crédit Agricole. In relation to the 101.5m Sale & Repurchase specifically, the defendants claimed that the sale and repurchase was carried out at Mr Hartanto's express instructions. They also contended that any proceeds or profits from the sale or trading of the shares were theirs to dispose of at their will.

Defendants' counterclaims

64 In addition, the defendants brought three counterclaims. The first related to the Share Warrants for the acquisition of 225m fresh NexGen shares, which were meant to be exercised using the loan monies. According to the defendants, Mr Hartanto was obliged to transfer either 225m shares from the TPG Account to the JV Account, or 112.5m shares to the Yuanta Account (on the premise that Yuanta was entitled to 50% of AEM's assets). As the plaintiffs had failed to do so, the defendants procured the transfer of the October 225m shares from the TPG Account to the Fullerton Account in order to satisfy the plaintiffs' outstanding obligations. Notwithstanding this transfer, the defendants claimed that they suffered S$5,175,000 in losses as they had lost the opportunity to sell the shares converted from the Share Warrants at a higher price earlier on, before the fall in the price of NexGen shares. In their defence, the plaintiffs argued that they had fulfilled their obligations by transferring the March 225m shares into the Yuanta Account. Mr Hartanto had stated in his affidavit that the March 225m shares were to be "treated as" the shares converted from the exercise of the Share Warrants (see [20] above).

65 The second counterclaim related to the $1.8m Transfer. As we sketched briefly at [32] above, the defendants claimed that under an oral agreement, Yuanta transferred S$1.8m as a loan to Mr Hartanto in consideration for the transfer of an additional 700m NexGen shares as collateral into the Yuanta Account. As Mr Hartanto failed to transfer 700m shares to the Yuanta Account, the defendants said they were entitled to be repaid the S$1.8m. In response, the plaintiffs claimed that the S$1.8m was a repayment to Mr Hartanto for the first tranche of his purchase of Mr Koesnadi's shares for AEM. According to the plaintiffs, the transfer of a further 700m shares to the Yuanta Account was not consideration for a personal loan but part of its existing obligations under the Loan Agreement, except that Mr Hartanto was only prepared to make the further transfer if the status of the 825m Shares was first clarified to his satisfaction.

66 Lastly, the defendants alleged that the plaintiffs had breached the Supplementary Agreement by using the loan monies for their private purposes. This raised the issue of whether the Scorpio East shares (see [31] above) had been properly acquired for AEM using the loan monies.

Decision below

67 The plaintiffs succeeded in their claims of breach of contract, breach of fiduciary duties, conversion and inducement of breach of contract insofar as the Share Sales were concerned. They failed in their conspiracy claim and in their claim for compensation for the Portfolio Loss and the Re-Pledged Shares Loss. Thus apart from the tort of conversion which is premised on an interference in property, the case below was resolved entirely on basis of the defendants' personal obligations.

Scope of duties owed by the parties in contract and equity

68 On the construction of the Agreements, the Judge found that the parties agreed that Yuanta was entitled to sell, pledge or trade the shares during the course of the Loan Agreement and to engage in hedging and trading strategies. However, Yuanta could only deal with the shares which had been re-pledged – in other words, the shares that were held in exchange for a loan and in respect of which Yuanta was at risk of default to the ultimate lender. Yuanta could not deal with the shares that had not yet been re-pledged against a loan but were "available to be pledged or used as collateral for *future* loans" [emphasis added] (see Judgment at [212]–[214]).

69 On the existence of fiduciary obligations, the Judge found that there were aspects to the parties' joint venture relationship in which each owed the other fiduciary obligations. She arrived at this conclusion considering that Yuanta acted "as trustee" of TPG's NexGen shares in the Yuanta Account that had not been re-pledged against a loan; the great deal of trust reposed by the plaintiffs in the defendants when they transferred their NexGen shares into the Yuanta Account; and the defendants' dependence on the plaintiffs to use the loan funds for mutual benefit. In this context, "[e]ach party was exercising power or discretion for and on behalf of the other party to the joint venture" (Judgment at [225]).

70 The content of their fiduciary obligations included: an obligation by the plaintiffs to ensure that joint investments were for the parties' mutual benefit and profit, and not their secret profits; an obligation by the defendants to use the pledged shares as collateral or security for loans for the benefit of the joint venture and not make profits from the shares held on trust for the plaintiffs prior to being pledged against a loan; and mutual obligations not to make or retain

secret profits (Judgment at [227]). These duties rested on the core fiduciary obligations of good faith and loyalty, as well as the rule against profiting from one's fiduciary position (at [218]). The Judge rejected the plaintiffs' attempts to overlay additional fiduciary duties, such as a duty to preserve the value of the collateral (at [228]). The Judge further reasoned that the defendants were "not entitled to sell the shares that had not been pledged against a loan as those shares were held on trust for the plaintiffs until such loan was arranged and such security provided" (at [229]).

Breaches by the defendants

71 Given her construction of the contract, the Judge found that the Share Sales were unauthorised by the plaintiffs and concerned shares that had not been re-pledged against a loan at the time of sale. Thus the Share Sales constituted a breach of contract by the defendants (see Judgment at [384], [387] and [388]). The Judge also found that the defendants breached their contractual obligation of good faith by dishonestly failing to disclose the unauthorised Share Sales to the plaintiffs and failing to disabuse the plaintiffs of the impression that the shares had been pledged to Crédit Agricole (at [395]–[396]).

72 In the defendants' favour, the Judge found that the defendants did not breach the Agreements by obtaining loans from a lender other than Crédit Agricole, pledging the 765m Shares to EFH for the loan, failing to notify the plaintiffs of margin calls from EFH, failing to service the interest on the EFH loan, or failing to disclose the terms of Yuanta's loan from EFH (at [372], [380], [392]–[393] and [397]). It is not entirely clear how the Judge's findings that the defendants were in breach of a contractual obligation of good faith and were dishonest in failing to disabuse the plaintiffs of the impression that the shares had been pledged to Crédit Agricole on the one hand, and her finding that there

was no breach in obtaining a loan from EFH rather than Crédit Agricole on the other hand, fit together. We will need to revert to these matters below.

73 The Judge was satisfied that Mr Yeh induced Yuanta's breaches of contract because he was the controlling mind of Yuanta (at [398]).

74 Turning to fiduciary breaches, the Judge found that both defendants breached their fiduciary duties by earning secret profits from the Share Sales and by failing to turn over some loan monies to the JV Account (Judgment at [415]–[416] and [418]–[419]). The Judge additionally found that Mr Yeh breached his fiduciary obligations by encouraging the plaintiffs' mistaken belief that Crédit Agricole was the lender and by failing to disclose the Share Sales (at [412]–[413]). However, the plaintiffs failed to establish that the defendants did not keep proper accounts, that they owed a duty to not retain 10% of the loan sums, or that they owed a duty to pre-empt, arrest or resolve EFH's margin calls (at [423], [425] and [426]).

75 In addition, the Judge found that both defendants were liable in the tort of conversion in respect of the unauthorised Share Sales (at [433]).

76 Although breach of trust was pleaded and the Judge was satisfied that Yuanta held the shares on trust for TPG, it seems the parties did not make submissions on the basis of a breach of trust, and neither did the Judge decide the matter on that basis.

77 The Judge dismissed the plaintiffs' conspiracy claim. The only unlawful means that were found to have been pleaded were three misrepresentations, namely that Mr Yeh was linked to Yuanta Financial Holdings in Taiwan, that Crédit Agricole was the lender, and that Crédit Agricole would charge a fee

amounting to 10% of the loan sums. These misrepresentations had not been proved, while the other unlawful means on which the plaintiffs sought to rely had not been pleaded as unlawful means (at [452]).

Remedies for the defendants' breaches

78 In summary, therefore, the Judge found that by conducting the Share Sales, Yuanta had committed breaches of contract, breaches of fiduciary duties and the tort of conversion. Mr Yeh was held liable for inducing Yuanta's breach of contract. In terms of relief, the Judge granted the following orders in the plaintiffs' favour:

(a) The defendants were to pay S$1,848,723.75 into a joint trust account held by the parties' solicitors pending the finalisation of the joint venture accounting exercise envisaged by the plaintiffs. This sum represented the shortfall in loan proceeds that the defendants had failed to turn over to AEM's use (Supplemental Judgment at [78(a)]).

(b) The defendants were to pay S$6,464,839.37 to the plaintiffs in respect of the unauthorised Share Sales (Supplemental Judgment at [78(b)]). This comprised the profits on the 101.5m Sale, the proceeds of the 60m Sale and the value of the October 225m shares at the time they were misappropriated from the TPG Account (which exceeded the proceeds of their sale) (Judgment at [429]; Supplemental Judgment at [18], [19] and [23]).

79 However, the Judge rejected the claim for equitable compensation for the Re-Pledged Shares Loss, *ie*, the value of the 765m Re-Pledged Shares at the time they were transferred by TPG into the Yuanta Account (Judgment at

[428]). This was rejected because loans had properly been provided to AEM on the basis of the shares' value at the time of the loans. The Judge also rejected the claim for equitable compensation for the Portfolio Loss, because the evidence was inconclusive as to whether the 60m Sale and the 225m Sale had caused a reduction in the price of NexGen shares (at [516]).

Defendants' counterclaims

80 The defendants failed in all their counterclaims:

(a) In relation to the Share Warrants, the Judge found that it was technically a breach of the Supplementary Agreement for TPG to have transferred 225m of their own NexGen shares (*ie*, the March 225m shares) into the Yuanta Account instead of applying the S$6.75m withdrawn from the JV Account to the exercise of the Share Warrants. However, the Judge held that since AEM was always going to incur the cost of S$6.75m to obtain 225m shares, the defendants were not entitled to any relief even if the S$6.75m was eventually paid to the plaintiffs (for the transfer of their own NexGen shares into the Yuanta Account) instead of NexGen (through exercising the Share Warrants). The Judge treated the March 225m shares as a joint venture asset acquired by AEM for the price of S$6.75m (Judgment at [533]). There was also no agreement that the 225m shares converted from warrants were intended to be cashed out in the market for an immediate profit.

(b) As for the $1.8m Transfer, the Judge rejected the defendants' claim that the sum was transferred as a personal loan. She was satisfied on balance that the payment of S$1.8m from Yuanta to AEM and in turn to TPI was in accordance with an earlier plan for AEM to purchase Mr

Koesnadi's shares (Judgment at [67] and [360]). Any expectation that TPG was to transfer another 700m shares to Yuanta was merely for providing further shares for pledging for loans under the existing Loan Agreement (at [360]).

(c) Finally, the Judge was satisfied that the Scorpio East shares were acquired for AEM as a joint investment (Judgment at [305]).

Issues in these appeals

The Appeal by the defendants

81 In the Appeal, the defendants do not challenge the Judge's findings of fact. The defendants appeal against their liability in respect of the Share Sales on four grounds. First, they reiterate their argument below that on a true construction of the Agreements, Yuanta was entitled to sell the shares in the Yuanta Account regardless of whether the shares had been re-pledged against a loan. Second the defendants deny holding the shares in the Yuanta Account on trust and deny owing any fiduciary obligations to the plaintiffs in respect of the disposal of the shares in the Yuanta Account. Third, following from their right to dispose of the shares, the defendants deny liability in conversion for their disposition of the shares. Finally, they argue that the Judge erred in finding Mr Yeh liable for inducing Yuanta's breaches of contract (if upheld) on the basis of the rule in *Said v Butt* [1920] 3 KB 497 ("*Said v Butt*").

82 In relation to the defendants' liability for the Share Sales, the issues are:

(a) What was the nature of the parties' rights, obligations and proprietary interests in relation to the shares in the Yuanta Account under the Agreements? Our views on this issue, having taken into account the parties' arguments, have been set out at [37]–[56] above.

(b) Was the disposal of the shares and/or their proceeds of sale a breach of any obligations owed by the defendants?

(c) Was Mr Yeh liable for inducing Yuanta's breach of contract (if established)?

(d) In any event, were the defendants entitled to dispose of the proceeds or profits of the Share Sales for their own benefit?

83 The defendants also seek to uphold their counterclaims, albeit in a slightly modified form at this stage:

(a) With regards to Scorpio East, the defendants seek via CA/SUM 58/2017 to adduce fresh evidence to show that the Judge was wrong to find that the Scorpio East shares belonged to AEM. On this basis, they seek the return of the S$3m withdrawn from the JV Account purportedly to purchase the Scorpio East shares.

(b) In relation to the Share Warrants, the defendants now seek the return of S$6.75m to a joint trust account given that this sum was not applied to exercise the Share Warrants.

(c) Lastly, the defendants dispute the Judge's findings that the $1.8m Transfer was not a loan from Yuanta to Mr Hartanto, because she did not justify why she preferred the plaintiffs' evidence to the defendants' evidence, when she found both sides' evidence to be deficient in some respects.

The Cross-Appeal by the plaintiffs

84 In the Cross-Appeal, the plaintiffs appeal in respect of their unsuccessful claims for compensation for the Re-Pledged Shares Loss and the Portfolio Loss.

85 First, in respect of the Re-Pledged Shares Loss, the plaintiffs seek equitable compensation for the value of 600m of the 825m Shares transferred by TPG into the Yuanta Account. They seek compensation for only 600m shares because it is their position that the March 225m shares belong to AEM, and AEM had paid good consideration of S$6.75m for it. They argue that the loss of value of these 600m shares flows from the defendants' breach of fiduciary duties of good faith and loyalty by concealing EFH's role in the pledging arrangement whilst encouraging the plaintiffs' misapprehension that Crédit Agricole was the lender. They argue that the Judge erred in failing to award compensation despite finding that Mr Hartanto would have carried out further checks on EFH if he had known that EFH was the lender to whom the 765m Shares had been re-pledged. They contend that where a fiduciary has wilfully failed to disclose information to the principal, the transaction embarked upon by a fiduciary is voidable as long as it is not proved that the principal would have affirmed the transaction.

86 Second, the plaintiffs seek equitable compensation for the Portfolio Loss – the fall in value of the 2.6bn NexGen shares held by TPG and never transferred to Yuanta. They argue that this loss was caused by the defendants' breach of fiduciary duties in selling, and permitting EFH to sell, the NexGen shares which had been transferred from TPG to Yuanta, which led to a fall in the share price.

87 Finally, the plaintiffs allege that the defendants conspired through unlawful means to cause the prices of NexGen shares to fall. The unlawful

means comprised the unauthorised Share Sales, encouraging the plaintiffs' belief that Crédit Agricole was the lender, and the secret re-pledging of shares to EFH. They dispute the Judge's finding that these acts were not pleaded as unlawful means. If found to be pleaded, the plaintiffs argue that based on the evidence adduced at trial, they ought to have succeeded in proving an intention to injure and causation between the unlawful acts and the collapse in the share price of NexGen. If they succeed in proving unlawful means conspiracy, the plaintiffs seek to be compensated in damages for the Portfolio Loss and the Re-Pledged Shares Loss.

88 The issues raised by the Cross-Appeal are thus as follows:

(a) Did the defendants' breaches of fiduciary duty cause the Re-Pledged Shares Loss? What is the test of causation in equity where a fiduciary's breach consists in non-disclosure of a material fact to the principal?

(b) Did the defendants' breaches of fiduciary duty cause the Portfolio Loss?

(c) What acts were pleaded by the plaintiffs as the unlawful means for the purposes of the tort of unlawful means conspiracy? Were the elements of the tort of unlawful means conspiracy satisfied on the facts of this case?

Evaluation of the arguments and decision below

89 As can be seen, the plaintiffs ran their case primarily on the basis of breach of contract and breach of fiduciary duties. Accordingly, the Judge grounded the defendants' liability in *personal* wrongs rather than an

interference with property rights. Crucially, the plaintiffs, the defendants and the Judge all failed to distinguish between the legal and equitable interests in the NexGen shares in Yuanta's hands. Without identifying and relying upon TPG's beneficial interest in the shares, it seems that the parties and the Judge were compelled to proceed as though Yuanta had acquired a full interest in the shares, leaving the plaintiffs' recourse in fiduciary breaches. This was despite occasional references by the Judge to Yuanta having acted "as trustee".

90 In our view, the failure to distinguish between legal and beneficial interests in the shares led to the case being argued in an unnecessarily complex fashion. This in turn led the Judge into complications in relation to issues such as the imposition of fiduciary duties upon a joint venture relationship without grounding these fiduciary duties in a trust.

91 In the light of our analysis of the parties' contractual arrangements (at [37]–[56] above), the analysis is in our view much simpler. Since the plaintiffs retained the beneficial interest in the NexGen shares, the crux of the wrong against the plaintiffs lay in the misapplication of trust property and not the use of the fiduciary position to make secret profits in breach of fiduciary duties. Indeed, once it is recognised that the NexGen shares belonged beneficially to TPG, it becomes clear that the proceeds made on the 60m Sale and 101.5m Sale & Repurchase were not even secret profits to begin with. First, since Yuanta was authorised to sell the shares under cl 1(c) of the First Loan Agreement, the sales were not "secret". Second, Yuanta did not make "profits" from the sales; when Yuanta sold the shares and obtained money in exchange, it obtained the *proceeds* of the sale (*ie*, the substitute for the shares) rather than *profits* in addition to the trust property. Hence, when Yuanta transferred the proceeds of the sales to Mr Yeh, it misapplied the *trust property* itself. Though it was

through this misapplication that Mr Yeh's companies and associates "profited", the profit consisted of the trust property. Likewise, when Mr Yeh procured a transfer of the October 225m shares from the TPG Account to Fullerton and thereafter sold it and pocketed the proceeds of sale, he intermeddled with property that was beneficially TPG's; the wrong did not consist in obtaining a secret profit using trust property but in misappropriating the property itself.

92 Thus in our view, the plaintiffs' recourse lay in an action for the misapplication of TPG's property. Fiduciary obligations *outside* the holding of the NexGen shares in trust for TPG are beside the point. Whereas below the case appears to have been argued and decided on the premise that the transfer of the shares to Yuanta constituted a transfer of the complete property in the shares to Yuanta, so that the plaintiffs' remedies had to be founded on the creation of fiduciary obligations arising out of the joint venture arrangements as a whole, in our view the matter is to be simplified by the foundational fact that the transfer of the NexGen shares to Yuanta as collateral or potential collateral was no more than a transfer of a legal interest in them, while the beneficial interest in the shares or their proceeds remained with TPG. It was not a case of fiduciary duties creating a trust out of Yuanta's property, but of TPG's enduring beneficial interest creating a trust (with standard fiduciary duties) of the shares when transferred to Yuanta. Having made this general comment, we now deal with the specifics of each aspect of the Appeal and Cross-Appeal.

The Appeal: the defendants' liability in respect of the Share Sales

93 We begin with the defendants' appeal against their liability to account for the proceeds of the Share Sales at [78(b)] of the Supplemental Judgment. We set out the Judge's findings in detail at [68]–[75] above. Essentially, the Judge found the defendants in breach of contract and of their fiduciary

obligations by carrying out the Share Sales. The defendants appeal against both conclusions.

Yuanta's liability in contract

94 The Judge found that Yuanta had the authority to sell, trade or pledge the shares but that this authority only extended to shares that had been re-pledged against loans. Since the Share Sales related to shares which were unpledged at the time of sale, Yuanta had no authority to sell them. Accordingly, the Judge held that the Share Sales were carried out in breach of contract (Judgment at [387] (60m Sale); at [384] (101.5m Sale & Repurchase); and at [388] (225m Sale)). In respect of the 101.5m Sale & Repurchase, the Judge rejected Yuanta's defence that the plaintiffs had given express authority to sell/trade these shares outside the contract.

95 On appeal, the defendants argue that Yuanta's authority to sell extended to all the shares in the Yuanta Account, as there were no words in the Loan Agreement that limited its authority solely to shares that had been re-pledged against a loan. In fact, the defendants contended in their written submissions that the shares were transferred absolutely to Yuanta as soon as TPG deposited them in the Yuanta Account. TPG's interest was limited to a contractual right to redeem either the shares or their equivalent cash value when TPG paid back the loan. This submission was not pursued at the oral hearing, during which Ms Barker in fact accepted that Yuanta held the shares legally for TPG beneficially. In the absence of that concession, Yuanta's alleged right to pocket the proceeds or profits of sales had to be founded on the idea that the complete property in the shares had somehow been transferred to Yuanta, if not at the point of transfer to Yuanta then at any rate once Yuanta had exercised its authority and discretion to sell or trade the shares. One might wonder why on earth TPG would have

been willing to do that. In our view, Ms Barker's concession at the oral hearing was rightly, and inevitably, made.

96 For reasons explained at [52] above, we agree with the defendants that Yuanta had authority to "sell, trade or pledge" all shares placed in the Yuanta Account, regardless of whether they had been pledged against a loan. The Judge's interpretation, confining the authority in cl 1(c) to shares that have been re-pledged towards a loan, was erroneous for several reasons.

97 First, it contradicts the wide definition of "Pledged Securities" on a plain reading of cl 1 (see [52] above). Second, it would lead to an absurd outcome. If the loan was advanced by a third party lender, Yuanta would lose the ability to sell or trade the shares because the shares would be in the possession of the lender or otherwise encumbered by the lender's interest; in these circumstances, it would be the lender's consent or authority that is required for a sale or trade. Since on the Judge's interpretation, Yuanta had no authority to sell or trade shares that were *not* held against a loan, the authority to "sell [or] trade" in cl 1(c) would be entirely useless. Indeed, the Judge herself recognised that on her construction, "the authority Yuanta had under the Loan Agreement to sell the shares was irrelevant" because the only shares over which Yuanta could exercise this authority (*ie*, the 765m Re-Pledged Shares) were in EFH's custody (Judgment at [214]). Hence, we prefer the interpretation that subjects all shares in the Yuanta Account to Yuanta's authority.

98 Third, we disagree with the Judge's understanding of the commercial purpose of Yuanta's discretion under cl 1(c). We note that in construing the Agreements, the Judge was influenced by her view of the commercial purpose behind Yuanta's authority to deal with the shares. She held that Yuanta only had

authority to deal freely in the shares if it had put itself "at risk" of non-payment (Judgment at [213]), presumably by itself advancing a loan against the security of these shares or by making itself personally liable for the repayment of the loan to the ultimate lender. She reasoned that the parties gave Yuanta the discretion to deal with the shares only in order to protect Yuanta's position in the context of a non-recourse loan where the lender could only look to the shares for recourse if the borrower defaulted (Judgment at [212]). Thus she concluded that Yuanta could only deal with shares that had been pledged against a loan.

99 In our view, the Judge's understanding of the commercial purpose of Yuanta's discretion is sensible but incomplete. The commercial purpose she has identified makes sense only where Yuanta is itself the lender, because it is only in such a situation that Yuanta would itself be at risk of non-payment and would have an interest in preserving the value of the collateral it can call on in the event of a default. But where Yuanta has procured the loan funds from a third party lender, Yuanta is not at risk at all because the third party lender can only look to the shares for recourse in a default. Yet the Judge found, and it is undisputed in this appeal, that Yuanta had the authority to pledge the shares to any lender (Judgment at [372]). Clause 1 of the Supplementary Agreement makes clear that Mr Hartanto and Mr Yeh envisaged that the 3.6bn shares were to be put forward for the purpose of obtaining a loan "from [Yuanta] *or institutions by guarantee of or in co-operation with* [Yuanta]". Furthermore, the Judge expressly rejected the submission that there should be an implied term that cll 1(c), 4(c), 4(e) and 4(f) do not apply unless Yuanta provides its own funds under the Loan Agreement (Judgment at [208]). If the power under cl 1(c) is operative *regardless of whether Yuanta itself advances the loan funds*, the commercial purpose identified by the Judge must be inadequate.

100 As explained at [58] above, we take the view that, in view of the entire structure of the parties' arrangements under the Agreements, Yuanta's discretion to "sell, trade or pledge" served a wider purpose of maximising or preserving the value of the shares so as to maximise or preserve either the loan value obtainable by the joint venture on the security of those shares, or the capital raised by the monetisation of those shares in the absence of a loan. This makes sense because the parties' objective was ultimately to raise capital for AEM's investments. This purpose is compatible with the view that Yuanta's discretion was exercisable in relation to *all* the shares in the Yuanta Account whether or not they were held as security for a loan.

101 Finally, implicit in the Judge's reasoning is the assumption that if Yuanta sold or traded the shares, any benefit of such sale or trade accrued to Yuanta personally. The Judge may have been concerned to narrow the scope of shares covered under Yuanta's authority because she found that Yuanta enjoyed an unfettered discretion to deal with these shares *for its own benefit*. However, once we recognise that the beneficial interest in the shares or the assets into which the shares have been converted remained in TPG, the appropriate limits to Yuanta's dealings are generated by property law. It is unnecessary to constrain the definition of "Pledged Securities" as such.

102 To conclude, since we find that Yuanta possessed authority to sell all shares in the Yuanta Account, including shares that were not re-pledged against loans, the Judge's reasoning on breach of contract cannot stand. Selling the shares placed in Yuanta's custody is in itself authorised under the Agreements. Yuanta did not breach the Agreements when it carried out the 60m Sale and the 101.5m Sale & Repurchase because these sales were expressly authorised by the Agreements. As the 225m Sale was carried out by Fullerton instead of

Yuanta, Fullerton did not have the same contractual authority to sell the shares, but neither is Yuanta liable since it did not carry out the sale.

103 Accordingly, we find that Yuanta is not liable for any breach of contract.

Yuanta's liability in breach of trust or fiduciary duty

104 Notwithstanding that Yuanta had authority to sell the shares, we find that Yuanta misapplied trust property when it paid the proceeds of the 60m Sale and the profits of the 101.5m Sale & Repurchase to unauthorised recipients.

105 The Judge found that the parties' joint venture relationship "included Yuanta acting as trustee of the plaintiffs' NexGen shares that had been transferred into [the Yuanta Account] and had not been pledged against a loan" (Judgment at [221]). She also found that the defendants were not entitled to sell the Unpledged Shares as those shares "were held on trust for the plaintiffs until [a loan on those shares] was arranged and such security provided" (at [229]).

106 Notwithstanding this finding of a trust, in the court below, the plaintiffs characterised their claim as a breach of fiduciary duties and not a breach of trust, although a breach of trust was pleaded. The Judge agreed with the plaintiffs. She held that the parties owed each other fiduciary duties moulded to the specific context of their joint venture (see [69]–[70] above). Rather than a breach of trust, she found that the defendants breached their fiduciary duties in two main ways. First, the defendants made secret profits from the Share Sales. Second, the defendants were not honest with the plaintiffs as they failed to disclose the Share Sales and encouraged the plaintiffs' mistaken belief that Crédit Agricole was the lender (Judgment at [411]–[416]).

107 On appeal, the defendants submit that the Judge wrongly found that fiduciary duties existed. They say that while the parties' agreements required trust and confidence, this does not mean that fiduciary obligations would arise. The only obligations were under contract and tort.

108 In our view, the Judge rightly found that the defendants owed fiduciary obligations to the plaintiffs, but this stemmed from a trust under which Yuanta held legal title to the shares in the Yuanta Account for TPG beneficially. Moreover, such a trust continued after loan proceeds or share sale profits or proceeds were transferred to AEM, because such *capital infusions* transferred to AEM from TPG's property remained in TPG's beneficial interest. The joint venture arrangements, whether at the Yuanta stage or at the AEM stage, constituted a trust of such property in favour of TPG. Fiduciary duties of course follow.

109 However, as we suggested above, we are of the view that the plaintiffs and the Judge mischaracterised the wrong committed by Yuanta. The crux of the wrong against the plaintiffs did not lie in a breach of fiduciary duty, whether through the dishonest concealment of EFH's role in the loan arrangement or the earning of secret profits through the sales of the shares without the plaintiffs' knowledge. We have found that Yuanta's sales/trades were *in themselves* authorised under cl 1(c) of the First Loan Agreement. To this extent, the sales were not "secret", because prior authorisation had been granted. Neither did Yuanta make "profits" from the sales. When Yuanta sold the shares and obtained money in exchange, it obtained the *cash into which the shares had been converted*, rather than *profits* in addition to the trust property. TPG's beneficial interest in the shares was to be traced into their substitute, the proceeds of sale. Hence, when Yuanta transferred the proceeds of the sales to

Mr Yeh and his business associates and relatives, it misapplied the *trust property* itself. That said, we are not minded to disturb the Judge's conclusion that the defendants breached their fiduciary duty of good faith and honesty, which was fully justified on the evidence, but the essence of that breach lay rather in the misappropriation of trust property, rather than in the sales or trading of the shares or in the choice of EFH as an undisclosed lender.

110 Thus, although Yuanta's sale/trade of the shares was not wrongful, we find that Yuanta misapplied trust property in its dealings in the *proceeds of sale*. As we explained at [55(d)] above, if Yuanta sold the shares, the proceeds of sale were to be held in the Yuanta Account on trust for TPG, because the cash in substitution for the shares remained in the nature of collateral in which the beneficial interest remained in TPG. Within the terms of the Agreements, any cash proceeds of a sale of the shares could only be applied in two ways: (a) to repurchase the shares in exercise of its authority under cl 1(c) to "trade" the shares; or (b) as TPG's capital infusion into AEM in the absence of a loan. Proceeding with this analysis, we find Yuanta liable for the following breaches of trust:

(a) For the 60m Sale, while Yuanta was entitled to sell the shares to third parties, it must have held the proceeds of the sale for TPG beneficially. Yuanta misapplied the trust property when it paid out the proceeds to its related companies which were not entitled to any beneficial interest in the proceeds.

(b) Similarly, for the 101.5m Sale & Repurchase, Yuanta was entitled to sell and repurchase the shares but the profits earned on such a trade strategy remained trust property and should have been applied to increase the amount of capital injected into AEM. Again, Yuanta misapplied the trust property when it paid out the profits to Mr Yeh's business associates and relatives who were not entitled to any beneficial interest in the proceeds.

(c) The 225m Sale is different, however, because the October 225m shares which were the subject of this sale were never placed into the Yuanta Account and were never handled by Yuanta. It would be recalled that the October 225m shares were transferred by Mr Yeh from the TPG Account directly into the Fullerton Account without passing through the Yuanta Account. From the Fullerton Account, the October 225m shares were sold and the proceeds paid out from Fullerton to Mr Yeh. In her judgment below, the Judge did not distinguish between the October 225m shares and the other shares sold by Yuanta because the plaintiffs argued the matter in a way which obscured this distinction by characterising all the defendants' misdeeds as breaches of fiduciary duty. On appeal, it must be recognised that Yuanta is not liable in respect of the 225m Sale or any other dealings with the October 225m shares because Yuanta never dealt with this parcel of shares.

111 On this basis, we find that Yuanta is liable to account to the plaintiffs for its breach of trust and the misapplication of the trust property. The plaintiffs' remedy lies in a reconstitution of the trust property. They are entitled to substitutive equitable compensation from Yuanta for the value of the proceeds of sale of the 60m Sale and the profits made on the 101.5 Sale & Repurchase.

Mr Yeh's liability to account

112 While Yuanta has no responsibility for the 225m Sale or any other dealings with the October 225m shares which were the subject of this sale,

Mr Yeh personally does. To reiterate, the October 225m shares merit different treatment because:

(a) The very transfer of the October 225m shares out of the TPG Account and into the Fullerton Account was not authorised under the Agreements. Pursuant to Attachment A of the First Loan Agreement, TPG was obliged to transfer shares in the TPG Account to the *Yuanta Account* only.

(b) The 225m Sale was not authorised because it was not carried out pursuant to Yuanta's contractual power of sale. Yuanta only had a contractual power of sale over the shares that had been transferred by TPG to Yuanta as collateral. Since (i) the October 225m shares had not been passed to Yuanta, and (ii) the sale was carried out by Fullerton rather than Yuanta, the 225m Sale cannot benefit from the contractual authority in cl 1(c) of the First Loan Agreement.

(c) Mr Yeh's retention of the proceeds of the 225m Sale for his own benefit was a clear interference with TPG's beneficial property.

113 The Judge found that Mr Yeh was dishonest in selling the October 225m shares (Judgment at [263]); the defendants do not contest this finding on appeal. In our view, Mr Yeh dishonestly (and thus fraudulently) misappropriated TPG's property without TPG's consent. In such a situation, a constructive trust arises by operation of law as it would be unconscionable for Mr Yeh, having dishonestly taken and sold the property and pocketed its proceeds of sale, to assert any beneficial interest in the shares or their proceeds of sale. Lord Browne-Wilkinson observed in *Westdeutsche Bank v Islington London Borough Council* [1996] 1 AC 669 at 716C:

> I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity.

On the authority of this case and several Australian cases, John McGhee QC (ed), *Snell's Equity* (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") comments at para 26–012:

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

114 While Lord Browne-Wilkinson's observations are not uncontroversial, doubts about his analysis pertain to whether a thief would have acquired legal title to the stolen property such that he could hold such legal title on constructive trust for the true beneficial owner. Such doubts do not affect our analysis in the present case because Mr Yeh was an authorised signatory and was granted a mandate to singly operate the TPG Account (see the Earlier Suit's Judgment (*supra* [28] above) at [170]). To that extent his dealings with the legal title could not be impugned.

115 Prior to Mr Yeh's dealings, the October 225m shares remained the legal and beneficial property of, and in the possession of, TPG. When Mr Yeh transferred the shares to the Fullerton Account, he evidently intended to interfere with TPG's beneficial ownership in the shares. This can be seen most clearly from the way he sold the shares and retained the proceeds for his own

benefit immediately after the shares were transferred to the Fullerton Account. These actions showed that his removal of the shares from the TPG Account was the first step in a chain of actions to misappropriate TPG's shares through Fullerton as an intermediary. Ultimately, Mr Yeh personally received from Fullerton the bulk of the proceeds of the 225m Sale.

116 Thus we find that from the time of the dishonest taking of TPG's property, Mr Yeh (by his personal involvement from that time in transferring the shares to Fullerton, as well as through Fullerton's initial receipt and then through his own receipt of the sale proceeds) misapplied and/or held TPG's property on constructive trust for TPG. Mr Yeh is liable to account to TPG for its property. In lieu of restoring the shares *in specie*, Mr Yeh is to pay TPG substitutive equitable compensation quantified according to the value of the shares at the time they were removed from the TPG Account.

Mr Yeh's liability for inducing breach of contract

117 Given that we have found that Yuanta was not in breach of contract, Mr Yeh could not have induced a breach of contract. We therefore allow the defendants' appeal against Mr Yeh's liability in the tort of inducement of breach of contract.

118 We should state that even if we had upheld the Judge's finding that the Share Sales were in breach of contract, we would have overturned her decision that Mr Yeh was liable in tort for inducing breach of contract. The Judge's reasoning on this cause of action was brief. She found that Mr Yeh "was the controlling mind of Yuanta and that the breaches committed by it were induced by him" (Judgment at [398]). This analysis runs into difficulties because a company is a distinct legal person that necessarily acts through its agents. The

Judge did not consider the principle in *Said v Butt* which provides that when a director acts *bona fide* within the scope of his authority, he is immune from tortious liability for procuring his company's breach of contract. This principle was affirmed in *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2008] 1 SLR(R) 80 and *M+W Singapore Pte Ltd v Leow Tet Sin and another* [2015] 2 SLR 271. The scope of the principle was recently clarified by this court in *PT Sandipala Arthaputra and others v STMicroelectronics Asia Pacific Pte Ltd and others* [2018] SGCA 17 ("*PT Sandipala*"). In *PT Sandipala* at [72], this court clarified that defendant-directors are immune from tortious liability for a company's breach of contract unless the plaintiff can prove that the defendant-directors breached their personal legal duties to the company in directing or participating in the breach of contract.

119 The Judge did not make findings that Mr Yeh intended in these respects in bad faith for Yuanta to breach the Agreements and had acted in dereliction of his duties vis-à-vis Yuanta. It is not obvious that Mr Yeh was in bad faith, because he may have considered that Yuanta was entitled to sell the shares (as indeed we have held that it was). Therefore, we are of the view that there was in any event an insufficient basis for Mr Yeh to be found liable in tort for inducing breach of contract.

Conversion

120 Given our findings above, it is no longer necessary to examine the claim in conversion. We make no finding on whether the misapplication of the proceeds of the Share Sales or the unauthorised electronic transfer of the October 225m shares to the Fullerton Account constituted the tort of conversion. These inquiries would raise the issue of whether pure intangibles can be

converted, an issue which was not argued before us (see *Qilin World Capital Ltd (HC)* (*supra* [42] above) at [211]–[212]).

121 Nonetheless, we find that the 60m Sale and 101.5m Sale & Repurchase were not acts of conversion since they were authorised under the Agreements; therefore we set aside the Judge's findings on conversion to this extent.

Relief

122 Accordingly, we allow the defendants' appeal to the extent that the 60m Sale and the 101.5m Sale & Repurchase did not constitute a breach of contract, a breach of fiduciary duties or a conversion. But we find Yuanta in breach of trust for misapplying the trust property when it transferred the proceeds of the 60m Sale and the 101.5m Sale & Repurchase to Yuanta's related companies and Mr Yeh's associates and relatives. Hence, we order only Yuanta (and not Mr Yeh) to account to TPG for the proceeds of the 60m Sale and the 101.5m Sale & Repurchase. We also find Mr Yeh liable to account to TPG for the value of the October 225m shares at the time they were removed from the TPG Account.

123 The Supplemental Judgment at [78(b)] quantified this sum as S$6,464,839.37 (including simple interest of 5.33% payable for five years on a principal sum of S$5,104,492.20). For reasons we explain at [135] below, the sum awarded for the profits of the 101.5 Sale & Repurchase is to be increased by S$225,000 to take into account the fact that all the March 225m shares belonged to TPG beneficially rather than AEM (contrary to the Judge's treatment in the Judgment at [403] and Supplemental Judgment at [17]–[18]).

124 Our orders are as follows:

(a) Yuanta must account to TPG for a principal sum of S$3,158,242.20, comprising S$1,774,733.20 for the profits on the 101.5m Sale & Repurchase and S$1,383,509 for the proceeds of the 60m Sale. Interest of S$841,671.55 is payable according to the Judge's formula of "S$[principal sum] x (0.0533 x 5)". We therefore order Yuanta to pay TPG the sum of S$3,999,913.75.

(b) Mr Yeh must account to TPG for a principal sum of S$2,171,250, being the value of the October 225m shares at the time of his dishonest misappropriation. Including interest calculated according to the Judge's formula, Mr Yeh is to pay TPG the sum of S$2,749,888.13.

The Appeal: the defendants' counterclaims

Scorpio East

125 Turning to the first of the defendants' counterclaims, the defendants seek the return of S$3m withdrawn from the JV Account on the basis that the monies were used by the plaintiffs to acquire Scorpio East for their own benefit. The defendants filed CA/SUM 58/2017 to adduce 11 documents as fresh evidence to show that the Judge was wrong to find that the Scorpio East shares belonged to AEM. The documents consist of notices and announcements related to shareholdings in Scorpio East, as well as police reports filed by Mr Yeh alleging that Mr Hartanto had misled the court that the acquisition of the Scorpio East shares was a joint investment. The defendants claim that the fresh evidence shows that AEM never had a beneficial interest in TPG's acquisition of the

Scorpio East shares because it was never disclosed that AEM was a shareholder or had an interest in the shares.

126 The test for further evidence to be adduced on appeal is laid down in *Ladd v Marshall* [1954] 1 WLR 149. It must be shown that (a) the evidence could not have been obtained with reasonable diligence for use in the trial; (b) the evidence is such that, if given, would probably have an important influence on the result of the case, though it need not be decisive; and (c) the evidence must be such as is presumably to be believed or apparently credible.

127 While the defendants accept that the documents could have been obtained at trial, they argue that the documents should nonetheless be admitted because they reveal some deception, fraud or deliberate suppression of material evidence by Mr Hartanto. They rely on this court's decision in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 where the court assessed the adduction of new evidence with more latitude on this ground (at [36]).

128 In our judgment, the *Ladd v Marshall* criteria have not been satisfied. We do not think that the documents conclusively reveal that Mr Hartanto had deceived the court as to AEM's interest in the Scorpio East shares. The plaintiffs' assertion, that Mr Hartanto had lied about AEM's interest, is one view of the documents. However, the documents are also compatible with the view that Mr Hartanto and TPG had failed to comply with their statutory obligations to make disclosures of AEM's interest in the shares. On this view, Mr Hartanto would not have lied about AEM's interest in Scorpio East. Whether and why Mr Hartanto concealed AEM's interest in the notices and announcements is a separate matter. Therefore, we do not see any basis to relax the criteria in *Ladd v Marshall*.

129 Going further, we are not convinced that the evidence, if adduced, would have an important influence on the result. The issue before the Judge was who had the beneficial interest in the 37m Scorpio East shares. In determining this question, the Judge was aware that the shares had been purchased by TPG in TPG's name (Judgment at [74]). Notwithstanding this, the Judge went on to find that the shares were purchased on AEM's behalf (Judgment at [291]–[306]). Since the new evidence merely reiterates that the shares were purchased in TPG's name, we are of the view that it would not assist in advancing the defendants' case.

130 For these reasons, we dismiss CA/SUM 58/2017 as well as the appeal in respect of the sum withdrawn to purchase the Scorpio East shares.

Share Warrants

131 We turn to the appeal in respect of the counterclaim for the S$6.75m withdrawn from the JV Account. This sum was withdrawn by TPG purportedly to exercise the Share Warrants. However, the monies were not applied towards exercising the Share Warrants because TPG had instead transferred 225m from its existing portfolio of NexGen shares into the Yuanta Account (the March 225m shares – see [20] above).

132 Despite finding that the plaintiffs' failure to exercise the Share Warrants was a "technical breach of the Supplementary Agreement", the Judge denied relief because AEM was left in the same net position as it would have been if the Share Warrants had been properly exercised: AEM had acquired 225m NexGen shares for the cost of S$6.75m (Judgment at [533]). This was because the Judge, mindful of the fact that S$6.75m had been withdrawn by the plaintiffs from the JV Account, as it were in payment for the March 225m shares, was

prepared to treat those shares as having been purchased by AEM and pledged to Yuanta (Judgment at [533]). Thus the Judge found that there was a breach but no loss was suffered.

133 In our judgment, the Judge erred in denying relief. The Judge found that the Share Warrants were never converted into tradeable shares (Judgment at [342]). Clause 1 of the Supplementary Agreement acknowledges that Mr Hartanto was under a subsisting obligation to deliver 3.6bn shares from TPG to Yuanta for the purposes of obtaining loans for AEM. Alongside this, cl 3 of the Supplementary Agreement provided for part of the loan funds to be utilised to convert the Share Warrants into 225m tradeable shares which would be pledged as security for further loans for the parties' joint investment. Clearly, the parties contemplated that the 225m shares converted from the Share Warrants were to be *fresh shares* in addition to the existing pool of TPG's 3.6bn shares. It is inconceivable that the March 225m shares could be characterised as a fulfilment of cl 3 of the Supplementary Agreement. The Judge erred in finding that AEM suffered no loss or was left in the same net position. The March 225m shares were never transferred (whether legally or beneficially) to AEM but to Yuanta, and were dealt with by Yuanta as part of its dealings described at [21] above. It was not correct to have treated AEM as having acquired the March 225m shares in, as it were, compensation for the outlay of the S$6.75m. The contractual arrangement was for AEM to acquire 225m fresh shares which would have enlarged the total pool of collateral available for raising funds for the parties' joint operations; AEM did not receive this or anything in exchange for S$6.75m.

134 On the flipside, the March 225m shares, which the plaintiffs say were acquired by AEM in exchange for S$6.75m, were transferred from TPG's existing pool of 3.6bn shares and were in fact transferred into the Yuanta

Account (see [18] and [20] above). In other words, they were part of the shares that TPG was under a subsisting obligation to deliver to Yuanta under the Agreements. There was no legal basis for TPG to have obtained a consideration of S$6.75m, and no reason for AEM to have paid S$6.75m, for TPG's performance of its subsisting obligations to put forward up to 3.6bn shares as collateral or future collateral. If TPG were allowed to pocket S$6.75m, TPG would have effectively procured a sale of 225m of its existing shares to AEM. This was clearly not in accordance with the Agreements. It was never agreed that AEM would purchase 225m shares from TPG.

135 For these reasons, we hold that TPG is to pay S$6.75m into a joint trust account. A corollary of our holding is that the March 225m shares were not acquired by AEM but remained TPG's beneficial property, though transferred to Yuanta for using as collateral for loans (subject to any security interest which was acquired over them pursuant to a loan). We have increased the sum payable in our order at [124] above (and see also [123] above) by S$225,000 to take this into account. This is because the plaintiffs below conceded that, because some of the shares sold by Yuanta were to be treated as AEM's shares, therefore S$225,000 of the proceeds of the share sales belonged to the defendants (by way of a 50% share through AEM in the shares treated as having been transferred to AEM) (see Judgment at [403] read with Supplemental Judgment at [17]). Now that these March 225m shares are no longer to be treated as transferred to and sold by AEM, the plaintiffs' S$225,000 concession has to be reversed. However, all parties are to be protected, through AEM, by having the whole of AEM's S$6.75 million paid back to it by TPG. What the status of that S$6.75m in AEM's hands is, or what would have been the status of any shares acquired by AEM as the *quid pro quo* for its S$6.75m, has not been the subject of debate in these appeals. But the Judge appears to have thought of the March 225m

shares which she treated as having been transferred to AEM as "an asset of the joint venture", "to be shared equally by the parties" (Judgment at [403] and [533]–[534]).

$1.8m Transfer

136 Finally, the defendants appeal in respect of the Judge's dismissal of their counterclaim for S$1.8m to be returned to the joint venture. The issue is whether the $1.8m Transfer from the Yuanta Account to TPI's account (through the JV Account) was a personal loan to Mr Hartanto which was to be repaid, or Yuanta's repayment of a bridging loan provided to it by TPG to purchase Mr Koesnadi's NexGen shares. We have set out the relevant facts and arguments at [32] and [65] above.

137 The Judge rejected the defendants' claim that the sum was transferred as a personal loan to Mr Hartanto. The defendants argue that the Judge had insufficient basis to prefer the plaintiffs' evidence to the defendants' evidence, when she found both sides' evidence to be deficient in some respects.

138 In our view, notwithstanding the difficulties with both sides' evidence, the Judge was satisfied that an e-mail dated 15 February 2011 substantiated the plaintiffs' defence that there was a plan for AEM to purchase Mr Koesnadi's stake in NexGen (Judgment at [67] and [360]). The defendants have not shown why this finding is wrong. Moreover, it was for the defendants to prove their entitlement under the counterclaim. The Judge found that the defendants could not reasonably maintain that the funds were a personal loan from Yuanta to Mr Hartanto when they were aware that all the funds in the Yuanta Account had come from the loans secured by the pledging of NexGen shares or from sales of TPG's NexGen shares (Judgment at [354]). In other words, the monies in the

Yuanta Account did not belong to Yuanta and were not Yuanta's to lend. Furthermore, Mr Yeh's version of events makes little sense because the deposit of 700m additional shares as collateral could not be consideration for a personal loan to Mr Hartanto when TPG was already under a subsisting obligation to deposit the 700m shares as collateral. This is so even if TPG was in reality reluctant to deposit 700m more shares until Yuanta furnished proper accounts of the whereabouts of the 825m Shares.

139 For these reasons, we dismiss the appeal in respect of the $1.8m Transfer.

The Cross-Appeal

140 We move on to the plaintiffs' cross-appeal in relation to the Judge's dismissal of their claims for the Re-Pledged Shares Loss and the Portfolio Loss. The plaintiffs allege that these losses resulted from the defendants' breach of fiduciary duties and unlawful means conspiracy.

Unlawful means conspiracy

141 We begin with the claim in unlawful means conspiracy because the plaintiffs devoted much of their oral argument to situating the EFH Pledge and the Share Sales in the wider context of a deliberate and elaborate scheme by the defendants to drive down the price of NexGen shares so as to enable them to earn secret profits. As will be seen below, this alleged scheme also formed the backbone of the plaintiffs' arguments that the Re-Pledged Shares Loss and the Portfolio Loss flowed from the defendants' breach of fiduciary duties.

142 The elements of the tort are not disputed. To succeed in a claim for conspiracy by unlawful means, the plaintiffs must show that:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of an agreement; and

(e) the plaintiffs suffered loss as a result of the conspiracy.

(*EFT Holdings Inc and another v Marineteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112])

143 The Judge was not satisfied that the unlawful means relied upon by the plaintiffs had been pleaded (Judgment at [452]). The only unlawful means that were found to have been pleaded were three misrepresentations, namely that Mr Yeh was linked to Yuanta Financial Holdings in Taiwan, that Crédit Agricole was the lender, and that Crédit Agricole would charge a fee amounting to 10% of the loan sums. The Judge was not satisfied that these misrepresentations had been proven. Hence, the claim for unlawful means conspiracy was dismissed. No finding was made about the defendants' intention to injure the plaintiffs.

144 The plaintiffs' case is that Mr Yeh and Yuanta conspired to conceal the Share Sales and the EFH Pledge in order to earn secret profits from the Share Sales. The unlawful acts that the plaintiffs rely on are the breaches of fiduciary duties relating to (i) misleading the plaintiffs into believing that the lender was

Crédit Agricole; (ii) the concealment of EFH's identity; and (iii) the wrongful Share Sales. We shall refer to these collectively as the "**Alleged Unlawful Means**". The plaintiffs assert that the Alleged Unlawful Means were properly pleaded in the reply and defence to counterclaim. As regards the intention to injure, their case theory goes that the deliberate secrecy and deception surrounding EFH's role in the pledging arrangement was designed with the singular purpose of injuring the plaintiffs as the defendants made secret profits from the unauthorised trading of the plaintiffs' shares. The scheme to earn the secret profits was sketched in the following manner:

(a) First, the defendants induced the plaintiffs to transfer a large number of NexGen shares to the defendants which the defendants intended to secretly sell and repurchase at a profit. In fact, the shares that were transferred by TPG into the Yuanta Account as collateral were effectively ring-fenced from the plaintiffs, such that Yuanta's dealings were obscured from their view. The defendants induced this transfer by encouraging the plaintiffs' belief that Crédit Agricole was the lender and Yuanta had substantial credit facilities from Crédit Agricole, when in truth Yuanta was a newly-incorporated shell company.

(b) The defendants' ability to sell the shares at a higher price and repurchase them later at a lower price for their own profit was dependent on the price of the NexGen shares declining. This decline was ensured by the secret EFH Pledge. Based on the evidence of both parties' experts, the plaintiffs claim there is a strong basis to conclude that EFH sold the 765m Re-Pledged Shares immediately upon receipt and that the defendants were aware of this practice. They claim that EFH's mass sales contributed to the fall in share price of NexGen. The defendants concealed not only EFH's identity and poor reputation but also all information relating to the financing arrangements with EFH so that the plaintiffs would not object to the EFH Pledge or carry out further checks on EFH. This included concealing EFH's proposal at one point for a cap on the volume of pledged shares that EFH could trade, a proposal which the plaintiffs say they would have instructed Yuanta to adopt so as to preserve the value of their NexGen portfolio.

(c) As a result of Yuanta's Share Sales and EFH's sale of the shares pledged to them, the price of NexGen shares plummeted. This enabled Yuanta to repurchase shares at a profit – as they in fact did with the 101.5m Sale & Repurchase. The plaintiffs claim that it could be seen from the coincidence in the timing of the secret trades and the timing of various tranches of the secret EFH Pledge that the defendants were "front running EFH" by selling before EFH could, anticipating that EFH would soon sell the shares pledged to it, and waiting for the NexGen share prices to fall before they repurchased the shares. This fall in NexGen share prices led to the Portfolio Loss.

(d) Further, as the prices were driven down, the margin calls were accelerated. Yuanta's wilful refusal to remedy EFH's margin calls strengthened the inference that the defendants had deliberately orchestrated the loan defaults for their secret profits. Moreover, the defendants dishonestly depleted the remaining funds/shares in the Yuanta Account which could have been used to meet the margin calls. This ultimately led to the forfeiture of all the 765m Re-Pledged Shares.

The plaintiffs argue that the facts in relation to this conspiracy had all been established at trial. As a result of this conspiracy, the plaintiffs allegedly suffered the Re-Pledged Shares Loss and the Portfolio Loss.

145 In response, the defendants seek to uphold the Judge's finding that the pleadings were inadequate. If it is found that the Alleged Unlawful Means were pleaded, the defendants ask that the case be remitted to the Judge for her to make factual findings on the intention to injure and the causation of loss.

146 We deal first with the pleading issue, which in our view is determinative of this claim. The Judge did not err in finding that the Alleged Unlawful Means were not pleaded and in rejecting the plaintiffs' attempt to widen the pleadings.

147 The three misrepresentations that the Judge found to be pleaded as unlawful means were particularised by the plaintiffs in their further and better particulars of their amended Reply and Defence to Counterclaim ("**the Reply**"). This was in response to the defendants' request for further particulars of the "unlawful acts and/or means by which the Plaintiffs were injured that are alleged, *apart from those pleaded at paragraphs 3 and 4 of the [Reply]*" [emphasis added]. The request assumes that these enumerated paragraphs of the Reply contained pleadings as to the unlawful means. The plaintiffs' pleading of an unlawful means conspiracy may be found at paragraph 4(c) of the Reply:

> … the Defendants wrongfully and with intent to injure the Plaintiffs by unlawful means, conspired and combined together to defraud the Plaintiffs and to conceal such fraud and the proceeds of such fraud from the Plaintiffs. Pursuant to the said conspiracy, the Defendants carried out the unlawful acts and means by which the Plaintiffs were injured, including but not limited to the matters pleaded at paragraphs 3 and 4 herein.

This pleading attempts to characterise all the other matters pleaded in paragraphs 3 and 4 as unlawful means. However, all that is alleged in paragraph 3 is that the defendants are liable to account for the October 225m shares which were transferred to the Fullerton Account. The rest of paragraph 4 features allegations that the defendants' unauthorised sale of the NexGen shares constituted various breaches in law and equity, and that Yuanta's breaches were induced or dishonestly assisted by Mr Yeh. While it was pleaded that the defendants carried out a "deliberate campaign … to cause a fall in the price of the NexGen shares" (at paragraph 4(g)), no particulars of this deliberate campaign were pleaded.

148 Thus, taken at its highest, the pleadings only allege that the Shares Sales were the unlawful means of causing injury. There is no mention that EFH's identity was concealed or that the EFH Pledge was executed with the intention to injure or that the EFH Pledge was concealed for the purpose of facilitating the defendants' profits on the Share Sales. Although the Judge considered and made factual findings as to the defendants' concealment of EFH's identity, she did so in relation to the allegations of breaches of fiduciary duties. The Judge considered it inappropriate for the plaintiffs to set out to prove other fiduciary breaches and then characterise them as unlawful acts or means for a conspiracy claim when they had not been pleaded in such terms (Judgment at [452]). In our view, she was correct to have adjudged as such.

149 Furthermore, even if we were to proceed on the basis that the Share Sales were pleaded as one of the unlawful means by which the conspiracy was carried out, the conspiracy claim would still fail because we have found that the 60m Sale and the 101.5m Sale & Repurchase were authorised under the Agreements.

The defendants' wrongfulness consisted in the disposal of the proceeds of sale in breach of trust, not in the sales themselves.

150 In any event, we are not persuaded that the conspiracy would be sustained on the facts. We do see that the Judge made *factual findings* that Mr Yeh was aware that the plaintiffs believed that Crédit Agricole was the lender; had concealed the identity of EFH from the plaintiffs by failing to provide accurate and honest answers when Mr Hartanto made specific inquiries; and had concealed the Share Sales (see Judgment at [290]). However, the Judge did not find that the defendants had acted deliberately to drive down the price of the NexGen shares. In our view, it is entirely counter-intuitive that the defendants would set out to dissipate a portfolio of shares worth $216m in value which were to be collateral or future collateral for loans to assist the joint venture in making investments. It is not evident to us that the defendants would do so in order to earn secret profits. The alleged scheme, to "front run EFH" by selling at a higher price and repurchasing after the price had been depressed by EFH's sales, was not borne out by the evidence of the transactions: of the Share Sales totalling 386.5m shares, only 101.5m were repurchased at a lower price for a small profit of slightly over $1.7m. The wide conspiracy and extensive destruction of value could not logically justify the relatively insignificant profit of $1.7m.

151 Moreover, in the picture painted by the plaintiffs, EFH was of central importance because Yuanta would have been counting on EFH to sell the shares immediately upon receipt. Yet it was not alleged that EFH had been a co-conspirator. There was no evidence before the Judge that the defendants had engaged in discussions with EFH about their *modus operandi*. At the most, the plaintiffs could only point to discussions between EFH and Mr Yeh in which a cap on trading with the collateral was proposed but not implemented. There was

no evidence on how EFH had actually disposed of the shares, only expert projections on their likely course of action. However, the Judge did not find sufficient evidence that EFH sold the shares upon receipt and that the defendants were aware of this practice (Judgment at [514]). We see no reason to disagree with her findings in this regard.

152 For these reasons, the conspiracy claim fails on the pleadings and, even if it did not, we are not persuaded that the Judge's factual findings were sufficient for us to infer an intention to injure and causation of the Portfolio Loss and the Re-Pledged Shares Loss. We therefore dismiss the appeal on the conspiracy claim.

Re-Pledged Shares Loss

153 Having failed in the claim for unlawful means conspiracy, the plaintiffs next raise the issue whether they are entitled to equitable compensation for the Re-Pledged Shares Loss on the basis of the defendants' breach of fiduciary duties. The plaintiffs claim the value of the shares *at the time they were transferred to Yuanta*, on the basis that the shares were dissipated due to the defendants' "deliberate misdirection, misrepresentation and concealment of material facts".

154 The breach we are concerned with here is the defendants' breach of fiduciary duties of good faith and loyalty by concealing EFH's role in the pledging arrangement whilst encouraging the plaintiffs' misapprehension that Crédit Agricole was the lender. The question is whether the defendants' breach of fiduciary duties caused the Re-Pledged Shares Loss. In this regard, the plaintiffs dispute the test of causation in equity where a fiduciary's breach consists in deliberate concealment of a material fact from the principal.

155 As a preliminary matter, we wish to clarify the amount of shares to which this head of loss relates. On appeal, the plaintiffs pursue compensation in respect of only 600m of the 825m Shares transferred by TPG into the Yuanta Account and further pledged by Yuanta to EFH. They have taken this position on the basis that the March 225m shares belong to AEM. However, we have found that the March 225m shares were *not* shares acquired for AEM using the exercise of the Share Warrants (see [135] above). Accordingly, we are ordering the plaintiffs to return the S$6.75m that was not applied towards the exercise of the Share Warrants. It follows that TPG continued to own the entire 825m Shares beneficially. Therefore, the Re-Pledged Shares Loss should concern the value of *all the 765m Shares* that were re-pledged by Yuanta to EFH.

156 Before we set out the plaintiffs' argument in greater detail, it is important to clarify that the Judge did not find that the *re-pledge* of the 765m Shares to EFH constituted any breach of the defendants' obligations (Judgment at [380]). The only proven breach which appears to be associated with the EFH Pledge is the defendants' breach of the duty of good faith and honesty *by encouraging the plaintiffs' mistaken belief that Crédit Agricole was the lender* (Judgment at [412]). To provide context to the plaintiffs' argument, it may be worth setting out the Judge's reasoning on this issue in full (Judgment at [408]–[412]):

> **Breaches of fiduciary duties**
>
> …
>
> ***Encouraging the plaintiffs' mistaken belief that Crédit Agricole was the lender***
>
> 408 As I have said it was never made clear by the defendant why there was such secrecy in relation to the identity of the true lender. His evidence that he had entered into a confidential agreement with EFH was not a proper explanation for the secrecy. Any arrangement that he entered into for the purposes of obtaining loans for the project, even if there were confidentiality arrangements, did not exclude the plaintiff from

knowing about such arrangements. The plaintiffs submitted that the real reason the defendant (and Mr Goh) kept the identity of the true lender secret was that it was in accordance with their desire to encourage the plaintiff to continue under the misapprehension that Crédit Agricole was the lender.

409 It is apparent that EFH may have had a reputation as a fringe lender that had been found to be in breach of contract in respect of arrangements that were not dissimilar to the ones that were being entered into to obtain loans for the joint venture project. It was suggested to the defendant that the reason he did not inform the plaintiff of the identity of EFH was because the plaintiff may not have endorsed such an arrangement. However he denied that this was his motivation. *The plaintiff did not give evidence that had he known that EFH was the true lender he would not have gone ahead with such an arrangement to obtain the loans. The highest he put it, sensibly in my view, was that he would have performed further checks in respect of EFH and that perhaps there may not have been a deal.*

410 As I have found earlier the plaintiff was advised on 30 June 2011 that there were three other banks involved in holding the NexGen shares (see [289] above). He was never advised that the shares had been pledged to EFH even when he asked the direct questions as to the location of the pledged shares and the loan amounts that had been provided against the pledged shares.

411 The plaintiff could not have been under the impression that Crédit Agricole was the only lender after the meeting of 30 June 2011. Even so, *the defendants owed a fiduciary duty of good faith to the plaintiffs in respect of the NexGen shares that were held on trust by Yuanta that had not been pledged against a loan*. That included the 60m shares that were secretly sold in August 2011. When the plaintiff asked about those shares being used to remedy the margin calls, the defendant advised him, dishonestly, that he had moved them to a custodian account. *In this correspondence the defendant encouraged the plaintiff's belief that Crédit Agricole was involved in the loan arrangements. This was in breach of defendant's duty of good faith.*

412 *I am satisfied that the plaintiffs have established that the defendant was in breach of his fiduciary duty to the plaintiffs in encouraging the plaintiff's belief that Crédit Agricole was a lender.*

[emphasis added]

157 It is not entirely clear from the Judge's reasons whether the duty of good faith was owed and breached only in relation to the shares that remained in Yuanta's possession (see the Judgment at [411]; see also [160] below). Nonetheless, on the assumption that the breach pertained to the 765m Re-Pledged Shares as well, the plaintiffs take issue with the part of [409] which we have given emphasis to in the quote above. Their contention is that the Judge erred in refusing compensation for the Re-Pledged Shares Loss despite finding that Mr Hartanto would have carried out further checks on EFH if he had known that EFH was the lender to whom the 765m Shares had been re-pledged.

158 The plaintiffs' three-pronged argument proceeds as such:

(a) The Judge erred in law in requiring the plaintiffs to show but-for causation, *ie*, that the plaintiffs would have rejected EFH as the lender had proper disclosure been made to them. Where a fiduciary has wilfully failed to disclose information from the principal, the transaction embarked upon by a fiduciary is voidable regardless of whether the principal would have acted the same way if proper disclosure had been made. The plaintiffs relied on *Brickenden v London Loan & Savings Co of Canada* [1934] 3 DLR 465 ("*Brickenden*") and *Bristol and West Building Society v May May & Merrimans (a firm) and others* [1996] 2 All ER 801 for the proposition that it is for the fiduciary to show that the principal would have acted in the same way even if full disclosure had been made.

(b) Even if but-for causation must be shown, the fiduciary should be liable as long as the fiduciary does not prove that the principal would have positively affirmed the transaction. On this basis, it ought to have been sufficient that Mr Hartanto would have done further checks and there "may not have been a deal", as the Judge found.

(c) Alternatively, the totality of the evidence shows that it was likely that the plaintiffs would have objected to or exited from the EFH Pledge if all material facts had been disclosed to them. Thus but-for causation should have been established.

159 Intertwined with this argument on causation is the plaintiffs' allegation that the EFH Pledge was part of the defendants' wider scheme – described at [144] above – to drive down the price of NexGen shares. The plaintiffs contend that the Judge was wrong to have isolated the defendants' concealment of EFH's identity from all other aspects of the defendants' conduct which had a bearing on the plaintiffs' decision to continue transferring shares as collateral into the Yuanta Account. These other aspects included the defendants' and EFH's parallel streams of share trading to drive down the share price and the defendants' conscious choice of a fringe lender like EFH which, according to the plaintiffs' expert, was known to trade with its collateral. Thus, the plaintiffs submitted at the oral hearing that in assessing the resulting loss, the appropriate question is "what would [the plaintiffs] have done, *if all of this had been disclosed*, including the dishonest intention to sell / trade / drive down prices to profit?" [emphasis added] According to the plaintiffs, the secrecy surrounding EFH's identity, the terms of EFH's loan, EFH's *modus operandi* as a non-recourse lender, the Share Sales, and EFH's margin calls, must all be viewed in connection because all these aspects combined to generate the defendants' secrets profits.

160 The defendants make three points in response. First, based on the Judge's findings, fiduciary duties were only owed in respect of the shares that remained in Yuanta's possession and had not been pledged to EFH. There was no fiduciary breach concerning the 765m Re-Pledged Shares to which the Re-Pledged Shares Loss could attach. Second, the real reason why equitable compensation for the Re-Pledged Shares Loss was refused was because the defendants were authorised to transfer the shares to EFH as a lender. Third, even if causation were the determinative issue, concealment or non-disclosure only gives rise to the remedy of rescission (or compensation in lieu thereof) without regard to causation where the fiduciary has failed to disclose an unauthorised profit or conflict of interest. Causation is not required in such a circumstance because the fiduciary is disabled from entering into the transaction in question without his principal's consent. However, the plaintiffs have not shown that the EFH Pledge gave rise to an undisclosed profit or placed the defendants in a conflict of interest. Moreover, disclosure is only relevant to the issue of consent, whereas the defendants did not require the plaintiffs' consent to enter into the EFH Pledge because Yuanta was granted an express discretion to pledge the shares under the Agreements.

161 Having considered the parties' submissions, we are of the view that the cross-appeal in respect of equitable compensation for the Re-Pledged Shares Loss should be dismissed.

162 First of all, we disagree with the way in which the plaintiffs have framed the issue in this aspect of the Cross-Appeal. Equitable compensation for the Re-Pledged Shares Loss was not refused because the plaintiffs failed to establish that they would have rejected EFH as the lender if full disclosure about EFH's role had been made. Rather, it was refused – or rather, it was not even

contemplated – because the EFH Pledge was a transaction authorised under the Agreements, notwithstanding that the defendants had not been fully candid about EFH's role.

163 It must be stressed that the EFH Pledge/Loan was not carried out in breach of any obligations (Judgment at [380]). The Agreements granted Yuanta the right to re-pledge the shares placed in the Yuanta Account with discretion and flexibility over whom to borrow from. The plaintiffs did not mount an argument that the identity of the lender was a material term of the Agreements. In fact, the Judge deliberated upon, and rejected, the argument that it was a fundamental term of the Agreements that Crédit Agricole was to be the lender (Judgment at [372]). She made the finding, correctly in our view, that the parties contemplated that funding could come from any lender besides Crédit Agricole. The plaintiffs do not seek to re-argue this point on appeal.

164 It follows from the above that the plaintiffs' consent to the lender's identity and the loan arrangements is not in issue at all. Regardless of whether they had been fully informed and how they would have wanted to act if they had been fully informed, *the plaintiffs had no right or power under the Agreements to consent to or reject a particular lender*.

165 The plaintiffs contend that they *had* a right or power to withhold consent under the Agreements by pointing to the fact that the "pledging" arrangement under the Loan Agreement was intended to be progressive. This was gleaned from the reference to "multiple-times fund raising" in cl 1(a) of the Loan Agreement and the arrangement for share-for-cash swaps in cl 6 of the Supplementary Agreement. As such, the plaintiffs claim that they always had a choice whether to proceed with or to stop transferring shares to Yuanta as

potential collateral for loans. While the parties intended for the defendants to have flexibility in identifying a lender, the plaintiffs argue that this did not excuse Mr Yeh's concealment of the true identity of the lender and misleading the plaintiffs to believe that the lender was Crédit Agricole.

166 In our view, even if the Agreements were construed to allow the plaintiffs to terminate their offer of NexGen shares as (potential) collateral for loans before the limit of 3.6bn was reached, the plaintiffs' choice pertained only to whether and how many shares were deposited with Yuanta. Once shares were deposited with Yuanta, the Agreements did not provide the plaintiffs with the power to withhold consent to Yuanta's re-pledging or trading arrangements. While Yuanta's exercise of discretion could be challenged on the basis of equitable rules controlling a trustee/fiduciary's exercise of discretion, the plaintiffs did not plead or submit that the discretion was substantively exercised for improper purposes and in bad faith; the fiduciary breach relied upon by the plaintiffs was the concealment of information.

167 It is uncontroversial that the scope of fiduciary duties is moulded according to the nature of the relationship and the facts of the case. In particular, where contractual and fiduciary relationships co-exist, the fiduciary relationship cannot be superimposed upon the contract in a way that alters the operation of the contract according to its true construction (*Hospital Products Limited v United States Surgical Corp* (1984) 156 CLR 41 at 97; see also *Snell's Equity* at para 7–012). In the present context, the defendants' fiduciary duty of good faith did not create in the plaintiffs' favour a right or power to consent to (or withhold consent from) the defendants' choice of lending and re-pledging arrangements, where none existed under the Agreements.

168 This does not mean that the defendants are unaccountable for their lack of candour as regards their dealings with the shares in their custody. As a custodial fiduciary, Yuanta owed the plaintiffs a duty to give an account of the trust property. The proper remedy for the defendants' withholding of information about the disposal of the shares ought to have been the giving of a trust account. Beyond this, as we mentioned, the substance of the discretionary decision to obtain loans from and re-pledge the shares to EFH was not challenged as improper or disloyal in itself; the plaintiffs only disputed its concealment and, at trial, the existence of this discretion. The Judge did not make a finding that the defendants' decision to borrow from EFH was an improper exercise of their discretion under cl 1(c) of the Loan Agreements and was concealed in bad faith as part of a deliberate scheme to harm the plaintiffs. Moreover, we are not convinced that the composite picture of a deliberate dishonest scheme which was urged on us by the plaintiffs can be sustained by the Judge's factual findings (see [150] above).

169 The manner in which the parties and the Judge approached the remedial issues below is consistent with our analysis that the plaintiffs have no right to claim the Re-Pledged Shares Loss where the EFH Pledge was not carried out in breach of any obligations. Let us explain:

(a) At the trial below, the plaintiffs did not distinguish between the losses arising from dealings with the 765m Re-Pledged Shares and the losses arising from dealings with the Unpledged Shares. They simply claimed the loss of value of *all* the 1.05bn shares transferred to Yuanta on the basis that *all* of Yuanta's dealings with them had been unauthorised (see Judgment at [427]). Since it has been adjudicated that the re-pledge of the 765m Shares to EFH was authorised, the plaintiffs' ground for claiming the loss of value of the 765m Re-Pledged Shares has fallen away.

(b) Next, when disposing of the plaintiffs' claim for equitable compensation for the net value of the "1.05 billion 'lost' shares", the Judge approached the value of the 765m Re-Pledged Shares from the perspective that the EFH Loan/Pledge was to be affirmed (Judgment at [427]–[428]). She treated the issue as one of *whether Yuanta had procured sufficient loans from EFH*, which turned on whether the loans were to be based on the value of the 765m Re-Pledged Shares at the time of the transfer into the Yuanta Account or at the time that loans were extended by EFH. She held that since the loans were to be obtained progressively, it was reasonable for Yuanta to have procured loans based on the share valuation at the time the loan was extended by EFH. No compensation was thereby granted for the difference in expected loan value between the time of transfer into the Yuanta Account and the time of the loans (Judgment at [428]). Pertinently, the Judge did not even contemplate awarding equitable compensation for the full value of the 765m Re-Pledged Shares at the time they were transferred to Yuanta.

(c) Going further, the Judge granted an order at [78(a)] of the Supplemental Judgment for the amount of loan proceeds from EFH that Yuanta had not paid over to AEM to be paid into a joint trust account. The plaintiffs do not challenge, and in fact seek to affirm, this award on appeal. The award of the shortfall in loan proceeds must be rooted in the premise that the loan transaction is affirmed rather than unwound. This premise is inconsistent with the plaintiffs' claim for the original value of the 765m Re-Pledged Shares as if the re-pledge to EFH had not taken place.

170 Yet, by claiming the Re-Pledged Shares Loss, the plaintiffs seek to be placed in the position as if the 765m Shares had not been re-pledged to EFH or even transferred to Yuanta. They seek the monetary equivalent of rescinding the loan transaction between Yuanta and EFH. As stated in their appellants' case:

> The Court can award the pecuniary value of the shares to put the Plaintiffs in a position *as if* (a) the secret Yuanta sales had not occurred, (b) *the secret EFH pledging and sales [by EFH] had not occurred*, so as to restore to the Plaintiffs the original value of the collateral (ie the date of pledging to Yuanta) … [emphasis added]

Having found that the loan transaction was authorised, and the plaintiffs having obtained the benefit of the loan funds, it is a fundamental contradiction for the plaintiffs to now ask to be restored to the position as if the 765m Re-Pledged Shares had not been transferred to Yuanta in the first place.

171 Therefore, we take the view that there is no breach that could form a basis for unwinding the EFH Loan/Pledge, and even proceeding on the basis of a breach of fiduciary duties by concealment, Mr Hartanto's likely reaction to the EFH Loan/Pledge would not and could not have made any difference because Mr Hartanto had no right or power to withhold consent to Yuanta's choice of lender.

172 Finally, and relatedly, the 765m Re-Pledged Shares were "dissipated" because the loan monies were not repaid to EFH for the redemption of the security. The Judge expressly rejected the plaintiffs' contention below that the defendants owed *fiduciary obligations* to resolve the margin calls and interest payments due to EFH (at [228]). Therefore, the failure to redeem the security

did not constitute an independent breach upon which a claim for the Re-Pledged Shares Loss may be based.

173 The foregoing reasons are sufficient for us to dispose of this part of the Cross-Appeal without delving into the question of the appropriate approach to causation in equity in respect of fiduciary disloyalty. In particular, it is unnecessary for us to decide the question of whether the approach to causation in *Brickenden* as regards the onus of proof and the materiality of the non-disclosure ought to be adopted. We would only note that the cases relied upon by the plaintiffs all pertained to the fiduciary's concealment of some interest he had in the transaction which placed him in a position of conflict or self-dealing. In this context, full disclosure is material to obtaining the principal's informed consent to release the fiduciary from the prophylactic rules against self-dealing, profiting from his fiduciary position, or facing a conflict between duties and interests. In the present case, however, we think it was inapposite for the plaintiffs to have relied on the principles applied in this line of cases. It was not argued that the defendants had an undisclosed personal interest in the EFH Loan/Pledge. Even on the plaintiffs' elaborate conspiracy theory, the defendants' profits were to be earned directly from the sale of the Unpledged Shares, not from the 765m Re-Pledged Shares that were transferred to EFH as security.

174 For these reasons, we dismiss the appeal in respect of the claim for equitable compensation for the Re-Pledged Shares Loss.

Portfolio Loss

175 Finally, we turn to the claim for equitable compensation for the Portfolio Loss. This claim is made on the basis of the defendants' breach of fiduciary duties in carrying out the Share Sales and in concealing the EFH Loan/Pledge.

176 The Judge refused compensation because she was not satisfied that the 60m Sale and the 225m Sale caused the reduction in the NexGen share price (Judgment at [516]). She did not take into account the impact of EFH's share sales (if any) on the share price because she found it problematic to assume, as the experts were asked to do, that EFH would sell all the shares immediately on receipt (Judgment at [514]). There was no evidential basis for this assumption, among the many possible permutations and combinations of sale volumes and timings by EFH.

177 The plaintiffs take issue with both reasons. First, they argue that the Judge should have considered the impact of EFH's share sales on the NexGen share price because the expert evidence was sufficiently clear that EFH would have sold the shares pledged to it immediately upon receipt. Second, they argue that the Judge erred in finding, based on the expert evidence, that the Share Sales by Yuanta did not cause a fall in the NexGen share price.

178 In our view, the claim for the Portfolio Loss fails on multiple fronts.

179 First, the defendants owed no fiduciary duties in relation to the shares that were retained by TPG and never brought into play in the parties' financing arrangement.

180 Second, in relation to the shares transferred to Yuanta, the defendants did not breach their fiduciary duties in carrying out the Share Sales because they were authorised to sell the shares in the Yuanta Account under the Agreements (see [109] above), while the October 225m shares did not come within the scope of the property in Yuanta's custody in respect of which fiduciary duties were owed. The breach of trust in respect of the shares in Yuanta's custody lay in the misapplication of the proceeds of sale. Since the sales by Yuanta were not wrongful in themselves, even if the fall in the NexGen share price could be traced to the sales, the loss would not have been caused by a wrongful act.

181 Third, the Portfolio Loss can only be claimed, if at all, as loss consequential to the defendants' breach of their duty of good faith by concealing EFH's role as lender. However, that the defendants dishonestly concealed EFH's role does not mean that the defendants should be rendered liable for *EFH's dealings* with the NexGen shares. We have rejected the plaintiffs' attempt to enlarge the defendants' liability to include liability for a wide and deliberate scheme to drive down the NexGen price (see [150]–[151] above).

182 Finally, even if the Portfolio Loss turned on the issue of causation alone, we see no reason to interfere with the Judge's evaluation of the expert evidence, and her conclusion that the Share Sales did not cause a fall in the NexGen share price.

183 Therefore, we dismiss the plaintiffs' appeal in respect of the Portfolio Loss.

Conclusion

184 In conclusion, we hold that Yuanta misapplied the shares held on trust for TPG by paying the proceeds of the 60m Sale and the profits of the 101.5m Sale & Repurchase to third parties instead of holding the monies for TPG or applying the proceeds as capital for AEM. We also hold that Mr Yeh dishonestly misappropriated the October 225m shares and their proceeds of sale, and is liable to account to TPG for their value.

185 We set aside the Judge's holding that (i) the Share Sales were in breach of the Agreements and in breach of the defendants' fiduciary duties; (ii) Mr Yeh is liable for inducing Yuanta's breach of contract; and (iii) the 60m Sale and the 101.5m Sale & Repurchase were acts of conversion (although we make no finding on whether Yuanta's dealings with the proceeds/profits of the 60m Sale and the 101.5m Sale & Repurchase as well as Mr Yeh's dealings with the October 225m shares amounted to conversion).

186 We affirm the Judge's holding on all the other claims and counterclaims.

187 Accordingly, we grant the following orders:

(a) The Judge's order at [78(a)] of the Supplemental Judgment is affirmed.

(b) The Judge's order at [78(b)] of the Supplemental Judgment (see our [124] above) is to be amended as follows: Yuanta is to pay TPG the sum of S$3,999,913.75. Mr Yeh is to pay TPG the sum of S$2,749,888.13.

(c) The plaintiffs are to pay S$6.75m into a joint trust account, being monies withdrawn from AEM but not utilised for the exercise of the Share Warrants (see our [135] above).

(d) The Cross-Appeal in CA 1/2017 is dismissed in its entirety.

188 These appeals should serve as a salutary reminder to commercial parties to pay careful attention to the legal structure as well as the legal boundaries of their business relationships. In the Judgment below, the Judge commented that the parties' joint venture relationship was not disciplined. Notwithstanding that millions of dollars were at stake, the parties' communications were poorly documented. They had no written business plan and, even if there was one, the parties did not rely upon it (Judgment at [60]). These remarks were well founded. For one, although the plaintiffs claimed that it was important to them that they retain majority control of NexGen and preserve the value of their NexGen shares, it has turned out that these interests were not adequately protected in the way their financing arrangements were designed. That the NexGen portfolio which they had invested so much in cultivating has become worthless, cannot now be legally attributed to the defendants under the cover of a wide-ranging conspiracy or unbounded fiduciary obligations.

189 We will hear the parties on (i) any questions which might arise out of the cross-obligations of the parties indicated by our orders at [187] above, and (ii) the costs of these appeals. We therefore give leave to the parties to make written submissions on such matters within three weeks and limited to no more than 15 pages each. Such submissions should cover any consequential issues, including in particular the status of the said sum of S$6.75m to be paid into the

joint trust account, the effect of the cross-obligations indicated by our orders, and costs.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Sir Bernard Rix International Judge

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