IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 131

Suit No 322 of 2012

Between

(1) Cheong Soh Chin
(2) Wee Boo Kuan
(3) Wee Boo Tee

… *Plaintiffs*

And

(1) Eng Chiet Shoong
(2) Lee Siew Yuen Sylvia
(3) C S Partners Pte Ltd

… *Defendants*

JUDGMENT

[Equity] — [Fiduciary relationships] — [When arising]

[Equity] — [Fiduciary relationships] — [Duties]

[Equity] — [Remedies] — [Account] — [Account on wilful default basis]

[Equity] — [Remedies] — [Account] — [Account of profits]

[Equity] — [Remedies] — [Account] — [Common account]

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

Cheong Soh Chin and others
v
Eng Chiet Shoong and others

[2018] SGHC 131

High Court — Suit No 322 of 2012
Vinodh Coomaraswamy J
27–30 June; 4–7, 11 July; 4 September; 30 October 2017

28 September 2018 Judgment reserved.

Vinodh Coomaraswamy J:

Introduction

1 This decision represents the latest instalment in the six-year long saga of a fallout between erstwhile friends and business partners. The essence of the case is this. The plaintiffs are very wealthy individuals. The defendants are experienced asset managers. The plaintiffs and defendants were family friends who agreed to embark on a venture together to grow the plaintiffs' wealth for mutual profit. The plaintiffs provided the capital and the defendants provided the financial expertise.

2 The parties' relationship soured. In April 2012, the plaintiffs brought this action to compel the defendants to account for their dealings with the plaintiffs' assets and to return those assets. The defendants brought a

counterclaim for management fees and related expenses incurred in managing and administering the plaintiffs' investments.

3 At the liability phase of this action, I allowed the plaintiffs' claim and dismissed the bulk of the defendants' counterclaim. The defendants appealed my judgment, but only to their counterclaim for management fees and related expenses.

4 The Court of Appeal dismissed the bulk of the defendants' appeal. The Court of Appeal did, however, award the defendants A$2m on a *quantum meruit* for a particular project known as Project Plaza. The Court of Appeal left undisturbed the remainder of my findings dismissing the defendants' counterclaim.

5 The parties now appear before me in the second phase of this action, the purpose of which is for the defendants to render the account which was ordered in the liability phase.

6 The accounting phase of this dispute comprises two judgments. This is because I had to deal with a preliminary issue. The preliminary issue was whether the defendants are precluded from asserting in the accounting phase that there was an overarching agreement for the plaintiffs to pay the costs and expenses incurred by the defendants in managing and administering the plaintiffs' investments. I took the view that the defendants were precluded from arguing that issue again. I gave oral judgment accordingly before the evidential hearings in the accounting phase began. The defendants have appealed against that decision. The grounds of my decision on that preliminary issue is the subject matter of *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2018] SGHC 130 ("*Cheong Soh Chin (Res Judicata)*").

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7 After receiving evidence in the accounting phase, I reserved judgment on the merits of the account. This judgment now deals with those merits, *ie* the taking of the account on the wilful default basis which the defendants were ordered to render in the liability phase. The plaintiffs assert that the account, properly taken on the wilful default basis, establishes that the defendants must pay the plaintiffs a sum of just over US$12m (excluding interest).[1] The plaintiffs arrive at that figure by falsifying certain disbursements made by the defendants as being unauthorised use of trust monies and surcharging the account for monies that they say should be credited to the *corpus* of the trust. Additionally, the plaintiffs also claim that certain monies received by the defendants as trustees were secret commissions which properly belong to the plaintiffs.

8 After hearing parties' submissions, I now hold substantially in favour of the plaintiffs.

Background facts

9 The facts have been set out in detail in the first instance and appellate judgments in the liability phase: *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2015] SGHC 173 ("*Cheong Soh Chin (HC)*") and *Eng Chiet Shoong and others v Cheong Soh Chin and others and another appeal* [2016] 4 SLR 728. The facts have also been summarised in *Cheong Soh Chin (Res Judicata)*. I will not repeat the facts in detail or in brief.

10 Consistently with those judgments, I use "the Wees" to refer to the plaintiffs and "the Engs" to refer to the defendants. Where it is necessary to identify a party individually, I use "WBK" to mean the second plaintiff, "WBT"

[1] Plaintiffs' closing submissions (11 August 2017) at para 3.

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to mean the third plaintiff", "ECS" to mean the first defendant, "SL" to mean the second defendant, and "CSP" to mean the third defendant.

Characterisation of the parties' relationship

11 The proper characterisation of the parties' relationship is essential to understanding the duties which the Engs owe to the Wees. To this end, I summarise my findings in *Cheong Soh Chin (HC*).

12 I found that the Engs were trustees of the Wees' monies under a presumed resulting trust (*Cheong Soh Chin (HC*) at [32]–[36]). This is because the Engs had been given the Wees' monies to invest, but the Wees had no intention to make the Engs the beneficial owners of those monies. Alternatively, I was also prepared to find that the Engs became the legal owners of the property which the Wees wished to invest in through them in the Engs' sole capacity as agents for the Wees. However, that was only an *alternative* finding, that I *would have* made, had I not already found that the Engs were presumed resulting trustees (*Cheong Soh Chin (HC*) at [32] and [36]). This judgment proceeds on my primary finding in *Cheong Soh Chin (HC*). The analysis that follows is therefore on the basis that the Engs are presumed resulting trustees.

13 Additionally, I also found that the Engs owed fiduciary duties to the Wees (*Cheong Soh Chin (HC*) at [32] and [35]). The reason for this was that they had used the Wees' monies to make investments on the Wees' behalf, and had managed and administered those investments. That relationship gave rise to the incidents of a fiduciary relationship, and thus the Engs properly bear fiduciary consequences for their acts and omissions.

14 The Engs did not appeal against my finding that the Engs were presumed resulting trustees and fiduciaries (see *Cheong Soh Chin (HC*) at [29]). Those

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findings are, therefore, unaffected by the Court of Appeal's judgment in *Eng Chiet Shoong (CA)*. Those findings therefore stand.

The parties' arguments

15 I briefly set out the parties' arguments here as a preliminary indication of the issues in contention. I will set out the parties' arguments more comprehensively when I deal in turn with each issue.

The plaintiffs' arguments

16 The Wees' claim is essentially that an account on the wilful default basis shows that the Engs owe the Wees just over US$12m, excluding interest. The Wees argue that certain items in the Engs' account should be falsified. They also argue that the Engs' account should be surcharged with certain other items.[2] The Wees made distinct arguments in relation to each item to be falsified or surcharged which I will canvass in more detail below when I consider the items individually.

17 The Wees also allege that certain payments made by third parties to ECS constituted secret profits which he earned while a fiduciary. The Wees therefore also claim an account of profits in respect of these sums in the event that they cannot be surcharged against the Engs.[3]

The defendants' arguments

18 The Engs separate the Wees' claims into two categories. In the first category are the items which the Engs seek to falsify. In the second category are the surcharges.

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2 Plaintiffs' closing submissions (11 August 2017) at para 4.

3 Plaintiffs' closing submissions (11 August 2017) at paras 202 – 206.

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19 In the first category are a number of disputed expenses which the Engs claim to be entitled to deduct from the account which they render. The Engs raise four alternative arguments on these disputed expenses:

(a) First, the Wees and Engs had an overarching agreement that the Wees would bear all expenses which the Engs incurred in managing the Wees' investments, including all of CSP's operating expenses (which in turn included the salaries of the CSP's employees).[4]

(b) Second, even if there was no single overarching agreement, there were multiple specific agreements that the Wees would bear all expenses which the Engs incurred in managing the Wees' investments including all of CSP's operating expenses (which in turn included the salaries of the CSP's employees).[5]

(c) Third, the Wees are precluded by an estoppel by convention from disallowing these expenses.[6] The Engs allege that the Engs and the Wees had, throughout the course of their relationship, proceeded on a common understanding or basis that the Wees would pay all expenses which the Engs incurred in managing the Wees' investments including all of CSP's operating expenses (which in turn included the salaries of the CSP's employees). Alternatively, the Engs allege that even if the Wees did not proceed on that understanding or basis, the Wees at least acquiesced to the Engs' proceeding on that understanding or basis.

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4 Defendants' closing submissions (11 August 2017) at para 82(a).

5 Defendants' closing submissions (11 August 2017) at para 82(b).

6 Defendants' closing submissions (11 August 2017) at para 82(c).

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(d) Fourth, the Engs incurred these costs and expenses as trustees, and are therefore entitled to be reimbursed for those costs and expenses out of the trust property.[7]

20 The nature of these four arguments is such that the outcome for the parties are binary. If the Engs succeed on any one of these four arguments, they can deduct *all* of the disputed expenses in the account and the Wees will be able to falsify *none* of them. Equally, if the Wees succeed on all four of these arguments, the Wees will be entitled to falsify *all* of the disputed expenses in account and the Engs can deduct *none* of them. For the purposes of these four arguments, therefore, the disputed expenses stand or fall together and can be analysed together.

21 In addition, however, the Engs also advance specific arguments in respect of particular disputed expenses. I examine these specific arguments in detail below.

22 In respect of items with which the Wees seek to surcharge the account, the Engs have mounted distinct arguments in relation to each specific item claimed. I canvass these arguments below where I address each item of surcharge in turn.

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7 Defendants' closing submissions (11 August 2017) at para 82(d).

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Issues

23 The arguments advanced by the parties raise the following issues for my decision:

(a) First, was there an overarching agreement under which the Wees agreed to bear the disputed expenses (the "overarching agreement issue")?

(b) Second, were there multiple specific agreements under which the Wees agreed to bear specific categories of disputed expenses (the "specific agreements issue")?

(c) Third, are the Wees estopped by an estoppel by convention from deducting the disputed expenses from the Wees' account (the "estoppel by convention issue")?

(d) Fourth, are the Engs entitled to deduct the disputed expenses from the account on the basis that they, as trustees, incurred these expenses properly ("the trustee's expenses issue")?

(e) Last, are the Wees entitled to falsify or surcharge the account in respect of each *specific* item claimed ("falsification and surcharging of specific items issue")?

24 I deal with the broad arguments (Issues 1 to 4) in turn first, before proceeding to an analysis of the falsification or surcharging in respect of each specific item claimed (Issue 5).

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Preliminary observations on the evidence

25 Before I address each issue in turn, I make two preliminary observations on the evidence presented in the accounting phase of this action.

Evidence from the liability phase

26 My first observation is that evidence given in the liability phase of this action remains evidence before the court in the accounting phase of this action. The trial of this action comprises both the liability phase and the accounting phase. The purpose of the accounting phase is merely to particularise and quantify the relief granted in the liability phase. Indeed, parties agree that evidence from the liability phase of this action remains in evidence in the accounting phase.[8] As such, all evidence given in the liability phase remains available to me now in the accounting phase.

27 The significance of this observation is as follows. The Wees filed affidavits of evidence in chief for the liability phase of this action. They were cross-examined at length on those affidavits in the liability phase. They also filed affidavits of evidence in chief for the accounting phase of this action. However, they elected not to be cross-examined in the accounting phase on these latter affidavits of evidence in chief. The consequence is that the contents of these latter affidavits of evidence in chief are not in evidence before me. But the Engs ask me to go further and invite me to draw an adverse inference against the Wees for refusing to be cross-examined on the latter set of affidavits.

28 I decline to draw an adverse inference against the Wees for the following reasons. On matters on which the Engs bear the burden of proof in the accounting phase, they must discharge their burden by adducing positive

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[8] Certified Transcript (27 June 2017), pp 109 (line 20) to 111 (line 21).

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evidence as part of their own case in chief. They cannot discharge that burden by pointing to an absence of evidence from the Wees. That amounts, in effect, to an impermissible attempt to reverse the burden of proof. On these matters, an adverse inference cannot assist the Wees.

29 Even on matters for which the Wees bear the burden of proof in the accounting phase, the only persons who are in a position to give direct evidence on many of those matters – as mandated by s 61 of the Evidence Act (Cap 97, 1997 Rev Ed) – are the Engs and not the Wees. Only the Engs can give direct evidence as to much of their dealings with the Wees' monies and assets. Only the Engs can give direct evidence as to how they came to incur many of the disputed expenses. Hence, the failure of the Wees to be cross-examined in the accounting phase of this action on aspects of the Wees' case on which they cannot give direct evidence does not justify an adverse inference.

30 Finally, to the extent that there remain some matters in the accounting phase on which the Wees bear the burden of proof and on which the Wees *can* give direct evidence, their evidence in the liability phase on those matters remains available as evidence in the accounting phase. That suffices to discharge any evidential burden and also to prevent it being said that any assertion of fact by the Engs in the accounting phase has been left uncontradicted by the Wees.

31 On any view, therefore, an adverse inference is either inappropriate or of no assistance to the Engs.

Role of experts in the accounting phase

32 My second observation concerns the expert evidence given in the accounting phase. Both parties engaged and adduced expert evidence from

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forensic accountants. The accountants have expressed views on whether an expense was incurred, in the sense that money was actually paid out; whether that money was paid out for a valid reason, in the sense that it was connected either directly or indirectly to the Wees' investments; and whether the expense claimed was reasonable in amount. They have even expressed views on whether a disputed expense should be allowed or disallowed.

33 In expressing these views, both experts have ventured beyond the remit of an expert. These issues are not matters of accounting practice but issues of fact or law which the court has to decide. Both experts have also regrettably shown themselves too ready to adopt the views of the party who engaged them as to whether a disputed expense should be allowed or disallowed.[9] In other words, the experts were wrong to express a view on an issue of fact or an issue of law and were even more wrong in being too ready to adopt a view that was not their own.

34 This is impermissible on several levels. First, it is impermissible because the question whether any specific expense should be allowed or disallowed when taking an account on a wilful default basis in equity is outside the realm of a forensic accountant's expertise.

35 Second, and flowing from the first, expressing a view on this issue essentially contravenes the ultimate issue rule. That rule prohibits an expert from giving his opinion on the very issue which the court has to decide. While the rule has lost some force today, especially in civil cases, it remains live. On this point, the Court of Appeal's observations in *Eu Lim Hoklai v Public Prosecutor* [2011] 3 SLR 167 at [44] bear repeating:

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9 Certified Transcript (4 July 2017), p 14 (line 4 – 20); Joint Expert Report (Exhibit A) at 4.

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> Ultimately, all questions – whether of law or of fact – placed before a court are intended to be adjudicated and decided by a judge and not by experts. An expert or scientific witness is there only to assist the court in arriving at its decision; he or she is not there to arrogate the court's functions to himself or herself...

36 Third, the expert's duty to the court is to express his own *independent* view and not merely to adopt the views of the party engaging him. This is made explicit by O 40A r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), which provides that an expert's duty is to "assist the Court on matters within his expertise" and that this duty to the Court "overrides any obligation to the person from whom he has received instructions or by whom he is paid". Experts do not assist the court on matters within their expertise by merely adopting their client's view.

37 I therefore wish to make clear that both experts' views carried no weight with me insofar as the expert was stating an assertion of fact or a conclusion of law. The former is not evidence of opinion. The latter is for the Court to decide.

38 I now address the issues in turn.

Issue 1: The overarching agreement issue

39 The gist of the Engs' argument on the overarching agreement issue is that the Wees and the Engs agreed that the Wees would bear all expenses which the Engs incurred in managing the Wees' investments including all of CSP's operating expenses. My decision, briefly summarised, is that there was no such overarching agreement. As this forms the subject of my grounds of decision in *Cheong Soh Chin (Res Judicata)*, I need say no more here.

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Issue 2: The specific agreements issue

40 The Engs' alternative argument is that each of the contemporaneous documents they cite in support of the overarching agreement nevertheless suffices to constitute a specific agreement as to a particular expense.[10] This argument is made in two ways.

41 The first way is as follows. The Wees conceded in the liability phase that they did reach specific agreements with the Engs which bound the Wees to pay certain expenses to the Engs. The Engs now argue that the correspondence and documents which they now cite as establishing a specific agreement are essentially equivalent in nature, or meet the same threshold, as those specific agreements conceded in the liability phase.[11]

42 The second way in which the Engs make this argument, which was advanced in oral submissions, is that these contemporaneous documents also suffice to constitute multiple binding *contractual* agreements.[12]

43 I hold that there were no specific agreements between the parties that the Wees would bear particular expenses. The reason for this is that the Engs are in fact precluded from arguing that additional specific agreements exist apart from those which I have found to exist in *Cheong Soh Chin (HC)*. To recapitulate, I held in *Cheong Soh Chin (HC)* that the parties had approached the overall WWW Concept as joint risk runners, which was inconsistent with the argument advanced by the Engs then (and now) that there was an overarching agreement. Additionally, I specifically held that the existence of any overarching agreement is contradicted by the evidence that shows that the

10 Defendants' closing submissions (11 August 2017) at paras 249 – 252.

11 Defendants' closing submissions (11 August 2017) at paras 250 – 252.

12 Certified Transcript (4 September 2017), pp 135 (Line 25) to 136 (Line 13).

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parties had entered into specific agreements from time to time for particular expenses on Project Plaza (see *Cheong Soh Chin (HC)* at [99]).

44 The fact that I found only certain specific agreements to exist implies that I rejected all other specific agreements. Because this issue of specific agreements has been raised and considered in *Cheong Soh Chin (HC)*, or ought to have been raised and considered there, the Engs cannot re-open the issue now.

45 The above analysis suffices to dispose of this issue. I am also of the view that each argument now advanced by the Engs fails in any event. The first argument on apparent equivalence fails because the standard which the Engs are comparing their documents against, namely, the specific agreements which the Wees have conceded, is not a sufficient standard to find a binding agreement. The reason is simply that these latter specific agreements were *conceded* as binding by the Wees,[13] which obviated any analysis in *Cheong Soh Chin (HC)* as to whether and why they were binding as a matter of law. Conversely, the Engs now have the burden of making a positive case that there were binding specific agreements as a matter of law. They cannot discharge that burden by referring to agreements which were *conceded* to be binding without argument or analysis.

46 The second argument, that the contemporaneous documents would also suffice to constitute separate and discrete contractual agreements in relation to particular expenses, also fails. The Engs have failed to particularise and identify each individual specific agreement which they allege to exist. And in any event, they have failed to identify how, in respect of any and each alleged contractual agreement, the necessary elements for a contract to exist are satisfied.

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13 Plaintiffs' closing submissions (Liability Phase) (9 April 2014) at paras 461 and 466.

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Issue 3: The estoppel by convention issue

47 The Engs' third argument is that an estoppel by convention has arisen from the parties' dealings over the years, such that the Wees are now estopped from denying the Engs' right to deduct the disallowed expenses in the account which they now render.

48 The necessary elements for an estoppel by convention were set out by the Court of Appeal in *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 at [28], and reaffirmed in *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 at [31]. These elements are that:

(a) the parties must have acted on "an assumed and incorrect state of fact or law" in their course of dealing;

(b) the assumption must be either shared by both parties pursuant to an agreement or something akin to an agreement, or made by one party and acquiesced to by the other; and

(c) it must be unjust or unconscionable to allow the parties (or one of them) to go back on that assumption.

49 The Engs argue that the assumed state of facts is that the Wees would bear all expenses which the Engs incurred in managing the Wees' investments including all of CSP's operating expenses (which in turn included the salaries of the CSP's employees).[14]

50 They submit that this argument is borne out by the fact that the Wees acted on that assumption or basis, or at the very least, acquiesced to the Engs

[14] Defendants' closing submissions (11 August 2017) at para 259.

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doing so. In support of this contention, the Engs cite various examples, including amongst others how the Wees requested information about CSP's staff and expenses, how the Wees were involved in setting up and renting CSP's Thong Teck office, how the Wees were given bank statements and cash flow statements that would have informed them about CSP's expenses and salary costs, and how the Wees were closely involved in the process by which CSP hired new staff.[15]

51 Finally, the Engs argue that it would be unjust for the Wees to go back on that assumption, as this would saddle the Engs with expenses and costs which they incurred for the Wees' investments, while it is only the Wees who will now enjoy the benefits of those investments.[16]

52 I reject this argument. I find that the elements necessary for an estoppel by contention to arise are not made out. In the first place, I do not accept that the parties acted on an assumed set of facts in their course of dealing or that the Wees acquiesced to the Engs doing so. The fact that the Wees asked for information and were informed of certain actions being taken, or were given bank statements or cash flow statements, is neither here nor there. That scenario is equally consistent with the Wees co-operating with the Engs as risk runners in the WWW Concept, and therefore requesting information or being informed as to the progress of the Engs' commitments and expenses towards that concept. The same can be said of the Wees' involvement with the hiring of staff or the setting up of the Thong Teck office.

53 Further, the Engs' own actions and evidence seem to be inconsistent with such a shared assumption. There are several examples of this. In an email

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15 Defendants' closing submissions (11 August 2017) at paras 259 – 265.

16 Defendants' closing submissions (11 August 2017) at para 266.

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from SL to WBT dated 7 July 2010, SL essentially said that the Wees had not paid the expenses incurred by CSP for several years:[17]

> …all these years I have been doing work for PPM/ the Funds /the portfolio company at my own cost and even taking the liabilities and the blame.

54 The same can be said of a later email dated 8 December 2010, where SL told WBK that:[18]

> The team at CSP, including ED/ECS have been working on the PE funds for many years without taking any fees from the fund or from the LPs. I funded the cost… But there is really a lot of work and cost I have incurred. Since there is no fees received from you all these years, ECS and I have to go out and look for income and opportunities elsewhere so that CSP can survive.

55 And to the same effect is this email from SL to WBK on 11 July 2011:[19]

> … CSP however did not receive any fees from the family and has been working at its own costs for the family for several years. The cost also did not include the cost of funding the investments which is increasingly difficult for the family office and the investments to continue if there is no support from the family. Perhaps we should meet and discuss about this when you return?

56 What these emails consistently show is that the Wees and Engs have never engaged in a course of dealing under which the Wees were expected to bear the expenses which the Engs incurred in managing the Wees' investments. In fact, the very complaint that SL levelled against the Wees in these emails is that the Wees were *not* paying those expenses and were not *expected* to pay those expenses. This suffices to show that there was, in fact, no assumed set of facts on which parties operated. Thus, there can be no estoppel by convention.

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17 42 AB 33370.

18 46 AB 36737.

19 47 AB 37654.

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57 Finally, it bears noting that this argument was advanced essentially as an afterthought. The notion of an estoppel, much less an estoppel by convention, was never pleaded. Nor was it even raised in the Engs' counsel's opening statement in the accounting phase.[20] It has only belatedly appeared after the trial in the Engs' closing submissions.[21] In these circumstances, it is difficult to see how the argument is advanced with any credibility.

Issue 4: Trustees' expenses issue

58 The Engs' final alternative argument in respect of the disallowed expenses as a whole is that the expenses which the Engs incurred in managing the Wees' investments are trustees' expenses properly incurred in the administration of the trust. They argue that they had no reason to incur these expenses otherwise than in order to manage the Wees' investments, and indeed, that they derived no personal benefit from incurring these expenses.[22]

59 The Wees seek to prevent the Engs from making this argument by alleging that it goes against the findings I made in *Cheong Soh Chin (HC)*. The Wees essentially argue that the issue of expenses was fully settled in my earlier finding that the Engs were risk runners and were therefore not entitled to claim any expenses other than expenses under the specific agreements in which the Wees conceded they agreed to bear expenses incurred by the Engs.[23] Further, the Wees argue that the proper forum for the Engs to have raised this issue was in their appeal, and, having failed to do that, the Engs cannot raise the issue now.

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20 Defendants' opening statement (19 June 2017).

21 Defendants' closing submissions (11 August 2017) at para 253.

22 Defendants' closing submissions (11 August 2017) at paras 268 – 276.

23 Plaintiffs' closing submissions (11 August 2017) at para 100.

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60 I take the view that the Engs remain entitled to raise this argument now. If the Engs were now relying on this argument to support a positive claim against the Wees, *eg*, in a claim or a counterclaim in which they were now seeking actively to recover these disputed expenses from the Wees, they would be precluded from pursuing that claim by my findings in *Cheong Soh Chin (HC)*. However, that is not what the Engs are doing now. What the Engs are doing now is to raise this argument as a justification for deducting the disputed expenses in the account which they have been ordered to render and to resist the Wees' claim to falsify those deductions. A claim framed this way could not therefore have been the subject of their counterclaim in the liability phase.

61 In any event, it also bears noting that counsel for the Wees, Mr Jeyaretnam, expressly indicated that aside from the overarching agreement argument, the Wees were not arguing that the Engs were precluded from running other arguments in the accounting phase to reduce their liability to account, which presumably would include this argument.[24] I therefore consider that it is open to the Engs to argue that the expenses might conceivably be trustees' expenses properly incurred, regardless of the findings against them at the liability phase.

62 I turn now to the law on a trustees' right to be indemnified out of the trust property. The general principle is well stated in Lynton Tucker, Nicholas Le Poidevin & James Brightwell (eds), *Lewin on Trusts* (Sweet & Maxwell, 19th Ed, 2015) ("*Lewin*") at para 21-003:

> A trustee is, subject to the terms of the trust, entitled to be indemnified out of the trust property in respect of liabilities, costs and expenses properly incurred by him in connection with the performance of his duties and the exercise of his powers and discretions as trustee:

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[24] Certified Transcript (27 June 2017), pp 97 (line 2) to 98 (line 15).

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> "Persons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred… The general rule is quite plain; they are entitled to be paid back all that they have paid out."
>
> [citing *Re Grimthorpe* [1958] Ch 615 at 623, *per* Danckwerts J]

63 The corollary to this general principle, however, is that the trustee is generally not entitled to be indemnified for costs and expenses incurred without authority, either in the trust instrument or from the beneficiaries. *Lewin* at para 21-042 spells this out:

> In general, a trustee is not entitled to indemnity if he incurs costs or liabilities in a transaction which is unauthorised by the terms of the trust instrument and without the request or implied assent of the beneficiaries. However, if the trustee acts in good faith, and the transaction benefits the trust estate, he may be entitled to indemnity to the extent that the transaction benefits the trust estate, though whether the indemnity is a matter of right rather than of discretion of the court is not clear.

64 What the above two passages from *Lewin* make clear is that a trustee has no right to be indemnified out of the trust property for unauthorised expenses because they have not been properly incurred. The latter half of the second passage does suggest an exception to this general principle: a trustee may nevertheless be entitled to claim an indemnity out of the trust property for unauthorised transactions which benefit the trust estate and which the trustee incurred in good faith. The caveat, however, is that the law is uncertain on this point as to whether the indemnity in these circumstances is a matter of right or lies at the court's discretion.

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65 In my judgment, a trustee's indemnity in these circumstances is not a matter of right but within the Court's discretion. In the exercise of its discretion, the Court can have regard to the totality of the trustee's behaviour. The Court is not confined to considering only how the trustee has behaved in relation to that one specific unauthorised transaction. In other words, it may be the case that in respect of one unauthorised transaction, the trustee did indeed incur the expense in good faith for the benefit of the trust estate. But if the same trustee has incurred a string of other unauthorised expenses which have not benefited the trust estate or otherwise than in good faith, it is right that the court retains a discretion to deny the trustee an indemnity even in respect of the apparently untainted transaction.

66 The above principles are of great relevance to the present case. I have found several instances of egregious behaviour by the Engs as trustees. I made an express finding of one such instance in *Cheong Soh Chin (HC)* at [46], where I observed that the Wees were wholly entitled to have all 20 of their SPVs transferred back to them, and the Engs' refusal to transfer seven of them could only have been driven by a desire to hold the SPVs hostage for their counterclaim against the Wees. Other instances are elaborated in greater detail below at [92]–[96], where I elaborate on my finding that the Engs were in wilful default.

67 At this point, however, it suffices to note that because of these instances of egregious behaviour, I would have held that the Engs are not entitled to any indemnity whatsoever in respect of any unauthorised transactions, even if such transactions might have benefited the trust estate and were done by the Engs in good faith.

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68 It therefore follows that the Engs are entitled to be indemnified only in respect of *authorised* transactions or, to put it another way, only in respect of expenses properly incurred. However, if the transaction is already authorised, there would ordinarily be no grounds for the Wees to disallow it and falsify the account in respect of that transaction. The finding that the transaction is authorised will therefore be enough on its own to satisfy the Engs' desire to resist falsification. The inquiry into whether an expense was properly incurred is therefore relevant only where the transaction was authorised but the Engs cannot show that all aspects and components of that expense were properly incurred.

69 As the question of whether a specific expense claimed or cost incurred was properly incurred depends on the particular transaction, this question is best left to be considered when each item is dealt with separately below.

Issue 5: Falsifying and surcharging

70 The final issue relates to whether the Wees' claims of falsification or surcharging in respect of each specific item should be allowed. I shall first set out the law on the taking of accounts on a wilful default basis, including the law as to burdens of proof and causation. I then set out instances of the Engs' misconduct that ground my finding that they were in wilful default. I then consider out what duties the Engs owe the Wees by virtue of their position as accounting parties due to their status as trustees and fiduciaries. I then apply the law to the specific items in dispute.

The law on taking of accounts

71 It is first important to appreciate the taxonomy within this branch of the law. There are broadly two categories of account as noted by the Court of

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Appeal in *Chng Weng Wah v Goh Bak Heng* [2016] 2 SLR 464 ("*Chng Weng Wah"*) at [21]:

> (a) a general or common account, where no misconduct has been alleged ("the common account"); and
>
> (b) an account on the footing of wilful default, which involves a breach of duty on the part of the fiduciary ("account on wilful default").

The common account

72 A common account, otherwise known as the general account, or the account in common form, does not depend on wrongdoing. The practical significance of this is that the beneficiary is entitled 'as of right' to be given an account in common form of the trustee's stewardship of the trust assets, without the beneficiary having to show that the trustee has committed a breach of trust (see the Court of Appeal's decision in *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 4 SLR 339 at [87]; Lord Millett NPJ's judgment in *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 (*"Libertarian Investments*") at [167]).

73 The reason for this was elaborated upon by Aedit Abdullah JC (as he then was) in *Lalwani Shalini Gobind and another v Lalwani Ashok Bherumal* [2017] SGHC 90 ("*Lalwani*"). At [16] of *Lalwani*, Abdullah JC explains that a critical aspect of the custodial fiduciary relationship is the duty of the trustee to keep accounts of the trust, and to allow the beneficiaries to inspect them as requested. This accounting procedure serves two purposes – firstly, the informative purpose of allowing the beneficiaries to know the status of the fund and what transformations it has undergone, and secondly, the substantive purpose that ensures that any personal liability a custodial fiduciary may have

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arising out of maladministration is ascertained and determined (citing Steven Elliott, *Snell's Equity* (John McGhee QC gen ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at para 20-013).

74 The claim for a common account is divided into three phases (*Chng Weng Wah* at [22]). First, the question is asked whether the claimant has a right to an account. Second, the taking of the account. Third, the court grants consequential relief. It can thus be observed that the taking of an account is a *process*. It is not, in itself, a remedy (see also *Lalwani* at [26]).

75 The duty to account is continuous, on demand, and is not confined to being discharged only at the time of distribution of the trust assets (*Lalwani* at [20]). However, the court has the discretion not to order an account where it is oppressive to require the trustee to do so, or for some other good reason (*Foo Jee Boo and another v Foo Jhee Tuang and others* [2016] SGHC 260 at [81]).

76 The extent of disclosure required in furnishing an account is fact-specific in nature. However, the trustee must by the accounting process give proper, complete, and accurate justification and documentation for his actions as a trustee (*see Lalwani* at [23]).

77 A trustee's account, once furnished, may disclose discrepancies. The beneficiary can then decide whether he wishes to falsify a discrepant entry, or to surcharge the account. A recent article by Prof Matthew Conaglen "Equitable Compensation for Breach of Trust, Off *Target*" (2016) 40 MULR 126 ("*Conaglen*") gives a helpful and illuminating account of this process.

78 By falsifying an entry in the account, the beneficiary essentially asserts that that entry on the credit side should be struck out of the account, and the

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trustee should not be given credit for that entry. The trustee then bears the burden of proving that that disbursement was in fact an authorised one, being one within the scope of the trust terms (*Conaglen* at 130). If the trustee cannot do so, the beneficiary by falsifying the account essentially disclaims any interest in the property, and the investment is treated as if it was bought with the trustee's own money (*Libertarian Investments* at [169]). However, the beneficiary is not *obliged* to falsify the entry. If the disbursement was made for an asset that has in fact *risen* in value, the beneficiary is entirely within his rights to adopt the transaction, the result of which is henceforth treated as forming part of the trust fund (see *Libertarian Investments* at [169]).

79 Conversely, where a beneficiary seeks to surcharge a common account, the beneficiary essentially asserts that the trustee has received more than the account records. In this case, the burden lies on the beneficiary to show that the trustee in fact received more than the account records (see *Snell's Equity* at paras 20-017 and 20-018). An example would be a beneficiary showing that the trustee had received income from the trust property (such as rent on real property or dividends from shares) that was not recorded in the trust accounts. The beneficiary is then entitled to surcharge the account to include that income on the debit side of the account (*Conaglen* at 130).

Account on a wilful default basis

80 An account taken on the wilful default basis is distinct from a common account because the former requires the trustee to have committed some sort of misconduct while the latter does not: see *Partington v Reynolds* (1858) 62 ER 98 at 99; *Lalwani* at [25]. As the Court of Appeal in *Ong Jane Rebecca v Lim Lie Hoa and others* [2005] SGCA 4 ("*Ong Jane Rebecca*") observed at [61], this means that the beneficiary seeking an account on the wilful default basis

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must allege and prove at least one act of wilful neglect or default. Unlike the common account, the taking of an account on a wilful default basis is therefore not available to beneficiary 'as of right'.

81 An instance of wilful default can be shown when custodial fiduciaries "do that which it is their duty not to do; or omit to do that which it is their duty to do": see *Re Owens* (1882) 47 LT 61. It is not a requirement for the trustee to be conscious of his misconduct, or indeed to appreciate that his behaviour is a breach of trust. Instead, it is sufficient that the trustee has been guilty of a want of ordinary prudence: see *Armitage v Nurse* [1998] Ch 241 at 252 (Millett LJ); *Meehan v Glazier Holdings Pty Ltd* [2002] 54 NSWLR 146 ("*Glazier Holdings*") at [65] (Giles JA). Practically, this is achieved if the beneficiary can show that trustee has *failed to obtain* for the trust that which *would have been* obtained if the trustee's duties had been discharged: *Glazier Holdings* at [65].

82 The scope of an account on a wilful default basis is wider than that of an account on the common account basis. As the Court of Appeal observed in *Ong Jane Rebecca* at [55], on a common account the trustee need only account for what was actually received and for its disbursement and distribution. Conversely, on an account on a wilful default basis, the trustee has to account not only for what was actually received, but also for what he *might have* received had it not been for the default. The trustee's potential liability on the common account is therefore limited to what has *actually* been received and paid out; while on the wilful default basis, the trustee's exposure to liability is far greater, as he is liable not only for what he has *actually* received, but is also additionally liable for what he *might have* received.

83 The trustee's exposure to liability is also broadened on the wilful default basis because the trustee is subject to what has been called a "roving

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commission" by the master taking the accounts (*Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] 1 Ch 515, 546 (Brightman LJ)). What this means is that the judge or registrar taking the account is entitled to look into all aspects of the trustee's management of the trust property and the trustee will be required to explain any suspect transactions, even if the particular transaction has not been complained of by the beneficiary.

84 The effect of this, as the Court of Appeal in *Ong Jane Rebecca* observed at [55], is that the accounting party will carry a much more substantial burden of proof than that which applies to him in the case of a common account. This is because the trustee has engaged in misconduct, and consequently ought to bear a greater burden in proving that the transactions he has carried out are within the scope of his duties and powers.

85 As for the process of how an account on the wilful default basis is actually taken, it becomes apparent that such an account covers the same ground as a common account but, *in addition*, the trustee is also liable to account for what he might have received if he had been diligent in his duty (see also *Snell's Equity* at para 20-025). Falsification and surcharging therefore apply as they would under a common account, subject to a caveat as to differing principles of causation as set out below.

Causation

86 It is clear that questions of causation do not enter into the picture when an account is falsified. Where the beneficiary falsifies an entry in the trustee's account, and the trustee cannot show that the disbursement or transaction was in fact justified or authorised, the entry is disallowed and the disbursement effectively treated as if it had not happened (see *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) ("*Ultraframe*") at [1513]). The transaction is instead

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treated as having been made by the trustee out of his or her own funds. The trustee then becomes personally liable to restore the original asset, or, if that is not possible, to reimburse the fund for the value missing (see Graham Virgo, *The Principles of Equity & Trusts* (Oxford University Press, 2nd Ed, 2016) at para 18.2.1).

87 It is not quite so clear whether questions of causation apply when an account is surcharged. The leading cases thus far seem to have confined the process of "surcharging" only to cases where the account is taken on a wilful default basis (see *Libertarian Investments* at [170]; *Ultraframe* at [1513]). Questions of causation then arise because the inquiry when an account is taken on a wilful default basis is concerned with compensation for loss. As the learned authors of *Snell's Equity* (at para 20-027) note, the "governing concept [for surcharges for wilful default] is compensation for loss caused by breach of duty, although this has not always been appreciated."

88 However, there can also be surcharges when an account is taken on the common basis. In my judgment, surcharges on the common account should not involve questions of causation. As has been pointed out above, the distinction between the common account and an account on the wilful default basis is that the former concerns only monies that the trustee has *actually received*, while the latter extends beyond that to monies that the trustee *would have received* if he had properly dealt with the trust property. This, to my mind, makes all the difference.

89 There is no requirement to establish causation for surcharges on the common account because it is not disputed that the trustee has *actually* received monies that should properly be regarded as forming part of the trust fund. As Prof Conaglen convincingly argues, no causal analysis is required to show what

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the reasonable trustee in that trustee's position would have received; it is already clear what this trustee has already received: see *Conaglen* at 143.

90 In contrast, as Prof Conaglen instructively points out, causation is much more relevant when surcharges arise when an account is taken on the wilful default basis. This is because these surcharges "necessarily require a hypothetical assessment of what a prudent investor would have done, in order to establish the manner in which the trustee should have acted": *Conaglen* at 146. A causal inquiry is therefore necessary to identify what the trustee *would have* received, as opposed to what the trustee has already *actually* received.

91 What this means, practically, is that when accounts are taken on a wilful default basis, two types of surcharges are available. This can be illustrated by an example. If the trustee has actually received income that should properly be credited to the trust, for example, dividends for shares held on trust, then a surcharge may be taken against him on a common account, and no causal inquiry is necessary. However, if the same trustee has in fact failed to invest within the range of authorised investments, a surcharge is taken against him when accounting on the wilful default basis. In this case, questions of causation do arise as to how a reasonable trustee would have behaved, and what investments a reasonable trustee in this trustee's position might have made for the trust.

The Engs' wilful default

92 I found in *Cheong Soh Chin (HC)* at [42] that the Engs were in wilful default. One instance of such behaviour I cited in *Cheong Soh Chin (HC)* at [46], and referred to in this judgment at [66] above, is the Engs' refusal to return seven of the Wees' 20 SPVs with no legal basis whatsoever, effectively holding the SPVs hostage as leverage for their counterclaim in the liability phase.

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93 Other instances abound. I cite two more examples. The first concerns the Engs' deceptive behaviour in relation to disclosing the Wees' actual interest in Agis Pte Ltd ("Agis"), one of the direct investments which the Engs made for the Wees. The evidence for this is a file which the Engs provided to the Wees on 12 May 2012 (the "12 May 2012 File").[25] That file contained information and documents regarding the Wees' investments (including breakdowns of capital calls and distributions, annual reports and write-ups).[26] The Engs prepared and delivered that file in response to the Wees' initial request for a thorough and detailed account of their entire private equity portfolio.[27]

94 In this file, the Engs prepared a table showing that the Wees' shareholding in Agis had been diluted from an initial 45.8%, to 2.4%. This table referred to a shareholder called "B1" whose stake in Agis was ultimately reduced to 2.4% in the last column of the table. A footnote indicated that "B1 represents Wee family". This dilution was consistent with the Engs' apparently having complied with the Wees' instruction not to take up rights issues in Agis. The table also showed that other investors, notably "B2" and "B3", held 33.9% each, while "non-BIL" shareholders held the remaining 29.8% shareholding.

95 This table was deliberately deceptive. The truth was that "B2" and "B3" also represented the Wees' investment, via their SPV 'Berners'. In other words, the Wees' shareholding in Agis was not just the 2.4% represented in the table as being held by "B1". The Wees in fact had a combined 70.2% shareholding which the table deceptively showed as being held separately by "B1", "B2" and "B3". This was a deception perpetrated on the Wees. It is clear evidence of misconduct by the Engs.

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25 50 AB 39637 – 39638.

26 Defendants' closing submissions (Liability Phase) (9 April 2014) at para 25.

27 Plaintiffs' closing submissions (11 August 2017) at para 85.

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96 A second example of misconduct involves the Engs' concealment of availability of existing funds to meet capital calls. In brief, what the Engs did in response to repeated queries was to misrepresent to the Wees repeatedly that the Engs did not have funds available to meet capital calls falling due on the private equity funds which the Engs controlled for the Wees. Instead, the Engs repeatedly asked the Wees to supply fresh funds to meet those capital calls. This is a failure of the trustee's duty to account, which includes a duty to inform the beneficiary as to the status of the trust accounts.

The duties owed by the Engs to the Wees

97 As noted earlier at [11]–[14], I found in *Cheong Soh Chin (HC)* that the Engs were resulting trustees and fiduciaries. I now elaborate as to how this finding shapes the kinds of duties the Engs owed the Wees.

98 In most cases, a presumed resulting trustee will owe only a few essential duties to the beneficiary of that trust. As the Court of Appeal observed in *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*") at [190], "a resulting trust… is very often a bare trust and, as such, only requires the trustee to convey the trust property when called upon to do so." That this is the main duty of the presumed resulting trustee is therefore beyond doubt.

99 I add, however, that until the trustee has executed that main duty, he is also subject to other duties. These are the duty to retain or preserve the trust assets and the duty to account to the beneficiaries when called upon to do so. This much can be discerned from the following extract from *Snell's Equity* at para 10-004:

> The basic duty of a trustee, in the absence of any power or duty to deal with the trust assets, is to retain the assets and account

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> for them to the beneficiaries in due course in accordance with the terms of the trust. That is only a default rule, operating in the absence of other terms of the trust.

100 Although that extract concerns the default duties of an express trustee, it stands to reason that until the resulting trustee under a bare trust has conveyed the trust property to the person properly entitled to it, he must also retain or preserve that property, and if he deals with it, he is liable to account for that to the beneficiary. The Engs are subject to these basic duties.

101 The Court of Appeal in *Tan Yok Koon* also observed at [196] that "[a]s a matter of principle, the idea that a fiduciary relationship is possible sits uncomfortably with the fact of a resulting trust". The reason for this is that fiduciary obligations are typically voluntarily undertaken (see *Tan Yok Koon* at [194]), but the resulting trust is imposed by law. That being said, the Court of Appeal did not foreclose the possibility that a resulting trustee could owe fiduciary obligations: it also observed at [196] that "it may well be that the *facts and circumstances* leading to the imposition of a resulting trust may also disclose an undertaking by the trustee – whether *express* ***or*** *implied* – to act in a certain way" [emphasis in original].

102 I found that the Engs were fiduciaries here, even though they held the monies and investments under a presumed resulting trust. As this is a departure from the typical scenario identified by the Court of Appeal above, I elaborate on my reasons for doing so.

103 I found that the Engs stood in a fiduciary relationship with the Wees because their relationship exhibited the essential hallmark of the fiduciary relationship: an obligation to act in the interests of the Wees. There are several examples of this.

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104 First, in SL's affidavit of evidence in chief for the liability phase, she explained that:[28]

> Through these years, my interactions with the Plaintiffs and their family extended beyond our banker-client relationship, and the Plaintiffs, in particular M, treated me not just as their banker, but also a family friend that they trusted.

105 Second, and perhaps more pertinently, in the same affidavit of evidence in chief, SL says that:[29]

> Notwithstanding the absence of any written agreement on CS Partners' engagement to administer the Plaintiffs' investments, in view of the long-standing relationship, the parties' mutual trust and understanding and the family issues that the Plaintiffs were facing, CS Partners agreed to continue the administration of the Plaintiff's investments and assumed the onerous liabilities that come with standing in as the [Beneficial Owner] of the Plaintiffs' investments.

106 SL's depiction of the relationship as being one grounded on trust is also echoed in ECS's affidavit of evidence in chief for the liability phase:[30]

> [SL] and the Plaintiffs have a long-standing relationship over decades, and the Plaintiffs, in particular M, treated her not just as their banker, but also a family friend that they trusted.

107 ECS's affidavit of evidence in chief then essentially repeats SL's affidavit of evidence in chief:[31]

> Notwithstanding the absence of any written agreement on CS Partners' engagement to administer the Plaintiffs' investments, in view of the long-standing relationship, the parties' mutual trust and understanding and the family issues that the Plaintiffs were facing, CS Partners agreed to continue the administration of the Plaintiff's investments and assumed the

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28 Lee Siew Yuen Sylvia's AEIC (Liability Phase) (8 March 2013) at para 7.

29 Lee Siew Yuen Sylvia's AEIC (Liability Phase) (8 March 2013) at para 17.

30 Eng Chiet Shoong's AEIC (Liability Phase) (8 March 2013) at para 7.

31 Eng Chiet Shoong's AEIC (Liability Phase) (8 March 2013) at para 17.

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> onerous liabilities that come with standing in as the [Beneficial Owner] of the Plaintiff's investments.

108 That trust lay at the heart of the relationship between the Wees and the Engs is also borne out by SL's testimony:[32]

> Q: Now, if I can take you to 46AB 36737. This is an e-mail you sent to Mr BK Wee and Mr BT Wee on 8 December 2010…
>
> I'll start with the bottom of the page, where you tell Mr BK Wee about how you remember his father's voice, and how you were his father's private banker, and how, when he was ill, you continued to keep in touch with him over the phone, and how you told him that you would take care of his sons. …
>
> You were making out that you really had the Wees' interests at heart, and would really look after them because of this promise to their late father, right?
>
> A: That's correct.

109 The undertaking to act in the Wees' interests is also replicated elsewhere in SL's testimony:[33]

> Q: I don't want "in general", Madam Lee. Either you must act on their instructions or, you are entitled, as a discretionary fund manager, to make decisions in the interests of the client. So which one is it?
>
> A: I am not the fund manager.
>
> Q: So do you act on instructions?
>
> A: I will let them know the circumstances.
>
> Q: Do you act on instructions, Madam Lee?
>
> A: Yes, I act on their instruction.
>
> Q: So if they say "Pay", you pay. If they say, "Do not pay", you don't pay?
>
> A: Usually, I have to protect their interests and I will pay.

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32 Certified Transcript (3 September 2013), pp 105 (lines 21 – 25) to 106 (lines 1 – 12).

33 Certified Transcript (4 September 2013), pp 13 (lines 17 – 25) to 14 (lines 1 – 21).

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> Q: Isn't that actually for the client to decide, whether or not to pay a capital call in the first place?
>
> A: Can I explain?
>
> Q: No, answer that question first, please, then you can explain.
>
> A: Yes. The client's interests come first, I agree.
>
> …
>
> A: Can I explain?
>
> Q: All right, go ahead.
>
> A: Your Honour, our relationship with the client has been for eight years. We have, from all these eight years, we have been taking care of their interests. …

110 The above evidence shows how the hallmark of a fiduciary relationship has been amply satisfied.

111 That the Engs owe the Wees fiduciary obligations is also confirmed by other aspects of their relationship. In the High Court of Australia decision of *Breen v Williams* (1996) 186 CLR 71, Brennan CJ at 82 indicated that fiduciary duties can arise where there is a "relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other". I find that this is also made out here.

112 While the Wees may be sophisticated investors in several respects, I found in *Cheong Soh Chin (HC)* at [12] that they were unfamiliar with private equity funds as an asset class. Conversely, ECS was experienced in this field, and tutored them in these investments. The Wees came to see him as their "trusted mentor" in this field: *Cheong Soh Chin (HC)* at [12]. This supports a finding that the Wees were in a position of dependence or trust on ECS, and consequently fiduciary obligations would arise. Indeed, this is true even though the parties were engaged in a commercial venture together. As the Hong Kong

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Court of Final Appeal noted in *Libertarian Investments* at [70], it is plain that fiduciary duties may well arise as aspects of a commercial relationship. This is exactly the case here.

113 I would also add that the finding that the Engs were fiduciaries who owed a duty to act in the interests of the Wees is in no way inconsistent with the finding that the Engs and Wees were also joint risk runners under the WWW Concept. To my mind, the Wees' advances of monies to the Engs activates a proprietary relationship of resulting trust over the initial monies advanced. Conversely, the finding that the parties were risk runners relates to how they would eventually make profits from the sale of their respective interests in successful PE funds, if they had indeed ultimately turned out to be successful.

114 Further, I note that the Court of Appeal did insert a caveat that a resulting trustee cannot be said to owe fiduciary duties until he is affected with the knowledge that he is not entitled to a beneficial interest in the property, because until then, his conscience is not affected such that the equitable jurisdiction to enforce trusts can be invoked to impose fiduciary duties on him: *Tan Yok Koon* at [198].

115 I wish to address the caveat as to timing. In this case, the understanding between the Wees and the Engs was that the Engs would not merely be passive trustees holding on to the Wees' monies for them. The shared expectation was that the Engs would invest those monies on the Wees' behalf, and manage and administer the monies or the investments made therefrom: see *Cheong Soh Chin (HC)* at [35]. Further, because this was their shared expectation from the beginning of the WWW Concept, it would also have been obvious to the Engs that they were not entitled to any beneficial interest in the monies or

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investments. Hence, fiduciary obligations were owed at all times by the Engs to the Wees, in relation to the items claimed in this trial now.

116 There are two key consequences to finding that the Engs were not simply bare trustees, but instead were fiduciaries. The first is that the Engs will owe fiduciary duties in addition to the duties set out at [98] above. The second is that their fiduciary obligations modify the Engs' basic duties to preserve the trust property and to account. Let me elaborate.

Fiduciary duties owed by the Engs to the Wees

117 Having found that the relationship between the Wees and the Engs is a fiduciary one, it is now incumbent upon me to specify what particular fiduciary duties the Engs owe. This flows from the Court of Appeal's ruling in *Tan Yok Koon* at [206] that "[t]he duties that are applicable to each resulting trustee will vary significantly, and are very fact-specific" [emphasis in original omitted].

118 Here, I am of the view that the Engs owed the Wees the specific duties not to make a profit out of their trust; and not to place themselves in a position where their duty to the Wees and their personal interests might conflict. The Engs stand in a position of considerable ascendancy and influence over the Wees. The Wees advanced more than $100m to the Engs for the Engs to hold and invest. The Wees were relative novices in this field, and took guidance from the Engs. They gave the Engs a great deal of discretion, and effectively allowed the Engs to control the investments. The no-profit and no-conflict rules are properly called upon in this situation to control this discretion, and protect the Wees from abuse.

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Modification of basic duties

119 The second key consequence is that the basic duties to preserve the trust property and to account are modified by the fiduciary obligation, which controls the discretion the Engs had to manage and administer the Wees' investments. Let me elaborate. In the typical presumed resulting trust scenario, a resulting trustee under the duty to preserve the trust property cannot simply disburse the funds, as to do so would be an unauthorised use of trust monies. He should retain the trust property and seek to execute his main duty of returning the trust property to the person who is entitled to it when called upon to do so.

120 The difference in the present case, however, is that the monies were advanced *precisely* for the purpose of investment, whether to create funds or participate in ventures under the WWW Concept. It would therefore be unfair to the Engs to find that they had to hold on the monies at all times, as this ignores the essential reason why the Wees advanced the monies in the first place. Nor would it have made sense to ask the Engs to convey the trust property to the Wees, when they had not been called upon to do so, and in fact, had been instructed by the Wees to invest the monies.

121 The situation is further complicated, however, by the fact that here, there is no contract governing the parties' respective rights and obligations regarding these investments (see *Cheong Soh Chin (HC)* at [16]), and, more importantly, no trust instrument spelling out exactly the scope of authorised investments. This directly impacts the taking of accounts, as it is now difficult to determine what is an unauthorised or authorised disbursement of the funds.

122 In my view, the means by which the Court is able to identify whether an expenditure was authorised or not, and consequently, whether it should be disallowed or not, is therefore an assessment of what the parties agreed was

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allowed in respect of that particular transaction, and, following from that, whether the Engs have in respect of that transaction fulfilled their fiduciary obligations. This will also be the means by which I consider whether the items claimed might be trustees' expenses properly incurred, for the purposes of determining Issue 4 above.

123 However, I also wish to make clear that on this unique factual matrix, the question whether an expenditure was authorised or not may already have been answered by the finding that the parties worked together as risk runners, with the consequence that the Engs are not entitled to claim management fees and expenses. Where this finding applies, there is no need to inquire into whether or how the fiduciary obligations which the Engs owe the Wees control the Engs' discretion in management, and in turn, the nature of items claimed as being authorised or not. This is *not* because the Engs will not owe the Wees fiduciary obligations in respect of such transactions, but rather is because the Engs have already made this claim for fees and expenses once, and failed in it.

124 For the sake of completeness, I wish to make clear that a resulting trustee's main duty of conveying the trust property when called upon to do so nevertheless continues to subsist, and is *not* modified by the obligation to invest or their fiduciary obligations. It is therefore clear beyond peradventure that the Engs' holding back on returning seven of the Wees' 20 SPVs (see [66] above) was an egregious instance of misconduct that grounded a finding that the Engs were in wilful default.

125 I now turn to consider each transaction in turn.

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Item no longer in contention

126 Before turning to items which the Wees seek to falsify or surcharge, I pause to note that the Wees are not seeking to claim withholding tax in Australia,[34] although this was an item dealt with by the Engs in their submissions.[35] As this item is not being pursued by the Wees, there is no need for me to make any decision on this item.

Items the Wees seek to falsify

127 I start first with the items the Wees seek to falsify.

Summary on the analysis to be taken for falsification

128 As the above analysis makes clear, the interactions between my earlier judgment in *Cheong Soh Chin (HC)* and the law is a complex and intricate one. For the sake of clarity, the result of the above analysis are these steps:

(a) First, the question must be asked whether the item claimed might be characterised as a fee or expense incurred under the WWW Concept. If it is, then the Wees will be entitled to falsify in respect of that item, because of my finding that the Engs had worked with the Wees as joint risk runners, and thus performed their services and incurred expenses speculatively in anticipation of being compensated or reimbursed out of the profit in the overall venture. Because they expected to be paid these expenses out of anticipated profits, they could not justifiably expect to be paid these expenses by the Wees.

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34 Plaintiffs' reply closing submissions (25 August 2017) at para 121.

35 Defendants' closing submissions (11 August 2017) at paras 431 – 467.

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(b) Second, if the item claimed does not fall within the first category above, the question that must then be asked is what the parties understood as being allowed in respect of particular transactions, and whether the Engs have discharged their fiduciary obligations in respect of those transactions. This is a fact-sensitive inquiry, and the Engs bear the burden of proof. If they have, the result is that the transaction was an authorised one.

(c) Third, even if the transaction was an authorised one, the Engs must also show that the expenses incurred in respect of the transaction were reasonable, and could be said to be trustee's expenses properly incurred.

Disputed salaries expenditure

129 This item comprises expenditure incurred by the Engs in respect of salaries. The parties have each used different labels for this, and have also differed on quantum. However, it is apparent that they refer to the same thing. The Wees classify this item as "Salaries concession", for a sum of US$4,398,847.[36] The Engs instead classify the item as "Staff Salaries", at a sum of US$4,267,301,[37] although elsewhere in their submissions they also refer to the sum of US$4,398,847.[38] The difference between the two figures can be explained by the inclusion of a sum of US$131,546 in the larger figure.[39] This additional sum actually represents a disputed amount of S$164,000 (US$131,546) that the Wees paid as a subsidy towards the salary of one of CSP's employees, Tan Choon Hong ("TCH"). I deal with that item separately

36 Plaintiffs' closing submissions (11 August 2017) at para 4.

37 Defendants' closing submissions (11 August 2017) at para 37.

38 Defendants' closing submissions (11 August 2017) at para 64.

39 Joint Expert Report (Exhibit A) at para 5.1.

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below. Hence, the sum I consider under the overarching item of disputed salaries is US$4,267,301.

130 Despite this being a much larger sum of money than the other sums claimed, both parties have advanced only very modest arguments. The Wees' essential contention is that these salaries were incurred speculatively as part of the WWW Concept, and hence the Engs should have expected to recoup these expenses only if that concept had proven successful and only out of their share of its profits.[40] Alternatively, the Wees say that these were operating expenses that would have been covered by other investors serviced by CSP and not solely to be borne by the Wees.[41]

131 In response, the Engs have essentially hung their case on there being an overarching agreement, or multiple specific agreements, or an estoppel by convention. Elsewhere, they have made only a brief note that the Wees' expert accepts that the relevant payments were supported by the relevant documentation, but disallowed them on the basis of his understanding of *Cheong Soh Chin (HC)*.[42]

132 I hold that the Wees are entitled to falsify this item against the account. The Engs' arguments on the existence of an overarching agreement, or multiple specific agreements, or an estoppel by convention, have all failed. That leaves them only the final argument: that these were trustees' reasonable expenses. However, they are unable to succeed on this argument. This is because I agree with the Wees that these salaries were speculatively incurred under the overall WWW Concept. To recap, with the exception of Project Plaza, for which the

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40 Plaintiffs' closing submissions (11 August 2017) at para 156(b).

41 Plaintiffs' closing submissions (11 August 2017) at paras 157 and 158.

42 Defendants' closing submissions (11 August 2017) at para 64.

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Court of Appeal has awarded the Engs compensation, the Engs otherwise worked with the Wees as joint risk runners, hoping to be rewarded and to recoup expenses out of the potential profits of the concept. The salaries would have been recouped out of such rewards, if any had materialised. That unfortunately has not turned out to be the case. But their claim cannot now be laid at the Wees' door.

Indirect expenses

133 This item comprises indirect expenses incurred by the Engs. I pause to note that the Wees and Engs have labelled and categorised this item somewhat differently. They also disagree as to quantum. The Wees have split this amount into two items: the first, "Disputed Indirect Project Expenses (Opex)" for a sum of US$763,992, and the second, "OPEX paid by ECS/LSY in 2005 and 2006" for a sum of US$40,293.[43] The Engs, in contrast, have only a single category labelled "Project Plaza – Indirect Expenses", but have identified two separate sums within this category, depending on the source of the expenses. Under the heading of "Amounts related to the Plaintiffs paid from 23 Bank Accounts in US$", the sum is US$759,425, while under the heading of "Amounts related to the Plaintiffs paid from ECS/LSY personal bank accounts in US$", the sum is US$40,293.[44] It is clearly the larger sum on which the parties disagree as to quantum: the Wees have simply adopted the sum in the Joint Expert Report,[45] while the Engs explain that their sum is lower due to the removal of $5,694.60 (approximately US$4,567) in respect of a payment made to Corporate Travel Services for an air ticket to Turkey in 2012.[46]

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43 Plaintiffs' closing submissions (11 August 2017) at para 4.

44 Defendants' closing submissions (11 August 2017) at para 37.

45 Joint Expert Report (Exhibit A) at para 4.1.

46 Defendants' closing submissions (11 August 2017) at footnote 14.

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134 The parties also appear to disagree on how these sums have been incurred. The Wees say that this was an item that "[does] not relate to Project Plaza",[47] while the Engs say that these were "indirect expenses that were incurred for Project Plaza from 2005 to 2013".[48] The Engs further substantiate this by saying that these were, amongst other things, disbursement claims by staff who worked on Project Plaza, expenses incurred in respect of trips taken by service providers to Singapore, and the general operating and office expenses of the staff that worked on Project Plaza.[49]

135 I hold that the Wees are entitled to falsify this amount against the Engs. As the Wees are seeking to falsify the account, the Engs bear the burden of showing the expenses were in fact properly incurred. This necessarily entails understanding *how* the expenses were incurred. The Engs say the expenses were incurred in respect of Project Plaza. As against the Wees, the Engs are surely in a better position to know. I therefore take the expenses as being incurred in respect of Project Plaza.

136 As these were expenses incurred for Project Plaza, the effect of *Cheong Soh Chin (CA)* must be considered. The Court of Appeal held at [93] that the "Engs are entitled to be compensated for work done with regard to Project Plaza". The term "work done" is broad enough to cover expenses, however direct or indirect they may be. Indeed, the Engs have not clearly explained what they mean by "indirect expenses", and how such expenses fall outside the sum of A$2m the Court of Appeal awarded them for "work done" on Project Plaza. To the extent that they are arguing that the Court of Appeal merely awarded them compensation for "fees", but not "expenses", I have already explained in

47 Plaintiffs' closing submissions (11 August 2017) at para 156(b).

48 Defendants' closing submissions (11 August 2017) at para 47.

49 Defendants' closing submissions (11 August 2017) at para 47.

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Cheong Soh Chin (Res Judicata) that this was a spurious distinction that the Engs themselves had not drawn in their counterclaim. I therefore hold that the effect of *Cheong Soh Chin (CA)* is that the Engs cannot claim indirect expenses incurred for Project Plaza. Consequently, the Wees are entitled to falsify this payment.

Project Sailfish

137 The Wees seek to falsify the amount of US$8,413 paid towards the liquidation costs of Azure Swan Sarl, a holding company within the Sailfish Investment Structure, otherwise known as the Seaglow Investment Structure. The Wees' essential contention is that this amount was not a legitimate expense as there was no need for the liquidation costs to be incurred.[50]

138 In support of this, the Wees make four key points. First, they cite various letters from the lead investor ("Ironbridge") stating that the liquidation costs had been entirely provided by the lead investor, with no calls being made on the Wees as co-investors.[51] Second, they also argue that not liquidating Azure Swan Sarl was a costs savings measure that should have been apparent to the Engs.[52] Third, they argue that the emails showed that Intertrust, the entity carrying out the liquidation, had looked to the 'sole shareholder' of Azure Swan Sarl for directions on whether to proceed, and this sole shareholder was none other than Orwell Holdings Ltd, a company controlled by ECS.[53] Fourth, they point out that the Engs' now claiming this expense is inconsistent with the claim the Engs

50 Plaintiffs' closing submissions (11 August 2017) at para 146.

51 Plaintiffs' closing submissions (11 August 2017) at paras 147 – 149.

52 Plaintiffs' closing submissions (11 August 2017) at paras 150 – 151.

53 Plaintiffs' closing submissions (11 August 2017) at para 152.

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had made at the liability phase for fees, which claim would include expenses, and which claim ultimately failed.[54]

139 To resist this claim, the Engs raise several arguments. First, they argue that the Wees were kept informed and were aware of the developments in the Sailfish investment, and were informed that the investment had folded.[55] They should thus have expected that Azure Swan Sarl would be liquidated.[56] Second, they argue that as the payment was made to an external party, Intertrust, the payment should be allowed.[57] Third, they argue that the email correspondence makes clear that the liquidation was initiated by Ironbridge and not ECS, with the Engs having no choice but to follow Ironbridge's lead in the matter.[58] Fourth, they argue that reliance on the Ironbridge letters is misplaced because the payments were in fact made to Intertrust, and thus any indications in the letters that Ironbridge had not called upon the Wees could not have referred to payments to Intertrust.[59]

140 I hold that the Wees are allowed to falsify the US$8,413 payment for the liquidation of Azure Swan Sarl. I accept that this payment was in fact made by the Engs to Intertrust in 2010. However, the key objective fact that indicates that this payment was unauthorised is a letter from Ironbridge dated 30 October 2015,[60] which clearly spells out that "[t]he costs required to wind up the Seaglow Investment Structure, in addition to the minimal cash that the structure retained

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54 Plaintiffs' closing submissions (11 August 2017) at para 153.

55 Defendants' closing submissions (11 August 2017) at para 280.

56 Defendants' closing submissions (11 August 2017) at para 282.

57 Defendants' closing submissions (11 August 2017) at para 283.

58 Defendants' reply closing submissions (11 August 2017) at para 126.

59 Defendants' reply closing submissions (25 August 2017) at para 127.

60 23 SAB 17181 – 17186; II DCBCS 1006.

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at the commencement of the liquidation have been provided 100% by the Fund, and no further calls have been made on the Co-Investor." Earlier in the same letter, the "Fund" is defined as the "Ironbridge Capital 2003/4 Fund",[61] while the Co-Investor in this context is the Wees. This therefore suggests that whatever payment was made to Intertrust was wholly unnecessary because the Fund had paid the necessary liquidation costs, and was therefore an unauthorised disbursement of the monies the Engs held on trust for the Wees.

141 Even if the Ironbridge Letter is wrong or mistaken as to the fact that Ironbridge paid the entire fee for the liquidation of the Seaglow Investment Structure (which includes Azure Swan Sarl), I also find that the Engs' payment for the liquidation of Azure Swan Sarl was in any event unnecessary. The evidence shows that Azure Swan Sarl was wholly owned and controlled by the sole shareholder, Orwell Holdings Ltd. This entity was in turn controlled by ECS. Even if Ironbridge, as the lead investor in the Seaglow Investment Structure, had sought to liquidate the Structure, Azure Swan Sarl was not jointly held with Ironbridge, and there was therefore no need to incur the unnecessary expense of liquidating Azure Swan Sarl. The Engs' duty was to advance the interest of the Wees, and they should have done this by avoiding unnecessary expenses after the investment had already proven unsuccessful.

FOF expenses

142 The Wees also seek to falsify payments made out in respect of fund-of-fund expenses. Two categories of payments fall under this broad heading. The first is "FOF expenses", as specified in the Joint Expert Report, with the amount given in the report as US$82,052.[62] The next category comprises FOF project

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61 23 SAB 17181 – 17186; II DCBCS 1005.

62 Joint Expert Report (Exhibit A) at para 9.1.

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expenses, which the Wees say amount to US$203,754,[63] but the Engs say amount to US$248,715.[64] The Engs say that this divergence arises from a reclassification of certain expenses in their expert, Mr Owain Stone's Fourth Report.[65]

143 The Wees say that both categories of payments were incurred speculatively as part of the WWW Concept, and therefore they are not liable to pay for these costs and expenses.[66] In addition, they also say that the Engs were well aware that the Wees would not have agreed to pay all expenses, and understood that some of these would be covered by other funds.[67] This, they argue, means that insofar as the costs and expenses were operating expenses, they ought to be falsified.[68]

144 The Engs say that these sums comprise professional fees incurred for the establishment of the Woolverstone Private Fund of Funds structure, payments rendered for professional services in respect of appointing Silversea Asset Management as broker for the Wees in the sale of the PE funds, travel related expenses arising from the Engs' staff's attendance at various meetings, and general operating and office expenses of staff administering the PE funds. They say that these expenses were incurred by the Engs in exchange for goods and services, are supported by relevant documentation, and are reasonable. There is therefore no reason for the Wees to disallow them.[69]

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63 Plaintiffs' closing submissions (11 August 2017) at para 4.

64 Defendants' closing submissions (11 August 2017) at para 37.

65 Joint Expert Report (Exhibit A) at para 3.1.

66 Plaintiffs' closing submissions (11 August 2017) at para 156(b).

67 Plaintiffs' closing submissions (11 August 2017) at para 157.

68 Plaintiffs' closing submissions (11 August 2017) at para 158.

69 Defendants' closing submissions (11 August 2017) at paras 62 – 63.

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145 I hold that the Wees are entitled to falsify these payments. These were payments made in relation to the PE funds, and not the direct investments. If these payments were incurred in respect of the initial PE Funds, the finding in *Cheong Soh Chin (HC)* at [20] was the parties had agreed to pay a management fee of US$450,000 per annum, and this was the extent of the remuneration to be made. If these payments were incurred in respect of the Additional PE funds, the finding in *Cheong Soh Chin (HC)* at [87] was that the Engs had performed their services speculatively, in the hope and anticipation of being compensated out of the eventual success of the WWW Concept, had that success materialised. There is therefore no scope for them now to claim expenses whether in relation to the Initial PE funds or the Additional PE funds. The Wees are entitled to falsify these payments.

Fees incurred in the reinstatement of Hall & Hanson Limited

146 Another payment the Wees seek to falsify is the expenditure of US$16,813 incurred in the reinstatement of Hall & Hanson Limited, a company incorporated in the Bahamas. Hall & Hanson Limited was part of the Bahamas Fund, a fund structure meant to hold the Wees' shares in Grand Banks Yachts.[70] Hall & Hanson Limited was struck off the Bahamian register of companies on or around 2 January 2014.[71]

147 The Wees' key contention is that my judgment in the liability phase (at para 2(a)) required Hall & Hanson Limited to be transferred back to the Wees, but this could not be done until Hall & Hanson Limited had been reinstated to the companies register.[72] The Wees argue that this was an order of court drafted

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70 Plaintiffs' closing submissions (Liability Phase) at para 683; Defendants' closing submissions (Liability Phase) (9 April 2014) at para 259.

71 Eng Chiet Shoong's AEIC for the Account (28 April 2017) at para 109.

72 Plaintiffs' closing submissions (11 August 2017) at para 140.

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and vetted by both parties, and which had been the subject of a clarification hearing on 4 August 2014, by which time Hall & Hanson Limited had already been struck off.[73] However, the Engs failed to raise any issues with the inclusion of Hall & Hanson Limited at that time, even though that was the appropriate forum to raise the matter.[74]

148 To resist this claim, the Engs argue that the circumstances at the time suggested that the Bahamas Fund/Hall & Hanson Limited did not serve any purpose for the Wees because the Grand Banks shares had been transferred out of the Fund.[75] Without specifically saying so, the Engs therefore suggest that they were justified in allowing Hall & Hanson Limited to be struck off. Further, they also argue that US$15,000.50 of the expenses incurred in respect of "Corporate Secretarial Services"; "Provision of two Individual Nominee Directors"; "Government registration fee" and "Our registered office/agency fees" would have been incurred even if Hall & Hanson Limited had not been struck off, and thus the Wees cannot be allowed to falsify this amount.[76]

149 I hold that the Wees are allowed to falsify the account in respect of US$1,812.50. I agree with the Wees that the appropriate forum for raising the matter of Hall & Hanson Limited having been struck off was when my judgment in the liability phase was clarified before me on 4 August 2014. As they did not do so then, they are obliged to comply with my judgment and incur the necessary reinstatement costs to transfer Hall & Hanson Limited back to the Wees.

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73 Plaintiffs' closing submissions (11 August 2017) at para 140.

74 Plaintiffs' closing submissions (11 August 2017) at paras 140 and 142.

75 Defendants' closing submissions (11 August 2017) at para 297.

76 Defendants' reply closing submissions (25 August 2017) at paras 120 – 122.

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150 I accept, however, the Engs' arguments that the bulk of the expenses of US$15,000.50 would have been incurred even if Hall & Hanson Limited had not been struck off. Hence, only the fees involved in the restoration of the company, being the "Government restoration handling fee", the "Government restoration fee", the "Government late fees" and the "Registered agent fee for restoring the company", collectively totalling US$1,812.50, should be falsified.

Payment to Churchill

151 Another item the Wees seek to falsify is a US$35,000 payment to Churchill Corporate Services ("Churchill"). Churchill played a key role in the creation of the Bahamas Fund, one of the investment structures created for the Wees. The Bahamas Fund includes the entities Hyde Investments Limited and Hall & Hanson Limited. Churchill issued an invoice dated 1 March 2012 (Invoice Ref: CCS/2012) for a sum total of US$60,000, for the payment of services in respect of "professional administration services in respect of the management of Hyde Investments Limited and the creation of the Hall and Hanson SMART Fund".[77] Churchill then issued a receipt dated 15 March 2012, indicating that US$60,000 had been received from CSP, for "legal, accounting, consultancy, administration and advisory services for a Bahamas fund".

152 The documentary evidence shows that a payment of US$25,000 was made on 16 May 2012.[78] The Wees do not seek to falsify this payment.[79] There is therefore an outstanding amount of US$35,000 which the Wees do seek to falsify, but which the Engs say was paid to Churchill to satisfy the invoice, albeit on 23 November 2012.[80]

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77 Eng Chiet Shoong's AEIC for the Account (28 April 2017) at para 102.

78 19 SAB 14253; Certified Transcript (4 July 2017), pp 96 (lines 14 – 25) to 97 (lines 1 – 11).

79 Certified Transcript (4 July 2017), pp 98 (lines 16 – 25) to 103 (lines 1 – 7).

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153 The Wees do not dispute that if the US$35,000 had indeed been paid towards setting up the Bahamas fund, that would be a legitimate and authorised use of their monies.[81] Rather, they seek to falsify the US$35,000 payment because of how late the payment was made – as the funds were transferred only on 23 November 2012, almost eight months after the receipt was issued on 15 March 2012.[82] They say that if full payment of the invoice had already been made, as evidenced by the receipt from Churchill, there is no reason why they should be made to pay part of it twice.[83] In essence, they say that the US$35,000 was not actually paid for a purpose, although the purpose is admittedly authorised.

154 The Engs' argument on this score is that there is no reason why the November 2012 payment of US$35,000 should be treated any differently from the May 2012 payment of US$25,000.[84] They say that the fact that the Wees had allowed the US$25,000 payment already shows that the receipt was inaccurate, and that full payment was not actually made. There is therefore no reason to distinguish between the two payments, especially when there is no other evidence to show that the Engs had any other transactions with the Churchill at the material time that might coincidentally also require a payment of US$35,000.[85]

155 I hold that the Engs have discharged their burden of showing that the transaction was an authorised one and that the Wees are therefore not entitled

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80 1 SAB 48.

81 Certified Transcript (4 September 2017), pp 27 (lines 16 – 25) to 28 (lines 1 – 23).

82 Plaintiffs' closing submissions (11 August 2017) at para 131.

83 Plaintiffs' closing submissions (11 August 2017) at paras 128 – 130.

84 Defendants' closing submissions (11 August 2017) at paras 291, 292 and 294.

85 Defendants' closing submissions (11 August 2017) at para 293.

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to falsify the payment of US$35,000 to Churchill. The fact that the Wees themselves do not dispute the payment of US$25,000 in May 2012, two months after the receipt was issued, shows that even the Wees accept that full payment of the invoice was not actually made at the time the receipt was issued. In other words, the issuance of the receipt does not mean that the full US$60,000 had been paid. Although the US$35,000 payment was in fact paid far later than the US$25,000 payment, the documentary evidence that the former was actually paid to Churchill is, in fact, stronger than the evidence for the latter. Unlike the May 2012 payment, which simply bears the words "Bahamas fund" scrawled in handwriting,[86] the HSBC Advice of Debit issued on 23 November 2012 clearly indicates that the Beneficiary of the payment was "Churchill Corporate Services Ltd".[87]

156 In saying this, I recognise that I am not to hold the Engs to the standard of a payment *conceded* by the Wees, as this is not the standard by which a trustee discharges his duty to account. Hence, to be clear, what I am saying is that the documentary evidence, read in light of the context, is sufficient for the Engs to have discharged their burden. The HSBC Advice of Debit is undoubtedly clear on its face; the receipt is clearly erroneous as to full payment of the US$60,000 *actually* having been made; and the sum of US$35,000 if added to the only other sum accepted by the Wees to have been paid for the Bahamas fund, namely the US$25,000 payment, squarely equals the requisite US$60,000. Because the Wees have not argued that the US$60,000 as a whole should be unauthorised, and because it is clear that this sum did go towards setting up entities for the purposes of the Wees' investments, I hold that the US$35,000 payment is an authorised one that the Wees cannot falsify.

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86 19 SAB 14253; II DCBCS 981.

87 1 SAB 48; II DCBCS 982.

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Project Gina

157 Another payment the Wees seek to falsify is a payment of US$7,496 towards Project Gina, which was part of the Bahamas Fund. These expenses were explained by the Engs as covering various operating expenses incurred by the Engs and CSP's staff in respect of Project Gina, including travel related expenses arising from work trips to source for potential investors; disbursement claims by the Engs and their staff incurred on those trips and meals with potential investors of the Project; internet and telephone charges; and postage and courier charges.[88]

158 The Wees do not advance substantial arguments on this score, beyond arguing that these were expenses incurred speculatively under the WWW Concept,[89] and further, that they were operating expenses that the Engs had testified would be covered by funds advanced by other investors.[90]

159 The Engs contend that these are expenses properly incurred for Project Gina, and which the Wees seek to falsify for no valid reason.[91]

160 I hold that the Wees are entitled to falsify this payment. Project Gina was part of the Bahamas Fund, one of the direct investments made by the Wees. This fund fell within the WWW Concept (*Cheong Soh Chin (HC)* at [23(d)]. Following my finding in *Cheong Soh Chin (HC)* at [51] that the Wees and Engs were "joint risk runners" working together under the WWW Concept, this means that the costs incurred by the Engs by Project Gina were indeed incurred

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88 Defendants' closing submissions (11 August 2017) at para 60.

89 Plaintiffs' closing submissions (11 August 2017) at para 156(b).

90 Plaintiffs' closing submissions (11 August 2017) at paras 157 – 158.

91 Defendants' closing submissions (11 August 2017) at para 61.

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speculatively, with the Engs to recoup those expenses out of the profits expected to be made from the WWW Concept if it had succeeded.

Bahamas Fund

161 The Wees also seek to falsify another payment allegedly made under the Bahamas Fund, being an amount of US$1,000 that is purportedly an overpayment on an invoice addressed to Hyde Investments Limited.[92] The Engs do not specifically address the matter of overpayment, and instead offer a differing figure of US$1,123, which they say was incurred as disbursement claims for a trip to Hong Kong for the setting up of the Bahamas Fund in November 2010.[93]

162 I hold that the Wees are entitled to falsify this sum. The Engs bear the burden of proof to show that this transaction was an authorised one. This burden has not been discharged by simply saying that a trip was taken that might have some connection with the Bahamas Fund.

Project Redspot

163 The Wees seek to falsify a sum of US$11,363 paid out in respect of Project Redspot. Project Redspot was an investment in Agis, a company in the business of navigation solutions, location-based technology and digital maps and was one of the Wees' five direct investments (*Cheong Soh Chin (HC)* at [23(c)].

164 The Wees' key contentions are that there are numerous miscellaneous charges for which there appear to be no supporting documents or approvals

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92 Plaintiffs' closing submissions (11 August 2017) at para 159(c).

93 Defendants' closing submissions (11 August 2017) at para 55(c).

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given by them.[94] In particular, they highlight a C$10,000 payment made to the Engs' daughter, Eng Li Min, which they argue is unsupported by any agreement.[95]

165 The Engs say that these were expenses properly incurred as disbursements claimed by CSP staff working on Project Redspot, and also included a US$9,170 (C$10,000) payment to Eng Li Min as a director of Berners, a company holding the Wees' shareholding in Agis.[96] They also dispute the allegation that the payments are not supported by relevant documentation, because the Wees' own expert confirms that the expenses were correctly tagged to the Wees' respective investments.[97]

166 I hold that the Wees are entitled to falsify this item. I have found that Project Redspot, as one of the Wees' five direct investments, fell within the WWW Concept: see *Cheong Soh Chin (HC)* at [23], [24], [51] and [57]. This means that the Engs would only have expected to recoup expenses incurred for their work on this out of the fruits of such a concept if it ultimately proved successful. This correspondingly means they could not have expected to be paid for their expenses.

Other operating expenses / new claims

167 This item has been labelled differently in the parties' respective submissions. The parties also differ as to the exact quantum claimed. Under the label of "New Claims", the Wees specify a sum of US$972,674.[98] Under the

94 Plaintiffs' closing submissions (11 August 2017) at para 159(b); Plaintiffs' reply closing submissions (25 August 2017) at para 76.

95 Plaintiffs' closing submissions (11 August 2017) at para 159(b); Plaintiffs' reply closing submissions (25 August 2017) at para 77.

96 Defendants' closing submissions (11 August 2017) at para 53.

97 Defendants' reply closing submissions (25 August 2017) at para 134(b).

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label of "Other Operating Expenses", the Engs indicate a sum of US$972,980.[99] The quantum stated in the Joint Expert Report is actually US$972,674, but the Engs explain that their figure is higher because of a re-classification of a US$306 payment from the Bahamas Fund.[100]

168 The Wees argue that these were operating expenses incurred speculatively as part of the WWW Concept, and in the alternative, that these were operating expenses that would have been covered by other investors and not solely to be borne by the Wees.[101]

169 The Engs contend that these were operating expenses incurred in the course of the management of the Wees' investments, which ought to be allowed as there is ample documentation supporting the breakdown of these operating expenses.[102]

170 I hold that the Wees are entitled to falsify this payment. The Wees have asserted that these were "operating expenses" incurred in respect of investments falling within the WWW Concept. The Engs have not resisted this contention made by the Wees, nor have they made any attempt to distinguish between those expenses that were incurred under the WWW Concept, and those that did not. The expenses were therefore expenses incurred by the Engs speculatively in the hope that the WWW Concept would ultimately prove successful.

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98 Plaintiffs' closing submissions (11 August 2017) at paras 4(1)(i) and 155(i).

99 Defendants' closing submissions (11 August 2017) at paras 37 and 65 – 66.

100 Defendants' closing submissions (11 August 2017) at footnote 26.

101 Plaintiffs' closing submissions (11 August 2017) at paras 156(b), 157 and 158.

102 Defendants' closing submissions (11 August 2017) at paras 65 – 66.

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SPV payments

171 Another item the Wees seek to falsify is an amount of US$21,780 under the label "SPV". They say this sum comprises payments to Maples and Calder, and incorporation charges for entities such as Manny Shines and Onecom Limited which have no connection with the Wees.[103]

172 The Engs have not raised any specific contentions in respect of this particular sum in their closing submissions.[104] Indeed, their expert seems to have accepted that this sum was made towards investments that were not, in fact, attributable to the Wees.[105]

173 Seeing as the Engs do not dispute that this sum was not, in fact, expended on the Wees' investments, I hold that the Wees are entitled to falsify this amount.

Salary Subsidy

174 A further item in dispute is an amount of US$131,546 (S$164,000) advanced by the Wees to the Engs to subsidise part of the salary of TCH, who was engaged in or around April 2007 to work on the Wees' direct investments, including Project Plaza and Project Red Spot.[106] However, the Wees have been inconsistent by apparently seeking to *both* falsify and surcharge this amount.

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103 Plaintiffs' closing submissions (11 August 2017) at paras 4 and 159(f).

104 Defendants' closing submissions (11 August 2017); Defendants' reply closing submissions (25 August 2017).

105 Owain Stone's 4th Expert Report (9 January 2017) at para 181; Certified Transcript (30 June 2017), pp 63 (lines 23 – 25) to 64 (lines 1 – 20).

106 Defendants' closing submissions (Liability Phase) (9 April 2014) at footnote 230.

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175 As the Engs have correctly pointed in out in their submissions,[107] the Wees have been guilty of double-counting this sum. The sum of US$131,546 is embedded by the Wees' expert in the sum total of the "Salaries Concession" in the Wees' submissions.[108] Although this is not made specifically clear in the submissions itself, it is apparent from the amount disallowed by the Wees' expert in the Joint Expert Report, under the line item "Subsidies by Plaintiffs".[109] The Salaries Concession was an item the Wees sought to falsify, as made evident earlier in this judgment. However, the Wees have also sought to surcharge this sum.[110] This is clearly double-counting.

176 As between falsification and surcharging, the proper course of action for the Wees is to falsify the sum. They say that the sum was taken out of one of their SPVs to pay a subsidy of S$8,000 towards the S$18,000 monthly salary for TCH, and that they had only agreed to pay this S$8,000 monthly sum for two years. However, the Engs continued paying out for a period longer than the agreed two years. Monies actually transferred have therefore been applied towards an unauthorised purpose.[111] These actions engage falsification in respect of the excess that has apparently been paid out as an unauthorised disbursement.

177 The Engs argue that they cannot be held to account for the whole sum, as they have not, in fact, received S$108,000 of the sum.[112] They argue that they have only received six out of 14 payments, totalling S$56,000.[113] They further

107 Defendants' reply closing submissions (25 August 2017) at paras 16 – 20.

108 Plaintiffs' closing submissions (11 August 2017) at para 4.

109 Joint Expert Report (Exhibit A) at para 5.1.

110 Plaintiffs' closing submissions (11 August 2017) at paras 4 (Item 2(d) of the Table) and 309 (Item (d) of the Table).

111 Plaintiffs' closing submissions (11 August 2017) at para 297.

112 Defendants' closing submissions (11 August 2017) at paras 305 – 309.

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say they are not liable to account for this remaining sum of S$56,000 as they say this has already been repaid to WBT in cash.[114]

178 In the absence of specific financial documentation showing that the payments were made (in respect of the S$108,000), the Engs' evidence elsewhere was that there were indeed funds available to actually pay out the salary subsidy. For example, in an email dated 4 July 2011, SL emailed WBK, WBT and ECS, stating that "The family originally supported CSP through partial payment of [TCH's] salary of S$8000 (That lasted for about 2 years and stopped)".[115] Similarly, SL's testimony at the liability phase trial was that "Mr Wee Boo Tee has agreed to cover $8,000 salary. However, he has covered, perhaps, 18 months of the $8,000, and he stopped."[116] While the numbers are divergent, the substance of the evidence is that at the very least, a substantial part of the monies were indeed transferred over. Certainly, the evidence does not suggest that the S$108,000 had not been paid. In the circumstances, I prefer the Wees' evidence that the S$164,000 had been paid over.

179 I hold that the Wees are not entitled to falsify this payment. Following my finding that the Engs received this money, they are under a duty to account for it. The evidence is that they applied these monies towards paying for TCH's salary. The Wees say they agreed to pay his salary for only two years and no more, and therefore seek to falsify the excess. But if this is true, why did the Wees even transfer the excess $164,000? In my view, the monies could only have been transferred because the Wees had the continuing intention that TCH

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113 Defendants' closing submissions (11 August 2017) at para 305.

114 Defendants' closing submissions (11 August 2017) at para 310.

115 47 AB 37627.

116 Certified Transcripts (5 September 2013), p 127 (lines 13 – 19).

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be paid. The Engs did so accordingly, and so the disbursements were authorised. The Wees are therefore not entitled to falsify this amount.

Agis rights issue

180 Another sum that the Wees seek to falsify against the Engs is the amount of US$904,995 used to subscribe for additional shares in Agis in three tranches under rights issues.[117] The Wees' essential contention is that these rights issues were taken up without authority in contravention of the Wees' direct instructions to the Engs not to do so.[118]

181 The Engs, by contrast, say that the amount was properly used to acquire the rights issues because they had continually informed the Wees about these rights issues and the Wees had never objected to taking them up.[119]

182 I hold that the Wees are entitled to falsify this amount against the Engs. I find that the understanding between the parties was that the Engs would not be entitled to take up the amount if the Wees had told them not to, and the Wees had, in fact, told them not to.

183 The Engs have, in their submissions, offered multiple examples of how they had kept the Wees informed about the rights issues.[120] They say this, coupled with the fact that the Wees can produce no contemporaneous evidence of an explicit instruction to the Engs to refuse to take up the rights issues, means they were justified in buying the issues.[121]

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117 Plaintiffs' closing submissions (11 August 2017) at para 110.

118 Plaintiffs' closing submissions (11 August 2017) at para 111.

119 Defendants' closing submissions (11 August 2017) at para 401.

120 Defendants' closing submissions (11 August 2017) at paras 403, 405, 406, 410 and 415 – 419.

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184 I find, however, that this stance is undermined by their own evidence elsewhere that shows that they knew that the Wees had not agreed to take up the rights issues. This is clearly borne out by the Engs' AEICs for the liability phase trial:

(a) SL's AEIC for the liability phase trial stated: [122]

> 52. As of January 2008, the Plaintiffs' shareholding in AGIS held through Berners is about 47%. ...
>
> 53. Subsequent to that, sometime in 2009 and 2010, AGIS' technology faced unexpected implementation issues and required more capital. Sometime in 2010, AGIS invited its shareholders to take part in several rights issue, and CS Partners duly informed the Plaintiffs about this via email and during CS Partners directors' meetings… *The Plaintiffs however elected not to take up any of the rights issue*. Due to the rights issue, the Plaintiffs' shareholding in AGIS has been diluted to 2.4%." [emphasis added]

(b) ECS's AEIC for the liability phase trial stated:[123]

> 56. As of January 2008, the Plaintiffs' shareholding in AGIS held through Berners is about 47%. ...
>
> …
>
> 58. Subsequent to that, sometime in 2009 and 2010, AGIS' technology faced unexpected implementation issues and required more capital to bring it to market than had been expected. Sometime in 2010, AGIS invited its shareholders to take part in several rights issue, and CS Partners duly informed the Plaintiffs about this via email and during CS Partners directors' meetings… *The Plaintiffs however elected not to take up any of the rights issue*. Due to the rights issue, the Plaintiffs' shareholding in AGIS has been diluted to 2.4%." [emphasis added]

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121 Defendants' reply closing submissions (25 August 2017) at paras 190 and 192.

122 Lee Siew Yuen Sylvia's AEIC (8 March 2013) at paras 52 – 53.

123 Eng Chiet Shoong's AEIC (8 March 2013) at paras 56 and 58.

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185 Further, ECS's evidence given in cross-examination at the accounting trial reinforces the accuracy of his AEIC:[124]

> Q: So, Mr Eng, you continue to stand by the statement: "That the Plaintiffs however elected not to take up any of the rights issue."
>
> A: Sorry?
>
> Q: You stand by this statement: "The Plaintiffs however elected not to take up any of the rights issue."
>
> A: That's correct, yes.
>
> Q: Okay. And, Mr Eng, as you are aware, that, of course is what the plaintiffs' position is themselves, that they elected not to take up any of the rights issue. So you are in agreement with the plaintiffs then that they didn't want to take up the rights issue.
>
> A: Sorry, you are saying that they didn't want to. And this is the same thing as saying they elected not to.
>
> Q: It's a simpler way of saying pretty much the same thing, right? So you agree with the plaintiffs they didn't want to take up the rights issue. Correct?
>
> A: They agreed to taking it up. So they elected not to take up the rights issue. That's correct. That's what I said.
>
> …
>
> Q: Mr Eng, I just need to clarify your answer a moment ago. You say, "They agreed to take it up so they elected not to take up the rights issue". Agreeing to take up the rights issue is the opposite of electing not to take up the rights issue. Do you understand that?
>
> A: I do.
>
> Q: Yes. And your evidence which you stand by is that the plaintiffs elected not to take up the rights issue. Correct?
>
> A: That's correct.
>
> Q: And so just to make sure we don't get confused, you would also be saying that the plaintiffs chose not to take up the rights issue, right?
>
> A: Chose not to take up, right?

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124 Certified Transcript (5 July 2017), pp 87 (lines 24 – 25) to 89 (lines 1 – 21).

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> Q: Yes.
>
> A: That would be consistent, yes.
>
> Q: Okay. And the consequence of their choosing, or electing not to take up the rights issue would then be that they would not take up the rights issue. Correct?
>
> A: That's correct.

186 The Engs make a great deal out of how ECS does later go on to apparently resile from this position in a later question from the Court:[125]

> COURT: Yes, page, 4. So you were saying that – I'm sorry, remind me again, what was your final landing on the plaintiffs' position on the rights issue? Were they in favour of it or against it? Were they in favour of taking up the shares or were they against it?
>
> A: They didn't tell me directly not to take it up, your Honour.

187 As between this apparently inconsistent evidence, I prefer the evidence given by ECS in response to the clear and comprehensive line of questioning by counsel for the Wees.

188 In any event, the documentary evidence indicates that the Engs knew that they were not allowed to take up the rights issue, hence their provision of a misleading shareholding table to the Wees in the 12 May 2012 Report when asked to provide a reconciliation of accounts to the Wees.[126] To recap, the Engs attempted to show through this table that they had complied with the Wees' refusal to take up the rights issues, as represented by the Wees' shareholding denoted by shareholder "B1" having been reduced from an initial 45.8% to 2.4%. A footnote to this table indicated that "B1 represents Wee family". The

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125 Defendants' reply closing submissions (25 August 2017) at para 190(b); Certified Transcript (7 July 2017), pp 32 (lines 19 – 25) to 33 (line 1).

126 50 AB 39637 – 39638.

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reality, however, was that the other investors on the table, B2 and B3, each holding 33.9% each, were actually the Wees' SPV, Berners.[127] This was conveniently left unmentioned, leading to the impression that these entities belonged to some other investors. In truth, the Wees actually held 70.2% of Agis, which properly reflects the result of the Engs actually taking up the rights issue on the Wees' behalf instead.

189 The Engs' case has never been that they could act over the objections of the Wees to take up the rights issues. Rather, the Engs' case has always been that the Wees did not explicitly disagree, as shown by their examples of the Wees being informed, and the apparent absence of explicit objection by the Wees. This shows that the Engs always understood that the Wees' refusal to take up the rights issue must be respected.

190 The above evidence shows that the Engs knew that the Wees did indeed refuse to take up the rights issues. The evidence of disclosure having been made is therefore neither here nor there. On their own evidence, the Engs acted in direct contravention of what they themselves understood to be allowed. Indeed, they knew they were doing so, as they would not otherwise have sought to conceal the Wees' actual shareholding in Agis in the 12 May 2012 report. I therefore hold that the Wees are entitled to falsify this sum.

191 It is true that Berners has now been transferred back to the Wees. By accepting the return of Berners, even when Berners still holds shares in Agis, it might seem as if the Wees have adopted the transactions, *ie*, adopted the shares acquired under the rights issues. I find however, that this is not necessarily the case. The Wees are entitled to have their SPV, Berners, returned to them, but they are still also entitled to examine the accounts of Berners, and falsify

127 Certified Transcript (6 September 2013), pp 64 (lines 1 – 25) to 66 (lines 1 – 17).

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transactions that have not been authorised. The rights issues were precisely these transactions.

192 That said, for the sake of completeness, it should be noted that the effect of falsification is that the unauthorised transactions will be taken *as if* they were made by the trustee on his own account. To falsify, the Wees will therefore have to transfer the Agis shares obtained without their authority as a result of the rights issues back to the Engs.

Stone's adjustment in his fourth report

193 Another item the Wees have indicated they wish to falsify is US$60,816, described as "Stone's adjustment in Stone's 4th Report".[128] The Wees have not set out any arguments relating to this specific item. In the circumstances, they are not entitled to falsify this amount.

Items the Wees seek to surcharge

194 I turn now to consider the items the Wees seek to surcharge.

Ironbridge consultancy fees

195 An item the Wees seek to surcharge is an amount of A$980,573 paid out pursuant to a consultancy agreement between the Seaglow Investment Structure and Johnstons Investments Limited.[129] Alternatively, they seek an account of profits for this amount.[130] The crux of both these arguments is that this amount represents fees paid by Ironbridge to ECS as an introduction fee for securing the Wees' participation as co-investors with Ironbridge in the Seaglow Investment

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128 Plaintiffs' closing submissions (11 August 2017) at para 4 (see Item 1(e) in Table).

129 Plaintiffs' closing submissions (11 August 2017) at para 202.

130 Plaintiffs' closing submissions (11 August 2017) at para 202.

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Structure.[131] Ironbridge is the majority equity shareholder in this structure, with an almost 90% shareholding.[132] I note that the defendants differ slightly on the amount to be surcharged, indicating instead a sum total of A$980,522, which is the sum of A$489,931.42, and A$490,590.27, which are the numbers reflected on receipt vouchers issued by Johnstons Investments Ltd.[133]

196 The Wees make several points in support of their characterisation of the fees as being introduction fees. The first concerns timing.[134] They say that it is highly suspect that the payments were made by Ironbridge in 2008 only after the Wees had committed capital to the Seaglow Investment Structure. They say that it is even more suspect that the agreement to pay the fees was entered into in August 2006, which is about the same time as the Wees committed to joining Seaglow. They further point out an inconsistency on the face of the document, which is dated 31 December 2007, when the date below ECS's signature is 31 August 2006.[135]

197 The second concerns the source of funds. The Wees say that it is clear that the sum was not actually paid out by Ironbridge itself, but rather paid out by the Seaglow Investment Structure, in which the Wees are co-investors.[136] They say that if this is the case, ECS cannot have been paid by Ironbridge for consultancy services to Ironbridge.

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131 Plaintiffs' closing submissions (11 August 2017) at para 205.

132 Plaintiffs' closing submissions (11 August 2017) at para 213(a); Defendants' reply closing submissions (25 August 2017) at para 195.

133 Defendants' closing submissions (11 August 2017) at para 468.

134 Plaintiffs' closing submissions (11 August 2017) at paras 231 – 233.

135 Plaintiffs' closing submissions (11 August 2017) at para 215.

136 Plaintiffs' closing submissions (11 August 2017) at paras 211 – 217.

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198 The third concerns the absence of any evidence of work undertaken by ECS.[137] This, they say, means that ECS did not actually do any work for Ironbridge that warranted or justified him receiving numeration amounting to almost A$1m.

199 The fourth concerns the recipient of these payments. The Wees argue that Johnstons Investments Limited is one of their SPVs, and therefore the sum rightfully belongs to them.[138]

200 In response to this claim, the Engs argue that the payment was a legitimate payment made by Ironbridge for services provided by ECS that was unrelated to and entirely independent of the Wees' investment in Seaglow.[139] In support of this, the Engs make the following key points.

201 First, Johnstons Investments Limited was not one of the SPVs which I ordered to be returned to the Wees in the HC Judgment.[140] Johnstons is therefore, in fact, the Engs' own investment vehicle.

202 Second, they cite an email from Paul Evans, a founding partner of Ironbridge, in which Mr Evans states that the payment was agreed by Ironbridge in August 2006.[141] This, say the Engs, was *before* the Wees had agreed to commit to Seaglow, and therefore could not represent an introduction fee for securing the Wees' investment.[142]

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137 Plaintiffs' closing submissions (11 August 2017) at paras 221 – 222.

138 Plaintiffs' closing submissions (11 August 2017) at para 225.

139 Defendants' closing submissions (11 August 2017) at para 469.

140 Defendants' reply closing submissions (25 August 2017) at para 199.

141 Exhibit D1.

142 Defendants' Closing Submissions (11 August 2017) at para 475; Defendants' reply closing submissions (25 August 2017) at para 197.

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203 Third, they point out that this same email states that the fees were "100% independent of the co-investment funding for the Sea-Glow acquisition".[143] The Engs say that this supports their contention that the fees were separate from the Wees' investments in Seaglow.[144]

204 I hold that the Wees are not entitled to surcharge this amount against the Engs. I find that the Wees have not discharged their burden of proof to show that this was a sum that should rightly be credited to the trust. Further, I also hold that the Wees are not entitled to an account of profits over this sum, as I do not agree with them that the sum was an introduction fee.

205 In the first place, if the Wees are right that the amount was an unauthorised payment out of the Seaglow Investment Structure, the proper claim to make is for falsification of the unauthorised disbursement. They have presumably not done so because they are unable to show that the source of the sums was necessarily their investment in the fund, a task made understandably difficult by the fact that the Wees are really only minority shareholders in the fund, with only about a 10% shareholding.

206 In any event, I cannot find that the fee was an introduction fee. The Engs have adduced cogent evidence to show that the fees were indeed payments for consultancy work done by ECS. In particular, Paul Evans' email makes clear that the fees were "100% independent of the co-investment funding for the Sea-Glow acquisition", and was paid "for advice provided by [ECS] to Sea-Glow (ie) it was in relation to the strategy and growth of the Riviera business with an emphasis on the opportunity in Asia".[145] This does suggest that the payment was not an introduction fee for introducing the Wees as co-investors in Seaglow.

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143 Exhibit D1.

144 Defendants' reply closing submissions (25 August 2017) at para 195.

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207 As for matters of timing, although it is suspicious that the consultancy agreement to pay the fees was entered into about the same time that the Wees agreed to join Seaglow, it is also true, as the Engs point out,[146] that the fees were to be paid more than a year after the Wees joined, which suggests that it was not merely a fee for introducing the Wees. This is also buttressed by the fact that the that the fees would have to be paid even if the Wees exited the Seaglow Investment Structure.[147]

208 Further, ECS's testimony was not that he had performed *no* services for Seaglow. Although he did describe himself as not being very involved with Riviera, he did specify the services he was meant to provide for Ironbridge under the agreement.[148] It was not the case that he did nothing at all.

209 Finally, I agree with the Engs that Johnstons Investments Limited was in substance their investment vehicle, even though its incorporation charges had been paid by the Wees.

Agis fees

210 Another item in dispute are fees totalling S$1,025,256 (US$822,368) paid by Agis Pte Ltd to CSP employees for work done by them on Project Redspot. The fees can be broken down into the following discrete items:[149]

(a) one-time structuring fees amounting to S$200,000;

(b) consultancy fees amounting to S$270,556;

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145 Exhibit D1.

146 Defendants' reply closing submissions (25 August 2017) at para 200.

147 Defendants' closing submissions (11 August 2017) at para 476.

148 Certified Transcript (6 July 2017), pp 64 (lines 10 – 25) to 66 (lines 1 – 15).

149 Plaintiffs' closing submissions (11 August 2017) at para 237.

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(c) monitoring Fees amounting to S$448,770;

(d) advisory fees amounting to S$77,040; and

(e) service fees amounting to S$28,890.

211 The Wees seek to surcharge these fees on the common account, on the basis that they were earned, but not disclosed, or not sufficiently disclosed, to them.[150] They say that the Wees were the largest and most substantial investor in Agis, and that the Engs would not have been in a position to earn the fees if not for the Wees' investment.[151]

212 Alternatively, they seek an account of profits, on the basis that this sum represents unauthorised profits made by the Engs in breach of their fiduciary obligations.[152]

The surcharge argument

213 I hold that the Wees are not entitled to surcharge the full amount against the Engs. The Wees bear the burden of proving that this amount properly belongs to the trust. The mere fact that the Engs earned fees from Agis after the Wees had invested in Agis does not mean that these were monies that the Engs as trustees should have got in for the trust. This is insufficient to discharge the Wees' burden of proof.

214 I hold, however, that the Wees are entitled to surcharge the monitoring fees. The Monitoring Fee Agreement, dated 21 January 2008, indicates that the recipient of this fee should be the Wees' SPV, Berners, and not CSP. CSP is

150 Plaintiffs' closing submissions (11 August 2017) at para 238.

151 Plaintiffs' closing submissions (11 August 2017) at paras 240 and 242.

152 Plaintiffs' closing submissions (11 August 2017) at para 238.

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merely meant to receive the fee on Berners' behalf. This is made explicitly clear by Clause 1.2, which bears reproduction:[153]

> In consideration of the provision of the Services, the Company shall pay to Berners the Monitoring Fee. The Monitoring Fee shall be payable in arrears on a quarterly basis. Payment of the Monitoring Fee shall be made by way of a cheque or bank transfer to CSP (details of which as may be provided by Berners to the Company from time to time), whom shall be entitled to receive such fees on Berners' behalf…

215 This therefore shows that the fee of S$250,000 per annum should go to the Wees. The Engs should have credited this amount to the trust account. This, however, is subject to the caveat that I do find that the Engs are entitled to some reimbursement out of this amount for trustees' reasonable expenses. This is because the Monitoring Fee Agreement itself indicates that Berners would be providing services to Agis Pte Ltd, but Berners ultimately did so through CSP's employees. This much is evident from the fact that cl 4.4 of the Agreement recognises CSP to be the advisors of Berners, and moreover provides that if CSP no longer advises Berners, the agreement should terminate:[154]

> If CSP is no longer an advisor to Berners, as notified under Clause 3.3, the Agreement shall terminate within 14 days of such advice and any dues payable by the Company to Berners shall be paid within fourteen (14) days of the termination.

216 I therefore hold that a reasonable amount of 50% of the fee should be deducted from the amount surcharged against the Engs.

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153 37 SAB 27022 – 27025 (II DCBCS 1073 – 1075A).

154 37 SAB 27024 (II DCBCS 1075).

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Account of profits

217 I now turn to analyse whether the Wees' alternative argument, that they are entitled to an account of profits, assists them on the other fees. I first set out the law, and then consider each of the fees in turn.

218 The Wees allege that the fees received by CSP were profits obtained by the Engs as fiduciaries because of their fiduciary position. This engages the no-profit rule. In the recent decision of *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 ("*Goh Chan Peng*"), the Court of Appeal made the following observations as to the operation of the no-profit rule at [51]:

> The no-profit rule obliges a director not to retain any profit which he has made through the use of the company's property, information or opportunities to which he has access by virtue of being a director, unless he has the fully informed consent of the company. The rule is a strict one and liability to account arises simply because profits are made… The no-profit rule can be seen as a particular application of the no-conflict rule, that a fiduciary may not obtain profit in connection with his position without the informed consent of the person he is duty-bound to protect…

219 The Court of Appeal further observed at [54] that the rule captures profits obtained by the fiduciary so long as they were obtained in connection with his position as fiduciary:

> … payments that flout the no-profit rule need not strictly flow to the fiduciary *qua* director. Instead, the profit merely has to be obtained in connection with his position as a director… or by "reason or in virtue of his fiduciary office" (*Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at para 7-041).

220 The fiduciary, however, can be absolved of wrongdoing if he gives full disclosure to the company, and receives the company's informed consent: *Goh Chan Peng* at [55]. To make full disclosure, the fiduciary must inform the

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claimant company/beneficiary that payment for the services would be made to the fiduciary personally, and must also disclose the details of the services to be rendered, including the amount of payment. It is not sufficient, as Mr Goh did in *Goh Chan Peng*, to merely inform the claimant that he might be entering into consultancy agreements, without sharing the details of the consultancy.

221 Although those observations were made in the context of directors' duties in the company law context, they can be transposed to the present context as they concern how fiduciaries, such as the Engs, should behave.

STRUCTURING FEE

222 The Wees argue that the structuring fee paid to CSP constituted a secret profit obtained by the Engs by virtue of their fiduciary position. They say that CSP only came to be in a position to earn these fees because of the Wees' investment.[155] On this point, they rely on the minutes of the Agis Extraordinary General Meeting held on 22 February 2008, which state that "the proposed Structuring Fee of $200,000 is less that [sic] 2% of Berners' $10.5 million investment in Agis. The investment is the largest ever committed by any shareholder in the Company".[156]

223 The Engs argue that they have made full disclosure of the structuring fees to the Wees.[157] In this regard, they point to email correspondence consistently informing the Wees that a term sheet was being negotiated for structuring fees amounting to 2.5% of the investment to be paid to CSP,[158] and

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155 Plaintiffs' closing submissions (11 August 2017) at para 249.

156 27 SAB 27055 (II DCBCS 1079).

157 Defendants' closing submissions (11 August 2017) at paras 393 – 394.

158 II DCBCS 1022 – 1028; II DCBCS 1032.

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a further email confirming that this term sheet had finally been agreed with a term that there be a "Transaction fee of 2.5% on full investment".[159]

224 I hold that the Wees are not entitled to claim an account of profits over the structuring fee. In the first place, I doubt whether the fees were in fact obtained by virtue of the Engs' fiduciary position. This is because CSP, even by controlling the Wees' shareholding through their control of Berners, was a minority in the resolution to pay the fees.[160] Although Berners was the largest shareholder in Agis, it only held 47.7% of the shares.[161] This means that the Engs did not find themselves in a position to award themselves fees by virtue of their position as fiduciaries.

225 Indeed, the decision of Harman J in *Re Gee* [1948] Ch 284 bears noting. There, Harman J observed at 295 that:

> … it appears not to be the law that every man who becomes a trustee holding as such shares in a limited company is made ipso facto accountable for remuneration received from that company independently of any use by him of the trust holding, whether by voting or refraining from so doing. For instance, A who holds the majority of the shares in a limited company becomes the trustee of the estate of B, a holder of a minority interest; this cannot, I think, disentitle A to use his own shares to procure his own appointment as an officer of the company, nor compel him to disgorge the remuneration he so receives, for he cannot be disentitled to the use of his own voting powers, nor could the use of the trust votes in a contrary sense prevent the majority prevailing.

226 The present facts, to my mind, are also a case where the Engs could not have exploited their control over the Wees' shareholding to vote themselves the fees, even if I accept that it is because they were fiduciaries to the Wees that

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159 II DCBCS 1035.

160 27 SAB 27055 (II DCBCS 1079).

161 27 SAB 27052 (II DCBCS 1076).

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they had the power to appoint directors or control the shareholding. I therefore do not take the view that the fees were obtained as a result of their fiduciary position.

227 In any event, however, I find that the Engs gave sufficient disclosure, and moreover, received the Wees' informed consent. The Engs highlighted multiple times to the Wees that such a fee was being negotiated,[162] and moreover, informed the Wees when that fee was finally agreed.[163] The relevant details of the fee, being the amount of 2.5% of the investment amount, was also disclosed.

228 Although there does not seem to be any documentary evidence confirming that informed consent was obtained, it is also true, as the Engs' counsel have pointed out that the Court of Appeal has taken the view that documentary proof is not always necessary. In *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737, the Court of Appeal observed at [44] that "[w]hile it is of course always preferable to have concrete documentary evidence that informed consent has indeed been obtained, it seems axiomatic to us that the factum of consent can be proved through oral evidence and/or inferences from established facts". Here, I find that the Wees had more likely than not agreed albeit tacitly to the Engs earning the structuring fees, seeing as their notice had been drawn to it multiple times, and they had failed to object.

CONSULTANCY AGREEMENT

229 Another agreement involves the payment of consultancy fees for the services of Markus Yong as an advisor, at a rate of S$45,000 per quarter, with the total sum coming up to S$270,556.

162 II DCBCS 1022 – 1028; II DCBCS 1032.

163 II DCBCS 1035.

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230 The Wees essentially argue again that CSP, and by extension, Markus Yong, would not have been in a position to earn these consultancy fees if not for their investment in Agis,[164] and that no sufficient disclosure of the fees was made.[165] The Engs also repeat their contentions that sufficient disclosure was made.[166]

231 I hold that the Wees are not entitled to claim an account of profits in respect of this amount. Again, I am in doubt as to whether the Engs can be said to have come by this amount by virtue of their fiduciary positions. Quite apart from the fact that Markus is not himself a fiduciary, it is also the case here, as with the structuring fees mentioned above, that the Engs were not in a position to award themselves these fees. Berners was a minority shareholder in Agis at this time, and was also a minority on its board of directors. And yet, the minutes of the EGM indicate that the resolution was passed with "100% in favour and 0% against".[167] For the same reasons as those expressed above in relation to the structuring fee, I hold that the Engs did not come by this fee because of their fiduciary position.

232 If I am wrong on this, however, I would have found that the Wees are entitled to an account of profits for the sum earned due to this consultancy agreement. This is because the Engs have not given sufficient disclosure as to the details of this agreement. As was pointed out by the Court of Appeal in *Goh Chan Peng*, it is not enough to say that there is a consultancy agreement afoot, and not give the details. Here, the Engs have provided no documentary evidence to show that the Wees knew of such an agreement, and indeed, of the amounts

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164 Plaintiffs' closing submissions (11 August 2017) at paras 240 and 242.

165 Plaintiffs' closing submissions (11 August 2017) at paras 256 – 257.

166 Defendants' closing submissions (11 August 2017) at para 393.

167 27 SAB 27054; II DCBCS 1078.

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to be earned thereunder. Even ECS's testimony on the stand suggests that he did not specify the details of this agreement:[168]

> Q: Is it your evidence that you told the Wees that CS Partners was receiving 200,000 as a structuring fee that it would keep for itself?
>
> A: I mentioned that there would be several fees, one of which would be monitoring fees. Essentially that would be to pay for the directors' time. And I said that there would be structuring fees. I told them that Markus Yong would be seconded to the company as a consultant and *he would be paid that amount, of whatever was agreed with the company*"
>
> [emphasis added]

ADVISORY FEES

233 Another disputed item involves the advisory fees. The Wees seek an account of profits in respect of CSP procuring for itself the position of advisor to Agis under an Advisory Agreement dated 1 February 2009, for which CSP would be paid $45,000 per quarter.[169]

234 The parties' respective contentions are essentially the same as those advanced in respect of the other fees above. The Wees allege that the Engs came to be in a position to earn such fees only because of the Wees' investment in Agis, but insufficient disclosure was made to them about the fees. Notably, they cite testimony from ECS agreeing with this view.[170]

235 The Engs' response is again to say that sufficient disclosure was made.[171]

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168 Certified Transcript (6 July 2017), p 45 (lines 1 – 10).

169 27 SAB 27300 (II DCBCS 1129).

170 Certified Transcript (2 August 2013), p 53 (lines 4 – 25).

171 Defendants' closing submissions (11 August 2017) at para 393.

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236 I hold that the Wees are entitled to claim an account of profits in respect of this sum. The Engs have accepted that the opportunity to provide the services came about as a result of the Wees' investments in Agis, as evidenced by ECS's testimony:[172]

> Q: The next document is the advisory agreement. This is at page 10. The advisor is CS partners, which is the service provider. Did CS Partners have this agreement drafted, Mr Eng?
>
> A: I can't be sure, Mr Jeyaretnam.
>
> Q: In any case, it was important to CS Partners to record what fees, if any, it would get for services?
>
> A: That's correct.
>
> Q: So a written agreement was entered into? Because of because of [*sic*] that a written agreement was entered into, to have a record of how much you're going to get paid?
>
> A: That's correct.
>
> Q: The opportunity for CS Partners to provide these services to Agis came about because the plaintiffs, through Berners, were invested in Agis Pte Ltd. Agreed?
>
> A: That is correct.

237 Further, unlike the structuring or consultancy agreements above, it is not clear how Agis decided that it should enter into the advisory agreement. It therefore cannot be said with certainty that the Engs did not come by this opportunity to earn fees as a result of their fiduciary position.

238 The Engs therefore need to show that sufficient disclosure has been made. But there is no evidence before me of such disclosure. I therefore hold that the Wees are entitled to claim an account of profits in respect of the sums paid out under the advisory agreement.

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172 Certified Transcript (2 August 2013), p 53 (lines 4 – 25).

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SERVICE FEES

239 As for the service fees, neither party has been able to explain how and for what purpose the service fees were incurred. The Wees appear to seek an account of profits for these fees simply because they fall within the category of 'Agis fees'.

240 My analysis above has shown that the circumstances under which the Engs came to earn these fees *does* matter. The service fees may well be tied to the consultancy and structuring fees agreements, for which I have denied an account of profits; they may also well be tied to the advisory fees, for which I have permitted an account of profits.

241 That said, the policy of the law is that fiduciaries should be deterred from breaching their fiduciary obligations. To that end, the law is that the burden lies on the fiduciary to show that the profit is not one for which he should account, as observed in the English decision of *Murad v Al-Saraj* [2005] EWCA Civ 959 at [77], and as applied by the High Court of Australia in *Warman v Dwyer* (1995) 182 CLR 544 at 561. Here, it suffices that the service fees fell within the category of 'Agis fees' and moreover were incurred at about the same time as the advisory fees. The Engs therefore bear the burden of showing that the profit was not one for which they should account. They have been unable to do so. Consequently, the Wees are entitled to an account of profits over the service fees.

Losses incurred on capital calls

242 Another item the Wees seek to surcharge are the losses they have allegedly suffered as a result of the Engs' refusal to use the Wees' funds already under the Engs' control to meet capital calls on their investments, despite the

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Wees' express instruction to them to do so. As a result, the Wees had to borrow fresh funds which were then advanced to the Engs to meet capital calls. The Wees have itemised their losses as follows:[173]

(a) mortgage interest and legal charges of US$59,439 incurred when WBK mortgaged his residence to obtain a credit line for funds for the capital calls;

(b) interest charges of US$132,071 and US$31,366 incurred on late payment; and

(c) losses amounting to US$2,447,405 incurred when two PEP funds and two CVC funds were force sold.

243 This is properly a claim for surcharge on the wilful default basis, as the Wees are arguing that the trust would not have lost these monies had the Engs behaved as a prudent trustee or fiduciary would have done.

244 The Wees' main argument is that they expressly instructed the Engs to use funds already under the Engs' control to meet the capital calls, and the Engs refused to do so, demanding that the Wees inject fresh funds instead.[174] This failure to follow their instructions, they say, was a breach of trust or fiduciary duty that has caused these losses.[175]

245 In addition, the Wees also advance four other arguments. The first is that the Engs by not using funds already under their control to meet the capital calls were in breach of the no-conflict rule. In support of this, they point out that the

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173 Plaintiffs' closing submissions (11 August 2017) at para 162.

174 Plaintiffs' closing submissions (11 August 2017) at paras 168 – 171.

175 Plaintiffs' closing submissions (11 August 2017) at paras 162 and 166.

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only party that required any substantial amount of money at the time was CSP, and thus the Engs' retention of the funds, presumably to ensure that there was sufficient money to pay themselves, was a case of preferring their own interests over the Wees.[176] The second is that the Engs' failure to inform them that the Engs already had sufficient funds under their control to meet the capital calls is a breach of the trustee's duty to account.[177] The third is that the Engs' repeated false assertions that they did not have sufficient funds to meet the capital calls is a violation of their overall duty to act in the best interests of the Wees.[178] The fourth is that the Engs violated their duty to act in the best interests of the Wees by not themselves recommending the use of monies already under their control to meet the capital calls.[179]

246 In response, the Engs say that they did not misrepresent to the Wees that there were insufficient funds already under the Engs control to meet the capital calls.[180] This is because they understood the Wees to be instructing them to meet capital calls out of distributions received on existing private equity investments, and not to use the other funds of the Wees which were then under the Engs' control.[181] These distributions were all collected in the Woolverstone Accounts, but were insufficient to meet the capital calls.[182] They say that the Wees were aware that the Engs were referring only to the Woolverstone Accounts when the Engs informed the Wees that they held insufficient funds to meet the capital calls, and therefore did not mislead the Wees as regards the availability of other

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176 Plaintiffs' reply closing submissions (25 August 2017) at paras 94 – 98.

177 Certified Transcript (4 September 2017), p 49 (lines 11 – 13).

178 Plaintiffs' further submissions (27 October 2017) at para 26(b).

179 Plaintiffs' further submissions (27 October 2017) at para 26(c).

180 Defendants' closing submissions (11 August 2017) at para 340.

181 Defendants' closing submissions (11 August 2017) at paras 344 – 345.

182 Defendants' closing submissions (11 August 2017) at paras 346 – 347.

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funds to meet the capital calls.[183] In support of this, they also point out that the funds in the 23 bank accounts which the Wees allege could have been used to meet the capital calls had been earmarked for other uses.[184]

247 Further, the Engs argue that the Wees have not made out their case on causation.[185] They say that the Wees wanted in any event to sell the PE Funds and realise whatever cash that might raise, even if this was done at a loss,[186] and this is in fact what happened. Further, they allege that the Wees contributed to their own losses as well, in that the Wees could have funded the capital calls out of the Wees' own funds.[187]

248 As the Wees bear the burden of proof, I examine their arguments to see if they have met that burden.

249 The Wees' main argument is that these losses arose because the Engs refused to follow the Wees' instructions to use all available monies to meet the capital calls.

250 The Engs deny that the Wees ever gave any such instructions, because they assert that the instructions were to meet capital calls out of available "distributions" received on the PE Funds and collected in the Woolverstone Accounts rather than out of the general funds available in the 23 bank accounts. I find that the Wees did give the instructions they claim they gave. The Engs cite various extracts from the Wees' affidavits of evidence in chief at the liability phase, and the Wees' evidence at trial, to support their argument that

183 Defendants' closing submissions (11 August 2017) at paras 347 – 351.

184 Defendants' closing submissions (11 August 2017) at paras 369 – 374.

185 Defendants' closing submissions (11 August 2017) at para 341.

186 Defendants' closing submissions (11 August 2017) at paras 352 – 362.

187 Defendants' closing submissions (11 August 2017) at paras 363 – 366.

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all the Wees ever intended them to do was to pay out of existing *distributions* which were *already received*, but not other available *funds*.[188]

251 The contemporaneous evidence, however, does not show such careful use of language. Rather, the evidence shows that the Wees wanted the Engs to use whatever funds were available at the time, not limited to available distributions collected in the Woolverstone Accounts. For example, in an email dated 25 January 2010, WBK told SL explicitly that "[SL] will use current bank balances to pay off current drawdowns except PEP – the facility may take up to 3 weeks."[189] Similarly, in another email dated 24 February 2010, WBK asked SL if "we have sufficient funds in the bank balance to settle the smaller amounts first",[190] without confining this to available distributions in the Woolverstone Accounts. That the Wees did not intend to confine the sources of funds is also clear from how they instructed the Wees to direct TCH's repayment of his loan towards meeting capital calls, as when WBK told SL to "[p]lease use [TCH's] repayment of his loan to cover the outstanding positions for FLC".[191] I therefore find that the Wees indeed instructed the Engs to use whatever funds remained available to meet the capital calls. Once again, the Engs were and are being disingenuous.

252 The next question that arises is whether the Engs were under any obligation to obey such instructions, such that a failure to comply with the instructions might constitute a breach of fiduciary duty. Fiduciaries are not generally required to comply with *each and every* instruction given to them by their principals. As the Court of Appeal in *Tan Yok Koon* noted at [194], a

188 Defendants' closing submissions (11 August 2017) at para 345.

189 38 AB 30344.

190 39 AB 30940.

191 47 AB 37627.

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fiduciary undertaking is voluntary in the sense that it arises "as a consequence of the fiduciary's conduct", which does not mean that the fiduciary "must be subjectively willing to undertake those obligations", but rather, "the undertaking arises where the fiduciary voluntarily places himself in a position where the law can objectively impute an intention on his or her part to undertake those obligations". On the present facts, however, I find that the Engs undertook to comply with the Wees' instructions, and that this was a fiduciary obligation. The very essence of the arrangement between the Wees and the Engs was that the Engs had to carry out any express instructions which the Wees might give them.

253 In the first place, this is what the Engs have themselves testified on the stand. At the liability phase of the trial, SL testified that if the Wees had told her to use surplus funds to meet the capital calls, she would have to comply:[192]

> Q: If the plaintiffs say to you, "Use the surplus to pay a capital call", you must do so?
>
> A: I will say yes.
>
> Q: According to you, you have no discretion as to the use of the funds?
>
> A: In general, yes.
>
> Q: In general? Did you have some discretion on the use of the funds?
>
> A: In general, we will use the funds to meet the calls.
>
> Q: Madam Lee, you know full well what I mean. Are you saying that you had a discretion whether to use the funds to meet the calls, or to ask the plaintiffs for additional funds, or to use the funds for some other purpose without going back to the plaintiffs? It's very important and very simple.
>
> A: In general, I will ask them.

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192 Certified Transcript (4 September 2013), p 13 (Lines 1 – 25).

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> Q: I don't want "in general", Madam Lee. Either you must act on their instructions or, you are entitled, as a discretionary fund manager, to make decisions in the interests of the client. So which one is it?
>
> A: I am not the fund manager.
>
> Q: So do you act on instructions?
>
> A: I will let them know the circumstances.
>
> Q: Do you act on instructions, Madam Lee?
>
> A: Yes, I act on their instruction.

254 The conduct of the Engs at the time also suggests that they understood that they should comply with the Wees' instructions. This is evident in their responses to the Wees' queries on the bank balances. The Engs' response was not that there were sufficient balances to meet the capital calls, but that the Engs were not required to comply with the Wees' instructions. Instead, the Engs simply and dishonestly said they did not have available funds. For example, in response to WBK's email of 24 February 2010, SL's reply was that she "only [had] a few hundred thousand US$ left (Not sufficient for PEP/FLC) (*would have used them if I could*)" [emphasis added].[193]

255 Alternatively, even if I am wrong that a fiduciary obligation has arisen which requires the Engs to carry out the Wees' express instructions, I also find that the Engs' actions were in breach of the no-conflict rule. I find that the Engs preferred their own interests by failing to disclose to the Wees that there were ample funds available to meet capital calls. Instead, it is obvious to me that the Engs were seeking to preserve those funds to pay the salaries of staff at CSP[194] and also make various unauthorised payments, including, for example, for the Agis rights issues.[195] By making these payments, they sacrificed the interests of the Wees in favour of their own interests.

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193 39 AB 30940.

194 Certified Transcript (6 September 2013) at p 18 (lines 2 – 17).

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256 This then brings us to the question of causation. As I have noted above, surcharges when taking an account on a wilful default basis are subject to proof of causation. This is because the wrongdoing fiduciary's conduct is being contrasted against what a reasonable and prudent trustee or fiduciary might have done in this scenario.

257 The plaintiffs have in their arguments pointed to the High Court decision of *Beyonics Technology Ltd and another v Goh Chan Peng and others* [2016] 4 SLR 472 as setting out the applicable law on causation in the context of equitable compensation. In that decision, Hoo Sheau Peng JC (as she then was) observed that the first approach would be the traditional "but for" test set out in *Target Holdings Ltd v Redferns* [1996] 1 AC 421. The second approach is the less strict approach in *Brickenden v London Loan & Savings Co of Canada* [1934] 3 DLR 465, where a claim for equitable compensation would succeed so long as the wronged party could show that the fiduciary's breach of duty was "in some way connected" to the loss.

258 Although those cases do set out the respective approaches for causation in the context of equitable compensation, it appears to me that an important prior question has been glossed over. That question is whether a surcharge on the wilful default basis is effectively the same as equitable compensation for a breach of trust or fiduciary duty. It appears to me that equitable compensation in the context of an account should be more limited in scope than equitable compensation for a breach of trust. This is so even though the basic aim of a surcharge on the wilful default basis is compensation for loss. The reason for this is that a surcharge as an accounting mechanism is concerned with what the *trust* would have had if the trustee had behaved as he ought to have done. It is not, in this sense, concerned with whatever additional outlays the trustee or the

195 Plaintiffs' closing submissions (11 August 2017) at para 171.

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fiduciary has incurred because of the underperformance of the trust, such as loans having to be taken out. As Prof Jamie Glister has observed, "the interposal of the account means that the trustee's liability is limited to the assets under management" (Jamie Glister, "Breach of Trust and Consequential Loss" (2014) 8 J of Eq 235 at 237). In other words, the beneficiary cannot claim consequential loss by way of a surcharge when an account is taken on the wilful default basis.

259 The effect of this is that the Wees' claims for the interest and mortgage charges incurred in respect of the mortgage of WBK's residence are necessarily excluded as a surcharge. These are consequential losses that flowed from the Wees being told, falsely, that the trust did not have enough available funds to meet the capital calls.

260 However, the question that then follows concerns the appropriate principles of causation that apply in respect of the late payment charges and the forced sale charges. These were losses incurred in respect of assets within the trust. I take the view that here, the principles of equitable compensation continue to apply. As the underlying principle in a surcharge for wilful default is compensation for loss, there is no reason to depart from these established principles, subject to the caveat above as to consequential loss. As for whether it is the *Target* approach of "but-for" causation or the *Brickenden* approach that applies, this depends on the classification of the relationship between the parties. In *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631, and *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245, I held that the *Brickenden* approach should apply to a fiduciary who is in one of the well-established categories of fiduciary relationships, who commits a culpable breach, and who breaches an obligation which stands at the very core

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of the fiduciary relationship. In other situations, the test remains "but-for" causation.

261 I hold that the proper approach to apply on the present facts is the "but for" test. To my mind, it is not clear that the Engs' relationship with the Wees falls within one of the "well-established categories" of fiduciary relationships. The present case is a novel one where I have found that the Engs as presumed resulting trustees nevertheless owed fiduciary obligations as they were allowed and expected to invest. This does not fall within any familiar categorisation of fiduciary relationships.

262 Turning to the "but-for" test, this test provides that the trustee is liable to make good a loss to the trust estate if, but for the breach, such loss would not have occurred. I find that here, the Engs are liable to make good the losses in respect of the late penalty charges and the forced sale charges. I find that the Wees have provided ample evidence showing that there were no other immediate uses for the existing funds held by the Engs, and that these funds were more than sufficient to meet the capital calls as they fell due. The Engs' refusal to use the existing funds therefore caused the loss.

263 The Engs' arguments on causation can also be quickly dismissed. The argument that they were holding on to the funds to meet future capital calls is not a good reason to meet the urgent and pressing obligations that were already due. Nor do I find that the evidence supports a conclusion that the Wees would have sold down the funds in any case, even if there were existing funds available to meet the calls – as was the case here. Further, it is no defence for a trustee to say that the beneficiary could have coughed up more funds of the beneficiary's own to meet a liability that arose because of the trustee's default.

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264 I therefore hold that the Wees are entitled to a surcharge over the losses on the late penalty charges and the forced sale charges.

Interest on TCH loan

265 Another item the Wees seek to surcharge is a sum of S$14,000 which represents interest payments on a loan they advanced to the Engs for them in turn to lend to one of their employees at CSP, Tan Choon Hong.[196] They allege that this sum represents seven months of a S$2,000 monthly payment, and that the Engs received this sum from TCH, but failed to transfer it on to the Wees.[197]

266 The Engs argue that there was no agreement that the Wees be paid the S$2,000 per month, because there was no agreement that the Wees' loan was to carry interest.[198] They acknowledge that they have made payments of S$2,000 to WBT amounting to S$58,000, but say that these were made essentially out of goodwill and not legal obligation, in view of what they say were WBT's marital problems at the time.[199]

267 I hold that the Wees are entitled to surcharge this amount against the Engs. The Engs have argued that the original principal sum of S$500,000 was not held on trust for the Wees because these were spent on staff salaries. In this respect, their arguments for TCH's salary are essentially the same as those for salaries in general. This was the subject of the Wees' falsification claim on the disputed salaries expenditure above. I have held that for that category of claims, those monies were indeed held on trust (see [129]–[132] above). This means that the interest earned by the Engs on the TCH loan was, in fact, interest earned

196 Plaintiffs' closing submissions (11 August 2017) at paras 4 and 304.

197 Plaintiffs' closing submissions (11 August 2017) at para 308.

198 Defendants' closing submissions (11 August 2017) at para 314.

199 Defendants' closing submissions (11 August 2017) at para 315.

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on trust property. I hold that this should properly be regarded as income earned on trust property for which the Engs must account to the Wees. To hold otherwise would be to allow the Engs to profit from the trust, which cannot be right.

Conclusion

268 For the above reasons, I hold that the Wees' claim has been substantially successful.

269 I will hear the parties on interest, costs and the form of the judgment which should follow from my findings and holdings in these reasons.

Vinodh Coomaraswamy
Judge

Philip Jeyaretnam SC, Foo Maw Shen, Chu Hua Yi, Ooi Huey Hien and Jasmine Yong (Dentons Rodyk & Davidson LLP) for the plaintiffs;
Koh Swee Yen, Jared Chen, Ho Wei Jie, Jill Ann Koh Ying, Lim Yangyu and Goh Mu Quan (WongPartnership LLP) for the defendants.

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