IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 165

Suit No 1294 of 2014

Between

(1) Tongbao (Singapore) Shipping Pte Ltd
(2) Tongbao Marine Pte Ltd

… *Plaintiffs*

And

(1) Woon Swee Huat
(2) Uni-Werks Marine and Engineering Pte Ltd
(3) Thia Kok Wah

… *Defendants*

JUDGMENT

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

[Equity] — [Remedies] — [Equitable Compensation] – [Principles in assessing]

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Tongbao (Singapore) Shipping Pte Ltd and another
v
Woon Swee Huat and others

[2018] SGHC 165

High Court — Suit No 1294 of 2014
Audrey Lim JC
31 July, 2–4, 7, 8, 10, 11, 14–18, 21–23, 28, 29 August, 4 September, 8, 9, 13–16, 21 – 24, 28 – 30 November, 1, 4, 5, 7, 12 December 2017, 19–21 February, 4 June, 9 July 2018.

23 July 2018 Judgment reserved

Audrey Lim JC:

Introduction

1 The first plaintiff ("TBS") and the first defendant ("Woon") entered into a joint venture ("JV") to construct a 45-metre anchor handling tug ("Vessel") on a 60-40 costs-sharing basis. The Vessel was built by the second defendant ("UWM"). The second plaintiff ("TBM") subsequently acquired TBS's 60% interest in the Vessel. The plaintiffs claimed that Woon breached his JV duties and that UWM assisted Woon in his breach, and claimed that there is no seaworthy Vessel despite TBS having expended more than US$5 million in the JV. They also claimed that the third defendant ("Thia") had breached his duties

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as TBS's director in failing to safeguard TBS's interest in the JV. Woon and UWM in turn claimed that TBS had failed to take delivery of the Vessel despite it being ready.

The entities and relationships between the parties

2 TBS was incorporated in 2003 with Yu Kebing ("Yu"), Thia and Low Chye Hin ("Low") as its directors and shareholders (and Yu being the majority shareholder). Alan Thia (Thia's son) ("Alan"), was TBS's general manager since its incorporation and also its director from 1 November 2010 to 15 November 2015. Thia and Low sold their shares in TBS around 21 October 2009 and resigned as directors around 6 November 2009, and Yu continues to be the majority shareholder of TBS. Yang Feng ("Yang") was appointed and remains a director from 1 November 2010. TBM was incorporated on 1 October 2009 with Yu, Thia and Low as its directors and shareholders. It was formed to transfer the value of the Vessel over to it when Yu bought over Thia and Low's shares in TBS as the share buy-out did not include the value of the Vessel.[1] The Vessel was transferred from TBS to TBM around 9 December 2009.

3 UWM, incorporated on 30 October 2007, is in the business of ship building and management. Woon and Thia were the initial directors (with Woon appointed as managing director)[2] and shareholders. On 5 November 2007, Low, Zikif Effendy ("Zikif") and Lie Tjit Kui ("Lie") joined UWM as shareholders, and Zikif and Lie were made directors of UWM. Woon and Thia resigned as UWM's directors around 4 February 2014 and 18 March 2013 respectively.

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1 3/8/17 NE 52–53.

2 15/8/17 NE 75.

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Plaintiffs' case

4 I set out the plaintiffs' case as narrated by Yu. Yu incorporated Shanghai Tongbao Shipping Co Ltd in China, which main business was chartering tug boats for towage, and Yang was its manager.[3] Yu, Thia and Low then incorporated TBS in order for Yu to obtain a foothold in the Singapore market.[4] Yu was TBS's managing director.[5]

5 Around July 2007, Thia suggested to Yu and Low that the Vessel be constructed in Indonesia. Thia informed Yu that Woon, who was in the vessel construction business, could construct the Vessel on a joint venture with TBS as follows.[6] The Vessel would be constructed at Woon's shipyard in Batam and TBS would procure the bank loan to fund the construction costs. The construction costs would be shared between TBS and Woon on a 60-40 basis and would be made through TBS; Woon would pay his 40% contribution to TBS and TBS would pay for the Vessel construction costs. Any profit or loss would be shared between TBS and Woon on a 60-40 basis. Finally, the construction would take about two years, at an estimated cost of US$5 million. As Yu did not know Woon, he asked Thia if Woon was trustworthy, and Thia vouched for Woon's trustworthiness. Hence, Yu agreed for TBS to enter the JV.

6 In July 2007, Yu, Thia and Low visited Woon's shipyard in Batam ("the Batam trip") and Woon informed Yu that the Vessel would be constructed at his shipyard. The JV between TBS and Woon was then proceeded with on the

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3 2/8/17 NE 14–15; 3/8/17 NE 69–70; 10/8/17 NE 95.

4 2/8/17 NE 28, 32, 35.

5 Item A1 of List of Issues on Liability dated 10 January 2018 ("List of Issues").

6 Yu's AEIC, para 44.

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terms that Thia had conveyed to Yu (see [5] above), and Yu left Thia to liaise with Woon. Low (for TBS) and Woon (for UWM) subsequently signed a Shipbuilding Contract dated 9 November 2007 for UWM (the builder) to build the Vessel for TBS (the owner). On 7 December 2007, TBS obtained a term loan facility from DBS Bank ("DBS") of US$4 million for the Vessel construction ("the Loan Facility"). As Yu was based overseas, he left the daily operations and financial matters to Thia, who was assisted by Alan.

7 Around mid-2009, Yu became increasingly concerned about the completion of the Vessel and he sent Yang to Singapore to find out the status of the Vessel construction. In early 2010, Yu discovered from Yang that Thia and Woon were directors and shareholders of UWM. Yu also discovered that the Vessel was not constructed at Woon's shipyard at PT TKBI ("TKBI"), but at a shipyard at PT CFB ("CFB"), and that the Vessel was moved to TKBI in late 2009. Yu's testimony in this regard is confirmed by Yang.[7]

8 In 2010 or 2011, Yu and Yang met with Woon, Thia, and Low, during which Yu enquired on the status of the Vessel construction. Woon stated that he would expedite its construction and asked for payment for additional expenses for the construction which Yu did not agree to.[8] Yu further discovered, in late 2012 or early 2013, that Alan was involved in UWM. On 20 May 2013, Yu requested Woon and Thia to provide a full and proper account to TBS of the Vessel construction costs. Woon's son, Simon, replied on 28 May 2013 to state that the accounts were handled by Thia and Alan.[9] Subsequent correspondences

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7 10/8/17 NE 95–97; Yu's AEIC, paras 81–90; Yang's AEIC, paras 9, 12.

8 Yu's AEIC, paras 101–102.

9 AB Cat A Vol 5, pp 1395–1396.

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ensued between TBS and UWM with a meeting held on 30 September 2013 to resolve the outstanding issues in which Yang, Woon, Ivan (Woon's other son) and Simon, among others, were present.

9 Dissatisfied with the state of affairs, the plaintiffs commenced this action in December 2014. TBS claimed that Woon had breached his duties under the JV to be responsible for construction of the Vessel and had breached his duties as a fiduciary: (a) to properly account to TBS for all costs incurred in the Vessel construction; (b) to exercise due care and skill in the construction and in management and control of the construction costs; (c) to keep clear and separate accounts for the Vessel construction costs and not to commingle this account with accounts of other vessels built by Woon or UWM; (d) by placing himself in a position of conflict; and (e) to act honestly and in good faith. By interposing UWM as a vehicle for the funds flow for payments made for the Vessel construction, Woon, through UWM, derived benefits without TBS's consent. Hence, UWM was liable for such benefits it received pursuant to Woon's breach of duties. Further and alternatively, UWM acted dishonestly in assisting Woon in his breach of duties.

10 TBS's claimed against Thia for breach of fiduciary duties as TBS's director. Thia had represented to Yu that Woon was trustworthy and had failed to inform TBS's board of directors that Woon had breached his duties and did not safeguard TBS's interest. Yang was called as a witness for the plaintiffs, and I will refer to his evidence, where relevant, in my findings.

First defendant's case

11 Woon's evidence is as follows. Around May to July 2007, Thia approached Woon to partner TBS to build the Vessel for sale. Throughout the

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negotiations of the JV terms, Woon communicated only with Thia, who represented TBS. Under the JV, TBS was responsible for all finance and accounting matters, and procurement for the Vessel construction. However, the construction cost was never agreed on and the Shipbuilding Contract was prepared for the purposes of obtaining financing for the Vessel. It was also agreed that the Vessel would be constructed at CFB.

12 Also in 2007, Woon suggested to Thia that they incorporate a company (UWM) to construct and sell vessels[10] with Woon, Thia, Zikif and Lie as shareholders. Lie was the owner of CFB in Batam (together with other shareholders)[11] which had leased the land from Zikif. Woon would supervise the construction of vessels, Lie would supply labour for the construction and Thia would be in charge of the daily business and commercial operations of UWM including its finance and accounts. Thia and Alan also handled the accounts and finance and procurement relating to the Vessel for UWM. Woon's 40% stake in the JV was contributed by Comfort Shipping Pte Ltd ("Comfort Shipping") and Sea Glory Shipping Pte Ltd ("Sea Glory") in equal shares. Andrew Lee ("Andrew") was Woon's business partner in Sea Glory. Hence, Woon's real interest in the JV was only 10%.[12]

13 After the Vessel was launched in December 2009, CFB ceased operations, and Thia agreed with Woon to move the Vessel to TKBI to be completed. Further construction costs were incurred thereafter but TBS did not pay its 60% contribution. When the Vessel was completed in January 2015, TBS

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10 14/8/17 NE 84; 16/8/17 NE 13.

11 14/11/17 NE 58.

12 17/8/17 NE 6.

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did not take delivery of it. Woon thus incurred additional construction costs and expenses to preserve and maintain the Vessel and claimed that the delay in Vessel completion was due to matters beyond his or TKBI's control.

14 Woon thus counterclaimed against TBS for breach of its duties under the JV, including failing to account for all the costs and expenses incurred in the Vessel construction and to discharge its responsibility for procurement for the construction. This included TBS's failure to further contribute its 60% share as well as expenses to maintain the Vessel totalling $188,690.64 and continuing at $6,100 per month.

Second defendant's case

15 UWM's case is essentially aligned with Woon's. As TBS did not take delivery of the Vessel, UWM "rescinded" the Shipbuilding Contract on 16 July 2015,[13] and claimed the outstanding construction costs and expenses to maintain and preserve the Vessel. Ivan, Simon and Lie were called as witnesses. I will set out briefly Ivan's evidence and refer to UWM's other evidence, where relevant, in my findings.

16 Ivan assisted Woon to manage TKBI and was a director of Lian Yi Shipbuilding and Construction Pte Ltd ("Lian Yi"), an entity related to TKBI. Woon was in charge of the Vessel construction,[14] and Thia was responsible for UWM's daily operations including finance and procurement for the Vessel construction. Alan assisted Thia with the daily decisions relating to administrative matters, procurement, finance and approval of payments for

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13 Yu's AEIC, p 398.

14 29/8/17 NE 88.

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UWM. Thia and Alan also managed the accounts and finances of TBS. Ivan claimed that Thia delayed the procurement of various items for the Vessel after it was launched in December 2009, and from late 2009, Thia abandoned his responsibilities in TBS and UWM. UWM then continued to engage TKBI and Lian Yi to complete the Vessel. However, as TBS failed to pay UWM for the construction costs from 30 October 2009, this contributed to the delay in the Vessel completion. As for Simon, he was never a director or employee of UWM, but he assisted Woon in UWM and in relation to the Vessel construction and accounts from June 2011.[15]

Third defendant's case

17 Thia oversaw the daily operations of TBS with Alan, except for accounts and finance which were handled by the accounts staff under Alan's purview. Thia informed Yu of his decision to invest as a shareholder and director in UWM sometime in October or November 2007 and Yu did not object. Although he was a director of UWM, he was not involved in its daily operations or finance matters. Thia stated that, under the JV, the Vessel would be constructed within two years for about US$5m. However, there was no agreement that the Vessel would be constructed at TKBI. Thia claimed that he was unaware of the Vessel construction costs as the accounts were not handled by him. Thia called Alan as his witness, and I will deal with his evidence in my findings below.

Various factual findings

18 I make various factual findings before dealing with the parties' respective claims, and begin with some miscellaneous issues. First, I find that

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15 8/11/17 NE 7.

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Thia oversaw the daily operations of TBS (as he admitted)[16] together with Alan. This included accounts and finance, even if the detailed administration was handled by the accounts staff. Thia approached DBS to finance the Vessel construction and authorised the drawdown on the Loan Facility.[17] He signed TBS's debit notes to Woon for Woon's 40% share of payment of the term loan made by TBS to DBS.[18] He was the only director with a room at TBS's premises, and Alan stated that he would take directions from Thia and Thia would deal with TBS's finance although the book-keeping was handled by the accounts staff.[19] I find that as Yu was not based in Singapore, he left TBS's daily operations to Thia and Alan.

19 Second, I find that Alan, as TBS's general manager and subsequently its director, was also in charge of the management of TBS including overseeing procurement[20] and finance and accounts.[21] I accept that Alan sought TBS's directors' approval for large expenditures and that Yu was kept informed of large payments made by TBS relating to the Vessel.[22] It is inconceivable that all the directors (who were also shareholders) had given Alan a free hand with TBS's money and did not query the purpose of the cheques they signed, particularly for large amounts.

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16 Thia's AEIC, para 13.

17 1/12/17 NE 43–45; ACB Vol 1, pp 165, 173; 4/12/17 NE 4–6.

18 ACB Vol 1, pp 199–209; 4/12/17 NE 22–23.

19 28/11/17 NE 99; 29/11/17 NE 19, 22.

20 AB Cat A Vol 1, pp 87, 145; AB Cat A Vol 2, p 161; 23/11/17 NE 4, 7, 8, 39, 72.

21 23/11/17 NE 20–21; Item A2 of List of Issues.

22 16/11/17 NE 44, 72–73; 85–88.

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20 Third, I find that Alan was authorised to represent UWM and was involved in its accounts and finance. He had a UWM e-mail address and stated that Yu allowed him to assist Thia in UWM.[23] He had authority to deal with UWM's DBS account, was designated as UWM's manager and signed off as such for UWM.[24] He was involved in procurement, signed purchase orders and other documents for UWM, was consulted by UWM's accounts staff on its accounts and circulated UWM's minutes of directors' meetings.[25]

21 Fourth, I disbelieve Yu that, prior to signing the Shipbuilding Contract, Thia did not inform Yu that he would be a director and shareholder in UWM with Woon and that Yu discovered this only around late 2009. I find that Thia had informed Yu of his decision to invest in UWM and Yu did not object.[26] Paragraph 5 of TBS's Directors' Resolution of 10 November 2007[27], which Yu signed, recorded that Thia was a director of UWM and "regarded as interested in the [JV between TBS and Woon]". Yu claimed that, when he signed the Resolution, Alan had explained paragraphs 1 to 4 to him, but did not explain "in detail" paragraph 5. I find that Alan had explained the entire Resolution to Yu,[28] and Yu knew that Thia was a director and shareholder of UWM. It is inconceivable that Alan had explained the first four paragraphs but not paragraph 5 "in detail" to Yu, given the brevity of the entire Resolution.

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23 21/11/17 NE 22; 23/11/17 NE 50.

24 AB Cat E Vol 1, p 235; 22/11/17 NE 50; 23/11/17 NE 48–49; AB Cat B Vol 1, p 200, AB Cat F Vol 49, p 464; 28/11/17 NE 121.

25 AB Cat A, Vol 1, pp 88, 102; AB Cat B, Vol 1, p 194; AB Cat E Vol 1, p 245; D1 ACB Vol 1, pp 1, 54; 23/11/17 NE 61; D2 ACB Vol 3, pp 291, 310, 319.

26 Thia's AEIC, para 23.

27 Yu's AEIC, p 228 (YKB-14).

28 16/11/17 NE 75; 21/11/17 NE 16.

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Terms of the JV

22 I find that the JV was concluded by 25 October 2007 and before the Shipbuilding Contract was signed. By then, procurement had begun. The contract between TBS and the architect, Conan Wu & Associates Pte Ltd ("Conan Wu"), for the Vessel design was dated 12 October 2007 ("Vessel Design Contract"), and the contract with Cummins Sales and Service (Singapore) Pte Ltd ("Cummins") for the Cummins engine was dated 24 October 2007[29] ("Cummins Contract"). The exact date on which the JV was concluded is immaterial, what is material being what was agreed upon.

23 The JV was an oral agreement between TBS and Woon. Yu confirmed that Thia had communicated with Woon on the JV terms, and that he had authorised Thia to represent TBS in the JV negotiations. From the evidence, the following terms were agreed on. TBS and Woon would share the costs of construction on a 60-40 basis, and the Vessel would be sold and any profits or loss would be shared on a 60-40 basis.[30] TBS would provide the funds for the construction costs by advancing 100% of the costs under the Shipbuilding Contract to the builder (which I find to be UWM). UWM would use the funds to pay for all Vessel expenses including equipment and labour, and Woon would then contribute his 40% share by reimbursing that share of the costs to TBS.[31] TBS would obtain a bank loan to fund the Vessel construction, with the loan repayment to be shared between TBS and Woon on a 60-40 basis.[32] Finally, Woon would be responsible for supervising the Vessel construction.[33]

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29 1/12/17 NE 31; Item A10 of List of Issues.

30 Yu's AEIC, paras 44(c), 44(d); Woon's AEIC, paras 9(a), 9(b).

31 Yu's AEIC, para 44(c); Woon's AEIC, para 9(g); 22/11/17 NE 32; 23/11/17 NE 11–14; 19/2/18 NE 36, 44.

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24 The parties dispute whether there was any agreement on the cost and location of, and the period for, the construction of the Vessel, as well as whether UWM would build the Vessel. Woon also claimed that TBS was responsible for all finance, accounts and procurement for the Vessel construction.[34]

Shipbuilding Contract

25 I deal with the Shipbuilding Contract first. Mr Kwek (Woon's counsel) claimed that it was not a valid contract at law. Mr Goh (UWM's counsel) stated that it was a valid contract between TBS and UWM but it did not accurately reflect all the terms between them or all the JV terms,[35] and it was prepared primarily for TBS to obtain a loan. I accept that it was prepared to support TBS's loan application as Woon, Alan and Thia had explained.[36] DBS required a shipbuilding contract to extend the Loan Facility to TBS[37] and would disburse loan instalments based on milestones in the Vessel construction set out in Clause 2.2 of the Shipbuilding Contract.

26 Whilst there was no intent to prepare a written agreement *of the JV*, the Shipbuilding Contract was nevertheless a valid contract between TBS *and UWM*, as Mr Goh conceded. The parties had viewed it as a binding agreement and acted in reliance on it. TBS made instalment payments to UWM based on Clause 2.2, Woon agreed that the amounts TBS had to pay UWM was based on

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32 Yu's AEIC, para 44(b); 15/8/17 NE 22–23.

33 Woon's AEIC, para 9(c); 15/8/17 NE 21; Thia's AEIC, para 33.1.

34 Woon's AEIC, paras 9(d), 9(e).

35 19/2/18 NE at 60.

36 Woon's AEIC, para 43; 16/8/17 NE 68; 16/11/17 NE 68–69; 29/11/17 NE 4.

37 8/8/17 NE 2.

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that clause,[38] and UWM referred to and relied on the Contract in invoicing TBS for payment.[39] UWM also relied on the Contract when it informed TBS of the Vessel completion in January 2015, when it subsequently proceeded to "rescind" the Contract and even in closing submissions.[40] Woon also relied on the Contract in his pleadings.[41]

27 Hence, whilst the Shipbuilding Contract reflected some of the JV terms, it did not accurately or completely reflect all the JV terms or the terms between TBS and UWM. For instance, the Vessel delivery period was stipulated in the Shipbuilding Contract as 12 months, although no one had intended the Vessel to be completed within that time. Hence, I proceed to consider the disputed JV terms and what the parties had agreed on.

Construction costs

28 TBS's case is that the JV parties had agreed to the construction cost of approximately US$5m. Thia testified that Woon had agreed to the amount of about US$5m,[42] and that he had informed Yu of this and the JV parties proceeded on that basis. Woon stated that there was no limit on the construction cost and TBS had agreed to pay its 60% share whatever the amount.[43] Woon claimed that he informed Thia that the cost would be around US$7.5m to US$8m but no agreement was reached, and the figure of US$5m was never

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38 23/8/17 NE 13–15.

39 ACB Vol 1, p 171.

40 Item A13 of List of Issues; AB Cat A Vol 8, pp 2276, 2298; UWM's Closing Submissions at paras 432–433.

41 Woon's Defence and Counterclaim (Amendment No. 2) at para 24(c).

42 Thia's AEIC, para 33.6; 5/12/17 NE 6.

43 15/8/17 NE 47, 54; 16/8/17 NE 11, 39; 19/2/18 NE 23.

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mentioned. There was also no subsequent agreement to vary the costs upwards as it was never fixed; hence, Woon's case is on an all or nothing basis.[44]

29 I find the JV parties had agreed on the construction cost of an estimated US$5m and prefer Yu's and Thia's versions. The cost, being a fundamental term, would more likely than not have been agreed on at the outset. Andrew agreed that it was important to determine the construction cost at the outset and this was an important consideration before he agreed to contribute to the JV via Sea Glory.[45] There was ample evidence to support TBS's position, whilst Woon's assertion was not borne out by any supporting evidence.

30 Thia stated that TBS would obtain a loan of 70% to 80% of the construction cost and he informed DBS that the Vessel purchase price was US$5m[46] – under the Loan Facility Agreement, the loan was for the lower of US$4m or 80% of the cost.[47] Further, Alan stated that Thia had mentioned that the estimated construction cost was US$5m.[48] Woon also admitted that TBS's obligation to pay UWM was based on Clause 2.2 of the Shipbuilding Contract;[49] if so, TBS's obligation to UWM was capped at US$5m. In the light of the above, and that under the JV TBS would advance 100% of the costs to UWM primarily through the bank loan, there was no satisfactory explanation on how additional funds would be raised or provided if the cost were unlimited.

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44 Woon's Closing Submissions, paras 143–144; 21/2/18 NE 36–37.

45 23/8/17 NE 29, 137.

46 29/11/17 NE 6–7.

47 AB Cat A Vol 1, pp 24, 31.

48 16/11/17 NE 56–57.

49 23/8/17 NE 14.

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31 TBS and UWM's contemporaneous records also support TBS's position. TBS's Directors' Resolution of 10 November 2007 recorded that UWM would construct the Vessel at an estimated US$5m.[50] UWM's memoranda of directors' meetings which took place on 26 May, 7 July and 30 October 2008 (which Woon, Lie and Thia attended) also showed that UWM would obtain US$5m for the Vessel.[51] The minutes of meeting received by Woon on 27 May 2008 clearly stated that accounting matters were discussed at length at the 26 May 2008 meeting and referred to the memorandum of Directors Meeting of that date.[52] I disbelieve Woon and Lie's claim that "money or finance" were not discussed at that meeting and that Woon never received the e-mail.[53] UWM's own spreadsheet, sent to Woon on 31 October 2008 and again on 28 November 2008 also showed the Vessel contract price as US$5m.[54] Pertinently, UWM's invoices to TBS for TBS to make instalment payments stated the Vessel contract price as US$5m.[55]

32 On the other hand, Woon's claim that the JV parties never agreed to the cost, and that he and Thia had a common understanding that it would be US$7.5m to US$8m, is a bare assertion and an afterthought. Indeed, his claim that there was *no limit* on the construction cost and that TBS would pay its 60% share, *whatever the amount*, defies logic and commercial sense. It was also raised belatedly in his affidavit evidence-in-chief in *June 2017* and his Amended

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50 AB Cat C Vol 1, p 14.

51 AB Cat C, Vol 1, pp 29–61; 19/2/18 NE 39–40.

52 17/8/17 NE 19.

53 15/8/17 NE 44; 17/8/17 NE 19–20; 13/11/17 NE 17; 14/11/17 NE 14.

54 AB Cat A Vol 1, pp 113–115; 134–136; 23/11/17 NE 28–29.

55 ACB Vol 1, pp 159, 164, 171.

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Defence and Counterclaim in *July 2017*,[56] despite knowing the plaintiffs' pleaded position, since *December 2014*, that it was US$5m.

33 That TBS would be liable for 60% of the construction cost without limit was not even raised by Woon at the 30 September 2013 meeting, after Yu had written to Woon on 20 May 2013 to enquire on the construction cost.[57] Simon's e-mail of 28 May 2013 (sent on Woon's behalf) did not challenge the estimated cost of US$5m stated in Yu's e-mail.[58] Indeed, the JV parties and UWM had met on various occasions to discuss payment of additional expenses which Woon and UWM hoped that TBS would bear a part of. Such discussions were unnecessary if the JV parties had agreed to bear the construction cost without limit.

34 On 18 April 2012, Ivan sent an e-mail recording matters purportedly discussed at a 20 March 2012 meeting (which Yang attended).[59] He set out the outstanding construction costs incurred and stated that it was "agreed" that this would be settled as soon as possible.[60] On 18 July 2012, Andrew e-mailed Yang stating: "[a]s agreed during our last meeting, once the registry documentation is complete, we should proceed to settle all the outstanding bills."[61] Contrary to Ivan's assertions[62] and the above correspondences, there was no agreement by TBS, at the 20 March 2012 meeting, that it would pay the purported additional

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56 16/8/17 NE 49–51.

57 22/8/17 NE 39–40; AB Cat A Vol 5, pp 1375–1377.

58 8/11/17 NE 35–37; AB Cat A Vol 5, pp 1374–1377, 1386, 1395.

59 AB Cat A Vol 3, pp 542–543.

60 Woon's AEIC, pp 21–23; Yang's AEIC, pp 129–130.

61 AB Cat A Vol 3, p 581.

62 Ivan's AEIC, para 26.

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expenses. Yang explained that at that meeting and even as at 18 April 2012, any additional expenses were open for discussion if UWM could justify them.[63] Mr Goh agreed that TBS did not then know of the expenses incurred by UWM (at least from 2010 onwards) as the supporting documents for such expenses were never sent to TBS.[64] Andrew, who was present at the 20 March 2012 meeting, admitted that Simon's e-mail of 18 April 2012 did not expressly state that the parties had, at that meeting, agreed that TBS would pay for the additional expenses. Andrew explained that the expectation was for TBS to pay its share because the Vessel had been registered in its name.[65]

35 Indeed, Simon's subsequent e-mail of 30 September 2013 stated that UWM "hoped" that the additional costs incurred for the Vessel construction could be shared by the JV parties.[66] By Woon's evidence, he was "suffering at that time" and had "hoped" that TBS could give UWM some money to do its work.[67] Additionally, there would have been no reason for Woon or UWM to write off a substantial sum of $255,321 purportedly owned to Lian Yi, Sea Glory and Woon for the Vessel construction and initially recorded in Ivan's 18 April 2012 e-mail as amounts "agreed … to be settled" if TBS had agreed to pay its share of the purported additional costs as reflected in that e-mail. Simon explained that Woon and UWM had decided to write off this sum only in 2014.

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63 14/8/17 NE 13.

64 10/8/17 NE 83–84.

65 28/8/17 NE 137–140.

66 AB Cat A Vol 7, pp 2017–2019; 22/8/17 NE 41–42; 23/8/17 NE 102–103; 29/8/17 NE 11, 20.

67 22/8/17 NE 45.

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36 Whilst the matters at [33] to [35] constitute post-contractual conduct which must be viewed with utmost scrutiny (see *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 at [54]), there is no blanket prohibition in the use of such evidence in contractual interpretation and I find that they provide "cogent evidence" of the parties' agreement at the time when the JV was concluded: *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd and others and another appeal* [2018] 1 SLR 180 at [51]. The parties' post-contractual conduct shows that at every stage, none of the parties had proceeded on the basis that they had agreed to pay the construction costs at whatever amount.

37 I turn to address some points made against TBS's position. First, I reject Mr Kwek's argument that it was not possible to price the construction cost until all the materials were procured or the Vessel was completed.[68] If that were so, buyers and builders will never be able to agree on the price of building a vessel at the time of contract but only at completion, which is illogical. As Yu explained, the price of building a vessel is agreed at the beginning and based on the market with risks involved.[69] Even Woon could purportedly price the Vessel cost at US$7.5m to US$8m during the JV negotiations. I accept that the figure agreed on was estimated at US$5m because, as Thia explained, the construction of such a vessel would cost approximately US$5m and the technical specifications were not finalised then.[70] In any event, when the Shipbuilding Contract was executed (which Woon claimed he signed in mid-December 2007)[71] and which reflected the price as US$5m, the Vessel Design Contract

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68 4/8/17 NE 12; 20/2/18 NE 54–55.

69 4/8/17 NE 13.

70 28/11/17 NE 141–142.

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had been prepared. Mr Kwek also submits that Thia's claim that Woon had informed him of the cost of about US$5m could not be believed, because the estimate was subsequently proven to be wrong as the amount was closer to Woon's US$7.5m or US$8m. This misses the point. The issue is whether the JV parties had agreed on a price. If so, that the actual cost was subsequently higher did not change the original agreement.[72]

38 Second, Yu would have realised by late 2009 that the Vessel construction costs may exceed US$5m. TBS's Directors Resolutions dated 30 September and 9 December 2009, which Yu signed, reflected the construction cost attributed to TBS at June 2009 to be about $5.2m.[73] TBS's 2009 Financial Statement and 2010 Financial Statement, which Thia and Yu signed respectively, reflected the total construction cost (at 30 June 2009) as $8,735,829, and the "total estimated final cost" as $9,425,000.[74]

39 I find this insufficient to support Woon's position that Yu or TBS had, by accepting the Directors' Resolutions and Financial Statements, agreed to bear the construction cost without limit. These documents were TBS's internal documents. As Mr Goh himself had put to Thia, the Directors Resolutions were intended to establish a carrying value of the Vessel to be attributed to TBS's shareholders, as Thia and Low were selling their shares in TBS to Yu and the Vessel would be transferred to TBM, and that also was why the 2009 Financial Statement and audited accounts were adopted.[75] Thia confirmed that TBS would

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71 16/8/17 NE 5.

72 20/2/18 NE 50–54.

73 Yu's AEIC, pp 264–273 (YKB-20); AB Cat C Vol 1, pp 91, 117.

74 D1 ACB Vol 2, pp 19–20.

75 29/11/17 NE 31–32.

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continue to bear the expenses of the Vessel construction even after Yu acquired Thia's and Low's shares in TBS, and that these expenses would be reimbursed to Yu when the Vessel was sold – this is supported by TBS's minutes of meeting of 22 June 2009.[76] Such documents and records did not go further to show that TBS had *agreed with Woon (or UWM)* to whatever amount of construction cost.

40 In fact, the accuracy of the figures in TBS's 2009 and 2010 Financial Statements is doubtful. It is not disputed that UWM would record the amounts advanced for the Vessel cost (*eg*, funds from TBS) and the amounts purportedly spent on its construction, and these figures were subsequently channelled from UWM's to TBS's records. Hence, the source of the records for incoming funds and expenditure on the Vessel was UWM.[77] Yet, based on UWM's own records, it is unclear how the figure of $8,735,829 (reflected in TBS's Financial Statements as the total cost of the Vessel at *30 June 2009*) was derived. UWM's spreadsheet, sent to Woon in *February 2010*, showed a total cost of $7,351,650.69,[78] *lower* than what was stated in TBS's *earlier* Financial Statement as the cost at 30 June 2009. Mr Kwek and Mr Goh do not dispute the figures in UWM's spreadsheet, although Mr Goh claimed that the spreadsheet was "not exhaustive" as it did not include some of the CFB expenses[79] – a claim that was unsubstantiated and not elaborated on. Indeed, the latest report, filed on *5 December 2017* by UWM's expert witness Leow Quek Shiong ("Leow"), had placed a figure of $6,991,178.14 as the total project costs for the Vessel (which included CFB's expenses),[80] which again is a different figure altogether.

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76 29/11/17 NE 30; AB Cat C Vol 1, p 90.

77 20/2/18 NE 132.

78 AB Cat A Vol 2, pp 288–291.

79 20/2/18 NE 133–135; 21/2/18 NE 5–8.

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Even with the inclusion into Leow's report of US$900,000 for the Cummins engine,[81] the final figure was still different from what was stated in TBS's Financial Statement and UWM's spreadsheet.

41 Hence, I did not place any weight on the Financial Statements. Yu had also explained that although the sum of $8,735,829 was reflected in the Financial Statements, this did not mean that he had agreed to that figure. There was no audit on whether the expenses as claimed by UWM were reasonable and the figures were estimates done by the accountant purely based on the contracts and did not reflect the final settled sum or relate to the actual construction cost.[82] At best, when TBS's directors signed the Financial Statements, they knew that this was what UWM was claiming as the cost of constructing the Vessel but this does not necessarily mean that they agreed to it.

42 Finally, I note that in 2012 TBS had agreed to settle a $6,000 payment to Wartsila Ship Design (Singapore) Pte Ltd ("Wartsila") (Conan Wu's successor) for an inclining test and the balance due to Cummins,[83] although it had already advanced to UWM moneys for the Vessel construction pursuant to the Shipbuilding Contract. However, this did not support Woon's claim that the JV parties had agreed to pay the construction costs at an unlimited amount. Yang explained that TBS had to discharge the payment to Cummins as it had signed the Cummins Contract and Cummins would rightly look to TBS for payment.[84] The same applied to the Vessel Design Contract which TBS had entered into with Conan Wu.

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80 Leow's 3rd affidavit, p 12 at para 2.24.

81 21/2/18 NE 25.

82 4/8/17 NE 75.

83 14/8/17 NE 17–18; Yang's AEIC, pp 136–137.

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43 To sum up, I find that the JV parties had agreed to the construction costs of about US$5m.

Period of Vessel construction

44 I find that the JV parties had agreed to the period of construction of approximately two years, as Yu and Thia stated.[85] It is inconceivable that such a fundamental term was not agreed on, and that UWM could take an indefinite period to construct the Vessel (as Woon initially claimed).[86] In fact, Woon admitted that Thia and he agreed, as a term of the JV, to a period of about two years, barring any delay and unforeseen circumstances.[87] In any event, all counsel conceded that even if there was no express term, a term would be implied that it would be constructed within two years, and that in this case the Vessel completion was clearly overdue.[88] I also add that the defendants confirmed that they were not claiming that TBS had acquiesced to the delay.[89]

Responsibility for Vessel construction

45 Yu claimed that Thia did not inform him, prior to signing the Shipbuilding Contract, that UWM would build the Vessel.[90] Woon claimed that he had informed Thia of this, and Thia stated that the JV parties agreed that

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84 11/8/17 NE 30–31.

85 Yu's AEIC, paras 44(e) and 52; Thia's AEIC, para 33.5.

86 16/8/17 NE 63–64.

87 16/8/17 NE 45–46, 52, 64–65.

88 19/2/18 NE 20–22.

89 21/2/18 NE 37–39.

90 3/8/17 NE 10–11.

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UWM would construct the Vessel.[91] I find that Yu knew of and agreed to UWM as the Vessel builder, and he knew that Woon was a shareholder of UWM.

46 First, the Shipbuilding Contract named UWM as the builder, and the plaintiffs accepted the Shipbuilding Contract.[92] Yu admitted that, shortly after the Contract was signed, Alan had informed him of its main terms and that UWM was the contracting party.[93] Next, TBS's Directors' Resolution of 10 November 2007 (which Alan explained to Yu) stated that UWM would be engaged as the Vessel builder.[94] When Yu signed the resolution, he knew that UWM would construct the Vessel, that it was Woon's company, and that TBS was the Vessel buyer.[95] Hence, even if Yu initially did not know that UWM was would be the builder (which I disbelieve), Yu subsequently knew and approved of it.

47 As between the JV parties, Woon was responsible to ensure that the Vessel would be constructed in accordance with specifications, in time and within the agreed costs. Woon admitted that under the JV he would handle and manage the Vessel construction and that he was overall in charge.[96] Hence, as between the JV parties, Woon was in charge of the Vessel construction, and responsible for its construction albeit through his vehicle UWM. Even Ivan admitted that Woon was in charge of the Vessel construction.[97]

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91 15/8/17 NE 30; Thia's AEIC, para 34.1; 29/11/17 NE 16.

92 Plaintiffs' Closing Submissions, para 53.

93 4/8/17 NE 17; 7/8/17 NE 47 and 55; 8/8/17 NE 65.

94 Yu's AEIC, Exhibit YKB-14; 3/8/17 NE 24–25; 16/11/17 NE 75; 21/11/17 NE 15–16.

95 3/8/17 NE 13, 22–24.

96 15/8/17 NE 80–81.

97 29/8/17 NE 88.

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Venue of Vessel construction

48 The Vessel was initially built at CFB and moved to TKBI. Yu claimed that under the JV the Vessel was to be constructed at TKBI. Woon and Thia denied this and claimed that, at the Batam trip, Woon had informed Yu that the Vessel could not be built at Woon's shipyard as there was no capacity.[98] Woon claimed that prior to the Vessel construction, TBS (through Thia, Alan, Low and Yu) had orally agreed that the Vessel would be built at CFB.[99]

49 I accept Yu's evidence that Thia had informed him that the Vessel would be constructed at Woon's shipyard (*ie*, TKBI) and the JV proceeded on that basis.[100] Indeed, I find that Yu was given the impression that the Vessel would be, and was all along being, constructed at TKBI, when Woon, Thia and Andrew knew that was not the case. First, Andrew's company, ALC Consulting Services Pte Ltd ("ALC Consulting"), had issued two reports on 6 March and 22 August 2008 respectively for TBS's purpose of drawing on the Loan Facility. The reports stated that ALC Consulting had carried out an inspection of the Vessel at *TKBI*. Andrew was very evasive when asked which shipyard he visited to inspect the Vessel to prepare the reports. He reluctantly admitted that it was CFB and that he had *deliberately* inserted "TKBI" into the reports.[101] Second, Thia was aware, when he signed (on TBS's behalf) the Letter of Confirmation to DBS to draw on the Loan Facility, that the Letter confirmed the construction venue as TKBI.[102]

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98 Woon's AEIC, paras 46 and 47; 15/8/17 NE 28 and 32; 23/8/17 NE 8; Thia's AEIC, para 31; 1/12/17 NE 51.

99 Woon's Defence, para 24(d); Woon's AEIC, para 47.

100 Yu's AEIC, paras 44(a) and 52.

101 AB Cat D Vol 1, pp 76, 147; 23/8/17 NE 114–115; 28/8/17 NE 96–97.

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50 Finally, the defendants have not satisfactorily explained why the Shipbuilding Contract stated TKBI as the construction venue if the parties had indeed agreed to CFB. Woon's claim that TBS had inserted TKBI into the Shipbuilding Contract knowing that it was "tentative" as the Vessel would not be built there[103] did not make sense since he claimed that he had told Thia, Low and Yu that the Vessel would not be constructed at TKBI and that UWM's directors had already agreed by mid-2007 to construct the Vessel at a new shipyard. Thia also asserted that, *at the Batam trip*, he had informed Yu that the Vessel would be constructed at CFB.[104] Moreover, when the Shipbuilding Contract was executed, CFB had been incorporated (*ie*, on 31 October 2007).[105] I also disbelieve Alan that he had assumed the Vessel was all along constructed at TKBI, and find that he knew that it was constructed at CFB. He had signed a UWM purchase order of 3 November 2008 for equipment to be delivered to CFB, and was copied on an e-mail from UWM's accounts staff[106] on 20 January 2009 which had a document of expenses incurred at CFB attached to it.[107]

51 At this juncture, I add that Thia's knowledge that the Vessel would be constructed at CFB cannot be imputed to TBS. Having found that the JV parties had agreed to build the Vessel at TKBI, there is no evidence that TBS's board of directors had authorised Thia to modify the JV terms. If at all, any agreement between Thia and Woon to construct the Vessel at CFB was based on Thia's

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102 1/12/17 NE 47.

103 Woon's AEIC, para 46.

104 1/12/17 NE 33.

105 Exhibit S; Item A6 of List of Issues.

106 Item A4 of List of Issues.

107 ACB Vol 1, p 275; AB Cat A Vol 2, pp 181–183; 24/11/17 NE 70–71.

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capacity *as a director of UWM* – it is not disputed that the directors and shareholders of UWM had set up UWM for that purpose.

52 Woon further claimed that the Vessel was moved to TKBI on the day of its launch on 4 December 2009,[108] and he kept Thia (but not Yu) informed of the move.[109] However there is evidence to suggest that the Vessel was moved to TKBI much later. An e-mail of 9 July 2013 from TKBI to Alan alluded to the Vessel having been "laid up a short while before it was decided to be towed to [TKBI]". Andrew and Alan confirmed that this meant that the Vessel would have been left for some time at CFB, which could be weeks or months.[110]

53 Regardless of when the Vessel was moved to TKBI, I find that this was because CFB decided to cease operations and not because it closed down due to unforeseen circumstances as Woon had given the impression. At that time, CFB was building 10 vessels, and when nine of them (apart from the Vessel) were completed, the workers were laid off and CFB had no new work.[111] Lie admitted that by May 2009 he had decided that CFB should not build anymore vessels and that all UWM's directors decided to remove all the equipment and tools from CFB.[112] Further, during a UWM directors' meeting on 26 October 2009, CFB's closure was discussed.[113] Hence, Woon and Thia knew and had decided, by May 2009 and in any case by October 2009, for CFB to be closed down.

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108 21/8/17 NE 49–51.

109 21/8/17 NE 85–86.

110 29/8/17 NE 36; 28/11/17 NE 1–2; AB Cat A Vol 6, p 1543.

111 21/8/17 NE 43–45.

112 15/11/17 NE 33–35.

113 21/8/17 NE 57–63; AB Cat C Vol 1, p 103.

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Responsibility for procurement for Vessel construction

54 Woon asserted that, under the JV, TBS was responsible for procurement. Yu claimed that although TBS assisted in procurement, this was the builder's responsibility.[114] Mr Kwek clarified that he had raised this issue only for the purpose of asserting that the responsible party was thus responsible to obtain and maintain the certificates for the procured equipment.[115]

55 I find that the responsibility for procurement was never a term that the JV parties had expressly agreed on. Apart from Woon's assertion, it was not Thia's evidence that this was a JV term. UWM's case is that it had agreed to construct the Vessel for TBS for consideration. It is undisputed that, under the JV, the entire construction costs would be funded first by TBS, by advancing 100% of the funds (mainly by the Loan Facility) to the builder for it to utilise for the Vessel construction including paying for equipment and parts. Hence, UWM, the builder and seller of the Vessel, was responsible for procurement. There was no reason for TBS to agree to be responsible as such when it would disburse all the moneys to UWM to pay for supplies and equipment. Indeed, UWM eventually did so for most items, and reimbursed TBS for items that TBS had assisted in ordering.[116]

56 Although TBS ordered various items for the Vessel (including after UWM was incorporated), I find that TBS was merely assisting UWM in procurement.[117] First, the documents showed that UWM had on numerous

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114 2/8/17 NE 102; 8/8/17 NE 71.

115 20/2/18 NE 7–9.

116 22/11/17 NE 27–28.

117 Exhibit E; 11/8/17 NE 77.

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occasions procured parts and equipment for the Vessel and on Woon's instructions, and had issued purchase orders to suppliers in relation to the Vessel.[118] Second, even for items ordered by TBS, UWM issued the purchase order to the supplier or the supplier issued a sales invoice to UWM,[119] and Mr Kwek admitted that TBS was not the party that contracted with suppliers on every item.[120] Third, Lian Yi had also assisted UWM to purchase equipment for the Vessel.[121] Fourth, I accept Thia's and Alan's explanations that TBS ordered the Cummins engine as UWM had not been incorporated then – Woon admitted to this and he even liaised with Cummins and was the named contact person in the Vessel Design Contract.[122] As Woon was in charge of procurement for other vessels built by UWM,[123] I find that he did likewise for the Vessel.

Responsibility for finance and accounts for Vessel construction

57 I reject Woon's claim that the JV parties agreed that TBS would be responsible for, and would control and handle all finance and accounts relating to the Vessel.[124] Woon admitted that UWM had to maintain its own accounts and that finance and accounts relating to the Vessel were its responsibility.[125] As TBS would advance 100% of the construction costs to UWM for it to pay for

118 Exhibit E; D3 ACB (Vol 1) p 8A; 15/8/17 NE 7–8; UWM's Closing Submissions, Annex A.

119 See items 3 and 9 of Exhibit E, 22/11/17 NE 33–34; AB Cat B Vol 1, p 63; D1 ACB Vol 1, p 59.

120 19/2/18 NE 12–13.

121 29/8/17 NE 48, 64.

122 Thia's AEIC, para 36; 15/8/17 NE 4 and 31; 16/11/17 NE 78–79; 23/11/17 NE 70; AB Cat B Vol 1, p 16; 28/11/17 NE 137.

123 15/8/17 NE 15.

124 Woon's AEIC, para 9(d).

125 15/8/17 NE 62; 23/8/17 NE 10–11.

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all expenses relating to the Vessel construction,[126] UWM was responsible for how the moneys would be spent and TBS had no access to UWM's accounts and no control over the expenditure of the moneys.[127] UWM recorded how the moneys were utilised, and this information was passed to TBS.[128] That TBS was keeping a record of the inflow and outflow of funds pertaining to the Vessel based on information obtained from UWM did not therefore make it responsible for controlling how the moneys (which were in UWM's hands) would be spent.

Roles of various persons in UWM

58 Before determining whether the parties had breached their respective obligations under the JV or Shipbuilding Contract, I turn to the role of various persons in UWM.

59 It is undisputed that Woon was overall in charge of vessel construction in UWM and that under the JV he would likewise be overall in charge of the Vessel construction. This included supervising workers and being responsible for the technical aspects of vessel construction, progress of construction and overall quality of work done.[129] As for finance and accounts, Woon claimed that he played no part in this relating to the Vessel or UWM and knew nothing about accounts. Woon also claimed that UWM's accounts staff did not report to him, and that he was not consulted on money matters.[130] I disbelieve Woon and find that he knew of UWM's financial status and made decisions on these matters.

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126 22/11/17 NE 23, 26–28, 32; 23/11/17 NE 11–14; Woon's AEIC, para 9(g).

127 21/2/18 NE 17–19.

128 29/11/17 NE 73; 19/2/18 NE 71; 20/2/18 NE 126.

129 15/8/17 NE 80–81.

130 Woon's 1st AEIC, para 22–24; 14/8/17 NE 99; 17/8/17 NE 36, 71, 73, 82.

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60 Woon admitted that he watched UWM's cash flow, monitored the Vessel construction cost, and UWM's accounts staff reported to him.[131] UWM's accounts staff e-mailed Woon to report on UWM's financial position and accounts, sought his approval for payments and looked to him to resolve UWM's cash flow issues.[132] Woon also signed invoices relating to the Vessel,[133] "made a lot of payments"[134] and liaised with third parties on payments.[135] He recorded the amounts that Sea Glory and Comfort Shipping had to contribute to the Vessel, thus keeping tabs on expenses.[136] In light of the overwhelming evidence, Woon's claims that he could not recall the e-mails sent to him, that he did not read them and could not read English (although he had sent various e-mails in English),[137] that he could not understand the accounts sent to him and that UWM's staff handled the financial issues,[138] were clearly unbelievable.

61 I find that Thia was also involved in UWM's financial matters and was aware of its financial position. I did not believe that he was not familiar with accounts and did not bother with how the moneys meant for the Vessel construction were applied,[139] as the correspondences showed otherwise.[140] I

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131 14/8/17 NE 120; 17/8/17 NE 34, 42.

132 AB Cat A Vol 1, pp 107, 113, 128, 129, 134, 140–144, 155; AB Cat A Vol 2, p 164, 167, 169, 186, 288–291; 14/8/17 NE 101–114.

133 Woon's AEIC, para 28; 14/8/17 NE 123; D3 ACB Vol 1, p 8.

134 17/8/17 NE 43; 18/8/17 NE 71.

135 AB Cat A Vol 2, pp 344–347; 14/8/17 NE 115 –117.

136 ACB Vol 1, p 193; 18/8/17 NE 67, 72.

137 AB Cat A Vol 2, p 257; AB Cat A Vol 5, p 1374.

138 14/8/17 NE 101–106, 109.

139 1/12/17 NE 71; 5/12/17 NE 42.

140 AB Cat A Vol 1, pp 107, 113, 119, 122, 127, 134–135; AB Cat A Vol 2, pp 164, 167, 169; 29/8/17 NE 81–82; 1/12/17 NE 58; 4/12/17 NE 2–3.

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accept Alan's evidence that UWM's accounts staff would take instructions from Thia or Woon, that UWM's staff would copy Alan on UWM's e-mails for Alan to inform Thia of its contents, and that Thia would discuss matters with Woon before making decisions.[141] Indeed, UWM's memoranda of directors' meetings showed that its finances were discussed. I thus find that UWM's directors, including Woon and Thia, were involved in its financial matters.

62 If the defendants' assertions were accepted, none of UWM's directors were responsible for or aware of UWM's finances; only the accounts staff had knowledge of them and made independent decisions without the input, instructions or approval of UWM's directors. This would be preposterous.

63 On procurement, I find, on the evidence (and Mr Kwek agreed),[142] that Woon, Thia, Alan and Ivan were all involved in procurement for UWM. As Woon was in charge of procurement for other vessels built by UWM,[143] I find that he did likewise for the Vessel. The documents showed that Woon instructed UWM to procure parts and equipment for the Vessel, and he decided on what to purchase and informed UWM and CFB to make them.[144] He also informed Thia of his requirements and travelled with him to buy equipment for the Vessel.[145] Ivan further stated that Alan and he were involved in procurement and that UWM's operations were a *joint effort*.[146] Thia and Alan also signed purchase orders and contracts for, and made purchases on behalf of, UWM.[147]

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141 16/11/17 NE 60–61, 99–100, 111–112; 23/11/17 NE 64.

142 22/11/17 NE 23–24.

143 15/8/17 NE 15.

144 Exhibit E; D3 ACB, Vol 1, p 8A; 15/8/17 NE 7–8, 9–13, 18–19; 22/8/17 NE 70.

145 14/8/17 NE 120–121; 13/11/17 NE 48; 16/8/17 NE 98.

146 29/8/17 NE 48, 63–64.

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Amounts disbursed by TBS and Woon's contribution

64 Having found that the Vessel construction cost was agreed at about US$5m, I turn to whether TBS had disbursed this amount (on a 100% basis).

TBS's contribution to the Vessel construction

65 The amounts disbursed by TBS either directly to UWM or to third party suppliers are as follows.[148] First, TBS disbursed US$3.5m to UWM, *ie*, US$1m from its own funds (before commencement of Vessel construction), and US$1.25m each upon steel cutting and completion of keel-laying drawn from the Loan Facility pursuant to the Shipbuilding Contract.[149] Woon has reimbursed TBS 40% of these sums (including repayment of interest on the Loan Facility).

66 Second, on UWM's request, TBS disbursed from its own funds $500,000 on 16 February 2009 and $1m on 20 April 2009 to UWM.[150] Although reflected as "loans" in TBS's payment vouchers, UWM treated the sums as progress payments for the Vessel construction[151] as no further payments were due from TBS under the Shipbuilding Contract until the Vessel was to be launched. Woon reimbursed TBS 40% on the $500,000 but did not reimburse his share on the $1m.

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147 D3 ACB Vol 1, pp 10, 27, 37, 39; D1 ACB Vol 1, pp 47 and 54; D2 ACB Vol 3, pp 291, 310, 319; AB Cat B Vol 1, pp 194–200.

148 Exhibit J; Leow's 2nd affidavit p 55 (para 5.1 of his report of 28 April 2017); 7/8/17 NE 12–35; 10/8/17 NE 8–10.

149 ACB Vol 1, p 160; 16/11/17 NE 85; AB Cat A Vol 1, p 103

150 ACB Vol 1, pp 234–239; 8/8/17 NE 19–21.

151 29/8/17 NE 165–166.

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67 I make some observations on the $500,000 and $1m. Mr Goh agreed that TBS could no longer use the Facility (which expired on 30 June 2009)[152] to pay further instalments under the Shipbuilding Contract as the Vessel was launched only in December 2009.[153] TBS does not dispute that it had advanced the $1.5m to UWM for the Vessel construction, and I accept Alan's evidence that TBS's directors including Yu approved the advance.[154] UWM was facing cash flow issues and TBS advanced UWM the money to pay for supplies required to construct the Vessel.[155] Yu also confirmed that the $1.5m was advanced to UWM as TBS could not continue to utilise the Loan Facility.[156] Hence, TBS had intended these "loans" to UWM to be capital for the Vessel construction.

68 Third, TBS paid Cummins a total of US$1,112,000 relating to the Cummins engine by instalments (with the first and second instalments of US$220,000 and US$770,000 paid by November 2008).[157] Of this, Woon had reimbursed US$528,000 (47% of the total cost) to TBS.[158] Fourth, TBS paid Wartsila $57,780 in total, of which UWM had reimbursed TBS $57,150.[159]

69 Hence, it is not disputed that TBS had disbursed around US$5.5m as at April 2009, and in total more than US$5.6m, either to UWM or third parties (on UWM's behalf) for the Vessel construction costs;[160] which figures do not

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152 8/8/17 NE 8.

153 8/8/17 NE 7–8, 14; 19/2/18 NE 135–136.

154 Item F of List of Issues; 16/11/17 NE 85–89, 114, 118–119; 28/11/17 NE 118.

155 16/11/17 NE 118–119; 23/11/17 NE 53; 24/11/17 NE 36–37, 41–45.

156 8/8/17 NE 13–14.

157 Exhibit E, item 2; 10/8/17 NE 51–52; ACB Vol 1 pp 181 and 184.

158 19/2/18 NE 92–93.

159 Plaintiffs' Submissions on Quantum, p 18; 4/6/18 NE 1.

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include interest (totalling US$224,791)[161] that TBS had to pay DBS on the Loan Facility. Even taking into account Woon's reimbursements as stated above, TBS had contributed its 60% share under the JV. As such, TBS has discharged its payment obligations under the JV and the Shipbuilding Contract.

Woon's contributions

70 Other than Woon's reimbursements to TBS as mentioned above, he purportedly contributed another $1,162,040 (which the plaintiffs dispute), through funds from Comfort Shipping and Sea Glory as follows.

71 First, on 5 and 21 May 2009, Comfort Shipping disbursed $500,000 to UWM ($250,000 each time), and which UWM reflected as a "loan" *from TBS*.[162] Also, on 5 May 2009, Sea Glory disbursed to UWM $500,000.[163] Neither Woon nor Andrew knew what these payments were for.[164] However, Ivan stated that these sums were subsequently treated as progress payments for the Vessel construction.[165] Under the JV, TBS would disburse funds to *UWM* and Woon would reimburse *TBS* 40% of the disbursed funds. No reason was given on why the manner of disbursement of the above sums departed from the JV arrangement, and the payments did not relate to any milestone in the Shipbuilding Contract.

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160 21/8/17 NE 31; 4/6/18 NE 4.

161 Plaintiffs' Submissions on Quantum, p 18.

162 ACB Vol 1, pp 241–243, 247–249; 22/8/17 NE 1–2.

163 ACB Vol 1, pp 244–245; 22/8/17 NE 4–5.

164 22/8/17 NE 8; 28/8/17 44–47.

165 29/8/17 NE 166–169.

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72 Second, on 10 February 2010, Sea Glory paid TBS $162,040.10, and TBS then paid onwards the same amount to UWM.[166] This was purportedly Woon's reimbursement (amounting to 20% of his contribution in the JV) towards additional expenses purportedly incurred by UWM for the Vessel, and for which UWM claimed TBS owed it $810,200.43.

73 I make some observations on the above. The additional expenses (assuming there were any) would seem to be lower. The $810,200.43 was derived from the difference between what UWM was contractually obliged to pay third parties (reflected as $7,014,706.65) and what it had paid them ($6,204,506.22).[167] However Mr Foo rightly pointed out that UWM had factored (into the $7,014,706.65) US$770,000 for the Cummins engine paid *by TBS to Cummins*. Mr Foo also explained that taking into account what TBS had advanced to UWM (*ie*, US$3.5m and $1.5m), UWM would have a surplus even after discharging its liabilities to third parties, or only a deficit of about $0.44m (*ie*, less that than the purported deficit of $810,200.43).[168] Indeed, Mr Goh conceded that UWM's accounts was not accurate and accepted that the shortfall (or additional expenses) should only be about $0.439m.[169] Moreover, when Sea Glory paid TBS $162,040.10, UWM had not invoiced TBS for further payments. It is thus unclear what Woon was reimbursing TBS for.[170] In any event, Woon never reimbursed another 20% to TBS, although he was liable for 40% of the purported additional expenses of $810,200.43.[171] Alan, who signed

166 ACB Vol 1, p 255–258; 22/8/17 NE 15; 4/6/18 NE 2.

167 ACB Vol 1, pp 251–253.

168 Exhibit Y; 28/11/17 NE 58–72.

169 1/12/17 NE 13–15.

170 28/11/17 NE 50–58.

171 28/11/17 NE 49, 56, 81.

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TBS's debit note, did not know the purpose of this payment to TBS and admitted that he had no basis to claim that TBS owed UWM the $810,200.43.[172] TBS was also not obliged to make any further payments to UWM. On 10 February 2010 (after Vessel launch), TBS had already advanced another $1.5m (equivalent to about US$1m) which would have covered the fourth instalment under the Shipbuilding Contract, and paid another US$770,000 directly to Cummins.[173]

74 Additionally, despite UWM informing TBS in April 2012 of outstanding amounts due as at 26 March 2012, which included expenses incurred by Lian Yi ($133,758.96), Sea Glory ($25,914.35) and Woon ($95,648.00) purportedly for the Vessel, Woon had, in 2014, decided to write them off.[174]

75 To sum up, whilst Woon claimed to have contributed another $1,162,040, the figures do not add up and were unreliable. Morever, as earlier stated, I find that the JV parties had agreed to the construction cost of around US$5m, and TBS had paid more than US$5.6m (on a 100% basis) and its 60% share. Hence, it is irrelevant if Woon had contributed another $1,162,040 to UWM. TBS had fulfilled its obligation under the JV and Shipbuilding Contract and was not obliged to make further payments for the Vessel construction.

Delay in Vessel completion

76 Woon claimed that construction began on the date of keel-laying (8 April 2008) and would complete within two years.[175] When the Vessel was

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172 28/11/17 NE 48, 74.

173 28/11/17 NE 50–58.

174 8/11/17 NE 46–47; AB Cat A Vol 3, p 542–543.

175 15/8/17 NE 36; 21/8/17 NE 70–71.

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launched on 4 December 2009,[176] Woon claimed that it was 85% to 90% completed and there was no delay in its construction or in the supply of the main components for installation,[177] although this is disputed by TBS. Woon stated that it would require 10 more months for outfitting; if so, the Vessel should have been completed by October 2010, but was only completed in January 2015. All counsel agreed that there was a clear delay in the Vessel completion,[178] even if one went by Woon's timeline. Woon proffered various reasons for the delay, none of which I accept, and I will explain why.

77 First, I reject Woon's claim that construction was delayed because CFB became defunct and the Vessel had to be moved to TKBI after its launch. After all, Woon claimed that when the Vessel was launched, construction was on schedule. In any event, I found that CFB's closure was a deliberate decision of UWM's directors. Woon also did not show how the move of the Vessel to TKBI caused a delay in its construction or how any delay was TBS's fault.

78 Second, I reject Woon's claim that TBS contributed to the delay by failing to continue paying its 60% share and Woon was short of funds as further costs were incurred after the Vessel was moved to TKBI. I found that TBS had fulfilled its payment obligations, and Ivan admitted that there was no basis to allege that the delay in construction was due to TBS's failure to contribute to the construction cost.[179] Woon agreed that TBS had to pay UWM according to Clause 2.2 of the Shipbuilding Contract.[180] In this regard, TBS had drawn on the

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176 Accounting Core Bundle Vol 1, p 502; 3/8/17 NE 42–43; 11/8/17 NE 35; 14/8/17 NE 66.

177 15/8/17 NE 32; 16/8/17 NE 99; 21/8/17 NE 73; 22/8/17 NE 50.

178 21/2/18 NE 32.

179 29/8/17 NE 135, 138.

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Loan Facility up to keel-laying and even advanced another $1.5m to UWM before the Vessel was launched and the next instalment due. By April 2009 (before the Vessel launch), TBS had disbursed about US$5.5m (see [69] above).

79 Pertinently, Leow (UWM's expert) had shown that UWM retained a net surplus of either $895,845.80, $642,120.51 or $549,111.86 (based on Leow's recalculated figures) after expenses for the Vessel construction (including CFB's expenses) were deducted from the contributions of the JV parties.[181] This was not disputed by Ivan or Mr Goh.[182] Regardless of which figure from Leow's report is adopted, UWM had a healthy surplus and sufficient buffer to cover further expenses for some time after the Vessel was moved to TKBI.[183] In fact, the first time TBS was asked to further contribute to the Vessel expenses was on 12 April 2011 (well past the two-year period for construction) and even then, it was not alleged that construction had slowed because of TBS's non-contribution.[184] It was not until 30 September 2013 that the assertion of TBS's non-contribution which affected the rate of construction was raised.[185] By this time, TBS had disbursed more than US$5.6m.

80 Third, the delay in meeting the requirement for a damage stability report (raised by the American Bureau of Shipping ("ABS"), a classification society, in September 2013 and fulfilled around December 2013),[186] which purportedly

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180 23/8/17 NE 13–14.

181 Leow's 2nd AEIC, para 10.3; Leow's 3rd AEIC, paras 2.17 and 2.24.

182 8/11/17 NE 103–104.

183 8/11/17 NE 80–81.

184 Ivan's AEIC, para 24; 29/8/17 NE 138–139; AB Cat A Vol 2, p 402.

185 8/8/17 NE 83; AB Cat A Vol 7, p 2018.

186 Yang's AEIC, pp 341–342; AB Cat A Vol 7, p 2110.

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contributed to the delay in the Vessel completion was also, in my judgment, not attributable to TBS. It was not Woon's case that TBS was responsible for obtaining this report, and I find that this was the builder's responsibility. I accept Yang's explanation that if the Vessel had been completed before 2011, there would not have been a formal requirement for such a report.[187] Woon could not show when this requirement came into force, and Wartsila's e-mail of 27 September 2013 suggested that this requirement took effect only much later.[188]

81 Fourth, Woon claimed that TBS's failure to pay the last instalment for the Cummins engine contributed to delay in the Vessel construction, as Cummins would not attend the commissioning of the engine until it was paid. TBS paid the final instalment on 29 August 2012.[189] I was not satisfied that any delay was attributable to TBS. This allegation was not pleaded by Woon nor mentioned in his evidence-in-chief as a reason for the delay and, in cross-examination, Woon was not even sure if this contributed to the delay.[190] The issue of the unpaid instalment was also first raised by Cummins with Woon on 6 March 2012, long after the date the Vessel should have been completed. Pertinently, UWM was to pay for all procurement and expenses for the Vessel construction from the moneys that TBS advanced to it.[191] That TBS subsequently agreed to bear the final instalment first for the Cummins engine did not alter UWM's responsibility (as between TBS and UWM) to pay suppliers all expenses for the Vessel construction.

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187 10/8/17 NE 23–24.

188 10/8/17 NE 22–23, 28, 40–41; Yang's AEIC, p 341.

189 10/8/17 NE 59–60; Yang's AEIC, pp 146–147; AB Cat A Vol 3, p 676.

190 22/8/17 NE 61–63.

191 22/11/17 NE 23, 26–28, 32; 23/11/17 NE 11–14; 19/2/18 NE 44; Woon's AEIC, para 9(g).

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82 Fifth, Woon claimed that TBS's failure to pay Wartsila the last instalment of $6,000 pursuant to the Vessel Design Contract led to a delay in the Vessel survey as Wartsila refused to participate in the survey until it was paid. I find that there was insufficient evidence to show that the delay, if any, was caused by TBS. I accept Yang and Yu's explanation that TBS had entered into the Vessel Design Contract (dated 12 October 2007) as UWM had not then been incorporated. Nevertheless, as stated earlier, UWM was responsible for discharging all expenses for the Vessel construction. Woon's claim is also bereft of details, and in any event Wartsila had informed Woon on 20 September 2012 that it had commenced work even though it had not been paid.[192] No doubt, Mok (from TKBI) had e-mailed Yang on 31 August 2012 stating that the Vessel's "estimated delivery time is now scheduled for 15th November 2012 subject to all Outstanding Contractual obligations that are required by [TBS] to be promptly settled with [Cummins] and [Wartsila]".[193] Yet despite Woon having agreed to pay Wartsila the $6,000 on 13 September 2012,[194] and TBS having paid the final instalment to Cummins on 29 August 2012 (before Mok's e-mail), the Vessel was not ready until 2015.

83 Sixth, it is unclear how ABS's loss of the inclining test report submitted to it[195] was attributable to TBS. Again, this was not pleaded as a cause of delay. Woon also claimed that "multiple changes in personnel within ABS" or "multiple changes in surveyors assigned by ABS to the Vessel" caused substantial delay to the Vessel completion, without elaborating on the multiple

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192 Yang's AEIC, para 44; AB Cat A Vol 3, p 743; 23/8/17 NE 84–85.

193 AB Cat A Vol 3, p 643.

194 23/8/17 NE 83–85; AB Cat A Vol 3, pp 676 and 694.

195 11/8/17 NE 56–57; 23/8/17 NE 90; AB Cat A Vol 5, p 1411.

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changes in personnel or surveyors or how this caused delay (let alone substantial delay). Further, the inclining test report was submitted to ABS in February 2013, long after the Vessel should have been completed, and in any event, ABS's approval was obtained not long after, in July 2013.[196] As Yang explained, the shipyard (TKBI) was responsible to check on the progress of the submissions; this is not disputed by Mr Goh.[197] Rather tellingly, even as at December 2013, after ABS's approval had been obtained, Mok (from TKBI) informed Simon (and Woon) that various works in relation to the Vessel remained outstanding.[198]

84 Mr Quek then asserted that delay to the Vessel completion was partly caused by Wartsila and ABS, as they had either submitted documents late or, in the case of ABS, had lost documents submitted to it.[199] I find this has not been made out, and in any case, could not be attributable to TBS or constitute a defence to TBS's claim. For starters, this reason was never pleaded by Woon or UWM nor raised by them. Moreover, it was for UWM (or Woon, who was supervising the Vessel construction) to periodically check with Wartsila or ABS to ensure that the documents were being processed in a timely manner.

85 Finally, Woon claimed that TBS failed to maintain a complete set of certificates for components and equipment which it had ordered for the Vessel. Again, I find this claim was not made out. Woon was not able to specify or explain which certificates UWM did not have or were not provided by TBS, other than to state that they "were certificates without which the surveyors … would not certify/approve the Vessel".[200] In any event, Alan informed Mok on

196 10/8/17 NE 16–18; AB Cat A Vol 6, p 1643.

197 11/8/17 NE 57.

198 AB Cat A Vol 8, p 2158.

199 10/8/17 NE 35; 11/8/17 NE 55–57; AB Cat A Vol 5, p 1411.

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4 February 2013 that he had given the original certificates to Chai (an employee of CFB) and was left with photocopies, and stated that for the major equipment purchased by TBS, the documents had been provided to UWM.[201] That the original certificates had been given to Chai was not disputed by Mr Kwek.[202]

86 Additionally, I find that UWM, the builder and the party responsible for procurement, was responsible to ensure that the certificates were accounted for and even if TBS had procured items on its behalf. I was not satisfied that any failure to provide complete certificates had contributed to the delay in the Vessel construction. Although Woon claimed that the surveyors would inspect the certificates at each stage of works,[203] he admitted that even without certificates, the Vessel construction could continue to the next phases, and further claimed that by December 2009 the Vessel was 85% to 90% completed. Yet, at the end of 2011, long after the two-year timeline for construction had passed, outfitting works had not been completed.[204] As for equipment procured by UWM, any abandonment of responsibility by Thia *in UWM* (as Woon alleged) which may have resulted in delay in obtaining the relevant certificates could not be attributed to TBS.

87 For completeness, various other matters which Woon and UWM claimed had contributed to the delay in the Vessel completion were no longer pursued,[205] namely, the delay in procurement of parts and supplies, the

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200 Woon's AEIC, para 39(b).

201 Yang's AEIC, p 464; 28/11/17 NE 101–102; 21/11/17 NE 64–65; AB Cat A Vol 4, p 1024.

202 20/2/18 NE 41–43.

203 22/8/17 NE 56.

204 23/8/17 NE 50.

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management of accounts and expenses pertaining to the Vessel construction and that TBS failed to provide a power of attorney to change the Vessel's registration. Likewise, any delay caused by workers at TKBI was irrelevant (aside from the fact that this was not pleaded) as the workers were within UWM's or TKBI's charge, and not TBS's.[206]

88 In conclusion, the purported reasons for delay in the Vessel completion were not made out. In any event, these reasons could not be attributed to TBS and hence, I do not find them to be valid defences to TBS's claim.

Plaintiffs' claim against Woon

The principles governing fiduciary obligations

89 TBS's claim against Woon is for breach of fiduciary obligations owed under the JV. The presence of a joint venture relationship can create fiduciary obligations, although it does not necessarily do so: *Ross River Ltd and another v Waveley Commercial Ltd and others* [2013] EWCA Civ 910 at [34]. Where there is an underlying contractual relationship between the parties, the extent and nature of any fiduciary obligations owed in any particular case would be informed by the terms of the underlying contract: *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 at [367].

90 The common thread, however, is that the fiduciary must act *bona fide* in the best interests of the principal: *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*") at [192]. In *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal*

205 20/2/18 NE 3–4; 21/2/18 NE 42–45.

206 21/8/17 NE 73.

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[2017] 2 SLR 592 ("*Beyonics*"), the Court of Appeal held – in the context of a director's duty to the company – that this core duty is part subjective and part objective. The subjective element lies in the court's consideration as to whether the fiduciary had exercised his discretion *bona fide* in what he considered to be in the interests of the principal. The court would be slow to interfere with commercial decisions made honestly but which, on hindsight, were financially detrimental to the principal (at [35]). The objective element relates to the court's supervision over fiduciaries who claim to have been genuinely acting to promote the principal's interests even though the acts done were not in the principal's interest. In such a case, the subjective belief of the fiduciaries cannot determine the issue – the court has to assess whether an intelligent and honest man in the position of the fiduciary could, in the whole of the existing circumstances have reasonably believed that the transactions are for the benefit of the principal (at [36]).

91 As some of the plaintiffs' allegations relate to a "failure to disclose", I should add that there is no standalone positive duty of disclosure; instead, this forms part of the fundamental duty to act in what the fiduciary considers in good faith to be in the best interests of the principal: *GHLM Trading Limited v Anil Kumar Maroo and others* [2012] EWHC 61 (Ch) at [192]. Further, it can also be incumbent on the fiduciary to disclose matters other than wrongdoing; the touchstone is what would be in the best interests of the principal: *Shepherds Investments Ltd v Walters* [2007] 2 BCLC 202 at [132].

Whether plaintiffs' claim against Woon made out

92 I turn now to the claims themselves. Mr Foo and Mr Kwek agree that there is an overarching duty owed by each JV party to the other, to act honestly and in good faith, and not to put himself in a position where his personal

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interests conflict with his duties under the JV. They also agree that the following duties are owed under the JV (although it is disputed which JV party owed the duty):[207]

> (a) a duty to properly account for all costs and expenses incurred in the Vessel construction and to keep proper accounts of the Vessel construction;
>
> (b) a duty to manage and control the Vessel construction cost (so that it does not overrun); and
>
> (c) a duty to exercise due care and skill in the Vessel construction.

As an aside, TBS decided not to rely on the argument that Woon owed a duty to keep clear and separate accounts of the Vessel construction costs and not to commingle moneys intended for the Vessel's construction with moneys for the construction of other vessels.[208]

93 Putting aside first the duty to act honestly and in good faith, and not to put one in a position of conflict or possible conflict, I find that Woon was the JV partner who owed the duties mentioned at [92(a)] to [92(c)]. I reiterate my earlier findings. Under the JV, TBS would advance 100% of the Vessel construction costs to UWM (of which Woon would subsequently reimburse TBS 40%) and based on Clause 2.2 of the Shipbuilding Contract. As the appointed builder, UWM was responsible for procurement, as well as finance and accounts relating to the Vessel's construction. Woon, as UWM's managing director, was the key decision maker. Hence, within the structure of the JV, it

[207] 20/2/18 NE 108–109, 139–141.

[208] 20/2/18 NE 138.

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was Woon who was responsible for and exercised control over these matters. Indeed, Woon admitted that he was responsible for supervising the Vessel construction, such construction being done by UWM. UWM was Woon's vehicle under the JV for the Vessel construction and Woon was thus the JV party who had to account for the costs and expenses incurred in the Vessel construction, keep proper accounts, as well as manage and control the construction costs. Woon, as the person supervising the Vessel construction, also owed the duty to exercise due care and skill in this respect.

94 However, Woon claimed that he did not know how TBS's moneys were used, he did not care about the Vessel construction costs or managing such costs, and he did not know how the construction expenses were allocated amongst the four 80-metre barges and five 25-metre tugboats ("the nine vessels") and the Vessel that UWM constructed.[209] In other words, Woon had completely disregarded his duty to manage and control the Vessel construction costs and to properly account for the costs incurred. Woon and Simon were unaware that UWM retained a net surplus after expenses for the Vessel construction were deducted from the JV parties' contributions (see [79] above) until this fact was revealed at trial.[210] Any costs overruns claimed by Woon would be due to his or UWM's failure to properly manage and control the Vessel construction costs.

95 Moreover, I find that Woon had breached his duties under the JV by preferring his own interest over that of the JV. He had placed himself in a position where his personal interests conflicted with his duties as a JV partner and had breached his duty to act honestly and in good faith for the best interest

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209 17/8/17 NE 41–42, 80; 18/8/17 NE 20; 16/8/17 NE 34–35.

210 8/11/17 NE 85, 90–92.

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of the JV. That UWM was constructing more than one vessel or Woon was supervising the construction of numerous vessels simultaneously did not *per se* amount to a breach of Woon's duties under the JV. However, Woon went beyond that. He used the moneys from TBS (including the DBS loan) to finance the construction of other vessels for the benefit of himself and his related companies. Through UWM, he constructed the nine vessels in preference to the Vessel and in so doing, UWM utilised TBS's moneys meant for the Vessel construction to fund the construction of those vessels. This led to a shortage of funds for and delay in the Vessel construction and completion.

96 To elaborate, I find that Woon had at the outset intended to finance the construction of the nine vessels at CFB with the moneys advanced by TBS for the Vessel. In 2007, the vessel-building market was booming and Woon wanted to make money by building vessels for himself or his companies and then sell them at a good price.[211] He had to look for a space "so that vessels could be built and [he] could earn money from there".[212] Indeed, Woon, together with Thia, Zikif and Lie had agreed to a business model, which came about before the JV terms were agreed.[213] Under this model, they would incorporate UWM to construct and sell vessels with Lie supplying the labour for construction, and the land for a new shipyard (CFB) to be set up would be leased from Zikif (see also [12] above).

97 The CFB shipyard became operational, according to Woon, around 8 April 2008.[214] UWM decided to complete the nine vessels before the Vessel.

211 15/8/17 NE 68, 98.

212 15/8/17 NE 98.

213 16/8/17 NE 2.

214 17/8/17 NE 60.

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Unlike the nine vessels constructed by UWM which had no written contracts, UWM and TBS entered into the Shipbuilding Contract whereby TBS would pay UWM periodically based on milestones of the Vessel construction. In fact, by April 2009, TBS had advanced about US$4.5m (more than 80% of the Vessel construction cost) to UWM and paid Cummins directly another US$1m. As for the nine vessels, UWM was only paid a deposit and it would receive full payment only after the vessels were completed and sold.[215] Woon and UWM could not show any independent evidence of how the construction costs for the nine vessels would be funded, and I find that this came from TBS's moneys to UWM. It is not disputed that TBS's moneys advanced to UWM for the Vessel were commingled with UWM's funds and used to conduct its operations, fund its business and construct other vessels. This is supported by both Leow (UWM's expert) and Yin (TBS's expert).[216]

98 The moneys advanced by TBS to UWM were used to roll over the cash flow for the construction of the nine vessels, leaving inadequate funds for the Vessel construction. Woon, being overall in charge of constructing vessels in UWM, had deliberately caused the nine vessels to be completed first. For instance, Woon wanted the barges, which could be completed within two to three months, to be completed quickly as the market was booming; these barges were built for sale to Lian Yi (Woon's company) and Lian Yi would "flip" them.[217] As a result, the four barges and five tugboats were completed by 2008 and October 2009 respectively,[218] whereas the completion of the Vessel was delayed.

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215 15/8/17 NE 66–68; 18/8/17 NE 25.

216 20/2/18 NE 87–88; 7/12/17 NE 24; Yin's 1st report at [2.5]–[2.9].

217 17/8/17 NE 60–61.

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99 I reiterate, Yu did not initially know that the Vessel would be constructed at CFB and was given the impression that it was constructed at TKBI. But despite the ongoing construction of the Vessel at CFB after the nine vessels were completed, UWM's directors chose to close down CFB and remove all the assets and equipment. Woon even informed Lie (on 2 November 2009) that the assets should be divided equally among UWM's shareholders; and when the equipment and assets at CFB were sold off in February 2010 for $1.6m, each of UWM's shareholders received $400,000.[219] Although the $1.6m were sale proceeds from the sale of UWM's assets, the sum was not returned to UWM to continue funding its operations (namely to complete the Vessel) but distributed to its shareholders. And despite Woon's claim that the Vessel was 85% to 90% completed when it was launched in December 2009 and that he only required 10 months to outfit the Vessel, the Vessel was not completed until January 2015. All the reasons given by Woon for the delay were, as I had earlier found, without merit.

100 The real cause of the delay in the Vessel completion was the result of Woon preferring his own interest (either directly or indirectly through entities in which he had a share) over the interest of the JV. He had intended to complete the nine vessels at the expense of the Vessel and used the moneys obtained from TBS for the Vessel to construct the nine vessels. This led to a shortage of funds for and delay in the Vessel construction and completion. By the time the nine vessels were completed and sold, TBS had already disbursed more than US$5.6m (including payments to Cummins) but the Vessel was far from complete. When the Vessel was finally completed in January 2015, the market

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218 Exhibit K, 21/8/17 NE 40–41, 47.

219 AB Cat A Vol 2, pp 257, 292; 21/8/17 NE 77–78.

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had declined considerably. As a result, the commercial purpose of the JV had been completely undermined.

Plaintiffs' claim against UWM

101 TBS claimed that UWM had dishonestly assisted Woon in his breach of duties. For dishonest assistance, four elements must be made out: (a) the existence of a trust or fiduciary duty; (b) the breach of it; (c) assistance rendered in respect of that breach; and (d) a finding that the assistance rendered is dishonest (see *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 at [20] and [22]). Assistance rendered is dishonest when the assistor has knowledge of the irregular circumstances that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them. Moreover, where a defendant (against whom a claim for dishonest assistance was made) was the controlling director or mind of the company, his knowledge can also be imputed on the company (see *Von Roll Asia Pte Ltd v Goh Boon Gay and others* [2017] SGHC 82 ("*Von Roll*") at [109]; and *Beyonics Technology Ltd and another v Goh Chan Peng and others* [2016] SGHC 120 ("*Beyonics (HC)*") at [159]).

102 Having found that Woon has breached the fiduciary duties under the JV, I find that dishonest assistance on UWM is made out. UWM was used as Woon's vehicle to carry out his breaches of duties (*eg*, the receipt of moneys from TBS which were then used for the construction of the nine vessels in preference to the Vessel), and the assistance rendered was dishonest. Being the controlling mind and will of UWM, Woon's knowledge can be imputed on UWM, and UWM is therefore imputed with the knowledge of the terms of the JV and that the moneys advanced by TBS for the Vessel was used to finance the

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construction of the nine vessels in preference to the Vessel. This is knowledge out of the pale that is "dishonest".

Plaintiffs' claim against Thia

103 Even if Yu or TBS knew that Thia was a director and shareholder of UWM, Thia nevertheless owed fiduciary duties to TBS as its director until he resigned on 6 November 2009. TBS's case is that Thia owed an overarching fiduciary duty "to safeguard TBS' interest in its JV with Woon",[220] and Thia had breached this duty in the following ways:[221]

(a) he had represented to Yu that Woon was trustworthy;

(b) he had failed to disclose his true interest in UWM and the nature of UWM as a company;

(c) he had failed to inform TBS's board of directors of Woon's lack of experience in building 45-metre tugs and that Woon's real interest in the JV was only 10% out of the 40% attributed to him; and

(d) he had failed to disclose Woon's breach of duties despite knowing the cash flow crunch UWM was experiencing, but instead procured TBS to advance moneys to UWM knowing that it was using the moneys to construct the nine vessels in preference to the Vessel.

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220 Plaintiffs' Closing Submissions, para 250.

221 Plaintiffs' Closing Submissions, para 252.

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Thia's representation that Woon was trustworthy

104 Thia admitted that he had informed Yu that Woon was trustworthy when the idea of the JV was raised.[222] Yu claimed to have been reluctant about constructing more vessels, but Thia assured him that he would be responsible for matters relating to the Vessel and vouched for Woon, and it was "out of respect" for Thia and Low that Yu agreed for TBS to enter the JV.[223] To the extent that TBS's claim is confined to the making of such a representation, I am unable to accept this as a standalone ground to find that Thia has breached his fiduciary duty. The description "trustworthy" is capable of different shades of meaning, even when examined in the context leading up to the entering of the JV. TBS has not specified how exactly Woon was *not trustworthy*, what Thia knew about this supposed lack of trustworthiness, and in any case, I find that Yu did not rely on Thia's representation to enter into the JV. Although Yu claimed that he did not want to construct any more vessels, he stated otherwise in cross-examination.[224] It was unlikely that Yu would agree to build the Vessel in reliance of Thia's assurance of Woon's trustworthiness when Yu had never met Woon, or merely out of respect for Thia and Low. Yu had agreed to the JV as he felt it would be profitable,[225] and he would not have done so if he did not think that it would benefit TBS and him. I therefore do not agree that this mere utterance, in and of itself, amounted to a breach of fiduciary duty, let alone a breach that caused any form of loss.

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222 5/12/17 NE 3.

223 Yu's AEIC, paras 46–47.

224 2/8/17 NE 78.

225 2/8/17 NE 103.

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Thia's failure to disclose his true interest in UWM

105 Yu claimed that Thia did not inform Yu that he was investing in UWM with Woon and that Yu discovered this only in late 2009. As stated earlier, I disbelieved Yu and found that he knew of and did not object to Thia's involvement in UWM, he knew that Woon was a shareholder of UWM and he knew that UWM would be the Vessel builder.

Thia's failure to inform TBS about Woon's lack of experience and real interest in the JV

106 Both planks of this argument are devoid of merit. It is not apparent how the revelation of these two matters (or lack thereof) was a necessary aspect of Thia's fiduciary duties to TBS. In any event, it is unclear how Woon's lack of experience in building a 45-metre anchor handling tug was a consideration that Yu had relied on when deciding whether to enter into the JV with Woon; it was not as if Woon had no experience whatsoever in building vessels. It is also not apparent how Woon's real interest in the JV would have affected TBS's (or Yu's) decision in entering into the JV. I do not think Yu cared where Woon would obtain the money for his 40% contribution so long as he paid up his share in the JV.

Thia's non-disclosure of the $1.5m "loan" from TBS to UWM

107 In relation to [103(d)], TBS's argument is that Thia had breached his duty to TBS as he knew that UWM was facing cash flow difficulties, but failed to safeguard TBS's interest in relation to a "loan" of $1.5m from TBS to UWM. This $1.5m comprised sums of $500,000 and $1m that were disbursed in February and April 2009 respectively (see [66] above) and subsequently capitalised in TBS's books as costs of the Vessel construction.

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108 I do not accept this argument. I have earlier found that the $1.5m was disbursed with prior approval of TBS's directors, including Yu and Low. In fact, Thia only signed one cheque and Alan was the signatory for the other. Both cheques were then countersigned by Low.[226] Yu knew that the advances were made to assist UWM in its cash flow and TBS had intended the $1.5m to UWM to be capital for the construction of the Vessel.

Thia's participation in the diversion of moneys intended for the Vessel

109 However, I find that Thia has breached his fiduciary duties owed to the plaintiffs by participating in the diversion of moneys intended for the Vessel to the nine vessels and to CFB, which resulted in the long delay to the Vessel completion.

110 Thia had agreed with Woon to incorporate UWM to construct vessels to be built on a new shipyard (CFB) for sale. He knew that CFB had to be set up from scratch and that it would require equipment and money to fund its setting up and its operating expenses. Thia also knew that CFB was totally dependent on funding from UWM and that expenses incurred at CFB would be charged to UWM.[227]

111 Thia was further aware that UWM would be building the nine vessels at CFB, even before CFB was set up. He also knew that the Vessel would be built at CFB even though he informed Yu that it would be built at TKBI (see [49] above). However, unlike the Vessel, the financing arrangements for the nine vessels were such that only a 10% deposit would be collected from the buyer;

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226 ACB Vol 1, pp 234, 238.

227 30/11/17 NE 30–32.

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the remaining 90% would be paid after the vessels had been completed.[228] While moneys for the nine vessels were not forthcoming, UWM was receiving regular progress payments from TBS. Thia claimed that "for shipbuilding, [they] would collect 10 per cent [first] and 90 per cent would be collected after the completion" as "all along for many years this has been our practice for making payments".[229] Yet he could not satisfactorily explain why TBS did not similarly pay a deposit first with the balance to be paid after the Vessel was completed, except to say that the Vessel was "different from other vessels… because it is a special supply wood [*sic*], it is [an] anchor handling tug" and that they had to pay for the Cummins engine upfront (which in any event was paid by TBS and not UWM).[230]

112 Being involved in UWM's (and TBS's) finance matters and being kept updated on the cash flow situation at UWM, Thia also knew that when UWM was constructing the nine vessels it was facing cash flow issues as he had "heard about this", although he claimed he did not know the details[231] (which I disbelieve). Alan had stated that the $1.5m advanced to UWM was approved by TBS's directors including Thia to assist UWM in its cash flow to pay suppliers for the Vessel. Thia signed on one of the two cheques (for $1m),[232] and he would have known that when TBS made the advances, no further instalments were due to UWM under the Shipbuilding Contract. Hence, whilst Yu may have approved of the $1.5m advance to TBS, he did not know (nor did Thia inform him) that

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228 30/11/17 NE 2–3, 30–32, 38; 1/12/17 NE 26–28.

229 1/12/17 NE 28.

230 1/12/17 NE 30–31.

231 4/12/17 NE 55.

232 4/12/17 NE 45–46.

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that sum would be used to partly fund the construction of the other vessels in preference to the Vessel.

113 On this note, Thia claimed that he was "very sure" that the money for the Vessel construction was not used to build UWM's other vessels;[233] a claim which I disbelieve as the documents showed otherwise and Thia was involved in UWM's directors' meetings where money matters were discussed (see [31] and [61] above). Such a claim was also inherently contradictory, since Thia claimed he was unaware of the accounts and finance in UWM (or TBS for that matter), and of how the moneys from TBS to UWM were used.[234]

114 Hence, Thia knew that UWM was using the moneys advanced by TBS for the Vessel construction to construct the nine vessels and to fund the setting up and operations of the CFB shipyard, and knowingly participated in this. As a shareholder of UWM, Thia stood to gain personally from the early completion of the nine vessels and sale thereof as the market was then booming. Moreover, when the nine vessels were completed, UWM's directors made a conscious decision to strip the CFB shipyard of its equipment and assets even though the Vessel (which was then at CFB) had not been completed. Thia also benefitted from the sale of the equipment and assets distributed to UWM's shareholders.[235]

115 Hence, I find that Thia had breached the fiduciary duty to act *bona fide* in the best interests of his principal (TBS) and had placed himself in a position where his personal interest (or interest in another entity, UWM) was in direct conflict with TBS's interest. On an application of the two-part test in *Beyonics*,

233 1/12/17 NE 29–30.

234 19/2/18 NE 158–159.

235 1/12/17 NE 85.

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Thia had not, subjectively, exercised his discretion *bona fide* in what he considered to be in the interests of the plaintiffs; neither could this diversion of money be in the interests of the plaintiffs, objectively speaking.

116 I add that even though Thia's interest in UWM was disclosed to Yu at the outset, and Yu was therefore aware that Thia was a director and shareholder of UWM with Woon and that UWM was the Vessel builder, this did not give Thia *carte blanche* to subordinate TBS's interests to his (or UWM's). The fact that Thia was a director of two separate entities did not entitle him to sacrifice the interest of one for the other (see *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597 at [64]).

Reliefs claimed by TBS against Woon, UWM and Thia

TBS's claim against Woon for equitable compensation

117 Having found Woon to be in breach of his JV duties which undermined the JV (and in fact when TBS commenced this Suit, the Vessel was not even ready), I next consider TBS's claim for equitable compensation against Woon. TBS put forth two methods of calculating the quantum to be awarded:[236]

(a) Under the first method, TBS claims equitable compensation for the sums of US$2,816,830.16 and S$1,300,630. It arrived at these figures by making the following computations:

(i) TBS paid to UWM, DBS, and Cummins the sum of US$4,616,791, and to UWM and Wartsila the sum of S$1,500,630;

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[236] Plaintiffs' Submissions on Quantum, paras 19–21.

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(ii) TBS was subsequently reimbursed by Woon (and/or Comfort Shipping/Sea Glory) the total of US$1,799,960.84 and S$200,000.

(iii) TBS claims the difference between the sums in (i) and in (ii).

(b) Under the second method, TBS seeks equitable compensation of 60% of its share of the proceeds from the sale of the Vessel on the basis that construction of the Vessel is completed in two years.

(i) Woon stated that in around 2007 to 2008, the Vessel could be sold for about US$9m to US$10m;[237] this was supported by Andrew (who was approached by Woon to invest in the construction of the Vessel) that the Vessel could fetch a price between US$9.5m and US$10m at that time.[238]

(ii) Separately, in an e-mail dated 22 November 2011, Andrew had referred to the Vessel and commented that an "average fairer figure… would be about US$7m".[239]

(iii) As the Vessel should have been completed by April 2010 (two years from keel-laying), and taking into account the falling market from 2008, the Vessel could have been sold for a price between US$7m and US$10m. TBS arrives at an estimate of US$8.5m by taking the median of this range.

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237 16/8/17 NE 47–48.

238 23/8/17 NE 28–29; 28/8/17 NE 29–30.

239 AB Cat A Vol 3, p 582.

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118 I consider the second method more appropriate and I will explain why.

The principles governing equitable compensation

119 The issue of equitable compensation was discussed in a number of recent local decisions. In *Quality Assurance Management Asia Pte Ltd v Zhang Qing and others* [2013] 3 SLR 631 ("*Quality Assurance Management*"), Vinodh Coomaraswamy JC (as he then was) set out a number of key principles:

(a) Equitable compensation, like common law damages, is assessed by reference to the amount of money necessary to restore the victim of a breach of fiduciary duty to the position the victim would have been in if not for the breach (at [41]).

(b) The deterrent function of equitable compensation means that the common law rules of causation, foreseeability and remoteness do not readily apply to equitable wrongdoers (at [42]).

(c) None of the common law limiting principles, including mitigation and comparative fault, ought to apply in a claim to recover equitable compensation as equity "deems by a fiction that it is decreeing performance of a primary obligation, *ie*, the defaulting fiduciary's obligation to pay an equitable debt" (at [50]).

(d) In the usual case, the legal burden of proving but-for causation would remain on the plaintiff throughout. The plaintiff has to show that the loss would not have occurred but for the breach, or that there was an adequate or sufficient connection between the equitable compensation claimed and the breach of fiduciary duty. This amount was to be

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assessed with the full benefit of hindsight and is quantified as at the date of recoupment, not as at the date of the breach of duty (at [60]).

(e) But when a case concerns (a) a fiduciary who is in one of the well-established categories of fiduciary relationships; (b) who commits a culpable breach; (c) who breaches an obligation which stands at the very core of the fiduciary relationship, several plaintiff-friendly consequences follow. Once the plaintiff adduces *some* evidence to connect the breach to the loss, equity will readily shift the evidential burden on causation to the breaching fiduciary (at [56] and [61]).

120 Subsequently, in *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 ("*Then Khek Koon*"), Coomaraswamy J elaborated on his holdings in *Quality Assurance Management*. He stated that an award of equitable compensation to restore the trust property to its original state or as compensation for a breach of the core fiduciary obligations of honesty and fidelity stands on a different footing from an award of equitable compensation for breach of a fiduciary's equitable duties of skill and care (at [104]). He also noted that there is a class of cases in which equity holds a breaching fiduciary liable to pay equitable compensation only if the "but for" test of causation is satisfied (at [106(c)]. Based on his analysis, Coomaraswamy J held (at [108]) as follows:

(a) Any fiduciary's liability for breaches of his duties of skill and care and of prudence and diligence are subject to the doctrines of foreseeability, causation and remoteness.

(b) A fiduciary who is in one of the well-established categories of fiduciaries and who commits a culpable breach of his core duties of

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honesty and fidelity is liable to pay equitable compensation even if the object of those duties is unable to prove but-for causation.

(c) A fiduciary who is not in one of the well-established categories of fiduciaries and who causes loss to the trust property as a result of an innocent breach of his fiduciary duties is not liable to reconstitute the trust property unless the object of those duties is able to prove at least a but-for causal connection between the breach of fiduciary duty and the loss to the trust fund.

Although the case went on appeal, Coomaraswamy J's holding above was not disturbed as the Court of Appeal determined the case on a different point and found it unnecessary to wade into the morass of complex and thorny issues relating to causation test for equitable compensation (*Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 at [11]).

121 Subsequently, in *Beyonics (HC)*, Hoo JC (as she then was) explained that the law in relation to a fiduciary in category (b) (at [120(b)] above) should not be read to mean that "but-for" causation was not required as a substantive rule, but as an evidentiary principle that is favourable to the innocent principal. Indeed, this was the position that Coomaraswamy J had earlier adopted in *Quality Assurance Management* at [61]. Hoo JC held (at [136]):

> In relation to the less strict approach to causation in *Brickenden*, *Quality Assurance* makes clear that, contrary to a literal reading of the former (as stated at [134]), the fiduciary is not immediately liable for all losses once the principal successfully proves that the breach is "in some way connected" to the loss. Instead, there is thereafter a shift of the evidential burden to the fiduciary to prove that "but for" his breach of fiduciary duties, the loss would still have occurred. Once the principal adduces *some* evidence to connect the breach to the loss, the evidential burden on causation shifts to the breaching fiduciary. … [emphasis in original]

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122 In the present case, the "but-for" causation did not pose any difficulty for the plaintiffs as my findings on the real cause of the delay in vessel construction (see [100] above) meant that the causal link between Woon's breach of his duty of loyalty and the loss suffered by the plaintiffs was established. Instead, the question is whether there is a principled way to choose between the two methods put forth by the plaintiffs.

123 In my view, the measure that is based on the value that the Vessel would have been sold at if the Vessel was completed sooner and in accordance with the agreed timeline (*ie*, the second method suggested at [117(b)]) should be adopted. This is because the duties Woon breached were non-custodial in nature and the more appropriate remedy is therefore not to restore the parties to their original positions, but to award reparative compensation, a secondary form of liability intended to remedy a breach of a primary duty.

124 In order to unpack what "reparative compensation" entails, it would be necessary to delve into the historical underpinnings of the award of equitable compensation (see generally *Agricultural Land Management v Jackson No (2)* [2014] WASC 102 ("*Agricultural Land Management*") at [334]–[349]; Yip Man and Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 ("Yip and Goh, "Navigating the Maze"") at paras 39–41). Historically, equity courts would grant monetary remedies to custodial fiduciaries after a preliminary step of accounting. This step of taking an account was aimed at ascertaining the true position between the fiduciary and the beneficiary: *Libertarian Investments Ltd v Thomas Alexej Hall* [2013] HKCFA 93 ("*Libertarian*") at [99], [167]–[168]. In terms of equitable compensation, there were two different forms of account: first, a common account; and second,

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an account on the basis of wilful default. The two correspond to different types of breaches.

125 An account of common form is typically ordered when there is a misapplication of trust property in breach of the trustee's duty to act only in accordance with the terms of the trust: Charles Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 Current Legal Problems 307 ("Mitchell, "Equitable Compensation for Breach of Fiduciary Duty"") at pp 320–321. When a common account is done and the evidence discloses any such unauthorised disbursement, this entry is falsified and the falsification would have the effect of creating a deficit between the account and the fund that the fiduciary must replenish (*ie*, by procuring the identical property or paying a sum of money that corresponds to the current market value of the missing property): *Agricultural Land Management* at [335]; Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" at p 322; Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 ("Ho, "An Account of Accounts"") at para 18. Where the trustee makes up for the deficit using the latter method, the trustee is "compensating", but in truth, such payment is restitutionary or restorative: *Libertarian* at [168]. It is more analogous to specific performance or a common law action in debt, and is made pursuant to one's *primary* obligation to account for one's stewardship: *Agricultural Land Management* at [336]; Yip and Goh, "Navigating the Maze" at para 45.

126 Substitutive compensation has been described as such because the trustee is said to be "substitutively performing" his obligation to produce the original property that had been misapplied: Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" at p 322; Steven Elliott, *Snell's Equity* (John McGhee QC gen ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at

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para 20–034. As this duty to replenish the fund is regarded as a primary duty, considerations of causation, foreseeability and remoteness are irrelevant: Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" at p 323. Finally, although I have referred only to the context of a breach of a trustee's duty, these rules are applicable to custodial fiduciaries, including company directors; the trustee being more commonly referred to as it is the archetypal custodial fiduciary: *Agricultural Land Management* at [363]; Yip and Goh, "Navigating the Maze" at para 45.

127 On the other hand, an account on the basis of wilful default is dependent upon proof of a loss. Such an account would then require the plaintiff to show that the custodial fiduciary, in breach of duty, failed to obtain a benefit for the fund, and on the taking of such an account, the plaintiff can then "surcharge" the account by the value of the rights that the custodial fiduciary would have obtained if the duty had not been breached: *Agricultural Land Management* at [347]. Reparative compensation is different from substitutive compensation because it presupposes the existence of a primary duty, the breach of which triggers a secondary obligation to compensate for loss. The award is therefore calculated by asking what loss was *caused* by the breach: Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" at p 323.

128 Hence, when the breach concerned does not involve a custodial duty, the accounting rules are inapplicable (Ho, "An Account of Accounts" at para 46) and the rules governing claims to reconstitute trust funds do not apply (Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" at p 326). The purpose of any remedy awarded in such a circumstance, therefore, cannot be restorative (in the sense of restoring a fund), and is compensatory and damage-based instead: Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" at p

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327. This was also the position taken by Ribeiro PJ in *Libertarian* at [82], where he endorsed the judgment of Tipping J in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 687, especially the holdings pertaining to the principles relevant to breaches involving an element of infidelity or disloyalty:

> … in such a case once the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover unless the defendant fiduciary, upon whom is the onus, *shows that the loss or damage would have occurred in any event, ie* without any breach on the fiduciary's part. Questions of foreseeability and remoteness do not arise in this kind of case either. Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach. [emphasis added]

As the second method proposed by the plaintiffs (at [117(b)] above) is premised on loss and damage suffered by them, I thus find it to be the applicable method.

Conclusion

129 Woon's and Andrew's evidence was that the Vessel could have been sold for a price between US$9m and US$10m in 2008. It was undisputed that the market deteriorated after 2008, and taking Andrew's e-mail on 22 November 2011 (see [117(b)] above) into consideration, I find that the Vessel could have been sold at a price of $8m in 2010. The plaintiffs claim a 60% share of the proceeds from the sale of the Vessel, and this would amount to US$4.8m.

130 I reach this finding by considering the remedial consequences of the breach of the duty to act *bona fide* in the good faith of the JV. Although I have found that Woon owed a number of other duties – *ie*, to account for costs incurred in the Vessel construction, to manage and control the construction, and

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to exercise due care and skill in doing so – TBS was not seeking a remedial response over and above the two methods outlined above at [117].

TBS's claim against UWM for equitable compensation

131 UWM, being the party dishonestly assisting the primary fiduciary (Woon) in breach in respect of the losses suffered by the plaintiffs, would also be liable to pay equitable compensation for the plaintiffs' losses caused by the breach of Woon's duty: *Parakou Shipping Pte Ltd (in liquidation) v Liu Cheng Chan and others* [2017] SGHC 15 at [189]; *Snell's Equity* at para 20-033).[240] This liability would be joint and several with Woon's liability: *Von Roll* at [117]. I note also that there is no need to show a precise causal link between the assistance and the loss; so long as the loss is caused by the breach of fiduciary duty, it will be recoverable from the accessory: *Novoship (UK) Limited & Ors v Yuri Nikitin & Ors* [2014] EWCA Civ 908 at [103].

TBS's claim against Thia for equitable compensation

132 Of the various arguments made against Thia, only the plaintiffs' argument in relation to Thia's complicity in the diversion of moneys intended for the Vessel has succeeded. Given the similarity between Thia's and Woon's breaches – both of which pertained to the breach of their respective duties of loyalty and fidelity – I find that Thia should be made jointly and severally liable for the $4.8m in equitable compensation.

133 In reaching this finding, I reject Thia's assertion that the operative end date for allocating responsibility for loss or damage is the date on which Thia resigned from TBS (6 November 2009). As a general rule, once a director

[240] Plaintiffs' Closing Submissions, para 191.

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resigns from office, he is no longer subject to the fiduciary duties that constrained his conduct during the course of his directorship as such duties exist only because of the special relationship that underpins them: Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) ("*Corporate Law*") at para 09.074. But in circumstances where the breach of duty subsisted during the course of the errant director's directorship, liability accrued after resignation can nonetheless be counted against the errant director: *Corporate Law* at para 09.076. In *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 ("*Cooley*"), the defendant was the managing director of the plaintiff company but intended to divert business opportunities to himself. He lied about his ill health, resigned and secured the contract for himself. Roskill LJ found that the defendant had come to know of opportunities relevant for the plaintiff but withheld such information when he had a duty to pass it on to the plaintiff. By retaining this information for his own benefit and interest, the defendant had placed himself in a position where his duty and his interests conflicted, and he could not thereafter evade liability for his transgression by merely resigning. Professor Pearlie Koh clarifies in "Once a Director, Always a Fiduciary?" (2003) 62(2) Cambridge Law Journal 403 at p 417 that *Cooley* stands for the proposition that resignation will not terminate the fiduciary obligations if, but for the resignation, the acts of the director taken in totality would amount to a breach of his obligations of loyalty. Professor Koh also emphasises that the rationale of the rule in this context is to prevent the use of resignation as a device to evade the strict fiduciary obligations.

134 In the present case, Thia's breach fell under category (b) (at [120(b)] above). For the purpose of causation, the plaintiffs would have to show that the breach was "in some way connected" to the loss; thereafter, there is a shift of the evidential burden to the fiduciary to prove that "but for" his breach, the loss

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would still have occurred. It was clear that Thia's breach was "connected" to the loss, *ie*, the loss of the sale proceeds that the plaintiffs would have obtained if the Vessel was sold in 2010 (even on Thia's case, he was a director of TBS up until 6 November 2009).

135 Here, the burden is on Thia to show that even if he had not breached his duty to TBS, the losses would still have been suffered. This shift in burden furthers the deterrent function of equitable compensation, and vindicates the high duty owed by a fiduciary to the wrong (*Quality Assurance Management* at [41]). I find that Thia has not discharged his burden. Mr Yeo's argument was excessively narrow, as it was limited to disclosure only in relation to where the Vessel was constructed; Mr Yeo therefore argued that even if full disclosure was made in relation to this, the construction of the Vessel would nevertheless have been delayed.[241] But as I have found above, Thia's breach extends beyond that as he had knowledge of and participated in the diversion of moneys intended for the Vessel to the nine other vessels. Thia has not established that the loss would nevertheless be suffered by TBS even if Thia did not participate in these breaches, or if Thia had notified the other shareholders of TBS that the diversion of moneys was taking place. It bears mention that Thia was the party who brought the parties to the Shipbuilding Contract together (at [5] above) and he had agreed with Woon to incorporate UWM to build vessels (including the Vessel) on CFB which would have to be newly set up. He also knew that UWM was facing cash flow issues in 2009 and had agreed to TBS advancing $1.5m to UWM. He was involved in UWM's finances and he knew that UWM was using the moneys advanced by TBS for the Vessel to construct the nine vessels and to fund the setting up and operations of the CFB shipyard. Thia had such

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241 Thia's Submissions on Quantum, paras 32–33.

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knowledge even while he was a director of TBS. Absent any argument to the contrary, I find that Thia has not shown that TBS would have suffered the losses it did regardless of whether he had breached his duties or not.

Woon's and UWM's counterclaims against TBS

136 Given the overlap between the Woon and UMW's counterclaims, I will deal with them collectively. It would be useful to first restate their respective positions. Woon's counterclaim against TBS comprises the following:

(a) TBS's purportedly outstanding share of the Vessel's construction costs;

(b) costs of maintaining and preserving the Vessel (as TBS has refused to take delivery of the completed Vessel);[242] and

(c) any difference in the value of the Vessel eventually sold and the sum of US$1.65 million (being the value of an offer in May 2016 for the completed Vessel).[243]

137 UWM sought the outstanding construction costs as well as maintenance and preservation costs in the sum of $1,538,174.35 and US$40,780.00 up to 31 May 2017 and maintenance and preservation costs to be assessed for the period thereafter.[244] This claim overlaps with [136(a)] and [136(b)] above, save for one main difference. In respect of outstanding construction costs, Woon's counterclaim was founded on the JV and a partnership and the claim would thus

242 Woon's Closing Submissions, para 192.

243 Woon's Closing Submissions, para 196.

244 UWM's Closing Submissions, para 404; UWM's Submissions on Quantum, para 226.

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be in accordance with the proportions of 60:40.[245] UWM's counterclaim was that it would be entitled to the entire sum in excess of amounts stated in the Shipbuilding Contract, given the absence of any agreement as to price and pursuant to an underlying assumption that all necessary funding would be provided in order to complete the Vessel.[246]

138 I make two preliminary points. First, Mr Kwek and Mr Goh agree that until the Vessel was completed in January 2015, any costs incurred would fall under the rubric of construction costs, and there is no separate head of claim for maintenance and preservation costs (collectively "maintenance costs") of the Vessel.[247] The respective parties under the JV and Shipbuilding Contract had agreed that TBS would only pay construction costs for the Vessel construction, and it is not any party's case that there would be a separate head of costs for maintenance of the Vessel. Second, in respect of Woon's and UWM's claims for construction and maintenance costs, Woon and UWM agree that only one set of costs was incurred and that there could not be double-payment in this regard.[248] I will deal with each head of counterclaim in turn.

Construction costs

139 In so far as additional construction costs are concerned, I dismiss this claim. I had earlier found that under the JV agreement, the Vessel was to be constructed for about US$5m. TBS had advanced about US$5.6m towards the construction costs and had paid its fair share of 60% under the JV even if I take

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245 Woon's Submissions on Quantum, para 106.

246 UWM's Closing Submissions, para 407.

247 4/6/18 NE 5.

248 Letter from Mr Kwek dated 11 June 2018, para 6; 4/6/18 NE 5.

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into account reimbursements received by TBS, which amounted to US$1,799,960.84 and $200,000.[249]

140 Woon's and UWM's arguments could only succeed if there was no agreement as to the bearing of construction costs. UWM argued that there was no agreement as to construction costs. So was its *quantum meruit* argument, for which it cited *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655 at [123]:

> … Where there is an express or implied contract *which is silent on the quantum of remuneration* or where there is a contract which states that there should be remuneration *but does not fix the quantum*, the claim in *quantum meruit* will be contractual in nature… *It is also relevant that there cannot be a claim in* quantum meruit *if there exists a contract for an agreed sum and there cannot be claim in restitution parallel to an inconsistent contractual promise between the parties*. … [emphasis added]

141 Woon's argument was based on the obtaining of an indemnity under s 24(2)(*a*) of the Partnership Act (Cap 391, 1994 Rev Ed), but again, the section opens with the caveat that such an indemnity would be subject to the agreement of the parties:[250]

> **Rules as to interests and duties of partners subject to special agreement**
>
> 24. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, *subject to any agreement express or implied between the partners*, by the following rules:
>
> …
>
> (2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him —

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249 Plaintiffs' Submissions on Quantum, pp 18, 22–23.

250 Woon's Submissions on Quantum, para 98.

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> (a) in the ordinary and proper conduct of the business of the firm; …
>
> [emphasis added]

142 I had earlier found that there was an agreement on the construction costs. Mr Kwek and Mr Goh had also agreed that it was not Woon's or UWM's case that there was any agreement to vary the costs upwards.[251] As such, there was no basis for Woon and UWM to mount this aspect of their counterclaim.

143 Woon also submitted that TKBI was entitled to possession of the Vessel until it was fully paid for the work done. Whilst shipbuilders may be entitled to exercise a possessory lien over a ship for any unpaid instalments (Toh Kian Sing, *Admiralty Law and Practice* (LexisNexis, 3rd Ed, 2017) at p 325, citing *Scott Steel Ltd v The Ship, Alarisa* (1996) 111 FTR 81), this is irrelevant as I have found that TBS had already paid its fair share.

Maintenance costs

144 In relation to maintenance costs, both UWM and Woon claim such costs of $188,690.64 for the period up to 31 May 2017, and continuing costs of $6,100 per month thereafter.[252] The parties accept that such costs only begin to accrue after the construction of the Vessel was completed in January 2015.

145 It is helpful to begin with a brief chronology of the relevant events. Before the Vessel was completed, the plaintiffs commenced this Suit in December 2014, alleging that Woon's wrongful conduct had completely

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251 21/2/18 NE 36–37.

252 Woon's Defence and Counterclaim (Amendment No 2), para 40C(b); Woon's Submissions on Quantum, para 111; Plaintiffs' Submissions on Quantum, para 52.

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undermined the entire purpose of the JV and UWM had dishonestly assisted Woon in his wrongful conduct.

146 Then, on 27 January 2015, UWM informed TBS that the Vessel was completed and ready for delivery. UWM stated that it would deliver the Vessel to TBS *only upon* receiving an additional $1,163,245.65 purportedly due from TBS as additional construction costs ("Additional Construction Costs").[253] In that letter, UWM enclosed a Statement of Accounts for the Additional Construction Costs based on a list of TKBI invoices dated 30 October 2009 to 27 January 2015. On 10 February 2015, TBS asked UWM to substantiate the Additional Construction Costs.[254] UWM replied on 23 March 2015 to state that TBS was not entitled to substantiation of the Additional Construction Costs as the Statement of Account had been provided and that if TBS failed to remit the Additional Construction Costs, UWM would treat its non-payment as a refusal to take delivery of the Vessel.[255]

147 On 6 April 2015, TBS again asked UWM for supporting documents, and also stated that various invoices listed in the Statement of Accounts had never been provided to TBS and that some items did not appear to be attributable to the construction of the Vessel but related to other vessels.[256] Then on 16 July 2015, UWM informed TBS that it was declaring the Shipbuilding Contract "rescinded" as a result of TBS's non-payment of the Additional Construction Costs and failure to take delivery of the Vessel.[257] TBS replied on 22 July 2015

253 AB Cat A Vol 8, p 2276.

254 AB Cat A Vol 8, p 2286.

255 AB Cat A Vol 8, p 2287.

256 AB Cat A Vol 8, p 2296.

257 AB Cat A Vol 8, p 2298.

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stating that it disagreed that it was at fault and reserved its rights on the matter.[258] On 4 August 2015, UWM informed TBS that they were intent on selling the Vessel to the first offer received.[259]

148 Then on 19 April 2016, TBS notified UWM that the Vessel's provisional certificate had lapsed,[260] to which UWM replied on 29 April 2016 that it was in the process of selling the Vessel and that the plaintiffs' cooperation was needed to effect changes to the Vessel's registration (then in TBM's name) and that TBS should not resist UWM's efforts to sell the Vessel.[261] This was the first time UWM sought TBS's assistance in procuring the sale of the Vessel. On 10 May 2016, UWM informed TBS that it was liaising with the MPA and that the MPA had requested for a meeting with TBS's and UWM's representatives to effect changes to the Vessel's registration and sale.[262] There was then a series of exchanges where TBS requested for more information, such as the details of the prospective buyer, the sale and purchase agreement and UWM's intentions in relation to the sales proceeds.[263] Subsequently, even after the identity of the broker of the potential buyer was disclosed and a statutory declaration that the said broker had no interest in the purchase was procured,[264] the parties were unable to conduct the meeting with the MPA due to some differences, particularly in relation to arrangements as to how to handle the proceeds of sale.[265] To date, the Vessel remains registered in TBM's name.

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258 AB Cat A Vol 8, p 2299.

259 AB Cat A Vol 8, p 2301.

260 AB Cat A Vol 8, p 2313.

261 AB Cat A Vol 8, pp 2315–2317.

262 AB Cat A Vol 8, p 2330.

263 AB Cat A Vol 8, p 2332.

264 AB Cat A Vol 8, pp 2339, 2350.

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149 In my view, UWM's claim for maintenance costs from January 2015 until around end April 2016 should not be allowed. But I would allow the maintenance costs from 1 May 2016.

150 Based on the correspondences between the parties, up until 29 April 2016, UWM had maintained the position that payment of the Additional Construction Costs was a necessary condition for the delivery of the Vessel. But this was unjustified given that TBS had already advanced more than US$5.6m for the Vessel construction and under the JV the construction costs were agreed at about US$5m. Hence, UWM had no reason to ask for any further construction costs and to withhold delivery of the Vessel on that score. Moreover, TBS was entitled to ask UWM to substantiate the Additional Construction Costs with supporting documents, which UWM had refused to do. It is not disputed that the Statement of Accounts listed a series of invoices which were not exhibited therein. Mr Goh admits that on his best case, UWM would have given invoices to TBS only up to 31 March 2011.[266] Mr Foo disputes Mr Goh's "best case" scenario, pointing out that Mr Goh had actually stated, at trial, that invoices generated from TKBI to UWM from 2010 onwards were not given to TBS.[267] Nevertheless, even taking Mr Goh's case at its highest, at the time when UWM wrote to TBS in January 2015, invoices from April 2011 had not been given to TBS for it to verify the genuineness of the Additional Construction Costs, and TBS was justified in requesting for further substantiation. In any case, I had earlier remarked that UWM's own record-keeping of the Vessel construction cost was unreliable (see [40] and [79] above) and would cast doubt on the final

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265 See, *eg*, AB Cat A Vol 8, p 2360.

266 4/6/18 NE 4.

267 10/8/17 NE 83; 4/6/18 NE 4.

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figure that made up the Additional Construction Costs. Since UWM's withholding of the Vessel was wrongful, the plaintiffs should not bear the maintenance costs incurred during this period.

151 But when UWM wrote on 29 April 2016 to inform the plaintiffs that it was in the process of selling the Vessel and subsequently informed them on 10 May 2016 that MPA had requested a meeting to effect the change in Vessel registration, the plaintiffs did not provide the necessary assistance. It was not apparent why TBS insisted on knowing about the identity of the potential buyer of the Vessel and why it wanted to have a say in the management of the sales proceeds when its claim at the material point in time centred on getting an account of the unauthorised benefits derived from the breach of fiduciary duties.[268] UWM had informed TBS that TBS's cooperation was necessary to make changes to the Vessel's registration details,[269] and I find that the plaintiffs were holding up any proposed sale to the third-party buyer while refusing to accept delivery of the Vessel. Hence, in my view, the plaintiffs have to bear the cost of maintaining and preserving the Vessel from May 2016. If the plaintiffs had co-operated and the Vessel could have been sold, any further maintenance costs would have been unnecessary.

152 The Shipbuilding Contract had come to an end after the Suit was commenced (this being a renunciation that would lead a reasonable person to conclude that the plaintiffs no longer intend to be bound by the Shipbuilding Contract: *Ng Chee Weng v Lim Jit Ming Bryan and another and another appeal* [2015] 3 SLR 92 at [66]) or at the very latest, when UWM wrote to the plaintiffs

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268 Statement of Claim dated 10 Dec 2014, p 21.

269 AB Cat A Vol 8, p 2330.

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to inform them that the Shipbuilding Contract was "rescinded" on 16 July 2015. Even if it could be said that the partnership between the JV parties had dissolved prior to May 2016, they nevertheless owed each other fiduciary duties (for *eg*, in the final sale and distribution of assets) up until the point when all matters relating to the JV have been settled. As Professor Yeo Hwee Ying opined in *Partnership Law in Singapore* (Butterworths Asia, 2000) at p 237:

> Actually, the partnership does not cease to exist immediately upon dissolution; it merely ceases to carry on business. Winding up commences thereafter and all partnership affairs will naturally have to be settled (including the conclusion of uncompleted transactions, payments to creditors, liquidation of assets and distribution of proceeds, if any, to the various partners). Only when all partnership matters have been fully wound up, is the partnership terminated altogether. This distinction between dissolution and final termination has to be underlined. *During the interim period before final termination, partners still owe to each other fiduciary duties (eg in the final sale and distribution of assets*) and they are therefore obliged to make disclosure. [emphasis added]

153 On the facts, I find that there was an enduring duty not to stymie the sale and distribution of the assets of the JV, and the actions of the plaintiffs were in breach of this duty. The measurable compensation of this breach ought to be based on the loss sustained in terms of the maintenance costs from 1 May 2016.

154 I note that this is consistent with the scheme of the Shipbuilding Contract, which places the burden of maintenance costs on the Vessel buyer in the event of a delay in taking delivery. Clauses 9.1, 9.3 and 9.4 of the Contract[270] provide that if TBS fails to take delivery of the Vessel and if UWM gives notice of an intention to "rescind [the Shipbuilding] Contract" for a default that is not remedied, then the eventual proceeds of sale will be applied first to the payment

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[270] AB Cat B Vol 1, pp 53–54.

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of expenses incidental to the sale of the Vessel and otherwise incurred by UWM as a result of TBS's default.

155 That brings me to the issue of the type of expenses and amount thereof. Woon and UWM submit a sum of $6,100 per month for maintenance costs, comprising $3,000 for berthing charges (at $100 per day), $820 in security personnel fees and $2,280 for labour charges for starting the Vessel's engines, machinery and equipment.[271] According to Woon, the standard rate charged by Batam shipyards for berthing ships of same or similar size as the Vessel is about $140 per day. Moreover, the Vessel's engines, machinery and equipment have to be started every one to two days to prevent them from deteriorating.[272] Security is required to guard the Vessel as the Vessel (or its parts and equipment) are at risk of theft.[273]

156 I find that the three types of expenses were expenses that are reasonable to maintain and preserve the Vessel and in any event, Mr Foo has not shown me evidence otherwise. I turn to the quantum of each item. In relation to berthing charges, there is no evidence to the contrary from Mr Foo that the quantum is exorbitant or unreasonable, and I will allow this sum of $3,000 per month. Likewise, I will allow the sum of $2,280 for provision of labour to start the Vessel's machinery *etc*, as there is no evidence that this sum was unreasonable.

157 However, I disallow the claim for security personnel fees as UWM has failed to prove that they had deployed security forces from a third party

271 Woon's Closing Submissions on Quantum, para 112.

272 Woon's Supplementary AEIC dated 14 August 2017, paras 10–12.

273 Woon's Supplementary AEIC dated 14 August 2017, paras 87–88.

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BRIMOB (as Woon claimed)[274] and that such fees were incurred at the material time. Whilst some evidence was produced, namely TKBI's payment vouchers to third parties or receipts from third parties, to show payments to a third party for security in 2010, 2011, 2012 and a receipt on 31 January 2015,[275] TKBI has not produced invoices from BRIMOB (or any third party security provider) or payment vouchers from TKBI to such third party provider, to support its claim for security for other months in 2015, and none for 2016 and thereafter. As such, it is doubtful if such costs were further incurred.

158 I am cognisant that the expenses are incurred at TKBI which is Woon's shipyard. Nevertheless, as there is no evidence to the contrary to show the reasonableness of the quantum claimed, I would allow the maintenance costs at $5,280 per month (comprising berthing charges and labour charges to start the Vessel's machinery *etc*) starting from May 2016 and continuing until the plaintiffs transfer the Vessel registration to UWM.

159 Both Woon and UWM were seeking to be paid the maintenance costs for essentially the same expenses but they agreed that there should not be "double payment".[276] I award the maintenance costs mentioned in [157] above to UWM. Mr Goh notes that Woon and TKBI had paid third parties for maintenance and preservation costs but that UWM was also "liable to make payment for the invoices to [TKBI]" as TKBI had issued the invoices to UWM.[277] That TKBI had issued invoices to UWM is supported by the invoices

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274 Woon's Supplementary AEIC dated 14 August 2017, para 88.

275 D1 ACB Vol 3, pp 271, 273, 277, 278, 280, 284, 286, 288, 291, 296, 308, 310, and 318.

276 Letter from Mr Kwek dated 11 June 2018, para 6.

277 Letter from Mr Goh dated 11 June 2018, para 3.

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tendered.[278] On this note, even though Mr Woon claimed to have made certain contributions whenever TKBI lacked sufficient funds, he was unable to distinguish invoices for which he paid and invoices for which TKBI paid,[279] and it appeared from the invoices that UWM was ultimately made responsible for the costs regardless of the party that initially incurred the expenses.

Potential depreciation in value of Vessel if subsequently sold

160 I turn now to Woon's claim for the difference in value of the Vessel eventually sold and the sum of $1.65m (found in his Closing Submissions) (see [136(c)] above), although Woon later claimed that it should be the potential shortfall between US$8m and the eventual sale price of the Vessel.[280]

161 First, this claim has not been pleaded in Woon's or UWM's counterclaims, and was only a point that Woon took up in his closing submissions. Second, the appropriate head of loss to claim for should be the difference between the potential offer of US$1.65m and the price that the Vessel could be sold at under present market conditions. Be that as it may, no evidence has been tendered on the present market price even though it was not impracticable to do so. As the Court of Appeal held in *Biofuel Industries Pte Ltd v V8 Environmental Pte Ltd and another appeal* [2018] SGCA 28 ("*Biofuel*"):

> 41 The starting point of the analysis is that BFI must prove *both* the fact of damage ***and*** its amount. We held that this was the legal position in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623

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278 D1 ACB Vol 3 pp 15–101, 406–418; 23/8/17 NE 11.

279 22/8/17 NE 89–90.

280 Woon's Closing Submissions on Quantum, para 124.

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> ("*Robertson Quay*") (at [27]) and stated that a claimant cannot make a claim for damages without placing before the court sufficient evidence of the *quantum* of loss it had suffered, even if it would otherwise have been entitled in principle to recover damages (at [31]).
>
> 42 … This Court thus affirmed the words of Devlin J (as he then was) in the English High Court decision in *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 at 438 that "where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can". We clarify, however, that this does not mean that a claimant such as BFI can simply claim that such evidence is not available or irrelevant, without more. The starting point remains that "a plaintiff cannot simply make a claim for damages without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages" (*Robertson Quay* at [31]). It is only "where the [claimant] has attempted its level best to prove its loss *and* the evidence is cogent" that the court will allow it to recover the damages claimed even if the quantum of loss cannot be determined with exact certainty (*Robertson Quay* at [31]) …
>
> [emphasis in original]

The Court of Appeal noted in *Biofuel* that the case at hand was not one "on the periphery where, as a matter of practicality, it is unclear whether [the relevant evidence] could have been adduced" (at [43]). Given this evidential deficiency, only nominal damages were awarded (at [45]).

162 In the present case, the trial covered both liability and quantum. It was therefore incumbent on Woon to make out his case on the loss occasioned as a result of the plaintiffs' failure to transfer ownership of the Vessels in a timely manner. There is nothing to suggest that Woon had "tried his level best" or that it was practically impossible to get an estimation of the present market value of the Vessel. The necessary corollary of this gap of evidence is, as Woon acknowledged,[281] that the claim is for *potential loss* – in the sense that there

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281 Woon's Closing Submissions, para 206(c)(*ii*).

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might very well be no loss if the Vessel fetched a price that was higher than $1.65m. If so, Woon has not even succeeded in *proving the fact of damage, let alone the amount*. Put another way, Woon is essentially imploring the court to award damages (or equitable compensation, for that matter) on a contingent event, which I disallow.

Transfer of ownership of the Vessel

163 Finally, I order that the Vessel be transferred back to UWM and UWM may dispose of the Vessel as it sees fit. Mr Foo agrees that the plaintiffs are not entitled to keep the Vessel if they were awarded equitable compensation.[282]

Conclusion and orders

164 In conclusion, I allow the plaintiffs' claims against the defendants accordingly. I dismiss Woon's and UWM's counterclaim for additional construction costs and partially allow UWM's counterclaim for maintenance costs. My orders are thus as follows:

(a) The defendants are to pay the plaintiffs US$4.8m jointly and severally, being 60% of the Vessel price estimated at US$8m in 2010.

(b) The plaintiffs are to effect the transfer of the Vessel registration to UWM, with such costs of re-registration to be borne by the plaintiffs.

(c) UWM is free to dispose of the Vessel as it sees fit. The plaintiffs have no further claim on any proceeds from the disposal of the Vessel.

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[282] 4/6/18 NE 4–5.

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(d) The plaintiffs are jointly and severally liable to pay UWM the preservation and maintenance costs at $5,280 per month starting from May 2016 and until the Vessel registration is effected back to UWM.

165 I will hear parties on costs.

Audrey Lim
Judicial Commissioner

Foo Maw Shen, Ng Hui Min and Loh Chiu Kuan (Dentons Rodyk & Davidson LLP) for the plaintiffs;
Winston Kwek and Max Lim (Rajah & Tann Singapore LLP) for the first defendant;
Francis Goh, Low Chun Yee and Joyce Ng (Eversheds Harry Elias LLP) for the second defendant;
Mark Yeo (Engelin Teh Practice LLC) for the third defendant.

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