IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 24

Civil Appeal No 193 of 2019

Between

Ernest Ferdinand Perez De La Sala

… *Appellant*

And

(1) Compañía De Navegación Palomar, S.A.
(2) Cosmopolitan Finance Corporation
(3) Dominion Corporation S.A.
(4) John Manners and Co (Malaya) Pte Ltd
(5) Peninsula Navigation Company (Private) Limited
(6) Straits Marine Company Private Limited
(7) Edward Robert Perez De La Sala
(8) James Morgan Copinger-Symes
(9) Maria Christina Copinger-Symes

… *Respondents*

GROUNDS OF DECISION

[Civil Procedure] — [Injunctions]
[Civil Procedure] — [Mareva injunctions]
[Trusts] — [Beneficiaries]
[Trusts] — [Resulting trusts] — [Presumed resulting trusts]
[Trusts] — [Variation] — [Statutory jurisdiction of court]
[Trusts] — [Variation] — [Inherent jurisdiction of court]

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Ernest Ferdinand Perez De La Sala
v
Compañía De Navegación Palomar, SA and others

[2020] SGCA 24

Court of Appeal — Civil Appeal No 193 of 2019
Steven Chong JA and Belinda Ang Saw Ean J
14 January 2020

27 March 2020

Steven Chong JA (delivering the grounds of decision of the Court):

Introduction

1 Various types of injunctive relief have been developed by the courts to address different situations. They are governed by different sets of principles though they share some common features. Therefore, to ensure that the correct set of principles is applied, it is first important to understand the specific type of injunction that is in play. The difficulty in identifying and applying the correct principles may be complicated by the fact that different types of injunctions have been issued in the same action.

2 The appeal arose from a complicated and drawn-out dispute over very substantial assets which were eventually found to be held on resulting trust. Over the course of the convoluted litigation, the court issued both Mareva as well as proprietary injunctions. Several applications were filed to vary the

injunctions and at times, the distinction between the Mareva and proprietary injunction might not have been properly appreciated.

3 At the heart of this appeal lies the essential question as to the circumstances under which a defendant can be permitted to invoke the Trustees Act (Cap 337, 2005 Rev Ed) ("Trustees Act") and the court's inherent jurisdiction to permit a withdrawal of funds seized under a proprietary injunction for living, legal and other expenses. We heard and dismissed the appeal on 14 January 2020. We now provide our detailed grounds of decision.

Background

4 This was an appeal by Ernest Ferdinand Perez De La Sala ("Ernest"), the defendant in the underlying Suit No 178 of 2012 ("Suit 178"), against the High Court Judge's dismissal of his application in Summons No 2794 of 2019 ("SUM 2794"). SUM 2794 was for a variation of an order of court dated 25 January 2013 (the "Proprietary Injunction") (as previously varied pursuant to an order of court dated 6 April 2018), to allow the release of the following funds from the account holding the enjoined sums:

(a) US$60,000 per month, to be released to Ernest's personal bank account; and

(b) US$6m as a lump sum for legal expenses reasonably incurred, to be released to Cavanagh Law LLP, Ernest's lawyers.

5 SUM 2794 was filed pursuant to s 56 of the Trustees Act and/or the inherent jurisdiction of the court in Suit 178. In essence, Ernest sought the court's exercise of its jurisdiction to release, from trust assets, the requested moneys for his living and legal expenses.

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6 The Judge below dismissed SUM 2794. Instead, he varied a previously-granted carve-out of a Mareva injunction (which is distinct from the Proprietary Injunction), such that Ernest was permitted to spend S$10,000 per week on living expenses and S$40,000 per week on legal expenses.

The parties in Suit 178

7 Ernest had taken over his family business and assets following his father's death. This included the management of the first to sixth respondents in this appeal (the first to sixth plaintiffs and fourth to ninth defendants in the counterclaim in Suit 178) ("the Companies"). In the course of such management, Ernest had transferred to himself certain assets of the Companies ("the Assets"). Suit 178 was brought by the Companies to seek, in the main, (a) recovery of the Assets; and (b) a declaration that the Assets in each of their names belonged absolutely to each of them. Ernest's defence was that he was the sole and beneficial owner of the Companies and the Assets.

8 The key members of the family involved in the dispute in Suit 178 were Ernest's mother and three siblings. Ernest, his siblings and his mother were referred to collectively in the proceedings below as "JERIC", while JERIC *sans* Ernest was referred to as "JRIC". For consistency, we adopt these abbreviations here.

9 The seventh to ninth respondents in this appeal, which we refer to collectively as "ECJ", were involved in the management of the Companies as directors.

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Procedural history

10 The Proprietary Injunction was granted by an order of court dated 25 January 2013, following the Companies' application in Summons No 1098 of 2012 for an injunction "to preserve and restore assets of the Compan[ies]". Ernest had moved monies from the Companies out of their accounts, and the Proprietary Injunction compelled Ernest to procure the transfer of the sum of US$200m to an account with Credit Suisse AG in the name of John Manners And Co (Malaya) Pte Ltd, the fourth respondent ("the Injunction Account").

11 The Proprietary Injunction was thereafter varied on several occasions. Notably, the enjoined sum in the Injunction Account was increased to US$250m on 17 May 2017.

12 On 22 March 2018, the Court of Appeal pronounced judgment on the appeals arising out of the High Court's decision in Suit 178 – Civil Appeals Nos 34, 35, 59 and 60 of 2017 – as reported in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 ("*Ernest Ferdinand Perez De La Sala (CA)*"). Therein, this Court found that:

(a) Ernest is not the sole beneficial owner of the Companies or the Assets (at [154]).

(b) The Companies are also not the absolute owners of the Assets. Instead, by operation of a presumption of resulting trust, the Companies hold the Assets on resulting trust for two Hong Kong companies, Northern Enterprises Ltd ("NEL") and John Manners and Company Limited (Hong Kong) ("JMC") (at [121]–[124] and [155]).

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(c) It was clear that a significant portion of the Assets existed for the benefit of JRIC in addition to Ernest, and that Ernest and JRIC had beneficial interests in NEL and JMC. The court held that the issues of precisely who else had a beneficial interest in the Assets, and what the nature and proportion of that beneficial interest is, did not arise to be determined in Suit 178 (at [5], [144] and [186]).

13 Thereafter, in Summons No 1587 of 2018 ("SUM 1587"), the Companies sought a further proprietary injunction over the portion of the Assets which were held in Ernest's personal accounts with UBS Bank (Canada) and UBS AG (Singapore branch) ("the SUM 1587 proprietary injunction"). On 6 April 2018, upon Ernest's counsel's request, the Judge granted a lump sum carve out of S$500,000 for Ernest's living and medical expenses on compassionate grounds (the "S$500,000 Carve-out"). Ernest was, however, to file an affidavit within two weeks of the hearing to justify this carve-out, and to state whether he had any other funds elsewhere. However, Ernest later declined to file this affidavit. As a result, on 21 May 2018, the S$500,000 Carve-out was rescinded. On the same day, the SUM 1587 proprietary injunction was granted.

14 On 7 March 2019, the Companies applied (*vide* Summons No 1168 of 2019) for a worldwide Mareva injunction over the assets in Ernest's name and/or under his control up to US$430m (the "Mareva Injunction"). This was the difference between the amount of the Assets Ernest was obliged to account for arising from this court's decision in *Ernest Ferdinand Perez De La Sala (CA)* (*ie*, over US$680m) and the enjoined sum pursuant to the varied Proprietary Injunction (*ie*, US$250m). On 12 March 2019, the Mareva Injunction for US$430m was granted. The Order of Court further stated that "[f]or the avoidance of doubt, the sum of US$430,000,000 enjoined [under the

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Mareva Injunction] shall include all sums enjoined [under the SUM 1587 proprietary injunction]" (see [13] above).

15 Alongside the Mareva Injunction, several conditions were imposed by the court:

(a) The Mareva Injunction was subject to a carve-out (the "Mareva Carve-out"): Ernest was allowed to spend S$5,000 a week towards his ordinary living expenses and S$20,000 a week on legal advice and representation. The Mareva Carve-out was subject to the following conditions:

(i) before spending any money, Ernest was to inform the Companies' solicitors where the money was to come from; and

(ii) the assets spent was not to be derived from the Assets which the Companies held on trust.

(b) In addition, Ernest was to disclose all assets worldwide in which he had any interest whatsoever, giving the value, location and details including the nature of interest of all such assets, via an affidavit ("Disclosure Affidavit").

It should be noted that, from this juncture onwards, *both* the Mareva Injunction and the Proprietary Injunction were in force concurrently. Ernest's Disclosure Affidavit (his 72nd affidavit) was filed on 27 March 2019.

16 On 12 March 2019, Originating Summons No 317 of 2019 ("OS 317") was filed by the Companies for a determination of the precise beneficial interests, whether direct or indirect, in the Assets found to be held on resulting

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trust by the Companies for NEL and JMC. This was the issue left outstanding in *Ernest Ferdinand Perez De La Sala (CA)*. OS 317 was pending before the courts at the time of the hearing of this appeal.

17 Coming back to SUM 2794, which was filed on 6 June 2019, the application was for a variation of the Proprietary Injunction to permit trust assets (*ie*, the Assets held on trust by the Companies) to be released, in the amount of US$60,000 per week for living expenses and a lump sum of US$6m for legal expenses incurred before or after the date of SUM 2794. At the hearing on 8 July 2019, the Judge directed that Ernest file a further affidavit to justify the orders sought in SUM 2794. Ernest filed his 77th affidavit on 15 July 2019, and the hearing was resumed on 22 October 2019. At this second hearing, the Judge dismissed SUM 2794. The Judge, however, accepted the Companies' submission that a variation of the Mareva Carve-out was more appropriate than a variation of the Proprietary Injunction. The Judge therefore doubled the Mareva Carve-out: Ernest was thereby allowed to spend S$10,000 a week towards his ordinary living expenses and S$40,000 a week on legal advice and representation. Ernest thereafter brought this appeal, *ie*, Civil Appeal No 193 of 2019 ("CA 193"), against the Judge's dismissal of SUM 2794.

Decision on the appeal

18 We dismissed the appeal. The central issues before us involved the particular legal bases relied on in Ernest's application in SUM 2794 to vary the Proprietary Injunction, which were (a) s 56 of the Trustees Act; and (b) the inherent jurisdiction of the court in the administration of trusts.

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19 We also dismissed an application, *vide* Summons No 11 of 2020, made by Ernest for further documents to be admitted as evidence at the hearing of the present appeal ("SUM 11").

Section 56 of the Trustees Act

20 Ernest's primary case on appeal was that the court has the power to vary the Proprietary Injunction pursuant to s 56 of the Trustees Act, and should exercise that power as it was expedient to do so.

21 The relevant provisions of s 56 state as follows:

> **Power of court to authorise dealings with trust property**
>
> **56.**—(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may —
>
> > (*a*) by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit; and
> >
> > (*b*) direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
>
> …
>
> (3) An application to the court under this section may be made by the trustees, or by any of them or by any person beneficially interested under the trust.

22 In its previous iteration, the equivalent of s 56 was s 59(1) of the Trustees Act (Cap 337, 1985 Rev Ed) ("Trustees Act 1985"), which is identical to the

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current s 56 for our purposes. In the case of *Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others* [1998] 2 SLR(R) 434 ("*Rajabali Jumabhoy*"), the court established that s 59(1) of the Trustees Act 1985 contemplated the following elements (at [78], citing *In re Downshire Settled Estates; In re Chapman's Settlement Trusts; In re Blackwell's Settlement Trusts* [1953] Ch 218 ("*Re Downshire (CA)*") at 244–245):

(a) an act unauthorised by a trust instrument,

(b) to be effected by the trustees thereof,

(c) in the management or administration of the trust property, and

(d) which the court will empower them to perform if in its opinion the act is expedient.

If these conditions are met, the court *may* then (a) confer upon the trustees the necessary power for the transaction; and (b) direct the manner in which the moneys are to be expended (s 59(1) of the Trustees Act 1985).

The purpose of s 56 of the Trustees Act

23 For context, we first establish the purpose of s 56(1) of the Trustees Act. We begin with the concept of lawful departures from trusts more broadly – while, as a general rule, trustees have to abide by the directions of the trust instrument, the trust is an instrument that spans a certain duration, and circumstances might change. One option for lawful departure from the terms of the trust is by agreement of the beneficiaries (if they are of full age and capacity, and are ascertained). Another option is for the trust variation to be effected by

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an order of court. This brings us to the inherent and statutory jurisdiction of the court to vary trusts.

24 Section 56 of the Trustees Act has its origins in, and is identical to, s 57(1) of the Trustee Act 1925 (c 19) (UK) ("the UK Trustee Act"). The court's power under s 57(1) of the UK Trustee Act is in turn historically part of a broader body of jurisprudence in relation to the court's authority to sanction departures from trusts. Broadly, the starting point is the court's inherent jurisdiction to authorise otherwise unauthorised acts of management or administration of the trust property in cases of emergency or "salvage". Mere expediency is insufficient to invoke the court's inherent jurisdiction to permit departure from the trust. We discuss the scope of the court's inherent jurisdiction to vary trusts in further detail at [44]–[46] below.

25 Section 57 of the UK Trustee Act was thereafter introduced to *expand* the court's jurisdiction to vary trusts. The court's statutory jurisdiction under s 57 is wider than its inherent jurisdiction, because it is not predicated on a situation of urgency or emergency. Instead, s 57 of the UK Trustee Act is premised on the proposed departure from the trust being expedient in the management and administration of the trust property, and this enables the court to confer power on trustees to undertake a wide range of dispositions and transactions where such power is otherwise absent (*Gelber and another v Sunderland Foundation and others* [2018] EWHC 2344 (Ch) at [7]–[8]). The objective of s 57 of the UK Trustee Act is to ensure that trust property is managed as advantageously as possible *in the interests of the beneficiaries as a whole* and, to that end, to authorise specific dealings with the property in situations where the court is of the view that it cannot be achieved by way of its inherent jurisdiction (*Re Downshire (CA)* at 248). This was cited in *Rajabali*

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Jumabhoy with approval at [78] in relation to s 59(1) of the Trustees Act 1985, which is *in pari materia* with s 56(1) of the Trustees Act, and the same objectives and principles would clearly apply to s 56(1) as well. While the application of s 56 would typically be invoked in relation to express trusts, the provision is not so limited, and it applies to trusts more generally.

Whether Ernest has standing to make the application under s 56 of the Trustees Act

26 Applications under s 56 of the Trustees Act may be made "by the trustees, or by any of them or by any person *beneficially interested* under the trust" [emphasis added]: s 56(3) of the Trustees Act.

27 While there is sparse authority on the scope of the term "any person beneficially interested under the trust", we were of the view that the term should be construed to mean "beneficiaries of the trust". The purpose of s 56 of the Trustees Act is for the authorisation of transactions and powers to effect transactions concerning *trust property*, in the interests of the *beneficiaries* as a whole (see above at [25]). In this context, it is clear that, short of being a trustee or a beneficiary of the trust, one does not have *locus standi* to apply under this provision.

28 It was a vital part of Ernest's case that he is a beneficiary of the Assets by virtue of his beneficial ownership of NEL and JMC. This reasoning was flawed. Merely having beneficial ownership in the beneficiary companies does not equate to having a beneficial interest in the Assets. This was aptly put by this court in *Ernest Ferdinand Perez De La Sala (CA)* at [119], when it observed that even if Ernest had fully bought out JRIC's shares in NEL and JMC, it would not *ipso facto* have given Ernest ownership of NEL and JMC's assets. Such a

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conclusion was reached on a simple application of the doctrine of separate legal personality – shareholders *qua* shareholders have no proprietary interest in the company's assets.

29 We acknowledge that, following the determination of *Ernest Ferdinand Perez De La Sala (CA)*, Ernest might stand to derive some sort of benefit from the Assets. Notably:

(a) This court first rejected Ernest's claim that he had beneficial ownership of all of the Assets, and found that the Assets were instead held on resulting trust for NEL and JMC, with the Companies as trustees, given that the Assets were substantially derived from NEL and JMC (at [144]). Ernest was not specifically mentioned in this resulting trust.

(b) This court then addressed the issue as to whether Ernest had made fraudulent misrepresentations to ECJ as regards a "family legacy" in favour of the De La Sala family. In holding that ECJ's understanding of the "family legacy" accorded with reality, that reality being that "[while] Ernest has not demonstrated that he has beneficial ownership of *all* the Companies' assets; … [w]hat is clear is that a significant portion of the pool of assets [*ie*, the Assets] existed for the benefit of JRIC" (at [186]).

(c) This court also earlier ruled out the possibility that NEL and JMC, being beneficiaries of the resulting trust, in turn held the Assets on trust for JERIC (at [119]).

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30 Taken together, while the capacity in which Ernest stands to benefit from the Assets is not entirely clear, what *is* clear is that Ernest has *not* been adjudged a beneficiary of the Assets that are being held on resulting trust for NEL and JMC. It was further stressed that NEL and JMC do not hold the Assets on any further trust for JERIC. Ernest would thus not be a beneficiary of the Assets, whether directly or indirectly, and would therefore not have standing under s 56(3).

Whether the relief sought pertains to "management or administration of the trust property"

31 In any case, *assuming* that Ernest had *locus standi* to bring the application under s 56 of the Trustees Act, the relief sought by Ernest fell outside the "management or administration" of the Assets. We recognise that the recent UK cases have given the term "management or administration" a broad interpretation in the context of s 57(1) of the UK Trustee Act, which is identical to s 56 of the Trustees Act. In the case of *South Downs Trustees Limited v GH and others* [2018] EWHC 1064 (Ch) ("*South Downs Trustees Limited*"), the court stated as follows at [39]:

> … It is plainly right to construe section 57(1), and the words "management and administration", *broadly* when considering the jurisdiction it gives to the court, provided the court has firmly in mind that the power does not permit the court to rewrite the trust itself. [emphasis added]

32 Nevertheless, it was plain in the circumstances that Ernest's application for an order to permit a distribution of the Assets to him fell outside mere "management or administration". Lynton Tucker *et al*, *Lewin on Trusts* (Sweet & Maxwell, 19th Ed, 2015) ("*Lewin*") at para 45–015 explained that "[t]he jurisdiction [under s 57 of the UK Trustee Act] *does not extend to the alteration of beneficial interests*, since such an alteration is not administrative in character

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and is an alteration to beneficial interests held by the beneficiaries in the trust property rather than a transaction concerning the trust property held by the trustees" (citing *Re Downshire (CA)* ([22] *supra*)). The UK Court of Appeal in *Re Downshire (CA)* noted as follows (at 245 and 247):

> … [The judge below] said: '… [s 57 of the UK Trustee Act] extends to transactions which are neither urgent nor of an emergency character, but does it extend to a re-writing of the trusts of the settlement, to a rearrangement of the beneficial interests thereunder for the advantage of the beneficiaries generally where there is no administrative problem? As I look at [s 57 of the UK Trustee Act and s 64 of the Settled Land Act 1925 (c 18) (UK)] it seems to me that they have been carefully framed so as to imply a negative answer. …'
>
> …
>
> … [W]e are satisfied that the application of both words ['management' and 'administration' in s 57 of the UK Trustee Act] is *confined to the managerial supervision and control of trust property* on behalf of beneficiaries. Such is the natural scope of both expressions, and *to attribute to them, or either of them, an additional association with the beneficial interests themselves, would be to superimpose upon their ordinary significance an interpretation that is both unnatural and unwarranted.*
>
> [emphasis added]

33 Likewise in Singapore, this court in *Rajabali Jumabhoy* ([22] *supra*) at [83] cited *Re Downshire (CA)* at 247 to stress the point that the "management or administration" of the trust property "is confined to 'the managerial supervision and control of trust property on behalf of the beneficiaries'".

34 The decision in *Re Downshire (CA)* was upheld by the House of Lords on appeal in *Chapman and others v Chapman and others* [1954] AC 429 ("*Chapman (HL)*"), although the House of Lords did not consider the court's jurisdiction under s 57 of the UK Trustee Act. Instead, its analysis focused on the inherent jurisdiction of the court, which we address below.

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35 In the present appeal, Ernest argued that distributions of trust assets fall within "management or administration". There are several difficulties with this argument. First, the authorities relied on by Ernest concerned distribution of trust assets to beneficiaries with *determined* beneficial interest:

(a) *In re Mair* [1935] Ch 562 pertained to a trust for the benefit of two women in equal shares. The court was asked to sanction, under s 57 of the UK Trustee Act, a proposal for the payment to each woman of a portion of the capital of the trust fund, to enable one of them to pay pressing debts. The court allowed the application.

(b) *South Downs Trustees Limited* ([31] *supra*) involved a discretionary express trust which had purchased some shares in a company, and the beneficiaries were the current and former employees of the company's business. The proposal, initiated by the trustee, was for the shares in the company to be sold and the proceeds distributed to all the beneficiaries. The court allowed the application.

36 In the present case, the proportion of beneficial interest in the Assets remains a hotly contested subject, and is pending the court's determination in OS 317. It was also not entirely clear whether, as at the time of the hearing of this appeal, Ernest had been adjudged to have a beneficial interest in the Assets at all (see discussion above at [30]). A direction that the resulting trustees release the sums of monies sought by Ernest would amount to (at least a tentative) determination that Ernest is beneficially entitled to those sums. This would clearly fall outside mere "management or administration" of trust assets. The effect of Ernest's application was to convert his unascertained beneficial interests in the shares of NEL and JMC into a beneficial interest in the Assets held on resulting trust for NEL and JMC. As explained at [32] above, this would

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amount to an impermissible alteration of the nature of Ernest's beneficial interest in the shares of NEL and JMC.

Whether the relief sought was "expedient"

37 In addition, Ernest did not discharge his burden of satisfying this court that granting the relief sought would be expedient.

38 Expediency requires that the proposed transaction be for the benefit of the whole trust, in that it facilitates better administration and management of the trust as a whole (*Lewin* at para 45–023). This does not mean the court needs to be satisfied that the transaction is in the interest of each and every individual beneficiary; rather, a broad view of the matter should be taken: *Leo Teng Choy v Leo Teng Kit and others* [2000] 3 SLR(R) 636 at [24]; *In re Craven's Estate; Lloyds Bank Limited v Cockburn (No 2)* [1937] Ch 431 at 436.

39 Ernest's case on appeal was that the requested relief would benefit the trust as a whole, because it would allow Ernest to obtain legal advice and representation in respect of the various legal proceedings involving the Assets in order to protect his interests and the interests of the beneficiaries of the Assets. According to Ernest, his beneficial interest in the Assets was likely to be the largest. This is because, besides his own beneficial interest in JMC and NEL, two of his siblings had assigned their interest in JMC and NEL to him, such that Ernest has at least 60% beneficial interest in NEL and 77.5% beneficial interest in JMC. In other words, his argument was that the proposed relief will benefit the trust as a whole because it will enable him to advance his case for (substantial) beneficial interest in the Assets and in the process will consequently determine the beneficial interest of the other beneficiaries.

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40 No authority was provided by Ernest in support of his proposition that such a use of trust funds is "expedient". It was difficult to square Ernest's proposed transaction with the requirement of expediency. First and most crucially, the notion of the transaction relating to "management and administration" of the trust is linked to the requirement that it is "expedient" – the transaction is expedient if it *facilitates the management and administration of the trust* as a whole. However, we have already found that the relief sought does not involve the management and administration of the trust at all. Second, Ernest's application essentially sought a distribution of the Assets for the purpose of funding his legal representation in proceedings against other potential beneficiaries of the trust. Ernest's counsel was unable to explain how this was for the benefit of the trust as a whole. In our view, it was clear that s 56 of the Trustees Act could not be used to assist one potential beneficiary in adversarial proceedings against other potential beneficiaries, as such a course would not be in the beneficiaries' interests as a whole.

41 Another argument explored by Ernest was that it was expedient because he potentially, and very likely, has the largest interest in the Assets. In our view, this was speculative. As we have explained at [28]–[30] above, until the conclusion of OS 317, the question of Ernest's beneficial interest in the shares of NEL and JMC (let alone his alleged beneficial interest in the Assets) remains unascertained.

42 For the above reasons, s 56 of the Trustees Act was not available to assist Ernest in his application.

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Inherent jurisdiction

43 Ernest's alternative case on appeal was that the court should exercise its inherent jurisdiction to vary the Proprietary Injunction. Ernest characterised the court's inherent jurisdiction in the administration of trust assets as a wide one. He submitted that the court has "wide powers to intervene and assist or regulate the management or administration of trust property" (citing *Halsbury's Laws of Singapore* vol 9(3) and 9(4) (LexisNexis, 2018) ("*Halsbury's Laws of Singapore*") at para 110.853), and may give directions to trustees to distribute trust property when it is "just and expedient" to do so (citing *In re MF Global UK Ltd (in special administration) (No 3)* [2013] 1 WLR 3874 ("*MF Global (No 3)*").

44 In our judgment, Ernest's submissions missed a crucial prerequisite for the exercise of the court's inherent jurisdiction – that it be exercised only in a handful of narrowly-defined and well-established cases. In the leading case of *Rajabali Jumabhoy* ([22] *supra*) at [68]–[75], this court had traced the origins of the court's inherent jurisdiction to sanction a variation of trust. Importantly, it cited with approval the *Re Downshire (CA)* ([22] *supra*) and *Chapman (HL)* ([34] *supra*) judgments, which examined the principles governing the exercise of such inherent jurisdiction. In sum, there are three key classes of cases in which the court's inherent jurisdiction to vary a trust will be asserted:

> (a) *Cases of "salvage" and "emergency"*: these involve some event or development, perhaps unforeseen, and not provided for by the settlor which threaten to make shipwreck of the settlor's intentions and it was imperative that something should be saved from impending shipwreck: *Re New* [1901] 2 Ch 534, at 544; *Chapman (HL)* at 469. As explained in *Lewin* at para 45–006, these cases pertain to the preservation and

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management of trust property. *Halsbury's Laws of Singapore* at para 110.853 elaborated that cases of emergency refers to cases where the situation which arose is unforeseen or unforeseeable by the settlor when he set up the trust, and calls for some action to be taken for the sake of preserving or to prevent erosion of the benefits to the beneficiaries. In cases of salvage on the other hand, the falling into disrepair or destitution of trust property may be foreseeable, but the courts may intervene by authorising the expenditure of capital or income in order to preserve the value of trust property from ruin or destruction: *Halsbury's Laws of Singapore* at para 110.511.

(b) *Cases of maintenance of minors*: these are cases where a trust only provided for accumulation of income for infant beneficiaries during their minority, without providing for maintenance. In such cases, the court can authorise maintenance to be provided, on the basis that the settlor would not have established a trust to benefit those beneficiaries in the future, and yet intend that they be left unprovided for in the meantime: *Chapman (HL)* at 455–456, 469.

(c) *Cases of compromise*: these relate to cases where there is a compromise of rights under a settlement or will which are the subject of real doubt or dispute. In such cases, the court may approve the compromise on behalf of minor, unborn or unascertained beneficiaries: *Chapman (HL)* at 445–447 and 469.

45 In *Chapman (HL)* at 469–470, Lord Asquith of Bishopstone observed that the inherent jurisdiction of the court would be asserted "mainly, if indeed not solely", in the above three classes of cases, and his view was that the inherent jurisdiction of the court was "limited to these three classes of cases".

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In *Rajabali Jumabhoy* at [75], this court recognised that the court's inherent jurisdiction would be exercised "mainly" in circumstances such as emergency.

46 Notably, in *Re Downshire (CA)* (cited in *Rajabali Jumabhoy* at [72]), the court stressed that:

> The … [inherent] jurisdiction *does not, in our view, extend to changes or re-arrangements of the beneficial interests* inter se *under the trust*, as distinct from re-arrangements or reconstructions of the trust property itself. [emphasis added]

47 Similarly, Lord Morton in *Chapman (HL)* at 462 affirmed the words of Roxburgh J in *In Re Downshire Settled Estates* [1952] 2 TLR 483 at 488 (reproduced in *Chapman (HL)* at 448–449), that where "the admitted purpose of the [proposed transaction] is not to solve any administrative problem but to rearrange beneficial interests to greater advantage", it falls outside the scope of the court's inherent jurisdiction. Lord Morton also held that the court would not exercise its inherent jurisdiction in cases of compromise where the compromise is simply sought between the beneficiaries to re-arrange the beneficial interests under the trust instrument (and to bind infants and unborn persons), and where there is no real dispute as to rights (at 445–446).

48 Ernest's application does not fall within any of the narrow, established classes of cases in which the court's inherent jurisdiction can be exercised to vary the trust. His case does not fall into the category of "salvage" or "emergency", as these cases pertain to the preservation and management of trust property. The present trust is not one for the accumulation of income, and there has clearly been no compromise between the potential beneficiaries of the resulting trust.

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49 The narrowly-defined categories reflect the court's reluctance to expand the scope of its inherent jurisdiction. The concern, in a case of an express trust, in keeping the court's inherent jurisdiction narrow is to "give effect to the intention of the settlor or testator as expressed in the trust instrument or the will". Hence, the court "should not arrogate to itself any inherent overriding jurisdiction to disregard that intention and rewrite the trust" (*Rajabali Jumabhoy* at [75]).

50 Such considerations regarding the sanctity of the settlor's intentions do not apply here, where the trust is a resulting trust. It may therefore be argued that the categories need not be so narrowly circumscribed. Even if that were the case, we were nonetheless satisfied that the inherent jurisdiction of the court does not assist Ernest in his application, for the reason that Ernest's application falls foul of the fundamental rule that the exercise of such inherent jurisdiction cannot be for the re-arrangement of beneficial interest under the trust (see [46]–[47] above). To exercise the court's inherent jurisdiction to sanction a distribution of assets in this case would be tantamount to a premature and tentative determination of beneficial interests in the Assets.

51 We now address some other authorities cited by Ernest. In sum, upon closer examination, they do not stand for his proposition that the court has "wide powers" to intervene (and direct trust property to be distributed) as long as it is simply "just and expedient". Instead, they relate to vastly different situations involving trustees who have already been *authorised to distribute* the trust assets to ascertained beneficiaries in question. Ernest's situation is distinct from these cases as he is not even an ascertained beneficiary of the resulting trust.

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52 It is first necessary to understand the order known as a "Benjamin order", established by the case of *In re Benjamin* [1902] 1 Ch 723 ("*Benjamin*"). Where a trustee is to distribute trust property, but is faced with a practical difficulty in establishing the existence of other possible beneficiaries or claimants, the court will give a direction to the trustees enabling them to distribute the trust property on an assumption of fact that there is no such other beneficiary or claimant. In *Benjamin*, the trustees were given liberty to distribute the testator's residuary estate on the basis that one of his sons, who had disappeared and not been heard from for some years, had pre-deceased the testator and would accordingly not have a share in the residuary estate. As Nourse J explained in *In re Green's Will Trust* [1985] 3 All ER 455 at 462, a Benjamin order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities. It protects trustees but it equally preserves the right of any person who establishes a beneficial interest to pursue such remedies as may be available to them.

53 Second, where the time arrives for the trustee to distribute trust property, but a third party issues proceedings to enforce an adverse claim to the trust property or any part of it, no distribution can safely take place until the proceedings are disposed of in some way. Nonetheless, the court has jurisdiction to permit or direct a trustee to distribute notwithstanding the existence of claims or potential claims from such third parties: *Finers (a firm) and others v Miro* [1991] 1 WLR 35 ("*Finers v Miro*"). This does not have the effect of destroying a proprietary right of third parties, but would afford protection against personal claims against the trustees by third parties: *Lewin* at para 26–033. In *Finers v Miro*, a solicitor-trustee held funds on behalf of a client absolutely. Later, the client faced allegations that he had acquired those assets from an insurance company by fraud, and liquidators of the insurance company had commenced

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proceedings against the client on the basis that the assets were held on constructive trust. Notwithstanding the claim, the court held that there could be payment out of the trust moneys to meet the client's legal expenses. As Balcombe LJ explained (at 46), the court has the jurisdiction to authorise payment out by a trustee who *prima facie* holds his assets for a named person absolutely, although with the possibility that there may be other persons interested in those assets.

54 In *MF Global (No 3)* ([43] *supra*), both *Benjamin* and *Finers v Miro* were followed and applied. *MF Global (No 3)* involved an investment bank which held client money on trust. When the bank went into special administration, and the applicants were appointed as its administrators, the applicants were to distribute the balance of the available funds in order to return client moneys, pursuant to the applicable regulations. Each client was to receive a sum rateable to their entitlement calculated according to the applicable regulations. The problem was that the class of beneficiaries was very large, there were claims submitted but rejected in whole or in part, and there might have been potential beneficiaries with good claims who were unknown to the administrators because their claims were not yet submitted. The administrators applied for the court's approval to distribute the moneys only to those beneficiaries who had submitted claims (which had also not been rejected). The court granted the application, and permitted the distribution despite the existence of (a) claims which had been rejected but had not been pursued in court; and (b) potential but unknown claims from third parties (at [28]–[31]). The latter, regarding potential but unknown claims, was simply an application of *Benjamin*, after the judge was satisfied by the evidence that the applicants had taken all reasonable steps to identify or notify potential claimants of whom they were unaware. The former, regarding rejected and unpursued claims, was

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an application of the holding in *Finers v Miro*. The judge observed that the inherent jurisdiction of the court was to enable practical effect to be given to a trust. If delays were incurred by waiting for the rejected claims to be pursued and determined in court, the purpose of the client money trust in that case – to facilitate the timely return of client money in the event of the failure of the firm – would be defeated. The court added that should the rejected claims be eventually pursued, it would be open to those claimants to lodge an application with the court, in which event full provision will be made for their claims while they are litigated (at [32]).

55 Ernest relied on these two cases of *Finers v Miro* and *MF Global (No 3)* for the proposition that the court should exercise its "inherent jurisdiction to sanction the distribution of trust property according to the practical probabilities" in this case, such that Ernest, being the probable beneficiary of the Assets, would receive a distribution. We disagreed. Both of these cases involve distributions to *ascertained* beneficiaries. In *MF Global (No 3)*, these were the clients who had filed successful claims with the investment bank. In *Finers v Miro*, the trustee *prima facie* held the assets for the sole client absolutely. In contrast, Ernest has not yet been adjudged a beneficiary of the Assets. In fact, in *Benjamin* and *MF Global (No 3)*, the distribution in accordance with "practical probabilities" meant that those unascertained (and unlikely) beneficiaries were disregarded in the distribution. They do not stand for the proposition that the court can and should direct or permit a distribution to someone who is *not* an ascertained beneficiary but merely lays claim to that title, no matter how probable that claim may be.

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Relevance of Ernest's alleged need for the enjoined funds

56 Before we address the last issue, we pause to discuss the relevance of Ernest's ability to show a need for the enjoined funds to his application in SUM 2794.

57 Given that the primary ground for Ernest's application was based on s 56 of the Trustees Act, the question as to whether he has a need for funds was strictly irrelevant to that analysis. It would ultimately not have made any difference to the outcome of the issues concerning Ernest's *locus standi*, whether the distribution sought related to the "management or administration" of trust assets, and whether the distribution sought was "expedient" (as defined above at [40]).

58 Nevertheless, the question of the availability of Ernest's personal funds was more broadly relevant to the question of whether the Proprietary Injunction should be varied to permit him to draw on the Assets which are subject to the Proprietary Injunction to meet his living and legal expenses. However, Ernest's case was not pursued in such explicit terms. In the usual case of a defendant who is subject to a Mareva injunction, provision is invariably made for the defendant's ordinary living and legal expenses. Should the defendant have other free assets which he can use to make payments, the court will then have to consider whether it is nevertheless just and convenient to permit him to use the enjoined assets for such purposes. There is no objection in principle to a defendant being allowed to use assets subject to a Mareva injunction as long as the purpose for which he requires the assets does not conflict with the policy underlying the Mareva jurisdiction: Singapore Civil Procedure 2020 (Vol 1) (Sweet & Maxwell 2020) at p 669, para 29/1/72; *Tribune Investment Trust Inc v Dalzavod Joint Stock Co* [1997] 3 SLR(R) 813 at [20]–[24]; *Royal Global*

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Exports Pte Ltd and others v Good Stream Co Ltd and another [2004] 4 SLR(R) 247 at [3]. The following passage was approved by Clarke LJ in *Halifax plc v Chandler* [2001] EWCA Civ 1750 at [19]:

> The court will always be concerned to ensure that a Mareva injunction does not operate oppressively and that a defendant will not be hampered in his ordinary business dealings any more than is absolutely necessary to protect the plaintiff from the risk of improper dissipation of assets. Since the plaintiff is not in the position of a secured creditor, and *has no proprietary claim to the assets subject to the injunction, there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with his other creditors*, even if the effect of such dealings is to render the injunction of no practical value. [emphasis added]

59 However, Ernest's application in SUM 2794 sought to vary the *Proprietary* Injunction, and *not* the Mareva Injunction. A proprietary injunction is a relief, having its origins in the exercise of the Chancery Court's jurisdiction, that "fastens on the specific asset" in which the plaintiff asserts a proprietary interest, and prevents the defendant from dealing with that asset and its traceable proceeds. The applicable test for granting such a proprietary injunction would be that set out in *American Cynamid Co v Ethicon Ltd* [1975] AC 396. In contrast, a Mareva injunction is granted in support of a claim for personal relief, which does not latch on to any specific asset of the defendant, but prevents the defendant from disposing of his own assets beyond a certain value to defeat a possible judgment that may be rendered against him: *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 at [143]–[144]. The short point is that unlike a proprietary injunction where the claim for the assets in question is the very subject matter of the injunction, in the case of a Mareva injunction, it assumes that the enjoined assets belong to the defendant.

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60 The distinction is not a novel one, but was a notable one in this case. As recently recognised in *Frédéric Marino v FM Capital Partners Ltd* [2016] EWCA Civ 1301 ("*Marino*") at [18] and [21], while living and legal expenses might *ordinarily* be provided for in a Mareva injunction, such would not be the case in a proprietary injunction:

> 18 In this sort of situation, the guidance from the authorities is clear. The ordinary position is that a defendant who has resources of his own which are not affected by a good arguable claim by the claimant that they are his (the claimant's) property ***should be required to use those unaffected resources to finance his legal defence and to meet his living expenses … The position where there is a proprietary freezing injunction is thus to be distinguished from that in which there is a general personal freezing injunction imposed under the court's* Mareva *jurisdiction*** in relation to the defendant's own assets (unaffected by any arguable proprietary claim made by the claimant), in which case the defendant is ordinarily to be given permission to draw on his resources so frozen to meet his reasonable legal and living expenses.
>
> …
>
> 21 As Sir Thomas Bingham MR put it in *Fitzgerald v Williams* [[1996] QB 657, CA] at pp. 669G-670A, in a judgment with which the other members of the court agreed:
>
> > 'A defendant should not be entitled to draw on a fund which may belong to a [claimant] until he shows that there is no fund of his own on which he can draw. …
> >
> > … The plaintiffs are in my view right to contend that ***unless and until the first defendant can establish on proper evidence that there are no funds or assets available to him to be utilised for payment of his legal fees and other legitimate expenses other than assets to which the plaintiffs maintain an arguable proprietary claim he should not be allowed to draw on the latter type of assets***.'
>
> [emphasis added in bold italics]

61 In a situation such as the present case, Ernest bears the burden to demonstrate that he has no or adequate assets unaffected by the Proprietary

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Injunction from which he can meet his living and legal expenses. On the facts, Ernest has not shown a pressing need for funds. In particular, he had failed to show that he has no other assets available to meet his living and legal expenses. In the proceedings below, Ernest had stated that the "only liquid assets that [he has] that are not derived from the [Assets] are the remainder of [a loan of US$2m from his brother-in-law Cecil Koutsos ("Koutsos Loan")]. Ernest maintained, on appeal, that apart from the doubled Mareva Carve-out that was permitted by the Judge, the only assets that Ernest has that are not derived from the Assets was the remainder of US$1.16m of the Koutsos Loan. We noted, however, that in Ernest's 77th affidavit (see [17] above), he had stated for the *first time* in the proceedings below that he had been funding his living and medical expenses since the Mareva Injunction with "cash" that he has in his apartment. Ernest had not previously mentioned this amount in his Disclosure Affidavit, in which he was required, by court order, to disclose all his assets worldwide. The Companies were therefore correct in noting that Ernest was less than truthful in omitting any mention of this cash in his Disclosure Affidavit. Ernest had also breached his obligation to inform the Companies of the source of this cash before spending it on his living and medical expenses (see [15(a)(i)] above). By the time the appeal was heard, Ernest still had not disclosed any further details regarding this cash in his apartment – its quantum, its origins, and how much has been spent and the remaining balance. Ernest has therefore failed to show that there are no other assets available to him to satisfy his living and medical expenses.

62 Lastly, we note that Ernest had not justified his expected living and medical expenses, and had merely made a bare assertion in his affidavit as to their quantum. Ernest had previously refused to provide the same in respect of the S$500,000 Carve-out in the past, resulting in the discharge of the S$500,000

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Carve-out (see [13] above). The fact that this was not the first time that Ernest has been elusive about his actual living and medical expenses is further cause for concern. Ernest has also not provided any explanation how he has been able to fund his legal fees to-date.

63 For completeness, we should add that even if Ernest was able to show that he has no other sources of funds unaffected by the Proprietary Injunction, the cases show that it does not follow that the variation should be allowed. As the court stated in *Marino* at [19], it should undertake "a careful and anxious judgment" to determine:

> [W]hether the injustice of permitting the use of the funds held by the defendant is out-weighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may in course turn out to be a successful defence. … In deciding where the balance of justice falls at this stage, it may be relevant to consider whether the defendant is willing to undertake to replenish the funds taken from proprietary assets at a later stage out of non-proprietary assets which might thereafter become available to him … .

Lewison J in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch) at [6] had set out four questions to be addressed in the inquiry (cited with approval in *Marino* at [23]): (a) Does the claimant have an arguable proprietary claim to the funds in issue? (b) If yes, does the defendant have arguable grounds for denying that claim? (c) If yes, has the defendant demonstrated that without the release of the funds in issue he cannot effectively defend the proceedings (or, it may be added, meet his legitimate living expenses)? (d) If yes, where does the balance of justice lie as between, on the one hand, permitting the defendant to expend funds which might belong to the claimant and, on the other hand, refusing to allow the defendant to expend funds which might belong to it?

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The appropriate proceedings in which to bring SUM 2794

64 Finally and for completeness, we address the question as to the appropriate proceedings in which Ernest ought to have brought SUM 2794. The Companies argued on appeal that SUM 2794 was incorrectly filed in Suit 178. We agreed. Suit 178 involved a cause of action whereby the Companies sought recovery of the Assets as misappropriated by Ernest. The end result of Suit 178 was *not a distribution* of the Assets but *only an account* of it. In filing SUM 2794 in Suit 178, Ernest was effectively seeking an advance of his share of the Assets prior to the determination of their beneficial interest which is *precisely the subject matter of OS 317*. The proper process was for Ernest to make an application for interim payment under OS 317, not Suit 178. Having said that, it is likely that Ernest's application, even if it was filed in OS 317, would be met with the same difficulties which we have identified above.

Conclusion

65 For the reasons set out above, we dismissed Ernest's appeal.

66 We awarded costs as follows:

(a) Ernest was to pay the Companies costs fixed at S$30,000 inclusive of disbursements for CA 193 and SUM 11.

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(b) Ernest was to pay ECJ costs fixed at S$15,000 inclusive of disbursements for CA 193 and SUM 11.

Steven Chong
Judge of Appeal

Belinda Ang Saw Ean
Judge

Chelva Retnam Rajah SC (Tan Rajah & Cheah) (instructed), Joan Peiyun Lim-Casanova and Tay Jia Wei Kenneth (Cavenagh Law LLP) for the appellant;
Thio Shen Yi SC, Koh Li Qun Kelvin, Niklas Wong See Keat and Benjamin Niroshan Bala (TSMP Law Corporation) for the 1st to 6th respondents;
Adam Muneer Yusoff Maniam, Tan Yuan Kheng, and Sam Yi Ting (Drew & Napier LLC) for the 7th to 9th respondents.

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