IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 271

Suit No 20 of 2019

Between

New Ping Ping Pauline

… *Plaintiff*

And

(1) Eng's Noodles House Pte. Ltd.
(2) Ng Weng San
(3) Teng Chai Hai
(4) Ng Mui Hong
(5) Ng Mei Ling
(6) Eng's Char Siew Wantan Mee Pte Ltd

… *Defendants*

JUDGMENT

[Companies] — [Common law derivative action] — [Whether leave necessary to commence]
[Tort] — [Conspiracy] — [Unlawful means]
[Equity] — [Fiduciary relationships] — [Duties] — [Breach]

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New Ping Ping Pauline
v
Eng's Noodles House Pte Ltd and others

[2020] SGHC 271

High Court — Suit No 20 of 2019
Valerie Thean J
20 – 24 July, 27 – 30 July, 3 – 7 August, 28 September 2020

22 December 2020 Judgment reserved.

Valerie Thean J:

Introduction

1 Mr Ng Ba Eng ("Mr Ng") ran a successful *wanton mee* hawker stall at Dunman Street that had a strong following and from 2002, won many awards. In 2009, his son (the second defendant, hereinafter called "Desmond") joined him at the stall. Around 2012, they were approached by a businessman customer, Jason, who proposed a collaboration. After successful negotiations, the first defendant ("the Company") was incorporated on 27 February 2012 and father and son commenced operations from the Company's new premises at Tanjong Katong Road. Pauline, Jason's wife and the plaintiff in this action, and Desmond were the sole shareholders and directors of the Company.

2 Mr Ng passed away in 2013. The Company continued to prosper but the relationships between the partners started to deteriorate. In 2018, following a

fall-out between the business partners, the Company failed to secure the renewal of the lease of its operating premises, and the business of the Company came to a standstill. These premises were eventually taken over by a new business called "Eng's Wantan Noodle Pte. Ltd." ("Eng's Wantan Noodle"). In this common law derivative action and counterclaim, the Ng family and Pauline lock horns over Mr Ng's legacy.

Facts

The parties and their claims

3 Mr Ng's father first sold *wanton mee* from a pushcart in the Duku Road vicinity. Mr Ng helped his father from a very young age and learned the skills of the trade under his father's tutelage.[1] Mr Ng carried on the business after his father retired in 1976.[2] Later, when street hawkers were reorganized into hawker centres, he moved to a hawker stall in Dunman Food Centre and continued his business there ("the Hawker Business").[3] Desmond assisted Mr Ng at the stall from 2009.

4 In early 2012, Jason approached Mr Ng with a business proposal to expand the Hawker Business.[4] The Company was incorporated on 27 February 2012 with a share capital of $2, with the plaintiff ("Pauline") and Desmond each initially holding 50% of the shares in the Company.[5] Pauline and Desmond were

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1 Ng Weng San's Affidavit Evidence-In-Chief ("Desmond's AEIC") at paras 9 - 11.

2 Desmond's AEIC at para 14.

3 Desmond's AEIC at para 22.

4 Desmond's AEIC at para 35; Jason Sim Chon Ang's AEIC dated 19 June 2020 ("Jason's AEIC") at para 4.

5 1AB 4; 2AB 988.

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also the directors of the company at the point of incorporation.[6] Desmond employed the third defendant ("Bill"), an employee at one of Jason's companies, to assist with managing the Company's finances.[7] Following the issuance of additional shares on 12 August 2015, Pauline and Desmond each had their shareholdings reduced to 47.5% and Bill was given 5% of the shareholding.[8]

5 The Company ceased business operations on 28 February 2018.[9] Pauline was removed as a director on 8 June 2018[10]. Desmond resigned as a director on 9 July 2018.[11] Bill is presently the only director of the Company,[12] having assumed directorship on 8 June 2018.[13]

6 In this action, Pauline contends Bill and Desmond have breached their fiduciary duties to the Company.[14] Desmond concedes he has such duties but denies any breach of them. Bill denies having any fiduciary duties prior to his becoming a director. Pauline's case is that Bill was vested with such duties as a "senior employee". Bill and Desmond, together with the other defendants, are also accused of conspiring to injure the Company by setting up a competing

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6 1AB 30.

7 Jason Sim's AEIC ("Jason's AEIC") at para 28.

8 1st & 3rd Defendant's Bundle of Documents dated 17 July 2020 ("3DBD") at p 3 – 16.

9 8AB 3508; Transcript, 29 July 2020 at p 13 line 32 – p 14 line 1.

10 2AB 1038; 1AB 39.

11 2AB 1043.

12 2AB 1043; 2AB 1038; Plaintiff's Closing Submissions dated 7th September 2020 ("PCS") at para 179.

13 1AB 39; 2AB 1038.

14 SOC, paras 22 –23.

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business.[15] This competing business is the sixth defendant, Eng's Char Siew Wantan Mee Pte Ltd ("Eng's Char Siew"), which was incorporated on 5 March 2018[16] by Desmond's sisters, the fourth and fifth defendants ("Mui Hong" and "Mei Ling" respectively). Mui Hong and Mei Ling each hold 50% of the shares in Eng's Char Siew and have been the sole directors of Eng's Char Siew since its incorporation.[17] Pauline contends that Eng's Char Siew was set up as part of a conspiracy to injure the first defendant.

7 In this context, Pauline brings a common law derivative action, claiming that

(a) the defendants (save for the Company) have conspired to injure the Company by setting up Eng's Char Siew;[18]

(b) Desmond and/or Bill has/have breached his/their fiduciary duties to the Company;[19]

(c) Desmond and/or Bill has/have breached his/their duties under s 157 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act");[20] and that

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15 SOC, para 28.

16 1AB 35.

17 1AB 35.

18 SOC, para 28.

19 SOC, para 22.

20 SOC, para 25.

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(d) Bill had misappropriated monies from the Company ("the Misappropriation claim").[21]

The Misappropriation claim was eventually withdrawn on the tenth day of trial.[22]

8 Mui Hong, Mei Ling and Eng's Char Siew, in turn, counterclaim that Pauline has committed the tort of passing off ("the Counterclaim").[23] They contend that Pauline and Jason are associated with Eng's Wantan Noodle, and helped set up its first outlet at the former premises of the Company.[24] In doing so, Pauline and Jason, whom Bill regards as the "shadow plaintiff"[25] and whom Desmond, Mui Hong and Mei Ling regard as the "real plaintiff"[26] of this suit, have both allegedly , "stolen the family business". Neither Jason nor Eng's Wantan Noodle have been joined in the Counterclaim.

Background to the dispute

9 Broadly speaking, the history of this dispute may be divided into four time periods:

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21 SOC, para 23 (11).

22 Transcript, 3 August 2020 at p 3 lines 9 – 14.

23 2nd, 4th, 5th and 6th Defendants' Defence and Counterclaim ("Ng Family Defence") at paras 31 – 32.

24 8AB 3446.

25 1st & 3rd Defendant's Closing Submissions dated 7th September 2020 ("3DCS") at para 12.

26 2nd, 4th, 5th and 6th Defendant's Closing Submissions dated 7th September 2020 ("2DCS") at para 9.

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(a) First, the period prior to the incorporation of the Company. This period was crucial to the development of the goodwill associated with the Company that forms the basis for the Counterclaim.

(b) Second, the period spanning the incorporation of the company and the years of good, dispute-free business which the Company enjoyed. This period is crucial to understanding the initial agreement between the parties at the time of incorporation, their respective roles and remuneration within the Company, and in particular, the role that Bill played in the company (*ie,* whether he had been vested with fiduciary duties or not).

(c) Third, the period which saw the relationship between the business partners (*ie,* Pauline and Desmond) deteriorate. Pauline claims that the conspiracy to injure the Company was incepted and executed during this period. This conspiracy is, in turn, the lynchpin of Pauline's common law derivative action as she complains that the conspiracy amounts to a fraud on the minority.

(d) Fourth, the period directly preceding and immediately after the Company ceased business. This period offers further insight into the conspiracy complained of, and also whether Pauline and Jason had themselves, attempted to appropriate the Company's business for their own purposes.

10 With this in mind, I turn to the facts.

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Pre-incorporation

11 The Hawker Business began its operations on the first floor of the Dunman Food Centre before subsequently moving to the basement. The stall in the basement ("the Dunman Stall") bore a white signboard with the English words "Eng's Char Siew Wan Ton Mee" in blue and the Chinese characters "榮高叉燒雲吞麵" in red.[27] These trade names (together, "the Original Tradenames") were at all times prominently displayed on the signboard at the Dunman Stall:[28]



Figure 1: The Original Tradenames

12 Business was brisk and the stall's *wanton mee* gained many admirers. The Hawker Business won many accolades, including the South East District Food Awards in 2002[29] and an "Excellent" rating from Makansutra (a local food reviewing website) in 2003.[30] Mr Ng himself was later anointed a "hawker

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27 Desmond's AEIC, para 23; 4AB 2125.

28 4AB 2125.

29 4AB 2110.

30 4AB 2144.

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master" in 2011 by the Straits Times and Lianhe Zaobao[31] (the local English and Chinese broadsheets respectively).

13 The cooking was shouldered primarily by Mr Ng.[32] Mr Ng was "the walking brand"[33], "the one who [won] all the award[s]"[34] and the "main thing that people will come to the shop [for]".[35] From 2009, Desmond assisted him at the stall daily by helping to cook, collecting takings and tending to customers.[36] The rest of the family played various supporting roles: Mui Hong, assisting with publicity;[37] Mei Kuen (Mr Ng's eldest daughter), "simple bookkeeping" and helping Mr Ng file tax returns;[38] Mei Ling, Desmond's wife ("Ah Keat") and Desmond's mother ("Mdm Loh"), wrapping the *wantons* and cutting chillis.[39]

Incorporation of the Company and employment of Bill

14 In or around early 2012, Jason approached Mr Ng with a business proposal to expand the Hawker Business.[40] No written records document the

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31 4AB 2114 – 2119.

32 Transcript, 4 August 2020, p 60 lines 21 – 28.

33 Transcript, 4 August 2020, p 71 lines 10 – 13.

34 Transcript, 30 July 2020, p 33 lines 30 – 31.

35 Transcript, 4 August 2020, p 71 line 15.

36 Transcript, 29 July 2020, p 64 lines 12 – 13; Desmond's AEIC at para 28.

37 Transcript, 4 August 2020, p 61 lines 5 – 6.

38 Transcript, 4 August 2020, p 54 lines 2 – 7; 29 July 2020, p 69 lines 17 - 18, lines 19 – 25.

39 Transcript, 5 August 2020, p 135 lines 12 – 16; p 138 lines 18 – 22; p 52 lines 27 – 29; Transcript 4 August 2020, p 55 lines 3 – 7.

40 Desmond's AEIC at para 34; Jason Sim Chon Ang's AEIC dated 19 June 2020 ("Jason's AEIC") at para 4.

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eventual agreement between the parties. It is common ground between the parties that (a) Jason advanced a sum of $150,000 as part of the agreement,[41] (b) there had been substantial goodwill built up by the Hawker Business prior to the incorporation of the Company, (c) the subject of trademarks, goodwill or tradenames was not discussed when the Company was being incorporated,[42] and (d) there was no written licensing agreement for any trademarks or tradenames.[43]

15 Pursuant to this agreement, the Company was incorporated on 27 February 2012 with Pauline and Desmond each initially holding 50% of the shares in the Company.[44] Bill, then an employee in Jason Parquet Specialist Pte Ltd ("JPS"),[45] joined the Company to assist with its accounts and finances.[46] There is no dispute that Bill was paid approximately $1,500 per month as an employee of the company and received 5% of the profits at year-end.[47] It is however disputed whether this was as part of a profit-sharing agreement or from his 5% shareholding in the Company.

16 The Company began business at its new premises at 287 Tanjong Katong Road Singapore 437070 ("the 287 Premises") around May 2012.[48] Desmond was the formal tenant under the tenancy agreement for these premises

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41 1st & 3rd Defendants' Defence ("Bill's Defence") at para 11(a); Ng Family's Defence at para 13(a); Statement of Claim at para 9.

42 2DCS, para 1(l).

43 3DCS, para 73; Transcript, 30 July 2020 at p 57 lines 20 – 23.

44 1AB 29; 2AB 988; 1AB 4.

45 Bill's AEIC at para 40.

46 Bill's AEIC at para 53.

47 Pauline New Ping Ping's AEIC dated 19 June 2020 ("Pauline's AEIC") at para 24. Bill's AEIC at para 63.

48 Bill's AEIC at para 68.

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("the 287 Tenancy Agreement"),[49] but there was an express clause in the lease that stated that the premises were for the business of the Company (*ie.* Eng's Noodles House Pte Ltd).[50] There was also a renewal clause[51] that entitled the tenant (Desmond) to write to the landlord three months before the expiry date of the tenancy (15 March 2018), to seek a renewal of the lease at a "rent to be agreed, or based on the prevailing market rent but otherwise containing the like conditions, covenants and stipulations as [we]re [t]herein contained with the exception of th[at] option for renewal" ("the Option to Renew").

17 The 287 Premises used two signboards (respectively, "the Top 287 Signboard" and "the Bottom 287 Signboard"; and collectively, "the 287 Signboards"):[52]



Figure 2: The Top 287 Signboard



Figure 3: The Bottom 287 Signboard

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49 1AB 469.

50 1AB 471.

51 1AB 474.

52 7AB 3273.

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18 The Top 287 Signboard stated "Eng's Char Siew Wantan Mee", accompanied by the Chinese characters "榮高叉燒雲吞麵". The look and get-up of this signboard, however, was different from the Original Tradenames and signboard used at the Dunman Stall in at least three regards.

19 First, the colour scheme was different. The "Eng's" used in the Original Tradenames was blue against a white background. It was accompanied by the Chinese characters ("榮高叉燒雲吞麵") in red and the English words "Char Siew Wan Ton Mee" in black. In contrast, the Top 287 Signboard had the English words "Eng's Char Siew Wantan Mee" in green, inscribed against a background with a yellow-white gradient. Second, the words were different too. The Top 287 Signboard used the words "Char Siew Wantan Mee" (different from "Char Siew Wan Ton Mee" [see Figure 1]) and these words were in bold on the new signboard as well. There were also, at first glance, some difference in the kerning of the words, although the visual evidence made these distinctions difficult to discern.[53] The same, red Chinese characters ("榮高叉燒雲吞麵") were used too. But the font used in the Original Tradenames was different, evoking a more calligraphic style as opposed to that used in the Top 287 Signboard. Third, the Top 287 Signboard had a picture of the noodles (on the left side of the board) and a small graphical representation of two chillies at the bottom right corner of the board. These were not present on the signboard at the Dunman Stall.

20 The Bottom 287 Signboard was materially similar to the Top 287 Signboard save for two differences. First, it did not have the chilli designs and

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53 7AB 3273.

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second, the English words used were "Eng's **Noodles House** Char Siew Wantan Mee" instead.

21 When business at the Company began, Desmond and Mr Ng did most of the cooking.[54] It took between seven and nine months[55] to train the staff and put the operational systems in place for the business to run on "autopilot".[56] After training the staff to cook, Desmond and Mr Ng stepped back from the kitchen work, transferring to the more customer facing "frontline".[57] Mr Ng however, continued the "supervising of all those [*sic*] kitchen backend",[58] even as most of the "hands-on" work was done by the staff.[59] As for the others, Mei Ling worked the till[60] while Ah Keat and Mdm Loh wrapped the wantons.[61] Bill only worked at the Company on a part-time basis handling the accounts,[62] and some administrative matters (such as liaising with the property agent).[63] Their jobs scopes and responsibilities did not change over the years.

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54 Transcript, 30 July 2020 p 62 lines 24 – 26; p 63 lines 3 – 7.

55 Transcript, 30 July 2020, p 65 lines 14 - 18.

56 Transcript, 30 July 2020, p 63 line 30 – p 64 line 3.

57 Transcript, 30 July 2020, p 63 lines 8 – 15.

58 Transcript, 30 July 2020, p 63 lines 14 – 15; 22 July 2020, p 58 lines 27 – 30.

59 Transcript, 30 July 2020, p 65 lines 25 – 28.

60 Transcript, 5 August 2020, p 51 lines 22 – 23.

61 Transcript, 5 August 2020, p 138 lines 3 – 6.

62 Bill's AEIC at para 60.

63 Transcript, 6 August 2020, p 98 lines 14 – 17.

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22 Regarding salaries, Mr Ng was initially paid $5,000/month; Desmond, $5,000/month; Mei Ling, $2,000/month; Ah Keat, $1,200/month; Pauline, $1,500/month; Bill, $1,500/month and Mdm Loh, $500/month.[64]

23 Mr Ng drew his last paycheck in June 2013. He passed away on 17 June 2013, from a sudden heart attack. Following this, Mdm Loh's monthly pay, which was $1,050 in June 2013,[65] was increased to $3,500 in July and August,[66] and from September, $3,600.[67] Desmond's monthly pay was increased from $5,000 to $5,500. The reason for these increments is a matter of dispute and relevant to the Counterclaim (see below at [135]). The Company's profitability increased steadily after Mr Ng passed away, but the relationships between parties started to decline.

Deterioration of relationship between Pauline, Jason and Bill

24 On 12 August 2015, 5% of the shareholding in the Company was allotted to Bill.[68] In order to achieve this, the share capital was first increased from $2 to $200. Following this, 94 shares (of $1 each) were issued to Pauline and Desmond each, bringing their respective share totals to 95 shares. Bill was then issued 10 shares.[69] Pauline contends that this allotment resulted from Bill's misrepresentations, an allegation that Bill disputes (see below at [74]).

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64 4AB 1997.

65 4AB 2014.

66 4AB 2015.

67 4AB 2017.

68 3DBD at p 3 – 16.

69 Transcript, 6 August 2020, p 49 lines 13 – 24; 3DBD at p 3 – 16.

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25 On 1 September 2015, the Company's registered address was changed through a directors' resolution to 30 Simon Lane Singapore 546048.[70] This was Bill's residential address.[71] Prior to the change in address, the Company's registered address was 16 Tampines Street 92 JP Building Singapore 528873 ("the JPS Address"). This was the corporate address of JPS, the company where Bill used to work.[72] The reasons for this change in registered address are disputed as well (see below at [79]).

26 Jason and Pauline contend that sometime in 2016 they discovered that they had been duped into helping Bill acquire a 5% share in the Company. They asked for the shares to be returned.[73] Matters continued to escalate. According to Bill, Jason and Pauline took the Company's documents on 20 January 2017, preventing the Company from filing its annual returns for 2016 and 2017, and incurring approximately $900 worth of filing/penalty fees imposed by the Accounting and Corporate Regulatory Authority.[74] Pauline filed a police report against Bill alleging financial misappropriation on 12 February 2018.[75] The Company meanwhile filed a suit for the return of its documents, which were then retrieved on 2 November 2018, after a settlement was reached between the parties.[76]

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70 3DBD at p17.

71 Statement of Claim at para 29(3).

72 Transcript, 22 July 2020, p 30 lines 16 – 20; Bill's AEIC at para 123.

73 Pauline's AEIC at para 46; Jason's AEIC at paras 39 – 41.

74 Bill's AEIC at para 133; 2 AB 664; 1AB 100 – 109.

75 2AB 686 – 689.

76 Bill's AEIC at para 133.

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Deterioration of relationship between Pauline, Jason and Desmond

27 In 2015, Jason fell into financial trouble arising from problems with Jason Holdings, the parent company of JPS.[77] Desmond claimed that around August 2015, Jason had asked him to purchase $120,000 of shares in Jason Holdings, saying this was to be treated as a loan and repaid within two to three days.[78] According to Desmond, Jason did not repay the amount and the shares are only worth around $750 today.[79] Desmond also contends that Pauline and Jason began picking fights with him about the Company. Matters were so heated that at one point, in a WhatsApp message dated 14 November 2016, Desmond expressed his wish to "clos[e] down the shop" and requested that Bill inform Pauline and Jason.[80]

28 Mui Hong, aware of the deteriorating relationship between the Company's directors, registered a sole proprietorship on 8 February 2017[81] "in anticipation of having [an] avenue to carry on the business" ("the Sole Proprietorship").[82] Later, she also registered a composite mark ("the Chilli Mark") comprising the words "Eng's", the Chinese characters "荣高" and the chilli logo that was mentioned above at [20]. This was registered on 3 October 2017 under the Sole Proprietorship:[83]

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77 Desmond's AEIC at para 60.

78 Transcript, 4 August 2020, p 36 line 29 – p 37 line 5; Desmond's AEIC at para 62.

79 Desmond's AEIC at paras 62 – 63.

80 2AB 633-634.

81 1AB 37.

82 Transcript, 4 August 2020, p 103 lines 10 – 12.

83 5AB 2513.

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Figure 4: The Chilli Mark

29 In a bid to "settle all the outstanding dispute [*sic*] and unhappiness and also to avoid causing any inconvenience to the shop in future", Desmond, in a WhatsApp message dated 31 May 2017, offered to buy out Pauline's shares for $350,000.[84] Jason did not take up this offer.

30 Mei Ling and Desmond said that by 2018, Jason and Pauline were "pushing [the Ng family] to franchise the Family Wantan Mee Business, which was never [the Ng family's] intention".[85] They contended that the pressure to franchise the business had been part of Jason's attempt to raise money to pay off his debts.[86]

Cessation of the Company's business and aftermath

31 The lease for the 287 Premises was due to expire on 15 March 2018. Pursuant to the renewal clause in the 287 Tenancy Agreement, negotiations had commenced with the landlord for the renewal of the lease.[87] In fact, the lease was still available for renewal as late as 1 January 2018.[88] Eventually, Desmond

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84 6AB at 3228; Transcript, 30 July 2020, p 78 lines 1 – 19.

85 Mei Ling's AEIC at para 19; Desmond's AEIC at para 71.

86 Desmond's AEIC at paras 60 – 68, 71; Bill's AEIC at paras 91 – 94.

87 Transcript, 30 July 2020, p 95 line 23 – p 97 line 17.

88 9AB 3615.

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and the landlord reached an agreement on a rental price for the subsequent lease term.[89]

32 Notwithstanding this, on 8 January 2018, Bill conveyed to the real estate agent, Jane, that Desmond wanted Pauline to sign the lease and that Jane should arrange with Pauline to sign the lease.[90] Pauline, when informed of this, professed surprise and confusion ("I have no idea abt the lease term and the files are all with [Bill]").[91]

33 Bill and Desmond did not hear from Pauline or Jane after 8 January and became suspicious that they had "lost the shop".[92] Mei Ling, on her part, observed that Jason had been speaking to the head chef at the Company,[93] coming to take measurements of the kitchen specifications after working hours[94] and scrutinising the company accounts.[95] Mui Hong's suspicions were aroused as well.[96] Desmond shared his sisters' trepidation and became convinced that the lease for the 287 Premises "was being stolen".[97]

34 On 24 January 2018, Desmond's lawyers wrote to Pauline seeking her cooperation in winding up the Company, citing a "collapse of trust and

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89 Transcript, 30 July 2020, p 97 lines 16 – 21; 2AB 663.

90 1AB 464.

91 1AB 464.

92 Transcript, 5 August 2020, p 111 lines 12 – 16.

93 Transcript, 5 August 2020, p 106 lines 11 – 25.

94 Transcript, 5 August 2020, p 106 line 30 – p 107 line 2.

95 Transcript, 5 August 2020, p 106 line 8.

96 Transcript, 4 August 2020, p 117 line 26 – p 118 line 3.

97 Transcript, 30 July 2020, p 94 line 29; 3 August 2020 p 44 line 18; p 62 line 2; p 120 lines 20 – 23; 4 August 2020, p 22 lines 8 – 10; p 39 lines 22 - 23.

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confidence in the partnership".[98] On the same day, Bill sent an email to Jane ("the 24 January 2018 Email") informing her that "Eng's Noodles House Pte Ltd will not be renew [*sic*] the tenancy agreement after the expired [*sic*] of the lease term (*ie*. 15 March 2018)".[99] It was also stated in that email that they would be making "arrangement to find a new tenant to lease the same place with the agreement rental of $8,800 per month for the next 3 years periods [*sic*]".[100] There was no reply from Jane. On 31 January 2018, Bill followed up with another email instructing Jane to "prepare a tenancy agreement and put the new tenant" as one Mr Chew Chye Sin Richard ("Richard").[101] Jane replied on 1 February 2018 that a new tenant had already been secured for the 287 Premises.[102]

35 The Company's business ceased on 28 February 2018.[103]

36 Eng's Wantan Noodle (the new tenant of the 287 Premises) was incorporated on the same day.[104] It then applied to register three marks (collectively, "the Franchise Marks"):

(a) the 1st Franchise Mark, identified by Trade Mark No. 40201815221W, was registered on 3 August 2018;[105]

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98 1AB 41.

99 9AB 3614.

100 9AB 3614.

101 9AB 3614.

102 9AB 3613.

103 8AB 3508; Transcript, 29 July 2020 at p 13 line 32 – p 14 line 1.

104 8AB 3446.

105 2nd, 4th, 5th and 6th Defendants' Bundle of Documents ("2DBD") 915.

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(b) the 2nd Franchise Mark, identified by Trade Mark No. 40201815222U, was registered on 3 August 2018 as well;[106] and

(c) the 3rd Franchise Mark, identified by Trade Mark No. 40201920188T, was registered on 17 September 2019.[107]



(1st Franchise Mark)



(2nd Franchise Mark)



(3rd Franchise Mark)

Figure 5: The Franchise Marks

37 The Ng family contended that Pauline and Jason were assisting Eng's Wantan Noodle, which set up its first franchise outlet at the Company's former address. The following facts are undisputed. First, Jason owes one Thomas Hong ("Thomas") some $1.46 million.[108] In fact, Thomas successfully sued Jason for the said sum and default judgment was entered against Jason on 30

106 2DBD 918.

107 2DBD 928.

108 Transcript, 28 July 2020, p 47 lines 22 – 25.

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September 2016.[109] Second, The same lawyers who represented Thomas in Suit 986 of 2016, represent Pauline in the present suit.[110] Third, Thomas Hong is involved with the Lao Huo Tang Group,[111] although his precise level of involvement is uncertain. Fourth, sometime around early 2018, Jason introduced Thomas to the real estate agent who was securing a new tenant for the 287 Premises[112] and was later "heavily involved in the renovation of the [first outlet of Eng's Wantan Noodle]" (which took over the 287 Premises).[113]

38 By the time of trial, Eng's Wantan Noodle had expanded to multiple franchise outlets across the island.

39 As for the Company, Pauline was removed from directorship on 8 June 2018[114] while Desmond resigned on 9 July 2018.[115] Bill became a director on 8 June 2018.[116] Desmond eventually brought proceedings attempting to wind up the Company on 20 March 2018.[117] Desmond's attempt to wind up the company was resisted by Pauline and he later withdrew his application on 7 May 2018.[118] The Company continues to subsist, but has no business whatsoever.

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109 2DBD 1201.

110 Transcript, 28 July 2020, p 9 lines 9 – 10.

111 Transcript, 22 July 2020, p 100 lines 10 – 14.

112 Pauline's AEIC at para 56.

113 Transcript, 22 July 2020, p 100 lines 6 – 8;

114 2AB 1038.

115 2AB 1043.

116 1AB 39.

117 1AB 117 – 118.

118 1AB 208 – 210.

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40 In the meantime, Mui Hong incorporated a new company, Eng's Char Siew, on 5 March 2018. This was owned in equal parts by Mei Ling and Mui Hong. The sisters have been the sole directors of Eng's Char Siew since its incorporation.[119] She assigned the Chilli Mark to Eng's Char Siew on 5 March 2018,[120] and applied for it to be formally transferred to Eng's Char Siew on 6 August 2018.[121]

41 Following this, Mui Hong registered three marks (collectively, "the Name Marks") under Eng's Char Siew:

(a) the 1st Name Mark, identified by Trade Mark No. 40201811254U, was registered on 19 October 2018;[122]

(b) the 2nd Name Mark, identified by Trade Mark No. 40201814979U, was registered on 30 November 2018;[123] and

(c) the 3rd Name Mark, identified by Trade Mark No. 40201814978P, was registered on 14 December 2018.[124]



(1st Name Mark)



(2nd Name Mark)



(3rd Name Mark)

119 1AB 35.

120 6AB 3236.

121 5AB 2515.

122 5AB 2545.

123 5AB 2565.

124 5AB 2587.

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Figure 6: The Name Marks

42 Pauline brought her claim on 14 January 2019, followed by notices of opposition to the three Name Marks registered by Eng's Char Siew on 19 February 2019,[125] 28 March 2019[126] and 11 April 2019.[127] She also applied to invalidate the Chilli Mark on 4 October 2019.[128]

Issues to be determined

43 Arising out of these facts, Pauline contends that Desmond, Bill, Mui Hong, Mei Ling and Eng's Char Siew were in a conspiracy to injure the Company and that Desmond and Bill had breached their fiduciary duties to the Company in the process. She therefore brought a common law derivative action on behalf of the Company. The defendants deny her narrative, and contend, in their defence, that it was Pauline who failed to renew the lease for the Company's benefit, and Pauline who acted to the Company's detriment. Moreover, Pauline did not seek any leave to bring a common law derivative action. The defendants attempted to strike out the action and failed; they nonetheless submit that this action could be dismissed at trial for lack of leave. The claim therefore brings the following issues to the fore:

(a) whether leave is required for the continuance of a common law derivative action, and if so, whether the action should be dismissed for lack of leave at this stage of proceedings;

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125 1AB 478 – 485.

126 1AB 487 – 494.

127 1AB 495 – 504.

128 1AB 534 – 550.

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(b) whether there was a conspiracy between the defendants to injure the company;

(c) whether Desmond and Bill had breached their fiduciary duties to the Company; and

(d) related to findings on (b) and (c), whether a common law derivative action is made out on behalf of the Company.

44 The Counterclaim brought by Mui Hong, Mei Ling and Eng's Char Siew arises out of the various defendants' defence that it was Pauline who was collaborating with Eng's Wantan Noodle. The main issue is whether Pauline, through these acts of collusion with Eng's Wantan Noodle, has committed the tort of passing off against Mui Hong, Mei Ling and Eng's Char Siew.

45 I deal with these five issues in turn.

Is leave required for the continuance of a common law derivative action?

46 Pauline's claim is premised on a common law derivative action that was commenced and continued without any leave being sought from the court. A distinction should be drawn between the common law derivative action and its statutory counterpart under s 216A of the Companies Act, where statute requires the obtaining of leave prior to the commencement of any suit. There is no applicable statutory rule in the case of a common law derivative action. Pauline's position is that leave was not necessary. The defendants, on their part, contend that such leave is necessary but in the present case, trial is necessary to decide the issue. They saw the issue as one to be decided at the end of trial. The issues, therefore, are: (a) whether leave was necessary; and (b) if so, what stage is its consideration appropriate?

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Is leave required?

47 In *Oates v Consolidated Capital Services Pty Ltd* [2009] NSWCA 183 (*"Oates*"), the issue of whether leave was required for the commencement of a common law derivative action was considered by the Court of Appeal of New South Wales (see [71] – [107]). After a survey of the cases and the historical development of the derivative action, the court concluded that there was no requirement to seek leave prior to the commencement of a common law derivative action (see [105]). Campbell JA appeared to assume, however, that leave was required for the continuance of such actions. At [99] and [100], he highlighted O 15 r 12A of the Rules of the Supreme Court 1965 (UK) (added pursuant to the Rules of the Supreme Court (Amendment) 1994) which required a plaintiff to apply for leave to continue an action.

48 In *Sinwa SS (HK) Co Ltd v Nordic International Ltd and another* [2016] SGHC 111 ("*Sinwa Nordic"*) Steven Chong J (as he then was) referred to *Oates*, observing at [37]:

> The [common law derivative action] would ordinarily be commenced in the aggrieved shareholders' own name, with the indication it is being brought in a representative capacity for the benefit of the company. It is thus well-established that the action may be brought *first*, without leave, before the court *thereafter* decides on the issue of *locus standi*. This is the reason why it was observed by Campbell JA in *Tom Michael Oates v Consolidated Capital Services Pty Ltd and others* [2009] NSWCA 183 that "there is no requirement under general law relating to derivative actions for leave to be obtained before a plaintiff commences such an action"
>
> [emphasis in original]

This recognised that there is no procedural requirement for leave before a plaintiff commences a common law derivative action. The same paragraph explains that the court would thereafter decide the issue of *locus standi*. Referencing *Oates*, there can be no doubt that such decision as to *locus standi*

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was to be upon an application for leave. This explains Chong J's view at [38] that "nonetheless leave of court was required to **proceed** with the common law derivative action in Nordic International's name *via* arbitration" [italics in original; emphasis added in bold]. The Court of Appeal also considered the issue of leave sought in a preliminary trial of issues in *Ting Sing Ning v Ting Chek Swee* [2008] SLR(R) 197, although no argument and therefore discussion was made of its necessity. No doubt parties there, as did Chong J in *Sinwa Nordic* at [37], considered the matter "well-established".

49 The same position was adopted by Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017), at para 3.012 ("*Minority Shareholders"*):

> Under the common law, *there is no procedural requirement to obtain leave before launching an action, but this does not mean that leave of the court is not required to pursue the action.* Due to the lack of entitlement as of right to bring a derivative action on the part of the minority shareholder, it has to be decided as a preliminary issue whether the self-appointed derivative plaintiff should be permitted to *proceed* with the action by way of an exception to the proper plaintiff rule. If leave is obtained following the determination of the preliminary point, the action would continue for the merits to be adjudicated. …
>
> [emphasis added]

50 The above text reminds us that a common law derivative action is a departure from the proper plaintiff rule. It further points us to the rationale behind the necessity for the plaintiff to obtain a grant of leave from the court. In *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189, the Court mandated that injury to the company be pursued by the company. The plaintiff acting in her representative capacity must establish the *locus standi* that justifies such a departure. Therefore, while leave is not necessary for the commencement of an action, it is necessary for the continued pursuance of the action.

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When should leave be sought?

51 Leave being necessary, how and when should it be sought? *Minority Shareholders* at para 3.013 suggested the use of two provisions of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court"): (a) O 33 r 2 for plaintiff; and (b) O 18 r 19 for the defendant:

> An application for a preliminary hearing for the purpose of deciding whether the shareholder-plaintiff is indeed entitled to proceed with the derivative action may be made under Order 33 Rule 2 of the Rules of Court. At this interlocutory stage, the court would have to decide whether the minority shareholder is entitled to prosecute corporate rights as an exception to the proper plaintiff rule. On the other hand, the defendants or alleged wrongdoers could apply to strike out the representative action, under Order 18 Rule 19 of the Rules of Court, on the basis that the proper plaintiff is the company. …

52 Pauline did not file, at any stage, any application under O 33 r 2 of the Rules of Court, or otherwise to seek leave to continue the action. Despite Pauline's primary position that that such leave was not necessary, Pauline's counsel suggested orally – and in my view too casually – if leave was indeed necessary as a legal requirement, that I grant leave on the first day of trial.[129] No formal application had been made, nor was this issue mentioned in his written opening statement.

53 As for Bill and the Company, they made an application to strike out or stay the action on account of the lack of leave ("the O 18 r 19 application"). This was heard by an Assistant Registrar ("the AR") and dismissed, on 24 April 2019.[130] Bill and the Company did not appeal from the decision of the AR. Notwithstanding the AR's dismissal of the O 18 r 19 application, their counsel

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129 Transcript 20 July 2020, p 35 lines 25 – 32.

130 8AB 3456 – 3470.

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("Mr Ong") took the view that a plaintiff continued to be under an obligation to obtain leave – "a request […] that must be made and pleaded even at the end of the matter."[131] This, he argued, was the plaintiff's (continuing) burden, and to be undertaken through O 33 r 2 of the Rules of Court.[132] In that regard, he drew a distinction between a plaintiff's application for leave under O 33 r 2, and a defendant's application to strike out, under O 18 r 19. The former, it was argued, would result in a final declaration that the plaintiff had leave, whereas the latter was adjudicated on the basis of the pleadings and thus could not be determinative of the matter. He therefore drew the conclusion that, at the end of trial, if no reasons for leave were disclosed on the facts on a balance of probabilities, the action could then be dismissed on that basis. Leave, in other words, could be addressed at the end of trial.

54 I do not think that could be correct. The purpose of leave must be to obviate the wasted time and costs that a trial of any action brought by the wrong party to a suit would entail. The proper course for a plaintiff, arising from *Sinwa Nordic* ([4847] *supra*) and *Oates* ([47] *supra*), would be to file an application for leave *prior* to trial of the action. A plaintiff who pursues an action without seeking leave is responsible, should he be unsuccessful, for the costs of the wasted action. If the plaintiff declines for reasons of his own to seek leave, a defendant is not without recourse. Nothing prevents a defendant from filing an application under O 33 r 2 of the Rules of Court to deal with the issue of the proper plaintiff, and in so doing seek a dismissal of the action under O 33 r 5 of the Rules of Court. This option is mentioned at *Oates* at [105]: "If trial of the matter would be long and complicated, a defendant might choose to have a

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131 Transcript 28 September 2020, p 57 lines 19 – 20.

132 Transcript 28 September 2020, p 58 lines 1 – 5.

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question of the plaintiff's standing to bring a derivative action decided as a preliminary question". In the alternative, and as suggested by *Minority Shareholders*, an application under O 18 r 19 of the Rules of Court is also available. *Oates* also envisages this option at [105]: "the defendant can move to seek summary dismissal of the claim". In such a case, an application on the basis that there is no proper plaintiff may be considered under O 18 r 19(*a*) of the Rules of Court, and affidavit evidence may be filed on the relevant issues. Such an adjudication would not be purely, as Mr Ong has characterised it, a matter of the pleadings. A decision pursuant to a striking out application could very well be just as dispositive of the issue as a preliminary hearing held pursuant to O 33 r 2 of the Rules of Court. On the other hand, a defendant may from the outset conclude there are sufficient grounds for leave. If he chooses not to press his point to strike out an action or have it dismissed at an interlocutory stage for lack of leave, he will have to be content to defend the action to its end as he has conceded the point. In this case, by choosing not to appeal the AR's order, Bill and the Company have conceded their case on the issue of leave. The remaining defendants, who have chosen not to take any action, have also conceded the point.

55 Conversely, there is no logical purpose for deciding on the issue of leave after trial. A leave application requires the court to assess whether there is a *prima facie* case of fraud on the minority. In that context, the court assesses on a *prima facie* basis, whether the defendant has control, whether there are alternative remedies, and whether the plaintiff has come before the court with unclean hands. By the end of trial, the witnesses would have been interrogated and these matters fully explored. Having already examined these matters fully, it would be a waste of judicial resources to consider separately the same issues but on a lower standard of scrutiny (*ie.* examining the matter on a *prima facie*

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basis). Such an analysis is more appropriately conducted *prior* to incurring the costs of a trial, with a view to preliminarily assessing whether the action should be continued.

56 I turn, then, to the main claim.

Conspiracy to injure by unlawful means

The applicable legal principles

57 In *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112] ("*EFT Holdings"*), the Court of Appeal set out the legal elements necessary for establishing the tort of unlawful means conspiracy:

(a) there must be a combination of two or more persons to do certain acts ("the Combination requirement");

(b) the acts must have been performed in furtherance of the agreement ("the Furtherance requirement");

(c) the acts must be unlawful ("the Unlawfulness requirement");

(d) the alleged conspirators must have had the intention to cause damage or injury to the plaintiff by those acts ("the Intention requirement"); and

(e) the plaintiff must have suffered loss as a result of the conspiracy ("the Loss requirement").

58 To establish her case, Pauline asserts that the defendants "combined together to set up a competing business to usurp [the Company's] assets and

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ride on the goodwill and reputation of [the Company]".[133] She relies on the following facts to support her allegations:[134]

(a) the issuance of shares on 12 August 2015;

(b) the change of the Company's address on 1 September 2015;

(c) the registration of the Sole Proprietorship on 8 February 2017;

(d) the registration of the Chilli Mark on 3 October 2017;

(e) the alleged attempt to appropriate the lease for the 287 Premises;

(f) the cessation of the Company's business on 28 February 2018;

(g) the attempted winding up of the Company on 13 April 2018, pursuant to his application on 20 March 2018 for the same;

(h) the incorporation of Eng's Char Siew as a private limited company on 5 March 2018; and

(i) the registration of the Name Marks.

59 On the facts, I find that there was no "combination" of the defendants as alleged. Further, the acts (a) to (i) complained of were not carried out in furtherance of any agreement between the defendants, nor unlawful. I also find that Pauline has not proved the defendants' intent to injure the Company. I conclude therefore, that there is no conspiracy to injure the Company by unlawful means, for reasons explained below.

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133 Statement of Claim at para 28.

134 Statement of Claim at para 29.

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The Combination requirement

60 The essence of conspiracy lies in the fact of agreement between the defendants: *Halsbury's Laws of Singapore* vol 18 (LexisNexis Advance, 2020) at para 240.611. The agreement need not be in the nature of an express agreement (see *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and others* [2007] 1 SLR(R) 196 at [95] – [96]), and the conspirators need not all have joined in the scheme at the same time, nor need each know what the other conspirators have agreed to do so long as they were sufficiently aware of the surrounding circumstances and shared the same object: *OCM Opportunities Fund II, LP and others v Burhan Uray (alias Wong Ming Kiong) and others* [2004] SGHC 115 at [49]. The question was how far each of the parties to the conspiracy was aware of the plan (if any) and "joined in the execution thereof": *The "Dolphina"* [2012] 1 SLR 992 at [265].

61 Pauline contends that there was an agreement between Bill, Desmond, Mui Hong, Mei Ling to set up Eng's Char Siew and thereby injure the Company.

Bill

62 Bill's defence is that he was not involved in any plan. Pauline's contentions that Bill was a conspirator are bound up with her suggestions that he was in fact a fiduciary of the Company. It is, according to Pauline, Bill's financial role in the Company that allowed him to assist to injure the company. Bill's defence, in contrast, is that he was a mere bookkeeper who could not have helped in the substantial way alleged. I thus first ascertain Bill's level of involvement with the company.

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(1) Bill's authority as a fiduciary

63 The "essence of an employment relationship is not typically fiduciary at all": *Nottingham University v Fishel* [2000] IRLR 471, as cited in *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2007] 3 SLR(R) 265 at [26]. An employee is only a fiduciary if he/she is placed in a position where he/she must act solely in the interests of his employer. There must be particular functions of the employee which require him/her to pursue the interests of his employer to the exclusion of other interests, including his/her own: *Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 163 ("*Clearlab"*) at [272].

64 As a rough and ready guide to when the imposition of a fiduciary obligation would be appropriate, *Clearlab* at [275] adopted the three factors identified by Wilson J (dissenting) in *Richard Hugh Frame v Eleanor Margaret Smith* [1987] 2 SCR 99 at [60], which were cited with approval by the Court of Appeal in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 at [41]:

> (a) The fiduciary has scope for the exercise of some discretion or power.
>
> (b) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (c) The beneficiary is peculiarly vulnerable to, or at the mercy of the fiduciary holding the discretion or power.

65 Practically speaking, this means that employees subject to a high degree of supervision and review by a more senior employee would typically not be regarded as fiduciaries: *OUE Lippo Healthcare Ltd (formerly known as*

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International Healthway Corp Ltd) and another v Crest Capital Asia Pte Ltd and others [2020] SGHC 142 ("*OUE Lippo"*) at [111]. Moreover, the employee's portfolio of responsibilities would be a crucial factor in determining whether he/she is subject to fiduciary duties as well. For example, in *ABB Holdings Pte Ltd and others v Sher Hock Guan Charles* [2009] 4 SLR(R) 111 ("*ABB Holdings"*), the employee-defendant was in charge of all aspects of the third plaintiff's business, being responsible for its general management as well as business development, marketing and sales. He "remained part of the top management and attended meetings of the Country Management Team […] He was able to hire and fire for the third plaintiff": *ABB Holdings* at [39]. As such, Judith Prakash J (as she then was) held that the defendant was "a very senior employee indeed", owing fiduciary duties to the third plaintiff: *ABB Holdings* at [39]. As Hoo Sheau Peng J put it in *OUE Lippo* at [112], "[f]iduciary duties akin to those owed by a director would likely be imposed on senior employees whose domain extended to *all or substantially all of the business of the company*" [emphasis added].

66 Unlike the employee-fiduciaries in the case law, Bill was hardly the "ruler in his own domain". Bill only worked at the Company on a part-time basis handling the accounts,[135] and some administrative matters (such as liaising with the property agent).[136] Pauline contends that Bill had "played a major role in the structuring of payments to the shareholders and [overseeing] the operations of [the Company] in many aspects including the financial affairs and CPF account of [the Company]".[137] However, in reality, Bill took instructions

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135 Bill's AEIC at para 60.

136 Transcript, 6 August 2020, p 98 lines 14 – 17.

137 PCS at para 99.

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from Jason, clearing matters with Jason before preparing the documents. Bill's evidence, which was not challenged, was that he gave Jason monthly briefings to update him on the accounts and to ensure that "[Jason] know[s] what is happening".[138]

67 Pauline, in her closing submissions, argues that Bill "signed most of the cheques".[139] However, she concedes in the same breath that the Company operated on a Group A-Group B signatory arrangement wherein one signatory from each Group must authorise any drawing on the Company's bank accounts.[140] Group A comprised Desmond and Mei Ling. Group B comprised Pauline and Bill.[141] Bill could not have unilaterally drawn on the accounts without Desmond or Mei Ling's assent. The simple fact of being a Group B signatory could not invest Bill with fiduciary duties. Further, the authority to sign for Group B was shared between Bill *and* Pauline. Messages between them show that Pauline was involved in signing the cheques, at least from 12 January 2016 onwards.[142] From 2016, she imposed a high degree of scrutiny. If there were no receipts for monthly claims, she would request for explanations.[143] She kept track of these defects over time ("There are chunks of no receipts claims every mth [*sic*], I cannot comprehend that.")[144] and took steps to rectify what she evidently saw as accounting defects ("For Desmond [*sic*] monthly claim in

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138 Transcript, 6 August 2020, p 35 line 4 onwards.

139 PCS at para 98.

140 PCS at para 98; Transcript, 7 August 2020, p 32 lines 4 – 6.

141 Transcript, 7 August 2020, p 32 lines 7 – 13.

142 2AB 606.

143 2AB 630.

144 2AB 633.

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future, pls [*sic*] refrain from signing the cheque. Leave it to me to sign.").[145] She viewed the Company's CPF account to check on the payroll and CPF contributions,[146] reviewed the Company's bank statements[147] and requested for spreadsheets of the Company's accounts.[148] She instituted a "monthly routine" of having the Company's profit and loss statements submitted to her;[149] she mandated that the Company's "account files" be submitted to her "every month";[150] and gave instructions that Desmond's monthly claims were to be approved by her ("Leave it to me to sign. Likewise for other cheques too, pls do not sign without my approval. I will sign all cheques in future.").[151] In fact, the text messages make clear that Pauline saw herself as being the dominant party in her relationship with Bill. When Bill refused her request to "submit the file to [her] every month", her reply was "I am the director of the company and I order u to submit the outstanding files that you have no given to me within the next 2 days".[152] As such, Bill's cheque-signing merely reflected the convenient arrangement between the parties rather than any broad, unfettered discretion on Bill's part.

68 Finally, I address an oral "employment agreement" which, as pleaded, charged Bill with (a) exclusive management of the operations of the Company together with Desmond, and (b) responsibility for the finances and accounts of

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145 2AB 641.

146 2AB 618.

147 2AB 626.

148 2AB 625.

149 2AB 628.

150 2AB 666 – 667.

151 2AB 641.

152 2AB 667 – 668.

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the Company as the person "in-charge".[153] This allegation was neither proven at trial nor pursued in closing submissions. I thus find that Bill was not in a fiduciary position *vis-à-vis* the Company prior to taking on the role as director of the Company on 8 June 2018.

(2) Bill's relationship with the Ng family

69 Moreover, it was clear by the end of trial that Mei Ling and Mui Hong would not have involved Bill in any family plan. Mei Ling and Mui Hong made their distrust of "outsiders" clear.[154] Everything was to be "a family business" following Desmond's debacle with Jason and Pauline.[155] As such, Bill has no shares in Eng's Char Siew and is not entitled to any profits of the company.[156] He is only paid $500 for some freelance accounting work that he does for Eng's Char Siew.[157] On Bill's part, he would have no motivation to be, as Pauline alleges, a supposed "mastermind" of the plot.[158] He is a retiree with a steady income from the Company. I accept Bill's evidence on his lack of participation with the family's plans of any kind.

Desmond

70 It is implicit in Pauline's accusations that Desmond was at the centre of the plan. However, at multiple points during trial, Mui Hong expressed her deep

153 SOC, paras 19 – 21.

154 Transcript, 5 August 2020 p 89 line 9; p 134 lines 4 – 13

155 Transcript, 5 August 2020 p 134 lines 12 – 13; p 89 lines 5 – 13.

156 Transcript, 5 August 2020, p 10 lines 19 – 26.

157 Transcript, 5 August 2020, p 10 line 29 – p 11 line 2.

158 Transcript, 6 August 2020, p 85 lines 16 – 26.

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dissatisfaction with Desmond.[159] He was not involved in securing the 248 Premises;[160] the sisters viewed the property[161] and procured the lease themselves.[162] He was not allowed to go anywhere near the 248 Premises when it was being renovated for Eng's Char Siew; Mui Hong took care of all the renovations.[163] He was not involved in procuring the supplies and ingredients for Eng's Char Siew[164]; Mei Ling was able to do "everything" from her six years' experience at the Company.[165] He was not asked about the recipes or the cooking – the sisters had "the consultant of [their] mother".[166] He could not have contributed any start-up capital either; he was "totally broke at that time".[167] Currently, Desmond "[helps] out in [his] sister's shop"[168] and greets the customers.[169] But he is not entitled to any of the profits[170] and draws no salary from Eng's Char Siew.[171] While some aspects of the family's evidence may be exaggerated, the manner in which the events unfolded (see [73]-[106] below) suggests that Desmond was not the chief strategist behind a conspiracy as Pauline alleges.

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159 Transcript, 4 August 2020, p 105 lines 1 – 23; p 116 lines 16 – 21; p 122 lines 3 – 8.

160 Transcript, 3 August 2020, p 20 line 27 – p 21 line 25; p 57 lines 28 – 31; 4 August 2020, p 127 lines 7 – 9.

161 Transcript, 4 August 2020, p 125 lines 13 – 20.

162 Transcript, 4 August 2020, p 126 lines 28 – 32; 30 July 2020, p 113 lines 27 – 31.

163 Transcript, 5 August 2020, p 83 lines 2 – 9.

164 Transcript, 30 July 2020, p 118, lines 2 – 25.

165 Transcript, 5 August 2020, p 82 lines 24 – 25; 4 August 2020, p 141 lines 7 – 9.

166 Transcript, 4 August 2020, p 144 lines 17 – 25.

167 Transcript, 30 July 2020, p 119 lines 27 – 32.

168 Transcript, 29 July 2020, p 31 lines 3 – 13.

169 Transcript, 4 August 2020, p 143 lines 2 – 4.

170 Transcript, 4 August 2020, p 147 line 16 – 17.

171 Transcript, 29 July 2020, p 31 lines 3 – 13.

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Mui Hong, Mei Ling and Eng's Char Siew

71 Mui Hong and Mei Ling set up Eng's Char Siew. This, however, was not pursuant to any conspiracy spearheaded by Desmond. I turn then, to the Furtherance and Intention requirements to explain their intentions and their plan.

The Furtherance and Intention requirements

72 Conspiracy is usually established by inference from objective facts (see *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901 at [19]). I therefore first deal with the nine acts alleged by Pauline (see [58] above) that were purportedly carried out in furtherance of the conspiracy and with intention to injure the Company. Given that the Furtherance and Intention requirements involve overlapping facts and findings, I address them together. While the Furtherance requirement is fairly straightforward, the Intention requirement deserves explanation. The Court of Appeal in *EFT Holdings* ([57] *supra*) put it as such (at [101]):

> A claimant in an action for unlawful means conspiracy would have to show that the unlawful means and the conspiracy were ***targeted or directed at the claimant. It is not sufficient that harm to the claimant would be a likely, or probable or even inevitable consequence of the defendant's conduct***. Injury to the claimant must have been intended as a means to an end or as an end in itself.
>
> …
>
> Lesser states of mind, such as an appreciation that a course of conduct would inevitably harm the claimant, would not amount to an intention to injure, although it may be a factor supporting an inference of intention on the factual circumstances of the case. In *Lonrho plc v Fayed* [1990] 2 QB 479 at 488-489 Woolf LJ observed that the requisite intent (for the tort of causing loss by unlawful means) would be satisfied if the defendant fully appreciated that a course of conduct that he was embarking upon would have a particular consequence to a claimant but nonetheless decided to pursue that course of conduct; or if the

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> defendant deliberately embarked upon a course of conduct while appreciating the probable consequences to the claimant. In our judgment, this is inconsistent with the requirement that intention must be show. It is simply insufficient in seeking to meet the element of *intention* to show merely that there was knowledge to found an awareness of the likelihood of particular consequences.
>
> [emphasis in italics in original; emphasis added in bold italics]

73 In my judgment, none of the nine acts were carried out in furtherance of any conspiracy.

Allotment of shares to Bill

74 I first consider the allegedly wrongful allotment of 5% of the Company's shares to Bill on 12 August 2015.[172] According to Pauline, the issuance of shares to Bill "paved the way for the Plaintiff's removal as a director in June 2018".[173] This was allegedly part of a calculated and pre-meditated plan to "wrest control of the [Company]".[174]

75 Bill's version is that Jason promised this 5% shareholding to him from the outset. It was only when Bill planned to leave Jason Parquet, that he decided he ought, for the sake of caution, to complete the paperwork and formalise the arrangement.[175] Desmond supported Bill's evidence on this point, explaining that while he was not happy with an arrangement that left him with less than 50% of the shares, this had been agreed with Jason from the start.[176] On

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172 1st & 3rd Defendant's Bundle of Documents dated 17 July 2020 (3DBD) at p 3 – 16.

173 PCS at para 115.

174 PCS at para 121.

175 Bill's AEIC at para 113.

176 Desmond's AEIC at paras 69 and 98

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Desmond's part, he signed the resolutions in 2015 because he felt he ought to honour the agreement.[177]

76 Pauline signed the resolutions too,[178] but claims that she had been misled and induced by Bill (and Desmond) into signing these documents.[179] I reject her evidence. Her assertions, as she admitted on the stand, are wholly unsubstantiated, bereft of any proof.[180] On 22 September 2015, she queried Bill on the specific allocation of shares on 22 September, and Bill explained that his 5% was derived by issuing extra shares to adjust the shareholding as follows:[181]

Shareholder	Shares (#)	Shareholding (%)
Pauline	95	47.5%
Desmond	95	47.5%
Bill	10	5%
Total	**200**	**100%**

Subsequently, she signed documents for dividends to be paid out to "shareholders who [were] in the Register of Members".[182] Bill was paid dividends for his shares in 2015,[183] 2016,[184] and 2017.[185]

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177 Desmond's AEIC at para 98.

178 1AB 175.

179 SOC, paras 29(1)(b) – 29(1)(c).

180 Transcript, 21 July 2020, p 61 lines 16 – 21 .

181 3DBD at p 3 – 16; Bill's AEIC, Tab 15 of Exhibit TCH-1.

182 1AB 181; 1AB 183; 1AB 187.

183 1AB 188.

184 1AB 186.

185 1AB 182.

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77 Pauline's evidence varied over the course of trial. At some points, she referred to a telephone conversation ("Bill told me there's a stack of document for me to sign, accounting document […] He told me Desmond has signed. I just have to sign below Desmond's signature will do.").[186] At other points, she characterised the misrepresentation as having been made through Bill's conduct ("[Bill] would leave the documents at the counter of the [Company's] premises for [Pauline] to sign as per the usual practice").[187] Whatever form these supposed representations took, there was simply no reference to, much less any misrepresentation of the contents of these documents. There was no suggestion that Bill and/or Desmond had sought to cover up or mask the nature of these share allotment documents. Pauline was simply told to sign the documents. Objectively speaking, there is nothing misleading about such an instruction. If Pauline's argument is that Bill had taken advantage of the "usual practice" and capitalised on her complacency to execute this share allotment, such an allegation was neither pleaded nor borne out by any evidence. If anything, the evidence suggested the precise opposite. Pauline is experienced in corporate documents, having held multiple directorships in the past.[188] The share allotment document was also, on its face, clear, with little room for confusion. The words "ALLOTMENT OF SHARES" were inscribed in bold at the top of the page, and the allotment of shares was the only matter printed on that page.[189]

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186 Transcript, 21 July 2020, p 63 lines 1 – 4

187 Transcript, 21 July 2020, p 68 lines 12 – 18.

188 8AB 3452.

189 1AB 175.

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78 The facts are plain. Pauline did not "discover" Bill's shareholding in 2016.[190] Pauline signed the papers in 2015 because she was aware of the earlier agreement between Bill and Jason. The shares, in other words, were not issued pursuant to any conspiracy to injure the Company.

Change of Company's registered address

79 I turn now to consider the change of the Company's address. Pauline's contention is that Desmond and Bill attempted to prevent any official correspondence from reaching her and/or the Company by changing its registered address to Bill's residential address.[191]

80 Bill, on the other hand, furnishes a reasonable explanation for changing the Company's registered address. Prior to the change in address, the Company's registered address was the JPS Address, where Bill worked.[192] With Bill's departure from JPS around August 2015, he no longer had access to the JPS mailbox. It therefore did not make sense for the Company's documents to be delivered to the JPS Address.[193] As far as the choice of new address was concerned, Bill's explanation was simple, clear and convincing:[194]

> Yeo: Okay. Now, why not regis---have the registered address at [the 287 Premises]?
>
> Bill: Can I explain?
>
> Yeo: Yes, this one I will let you explain.
>
> Bill: 287 is a shop.

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190 Statement of Claim at para 29(4).

191 SOC, para 29(3).

192 Transcript, 22 July 2020, p 30 lines 16 – 20; Bill's AEIC at para 123.

193 Bill's AEIC at para 124

194 Transcript 6 August 2020, p 86 lines 21 – 30.

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Yeo: Okay.

Bill: Postman just throw the thing on the floor.

Yeo: Okay.

Bill: It may be lost.

Yeo: Okay.

81 On her part, Pauline did not report any issues with access to any Company documents. She was able to sign off on dividend distributions with no issues in the years following the change in address.[195] Further, the address was changed through a directors' resolution on in September 2015.[196] Pauline was one of the directors that authorised the Company to change its registered office to Bill's residential address.[197] This means that she had *explicitly* agreed to the change in address. When confronted with this during cross-examination, she ultimately conceded that she had signed the directors' resolution and that this resolution reflected an agreement between Jason, Desmond, Bill and herself, namely "that it would be more convenient if the Company's official correspondence were mailed straight to [Bill's home]."[198]

82 It follows that the change of address was not intended to harm the Company.

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195 1AB 181.

196 3DBD at p17

197 3DBD at p17.

198 Transcript, 22 July 2020, p 33 lines 4 – 16.

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Registration of the Sole Proprietorship

83 Mui Hong registered the Sole Proprietorship on 8 February 2017.[199] Pauline suggests that this had been done pursuant to the conspiracy between the defendants. Pauline's arguments are threefold. First, she contends that Mui Hong's stated reasons for registering the Sole Proprietorship are unbelievable and inconsistent with her affidavit of evidence-in-chief.[200] Second, she argues that Mui Hong could not have done this without prior discussion with Desmond.[201] Third, Pauline argues that even if this registration had been carried out without Desmond's approval or knowledge, Desmond did nothing about it after he found out about the registration. He had effectively acquiesced to a conspiracy.[202]

84 I deal with Mui Hong's reasons first. These are believable and consistent with the narrative that unfolded over trial. Part of the motive was sentimental in nature ("no one has made an effort to register this name which I personally embrace it very, very much in commemoration to my father"),[203] such sentiment being entirely consistent with the Ng family's strong attachment to the "Eng's brand". Part of the motive is strategic ("in anticipation of having an avenue to carry on the Family Wantan Mee Business in the event [it] could not be able to operate through [the Company]"),[204] such a plan being consistent with the family's desire to protect and preserve the authenticity of their "Eng's brand".

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199 1AB 37.

200 PCS at para 128.

201 PCS at para 125.

202 PCS at paras 126 – 127.

203 Transcript, 4 August 2020, p 100 lines 30 – 32.

204 Transcript, 4 August 2020, p 102 lines 7 – 10.

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Crucially, none of these motives involve injuring the Company. If anything, this registration was a back-up plan in the event that the Company ceased business operations.

85 Pauline's last two arguments concern Desmond. She contends that Mui Hong could not have registered the Sole Proprietorship without prior discussion with Desmond,[205] and that Desmond must have condoned the registration when he found out about it and did nothing afterwards.[206] Desmond and Mui Hong's evidence was that Desmond was told *after* Mui Hong had registered the Sole Proprietorship,[207] and Desmond was of the view that Mui Hong, being a member of the Ng family, was entitled to register such a sole proprietorship anyway.[208]

86 The Sole Proprietorship was not used to operate any business. Mui Hong only took action to set up any *wanton mee* business[209] after the Company was unable to secure the lease for its business. Therefore, Desmond's tacit acceptance of Mui Hong's action cannot be taken as a step in a conspiracy. In fact, Desmond's actions reveal that he was hoping to continue with the Company. After the registration of the Sole Proprietorship, Desmond offered to buy Jason's share of the Company.[210] Desmond's evidence was also that he would have continued with the Company if Pauline had signed the lease.[211]

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205 PCS at para 125.

206 PCS at paras 126 – 127.

207 Transcript, 30 July 2020, p 100 lines 18 – 26; 4 August 2020, p 99 lines 25 – 32.

208 Transcript, 30 July 2020, p 100 line 22 – 25.

209 1 AB 34.

210 6AB 3228; Transcript 30 July 2020, p 78 lines 1 – 19.

211 Transcript 3 August 2020, p 61 lines 19 – 32; 30 July 2020, p 98 line 30 – p 99 line 5.

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87 The evidence of Desmond,[212] Mui Hong[213], Mei Ling[214] and Mdm Loh[215] show, rather, that the Ng family regarded the "Eng's" name as family property.[216] They regarded it as something to be protected from unauthorised use, especially by Pauline, Jason and any of their associates. Mui Hong's, and the Ng famly's (if any at all) intent in registering the Sole Proprietorship was directed towards protecting "this Eng's brand"[217] and towards devising a contingency should the Company's business cease, not injuring the Company,

88 I therefore find that the registration of the Sole Proprietorship was not intended to injure the Company, much less made in furtherance of any agreement to do the same.

Registration of the Chilli Mark

89 Mui Hong registered the Chilli Mark on 3 October 2017.[218] Pauline's allegation was that the registrations of the Chilli Mark and the Sole Proprietorship, were "to lay the groundwork" for the eventual incorporation of Eng's Char Siew.[219] In particular, Pauline pointed to the fact that Mui Hong had registered the Chilli Mark under the Sole Proprietorship (rather than under her

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212 Transcript, 4 August 2020, p 41 line 9 – 14.

213 Transcript, 4 August 2020, p 99 lines 18 – 19.

214 Transcript, 5 August 2029, p 102 lines 26 – 27.

215 Transcript, 5 August 2020, p 144 lines 1 – 4

216 Transcript, 4 August 2020, p 80 line 19; 5 August 2020, p 45 line 45; p 144 line 25 – 26; p 147 line 29; p 158 lines 5 – 6.

217 Transcript, 4 August 2020, p 41 lines 9 – 10; 5 August 2020, p 102 lines 26 – 27; p 144 lines 1 – 2.

218 5AB 2513.

219 PCS at para 134.

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own name)[220] and had registered the Chilli Mark under Class 30 (for the manufacture of noodles).[221] This, according to Pauline, was incontrovertible proof that the registration was a preparatory step towards usurping the Company's business.

90 Mui Hong's explanation is that she had registered the Chilli Mark because she had designed the "logo, the motif and everything". She simply wanted to keep it.[222] Jason challenges her account. He claims that the Chilli Mark had been designed by him and his personal assistant ("Cindy"), who was not called as a witness. According to Jason, Mui Hong had only fabricated the signage.[223]

91 Nothing turns on who had actually designed the mark. The only relevant issue is whether the registration was part of a plan to injure the Company. In my judgement, Mui Hong registered the Chilli Mark for the same reasons that she registered the Sole Proprietorship. Mui Hong was taking pre-emptive steps to protect the "Eng's brand". The Chilli Mark, being "linked to the Eng's Char Siew Wantan Mee name",[224] was registered to achieve those ends. This was why the Chilli Mark was registered under the Sole Proprietorship rather than under Mui Hong personally. This was also why the fact of this registration was kept from Pauline.

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220 PCS at para 134.

221 PCS at para 134.

222 Transcript, 4 August 2020, p 111 lines 4 – 8.

223 Jason's AEIC at para 20.

224 Transcript, 4 August 2020, p 113 line 18.

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92 In that regard, my earlier findings regarding the registration of the Sole Proprietorship (see [87] above) apply with equal force here. As explained earlier, the Intention requirement is only fulfilled by acts that *target* or are *directed at* the claimant. It is not sufficient that harm to a claimant is a likely or probable or even inevitable consequence of a defendant's conduct: *EFT Holdings* ([57] *supra*) at [101]. Here, Mui Hong's efforts were directed at protecting the "Eng's brand", not injuring the Company. As such, I find that there was no intention to injure the Company through the registration(s) of the Chilli Mark (and the Sole Proprietorship).

Alleged appropriation of the lease

93 The tenancy agreement for the 287 Premises expired on 15 March 2018. After no news was received on Desmond's request for Pauline to renew the lease, Bill informed Jane on 24 January 2018 that "Eng's Noodles House Pte Ltd will not be renew [*sic*] the tenancy agreement after the expired [*sic*] of the lease term (*ie*. 15 March 2018)", promising to "make arrangement to find a new tenant to lease the same place with the agreement rental of $8,800 per months [*sic*] for the next 3 years periods [*sic*]."[225] This was on the same date that Desmond's solicitors sent Pauline a letter that they had instructions to wind up the Company. Bill then emailed Jane on 31 January 2018, asking for Richard's name to be put on the tenancy agreement.[226] Jane's response was that a new tenant had already taken up the lease by then.[227] Pauline alleges that the attempt to assign the lease to Richard had been an effort by the defendants "to

225 9AB 3614.

226 9AB 3614.

227 9AB 3613.

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appropriate the lease for themselves".[228] This, according to Pauline, was part of the conspiracy to injure the Company as it would have allowed Eng's Char Siew to take over the 287 Premises.[229]

94 Desmond and Bill's explanation is somewhat convoluted but gels with the facts. Desmond perceived the lease to be a source of personal liability when it was under his name. He was willing to take on such "personal liability" when the "relationship [was] still very good" but did not want to do so after "trouble started".[230] That said, Desmond was keen on continuing the Company's business.[231] Frustrated as he was with the issues amongst the partners,[232] Desmond testified that he would have carried on the Company's business if the lease had not been taken over by somebody else.[233] In my view, by asking Pauline to take up the lease,[234] Desmond was signalling his dissatisfaction with the way Pauline was treating him,[235] and attempting to have her take responsibility, rather than to stand on the side-lines complaining about the manner in which he managed the operations. By also previously expressing his intentions to retire,[236] he was reminding her that he was the party responsible for the cooking and the joint venture's success. The sequence of events indicates

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228 PCS at para 144.

229 PCS at para 152.

230 Transcript, 30 July 2020, p 98 lines 9 – 26.

231 Transcript, 30 July 2020, p 93 lines 1 – 6.

232 Transcript, 30 July 2020, p 87 lines 18 – 21.

233 Transcript, 3 August 2020, p 61 lines 19 – 32; 30 July 2020, p 98 line 30 – p 99 line 5.

234 2AB 662.

235 Transcript, 30 July 2020, p 98 lines 9 – 17.

236 2AB 633.

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that he did not anticipate that she would assist another to acquire the lease and secure the employment of the cook that he and his father had trained.

95 In this context, the 24 January 2018 Email was entirely explicable. Pauline had not responded to the request for her to sign the lease.[237] There was no word from Jane either.[238] By this time, Desmond had decided that he ought to wind up the company, and was suspicious that the lease had been taken up by another.[239] The 24 January Email, therefore, was a 'test' devised by Desmond and Bill to ascertain if the lease had already been promised to anyone else. Their thinking was that if Jane did not come back to Bill asking "why you all Eng Noodle House want to give up",[240] it would be confirmation that she had promised the lease to another interested party. In much the same vein, the attempt to assign the lease to Richard on 31 January 2018[241] was a way for Bill and Desmond to ascertain, in the face of Jane's silence, whether the lease had already been assigned to someone else.[242] Jane was thereby forced to respond that the lease had been taken up by someone else. In that regard, Desmond's suspicions were well-founded.

96 For these reasons, I find that the 24 and 31 January emails were not advancing any sort of conspiracy or plot to take over the 287 Premises on behalf of Eng's Char Siew. The lease had been secured by another by this juncture. If Desmond had wanted to secure the lease for his own benefit, he would have

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237 Transcript, 3 August 2020, p 62 line 30 – p 63 line 2.

238 Transcript, 4 August 2020, p 39 lines 16 – 22.

239 Transcript, 4 August 2020, p 39 lines 20 – 23.

240 Transcript, 6 August 2020, p 108 lines 9 – 13.

241 9AB 3614.

242 Transcript, 3 August 2020, p 122 lines 12 – 14; 6 August 2020, p 115 lines 16 - 24.

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acted earlier and more decisively. He was certainly in a position to do so since he was the named tenant for the 287 Premises (see above at [16]) and the landlord had agreed to his price.[243] For them to have asked Pauline to sign the lease in January and to have allowed matters to unfold in the manner that they did suggests a lack of a strategic plan on the alleged conspirators' part.

Cessation of business, winding-up application and incorporation of Eng's Char Siew

97 I turn now to address the last three events that Pauline relies on to establish her (representative) action in unlawful means conspiracy. These are:

(a) the cessation of the Company's business on 28 February 2018;

(b) the application to wind-up the Company; and

(c) the incorporation of the Sole Proprietorship as Eng's Char Siew.

98 These events will be addressed together because they are all, in substance, a *reaction* to Eng's Wantan Noodle taking over the lease for the 287 Premises. I base my finding on two observations.

99 Firstly, the whole process of setting up and establishing Eng's Char Siew was hasty and improvised. Desmond, Mui Hong and Mei Ling's testimony aligned. They testified that this was a "very last minute rush decision",[244] that was "urgently"[245] made and "very last minute".[246] Mui Hong and Mei Ling were

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243 Transcript, 30 July 2020, p 97 lines 16 – 21.

244 Transcript, 4 August 2020, p 132 line 9.

245 Transcript, 3 August 2020, p 52 line 31.

246 Transcript, 5 August 2020, p 73 lines 3 – 4.

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scrambling to find a location for Eng's Char Siew.[247] They viewed the 248 Premises in mid-February,[248] signed the lease on 21 February 2018,[249] took over the premises in April,[250] and opened Eng's Char Siew for business on 13 May 2018.[251] They were desperate and settled for the 248 Premises even though it was actually a lease for two units[252] and the rental fees were significantly higher than the 287 Premises.[253] They did not have a business plan[254] and do not have any concrete profit-sharing arrangement till this day.[255] The Ng family does not "even talk about profits" and "[n]obody expects to take in any profit".[256] In fact, Eng's Char Siew is not a profitable business.[257] This would seem to be the result of haphazard reactions to events as they unfolded, rather than (as Pauline alleges) a premeditated plan dating back to 2015.

100 Second, I am satisfied that the Ng family was genuinely concerned about the use of the name "Eng's" by Eng's Wantan Noodle. The family members who testified at trial presented a unified and convincing narrative – The "Eng's brand" was threatened when a new tenant took over the 287 Premises looking to set up a similar business. The Ng family then rallied together to protect the

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247 Transcript, 3 August 2020, p 52 lines 30 – 32.

248 Transcript, 4 August 2020, p 125 lines 24 – 28.

249 Transcript, 4 August 2020, p 139 lines 15 – 17.

250 Transcript, 4 August 2020, p 139 lines 15 – 23.

251 Transcript, 4 August 2020, p 139 lines 27 – 32.

252 Transcript, 4 August 2020, p 128 lines 25 – 32.

253 Transcript, 4 August 2020, p 129 lines 20 – 25; p 131 lines 15 – 21.

254 Transcript, 4 August 2020, p 123 lines 3 – 4; p 131 lines 24 – 30; p 132 line 9.

255 Transcript, 4 August 2020, p 148 lines 13 – 16; p 149 lines 8 – 9; 29 July 2020, p 54 lines 10 – 19.

256 Transcript, 4 August 2020, p 148 line 12 and 16.

257 Transcript, 4 August 2020, p 145 lines 27 – 31; 29 July 2020, p 54 lines 5 – 6.

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"Eng's brand".[258] In fact, Mei Ling had been suspicious of Jason and Pauline from as early as January 2018. Her testimony was that Jason had been speaking to the head chef at the Company,[259] coming to take measurements of the furniture after working hours[260] and scrutinizing the company accounts.[261] The implication here, of course, was that Jason had been taking preparatory steps to divert the Company's custom to another business. I make no findings as to whether Jason actually did these things, but I do accept that Mei Ling was suspicious of Jason and Pauline at that time. I also accept that Mei Ling's observations were communicated to Mui Hong, whose suspicions were, in turn, aroused as well.[262] Desmond, on his part, was fully convinced that the lease had already been 'stolen'[263] and confirmed that he shared Mei Ling's views.[264]

101 It was in this context that Mei Ling and Mui Hong banded together to set up Eng's Char Siew. Eng's Char Siew was their way of asserting the original and authentic "Eng's brand" - a way for them to "stand up and tell the public that, hey, we are here".[265] As for the Company, it was clear by 1 February 2018[266] at the latest, that it had no more future. The lease had been taken up by another

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258 Transcript, 3 August 2020, p 52 line 29 – p 53 line 1; 4 August 2020, p 41 lines 9 – 10; p 129, lines 2 – 4; p 146 lines 11 – 14.

259 Transcript,5 August 2020, p 106 lines 11 – 25.

260 Transcript, 5 August 2020, p 106 line 30 – p 107 line 2.

261 Transcript, 5 August 2020, p 106 line 8.

262 Transcript, 4 August 2020, p 117 line 26 – p 118 line 3.

263 Transcript, 30 July 2020, p 94 line 29; 3 August 2020 p 44 line 18; p 62 line 2; p 120 lines 20 – 23; 4 August 2020, p 22 lines 8 – 10; p 39 lines 22 – 23.

264 Transcript, 4 August 2020, p 41 lines 4 – 10; p 119 lines 24 – 31.

265 Transcript, 4 August 2020, p 129 line 4.

266 9AB 3613.

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tenant[267] and relations between the directors had deteriorated irreparably due to the bitter infighting ("damage has been done").[268] The decision to cease the business is a natural and entirely reasonable one. It follows that the decision to wind-up the company was a sensible one as well. These decisions are entirely explicable in the light of the circumstances that the Company found itself in,[269] and not by any supposed conspiracy between the defendants to injure it.

102 In that regard, the agreement that was being furthered (if any) was a family effort to root out mimicry, not misappropriate the Company's custom. In fact, there was no Company to injure anymore. In any case, injury of the Company was neither the intent nor the means towards achieving their true goal – "to fight, to get back our "Eng's" and *rong gao*".[270]

Registration of the Name Marks

103 As for the Name Marks (see above at [41]) , Pauline alleges that their registration (together with the Chilli Mark's registration) is further proof of the conspiracy to "usurp the Company's [intellectual property] assets".[271]

104 To this, the defendants contend that all the "IP assets" which Pauline claimed on behalf of the Company were part of a licensing arrangement between the "Ng family" and the Company. They aver that the Ng family owned the tradenames "Eng's Noodles House Char Siew Wantan Mee", "Eng's Char Siew

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267 Transcript, 30 July 2020, p 130 lines 1 – 7.

268 Transcript, 4 August 2020, p 137 line 11; NEs 3 August 2020, p 24 lines 26 – 27.

269 Transcript, 29 July 2020, p 14 lines 2 – 16.

270 Transcript, 5 August 2020, p 46 lines 13 – 14.

271 SOC, para 23(9).

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Wantan Mee" and "榮高雲吞麵". They could not have "usurped" things which were theirs all along.[272] This licence also grounds the counterclaim, and I deal with it in that context (see [129] below). In respect of Pauline's allegations on the Name Marks, it suffices to note that these registrations were well after the Company's cessation of business. Eng's Wantan Noodle had registered the 1st[273] and 2nd Franchise Marks[274] much earlier on 3 August 2018. Eng's Char Siew's solicitors wrote to Eng's Wantan Noodle and the Intellectual Property Office of Singapore, objecting to the mark on 20 September 2018.[275] Eng's Char Siew then made a string of trademark applications on 19 October 2018[276], 30 November 2018,[277] and 14 December 2018, registering the Name Marks.[278] The chronology of events suggests to me that the registration of the Name Marks was retaliatory in nature. It was not part of a plot to injure the Company. In any event, the Company was defunct by this stage. Without premises, it could not operate. The Ng family's real adversary was Eng's Wantan Noodles. That was the true target of their actions.

105 For this reason, I do not find that the registration of the Name Marks was done in furtherance of a conspiracy to injure the Company.

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272 Ng Family's Defence at paras 20, 21 and 24(h).

273 2DBD 915.

274 2DBD 918.

275 2DBD 920 – 926.

276 5AB 558.

277 5AB 579.

278 5AB 602.

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The Unlawfulness and Loss requirements

106 Having found that the Combination, Furtherance and Intention requirements are not satisfied on the facts, it is no longer necessary for me to address the remaining requirements. There is no loss to speak of since a conspiracy has not been established, and the only unlawful actions are Bill and Desmond's potential breaches of their fiduciary duties to the Companies. I deal with these actions (and any evaluation of their lawfulness) in the section below.

Breach of fiduciary duties owed to the Company

107 It is undisputed that Desmond and Bill owed fiduciary duties to the Company during the terms of their directorships. These are respectively:

(a) for Desmond, from 27 February 2012 up till 9 July 2018;[279] and

(b) for Bill, from 8 June 2018[280] till present day.

Pauline avers that these duties had been breached.

Bill

108 Up to the point of trial, two of Pauline's contentions relied upon Bill being a fiduciary. The first was a claim of financial misappropriation. This was dropped midway through trial. The second relates to the conspiracy allegations, which I have dismissed. I have also held in that context that Bill was not a fiduciary prior to his becoming a director on 8 June 2018 (see above at [68]). Bill's participation as a director was after the Company had ceased operations.

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279 2AB 1043.

280 1AB 39; 2AB 1038.

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There are no further allegations made by Pauline about any potential breaches of fiduciary duty on Bill's part after he assumed directorship in the Company.

Desmond

109 Pauline has pleaded that Desmond breached three fiduciary duties:[281]

(a) A duty to act in good faith in the best interests of the Company.

(b) A duty to act for the proper purposes of the Company in relation to its affairs.

(c) A duty not to place or allow himself to be placed in a situation or position whereby any of his duties and obligations to the Company conflict or may conflict with his own personal interests.

110 The first two duties pleaded are in essence, a reference to the alleged conspiracy between the defendants to injure the company. Having found that such a conspiracy does not arise on the facts, I find that those duties have not been breached. By the same token, the alleged breaches of the Companies Act which related to the allegations of conspiracy were therefore not made out either. The statement of claim, without listing which of the limbs in s 157 of the Companies Act were being relied on, simply stated that the "duty to act honestly and use reasonable diligence in the discharge of the duties" had been breached as well. I took Pauline's allegations of such breaches to be merely the statutory equivalents of the same breaches (of fiduciary duties) that she complained of at general law. As such, where her claims of breach (of fiduciary duties) in general law failed, I dismissed their Companies Act equivalents as well. The analysis,

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281 Statement of Claim at para 22.

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in other words, was one and the same. Indeed, I am fortified in my approach by the lucid observations in Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 09.025:

> Indeed, it is asserted that section 157(1) [of the Companies Act] "mirrors a directors' general fiduciary duty at common law", giving rise to the suggestion that the statutory exhortation to "act honestly" is shorthand for all the other general law duties as well.

111 I turn then, to whether there has been any breach of a duty to avoid conflicts of interest. At issue is Desmond's omission to disclose the registration of the Sole Proprietorship and the Chilli Mark to the Company when he found out about them.

112 While Desmond was not personally involved in making either decision, the law is clear that it proscribes not just conflicts between a fiduciary's *personal* interest and his beneficiary's interests, but also conflicts between a *third party's* interests and his beneficiary's interests: *Sim Poh Ping v Winsta Holding Pte Ltd and another and other* appeals [2020] 1 SLR 1199 at [69] – [70]. Further, this rule proscribes not just actual but potential conflicts of interest as well: *Ng Eng Ghee and others v Mamata Kapildev Dave and other (Horizon Partners Pte Ltd, Intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Horizon Towers*") at [138].

113 On that reading, Desmond's failure to disclose the registration of the Sole Proprietorship and the Chilli Mark puts him in breach of his fiduciary duty. The Sole Proprietorship was synonymous with his sister, Mui Hong. The Chilli Mark posed a threat to the Company since none of the Company's trade names or trademarks were registered at that time. Yet, neither the Chilli Mark nor the Sole Proprietorship were disclosed to the Company.

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114 Notwithstanding this, the remedy applicable in a claim premised on a conflict of interest would sound in either an account of profits, or equitable compensation. In the present case, the Sole Proprietorship was not used. An account of profits may not be pursued as the fiduciary in question has not profited in any way. Nor could equitable compensation be pursued as the breach did not cause damage to the Company: see *Sim Poh Ping* at [241].

115 In respect of the allegations as to Desmond's failure to disclose the registration of the Name Marks or his failure to disclose the registration of Eng's Char Siew, these events occurred after 28 February 2018. By then, the Company had ceased business and was effectively defunct. The Company had no further business to carry out and no prospect of resuming business either. It would therefore be meaningless to speak of other commercial interests (such as the acquisition of competing intellectual property) as conflicting with its business interests.

Common law derivative action

116 There are two requirements to sustain a common law derivative action. First, the company must have a reasonable case against the defendant(s); and second, the minority shareholder-plaintiff must have *locus standi* to bring the common law derivative action in the name of the company. This depends, in turn, on whether the minority-shareholder plaintiff is able to show that he falls within the "fraud on the minority" exception to the proper plaintiff rule: see *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 at [20], [47]–[48]).

117 In view of my findings on conspiracy and breach of fiduciary duty, the company does not have a reasonable case against the defendants.

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118 My findings on the facts also show that there is no fraud on the majority. On the contrary, the defendants advance a defence alleging that Pauline's suit was motivated by a desire to misuse the Company's intellectual property in order to assist Eng's Wantan Noodle. I agree that on a balance of probabilities, Pauline (together with Jason) assisted in the set-up of Eng's Wantan Noodle. First, Pauline admitted at trial that Jason co-managed Eng's Wantan Noodle.[282] Second, Pauline's own evidence shows that she was involved in setting up Eng's Wantan Noodle. The accountants she hired to look into the Company's finances were told that "the shareholders [of the Company] have each set up their own respective noodle house in the vicinity of [the Company's] location".[283] Third, Pauline and Jason were instrumental in the setting up of Eng's Wantan Noodle. It was Jason who introduced Thomas to the real estate agent to enable Thomas to secure the lease for the 287 Premises;[284] it was Jason who "recommended" Mr Law Boon Meng, the Company's head chef, to work for Eng's Wantan Noodle;[285] it was Jason who had assisted with Eng's Wantan Noodle's renovation of the premises;[286]and it was Pauline who gave Eng's Wantan Noodle the use of the main operational telephone number which customers had used to call the Company for six years.[287]

119 With the dismissal of her common law derivative action, Pauline's claim fails. Accordingly, I do not grant her any of the injunctions and declarations she

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282 Transcript, 21 July 2020, p 33 lines 17 – 25.

283 3AB 3475.

284 Pauline's AEIC at para 56.

285 Transcript, 28 July 2020, p 15 lines 12 – 25.

286 Transcript, 22 July 2020, p 100 lines 6 – 8.

287 8AB 3511.

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seeks, particularly those that concern the Name Marks and the Chilli Mark. Some of her assertions and the defendants' defences are, however, relevant to the Counterclaim, which I now turn to.

Counterclaim on the tort of passing off

120 I turn now to the Counterclaim brought by Mui Hong, Mei Ling and Eng's Char Siew (collectively, "the Counterclaimants").

121 The three elements of a claim in passing off were summarized by the Court of Appeal in *Singsung Pte Ltd v LG 26 Electronics Pte Ltd (trading as L S Electrical Trading)* [2016] 4 SLR 86 ("*Singsung*") at [27] – [28], citing *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 at 499:

> First, [the claimant] must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether this consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. Whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods or services is immaterial, as long as they are identified with a particular source which is in fact the plaintiff. … Thirdly, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.

Necessity for goodwill

122 The establishment of goodwill is the bedrock of this tort. The proper plaintiff and owner of the goodwill who may assert the rights appurtenant is the

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fundamental question at hand. By this counterclaim, Mui Hong, Mei Ling and Eng's Char Siew contend that they own the goodwill. I find that they do not, for reasons that follow.

Nature of the goodwill required

123 Goodwill is both "a reflection of a public state of mind on the one hand, and […] legal property on the other": *Christopher Wadlow, The Law of Passing Off: Unfair Competition by Misrepresentation* (Sweet & Maxwell, 5th Ed, 2016) ("*Wadlow*") at para 3-138. The essential features of goodwill were distilled by the Court of Appeal in *Novelty Pte Ltd v Amanresorts Ltd and another* [2009] 3 SLR(R) 216 at [39]:

> … First, it is the association of a good, service or business on which the plaintiff's mark, name, labelling, *etc* (referred to generically as the plaintiff's "get-up") has been applied with a particular source. Second, this association is an "attractive force which brings in custom…

124 In the present case, the good being sold was *wanton mee*. It is associated with a particular source, namely the business using the late Mr Ng's recipe and method of preparation. In particular, the *wanton mee* is known for its "springy noodles"[288] and accompanied by a "gunpowder" chilli paste.[289] It is this association that formed the attractive force that brought in custom.

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288 1 AB 2191, 2203, 2212, 2214.

289 1AB 2196, 2207, 2214; 1AB 363.

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Owner of the goodwill

125 The fundamental question at hand is the ownership of the goodwill. Professor Wadlow suggests the following tests for determining the ownership of goodwill (at para 3-140):

> One is to ask who is in fact more responsible for the character or quality of the goods; the other is to ask who is perceived by the public as being responsible. The latter is (perhaps surprisingly) the more important, but it does not provide a complete answer to the problem because in many cases the relevant public is not concerned with identifying or distinguishing between the various parties who may be associated with the goods. If so, actual control provides a less decisive test, but one which does yield a definite answer.

126 There is no doubt that during the years at Dunman Food Centre, the goodwill attached to the Hawker Business and Mr Ng was the owner of this goodwill. He was responsible for the cooking and the person who won the accolades (see [13] above). It was his recipe and method of preparation that drew the customers. He was the "walking brand"[290] and "the main figurehead which customers identified with."[291]

127 Goodwill is personal property and may be assigned: *Wadlow* at para 3-195. When the Company was incorporated, Mr Ng operated through the Company. As such, the goodwill owned by Mr Ng and the Hawker Business attached itself to the business of the Company. This goodwill was still used by the Company after Mr Ng's passing, up until the time the Company ceased operations. This was the reason that Pauline used a common law derivative action in order to assert rights to the marks: her case rested on the fact that the

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290 Transcript, 4 August 2020, p 71 lines 10 – 13.

291 Teng Chai Hai's AEIC dated 14 July 2020 ("Bill's AEIC"), at para 71.

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goodwill was associated with the business of the Company, and her action was brought to secure what she characterised as the intellectual property of the Company.

128 The question relevant to the Counterclaim is whether, and in light of the fact that the business of the Company had ceased operations, this goodwill was transferred to the Counterclaimants. The Counterclaimants' claims to ownership of the goodwill is in turn, founded on their belief that "each of the family members held the right to the goodwill".[292] I deal here with their arguments.

(1) Licence

129 The Counterclaimants' claim to ownership of the goodwill was supposedly evinced by a licensing arrangement. This licensing arrangement, in turn, was the crux of their defence to the claim as well. In the Counterclaimants' pleadings, the licensing agreement was described as follows. It was an oral agreement made in 2012 when Jason first approached Mr Ng with the business proposal to set up the Company.[293] "[Mr Ng] was the licensor (as representative of his immediate family) and [the Company] was the licensee."[294] "Jason, [Mr Ng] and the 2nd to 5th Defendants" were present when the licensing agreement

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292 2DCS at para 45.

293 Set Down Bundle, p 128 - Further and Better Particulars of the 2nd, 4th, 5th and 6th Defendants dated 5 March 2019.

294 Set Down Bundle, p 129 - Further and Better Particulars of the 2nd, 4th, 5th and 6th Defendants dated 5 March 2019.

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was entered into.[295] The subjects of the licensing agreement were the following tradenames:[296]

(a) "Eng's Noodles House Char Siew Wantan Mee";

(b) "Eng's Char Siew Wantan Mee"; and

(c) "榮高雲吞麵".

130 The Company's trade names were similar, but different from the Original Tradenames, which (as stated earlier at [11]) were as follows:[297]

(a) "Eng's Char Siew Wan **Ton** Mee" [emphasis added]; and

(b) "榮高雲吞麵".

131 However, there was no evidence of any written agreement, and it was apparent from the trial that there was no proof of an oral agreement either. The burden of proof to infer such an agreement falls on the Counterclaimants. To that end, they sought to prove (a) the existence of the licensing agreement and (b) that after Mr Ng's death, the whole Ng family became the new licensors of the goodwill.

132 First, they sought to prove the existence of the licensing agreement by pointing to Mr Ng's salary. Their evidence was that Mr Ng (together with

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295 Set Down Bundle, p 129 - Further and Better Particulars of the 2nd, 4th, 5th and 6th Defendants dated 5 March 2019.

296 Ng Family's Defence at paras 20.

297 Desmond's AEIC at para 23; 4AB 2125.

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Desmond) was paid the most in the Company.[298] He was paid $5,000 a month despite not playing an active role in the kitchen.[299] One explanation was that the $5,000 was a royalty. As Mdm Loh put it, "[m]y husband didn't do anything. My husband wasn't even working. Why would he be paid a salary? It's a royalty. It's for the use of the brand name. Of course, he will have to get back money for it."[300]

133 In my view, while Mr Ng was alive, the use by the Company of his name and his marks was with his consent and permission. This permission was reflected in the sum of his salary. Professor Wadlow describes "licenses for goodwill" as such (at para 3-213):

> The owner of the goodwill in a business may prima facie license another business to do any act which but for the license would amount to passing off. To this extent it is permissible to speak of licensing goodwill, although *what is licensed is not properly the goodwill as such but the right to do something which would otherwise infringe the licensor's rights in it.*
>
> [emphasis added]

134 The use of the 287 Signboards, and in particular, the Top 287 Signboard, without Mr Ng's consent would have amounted to passing off. This was especially since the Top 287 Signboard proudly proclaimed that the business at the 287 Premises was "[t]he only original from Dunman Food Centre".[301] The continued use of the Top 287 Signboard (without protest) and the continued payment of Mr Ng (even though he was not heavily involved in the Company's operations) could be some evidence that a licensing arrangement was in place,

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298 4AB 1994 –2040.

299 Transcript, 30 July 2020, p 63 lines 14 – 15.

300 Transcript, 5 August 2020, p 139 lines 30 – 31.

301 7AB 3261.

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even if the parties had not explicitly labelled it as such. I note that by the Counterclaimants' own pleadings,[302] the real licensor here was Mr Ng and not any of the Counterclaimants, and this is the essential difficulty with their case. This goodwill was first attached to the Hawker Business, and then the Company, while Mr Ng was alive.

135 Second, the Counterclaimants argue that the licensing arrangement *continued* despite Mr Ng's passing on 17 June 2013. They point to Mdm Loh's large increase in salary after Mr Ng's passing. They point out that there was an increase despite the fact that there was no change in workload for Mdm Loh. She was only wrapping *wantons* the whole time the Company was operating at the 287 Premises.[303] The defendants then conclude that her increase in salary could only be explained as her taking the benefit of the licensing agreement upon Mr Ng's death.

136 The facts show that the pay raises after Mr Ng passed away were not limited to the Ng family. Most staff received at least a 10% increase in salary,[304] and Bill's salary increased by 20% to $1,800/month. The pay for Pauline, Bill and the Ng family is tabulated here for easy reference:[305]

	2012	**Jan 2013 – Apr 2013**	**May 2013**	**June 2013**	**Jul – Aug 2013**	**Sept 2013 onwards**

302 Set Down Bundle, p 128 - Further and Better Particulars of the 2nd, 4th, 5th and 6th Defendants dated 5 March 2019; Set Down Bundle, p 115 - Further and Better Particulars of the 1st and 3rd Defendants' Defence filed 4 March 2019.

303 Transcript, 5 August 2020, p 154 lines 5 – 7.

304 4AB 2013 – 2017.

305 4AB 1994 – 2007; 4AB 2008 - 2025; 4AB 2026 - 2040 – Company Payroll Excel Sheet 2014.

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	2012	**Jan 2013 – Apr 2013**	**May 2013**	**June 2013**	**Jul – Aug 2013**	**Sept 2013 onwards**
Pauline	1,200 - 1,500	1,200	1,200	1,200	1,200	1,200
Bill	1,500	1,500	1,500	1,500	1,500	1,800
Mr Ng	5,000	5,000	5,000	5,000	-	-
Desmond	5,000	5,000	5,000	5,000	5,000	5,500
Mei Ling	2,000	2,000	2,000	2,200	2,200	2,400
Ah Keat	1,200	1,200	1,200	1,200	1,200	1,300
Mdm Loh	500	500	850	1,050	3,500	3,600

137 Therefore, the mere fact of a pay raise could not give rise to the inference that the Ng family and the Company had a licensing arrangement. The combined increment of Desmond, Mei Ling, Ah Keat and Mdm Loh's salaries from May 2013 (before Mr Ng passed away) to September 2013 (the salaries they eventually settled on) amounted to $3,750, which was less than Mr Ng's salary prior to his passing. The business was doing well, and a recognition of the Ng family's central role in the business would not necessarily lead to an inference that first, the Ng family owned the goodwill in the Company's business; and second, there was a licensing agreement with the Company. Even more fundamentally, there is no evidence that Mr Ng assigned that goodwill to his

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entire family. This leads to the Counterclaimants' arguments on heritage, which I turn to.

(2) Heritage ownership

138 The Counterclaimants' contention is that the "Family Wantan Mee Business", along with all the goodwill vested in it, had always been "meant to be passed down from generation to generation".[306] A family intention is not, however, sufficient. The case remains that ownership of goodwill must be proven as a fact, and must attach to a business: *CDL Hotels International Ltd v Pontiac Marina Pte Ltd* [1998] 1 SLR(R) 975 at [46]. The Counterclaimants' argument assumes that it attaches to Eng's Char Siew, the business of Mui Hong and Mei Ling. I reject this assumption, which relies on the contribution approach, for reasons I detail below.

(3) Contribution approach

139 The Counterclaimants submitted that the Ng family had made "substantive and critical contributions" to the Company's operations.[307] The implication here was that contribution to the Company's operations, either in cooking, finances, "back-end preparation" or artwork design,[308] entitled the contributors to ownership of the goodwill.

140 This argument relied on *Gromax Plasticulture v Don. & Law Nonwovens Ltd* [1998] EWHC Patents 316 ("*Gromax*"). There, the plaintiff-distributor had a "developing range of 'Gro-' products" and the defendant-

306 2DCS at para 44.

307 2DCS at para 64.

308 2DCS at para 64.

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manufacturer had "a stable of '-Shield' products": *Gromax* at [72]. The plaintiff had marketed a plastic crop cover manufactured by the defendant which would be marketed under the name "Gro-Shield". The parties had agreed to cooperate in the promotion of Gro-Shield. In the initial period, the product was sold in a way which identified the defendant as the manufacturer. However, all subsequent publicity served to link the product with the plaintiff alone. The relationship between the parties later deteriorated and the defendant registered a trademark under the "Gro-Shield" name. The plaintiff applied for an injunction against the defendant and asserted an exclusive right to use the name "Gro-Shield". This application was refused. Lindsay J held that the goodwill associated with the Gro-Shield name had been vested in the parties jointly.

141 *Gromax*, however, is not strictly speaking an endorsement of the contribution approach. *Gromax* involved a licensing agreement. *In that licensing context*, Lindsay J looked to whether the plaintiff-licensee had "performed a more significant role than one might expect from a mere distributor" (*Gromax* at [70]), entitling him to claim ownership of the goodwill in the product. The holding in *Gromax* does not apply to the present case. The Counterclaimants are not suggesting that the Ng family had been licensees which had contributed in a manner beyond what is "reasonably incidental to the maintenance or promotion such commercial interest in the name as the license had conferred upon the licensee" (*Gromax* at [74]). If anything, they are contending that the Ng family was a *licensor* of the Eng's Trade Names (see [129] above).

142 In fact, Lindsay J considered the issue of contribution as a part of his consideration of the true test of ownership of goodwill, to ascertain the party *perceived* by the public as being responsible for the product. Whether he was considering the "presentation of [the product] to the public" (at [72]), the

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"evidence of the 10 [customers] who were called" (at [73]) or the manner in which the "Gro-Shield" name was used (at [75]), the Lindsay J was at all times concerned with whether there was a "clear association in [the customers' minds] between "Gro-Shield" and [the plaintiff]" (at [73]), whether the product had been "described in a way that showed its association with [the defendant]" (at [74]) and what was the "public perception of who was responsible for the character and quality of the goods" (at [75]). The focus of Lindsay J's judgment, in other words, was to identify who the relevant goods and services were identified with in public perception.

143 In this particular case, to illustrate public perception, the Counterclaimants produced two long-time patrons, Mr Too Shen Pin and Mr Kervin Seng, who testified that "[a]t all times [they] attribute[d] the Wantan Mee, its business and its recipe to the Ng family."[309] But this was not cogent evidence that the Counterclaimants were identified with the unique aspect that attracted custom. An assortment of food blog reviews,[310] local broadsheet columns,[311] magazine clippings[312] and alternative news media articles[313] adduced were not helpful as well. These did not show that the public attributed the goodwill to other members of the Ng family aside from the late Mr Ng or Desmond. Even if such news coverage was taken as reliable evidence of who the public attributed the goodwill to, those persons would have been the late Mr Ng and at most, Desmond. Even Mr Seng recounted that as far as "operating the

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309 Too Shen Pin's AEIC dated 18 June 2020 at para 8; Seng Liang Huat Kervin's AEIC dated 18 June 2020 at para 14.

310 4AB 2191, 2193, 4AB 2196, 2200, 2207, 2214, 2344, 2340, 2079.

311 1AB 364.

312 1AB 363.

313 8AB 3586.

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hawker stall and operating 287 Tanjong Katong Road"[314] went, it was "always … Desmond and his father before the father passed away".[315] Moreover, the evidence of Mei Ling and Mui Hong made clear that they remained dependent upon Desmond's presence at the Eng's Char Siew to bring in custom.[316] Nevertheless, Desmond is not a plaintiff in the Counterclaim; neither is there any assertion made in the Counterclaim that he is the owner of the goodwill. The Counterclaimants were Mei Ling, Mui Hong and Eng's Char Siew, who are unable to prove ownership over the goodwill. The counterclaim therefore fails at this threshold step.

Misrepresentation and damage

144 Besides failing to establish ownership of the goodwill, the Counterclaimants did not make out the element of misrepresentation by the defendant to that Counterclaim either. The entity responsible for any claimed misuse (if the Counterclaimants had successfully established ownership of the goodwill) would have been Eng's Wantan Noodle. Instead, the Counterclaim was pursued against Pauline. Even if Pauline had been an "accessory" in the tortious act, as claimed in the Counterclaimants' submissions,[317] the fact remains that Eng's Wantan Noodle is a separate legal entity. The counterclaim should have been brought against the particular party responsible for any misrepresentation. Neither was it pleaded that Pauline and Eng's Wantan Noodle were in any kind of conspiracy. It follows then that the final element of damage is not made out either. The Counterclaim is accordingly dismissed.

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314 Transcript, 5 August 2020, p 127 lines 14 – 15.

315 Transcript, 5 August 2020, p 127 line 21.

316 Transcript, 30 July 2020, p 116 lines 10 – 19; 4 August 2020, p 143 lines 2 – 7.

317 Transcript, 28 September 2020, p 45 lines 3 – 17.

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Conclusion

145 In conclusion, I dismiss both the claim and counterclaim. I shall hear counsel on costs.

Valerie Thean
Judge

Leslie Yeo and Jolene Tan (Sterling Law Corporation) for the plaintiff;
Suresh S/O Damodara, Clement Ong and Joni Khoo (Damodara Ong LLC) for the first and third defendant;
Leo Cheng Suan and Denise Tay (Infinitus Law Corporation) for the second, fourth, fifth and sixth defendant;

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