IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA(I) 8

Civil Appeal No 3 of 2022

Michael A Baker (executor of the estate of Chantal Burnison, deceased)

… *Appellant*

And

(1) BCS Business Consulting Services Pte Ltd
(2) Marcus Weber
(3) Renslade Holdings Limited

… *Respondents*

In the matter of SIC/SUM 25/2021 in SIC/S 3/2018

Between

Michael A Baker (executor of the estate of Chantal Burnison, deceased)

… *Plaintiff*

And

(1) BCS Business Consulting Services Pte Ltd
(2) Marcus Weber
(3) Renslade Holdings Limited

… *Defendants*

Version No 2: 21 Sep 2022 (16:28 hrs)

JUDGMENT

[Equity] — [Remedies] — [Account]

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Baker, Michael A (executor of the estate of Chantal Burnison, deceased)
v
BCS Business Consulting Services Pte Ltd and others

[2022] SGCA(I) 8

Court of Appeal — Civil Appeal No 3 of 2022
Steven Chong JCA, Belinda Ang Saw Ean JAD and Arjan Sikri IJ
26 July 2022

21 September 2022 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 It is an essential duty of any trustee to maintain and render a proper and accurate account of trust assets. That duty is part of the irreducible core of obligations owed by trustees to beneficiaries. Any unexplained failure or omission of a trustee to properly account to the beneficiaries may result in a court resolving doubts against such a trustee. That is entirely a consequence of the court placing the burden of proof on trustees to discharge their duties to the beneficiaries in providing complete, proper and accurate account of the trust assets.

2 The present case turns on role of the burden of proof in deciding whether certain expenses that were reflected in the trustees' account of trust assets had been properly incurred. The beneficiaries had sought to falsify numerous

expenses which were broadly termed as "Other outgoings including miscellaneous costs and expenses" ("Other Outgoings") and amounted to nearly US$3.66m. Supporting documents were not furnished for these expenses and only bare assertions were provided by the trustees in respect of them. The Singapore International Commercial Court ("SICC") found substantially in favour of the beneficiaries, but declined to falsify two deductions of US$340,000 and US$50,000 (the "Deductions") on the basis that the explanations for them were reasonable. The present appeal only pertains to the Deductions.

3 We heard the present appeal together with CA/CA 70/2021 ("CA 70"). Our decision for CA 70 may be found in *BCS Business Consulting Services Pte Ltd and others v Baker, Michael A (executor of the estate of Chantal Burnison, deceased)* [2022] SGCA(I) 7. That judgment being released simultaneously with this, we adopt the same terms of reference and abbreviations employed therein for this judgment unless otherwise specified.

Background facts

4 The appellant is Mr Michael A Baker, the executor of the estate of Ms Chantal Burnison (the "Estate" and "Chantal"). The respondents are Mr Marcus Weber ("Weber") and two companies he controls, namely BCS Business Consulting Services Pte Ltd ("BCS") and Renslade Holdings Limited ("Renslade (HK)").

5 The present appeal is against the decision of the SICC in *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2022] 3 SLR 252 (the "Judgment") to decline to allow the beneficiaries to falsify two expenses in the respondents'

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account of the trust assets. This followed the decision of the SICC in SIC/S 3/2018 ("Suit 3") in *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2020] 4 SLR 85 (the "Suit 3 Judgment"), in which the SICC found that there was a trust constituted by an oral agreement between Chantal and Weber. The SICC found that BCS and/or Renslade (HK) held the rights to the inventions and patents of the compound "Ethocyn" and the income or proceeds generated therefrom (collectively, the "Trust Assets"), and/or the moneys paid by Nu Skin International Inc to BCS (the "Trust Moneys") on trust for the Estate. Accordingly, the SICC ordered that the respondents provide a detailed account of all transactions that had taken place in respect of the Trust Assets and/or Trust Moneys, and granted an order that the respondents pay to the appellant all the sums due to it on the taking of the account. This decision was subsequently upheld on appeal in CA/CA 76/2020.

6 Following the Suit 3 Judgment, on 13 October 2020, the respondents filed an affidavit, Weber's 19th affidavit, to account for the Trust Assets and Trust Moneys (the "Partial Account"). Following the exchange of correspondence between the parties, the respondents filed a further affidavit on 19 April 2021, Weber's 20th affidavit, providing a combined account of the Trust Assets and Trust Moneys for the period from 2000 to 2021 (the "Combined Account"). Subsequently, after the respondents disagreed with the sum demanded of it in the aggregate sums of US$14,377,533.52 and CHF1,721,816.99 (comprising the sums due on the taking of account, namely US$10,361,395.25 and CHF1,662,894.67 plus accrued interest) and consequently did not pay over the amount, the appellant filed SUM 25 on 14 May 2021 seeking, *inter alia*, orders that the respondents pay over the sums of US$10,361,395.25 and CHF1,662,894.67 plus interest.

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7 The Deductions that are the focus of CA 3 are part of a single entry (S/N 430) in the Combined Account that was described as "Other Outgoings". This was incurred over various dates and amounted to a very substantial sum of US$3,659,469.30. Other alleged expenses which came under this entry included consulting services provided by Weber to develop and expand the Ethocyn business as well as general and administration expenses incurred by Renslade Singapore Pte Ltd ("Renslade (S)") for the Ethocyn business from 2000 to 2007 in the sum of about US$1.03m.

8 As regards the US$340,000 deduction, Weber had deposed that:

> In our[*sic*] around 2010, Ms Burnison informed me that a former friend of Heika, a French attorney, was blackmailing Heika. She did not give me any details, but informed me that this was a very serious situation. To resolve this, Ms Burnison asked me to pay the French attorney the amount of USD 340,000. I paid it as requested.

9 As for the US$50,000 deduction, he had deposed that:

> For the establishment of the Amarillis Foundation I had expenditures of about USD 50,000, including but not limited to the following:
>
> (a) legal fees for the preparation of the deed of incorporation and the Regulations of the Amarillis Foundation (Panama) by Mr Wehinger [a Swiss attorney];
>
> (b) expenses for the incorporation of the Amarillis Foundation in Panama; and
>
> (c) follow-up costs for the administration of the foundation (e.g. levy for the maintenance of the foundation).

10 The Amarillis Foundation (the "Foundation") is mentioned earlier in that affidavit as being first discussed between Chantal, Mr Wehinger and Weber in Zurich in 2014. Based on this, Weber deposed that he:

> (a) developed a concept for the transfer of Ethocyn Rights and revenues to a foundation under Panamanian law;

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> (b) discussed the concept of the foundation at several meetings with Ms Burnison and Heika as well as with Mr Wehinger who later prepared the Regulations of the Foundation;
>
> (c) assigned lawyers to set up the foundation; and
>
> (d) made arrangements to transfer assets into the foundation.

11 Details of the Foundation were furthermore discussed at a meeting between the appellant, Chantal, Weber and Mr Wehinger in Los Angeles in May 2016, where according to Weber, Chantal agreed to the by-laws of the Foundation. In the Suit 3 Judgment, the SICC noted Heika's evidence that at a meeting with Weber and Mr Wehinger in Zurich in July 2016, they had spoken to her about the Foundation, which was explained as a vehicle to return the alleged Trust Assets/Moneys to Chantal (see the Suit 3 Judgment at [171]). The Regulations of the Foundation were shown to Heika at the meeting and were included in the Agreed Bundle.

12 The respondents submitted that the entry relating to "Other Outgoings" reflected various expenses that were incurred by them for "the extensive work done for the Ethocyn business and/or with [Chantal's] approval over the course of about 20 years". Further, although they had not been able to locate supporting documents for these expenses, they had provided evidence on the work done and expenses incurred which fell under this head of expense.

13 The appellant deposed that the alleged US$340,000 deduction was "preposterous" since:

> … To the best of my knowledge, there was no payment made to a French attorney regarding any issue of blackmail. There is not a single piece of documentary evidence to support Weber's allegation. In fact, there is no supporting document, such as invoices or emails from Chantal, Birka, Heika or me to show

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> that the aforementioned payments were requested/approved by us or to verify the amounts paid.
>
> [emphasis in original]

14 The appellant also submitted that, in respect of the US$50,000 deduction, there was also no evidence of such a payment.

15 The appellant argued that the US$3,659,469.30 claimed under this entry was made without the production of any documents to show what, when and to whom the amounts were paid. It was submitted that given the precision of the sum (down to the cent), the respondents ought to have documents to at least verify the amount incurred. Yet there were no supporting documents or even a specific breakdown for the amount. The appellant observed as well that although the total amount was calculated as US$3,659,469.30 in the Combined Account, this was later increased in Weber's 21st affidavit to US$3,683,376.22, and no explanation was given for the increase. It was claimed that in all likelihood, the respondents had arrived at the sum via "backwards engineering": they had probably deducted the other expenses incurred from the total income and derived this balance amount which they labelled as "Other Outgoings". This would ensure that the respondents would not have to pay any further amount to the appellant.

Decision below

16 The SICC observed that when a beneficiary falsifies an entry in the account, the beneficiary is challenging or disputing the alleged use of the trust funds. The burden then lies on the trustee to prove that the disbursement was authorised (see the Judgment at [21], citing *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2019] 4 SLR 714 ("*Cheong Soh Chin*") at [78] and *Dextra Partners Pte Ltd and another v Lavrentiadis, Lavrentios and another*

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appeal and another matter [2021] SGCA 24 ("*Lavrentiadis (CA)*") at [46]). However, a trustee is also entitled to be indemnified out of trust property for costs and expenses properly incurred in the course of managing the trust (see the Judgment at [22]). In applying the burden of proof, the SICC recognised that a trustee owes a duty to keep records and to be ready to give an account, although it found that the respondents could not be considered as professional trustees for whom a stricter level of disclosure would be required to discharge the duty to furnish an account on a common basis (see the Judgment at [23]–[26]).

17 On the entry for "Other Outgoings", the SICC observed that the total sum of US$3,659,469.30 (for which no breakdown was provided) was *prima facie* suspicious, as the accounts "neatly resulted in no money being owed" by the respondents to the appellant. It rejected the respondents' submission that everything was or must have been spent for the purpose of the Ethocyn business; the respondents could not "claim broad swathes of expenses with generic explanations". The SICC therefore approached its analysis from the position, in respect of S/N 430, that none of the deductions stated therein should be allowed unless the respondents could show that they had satisfied their burden of proof (see the Judgment at [129]).

18 The SICC found that the US$340,000 deduction was justified as the situation described by Weber was very specific, and it might have been reasonable in the circumstances that Chantal's request was not documented. There were also no counterindications that this expense was not directed by Chantal, apart from the appellant's denial that this ever occurred. Further, no evidence was adduced from Heika to dispute Weber's account (see the Judgment at [132]).

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19 The SICC was similarly of the view that there was sufficient basis for the US$50,000 deduction. It noted that, in the Suit 3 Judgment at [177], it had found that certain meetings in May and July 2016 were for the purposes of discussing how to return the alleged Trust Assets and/or Trust Moneys to Chantal and her daughters through the Foundation. Since it was apparently only at a meeting in December 2016 that Weber claimed to be the beneficial owner of the Trust Assets, it appeared that there were some steps taken towards effecting a transfer of the Trust Assets through the Foundation, and these expenses incurred in doing so would have been properly made (see the Judgment at [133]).

20 As the SICC did not accept the respondents' claims relating to the other deductions under S/N 430, it held that the category of "Other Outgoings" should be reduced to US$390,000 only, being the sum total of the Deductions (see the Judgment at [130]–[132] and [134]).

The parties' submissions on appeal

21 The parties do not dispute the applicable principles on the falsification of accounts that were applied by the SICC (as stated at [16] above).

22 The appellant argues that the SICC failed to consider: (a) the lack of documentary evidence and particulars supporting the Deductions, which amounted to a failure by the respondents to discharge their burden of proof; (b) the fact that the Deductions were not raised in earlier accounts provided by the respondents or in the parties' correspondence, and were only raised belatedly without proper substantiation; and (c) that Weber was shown to be a dishonest and unreliable witness.

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23 The respondents argue that: (a) the SICC had correctly considered the surrounding circumstances in finding that approval was given for the Deductions (or that they were otherwise validly incurred) and rejected the appellant's central contention that they were not supported by documentary evidence; (b) the fact that Weber only mentioned them in his 21st affidavit was at best a neutral factor on the issue of falsification, and could be explained by the fact that Weber was only able to recall them prior to filing the same; and (c) the SICC had the opportunity to assess Weber's credibility in Suit 3, and nevertheless found in favour of the respondents in relation to the Deductions.

Our decision

The duty to provide proper, complete and accurate justification and documentation

24 The duty of a trustee to be constantly ready with his account has been said to be the "first duty" of a trustee (*Pearse v Green* (1819) 1 Jac & W 135 at 140; cited in *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 4 SLR 339 at [86]). In providing an account to the beneficiaries, it has been said that what is required from a trustee is: (a) he must say what the assets were; (b) he must say what he has done with the assets; (c) he must say what the assets now are; and (d) he must say what distributions have taken place (*Ball v Ball and another* [2020] EWHC 1020 (Ch) at [24]). The trustee must by the accounting process give "proper, complete, and accurate justification and documentation for his actions as a trustee," as the taking of an account is a means to hold the trustee accountable for his stewardship of trust property (*Lalwani Shalini Gobind and another v Lalwani Ashok Bherumal* [2017] SGHC 90 at [23]).

25 Thus, as noted in John McGhee QC and Steven Elliott QC, *Snell's*

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Equity (Sweet & Maxwell, 34th Ed, 2020) at para 20-013, the accounting procedure serves the informative purpose of allowing the beneficiaries to know the status of the trust property and what transformations it has undergone. The procedure may identify specific assets in respect of which the beneficiaries may be entitled to proprietary relief. Further, it has a substantive purpose in that any personal liability from maladministration of the trust may be ascertained. In this regard, the onus of proof to explain the trustee's disbursements is on the trustee since he has the day-to-day management and control over the funds. He must therefore show that his management and disbursements of the funds was consistent with the trust (*Maintemp Heating & Air Conditioning Inc v Momat Developments Inc et al* (2002) 59 OR (3d) 270 at [40]–[44]).

Delay in the provision of breakdown and changing figures

26 It is therefore particularly glaring that the respondents were not ready, over the course of about ten months, to provide even particulars in the form of a breakdown for the "Other Outgoings"; much less furnish any documentary evidence in respect of them. The duty to render proper accounts when called upon was clearly not performed (*Kemp v Burn* (1863) 4 Giff 348 at 349–350). It is notable that in October 2020, the appellant's solicitors had already objected to the then-sum of US$4,459,813.37 claimed to represent "Other Outgoings" on the basis that these purported expenses had not been identified, nor shown to have been incurred for Ethocyn-related purposes or authorised by Chantal. It was pointed out that the respondents had not exhibited *any* supporting documents at all in respect of the significant expenditure. The lack of information and documents as regards the deductions under the "Other Outgoings" was again emphasised to the respondents' solicitors in March 2021. This objection was repeated in the appellant's 23rd affidavit filed on 16 April 2021.

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27 Yet, it was only in Weber's 21st affidavit filed on 10 August 2021 (about ten months after the objections were first raised by the appellant) that details on the breakdown of the sum were provided. At the same time, as pointed out by the appellant, the total sum of these "Other Outgoings" was different in each of Weber's affidavits filed for the purposes of providing an account for the Trust Assets: from US$4,459,813.37 in the Partial Account, to US$3,659,469.30 in the Combined Account, and US$3,683,376.22 in Weber's 21st affidavit. But apart from the fact that, until Weber's 21st affidavit, no explanation was forthcoming as to how the amount was arrived at, conspicuously, there was also no documentary evidence supporting the constituent expenses.

The level of documentation needed

28 As noted by the High Court of Ireland in *Augustus Terence Chaine-Nickson v The Bank of Ireland and ors* [1976] IR 393, the trustees' obligation to account is not satisfied by merely giving particulars of payments made by them, but extends to providing copies of the trust accounts and information as to the investments which represent the trust fund (at 397). The beneficiary is entitled to information as to the way in which the trust fund has been invested and dealings by the trustee with it (at 398). The information required depends on the nature of the fund or property: for example, if the investment is real property, details regarding any expenditure in relation to the real property and rents and profits received would be required. And in the case of a trust fund held entirely in a bank account, the giving of an account might be straightforward, though the obligation to account might be more onerous when decisions have been made regarding the movement of monies (*Best & anor v Ghose & ors* [2018] IEHC 376 ("*Best v Ghose*") at [92]).

29 We note, at this juncture, that the SICC had found that the respondents

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were not professional trustees in the sense of being engaged in the profession or business relating to trusts (see the Judgment at [26]). They were therefore not to be held to the standards of a professional trustee, with the court quicker to make adverse findings against them if inadequate records were kept (see the Judgment at [24]). Weber was, however, a businessman who provided services for Chantal that were, at times, professional services (see the Judgment at [24]–[25]). Even so, in our judgment, the bare assertions of Weber do not go towards the level of documentation that he ought to have provided in relation to both the *fact* of payment and the *quantum* thereof.

30 In our judgment, there is nothing particularly sophisticated about the essential task of a trustee, whether professional or lay, in documenting expenses. Save for exceptional circumstances which are discussed below, a trustee is expected to provide an explanation for the breakdown of expenses and to substantiate the same with sufficient supporting evidence, oral or documentary depending on the nature and quantum of such expenses. This would particularly be the case for the respondents given Weber's background and experience as a businessman who was "described by Chantal as an 'accountant' and [was] doing as she instruct[ed] and reporting back to her", as observed by the SICC (see the Suit 3 Judgment at [99]). As someone who was adjudged to be working for Chantal as a trustee and who earned commission for that work (see the Suit 3 Judgment at [187]–[188]), it is difficult to give allowance for Weber's lack of accounting records of the work he had done in respect of the Deductions, even if the work was not done as part of a business relating to trusts.

31 It has been recognised that the court may make some allowances for a lay trustee's accounting (*Sveinson v Sveinson Estate* [2012] MJ No 26 ("*Sveinson*") at [116]). For example, in *Ross v Ross* (1896) SC 67, the mother, the sole guardian of her son following her husband's death, was unable to

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produce accounts for payments made towards the upkeep of establishments and her son's maintenance. The House of Lords held that notwithstanding her failure as the guardian to keep strict accounts, she was entitled to a fair and reasonable allowance out of the income of his estate, having "in other respects done her duty by the ward" (at 78–79). On the other hand, in *Sveinson*, the Manitoba Court of Queen's Bench considered that an executor could not be credited with the full amount for work that he claimed to have done for the estate. There were no reliable records of the tasks which he had done and the time which he had spent doing them. It was also difficult to make allowances for his accounting given his assertions that he had, *inter alia*, "owned or managed large business enterprises", as well as his lack of credibility (at [115]–[117]). The trustee in that case had made no records of monetary transactions and ultimately accepted responsibility for the amounts for which he could not account (at [78] and [91]).

32 The following cases illustrate that a non-professional trustee such as the respondents should nevertheless furnish documentation on the fact and quantum of payment:

(a) Both aspects were in issue in *Lau Koon Ying Matthew as the Executor of the estate of Lau Yiu Wing, deceased ("the Deceased") v Lau Tark Wing and another* [2019] HKCU 1595 ("*Matthew Lau*"), where the Hong Kong Court of First Instance rejected the proposed deduction of expenses by the accounting party (a chartered accountant) in relation to rental proceeds. These were not supported by documentation: among other things, a blanket 10% that was claimed for repairs for wear and tear was rejected for lack of supporting documentation or particulars; and a claim of tax purportedly paid by the accounting party's two companies was also rejected, as the court did not

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see the financial statements of the two companies and could not accept on balance that the expenses had been paid (at [25]).

(b) The fact of payment was also unclear in *Wecomm Limited v Rosenhoiz* [2004] EWHC 1854 (QB) ("*Wecomm*"), where the plaintiff company sought to recover £10,000 of the company's cash which had been entrusted to the defendant, its former chief executive officer, and which he had requested from the company's chief operating officer. The evidence from another witness was that the witness had received the money and passed it to a third person who said he would help "open doors", but no receipt was given or requested (at [84]). The English High Court was of the view that the company was entitled to recover it from the defendant, given that the money was received by him but "has disappeared in dubious circumstances where it is said that it has gone to a shadowy figure" (at [88]).

(c) On the other hand, the fact and quantum of payment were sufficiently proved in *Chan Fuk Tai & ors v Chan Wai Ming* [2020] HKCU 1567 ("*Chan Fuk Tai*"). There, even though evidence on the part of the administrator of an estate was scant and it was unclear from the invoices produced for various claimed renovation works whether he had in fact paid those sums, the Hong Kong Court of First Instance was satisfied that these were incurred based on the oral testimony from a contractor who confirmed that the works were indeed performed, verified the amounts in the invoices, and that the administrator had properly paid these amounts to him (at [51]–[55]).

33 Whilst it may be true that there is no rigid requirement for the respondents as trustees to always adduce supporting documents for every

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transaction, that will ultimately depend on the nature of the expenses, the quantum and whether such expenses would typically be reflected in some documentation. Thus, while a trustee who is able to provide documentary evidence in support of deductions would be placed in a favourable position to discharge his burden of proof, where such documentary evidence is not available, oral evidence may suffice. However, the quality of that oral evidence will naturally be subject to the scrutiny of the court and in this regard, it would be helpful for a trustee to have other cogent evidence to corroborate his oral account.

34 For example, in the context of the administration of an estate, it has been observed that under the customary practice, proper accounts must show "all receipts as well as payments, which should be supported by vouchers, and the … trustee must also furnish information sufficient to verify the fact of any investment transaction". However, in the absence of vouchers, oral evidence of disbursements may be allowed (*Phillip Allan Yates & ors v John Norman Phillips Halliday* [2006] NSWC 1346 at [58]). This was the case in *Christensen v Christensen and another* [1954] QWN 37 ("*Christensen*"), where the trustee in administering an estate which included a farming property had not preserved detailed accounts and had few vouchers relating to the accounts of this business. The accounts also extended over a period of many years and money was expended in the ordinary course of running the farm. Macrossan CJ in the Queensland Supreme Court heard oral evidence from the farm's manager as to the expenses incurred and an independent expert on the probable cost of operating the farm. He also accepted in evidence the proved copies of income tax returns with schedules attached, and eventually allowed many unvouched items.

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35 Further, in *Chan Fuk Tai*, the court had also allowed various miscellaneous expenses relating to travel as well as other expenses incurred in the administration of the estate, even though the administrator did not produce any documentary evidence for them. The court accepted the explanation for many of these items and found that their nature was such that they were properly incurred. They included opening up the deceased's safe deposit box, two meals which included family members of the deceased and expenses incurred in assessing and demolishing damaged windows at the deceased's property following a fire which the plaintiff beneficiaries did not dispute took place. It was also significant that these amounts (of about HK$63,247 in all) were in the court's view modest and reasonable (at [67]–[76]).

36 The court will also take a practical view in assessing whether documentary evidence supporting certain expenses might exist or otherwise cannot be obtained. In *Exsus Travel Ltd and others v Turner and another* [2014] EWCA Civ 1331 ("*Exsus*"), the English Court of Appeal noted that while the legal burden is on an accounting party to justify payments made for the benefit of the beneficiary, "how that burden is discharged will vary from case to case" (at [42]). It found that the judge below was entitled to find that the respondent ex-employees had discharged their burden of proof even if "not every paper and electronic trail could be pursued to an entirely satisfactory conclusion" (at [47]). This was because the court assessed and accepted the explanations given on how company credit cards were used on a day to day basis, considered the available documents disclosed by the company, and noted that an ex-employee was entitled when called upon to account to say that the records underlying the payments should still be with the ex-employer and had not been disclosed (at [57]–[59]).

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The US$340,000 deduction

37 With the above principles in mind, we turn now to the Deductions. The SICC found that the US$340,000 deduction was justified given the specificity of the situation described by Weber, and it was reasonable that Chantal's request was not documented. There was also no counterindication apart from a bare denial and no evidence was put forward from Heika, the purported victim of the blackmailing incident (see the Judgment at [132]). On appeal, the respondents contend that Weber had specifically described a unique situation that was within his personal knowledge, and that they have always maintained that Chantal often gave instructions informally or orally.

38 With respect, these reasons do not justify the refusal to falsify this specific and substantial expense. Taking the respondents' case at its highest that, given the *nature* of the expense, Chantal might not have reduced her instructions into writing, the fact remains that such expenses should readily be supported by some form of documentation. Here, it is totally bereft of any material detail let alone supporting documents. The name of the French attorney to whom the sum of US$340,000 was paid has not even been revealed, even on a confidential basis to the court. This hardly amounts to sufficient information and documentation that is necessary to understand the expense allegedly paid or its nature (*Best v Ghose* at [93]).

39 The specificity of the situation described by Weber does not compensate for or account for the *total absence* of any material detail in respect of the US$340,000 deduction. As pointed out by the appellant, the SICC had falsified other entries for which the respondents had similarly provided specific descriptions. For example, the respondents had alleged that two payments of US$331,269.08 in total were made to a company known as Plexus AG at the

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oral instruction of Chantal, who had purportedly stated that the company was owned by her and her ex-husband (see the Judgment at [66]). This assertion was rejected by the SICC, even though the respondents had provided an invoice from Plexus AG pertaining to one of the transfers and evidence showing the transfers from Renslade (S) to Plexus AG. Yet, the mere fact that the payment voucher for the invoice was signed by someone from BCS was found nonetheless to be insufficient basis for the SICC to infer that it was approved by Chantal. The respondents were thus found not to have discharged their burden of proof in relation to the deductions given, among other things, the absence of documentary evidence concerning Chantal's authorisation and the lack of evidence as regards the purpose of the transfers (see the Judgment at [67]).

40 In our view, greater scrutiny should similarly have been made by the SICC in relation to the US$340,000 deduction. It should moreover not be overlooked that US$340,000 is a very substantial sum (as opposed to, for example, the modest sums involved in *Chan Fuk Tai*) and there should minimally be some banking documentation to support this expense such as remittance instruction, bank statements, *etc*. Even if the original documents have been misplaced, there is no evidence that the respondents made any attempt to contact the relevant bank for the information.

41 Such failure to provide documents in support of payments that were purportedly made was additionally significant in *Excel Courage Holdings Ltd and another v Wong Sin Lai, also known as Wong Sin Lei and others* [2016] HKCU 440, where the defendant, a former director of the claimant company, stated that he had paid HK$30m in cash to another person, one Mr Lau, pursuant to an oral investment agreement. As part of the agreement, the defendant claimed to co-own the shares that the company had held, and which he was sued for disposing in breach of his fiduciary duties. The Hong Kong Court of First

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Instance accepted that in the context of business dealings involving Mr Lau, large cash transactions without a paper trail were "not improbable" (at [95]). But the assertion of the HK$30m payment to Mr Lau was entirely unsupported by any documentation, save for a sale agreement showing that the defendant had sold his interest in another company in consideration of two cheques totaling HK$33m a year prior. The court observed that although the defendant's story was initially thought to be "so fantastic that possibly it, or some of it, might be true", the absence of documentation in circumstances where some documentation of the money trail was expected meant that the defendant could not establish the alleged payment to Mr Lau (at [99]).

42 In the present case, a somewhat improbable event has similarly been alleged, in the context of a course of dealing where it has been claimed that Chantal often did not issue written instructions. But it is nevertheless the case that there should have been some form of paper trail to evidence the *payment*. Furthermore, while it is true that Heika could have come forward to deny the blackmailing incident, even if we are minded to draw the inference that the blackmailing incident did occur (again taking the respondents' case at its highest), this does not invariably mean that *any* blackmail amount was paid, much less the specific sum of US$340,000.

43 The irresistible inference is that the respondents have failed to provide any details of this expense for the simple reason that it would have led to a train of inquiry which may well disprove this expense. In the circumstances, for the court to allow this deduction would be to impermissibly reverse the burden of proof on the appellant.

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The US$50,000 deduction

44 This deduction was justified by the SICC on the basis that since there were some discussions about returning the trust assets through the Foundation, it may be concluded that the expenses were incurred on behalf of Chantal (see the Judgment at [133]).

45 But the mere fact that strict records of Chantal's instructions and approvals might not always be kept does not detract from the fact that there should nonetheless be supporting *third-party* documents for this expense. Any information regarding Chantal's discussions in relation to the Foundation would concern the authority to set up the Foundation and not go towards the fact that this specific expense had been incurred and paid.

46 We note as well that before us, counsel for the appellant contended that the Foundation did not in the first place exist. That was the position it had already taken in the proceedings in Suit 3 (see the Suit 3 Judgment at [30(c)]). Weber had deposed in those proceedings that he had intended to set up such a foundation in 2016, after Chantal had fallen ill, but did not do so in light of the appellant's commencement of Suit 3 in November 2017. In SUM 25, the appellant argued that this was inconsistent with Weber's claim in his 21s taffidavit that he had discussed with Chantal and Mr Wehinger about the establishment of a foundation in 2014 and even paid about US$50,000 to establish the same. In the Judgment, however, the SICC accepted that the Foundation had been set up, with "steps taken towards effecting the transfer of the Trust Assets through the Foundation" (see the Judgment at [133]).

47 We agree that any evidence surrounding the existence of the Foundation is wanting. There is no evidence of the incorporation and administration of the

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Foundation, apart from the Regulations of the Foundation as mentioned at [11] above. In any event and more significantly, even if the Foundation did exist, it bears repeating that this expense is one which should be fully capable of being supported by some third-party documents. To begin with, the payment of Mr Wehinger's fees for the Foundation is infinitely capable of proof such as via an invoice, remittance advice, bank statement or receipt. *None* of these usual documents has been disclosed. No attempt has been made to contact Mr Wehinger to provide the *usual* supporting documents and no explanation whatsoever has been provided as to why the respondents have failed to reach out to Mr Wehinger.

48 Therefore, taking the respondents' case at its highest that Chantal was aware of the Foundation and that some work might have been carried out to set up the Foundation, the issue before us is whether the specific deduction of US$50,000 should be falsified, bearing in mind the nature of the expense and the *total absence* of any documents in support of this specific expense.

49 In our view, if the respondents sought to justify this deduction with such bare and plainly unsatisfactory information, they must stand the risk that the court may find that the burden of proof in respect of this specific deduction of US$50,000 had not been discharged. Any other view would denude the legal effect of placing such a burden of proof on the respondents. The respondents have elected to adopt an all or nothing approach since they have opted not to provide any documents to support *any* sum for this expense. It is simply insufficient to show that *some* expenses might have been incurred. The relevant inquiry is whether the respondents have provided *any* proper, complete and accurate documentation to support the US$50,000 deduction. The answer is obvious.

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50 The present case therefore bears similarities with *Lavrentiadis, Lavrentios v Dextra Partners Pte Ltd and another* [2020] SGHC 146, where the High Court found that an "investment swap" allegedly entered into on behalf of the plaintiff, a client of a licensed foreign law practice ("Dextra"), was not in fact entered into as, among other things, there was no document whatsoever evidencing the agreement to enter into the swap, even though many different parties were involved. It was thus "incredulous that there [was] no objective contemporaneous record" of the alleged swap (at [59]). Similarly, it was found that certain expenses paid to a company called Carnelia (which was set up to provide services to Dextra's clients) was unauthorised as while Dextra produced the invoices issued by Carnelia in respect of the payments, there were no documents supporting the amounts billed by Carnelia, and no evidence that the plaintiff agreed to pay the amounts billed by Carnelia (at [122]). These findings were upheld on appeal in *Lavrentiadas (CA)* (at [33]–[41]). In the present case, there is even less evidence supporting any amounts that were paid in respect of this US$50,000 deduction.

51 *Cheong Soh Chin* is also instructive: there, it was held that the trustees could not discharge their burden of proof to show that a US$1,000 payment made under a fund was authorised, by simply claiming that a trip was taken that might have some connection with that fund (at [161]–[162]). It is therefore simply insufficient in the circumstances for the respondents to provide bare assertions in support of their case that the Deductions were made, and validly incurred.

52 We emphasise that this is not a case where there was some, but incomplete documentation to support the Deductions – as compared with the invoices furnished in *Chan Fuk Tai* and income tax returns in *Christensen* – or, as in *Exsus*, a reasonable explanation for the absence of certain payment records.

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Here, no documentation whatsoever was provided to support the Deductions and no coherent reason was furnished to explain that absence. No evidence was offered from other parties who could conceivably support the respondents' case. The lack of supporting documentation as to the fact of payment (*Wecomm*), much less any particulars in this regard (*Matthew Lau*), is fatal to the respondents' version of events. With respect, therefore, the SICC erred in finding that the respondents had discharged their burden of proof on essentially the mere say-so of Weber.

The relevance of the presumption

53 Although the appellant invites this court to presume against the respondents for their failure to keep proper records of the Deductions, we do not think it necessary to do so in the light of our finding above that the respondents had not discharged their burden of proof.

54 The appellant refers to *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 ("*Libertarian Investments*") where Lord Millett held that where the absence of evidence is the consequence of the fiduciary's own breach of duty, the court may nevertheless, among other things, "make every assumption against the party whose conduct has deprived it of necessary evidence" (at [174]). Where relevant documents have been destroyed, for example, the presumption is applied by drawing inferences or making assumptions contrary to the interests of the party responsible for such destruction, although such inference must also be consistent with the other evidence (*Malhotra v Dhawan* [1997] 8 Med LR 319).

55 In our view, the presumption is more applicable in a situation where an assessment of value or damages has become problematic due to wrongdoing by

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a trustee (*Katharine Myfanwy McNally & 7 Ors v Nicholas Peter Harris & 5 Ors (No. 3)* [2008] NSWSC 861 ("*McNally*") at [41]). In *Libertarian Investments,* where the defaulting fiduciary had not spent the plaintiff's money on company shares as claimed but had instead misappropriated the amount, one issue concerned the value that the court ought to attribute to 58% of the shares as a realisable price for them, for the purpose of equitable compensation (at [127]). The court noted that while there were evidential gaps in accepting the closing price of the shares on the date of the judgment (the company having subsequently been publicly listed), it would also be difficult to find a better basis for valuing those shares given that it had been nearly 10 years since the fiduciary claimed to have entered into that transaction, and the company was publicly listed three years ago with a new and changing set of shareholders. Thus, the court would apply a "robust approach" and assume that the listed shares traded were essentially the same as those which the fiduciary should have purchased on behalf of the plaintiff (at [137]–[139]; see, to similar effect, *McNally* at [42]–[45], in the context of equitable compensation).

56 The application of the presumption may also be seen in *Tang Tak Sum and another v Tang Kai Fong* [2020] HKCU 582, where the accounting party who had been in control and management of the subject property provided three different versions of the rental income that was received for the period from 1 April 2004 to 31 March 2015. He sought to claim that the actual amount of rent received was the lowest as in the third version, in the face of other evidence including the assessable value of the property as shown in tax demands for the same period. On the application of the presumption, the Hong Kong Court of First Instance disregarded the trustee's claim as to the amount of rent received for the period, in favour of the amount claimed by the beneficiary and which, on the trustee's admission, he had been receiving annually since 1 April 1995

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(at [55] and [62]).

57 Here, no evidence at all has been furnished by the respondents, and there is no real contest as to any ascertainment of value or loss. In these circumstances, the respondents have evidently failed to satisfy their burden of proof to show that the alleged expenses were incurred and properly so. Accordingly, the issue of drawing any presumption as regards any ambiguity of the quantum of the expense does not arise.

Conclusion

58 The appeal is therefore allowed. We award the appellant the costs of the appeal, fixed at S$30,000 inclusive of disbursements. The usual consequential orders shall apply.

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Arjan Kumar Sikri
International Judge

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