IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA(I) 2

Civil Appeal from the Singapore International Commercial Court No 7 of 2022

Between

(1) Tamar Perry
(2) Solid Fund Private Foundation

… *Appellants*

And

(1) Jacques Henri Georges Esculier
(2) Bonnet Esculier Servane Michele Thais

… *Respondents*

In the matter of SIC/S 4/2020

Between

(1) Tamar Perry
(2) Solid Fund Private Foundation

… *Plaintiffs*

And

(1) Bonnet Esculier Servane Michele Thais
(2) Jacques Henri Georges Esculier

… *Defendants*

GROUNDS OF DECISION

[Conflict of Laws — Choice of law — Equity]
[Conflict of Laws — Choice of law — Property]
[Trusts — Recipient liability — Proprietary liability]

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v
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[2023] SGCA(I) 2

Court of Appeal — Civil Appeal from the Singapore International Commercial Court No 7 of 2022
Judith Prakash JCA, Steven Chong JCA and Beverley McLachlin IJ
18 January 2023

2 March 2023

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 The essence of any Ponzi scheme entails the circulation of money among the scheme's investors. Like in all Ponzi schemes, some investors suffer losses, others make gains depending on when they entered and exited their investment. Typically, later investors in a Ponzi scheme will not benefit because at some stage, the money cycle will run out. This was precisely what happened in this case which eventually led to the present proceedings.

2 Both parties in CA/CAS 7/2022 ("CAS 7") were unsuspecting victims of a Ponzi scheme. However, the respondents exited their investment at a fortuitous time. In doing so, they realised the profits of their investment. It appeared that the money used to pay the respondents came from funds transferred by the appellants to the scheme. The use of one investor's funds to

repay another investor in this way is in itself not remarkable. That is after all the hallmark of any Ponzi scheme.

3 The slight complication in this dispute was that the payments received by the respondents were made by one of the companies in the group perpetrating the scheme, this company being Lexinta Group Limited ("LGL"). LGL was strictly speaking not an express party to the asset management agreements (the "AMAs") under which the respondents and the appellants made their investments. Yet, LGL was the entity that made the payments in question to the respondents. Those payments came about because the appellants had transferred the funds to LGL on the instruction of the individual behind the scheme.

4 This interesting aspect of the transfer inspired the appellants to raise various arguments including the significance of the start date of the Ponzi scheme, that the funds were subject to various trusts which the appellants were entitled to trace and recover, and that the respondents had notice of the appellants' claim at the time when the payments were received. However, as we will explain below, the relevance or otherwise of these various arguments ultimately depended on the governing law of the transaction. In that regard and unsurprisingly, competing candidates for the governing law were put forward in the court below and on appeal: Swiss law being the express choice of law under the AMAs, Singapore law being the *lex situs* of the funds and Hong Kong law being the law of the place of incorporation of LGL.

5 We heard and dismissed the appeal on 18 January 2023 after due consideration of the parties' respective submissions. We set out our detailed reasons below.

Background facts

Background to the dispute

6 The Ponzi scheme in question was administered by a group of companies (collectively referred to as "Lexinta") under the control of one Bismark Badilla ("Mr Badilla"). Lexinta comprised at least five companies, three of which were expressly defined in the AMAs as the companies comprising the "Lexinta Group". The "Lexinta Group" was named as the "Asset Manager" and the counterparty to the AMAs. The relevant provision in the AMAs reads as follows:

> ASSET MANAGEMENT AGREEMENT
>
> **BY AND BETWEEN:**
>
> …
>
> Hereinafter referred to as the CLIENT.
>
> **And**
>
> **Lexinta Group, (LEXINTA LTD) (LEXINTA MANAGEMENT LTD) (LEXINTA INC)**
>
> Hereinafter referred to as the ASSET MANAGER. CLIENT and ASSET MANAGER are hereinafter collectively referred to as the PARTIES.
>
> [emphasis in bold in original]

7 The other two companies in Lexinta were LGL and Lexinta AG who were not named in the AMAs.

8 The respondents were earlier investors in the Ponzi scheme and made their initial investment in April 2014 pursuant to an asset management agreement (the "Esculier AMA"). The appellants were slightly later investors and made their investment through two AMAs on 18 April 2016 and 7 July 2016 (referred to as the "SRE AMA" and "BGNIC AMA" respectively). All three

AMAs have substantially similar terms. As for how the appellants and the respondents were persuaded to invest in the Lexinta Group, Mr Badilla had represented to them that the Lexinta Group would invest the funds into initial public offerings ("IPOs") of listed securities prior to their listing and thereafter sell the holding in the open market after the listing for a profit.

9 In late 2015, the respondents decided to realise the profits of their investment. From August 2016 to February 2017, the respondents received various payments amounting to around US$10 million from LGL (the "Disputed Moneys"). It was also during this time that the appellants deposited in excess of US$25 million into LGL's DBS bank account in Hong Kong (the "LGL Account") pursuant to the SRE AMA and BGNIC AMA:

(a) US$7,020,750 was transferred by the first appellant or for the first appellant's benefit to the LGL Account:

(i) US$1 million on 19 April 2016;

(ii) US$1 million on 12 May 2016;

(iii) US$900,000 on 7 July 2016;

(iv) US$3,620,750 on 9 September 2016; and

(v) US$500,000 on 23 August 2017.

(b) The British Guarantee National Investment Company ("BGNIC"), an investment vehicle of the first appellant's family, transferred a total of US$18 million to the LGL Account:

(i) US$3 million on 11 July 2016;

(ii) US$7 million on 5 August 2016; and

(iii) US$8 million on 1 February 2017.

10 By way of a sale and purchase agreement dated 25 September 2017, the second appellant acquired certain assets of BGNIC, including BGNIC's right and interest to the moneys it had transferred to the LGL Account.

Procedural history

11 Through *ex parte* discovery orders from the Hong Kong courts, the first appellant discovered in March 2018 that the Disputed Moneys had been transferred to the respondents' DBS account in Singapore. DBS froze the respondents' account following demands from the first appellant's lawyers. The appellants and the respondents were unable to agree on the ownership of the Disputed Moneys. DBS therefore commenced interpleader proceedings in the High Court of Singapore by way of HC/OS 1016/2019 ("OS 1016"), where the appellants and the respondents were named as defendants. Dedar Singh Gill JC (as he then was) decided that it was not appropriate to decide OS 1016 summarily and ordered that the competing claims be determined in separate proceedings between the appellants and the respondents, with DBS's attendance in these further proceedings dispensed with. These proceedings later came to be SIC/S 4/2020 ("Suit 4").

12 On 15 July 2022, Suit 4 was dismissed by the Singapore International Commercial Court Judge (the "Judge") in *Perry, Tamar and another v Esculier, Bonnet Servane Michele Thais and another* [2022] SGHC(I) 10 (the "Judgment"). On 29 July 2022, the appellants filed a Notice of Appeal against the Judgment. Subsequently, on 22 September 2022, the parties to OS 1016 recorded a consent order in HC/ORC 4867/2022 (the "Consent Order")

providing for, among other things, the appellants' payment of the costs incurred in OS 1016 by DBS and the respondents.

Summary of decision below

13 In Suit 4, the appellants claimed that since LGL was not a party to the SRE AMA and BGNIC AMA, LGL held the Disputed Moneys on trust for the appellants pending LGL's transfer of the Disputed Moneys to the "Asset Manager" as defined in these AMAs to be invested. The Disputed Moneys were not the respondents' return on their investment. The payment of the Disputed Moneys did not discharge any obligation the Lexinta Group owed to the respondents under the Esculier AMA since it was paid by LGL. Under Hong Kong law, the appellants as beneficial owners were entitled to recover the Disputed Moneys from the respondents as the respondents were not *bona fide* purchasers for value without notice.

14 The respondents contended that the transfers were governed by Swiss law because the AMAs contained an express choice of Swiss law. Since Swiss law did not recognise the concept of a trust, the appellants' claim should fail. Moreover, LGL's payment of the Disputed Moneys had discharged the Lexinta Group's obligations under the Esculier AMA.

15 At the conclusion of the trial, the Judge dismissed the appellants' claim and allowed the respondents' counterclaim for an award of damages arising from the freezing of the Disputed Moneys in their DBS account. The Judge made the following findings:

(a) First, the Judge found that a Ponzi scheme had been in operation at the latest from 2015, but was unable to place any date on when the Ponzi scheme began.

(b) Second, even though LGL was not listed as part of the Lexinta Group in the AMAs, the AMAs extended by implication to include LGL as a party thereto. The Judge dismissed the appellants' claim on this basis because he viewed the appellants' case as being founded on the assertion that there was no contractual relationship between the parties and LGL, and that LGL therefore held the funds on trust for the appellants.

(c) Third, even assuming that LGL was not a party to the AMAs, Swiss law was the applicable law because the foundational source of the alleged trust was the AMAs, which were governed by Swiss law.

(d) Fourth, the appellants had no cause of action against the respondents under Swiss law because Swiss law did not recognise the concept of a trust.

(e) Fifth, even if Hong Kong law applied, the appellants could not claim against the respondents because the respondents were *bona fide* purchasers for value without notice.

(f) Sixth, the first appellant had standing to claim for the transfers, including the transfer of US$3,620,750 made on 9 September 2016 by another entity, JL Securities S.A. ("JL Securities") for the benefit of the first appellant. Nothing turned on this finding in this appeal.

(g) Seventh, the appellants were ordered to pay the respondents damages arising from the freezing of the respondents' DBS account because the respondents would otherwise have invested the moneys to achieve a higher return.

16 The appellants appealed against the whole of the Judgment, save for: (a) the Judge's sixth finding on standing; and (b) the Judge's finding that the sums paid by the appellants to LGL were never invested but were paid directly out to the respondents under the Ponzi scheme.

Respondents' preliminary objection

17 The respondents raised a preliminary objection to CAS 7. They argued that CAS 7 was no longer live because Suit 4, which spawned from OS 1016, had concluded following the Consent Order. We disagreed for two reasons.

18 First, the mere fact that Suit 4 was commenced on the court's directions in OS 1016 did not mean that Suit 4 and its appeal in CAS 7 would *ipso facto* be deemed as concluded following the Consent Order in OS 1016. This submission emanated from a misunderstanding of the nature of OS 1016 and Suit 4, and the effect of the Consent Order. Interpleader proceedings are unique because the respondents are not defendants but are instead competing claimants for the funds in the possession of the interpleader (*Precious Shipping Public Co Ltd and others v OW Bunker Far East (Singapore) Pte Ltd and others and other matters* [2015] 4 SLR 1229 at [58]–[60]). In OS 1016, the plaintiff was DBS and the defendants were *both* the appellants and the respondents. In Suit 4 and CAS 7, the action was commenced by the appellants to recover the Disputed Moneys in the respondents' DBS account. This action was premised on entirely different causes of action which were not before the court in OS 1016.

19 Second, the Consent Order conspicuously made no mention of Suit 4 or CAS 7. This was significant because by the time the Consent Order was entered into on 22 September 2022, CAS 7 was already pending before this court. If the intention of the parties to the Consent Order was also to resolve the merits of

the dispute over the Disputed Moneys, there was no reason why that was not specifically provided for in the Consent Order.

Significance of the start date of the Ponzi scheme

20 The start date of the Ponzi scheme was a fact in issue at the trial because the appellants ran the case that the Ponzi scheme pre-dated their and the respondents' investments in April 2016 and April 2014 respectively. The respondents' investments were not genuine because no money was ever invested, and any returns on the respondents' investment were "fake" and could only have come from moneys transferred to LGL by the appellants.

21 At the appeal hearing, we queried the appellants' counsel, Mr Paul Chaisty KC ("Mr Chaisty"), on the significance of the start date of the scheme to the appellants' claim because it appeared to us that whether the Ponzi scheme started before or after both parties' investments may not be helpful in determining the dispute. It seemed to us that this factual issue was raised by the appellants in aid of their trust argument. If the appellants' point behind proving the start date of the Ponzi scheme was to show that the Disputed Moneys received by the respondents were not "genuine" returns, then there would be no need to prove that the Ponzi scheme existed at the time the respondents made their first investment. It would have sufficed to show that the funds the respondents received were in fact the funds transferred by the appellants to LGL. This was precisely what the Judge found (Judgment at [82]) and there was no appeal against this finding.

22 In response to the appellants' argument that the Disputed Moneys were not "genuine" returns on the respondents' investment, the respondents denied in their Defence that the Disputed Moneys came from the appellants' transfers

to LGL. The respondents averred that the payment of the Disputed Moneys was instead the Lexinta Group's return of the respondents' investments in discharge of the Lexinta Group's obligations under the Esculier AMA. However, we did not think it could be seriously denied that the payments to the respondents came from the very transfers made by the appellants. This could be demonstrated by the close proximity in time between the appellants' transfers to LGL (see [9] above) and LGL's transfers to the respondents as illustrated in the table below:

S/N	Date	Description of transfer	Amount transferred
1	5 August 2016	BGNIC to LGL	US$7,000,000
2	**5 August 2016**	**LGL to the respondents**	**US$7,439,004.77**
3	9 September 2016	JL Securities to LGL for the first appellant's benefit	US$700,000
4	9 September 2016	JL Securities to LGL for the first appellant's benefit	US$122,000
5	9 September 2016	JL Securities to LGL for the first appellant's benefit	US$895,600
6	9 September 2016	JL Securities to LGL for the first appellant's benefit	US$1,903,150
7	**12 September 2016**	**LGL to the respondents**	**US$1,499,488**

8	**28 September 2016**	**LGL to the respondents**	**€164,841.26**
9	1 February 2017	BGNIC to LGL	US$8,000,000
10	**1 February 2017**	**LGL to the respondents**	**US$1,302,250.92**

23 In our judgment, it could be inferred from the above pattern that the Disputed Moneys were in fact from the appellants' transfers to LGL, and were not "genuine" returns on the respondents' investment in the sense of being profits earned on the respondents' initial investment. There was no evidence that the respondents' initial investment was ever invested in any IPOs as represented by Mr Badilla. However, the mere fact that the Disputed Moneys were not genuine returns on the respondents' investment did not *per se* entitle the appellants to recover the Disputed Moneys. The appellants' entitlement to the Disputed Moneys still stood to be determined according to the governing law. We elaborate further at [35] below.

24 We turn to consider the appellants' challenge against the Judge's finding that the Ponzi scheme was in operation at the latest from 2015, but that he was unable to identify a start date to the Ponzi scheme. In our view, there was no basis to this challenge.

25 To situate the appellants' submission as regards the start date of the Ponzi scheme in its proper context, the following observations were material.

(a) It was common ground that both the appellants and the respondents were not aware of the Ponzi scheme at the time of their investments in April 2016 and April 2014 respectively. At most, the

appellants claimed that the respondents had notice of the appellants' interest in the Disputed Moneys when the respondents demanded the return of their investment in April 2016.

(b) Although the information as regards the start date of the Ponzi scheme was not within the knowledge of either the appellants or the respondents, the appellants bore the burden of proof to establish the start date since that was their pleaded case.

(c) The respondents were not required to advance a positive case as regards the start date and were entitled to put the appellants to strict proof.

26 During oral submissions before us, Mr Chaisty acknowledged that under Singapore law, the Judge was entitled to find that a fact was "not proved" within the meaning of s 3(5) of the Evidence Act (Cap 97, 1997 Rev Ed). However, he argued that the Judge's refusal to find that a Ponzi scheme had been in operation *before* 2015 was against the weight of the evidence.

27 The Judge concluded at [86] of the Judgment that "the Swiss authorities had uncovered no information which supported a conclusion that [Mr Badilla] had been conducting a Ponzi scheme earlier than 2015". To dispute the correctness of this finding, Mr Chaisty referred to a report by the Swiss Public Prosecutor's Office (the "Swiss Prosecutor") dated 20 April 2021, which reported that Mr Badilla had been deceiving 69 investors from 2011 to 2017. Implicit in Mr Chaisty's argument was the assertion that "the Swiss authorities" included the Swiss Prosecutor. In that regard, two other *different* dates for the start date of the Ponzi scheme were raised by the Swiss Prosecutor:

(a) On 25 April 2018, the Swiss Prosecutor made a Petition for an Investigation Order to the Enforcement Measures Court for the Zurich District (the "Petition"). At page 3 of the Petition, the Swiss Prosecutor stated that, *at the latest from 2015*, Mr Badilla was "surmised" to have misappropriated the funds invested by investors in Lexinta. The Judge referred to the Petition at [87] of the Judgment when he found that he was "unable to place any date on when the Ponzi scheme began, earlier than the conclusion reached by the Swiss authorities as being 'at the latest from the year 2015'".

(b) On 26 April 2018, the Zurich District Court ordered that Mr Badilla be taken into investigative custody pending trial (the "Order"). At paragraph 4.2 of the Order, the Zurich District Court referred to the allegations made by the Swiss Prosecutor that Mr Badilla had, *from 2012 to 2017*, misappropriated the funds invested by investors in Lexinta AG. Paragraph 4.3 of the Order further recorded Mr Badilla's *admission* that he had deceived investors on the use of the moneys *from the year 2015.*

28 The appellants also referred to various other evidence, such as a 2017 report from the Swiss Department of Justice to Hong Kong requesting mutual legal assistance. The report stated that Mr Badilla was "strongly suspected" to have, from 2010 to 2017, received funds from various investors. Mr Chaisty argued that all the evidence showed, on the balance of probabilities, that a Ponzi scheme had been in operation by 2014.

29 In our judgment, there was no basis for the appellants to contend that the Judge's finding on the start date of the Ponzi scheme was against the weight of the evidence.

30 During oral closing submissions, we raised to Mr Chaisty the possibility that the above-mentioned evidence may not be admissible under the Evidence Act. The evidence given by the Swiss Prosecutor and the Swiss Department of Justice were *allegations* based on the evidence of other witnesses such as Mr Badilla and were therefore strictly hearsay. However, as parties did not submit on the issue of admissibility or otherwise object to the admissibility of the evidence, we did not consider the issue further and proceeded on the assumption that the evidence was admissible under the Evidence Act.

31 However, assuming the evidence was admissible under the Evidence Act, there was still the question of weight to be ascribed to that evidence. In that regard, there can be no serious dispute that there is a distinct difference between an allegation and an admission. Mr Badilla's admission that the Ponzi scheme started in 2015 had evidential value as it was evidence against his own interests. In contrast, the evidence relating to the Swiss Prosecutor's allegations was inconsistent. As we observed at [27] above, it appeared that the Petition and the Order reflected *different* start dates for the Ponzi scheme. Having regard to all the evidence, the Judge's finding that there was insufficient evidence supporting the start date of the Ponzi scheme as being prior to 2015 was not against the weight of the evidence.

32 None of the other evidence raised by the appellants was of assistance to their case. Most of the evidence raised by the appellants was consistent with the finding that the Ponzi scheme began at the latest in 2015. These included: (a) the May 2016 closure of the Hang Seng Bank account into which the respondents had transferred their investment; (b) the records of the LGL Account which showed the immediate outward transfers of funds received from April 2016; (c) the fact that other investors who commenced proceedings in Hong Kong

entered into AMAs with Lexinta in 2015; and (d) the fact that LGL's securities trading account had a nil balance in January 2018.

33 The remaining evidence was equally unhelpful. The mere fact that Lexinta reported extremely high returns in 2014 to 2016 did not necessarily lead to the conclusion that such returns had been procured through illegitimate means. Further, the arrest report of the Zurich Cantonal Police dated 23 April 2018 merely provided information on Mr Badilla's arrest and did not contain any detail of the crimes Mr Badilla had been accused of or the dates when those crimes were committed.

34 In any case, taking the appellants' case at its highest, whether there was a Ponzi scheme or not only assumed significance if Swiss law was *not* the governing law. Dr Felix Dasser ("Dr Dasser"), the respondents' Swiss law expert at the trial, opined that the mere fact that Mr Badilla might have operated a Ponzi scheme through Lexinta did not render an agreement between a good faith investor and the Lexinta Group invalid under Swiss law. Dr Dasser relied on a similar Ponzi scheme case decided by the Swiss Federal Supreme Court. In *Heer v Goldstein* DFSC 87 II 18 (7 February 1961) ("*Heer*"), the Swiss Federal Supreme Court held that an investor in a Ponzi scheme was contractually entitled to claim the repayment of his investment as well as his profit margin based on a valid investment contract, since he had acted in good faith. Hence, under Swiss law, an investor in a Ponzi scheme could not question the validity of the payment to another investor, at least not in the absence of proven bad faith on the part of the other investor. The appellants elected not to call their own Swiss law expert to contradict Dr Dasser's evidence and his evidence therefore stood unchallenged.

35 Dr Dasser's evidence also exposed the cardinal flaw in the appellants' case: the appellants did not have an automatic entitlement to the Disputed Moneys *just because* the Disputed Moneys received by the respondents were not "genuine" returns and originated from the funds transferred by the appellants to LGL. The key inquiry under Swiss law was whether the respondents had acted in bad faith. Even if the appellants were able to show that the Ponzi scheme pre-dated the respondents' investment *and* that the respondents' returns on their investment came from the funds transferred by the appellants to LGL, these two findings would not have been sufficient to establish bad faith on the part of the respondents. Moreover, as we observed at [25(a)] above, the appellants did not allege that the respondents had acted in bad faith because they knew of the Ponzi scheme in April 2014. In the circumstances, under Swiss law, proof of the start date of the Ponzi scheme prior to the respondents' investments was in and of itself unhelpful to the appellants' case theory.

Appellants' transfers to LGL were made pursuant to the AMAs

36 This issue was significant to determine (a) the terms governing the transfers and (b) the governing law of the transfers. If the transfers were made pursuant to the AMAs, then Swiss law would apply as the governing law of the transfers and the appellants' claim in trust would fail because Swiss law did not recognise the concept of a trust.

37 The Judge found at [99] of the Judgment that the three AMAs extended by implication to include LGL as a party thereto. It appeared to us that this finding arose from the manner in which the appellants presented their case. The appellants pleaded that (a) LGL was not a party to the AMAs; and (b) there was an express or implied term that the moneys transferred would be held by LGL

as custodian or nominee pending LGL's transfer of those moneys to the "Asset Manager" as defined in the AMAs for investment. However, it was never the respondents' case that LGL was a party by implication or otherwise. Therefore, it appeared to us that in finding that LGL was a party to the AMAs by implication, the Judge was addressing the appellants' pleaded case without proper appreciation that that was not the respondents' case.

38 During oral submissions before us, counsel for the respondents, Ms Aurill Kam, clarified that the Judge's finding that LGL was an implied party to the AMAs was not crucial to the respondents' case in any event. The respondents' pleaded case was that the appellants' payments were made directly to the Lexinta Group and into the LGL Account as contemplated under the AMAs. It seemed to us that the respondents were simply seeking to establish that the appellants' transfers were made pursuant to the AMAs. It was thus not material whether LGL was or was not a party to the AMAs. To the extent that the Judge found LGL to be a party to the AMAs by implication, we did not think this finding was necessary or correct. There was no need for LGL to be a party to the AMAs by implication or otherwise in order to subject the appellants' transfers to the terms of the AMAs.

39 In our view, the relevant inquiry was whether the appellants' transfers to LGL were made pursuant to the AMAs. If so, the transfers would be governed by the terms of the AMAs. It was clear to us that the appellants did not transfer the funds to LGL in a vacuum or without a reason. Instead, the transfers were clearly made for the purpose of investment under the AMAs. This was the evidence of *both* the first appellant and Marc Van Campen ("Mr Van Campen"), a partner in the law firm acting for the second appellant and who was involved in the affairs of the first appellant's family since 2006. Both the first appellant and Mr Van Campen gave evidence that the appellants' transfers to the LGL

Account were directed by Mr Badilla, who at the material time directed and controlled Lexinta, *including* the Lexinta Group, the named "Asset Manager" under the AMAs. Mr Van Campen further accepted that BGNIC transferred US$18 million to LGL for that sum to be managed under the terms of the BGNIC AMA. The first appellant also gave evidence that she made no distinction between any of the Lexinta companies at the time when the AMAs were entered into.

40 When these points were made to Mr Chaisty at the hearing, he eventually accepted that the appellants' transfers were made pursuant to the AMAs, albeit with the Lexinta Group and not LGL. Mr Chaisty emphasised that the funds were sent by the appellants to LGL for LGL to transfer to the "Asset Manager" for investment. However, this was not borne out by the evidence since there was never any such direction in the appellants' transfer instructions to their bank, Banque Pictet & Cie SA in Switzerland. In any event, this argument ignores the fact that absent the AMAs, the transfers would never have taken place. The appellants' pleaded case was that they transferred the funds to LGL on terms that the funds would be held by LGL as custodian or nominee *under the terms of the AMAs*. The flipside of this submission was that absent the AMAs, the appellants would have had no reason to transfer the funds to LGL and would not have done so. This was all the more pertinent when the circumstances surrounding the transfers were considered. The first appellant transferred the first US$1 million to LGL on 19 April 2016, a mere one day after the SRE AMA was entered into. The inevitable inference to be drawn was that at all material times, the appellants contemplated and intended for the transfers to be governed by the AMAs. Viewed in this manner, there could be no dispute that the transfers were governed by the terms of the AMAs irrespective of the status of LGL as a party to the AMAs.

41 Our finding that the appellants' transfers to LGL were governed by the terms of the AMAs had a significant impact on the pivotal issue of the appeal as foreshadowed above – the governing law of the dispute, to which we now turn.

Governing law

42 As we stated briefly, there were three competing candidates for the governing law of the transfers: (a) Swiss law as the express law of the AMAs; (b) Singapore law as the *lex situs*; and (c) Hong Kong law as the law of the place of LGL's incorporation.

43 Because we found that the transfers were made pursuant to the AMAs, it followed that Swiss law applied as the express choice of law. In any event, neither of the other two competing laws could apply as the governing law.

44 It must be borne in mind that the appellants' claim was founded in equity. In *Rickshaw Investments Ltd and another v Nicholai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*"), this court held at [80] that in determining the applicable law to claims in equity, it is important to ascertain the foundational sources from which the relevant equitable rights and remedies arise. These would include, among others, established categories of law such as contract and tort. While we did not go so far as to endorse the proposition that equitable concepts and doctrines would always be dependent on other established categories of law, we accepted that such categories remain relevant and important considerations.

45 The case of *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 ("*Rappo*") concerned a claim for breach of fiduciary duties, fraudulent misrepresentation and deceit arising out

of dealings in artworks (*Rappo* at [34]). There, this court applied *Rickshaw Investments* and found that the "legal foundation" of the respondents' claim was essentially contractual as the parties had an oral agreement as regards the procurement of the artworks which were the subject of the fraud (*Rappo* at [77]).

46 In the present case, the appellants' claim was similarly for breach of trust and/or fiduciary duties arising out of the investments. The "legal foundation" of the appellants' claim was contractual because the appellants' investments, which were the subject of the alleged breach of trust, were made pursuant to the AMAs. Without the AMAs, the appellants would not have invested in the Lexinta Group. Therefore, it was clear to us that the "legal foundation" of the present dispute was the AMAs. Since the AMAs included an express choice of Swiss law, Swiss law applied to govern the present dispute.

47 The appellants' position that Singapore law applied as the *lex situs* was not pleaded and was belatedly raised during written closing submissions in the court below. We agreed with the Judge that this position should be rejected on this basis. In any case, as this court stated in *Rappo* at [70], it is the quality and not the quantity of the connecting factors that is crucial in the analysis. The search is for those connections with the most relevant and substantial association with the dispute. In our judgment, the quality of the AMAs as the very reason for the investments outweighed the quality of the other connecting factors identified by the appellants which would give rise to either Hong Kong law or Singapore law being the governing law of the dispute.

48 The appellants did not challenge the Judge's findings under Swiss law. In any case, the appellants' claim could not succeed under Swiss law. There were four fatal points against the appellants' case under Swiss law.

49 First, under Swiss law, whether there was a Ponzi scheme or not was irrelevant. The issue was whether the respondents had acted in bad faith (see [34] above). However, it was never alleged that the respondents had acted in bad faith or were complicit in the scheme. The appellants' pleaded case was, at best, that the respondents were not *bona fide* purchasers for value without notice at the time when they received the Disputed Moneys from LGL because they had been put on notice of the appellants' claim when they made demands to Mr Badilla and Lexinta for payment. The only person the appellants alleged to have acted in bad faith was LGL, who was not a party to the present proceedings. In any case, we agreed with the Judge's finding that the respondents did not know and could not have known of the Ponzi scheme when they made demands to Mr Badilla and Lexinta for payment.

50 Second, the appellants were unable to prove on the balance of probabilities the start date of the Ponzi scheme. The Judge was entitled to find that the start date of the Ponzi scheme was not proved and that finding was not against the weight of the evidence.

51 Third, even if the appellants were able to prove that the Ponzi scheme started before April 2014 when the respondents invested in the Lexinta Group, the appellants' claim in trust against the respondents would still have failed because Swiss law did not recognise the concept of a trust. To the extent the appellants claimed that LGL was a fiduciary, Dr Dasser's evidence in that regard was that a fiduciary could fully dispose of the rights or property transferred to him by the fiduciant. That this transfer violated the legal relationship between the fiduciary and fiduciant did not prevent a third party (the respondents) from gaining full legal rights.

52 Fourth, under Swiss law, payment by LGL to the respondents discharged the Lexinta Group's obligations to the respondents under the Esculier AMA. Payment obligations did not need to be personally performed by the debtor (in this case, the Lexinta Group as defined in the AMAs) and could be performed by third parties (in this case, LGL). This was Dr Dasser's unchallenged evidence. This evidence directly contradicted the appellants' case that they could claim against the respondents because LGL's payment of the Disputed Moneys did not discharge any contractual obligation owed by the Lexinta Group to the respondents.

53 The appellants attempted to draw a distinction between the principal sum invested and the interest on the sum, arguing in the alternative that the latter was recoverable even if the former was not. Put another way, the appellants argued that the respondents could not retain the profits they received from the scheme, *ie*, around US$4 million of the Disputed Moneys. This argument could not succeed. It was contradicted by Dr Dasser's evidence and in particular his opinion based on the decision in *Heer*. In that case, Ms Oschwald built a Ponzi scheme around fraudulent promises of selling pharmaceutical products. Dr Heer was an investor in the scheme but Ms Oschwald never returned Dr Heer's payments to him. Another investor, Dr Goldstein, invested CHF 200,000 and in due course received CHF 370,000 back (*ie*, the principal sum and a "profit" of CHF 170,000). Dr Heer sued Dr Goldstein for CHF 170,000, the "profit" portion. The Swiss Federal Supreme Court dismissed the claim and ruled that Dr Goldstein was contractually entitled to retain the repayment of his investment *as well as his profit margin* based on a valid investment contract, since his investment was made in good faith. *Heer* thus made clear that there was no merit to the appellants' attempt to draw this distinction.

54 Given our findings that Swiss law applied and that the appellants could not succeed under Swiss law, it was no longer necessary to consider the appellants' case under Hong Kong law. For completeness, even if Hong Kong law applied, we saw no reason to depart from the Judge's findings in that regard. All the evidence highlighted by the appellants in support of their argument that the respondents were not *bona fide* purchasers for value under Hong Kong law showed, at best, that the respondents had concerns about the Lexinta Group's *liquidity* and not its *iniquity* in relation to the Ponzi scheme. None of them amounted to proof that the respondents had notice of the Ponzi scheme such that it would have been unconscionable for the respondents to retain the Disputed Moneys.

Conclusion

55 For all of the above reasons, we upheld the Judge's decision and dismissed the appeal. The appellants were ordered to pay the respondents' costs fixed at $150,000 (all-in).

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Beverley McLachlin
International Judge

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