IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 23

Originating Application No 8 of 2023

Between

Transpac Investments Limited

… *Claimant*

And

TIH Limited

… *Defendant*

JUDGMENT

[Contract — Contractual terms — Express terms]
[Contract — Contractual terms — Implied terms]
[Equity — Estoppel — Duty to speak]
[Limitation of Actions — Particular causes of action — Contract]

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Transpac Investments Ltd
v
TIH Ltd

[2024] SGHC(I) 23

Singapore International Commercial Court — Originating Application No 8 of 2023
Sir Henry Bernard Eder IJ
27–31 May, 3, 5 June 2024

20 August 2024 Judgment reserved.

Sir Henry Bernard Eder IJ:

Introduction

1 The claimant ("TIL") is an investment holding company incorporated in the British Virgin Islands.

2 TIL owns a 10.17% stake in the defendant ("TIH") which is itself an investment fund company listed on the Singapore Exchange. Investment and fund management services were previously provided to TIH by another company, Transpac Capital Pte Ltd ("TCPL"). The arrangements between TIH and TCPL were due to expire on 31 December 2015, and in this regard, a Deed of Termination dated 30 December 2013 (the "DOT") was entered into between TIH and TCPL. TCPL was put into members' voluntary liquidation on 28 November 2016 and is now dissolved as of 18 January 2024. Since 2014, the

investment manager of TIH has been TIH Investment Management Pte Ltd ("TIHIM").

3 The present suit involves a dispute over a sum of US$10 million originally deposited by TIL into a bank account (the "Bond Account") in Bank Pictet & Cie (Asia) Ltd ("Bank Pictet") pursuant to the terms of a Deed of Agreement dated 30 December 2013 between TIL and TIH (the "Bond Deed"). In very broad terms, the main purpose of the deposit was to cover potential contingent claims following the sale of certain shares to third parties as described below.

4 In essence, it is TIL's case that it is entitled to the return of the whole or at least part of the deposit together with interest thereon (the "Bond Amount") and the closure of the Bond Account. In support of that case, TIL seeks certain declaratory relief and/or an order for specific performance or alternatively damages in lieu of specific performance.

5 TIH denies all these claims.

6 In broad terms, the main focus of the present dispute turns on the scope and effect of the Bond Deed and a further agreement between TIL and TIH dated 29 May 2014 entitled TIL Bond Account Operating Agreement (the "BOA").

The Evidence

7 In addition to a large number of contemporaneous documents disclosed in the course of the proceedings, the parties rely upon evidence from the following witnesses all of whom provided witness statements and gave oral evidence during the trial:

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(a) On behalf of TIL, Leong Ka Cheong Christopher ("Dr Leong"). He is the president of Transpac Capital Limited ("TCL") and is the ex-president of TCPL, both affiliates of TIL. He is also an ex-director of TIH.

(b) On behalf of TIH:

(i) Kin Chan ("Mr Chan"). He is chairman of the board of TIH.

(ii) Wang Ya Lun Allen ("Mr Wang"). He is a director of TIH.

(iii) Ang Swee Eng (also known as Emily Ang) ("Ms Ang"). She is the chief financial officer of TIHIM.

8 TIL also served orders to attend court against three further individuals, *viz*,

(a) Gan Kwee Lian ("Ms Gan"), a former partner (now retired) in the tax department of KPMG Services Pte Ltd ("KPMG SG").

(b) Lee Chin Siang Barry (Li Jingxiang), an audit partner at KPMG LLP. He was the principal auditor for the consolidated accounts of TIH for the financial years 2012–2016; and

(c) Low Gin Cheng Gerald, an audit partner at KPMG LLP. He was TIH's principal auditor at the time of the Foodstar Transaction referred to below.

In response to the orders to attend court, each of these three individuals provided a witness statement. In the event, the defendant elected not to cross-examine

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them. The result is that these three statements were admitted as unchallenged evidence.

9 In addition, the parties served reports from experts on Chinese tax law from the following individuals both of whom gave oral evidence:

(a) Appointed by TIL: Huang Xinhua ("Mr Huang"). He was previously an associate professor at the Law School of Tsinghua University in the People's Republic of China ("PRC"). He retired from that position in April 2021 and is currently employed by that law school to undertake teaching duties.

(b) Appointed by TIH: Dong Gang ("Mr Dong"). He is a licensed lawyer and certified tax agent in the PRC. He previously worked with the "Big 4" accounting firms. Since 2009, he has been a partner in the law firm King & Wood Mallesons ("KWM") and since 2011 has been head of KWM's tax practice in China.

10 In addition to their individual reports, the experts also provided a Joint Report setting out points of agreement and disagreement followed by brief supplementary reports.

Outline of Facts

The parties and related entities

11 TIL was an associate of TCPL, which in turn was (prior to its liquidation) the manager of a number of different funds ("Transpac Funds") including TIH. Apart from TIH, the Transpac Funds were either investment trusts or limited partnerships. As the investment manager of TIH pursuant to a management agreement dated 12 March 1994 (as supplemented and amended

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from time to time), TCPL had all the responsibilities, obligations and privileges equivalent to the general partner of limited partnerships, including full discretionary power of execution. On 30 March 1994, TIH granted a power of attorney to TCPL, pursuant to which TCPL had the authority and power to do any act, execute any document or enter into any contract on behalf of TIH for the purposes of carrying out TCPL's duties as investment manager.

12 TIH invested alongside the Transpac Funds and also itself invested in the Transpac Funds. Some of TIH's investments were made through TIH's wholly-owned subsidiary, Little Rock Group Ltd ("LRG").

13 To manage the Transpac Funds, TCPL was supported by a number of affiliates including TCL, a wholly-owned subsidiary of TCPL; Transpac Nominees Pte Ltd ("TNPL") which provided trustee, fiduciary and custody services for the investments of the Transpac Funds; and Transpac Trust Company Limited ("TTCL"), which carried on business as trustees for the Transpac Funds; and Transpac Investment Management Limited ("TIML").

14 Between 1993 and 1997, Dr Leong set up a number of other separate investment vehicles, *viz,* Transpac Capital 1996 Investment Trust ("TPC96"), Transpac Equity Investment Trust ("TEIT") and Transpac Venture Partnership II ("TVPII") ("Parallel Fund" collectively referred to as the "Parallel Funds"). In each case, the Parallel Funds were constituted by a trust deed, with TTCL as trustee. TPC96's trust deed provided in material part as follows:

> …
>
> 2.7 Conflicts of Interest. (a) Potential Conflicts of Interest. Subject to the provisions of Section 2.7(c) below and mandatory provisions of applicable law, each Investor Beneficiary acknowledges that there may be situations in which the interests of the Trust, in a Portfolio Company or otherwise, may conflict with the interests of the Trustee, the Manager or their

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respective Affiliates. ***Neither the Trustee, the Manager, the Adviser nor any of their respective Affiliates shall have any liability to the Trust or any Investor Beneficiary*** in the absence of Disabling Conduct of such Covered Person in respect of actions in respect of the foregoing taken in good faith by them in the pursuit of their own interests, except as expressly limited by this Declaration of Trust.

(b) Standards for Decision Making. In any case where this Declaration of Trust provides any determination or action be made or taken in "good faith" or that any Person make a "good faith judgment" or act in a manner that is "fair" or "fair and reasonable," or pursuant to any other described standard, such standard (i) shall require such Person to act reasonably, (ii) shall be considered for all purposes the applicable standard and shall be applied in lieu of any other standard otherwise prevailing under applicable law or in equity and (iii) shall apply notwithstanding that the Trustee, the Manager, the Adviser or any such Affiliate may be interested in the subject transaction.

(c) Actual Conflicts of Interest. On any issue involving an actual conflict of interest not provided for elsewhere in this Section 2, the Trustee will be guided by its good faith judgment as to the best interest of the Trust after prior consultation with the Advisory Committee, which shall review conflicts and potential conflicts of interest that may arise between the Trustee and its respective Affiliates, on the one hand, and the Trust, on the other, and the Trustee shall take such actions as are determined by the Advisory Committee to be necessary or appropriate to ameliorate such conflicts of interest. These actions shall include one or more of the following:

(i) appointing an independent Person (which may, without limitation, be an investment banker, legal counsel, the Advisory Committee, or a committee of Investor Beneficiaries) to make a determination with respect to any matter as to which a conflict of interest exists or may exist;

(ii) appointing an independent Person selected by the Trustee, subject to the concurrence of the Advisory Committee, to manage the Trust Property in question;

(iii) appointing a Person to manage the assets in question of the Trustee, Manager, the Adviser or their Affiliates or other entity with which the conflict of interest arises, subject to the concurrence of the Advisory Committee;

(iv) disposing of the Portfolio Investment in question by the Trust on terms that are determined in the good faith

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> judgment of the Trustee to be commercially reasonable under the circumstances, or providing for the disposition by the Trustee or the other entity with which the conflict of interest has arisen of the property giving rise to such conflict of interest; or
>
> (v) taking any other action as to such actual conflict of interest that is recommended by the Trustee and approved either by the Advisory Committee or by a Majority in Interest of the Investor Beneficiaries excluding the Designated Affiliates.
>
> ***If the Trustee takes one or more of the foregoing actions in good faith, neither the Trustee nor any of its Affiliates shall have any liability to the Trust or any Beneficiary*** in the absence of Disabling Conduct in respect of actions taken in good faith by it in the pursuit of its own interest.
>
> …
>
> "Disabling Conduct" shall mean (i) conduct that constitutes willful misfeasance, bad faith, fraud, gross negligence or reckless disregard of duty in the conduct of the duties of the Person referred to, (ii) conduct that results in the conviction of such Person for embezzlement or similar felony involving misappropriation of funds in connection with the business of the Trust or any Portfolio Company, (iii) a failure by the Trustee or the Manager to terminate any director or employee within ten Business Days after any such Person has been convicted of conduct specified in (ii), (iv) a material breach of this Declaration of Trust, the Management Agreement or the Investment Advisory Agreement, and (v) a material violation of applicable securities or regulatory law or a breach of fiduciary obligations.
>
> [emphasis added in ***bold italics***]

15 The trust deeds for the other two Parallel Funds were similar but not completely identical. For present purposes, it is sufficient to note that the wording of clause 2.7(c) of the TVPII trust deed was slightly different in that it required the trustee of that Parallel Fund to consult with "a Majority in Interest of the Investor Beneficiaries" rather than an Advisory Committee; and the definition of "Disabling Conduct" stipulated that: "'Disabling Conduct' shall mean conduct that constitutes wilful misfeasance, bad faith, fraud, gross negligence or reckless disregard of duty in the conduct of the duties of the

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Person referred to and shall also include a breach of this Declaration of Trust, the Management Agreement or the Investment Advisory Agreement." I mention these matters for the sake of completeness although I do not consider that anything turns on these differences in the present case.

16 At all material times, LRG held participating interests in these three Parallel Funds as follows:

(a) TPC96: 34.11%;

(b) TVPII: 47.15%; and

(c) TEIT: 4.65%.

17 The Parallel Funds were closed-end funds with a fixed amount of committed capital and limited lifespan ("charter life"). They were structured to have an investment period of five years, after which no new investments would be made, and the funds would embark on the liquidation mode. Complete liquidation of the portfolio and closure of a fund usually would come some years beyond the charter life and some investors might seek liquidity through private sale of their interest. They were originally set up with the following end-dates for their charter lives, though the lives of these funds were subsequently extended until 2016:

(a) TEIT: 30 June 2005;

(b) TVPII: 2004; and

(c) TPC96: 24 April 2007.

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The Divestments

18 As stated above, the main purpose of the deposit of US$10 million was to cover potential contingent claims following the sale of certain shares to third parties. The relevant sales (referred to as the "divestments") related to sales of shareholdings in three different companies, *viz,* (a) Foodstar Holdings Pte Ltd ("Foodstar"); (b) Pharmstar Limited ("Pharmstar"); and (c) Foshan Zhongnan Aluminium Wheel Co, Ltd ("Zhongnan" or "FZ").

The Foodstar Transaction

19 Foodstar was a company incorporated in Singapore in 1994. It was a platform created by TCPL to invest in Chinese municipal and local businesses and to provide capital and management acumen to help them grow into businesses of critical mass. TIH held a substantial direct and indirect stake in Foodstar. According to TIL, TIH held a 70.32% stake in Foodstar. Ms Ang's evidence for TIH is that TIH held, in total, a direct and indirect interest of 80.77% in Foodstar.

20 By a Stock Purchase Agreement dated 18 June 2010 ("Foodstar SPA"), TIH, TCPL and TNPL ("Foodstar Sellers") sold the entire shareholding in Foodstar to third party companies within the Heinz Group (the "Foodstar Transaction" and "Heinz" respectively). Heinz took over all the employees of Foodstar and its subsidiaries, including the Transpac staff seconded to such entities. The employees seconded to Foodstar's China operations returned to TCL after the earn-out period was completed. The purchase price of Foodstar included an upfront amount paid at closing of approximately US$165,446,559.30 and an earn-out portion payable upon satisfaction of conditions capped at approximately US$140 million. As part of the Foodstar SPA, the Foodstar Sellers agreed to indemnify Heinz in relation to certain

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pending litigation between a subsidiary of Foodstar ("KWS") and Nestle in the Trademark Court in China ("Nestle Bottle Lawsuit") – although, jumping ahead in time, it is important to note that KWS won the case in late 2013.

21 By a Side Letter dated 18 June 2010, the Foodstar Sellers also covenanted to pay any tax and penalties arising under what is referred to as Circular 698. In broad outline, Circular 698, which came into force in 2008, was issued by the tax authorities of the PRC to prevent foreign enterprises from avoiding income tax obligations by indirect transfer of shares through *certain arrangements*. Where indirect transfers of the equity interest in a Chinese resident enterprise have taken place under certain circumstances, Circular 698 required certain documents to be provided to the PRC tax authorities within 30 days to prove that any income tax obligation was not applicable because the indirect share transfer was for a "*reasonable commercial purpose*". The "*certain arrangements*" referred to are arrangements where (a) equity in an offshore holding company which holds equity in a Chinese resident enterprise is being sold, and the actual tax burden in the offshore jurisdiction where the holding company is located is less than 12.5%, or (b) if such jurisdiction exempts income tax on foreign sourced income for its tax residents.

22 Before entering into the Foodstar SPA, KPMG SG was engaged to advise on the tax implications of the Foodstar Transaction. The advice given by KPMG SG was contained in a Memorandum dated 2 November 2010. In summary, the main conclusions as stated in that memorandum were as follows:

> **Application of Notice 698**
>
> Based on a strict reading of the Circular, there should be ground for Foodstar to argue that the sale of shares in Foodstar should not fall under Notice 698 for the following reasons: -
>
> a) The prevailing corporate tax rate in Singapore is 17% (i.e. more than 12.5%); and

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> b) A Singapore tax resident is subject to Singapore income tax on its offshore income on remittance basis, unless the income qualifies for tax exemption subject to certain conditions being met. It is also noted that TIH (a major shareholder of Foodstar) would be subject to Singapore income tax on the gain on sale of shares in Foodstar if not for the Enhanced-Tier Fund Incentive Scheme granted to it which exempts Singapore income tax on the gain on disposal of designated investments.
>
> In the light of the above, we are of the view that there is a chance for Foodstar to argue that the reporting requirements stipulated in Notice 698 are not triggered in the case of Foodstar. Therefore, Foodstar may not be required to submit the relevant documentation to the PRC tax authorities.
>
> **Practical considerations**
>
> From our dealings with the PRC tax authorities, there is a possibility that the PRC tax authorities may challenge that the transaction is one that falls under Notice 698 and that the transfer of shares in Foodstar be reported. In this regard, we were told that the PRC tax official in-charge of Foodstar's tax matters has raised the reporting requirements with the management of Foodstar and would like to know how the management would justify the non-applicability of Notice 698 in this case.
>
> …
>
> Based on the above analysis, we are of the view that Foodstar should have a good argument that the sale of Foodstar via indirect transfer of shares outside China is not a scheme that is designed for tax avoidance and therefore should not be subject to capital gains tax under Notice 698. Note however that our above view is subject to the agreement of the provincial tax official and the SAT who has the final decision making authority on the applicability of Notice 698.

23 Based on this advice, TIH decided that it was unnecessary to submit the relevant documentation to the PRC tax authorities; and did not do so.

24 The main portion of the Foodstar Transaction (save for the earn-out arrangements) was completed on or around 2 November 2010. On 19 December 2012, Heinz accelerated the earn-out programme associated with the Foodstar

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Transaction and entered into an amendment agreement with the Foodstar Sellers for the final completion of the Foodstar Transaction. The amendment agreement provided that the Foodstar Sellers were to receive the sum of US$60 million as full and final payment of the earn-out payments due under the Foodstar SPA, and that the Foodstar Sellers' obligations in relation to any potential claims from the Nestle Bottle Lawsuit would terminate on 1 July 2014.

25 Of the three Foodstar Sellers, only TIH remains in existence today. TNPL was put into members' voluntary liquidation on 21 May 2015. TCPL was put into members' voluntary liquidation on 28 November 2016.

The Pharmstar Transaction

26 Pharmstar is a company registered under the laws of the British Virgin Islands, in which TIH had a participation interest of 3.11%. Pharmstar's shares were held by TNPL on behalf of TPC96 (*ie,* one of the Parallel Funds) managed by TCPL. Pharmstar wholly-owned a Chinese company known as Guangdong Hongshanhu Pharmaceutical Co., Ltd. By an agreement for the sale and purchase of shares in Pharmstar Limited dated 18 December 2012, TNPL sold its shares of Pharmstar to IDDT International Group Limited ("IDDT") for RMB 21,000,000 (the "Pharmstar Transaction"). IDDT undertook to deal with all tax matters. Accordingly, while TPC96 had provided a sum of S$19,000 as reserves for possible tax liabilities under Circular 698 and TIH had provided a nominal reserve of S$1,000, it was not expected that there would be any tax liability arising from the Pharmstar Transaction.

The FZ Transaction

27 Zhongnan was a company that manufactured aluminium alloy wheel hubs in China. At all material times, it was owned 80% by TVPII and TEIT

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through Kendal Enterprises Limited, a holding company registered in the British Virgin Islands, in which TIH had a participation interest of 42.61%. By a Sale and Purchase of Shares Agreement dated 27 September 2012 ("Kendal SPA"), TNPL (as seller) agreed to sell all its equity stake in Kendal Enterprises Limited to A&E Holding Limited for the purchase price of RMB188,550,077 (the "FZ Transaction"). Of this amount, A&E Holding Limited was to pay the US$ equivalent of RMB183,550,077 on signing of the Kendal SPA. The US$ equivalent of the remaining amount of RMB5,000,000 was to be paid by 26 September 2014.

28 Ernst & Young ("E&Y") was the auditor of Zhongnan and Jane Hui, Leader of China Tax Centre and Partner, advised in September 2012 after the sale of Zhongnan that Circular 698 would not apply to the FZ Transaction and that there was no need to file a Circular 698 submission. Accordingly, TCPL made no such application/submission. Nevertheless, in keeping with its fiduciary duty as the investment manager of the Transpac Funds, TCPL maintained a contingency reserve for possible tax liabilities under Circular 698 for TIH and the Parallel Transpac Funds in respect of the FZ Transaction.

29 So far as the potential contingent claims relating to Circular 698 are concerned, the evidence of Dr Leong was that the advice of both KPMG SG and E&Y was that if no action was taken within three to five years by the PRC tax authorities to collect tax, one could safely assume that no tax would be chargeable and that the Bond Amount would be released within approximately such period of time. It is unclear whether such categoric advice was, in fact, ever given by either KPMG SG or E&Y but I readily accept that Dr Leong honestly believed that that was what he had, in effect, been told. At the very least, it is fair to say that that appears to have been the general expectation at the time of the original deposit. In such circumstances, it is hardly surprising that

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Dr Leong had become increasingly angry about the fact that the Bond Amount still remained locked in the Bond Account after some 10 years and that even at the time of this trial in mid-2024, there was apparently still no prospect of the Bond Amount being released in the foreseeable future otherwise than by obtaining appropriate relief by the present suit. As Dr Leong said in paragraph 87 of his second witness statement dated 25 March 2024: "Throughout a career of nearly sixty years encompassing scientific research, entrepreneurship, senior multinational management and financial services, I have never experienced the perpetration of miscarriage of justice at such a scale, until now." Needless to say, while I have considerable sympathy for Dr Leong, the present trial must be conducted having regard to the terms of the contractual agreements agreed between the parties and applicable legal principles on the basis of the evidence submitted.

Subsequent events

30 On or about 7 June 2011, the PRC tax authorities raised certain queries with regard to the tax treatment of the Foodstar Transaction and requested TCPL to provide them with (a) an explanation of the Foodstar Transaction and (b) a copy of the Foodstar SPA for their review. As a result, on terms set out in a letter dated 13 July 2011, TCPL instructed KPMG SG to assist with regard to such enquiries and, in particular, to assist in formulating strategies on how to reduce the PRC tax exposure of capital gains arising from the Foodstar Transaction and fulfilling the reporting requirements under Circular 698.

31 With the assistance of KPMG SG, TIH duly responded to the PRC tax authorities by way of a document entitled "Explanation Letter Regarding the Filing of Equity Transfer of Foodstar Holdings Pte Ltd" ("Foodstar 698 Tax Submission") sent around June–July 2012. In summary, that document

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explained the status of TIH/TCL and set out, *inter alia*, the relationship between TIH/TCL and Foodstar, the nature of Foodstar's business operations and the purpose of the Foodstar SPA; it sought to explain "… the reasonable business purpose for the establishment of Foodstar ... to demonstrate that the overseas investor's establishment of Foodstar has a legitimate business purpose and is not intended for the indirect transfer of equity of Chinese resident enterprises through abuse of organizational arrangements ...". The PRC tax authorities acknowledged receipt of the Foodstar 698 Tax Submission on 28 July 2012.

32 As I understand, no further response was ever received from the PRC tax authorities for about another two years until about June 2014 as referred to below.

Internalisation Exercise

33 Meanwhile, sometime in the late 2000s or early 2010s, Mr Chan indicated a desire to take over the management of TIH. After mulling over various formats, he and Dr Leong agreed to such a reorganisation in what became known as the "Internalisation Exercise". In summary, what happened was that (a) TCPL's engagement as TIH's investment manager was terminated, and (b) TIH formed a wholly-owned subsidiary, TIHIM (see [2] above), to manage TIH. TIHIM took over all the employees of TCPL, including, *inter alia*, TCPL's head of Singapore office, Stanley Cheong ("Mr Cheong"), its chief financial officer, Ms Ang and its head of human resources, Tham Shook Han. Mr Wang became the chief executive officer of TIHIM in June 2014. Mr Cheong remained also a director of TIH and a shareholder of TCPL and TCL. This Internalisation Exercise was eventually completed in around May 2014, and, as a result, TCPL stopped being TIH's investment manager.

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The Deed of Termination and the Bond Deed

34 As part of the Internalisation Exercise, it was necessary for TCPL and TIH to agree how to deal with the potential contingent claims in relation to the Foodstar Transaction, Pharmstar Transaction and FZ Transaction. In very broad terms, the total of these potential contingent claims was approximately US$63 million. Of that sum, Dr Leong and Mr Chan agreed in principle that these would, in effect, be shared between TIH (approximately 80%) and TCPL (20%). TIH's portion was to be provided for through a US$50 million cash reserve and TCPL's portion by TIL in the form of a US$10 million bond.

35 The terms of that agreement were embodied in two agreements, *viz,* a Deed of Termination ("DOT") and the Bond Deed both dated 31 December 2013.

36 The DOT provided in material part as follows:

> "**Contingent Claims**" means any taxes, claims and expenses which may be incurred by TIH in relation to certain investments made by TIH, provisions for which have been made by TIH as follows:

Contingent Claims	**Provisions for Contingent Claims** **S$'000**
Foodstar final earnout (provision for Nestle claims)	44,008
Foodstar sale proceeds (provision for 698 tax and expenses)	12,052
Foodstar final earnout (provision for 698 tax)	5,220
FoshanZhongnan (provision for 698 tax, claims and expenses)	1,800

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Pharmstar (provision for 698 tax)	1
TOTAL	**63,081**

…

6.3. On the Completion Date,

(a) TIH shall pay to TCPL the Consideration; and

(b) TCPL shall transfer to TIH out of the trust account which it holds for the benefit of TIH and other Transpac funds the monies which it holds on trust for TIH (approximately of S$19.1 million as at the date of this Deed), and TIH shall earmark a total sum of S$50,465,000 as the "**Reserve Funds**".

…

10.5. **The Reserve Funds**

(a) The Reserve Funds shall be earmarked to be applied for the satisfaction of Contingent Claims.

(b) TIH undertakes to honor all crystallised Contingent Claims (as determined by the judgment in good faith of the general partner or trustee of the funds (in which TIH has a Participation Interest) that have invested in the businesses giving rise to the Contingent Claims) fully in a timely manner and shall indemnify TCPL and its affiliates for liabilities (including full legal and other professional expenses) suffered and hold them harmless for any failure to do so.

(c) TIH agrees that it may borrow for investment purposes up to 30% of its net asset value (as determined by TIH, acting reasonably and in good faith) as at the time of borrowing, and that it shall retain sufficient borrowing capacity as it deems necessary to replenish the Reserve Funds as and when necessary to satisfy all Contingent Claims in the event it utilises the Reserve Funds or any part thereof otherwise than for the satisfaction of Contingent Claims.

(d) TIH undertakes to fully replenish the Reserve Funds whenever and for the duration of any period when the net asset value of TIH (as determined by TIH, acting reasonably and in good faith) falls below SS100 million.

(e) As and when the Contingent Claims are deemed to have been satisfied (as may be determined by the

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> judgment in good faith of the general partner or trustee of the funds (in which TIH has a Participation Interest)), the amount required to be earmarked by TIH as the Reserve Funds shall be reduced accordingly.

37 The Bond Deed provided in material part as follows:

> 1. **Definitions**. For the purposes of this Deed,
>
> > "Contingent Claims" means any taxes, claims and expenses (including the costs and expenses of any third party advisors appointed in relation to the Contingent Claims, if required by the judgment in good faith of the general partner or trustee of the funds (in which TIH has a Participation Interest) that have invested in the businesses giving rise to the Contingent Claims, with the consent of TIH, such consent not to be unreasonably withheld) which may be incurred by TIH in relation to certain investments made by TIH, provisions ("Provisions for Contingent Claims") for which have been made by TIH as follows:

Contingent Claims	**Provisions for Contingent Claims** **S$'000**
Foodstar final earnout (provision for Nestle claims)	44,008
Foodstar sale proceeds (provision for 698 tax and expenses)	12,052
Foodstar final earnout (provision for 698 tax)	5,220
Foshan Zhongnan (provision for 698 tax, claims and expenses)	1,800
Pharmstar (provision for 698 tax)	1
TOTAL	**63,081**

> > "Participation Interest" means the participation by TIH as a limited partner or trust beneficiary in other investment funds or co-investment in an investee

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> company with other funds managed by Transpac Capital Pte Ltd ("TCPL") or its affiliate.
>
> 2. **Payment of 20% of Contingent Claims**. In the event that any Contingent Claim crystallises and becomes due and payable as an actual liability (as determined by the judgment in good faith of the general partner or trustee of the funds (in which TIH has a Participation Interest) that have invested in the businesses giving rise to the Contingent Claims ("Crystallisation"), TIL undertakes to pay to TIH 20% of the value of the Contingent Claim, subject to the terms and conditions hereunder. For the avoidance of doubt, the maximum liability of TIL for any Contingent Claims shall be limited to the amount of US$10,000,000.
>
> 3. **Designated Account**. TIL shall deposit the amount of US$10,000,000 into a special account to be set up at Bank Pictet & Cie (Asia) Limited in Singapore (the "Account" and the "Bank" respectively), which shall be designated for the satisfaction of any payments of 20% of the Contingent Claims to be made by TIH hereunder (the "Claims"), and operated in accordance with the terms and conditions hereunder and such other terms and conditions as may be agreed between the Parties, provided that no monies may be withdrawn from the Account without the written consent of TIH.
>
> 4. **Payments from Account**. The Account shall be maintained for as long as there are any Provisions for Contingent Claims (as determined in good faith by TIH with the consent of its auditors). In the event that there are no Provisions for Contingent Claims (as determined in good faith by TIH with the consent of its auditors), (i) the aggregate amount of the Claims shall be released to TIH; (ii) the remaining monies in the Account after satisfying the Claims (if any) shall be released to TIL; and (iii) the Account shall be closed. For the avoidance of doubt, any interest paid or investment earnings by the Bank on any monies in the Account shall belong to TIL.

38 As set out in clause 1 of the Bond Deed, the term "Contingent Claims" was defined in wide terms in relation to the "provisions" made by TIH in respect of: (a) the Foodstar final earnout (provision for Nestle claims) (the "Contingent Nestle Claim") valued at S$44,008,000; (b) the Foodstar sale proceeds (provision for 698 tax and expenses) and Foodstar final earnout (provision for 698 tax) (the "Contingent Foodstar Tax Claim"), valued at a total sum of

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S$17,272,000, (c) the Foshan Zhongnan (provision for 698 tax, claims and expenses) (the "Contingent FZ Claim") valued at S$1,800,000, and (d) the Pharmstar (provision for 698 tax) (the "Contingent Pharmstar Claim") valued at S$1,000. The Contingent Foodstar Tax Claim was broken down in TIH's defence at para 9(a) into: (a) possible tax and expense liabilities in respect of the sale proceeds from the Foodstar transaction: S$12,052,000; and (b) possible tax liabilities in respect of the final earn-out amounts from the Foodstar transaction: S$5,220,000.

39 In passing, it is also important to note clause 4 of the Bond Deed as set out above which was heavily relied upon by TIH in support of its case that the Bond Account was to be "... maintained for as long as there are *any* Provisions for Contingent Claims (as determined in good faith by TIH with the consent of its auditors) ..." [emphasis added]. So far as relevant, I deal with this further below.

40 Separately, the Parallel Funds also made provision for reserves in respect of their own potential liabilities for the aforesaid (see [38] above) contingent claims (the "Parallel Funds Contingent Claims") aggregating approximately S$27.5 million as summarised in the table below:

	TPC 96	TVP II	TEIT
Contingent Claims	**Set Aside for Contingent Claims S$'000**	**Set Aside for Contingent Claims S$'000**	**Set Aside for Contingent Claims S$'000**
Foodstar final earnout (provision for Nestle claims)	12,690	6,220	0

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Foodstar sale proceeds (provision for 698 tax and expenses)	3,359	1,663	0
Foodstar final earnout (provision for 698 tax)	1,455	720	0
Foshan Zhongnan (provision for 698 tax, claims and expenses)	0	657	930
Pharmstar (provision for 698 tax)	19	0	0
TOTAL	**17,523**	**9,260**	**930**

The Bond Operating Agreement ("BOA")

41 On 29 May 2014, TIL and TIH entered into a further agreement entitled "TIL Account Bond Operating Agreement" (the "BOA") setting out what was stated in the preamble to be "... their agreement on certain operating procedures relating to the [Bond Account] and to supplement the terms of the TIL Bond ...". The BOA provided in material part as follows:

> …
>
> (B) "**TIH Contingent Claims**" mean any taxes, claims and expenses which may be incurred by TIH in relation to certain investments made by TIH, provisions for which have been made by TIH as follows:

Contingent Claims	**Provisions for Contingent Claims S$'000**
Foodstar final earnout (provision for Nestle claims)	44,008

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Foodstar sale proceeds (provision for 698 tax and expenses)	12,052
Foodstar final earnout (provision for 698 tax)	5,220
Foshan Zhongnan (provision for 698 tax, claims and expenses)	1,800
Pharmstar (provision for 698 tax)	1
TOTAL	**63,081**

(C) The corresponding provisions for the aforesaid contingent claims ("**Parallel Funds Contingency Claims"**) made by the funds ("**Parallel Funds**") managed by Transpac Capital Limited ("**TCL**") that have invested in the businesses that give rise to the TIH Contingent Claims are:

	TPC 96	TVP II	TEIT
Contingent Claims	**Set Aside for Contingent Claims S$'000**	**Set Aside for Contingent Claims S$'000**	**Set Aside for Contingent Claims S$'000**
Foodstar final earnout (provision for Nestle claims)	12,690	6,220	0
Foodstar sale proceeds (provision for 698 tax and expenses)	3,359	1,663	0
Foodstar final earnout (provision for 698 tax)	1,455	720	0
Foshan Zhongnan (provision for 698 tax, claims and expenses)	0	657	930
Pharmstar (provision for 698 tax)	19	0	0

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TOTAL	**17,523**	**9,260**	**930**

(D) Pursuant to an agreement between TIH and its Investment Manager, TIH undertakes to fully honour in a timely manner all crystallised TIH Contingent Claims as determined by the good faith judgment of TCL

(E) Upon closure of the Account, TIL shall pay TIH 20% of the value of any TIH Contingent Claim that TIH, based on the advice of TCL, has settled during the tenure of the TIL Bond ("**Settled TIH Contingent Claims**").

…

2. Operation of the Account

2.1 **The Account**. TIL shall deposit the amount of US$10,000,000 into the Account in the Bank. The deposit of such amount into the Account shall have satisfied the terms and conditions of the TIL Bond.

2.2 **Authorised Signatories**. The authorised signatories to the Account shall be as follows:

2.2.1 Group A, representing the interests of TIL:

(a) Harry Leong, UK Passport number [*****]4522; and

(b) Eric Ho, HK Passport number [*****]4490; and

2.2.2 Group B, representing the interests of TIH:

(a) Kin Chan, HK Passport number [*****]8633; and

(b) Angie Yick Yee Li, HK Passport number [*****]0895.

All withdrawals from the Account must be authorised by at least one signatory from Group A and Group B.

…

2.5 **Account Closing Instruction.** On or before the opening of the Account, an undated account closing instruction shall be signed by a signatory from Group A and Group B respectively ("**Closing Instruction**") to be delivered to the Bank to close the Account in accordance with Clause 2.6, 2.7 and 2.8 below. The Closing Instruction shall be held by a custodian jointly selected by the Parties (the "**Custodian**"). Upon closing of the Account, all sums in the Account shall be transferred to such other

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account that TIL may specify. TIH shall, and shall procure that the Group B signatories shall, facilitate such transfer if necessary. In the event that the Bank requires a new or updated Closing Instruction, TIL and TIH shall procure their respective signatories to promptly comply.

…

2.7 **Account Closure Event.** The Account may be closed on the occurrence of any of the following events (an "**Account Closure Event**"):

2.7.1 the board of directors of TIH agrees and resolves that the TIL Bond may be released and discharged. Upon this release, TIL shall settle within 5 working days any outstanding debt to TIH in respect of the Settled TIH Contingent Claims; or,

2.7.2 TCL has received advice in writing from its advisors, namely:

(a) DLA with respect to the Contingent Claim arising from the Nestle litigation, and

(b) KPMG with respect to the Contingent Claim arising from the Foodstar tax; and

(c) Ernst and Young with respect to the Contingent Claim arising from the Zhongnan tax (hereinafter referred to collectively as "**Advisors**" and singly as an "**Advisor**"),

each to the effect that:

(i) there is no claim for a sufficient period of time and it is prudent for the relevant contingent liability or a large part thereof to be released; or

(ii) there is a claim and, in the good faith opinion of the Advisor, the claim should be settled and any balance of the relevant Contingent Claim may be released, in which case TIH shall pay 100% of the contingent claim as advised by TCL and TIL shall repay TIH 20% of the Settled TIH Contingent Claims in accordance with clause 2.9; or

2.7.3 Not less than 99% of the Parallel Funds Contingent Claims have been settled or distributed to the beneficiaries of the Parallel Funds in accordance

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> with the trust deeds and management agreements of the Parallel Funds; or
>
> 2.7.4 TIL and TIH have reached agreement in writing to restructure the TIL Bond and their respective board of directors instructs the signatories to close the Account; or
>
> 2.7.5 there is a material breach of this Agreement or the Termination Deed by TIH, its affiliates or its officers. For the avoidance of doubt, the Custodian is acting as an independent officer and not as an officer of TIL or TIH in carrying out his duties as the Custodian.
>
> 2.8 **Account Closure**. The Parties shall, as soon as reasonably practicable after becoming aware of the occurrence of an Account Closure Event, jointly or severally notify the Custodian that the Account should be closed. The Custodian shall then take steps to execute the Instruction and present it to the Bank to close the Account. After the Account is closed, the TIL Bond shall be deemed to be released and TIL shall have no further liability to TIH, its affiliates or officers.
>
> 2.9 **TIL Bond Settlement**. Upon confirmation by the Bank that the Closing Instruction has been received and the Account is being closed, TIL shall pay to TIH 20% of the Settled TIH Contingent Claims.
>
> …
>
> **5. Consistency of Terms**
>
> In the event of any conflict or inconsistency between any of the terms of this Agreement with any of the terms of the TIL Bond, the terms of this Agreement shall prevail and the TIL Bond shall be deemed to have been amended to the extent necessary to give effect to the terms of this Supplemental Agreement.

42 Mr Kin Chan gave evidence that as at 31 December 2014, TEIT had a provision for the Parallel Funds Contingent Claims in the sum of US$366,355, TPC 1996 provided for the sum of US$3,772,571 and TVPII provided for the sums of S$1,520,759 and US$1,040,585 (for Singapore and US investors respectively).

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Appointment of Custodian under the BOA

43 Pursuant to the BOA, Mr Stanley Cheong was appointed as the Custodian of the Bond Account under terms of a letter dated May 2014 and signed jointly by TIL and TIH. Paragraph 2 of that letter states as follows:

> 2. Upon receipt of the Instruction, you will hold the Instruction in escrow until you are notified by both TIL and TIH in the form attached as Annex 1 that an Account Closure Event has occurred, upon which you shall:
>
> (a) date the Instruction; and
>
> (b) present it to the Bank in order to effect the closure of the Account.

44 The form there referred to as "Annex 1" is a draft instruction again signed by both TIL and TIH as follows:

> Annex 1
>
> Date:
>
> To: Cheong Kok Yew (Stanley)
>
> Dear Stanley,
>
> Notification of Account Closure Event
>
> We refer to your appointment as custodian dated May 2014.
>
> We would like to notify you that an Account Closure Event has occurred, and you may upon receipt of this notification from both TIH and TIL, proceed to date the Instruction and present it to the Bank in order to effect the closure of the Account.
>
> Regards
>
> [signature]
>
> TIH Limited
>
> Name: Kin Chan
>
> Designation: Director

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> or
>
> [signature]
>
> Transpac Investments Limited
>
> Name: Eric Ho Ka Yu
>
> Designation: Authorised Signatory

Decision not to approach PRC tax authorities

45 Shortly after the BOA was signed, Ms Gan sent an e-mail dated 10 June 2014 to Ms Ang informing her that the PRC tax authorities had contacted KPMG's offices in China seeking clarification on matters relating to tax concerning the Foodstar Transaction. In that e-mail, Ms Gan confirmed that her colleagues had attended to the clarification sought but stated that it was uncertain at that juncture as to whether the PRC tax authorities might take a closer look at the filing and raise questions subsequently. After referring to certain supplementary regulations, Ms Gan stated:

> Following from the above, on grounds of prudence, we are of the view that it may not be advisable to approach the PRC tax authorities on the filing at this juncture due to all the uncertainties surrounding this issue …

46 The response to that e-mail came from Dr Leong who stated:

> I agree with you that we should not be proactive in any aspect. Just let the matter play out by itself….

Release of TIH's Reserve Funds and distribution of funds by the Parallel Funds

47 On 7 July 2014, Dr Leong received from Ms Mabel Lui (who previously headed a team of lawyers representing the Foodstar Sellers) of Winston & Strawn an e-mail advising that given the lapse of time, as at 1 July 2014 "... Transpac is not liable in any way to Heinz in respect of the Nestle Bottle lawsuit

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...". That advice was considered internally within TCPL by, in particular, Mr Harry Leong (a key decision-maker in the Transpac group) and Ms Ang. According to Mr Harry Leong's e-mail dated 8 July 2014, his view was that instructing DLA Piper (Ms Mabel Lui's then firm) to write a legal opinion would be a costly exercise involving a lengthy review. Accordingly, in light of Ms Lui's advice confirming that there were no claims pertaining to the Nestle lawsuit as at 1 July 2014, it appears that an internal decision was made to rely simply on Ms Lui's advice and to dispense with obtaining a further opinion from DLA Piper before releasing the reserve previously set aside in respect of the Nestle claim. As explained by Ms Ang, it was on this basis that a few weeks later in August 2014, the sums set aside in the Parallel Funds in respect of the Contingent Nestle Claim were distributed in accordance with a Notice of Distribution dated 13 August 2014 issued to each of the investor-beneficiaries in the Parallel Funds. Separately and at about the same time, TIH decided to release (but not distribute) its own reserve of S$44,008,000 in respect of the Contingent Nestle Claim. According to Dr Leong, TIH released its reserves for the Contingent FZ Claim, the Contingent Pharmstar Claim and the Contingent Nestle Claim in 2015.

Bulletin No.7

48 On 6 February 2015, the PRC State Administration of Taxation issued new guidance ("Bulletin No.7") on the PRC tax treatment of an indirect transfer of assets by a non-resident enterprise. The purpose and broad effect of Bulletin No.7 was summarised in an article published by Deloitte as follows:

> Under Circular 698, a non-resident enterprise transferring shares in an offshore intermediary enterprise that directly or indirectly holds an equity interest in a PRC enterprise are subject to PRC tax on the gains from the transfer if the PRC tax authorities determine that the arrangement lacks a *bona fide* commercial purpose and re-characterize the indirect transfer as

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> a direct transfer of the PRC enterprise. Bulletin 24 clarifies certain aspects of the rules in Circular 698.
>
> Bulletin 7 does not replace Circular 698 and Bulletin 24 in their entirety. Instead, it abolishes certain provisions and provides more comprehensive guidelines on a number of issues, as explained below. While Bulletin 7 is effective from the date of issuance, it also applies to transactions that took place before the date of issuance but for which the relevant PRC tax treatment has not been decided upon by the Chinese tax authorities. Thus, Bulletin 7 will affect both future and past transactions.

Retention by TIH of Provision in respect of Potential Tax Liability

49 Ms Ang – TIHIM's chief financial officer – gave evidence that TIH made a provision for the Contingent Foodstar Tax Claim in its audited financial statements starting from the financial year ended 31 December 2010.

50 On 25 February 2015, a meeting of the board of directors of TIH took place. The board minutes recorded:

> A provision of $16.04m for the 698 tax (and expense) issue for Foodstar and Zhongnan has been provided for. Tax advisors have advised that such provision should be provided for the next 2 years before the provision can be released.

51 On 8 May 2015, there was a meeting of TIH's audit committee ("AC"). The minutes of that meeting recorded as follows:

> An amount of $19m (including Little Rock) is still held for Foodstar/Zhongnan tax matters (and another $3m held by the funds.) KPMG has advised that such funds be held for at least 3 years from the date of submission. It is anticipated that the fund be set aside for another one year.

52 Thereafter, as reflected in subsequent AC minutes and in the absence of feedback from the PRC tax authorities, TIH decided to retain that provision in its books against the potential tax liability – although the actual amount of such

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provision fluctuated to some extent depending on currency fluctuations. That provision remains in TIH's books.

Outstanding debt of S$250,012.77/US$419,156.21

53 In passing, I note that it is TIH's case that TCL/TCPL had failed to pay an alleged outstanding debt in the sum of S$250,012.77 in respect of management fees and staff salary loan following the Internalisation Exercise pursuant to clause 2.1 of the DOT. On 14 July 2015, a demand for payment of such sum was sent by Morgan Lewis Stanford on behalf of TIH to TCL. By a letter dated 2 February 2016, a further demand for such sum and other sums allegedly due and owing in respect of alleged wrongful deductions totalling US$419,156.21 was made by TSMP Law Corporation on behalf of TIH. Thereafter, TIH sent further chaser letters including on 1 November 2016 and 14 March 2018. It is not clear on what grounds, if any, those claims are disputed save that TIL maintains that TIL is not itself liable to pay such claims. Be that as it may, it is common ground that such sums have never been paid. It is also common ground that TIH never commenced proceedings to recover such sums. According to Mr Chan, the only reason for not pursuing these claims was because it was uneconomic to do so. Although it would seem that any such claims are now time-barred, the fact that such alleged sums have never been paid is relied upon by TIH in these proceedings in support of its case that TIL has "unclean hands" and that, for that reason, the court should deny the relief now sought by TIL in these current proceedings. In so far as may be relevant, I deal with this point further below.

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Distribution by the Parallel Funds of provision in respect of potential tax liabilities

54 According to a letter from KPMG LLP dated 8 December 2015, it appears that as at 31 October 2015, the Parallel Funds had reversed the provisions for the relevant potential tax liabilities on the basis that the relevant trustees of the Parallel Funds (the "Trustees") were of the opinion that those potential tax liabilities were unlikely to crystallise; and that KPMG LLP had been told by the relevant Trustees that "... In the event that those tax liabilities crystallise after the final distribution is made … the Trustee and investor beneficiaries … will resolve the matter directly with the tax authorities."

55 Although that letter invited the relevant Trustees and investor-beneficiaries to submit further comments in order for KPMG LLP to formally complete its auditors' report, it is unclear what comments (if any) were submitted.

56 Be that as it may, on 9 December 2015, letters were sent on behalf of the three Parallel Funds to its investors (including LRG) proposing to distribute all the funds previously set aside to cover the contingency claims in respect of the potential tax liabilities of the Foodstar Transaction. The letters were all in standard form and provided as follows:

> Dear Investors,
>
> Since all the material assets of your Fund have been disposed, the only outstanding item left in the [name of Parallel Fund] (the "Trust") is the provision for potential tax liabilities in respect of the sale of investments in China.
>
> The opinion of your Fund's tax advisors is that the tax is not applicable to the transactions, and indeed the Chinese tax authorities have not taken action on the matter. We further have been informed that the Chinese tax authorities do not notify the relevant parties unless a tax is due and thus its inaction over a period of time means no action is intended. In

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consultation with tax advisors your Trustee has decided that sufficient time has lapsed and the provision could be reversed. Therefore, the Trust will be dissolved and assets distributed on 29 December 2015. Your Fund's lawyers have indicated that under BVI law the Trustee can dissolve the Trust at any time as its formal term has already expired. We enclose herewith a summary of distribution to be made to investors (Appendix A) for your information.

However, since there is no defined statutory limit on the tax, the tax advisors would not issue a formal advice on the tax position and the auditors would not issue an opinion on the release of the provisions. Attached please find the draft final audit report and a cover letter from KPMG, which are self-explanatory. KPMG requests the Trustee to consult the beneficiaries so that in the event that the tax liabilities crystallize, they would work together to resolve them. The Trustee considers such crystallization to be remote.

This letter serves as the final distribution notice. By accepting the distribution you agree to (1) accept the draft final audit report, and (2) join the Trustee to work out a solution with the tax authority in case the potential tax liabilities crystallize. Your share of the final distribution will be remitted to your account on file on 29 December 2015 unless you inform us on or before 21 December 2015 that you prefer to defer receiving your share of the distribution at this point in time, in which case your shares of the distribution will be put in a trust account until you decide to withdraw it. The Trustee regrets any inconvenience caused but there is no other way to facilitate dissolution of the Trust and distribution of the cash locked in the tax provision. The Trustee wishes to thank all the investors for their patience. Your fund has come through an arduous journey but at least all investors staying with us to the end make money on their investment.

Please respond to this letter at your earliest convenience either by email to [e-mail address]; mail to The Trustee of "[name of Parallel Fund]", c/o Transpac Capital Limited, [address]; by Phone: [phone number] or by Fax: [fax number].

Should you wish to give alternative remittance instructions apart from the last set of bank instructions provided to us, please fax or email your instructions to the attention of Ms Vinnessy Yik at fax number [fax number] or at email address [e-mail address] to reach us no later than 21 December 2015.

We look forward to hearing from you.

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57 This was an important letter as Ms Ang confirmed in evidence. She forwarded it the following day, *ie,* 10 December 2015 to, *inter alia,* Mr Wang (who was and had been a director of TIH since February 2015) and Mr Harry Leong. Ms Ang confirmed in evidence that she saw nothing objectionable about the points made in the second paragraph of the letter (see [56] above), *viz*, that the Parallel Funds' tax advisors were of the opinion that tax was not applicable to the transactions, that the PRC tax authorities had not taken action on the matter, and that the available information was that the PRC tax authorities did not inform the relevant parties unless tax was due and thus that the authorities' inaction over a period of time meant no action was intended. For present purposes, the important point is that no objection was ever made by Ms Ang nor anyone else on behalf of LRG or TIH nor any of the other investor-beneficiaries to the proposed distribution of funds. Ms Ang confirmed that nothing in the letter prevented LRG from rejecting the Trustees' proposal or airing their disagreement to the Trustees. Mr Wang confirmed in evidence that he and Mr Kin Chan (Chairman of TIH) had seen the 9 December 2015 letter from the Trustees of the Parallel Funds and the attached draft KPMG audit report for the Parallel Funds with its disclaimer, and had discussed the letter. He also testified that they were thinking "[w]e take the money, we just see what Transpac will be doing" and that they "took the approach to say let's watch and see exactly what tricks or what is happening". Mr Wang accepted that Transpac did not stop TIH from asking questions. Ms Ang also confirmed in evidence that all the assets of the Parallel Funds were distributed on or about 29 December 2015.

58 On the same date, *ie,* 29 December 2015, KPMG LLP issued its audit report in respect of the financial statements for each of the Parallel Funds. In each case, the report contained a note (Note 10) which included the following statement:

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> As at 31 December 2014, other payables and accruals included an amount … for tax liabilities expected to arise from the disposal of certain investment in prior years and there is no clear statutory time limit for the tax exposure. As it has been 3 years since the disposal was completed and the tax authority has yet to provide the tax assessment to the Trust, the Trustee was of the opinion that sufficient tax has passed and the risk of the tax liabilities crystallising was remote. As such, the accrued tax liabilities of … was reversed as at 31 October 2015.

59 The financial statements were provided under cover of a letter from KPMG LLP which stated as follows:

> *Basis for Disclaimer of Opinion*
>
> As explained in Note 10, there is no clear statutory time limit for the tax liabilities. The accrual for tax liabilities from prior years reversed during the year, as the Trustee considers the risk of the tax liabilities crystallising to be remote and the accrual no longer necessary as at 31 October 2015. In the event that the tax liabilities crystallise in future, the Trustee and investor beneficiaries of [the relevant Parallel Fund] will resolve the matter with the tax authority.
>
> As a result, we were unable to determine whether any adjustments were necessary in respect of [the relevant Parallel Fund's] accrual of tax liabilities.
>
> *Disclaimer of Opinion*
>
> Because of the significance of the matter described in the Basis for Disclaimer of Opinion paragraph, we have not been able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion. Accordingly, we do not express an opinion on the financial statements.

60 In passing, I note a number of important points.

(a) It appears that such distributions were made not on the basis of any advice by KPMG LLP but by the relevant Parallel Funds on the basis of the opinion by the relevant Trustees themselves that the risk of the potential tax liabilities crystallising was "remote".

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(b) It was TIH's case that such distributions were made in circumstances which constituted an actual conflict of interest and were therefore made in breach of – and thus not in accordance with – the trust deeds of the Parallel Funds as required by clause 2.7.3 of the BOA. This was hotly disputed by TIL.

(c) In any event, it was TIL's case that Ms Ang and Mr Wang were both informed in advance that such distributions would be made and that such distributions were subsequently in fact made with the full knowledge of Ms Ang and Mr Wang (and therefore TIH) with the result that TIH had, in effect, waived any breach by TIL and/or were estopped from asserting any such breach.

(d) Further, it was TIL's case that although Ms Ang and Mr Wang had no objection to the distribution of funds which had previously been retained by the Parallel Funds to cover potential tax liabilities, TIH continued to maintain its provision in respect of TIH's similar potential tax liabilities. In summary, it was submitted by TIL that such inconsistent treatment amounted to bad faith on the part of TIH or at least was unjustified.

61 So far as relevant, I deal with these further important points below.

62 On 4 January 2016, TTCL sent a copy of the final audited reports of the Parallel Funds to all the investor-beneficiaries, stating that the reserves against contingent liabilities had been released and all assets distributed, and that the Parallel Funds were effectively terminated. Also on 4 January 2016, TIL wrote to TIH as follows:

Dear Sirs,

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> Re: TIL Bond Account Operating Agreement ("Bond Agreement")
>
> This letter serves as notice that the reserves for contingent liabilities that form the subject of the Bond have been fully released. Under clause 2.7.3 of the Bond Agreement, the condition for the closing of the account [********].002 ("Bond Account") has been fulfilled and the Bond Account may be closed under clause 2.8. Furthermore we confirm there is no Settled TIH Contingent Claims.
>
> We shall instruct the Custodian of the Bond Account in due course.

63 This letter prompted an immediate robust response later the same day, *ie,* 4 January 2016, from TIH to both TIL and Mr Cheong (the Custodian of the Bond Account) stating that TIH emphatically disagreed with the entire contents of TIL's letter, that TIH objected in the strongest possible terms to any action taken to close the Bond Account or to transfer moneys out of the Bond Account, and instructing Mr Cheong not to take any action whatsoever to close the Bond Account. On the same day, TIH also wrote to Bank Pictet informing them, *inter alia*, that the steps being taken to close the Bond Account were illegal and in breach of contract, and requested the bank not to take any action to close the Bond Account. By letter dated 3 February 2016, TIH again wrote in similar terms to Bank Pictet telling them not to take any action to close the Bond Account until it received further and affirmative notice from TIH. Similarly, by letter dated 3 February 2016, TSMP Law Corporation wrote on behalf of TIH to Mr Cheong telling him that, until he receives affirmative notice from TIH, he should not close the Bond Account or take any position on the dispute between TIH and TIL.

64 On 25 February 2016, there was a meeting of TIH's AC. The minutes of that meeting record the following:

> … The provision for Foodstar's tax of about $18m has not been released as there is no statute of limitation on the 698 tax in China and the tax agent has not given clearance to release the

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> funds. Hence the contingent liability for Foodstar's tax will continue to be reflected in TIH's books.

65 On 10 May 2016, a further meeting of TIH's AC took place. The minutes of that meeting record the following:

> Barry from KPMG commented that the 698 ruling for Foodstar has no time bar in China, hence it would not be prudent to recommend that such funds be released. However, if TIH had not been a listed entity, another individual or entity could undertake that liability and the $18m can be released for other use.

66 In the course of 2016, the different positions taken by, on the one hand, TIL, and, on the other hand, TIH, became increasingly clear. For present purposes, it is sufficient to note that certain discussions appear to have taken place between Dr Leong and Mr Chan to try to resolve what should happen with regard to the Bond Amount and Bond Account although, in the event, such discussions did not bear fruit.

67 In summary, following a meeting between Dr Leong and Mr Chan on 17 October 2016 and as appears from an exchange of e-mails on 17/18 October 2016, the position taken by TIL was that the conditions for the closure of the Bond Account had been satisfied at the end of 2015 and that it should therefore be closed – although according to Dr Leong he was in no hurry to close the account. This was disputed by TIH. In particular, as stated by Mr Wang in his e-mail dated 17 October 2016, clause 4 of the Bond Deed clearly states "... the true intention and spirit of the agreement which is to release/close the [Bond Account] only when we [*ie,* TIH] can get sign off from our auditor to release the contingent liabilities...".

68 During the remainder of 2016 and thereafter, there were further discussions and correspondence between the parties regarding the central issue

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as to whether the Bond Amount should be released, and the Bond Account be closed. However, I do not propose to refer to these further discussions and correspondence in any detail. For present purposes, it is sufficient to note that the position of the parties remained largely unchanged, *viz,* TIL maintained that the conditions for the closure of the Bond Account had been triggered and that it should therefore be closed, and the Bond Amount paid to TIL. To the contrary, TIH maintained that the Bond Account should be maintained in accordance with the terms of clause 4 of the Bond Deed, *ie,* until TIH obtained the consent of its auditors to release the contingent liabilities in respect of the potential PRC tax liabilities.

69 On 23 February 2018, there was a board meeting of TIH. The board minutes record as follows:

> PRC 698 capital gains tax rule — China's tax has been revolving but we are still not clear on the statute of limitation. This is in relation to the Foodstar divestment. Board discussed the effect of this and decided that there should be no change for the time being. TIHIM will revisit this matter in one year's time

Early 2018: Discussions with Ms Gan (KPMG SG)

70 Shortly thereafter, there was a series of discussions and e-mail exchanges involving Ms Gan of KPMG SG. The nature of such discussions was hotly disputed by the parties. In summary, it is TIL's case that Ms Gan had agreed to provide an opinion permitting the release of the provisions for the Contingent Foodstar Tax Claim, but that she had been persuaded not to do so as a result of pressure by Mr Wang. This was denied by Mr Wang. For its part, TIH maintained that, in truth, it was Dr Leong who had sought to put pressure on Ms Gan to produce a "clean" opinion with a view to obtaining the release of the Bond Amount.

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71 It is convenient to start by referring to the e-mail exchanges between Dr Leong and Ms Gan. I set these out at some length because they are essential in seeking to understand the clash of evidence between Dr Leong, Mr Wang and Ms Gan as to a crucial point in this case, *ie,* why KPMG SG never produced any written opinion concerning the potential tax liabilities in respect of the Foodstar Transaction.

(a) On 5 March 2018, Dr Leong wrote to Ms Gan stating:

> Please note 2.7.2. All you need to say is that sufficient time has passed and it is prudent to release the bond. It will be up to TIH and TIL to decide. Please let me have this letter within this week. Thank you.

(b) According to the e-mails, Ms Gan then asked whether Dr Leong was available for a call – although it is not clear from the e-mails whether a call did in fact take place prior to a further e-mail which Ms Gan sent on 8 March 2018 to Dr Leong stating:

> Dr Leong
>
> Perhaps you want to email me the details which you shared with me on the release of reserve of various funds and the suggested wordings of the letter. As mentioned I am not able to use any wordings that imply decision making on behalf of a company, regardless if that company is an audit client of KPMG or otherwise.
>
> Thank you for your understanding .
>
> Regards
>
> Kwee Lian

(c) It is again unclear whether any phone call took place between Dr Leong and Ms Gan immediately after that e-mail. But it seems likely or at least possible given the terms of a further e-mail which Dr Leong sent to Ms Gan with copy to Mr Cheong the following day, *ie,* 9 March 2018 stating:

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> Kwee Lian
>
> Thank you for informing me that sufficient time has passed and there is little likelihood that the 698 withholding tax would be imposed on the buyer of Foodstar.
>
> I have sent you the Bond Operating Agreement, which provides the form of tax advisor opinion related to the reserves made against the contingent tax law ability. Please note that at the time of internalization we had discussed the ramifications of the reserves with KPMG tax and audit and believed the reserves could be released in another year or two. Indeed, the Parallel Funds have released all its reserves and fully distributed the money in 2016.
>
> I hope you recall our dinner meetings with Barry and Gerard and discussed the treatment of those releases. KPMG provided a draft final audit statement for the Parallel Funds without an opinion. Such draft audit statement was sent to every limited partner (investor) in those Funds. of which TIH was one. enquiring if the investor would accept the statement and receive distribution. No one investor objected and the funds made a final distribution at the end of 2016 and are closed. Since then you, Barry, Gerard, Stanley and I have met a couple of times to discuss the reserve held by TIH and the question has always been whether sufficient time has been passed.
>
> I am therefore elated that you now have decided that sufficient time has elapsed. I am copying this email to Stanley because in case you need information on the Parallel Funds he is in a better position to furnish.
>
> I would like to suggest that, as tax advisors to Transpac Funds on the 698 tax matter, KPMG may consider issuing an opinion to the effect that sufficient time has elapsed since the Foodstar Holding was sold to Heinz and reserves against any tax claim thereof may no longer be required.
>
> Stanley, please correct any error or omission.
>
> Chris

(d) Mr Cheong responded immediately by e-mail stating: "From my recollection of the matter, the facts are accurate." Shortly thereafter, Dr Leong sent a further e-mail on the same day to Ms Gan again copied to Mr Cheong stating, "Please feel free to ask Stanley for dates and excerpts of communications with KPMG and limited partners."

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However, there appears to have been no response (at least by e-mail) by Ms Gan.

(e) On 15 March 2018, Dr Leong sent a further e-mail to Ms Gan again copied to Mr Cheong stating:

> Is there anything else that Stanley and I can provide? Since you have already advised us that a reasonable time had passed since the sale of Foodstar was effected and the risk of the Chinese authorities taking action against Transpac Capital entities on the 698 withholding tax is minimal, why not just issue this opinion?
>
> I see no reason that you should drag on.

There appears to be no response by Ms Gan to this e-mail although it is possible that they may have spoken on the phone.

(f) In any event, later that same day, on 15 March 2018, Dr Leong sent a further e-mail to Ms Gan stating:

> Kwee Lian
>
> Let me reiterate that you are not to make a decision for TIH, but to advise Transpac Capital, as manager of the residual matter concerning the investment of its Funds (TIH and the Parallel Funds) in Foodstar, the status of the reserves that Transpac Funds made against the 698 withholding tax in respect of the sale of Foodstar. It has been some 8 years since the sale and you have indicated that sufficient time has lapsed so there is little likelihood of the Chinese authority taking action.
>
> Please be reminded that shortly after the transaction KPMG had filed application to the tax authority in China that the 698 withholding tax would not be applicable to the Foodstar transaction. I still remember at that time you told us that China tax authorities do not inform the relevant party if no tax has to be paid. After a reasonable period, usually 3-5 years, the relevant party may recognize that no tax is being charged. We have been patient and I am happy that now you have affirmed that such time has come.
>
> I am copying Stanley in case you want to get further facts from him.

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Chris

(g) Thereafter, following various discussions, Ms Gan sent an e-mail to Dr Leong on 21 March 2018 with a "proposed scope" for KPMG SG "... to comment on the likelihood of the Chinese tax authorities imposing taxation on the gains derived by the company from the sale of shares in [Foodstar]...". The estimated fees were S$30,000. Dr Leong responded immediately stating: "Please proceed. Can you get it done by this weekend?" Ms Gan then responded the following day, *ie,* 22 March 2018 stating that she could only deliver the report the following week. On 26 March 2018, Dr Leong sent an e-mail to Ms Gan asking if he could have a "preview" before KPMG SG issued the letter to which Ms Gan responded: "Sure". After Dr Leong asked to know when, Ms Gan responded: "Likely on Wednesday". However, on 29 March 2018, Ms Gan's assistant sent an e-mail stating that "Due to unforeseen circumstances, we would not be able to deliver the draft this week."

(h) There was then a further unexplained delay. The evidence of Dr Leong is that, after waiting some time for the draft letter from KPMG SG, he called Ms Gan on about 17 April 2018 to find out the reason for the delay and that Ms Gan informed him that "... the senior partner in KPMG-Singapore had forbidden the issuance of the opinion due to the objections made by Allen Wang of TIH". Following that discussion, Dr Leong sent a long e-mail dated 17 April 2018 to Ms Gan stating:

Kwee Lian

It is an extreme shock to learn that your senior partner has forbidden you to issue the opinion you had agreed on, namely that sufficient time has elapsed since the sale of Foodstar to Heinz in 2010 and the likelihood of 698 withholding tax being imposed on the buyer is slim.

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> It is causing a great deal of damage to Transpac Capital if KPMG allowed Allen Wang to block the issuance of such an opinion.
>
> In the matter of Foodstar and certain other direct investments, TIH's direct investments are managed by Transpac Capital Pte Ltd ("TPC"), and after the internalization of TIH management by Transpac Capital Limited ("TCL"), as Participatory Interests together with the Parallel Funds. The management of Foodstar tax liabilities rests with TPC/TCL, not TIH. Your client in respect of the Foodstar tax matter is TPC/TCL, not TIH, though TIH may be a client of your[s] on other tax matters. I have been representing TPC/TCL in my discussion with you on this matter all these years and was so happy when you confirmed to me last month that sufficient time has lapsed. Now I feel injured.
>
> I have over the years given you full details of the circumstances related to the need of a tax opinion on Foodstar. Let me clarify once more. At the time of internationalization [*sic*] of management, TIH had contingent liabilities with respect to tax and legal action and an affiliate of TPC agreed to put up a bond to cover the clawback in the event of their crystallization. KPMG's opinion on the time span of the 698 tax liability pertains only to the operation of the bond. I am sending you once again the Bond Operating Agreement and draw you[r] attention to clause 2.7.2, which stipulates that the opinion is to be issued to TCL.
>
> Please note that TIH had released the contingent liabilities on 2.7.2(a) and (c). Only 2.7.2 (b) remains. Please also note that 2.7.2(c) pertains to another 698 tax situation and that transaction came after the sale of Foodstar. TIH had released the contingent liabilities of that transaction. Thus I cannot think of a valid commercial reason why TIH would block your issuing an opinion when a similar opinion was accepted several years ago.
>
> TIH has no right to request KPMG not to issue a professional opinion and KPMG has no reason to consult TIH on the Foodstar tax matter. I urge you to issue the opinion forthwith.
>
> Please let me know your decision by April 20.
>
> Chris

(i) On 19 April 2018, Ms Gan responded by e-mail saying that she would discuss Dr Leong's e-mail with her risk management partner, that she was currently travelling, and that she could only update Dr Leong after her return to the office on 26 April.

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(j) On 1 May 2018, Dr Leong sent a further e-mail to Ms Gan stating: "I have patiently waited another two weeks. Please send us the letter." However, according to Dr Leong, Ms Gan never did get back to Dr Leong. In any event, it is common ground that KPMG SG never did issue the tax opinion.

72 I have set out at some length the relevant e-mail exchanges between Dr Leong and Ms Gan during this period and referred as necessary to the evidence of Dr Leong. It remains to refer to the evidence of Ms Gan and Mr Wang with regard to their involvement on this aspect of the case.

73 As for Ms Gan, her evidence is contained in her witness statement which, as noted above, was produced as a result of the order to attend court served on her by TIL. Given that TIH decided not to cross-examine Ms Gan, her statement stands as unchallenged evidence. In paragraphs 31–33 of her witness statement, Ms Gan states as follows:

> 31. In or around 2018, Dr Leong (on behalf of the Claimant) approached me asking for an opinion with respect to the Contingent Foodstar Tax Claim. I recall that he wanted a "clean" (i.e., unqualified) opinion that Circular 698 no longer applied to the Foodstar Transaction. He informed me that he wanted this "clean" opinion so that the provisions for the Contingent Foodstar Tax Claim in the Defendant's accounts could be released.
>
> 32. I recall that after a discussion with my tax colleagues in KPMG China, my preliminary view at the time was that the risk of the PRC tax authorities imposing tax retroactively on the Foodstar Transaction may be low but was not "nil". I further recall that at the time, my KPMG China tax colleagues had informed me that the Chinese tax authorities were reviewing a number of similar transactions. In the circumstances, I informed Dr Leong that a "clean" opinion was not possible; and that in any event, it was not within the purview of a tax partner to determine if an accounting provision could be released or otherwise.

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> 33. In the circumstances, I never agreed to issue an Opinion that "*sufficient time had passed since the Foodstar Transaction and that the provisions for the Contingent Foodstar Tax Claim could be released*", as alleged by the Claimant (see paragraph 29 above).
>
> [emphasis in original]

74 In paragraphs 35–37 of her statement, Ms Gan comments on some of her e-mails with Dr Leong referred to above as follows:

> 35. In the said exchange, there was an email from Dr Leong to me on 17 April 2018 stating that "*it is an extreme shock to learn that your senior partner has forbidden you to issue the opinion you had agreed on, namely that sufficient time has elapsed since the sale of Foodstar to Heinz in 2010 and the likelihood of 698 withholding tax being imposed on the buyer is slim.*" I do not recall agreeing to issue such an opinion, as alleged by Dr Leong in his email of 17 April 2018.
>
> 36. I recall informing Dr Leong that KPMG SG's risk and compliance partners had flagged an issue – involving a potential conflict of interest - with KPMG SG issuing a tax opinion on the applicability of Circular 698 to the Foodstar Transaction where KPMG SG were *also* the auditors of the Defendant. I also recall informing Dr Leong that as a result of the potential conflict of interest, KPMG SG could not issue any tax opinion on the applicability of Circular 698 to the Foodstar Transaction.
>
> 37. In this regard, I note that in response to Dr Leong's email of 17 April 2018, I replied on 19 April 2018 stating "*I would* (sic) *discuss your email with my risk management partner. As I am currently travailing* (sic) *and will only be back to office on 27 April, I could* (sic) *only update you after that.*" I do not recall if I sent any response in writing to Dr Leong. However, as stated above, I recall informing Dr Leong that as a result of the potential conflict of interest, KPMG SG could not issue any tax opinion on the applicability of Circular 698 to the Foodstar Transaction.
>
> [emphasis in original]

75 As for Mr Wang, his evidence is contained in paragraph 143 of his witness statement:

> 143. For completeness, I should add that in or around the start of 2018, Ms Gan Kwee Lian called TIH's Ms Emily Ang and myself to seek TIH's opinion on the Contingent Foodstar Tax

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> Claim. During this call, we were informed that Chris Leong had been pressuring KPMG to issue written advice in respect of the Contingent Foodstar Tax Claim. In response, we raised our concerns that (a) KPMG may be conflicted from issuing this advice given that KPMG was engaged by TCPL only, but the advice would potentially affect TIH's interests if the Bond Amount were to be released, and (b) any tax advice issued by KPMG in respect of the Contingent Foodstar Tax Claim was a matter of Chinese tax law and that KPMG Singapore should ensure that any tax advice issued by KPMG was cleared by the relevant KPMG (China) tax partner first. Ms Gan Kwee Lian ended the call stating that she would discuss the matter internally and get back to us. Save for the above, neither TIH nor myself had any further correspondence with KPMG on the matter.

Unlike Ms Gan, Mr Wang gave oral evidence and, in particular, was cross-examined. However, in broad terms, he maintained that what he said in this paragraph 143 of his statement was the truth. I accept that evidence.

76 Having set out the relevant e-mail exchanges at some length and heard the oral evidence of Dr Leong, Mr Wang and Ms Ang concerning this part of the case, it is convenient that I set out my conclusions concerning this aspect of the case which are, in summary, as follows:

(a) There is no doubt that Dr Leong was extremely keen to obtain the relevant opinion from KPMG SG as required by clause 2.7.2 of the BOA in order to trigger the requisite Account Closure Event (see clause 2.7.2 reproduced at [41] above) and thereby enable TIL to receive the Bond Amount which (by that time in 2018) had sat in the Bond Account for some four years.

(b) Equally, there is no doubt that Dr Leong felt particularly aggrieved by the fact that although TIH had not objected to the distribution of funds out of the Parallel Funds and had benefited by such distribution by reason of the receipt of such funds by TIH's wholly-

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owned subsidiary, *ie,* LRG, TIH were, in effect, refusing to cooperate in allowing the closure of the Bond Account and the payment to TIL of the Bond Amount.

(c) I accept that Dr Leong honestly thought that Ms Gan had told him orally that the likelihood of any tax being imposed by the PRC tax authorities in relation to the Foodstar Transaction was slim. That is consistent with what he stated in his e-mail dated 17 April 2018 (see [71(h)] above). It is also broadly consistent with Ms Gan's own evidence in paragraph 32 of her witness statement that such risk "... may be low but not 'nil'" [emphasis in original]. However, so far as relevant, I do not accept that Ms Gan ever confirmed orally to Dr Leong that KPMG SG could or would produce a written advice that complied with the requirements of clause 2.7.2(b) and sub-(i) of the BOA.

(d) It seems to me that Ms Gan probably felt that she was in a difficult position because, despite Dr Leong's entreaties, she felt unable to produce a "clean" opinion which would satisfy the requirements of clause 2.7.2(b) and sub-(i). Indeed, she expressly states in paragraph 32 of her witness statement that she told Dr Leong that it was not possible to produce a "clean" opinion.

(e) In such circumstances, it is perhaps unsurprising that, according to Mr Wang, Ms Gan called him and Ms Ang as referred to in paragraph 143 of Mr Wang's witness statement. It is perhaps debatable whether, given KPMG SG's role with regard to the provision of a written advice under the BOA, Ms Gan ought to have made that call. I note that Ms Gan does not refer to that call in her witness statement, and the fact that she did not give oral evidence makes it particularly difficult for the court

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to express any view on that topic. In that context, I bear well in mind that KPMG LLP were also TIH's auditors. In the circumstances, it seems to me that there is at least some force in the argument that when Ms Gan called, Mr Wang and Ms Ang ought simply to have told her that it was not for them to make any comment as to whether KPMG SG should or should not issue the written advice and that it was a matter for KPMG SG alone to decide whether or not to do so.

(f) Be that as it may, on the evidence, I do not consider that it can be said that TIH or Mr Wang acted wrongfully or in bad faith so as to prevent KPMG SG from issuing the requisite opinion that would satisfy the strict requirements of clause 2.7.2(b) and sub-(i) of the BOA. In particular, unlike the position with regard to the Parallel Funds, it is important to emphasise that that provision contemplated specific written advice from KPMG that "...there is no claim for a sufficient period of time and it is ***prudent*** for the relevant contingent liability or a large part thereof to be released" [emphasis added]. The so-called "concerns" that Mr Wang and Ms Ang raised with Ms Gan as referred to by Mr Wang in his statement were hardly surprising or controversial. Although, as I have said, Ms Gan did not refer to this call in her witness statement and did not give oral evidence, I suspect that she was well aware of both the possible conflict (otherwise why make the call?) and the need to obtain advice on PRC tax law. These were matters which must have been obvious to Ms Gan. In any event, it is, as I have said, quite clear from Ms Gan's evidence that KPMG SG was never prepared to issue a "clean" opinion.

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2019 – KPMG and the Dentons Opinion

77 In early 2019, TIH's auditors raised an issue concerning the provision in TIH's accounts with regard to the Contingent Foodstar Tax Claim. The issue was raised with Mr Wang who circulated an internal e-mail within TIH dated 31 January 2019 which stated as follows:

> 1. Our provision against 698 tax arising from Foodstar sale in 2012: we have been informed by auditor that we need to look into the provision of the 698 tax since it has been quite some time since the filing of the 698 tax submission to china tax authority. KPMG Tax was the advisor of the transaction in the past for Transpac Capital as the manager for TIH. We are now in the midst of getting a second opinion on the tax position for the transaction to determine the potential risk level for us to decide if we need to keep the provision or we should not keep the provision. We expect the auditor partner to bring this issue up with Tong Kap during a pre meeting between AC chair and auditor before the board meeting. Our view is that we want to be very conservative and we have concern on certain assumptions/representation made in the tax filings that may lead to potential inquiry and therefore subject to potential tax in China. We are discussing this matter with a tax partner from Kings & Wood Mallesons which is the largest/most respected law firm in China to seek an opinion. The auditor also agreed to rely on the opinion to determine if the provision is necessary. We aim to procure the opinion before the accounts are finalized. The reason for the rush is we were told the statutory of limitation for the tax was 5 years and we had to release the provision if there is no specific reason. Again. the primary reason of procuring this opinion is due to the fact the KPMG tax is conflicted and was the one who prepared the tax submission in 2012.

78 This was followed by an exchange of further internal e-mails as follows:

(a) Later on the same day, *ie,* 31 January 2019, Mr Wang circulated an internal e-mail which stated in material part:

> As Alex has shared with us, his view is that there is a high risk for the transaction being taxable so we should keep the provision. KPMG Tax is conflicted as they were the one filing the return for Transpac and TIH back in the days.

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> We are in the midst of seeking opinion to allow us to keep the provision before the accounts are finalized. Because KPMG Tax is saying statury [*sic*] of limitation runs out last year.

(b) On the following day, *ie,* 1 February 2019, Mr Alex Au, one of the directors of TIH, responded saying:

> Circular 698 and the subsequent PN7 are primarily both anti-avoidance measures and there is no time limitation on tax evasion in PRC.

(c) On 3 February 2019, one of the other directors, Mr Liong Tong Kap commented: "Thanks. I share [Mr Chan's] concern too". Shortly thereafter on the same day, Mr Chan added his comments stating: "Allen please express our views strongly to the auditors". Mr Wang then responded: "Yes, have already done so. We need to help the auditor to help us as well. We need to get an opinion from [a non-conflicted] advisor so the auditor can sign off on keeping the provision …". Mr Chan then commented: "Great".

(d) There were then further internal e-mails within TIH concerning the possible removal of the provision in TIH's accounts with regard to the Contingent Foodstar Tax Claim – in particular on 4, 5 and 11 February 2019. It is unnecessary to set these out at length save to note that the general tenor of all these messages was that TIH were displeased by the suggestion that the auditors were coming at short notice trying to ask TIH to remove the provision without giving TIH an appropriate time to consider the position, that there was a "high risk for the transaction being taxable so we should keep the provision", that TIH was keen to be "very conservative", that it was TIH's decision as to whether to retain the provision, and that TIH needed the auditors to help TIH. The bottom line appears to have been that TIH believed or at least hoped that KPMG LLP were prepared to sign off the provision provided it was supported

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> by the opinion of a "consultant". As to these messages, it is unclear on what basis the view was expressed that there was a "high risk" of the Foodstar Transaction being taxable other than the unsubstantiated suggestion that TCL were "aggressive" in their tax reporting practice.

79 Be all that as it may, shortly after this exchange of internal e-mails, the decision was apparently made by TIH to obtain a legal opinion from Dentons regarding tax matters relating to the Foodstar Transaction. That legal opinion was produced by the Beijing Office of Dentons dated 20 February 2019 (the "Dentons Opinion"). It is a lengthy document and contains several important observations and conclusions including (in the English translation) at paragraph 5(b): "There is a high probability that it will be subject to investigation, adjustment, and ultimately taxation by the competent tax authorities in China on the grounds of lacking reasonable business purpose." The final conclusion at the end of the Dentons Opinion was as follows:

> **Our law firm believes** that the subject transaction may fall within the scope of application of the Announcement No. 7 of the State Taxation Administration, and if applicable, there is a significant possibility that the competent tax authority will determine that your arrangement lacks reasonable business purposes and reclassify the indirect transfer transaction as a direct transfer of equity of Chinese resident enterprises or other properties, subjecting it to taxation. After the 10-year retroactive period from the year in which the transaction occurred has expired, the tax authority may not conduct tax adjustments based on the reason of "retroactive period has expired." Likewise, there is uncertainty about whether the tax authority will recognize that "you are not required to make tax payments due to the tax authority's responsibilities, and three years have passed since the obligation arose."
>
> [emphasis in original]

It is TIL's case that the Dentons Opinion was flawed or at least not sufficiently "independent" because the main plank of its conclusions (*viz,* that the Foodstar Transaction lacked reasonable business purpose) could only have been reached

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on the basis of input from TIH which was necessarily biased in favour of retaining the provision and against TIL's keen desire to close the Bond Account and release the Bond Amount to TIL; and that, in any event, that conclusion was obviously incorrect. So far as relevant, I consider this further below.

80 It is perhaps unsurprising that on the basis of the Dentons Opinion, KPMG LLP apparently confirmed shortly thereafter to TIH that KPMG LLP were content for TIH to keep the provision for FY2018. As expressed by Mr Chan in an internal e-mail dated 4 March 2019, he did not think that TIH should keep the provision forever but that TIH should do so for the next three to five years. In the event, it was agreed both internally and with KPMG LLP that the position with regard to this provision would be reassessed annually. On 11 February 2020, Dentons confirmed by way of e-mail that they maintained the legal opinion issued in 2019, and KPMG LLP in turn on 25 February 2020 again concurred with the assessment by TIH's management on retaining the tax provision for the Contingent Foodstar Tax Claim.

2020 – KPMG-China

81 In about April 2020, the issue as to whether the Bond Account should be closed was raised again internally within TIH. In particular, the question was raised as to whether to instruct KPMG to issue a formal tax opinion letter for the purpose of triggering clause 2.7.2 of the BOA. Discussions continued into May 2020 with Ms Ang saying in an e-mail dated 22 May 2020 that the issue had been discussed with TIH's Board; and that the Board had given instructions for TIH's own advisors to work with KPMG, E&Y and DLA to determine what are the risks involved "...because they are conflicted when it comes to interests of TIH". The Board also requested that the costs should be borne by TIL. Dr Leong considered that this proposal was preposterous given that KPMG, E&Y

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and DLA were the relevant entities designated in the BOA to provide the relevant written advice (see clause 2.7.2 at [41] above). As a result, this proposal was not adopted.

82 Instead, Dr Leong decided to instruct Mr Ricky Gu of KPMG to consider the Foodstar Transaction tax situation. Mr Ricky Gu did provide an initial draft written advice dated 5 June 2020 which contained the following conclusion:

> **4. Conclusion**
>
> In the 698 reporting package submitted to the in-charge tax authority in the year 2012, the Shareholders had listed out the arguments to support the reasonable business purposes of FSSG, as well as the reasons why the Transaction shall not be subject to PRC CIT. As there have been no further challenges/queries from the in-charge tax authority since then, it can be considered as the tax treatment is accepted by the in-charge tax authority.
>
> Should the in-charge tax authority subsequently come back and seek to impose tax, if it can be proved that it was their own fault to make the wrong judgement to accept our previous tax treatment as we had fully disclosed all the information of the case, then the general statute of limitations of 5 years has lapsed, and they do not have the right to further adjust the tax treatment.
>
> However, if the in-charge tax authority argues that the previous tax treatment was unfinalized due to no any written documentation from them to confirm the tax treatment, it would have the right to further investigate the case, but the Transaction will be protected under 10-year statute of limitations from 2 November 2020. In addition, the Transaction happened and completed around 10 years ago and there was a merger of tax authorities during 2018, we understood that the tax officials only reviewed the cases happened 3 years before the merger at the time, the likelihood for them to review the Transpac's case again is remote.

83 That draft was reviewed by Dr Leong. He made certain suggestions and some amendments in "red". In particular, he added a note to the last paragraph of the above conclusion: "please add language to strengthen the conclusion that not only no review but also no tax will be imposed." Shortly thereafter, KPMG

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produced a revised draft letter dated 11 June 2020. However, KPMG did not add any words to the effect suggested by Dr Leong although the text under the heading "Conclusion" was substantially changed and expanded to read as follows:

> **4. Conclusion**
>
> We consider that the risk for the in-charge tax authority to review the Transpac's case again is low, based on below factors:
>
> - In the 698 reporting package submitted to the in-charge tax authority in 2012, the Shareholders had listed out the arguments to support the reasonable business purposes of FSSG, as well as the reasons why the Transaction shall not be subject to PRC CIT. The in-charge tax authority had issued an official receipt for the 698 reporting.
> - There have been no further challenges/queries from the in-charge tax authority since the 698 reporting in 2012. Despite the in-charge tax authority has no obligation to issue a written notice to the Shareholders to confirm the tax treatment on the Transaction, such facts imply that the tax treatment had been accepted by the in-charge tax authority, and the chance for them to raise queries after 8 years should be low.
> - GAAR Administrative Measures was issued 4 years after the Transaction was completed, which stipulated that these Measures shall be implemented with effect from 1 February 2015, and apply to tax avoidance cases pending for finalization by the tax authorities prior to 1 February 2015. In Transpac's case, the in-charge tax authority had not raised any queries on the reasonable business purposes since submission of reporting materials, nor had they challenged that the Transaction should be characterized as a tax avoidance case (i.e. there was no dispute pending for finalization). Under normal practice, if the in-charge tax authority considered the Transaction involved in tax avoidance, they would have raised the queries following the 698 reporting until they were satisfied with further evidences or they taxed the Transaction eventually. However, the in-charge tax authority has not raised any further queries/challenges since the reporting. Therefore, the risk of adopting GAAR Administrative Measures retroactively on Transpac's case should be low.
> - There is argument that Announcement 7 does not apply to the Transaction, as it was issued after the Transaction.

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> Since the promulgation date of Announcement 7, the in-charge tax authority has not raised any other challenges/queries about the Transaction neither. Therefore we consider that practically the tax treatment of the Transaction should have already been finalized under Circular 698.
>
> - In addition, the Transaction happened and completed around 10 years ago and there was a merger of tax authorities during 2018, we understood that the tax officials only reviewed the cases happened 3 years before the merger at the time, the likelihood for them to review the Transpac's case again is remote.

84 Although this wording confirmed that the risk of the tax authority reviewing Transpac's case was "low" based on the factors set out in the rest of the text, it plainly did *not* satisfy the requirements of clause 2.7.2(b) and sub-(i) of the BOA. Dr Leong followed this up with Mr Ricky Gu in the course of July 2020 via WeChat messages but to no apparent avail. It appears that Mr Ricky Gu informed Dr Leong that he would communicate with KPMG SG to find out more. However, Dr Leong did not receive any further updates from Mr Ricky Gu. The opinion was never issued.

85 In January 2021, Ms Ang contacted Dentons who advised that their views remained as previously expressed in the Dentons Opinion. The minutes of the AC meeting on 1 March 2021 recorded as follows:

> Tax provision of S$17.7m in relation to Foodstar remained appropriate as at 31 Dec 2020 as KPMG had obtained confirmation from Dentons Beijing that there were no change in circumstances and opinion issued in prior years.

86 Dentons issued an updated legal opinion on 6 August 2021 to take into consideration several revisions to the PRC's tax laws, though there was no change to the conclusion of its 2019 legal opinion. That continued to be Dentons' advice as confirmed by e-mails dated 11 February 2022 and 31

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January 2023; and on that basis, KPMG LLP concurred with TIH's assessment that the relevant provision remained appropriate.

87 In concluding this part of this judgment, I note that between April and July 2021, there was a very heated exchange of e-mail correspondence between, *inter alia*, Dr Leong and Mr Chan, with Dr Leong complaining that the Bond Amount had been locked away for almost seven years and accusing Mr Chan of making "bad faith statements". Various tentative proposals were made with regard to the best way forward. However, such proposals did not progress with the result that the Bond Amount remains in the Bond Account to this day.

88 Against that background of facts, I turn to the main issues.

Summary of the Main Issues

89 TIL's primary case is that the Bond Account should be closed and the Bond Amount released in full. That case rests upon a contention that there has been one or more Account Closure Events within the meaning of clause 2.7 of the BOA. In that context, TIL originally relied upon clauses 2.7.2, 2.7.3, and 2.7.5 of the BOA. However, it is plain that no advice in writing falling within the scope of clause 2.7.2 was ever received; and, as such, it follows that there was no Account Closure Event within the meaning of clause 2.7.2. It remains to consider TIL's case in relation to clauses 2.7.3 and 2.7.5.

90 As for clause 2.7.3 of the BOA, TIL contends that not less than 99% of the Parallel Funds Contingent Claims have been settled or distributed to the beneficiaries of the Parallel Funds in accordance with the terms of the trust deeds and management agreements of the Parallel Funds; and that this constitutes an Account Closure Event for the purposes of clause 2.7.3. In response, TIH advances three main counter-arguments, *viz*,

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(a) First, TIH denies that not less than 99% of the Parallel Funds Contingent Claims have been settled or distributed to the beneficiaries of the Parallel Funds.

(b) Second, TIH asserts that any such settlement or distribution was not made in accordance with the terms of the trust deeds and management agreements of the Parallel Funds in particular because any such settlement or distribution was made in circumstances where there was a conflict of interest and/or a breach of the trust deeds. In response, TIL denies any conflict of interest and/or breach of the trust deeds and maintains that the relevant settlements were made in accordance with the terms of the trust deeds and management agreements. In any event, TIL submits that the settlements/distributions were made with the informed consent of all concerned (including TIH) and/or TIH waived any such breach or is estopped from relying upon any alleged conflict of interest and/or breach.

(c) Third, even if clause 2.7.3 of the BOA was triggered, TIH disputes that this means that the Bond Account must be closed and the Bond Amount returned to TIL. In that context, TIH relies on clause 4 of the Bond Deed which provides, in effect, that the Bond Account shall be maintained for as long as there are any provisions for contingent claims as determined in good faith by TIH with the consent of its auditors (as TIH maintains was, and indeed still is, the case). This is disputed by TIL on two main grounds, *viz,* (i) clause 4 of the Bond Deed is inapplicable because it has been superseded by the terms of the BOA; alternatively, if clause 4 of the Bond Deed does apply, (ii) in the circumstances, TIH is not acting in good faith by maintaining the provisions for the contingent claims in its accounts.

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91 Further or alternatively, TIL submits that TIH caused KPMG SG and/or KPMG's PRC office to refrain from issuing the requisite opinion under clause 2.7.2(b) and sub-(i) of the BOA, thereby acting in breach of clause 2.7.5 of the BOA, and that such conduct amounted to a further Account Closure Event. This is denied by TIH. In any event, TIH again relies upon clause 4 of the Bond Deed; and, once again, this is disputed by TIL for the same reasons as stated above.

92 Alternatively, TIL asserts that a proportionate part of the Bond Amount should be released and returned, as the only remaining provision made by TIH is for the Contingent Foodstar Tax Claim.

93 In any event, it is TIH's case that all of TIL's claims must be rejected because they are time-barred under the Limitation Act 1959 (2020 Rev Ed) ("Limitation Act"). Finally, TIH submits that TIL is not entitled to seek equitable relief (*ie,* specific performance) as it comes to equity with "unclean hands".

94 In light of that brief summary, I propose to deal with the issues in the following order:

(a) Issue 1: Clause 2.7.3 of the BOA: Has not less than 99% of the Parallel Funds Contingent Claims been settled or distributed to the beneficiaries of the Parallel Funds in accordance with the trust deeds and management agreements of the Parallel Funds, such that clause 2.7.3 of the BOA has been satisfied?

(b) Issue 2: Clause 2.7.5 of the BOA: Has there been a material breach of the BOA or the Bond Deed by TIH, its affiliates or its officers within the meaning of clause 2.7.5 of the BOA?

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(c) Issue 3: If any of the Account Closure Events occurred, is TIH entitled to maintain the Bond Amount in the Bond Account by virtue of clause 4 of the Bond Deed?

(d) Issue 4: Is there a term to be implied in fact into the BOA and/or the Bond Deed that (i) after the applicable limitation period for the Contingent Claims has expired, the parties would close the Bond Account and return the Bond Amount to TIL; and/or (ii) if TIH no longer has any liability in respect of any head of the Contingent Claims or ceases to make any provisions in its accounts for any head of the Contingent Claims, the proportionate part of the Bond Amount shall be released to TIL?

(e) Issue 5: Does the Limitation Act bar TIL's claim?

(f) Issue 6: Does the unclean hands doctrine bar TIL's claim?

Issue 1: Clause 2.7.3 of the BOA

95 I have already set out clause 2.7.3 of the BOA at [41] above. In effect, it defined one of the Account Closure Events as being when not less than 99% of the Parallel Funds Contingent Claims have been settled or distributed to the beneficiaries of the Parallel Funds in accordance with the trust deeds and management agreements of the Parallel Funds.

Settlement or distribution of not less than 99% of the Parallel Funds Contingent Claims?

96 As stated above, the first issue under this head is whether, as TIL contends but TIH disputes, not less than 99% of the Parallel Funds Contingent Claims have been settled or distributed to the beneficiaries of the Parallel Funds.

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It is fair to note that certain of the accounting documents adduced in evidence were, at least initially, somewhat confusing partly because of the utilisation of different exchange rates. However, after Ms Ang was cross-examined at some length with regard to the underlying documents, she confirmed that all of the assets of the Parallel Funds were distributed on or about 29 December 2015 (see [57] above). Mr Wang similarly gave evidence that the Parallel Funds made two major distributions and were closed after the December 2015 distributions. On the basis of that evidence, it is my conclusion that not less than 99% of the Parallel Funds Contingent Claims have been settled or distributed to the beneficiaries of the Parallel Funds and that, to that extent, the requirements of clause 2.7.3 have been satisfied.

Compliance with clause 2.7 of the Parallel Funds' trust deeds?

97 The second main issue under this head concerns TIH's contention that such distribution did not satisfy the other requirements of clause 2.7.3 because it was not "...in accordance with the trust deeds and management agreements of the Parallel Funds". Specifically, TIH complains that TTCL (the trustee of the Parallel Funds) failed to comply with clause 2.7 of the Parallel Funds' trust deeds when distributing the reserves kept for the Parallel Funds Contingent Claims to the beneficiaries (see [90(b)] above). Clause 2.7 of the Parallel Funds' trust deeds have been reproduced at [14] above. In evidence, Dr Leong accepted that none of the steps prescribed in clause 2.7(c) in the Parallel Funds' trust deeds that deal with situations of conflicts of interest were undertaken or followed. However, his evidence and TIL's submission were that there were no relevant conflicts of interest and that therefore there was no failure to comply with clause 2.7.

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98 In considering that submission, a convenient starting point is the classic speech of Lord Wilberforce in *New Zealand Netherlands Society "Oranje" Incorporated v Laurentius Cornelis Kuys and Another* [1973] 1 WLR 1126 (PC) ("*Oranje*") in particular at 1129H–1130B:

> The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords: *Phipps v. Boardman* [1967] 2 A.C. 46. It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in *Phipps v. Boardman* at p. 123:
>
> > "Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case."

Lord Wilberforce, at 1130C–D in *Oranje*, went on to say that "[a] person … may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at."

99 In this context, the decision of the English Court of Appeal in *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] 1 WLR 4481 ("*Medsted*") is also of assistance. In *Medsted*, the claimant broker agreed to introduce individuals to the defendant investment institution. The defendant investment institution agreed to pay the claimant broker a share of the commission payable by the defendant investment institution's clients. Although the clients knew that the claimant broker was being paid commission by the defendant investment institution, they did not know the amount of the commission. The defendant investment institution subsequently conducted

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business directly with some of the clients, eliminating the claimant broker from its ability to claim its commission. The claimant broker brought a claim for breach of a non-circumvention term in the contract. The judge below held that the defendant investment institution had breached the contract but awarded only nominal damages as the judge considered that the claimant broker, by failing to inform the clients of the extent of its share of the commission, had been in breach of its fiduciary duty to the clients. The Court of Appeal allowed the appeal. The Court of Appeal held that where a principal knew that his agent was receiving commission from a third party, the agent would not necessarily be under a fiduciary duty to disclose to the principal the amount of commission that it was receiving; that, rather, the scope of the agent's fiduciary duty would depend on the nature of the relationship between the principal and the agent. On the facts in *Medsted*, the claimant broker had not been under a fiduciary duty to disclose to them the exact amount of the commission it was receiving. To the extent that the claimant broker was the fiduciary of its clients, it had not been a breach of that duty for it not to disclose the amounts of commission it was receiving.

100 In *Medsted* at [45], Longmore LJ stated, after quoting Millett LJ's statement on a fiduciary's duty in *West Building Society v Mothew* [1998] Ch 1 at 18,

> But this statement of principle does not absolve the court from deciding the scope of the fiduciary's obligations. If, in fact, the agent has, in the light of the facts of the case, no obligation to disclose the actual amount of commission he is paid when his principal knows he is being paid by the third party to the transaction, it does not advance the matter to say that, because he is a fiduciary, he must disclose the actual amount he is being paid. It is the scope of the agent's obligation that is important, not the fact that he may correctly be called a fiduciary. As Lord Wilberforce said in *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126, 1130a, "the precise scope of [the duty] must be moulded according to the nature of the

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> relationship". See also *Hospital Products Ltd v United States Surgical Corpn* (1984) 156 CLR 41, 102, per Mason J: "it is now acknowledged generally the scope of the fiduciary duty must be moulded according to the nature of the relationship …"

101 Longmore LJ held, at [42] of *Medsted*, that:

> … the scope of the fiduciary duty is limited where the principal knows that his agent is being remunerated by the opposite party. As *Bowstead & Reynolds* say, if the principal knows this, he cannot object on the ground that he did not know the precise particulars of the amount paid. …

102 The key point here is that in every case where there is an allegation made that a fiduciary has acted/omitted to act in relation to a transaction where the fiduciary is allegedly in a position of conflict, it is important to consider the *scope* of the fiduciary's duty. The precise scope of the no-conflict duty must be moulded according to the nature of the relationship. In this regard, the state of the principal's knowledge is an important consideration. All the facts and circumstances of the case, along with the surrounding context, must be considered as well.

103 In my judgment, an analysis of the facts, circumstances and context show that none of the purported interests identified by TIH (see [90(b)] above) fall within the scope of TTCL's no-conflict duty, as trustee of the Parallel Funds. Most importantly, the interest of TIH in maintaining the Bond Account and the Bond Amount and in minimising the sums that it might potentially have to pay in respect of potential PRC tax liabilities was not an interest *qua* beneficiary of the Parallel Funds. Thus, such an interest is not an interest that is within the scope of TTCL's no-conflict duty, in the context of its role as the trustee of the Parallel Funds. The Parallel Funds are closed-end investment funds which invest a fixed amount of committed capital invested by their investor-beneficiaries, and then embark on liquidation of the portfolio to deliver returns

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for the investor-beneficiaries (see [17] above). In that context, the interests of the investor-beneficiaries, *qua* investor-beneficiaries, was to get a good return on the capital they had invested in the Parallel Funds. TTCL, as trustee of the Parallel Funds, was obliged to ensure that its own interests did not conflict with the interests of the investor-beneficiaries in getting a good return on the capital they have invested in the Parallel Funds. Thus, for instance, if TTCL wished to sell certain stocks owned by the Parallel Funds to TTCL's affiliates, there would be a conflict of interest and the conflict-resolution procedures in clause 2.7 of the Parallel Funds' trust deeds would no doubt be triggered and have to be complied with. However, TTCL, as trustee, certainly cannot be expected to consider the *other* interests of the investor-beneficiaries, to the extent that these interests are not interests that the investor-beneficiaries have in their capacity as investor-beneficiaries.

104 I bear well in mind TIH's submission that the investor-beneficiaries also have an interest in ensuring that reputational risk is minimised or eliminated, or that distributions are done with the consent of the auditors (*ie*, with a non-disclaimed opinion). However, in my judgment, this submission does not assist TIH in particular because it is unclear how there is a *conflict* between such interests and the interests of TTCL as trustee. Clearly, TTCL would also have an interest in minimising reputational risk while maximising returns, and TTCL would also clearly have an interest in ensuring that the relevant accounting and auditing standards are complied with. There is thus interest *alignment* in this respect, instead of conflict. Furthermore, the fact that the final distributions of the Parallel Funds' assets took place with a disclaimed opinion from KPMG LLP was plain to see from the perspective of all investor-beneficiaries, as this was expressly communicated in the 9 December 2015 letters from TTCL as trustee of the Parallel Funds sent to all investor-beneficiaries (see [56] above).

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KPMG LLP's draft final audit report was also annexed to those letters. By not responding to the 9 December 2015 letters to air any objections, evidently the investor-beneficiaries felt that their interests were well-catered for by the Parallel Funds' long-awaited distribution of the assets which, indeed, belonged to them.

105 In addition, as noted above at [99]–[102], it is important in this context to have regard to the state of the principal's knowledge in ascertaining the scope of a trustee's no-conflict duty. The Parallel Funds' trust deeds were all drawn up in the 1990s (see [14] above). The BOA was entered into on 29 May 2014 (see [41] above). TTCL was never a party to the BOA. The Parallel Funds' trust deeds were never amended to import any aspect of the BOA into those trust deeds. TIH knew about TTCL's role as trustee of the Parallel Funds, and knew about the nature of the Parallel Funds, and yet chose to include an Account Closure Event in clause 2.7.3 of the BOA which depended on TTCL's exercise of its powers and functions under the Parallel Funds' trust deeds. In my view, TIH cannot complain that its interests, not *qua* beneficiary of the Parallel Funds, but instead *qua* contracting party to the BOA, have been affected.

106 Thus, in my judgment, the requirements of clause 2.7.3 of the BOA were satisfied, and an Account Closure Event occurred because provisions made for the Parallel Funds Contingent Claims have been distributed to the beneficiaries of the Parallel Funds in accordance with the trust deeds and management agreements of the Parallel Funds.

Estoppel against TIH?

107 Further, there is, in my view, an additional reason why TIH's contention – that clause 2.7.3 of the BOA has not been satisfied – must be rejected, *viz,*

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TIH is equitably estopped or barred by the doctrine of acquiescence from claiming non-satisfaction of clause 2.7.3 of the BOA.

108 At the outset, I note that TIH submitted that this point was never pleaded by TIL and that it is therefore not open to TIL to rely upon it. In considering that submission, it is, I think, correct that TIL's pleadings do not specifically refer expressly to the doctrine of estoppel. However, as recognised by the Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [5] and [43], that is not necessarily fatal provided that, at the very least, the pleadings disclose the material facts which would support such a claim so as to give the opponent fair notice of the substance of such a case. Here, I am satisfied that the material facts surrounding the final distribution of assets from the Parallel Funds and relevant to this part of TIL's case based on estoppel were sufficiently set out in its pleadings in particular in its Reply (Amendment No 1); and that therefore this point is open to TIL.

109 The essence of acquiescence is that a plaintiff who knows about the conduct which it complains of and yet does nothing to object to or prevent such conduct may be taken to have made a representation to the defendant that it does not object to that conduct, which representation may found an estoppel, a waiver or an abandonment of rights: *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 at [188], citing *Tan Yong San v Neo Kok Eng* [2011] SGHC 30 at [112] and [114] and *Genelabs Diagnostics Pte Ltd v Institut Pasteur* [2000] 3 SLR(R) 530 at [76]. The Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") summarised the general principles on waiver and estoppel at [54]–[61]. Waiver by election concerns a situation where a party has a choice between two inconsistent rights: *Audi Construction* at [54]. If that party

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elects not to exercise one of those rights, it will (in appropriate circumstances) be held to have abandoned that right if it has communicated its election in clear and unequivocal terms to the other party, whilst being aware of the facts which have given rise to the existence of the right it is said to have elected not to exercise: *Audi Construction* at [54]. As for the doctrine of equitable (or promissory) estoppel, this doctrine "requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back upon his representation": *Audi Construction* at [57], referring to *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The "Kanchenjunga")* [1990] 1 Lloyd's Rep 391 at 399 col 2. Crucially, the Court of Appeal noted that "a party to an equitable estoppel is representing that he will in future forbear to enforce his legal rights": *Audi Construction* at [57]. The Court of Appeal held that mere silence or inaction will not normally amount to an unequivocal representation, but mere silence may amount to such a representation in certain circumstances, particularly where there is a duty to speak (*Audi Construction* at [58]). Whether there is a duty to speak is a question that must be decided "having regard to the facts of the case at hand and the legal context in which the case arises" (*Audi Construction* at [61]). The expression "duty to speak" refers to circumstances in which a failure to speak would lead a reasonable party to think that the other party has elected between two inconsistent rights or will forbear to enforce a particular right in the future, as the case may be (*Audi Construction* at [61]).

110 The Court of Appeal has considered when silence or inaction will amount to a representation in *The "Bunga Melati 5"* [2016] 2 SLR 1114 at [14]–[17]. The Court of Appeal stated:

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14 This is consistent with the well-established rule that silence or inaction will count as a representation where there is a *legal* (and not merely moral) duty owed by the silent party to the party seeking to raise the estoppel to make a disclosure: see *Hong Leong* at [194]; and see Wilken & Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford, 3rd Ed, 2012) at para 9.55. For our part, we would be content to state that the rule would apply where in all the circumstances, there was a legal or equitable duty to make the disclosure, communication or correction, as the case may be.

15 The question of when such a duty arises does not lend itself to easy answers. Bingham J in *Tradax Export SA v Dorada Compania Naviera SA (The Lutetian)* [1982] 2 Lloyd's Rep 140 (at 157) regarded Lord Wilberforce's decision in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 as persuasive authority for the proposition that:

> … the duty necessary to found an estoppel by silence or acquiescence arises where ***a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations.*** …

16 ***The court thus has to decide the onus and ambit of responsibility of the silent party, by reference to whether a mistaken party could* reasonably *have expected to be corrected.*** This will inevitably depend on the precise circumstances of the case and whether they were of such a nature that it became incumbent upon the silent party, who is taken to be acting honestly and reasonably, to correct the mistaken party's belief. Given the myriad of circumstances that may arise in commerce and the desirability of maintaining flexibility in the doctrine of estoppel, it would neither be appropriate, nor ultimately helpful, for us to attempt to draw neat circles delineating precisely when a duty to speak may arise.

17 However, having articulated the principle on which liability may be founded in these situations, it is appropriate for us to emphasise one important predicate that is especially relevant to the disposal of this matter. For such a duty to arise at all***, it must be shown, at least, that the silent party knew that the party seeking to raise the estoppel was in fact acting or proceeding with its course of conduct on the basis of the mistaken belief which the former is said to have acquiesced in*** (see *Hong Leong* at [197]). We leave to one side the fact that this falls short of the situation in *Spiro* ([8] *supra*),

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> where not only did Mr Lintern know that Mrs Lintern was conducting the negotiations with Mr Spiro, but further, Mr Spiro knew that Mr Lintern knew this and further that Mr Lintern was evidently content for it to be so.
>
> [emphasis in original omitted; emphasis added in ***bold italics***]

111 In my judgment, a duty to speak did here arise on TIH's part in the present case (which duty to speak would cause TIH to be estopped from contesting TIL's compliance with clause 2.7.3 of the BOA) because of three main factors: (a) TIH was sent the 9 December 2015 letters (reproduced above at [56]) by TTCL (as trustee of the Parallel Funds), and the letters expressly invited responses to the trustee's proposed distribution of the reserves kept for the Parallel Funds Contingent Claims; (b) TIH (through LRG) received the 9 December 2015 letters and its decision-makers *subjectively* appreciated and considered the 9 December 2015 letters, before deciding not to respond; and (c) once the reserves kept for the Parallel Funds Contingent Claims were distributed with the consent of the Parallel Funds' investor-beneficiaries, the money was distributed. The trustee has no power to claw the moneys back. There would be no way for TIL to comply with clause 2.7.3 of the BOA anymore. In my judgment, this confirms or reinforces the conclusion that TIH had a duty to speak when invited to do so, before the distributions were carried out by the trustee of the Parallel Funds.

112 By way of further clarification and at the risk of repetition, it is important to note that TIH received the 9 December 2015 letters from the Parallel Funds via fax. This was followed up the next day (*ie,* 10 December 2015) by an e-mail from Ms Ang to Mr Harry Leong, Ms Vinnessy Yik (*ie,* a contact person for the Parallel Funds, as indicated in the 9 December 2015 Letters – see [56] above) and Mr Adrian Woo, copied to Mr Wang, where Ms Ang stated:

> Dear Harry.

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> We received the fax today from Transpac on the proposed liquidation and distributions of final proceeds to the investors beneficiary on 29 December 2015. The distributions would have included the sale proceeds from ACE.
>
> Therefore, please advise if you will also be remitting the sale proceeds to TIH and Little Rock on their direct interest in ACE and the amount to be remitted.
>
> In addition ,we have also requested for the basis of calculating of the management fee.
>
> Would appreciate if you could advise as soon as possible.
>
> Regards,
>
> Emily

113 While the Distribution Lists for the 9 December 2015 letters appear to not be in evidence, the Distribution Lists for the Parallel Funds' 23 December 2015 follow-up letter explicitly stated that the letters were faxed to the fax number "65-6225 5538" and directed to the attention of "Ms Emily Ang", who is TIHIM's chief financial officer. The fax number "65-6225 5538" is TIH's fax number. For TEIT (one of the Parallel Funds), the 23 December 2015 follow-up letter was sent to "Little Rock Group c/o TIH Investment Management Pte Ltd", which further indicates that TIH and LRG were coterminous. I also note that it was TIH's own pleaded case that LRG was TIH's wholly-owned subsidiary.

114 In the light of all the evidence, it is plain that TIH's decision-makers had contemporaneous knowledge of the 9 December 2015 letters and made a conscious decision to take a "watch and see" approach. Thus, Mr Wang (TIH's director) accepted in evidence that he and Mr Kin Chan (chairman of TIH) discussed and talked about the 9 December 2015 letters and the KPMG LLP audit report for the Parallel Funds with its disclaimer therein. He said "[a]fter we look at this, I mean [Mr Chan] and I actually discussed and talk about this." He also testified that "[w]e take the money, we just see what Transpac will be

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doing". He further stated "[w]e were contemplating on who to ask and then we took the approach to say let's watch and see exactly what tricks or what is happening". Mr Wang conceded that Transpac did not stop TIH from asking questions.

115 Dr Leong's undisputed evidence was that the 9 December 2015 letters sent by the trustee of the Parallel Funds were met with no objections, and in fact some investors responded positively to the letters. Thus, on 29 December 2015, the final distributions were made by the Parallel Funds to all investors. Dr Leong's undisputed evidence is also that TIH did not object to the release of the tax provision and the final distribution from the Parallel Funds, and did not request for its share of the distributions to be placed in the trust account. This is confirmed by Ms Ang's and Mr Wang's evidence (see [57] above). I note that TIH's pleaded case is that it did not itself receive the full benefit of the distribution of the benefits from the Parallel Funds because the distributions went to LRG and not TIH. However, I do not consider that this is relevant or at least determinative in the present context. The fact is that LRG was TIH's wholly-owned subsidiary. In any event, TIH was given proper notice of and was therefore fully aware of the trustee's intention to make a final distribution of the moneys from the Parallel Funds; it was expressly *invited* to respond to the Parallel Funds' trustee's 9 December 2015 letters; it therefore had a full opportunity to object to such distribution if it wished but it did not do so; nor were any other objections received from any other party.

116 For all these reasons, it is my conclusion that TIH is, in effect, precluded from now contending that the assets from the Parallel Funds were not distributed to the beneficiaries of the Parallel Funds in accordance with the trust deeds and management agreements of the Parallel Funds, and, moreover, from denying that clause 2.7.3 of the BOA has been triggered.

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Estoppel against TIL?

117 I turn to deal with TIH's case that TIL is estopped from relying on clause 2.7.3 of the BOA because TIL expressly and by its conduct represented to TIH that it would not rely on the said clause to seek a release of the Bond Amount.

118 In considering that submission, the starting point is TCL's letter dated 2 December 2016 which stated:

> … At the end of 2015, the contingency reserves of the Parallel Funds have been fully released and distributed, with the consent of every limited partner, including TIH. Under the TIL Bond Account Operating Agreement, the Bond Account is to be closed upon the settlement or distribution of not less than 99% of the contingent reserve in the Parallel Funds. However, Kin Chan and Anglie Li, being authorised signatories to the Bond Account, refused to sign the closure documents, as TIH still has a contingent reserve of $16.22 million on its books, as required by its auditors KPMG. ***Dr. Leong, being cognizant of the debacle TIH is in while KMPG requires the maintenance of a contingency reserve, offered to keep the Bond intact until KPMG agrees to release the contingency reserve but relocating the account to another bank that has a better long term investment product. Despite such good faith on TIL's part, Kin Chan still refused to cooperate.*** As the second largest shareholder of TIH, it behooves TIL to work closely with ASM funds to realize the optimum potential of TIA. It is in this vein that TIL is willing to maintain the Bond even though the contingency reserve is substantially less than the original quantum. …
>
> [emphasis added in ***bold italics***]

119 On 22 December 2016, TIH responded stating:

> Thank you for your letter dated 2 December 2016, which we received on 5 December 2016. After careful consideration of these different matters, we would respond as follows:
>
> …
>
> *Transpac Investments Limited bond*
>
> As we have agreed in writing, this bond shall not be released until KPMG has cleared TIH of contingent tax liabilities,

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> particularly contingent tax liabilities arising from the sale of Foodstar. until then, the bond held at the Pictet & Cie bank account will not be released without the authority of the authorised signatories, in accordance with our written agreement. You are well aware of the risk of contingent tax liabilities highlighted by KPMG which has been the case since prior to the internalization; a matter which was approved by Stanley Cheong, also a partner of Transpac, during the period that Mr. Cheong was employed at Transpac and TIH Investment Management Pte. Ltd..
>
> Our position on these matters is taken in accordance with the legal advice we have received and consideration for the best interests of the investors in TIH. All our rights are fully reserved.
>
> *Conversations thus-far*
>
> We would very much like to continue the conversation on these topics with a view to their resolution as soon as possible, and hope that you will be more willing to compromise in order to get to this point. Each of these matters are entirely separate and unrelated and should be resolved on their own individual merits.
>
> We look forward to hearing from you.

120 In my judgment, there is nothing in TCL's 2 December 2016 letter that can be construed as an unequivocal representation that it would forbear from relying on clause 2.7.3 of the BOA for Bond Account closure. TCL's 2 December 2016 letter frames Dr Leong's offer to keep the Bond Amount intact as a gesture of good faith. However, that letter specifically frames Dr Leong's purported offer "to keep the Bond intact until KPMG agrees to release the contingency reserve" as being tied to "relocating the account to another bank that has a better long term investment product". However, that offer was apparently rejected. The same paragraph of TCL's letter further notes TCL's position that "[u]nder the TIL Bond Account Operating Agreement, the Bond Account is to be closed upon the settlement or distribution of not less than 99% of the contingent reserve in the Parallel Funds". In other words, TCL had explicitly referred to the Account Closure Event in clause 2.7.3 of the BOA. On a plain reading of TCL's 2 December 2016 letter, there is no clear or

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unequivocal representation by TCL that it was electing not to rely on 2.7.3 of the BOA. The parties were still staking out their respective positions and trying to find an agreed solution to their disputes.

121 Turning to TIH's 22 December 2016 reply, TIH appears to be setting out its preferred interpretation of the BOA. Importantly, TIH flagged that its decision-makers "would very much like to continue the conversation on these topics with a view to their resolution as soon as possible, and hope that [TCL] will be more willing to compromise in order to get to this point". The parties' positions were thus still in a state of flux. I note in this regard that there was no indication in TIH's 22 December 2016 reply that TIH was willing to take up Dr Leong's purported offer to keep the Bond Amount intact so long as the Bond Amount could be relocated to another bank that had a better long term investment product.

122 In summary, there was, in my judgment, no unequivocal representation that TCL/TIL would not insist on its legal rights. The correspondence between the parties is equally consistent with temporary forbearance by TCL/TIL in the interest of finding an amicable solution to the disputes between the parties. Accordingly, I reject TIH's case that TIL is barred from relying upon clause 2.7.3 of the BOA.

123 For all these reasons, it is my conclusion that on or about 29 December 2015, there was an Account Closure Event within the meaning of clause 2.7.3 of the BOA.

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Issue 2: Clause 2.7.5 of the BOA: material breach of the BOA or the Bond Deed by TIH, its affiliates or its officers

124 In the light of my conclusion that there was an Account Closure Event falling within clause 2.7.3 of the BOA, it is strictly unnecessary to consider whether, as TIL asserts, there was a further Account Closure Event falling within clause 2.7.5 of the BOA. However, for the sake of completeness, I turn to deal with this point.

125 In essence, TIL contends that TIH acted in material breach because it has in bad faith, maintained provision in its accounts for the Contingent Foodstar Tax Claim and interfered with and/or influenced KPMG SG and KPMG's PRC office to refrain from issuing the requisite opinion under clause 2.7.2 of the BOA, to prevent the release of the entire Bond Amount. In TIL's opening statement, TIL has further alleged that TIH breached a duty of good faith found in clause 4 of the Bond Deed which provided:

> **4. Payments from Account.** The Account shall be maintained for as long as there are any Provisions for Contingent Claims (***as determined in good faith by TIH with the consent of its auditors***). In the event that there are no Provisions for Contingent Claims (***as determined in good faith by TIH with the consent of its auditors***), (i) the aggregate amount of the Claims shall be released to TIH; (ii) the remaining monies in the Account after satisfying the Claims (if any) shall be released to TIL; and (iii) the Account shall be closed. For the avoidance of doubt, any interest paid or investment earnings by the Bank on any monies in the Account shall belong to TIL.
>
> [emphasis added in ***bold italics***]

126 As to the duty of good faith, it is sufficient to refer to *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738, where the Court of Appeal stated at [45] that "[a]t its core, the concept of good faith encompasses the threshold subjective requirement of acting honestly, as

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well as the objective requirement of *observing accepted commercial standards of fair dealing in the performance of the identified obligations*. This encompasses a duty to act fairly, having regard to the legitimate interests of the other party" [emphasis in original]. At [47], the Court of Appeal further stated that the "common threads connecting most attempts to define 'good faith' are fairness and honest dealing".

127 In considering this part of TIH's case, I turn first to consider TIH's maintenance of the provision in its accounts for the Contingent Foodstar Tax Claim. As to whether such provision was and continues to be maintained in "good faith" depends, at least in part, as to the risk of the PRC tax authorities making any claims to recover tax.

128 As to that, the evidence of Mr Huang (TIL's expert on PRC law) was clear, *viz,* save in cases of tax evasion, tax fraud or tax resistance (*ie,* a deliberate refusal to pay tax as claimed by the tax authorities), there is, in effect a 10-year limitation period. After that period, the tax authorities lose the right to recover any tax. To be clear, there is no question here of tax resistance; and both parties expressly confirmed in the course of their final submissions that there was no basis for suggesting that this case involved any question of tax evasion or tax fraud. On this basis and on the basis of Mr Huang's expert evidence, it is therefore clear that there is no risk of the tax authorities being able to recover any tax.

129 As set out in his original expert report, Mr Dong (TIH's expert on PRC law) disagreed with Mr Huang. In particular, it was his opinion that even in non-tax evasion cases, the PRC tax authorities would, or at least might, be able to recover tax after the 10-year limit. In support of that opinion, Mr Dong referred to a number of cases in the PRC courts where, according to Mr Dong, the tax

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authorities had successfully recovered tax even after the 10-year period. That opinion and the cases relied upon by Mr Dong were the subject of detailed cross-examination by counsel on behalf of TIL. It is unnecessary to examine that evidence in any detail. For present purposes, it is sufficient to say that it is quite clear that none of the cases referred to by Mr Dong provided any support for the view that the tax authorities were able to recover after the 10-year period in non-evasion cases.

130 Given that the 10-year PRC limitation period has now expired and on the basis of the evidence submitted, it follows that, in my judgment, there is no risk of the PRC tax authorities being able to recover the Contingent Claims and that there is no proper basis *now* for TIH maintaining the provisions.

131 However, I emphasise the word "now" because (a) the limitation period has only recently expired; and (b) the fact, as I have found, that there is no proper basis *now* for TIH maintaining the provisions does not necessarily mean that TIH has acted otherwise than in good faith in maintaining the provisions prior to the expiry of the 10-year limitation period.

132 The latter depends upon an examination as to the position prior to the expiry of the 10-year limitation period and the basis upon which TIH decided to maintain the provisions in its accounts as to which I have already set out the main facts in the earlier part of this judgment. I do not propose to repeat what I have already said.

133 For present purposes, it is sufficient to highlight that in support of its case that TIH had acted otherwise than in good faith in maintaining the relevant provisions in its own accounts, TIL relied heavily on the fact that this was in stark contrast to the fact that TIH had been entirely content for the Parallel Funds

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to release the provisions in their accounts and to make a final distribution. At first, I was much impressed by that submission. However, the position with regard to the Parallel Funds and TIH's own position is not identical. In particular, the decision by TIH to maintain the provisions in its accounts was based in large part on external professional advice – in particular, as appears from the earlier part of this judgment, the advice of KPMG LLP and Dentons over an extended period. (In passing, I should note that neither Dentons nor KPMG LLP has been asked for their advice following the expiry of the 10-year limitation period.) I deal separately below with the allegation by TIL that TIH interfered with and/or influenced KPMG SG and KPMG's PRC office to refrain from issuing the requisite opinion under clause 2.7.2 of the BOA. However, subject to that allegation and in the light of the advice received by TIH from Dentons and KPMG LLP as set out above, it seems to me quite impossible to say that TIH acted otherwise than in good faith in maintaining the provisions in its accounts. I therefore reject this part of TIL's case.

134 I turn then to the related allegation that TIH wrongly interfered with and/or influenced KPMG SG and KPMG's PRC office to refrain from issuing the requisite opinion under clause 2.7.2 of the BOA. In truth, this allegation is almost entirely speculative and unsupported by any cogent evidence. So far as the Dentons Opinion is concerned, it is fair to note that certain passages appear to be based on information provided by TIH. However, of itself, that is hardly surprising; and there is nothing in what is stated in the Dentons Opinion (nor in relation to subsequent communications with Dentons) to suggest that TIH acted in bad faith or otherwise in an improper fashion. The position with regard to KPMG LLP is similar – if not stronger. Not only is there no objective evidence to support TIL's case with regard to any wrongful interference by TIH, there is the positive evidence of the KPMG witnesses themselves to the contrary

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including the important evidence of Ms Gan to the effect that KPMG SG's refusal to furnish the opinion sought by TIL was based on its own professional, reasoned view of the risks of the tax liabilities crystallising.

135 For these reasons, I reject TIL's case that there was an Account Closure Event as a result of a material breach within the meaning of clause 2.7.5 of the BOA.

Issue 4: whether clause 4 of the Bond Deed requires maintenance of Bond Amount

136 So far, I have concluded that there was an Account Closure Event falling within clause 2.7.3 of the BOA (but not otherwise). On this basis, TIL submits that it necessarily follows that the Bond Account must be closed, and the Bond Amount released to itself pursuant to clause 2.8 of the BOA. I have already set this out above but for convenience, it provided as follows:

> 2.8 **Account Closure**. The Parties shall, as soon as reasonably practicable after becoming aware of the occurrence of an Account Closure Event, jointly or severally notify the Custodian that the Account should be closed. The Custodian shall then take steps to execute the Instruction and present it to the Bank to close the Account. After the Account is closed, the TIL Bond shall be deemed to be released and TIL shall have no further liability to TIH, its affiliates or officers.

Even on the assumption that there was an Account Closure Event, TIH disputes that clause 2.8 of the BOA is applicable and that it necessarily follows that the Bond Account must be closed, and the Bond Amount released. In support of that submission, TIH relies upon two main points. First, TIH relies upon the opening words of clause 2.7 which state only that upon an Account Closure Event, the Bond Account *"may"* be closed, *not* that it must be closed. Second, TIH relies upon clause 4 of the Bond Deed which I again reproduce for convenience:

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> 4. **Payments from Account**. The Account shall be maintained for as long as there are any Provisions for Contingent Claims (as determined in good faith by TIH with the consent of its auditors). In the event that there are no Provisions for Contingent Claims (as determined in good faith by TIH with the consent of its auditors), (i) the aggregate amount of the Claims shall be released to TIH; (ii) the remaining monies in the Account after satisfying the Claims (if any) shall be released to TIL; and (iii) the Account shall be closed. For the avoidance of doubt, any interest paid or investment earnings by the Bank on any monies in the Account shall belong to TIL.

TIH submits that clause 4 of the Bond Deed expressly provides for the maintenance of the Bond Account "...for as long as there are any Provisions for Contingent Claims (as determined in good faith by TIH with the consent of its auditors)...".

137 As to these points, my observations and conclusions are as follows:

(a) I agree that, viewed in isolation, the opening words of clause 2.7 of the BOA might indicate that even in the case of an Account Closure Event, it does not follow that the Bond Account must be closed. However, it is important to read the clause as a whole and, in particular, together with clause 2.8 which makes absolutely plain that the parties shall, as soon as reasonably practicable after becoming aware of the occurrence of an Account Closure Event, jointly or severally notify the Custodian that the Bond Account should be closed. The language is mandatory, obliging both parties or at least one of the parties in the event of an Account Closure Event to give the Custodian the necessary notification to close the Bond Account in accordance with the instruction annexed to the BOA. I therefore reject TIH's case that clause 2.8 of the BOA is inapplicable.

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(b) As to TIH's reliance on clause 4 of the Bond Deed, I readily accept that the clause is inconsistent with clause 2.8 of the BOA. Whereas clause 2.8 of the BOA states that parties "shall, as soon as reasonably practicable after becoming aware of the occurrence of an Account Closure Event, jointly or severally notify the Custodian that the Account should be closed [and] [t]he Custodian shall then take steps to execute the Instruction and present it to the Bank to close the Account", clause 4 of the Bond Deed appears to provide that even after the occurrence of an Account Closure Event, the Bond Account needs to be maintained, and thus cannot be closed, as long as there are any provisions for Contingent Claims (as determined in good faith by TIH with the consent of its auditors). However, the short answer to this inconsistency lies in clause 5 of the BOA which provides:

> **Consistency of Terms**
>
> In the event of any conflict or inconsistency between any of the terms of this Agreement with any of the terms of the TIL Bond, the terms of this Agreement shall prevail and the TIL Bond shall be deemed to have been amended to the extent necessary to give effect to the terms of this Supplemental Agreement.

Thus, in my view, the effect of clause 5 of the BOA is that, to the extent of any inconsistency, clause 2.8 of the BOA must "prevail" over clause 4 of the Bond Deed.

138 For the sake of completeness, I should mention that even if clause 4 of the Bond Deed was relevant, there is a potential important question as to whether, going forward, TIH can rely on that clause to insist on the Bond Account remaining open in light of my conclusion as stated above that there is no longer any risk of the tax authorities seeking to claim any tax. However, this point was not explored at trial and, in the light of my earlier conclusion that clause 2.8 of the BOA prevails, I say no more about this point.

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Issue 5: Implied terms

139 In the alternative to its primary case, TIL relied upon a number of implied terms including an implied term in the BOA and/or the Bond Deed that (a) after the applicable limitation period for the Contingent Claims has expired, the parties would close the Bond Account and return the Bond Amount to TIL; and/or (b) if TIH no longer has any liability in respect of any head of the Contingent Claims or ceases to make any provisions in its accounts for any head of the Contingent Claims, the proportionate part of the Bond Amount shall be released to TIL. I see some force in at least certain of these alleged implied terms. However, given my conclusion that there was an Account Closure Event falling within clause 2.7.3 of the BOA, it is unnecessary to say anything further about this alternative part of TIL's case.

Issue 6: Limitation Act 1959

140 It is TIH's case that TIL is time-barred from bringing the present action against TIH under s 6(1)(*a*) of the Limitation Act 1959 (2020 Rev Ed) (the "Act") which provides in material part as follows:

> **Limitation of actions of contract and tort and certain other actions**
>
> **6.**—(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:
>
> (*a*) actions founded on a contract or on tort;
>
> …
>
> (7) Subject to sections 22 and 32, this section shall apply to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

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141 In support of that case, TIH submits that (a) the present action is indeed "..founded on a contract.."; and (b) the present action is time-barred because on the basis that (as I have concluded) there was an Account Closure Event falling within clause 2.7.3 of the BOA, *ie*, on 29 December 2015 on the final distribution of funds held by the Parallel Funds, the action was not commenced until more than six years after that date, on 27 September 2022.

142 The suggestion that the present action is time-barred, and that TIL is, in effect, precluded from recovering the Bond Amount notwithstanding that (a) as I have concluded, there has been an Account Closure Event and (b) the money in the Bond Account belongs to TIL is, at first blush, somewhat surprising. If that is right, what is to happen with the money sitting in the Bond Account? Is it to sit there until the end of time in the hands of Bank Pictet which has no beneficial interest in the money? It seems to me that that is a most improbable conclusion. To borrow the words of Lee Seiu Kin J (as he then was) at [41] in *Lau Soon and another v UOL Development (Dakota) Pte Ltd and another appeal* [2022] 3 SLR 625, if the present action is, as TIH submits, time-barred, that would seem to be an "insensible and irrational state of affairs …".

143 In the course of submissions, various possible counter-arguments were canvassed as to why the present action is not barred by s 6(1)(*a*) of the Act. For example, on behalf of TIL, it was submitted that this is a case which, at least by analogy, fell within the exception in s 6(6)(*b*) of the Act which provides that s 6 of the Act shall not apply to any action to recover money secured by any mortgage of or charge on land or personal property. Although the present case did not involve a mortgage, the submission was that the rationale for disapplying the six-year limitation period was equally applicable to the present case. I recognise the ingenuity underlying that submission, but it is not one which I am

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able to accept simply because the present case does not fit within the language of s 6(6)(*b*) of the Act.

144 Another argument advanced on behalf of TIL was that, contrary to TIH's submission, the cause of action based on clause 2.7.3 of the BOA accrued not on 29 December 2015 but much later, *ie*, on 18 October 2016 when, according to TIL, TIH resiled from its obligations under clause 2.8 of the BOA when Mr Chan forwarded to Dr Leong, Mr Wang's e-mail dated 17 October 2016 stating that the only way the Bond Account could be closed was if the provisions for Contingent Claims were released from TIH's accounts. Again, I recognise the ingenuity of that submission but I am unable to accept it. As it seems to me, such conduct was, at most, a renunciation of TIH's obligations under the BOA which was never accepted by TIL and did not override or otherwise affect the original Account Closure Event.

145 A yet further argument raised by TIL was that it was only in November 2020 (*ie*, ten years from the date of the completion of the Foodstar Transaction) that TIL's right to recover the assets could arise because it was only from then that it could be said that there was no risk at all of the tax authorities being able to recover tax. That argument might be relevant in the context of TIH's argument based on clause 4 of the Bond Deed but, in my view, it does not assist TIL in the context of its own case (which I have accepted) that there was an Account Closure Event falling within clause 2.7.3 of the BOA on 29 December 2015.

146 However, I am satisfied that the present action is not time-barred for one or more of the following reasons.

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147 First, it is important to bear in mind that the Act does not bar the right but only the remedy: see s 4 of the Act and *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318 at [117].

148 Second, an important question arises as to the scope of s 6(1)(*a*) of the Act and, in particular, whether the present action is one which is "founded on a contract". I recognise that in the light of my conclusion that there was an Account Closure Event falling within clause 2.7.3 of the BOA and having regard to the terms of clause 2.8 of the BOA, there is some force in the argument that the present action is one which falls within the scope of s 6(1)(*a*) of the Act. However, in my view, such an analysis fails to have regard to the fact that the present claim is one which is for the release of money that incontrovertibly belongs to TIL. In truth, clause 2.8 of the BOA merely provides the machinery for enabling TIL to recover its own money. To that extent, it seems to me that the better argument is that the present action is not one founded on a contract but one which is founded on proprietary principles, *ie*, TIL's ownership of the Bond Amount. Here, there is no dispute that TIL was the transferor who provided the Bond Amount currently sitting in the Bond Account. Pursuant to clause 3 of the Bond Deed, TIL transferred the original US$10m into the possession of Bank Pictet for a specified purpose – the setting aside of said sum to satisfy 20% of the Contingent Claims. There was no intention by TIL to part with the beneficial interest in the transferred money. There is no suggestion at all that Bank Pictet or TIH beneficially owns the Bond Amount. The result is that Bank Pictet must be holding the Bond Amount on a resulting trust for TIL: see, for example, *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 [43]–[44]; *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [35].

149 Third, I bear well in mind that part of the relief sought by TIL in this case is for an order that TIH "... take the necessary steps for closure of the Bond

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Account and for the sums thereunder ... to be released to [TIL]"; and that such an order might be regarded as one which is a claim founded on a contract. However, I am not sure that an order formulated in such terms is necessary having regard to the terms of clause 2.8 of the BOA which provides in material part: "...as soon as reasonably practicable after becoming aware of the occurrence of an Account Closure Event, jointly or **severally** notify the Custodian that the Account should be closed. The Custodian shall then take steps to execute the Instruction and present it to the Bank to close the Account" [emphasis added]. The fact that the notice to the Custodian may be given *"severally"* means that it would be open to TIL to give the notice itself to the Custodian without any specific order against TIH or other involvement or participation of TIH. In other words, clause 2.8 does not require TIH to take any action. Rather, it allows any party to the BOA, after becoming aware of the occurrence of an Account Closure Event, to either "jointly or severally" notify the Custodian of the Bond Account that it should be closed, and the Custodian shall thereafter take steps to execute the Instruction to close the account. The "Instruction" refers to the written instruction addressed to Bank Pictet prepared and executed in blank for the closure of the Bond Account. The Instruction already bears the signatures of the authorised signatories. All that needs to be done is for the Custodian, Mr Cheong, to present it to Bank Pictet. Mr Cheong is a director of TIL and a long-time associate of Dr Leong so there should be no practical barrier to TIL simply asking Mr Cheong to present the Instruction to Bank Pictet to instruct it to close the Bond Account.

150 Following issuance of this judgment, it will be necessary to consider carefully with counsel the precise wording of the order that this court should make. For present purposes, I would only say that my present tentative view is that it would be sufficient simply to declare that the Bond Account should be

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closed and that the Bond Amount be returned to TIL. In my view, such an order would not be barred by the Act. Finally, I think it is important to bear in mind the mechanism for closing the Bond Account as stipulated in the BOA and, in particular clause 2.8. In particular, the BOA does not provide that the Bond Account must be closed automatically if there is an Account Closure Event. If that were so, it might well be said that TIL's cause of action might have arisen on or about 29 December 2015. However, clause 2.8 does not so provide. Rather, at the risk of repetition, it stipulates that "[t]he Parties shall, as soon as reasonably practicable after becoming aware of the occurrence of an Account Closure Event, jointly or severally notify the Custodian that the Account should be closed." As such, it seems to me that there is an argument that it is only as a result of this present judgment that it can properly be said that the parties have become "...aware of the occurrence of an Account Closure Event...". Further, in circumstances where, for at least 8 years, TIH's steadfast position has been that there was no Account Closure Event and that (as TIH specifically and repeatedly instructed) the Custodian must not close the Bond Account, it seems difficult, if not, impossible to say that it was "reasonably practicable" for TIL to take its own unilateral steps to effect closure of the Bond Account.

151 Accordingly, it is my conclusion that for one or more of these reasons, the present action is not time-barred.

Issue 7: Unclean hands doctrine

152 In summary, it is TIH's case that in so far as TIL seeks equitable relief (*ie*, specific performance), TIL is not entitled to such relief as it comes to equity with "unclean hands" as evinced by TIL and/or the Transpac Group's bad faith conduct (the "unclean hands doctrine"). In summary, the alleged "bad faith" conduct alleged by TIH was:

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(a) procuring the release of the provisions set aside for the Parallel Funds Contingent Claims in breach of the Parallel Funds' trust deeds, without the consent of the funds' auditors, for the collateral purpose of procuring the release of the Bond Amount;

(b) TCPL/TCL refusing to make repayment of salaries and excess management fees under the DOT as well as improper deductions from proceeds from the divestment of ACE International B.V.I. Limited;

(c) foisting the entire Contingent Foodstar Tax Claim on TIH solely; and

(d) making false statements in respect of the opinions required from KPMG and E&Y to satisfy clause 2.7.2 of the BOA.

153 As to this part of TIH's case, my observations and conclusions are as follows:

(a) In broad terms, the existence of the unclean hands doctrine is indisputable: see, for example, *Lian Tian Yong Johnny v Tan Swee Wan and another* [2023] SGHC 292 at [28].

(b) I also readily accept that such a doctrine will or at least may apply even if the remedy sought is not strictly an exercise of the court's equitable jurisdiction but concerns the exercise of the court's discretion: see, for example, *Paillart Philippe Marcel Etienne and another v Eban Stuart Ashley and another* [2007] 1 SLR(R) 132 at [47].

(c) However, my tentative view is that consistent with the decision of the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340, the unclean hands doctrine does not operate to bar a claim (as in the present case)

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where a party is seeking to recover its own money. To that extent, I am doubtful that the doctrine has any application in the present case.

(d) However, even if that is wrong, I do not consider that the facts and matters relied upon by TIH support a conclusion that the relief sought by TIL is defeated by operation of the unclean hands doctrine. In particular, as to the matters relied upon:

(i) As I have already concluded, the release of the provisions of the Parallel Funds Contingent Claims was not, in my view, in breach of the Parallel Funds' trust deeds. On the contrary, such release was effected with full notice to the relevant investor-beneficiaries as well as to TIH without any objection by any party.

(ii) TIL was not itself the party responsible for the claims in respect of salaries/management fees. If payable, they were due from another entity within the Transpac Group. As such, I can see no proper basis for saying that such non-payment affects TIL's claims in the present action whether by way of the unclean hands doctrine or otherwise.

(iii) There is no proper basis for the assertion that TIL "foisted" the entire Contingent Foodstar Tax Claim on TIH. In any event, as I have held on the basis of the evidence submitted, there is no longer any risk of the PRC tax authorities seeking to recover any tax.

(iv) I accept that certain of the statements made by or on behalf of TIL in relation to the tax advice it had received were, in part, inaccurate. However, I do not consider that this

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constituted unconscionable conduct on its part or otherwise was such as to attract the unclean hands doctrine.

154 For these brief reasons, I reject this part of TIH's case. In short, I do not consider that the relief sought by TIL is precluded or otherwise affected by the unclean hands doctrine.

Conclusions

155 For all these reasons, I would summarise my conclusions as follows:

(a) An Account Closure Event falling within clause 2.7.3 of the BOA occurred on or about 29 December 2015 but not otherwise.

(b) TIL is entitled to give notice to the Custodian of the Bond Account that such account should be closed (the "Instruction").

(c) The Custodian shall then take immediate steps to execute the Instruction, present it to Bank Pictet to close the Bond Account and return the Bond Amount (and the interest thereon as per clause 4 of the Bond Deed) forthwith to TIL.

156 Within seven days of the date of this judgment, I hereby direct that the parties shall draw up an order to reflect the above (with such modifications as may be appropriate consistent with the terms of this judgment) for approval of the court.

157 Further, within 21 days of the date of this judgment and unless otherwise agreed, I hereby direct that the parties shall serve written submissions on any

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outstanding issues including issues of costs and interest (if any) limited to 15 pages each.

Sir Henry Bernard Eder
International Judge

Foo Maw Shen, Chu Hua Yi and Foo Jyh Howe (FC Legal Asia LLC) for the claimant;
Nair Suresh Sukumaran, Noel Chua Yi How and Alex Chia Yao Wei (PK Wong & Nair LLC) for the defendant.

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