IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 310

Suit No 521 of 2021

Between

(1) Devin Jethanand Bhojwani
(2) Dilip Jethanand Bhojwani
(3) Sandeep Jethanand Bhojwani

… *Plaintiffs*

And

Jethanand Harkishindas Bhojwani

… *Defendant*

JUDGMENT

[Civil Procedure — Affidavits — Principles applicable to grant of permission to adduce new affidavit of evidence-in-chief after deadline for filing and exchanging of affidavits of evidence-in-chief between litigants has elapsed — Two-stage test of relevance and prejudice for allowing new affidavit of evidence-in-chief to be admitted into evidence — Whether undue prejudice is occasioned to litigant where opposing party seeks to introduce new affidavit of evidence-in-chief addressing new points of fact close to start of civil trial after deadline for affidavits of evidence-in-chief to be filed and exchange between them has passed]
[Civil Procedure — Pleadings — Amendment — Principles applicable to grant of permission to amend pleadings — Whether to allow amendment of reply close to start of civil trial where amendment is responsive to pleading in amended defence]

[Equity — Fiduciary relationships — Fiduciary relationship of trustee and beneficiary — Whether fiduciary breached no-conflict rule — Whether fiduciary placed himself in position where duty to principal and personal interest may conflict in approving amendment to company constitution negating rights of trust property in form of preference share whilst holding ordinary shares in same company as absolute owner]
[Equity — Maxims — Defences — Whether beneficiaries alleging breaches of trust came to court of equity with clean hands — Relationship between clean hands doctrine in equity and *Ochroid Trading* approach to illegality doctrine in common law]
[Equity — Remedies — Account — Account on wilful default basis — Applicable test for showing wilful default of trustee — Whether trustee displayed want of ordinary prudence in conduct and administration of trust]
[Succession and Wills — Construction — Application of armchair principle to construction of meaning of testament constituting express testamentary trust — Whether testament on proper construction conferred power on trustee to effect conversion of preference share in company held on trust into ordinary share notwithstanding trustee holds ordinary shares in same company as absolute owner]
[Trusts — Breach of trust — Exclusion of liability — Construction of exclusion of liability clause — Restrictive interpretation of clause purporting to exclude liability of trustee — *Armitage v Nurse* approach to construction of exclusion of liability clauses in trusts instruments — Whether phrase "absolute discretion" in trust instrument enlarged trustee's powers — Whether phrase "absolute discretion" abridged trustee's duties — Whether phrase "absolute discretion" amounted to valid and enforceable exclusion of liability clause]
[Trusts — Breach of trust — Remedies — Remedy of surcharging — Application of remedy of surcharging to default of trustee on management stewardship duty — Causal inquiry to identify what prudent trustee would have done in hypothetical assessment of how trustee should have acted — Whether hypothetical prudent trustee would have approved amendment to company constitution negating rights of trust property in form of preference share without accretion of equivalent value to trust estate to compensate for corresponding loss of market value of share]
[Trusts — Breach of trust — Remedies — Remedy of falsification — Application of remedy of falsification to default of trustee on custodial stewardship duty — No causal inquiry where substitutive remedy of falsification is engaged — Disallowing sale of company shares held on trust where trust shares were sold by trustee at sale price below market value with corresponding obligation on trustee to reconstitute trust estate *in specie*]

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Devin Jethanand Bhojwani and others
v
Jethanand Harkishindas Bhojwani

[2024] SGHC 310

General Division of the High Court — Suit No 521 of 2021
Goh Yihan J
19–22, 26–28 March, 2 April, 25 September 2024

5 December 2024 Judgment reserved.

Goh Yihan J:

Introduction

1 The plaintiffs in HC/S 521/2021 (the "Suit") are Mr Devin Jethanand Bhojwani ("Devin"), Mr Dilip Jethanand Bhojwani ("Dilip"), and Mr Sandeep Jethanand Bhojwani ("Sandeep"). They are suing the defendant, their father, Mr Jethanand Harkishindas Bhojwani (also known as "Sajan"). The plaintiffs' mother is Mdm Lakshmi Prataprai Bhojwani ("Lakshmi"). While Lakshmi appeared as a witness during the trial, she is not a party to the Suit.

2 In essence, the plaintiffs allege that Sajan, the trustee, acted in breach of a testamentary trust (the "Trust") created under the Last Will and Testament (the "Will") of their late paternal grandfather, Mr Harkishindas Ghumanmal Bhojwani ("Harkishindas"). The plaintiffs are beneficiaries under the Trust. They therefore claim against Sajan for an account of the Trust on a wilful default

basis, and for reliefs arising from Sajan's alleged breaches of his duties as a trustee. Sajan's main defence is that he had exercised his powers as trustee in utmost good faith at all material times, and that he had not intentionally made any decision to benefit himself personally out of the Trust.

3 After considering the matter, I allow the plaintiffs' claim to the extent specified in this judgment. I now explain the reasons for my decision.

The undisputed facts

4 I begin with the undisputed facts. Harkishindas made the Will dated 20 October 2006. He passed away on 4 March 2007. The plaintiffs' uncle and the defendant's younger brother, Mr Moti Harkishindas Bhojwani ("Moti"), is the executor of the Will.[1]

5 The Trust was created pursuant to cll 5 and 7(b) of the Will. It is discretionary in nature. Clause 5.2 of the Will (read with cl 5.1(iii)) provides that Sajan shall:[2]

> … hold the Trust Property upon trust for all or such one or more of the beneficiaries at such ages or times in such shares and upon such trusts for the benefit of all or any one or more of the beneficiaries as [Sajan] in his absolute discretion may by deed or deeds revocable or irrevocable at any time or times during the trust period appoint …

6 Moreover, pursuant to cl 5.1(i) of the Will, "the trust period" is to be 30 years from the date of Harkishindas's death. The plaintiffs and Lakshmi are

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1 Affidavit of Evidence-in-Chief of Devin Jethanand Bhojwani dated 17 January 2024 ("Devin's AEIC") at paras 7–8.

2 Devin's AEIC at p 167.

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the only named beneficiaries of the Trust (collectively, the "Named Beneficiaries") pursuant to cll 5.1(ii)(a)–5.1(ii)(d) of the Will.[3]

7 Clause 5.1(iv) of the Will sets out the assets which the defendant holds on trust for the Named Beneficiaries. These assets, which I will refer to collectively as the "Trust Assets", are:[4]

(a) shares in several private companies which Harkishindas co-founded and form part of a conglomerate loosely known as "Shankar's Group", of which Shankar's Emporium (Private) Limited ("SEPL") is the main holding company (collectively, the "Trust Shares"); the Trust Shares are as follows:

(i) 9,000 shares in Malaya Silk Store (Private) Limited ("MSSPL");

(ii) 150,000 ordinary shares in SEPL;

(iii) 15,000 shares in Sharrods (Private) Limited ("Sharrods");

(iv) 11,360 shares in Shankar's Pte Ltd ("SPL");

(v) 15,000 shares in Sovrein (Private) Limited ("Sovrein");

(vi) 12,001 shares in Lions Amalgamated Industries Private Limited ("Lions");

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3 Devin's AEIC at p 166.

4 Devin's AEIC at pp 166-168.

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(vii) one share in Shankar's Investments Pte Ltd (formerly known as Shankar's Vietnam (Private) Limited) ("SIPL");

(viii) one share in Liberty Merchandising Pte Ltd ("LMPL"); and

(ix) one founder's share in SEPL (the "Founder's Share") and any conversion therefrom to shares of any other class, which, pursuant to cl 5 of SEPL's Memorandum and Articles of Association ("M&A"), entitles its holder to certain rights beyond those held by a holder of an ordinary share in SEPL;

(b) a property at 32 Branksome Road, Singapore 439565 ("32BR"); and

(c) one-third of the residuary estate under cl 7(b) of the Will.

8 Out of the eight private companies named in cl 5.1(iv) of the Will, five were struck off in 2010. These were: (a) Sharrods; (b) SPL; (c) Sovrein; (d) Lions; and (e) SIPL (collectively, the "Struck Off Companies").

9 It is not disputed that the Trust did not have its own bank account for at least the period from 4 March 2007 to 23 February 2017. In purported exercise of his trust powers, Sajan, on or around 3 October 2019, irrevocably declared and determined in a Deed of Advancement that a piece of real property in Singapore situated at Questa @ Dunman (the "Questa Property"), which is not listed under the Will but which Sajan alleges to have formed part of the Trust Assets subsequently, would be allocated and distributed from the Trust, free

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from any and all encumbrances, to Dilip. Then, on 10 January 2020, Sajan executed a Deed dated that same date under which he irrevocably declared and determined that Lakshmi "shall receive no further distribution from any of the remaining Trust Property" and "has no further interest in any of the remaining Trust Property", following his allocation and distribution of 32BR from the Trust to Lakshmi free from any and all encumbrances. Sajan also executed a Deed of Appointment dated 10 January 2020 under which he revocably appointed that he held all of the remaining Trust Assets for the benefit of the plaintiffs only.[5]

10 In addition, on 23 February 2021, Sajan informed the plaintiffs that he had executed three Deeds on 16 February 2021 to sell the Trust Shares in the three remaining companies, namely: (a) MSSPL; (b) SEPL; and (c) LMPL (collectively, the "Live Companies"). These Deeds also provided that the proceeds of the sales shall be paid into the Trust and that Sajan revocably appointed that he held the proceeds of sales for the benefit of the plaintiffs only.

11 Finally, on 14 April 2021, Sajan executed two Deeds and one Deed of Appointment, which determined that: (a) Devin and Sandeep shall receive no further distribution from any of the remaining Trust Assets; (b) Devin and Sandeep shall have no further interest in any of the remaining Trust Assets; and (c) the remaining Trust Assets shall be held for the benefit of Dilip only.[6] In this regard, it is undisputed that Devin and Sandeep have never received any distribution from the Trust Assets. Indeed, on 9 July 2019, Sajan informed the plaintiffs that he had decided to make a cash distribution of $150,000.00 from

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5 Devin's AEIC at para 61.

6 Devin's AEIC at para 249 and pp 1131–1142.

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the proceeds of the Trust Assets to each of the three plaintiffs, but the plaintiffs did not accept this. Devin wrote an e-mail to Sajan on 10 July 2019, copying Dilip, Sandeep, and Lakshmi, to explain the plaintiffs' reasons for not accepting the distribution. In the same correspondence, Devin also asked Sajan to keep the moneys in the special account that Sajan had set up for the Named Beneficiaries.[7]

12 Throughout his time as trustee, Sajan, broadly speaking, produced three main sets of documents conveying information about the Trust to the plaintiffs. The first was a two-page "trust statement" for the period ending 31 December 2017 (the "December 2017 Trust Summary"), which Sajan e-mailed to the plaintiffs on 16 May 2018.[8] The second was a trust statement disclosed in a 19 August 2020 affidavit in HC/OS 1339/2019 that set out expenditures and the Trust Assets for the period up to 31 December 2017 (the "August 2020 Trust Statement").[9] The third was a trust statement disclosed in Sajan's affidavits verifying the 5th and 6th Supplementary Lists of Documents, updated as at 20 September 2023 and dated 16 November 2023, for the period up to 31 December 2021 (the "November 2023 Trust Statement").[10] The November 2023 Trust Statement included a Microsoft Excel document that recorded various purported Trust Assets and expenditures. I shall refer to these collectively as the "Trust Statements".

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7 Devin's AEIC at pp 1144–1147.

8 Devin's AEIC at pp 233–235.

9 Devin's AEIC at pp 554–561.

10 Affidavit of Jethanand Harkishindas Bhojwani dated 1 November 2023 at p 6 Schedule 1 Part 1; Affidavit of Jethanand Harkishindas Bhojwani dated 24 November 2023 at p 10 Schedule 1 Part 1.

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The parties' applications at the trial

13 With these undisputed facts in mind, I turn first to the parties' applications that were made shortly before the first day of the trial. I decided these applications during the trial and provided brief reasons to the parties at the time. I now set out the fuller reasons for my decisions.

SUM 678 (Amendment of Pleadings)

14 HC/SUM 678/2024 ("SUM 678") was the plaintiffs' application to amend their Reply (Amendment No 2). The plaintiffs' proposed amendments identified relevant provisions from SEPL's M&A, as well as applicable clauses from a Shareholders' Agreement dated 2 August 2002 (the "SHA") that was also referred to at para 25(d) of Sajan's Defence (Amendment No 2).

The applicable law

15 The law on amendments to pleadings is clear. I adopted the General Division of the High Court's three-step framework in *Wang Piao v Lee Wee Ching* [2024] 4 SLR 540 ("*Wang Piao*") on the issue, which provides (at [16]–[18]) that:

(a) First, the court determines the stage of the proceedings in which the amendments are being sought. This may affect the ease with which the court allows the amendments sought.

(b) Second, the court considers whether the amendments sought would enable the real question and/or issue in controversy between the parties to be determined.

(c) Third, the court considers whether it is nonetheless just to allow the amendments, based on factors such as the prejudice

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> occasioned to the other party by the amendment which cannot be compensated in costs and whether the party seeking to amend his or her pleadings is effectively seeking a second bite at the cherry.

16 For completeness, as the General Division of the High Court had observed in *Wang Piao* (at [8]–[11]), the new Rules of Court 2021 (the "ROC 2021") provides for a more restrictive approach in relation to applications to amend pleadings within less than 14 days before the commencement of the trial "except in a special case" (see O 9 r 14(3) of the ROC 2021). Here, however, while SUM 678 had been brought within that 14-day period (*viz*, on 13 March 2024, where the first day of trial was 19 March 2024), I did not have to consider how the three-step framework in *Wang Piao* at [16]–[18] should be recalibrated for such a scenario. That was because the Suit had been brought on 11 June 2021 and, consequently, is not governed by the ROC 2021 (see O 1 r 2(3)(*a*) of the ROC 2021). Moreover, O 20 r 5(1) of the old Rules of Court (2014 Rev Ed) does not prescribe a different approach where an application for the amendment of pleadings is brought at the doorstep of trial. Accordingly, I did not have to decide whether the present application amounted to a "special case" for the purposes of O 9 r 14(3) of the ROC 2021 (see *Wang Piao* at [10]–[11]). Instead, it sufficed for me to apply the ordinary three-step framework set out in *Wang Piao* at [16]–[18] to the facts of SUM 678. Thus, I also did not have to decide whether SUM 678 satisfied the threshold of being made under "very extenuating and unique circumstances" that rendered it "necessary and just in all the circumstances to permit the amendment", thereby amounting to a "special case" within the meaning of O 9 r 14(3) of the ROC 2021 (see the General Division of the High Court decision in *Royal & Sons Organisation Pte Ltd v Hotel Calmo Chinatown Pte Ltd* [2024] SGHC 248 at [111]).

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My decision: SUM 678 was allowed

17 I allowed the proposed amendments mainly because they were responsive to para 25(h) of Sajan's Defence (Amendment No 2), which stated that the conversion of the Founder's Share into one ordinary share would have been effected by majority vote in any event and the defendant would have been powerless to stop that.

18 To begin with, Sajan accepted that the plaintiffs' proposed amendments had been circulated to his counsel on 29 February 2024. This was around three weeks before the trial. Thus, I was satisfied that the proposed amendments were not sought near the doorstep of the trial to belatedly introduce new issues or claims. In any case, Sajan recognised that his objections to the plaintiffs' proposed amendments were not based on any allegation of delay on their part.

19 Next, I was satisfied that the proposed amendments sought would enable the real question and/or issue in controversy between the parties to be determined. In this regard, Sajan argued that the proposed amendments were not responsive to para 25(h) of the Defence (Amendment No 2) and hence should have been made to the Statement of Claim (Amendment No 2) instead. Sajan further argued that it was the plaintiffs who first raised the issue of the conversion of the Founder's Share in their Statement of Claim (Amendment No 2) when they pleaded that they discovered that Sajan had agreed to convert the Founder's Share into an ordinary share in SEPL. As such, Sajan claimed that the proposed amendments to the plaintiffs' Reply (Amendment No 2) did not arise out of para 25(h) of the Defence (Amendment No 2). For completeness, para 25(h) of the Defence (Amendment No 2) reads as follows:

> The conversion of the 1 Founder's Share in SEPL into 1 ordinary share would therefore have been put into effect by

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> the majority vote of the other shareholders of SEPL in any event, even if the Defendant had voted against it.

Taking a step back, the crux of Sajan's complaint was that the plaintiffs' proposed amendments to their Reply (Amendment No 2) would take away his right to be heard on the proposed amendments.

20 I disagreed with Sajan's argument. In my view, the proposed amendments were responsive to para 25(h) of the Defence (Amendment No 2) in that they were made in response to Sajan's pleading that the conversion of the Founder's Share into an ordinary share would have been effected by the majority vote of the other shareholders of SEPL, even if he had voted against it. In this regard, para 25(h) of the Defence (Amendment No 2) suggested that a majority vote in favour of the conversion was all that was needed to effect it, such that Sajan would have been powerless to stop the conversion, even if he had disagreed with the majority. As such, the plaintiffs' proposed amendments, in so far as they responded to this pleading by saying that a simple majority vote is insufficient for a conversion to take place, were clearly responsive. Indeed, in the proposed amendments, the plaintiffs identified the relevant provisions from SEPL's M&A, as well as the applicable clauses from an SHA referred to by Sajan at para 25(d) of the Defence (Amendment No 2). These provisions and clauses were said to show that the unanimous consent of SEPL's directors and/or the shareholders party to the SHA was required for the conversion to take place.

21 Finally, I considered that it was just to allow the proposed amendments. In this regard, Sajan argued that he would suffer prejudice which was non-compensable by costs because he would lose the right to be heard. I observed that the proposed amendments simply identified the relevant provisions and

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clauses found in documents that were already in the parties' pleadings, and which Sajan referred to in his own evidence and Defence (Amendment No 2). Thus, Sajan could not be said to have been prejudiced by the proposed amendments. Indeed, the proposed amendments did not substantively change the plaintiffs' case or introduce any new claims.

22 For these reasons, based on the three-step framework in *Wang Piao* at [16]–[18], I allowed the proposed amendments and granted SUM 678.

23 As for Sajan's request for a rejoinder, I rejected this because the premise of a rejoinder is that a defendant has something that he needs to plead in response to a plaintiff's reply. Since I concluded that the plaintiffs' proposed amendments in the Reply (Amendment No 2) were rightly responsive to the Defence (Amendment No 2), it followed that there was no basis for Sajan to file a rejoinder. Indeed, this was not a case where Sajan was applying for permission to plead any new factual particulars that were responsive to the amended pleadings in the Reply (Amendment No 3).

SUM 663 (Admission of new AEIC out of time)

24 Next, HC/SUM 663/2024 ("SUM 663") was Sajan's application to admit Mr Abdul Khader Mohamed Ismail's ("Mr Ismail") affidavit of evidence-in-chief ("AEIC") into evidence for the Suit, or for Mr Ismail's oral evidence-in-chief ("EIC") to be adduced during the trial itself.

25 I disallowed Sajan's application to admit Mr Ismail's AEIC into evidence or for an oral EIC of Mr Ismail to be taken because Mr Ismail's AEIC or EIC would have introduced new evidence on new points of fact that would have prejudiced the plaintiffs. In the paragraphs to follow, I shall address my

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decision to disallow the admission of Mr Ismail's AEIC. I should also clarify that my reasons apply equally to my decision to disallow the taking of Mr Ismail's oral EIC at the trial.

The applicable law

26 Sajan's application to admit Mr Ismail's AEIC was ostensibly premised on the court's inherent powers to do so. In so far as this is correct, it is trite that the court only exercises its inherent powers where it is *necessary* to do so. In the specific context of allowing a party to admit a new AEIC at the doorstep of trial, it is necessary to consider the purpose of having parties adduce their EICs via affidavits. In this regard, the Court of Appeal observed in *Auto Clean 'N' Shine Services (a firm) v Eastern Publishing Associates Pte Ltd* [1997] 2 SLR(R) 427 ("*Auto Clean*") (at [14]) that the purpose is to "achieve a fair and expeditious disposal of proceedings, to save costs and to eliminate any element of surprise", and so "the parties are required to disclose substantially their evidence at the early stage of the proceedings and they would then be able to assess the respective strengths and weaknesses of their cases."

27 Relatedly, on the belated calling of witnesses, the Court of Appeal observed in *Auto Clean* (at [17]) that "the courts should not adopt an unduly rigid or restrictive approach in considering the directions to be given concerning matters pertaining to the trial or hearing", and that "a balance should be struck between the need to comply with the rules and the parties' right to call witnesses whom they deem necessary to establish their case". However, where the balance is to be struck is dependent on the factual circumstances of each case. In *Auto Clean*, while the plaintiffs there were permitted to call additional witnesses, it is important that the action had not even been set down for trial (at [18]). The court observed that there would be no element of surprise in allowing the

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plaintiffs to call additional witnesses to give evidence and in granting an extension of time for the plaintiffs' two witnesses to file their AEICs. This was because the parties were "still at a relatively early stage" of the proceedings; thus, on the facts there, "no prejudice would be caused to the defendants", who "would have sufficient time and opportunity to consider, and, if necessary, to respond to the evidence" (at [18]).

28 In addition to *Auto Clean*, the plaintiffs pointed me to the English case of *TC00544: Xentric Limited* [2010] UKFTT 249 (TC) ("*Xentric*"). In that case, the First-Tier Tribunal (Tax) considered whether to admit eight new witness statements that were served around three weeks before the relevant hearing. In considering that matter, the Tribunal adopted a two-stage approach:

(a) first, the Tribunal would assess the relevance of the evidence sought to be admitted (see *Xentric* [20]–[21]); and

(b) second, the Tribunal would then weigh, as part of a "balancing exercise", the prejudice occasioned to each of the parties should the late evidence be admitted or not (see *Xentric* at [16]–[17], [19] and [29]).

29 Applying this framework to the facts, the Tribunal in *Xentric* refused (at [51]) to admit all eight witness statements. The Tribunal observed that: (a) the appellant was prejudiced by the short time left to prepare before the hearing and ought to be given a fair opportunity to rebut or throw into question that evidence or any part of it; (b) the presence of prior witness statements covering similar ground reduced any prejudice to the respondent; and (c) the respondents did not provide any satisfactory evidence as to why the evidence had been adduced at

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such a late stage of the proceedings (see, *eg*, *Xentric* at [37], [41], [44]–[45] and [48]–[50]).

30 In my view, the two-stage approach adopted by the Tribunal in *Xentric* can be adopted in Singapore. While the present case is not governed by the ROC 2021, the two-stage approach has the benefit of being consistent with the Ideals in O 3 r 1(2) of the ROC 2021. In particular, it is consistent with the ends of according "fair access to justice", "expeditious proceedings", "efficient use of court resources", and "fair and practical results suited to the needs of the parties", which the court must seek to achieve in all its orders and directions (see O 3 rr 1(2)–1(3) of the ROC 2021). Leaving aside the Ideals, it also accords with prior principle and precedent, including the need to strike a proper balance between, on the one hand, instilling procedural discipline in civil litigation and, on the other hand, permitting parties to present the substantive merits of their respective cases to the court notwithstanding procedural irregularities (see the High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [4]–[9] and the decision of the Court of Appeal in *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [20]–[23]).

My decision: SUM 663 was dismissed

31 Applying the two-stage approach in *Xentric* outlined at [28] above, I dismissed SUM 663.

32 First, I observed that many aspects of Mr Ismail's evidence were not relevant. As a preliminary point, some of it covered substantially the issues that Sajan already covered in his AEIC, including the object of the SHA and the reasons for which it was entered into (see paras 12–13 of the proposed AEIC of

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Mr Ismail). While that was not determinative of its probative value, much of Mr Ismail's evidence was irrelevant to the issues at hand. For example, Mr Ismail's AEIC goes on at length about his *own* interpretation of what the Will means, which is a question for the court to decide (see paras 18–20 of the proposed AEIC of Mr Ismail). Mr Ismail's AEIC also discusses whether the plaintiffs had the option of becoming an active part of SEPL's business, which is not material to whether Sajan had breached his duties to them as trustee (see paras 21–22 of the proposed AEIC of Mr Ismail). In any event, even in respect of the parts of Mr Ismail's AEIC which could have some probative value to the Suit, I would have had to consider whether it was broadly fair to the plaintiffs to allow the evidence to be admitted at such a late stage of the proceedings.

33 In considering the broader fairness point, I observed preliminarily that the admission of Mr Ismail's AEIC was not driven by the plaintiffs' proposed amendments to their Reply (Amendment No 2) in SUM 678. Indeed, at para 12 of Sajan's supporting affidavit, he listed several issues that Mr Ismail's AEIC would attest to that had nothing to do with the plaintiffs' proposed amendments. For example, the issue of whether Harkishindas had knowledge of the written agreement between Sajan and the other second-generation SEPL shareholders (*ie*, Moti, Mr Jaikirshin s/o H Bhojwani ("Jack"), Mr Hiro J Bhojwani ("Hiro"), and Mr Mohandas Jamnadas Bhojwani ("Manu")), as stated in paras 5(b) and 16 of the proposed AEIC, had nothing to do with the plaintiffs' amendments in SUM 678. Thus, the fact that I had allowed the plaintiffs' amendments was not a good reason to allow Mr Ismail's AEIC to be admitted into evidence.

34 Second, the new issues that Mr Ismail's AEIC would introduce at the start of trial would clearly prejudice the plaintiffs and their conduct of the trial. The parties were directed to exchange their AEICs on 17 January 2024, just

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over two months before the start of the trial. It goes without saying that the plaintiffs would be prejudiced by not having had the chance to prepare their case at trial in response to Mr Ismail's evidence. It was no answer that the plaintiffs' solicitors would have seen the draft AEIC as early as 8 March 2024, which, in any event, was still very close to the first day of trial (*viz*, 19 March 2024) and later than the date fixed for parties to serve their AEICs on one another. The plaintiffs and their solicitors cannot be expected to spend time preparing to rebut a draft AEIC on the basis that it will be admitted, when that time can be better spent on other evidence already properly admitted for the trial.

35 Moreover, the plaintiffs were unable to address Mr Ismail's evidence in their own AEICs or file supplementary AEICs timeously before the start of trial. This is thus not only similar to the factual matrix in *Xentric* but also similar to that in the English High Court of Justice Queen's Bench Division (Commercial Court) decision of *Otkritie Investment Ltd v Urumov* [2013] EWHC 4799 (Comm) ("*Otkritie Investment*"). In *Otkritie Investment*, Eder J refused to admit witness statements that were furnished after the commencement of trial and after the parties had adjourned to prepare closing submissions (at [1]–[2]). Eder J observed that, even assuming that the evidence in the two witness statements were relevant, "[l]itigation has to be conducted according to some basic rules if it is to be conducted efficiently and is not to be made the subject of complete mockery" (at [14]). Hence, Eder J held that "this new evidence comes far too late in circumstances where to allow it to be adduced now would cause not only severe disruption to the management of the trial, but would also cause immense unfairness to the Claimants" (at [16]). In his view, the admission of evidence "at this very late stage would require very very [*sic*] exceptional circumstances indeed", having due regard to "the

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importance of maintaining some kind of orderly way in which evidence is put before the court" (at [15]). These observations apply similarly here.

36 Third, Sajan did not give a good explanation for why he had waited until around a week before the start of trial to apply to introduce the new evidence, save that he recently reflected on and recalled the relevance of the new evidence. In fact, Sajan had close to one and a half years to consider the matter but chose to put forward the application to include Mr Ismail's evidence only on the doorstep of trial. I did not accept that Sajan's memory was jogged only when he considered the plaintiffs' proposed amendments to the Reply (Amendment No 2) when they were circulated to his counsel on 29 February 2024. Moreover, even if I accepted Sajan's account, it was inexplicable why he did not think carefully about his case when he had to put together his own AEIC by January 2024.

37 Fourth, as I have already alluded to at [32] above, some of the issues in Mr Ismail's AEIC were already covered by Sajan in his own AEIC. Thus, any prejudice caused to Sajan by the supposed gaps in his evidence were addressed by his own evidence. In so far as there was a gap in the evidence, Sajan could not be allowed to belatedly include new evidence to patch up his case. This is especially so since he had seen the plaintiffs' AEICs before desiring to introduce Mr Ismail's evidence.

38 In the end, while each party should be allowed to bring its best evidence to trial, this must take place within the civil procedural framework, which has rules designed to ensure a procedurally and substantively fair trial. Hence, the Court of Appeal has held that, although "every litigant has a general right to bring all evidence *relevant* to his or her case to the attention of the court"

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[emphasis in original] (see *Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2010] 3 SLR 110 ("*Basil*") at [24]), this general right is subject to specific limits, "in accordance with the rules of procedure whose purpose is to ensure the *fair*, economical, swift and orderly resolution of a dispute" [emphasis in original] (see *Basil* at [25]). In my judgment, allowing Mr Ismail's AEIC to be admitted into evidence (or allowing for the oral EIC of Mr Ismail to be taken) would have compromised the plaintiffs' right to a fair trial more than it would, if at all, have impinged on Sajan's right to bring his best defence to the trial.

39 For these reasons, I dismissed SUM 663.

The parties' general cases for the Suit

40 Having explained my reasons for how I decided the parties' applications at the start of the trial, I come now to the parties' general cases for the Suit.

The plaintiffs' general case

41 The plaintiffs allege that Sajan has breached his duties in respect of the Trust. They claim that Sajan concealed the existence of the Trust from them and Lakshmi for almost a decade. The plaintiffs explain that they would not have known about the Trust until they inadvertently discovered its existence around September 2016. Aside from this concealment, the plaintiffs also allege that Sajan has consistently failed to maintain and produce adequate and accurate accounts of the Trust, commingled personal funds with funds covered by the Trust, and mismanaged Trust Moneys and Trust Assets (for clarity, I use "Trust Moneys" to refer to any moneys, excluding the Trust Assets, which rightfully belong to the Trust). Further, the plaintiffs say that Sajan has also sought to

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wrongfully remove several of the plaintiffs as beneficiaries of the Trust. In my view, the plaintiffs' case can be distilled into five main planks.

42 First, Sajan commingled the Trust Moneys and Trust Assets with other moneys and assets, and generally mismanaged the Trust. Sajan allegedly did so in the following ways:

(a) Sajan intentionally concealed the existence of the Trust from the Named Beneficiaries.[11] Since the plaintiffs were adults when the Trust arose, it would have been proper to apprise them of the existence of the Trust and of any significant decisions relating to the Trust Assets.

(b) Sajan failed to produce and maintain adequate and accurate accounts of the Trust.[12] The December 2017 Trust Summary was two pages long,[13] and was inadequate, incomplete, and not accompanied by any supporting documentation. He did not check the other Trust Statements carefully. Besides, the November 2023 Trust Statement only covered the period up until the end of 2021.

(c) Sajan failed to segregate the Trust Moneys from his own.[14] In this regard, it is undisputed that Sajan did not open a separate bank account for the Trust until 24 February 2017. Before then,

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11 Plaintiffs' Closing Submissions dated 14 May 2024 ("PCS"), Heading IV.C.

12 PCS, Heading IV.D.

13 Devin's AEIC at pp 234–235.

14 PCS, Heading IV.B.

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the expenses, purchases, and investments attributed to the Trust were made through one of Sajan's own bank accounts. Further, moneys intended for the Trust flowed into his personal accounts.

(d) Sajan tried to saddle the Trust with expenses without informing the plaintiffs. These included alleged expenses for the plaintiffs' education, insurance premiums, credit cards, investments, cars, and properties that the plaintiffs always believed were gifts from Sajan. A great number of these expenses ought not to have been charged to the Trust.[15]

43 Second, Sajan wrongfully converted the Founder's Share.[16] As mentioned at [7(a)(ix)] above, cl 5 of SEPL's M&A provides the holder of the Founder's Share with certain rights. These rights include the right to: (a) hold office as a director of SEPL; (b) appoint anyone else as a director; (c) exercise all powers, authorities, and discretions vested in the directors generally by the M&A of SEPL; (d) remove any director other than a founder shareholder; and (e) receive 10% of SEPL's net profits annually. These rights are entrenched rights in the company's constitution. However, on 15 September 2008, Sajan voted to convert the Founder's Share into one out of 6,184,004 ordinary shares in SEPL (the "Conversion"). Sajan agreed to the Conversion despite the Founder's Share being far more valuable than an ordinary share. In this regard, the plaintiffs' expert has valued the Founder's Share at $9,522,738.00 as of 15 September 2008, as compared to an ordinary share in SEPL at $6.08 as of the same date. Sajan's decision to carry out the Conversion therefore caused the

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15 PCS, Headings IV.E, IV.F and IV.G.

16 PCS, Heading V.

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plaintiffs' loss in the form of: (a) the loss of the rights associated with the Founder's Share, including the right to 10% of SEPL's annual net profits; and (b) the diminution in the market value of the Founder's Share in SEPL.

44 Third, Sajan sold the Trust Shares in SEPL and LMPL (collectively, the "Two Live Companies") without reasonable justification and, in any event, at an undervalue.[17] In this regard, Sajan sold the Trust Shares in the Two Live Companies to his brothers with deeds dated 16 February 2021. According to the plaintiffs, Sajan had no pressing need to sell the Trust Shares in the Two Live Companies when he did. Sajan merely wanted to deplete the Trust Assets to reduce his accountability, and to punish the Named Beneficiaries for questioning him on his management of the Trust. Further, according to the plaintiffs' expert, the fair value of the Trust Shares in the Two Live Companies was far higher than the value which the defendant obtained through the sales. Sajan therefore breached his trustee's duties in selling these shares and accepting the sales of these shares at an undervalue. While the plaintiffs initially pleaded that the Trust Shares in all three Live Companies (including those of MSSPL) were sold at an undervalue, this claim was dropped by the plaintiffs in light of new information obtained in the interlocutory process. That leaves only the plaintiffs' claims in respect of the Two Live Companies.[18]

45 Fourth, Sajan realised the Trust Shares in Sharrods, SPL, and Sovrein (collectively, the "Three Struck Off Companies") at an undervalue in 2010.[19] In this regard, Sajan was the overall chairman of the Shankar's Group, and a

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17 PCS, Heading VI.

18 Devin's AEIC at paras 239–245.

19 PCS, Heading VII.

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substantial shareholder of all these three companies. He should therefore have ensured that the Trust Shares in these companies were properly realised at fair market value. Sajan breached his trustee duties in realising these shares at a significant undervalue. While the plaintiffs had initially pleaded that the capital returned to the shareholders from the 2010 striking off of all five of the Struck Off Companies (including Lions and SIPL) were realisations at an undervalue, they have likewise dropped their claims in respect of Lions and SIPL, in light of new information obtained in various pre-trial applications. This therefore leaves only their claims in respect of the Three Struck Off Companies.[20]

46 Fifth, Sajan had executed the various deeds to exclude Devin and Sandeep from the Trust out of spite, so as to punish Devin and Sandeep for challenging him and to reduce his accountability over the Trust.[21] The deeds were also executed when Sajan had an all-encompassing power of attorney to act on behalf of Dilip, which Dilip revoked on 10 December 2021. Thus, Sajan's execution of these deeds was in bad faith and with improper motives, and contrary to the purpose of the Trust. These deeds are therefore invalid.

47 For convenience, I will deal with the parties' respective cases for the rest of this judgment along these five main planks that I have identified.

Sajan's general case

48 Sajan rejects the plaintiffs' accusations of wrongdoing, including the allegation that he has benefitted himself at their expense. Instead, Sajan believes

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20 Devin's AEIC at paras 215–225.

21 PCS, Heading III.B.

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that he has acted with utmost honesty and in good faith. Indeed, he has never deliberately or intentionally made any decision to benefit himself personally, and always intended to benefit the Named Beneficiaries.[22] Even if he is found to have acted in excess of his powers as trustee, Sajan points out that his conduct will not be fraudulent if he had done so in good faith and in the honest belief that he was acting in the interests of the Named Beneficiaries. More broadly, Sajan contends that the plaintiffs commenced the Suit because they do not want to wait until the Trust Period expires in 2037 to obtain the Trust Assets.[23] Sajan's case can be broadly distilled into the following points, bearing in mind the five planks of the plaintiffs' case at [42]–[46] above.

49 First, Sajan raises the preliminary issue of whether Devin and Sandeep, who have been excluded as beneficiaries of the Trust, have any standing to commence the Suit.[24] While Devin and Sandeep argue that the executed deeds to this effect are invalid, Sajan argues that he is not compelled under the Trust to make dispositions to all the Named Beneficiaries. This therefore answers the plaintiffs' point that Sajan executed the various deeds to exclude Devin and Sandeep from the Trust out of spite.

50 Second, regarding the plaintiffs' allegation that he commingled and mismanaged the Trust Moneys and Trust Assets, Sajan makes the following points:

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22 Defendant's Closing Submissions dated 14 May 2024 ("DCS") at para 5.

23 Affidavit of Evidence-in-Chief of Jethanand Harkishindas Bhojwani dated 17 January 2024 ("Sajan's AEIC") at para 22; Defendant's Opening Statement dated 11 March 2024 ("Defendant's Opening Statement") at para 11.

24 DCS, Heading B.I, Defendant's Opening Statement at para 21.

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(a) He did not conceal the existence of the Trust from the plaintiffs. Instead, Sajan made multiple attempts to apprise the plaintiffs in family conversations from as early as 2009 that Harkishindas had left behind some assets for them. However, by 2015, the relationship between Sajan and the plaintiffs had deteriorated to such an extent that the plaintiffs were dismissive of everything that Sajan had to say. In any event, even if Sajan had concealed the existence of the Trust, he had not done so out of personal interest.[25]

(b) He had, consistent with his ongoing duty as trustee, provided the plaintiffs with the comprehensive and updated November 2023 Trust Statement, together with all the supporting documentation necessary to support the figures therein. However, the plaintiffs have not paid any regard to the November 2023 Trust Statement. Indeed, it should have been clear to them from that statement that the Trust Moneys would have been grossly insufficient to fund the full extent of what the plaintiffs claim are Trust Moneys or Trust Assets.[26]

(c) While it was not ideal that Sajan did not open a separate bank account for the Trust, there is no evidence that Sajan either misappropriated the Trust Assets or used any of such assets for his personal benefit. Instead, Sajan acted in good faith, and he took a holistic approach in administering the Trust, given that his

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[25] Defendant's Opening Statement at para 22.

[26] Defendant's Opening Statement at para 24.

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entire estate would ultimately be bequeathed to the plaintiffs under his will.[27]

(d) Sajan has the discretion to apply the Trust Moneys towards the plaintiffs' costs of living. The November 2023 Trust Statement makes it clear that the Trust only bore a percentage of the plaintiffs' credit card expenses and insurance premiums, and that Sajan also bore substantial amounts of their expenses and premiums personally, without seeking reimbursement from the Trust to date.[28] Also, the November 2023 Trust Statement makes clear that while Sajan had parked a notional estimate of $200,000 for the plaintiffs' education expenses, he has not sought reimbursement for this item from the Trust. Sajan therefore bore the plaintiffs' education expenses without seeking any actual reimbursement from the Trust.[29]

51 Third, it was necessary for Sajan to have effected the Conversion. In this regard, Sajan exercised his power and discretion as trustee, failing which the business would have been dissolved, and there would only have been a notional value to the said Founder's Share. Again, Sajan acted in good faith and took a holistic approach given that his personal shareholdings would ultimately be bequeathed to the plaintiffs.[30]

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27 Defendant's Opening Statement at para 28.

28 Defendant's Opening Statement at para 35.

29 Defendant's Opening Statement at para 36.

30 Defendant's Opening Statement at para 29.

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52 Fourth, Sajan exercised his power and discretion as trustee in making the decision to sell the Trust Shares in the Two Live Companies. Sajan was constrained by and duly observed the protocol set out in the various companies' constitutions in respect of the sales of the shares. The Two Live Companies had appointed valuers, and the valuations were done at arm's length. Sajan obtained purchase prices which were higher than those posited in the valuations. Indeed, the plaintiffs themselves were intent on selling the Trust Shares in 2017.[31]

53 Fifth, the Trust Shares in the Three Struck Off Companies only formed a minority of the shares in those companies. Even when coupled with Sajan's shares, Sajan would have been unable to prevent the resolutions for the striking off of those companies from being passed in the general meeting.[32]

The relevant issues

54 With the parties' general cases in mind, I asked the parties to address the following relevant issues in their closing submissions:

(a) whether Devin and Sandeep have standing to bring the Suit;

(b) whether Sajan commingled and mismanaged the Trust Moneys and Trust Assets;

(c) whether Sajan wrongfully converted the Founder's Share in SEPL;

(d) whether Sajan sold the Trust Shares in the Two Live Companies at an undervalue; and

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31 Defendant's Opening Statement at para 30.

32 Defendant's Opening Statement at para 31.

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(e) whether Sajan realised the Trust Shares in the Three Struck Off Companies at an undervalue.

55 In addition to these issues, Sajan raises two overarching issues in his closing submissions:

(a) First, the powers afforded to the trustees under the three trusts (including the Trust here) created under the Will are "peculiar, extraordinary, and atypical".[33] These include the "absolute" powers, discretions, protections, and indemnities afforded to Sajan in his capacity as trustee. In essence, Sajan was effectively granted "'absolute' or virtually untrammelled discretion, power, and dominion over the Trust [A]ssets during the course of the … 30-year life-span of the Trust".[34] As such, Sajan submits that the court "might tread lightly on the [t]estator's clear and express intentions, given regard will be given to the testamentary intention expressed by the testator in his will".[35]

(b) Second, the plaintiffs have not come to court with clean hands and yet seek equitable remedies. In essence, Sajan submits that the Suit is the plaintiffs' attempt to abuse the court's process. Indeed, the plaintiffs are using these proceedings to: (i) continue to exhaust Sajan's will to continue as trustee; (ii) compel him to hand over the remainder of the Trust Assets to them prematurely; and (iii) further enrich themselves by alleging that Sajan

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33 DCS at para 13.

34 DCS at para 15.

35 DCS at para 17.

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> breached his duties and is thus liable to them for equitable compensation.[36]

56 Since Sajan has raised these overarching issues, I will deal with them first before turning to the five relevant issues I had asked the parties to focus on (see at [54] above). To provide the relevant legal context, I begin with a discussion of the relevant principles in relation to a trustee's powers and duties, and whether Sajan was granted absolute power or discretion under the Trust, on account of the use of the phrase "absolute discretion" by Harkishindas in his Will, which constituted the Trust.

Whether Sajan was granted absolute power or discretion under the Trust

The relevance of the phrase "absolute discretion" in the Will on Sajan's duties under the Trust

The applicable principles

57 The starting point is that a trust grants various, sometimes extensive, powers to a trustee. A trust power is "a legal authority conferred on a person to dispose of property which is not his own" (see Lynton Tucker, Nicholas Le Poidevin QC & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th Ed, 2020) ("*Lewin on Trusts*") at para 28−001). *Lewin on Trusts* (at para 28–001) further explains that powers granted under a trust ordinarily include: (i) powers of appointment and other dispositive powers "which enable the creation of beneficial interests in property", (ii) administrative powers, such as a trustee's powers of investment and sale, and (iii) other powers not readily

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[36] DCS at para 23.

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categorised as either dispositive or administrative, such as powers of appropriation and powers to appoint new trustees.

58 It is also relatively uncontroversial that a trustee's exercise of these powers is constrained by various duties, which may include statutory, fiduciary, and stewardship duties. Some of these duties, at the stage when a trustee is considering the exercise of his powers, include: (a) a duty to act responsibly and in good faith; (b) a duty to take only relevant matters into account; (c) a duty to act impartially; and (d) a duty not to act for an ulterior purpose (see *Lewin on Trusts* at para 29−033 as well as the recent Court of Appeal decision of *Credit Suisse Trust Limited v Ivanishvili, Bidzina and others* [2024] 2 SLR 164 ("*Credit Suisse*") at [39] and [41]). Furthermore, trustees are under duties of care when exercising their powers to administer the trust property and deal with it (see *Lewin on Trusts* at paras 34−002 and 34−007, as well as *Credit Suisse* at [49]). Conceptually, on a Hohfeldian analysis, it is these duties that are capable of being enforced by the beneficiaries. Where the trustee is conferred powers and liberties to deal in trust property, the corollary of this is that the beneficiary holds a corresponding right to claim against the trustee to enforce the constraints upon these liberties, inclusive of the trustees' duties (leaving aside the question of the specific remedy available to the beneficiaries). Those constraints on the trustee's exercise of his or her powers are thus reflected in the duties owed by a trustee to the beneficiaries in regard to such exercise, which serve to vindicate the contents of the beneficiary's rights in respect of the trust and the trustee's discharge of that trust (see, *eg*, *Lewin on Trusts* at paras 29–032 and 29–033).

59 As the extent of a trustee's discretion is a matter of construction of the trust instrument that confers the trust powers in the first place, it is necessary to discern the intent and purpose behind the trust powers and determine their scope

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from that construction. As a starting point, the construction of the power-conferring clause itself may explain the extent of a trustee's discretion. However, where such construction does not yield an answer, then it may be that the trust instrument contains other provisions which impose conditions that govern a trustee's exercise of his or her discretion. Therefore, it may not be meaningful to speak abstractly of how "absolute" a trustee's "discretion" is, even if premised on a construction of the trust instrument. Instead of asking how broad or narrow a trustee's discretion is *in general*, it would be better to analyse whether, on a proper construction of the trust instrument, the trustee's duties or liabilities have been excluded or exempted in some way. This can be done by way of express provisions to that effect (see *Lewin on Trusts* at para 41−127). Here, however, Sajan is, in effect, arguing that on a proper construction of the Will, considering *inter alia* its clauses regarding his "absolute discretion", the effect of the Will, and its provisions, is to:

(a) enlarge his trust powers;

(b) abridge his duties under the trust; or

(c) exclude his personal liability for breaches of trust (*ie*, similar to the effect of trustee exemption clauses).

My decision: the phrase "absolute discretion" in the Will has no bearing on Sajan's duties under the Trust

60 I begin with a construction of the power-conferring provisions of the trust instrument, *ie*, cll 3 and 5.2 of the Will. In this regard, Sajan argues that the powers granted under the Trust are "almost extra-terrestrial",[37] and relies on

[37] DCS at para 13.

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the use of the phrase "absolute discretion" in cll 3 and 5.2 of the Will to submit that the Trust should be construed differently from a "typical trust".[38] However, I agree with the plaintiffs that express trusts with "absolute discretion" clauses are not uncommon.[39] More importantly, Sajan has cited no authority for the proposition that the phrase "absolute discretion" should affect the construction of the Trust. In fact, the Court of Appeal decision of *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 4 SLR 339 ("*Foo Jee Seng*") makes it clear that the phrase "absolute discretion" does not preclude the court's intervention in the exercise of a trustee's powers (at [55] and [64]), and by extension, does not preclude claims by beneficiaries against trustees for breach of trust (at [47]–[48], [52]–[53] and [77]–[78]).

61 Further, I do not find that the use of the phrase "absolute discretion" in the Will gives rise to any of the three situations described at [59(a)]–[59(c)] above.

62 First, the idea behind enlarged powers is that "[t]he terms of a trust may enlarge the powers of trustees so as to authorise some act in the administration of the trust which would not otherwise be authorised" (see *Lewin on Trusts* at para 41−128). However, enlarged powers do not, in themselves, rule out the operation of a trustee's duties when exercising such powers. This is why, even if an act or transaction is "of a kind coming within an extended power", but "is in the particular circumstances of the case one that a prudent trustee would have eschewed, the trustee will not be able to rely upon the extended power as authorising the act or transaction" (see *Lewin on Trusts* at para 41−128).

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38 DCS at paras 13−14.

39 Plaintiffs' Reply Submissions dated 24 May 2024 ("PRS") at para 73.

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Applying these principles to the Trust, I am unable to see how the phrase "absolute discretion", or any other provision of the Will, extends or enlarges any of the powers granted to Sajan. For example, the powers granted under, among others, cll 3 and 5.2 of the Will, are not extended by the phrase "absolute discretion". In this regard, while the acts and transactions which Sajan, as trustee, may enter into are spelled out in cl 3, the use of the phrase "absolute discretion" does not mean that Sajan, in entering into such acts or transactions, is excused from the ordinary duties of a trustee when exercising his discretion to enter into such acts or transactions, including the duty to act in good faith, the duty to act impartially, or the duty to take only relevant matters into account, among others (see at [58] above).

63 Second, I consider whether the phrase "absolute discretion", or any other provision of the Will, abridges Sajan's duties and/or excludes his liability for breaches of trust. The conceptual difference between the two is that the latter, unlike the former, "does not justify the acts or omissions of the trustees" such that there is "no unauthorised act or breach of duty". Rather, the latter "saves trustees from the personal liability to pay compensation for breach of trust" (see *Lewin on Trusts* at para 41−131). In this regard, the general principle is that exemption clauses must be phrased with "clear and unambiguous words" (see the English Court of Appeal decision of *Armitage v Nurse and others* [1998] Ch 241 ("*Armitage v Nurse*") at 255H) such that "[a]nything not clearly within it is treated as falling outside it" (see David Fox, "Breach of Trust" in *Snell's Equity* (John McGhee QC and Steven Elliott QC eds) (Sweet & Maxwell, 34th Ed, 2020) ("*Snell's Equity*") at para 30−025 and *Lewin on Trusts* at para 41−141; see also, *eg*, *John Knox and others (Millar's Trustees) v William MacKinnon (Millar's Judicial Factor)* (1888) SC 83 at 86–87 and *Barnsley and others v Noble* [2017] 2 WLR 1231 at [38]–[43] and [52]–[67]). Applying this

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principle to the Trust, I find that the phrase "absolute discretion" in cll 3 and 5.2 of the Will does not abridge Sajan's duties or exclude his liability for breach of trust. Such general words fail to make clear which defaults of the trustee would – and, more importantly, which defaults would not – be covered by the purported exemption, so as to constitute a valid exclusion of a trustee's liability. Similarly, the fact that the Will accorded "wide and unfettered powers" to the trustee is, contrary to Sajan's submissions, insufficient for a court to find that the trustee's duties have been abridged or that a breach thereof is exempted under the Trust.[40] This is because the phrase "absolute discretion", by itself, says nothing about the specific duties of a trustee that are said to be abridged or the liabilities for specific defaults which are excluded (see at [62] above).

64 Accordingly, I find that the phrase "absolute discretion", along with the other alleged indicia that Sajan points to within the Will, does not affect any of Sajan's duties under the Trust, nor does it excuse or limit his liability for breach of trust. This includes the exemption clause in cl 11.1 of the Deed of Declaration of Trust dated 1 August 2008 (the "Deed of Declaration") executed by Sajan,[41] which purports to exempt his liability for loss caused to the Trust Assets. That clause, even if effective, cannot override the scope and contours of the testamentary Trust created by the Will itself. As I have rejected the argument that the phrase "absolute discretion" in the Will has the effect of abridging Sajan's duties as trustee or exempting him from liability for breaches of duty, it follows that cl 11.1 of the Deed of Declaration cannot validly effect a result that is contrary to that of the Trust. In any event, I find that Sajan cannot rely on

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40 Defendant's Further Submissions dated 21 June 2024 ("DFS") at paras 5–6 and 11.

41 Defendant's Reply Submissions dated 24 May 2024 ("DRS") at para 10.

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cl 11.1 of that declaration because the terms of the Trust are to be found in the Will that created it and not in any subsequent unilateral declaration of the trustee (see at [144]–[146] below). I arrive at the same finding in respect of cl 11.2 of the Deed of Declaration, which purports to declare that Sajan's discretion under the Trust is "absolute and uncontrolled", and accordingly he "shall not be liable for any loss or damage" flowing from any exercise of such discretion. The Deed of Declaration cannot validly abrogate or negate a liability properly arising out of the trust instrument, *viz*, the Will, which, as I have found, does not abridge Sajan's duties as trustee or exempt him from liability for his defaults by way of the phrase "absolute discretion" (see at [63] above).

There is no duty on a trustee to refrain from deciding to exercise his powers in a manner which falls below the standard of Wednesbury *unreasonableness*

65 The foregoing would have been the end of the matter had the plaintiffs' submissions not suggested that the court is entitled to intervene to ensure that "decision-making affecting a beneficiary is not capricious, arbitrary, perverse or irrational".[42] They also cited *Foo Jee Seng* (at [59]–[61]), in which the Court of Appeal, in *obiter dicta*, did not foreclose the possibility of a court's intervention on the basis of a trustee's decision being unreasonable, by invoking analogous principles in the public law context, albeit expressing some reservations regarding the same.[43]

66 With the plaintiffs' arguments in mind, and drawing on the discussion in *Foo Jee Seng*, the question is whether a trustee should come under a general

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42 PCS at para 8.

43 PCS at para 5.

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duty to refrain from exercising his or her power in a manner that "no reasonable body of trustees properly directing themselves could have" done (see the decision of the English High Court Chancery Division in *Edge and others v Pensions Ombudsman and another* [1998] 3 WLR 466 ("*Edge*") at 487, cited in *Foo Jee Seng* at [59]). I shall term this duty the "*Wednesbury* duty" for convenience. For the reasons which follow, I find that the *Wednesbury* duty should not be recognised in the trusts context.

67 First, such a duty appears to be superfluous considering that trustees are already subject to a duty of care, arising from both common law (see *In re Speight* (1883) 22 Ch D 727 ("*Speight v Gaunt*") at 739–740) and statute (see s 3A of the Trustees Act 1967 (2020 Rev Ed) (the "Trustees Act")). The standard imposed by *Speight v Gaunt* is that "a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own" (at 739) (see also the Court of Appeal decision of *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 at [153], relying on the House of Lords reasoning in *Ferdinand Longfield Speight and others v Isaac Gaunt* (1883) 9 App Cas 1 at 19). A further gloss is that, in the context of investments, Lindley LJ said in the English Court of Appeal decision of *In re Whiteley* (1886) 33 Ch D 347 at 355 that:

> … The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. …

As for the statutory duty imposed by s 3A of the Trustees Act, it requires that a trustee, in exercising any power, carrying out any duty, or doing any act referred

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to in the First Schedule, "exercise such care and skill as is reasonable in the circumstances".

68 From the foregoing, the ordinary standard of care is a more stringent standard for the trustee to meet, with the consequence that it is easier for a beneficiary to prove a breach of the ordinary standard of care, as compared to the *Wednesbury* duty. This is because the ordinary standard of care imposed on a trustee can be broadly analogised to the standard of care under the tort of negligence, both of which hold the defendant to the general standard of a reasonable man. The trustee would thus be liable for breaching his duty of care if he falls below the standard of the ordinary prudent man of business (see *Speight v Gaunt* at 739). However, for the *Wednesbury* duty to be breached, the decision made by the trustee must be one "that *no reasonable body of trustees* properly directing themselves could have reached" [emphasis added] (see *Edge* at 487, cited in *Foo Jee Seng* at [59]). This is a significantly higher standard for a beneficiary to prove. Indeed, as Lord Diplock put it in the House of Lords decision of *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 (at 410), a decision would only be in breach of the *Wednesbury* duty if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". Given that it is generally easier for beneficiaries to prove a breach of the ordinary standard of care imposed on a trustee, as opposed to a breach of the *Wednesbury* duty, there is no good reason to impose a *Wednesbury* duty to further enhance the protection afforded to beneficiaries.

69 Second, I respectfully agree with the Court of Appeal's cautious approach in *Foo Jee Seng* regarding the importation of public law concepts or

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principles into the area of trusts law (at [61]). After all, "[t]he considerations which are applicable in the area of public law are hardly the same as those which apply to the duties of trustees and how the trustees should exercise the discretion vested in [them]" (at [61]). While it appears that contractual discretions are subject to analogous restrictions in that they cannot be exercised so capriciously or arbitrarily as to be categorised as perverse (see the decision of the General Division of the High Court in *Maybank Singapore Ltd v Synergy Global Resources Pte Ltd* [2024] 3 SLR 1316 at [23]–[24]; see also the UK Supreme Court decision of *Braganza v BP Shipping Ltd and another* [2015] 1 WLR 1661 at [26]–[37] for the "*Braganza* rationality test"), the reason that courts have imposed such a constraint is because there are often few, if any, other constraints on a contracting party's power to exercise such discretions. Without those constraints, a party's exercise of discretion may deprive the counterparty of its contractual rights or warp the parties' bargain (see the decision of the Appellate Division of the High Court in *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2022] 1 SLR 1318 at [91]). In contrast, there is arguably less need for such an additional duty on trustees, given the existence of various other duties on trustees, including a general duty of care, as I have explained at [67]–[68] above.

70 For these reasons, I am not prepared to find that there is a *Wednesbury* duty owed by trustees in their discharge of a trust, *ie*, a general duty on a trustee to refrain from exercising his powers in a manner that no reasonable body of trustees properly directing themselves would have done. Concomitantly, I do not find that there is a general right for a beneficiary to claim against the trustee to enforce such an alleged duty (see at [58] above).

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71 For present purposes, I reiterate my earlier conclusion that the phrase "absolute discretion", along with the other alleged indicia that Sajan points to within the wording of the Will or other subsequent deeds (which cannot, in any event, amend the terms of the Will), does not affect any of Sajan's duties under the Trust, nor does it excuse or limit his liability for breach of trust (see at [62]–[64] above). Having found this, the case now turns on whether any of Sajan's acts as trustee violated any one or more of the foregoing duties restricting his use and exercise of his trust powers. Before I can proceed to consider this issue, I must, however, deal with the second anterior question raised by Sajan, that is, whether the plaintiffs come to this court with clean hands.

Whether the plaintiffs come with clean hands

The applicable principles

72 I begin with the applicable principles on the "clean hands" doctrine. In the High Court decision of *Keppel Tatlee Bank Ltd v Teck Koon Investment Pte Ltd and others* [2000] 1 SLR(R) 355 ("*Keppel Tatlee*"), Lai Siu Chiu J (as she then was) opined (at [29]) that "[i]t is well established that a person seeking equitable relief must come to a court of equity with 'clean hands'; in other words, he must not have behaved unconscionably himself". In *Keppel Tatlee*, the court did not allow equitable relief (in that case, proprietary estoppel) to be invoked as the second and third defendants "did not come to court with clean hands", and their conduct was "reprehensible" ([33]–[36]).

73 However, whether a person comes with "clean hands" is a question of degree. As Sundaresh Menon JC (as he then was) put it in the High Court decision of *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 ("*Hong Leong*") at [225], the clean hands doctrine

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"does not mean [the plaintiff seeking relief in equity] must be blameless in all ways". Menon JC set out the following principles relating to the doctrine of clean hands (at [225]−[226]):

(a) Firstly, the undesirable behaviour in question must have an immediate and necessary relation to the equity sued for (or a "sufficiently close connection" (see Ben McFarlane, "The Maxims of Equity" in *Snell's Equity* at para 5−010)). It must also be a depravity in a legal as well as in a moral sense.

(b) Secondly, the maxim is no longer strictly enforced. The question is whether, in all the circumstances, it would be a travesty of justice to assist the plaintiff given his blameworthy participation or role in the transaction.

(c) Lastly, the whole circumstances must be considered, having regard to the relief sought. The relative blameworthiness of a plaintiff in equity can only be appraised by way of a complete and exhaustive scrutiny, and relief which is less drastic need not be defeated by conduct which is less opprobrious.

74 The key question is therefore what qualifies as a "sufficiently close connection" for unclean hands to defeat a claim in equity. In this regard, McFarlane in *Snell's Equity* suggests (at para 5–010) that there is a "close similarity" between the equitable maxim "he who comes into equity must come with clean hands" and the common law doctrine of illegality (*ex turpi causa non oritur actio*). He further suggests that the same public considerations and multi-factorial approach in the UK Supreme Court decision of *Patel v Mirza* [2016] 3 WLR 399, which is the dominant approach in the UK governing

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common law illegality, could be relevant when determining if "unclean hands" should defeat a claim in equity (see *Snell's Equity* at para 5–010).

75 In my view, the question of whether there is a "sufficiently close connection" between the undesirable behaviour in question and the equity being sued for is precisely the sort of question that admits a multi-factorial approach. After all, it is a question of degree that is dependent on all the relevant circumstances. Indeed, the General Division of the High Court had decided in *Lau Sheng Jan Alistair v Lau Cheok Joo Richard and another* [2023] 5 SLR 1703 at [67]–[69] that the Court of Appeal's framework in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363, encompassing the proportionality principle, can be applied, with suitable modifications, to the illegality defence in the trusts context. Likewise, given the close connection between the "clean hands" doctrine and the illegality defence in common law, the factors considered under the proportionality principle in the Court of Appeal decision of *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*") at [66] and [70] could be relevant when considering whether the plaintiffs have come to equity with clean hands. These factors, with appropriate modifications, are: (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the seriousness of the offence or undesirable behaviour; (c) the causal connection between the claim and the illegal conduct or undesirable behaviour; (d) the conduct of the parties; and (e) the proportionality of denying the claim. The question guiding the proportionality inquiry should be, as Menon JC put it, "whether in all the circumstances it would be a travesty of justice to assist the plaintiff given his blameworthy participation or role in the transaction" (see *Hong Leong* at [226], quoting *Halsbury's Laws of Singapore* vol 9(2) (LexisNexis, 2003) at para 110.016 in reliance).

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My decision: the plaintiffs' conduct does not warrant the denial of equitable relief

76 Turning to the facts of the present case, Sajan raises numerous examples of the plaintiffs' alleged bad conduct that he says should deny them equitable relief. These include that: (a) Lakshmi has likely been funding the plaintiffs' litigation expenses in this Suit and is acting in cahoots with the plaintiffs;[44] (b) Lakshmi had already taken out other proceedings against Moti as executor of the Will (for an account of Harkishindas's estate) and Sajan (for an account of the Trust ("OS 1407"), and for divorce against Sajan);[45] (c) the plaintiffs lied about only having discovered the existence of the Trust on 16 September 2016;[46] (d) the Named Beneficiaries' AEICs are strikingly similar;[47] (e) the plaintiffs are allegedly lying about various other aspects of their claim;[48] (f) Lakshmi allegedly committed perjury to the court in OS 1407;[49] (g) the plaintiffs make allegations that are unsupported or contradicted by other judgments or court orders;[50] (h) Lakshmi had prayed for many of the same reliefs in OS 1407 as the plaintiffs seek in the present case, which amounts to an abuse of process;[51] and (i) Devin's AEIC included opinion evidence when Devin was only a factual witness.[52]

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44 DCS at para 24.

45 DCS at paras 25−26.

46 DCS at paras 29−39.

47 DCS at paras 40−42.

48 DCS at paras 43−46 and 59−60.

49 DCS at paras 54−58.

50 DCS at paras 61−62.

51 DRS at para 15(e).

52 DRS at para 15(d).

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77 In my view, Sajan's assertions are without merit. It is not necessary for me to respond to each of Sajan's assertions. Instead, I will outline four reasons why I disagree with him.

78 First, as the plaintiffs correctly point out,[53] Sajan's allegations against Lakshmi are irrelevant. Because she is not a claimant here, the "cleanliness" of her hands does not matter.

79 Second, several accusations Sajan makes are speculative – for instance, the accusation that Lakshmi is funding the plaintiffs' litigation expenses, or that she is in cahoots with the plaintiffs. Indeed, for many of the alleged "lies" of Lakshmi and the plaintiffs to be made out, Sajan must successfully prove his own case and disprove the plaintiffs' case on their merits. For various reasons I will explain below, I find that the plaintiffs have proven their allegations, which means that the allegations do not amount to lies, at least on a balance of probabilities.

80 Third, the reliefs sought in the other proceedings are different from the reliefs in the instant suit,[54] and there is therefore no question of vexatious litigation. In particular, in OS 1407, Lakshmi had prayed for an "independent corporate trustee" to be appointed over the Trust and to replace Sajan as the trustee thereof.[55] In the Suit, however, the plaintiffs pray for Lakshmi and Devin

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53 PRS at para 85.

54 PRS at para 88.

55 1st Affidavit of Lakshmi Prataprai Bhojwani in HC/OS 1407/2017 dated 14 December 2017 at paras 48 and 50.

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to be appointed as the replacement co-trustees.[56] There are certainly similarities in some reliefs prayed for between OS 1407 and the Suit. Nevertheless, they are distinct legal actions, involving different plaintiffs and discrete prayers. The plaintiffs' filing of the Suit to vindicate their putative rights cannot be said to be an abuse of process merely because Lakshmi filed OS 1407 to vindicate her distinct putative rights. Legal actions may overlap without being duplicative or giving rise to improper vexation or oppression.

81 Fourth, similarities in the AEICs of key witnesses are to be expected if they share a common narrative of the facts. Moreover, the instant case is distinguishable from the case of *Jasviderbir Sing Sethi and another v Sandeep Singh Bhatia and another* [2021] SGHC 14 at [55]–[61], relied on by Sajan in his submissions,[57] because the replication of the evidence in the relevant AEICs in that case was exact and extensive, going beyond what would ordinarily be expected from witnesses testifying about the same events. In the words of Vinodh Coomaraswamy J in that case (at [57]), 32 passages in the AEICs there "were replicated verbatim or almost verbatim right down to the punctuation and the turns of phrase". That is not the case with the AEICs of the plaintiffs and Lakshmi here.

82 For the above reasons, I find that the allegations against the plaintiffs are not established or even if they were, those allegations do not evince any blameworthy behaviour on the part of the plaintiffs. This is sufficient to dispose of the allegation that the plaintiffs have come to equity with unclean hands. But if I had to consider whether there was a sufficiently close connection between

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56 PCS at para 171.

57 DCS at para 41.

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the plaintiffs' impugned conduct (had I found them to be made out) and the Suit, I would have answered that question in the negative. Applying the *Ting Siew May* factors at [75] above, the alleged misconduct (*ie*, ancillary litigation and disputed allegations of fact) is not sufficiently causally connected to the plaintiffs' claims in the Suit, which are, at its core, that Sajan breached his duties to them as a trustee. It would therefore have been disproportionate to disallow the plaintiffs' claims on the basis that they have come with unclean hands.

83 Therefore, the plaintiffs' conduct does not warrant the denial of equitable relief based on the "clean hands" doctrine. Having dealt with the two overarching issues Sajan raised as to his alleged "absolute discretion" as a trustee (see at [55(a)] above) and the plaintiffs having failed to come to a court of equity with clean hands (see at [55(b)] above), I turn now to address the five issues that I asked the parties to focus on (see at [54] above).

Whether Devin and Sandeep have standing to bring the Suit

The parties' arguments

84 I turn to consider if Devin and Sandeep have standing to bring the Suit. As will be recalled, Sajan executed two Deeds and one Deed of Appointment on 14 April 2021 (see at [11] above). These determined (or purported to determine) that: (a) Devin and Sandeep would receive no further distribution from, and would have no further interest in, any of the remaining Trust Assets; and (b) Sajan would hold the Trust Assets on trust only for Dilip's benefit. The plaintiffs argue that, when considered against the chronology of events, Sajan's execution of these Deeds was clearly to silence Devin and Sandeep and/or to retaliate against them for their seeking an explanation on several aspects of Sajan's management of the Trust.

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85 More specifically, the plaintiffs submit that Sajan reconfirmed, as late as 16 February 2021, that the plaintiffs were still beneficiaries. As such, it must have been Devin's questioning of Sajan's decisions as trustee, on 1 March 2021, that led to Sajan's subsequent execution of the Deeds on 14 April 2021. The plaintiffs suggest that Sajan took umbrage at Devin's questioning and decided that it was more convenient to silence the more vocal and less pliable of the plaintiffs, namely, Devin and Sandeep. As for Sajan's contention that he still intends to leave everything to his sons through his will, the plaintiffs say that that does not assist him because Sajan's will remains revocable. Indeed, if Sajan genuinely intends to leave everything to his sons, it does not make sense to cut Devin and Sandeep out of the Trust at this point. Accordingly, the most likely explanation for Sajan's execution of the Deeds is that this was an act of petty spite on his part, designed to avoid being held accountable for his shortcomings in administering the Trust and/or to "punish" Devin and Sandeep.[58]

86 I turn now to Sajan's response. While Sajan had suggested in his opening statement that Devin and Sandeep "have no standing to bring [the Suit], and to seek *any* of the remedies therein" [emphasis added],[59] he appears to have softened his position in his closing submissions. Sajan now maintains that Devin and Sandeep "only have the capacity … to seek an account of Trust assets or monies *up to and until 14 April 2021*" [emphasis added].[60] In any event, Sajan's response on this issue is that he did not execute the Deeds in bad faith or with improper motives. Indeed, Sajan provided clear reasons and explanations for

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58 PCS at para 27.

59 Defendant's Opening Statement at para 2 (n 1).

60 DCS at para 74.

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removing Devin and Sandeep as beneficiaries of the Trust, which is that he favoured Dilip over them.[61] There is also no basis for suggesting that Devin and Sandeep were removed as they had asked questions about the December 2017 Trust Summary. This is because Dilip can still ask questions about that document and his management of the Trust in general.[62]

My decision: Devin and Sandeep have standing to bring the Suit

87 In my judgment, Devin and Sandeep have standing (on which, see generally, Timothy Liau, *Standing in Private Law* (Oxford University Press, 2023)) to bring the Suit because I find that Sajan had executed the Deeds to exclude them from the Trust in bad faith. Accordingly, the Deeds are invalid, and Devin and Sandeep remain beneficiaries of the Trust.

88 First, the chronology of events leads me to infer that Sajan had excluded Devin and Sandeep for improper reasons. Prior to the exclusion of Devin and Sandeep, Sajan had repeatedly affirmed the status of all three plaintiffs as beneficiaries to the Trust, as follows:

(a) First, on 10 January 2020, Sajan executed one Deed and one Deed of Appointment,[63] the latter of which declared (at cl 1) that he held all of the remaining Trust Assets under the Trust for the plaintiffs' benefit only (to the exclusion of Lakshmi).[64]

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61 DCS at paras 77–78.

62 DCS at para 79.

63 Agreed Bundle of Documents ("ABOD") Vol 1 at pp 216–222.

64 ABOD Vol 1 at p 218.

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(b) Then, on 16 February 2021, Sajan executed three Deeds for the sale of the remaining Trust Shares in the Live Companies. These Deeds stated (at cl 2) that he held all the proceeds of sale for the plaintiffs' benefit.[65]

(c) Subsequently, on 23 February 2021, after the Trust Shares in the Live Companies had been sold on 18 February 2021, Sajan informed the plaintiffs of this.[66]

Thus, all the way until February 2021, Sajan had given no indication to Devin and Sandeep that they were going to be excluded from the Trust. To the contrary, he repeatedly affirmed through the abovementioned acts that they were beneficiaries.

89 However, after Devin and Sandeep started to question Sajan's management of the Trust in March 2021, Sajan executed the Deeds on 14 April 2021, removing or purporting to remove Devin and Sandeep as beneficiaries. This followed emails from Devin which questioned Sajan in March–April 2021, copying Dilip and Sandeep. In these e-mails, Devin made clear his disagreement with Sajan's actions in relation to the Trust. Although Devin was the author of the e-mails, the contents of the e-mails leave no room for doubt that Devin was not expressing his views alone but conveying the views of Sandeep as well. For instance, in the e-mail sent by Devin to Sajan (copying Dilip and Sandeep) on 7 April 2021, Devin wrote that "Sandeep and Devin

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65 ABOD Vol 1 at pp 223–230; Devin's AEIC at pp 1060–1071.

66 Statement of Claim (Amendment No 2) at paras 39–40; Devin's AEIC at para 231.

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disagree with your characterisation of events in paragraph 3 of your email."[67] This was in response to Sajan's e-mail of 30 March 2021, which spoke of alleged "documents stolen from my laptop by Sandeep and Devin".[68] Further, on 1 March 2021, when Devin authored an e-mail to Sajan questioning his acts as trustee, including his execution of Deeds selling the Trust Shares in the Live Companies, that e-mail was signed off with: "Devin Dilip Sandeep".[69] It was thus no coincidence that Sajan then executed the Deeds purporting to exclude Devin and Sandeep from the Trust just a week after the last e-mail of 7 April 2021. It was also no coincidence that, at the time, there was a general power of attorney in force authorising Sajan to exercise various powers over Dilip's properties, which was only revoked on 10 December 2021.[70] Thus, it is clear from this chronology of events that the precipitating event for Sajan's execution of the Deeds is likely to have been Devin's and Sandeep's questioning of Sajan's management of the Trust in March–April 2021.

90 Second, Sajan's purported explanation for removing Devin and Sandeep as beneficiaries is not convincing. In essence, Sajan's explanation is that Dilip was the "weakest" of his three sons, and hence he wanted to favour Dilip over Devin and Sandeep. However, if this was indeed Sajan's reason for excluding Devin and Sandeep from the Trust, he would have done so much sooner. After all, Sajan's belief that Dilip was the "weakest" son was unlikely to be one that he came to hold only in March or April 2021. Given that Sajan had consistently recognised Devin's and Sandeep's entitlement as beneficiaries to the Trust until

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67 ABOD Vol 1 at p 365.

68 ABOD Vol 1 at p 365.

69 ABOD Vol 1 at pp 366–367.

70 Devin's AEIC at paras 258–260 and pp 1149–1169.

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February 2021, it made no sense that Sajan suddenly realised that he needed to exclude Devin and Sandeep from the Trust to cater for Dilip. Sajan also did not explain what prompted him to only come to this sudden realisation in March or April 2021.

91 Third, Sajan's contention that he intends, through his latest will, to still leave everything he has to his sons, including Devin and Sandeep, is not convincing. To begin with, Sajan does not deny that he can revoke his latest will at any time, which means that Devin and Sandeep are not assured of receiving any assets. Moreover, I agree with the plaintiffs that if Sajan's genuine intention is to leave everything to his sons, then it would not make sense for him to cut Devin and Sandeep out from the Trust now.

92 Finally, I note that Sajan's response to the allegation that he executed the Deeds in bad faith is to simply reiterate that he had an "absolute discretion" to do so and that he was not obliged to explain his decisions.[71] I do not accept this argument because, as I have explained previously at [58]−[64], the phrase "absolute discretion" neither abridges Sajan's duties under the Trust nor absolves Sajan for liability for any breaches of trust. Besides, it is well-established that a trust instrument cannot purport to negate the trustee's duty to act in good faith, as this is part of the "irreducible core" of a trustee's obligations (see *Armitage v Nurse* at 253H−254A; see also *Credit Suisse* at [39]).

93 Accordingly, I find that Sajan had executed the Deeds in bad faith. Since Sajan exercised his trust power in executing the Deeds in bad faith, the purported exclusion of Devin and Sandeep as beneficiaries of the Trust ought

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[71] DRS at paras 31−33.

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to be treated as void (and not merely voidable). This follows from the general principle that a purported exercise of a trust power amounting to a fraud on a power, *ie*, "exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power … is void" (see *Lewin on Trusts* at para 30–067). Consequently, "an exercise of a power which is vitiated as a fraud on a power is void in equity" and "it does not alter the beneficial interests; it is not merely voidable"; as "[t]he exercise is outside the scope of the power", it will be "treated as not having taken place" (see *Lewin on Trusts* at para 30–090).

94 My finding that the Deeds are void resolves the question of Devin's and Sandeep's standing to sue in the Suit. In any case, even if the Deeds of 14 April 2021 were valid, Devin and Sandeep remained beneficiaries up until 14 April 2021, therefore giving them standing to bring claims at least in respect of alleged breaches committed in the period up to their removal. In this regard, a trustee cannot conveniently escape liability for past wrongful acts or omissions simply by excluding beneficiaries from the trust after the fact. However, for clarity, I find that Devin and Sandeep have standing to bring the Suit in its entirety without such temporal limitation. Sajan's preliminary objection to Devin's and Sandeep's standing therefore fails.

Whether Sajan breached his trustee duties by commingling and mismanaging the Trust Moneys and Trust Assets

The applicable principles

95 Having established that Devin and Sandeep have standing to bring the Suit together with Dilip, and that Sajan continued to owe them duties as trustee after 14 April 2021, I turn to the more substantive issues, which relate to Sajan's

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duties as a trustee. Given this, I will first discuss the applicable principles in relation to a trustee's duty to, among others, maintain proper and complete accounts and documentation.

96 In this regard, separately from the general duties that a trustee comes under when exercising his powers, there are several additional (positive) duties imposed on a trustee in the context of maintaining and providing accounts of trust assets (see, generally, Christopher Hare and Vincent Ooi, *Singapore Trusts Law* (LexisNexis, 2021) at pp 508–516 and Alvin See, Yip Man and Goh Yihan, *Property and Trust Law in Singapore* (Kluwer Law, 2018) at pp 406–414). For example, the Court of Appeal in *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2023] 1 SLR 35 ("*Baker*") held (at [1]) that "[i]t is an essential duty of any trustee to maintain and render a proper and accurate account of trust assets". Steven Chong JCA further explained the nature of this duty (at [24]) as follows:

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

97 The following additional points were also made by Chong JCA in *Baker*:

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(a) The trustee must be "constantly ready" with his account (at [24]).

(b) There is nothing particularly sophisticated about the essential task of a trustee, whether professional or lay, in documenting expenses (at [30]).

(c) While a court may make some allowance for a lay trustee's accounting (at [31]), a non-professional trustee should nevertheless furnish documentation on the fact and quantum of payments respecting the trust (at [32]).

(d) While there is no rigid requirement for a trustee to always adduce supporting documents for every transaction, that would "ultimately depend on the nature of the expenses, the quantum and whether such expenses would typically be reflected in some documentation" (at [33]). Save in exceptional circumstances, a trustee is generally "expected to provide an explanation for the breakdown of expenses and to substantiate the same with *sufficient supporting evidence, oral or documentary depending on* the nature and quantum of" [emphasis added] the particular expense at issue (at [30]).

98 Further, as the plaintiffs rightly submit, there arises, from the above-mentioned duties to maintain and provide accounts of trust assets, the trustee's anterior duty to inform the beneficiaries of their rights under a trust. This is logically concomitant to the principle of trustee accountability. Indeed, if beneficiaries are not aware of their rights, then they cannot hold the trustee accountable for his or her discharge of duties under the trust (see the High Court decisions of *Lalwani Shalini Gobind and another v Lalwani Ashok Bherumal* [2017] SGHC 90 at [23] and [45] and *Estate of Yang Chun (Mrs) née Sun Hui*

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Min, deceased v Yang Chia-Yin [2019] 5 SLR 593 at [117]; see also the Decision of the General Division of the High Court in *Victory International Holdings Pte Ltd v Borrelli, Cosimo and another and another matter* [2024] SGHC 79 for an analogous line of reasoning at [87] adopted in the context of a mortgagor-receiver relationship regarding the receiver's conduct of the sale of the mortgaged property). This explains why a trustee must inform a beneficiary of his or her interest under a trust when the latter comes of age (see the English High Court decision of *Hawkesley v May and others* [1956] 1 QB 304 at 322, as well as Richard Nolan, "The Duties and Discretions of Trustees" in *Snell's Equity* at para 29−024). More broadly, given the observations of Chao Hick Tin JA in *Foo Jee Seng* (at [54]) that the beneficiaries' wishes, needs, and interests cannot be completely disregarded by a trustee in exercising his or her discretion under the trust, it follows that a trustee cannot keep the beneficiaries in the dark about a trust if he or she is to consider their wishes, needs, and interests. Logically, a beneficiary cannot express any wishes regarding the exercise of a trust power in respect of a trust that he or she does not know about.

99 With the above principles in mind, I consider whether Sajan breached his trustee duties by commingling and mismanaging the Trust Moneys and Trust Assets.

The parties' general arguments

100 The plaintiffs' starting point is that, in addition to the limits on a trustee's exercise of discretion, there are several other duties imposed on a trustee to maintain and provide accounts of trust assets. I have outlined these duties in the preceding section. The plaintiffs say that Sajan has breached these duties by: (a) commingling the Trust Moneys; (b) concealing the Trust's existence from

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the Named Beneficiaries; and (c) not maintaining proper accounts of the Trust. Accordingly, the plaintiffs ask that a further account of the Trust be taken, especially in relation to outlays concerning credit card expenses and insurance premiums. In addition, the plaintiffs ask that I make certain findings of fact in relation to past expenses that Sajan has declared that he does not intend to claim from the Trust. For convenience, I will only go through the plaintiffs' (and Sajan's) specific positions below when addressing each of these allegations.

101 As for Sajan, his general position is that, even if he were found to have commingled the Trust Moneys and/or mismanaged the Trust, he did not act fraudulently or dishonestly. Instead, Sajan points out that he has engorged the Trust substantially to date, by injecting some $2,248,006 of his personal moneys into the Trust, which he has no intention of claiming from the Trust.[72] Indeed, Sajan argues that it ought to be clear from the various Trust Statements that the income of the Trust would not have been able to afford the Trust Assets and expenses acquired or incurred before the sale of the Trust Shares in the Live Companies in 2021.[73] These various assets and expenses include the acquisition of the Questa Property and a 50% share of an apartment unit in London (the "Atrium Property"),[74] and the payment of premiums for the various insurance policies of the Trust held in the plaintiffs' names.[75] Moreover, Sajan points out that the provisions of the Trust do not preclude him from making retrospective decisions in relation to the Trust, including his determination of what constitutes Trust Assets or investments. Thus, even if the plaintiffs thought that Trust

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72 DCS at para 83.

73 DCS at para 84.

74 Sajan's AEIC at paras 61–63.

75 DCS at para 84.

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Assets or investments were gifts from Sajan personally, Sajan was entitled to retrospectively decide that these were Trust Assets instead.[76]

My decision: Sajan breached his trustee duties by commingling and mismanaging the Trust Moneys and Trust Assets

102 In my judgment, Sajan breached his trustee duties by commingling and mismanaging the Trust Moneys and Trust Assets.

Commingling

(1) The parties' specific arguments

103 In relation to Sajan's alleged commingling of the Trust Moneys, the plaintiffs submit that it is "beyond debate" that he had done so. The plaintiffs point out that there was no separate bank account for the Trust from Harkishindas's death on 4 March 2007 until 24 February 2017, when a separate account was eventually opened.[77]

104 In response to this, Sajan submits that he genuinely saw no need to open a separate bank account for the Trust Moneys, as they could be ascertained from amounts that are made payable to Sajan in his capacity as trustee. He therefore explained during the trial that, while the Trust Moneys were left in his bank accounts, the amounts were ascertainable such that the situation was like mixing "oil and water" or akin to where "two cars were parked in one garage".[78] In this regard, Sajan first accounted for the Trust's income until 31 December 2017 by

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[76] DCS at para 86.

[77] PCS at para 39.

[78] DCS at para 92; Certified Transcript 27 March 2024 at p 62 lines 2−24.

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way of the December 2017 Trust Summary.[79] He opened a bank account for the Trust in February 2017 and transferred all of the Trust Moneys from his own account to the new account. He then ensured that all incoming receivables due to the Trust were placed in the new account from then on.[80] Thus, Sajan argues that the plaintiffs cannot point to any discernible loss flowing from Sajan's management of the Trust in this way.[81]

(2) Sajan commingled the Trust Moneys

105 In my view, Sajan has clearly commingled the Trust Moneys. Sajan does not deny this. In fact, he admitted that, despite moneys coming into the Trust from as early as 2009, the moneys were placed into a joint bank account under Sajan's and Lakshmi's names, with this account also containing Sajan's personal moneys.[82] Indeed, Sajan stated at various points of his cross-examination that he simply "did not think it problematic to put it [*ie*, the Trust Moneys] in the same account as that -- as my own money was put".[83] He also admitted in his AEIC that, on hindsight, he could have "appointed a professional trustee / separate trust property from my personal assets, but this would have incurred additional cost [*sic*]".[84] However, at trial, Sajan admitted that opening a bank account would not have incurred any additional costs.[85]

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79 DCS at para 93.

80 DCS at para 94.

81 DCS at para 95.

82 Sajan's AEIC at para 124; Certified Transcript 27 March 2024 at p 60 line 14 to p 62 line 11.

83 Certified Transcript 27 March 2024 at p 65 lines 13−19.

84 Sajan's AEIC at para 125.

85 Certified Transcript 27 March 2024 at p 66 lines 1−9.

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106 I therefore find that Sajan has breached his duty to segregate Trust Assets and Trust Moneys from his own. As stated in *Lewin on Trusts* at para 34–040, "[i]t is a clear breach of trust to mix trust money or trust goods with other money or goods; indeed, a freedom to mix money or other assets with the recipient's own or to use them for his own benefit is in general inconsistent with trusteeship." Likewise, Lord Browne-Wilkinson opined in the House of Lords decision of *Foskett v McKeown and others* [2001] 1 AC 102 at 110 that, "[w]here a trustee in breach of trust mixes money in his own bank account with trust moneys, the moneys in the account belong to the trustee personally and to the beneficiaries under the trust rateably according to the amounts respectively provided." In addition, given the relative ease with which Sajan could have taken steps to segregate the Trust Assets and Trust Moneys from his own moneys (in that opening a bank account would not have incurred any additional costs), I find that his failure to do so also constitutes a breach of his duty of care in administering the Trust under common law (see *Speight v Gaunt* at 739–740; see also *Lewin on Trusts* at para 34–002).

Concealment of the Trust

107 I turn now to Sajan's alleged concealment of the Trust. I find that the evidence supports the plaintiffs' version of events, which is that the Trust was concealed from the Named Beneficiaries until, at the earliest, 16 September 2016.

(1) The parties' specific arguments

108 The parties' contesting versions of events stem from the receipt of a letter they have termed the "Crawford Letter". This is a letter dated

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9 September 2016 from Crawford, which is a firm of loss adjustors.[86] Crawford sent the letter to 32BR at the behest of the builders of another property directly across the street from 32BR, as part of a pre-construction survey of nearby properties.[87] Importantly for present purposes, the Crawford Letter referred to Moti as the occupant of 32BR even though the Named Beneficiaries and Sajan had resided there for over 30 years.[88]

109 According to the plaintiffs, the Crawford Letter arrived at 32BR around the mid-morning of 16 September 2016. Sandeep's evidence is that he approached Sajan "not more than a few hours" after the Crawford Letter arrived at 32BR.[89] This meant that the subsequent conversation likely took place in or around the early afternoon. After Sajan realised that the Crawford Letter could result in questions about the ownership of 32BR, he spoke to Moti. Shortly thereafter, at around 3.52pm on 16 September 2016, Moti wrote to Withers Kattharwong ("WKW") with instructions for 32BR to be transferred from himself, as executor of the Will, to Sajan (as trustee).[90] Sajan then forwarded Moti's e-mail correspondence with WKW to the plaintiffs that same evening at 8.14pm, with a brief reference to a "[l]etter of 30th August & today. 16th Sep afternoon".[91] At that time, Devin and Sandeep spoke to Sajan about the

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86 Devin's AEIC at para 15.

87 Devin's AEIC at para 15 and p 171.

88 Devin's AEIC at para 16.

89 Affidavit of Evidence-in-Chief of Sandeep Jethanand Bhojwani dated 17 January 2024 ("Sandeep's AEIC") at para 7.

90 Devin's AEIC at p 173.

91 Devin's AEIC at pp 173−175.

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ownership of 32BR. It was then that they were informed about the existence of the Trust, and that 32BR was part of the Trust Assets.[92]

110 Subsequently, on or about 22 September 2016, Devin, Sandeep, and Sajan attended a meeting at WKW to learn more about the ownership of 32BR and the Trust.[93] On 24 September 2016, Sajan sent an e-mail to the Named Beneficiaries, which stated, among other things, that the Named Beneficiaries "are the underlying beneficiaries of [32BR], gifted to you, as per the Trust Document & I am just the Trustee". The e-mail asked the Named Beneficiaries to decide how they would like 32BR to be transferred.[94] For completeness, I set out his email below:[95]

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92 Devin's AEIC at para 19.

93 Devin's AEIC at para 20.

94 Devin's AEIC at para 23; Sandeep's AEIC at para 12.

95 Devin's AEIC at p 177; ABOD Vol 1 at p 244.

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From: Sajan
To: Lakshmi Bhojwani; Devin. Bhojwani; Phil Bhojwanay; Sandeep Bhojwani
Subject: To effect a Change of Trustee etc., 32, Branksome Road to the underlying beneficiaries Lakshmi, Devin, Dilip, Sandeep Bhojwani (as per Trust).
Date: Saturday, 24 September 2016 7:42:13 pm

Dear all, Lakshmi, Devin, Dilip & Sandeep Bhojwani

32, Branksome Road:

You are the underlying beneficiaries of 32, Branksome Road, gifted to you, as per the Trust Document & I am just the Trustee.

As per discussions we (Devin, Sandeep n myself), had with KWP Adrian & Liang Joe at their office on this Thursday its reconfirmed that I am the Trustee.

You four have a share n stake in this property, as beneficiaries.

Please advise how., you would like the Property to be transferred.

As the Trustee I will accordingly instruct the Lawyers to expedite & do so as desired and agreed by the four of you.
Please let me know when you can.

Thanks, n regards,
Jethanand H Bhojwani (trustee for 32, Branksome Road)

Regards
Sajan

Sent from my iPhone

111 Following their receipt of this e-mail, the plaintiffs agreed that 32BR should be transferred to Lakshmi.[96] Finally, on 16 November 2016, which was after 32BR had been transferred to her, Lakshmi received documents from WKW, which contained a copy of the Will. The plaintiffs say that this was the first time that they had sight of a copy of the Will, albeit through Lakshmi.[97]

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96 Devin's AEIC at para 24.

97 Devin's AEIC at paras 26−27.

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112 In light of the foregoing events, the plaintiffs submit that Sajan concealed the existence of the Trust from the Named Beneficiaries until the Crawford Letter had emerged.

113 In response, Sajan's position is that he had apprised the Named Beneficiaries, albeit orally, that they were beneficiaries under the Trust on several occasions from about 2009. Sajan points out that since the Named Beneficiaries lived with Sajan at 32BR at all material times, Sajan would not have been so excessively formal as to write to them to declare that he held the Trust Assets as a trustee under the Trust. Thus, the plaintiffs are capitalising on an evidential lacuna and have concocted a lie about how they came to find out about the Trust.[98] In particular, Sajan asserts that the plaintiffs have lied about how they came to learn about the Trust following the emergence of the Crawford Letter.[99] Sajan raises a few points of contention in relation to the plaintiffs' version of events about the Crawford Letter. I will deal with these competing versions of events in the next subsection below.

(2) Sajan concealed the Trust from the plaintiffs until 16 September 2016

114 In my judgment, Sajan concealed the existence of the Trust from the plaintiffs until 16 September 2016.

115 In the first place, Sajan's alternative version of events, that he had orally informed the plaintiffs about the Trust from 2009, came about only through a

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98 DCS at para 29.

99 DCS at para 30.

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belated correction to his AEIC when he first took the stand on 26 March 2024.[100] Sajan's original AEIC instead stated that he had informed the plaintiffs about the Trust "[f]rom as early as 2016".[101] While a witness's belated correction of his AEIC will not always be regarded as less believable, the circumstances of the present case lead me to disbelieve Sajan's corrected evidence. One, Sajan's explanation for the correction is that the earlier date of 2016 was a "typo".[102] This is inherently unbelievable since Sajan would have known from the pleadings that one of the plaintiffs' complaints against him is that he had concealed the Trust from them until nine and a half years after Harkishindas's demise in 2007.[103] The plaintiffs also gave the factual particulars of their discovery of the Trust, inclusive of their receipt of the Crawford Letter "[o]n or about 16 September 2016",[104] and Sajan's email to the plaintiffs informing them that they were beneficiaries under the Trust on 24 September 2016.[105] As such, the date at which he says he disclosed the Trust would be of utmost importance. It is not believable that Sajan would have made such a serious typographical error in his AEIC. Two, Sajan's earlier version that he had disclosed the Trust to the plaintiffs only in 2016 was consistent with the plaintiffs' pleaded version of events.[106] Sajan therefore belatedly changed his evidence to escape from the plaintiffs' version of events.

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100 Certified Transcript 26 March 2024 at p 134 lines 13−21.

101 Sajan's AEIC at para 51.

102 Certified Transcript 27 March 2024 at p 74 lines 4−13.

103 Statement of Claim (Amendment No 2) at paras 8–9.

104 Statement of Claim (Amendment No 2) at para 9(a).

105 Statement of Claim (Amendment No 2) at para 9(e).

106 Statement of Claim (Amendment No 2) at para 9.

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116 Further, even if I were to accept that Sajan had orally informed the plaintiffs of the Trust from 2009, Sajan has adduced no evidence, nor even pleaded any detail, about how he had apprised the plaintiffs of the Trust. For example, there is nothing in the record as to the level of detail that Sajan disclosed to the plaintiffs about the Trust, if he had done so. Moreover, there is nothing in the record evidencing that Sajan had informed the plaintiffs of the Trust from 2009. While Sajan has explained that there was no need for him to put this in writing since he lived with the Named Beneficiaries under one roof at the material time,[107] this explanation fails to account for why Sajan made no mention of this fact, contemporaneously, when the plaintiffs alleged in their correspondences that they only learnt about the Trust in late 2016. In this regard, an e-mail sent by Devin to Sajan on 29 August 2018, copying Dilip and Sandeep, is illuminating. In that e-mail, Devin was responding to Sajan about the December 2017 Trust Summary and stated that "[a]s you know, we only learnt of Dada's will and the trust in late-2016".[108] Sajan did not respond to that statement. If it were true that Sajan had told the plaintiffs about the Trust in 2009, it is reasonable to expect him to have responded to that statement at the time to set the record right. Yet, there is no evidence that Sajan had done so, whether in writing or orally.

117 More importantly, the plaintiffs' version of events is inherently credible and consistent. The plaintiffs' account is essentially that there was a "sudden burst of activity" in relation to the Trust following their receipt of the Crawford

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107 Certified Transcript 27 March 2024 at p 107 line 24 to p 108 line 6.

108 ABOD Vol 1 at p 280.

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Letter.[109] In this regard, the plaintiffs point out that there was a hastily arranged meeting with WKW on 22 September 2016, merely days after the arrival of the Crawford Letter.[110] The purpose of this meeting was to enable Devin and Sandeep to learn about why 32BR was being held in Moti's name.[111] That this meeting took place is evidenced by Sajan's e-mail to the Named Beneficiaries on 24 September 2016, which includes the line: "[a]s per discussions we (Devin, Sandeep n myself), had with KWP Adrian & Liang Joe at their office on this Thursday [*viz*, 22 September 2016] its reconfirmed that I am the Trustee".[112]

118 Moreover, Sajan's e-mail of 24 September 2016, informing the Named Beneficiaries about 32BR's status as one of the Trust Assets under the Trust, would not have been necessary if the parties had known about the Trust from 2009 (see at [110] above).[113] The lines "[y]ou are the underlying beneficiaries of [32BR], gifted to you, as per the Trust Document & I am just the Trustee" and "[y]ou four have a share n stake in this property, as beneficiaries", written by Sajan, would be an unnatural way of conveying information which the Named Beneficiaries supposedly knew for around seven years since as early as 2009. The ordinary interpretation to be gleaned from Sajan's words is that he was *explaining* the present situation to the Named Beneficiaries, *ie*, conveying *new* information to them which was only recently learnt about at the WKW meeting of 22 September 2016, as referenced in Sajan's e-mail.

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109 PCS at para 41.

110 PCS at paras 40(e) and 41(d); Devin's AEIC at para 20.

111 Devin's AEIC at para 20.

112 ABOD Vol 1 at p 244.

113 PCS at para 41(d).

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119 Next, the objective evidence shows that 32BR was registered in the sole name of Lakshmi on 12 October 2016,[114] and that this transfer was procured by Sajan who sent an email (copying the Named Beneficiaries) to a WKW lawyer on 28 September 2016 giving instructions for such transfer.[115] This corroborates the plaintiffs' version of events that, having learnt of the Trust's existence following the arrival of the Crawford Letter and the WKW meeting, Sajan asked the Named Beneficiaries how they wished for 32BR to be dealt with in his email of 24 September 2016, and the Named Beneficiaries collectively decided that 32BR should be transferred to Lakshmi.[116] Devin then sent a WhatsApp message to Sajan on 27 September 2016 of a draft email for Sajan to send to WKW, with instructions for 32BR to be transferred to Lakshmi's name, which Sajan sent to the WKW lawyer on 28 September 2016.[117] Indeed, Sajan has not provided any alternative explanation for what triggered the Named Beneficiaries' sudden decision to procure a transfer of 32BR to Lakshmi in September 2016, if not due to their unexpected discovery of the Trust's existence in that same period.

120 Finally, it was a few months after the arrival of the Crawford Letter that Sajan felt the need to open a bank account for the Trust on 24 February 2017.[118] These events are all consistent with the plaintiffs' account, which is essentially that they knew about the Trust only in September 2016, following the arrival of the Crawford Letter and the WKW meeting shortly thereafter, and that Sajan's subsequent actions were driven by that knowledge.

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114 Devin's AEIC at pp 183 and 185.

115 Devin's AEIC at p 181.

116 Devin's AEIC at paras 23–24.

117 Devin's AEIC at pp 179–181.

118 Devin's AEIC at para 90(a) and p 488.

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121 Furthermore, I do not accept Sajan's attempt to discredit the plaintiffs' version of events on several points.

122 First, Sajan argues that it is likely that the Named Beneficiaries would have been aware that 32BR was not registered in Sajan's name even before they sighted the Crawford Letter.[119] Sajan points out that the household would have received many letters from various parties over the years that were addressed to Moti as the registered proprietor from 2007 until 2016. Thus, Sajan seeks to discredit the entirety of the plaintiffs' version of events by saying that they lied about their surprise, upon sight of the Crawford Letter, regarding the ownership of 32BR. In my view, the problem with this contention is that Sajan's counsel, Mr Terence Tan ("Mr Tan"), did not successfully challenge the plaintiffs' evidence that they did not receive any letter addressed to Moti, prior to their receipt of the Crawford Letter, during the trial.

123 To demonstrate this, I need only refer to the two excerpts from the transcript of Mr Tan's cross-examination of Lakshmi and Sandeep, respectively, that Sajan relies on to support his contention in his closing submissions (at para 33).[120] The first is an exchange between Mr Tan and Lakshmi during the cross-examination of the latter:[121]

> Q. Do property tax letters come to 32 Branksome Road?
>
> A. Pardon?
>
> Q. Property tax letters come to 32 Branksome Road, are they delivered, have you ever seen a property tax letter from Inland Revenue?

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119 DCS at para 33(a).

120 DCS at para 33(a).

121 Certified Transcript 21 March 2024 at p 145 lines 14–23.

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A. I might have. I don't know.

Q. And you've never seen a letter to Mr Moti --

A. No.

Q. -- at 32 Branksome Road?

A. No.

124 And the second is the exchange between Mr Tan and Sandeep in his cross-examination by the former:[122]

Q. All right. So I'll ask the question again. After March of 2007, after your grandfather had passed away, there was not a single instance where a letter arrived at 32 Branksome addressed to your uncle Moti?

A. No, not that I saw or anything, no.

125 As can be seen from these excerpts reproduced at [123]–[124] above, both Lakshmi and Sandeep maintained that they never saw any letter sent to 32BR that was addressed to Moti. Mr Tan never seriously pressed the point and the plaintiffs' unchallenged evidence in this regard stands. Indeed, Sajan has also not sought discovery of these letters, and there is nothing in the evidence that assists Sajan in discharging his burden of proof on this contention. While Sajan submits that it is "inherently improbable" that no letters addressed to Moti had previously been sent to 32BR prior to the delivery of the Crawford Letter in September 2016,[123] I do not find that that changes my conclusion. In addition to being speculative, this submission does not answer the question of whether the Named Beneficiaries had noticed such correspondences in the past or that Moti was specifically the one being named on these purported letters (if any)

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122 Certified Transcript 22 March 2024 at p 61 lines 16–21.

123 DCS at para 33(a).

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prior to their noticing the same in respect of the Crawford Letter. Accordingly, the evidence of Lakshmi and Sandeep in the trial stands on this front.

126 Second, Sajan asserts that the "shriftness" by which he forwarded Moti's e-mail correspondence with WKW to the plaintiffs on 16 September 2016 at 8.14pm shows that the plaintiffs must have known that 32BR was one of the Trust Assets.[124] For completeness, the e-mails which Sajan forwarded to the plaintiffs had been exchanged between Moti and WKW over the "Property at 32A Branksome Road". While WKW's e-mail to Moti on 30 August 2016 mentions only the transfer of 32A Branksome Road,[125] Moti's reply on the same day refers to "both houses" and alludes to Sajan.[126] Then, in Moti's e-mail to WKW on 16 September 2016 at 3.52pm (copying Sajan), he asks WKW more specifically to "draw up the legal paperwork to transfer the 2 properties from myself as Administrator To : … [Sajan] for [32BR]".[127] In my view, it seems that Moti's discussion with WKW was concerned with the transfers of both 32A Branksome Road and 32BR.

127 It is, however, unclear why Moti initiated the discussion with WKW on 16 September 2016. Neither has Sajan provided any explanation in this regard. It is therefore not possible for me to infer from Sajan's "shrift" forwarding of these e-mails to the plaintiffs that the plaintiffs must have known that 32BR was one of the Trust Assets. In fact, that Moti, seemingly of his own accord, followed up on his own e-mail dated 30 August 2016 with a fresh e-mail on

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124 DCS at para 33(b).

125 Devin's AEIC at p 174.

126 Devin's AEIC at pp 173−174.

127 Devin's AEIC at p 173.

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16 September 2016 at 3.52pm[128] fits the plaintiffs' version of events. By this account, Sandeep had spoken to Sajan about the Crawford Letter in the early afternoon of 16 September 2016.[129] It is likely that Sajan then spoke with Moti, and this led to Moti's unsolicited follow-up to his own e-mail dated 30 August 2016, which WKW had not responded to. Indeed, Sajan's "shrift" forwarding of these e-mails to the plaintiffs appears to allude to this conversation which he had with Sandeep earlier that day about why 32BR was registered in Moti's name, with the words: "today. 16th Sep afternoon."[130] Considered against the plaintiffs' evidence as to an alleged conversation between Sandeep and Sajan in the afternoon of 16 September 2016 about the arrival of the Crawford Letter, I infer that these words in Sajan's e-mail must have been a reference to that conversation. That would go towards explaining why Sajan did not elaborate further within the body of his e-mail of 16 September 2016, as he had already spoken with Sandeep about the matter just prior to forwarding these e-mails.

128 Third, Sajan highlights that title searches on 32BR and 32A Branksome Road were conducted on the night of 16 September 2016.[131] Sajan uses this fact to impugn the plaintiffs' case. He says that, since the contents of the forwarded e-mail thread between Moti and WKW were clear, there would have been no need for the plaintiffs to have conducted the searches.[132] I cannot see how this refutes the plaintiffs' version of events. In any case, the plaintiffs are surely entitled to conduct title searches to confirm the assertions in the e-mails

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128 Devin's AEIC at p 173.

129 Devin's AEIC at para 17; Sandeep's AEIC at paras 7–9.

130 Devin's AEIC at p 173.

131 Devin's AEIC at para 18.

132 DCS at para 33(c).

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forwarded to them by Sajan. Indeed, if, on the plaintiffs' account, they have only recently uncovered that Sajan had concealed the existence of the Trust from them since the passing of Harkishindas, then that would surely have encouraged them to verify details provided to them by Sajan regarding the Trust and the Trust Assets.

129 Fourth, Sajan argues that there is no reason for Lakshmi to be dismayed as of 18 September 2016, which was when she told Sajan that Moti's name ought to be removed from 32BR, according to her affidavit in OS 1407.[133] This is because the plaintiffs would have apprised her that "instructions had already been provided in the afternoon on 16 September 2016 for [32BR] to be transferred to Sajan, and that instructions would be provided at a subsequent stage as to the further transfer of [32BR] to the Trust's beneficiaries".[134] However, I fail to see how this argument refutes the plaintiffs' version of events. This logic leads to the conclusion, at best, that Lakshmi had been untruthful in her evidence as to her state of mind on 18 September 2016; but it does not disprove the primary fact that the Named Beneficiaries, including Lakshmi, only knew about the Trust on 16 September 2016. Put simply, even if Lakshmi had lied about her state of mind on 18 September 2016, that does not mean that the plaintiffs had lied about their version of events as to the concealment of the Trust and the circumstances of its discovery. To be clear, I am not convinced, in any event, that Sajan has demonstrated that Lakshmi lied about being dismayed as of 18 September 2016. No objective evidence would contradict or cast doubt on that assertion. Devin and Sandeep only attended the meeting at

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133 DCS at para 31(f).

134 DCS at para 33(e).

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WKW with Sajan on 22 September 2016 (see at [117] above). Sajan's e-mail to the Named Beneficiaries, asking them how they would like him to deal with 32BR, as trustee, was only sent on 24 September 2016 (see at [118] above). Sajan only sent his email to WKW giving instructions for 32BR to be transferred to Lakshmi on 28 September 2016 (see at [119] above), which transfer was only completed on 12 October 2016 (see at [119] above). Against this factual matrix, I fail to see what is so inherently unbelievable about Lakshmi's evidence of her feelings of dismay and distress, in the period of 16–18 September 2016,[135] about 32BR being registered in Moti's sole legal name. It coheres with the plaintiffs' version of events that they were learning details about the Trust and the Trust Assets – including 32BR – for the first time in this period of September 2016. I also see no material discrepancy between Lakshmi's evidence in OS 1407 of feeling dismayed as of 18 September 2016 and her AEIC in this Suit of being "extremely distressed" and "extremely disturbed" on 16 September 2016,[136] as is suggested by Sajan.[137]

130 Fifth, Sajan argues that the plaintiffs had lied about the events in relation to the Crawford Letter so that they can claim on the basis of events in 2016 (as opposed to in 2009) and therefore circumvent the time bar under the Limitation Act 1959 (2020 Rev Ed) ("Limitation Act").[138] I do not accept this contention because Sajan never put this to the plaintiffs' witnesses during the trial. The plaintiffs therefore had no opportunity to dispute this contention (see, *eg*, the

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135 DCS at paras 31(d)–31(f) and 33(e); Affidavit of Evidence-in-Chief of Lakshmi Prataprai Bhojwani dated 17 January 2024 ("Lakshmi's AEIC") at para 13.

136 Lakshmi's AEIC at para 13.

137 DCS at para 33(e).

138 DCS at para 37.

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High Court decisions of *Ong Teck Soon (executor of the estate of Ong Kim Nang, deceased) v Ong Teck Seng and another* [2017] 4 SLR 819 at [75] and *UWF and another v UWH and another* [2021] 4 SLR 314 at [166]). Besides, as the plaintiffs correctly point out, the time bar found in s 6(1)(*a*) of the Limitation Act, which Sajan attempts to rely on,[139] applies to "actions founded on a contract or on tort", and not claims for breach of trust,[140] despite Sajan's attempt to frame the present claim as "tortious breaches of duty by Sajan as [t]rustee".[141] In any event, in respect of Sajan's reliance on s 6(2) of the Limitation Act,[142] he has failed to demonstrate, on a balance of probabilities, that the plaintiffs are lying in their version of events to circumvent any statutory limitation period, especially when analysed against all the objective evidence at [115]–[120] above. These are not bare self-serving assertions of the plaintiffs but backed up by contemporaneous communications and the flurry of activities in the period of September–October 2016.

131 For all of these reasons, I find that the balance of the evidence shows that Sajan failed to disclose the Trust to the Named Beneficiaries, including the plaintiffs, until 16 September 2016. I further find that his concealment of the Trust from them was deliberate. That intentionality can be inferred from the circumstances of Sajan's concealment. In this regard, the Named Beneficiaries were never informed of the Trust despite the extensive length of time of nearly a decade between the death of Harkishindas in March 2007 and their discovery of the Trust in September 2016. In the interregnum, there were multiple dealings

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139 DCS at para 37.

140 PRS at para 24.

141 DCS at para 37.

142 DCS at para 37.

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in the Trust Assets and Trust Moneys, including new acquisitions, the making of expenditures, the striking off of companies, the receipt of dividends and rents, the conversion of shares, *etc*,[143] none of which were ever revealed to the Named Beneficiaries despite their beneficial interests therein. The length of time coupled with the many dealings in the Trust Assets in that period compels the inference that Sajan's non-disclosure of the Trust's existence must have been deliberate on his part. It is not believable that he merely forgot to mention the Trust's existence or the status of any of the Trust Assets in nearly a decade, nor is it plausible that, despite the many opportunities to apprise the Named Beneficiaries of the developments and dealings in the Trust Assets in that period, Sajan inadvertently overlooked doing so, repeatedly, and consistently, on each and every occasion. Thus, I find that, when the totality of the facts is considered, Sajan's concealment of the Trust's existence from the Named Beneficiaries was more likely than not to have been deliberate. In so doing, Sajan breached his duties as trustee to inform the plaintiffs of their rights under the Trust (see at [98] above).

Maintenance of proper accounts

(1) The parties' specific arguments

132 In relation to Sajan's alleged failure to maintain proper accounts of the Trust, the plaintiffs submit that there are many errors, inconsistencies, and unexplained expenses charged to the Trust.[144] Moreover, Sajan revealed under cross-examination that, despite having spent some 50 years in business, he still

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143 ABOD Vol 1 at pp 162–179.

144 PCS at para 46.

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does not know how to read a balance sheet and requires help to do so.[145] He also claimed that he is not familiar with income or cash flow statements, or the function of a general ledger for a company.[146] The plaintiffs submit that, in light of Sajan's admitted shortcomings, the situation is even more problematic in that Sajan assumed that he was competent to maintain accurate accounts of the Trust.[147] Above all, the plaintiffs point out that Sajan's failure to maintain proper accounts was systemic and list eight particularised instances where Sajan had so failed.[148]

133 Moreover, for the accounts that had been provided, Sajan explained during his cross-examination that there was a clear inconsistency in the various Trust Statements between what he had intended as an "advance" (by his understanding, moneys contributed to the Trust that did not need to be repaid), and what the accountant had recorded as a "loan" (a liability of the Trust that needed to be repaid). However, Sajan did not correct this because he accepted his accountants' explanation that this was "the way we put it".[149] Thus, Sajan waited until his cross-examination during the trial to clarify that he was not seeking to claim millions of dollars in expenses from the Trust, and that his accountants "never understood" him and had "completely messed it up".[150] The plaintiffs suggest that this must mean that the Trust Statements given to date are "completely wrong", such that the need for a further and better account is

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145 PCS at para 49.

146 PCS at para 49.

147 PCS at para 49.

148 PCS at para 50.

149 PCS at para 51.

150 PCS at para 52.

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incontestable.[151] This flows from the irreducible core of responsibility and the various duties that Sajan owes as a trustee.[152]

134 In response, Sajan contends that the plaintiffs do not have the necessary qualifications to determine if the accounts provided to them through the Trust Statements have any discrepancies. Sajan submits that if the plaintiffs really had intended for their contentions to be taken seriously, then they ought to have appointed an expert to advance those contentions.[153] In particular, there was no evidence led to show that the December 2017 Trust Summary was "fraudulent or constructed negligently" or that any losses had been occasioned.[154] There is also no established protocol for how the Trust Statements had to be prepared, such as being accompanied by supporting documents.[155]

135 Further, cl 11.1 of the Deed of Declaration also protects Sajan from being liable for any loss arising from the negligence or fraud of any agent employed by him as trustee, so long as he did not act fraudulently or dishonestly. In the present case, Sajan acted in good faith in appointing such agents.[156] More specifically, Sajan contends that the following expenses could be legitimately charged to the Trust, namely: (a) expenses previously paid to accountants who prepared the December 2017 Trust Summary; (b) legal expenses Sajan incurred in OS 1407; (c) probate expenses for Harkishindas's estate; and (d) the Trust's

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151 PCS at para 52.

152 PCS at para 55.

153 DCS at para 88.

154 DCS at para 88(a).

155 DCS at para 88(a).

156 DCS at para 88(b); DRS at para 43.

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investments in an agro business in Indonesia through PT Golden Vintage Agro ("PTGVA") and a food and beverage business in Vietnam known as "Food Kingdom".[157]

136 In any case, Sajan contends that the November 2023 Trust Statement, which provides an account until 31 December 2021,[158] renders the plaintiffs' prayer for an account nugatory.[159] This is because the Suit was commenced on 11 June 2021 and any causes of action or remedies ought to be limited to the state of affairs up to the commencement of the Suit.[160] Sajan also remains "willing and able to provide an updated trust statement until 31 December 2023".[161]

137 Relatedly, Sajan argues that the provisions of the Trust do not preclude him from making retrospective decisions in relation to the Trust, including his determination of what constitutes Trust Assets or investments. Thus, even if the plaintiffs thought that certain Trust Assets or investments were gifts from Sajan personally, Sajan was entitled to retrospectively decide that these were Trust Assets.[162]

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157 DCS at paras 88(a)–88(d); Sajan's AEIC at paras 70–81.

158 ABOD Vol 1 at pp 181–189.

159 DCS at para 97.

160 DCS at para 97.

161 DCS at para 97.

162 DCS at para 86.

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138 Finally, if Sajan had indeed failed to maintain proper accounts of the Trust, these should be regarded as innocent breaches of his fiduciary duty.[163] He argues that most of the acquisitions of Trust Assets or investments were for the benefit of the plaintiffs,[164] and that the income of the Trust would not have been sufficient to afford the acquisition of the full extent of the Trust Assets and expenses acquired or paid for before 2021 (which was when the shares in the Live Companies were sold).[165] Thus, as a matter of equity, any improperly made expense should be set off against Sajan's having substantially engorged the Trust by $2,279,084.60 and having paid £617,030.06 in respect of the 50% share in the Atrium Property held by the Trust.[166]

(2) Sajan did not maintain proper accounts of the Trust

139 In my judgment, the evidence is clear that Sajan did not maintain proper accounts of the Trust.

140 First, Sajan himself admitted under cross-examination that large sections of expenses recorded across multiple Trust Statements are incorrect. Indeed, in Sajan's own words, his accountants "never understood" him and had "completely messed it up".[167] This casts grave doubts on the accuracy of the various Trust Statements. In any case, Sajan himself bears the duty to maintain proper accounts, which he did not. In this regard, Sajan's own admissions under cross-examination show the following lapses:

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163 DCS at para 98.

164 DCS at para 89.

165 DCS at para 84; DRS at para 42.

166 DCS at paras 83 and 99.

167 Certified Transcript 27 March 2024 at p 179 lines 4−11.

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(a) Sajan did not maintain a contemporaneous account of the Trust Assets. This is apparent from the fact that the November 2023 Trust Statement only gave an account until 2021. In fact, Sajan admitted that from 2008 up until today, he had not maintained a contemporaneous account of the Trust Assets.[168]

(b) Sajan admitted that he had not kept a contemporaneous record of cash inflows and outflows from the Trust.[169]

(c) Sajan admitted that he did not check the December 2017 Trust Summary "line by line".[170] He explained that this trust statement was prepared by an old auditor of his companies and "when [the auditor] prepared like this, I thought he was doing what was right to do, so I accepted this".[171] Thus, Sajan abdicated the responsibility of keeping proper accounts to his accountant. Indeed, Sajan only gave this trust statement, in his own words, a "cursory look",[172] and he admitted that it was not a proper, complete, and accurate set of documentation for the Trust.[173]

(d) Sajan admitted that he did not check the August 2020 Trust Statement as well. He recognised that while he ought to have checked, he only gave it a "cursory look".[174] He only had a

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168 Certified Transcript 27 March 2024 at p 118 lines 14–21.

169 Certified Transcript 27 March 2024 at p 118 line 22 to p 119 line 14.

170 Certified Transcript 27 March 2024 at p 125 lines 3−5.

171 Certified Transcript 27 March 2024 at p 121 lines 17−23.

172 Certified Transcript 27 March 2024 at p 126 lines 4−15.

173 Certified Transcript 27 March 2024 at p 154 lines 20−23.

174 Certified Transcript 27 March 2024 at p 126 lines 15−24.

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"rough idea" of what was in the August 2020 Trust Statement, as well as the December 2017 Trust Summary.[175]

(e) Sajan admitted that he only looked at the November 2023 Trust Statement in a "cursory manner".[176]

141 In my view, Sajan's admissions above are sufficient to establish that he had breached his duties to maintain proper accounts of the Trust. In addition, I find that these lapses amount to breaches of his duty of care in administering the Trust. While Sajan is a lay trustee, his egregious breaches cannot be excused by the allowance sometimes granted to lay trustees (see *Baker* at [31]). Even a non-professional trustee should nevertheless furnish documentation on the fact and quantum of payments in respect of a trust (see *Baker* at [32]). Furthermore, it is not necessary for the plaintiffs to have adduced expert evidence as to what a trustee in Sajan's position ought to have done. As the Court of Appeal held in *Baker* (at [30]), there is nothing "particularly sophisticated" about the essential task of a trustee in documenting expenses. After all, even a lay trustee may be expected to "keep at least informal accounts and records" of all the trust-related transactions and expenses (see *Lewin on Trusts* at para 21–031). These accounts and records should have been maintained as and when such transactions arose, instead of on a *post hoc* basis (see at [140(a)] above). Otherwise, the accuracy of these records would come under serious question (see, *eg*, the decision of the English High Court Chancery Division in *Jones and others v Firkin-Flood and another* [2008] EWHC 2417 (Ch) ("*Jones v Firkin-Flood*") at [231]–[232]), as

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175 Certified Transcript 27 March 2024 at p 126 line 25 to p 127 line 6; p 138 line 25 to p 139 line 3.

176 Certified Transcript 27 March 2024 at p 138 line 25 to p 139 line 3.

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is the case here. That these records should have to be updated contemporaneously also follows from the principle that it is the "bounden duty" of a trustee to be "constantly ready with his accounts" (see *Lewin on Trusts* at para 21–031; see also *Baker* at [24]), and to allow beneficiaries to inspect the accounts when so requested (see *Foo Jee Seng* at [86]–[87], relying on *Pearse v Green* (1819) 37 ER 327 at 329).

142 Second, even if Sajan had the power to make retrospective decisions in relation to the Trust, this does not extend to a power to retrospectively cure his breach of duty to maintain proper accounts of the Trust. The starting point is that, for the reasons that I have explained earlier, I find that the phrase "absolute discretion" does not abridge Sajan's continuing duty to keep and maintain accurate accounts of the Trust (see at [57]−[63] above). Therefore, for the same reasons given at [141] above, it is not acceptable for Sajan to have allowed his alleged gifts to the Trust to be retrospectively recorded as loans or advances.[177] It is also unacceptable for Sajan to have abdicated to his accountants the responsibility for ensuring the accuracy of the Trust Statements.[178] While it may be true that Sajan has the power to loan moneys to the Trust (see cl 3(e) read with cl 5.2 of the Will) and to subsequently forgive those loans,[179] as I understand Sajan to be arguing,[180] this is simply not what happened. That much is clear from Sajan's testimony that the advances that he made to the Trust were

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177 Certified Transcript 27 March 2024 at p 168 line 2 to p 170 line 13; p 178 line 18 to p 179 line 11; p 190 line 19 to p 191 line 21.

178 Certified Transcript 27 March 2024 at p 170 lines 2−13.

179 ABOD Vol 1 at pp 192 and 196.

180 DCS at para 86.

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intended to be his gifts to the Trust.[181] Since he intended these transactions to be gifts all along, it was his responsibility to ensure that the Trust Statements reflected the true nature of the transactions, and his failure to do so is a breach of his duty to maintain proper accounts of the Trust.

143 Third, it is immaterial that the plaintiffs have not pointed to any discernible loss from Sajan's management of the Trust. Given the concerns about the accuracy of the Trust Statements, the plaintiffs cannot reasonably be expected to point to any loss prior to the taking of accounts of the Trust. In any case, even if it is true that the plaintiffs have suffered no loss, that is not relevant to whether Sajan breached his duty to keep proper accounts of the Trust. This is because a trustee's failure to keep proper records is itself a breach of trust, without requiring proof of loss (see *Lewin on Trusts* at para 21−031, which opines that "[t]he failure to keep proper records appears itself to be a breach of trust"; see also the Supreme Court of New South Wales decision in *Smith v Stewart* [2000] NSWSC 1224 at [48] and *Jones v Firkin-Flood* at [231]). However, to be clear, the extent of a trustee's liability for his breach of such a duty is a separate question from whether a breach has taken place at all. The latter is a question of the consequential relief or remedy whereas the former is a question of whether a breach is established in the first place.

144 Fourth, Sajan's reliance on cl 11.1 of the Deed of Declaration does not assist him (see at [64] above). This clause provides as follows:[182]

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181 Certified Transcript 27 March 2024 at p 168 line 2 to p 170 line 13.

182 ABOD Vol 1 at p 155.

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> **11. PROTECTION OF TRUSTEES**
>
> 11.1 The Trustee [*ie*, Sajan] shall not be liable for any loss to the Trust Property arising by reason of:-
>
> (a) the negligence or fraud of any agent employed by the Trustee even if the employment of such agent was not strictly necessary or expedient;
>
> (b) any mistake or omission made in good faith by the Trustee; or
>
> (c) any other matter or thing except fraud or dishonesty of the Trustee.

To begin with, the terms of the Trust are to be found in the Will, and not the Deed of Declaration. This is because a testamentary trust is completely constituted as soon as the relevant will is admitted to probate (see *Lewin on Trusts* at para 3−066). Therefore, when the Will was admitted to probate, the Trust Assets and Trust Moneys already belonged to the Trust. At no point did the Trust Assets and Trust Moneys belong beneficially to Sajan. Given that Sajan never had absolute ownership of the Trust Assets and Trust Moneys, it was never open to him to declare (or "re-declare") a trust over those assets and moneys, on the terms contained in the Deed of Declaration. In short, the Deed of Declaration, along with the clauses therein, have no legal effect because the Trust already came into existence before the Deed of Declaration.

145 For completeness, I am of the view that the Will does not give Sajan the power to subsequently introduce new or expanded exclusion clauses into the Trust, whether by deed or otherwise. The relevant power that Sajan possesses under the Will is a power to *inter alia* make appointments in favour of any one or more of a class of beneficiaries and to appoint new beneficiaries nominated to Sajan by two beneficiaries and accepted in writing by him (see cl 7(b) read

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with cll 5.1(ii)(f) and 5.2 of the Will).[183] That power does not encompass modifying the terms of, or re-writing, the Will. A power to amend the terms of the trust instrument itself must be conferred on the trustee expressly, and without an express power of that kind, the trust instrument cannot be unilaterally rewritten by the trustee (see para 33–071 of *Lewin on Trusts*; see also *Smith v Hurst* (1852) 68 ER 826 at 833). It follows that a trustee cannot unilaterally grant to himself or herself a power to amend the original trust instrument where none was present in the same, as Sajan purported to do here by declaring cl 9 of the Deed of Declaration, entitled "POWER TO VARY TRUST DEED".[184]

146 Besides, even if I were to find that cl 11.1 of the Deed of Declaration had somehow been incorporated into the Trust instrument – *ie*, the Will – I would have found that it was ineffective in excluding Sajan's liability for breach of his duty to keep and maintain proper accounts of the Trust. Pertinently, cl 11.1 states that the trustee is not "liable for any *loss* to the Trust Property" [emphasis added]. This is crucial. The duty of a trustee to maintain a proper account of the Trust is breached irrespective of whether any consequential loss is occasioned to the Trust Assets (see at [143] above). Accordingly, that clause has nothing to say on whether Sajan has breached his duty to maintain proper accounts of the Trust and the Trust Assets, even if the deed were legally valid, which, as I have found, was not competent to alter or revoke the provisions of the Trust constituted under the Will. The same analysis would apply, *mutatis mutandis*, to Sajan's arguments invoking cl 11.2 of the Deed of Declaration – which purports to exclude Sajan's liability for "loss or damage" arising out of

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183 ABOD Vol 1 at pp 195–197.

184 ABOD Vol 1 at p 155.

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his exercises of discretion – and cl 12 of the same, concerning indemnifications of Sajan for losses occasioned to the Trust Assets.[185] The same analysis would also apply to any other Deeds of Declaration promulgated by Sajan, such as the one dated 28 April 2008, which I observe includes similarly worded provisions under cll 10–11.[186]

147 Fifth, while Sajan may point to him having engorged the Trust in the sum of $2,279,084.60 and having paid £617,030.06 in respect of the Trust's 50% share in the Atrium Property,[187] these are ultimately immaterial in deciding whether he had kept proper accounts of the Trust. Indeed, because of the demonstrated inaccuracy of the Trust Statements, there is no clear manner of ascertaining if, and by how much, Sajan has engorged the Trust, and to compare that amount against the quantity of deductions and expenses from the Trust that may be inaccurately recorded therein. And even if he has done so, his voluntary contributions form additional assets belonging to the Trust, and thus cannot be used to offset assets that he may have mismanaged or misapplied. Moreover, broadly speaking, a trustee who contributes moneys into a trust cannot behave as if he still controls those moneys. Those moneys would have become Trust Assets. It follows that they cannot then be used to offset other non-trust related expenses.

148 For these reasons, I find that Sajan has breached his duty to maintain proper accounts of the Trust. I turn now to consider the appropriate remedies for such breach.

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185 ABOD Vol 1 at p 156; DCS at para 88(b).

186 ABOD Vol 1 at pp 147–148.

187 DCS at para 99.

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(3) Remedies for Sajan's failure to maintain proper accounts

(A) ACCOUNT ON A WILFUL DEFAULT BASIS

(I) THE APPLICABLE PRINCIPLES

149 I begin with the applicable principles from *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 ("*Sim Poh Ping*"). The Court of Appeal in *Sim Poh Ping* (at [99]) drew a distinction between a trustee's stewardship duty and fiduciary duty. In this regard, breaches of fiduciary duties can be further classified into custodial and non-custodial breaches (at [104]). The latter type does not involve the stewardship of assets as such, *ie*, the breaches do not involve any of the assets already entrusted to the fiduciary (at [105]). The remedy would be a compensatory monetary award, *ie*, equitable compensation, and the principal can also seek an account of profits if the fiduciary earned profits from the breach (at [105]). The former type does involve the stewardship of assets – *viz*, it is a breach of fiduciary duty resulting from a misapplication of the principal's funds or trust funds (at [106]). The Court also observed, in *obiter*, that a breach of a custodial fiduciary duty may attract remedies similar to a breach of a custodial stewardship duty of a trustee, given that they both involve closely analogous scenarios of a demonstrated misapplication or wrongful disposal of the principal's or beneficiary's assets, *ie*, an award of substitutive compensation (at [109]).

150 Turning to a trustee's stewardship duties, there is a distinction between the breach of a custodial stewardship duty and a management stewardship duty, the difference being that the former concerns misapplication of trust assets, and the latter concerns a failure to administer the trust fund in accordance with the trustee's equitable duties, including the equitable duty of care, *ie*, involving a "lack of appropriate skill or care" (see *Sim Poh Ping* at [100]). On the orthodox

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approach, when a breach of the custodial stewardship duty of a trustee has been established, the court can first make an order for a process of accounting on the basis of a "common account". Once it is established through this process of accounting that the trustee had disposed of an asset without authority, the principal's remedy is for the court to falsify (*ie*, disallow) the unauthorised disposal (at [111]−[112]). The court would do so and order the trustee to either reconstitute the trust fund *in specie* or reconstitute the trust fund in monetary terms in lieu of reconstitution *in specie* (at [112]). This remedy is *substitutive* in nature in that it does not matter whether the dissipation of the asset would have occurred even without the unauthorised act (at [113]).

151 The Court of Appeal noted that if the orthodox approach is accepted, the English decisions in *Target Holdings Ltd v Redferns (a firm) and another* [1996] 1 AC 421 ("*Target Holdings*") and *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 ("*AIB*") may need to be reconsidered in so far as both cases treated a breach of the custodial stewardship duty of a trustee as attracting a *compensatory* as opposed to *substitutive* remedy (see *Sim Poh Ping* at [116]; see also at [150] above). Indeed, not following *Target Holdings* and *AIB* would preserve the equitable remedy of falsification where a trustee breaches their custodial stewardship duty (at [119]).

152 Finally, besides the process of taking an account on a common basis, an account can also be taken on a wilful default basis, in response to a breach of the trustee's management stewardship duty (see *Sim Poh Ping* at [120]). The specific remedy is that of surcharging. The Court of Appeal summarised the relevant principles (at [120]−[121]) as follows:

> 120 … An account on the wilful default basis, *unlike* the common account, depends upon trustee misconduct, as we made clear in our decision in *Ong Jane Rebecca v Lim Lie Hoa*

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> *and others* [2005] SGCA 4 at [61]. An account on a wilful default basis is sought by the principal where the account is shown to be defective because it does not include assets which the trustee in breach of his duty failed to obtain for the benefit of the trust. In this case, the account will be surcharged – that is to say, the asset will be treated as if the trustee had performed his duty and obtained it for the benefit of the trust. The trustee will be ordered to make good the deficiency in the trust by payment of a monetary award.
>
> 121 The focus, in ordering the monetary payment in the case of an account taken on a wilful default basis, is on the *loss* caused to the trust fund … This payment of equitable compensation is akin to the payment of damages as compensation for loss … Prof Conaglen has instructively explained (see Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" (2016) 40 *Melbourne University Law Review* 126 at 146) that surcharges on the wilful default basis "necessarily [require] a hypothetical assessment of what a prudent investor would have done, in order to establish the manner in which the trustee should have acted"; this hypothetical assessment entails a causal inquiry to identify what the trustee would have received had he properly discharged his duties. Unlike falsification, *causation* in the full sense between the breach of duty and the loss sustained by the trust is therefore *relevant*.
>
> [emphasis in original]

153 In explaining the practical significance of ordering an account on a common basis as opposed to a wilful default basis, it must be remembered that ordering an account to be taken of a trust is an anterior step in a process that enables the beneficiary to have the information at hand to pursue remedies in respect of breaches of trust, such as the remedies of falsification and surcharging (see Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" (2016) Melbourne University Law Review 126 ("*Conaglen*") at 129–135). Accordingly, it is the process of accounting that provides a means for the beneficiary to establish what was lost from the trust and not the showing of loss which entitles a beneficiary to seek an order for an account. As was held by Austin J in the Supreme Court of New South Wales decision of *Glazier*

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Holdings Pty Ltd v Australian Men's Health Pty Ltd (No 2) [2001] NSWSC 6 ("*Glazier Holdings*"), an order for an account is rendered "for the taking of accounts of money received and disbursed by the person who is responsible for the administration of" *inter alia* a trust fund "and for payment of any amount found to be due by that person *upon the taking of the accounts*" [emphasis added] (at [37]), for the beneficiary to challenge individual items in the accounts (at [38]–[42]). Hence, it was said by Lord Millett NPJ in the Hong Kong Court of Final Appeal decision of *Libertarian Investments Ltd v Thomas Alexej Hall* [2014] 1 HKC 368 ("*Libertarian Investments*") (at [168]) that:

> … an order for an account does not in itself provide the plaintiff with a remedy; it is merely the *first step in a process* which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good. Once the plaintiff has been provided with an account he can falsify and surcharge it. …
>
> [emphasis added]

154 Thus, where an account is taken in common form, the accounting party only accounts for what was *actually* received or disposed of – and *no more* than that (see *Conaglen* at 132, relying on *Partington v Reynolds* (1858) 62 ER 98 ("*Partington*") at 99). Hence, a beneficiary is entitled as of *right* to an order for an account to be taken of a trust on a common account basis, which is not a remedy for a wrong but an enforcement of the performance of an obligation. As such, no misconduct or breach of duty need be shown to obtain such an order (see *Libertarian Investments* at [167]). That being said, the court always has the residual discretion not to order an account where it is oppressive to require the trustee to do so or where for some other reason it would be wrong in the court's view to make such an order (see the High Court decision of *Foo Jee Boo and another v Foo Jhee Tuang and others* [2016] SGHC 260 at [81]).

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155 In contrast, where an account of the trust on a wilful default basis is ordered, the trustee's liability is potentially greater. This is because, as held in *Partington* at 99, the trustee must "account, not only for what he has received, but also for what he might, without his wilful neglect or default, have received, although he has not received it". The trustee is also put to a more substantial burden of proof, in that, on a falsification, the onus is on the accounting party to justify the accounting entry (see *Glazier Holdings* at [42], approved by the Court of Appeal in *Ong Jane Rebecca v Lim Lie Hoa and Others* [2005] SGCA 4 ("*Rebecca Ong*") at [55]). The trustee is also "subjected to a 'roving commission', under which the judge (or master) can look into all aspects of the trustee's management of the trust fund and force the trustee to explain any entry, even where the beneficiaries have not pleaded anything regarding the entry" (see *Conaglen* at 133, relying on *Bartlett and others v Barclays Bank Trust Co Ltd (Nos 1 and 2)* [1980] Ch 515 ("*Bartlett*") at 546).

156 However, unlike with the taking of an account on a common basis, an order for an account on a wilful default basis is not granted to a beneficiary as of right (see at [154] above). Rather, as the name would suggest, the beneficiary must show that the trustee "has been guilty of wilful neglect or default in getting in the assets, or of other misconduct" (see *Partington* at 100). A "wilful default" does not require conscious wrongdoing on the trustee's part (see *Bartlett* at 546), but not every breach of trust will constitute a "wilful default" (see *Conaglen* at 134). In order to ascertain what an instance of "wilful default" entails, Vinodh Coomaraswamy J helpfully set out some principles in the High Court decision of *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2019] 4 SLR 714 ("*Cheong Soh Chin*"), which I respectfully adopt (at [81]):

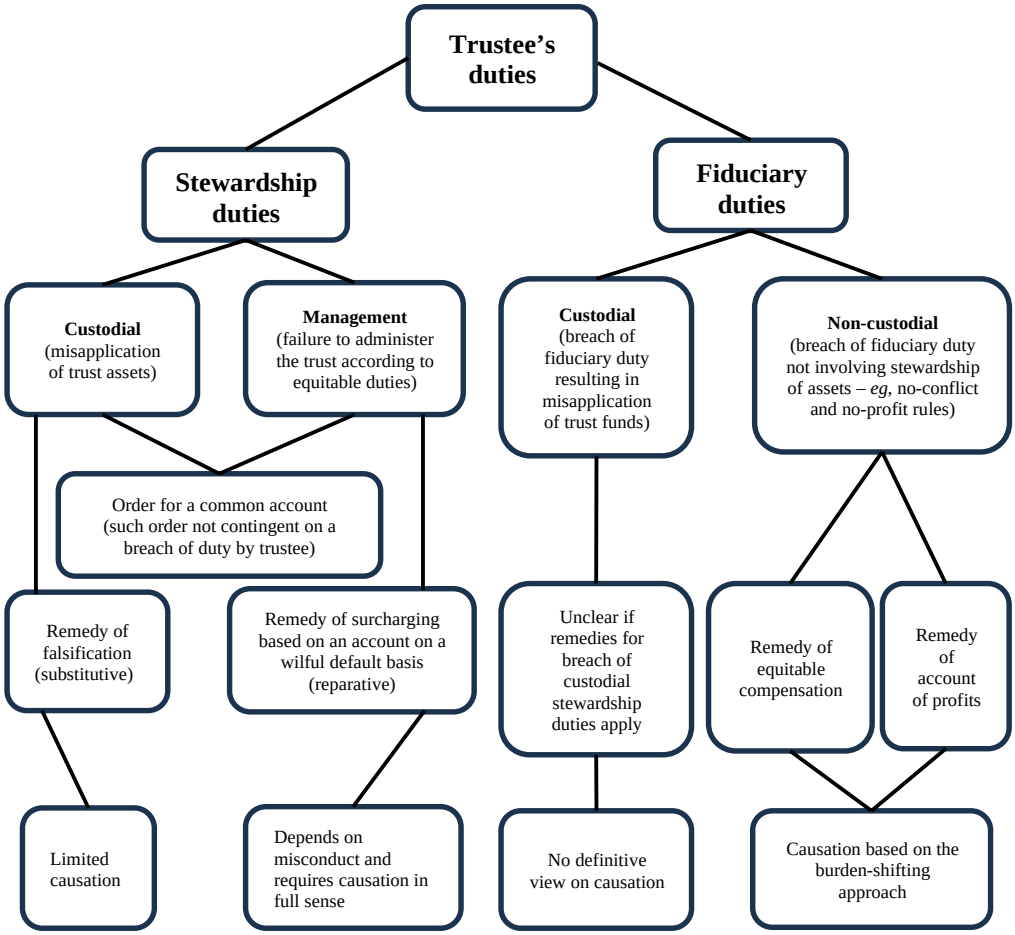
> An instance of wilful default can be shown when custodial fiduciaries "do that which it is their duty not to do; or omit to

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> do that which it is their duty to do": see *Re Owens* (1882) 47 LT 61. It is not a requirement for the trustee to be conscious of his misconduct, or indeed to appreciate that his behaviour is a breach of trust. Instead, it is sufficient that the trustee has been guilty of a want of ordinary prudence: see *Armitage v Nurse* [1998] Ch 241 at 252 (Millett LJ); *Meehan v Glazier Holdings Pty Ltd* [2002] 54 NSWLR 146 ("*Glazier Holdings*") at [65] (Giles JA). Practically, this is achieved if the beneficiary can show that trustee has *failed to obtain* for the trust that which *would have been* obtained if the trustee's duties had been discharged: *Glazier Holdings* at [65].
>
> [emphasis in original]

157 For simplicity, I summarise the present state of the law, as I understand it stands under *Sim Poh Ping*, in so far as it pertains to the various duties of a trustee and the remedies available therefor:

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Needless to say, in the event of any inconsistency, the Court of Appeal's much more detailed articulation of the law in *Sim Poh Ping* prevails over the contents of this infographic, which is intended merely as a short summary of the law.

(II) MY DECISION: THE PLAINTIFFS ARE ENTITLED TO AN ACCOUNT ON A WILFUL DEFAULT BASIS

158 I have concluded above (at [141]) that Sajan breached his duties as a trustee to maintain proper accounts of the Trust. Moreover, pursuant to my analysis at [150] above as to the distinction between the custodial stewardship duties and management stewardship duties of a trustee, I find that this amounted

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to a breach of Sajan's management stewardship duties, *ie*, it was a "breach involving a lack of appropriate skill or care" on Sajan's part (see *Sim Poh Ping* at [100]). I also find that his conduct reflects a "want of ordinary prudence", to borrow the words of Coomaraswamy J in *Cheong Soh Chin* at [81] (citing *Armitage v Nurse* at 252D). For the reasons above (at [59]−[64]), I reject Sajan's argument that it follows from the words "absolute discretion" used in the Will that the plaintiffs are not entitled to an account on a wilful default basis, as I have held there that the wording of the Will does not effectively exclude or abridge Sajan's duties as trustee to keep proper accounts of the Trust.[188]

159 Consequently, the plaintiffs are, in principle, entitled to seek an account on a wilful default basis, as this remedy is not precluded by the wording of the Will. The question, then, is whether they are entitled to an account on a wilful default basis under general law. It is clear that they are, as I have held that Sajan's mismanagement of the Trust accounts amounts to a breach of his management stewardship duty as trustee, and "the beneficiary seeking an account on the wilful default basis must allege and prove at least one act of wilful neglect or default" (see *Cheong Soh Chin* at [80]; see also *Rebecca Ong* at [59]–[61]). This they have done on the evidence before me. The practical effect, amongst others, is that, in invoking the remedy of surcharging, Sajan as trustee would be liable not only for moneys and assets *actually* received but also those which *would have* been received but for his wilful defaults (see at [155] above). This will depend, however, on whether the plaintiffs successfully show the Trust to be "defective because it does not include assets which the trustee in breach of his duty failed to obtain for the benefit of the trust" (see *Sim Poh Ping*

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188 DRS at para 28.

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at [120]), which I will consider below based on the specific alleged breaches of Sajan put forward by the plaintiffs at [43]–[45] above.

160 Accordingly, I find that the plaintiffs are entitled to an account on a wilful default basis. This is separate from the issue of Sajan's monetary liability to the plaintiffs (if any) pursuant to such remedies as *inter alia* falsification or surcharging. It remains for the plaintiffs to show, on the evidence, that they are entitled to such reliefs and the quantum of the same (see at [159] above). As I have explained at [153] above, an order for an account to be taken is merely the anterior step for a beneficiary to be put into a better position to challenge the individual entries in the trust's accounts, and to thereby enable remedies, such as that of surcharging and falsification, to be invoked against such entries (see *Conaglen* at 129–130, relying on *Pit v Cholmondeley* (1754) 28 ER 360 at 360–361; see also *Libertarian Investments* at [168]–[173] (*per* Lord Millett NPJ) and *Glazier Holdings* at [36]–[42] (*per* Austin J)).

(B) REMOVAL OF NON-CLAIMED EXPENSES FROM THE TRUST STATEMENTS

161 In addition to the order for an account to be taken of the Trust, I also find that Sajan made the following concessions under cross-examination as to past expenses that he does not intend to claim from the Trust. As a result, he is not allowed to claim for these expenses out of the Trust. These expenses are summarised in the table below:[189]

189 PCS at para 57.

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Claimed Expense	**November 2023 Trust Statement**	**Relevant Testimony from Sajan**	**My Decision**
Education Fees	$200,000[190]	Q. Your position is that whatever money you spen[t] on education, you're not claiming it from the trust? A. No, not claiming.[191]	This amount, reflected in the November 2023 Trust Statement as a deduction from the Trust, should be removed entirely.
Investment in PTGVA	$404,941.30[192]	Q. Okay. So if you invested half a million in GVA, you're not asking the trust to pay you back half a million; correct?	While row 112, column Q of the November 2023 Trust Statement states that Sajan is not claiming any moneys from these ventures, and that

190 ABOD Vol 1 at p 184, row 111.

191 Certified Transcript 27 March 2024 at p 196 lines 14−16.

192 ABOD Vol 1 at p 184, row 112.

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		A. Whatever was the net loss in GVA, I'm not claiming. So whatever I was out-of-pocket eventually, I'm not claiming. Q. Right. So there is no loan by you to the trust to invest in the GVA, can we agree to that? A. Yeah.[193]	these investments have been fully written off at no cost to the Trust, the amount is still reflected under the sub-category entitled "Other Trust Investments" under the main category of Section D, "Sajan's Asset Contributions to the Trust (SGD)".[194] The amount is reflected as an outlay of "(512,941.30)",[195] which appears to be based on the total sum under "Other Trust Investments" reflected in row 60,[196]

193 Certified Transcript 27 March 2024 at p 219 lines 2−10.

194 ABOD Vol 1 at p 188.

195 ABOD Vol 1 at p 188.

196 ABOD Vol 1 at p 187, row 60.

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			which column Q thereof explains to be a combination of the investments in both PTGVA and Food Kingdom "set up under the Trust", but "fully written off at no cost to the trust", with Sajan "not claiming any monies from these ventures". This amount should be removed entirely.
Investment in Food Kingdom	$108,000.00[197]	Q. Okay. Similarly for Food Kingdom, that is a business that also failed? A. Yeah.	I repeat the explanation in the above row, applied *mutatis mutandis* to row 113 column Q,[199] row 60 column Q,[200] and the outlay reflected under

197 ABOD Vol 1 at p 184, row 113.

199 ABOD Vol 1 at p 184, row 113.

200 ABOD Vol 1 at p 187, row 60.

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		Q. You invested some money into it, right? A. So same outcome, same situation. Q. You are not claiming that from the trust? A. Not claiming.[198]	"Other Trust Investments".[201] This amount should be removed entirely.
Audi Car	$247,804.00 (deduction for purchase)[202] $60,500.00 (proceeds from sale, returned to Trust)[203]	Q. It says "Purchase of Audi for sons", $247,000. You are claiming it as an expense from the trust. A. No, I paid for it.	The amount of "(247,804.00)" under "Purchase of Audi A6 Car", reflected in the November 2023 Trust Statement as a deduction from the

198 Certified Transcript 27 March 2024 at p 219 lines 11−17.

201 ABOD Vol 1 at p 188.

202 ABOD Vol 1 at p 186, row 57.

203 ABOD Vol 1 at p 186, row 35.

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		… Q. But are you asking the trust to pay you back? A. No. In fact, when I sold the car, I received $60,500 … we got $60,500 back for the car I paid for for them to use, I gave the money to the trust. Q. … Are you asking the trust to reimburse you? A. No.[204]	Trust,[205] should be removed entirely. The car sale proceeds of $60,500, reflected under the sub-category entitled "Sale of car (Audi A6 car provided by Sajan)",[206] are to remain with the Trust.

204 Certified Transcript 27 March 2024 at p 220 line 11 to p 221 line 8.

205 ABOD Vol 1 at p 188.

206 ABOD Vol 1 at p 188.

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Questa Property	$1,131,404.40[207]	Q. … Based on the evidence you've given, you do not intend to claim for the monies that you have advanced for Questa; correct? A. Yeah. … Q. No, you do not intend to claim the Questa expenses from the trust? A. No, I do not intend to claim what I invested for the Questa, I do not intend to claim that back.	For reasons which I will explain at [162]–[164] below, I agree with the plaintiffs' primary position that Sajan purchased the Questa Property as a gift for Dilip, and so it never fell under the Trust. The moneys advanced by Sajan for the Questa Property should not be charged to the Trust as a trust-related expense. For clarity, both categories of deductions for the expense of "(762,574.13)" for "Questa Property Expenses" and

[207] ABOD Vol 1 at p 186, rows 45 and 58.

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		Q. Sure. So what you invested for Questa should not be claimed from the trust. Can we agree to that? A. In my words, what I gave the initial payments and whatever, I'm not claiming that back.[208]	"(368,830.27)" for "Payments for Questa Property" should be removed entirely.[209] However, even if it were an acquisition for the Trust, Sajan has stated in his evidence that he will not claim the property-related expenses from the Trust. Hence, even in the event that the Questa Property was not acquired as a gift for Dilip but for the Trust, Sajan would still not be entitled to claim this expense from the Trust. It

[208] Certified Transcript 27 March 2024 at p 192 line 18 to p 193 line 14.

[209] ABOD Vol 1 at p 188.

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			should be removed entirely.
Atrium Property	£617,030.06[210]	Q. And I think we agreed that the loan towards purchase of assets pertains to Questa and Atrium; correct? A. No, not identified, yes, I think that's what it is. … Q. Which means that you have no intention of claiming this money back, right? A. Right.	This amount, reflected in the November 2023 Trust Statement as a deduction from the Trust,[212] should be removed entirely.

[210] ABOD Vol 1 at p 187, row 65.

[212] ABOD Vol 1 at p 188.

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		Q. You have no intention of saying that this is an expense of the trust; correct? A. Correct.[211]	

162 Before moving on to other concessions by Sajan, I explain why I agree with the plaintiffs' primary position that Sajan purchased the Questa Property as a gift for Dilip and not as one of the Trust Assets. I accept the evidence of Dilip that when Sajan purchased the Questa Property, he made no mention of it being held on trust by Sajan for Dilip or any of the Named Beneficiaries.[213] It squares with the facts surrounding its acquisition – which are admitted by Sajan – that the Questa Property was registered in Dilip's sole name from the outset and the loan was taken out in Dilip's name.[214] Sajan subsequently declared via a Deed of Advancement dated 3 October 2019 that the Questa Property would be allocated and distributed from the Trust, free from all encumbrances, to Dilip alone.[215]

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211 Certified Transcript 27 March 2024 at p 171 lines 6−18.

213 Affidavit of Evidence-in-Chief of Dilip Jethanand Bhojwani dated 17 January 2024 ("Dilip's AEIC") at paras 28–31.

214 Sajan's AEIC at para 57.

215 Sajan's AEIC at para 59 and pp 240–241.

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163 While Sajan asserts on affidavit that he purchased the Questa Property for the benefit of the Trust,[216] it is highly artificial to purchase the Questa Property for the Trust but register it in Dilip's sole name and for the loan to be registered in his name. Indeed, if it was intended to be one of the Trust Assets at the time of its acquisition back in 2011, it could have been made the subject of an appointment in favour of any one or more of the Named Beneficiaries, and not just Dilip. I find that, on the balance of probabilities, the more likely explanation for these circumstances surrounding the acquisition is simply that Sajan intended for the Questa Property to be a gift to Dilip from the outset and not an acquisition for the Trust.

164 Indeed, that appears also to have been the plaintiffs' understanding of the acquisition even prior to their instituting the present Suit. In Devin's email to Sajan sent on 29 August 2018 (and copying Sandeep and Dilip), Devin remarks of the December 2017 Trust Summary that "this account contradicts what you have verbally communicated to us in the past". He cites the example of "Questa: This apartment was a gift to Dilip but now we see it has strangely become a part of the trust" [emphasis in original].[217] That this was the plaintiffs' understanding back in August 2018 lends support for Dilip's evidence that Sajan's words and conduct, at the time of the acquisition back in 2011, gave the impression that the Questa Property was being acquired as a gift for Dilip and not as one of the Trust Assets.[218] Considered against how Sajan conducted the acquisition of the Questa Property at the time (see at [163] above), I find it to

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216 Sajan's AEIC at paras 56 and 58.

217 ABOD Vol 1 at p 280.

218 Dilip's AEIC at paras 28 and 31.

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be more likely than not that Sajan intended for the Questa Property to be a gift to Dilip alone and not one of the Trust Assets when it was acquired back in 2011. The recording of the expenses relating to the Questa Property as trust-related expenses was an afterthought on Sajan's part when, on 16 May 2018, Sajan had to produce the December 2017 Trust Summary to the plaintiffs,[219] which prompted the plaintiffs' contemporaneous expression of surprise in Devin's email of 29 August 2018 that *inter alia* expenses relating to the Questa Property were recorded as trust-related expenses when, all along, they had always understood it to be "a gift to Dilip".[220]

165 Even if it were an acquisition for the Trust, Sajan has stated in evidence that he will not claim the property-related expenses from the Trust.[221] Hence, Sajan would still not be entitled to claim this expense from the Trust. It should be removed entirely as a deduction recorded against the Trust, as I have held at [161] above.

(C) MAXIMUM QUANTITY OF OTHER CATEGORIES OF EXPENSES CLAIMABLE FROM THE TRUST

166 In addition to the foregoing expenses, in relation to which Sajan made clear concessions in his evidence, there are other expenses relating to credit card expenses and insurance premiums, for which Sajan's evidence was less clear. Sajan's Defence (Amendment No 2) states at para 21(h) that "[a]lthough [Sajan] paid for the [p]laintiffs' education fees, credit card expenses and insurance premiums, from [Sajan's] own funds, he had no intention to, and he has not and

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219 ABOD Vol 1 at pp 272–277.

220 ABOD Vol 1 at p 280.

221 Certified Transcript 27 March 2024 at p 192 line 15 to p 193 line 16.

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would not, seek repayment of the monies from the Trust, because his intention all along was to provide financially for the [p]laintiffs as beneficiaries of the Trust".[222] However, during his cross-examination, Sajan maintained that he was claiming "some" credit card expenses from the Trust but could not identify precisely what he was claiming for. He simply said that:[223]

> Trust paid some -- trust monies paid -- trust paid for some of the credit card bills. I paid their credit card bills too. What I paid, I'm not claiming back. Whatever I was reimbursed, that's all it did. Further than that, not claiming back.

Adding to the lack of clarity, Sajan's AEIC states that "[s]ome Trust monies were utilised to bear part of my Sons' expenses, in the total sum of S$66,057.82. Of the said sum, S$3,520.00 was for my Sons' insurance expenses, while S$62,537.82 was for my Sons' credit card expenses".[224] This is in the context of Sajan distinguishing between the plaintiffs' expenses which had been borne personally by Sajan, "incurred" at his "personal expense", in contradistinction to their expenses which were paid for with "[s]ome Trust monies".[225]

167 Thus, taken at its highest, and putting aside Sajan's assertions in his Defence (Amendment No 2) that he is not claiming back any expenses towards the plaintiffs' credit card expenses and insurance premiums, he is only entitled to deduct from the Trust, at maximum: (a) $62,537.82 as credit card payments; and (b) $3,520.00 as insurance premiums. In contrast, the total credit card expenditure claimed in the November 2023 Trust Statement is $708,626.95

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222 Defence (Amendment No 2) at para 21(h).

223 Certified Transcript 27 March 2024 at p 199 lines 17–21.

224 Sajan's AEIC at para 106.

225 Sajan's AEIC at para 106.

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(added up across Sections C, D and E),[226] and the total "Life and Automobile Insurance Premiums" is $519,772.53.[227] There is thus a clear discrepancy between what Sajan says he will claim from the Trust and what is reflected as being claimed from the Trust in the November 2023 Trust Statement. Further, as the plaintiffs correctly point out,[228] Sajan has not explained how he arrived at the figure of $62,537.82. Sajan's position under cross-examination, *viz*, that "[t]he insurance premium payments till 2017 came from the trust monies" and that "[a]fter that, I paid further insurance premiums",[229] is also inconsistent with why he is claiming $3,520.00 in expenses for insurance premiums, which, from the November 2023 Trust Statement, appear to correspond to one group of payments (added up) in the year 2020.[230]

168 Considering the admitted inaccuracies of the Trust Statements (see, *eg*, at [140]–[142] above), as well as how the figures of $62,537.82 and $3,520.00 were reached, I do not reach any conclusion as to precisely how much Sajan is entitled to deduct from the Trust in respect of these expenses. However, I find that Sajan is not entitled to deduct anything exceeding these figures in terms of credit card expenses and insurance premiums, respectively. This is because, on Sajan's own case, these are the maximum sums which he is claiming for these categories of expenses. Sajan is to render an account of the actual amounts spent on these expenses as part of the remedy for an account of the Trust to be taken on a wilful default basis, as I have already ordered at [158]–[160] above.

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226 ABOD Vol 1 at p 188.

227 ABOD Vol 1 at p 188.

228 PCS at para 60(d).

229 Certified Transcript 27 March 2024 at p 206 lines 9−18.

230 ABOD Vol 1 at p 184 rows 132−134, column O; p 187 row 68; p 188, Section E.

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Whether Sajan breached his trustee duties by converting the Founder's Share

The background to the Conversion

169 I turn now to consider whether Sajan breached his duties as trustee in effecting the Conversion (see at [43] above). By way of background, it is undisputed that the Founder's Share was part of the Trust Assets, pursuant to cl 5.1(iv)(j) of the Will.[231] To recapitulate, the Founder's Share had special rights attached to it. These rights included the right to hold office as a director, the right to remove any director (apart from a founder shareholder), the right to appoint a director, and the right to 10% of the net profits of SEPL annually.[232] Crucially, SEPL's M&A (at cl 5) provides that "[t]he rights hereby attached to the Founder Shares shall not be altered, they are fundamental."[233]

170 It is not disputed that, on or around 15 September 2008, Sajan converted the Founder's Share into one ordinary share out of 6,184,004 ordinary shares in SEPL for no consideration.[234] He did this by voting in favour of directors' and shareholders' resolutions to remove cl 5 of SEPL's M&A.[235] It is also not disputed that Sajan is empowered under the terms of the Trust to make this conversion. In this regard, cl 5.1(iv)(j) of the Will defines one of the Trust Assets to be "my [*ie*, Harkishindas's] 1 founder's share in [SEPL] and any

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231 ABOD Vol 1 at p 196.

232 ABOD Vol 5 at pp 273–274.

233 ABOD Vol 5 at p 274.

234 Statement of Claim (Amendment No 2) at para 34; Defence (Amendment No 2) at paras 25(d)(vi)–25(d)(vii) and 25(e).

235 PCS at para 70(d).

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conversion therefrom to shares of any other class",[236] and cl 3(h) (read with cl 5.2) includes a broadly worded "catch-all" provision which empowers the trustee "to do or omit to do all such acts or things as my [trustee] shall in his absolute discretion consider to be for the benefit of … any one or more of the beneficiaries".[237]

171 It must follow from these clauses that Sajan was impliedly given the power under the trust instrument (*ie*, the Will) to convert the Founder's Share. In any case, the plaintiffs' complaint against Sajan is not that he acted outside the scope of his powers by converting the Founder's Share. Rather, their complaint is that Sajan breached his duty as a trustee to guard, preserve, and maximise the Trust Assets,[238] and additionally or in the alternative, breached his duty of care in exercising his power to convert the Founder's Share, causing a loss to the value of the trust estate at the expense of the interests of the Named Beneficiaries.[239] The question I turn now to consider is whether Sajan did indeed breach these duties in effecting the Conversion.

The parties' arguments

172 The plaintiffs argue that Sajan's conversion of the Founder's Share to one ordinary share amounted to a breach of his duties as a trustee.[240] This is because, based on the plaintiffs' expert evidence that SEPL had net profits of about $141.6m from FY2007 to FY2020, the holder of the Founder's Share

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236 ABOD Vol 1 at p 196.

237 ABOD Vol 1 at p 193.

238 PCS at para 72.

239 PCS at para 73; Statement of Claim (Amendment No 2) at para 36.

240 Statement of Claim (Amendment No 2) at paras 32(e) and 34–36.

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would have been entitled to at least $14.16m in the same period if not for the Conversion having been effected by Sajan.[241] Indeed, Sajan recognised, through his counsel's opening statement, that "if the [F]ounder's [S]hare had not been converted… certainly the plaintiffs would be entitled to 10 per cent of net profit amongst other perks, amongst other benefits. *That is not in contest*" [emphasis added].[242]

173 In addition to the entitlement to the profits, both parties' experts agree that the Founder's Share is itself worth much more than one ordinary share in SEPL. Thus, the plaintiffs' expert, Mr Chaitanya Arora ("Mr Arora"), valued the Founder's Share at $9,522,738.00 as compared to $6.08 for an ordinary share as of 15 September 2008 (*ie*, on the date of the Conversion). Mr Arora also valued the Founder's Share at $23,816,404.00, compared to $25.55 for an ordinary share, as of 1 December 2023 (*ie*, the "current date" defined in Mr Arora's report). Even Sajan's expert, Mr Henry Young Hao Tai ("Mr Young"), eventually assessed (subject to how the SHA is interpreted and applied; see at [222] below) that the Founder's Share was worth around $2.444m as at 15 September 2008 as compared to $3.56 for one ordinary share on the same date, and would be worth around $7.766m at the current date, which is much higher than the value of $11.30 he ascribed to an ordinary share on the same date.[243] Thus, the Conversion caused a huge loss to the Trust and was not in the plaintiffs' best interests.

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241 PCS at para 71.

242 Certified Transcript 26 March 2024 at p 122 lines 10−15.

243 Joint Expert Report dated 15 March 2024 ("JER") at Appendix 1 Table 1.

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174 Further, the plaintiffs argue that Sajan's various defences, which I will outline shortly, do not hold up against the evidence. First, Sajan was not compelled to effect the Conversion. Second, Sajan's narrative about a conflict within his family precipitating the Conversion is contrived and not supported by the evidence. Third, and ultimately, had Sajan objected, the Founder's Share would never have been converted. Thus, Sajan knowingly breached his duties as a trustee by voting in favour of the Conversion. He must therefore be made to account to, and compensate, the Trust for this breach.

175 Sajan's main defence is found at paras 25–27 of the Defence (Amendment No 2). In essence, Sajan asserts that the Conversion was not a decision solely made by him. Rather, it was a collective decision made by the shareholders of SEPL.[244] In this regard, Sajan pleaded that, sometime in August 2002, the five children of Harkishindas and his late brother had agreed that any party who "may inherit or have inherited" any of the two founder's shares in SEPL shall convert them into ordinary shares.[245] This agreement, the SHA (see at [14] above), was apparently made during Harkishindas's lifetime and with his full agreement.[246] These five second-generation shareholders recognised that none of them were the founders of SEPL, and they resolved that they should all be treated on the same footing so as to avoid conflict in the family business.[247] Thus, they decided to convert those founder's shares to avoid a disorderly winding up of the family businesses which would not have been in the interest

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244 Defence (Amendment No 2) at para 25(d).

245 Defence (Amendment No 2) at para 25(d)(ii).

246 Defence (Amendment No 2) at para 25(d)(iii).

247 Defence (Amendment No 2) at para 25(d)(iv).

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of all the shareholders.[248] This is because, in that event, the value of the Founder's Share would have then become 10% of nothing.[249]

176 In any case, Sajan would have been powerless to stop the Conversion. This is because Sajan only held around 2.43% of the total shareholding in SEPL under the Trust.[250] The conversion of the Founder's Share into one ordinary share in SEPL would hence have been put into effect by the majority vote of the other shareholders of SEPL, even if Sajan had voted against it.[251] Therefore, Sajan argues that the decision to convert the Founder's Share was not made in bad faith in relation to the plaintiffs, and did not constitute a breach of his duties to them as trustee.

My decision: Sajan breached his trustee duties by converting the Founder's Share in the manner that he did

177 In my judgment, Sajan breached his trustee duties to take reasonable care in managing the Trust Assets by converting the Founder's Share into an ordinary share in SEPL without receipt of any consideration accruing to the Trust that represents the real difference between the value of the Founder's Share and one ordinary share in SEPL.

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248 Defence (Amendment No 2) at para 25(d)(v).

249 DCS at para 113.

250 Defence (Amendment No 2) at para 25(g).

251 Defence (Amendment No 2) at para 25(h).

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Sajan did not breach his trustee duties to manage the Trust Assets and take reasonable care by converting the Founder's Share per se

178 For reasons that I will develop below, I find, as an important preliminary point, that Sajan's default is *not* in the act of converting the Founder's Share *per se*, but in effecting the Conversion *in a manner* that fell below the objective standard of his duty of care as trustee (see at [67]–[68] above) and resulted in loss to the Trust.

179 To begin with, the language of cl 5.1(iv)(j) of the Will – *viz*, "my 1 founder's share in [SEPL] and *any conversion therefrom to shares of any other class*" [emphasis added] – contemplates the prospect of the Founder's Share being converted by the trustee, and this is shored up by the broad powers conferred in, *inter alia*, cl 3(h) read with cl 5.2 of the Will (see [170] above). Hence, that Sajan had the power to convert the Founder's Share is clear, whether that power is seen as expressly conferred by cl 3(h) read with cl 5.2 of the Will (see *Lewin on Trusts* at para 28–029) or "created by necessary implication" by way of *inter alia* the language of cl 5.1(iv)(j) envisaging the prospect of such conversion (see *Lewin on Trusts* at para 28–031). However, the use of a power by a trustee is subject to the control of the court, and it is open to a beneficiary to challenge a trustee's exercise of a trust power where he or she "acted in breach of a duty of care in the exercise of investment or other administrative powers" (see *Lewin on Trusts* at paras 30–100 and 30–101(13)).

180 More broadly, it is important to be clear about the nature of a trustee's default to properly characterise *what* the breach of duty was and, by extension, how the remedy therefor is to be understood. Here, I do not find that the *act* of converting the Founder's Share was a breach of Sajan's trustee duties. Put another way, his *decision* to exercise his trust powers to determine, in his

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discretion, that the special rights of the Founder's Share should be removed, was not unreasonable in itself and cannot be said to be a decision that a person of ordinary prudence in his position would not have made. Indeed, it would not have been objectively imprudent or careless for a trustee in Sajan's position to effect a conversion of the Founder's Share in a manner that occasioned no net loss to the value of the Trust, such as by converting the Founder's Share into sufficient numbers of ordinary shares that would preserve the market value of the Trust Assets overall.

181 The problem, however, was that Sajan converted the Founder's Share into one ordinary share in SEPL – which held fewer rights and thus held a significantly lower market value – in exchange for no additional value inuring to the Trust in return to make up for the shortfall between the real value of the Founder's Share and the value of one ordinary share in SEPL. The result was that the Conversion occasioned a loss to the value of the Trust, and that was a loss which an ordinary prudent trustee in Sajan's position would have appreciated and consequently would have exercised due diligence and care to avoid (see *Lewin on Trusts* at para 34–002 and *Speight v Gaunt* at 739–740). I conclude thus for the reasons that follow.

Sajan breached his trustee duties to manage the Trust Assets and take reasonable care by converting the Founder's Share without receipt of any consideration in return to the Trust.

182 First, the evidence is clear that the Founder's Share is worth far more than one ordinary share in SEPL (see at [173] above). Thus, unless Sajan can point to a cogent reason to explain the Conversion, it will be hard for him to deny that he breached his duty to manage the Trust Assets when he converted the Founder's Share into an ordinary share that was worth far less in value for

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no additional consideration to the Trust in return to make up for the shortfall in value.

183 Second, I find Sajan's explanation, that the Conversion was necessary to avoid a disorderly winding up of the family business, to be unsupported by the evidence. To begin with, it is curious that Sajan's closing submissions rely on his *pleadings* as opposed to any evidence in his AEIC.[252] It is trite that pleadings do not constitute evidence on which the court can make findings of fact. In this regard, Sajan's assertion in his Defence (Amendment No 2) that if the Founder's Share were not converted, that would have led to a disorderly winding up of the family business,[253] is not found in his AEIC at all, save only for a brief reference in para 97 that he and the second-generation shareholders reached an agreement to "all be treated on the same footing so as to avoid conflict in the family business".[254] This amounts to nothing more than a bare assertion in his interest.

184 More pertinently, there is a complete lack of evidence as to how a "disorderly winding up" would have taken place if not for the Conversion. While Sajan testified under cross-examination that a failure to effect the Conversion "would have put the company [*ie*, SEPL] in jeopardy",[255] and that there were "compelling reasons and situations" as exemplified by "a problem" in 2002 and "problems" in 2008,[256] these assertions were never stated in Sajan's

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252 DCS at para 107.

253 Defence (Amendment No 2) at para 25(d)(v).

254 Sajan's AEIC at para 97.

255 Certified Transcript 28 March 2024 at p 57 lines 17−21.

256 Certified Transcript 28 March 2024 at p 57 line 22 to p 59 line 4.

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Defence (Amendment No 2) or his AEIC.[257] There are no details furnished as to the nature of these "problems" for the court to assess whether they necessitated the Conversion (let alone for no additional value in return to the Trust). Furthermore, Sajan failed to get his brothers and cousins, who are part of the second-generation shareholders whom Sajan was supposedly keen to avoid conflict with, to testify in court. This is despite some of these individuals, namely, Jack, Moti, and Hiro, being at the trial for several days.[258] I thus infer from Sajan's failure to call these individuals as witnesses, who would have been central to any explanation as to how the Conversion was necessary to avoid a conflict amongst Sajan and the second-generation shareholders,[259] that they would have provided evidence adverse to Sajan's account. Therefore, I find Sajan's explanation, that the Conversion was necessary to avoid a "disorderly winding up" of the family business, to be unsupported by the evidence.

185 Third, while Sajan no longer relies on cl 1.5 of the SHA between him and the second-generation shareholders in his closing submissions,[260] I find that cl 1.5 would not have assisted him. In this regard, Sajan relied on cl 1.5 of the SHA at para 95 of his AEIC to say that "the 5 second generation shareholders of [SEPL] … agreed that any party who may inherit or have inherited any of the 2 Founder's Share[s] shall convert them into ordinary shares".[261] If correct, this would support Sajan's version that he was compelled by cl 1.5 to convert the

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257 Defence (Amendment No 2) at para 25; Sajan's AEIC at paras 90–100.

258 Certified Transcript 26 March 2024 at p 137 line 24 to p 138 line 1; 27 March 2024 at p 87 lines 2−12.

259 Certified Transcript 28 March 2024 at p 69 lines 6–18.

260 DCS at para 111.

261 Sajan's AEIC at para 95.

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Founder's Share. However, cl 1.5 does not have this effect. Instead, cll 1.4 and 1.5 state as follows:[262]

> 1.4 There are two (2) founder shares issued by Shankar's Emporium Pte Ltd, Malaya Silk Store Pte Ltd and Sherridon Exim Pte Ltd which are not registered in the names of any of the parties to this agreement. If any party should become the beneficial owner of any of the founder shares whether by gift, inheritance, acquisition, purchase, transfer or other means, that party undertakes not to exercise any of the rights expressed in the Memorandum of Association of Shankar's Emporium Pte Ltd, Malaya Silk Store Pte Ltd and Sherridon Exim Pte Ltd except as a shield to protect himself and others at any general meeting or meeting of the Board of Directors or in any civil or other proceedings.
>
> 1.5 However, clause 1.4 hereinabove shall be applicable only if the founder shares are not extinguished during the lifetime of the founders. The parties agree that if any party(ies) should become the beneficial owner of both the founder shares in Shankar's Emporium Pte Ltd, Malaya Silk Store Pte Ltd and/or Sherridon Exim Pte Ltd whether by gift, inheritance, acquisition, purchase, transfer or other means, that party(ies) shall reduce the rights of the said founders shares in Shankar's Emporium Pte Ltd, Malaya Silk Store Pte Ltd and/or Sherridon Exim Pte Ltd to that of ordinary shares forthwith.

It is clear that cl 1.5 only applies if any party to the SHA becomes a beneficial owner of *both* founder's shares in SEPL, MSSPL, and/or Sherridon Exim Pte Ltd, but this did not happen under the Will. Sajan was never the beneficial owner of the single Founder's Share bequeathed by Harkishindas, let alone *both* founder's shares in SEPL. Thus, I agree with the plaintiffs that cl 1.5 never applied to compel Sajan to convert the Founder's Share. And even if cl 1.5 applied to Sajan, it does not require him to convert the Founder's Share to just

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[262] Sajan's AEIC at p 296.

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one ordinary share. Instead, it requires the relevant party to "reduce the rights" of the Founder's Share to those "of ordinary shares", without stipulating the number of ordinary shares that must result from this process of conversion.

186 Fourth, Sajan had the power to prevent the Conversion. This is because cl 5 of SEPL's M&A, which provides that the rights attached to the founder's shares are "fundamental" and "shall not be altered",[263] is both an entrenching and entrenched clause pursuant to s 26A of the Companies Act 1967 (2020 Rev Ed) (the "CA"). It satisfies the definition of an "entrenching provision" found in s 26A(4)(*a*) of the CA, by providing that the rights of the founder's shares set out in cll 5(i)–5(viii) "may not be altered in the manner provided by this Act [*ie*, by way of special resolution in s 26(1) of the CA]". This means that, pursuant to s 26A(2) of the CA, cl 5 may not be removed or altered unless *all* the members of the company agree. Sajan therefore could have blocked the removal of cl 5, but he chose not to do so. Instead, he voted through the relevant directors' and shareholders' resolutions to remove the special rights of the two founder's shares (including the Founder's Share) as stipulated in cl 5 of SEPL's M&A.[264] By allowing the Conversion to happen in the manner that it did, Sajan breached his duty to protect the Trust Assets, and breached his duty of care in managing the Trust Assets.

187 Accordingly, for all the reasons above, I find that Sajan breached his trustee duties by converting the Founder's Share in the manner that he did.

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263 ABOD Vol 5 at p 274.

264 Certified Transcript 28 March 2024 at p 52 line 6 to p 56 line 10.

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Sajan's conversion of the Founder's Share amounted to a breach of his management stewardship duty as trustee

188 Moreover, while I agree with the plaintiffs that it was a breach of Sajan's trustee duty to convert the Founder's Share into an ordinary share in SEPL for no additional value in return to make up for the shortfall in value between the Founder's Share and one ordinary share in SEPL, I do not agree that it was a breach of his custodial stewardship duty as opposed to his management stewardship duty.[265] This distinction is relevant in assessing the appropriate remedy to be ordered for such a breach (see David Fox, "Breach of Trust" in *Snell's Equity* at para 30–011). While a breach of the former type may attract the remedy of falsification (which is substitutive), the latter attracts the remedy of surcharging (which is compensatory) (see the Wellington Court of Appeal decision of *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 ("*Bank of New Zealand*") at 687–688 (*per* Tipping J) and *Libertarian Investments* at [168]–[170] (*per* Lord Millett NPJ); see also at [150]–[152] above and *Sim Poh Ping* at [111]–[113] and [120]–[121]).

189 More specifically, I do not agree that the Conversion can be conceptualised as a breach of Sajan's custodial stewardship duties attracting the remedy of falsification or an order for Sajan to reconstitute the trust asset *in specie* or its equivalent value (see *Bank of New Zealand* at 687 and *Libertarian Investments* at [168]). This is because Sajan did not make an unauthorised disbursement from the Trust in converting the Founder's Share. It is artificial to conceive of the Conversion as Sajan's wrongful disbursement of the Founder's Share in favour of an ordinary share in SEPL. The share itself remained in the

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265 Plaintiffs' Further Submissions dated 21 June 2024 ("PFS") at paras 16–18.

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Trust throughout that process. Rather, the Conversion was a product of a change in SEPL's company constitution which caused a change in a quality or attribute in the share. It is like the situation where a trustee, who holds shares in a company on trust, then uses his control over the company's affairs to negligently induce the company to enter into a commercially unviable bargain or an unprofitable industry. Such mismanagement of the trust asset may result in a decline in the market value of the shares, but a mismanagement resulting in a depreciation in the value of a trust asset is very different from an unauthorised disposal of that asset.

190 David Fox, "Breach of Trust" in *Snell's Equity* describes the distinction as such in para 30–012:

> **(b) Breach of custodianship duty or breach of management duty.** Two main kinds of breach of trust need to be distinguished when considering the trustee's liability make [*sic*] restoration to the trust fund: a misapplication of trust assets in breach of his duty to preserve the custody of the trust assets, and a breach of his duty to manage the assets.
>
> A trustee misapplies trust assets if he disposes of them in breach of his general duty to preserve them according to the terms of the trust. A misapplication may occur where the trustee invests trust money in an unauthorised security; where he pays trust money to an unauthorised agent; or where a trustee releases trust money in breach of the authority conferred upon him by his beneficiary. The loss to the trust *consists in a direct transfer of an asset out of the fund.*
>
> A trustee commits a different kind of breach when he fails to manage the trust fund according to his equitable duties. He may, for example, cause loss to the trust by failing to exercise reasonable care and skill in selecting an investment, or in selecting an agent to whom he pays trust money. Here the loss suffered by the trust is *not caused by a wrongful disposal of assets from the fund.* In the two examples given, the trustee's actions were authorised but they were performed negligently, in breach of his equitable duty of care. The loss consists in a fall in the value of the trust fund compared with its value if due care had been exercised.

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[emphasis added]

191 In my judgment, the Conversion of the Founder's Share by Sajan is much more akin to the latter category described in the textbook cited above than the former. It was not an unauthorised disposition of the share but the approval of a management decision by SEPL's board which resulted in a change in the share's quality that negatively affected its market value. I therefore find that Sajan's conversion of the Founder's Share was a breach of his management stewardship duty and not, as argued by the plaintiffs, a breach of his custodial stewardship duty as a trustee.[266]

192 Further, Sajan's Conversion of the Founder's Share is an instance of wilful default, since he displayed a want of ordinary prudence in consciously bringing about such a massive loss to the Trust, without considering how he could have reasonably prevented that loss. As I have found (at [180]–[187] above), the default of duty in the Conversion lay in Sajan's omission to take reasonable steps that a man of ordinary prudence would have taken, in his same position, to ensure that the Conversion did not occasion a net loss to the value of the Trust that, in fact, occurred. As I have already held that the plaintiffs are entitled to an account of the Trust being taken on a "wilful default" basis (see at [158]–[160] above), it is for the plaintiffs to show that they are entitled to surcharge the Trust, in respect of the Conversion, and to prove the loss to the Trust flowing from that default of Sajan.

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[266] PFS at para 16.

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Sajan is liable to compensate the Trust for losses occasioned by the Conversion by way of the remedy of surcharging

193 The principles on the appropriate remedy for breach of trust have been summarised above at [150]−[152], and I do not propose to repeat them. The nature of Sajan's breach of his management stewardship duty in relation to the Conversion calls for an account on the wilful default basis, and Sajan will be liable to surcharge the Trust on a wilful default basis for the consequential losses occasioned by the Conversion by way of a reparative monetary award for the same (see *Cheong Soh Chin* at [258] and *Sim Poh Ping* at [120] and [124]–[125]).

194 For present purposes, I set out, briefly, the principles relating to surcharging. The Court of Appeal explained in *Sim Poh Ping* (at [121]) that the remedy of surcharging is akin to the payment of damages as compensation for loss. Surcharges on the wilful default basis necessarily require a hypothetical assessment of what a prudent trustee would have received had he properly discharged his duties (see *Libertarian Investments* at [170] (*per* Lord Millett NPJ); see also *Cheong Soh Chin* at [90]).

195 Applying these principles of causation to the facts, I am of the view that a prudent trustee would certainly not have voted to convert the Founder's Share into a single ordinary share in SEPL for no additional value in return to the Trust to make up for the shortfall. A prudent trustee would have taken reasonable care to avoid causing loss to the value of the Trust, as has occurred here. Hence, he or she would have ensured the substitution of the Founder's Share with (a) a sufficient number of ordinary shares in SEPL that are comparable in value to the value of the Founder's Share; (b) any other form of asset of equivalent value; or (c) an ordinary share in SEPL *and* a sum of money representing the difference

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between the full value of the Founder's Share and that of an ordinary share in SEPL. Therefore, I find that the Trust would not have suffered the loss caused by the wrongful conversion of the Founder's Share had Sajan not voted in favour of converting the Founder's Share in the manner he had. In other words, Sajan's vote in favour of the Conversion caused significant loss to the Trust, which loss would have been avoided by a prudent investor in the same position.

196 For completeness, I note Sajan's argument that, applying a "but for" test of causation, a prudent trustee would have voted to convert the Founder's Share "having regard to the likelihood of exit of the other major shareholders and the disorderly winding up of SEPL and the family business, which would have rendered the Founder's Share essentially worthless". Further, that, "although the conversion of the Founder's Share into one ordinary share resulted in a lower overall valuation of the Trust's shares, this conversion decision itself was overall essential to preserve the value of the family business as a going concern, but was done so as to ultimately benefit the [p]laintiffs".[267]

197 In my judgment, Sajan's argument is a *non sequitur*. To succeed in his argument on causation, Sajan has to show that a prudent trustee would not only have converted the Founder's Share but would have converted the Founder's Share *in the manner that he did*, resulting in a large net loss to the Trust between the value of a Founder's Share (with special rights) and one ordinary share in SEPL (without such rights). He cannot do so merely by reference to alleged problems that would have been caused to SEPL, as a family business, from only some members holding "special rights". Preserving the goodwill between

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[267] DFS at paras 19 and 23(a).

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SEPL's members (by ensuring equality of treatment between all members in SEPL) may have formed a reasonable basis for a prudent trustee in Sajan's position to have wished to reduce or negate the "special rights" of the Founder's Share. However, it does not show that a prudent trustee would have gone further to convert the Founder's Share into one ordinary share in SEPL, causing a large net loss to the inherent market value of one of the Trust Assets in the process.

198 Moreover, that was certainly not the *only* means available to a prudent trustee to reduce or negate the "special rights" associated with the Founder's Share. As the plaintiffs point out, Sajan could have sought the conversion of the Founder's Share into multiple ordinary shares in SEPL,[268] sufficient in number to ensure that the value of the Trust overall would remain close to unchanged. In my view, a prudent trustee could have explored other alternatives if he desired to remove the "special rights" of the Founder's Share to address the problems he allegedly foresaw from keeping the two founder's shares in SEPL unchanged.[269] The founder's shares could have been purchased or acquired by SEPL by way of special resolution and, if need be, SEPL's M&A could have been amended by way of special resolution to facilitate the purchase or acquisition by SEPL (see s 76B(1) of the CA), whilst meeting the requirements in Part 4 Division 3 of the CA for such a buyback (see, *eg*, the Court of Appeal decision of *The Enterprise Fund III Ltd and others v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd)* [2019] 2 SLR 524 at [115]–[117]). In his capacity as trustee, Sajan could have conditioned his assent to the conversion exercise on receipt of compensation for the likely

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268 Plaintiffs' Further Submissions dated 25 September 2024 ("PFFS") at paras 7–9.

269 Sajan's AEIC at paras 95–99.

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depreciation in the value of the Trust Assets from the persons who stood to benefit from the Conversion, namely, the other ordinary shareholders in SEPL.

199 There is no evidence to indicate if any of the avenues at [195] and [198] above were possible or plausible at the time. Sajan's AEIC is silent in this respect, and it is clear that no alternatives (whether those at [195] and [198] above or any others) were ever explored by him when he effected the Conversion of the Founder's Share into one ordinary share in SEPL for no additional comparable value in return.[270] I therefore cannot accept that a prudent trustee in Sajan's position would have countenanced causing such a loss to the Trust in the form of depreciation in the market value of the Founder's Share (from the loss of its "special rights") for no additional value in return and without any cogent reason.

The assessment of loss caused to the Trust by the Conversion

200 Having established that the conversion of the Founder's Share in the manner that Sajan did was wrongful, I now turn to assess the loss caused to the Trust by this act. In my view, the loss to the Trust caused by the wrongful conversion of the Founder's Share can be conceptualised as comprising three components:

(a) First, the loss to the market value of the Founder's Share *when* the Conversion was effected on 15 September 2008.

(b) Second, the loss of any increase in the market value of the Founder's Share *post*-dating the Conversion of 15 September 2008.

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[270] Sajan's AEIC at paras 90–99.

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(c) Third and lastly, the income which could have been earned from the Founder's Share after 15 September 2008 but for the Conversion (or the proceeds of any conversion), including the exercise of a constitutional right to 10% of SEPL's net profits annually.

201 Conceptually, to determine which of the three heads of loss (at [200(a)]–[200(c)] above) the plaintiffs are entitled to, one must bear in mind two features of the remedy of surcharging:

(a) First, the measure of damage is to compare the value of the Trust against the value it *would have had* if Sajan had performed his duties as a trustee. This will entail "a hypothetical assessment of what a prudent investor would have done, in order to establish the manner in which the trustee *should have* acted" [emphasis added] (see *Conaglen* at 146 and *Sim Poh Ping* at [121]). This requires a clear conceptualisation of what, exactly, was the default of the trustee in this case. Logically, only if the default has been properly determined can the court then analyse its inverse scenario, *ie*, what the counterfactual of no-default would have been.

(b) Second, causation is a necessary element of the remedy of surcharging. This is because the beneficiary is seeking to "surcharge" the trust on the basis that, if the trustee had performed his or her duties (*ie*, but for his or her default of duty), the trust would have an additional value or asset that it does not have at present (see *Sim Poh Ping* at [120]). This "entails a causal inquiry to identify what the trustee would have received had he properly discharged his duties" (see *Sim Poh Ping* at [121]). While policy considerations shift the burden of disproving causation of loss onto the defaulting fiduciary where the duty that was

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breached was a fiduciary one (see *Bank of New Zealand* at 687 and *Sim Poh Ping* at [240] and [244]–[245]), these policy considerations do not apply to a breach of a trustee duty that is not a breach of a core fiduciary duty to avoid conflicts of interest and to act in good faith (see *Sim Poh Ping* at [253]). Where the breach lies in the omission of a trustee to exercise adequate care or diligence, the ordinary approach to causation should generally apply to such a case (see *Bank of New Zealand* at 688 and *Libertarian Investment* at [77] (*per* Ribeiro PJ)). Hence, the burden is on the plaintiffs to show the necessary causal link between the default of Sajan and the loss of value to the Trust and the Trust Assets.

202 I therefore proceed to consider the appropriate counterfactual against which to compare the present value of the Trust. The appropriate counterfactual is the value that the Trust *would have had* if Sajan had performed his management stewardship duties as a trustee (the "Counterfactual").

(1) The appropriate Counterfactual is that of a prudent trustee who exercised his or her discretion to convert the Founder's Share or remove its "special rights" in SEPL but in a manner that did not occasion any net loss to the value of the Trust Assets

203 To begin with, the underlying assumption of the plaintiffs' case that they are entitled to compensation for all three heads of loss at [200(a)]–[200(c)] is that the appropriate Counterfactual is one where the Conversion does not take place at all, and the Founder's Share remains within the Trust to date. I do not agree with such an approach.

204 While I agree that the Conversion was a default of Sajan's duties as a trustee, it is paramount to properly characterise *which* aspect of Sajan's acts or omissions amounted to a default of duty (see at [180]–[181] above). This is

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because the Counterfactual is necessarily the flipside of the trustee's default – *ie*, one can only ascertain the actions of a hypothetical non-defaulting trustee after one has ascertained *what* it was about the trustee's acts or omissions that amounted to a default of their duties (see *Sim Poh Ping* at [121]). Indeed, the object of surcharging is to "surcharge" the trust estate only with "that which the trustee was *duty-bound* to acquire for it" [emphasis added] (see *Conaglen* at 146).

205 I am therefore unable to agree that the appropriate Counterfactual is to compare the present case against a hypothetical where the prudent trustee declined to convert the Founder's Share at all, such that the Founder's Share remains within the Trust to date. In this regard, it is important that Harkishindas, as the settlor, conferred on Sajan (as trustee) a power under the Will to effect the Conversion (see at [179] above). It is thus for Sajan as the trustee to decide, in his discretion, whether the Founder's Share would be retained in that form or be converted into share(s) of a different class or into a different form such as cash proceeds. This follows from the principle of non-intervention in a trustee's exercise of a permissive power conferred upon them by the trust and by the settlor, which the learned authors of *Lewin on Trusts* have summarised as such (at para 30–104):

> Where a power is given to trustees to do or not to do a particular thing at their absolute discretion, the court will not restrain or compel the trustees in the exercise of that power, provided that their conduct is informed, *bona fide* and uninfluenced by improper motives …
>
> The principle is both that the court will not interfere before the trustees have acted to compel a particular exercise of the power and, ***except as stated****, that after they have acted it will not overturn their exercise of the power.* The mere fact that the court would not have acted as the trustees have done *is no ground for interference. The settlor has chosen to entrust the power to the trustees, not to the court.*

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[emphasis added]

206 In sum, this principle provides that, in the absence of evidence of a breach of duty, the court does not generally interfere in a trustee's exercise of a discretionary power by substituting its judgment for that of the trustee, merely because it would have exercised the discretionary power differently from the trustee (see the UK Supreme Court decisions of *Pitt and another v Holt and another* [2013] 2 AC 108 at [73] and [88] and *Children's Investment Fund Foundation (UK) v Attorney General and others* [2022] AC 155 at [36], [120]–[122] and [201] (*per* Lady Arden JSC) and [216] (*per* Lord Briggs JSC)). While the court will "[n]o doubt … prevent trustees from exercising their discretion in any way which is wrong or unreasonable", "that is very different from *putting a control upon the exercise of the discretion which the testator has left to them*" [emphasis added] (see the English Court of Appeal decision of *Tempest v Lord Camoys* (1882) 21 Ch D 571 ("*Tempest*") at 580).

207 In the present case, I did find that Sajan defaulted on his duty – more specifically, his management stewardship duty as trustee – in effecting the Conversion in the way that he did (see at [195] and [198]–[199] above). As a breach of duty has been made out, the court is entitled to interfere in Sajan's effecting of the Conversion, *per* the reasoning in *Tempest* (at 578 and 580), without falling afoul of the principle of non-intervention. However, that does not mean that the animating rationale behind that principle ceases to have any further role. It remains the case that the settlor, Harkishindas, wanted Sajan, as the trustee – and not the court – to have the power to decide whether the Founder's Share is to remain intact in its present form or be converted into a

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different form and held as one of the Trust Assets, *per* cl 5.1(iv)(j) of the Will (see at [179] above).[271]

208 This has implications on how the court analyses what the prudent trustee was "duty-bound" to do under the circumstances, which in turn informs the court's analysis of how the appropriate Counterfactual of the non-defaulting trustee in Sajan's position is to be understood (see at [204] above). In this regard, while the decision to convert may have been a legitimate exercise of discretion on Sajan's part, that did not justify him effecting the Conversion in such a way that was clearly injurious to the Trust and the value of the Trust Assets. That being the case, the appropriate Counterfactual, for the purposes of applying the remedy of surcharging, is not that of a trustee who refuses to convert the Founder's Share at all, but a trustee who honestly exercises his or her discretion to convert the same, but effects that conversion whilst exercising proper care and diligence to ensure that the Trust did not suffer the loss in value that it did sustain.

(A) THE LOSS TO THE MARKET VALUE OF THE FOUNDER'S SHARE WHEN THE CONVERSION WAS EFFECTED ON 15 SEPTEMBER 2008

209 Applying the appropriate Counterfactual, the plaintiffs are entitled to surcharge the Trust in the amount of the difference in value between the Founder's Share and one ordinary share in SEPL as at the date of the Conversion on 15 September 2008. The plaintiffs are thus entitled to the head of loss stated at [200(a)] above, but not the other two heads of loss at [200(b)]–[200(c)] above, for the reasons which follow.

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271 ABOD Vol 1 at p 196.

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(B) THE LOSS OF ANY INCREASE IN THE MARKET VALUE OF THE FOUNDER'S SHARE POST-DATING THE CONVERSION ON 15 SEPTEMBER 2008

210 Second, the plaintiffs are not entitled to the head of loss stated at [200(b)], namely, any increase in the market value of the Founder's Share after the Conversion was effected. They would only be entitled to that loss if it can be shown that there is a causal link between Sajan's default and that loss to the Trust. As explained at [201(b)] above, for a breach of a management stewardship duty, the ordinary approach to causation should apply, *viz*, that the plaintiffs bear the burden of proving causation of loss. There is no shifting of the burden of proof (as to causation of loss) to the fiduciary guilty of a non-custodial breach of a fiduciary duty for public policy considerations. Therefore, the plaintiffs would have to adduce evidence showing that if a prudent trustee in Sajan's position complied with their duties, the Founder's Share would remain in the Trust to date in its prior unconverted state, such that they are entitled to surcharge the Trust in the amount stated at [200(b)] above.

211 I do not find that there is such evidence before me. There is nothing to indicate that if a trustee who had exercised his or her discretion to convert the Founder's Share had gone about that conversion exercise with proper care and diligence, they would have found themselves unable to convert the Founder's Share in any way that would not cause a loss to the Trust (*ie*, the loss of the market value at [200(a)] above). Nor is there evidence for me to infer that they would then have retained the Founder's Share in its prior form and then not attempted to convert the Founder's Share at any point between 15 September 2008 and the present. Further, there is no evidence that they would have continuously found themselves unable to convert the Founder's Share in that period on terms that would not occasion loss to the Trust, with the result that, if a prudent trustee in Sajan's position had performed his or her duties, the

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Founder's Share would still remain in the Trust to date and in its prior unchanged state.

212 The plaintiffs suggest that Sajan, as the defaulting trustee, should bear the onus of proving such facts and therefore bear the consequences of no evidence being adduced to show whether that would have been the result of a prudent trustee properly performing his or her duties.[272] For the reasons stated at [201(b)] above, I disagree and find that the plaintiffs bear the burden of proving the causal link between Sajan's default of duty and the amount in which they wish to surcharge the Trust. Due to an absence of evidence, the result is that the plaintiffs have failed to prove that the loss at [200(b)] was caused by Sajan's breach of duty or would not have been sustained if a prudent trustee in Sajan's position had discharged his or her duties as trustee. The plaintiffs may argue that this is unfair to them as Sajan, as the defaulting trustee, should be the one to adduce evidence that the Founder's Share would have been so converted by a prudent trustee without causing loss to the Trust.[273] However, it is also unfair for a beneficiary to be overcompensated by being awarded damages based on a hypothetical counterfactual that, on the available evidence, cannot be shown to have been likely to have materialised.

(C) THE INCOME WHICH COULD HAVE BEEN EARNED FROM THE FOUNDER'S SHARE AFTER 15 SEPTEMBER 2008 BUT-FOR THE CONVERSION

213 Finally, I consider whether the plaintiffs are entitled to surcharge the Trust in the amount at [200(c)] above, namely, for the income that could have been earned from the Founder's Share after 15 September 2008, in the event

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272 PFS at paras 24–25.

273 PFFS at paras 8 and 13.

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that the Conversion had not taken place on that date. This would include, *inter alia*, a right to 10% of the net annual profits of SEPL, *per* cl 5(vii) of SEPL's M&A.[274] Given that the appropriate Counterfactual is that of a prudent trustee converting the Founder's Share to remove the "special rights" inhered therein, but in such a way that would not occasion a net loss to the value of the Trust overall, it follows that, in that Counterfactual, the Trust would not be entitled to the receipt of 10% of the net annual profits of SEPL after 15 September 2008.

214 However, the plaintiffs have argued that a prudent trustee seeking to convert the Founder's Share would have done so by converting it into many ordinary shares in SEPL, in order to preserve the ability of the Trust to receive dividends from SEPL in future.[275] This would require the plaintiffs to show that, on a balance of probabilities, a prudent trustee in Sajan's position, exercising his or her discretion to convert the Founder's Share so as to remove the "special rights" inhered therein (which fell within Sajan's discretion to determine), would have done so specifically by way of converting the Founder's Share into many ordinary shares in SEPL, in the amounts stated by the plaintiffs.[276] This follows from my finding that the burden is on the plaintiffs to prove causation of loss for the purpose of applying the remedy of surcharging at [201(b)] above.

215 I do not find that to be the case here. Where the court is tasked with a hypothetical assessment of what would have happened if a prudent trustee had complied with his or her trustee duties under the same circumstances, as is the test applicable to the remedy of surcharging (see *Sim Poh Ping* at [121]), it is

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274 ABOD Vol 5 at p 274.

275 PFFS at paras 9–10.

276 PFFS at para 10.

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not unusual that the court is faced with the challenge that a prudent trustee *could* have embarked on a number of different methods of properly discharging their duties in relation to the trust. In this regard, I note the analysis propounded in *Conaglen* on this issue (at 144–146), which I reproduce as follows:

> In *Re Brogden; Billing v Brogden* ('*Brogden*'), Brogden covenanted to transfer, within five years of his death, £10,000 to trustees of a marriage settlement for his daughter. Two of the three trustees were sons of Brogden, who had been in business with him and who were continuing to run that business after Brogden died. The daughter's husband repeatedly pressed the other trustee, Budgett, to pursue payment of the money into the trust, but he appeared unwilling to press the point for fear of destabilising the business of his co-trustees. The daughter sued, but the sons were insolvent. The claim therefore focused on Budgett's liability as the remaining solvent trustee. The Court of Appeal considered that, after five years had elapsed following Brogden's death, Budgett had been duty bound to call for payment of the sum into the daughter's trust and to take reasonable steps to enforce that payment if it were not received: 'where a trustee does not do that which it is his duty to do, prima facie he is answerable for any loss occasioned thereby.' Budgett argued that attempts to recover the sum due would have failed, or would have recovered less than the full sum. The Court held that Budgett must prove what would have happened if he had acted properly: '[i]t is the trustee who is seeking to excuse himself for the consequences of his breach of duty.' Budgett failed to prove what he would have recovered if he had taken appropriate action, and so he was held liable for the entire sum. This approach thus involves a causal analysis – considering what would have happened but for the trustee's breach of duty – but it treats recovery of the entire debt as the prima facie loss caused by the breach and places the burden of disproving that on the trustee.
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> The decision in *Brogden* rests on the trustee's clear duty to collect the debt. The same approach would apply where the trustee had a duty to make a particular investment and failed to do so. Where, however, the trustee had a discretion as to which investments were to be made, and failed to exercise that discretion, the Lords Justices in *Robinson v Robinson* considered that they could not identify what the trustee ought to have done, and so were unable to hold him to his duty beyond requiring him to account for the least beneficial option available to him (the sum which ought to have been invested with interest). This approach is, however, not so much concerned

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> with the principles of trust accounting as it is with the difficulty of identifying what the trustee ought to have done, in order to hold him to that standard. In *Nestle v National Westminster Bank plc* ('*Nestle*'), Dillon LJ appeared to accept that the trustee's liability in *Robinson v Robinson* ought not to be measured by reference to the accident that one of the potential investments proved, with the benefit of hindsight, to have been more profitable than others. But he rejected the view that this justifies holding the trustee liable only for the minimum investment value that could have been achieved. In other words, the fact that a trustee has a range of possible investments to choose from should not relieve the trustee from having to pay in compensation the amount which the trust has lost as a result of him or her not having acted in accordance with his or her duty to invest the trust fund in the way a prudent trustee would have acted. This necessarily requires a hypothetical assessment of what a prudent investor would have done, in order to establish the manner in which the trustee should have acted.
>
> *Brogden* and *Nestle* are both concerned with what would have happened if the trustee had complied with his duty. In *Brogden*, the duty to collect the debt was clear, but evidence was needed to establish what would have happened if the trustee had sought to do that; in *Nestle*, evidence was needed to establish what the trustee's duty required, by reference to how a prudent investor would have acted. Given that the purpose of a surcharge in a wilful default accounting is to ensure that the trust fund contains that which the trustee was duty-bound to acquire for it, it seems impossible to avoid a causal analysis of some sort in these cases.

216 The above excerpt in *Conaglen* shows that the causation analysis must be approached by asking whether it has been demonstrated *what*, exactly, the prudent trustee should have done. Where it is clear what the prudent trustee would have done to comply with his or her duty – *eg*, in the case of a "clear duty to collect the debt" – the beneficiary will have established the causal link to the loss at issue by showing that, if that duty had been performed, the trust would prima facie have held the recovered debt. The situation is different, however, where the beneficiaries have failed to show that the trustee is duty-bound to perform an asserted act which, if performed, would furnish the requisite causal

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link to the loss sought by the beneficiaries to surcharge the trust by that amount. In that scenario, the burden is not on the trustee to disprove a causal link that has never been shown to begin with but is, instead, on the beneficiaries to prove the causal link they assert.

217 Applying the same approach to the loss sought by the plaintiffs at [200(c)] above, they would only be entitled to claim the lost income from the Founder's Share or the proceeds of the Conversion if they can show, on a balance of probabilities, that the hypothetical prudent trustee would have either (a) not effected the Conversion *at all* (such that the Founder's Share retained its "special rights" to, *inter alia*, 10% of the net annual profits of SEPL) *or* that (b) the hypothetical prudent trustee exercising due care and diligence not to harm the value of the Trust would have converted the Founder's Share via the specific route of converting the Founder's Share into many ordinary shares in SEPL, in the manner asserted by the plaintiffs,[277] such that the plaintiffs are entitled to surcharge the Trust in the amount of the dividends that would have been earned from these ordinary shares in SEPL after 15 September 2008. I am not convinced that the evidence shows that the hypothetical prudent trustee would have embarked upon these courses of action.

218 First, I have rejected the notion that the court is entitled to interfere in the trustee's exercise of discretion to convert the Founder's Share by operating on the premise that a hypothetical prudent trustee would oppose a conversion of the Founder's Share into any other form *per se*. This is a decision which fell within the scope of Sajan's powers as trustee, subject to a duty on him to effect

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[277] PFFS at paras 9–12.

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that conversion with due care to prevent injury to the Trust (see at [205]–[208] above).

219 Second, as for the plaintiffs' argument that the hypothetical prudent trustee would have opted for converting the Founder's Share into many ordinary shares in SEPL to preserve the Trust's ability to claim dividends from SEPL in future, I do not agree. This assumes that the hypothetical prudent trustee would have prioritised the right to receive future income from the Trust over the receipt of immediate capital for the loss in value of the Founder's Share once its "special rights" under cl 5 of SEPL's M&A had been revoked. But there is no evidence provided by the plaintiffs for the court to make such an assumption. Indeed, this is a case where the hypothetical prudent trustee would have had to weigh the benefits and drawbacks of the different possible methods of removing the "special rights" of the Founder's Share whilst preserving the overall value of the Trust. It cannot be assumed that the hypothetical prudent trustee would have adopted the specific method now asserted by the plaintiffs in their submissions. Moreover, the option of converting the Founder's Share into many ordinary shares in SEPL might have carried other disadvantages for the Trust. These may include significantly diluting the value of each individual share in SEPL.

(D) SUMMARY

220 In sum, I do not order that the Trust be surcharged for any future income post-dating the date of the Conversion of 15 September 2008 in [200(c)]. I also do not order that the Trust be surcharged by any increase in the market value of the Founder's Share after 15 September 2008 in [200(b)], since it cannot be shown on the evidence that the hypothetical prudent trustee would have avoided converting the Founder's Share altogether. However, I order that the Trust be

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surcharged in the amount of the difference between the market value of the Founder's Share and one ordinary share in SEPL *as at 15 September 2008*, as stated at [200(a)] above, that being the very value which the trustee was duty-bound to obtain for the Trust and the very loss that Sajan was obligated to exercise due care to avoid causing to the Trust in the first place. I proceed to assess the quantum of that loss.

(2) The proper valuation of the difference between the value of the Founder's Share and the value of one ordinary share in SEPL as at 15 September 2008 for the purposes of surcharging the Trust

221 I proceed to consider the parties' expert evidence as to the difference between the value of the Founder's Share and one ordinary share in SEPL as at 15 September 2008. The plaintiffs' expert, Mr Arora, furnished a report in his AEIC that the fair market value of the Founder's Share in SEPL as of that date was $9,522,738.00, and that of one ordinary share in SEPL was $6.08.[278] That yields a difference of $9,522,731.92.

222 The report of Sajan's expert, Mr Young, valued the Founder's Share at the same value as an ordinary share in SEPL because it was valued on the basis that cl 1.4 of the SHA (see at [185] above) essentially prevented Sajan from exercising the rights of the Founder's Share "except as a shield to protect himself and others at any general meeting or meeting of the Board of Directors or in any civil or other proceedings".[279] In my judgment, and with respect, this was an erroneous basis for valuation, as cl 1.4, on its face, only applied if a party

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278 Affidavit of Evidence-in-Chief of Chaitanya Arora dated 17 January 2024 ("Arora's AEIC") at p 46.

279 Affidavit of Evidence-in-Chief of Henry Young Hao Tai dated 17 January 2024 ("Young's AEIC") at p 25; Sajan's AEIC at p 296.

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became the "beneficial owner of any of the founder shares". Sajan was never the beneficial owner of the Founder's Share and held only the bare legal title thereto. Moreover, Mr Young ought not to have opined on the operation of cl 1.4, which is a legal question that is not within his professed expertise. I therefore do not agree with Mr Young's valuation of the Founder's Share as being worth $3.95, same as one ordinary share in SEPL, as of 30 June 2008.[280]

223 For completeness, I note that Mr Young sought to supplement his AEIC evidence with an additional valuation of the Founder's Share based upon the assumption that the SHA did not preclude a holder of the Founder's Share from exercising the rights inhered therein. He did so by adding a table to Appendix 1 of the joint expert report, which purported to provide Mr Young's assessment of the value of "1 Founder's Share" whilst "[a]ssuming restrictions of the Founder's [S]hare based on the [SHA] is [*sic*] **not** taken into account" [emphasis in original].[281] In that table, Mr Young's assessment appears to be found in a cell falling under the column heading "Mr Young's assessment – Conclusion", and reads "2,444" at the row "SEPL – 15 September 2008 – 1 Founder's Share".[282] This cell is in the same row as Mr Arora's assessment of "9,523" (*ie*, Mr Arora's assessment of the Founder's Share having a value of $9,522,738.00, rounded-up). I assume, although this is not entirely clear, that what Mr Young means by this cell is that he has assessed the value of the Founder's Share to be worth about $2.444m, in contrast to Mr Arora's valuation of the same as $9.523m.

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280 Young's AEIC at pp 31 and 139.

281 JER at p 49.

282 JER at p 49.

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224 The plaintiffs object to the admissibility of this new evidence (*ie*, Appendix 1) based on prejudice to their case, arguing that their expert, Mr Arora, ought to have been given fair notice of Mr Young's evidence on this issue in his AEIC and the original reports appended therein.[283] I agree. However, even putting aside these objections to the admissibility of Mr Young's Appendix 1 table, I would not have accorded much weight to the figure arrived at in Mr Young's table.

225 To begin with, apart from the insertion of this "2,444" figure into the tables in Appendix 1, there is little by way of reasoned explanation for why and how the figure is arrived at, in contrast to Mr Young's earlier valuation of the Founder's Share (accounting for the SHA) of $3.95 per share (same as for an ordinary share of SEPL), based on a market-based valuation of the fair value of SEPL's total equity as at 2008.[284] In contrast, the joint expert report only states cursorily that the figure in the relevant table is "Mr Young's valuation under an alternative viewpoint assuming restrictions of the Founder's [S]hare based on the [SHA] is [*sic*] not taken into account",[285] and that "to aid the Court in understanding a like to like comparison, Mr Young considers an alternative view whereby rights of the Founder's [S]hare were not restricted in any ways and estimates the value as of each valuation date".[286] Beyond that, there is little else that is explained in terms of the data and methodology used to arrive at the figure of "2,444" in that table in Appendix 1.

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283 Certified Transcript 2 April 2024 at p 29 lines 7–22.

284 Young's AEIC at pp 30–31.

285 JER at pp 16 and 40.

286 JER at pp 14–15 and 40.

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226 Mr Young's lack of explanation for the figure of "2,444" is significant. The assessment of expert evidence revolves around an appraisal of the expert's methodology and how the expert arrived at their opinion. The "court's determination as to whether it should accept parts of an expert's evidence (and if so which parts) is guided by considerations of consistency, logic and coherence", and "[t]his requires a scrutiny of the expert's methodology and the *objective facts* he had based his opinion upon" [emphasis in original] (see the Court of Appeal decision of *Armstrong, Carol Ann (executrix of the estate of Peter Traynor, deceased, and on behalf of the dependents of Peter Traynor, deceased) v Quest Laboratories Pte Ltd and another and other appeals* [2020] 1 SLR 133 at [90]). Hence, the task of the trial judge is to sift, weigh, and evaluate expert evidence against the prevailing factual matrix, wherein "[c]ontent credibility, evidence of partiality, coherence and a need to analyse the evidence in the context of established facts remain vital considerations" (see the High Court decision of *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [76]). In the course of that exercise, the fact-finder must "examine the correctness of the expert's premises and reasoning process" and "carefully consider the factual or other premises on which the expert based his opinion" (see the Court of Appeal decision of *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 at [23]). As such, I accord little weight to the figure arrived at in Mr Young's table.

227 For completeness, I also examine Mr Young's reasons for disagreeing with the valuation of Mr Arora. In the joint expert report, Mr Young states that, in addition to giving weight to the curtailment of the rights of the holder of the Founder's Share by the SHA (which I have rejected), he took the view that Mr Arora erred in factoring in the remuneration that could be received by a director through director's fees or through employee remuneration as they are

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"not expected cash flows to equity shareholders".[287] However, the right of the holder of the Founder's Share to hold office as a director of SEPL is a right which would naturally factor into the commercial attractiveness of the Founder's Share. Even if a particular holder chooses not to exercise that right, the possibility of assuming office as a director and a chance of receiving fees or remuneration therefrom would sensibly factor into the determination of the price to be paid by a willing buyer for the Founder's Share in a market transaction. I therefore see no error in the approach or reasoning of Mr Arora in this respect.[288]

228 For these reasons, I accept the valuation of Mr Arora over both valuations of Mr Young, be it the lower valuation of $3.95 in his expert report or the alternative valuation in Appendix 1 of $2.444m. I prefer the expert evidence of Mr Arora and his assessment of the difference in value between the Founder's Share and an ordinary share in SEPL at $9,522,731.92 (see at [221] above), and I accept the evidence in his expert report for the same.[289] As I held at [209]–[220] above that the plaintiffs are entitled to surcharge the Trust for the difference between the value of the Founder's Share and one ordinary share in SEPL as of 15 September 2008 (see at [200(a)] above), I order that the Trust shall be surcharged in the amount of $9,522,731.92. Sajan is liable to compensate the Trust in this amount.

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287 JER at pp 16 and 40–41; Young's AEIC at p 98.

288 Arora's AEIC at pp 41–42 and 46.

289 Arora's AEIC at p 46.

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(3) The Conversion did not amount to a non-custodial breach of Sajan's fiduciary duty

229 Before I proceed to consider the other alleged defaults of duty on Sajan's part, I briefly consider the plaintiffs' claim that the Conversion also amounted to a non-custodial breach of Sajan's fiduciary duty on the basis that he allegedly placed himself in a position of conflict between his duty to the Named Beneficiaries and his personal interest. This stems from the plaintiffs' pleading that Sajan, as an absolute owner of around 22% of the shares in SEPL at the time, stood to benefit personally from the Conversion.[290] It is suggested that this was a breach of the no-conflict rule on Sajan's part as an ordinary shareholder would enjoy the prospect of benefitting from the cancellation of the "special rights" of the founder's shares in SEPL under cl 5 of SEPL's M&A, including and especially a founder's shareholder's right to 10% of the net annual profits of SEPL, which would crowd out the profits available to be distributed to the other ordinary shareholders in SEPL in dividends.[291]

230 While the reliefs available to the plaintiffs may differ if the Conversion amounted to a non-custodial breach of Sajan's fiduciary duty, I find that the Conversion was not a non-custodial breach of Sajan's fiduciary duties – more particularly, the no-conflict rule, or the duty of a fiduciary to "not place himself in a position where his duty and his interest may conflict" (see the English Court of Appeal decision of *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1997] 2 WLR 436 at 449 (*per* Millett LJ)). In this regard, it is trite law that the no-conflict rule is a strict rule in equity that is violated once

290 Statement of Claim (Amendment No 2) at para 36.

291 PFS at para 20(a).

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the fiduciary has placed himself or herself in a position where duty and interest conflict, even where there is no bad faith or evidence that the fiduciary preferred his or her personal interests over the interests of the principal (see, *eg*, *Keech v Sandford* (1726) 25 ER 223).

231 In the present case, Sajan, in effecting the Conversion of the Founder's Share whilst also being an absolute owner of ordinary shares in SEPL, would not violate the no-conflict rule because that position of conflict was one authorised by Harkishindas or the terms of the Trust found in the Will. To begin with, it is not seriously contested that Sajan was given the power in the Will to convert the Founder's Share, including the revocation of the "special rights" inhered in that asset under cl 5 of SEPL's M&A. Indeed, the plaintiffs accept in their submissions that cl 3 read with cl 5 of the Will give Sajan the power to convert the Founder's Share.[292] While this by itself would not be an authorisation for Sajan to place himself in a position of conflict, I find, on a proper construction of the provisions of the Will, that Harkishindas intended to confer on Sajan a power to convert the Founder's Share notwithstanding that Sajan also held ordinary shares in SEPL as absolute owner.

232 Indeed, the construction of the trust power for Sajan to convert the Founder's Share is an exercise of testamentary construction. This is because it is a testament – *viz*, the Will – which is the trust instrument that constitutes the Trust. As such, ordinary principles of testamentary construction govern the proper interpretation of that trust power. That includes the armchair principle, as explained by the High Court in *Chiang Shirley v Chiang Dong Pheng*

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[292] PFFS at para 3.

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[2015] 3 SLR 770 ("*Shirley Chiang*") as a principle under which the court puts itself in the position of the testatrix and considers all material facts known to the testatrix for the purpose of determining the testatrix's intention as expressed in the will (at [103]). As the Will is silent on the specific question of whether Sajan has the power to convert the Founder's Share *notwithstanding* that he is also an absolute owner of ordinary shares in SEPL, the armchair principle can be invoked to place the court in Harkishindas's armchair and construe the language of the Will against the relevant surrounding circumstances to shed light on this interpretative issue (see *Shirley Chiang* at [103]).

233 Applying the armchair principle, a contextual fact relevant to the construction of the Will is that Harkishindas was fully aware that Sajan was an ordinary shareholder in SEPL and actively involved in managing its business and affairs. Another crucial aspect of the surrounding context is that SEPL was, and remains, a family company. It was founded by Harkishindas, and his brother and its shareholders were Sajan and his family members.[293] Thus, Harkishindas had contemplated SEPL being run as a family-run company, owned and controlled by Sajan and his relations. Under those circumstances, Harkishindas could not have intended for Sajan to disgorge himself of all his shares in SEPL to become a trustee of the Trust Assets, which included the Founder's Share. Given the factual background as understood by Harkishindas at the time, if Harkishindas had truly wanted Sajan to sell off all his shares in SEPL on his death, in a company Sajan had led since 1979, one would have expected Harkishindas to make some express mention of that startling expectation in the wording of the Will. Yet, the Will is silent on that requirement.

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293 Devin's AEIC at para 56.

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234 Putting myself in the testator's armchair, therefore, I find that the better construction of the Will, and of Harkishindas's testamentary intention, is that Harkishindas had intended for Sajan to retain his pre-existing position as shareholder and director in SEPL, whilst he also held the Founder's Share on Trust for the Named Beneficiaries. To do so, Sajan must have been authorised to exercise the rights conferred upon the holder of the Founder's Share, be it to claim 10% of SEPL's net annual profits or vote in favour of its conversion, whilst holding ordinary shares in SEPL as an absolute owner. Accordingly, as Sajan was authorised under the Will, the trust instrument, to vote to convert the Founder's Share whilst holding shares in SEPL at the same time, his standing in that position did not violate the no-conflict rule and, by extension, did not amount to a non-custodial breach of his fiduciary duty of loyalty.

235 Consequently, the plaintiffs' remedy in respect of Sajan's wrongful Conversion of the Founder's Share in a manner that occasioned a net loss to the value of the Trust is limited to the equitable remedy of surcharging. As I have held at [228] above, Sajan is obligated to surcharge the Trust in the amount of $9,522,731.92.

Whether Sajan breached his trustee duties in exercising his power of investment to sell the Trust Shares in the Two Live Companies

236 I turn now to consider if Sajan breached his trustee duty of care in exercising his power of investment to sell the Trust Shares in SEPL and LMPL (*ie*, the Two Live Companies; see at [44] above) allegedly at an undervalue. The disputed transactions occurred on 18 February 2021 (based on deeds of sale

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dated 16 February 2021),[294] when Sajan sold the following Trust Assets: (a) 150,001 shares in SEPL (including one ordinary share which was converted from the Founder's Share) for $2,337,000.58; and (b) one share in LMPL, which was sold for $14,147.00.[295] The sale of the SEPL shares was to Sajan's brothers, Moti and Jack,[296] while the LMPL share was sold to Jack.[297]

The parties' arguments

237 The plaintiffs object to Sajan's sale of the Trust Shares in the Two Live Companies for two reasons: (a) he had no justifiable reason to sell these Trust Shares, and (b) in any event, Sajan sold these Trust Shares at an undervalue.[298]

238 As to the first reason, the plaintiffs acknowledge Sajan's position that he sold the Trust Shares in the Two Live Companies "in the exercise of the absolute discretion conferred on him as Trustee pursuant to Clause 5.2 of the [Will]".[299] However, the plaintiffs contend that there are clear limits placed on Sajan's exercise of this power and that Sajan had exceeded these limits by being recklessly indifferent to their interest as beneficiaries.[300] In particular, the plaintiffs allege that Sajan possessed information suggesting that the commercial situation was not as dire as he had represented. Among this

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294 ABOD Vol 1 at pp 223–230.

295 Plaintiffs' Quick Reference Bundle for Closing Submissions dated 14 May 2024 ("Plaintiffs' Quick Reference Bundle") at p 116, Agreed Statement of Facts ("ASOF") at para 22(a)−(b).

296 ABOD Vol 5 at pp 481–482.

297 ABOD Vol 5 at p 526.

298 PCS at para 97.

299 PCS at para 98 and Defence (Amendment No 2) at para 29(d).

300 PCS at para 99.

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information were valuation reports prepared by SEPL's and LMPL's auditors, which were, at the very least, cautiously optimistic about the COVID-19 situation, as well as the companies' ability to recover from it.[301] The plaintiffs say that it is therefore baffling how any reasonable trustee could have arrived at the conclusion that the Trust Shares ought to be offloaded post-haste. Importantly, Sajan did not sell his own shares in SEPL, which he claims to have tried to do since 2021.[302]

239 As to the second reason, the plaintiffs point out that the Trust Shares in SEPL initially consisted of 150,000 ordinary shares and one Founder's Share. If the Founder's Share was wrongfully converted, the plaintiffs say that "it is obvious that the fair value of the Trust Shares in SEPL must have been significantly higher than the value obtained by Sajan on 18 February 2021".[303] The plaintiffs' expert, Mr Arora, has valued this at $23,212,055.00.[304]

240 In response, Sajan maintains that he had good reason for selling the Trust Shares. He states that while he decided to sell these shares during the COVID-19 pandemic, it was a "defensive strategy to minimise potential losses for the Trust".[305] Thus, the plaintiffs are really asking the court to engage in a speculative exercise, and to second guess Sajan's commercial decision as trustee.[306] In any case, Sajan should not be found to have sold the Trust Shares

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301 PCS at para 101.

302 PCS at para 102.

303 PCS at para 106.

304 PCS at para 106.

305 Sajan's AEIC at para 117.

306 Sajan's AEIC at para 117; DCS at para 132.

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at an undervalue because they were sold pursuant to valuations conducted by the Two Live Companies' appointed auditors.[307] Sajan saw no cause to doubt those valuations.[308]

My decision: Sajan breached his trustee duties in selling the Trust Shares in the Two Live Companies

Sajan breached his duty of care in selling the Trust Shares in the Two Live Companies

241 In my judgment, Sajan breached his duty of care in selling the Trust Shares in the Two Live Companies. In saying this, I recognise Sajan's argument that he was exercising his commercial judgment in selling those shares as a defensive strategy to minimise losses during the COVID-19 pandemic. But a trustee is not absolved of breaches of duty in relation to the exercise of his investment powers simply because he proffers any reason, however bare, for the exercise of those powers. First, trustees come under a statutory duty, along with a duty at common law, to take care when exercising their power of investment (see at [67] above). Second, trustees come under statutory duties to "obtain and consider proper advice" about the way that their power of investment should be exercised, and whether the investments should be varied (see ss 6(1) and 6(2) of the Trustees Act). The statutory duties under ss 6(1) and 6(2) of the Trustees Act largely duplicate the trustee's general common law duty of prudent administration (see *Lewin on Trusts* at para 35−076; see also the English Court of Appeal decision of *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260 at 1282 (*per* Leggatt LJ) for an interpretation of the UK

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307 DCS at para 134.

308 DCS at para 134.

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provisions in the Trustee Investments Act 1961 (c 62), which are *in pari materia* to ss 6(1) and 6(2) of the Trustees Act). This is not to say that a trustee cannot take a divergent course from the information or advice that he has been given, but as *Lewin on Trusts* observes (at para 35−058), "with the right to reject advice goes the responsibility for doing so, and it would be less difficult to make trustees accountable for an error in investment policy if they committed it in the teeth of proper advice to the contrary." Therefore, if a trustee rejects advice as to whether trust investments should be varied or divested, he should have proper reasons for doing so, especially if the information or advice is cogent.

242 Sajan has argued that the Trustees Act does not apply to his management and administration of the Trust. He has relied on the use of the phrase "absolute discretion" in the Will and the alleged far-reaching powers conferred on him as trustee in cl 3(g) of the Will (read with cl 5.2 of the Will) which enables him to "make any investments" which he "consider[s] to be to the advantage of [the] estate" and cl 3(h) which gives him the power to do or omit to do any such acts that he, "in his absolute discretion", considers to be for the benefit of the trust estate (see at [170] above).[309] He also points to s 2(2) of the Trustees Act which provides that powers conferred on trustees under the Trustees Act (see Part 3 of the Trustees Act) are additional to the powers conferred by the trust instrument and apply unless a contrary intention is expressed therein.[310] According to Sajan, this means that the powers conferred on him under the Will have primacy over the powers conferred under the Trustees Act.[311]

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309 DFS at paras 3–9 and 11.

310 DFS at para 1.

311 DFS at para 2.

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243 To the extent that Sajan suggests that the language of the Will has the effect of excluding the statutory duty of care under s 3A(1) for the purposes of s 3A(2) of the Trustees Act, or that other duties under the Trustees Act are excluded in the same way, I do not accept that the wording "absolute discretion" suffices to have that effect, for reasons similar to those that I have considered in finding that the Will does not suffice to exclude Sajan's common law duty of care (see at [59]–[64] above). Likewise, in relation to the duties under ss 5 and 6 of the Trustees Act (which apply in relation to exercises of the general power of investment under s 4), the Will is silent on whether that general power of investment (and its corresponding duties) is limited or excluded for the purposes of s 2(2) of the Trustees Act. I proceed to consider whether Sajan obtained and considered proper advice, *per* s 6(1) of the Trustees Act, in selling off the Trust Shares in the Two Live Companies.

244 In this present case, Sajan has not explained how he arrived at the conclusion that selling off the Trust Shares in the Two Live Companies amounted to a defensive strategy to minimise potential losses for the Trust. In the absence of any detailed explanation, it falls to the court to examine the information and advice within Sajan's possession when he made the decision to sell off the Trust Shares in the Two Live Companies. In this regard, Sajan admitted that he only read the SEPL valuation report dated 5 February 2021 (the "RSM Report") in a cursory way and could not remember if he had applied his mind to determine its correctness.[312] However, the RSM Report stated that the economy was projected to gradually recover from FY2022 onwards.[313] Also,

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312 Certified Transcript 28 March 2024 at p 72 lines 5−16 and p 74 line 24 to p 75 line 3.

313 ABOD Vol 5 at p 605.

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efforts were being undertaken by SEPL to transition into a new, and more sustainable, business model.[314] Moreover, LMPL's auditors had increased their valuation of the trust share in LMPL between January 2020 and January 2021, indicating an upward trend in the value of the Trust Shares.[315] As such, I agree with the plaintiffs that Sajan has not provided a justifiable reason, or any sensible reasoning process, for selling off the Trust Shares in the Two Live Companies in light of these circumstances. This amounts to (a) a breach of his statutory duty to consider proper advice about the way his power of investment should be exercised, and whether the investments should be varied (s 6(1) of the Trustees Act); and (b) a breach of his duty of care in relation to the exercise of his powers of investment, both under statute (see s 3A(1) read with para 1 of the First Schedule of the Trustees Act) and common law (see *Speight v Gaunt* at 739–740).

245 More tellingly, Sajan has not provided any evidence that he was trying to sell his own shares in SEPL, which he claims to have tried to do since 2021. This is critical. If Sajan truly believed that it was important to sell off the Trust Shares in the Two Live Companies as a defensive strategy, it would have made sense for him or the other shareholders to have also attempted to sell off their own shares, at least to some extent. However, there is no evidence that Sajan or the other shareholders did this. It is telling, in this regard, that the record contains sale notices in relation to the sale of the Trust Shares in the Two Live Companies but none in relation to Sajan's shares in SEPL.[316] This casts further

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314 ABOD Vol 5 at p 615.

315 ABOD Vol 5 at pp 641 and 646.

316 ABOD Vol 5 at pp 374–386 and 493–499.

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doubt on his assertion that he had sold the Trust Shares pursuant to a defensive strategy, or at the very least, calls into question the cogency and veracity of that justification. I would infer from Sajan's omission to sell his shares in SEPL at that time, under the circumstances, that he did not genuinely see a need to sell the Trust Shares in the Two Live Companies at the time and on the grounds he asserts, namely, the need to minimise losses in that period (see at [240] above).

246 Accordingly, I find that Sajan breached his duty of care, and his statutory duty to consider proper advice, in selling the Trust Shares in the Two Live Companies.

Sajan's breach in selling the Trust Shares in the Two Live Companies amounted to a breach of Sajan's custodial stewardship duties as trustee

247 The next question I consider is whether Sajan's breach of trust in selling the Trust Shares in the Two Live Companies may be conceptualised as a breach of his custodial stewardship duties as trustee. The implication is that, if so, the plaintiffs are entitled to the remedy of falsification. This means that, on a taking of an account of the Trust, as the plaintiffs have sought and are entitled to (see at [160] above), the plaintiffs would be entitled to falsify an entry by removing it from the accounts as an unauthorised disbursement from the Trust. The result would be that Sajan would be liable to reconstitute the Trust *in specie* or pay an amount into the Trust as a substitute *in lieu* of the value wrongfully disbursed from the Trust (see at [150]–[151] above).

248 I find that Sajan's breach in selling the Trust Shares in the Two Live Companies is a breach of his custodial stewardship duties as trustee. The plaintiffs are accordingly entitled to falsify the unauthorised disposals by

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disallowing the two transactions on 18 February 2021 in which Sajan had sold off the SEPL and LMPL shares to his brothers.

249 Unlike the Conversion of the Founder's Share, which was an exercise of the rights under the Trust in such a way that mismanaged the Trust Assets and damaged their economic value, the sale of the Trust Shares was a disbursement out of the trust estate that depleted the Trust Assets. It falls within the first category set out by Tipping J in *Bank of New Zealand* at 687 as to "breaches leading directly to damage to or loss of the trust property" as opposed to his third category of "breaches involving a lack of appropriate skill or care". In the first category of breaches, the appropriate remedy is as follows (*Bank of New Zealand* at 687):

> … In the first kind of case the allegation is that a breach of duty by a trustee has directly caused loss of or damage to the trust property. The relief sought by the beneficiary is usually in such circumstances of a restitutionary kind. The trustee is asked to restore the trust estate, either in specie or by value. The policy of the law in these circumstances is generally to hold the trustee responsible if, but for the breach, the loss or damage would not have occurred. This approach is designed to encourage trustees to observe to the full their duties in relation to the trust property by imposing upon them a stringent concept of causation. …

250 Lord Millett NPJ similarly described the remedy for such breaches in *Libertarian Investments* at [168] as such:

> … Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. This will produce a deficit which the defendant must make good, either *in specie* or in money. Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative. The amount of the award is measured by the objective value of the property lost determined

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> at the date when the account is taken and with the full benefit of hindsight.

251 I find that, for the reasons at [241]–[246] above, Sajan's sale of the shares in SEPL and LMPL was an unauthorised disposal of the Trust Assets. Or, in the words of the Court of Appeal in *Sim Poh Ping*, it is closer to a situation "where the trustee *misapplies trust assets*" [emphasis in original] than one where "he *fails to administer the trust fund in accordance with his equitable duties*, such as when he administers the trust negligently, in breach of his equitable duty of care" [emphasis in original] (at [100]). On the facts of the present case, Sajan's failure lay in his breach of his statutory duty to consider proper advice and duty of care in making the decision *to sell* the Trust Shares, at the time that he did, and on the purported basis that he claimed had motivated the sales (see at [244]–[245] above). To my mind, such defaults are properly characterised as a breach of Sajan's custodial stewardship duties as trustee.

Sajan is liable to pay into the Trust a sum to substitute for the value the Trust would have if the unauthorised disbursements had not occurred

252 The remedy is one of falsification, *ie*, the 18 February 2021 sales of the Trust Shares are falsified or disallowed. As reconstitution *in specie* cannot be effected by Sajan, he will have to pay into the Trust a sum to substitute for the value the Trust would have if the unauthorised disbursements had not occurred, *ie*, to make good the "deficit" in the trust fund "in money" (see *Conaglen* at 131). The proper measure of damages is accordingly the market value which the Trust Shares in the Two Live Companies would have *to date* – or, as Lord Millett NPJ put it in *Libertarian Investments* at [168], "determined at the date when the account is taken and with the full benefit of hindsight" – after subtracting the consideration received by the Trust from the sales.

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(1) The proper valuation of the difference between the value of the Trust Shares in SEPL at present date and the purchase consideration received by the Trust on 18 February 2021 (*viz*, $2,337,000.58)

253 It will be recalled that it is undisputed that 150,001 ordinary shares in SEPL were sold by Sajan on 18 February 2021 for $2,337,000.58 (see at [236] above).[317] Sajan is liable to compensate the Trust for the value of those shares in SEPL to date after subtracting that purchase sum. That leaves me only to assess the value of those shares in SEPL at the present date, based on the available evidence.

254 Mr Arora's valuation of one ordinary share in SEPL at "current date", defined in his report as 1 December 2023,[318] is $25.55.[319] Accordingly, the value of 150,001 ordinary shares in SEPL would be $3,832,525.55. In contrast, Mr Young's valuation of one ordinary share in SEPL as of 30 June 2022 (which is the latest date on which Mr Young assesses the value of SEPL's shares, the other two being 30 June 2008 and 31 March 2021) is $12.56.[320] This yields a total valuation of 150,001 ordinary shares in SEPL of $1,884,012.56. For the reasons that follow, I prefer Mr Arora's valuation over Mr Young's valuation.

255 To start, I note for completeness that the valuation of $12.56 in Mr Young's report is made on the assumption that "one Founder's Share in SEPL was not converted into 1 ordinary share on 15 September 2008, as of the

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317 ASOF at para 22(a).

318 Arora's AEIC at para 4(c) and p 16.

319 Arora's AEIC at p 55.

320 Young's AEIC at pp 15–16.

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present day" [emphasis in original].[321] Mr Young's valuation of the Trust Shares in SEPL as of 18 February 2021, on the date of the sale, is a higher value of $2,313,855.[322] However, crucially, Mr Young in his report values one ordinary share in SEPL and the Founder's Share at the *same value*,[323] on the assumption that the SHA has the effect of precluding the exercise of the rights in the Founder's Share "if the original founder is not the owner of these founder's share".[324] I disagree with that interpretation of the SHA for the reasons at [222] above. The result is that Mr Young's valuation of the Founder's Share in his report is *effectively* not any different than a valuation of one ordinary share in SEPL. Having established that these two figures are effectively valuing the same assets, I proceed to compare the differing bases on which the experts have arrived at their respective valuation figures, as is the task of the court in evaluating expert evidence (see at [226] above).

256 The main disagreement between the experts, causing the divergence in valuations reached, was whether a discount for lack of control ("DLOC") and a discount for lack of marketability ("DLOM") should be applied in valuing the Trust Shares in SEPL.[325] In this regard, I agree with the plaintiffs that a DLOM and a DLOC ought not to apply in the valuation of the 150,001 ordinary shares in SEPL. However, I do not reach this finding based on some of the reasons given in their submissions, which are geared towards valuing the Trust Shares in SEPL for the purpose of assessing their fair value in the 18 February 2021

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321 Young's AEIC at p 16.

322 Young's AEIC at p 15.

323 Young's AEIC at pp 33–34.

324 Young's AEIC at p 15.

325 JER at pp 32–33.

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transaction that took place.[326] Instead, I place much weight on the argument that a DLOC and a DLOM were inapposite to the 2021 transaction that in fact took place between Sajan and his brothers, Jack and Moti.[327] Moreover, the remedy of falsification has the effect that the 2021 disbursements in breach of trust are disallowed, such that the wrongfully disposed-of assets are treated as rightfully within the Trust to date. The appropriate comparator is therefore the Trust Shares in SEPL still being held by Sajan as trustee to date, and not having been sold off in 2021. In that scenario, I agree with the plaintiffs and Mr Arora that a DLOC and a DLOM ought not to apply.

257 First, I agree that a DLOC ought not to apply as (a) the most significant component of the overall equity value of SEPL is its property segment, which was valued on a Net Asset Value ("NAV") approach instead of a going concern basis, for which there is no premium for control factored in that would have to be countered by applying a DLOC,[328] and (b) the electronics segment of SEPL was valued with comparators in the marketplace based on the share prices of minority shareholdings in other companies, wherefor a DLOC would already have been applied.[329] Moreover, Mr Arora correctly notes that the valuation of the investment properties that contribute to the value of the property segment of SEPL is based on third-party valuations of the market values of the properties, which would have already reflected relevant discounts for a DLOM, such that applying a DLOM again would result in double-counting.[330]

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326 PCS at paras 136–137.

327 PCS at paras 136 and 137(c).

328 Arora's AEIC at p 116; PCS at para 137(a).

329 Arora's AEIC at pp 95–96; PCS at para 137(b).

330 Arora's AEIC at p 116; PCS at para 139(a).

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258 Second, I note that Mr Young's approach in factoring in a DLOM and a DLOC in his valuation of the Trust Shares in SEPL was based on the fact that a "typical market participant acquiring private shares in a closely held family business on a minority basis would expect to transact at a price with **significant discount for lack of marketability and control applied**" [emphasis in original].[331] However, I am not valuing the Trust Shares in SEPL in connection with a "typical market participant" stepping into SEPL as a minority shareholder with no control over the company's affairs and without a readily available means to exit from the private company at-will. Again, the context here is that I am assessing the comparator of Sajan holding onto the Trust Shares in SEPL to date, with the 2021 sales having been disallowed under the Trust as falsified entries (see at [256] above).

259 For these reasons, I prefer the valuation of Mr Arora which did not apply a DLOC or a DLOM, to Mr Young's, who did.[332] The valuation Mr Arora arrived at for 150,001 ordinary shares in SEPL as at 1 December 2023 is $3,832,525.55. Applying this figure to the remedy of falsification, Sajan sold the Trust Shares in SEPL in February 2021 for the sum of $2,337,000.58.[333] To make good the deficit in the Trust when that disbursement is disallowed, Sajan is to pay the balance sum of $1,495,524.97 to the Trust as a restitutionary or a restorative, as opposed to compensatory remedy (see at [249]–[250] above).

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331 Young's AEIC at p 78.

332 Mr Arora's AEIC at p 55; Mr Young's AEIC at p 34.

333 Statement of Claim (Amendment No 2) at para 41(b).

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(2) The proper valuation of the difference between the value of the trust share in LMPL at present date and the purchase consideration received by the Trust on 18 February 2021 (*viz*, $14,147.00)

260 Likewise, it is undisputed that, on 18 February 2021, Sajan sold the one trust share in LMPL to Jack for $14,147.00.[334] Accordingly, I proceed to assess the value of the LMPL share to date for the purposes of applying the remedy of falsification and to determine the deficit to the Trust that Sajan must make good.

261 To begin with, Mr Arora's report estimates the value of one share in LMPL at 18 February 2021 to be $1,854,000.00.[335] Mr Young's valuation of the same share, as of 30 November 2020, is $10,766.00.[336] These are the latest valuations of the one trust share in LMPL from both experts' reports.[337] Hence, although I have found that the correct measure of Sajan's liability to the Trust is to compare the consideration received for the 2021 sale against the value of the one trust share in LMPL at present, the court must do the best that it can on the evidence available before it to reach the best estimate possible of the value of that *share to date* (see, *eg*, the Singapore International Commercial Court decision of *Singapore Airlines Ltd v CSDS Aircraft Sales & Leasing Inc* [2022] 5 SLR 1 at [52], affirmed on appeal in *CSDS Aircraft Sales & Leasing Inc v Singapore Airlines Ltd* [2023] 2 SLR 91 at [36]–[37] and [42]–[44]). As these are the best available valuations of the LMPL share that are closest to the present date, I assess these valuations to determine the value of the LMPL share to date.

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334 ASOF at para 22(b).

335 Arora's AEIC at p 60.

336 Young's AEIC at p 41.

337 Arora's AEIC at p 20; Young's AEIC at pp 15–16.

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262 The experts' difference in valuation stems from their differing approaches to valuing LMPL.[338] Mr Arora uses a market-based approach as LMPL is a going concern with its own operations as of 18 February 2021.[339] He arrives at his valuation by using SEPL's electronics segment as a comparator to determine LMPL's likely valuation as both companies operate in a similar industry.[340] However, Mr Young uses an NAV approach on the basis that LMPL was said to have been repurposed as a special purpose vehicle ("SPV") for related party transactions.[341] Mr Young arrives at the conclusion that LMPL was an SPV because: (a) LMPL's trade receivables and trade payables make up less than 1.5% of LMPL's yearly revenue; and (b) LMPL does not have any inventories on its balance sheet.[342]

263 I agree with the plaintiffs that these two reasons given by Mr Young do not necessarily mean that LMPL is an SPV. First, a company that receives a lower proportion of trade receivables and payables compared to its revenue can still be an operating company and thus not be an SPV.[343] As Mr Arora pointed out in his oral evidence, the ratio of LMPL's trade receivables to its revenue falls within the range of comparable companies which had ratios within a range of 1.3–44.1% and were nevertheless not SPVs.[344]

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338 JER at pp 42–43.

339 Arora's AEIC at p 58.

340 Arora's AEIC at p 59.

341 Young's AEIC at p 40.

342 JER at p 42.

343 PCS at para 142(a).

344 Certified Transcript 2 April 2024 at p 217 at lines 3–14.

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264 Second, a company with no or little inventory can still be an actively operating company.[345] It would depend on the company's business model. If the company only purchases products when there is a sale that has been secured, it is expected that there would be few products that would need to be warehoused. In my view, Mr Arora gave a logically cogent opinion that many businesses have distribution schemes which do not require them to own or store large amounts of inventory, depending on how they have structured their supply chain.[346] Therefore, the absence or low quantity of inventories is not decisive or conclusive evidence that a company is merely an SPV.[347]

265 As I disagree with Mr Young's premise that LMPL should be valued on the basis that it is an SPV rather than an actively operating company, I prefer the expert valuation of Mr Arora, who adopted a market-based valuation approach based on comparators in the industry, particularly with SEPL's electronics segment.[348] I also disagree with Mr Young's application of a DLOC to the trust share in LMPL as the market-based approach which compares the trust share in LMPL to other minority shareholdings would already factor in a DLOC.[349] Moreover, Mr Young conceded in cross-examination that he had applied an excessive DLOC to the trust share in LMPL, which was based on the same DLOC he had applied to the Trust Shares in SEPL.[350] The reason that the DLOC he had applied to the Trust Shares in SEPL was excessive, when

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345 PCS at para 142(b).

346 Certified Transcript 2 April 2024 at p 217 line 21 to p 218 line 1.

347 Certified Transcript 2 April 2024 at p 218 lines 2–4.

348 Arora's AEIC at p 59.

349 PCS at para 143.

350 Certified Transcript 2 April 2024 at p 213 line 12 to p 214 line 5.

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applied to the trust share in LMPL, is because the lack of control that a putative purchaser of the trust share in LMPL would have would clearly be less severe than the lack of control that a putative purchaser of the Trust Shares in SEPL would have, given that the Trust controlled 50% of LMPL's shareholding but less than 3% of the total shareholding of SEPL.[351]

266 I therefore apply Mr Arora's expert valuation of the value of the Trust Shares in LMPL as of 18 February 2021 at $1,854,000.00.[352] Given that the trust share in LMPL was sold by Sajan for $14,147.00,[353] for the purposes of the remedy of falsification, I disallow or falsify the sales transaction in 2021 and order Sajan to make good the difference to the Trust. Accordingly, Sajan is to reimburse the Trust in the amount of $1,839,853.00, as a restorative payment as opposed to a compensatory remedy (see at [249]–[250] and [259] above).

Whether Sajan breached his trustee duties in realising the Trust Shares in the Three Struck Off Companies at an undervalue

The parties' arguments

267 I turn to consider if, as the plaintiffs claim, Sajan realised the Three Struck Off Companies at an undervalue in breach of his duties as trustee. These three companies had been struck off in 2010, resulting in a return of capital to the Trust.[354] However, the amount returned to the Trust was significantly lower than the value of the Trust Shares.

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351 Certified Transcript 2 April 2024 at p 213 lines 12–15.

352 Arora's AEIC at p 60.

353 Statement of Claim (Amendment No 2) at para 41(e); Plaintiffs' Quick Reference Bundle at p 116, ASOF at para 22(b).

354 Sajan's AEIC at para 109.

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268 In response, Sajan submits that he was not entirely responsible for the decision to strike off the companies.[355] Thus, unless it can be shown that Sajan derived personal benefit from accepting the purportedly undervalued striking off of the companies and their shares, there are no profits to disgorge on his part.[356] Sajan also refers to the Limitation Act but does not make any serious submissions in this regard.[357]

My decision: Sajan breached his trustee duties in realising the Trust Shares in the Three Struck Off Companies at an undervalue

Sajan breached his duty of care in realising the Trust Shares in the Three Struck Off Companies at an undervalue

269 I find that Sajan realised the Trust Shares in the Three Struck Off Companies at an undervalue. The equity that should have been returned to the company (*ie*, the fair market value or "FMV" of the shares) can be calculated based on the total equity of each company (based on an NAV analysis of each company's value, based on information drawn from the balance sheets of each company on 30 June 2009, being the latest financial statements available before each company was struck off),[358] multiplied by the percentage of the total shareholding in each company held by the Trust.[359] I accept the plaintiffs' calculations in this regard, which reveal that there were undervalue transactions in respect of these three companies, as follows:[360]

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355 DCS at para 136.

356 DCS at para 139.

357 DCS at para 140.

358 Arora's AEIC at p 62.

359 Arora's AEIC at p 63 (Table 7−1); PCS at para 151.

360 PCS at para 151.

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Name of company (% of shares held by the Trust)	**Total equity that ought to have been returned to the Trust upon striking off**	**Actual amount returned to the Trust**		**Amount of undervalue**
		Based on November 2023 Trust Statement[361]	*Based on Sajan's 5 October 2018 letter to the plaintiffs*[362]	
Sharrods (3%)	$399,506.00	$13,948.20	$492.00	$385,557.80 or $399,014.00
SPL (7.1%)	$69,656.00	$64,428.52	$48,183.00	$5,227.48 or $21,473.00
Sovrein (3%)	$1,572,576.00	$3,555.93	$7,203.00	$1,569,020.07 or $1,565,373.00

270 The plaintiffs highlight that there are two different sets of values for the amounts that were actually returned to the Trust – one based on the November 2023 Trust Statement provided by Sajan, and the other based on a letter that Sajan sent to the plaintiffs on 5 October 2018. This explains why there

361 ABOD Vol 1 at p 181, rows 18−20.

362 Devin's AEIC at para 213 and p 1034.

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are two potential numerical figures representing the discrepancy for each company. Since an account of the Trust has not yet been taken, I make no finding as to which figure is correct, but I accept that the discrepancy between the equity that ought to have been returned and the capital that was returned (on either of the two figures) is significant (almost $2m in total).

271 For completeness, I note that the estimates of the Three Struck Off Companies' total equity value, at the time of their striking off, are based on Mr Arora's assessment. The main difference between Mr Arora and Mr Young on this issue is the relevance of FMV to the assessment of the valuation of the correct amount of financial capital that ought to be returned to a company in the event of its striking off.[363] To summarise, Mr Arora considers FMV to be a relevant concept in valuing the return of capital to the Trust on the striking off of the Three Struck Off Companies.[364] He defines FMV based on the definition of the International Valuation Standards, namely:[365]

> the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgably, prudently, and without compulsion.

I agree with Mr Arora's opinion that the FMV on the return of capital can be calculated by reference to the amount which a buyer would be willing to pay to acquire, from the Trust, the rights to receive the return of capital.[366]

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363 JER at pp 44–45.

364 Arora's AEIC at p 124.

365 Arora's AEIC at pp 21, 90–91 and 124.

366 Arora's AEIC at p 124.

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272 In contrast, Mr Young argues that the concept of FMV is not relevant to assessing the return of capital for the Three Struck Off Companies because the return of capital "represents the economic returns (*eg*, from accumulated profits or proceeds from unwinding the business) and such returns are not exposed on the open market for market participants".[367] On that basis, Mr Young concludes in his report that the FMV of the Trust Shares in the Three Struck Off Companies cannot be valued as of the date of their striking off.[368]

273 It may be true that such returns are indeed not often exposed on the open market, but this does not refute Mr Arora's point that it is possible, with adequate data on the companies' assets at the material time, to estimate a hypothetical value of such returns, if they were to be exposed on the open market. In this regard, Mr Young has not provided any reasoned explanation as to why it is impossible to estimate the amount that a buyer would be willing to pay to acquire the rights to receive the return of capital. I believe that the concept of FMV is relevant when assessing the value of shareholdings in a company being struck off, the economic value of which stems from the shareholder's rights to the receipt of capital from the assets of the companies being struck off.

274 Therefore, I agree with Mr Arora that FMV can be used to calculate the value of returns of capital from companies which have been struck off. Accordingly, I prefer the expert view of Mr Arora – and his valuation of the quantities of capital that ought to have been returned to the Trust on a striking off on an FMV and NAV basis – over that of Mr Young.

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367 Young's AEIC at p 42.

368 Young's AEIC at pp 16 and 42.

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275 I now explain why I find that Sajan's realisation of the Trust Shares in the Three Struck Off Companies at a significant undervalue amounts to a breach of his duty of care in the management of the Trust. As a starting point, the plaintiffs, by adducing evidence of the large discrepancy between the sum that the Trust should have received, and the amount that the Trust did receive, have discharged their evidential burden of proving Sajan's breach of duty of care. The difference calls for an explanation from Sajan, especially because Sajan is the trustee and should, had he discharged his duty to maintain proper accounts, have been in possession of documents or information that would be able to explain the significant difference.

276 However, Sajan has been either unwilling or unable to provide an explanation. First, there is no explanation in his AEIC.[369] Next, in his testimony at trial, Sajan's only explanation regarding the large discrepancy was that his father handled the business of the Three Struck Off Companies.[370] Furthermore, he claimed that he could not remember whether he had checked the equity of each of the Three Struck Off Companies,[371] and was not even sure if he had been aware of the discrepancy at the material time.[372] Finally, at least in relation to SPL, he admitted that he had not checked to make sure if the Trust had received the right amount from the sale of the Trust Shares in SPL.[373] I infer from the evidence that Sajan failed to ascertain whether the Trust had received the correct amount from the realisation of the Trust Shares in the Three Struck Off

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369 Sajan's AEIC at paras 109−112.

370 Certified Transcript 28 March 2024 at p 106 lines 9−16; p 111 lines 11−19.

371 Certified Transcript 28 March 2024 at p 111 lines 5−10.

372 Certified Transcript 28 March 2024 at p 107 lines 5−22.

373 Certified Transcript 28 March 2024 at p 108 line 16 to p 109 line 7.

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Companies, and his negligent handling of the realisations amounts to a breach of his duty of care in the management of the trust under common law (see *Speight v Gaunt* at 739–740; see also at [67] above).

Sajan also breached his custodial stewardship duty as trustee in his realisation of the Trust Shares in the Three Struck Off Companies

277 Lastly, I find that Sajan's mishandling of the realisation of the Trust Shares at [275] above also amounted to a breach of his custodial stewardship duty as trustee, as there was an unauthorised disbursement or disposal of Trust Assets in breach of trust. In this respect, my analysis above at [249]–[251] as to why Sajan's sales of the Trust Shares in the Two Live Companies constituted a breach of his custodial stewardship duties, attracting the remedy of falsification, is apposite here and applies *mutatis mutandis* to this point as well.

278 In brief, unlike the Conversion of the Founder's Share which could not be rationalised as a disbursement of the Trust Assets, the result is different where a trustee, in breach of trust, disburses moneys or assets out of the trust. That was the case with the sales of the Trust Shares in the Two Live Companies on 18 February 2021; hence, they are conceptualised as defaults on Sajan's custodial stewardship duties as trustee. The same is true of the striking off of the Three Struck Off Companies. The substantive result of that process was that Trust Assets, in the form of the Trust Shares in these three companies, had been disbursed out of the Trust (in exchange for the capital that was returned thereto).

Sajan is liable to pay into the Trust an amount representing the deficiency in the Trust to date

279 As Sajan's striking off of the Three Struck Off Companies and his realisation of the Trust Shares therein at an undervalue was a breach of his

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custodial stewardship duty, the correct remedy is falsification. I disallow the relevant disbursements, with the effect that the Trust is treated as if it still held the Trust Shares in the Three Struck Off Companies to date. As reconstitution of the Trust *in specie* is clearly impossible, Sajan will be required to pay into the Trust an amount representing the deficiency in the Trust to date.

280 In theory, that would be the difference between the value of those Trust Shares *to date* after subtracting the capital that was actually realised back in 2010 and returned to the Trust at the time. However, no valuations of the Trust Shares as at the present date are available – and indeed, any such valuations would be highly speculative, since they would involve guessing whether the companies would or would not have increased in profitability in over a decade since their striking off. As such, I find that the valuations in Mr Arora's report as to the value of the Trust Shares in 2010 at the time of the striking off (see the second column of the table at [269] above) is the best estimate available to assess the value of the Trust Shares to date if they had remained in the Trust.

281 Accordingly, Sajan's liability to the Trust is calculated by taking the sums in the second column of the table at [269] above and subtracting the actual amounts received by the Trust in 2010 upon the striking off of the Three Struck Off Companies. Due to the discrepancies identified at [270] above, I make no finding of fact as to what those amounts were. Instead, these sums are to be ascertained after an account has been taken of the Trust on a wilful default basis, as I ordered at [158]–[160] above. Consequently, I leave it to after the accounting process has been completed for the plaintiffs to submit what the appropriate quantum should be for Sajan to reconstitute the Trust under the remedy of falsification, in respect of the Trust Shares in the Three Struck Off Companies. Likewise, the plaintiffs will have liberty to seek to falsify or

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surcharge the Trust in respect of other entries and transactions, and depending on whatever new information the accounting process throws up (see *Libertarian Investments* at [168]; see also *Glazier Holdings* at [38]–[39] and [42] and *Conaglen* at 129–135).

282 For the purposes of the striking off at issue here, however, the accounting process is relevant *only* to determine the sums received by the Trust in 2010 from the striking off. As I have held, the proper valuation of the Trust Shares in the Three Struck Off Companies has already been adjudicated – *viz*, the second column of the table at [269] above, *per* Mr Arora's valuation. Sajan's liability to make good the deficit in the Trust, under the remedy of falsification, is determined by the difference between the former sums (to be ascertained) and the latter amounts (already adjudicated).

Whether Sajan should be removed as trustee

283 Finally, I come to the question of replacement of Sajan as trustee. The test for whether a trustee should be removed is whether he has acted in a manner "such as to endanger the trust property to [show] a want of honesty, or a want of proper capacity to execute [his or her] duties, or a want of reasonable fidelity" (see the General Division of the High Court decision in *Siraj Ansari bin Mohamed Shariff v Juliana bte Bahadin and another* [2022] SGHC 186 at [81], citing the High Court decision of *Yusof bin Ahmad and others v Hongkong Bank (Singapore) Ltd and others* [1990] 1 SLR(R) 369 at [10]). Given my findings above, that Sajan purported to exclude Devin and Sandeep as beneficiaries in bad faith, and that he repeatedly breached his duty of care when exercising his

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powers under the Trust, along with his inability to read balance sheets[374] and his unfamiliarity with income statements, cash flow statements,[375] and the function of a general ledger for a company,[376] I find that Sajan has displayed a lack of proper capacity to execute his duties as a trustee, as well as a want of reasonable fidelity. As a result, I agree with the plaintiffs that Sajan should be removed as a trustee.

284 However, I decline to grant the plaintiffs' prayer to nominate Lakshmi and Devin as replacement co-trustees.[377] This would create a conflict of interest as Devin would be both a trustee and a beneficiary under the Trust. While I accept that such a situation is not unheard of in other trust arrangements, I am reluctant to create such a conflict of interest when it is within this court's power to prevent that. Therefore, I instead order that a professional trustee be appointed to replace Sajan as trustee of the Trust. If the parties are unable to agree, the parties are each to submit a nominee for the court's consideration within ten days of this decision.

Conclusion

285 For all the reasons above, I allow, to the extent specified in this judgment and summarised below, the plaintiffs' claims against Sajan for breaches of his duties under the Trust:

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374 Certified Transcript 27 March 2024 at p 115 line 22 to p 116 line 1.

375 Certified Transcript 27 March 2024 at p 117 lines 3−15.

376 Certified Transcript 27 March 2024 at p 119 lines 2−10.

377 PCS at para 171.

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(a) I declare that the deeds dated 14 April 2021, which, among other things, purport to terminate Devin's and Sandeep's status as beneficiaries of the Trust, are void (see at [93]–[94] above).

(b) The plaintiffs are entitled to an account of the Trust on a wilful default basis (see at [158]–[160] above).

(c) Sajan is not allowed to claim reimbursement from the Trust for the expenses set out in the table at [161] above.

(d) Sajan is not allowed to claim from the Trust reimbursement exceeding $62,537.82 and $3,520.00 for credit card expenses and insurance premiums, respectively (see at [168] above).

(e) For the wrongful Conversion of the Founder's Share, the plaintiffs are entitled to surcharge the Trust in the amount of $9,522,731.92, for which Sajan is liable to compensate the Trust (see at [221] and [228] above).

(f) For the wrongful sale of the Trust Shares in the Two Live Companies, the plaintiffs are entitled to falsify the Trust and to disallow those entries. Sajan is liable to make good the deficit in the Trust in the following amounts:

(i) $1,495,524.97 for the sale of the Trust Shares in SEPL (see at [259] above); and

(ii) $1,839,853.00 for the sale of the one trust share in LMPL (see at [266] above).

(g) For the realisation of the Trust Shares in the Three Struck Off Companies at an undervalue, the plaintiffs are entitled to falsify

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the Trust and disallow those disbursements. Sajan is liable to make good the deficit in the Trust, with the precise quantity to be reimbursed to the Trust by him to be determined after an account has been taken of the Trust, in accordance with my findings at [269]–[270] and [279]–[282] above.

(h) I also order that Sajan be removed as trustee and be replaced by a professional trustee (see at [284] above). If the parties are unable to agree, the parties are each to submit a nominee for the court's consideration within ten days of this decision.

(i) The parties shall have the liberty to write in for clarifications within ten days of this decision if necessary.

286 In closing, I should record my gratitude to counsel for their extensive assistance. In particular, Mr Thio Shen Yi SC, Mr Nguyen Vu Lan (who conducted part of the examination of witnesses), and Mr Tan all conducted themselves reasonably and helpfully, both to the court and to each other. I should also record my gratitude to counsel for tendering their multiple rounds of submissions timeously. While I stated many years ago in a previous capacity at the Supreme Court in the High Court decision of *The Management Corporation Strata Title Plan No 689 v DTZ Debenham Tie Leung (SEA) Pte Ltd and Another* [2008] SGHC 98 (at [118]), that counsel should bow not only to the court but its schedule (and timelines), I think that such guidelines can only be implemented with the co-operation of counsel, who too operate under their own schedule (and timelines). This is perhaps why the court quite literally *returns* counsel's physical bow as part of custom and tradition. And, even 16 years on, this is why it is to *counsel's* accommodation, past and present, that I remain grateful for.

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287 Unless the parties are able to agree on the appropriate costs order, they are to write in with their submissions, limited to ten pages each, within ten days of this decision.

Goh Yihan
Judge of the High Court

Thio Shen Yi SC, Koh Li Qun Kelvin, Nguyen Vu Lan, Uday Duggal, Ng Qiheng Glenn and Choo Jit Kim Perl (TSMP Law Corporation) for the plaintiffs;
Tan Li-Chern Terence (Robertson Chambers LLC) for the defendant;
Lim Dao Yuan Keith, Sun Lupeng Cedric and Carmen Lee Jia Wen (Damodara Ong LLC) for Shankar's Emporium (Private) Limited, Malaya Silk Store Pte Ltd and Liberty Merchandising Company (Private) Limited (on watching brief).

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