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

[2023] SGHC 273

Suit No 229 of 2021 (Registrar's Appeal No 143 of 2023 and Summons No 2311 of 2023)

Between

(1) SW Trustees Private Limited (In Compulsory Liquidation)
(2) Farooq Ahmad Mann

… *Plaintiffs*

And

(1) Teodros Ashenafi Tesemma
(2) Cheng Ka Wai
(3) Chooi Kok Yaw
(4) Alexander Ressos
(5) Sino Africa Trading Limited
(6) Coca-Cola Sabco (East Africa) Limited

… *Defendants*

And

Teodros Ashenafi Tesemma

… *Third Party*

JUDGMENT

[Civil Procedure — Amendments]
[Civil Procedure — Appeals — Adducing fresh evidence on appeal]
[Limitation of Actions — Postponement of limitation period]

TABLE OF CONTENTS

SW Trustees Pte Ltd (in compulsory liquidation) and another
v
Teodros Ashenafi Tesemma and others
(Teodros Ashenafi Tesemma, third party)

[2023] SGHC 273

General Division of the High Court — Suit No 229 of 2021 (Registrar's Appeal No 143 of 2023 and Summons No 2311 of 2023)
Goh Yihan JC
28 August 2023

29 September 2023 Judgment reserved.

Goh Yihan JC:

1 This is the sixth defendant's appeal against the decision of the learned Assistant Registrar ("the AR") in HC/SUM 1423/2023 ("SUM 1423"). The AR granted leave to the plaintiffs to amend the Statement of Claim (Amendment No 1) (the "SOC A1") in the manner as shown in the draft Statement of Claim (Amendment No 2) (the "Draft SOC A2"),[1] save that: (a) the Draft SOC A2 is to include the reference to the sixth defendant and one Mr Jacques Vermeulen ("Vermeulen") at para 52.5; and (b) the portions relating to the "Depot claims" are to be removed as the plaintiffs are no longer pursuing those changes.

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[1] Plaintiffs' Bundle of Documents dated 23 August 2023 ("PBOD") at Tab 1.

2 In essence, the sixth defendant's appeal is limited to the following amendments allowed by the learned AR:

(a) the introduction of a new allegation of unlawful means conspiracy involving "downward adjustments" to the accounts of AMBO International Holdings Ltd ("AMBO") in 2015 ("downward adjustments conspiracy");

(b) the introduction of a new allegation of fraudulent concealment; and

(c) the addition of a new conspirator in Vermeulen.

3 In addition to its substantive appeal in HC/RA 143/2023 ("RA 143"), the sixth defendant also applied to admit further evidence for the purposes of the appeal in HC/SUM 2311/2023 ("SUM 2311"). After taking some time to consider the matter, I allow SUM 2311, as well as RA 143, for the reasons below.

Brief background

4 It is helpful to begin with the plaintiffs' pleaded case. The first plaintiff was put into insolvent liquidation on 21 June 2019. The second plaintiff, Mr Farooq Ahmad Mann, was appointed as its liquidator. The underlying debt had arisen from an arbitration award obtained on 21 July 2017 by SGI SWE Limited and Schulze Global Investments Holdings LLC (the "SGI Creditors"). The SGI Creditors are the first plaintiff's only creditors. The sixth defendant is Coca-Cola Sabco (East Africa) Limited.

5 In March 2021, the plaintiffs commenced HC/S 229/2021 against the defendants. This was done with the court's permission, which it granted under s 144(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA") in HC/SUM 62/2021. The plaintiffs' unamended case against the sixth defendant is that the first defendant, conspiring with one or more of the defendants, caused assets belonging to the first plaintiff to be sold at an undervalue to, among others, the sixth defendant with no consideration paid to the first plaintiff. More specifically, the plaintiffs' case centres on the sixth defendant's purchase of the first plaintiff's minority shareholding of 5,251,250 shares in AMBO (the "AMBO shares"). AMBO is a company incorporated in Mauritius, and its main asset was its shareholding in AMBO Mineral Water SC ("AMBO Min"), a company incorporated in Ethiopia. This purchase was done pursuant to a Sale and Purchase Agreement dated 23 March 2017 (the "SPA"). The first defendant, Mr Teodros Ashenafi Tesemma ("Ashenafi"), who was a director of the first plaintiff at the material time, negotiated the SPA on the first plaintiff's behalf. Also involved in the negotiation process was the managing agent of AMBO, Mr Melvin Ramasawmy from Trident Trust Company Mauritius (Limited) ("Trident Trust"). The terms of the SPA, which are not disputed, provide that the AMBO Shares are to be sold for US$10,796,784, which the sixth defendant is to pay to the first plaintiff and its nominees.

6 Besides Ashenafi, there were other directors of the first plaintiff at the material time. They were the second and third defendants. The second defendant, Mr Cheng Ka Wai ("Cheng"), was a director of the first plaintiff between 11 December 2009 and 1 August 2017, and was the in-house accountant of the first plaintiff during his directorship. The third defendant,

Mr Chooi Kok Yaw ("Chooi"), was a director of the first plaintiff between 10 October 2012 and 1 August 2017, and was the company secretary of the first plaintiff during that period.

7 Having not received the promised amount, the plaintiffs now say that the sixth defendant's purchase of the AMBO Shares under the SPA was a transaction at an undervalue under s 224 of the IRDA, or its predecessor provisions in s 98 of the Bankruptcy Act 1995 (2020 Rev Ed) read with s 329 of the Companies Act (Cap 50, 2006 Rev Ed). The plaintiffs say that the payment mechanics of the SPA show that the sixth defendant conspired with the other defendants to cause financial damage to the first plaintiff, or to dissipate its assets to the prejudice of creditors. This includes, among other acts, the sixth defendant choosing not to conduct "industry standard" know-your-client and anti-money laundering inquiries on two of the nominees.

8 The sixth defendant's case is that its purchase of the AMBO Shares was a *bona fide* commercial, arms-length transaction that was not at an undervalue. More specifically, during the negotiation and implementation of the SPA, the first plaintiff was represented by reputable international counsel. This counsel had proposed the payment mechanics in the SPA, which the sixth defendant saw no reason to object to. Thus, the sixth defendant says that it made full payment and performed all its obligations under the SPA, including paying all sums required to the first plaintiff and to its nominees. This is evidenced by documents which the sixth defendant has provided in general discovery, including bank transfer advice and bank account statements. Having paid the entire purchase sum of US$10,796,784 as stipulated in the SPA, the sixth defendant says that it would be unjust to require it to pay any further sums to the first plaintiff for the AMBO Shares.

9 Therefore, the sixth defendant says that there was no transaction at an undervalue. Alternatively, the sixth defendant also pleads that the plaintiffs have already accepted that the first plaintiff benefited from the sixth defendant's payment of US$4,375,000 to it, and the sixth defendant's payment of US$43,047 to AMBO. In this regard, the combined value of US$4,418,047 received by the first plaintiff is not significantly less than the value, in money or money's worth, of the AMBO Shares that the sixth defendant purchased at the time of the SPA.

10 It is in this context that the plaintiffs brought the application below to amend the SOC A1 in the terms of the Draft SOC A2. The three relevant amendments that are the subject of the present appeal are as follows:

(a) At paras 52.1 to 52.7 of the Draft SOC A2, the plaintiffs introduce a new cause of action, alleging that all six defendants (except the fifth defendant) and Vermeulen engaged in an unlawful means conspiracy to cause loss to the first plaintiff. This conspiracy involved downward adjustments made by the first defendant and other unnamed persons in 2015 to the accounts of AMBO ("AMBO Accounts").[2]

(b) At para 52.2 of the Draft SOC A2, the plaintiffs introduce a new cause of action, alleging that the first defendant, the sixth defendant, and Vermeulen "knowingly, intentionally, and fraudulently withheld from Trident Trust" the fact that some of the payments in the SPA were to be

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2 PBOD at p 19, para 21.2.3(b).

made to non-parties.[3] According to the plaintiffs, this amounts to fraudulent concealment.

(c) The Draft SOC A2 seeks to join Vermeulen as the seventh defendant to the proceedings.

11 The plaintiffs claim Vermeulen is and was, at all material times, a director of Coca-Cola Beverages Africa (which is the parent company of the sixth defendant). The plaintiffs also claim Vermeulen has been a director of AMBO since 10 November 2016.

The AR's decision

12 In her decision, the AR addressed four objections that the sixth defendant had raised in respect of SUM 1423. These related to: (a) the plaintiffs' delay in bringing the application; (b) the plaintiffs' failure to specify if they were relying on O 15 r 4 or O 15 r 6 of the Rules of Court (2014 Rev Ed) (the "ROC 2014") in their application to join Vermeulen; (c) how the new causes of action sought to be added are time-barred; and (d) how the new causes of action sought to be added are legally and/or factually unsustainable.

13 First, the AR found that while the delay was not ideal, it could be compensated with costs. Second, the AR found that the plaintiffs' failure to specify if they were relying on O 15 r 4 or O 15 r 6 of the ROC 2014 was not fatal. It was also just to add Vermeulen as a defendant to ensure the effectual and complete determination of issues common to Vermeulen and the existing

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[3] PBOD at p 55 at para 52.2.1.

parties. Third, the AR considered that the plaintiffs had discharged their burden of showing that the limitation period could be postponed. Finally, the AR did not find the conspiracy claim to be factually unsustainable. Therefore, the AR allowed SUM 1423 for the plaintiffs to amend the SOC A1 in the terms of the Draft SOC A2, subject to the two qualifications mentioned (see [1] above).

The parties' cases in RA 143

14 I now briefly set out the parties' cases in relation to RA 143.

15 The sixth defendant objects to three amendments in the Draft SOC A2.[4] First, the plaintiffs should not be allowed to introduce a new conspiracy involving downward adjustments to the AMBO Accounts in 2015, because: (a) the amendment does not disclose a reasonable cause of action; (b) the amendment application in SUM 1423 was made after the expiry of the relevant limitation period; and (c) the limitation period may not be postponed. Second, the plaintiffs should also not be allowed to introduce a new allegation of fraudulent concealment because the amendment is factually unsustainable. Finally, the plaintiffs cannot add Vermeulen as a new conspirator because: (a) the amendment does not disclose a reasonable cause of action; (b) Vermeulen has a limitation defence; and (c) joining Vermeulen results in unnecessary incursion of time and costs.

16 In response, the plaintiffs' case is twofold.[5] First, their claim in conspiracy is not time-barred. Second, the amendments are just and necessary

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4 6th Defendant's Written Submissions dated 23 August 2023 ("6DWS") at para 5.

5 Plaintiffs' Written Submissions dated 23 August 2023 ("PWS") at para 6.2.

to allow the real dispute between the parties to be resolved, and any prejudice caused to the sixth defendant is not of such nature and extent as to be irremediable with costs.

Whether SUM 2311 should be allowed

17 I begin with SUM 2311, which is the sixth defendant's application to admit the documents exhibited in Mr Thobeka Nozuko Makaula's Fifth Affidavit dated 31 July 2023. According to the sixth defendant, these documents show that it did not withhold information from Trident Trust on the payment mechanics of the SPA. Instead, the documents show that during the negotiation of the SPA, the sixth defendant's solicitors from the South African law firm of Bowman Gilfillan Incorporated ("Bowman") provided drafts of the SPA to Trident Trust many times, in which the payment mechanics had been set out. Therefore, according to the sixth defendant, these documents conclusively show that the sixth defendant did not conceal any right of action in relation to the payment mechanics of the SPA.[6]

The applicable law

18 The applicable law is not in dispute. Order 56 r 1 of the ROC 2014, which governs registrar's appeals, such as the present appeal, does not expressly deal with the issue of whether further evidence may be admitted on appeal:

> **Appeals from decisions of Registrar to Judge in Chambers (O. 56, r. 1)**
>
> **1.**—(1) An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar.

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6 6DWS at paras 101–103.

> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 112 to attend before the Judge on a day specified in the notice.
>
> (3) Unless the Court otherwise orders, the notice must be issued within 14 days after the judgment, order or decision appealed against was given or made and served on all other parties within 7 days of it being issued.
>
> (4) Except so far as the Court may otherwise direct, an appeal under this Rule shall not operate as a stay of the proceedings in which the appeal is brought.

In contrast, in an appeal to the Court of Appeal, there is a requirement that "no such further evidence (other than evidence as to matters which have occurred after the date of trial or hearing) shall be admitted except on *special grounds*" [emphasis added] (see O 57 r 13(2) of the ROC 2014; see also s 59 of the Supreme Court of Judicature Act 1969 (2020 Rev Ed)).

19 Nevertheless, the threefold requirements set out in the seminal English Court of Appeal decision of *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") govern the admissibility of new evidence in the present case (see, *eg*, the Court of Appeal decisions of *Toh Eng Lan v Foong Fook Yue and another appeal* [1998] 3 SLR(R) 833 at [34], *ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499 at [99], and *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 ("*Anan Group*") at [21]). The three requirements in *Ladd v Marshall* are:

(a) first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or hearing;

(b) second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

(c) third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

20 However, the *Ladd v Marshall* requirements do not apply with full force in all appeals. In this regard, the Court of Appeal in *Anan Group* set out a two-step analysis that a court should adopt in dealing with an application to adduce fresh evidence on appeal. At the first stage, the court should consider the nature of the proceedings below and evaluate the extent to which it bore the characteristics of a full trial. The cases should be analysed as lying on a spectrum as follows (see *Anan Group* at [35]).

(a) On one end of the spectrum, there are appeals against a judgment after trial or a hearing bearing the characteristics of a trial, where the court should apply the *Ladd v Marshall* requirements in its full rigour.

(b) On the other end of the spectrum, which consists of interlocutory appeals or appeals arising out of hearings which lack the characteristics of a trial, the court remains guided by the rule in *Ladd v Marshall* but is not obliged to apply it in an unattenuated manner.

(c) However, for cases falling in the middle of the spectrum, which include appeals against a judgment after a hearing of the merits but which did not bear the characteristics of a trial, the court is to determine the extent to which the first requirement, *ie*, the criterion of non-availability, should be applied strictly. Relevant non-exhaustive factors include: (i) the extent to which documentary and oral evidence was adduced for the purposes of the hearing; (ii) the extent to which parties had the opportunity to revisit and refine their cases before the hearing;

and (iii) the finality of the proceedings in disposing of the dispute between the parties.

21 At the second stage, the court should determine whether there are any other reasons for which the *Ladd v Marshall* requirements ought to be relaxed in the interests of justice (see *Anan Group* at [37]–[54]). In any event, the court should conduct a balancing exercise between the interests of finality and the right of an applicant to put forth relevant and credible evidence, having regard to the considerations of proportionality and prejudice (see *Anan Group* at [59]).

22 Therefore, because the learned AR's decision below was an interlocutory hearing that is unlike a trial or the taking of oral evidence, the *Ladd v Marshall* requirements serve only as a guideline that the court is entitled but not obliged to refer to in the exercise of its unfettered discretion (see *Anan Group* at [35]). Indeed, applying *Anan Group*, the High Court in *Fauziyah bte Mohd Ahbidin (executrix of the estate of Mohamed Ahbideen bin Mohamed Kassim (alias Ahna Mohamed Zainal Abidin bin Kassim), deceased) v Singapore Land Authority and others* [2020] SGHC 123 (at [26]–[28]) held that a striking out application was a purely interlocutory hearing for which the attenuated *Ladd v Marshall* requirements should apply. This would be even more so in the present case, which concerns an application to amend pleadings. As such, I disagree with the plaintiffs' reliance on cases such as *Chan Tam Hoi (alias Paul Chan) v Wang Jian and other matters* [2022] SGHC 192 (at [31]–[32]) to argue for a more stringent application of the first criterion of availability. This is because the cases cited by the plaintiffs all concerned

applications or appeals at much later stages of proceedings, for instance, an appeal following a full trial.[7]

23 Further, even if I am wrong and it might be said that the present application to amend bears some resemblance to an appeal against a judgment after a hearing of the merits, in so far as the sixth defendant objects to the amendments as being liable to be struck out, *ie*, it is a case falling in the middle of the spectrum, it would still be open to me to relax the first criterion of non-availability and focus on the second and third criteria of relevance and credibility (see *Anan Group* at [37]).

My decision: SUM 2311 is allowed

24 I allow SUM 2311 because I am satisfied that the three requirements in *Ladd v Marshall*, which need not be applied strictly in the present case, are, in any event, fulfilled.

25 First, I am satisfied that the sixth defendant has provided a satisfactory explanation as to why the documents sought to be adduced in SUM 2311 had not been surfaced earlier. Although the plaintiffs argue that the sixth defendant had known about the documents at the time of SUM 1423,[8] the sixth defendant does not deny that the documents have always been in its possession at the time SUM 1423 was heard.[9] I accept the sixth defendant's explanation that it did not fully appreciate the significance of Bowman's communications with Trident

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7 PWS at paras 17–18.

8 PWS at para 21.

9 6DWS at para 108; Fifth Affidavit of Thobeka Nozuko Makaula dated 31 July 2023 at para 33.

Trust prior to the hearing of SUM 1423 because the affidavits and submissions in that application had been focused on whether the plaintiffs had pleaded a reasonable cause of action in relation to a new conspiracy involving a depot.[10] Moreover, the first criterion of non-availability can be relaxed given that the present application, being an application to amend pleadings, is an interlocutory matter that is being contested at a relatively early stage of the litigation, where it may be "unjust to expect a party to have all his tackle in order" (see the Court of Appeal decision of *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159 at [55], citing *Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick (a firm)* [2001] 1 BCLC 589 at 621*a–b*).

26 Second, it is clear that the documents are relevant in determining whether there was fraudulent concealment on the part of the sixth defendant. This will have an important influence in the present case because if these documents are admitted, then the allegations in the Draft SOC A2 that the sixth defendant was involved in fraudulent concealment would fall away as being "contradicted by all the documents or other material" (see the Court of Appeal decision of *The "Bunga Melati 5"* [2012] 4 SLR 546 at [37], citing the House of Lords decision of *Three Rivers District Council and others v Bank of England (No 3)* [2001] 2 All ER 513 at [95]).

27 More broadly, the documents are relevant in disproving the plaintiffs' allegations that the sixth defendant and Vermeulen fraudulently concealed a right of action by not disclosing the payment mechanics in the SPA from Trident

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[10] 6DWS at paras 105–106.

Trust. In this regard, I do not agree with the plaintiffs' argument that the documents are immaterial because s 29(1)(*b*) of the Limitation Act 1959 (2020 Rev Ed) (the "LA") can apply to a claim of conspiracy even where the fraudulent concealment of the right of action did not involve *every* conspirator.[11] The plaintiffs relied on the High Court decision of *Sang Cheol Woo v Charles Choi Spackman and others* [2021] SGHC 42 ("*Sang Cheol Woo*") (at [85]–[86]) for this argument.[12] However, before me, counsel for the plaintiffs, Mr Yap Zhan Ming ("Mr Yap"), accepted that the case does not go so far. Indeed, in my view, the court in *Sang Cheol Woo* was not referring (at [86]) to the claim of conspiracy. Further, I do not find the plaintiffs' argument convincing because if it can be shown that a party (in this case, the sixth defendant and Vermeulen) did not fraudulently conceal the right of action, then it must follow that they were not part of a conspiracy to do such a thing.

28 Further, the plaintiffs argue that the documents are immaterial because the plaintiffs' case against the sixth defendant is not limited to the negotiation with Trident Trust. Therefore, the plaintiffs submit that the documents do not completely dispose of the issue of whether the sixth defendant concealed any right of action in the negotiation of the SPA. However, as counsel for the sixth defendant, Mr Wilson Zhu ("Mr Zhu"), highlighted before me, the plaintiffs' characterisation is inconsistent with the sworn affidavit of the second plaintiff, where he described the plaintiffs' pleaded case on conspiracy as "knowingly, intentionally and fraudulently withholding from Trident Trust".[13] Mr Zhu also

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11 PWS at para 24.

12 PWS at para 34.

13 2nd Affidavit of Kimberly Ng Qi Yuet dated 11 August 2023 at para 13.2.

pointed out that the plaintiffs' further and better particulars dated 19 July 2022 at para 1 responded to the SOC A1 at para 21C, concerning whether the sixth defendant had made due diligence enquiries with respect to the SPA. This allegation has now been removed in the Draft SOC A2. This therefore reinforces Mr Zhu's point that the plaintiffs' case against the sixth defendant is limited to the negotiation with Trident Trust. Thus, I agree with Mr Zhu's arguments on both these points and therefore reject the plaintiffs' argument that the documents are immaterial.

29 Third, I am satisfied that the documents are apparently credible because they are contemporaneous documents generated by two professional firms, namely, Bowman and Trident Trust. In any event, the plaintiffs do not seem to dispute the apparent credibility of the documents.

30 For all these reasons, I allow SUM 2311 and admit the documents exhibited in Mr Thobeka Nozuko Makaula's Fifth Affidavit dated 31 July 2023.

Whether the amendment to introduce a new "downward adjustments" conspiracy claim should be allowed

The applicable law

31 The applicable law in relation to the amendments of pleadings is well established. In the High Court decision of *Wang Piao v Lee Wee Ching* [2023] SGHC 216 ("*Wang Piao*"), the court, after an examination of the relevant case law, held that a court could apply the following three-stage analytical framework in determining an application to amend (at [40]):

> (a) First, the court should determine the stage of proceedings at which the amendments are sought. This would affect how the general principles apply. More broadly, the later

> an application is made, the stronger would be the grounds required to justify it.
>
> (b) Second, the court should consider whether the amendments sought would enable the real question or issue in controversy between the parties to be determined. It is relevant to consider whether the application is made in good faith, and whether the proposed amendments are material.
>
> (c) Third, the court should consider whether it is just to allow the amendments, by assessing, *eg*, whether the amendments would cause any prejudice to the other party which cannot be compensated in costs, and whether the applying party is effectively asking for a second bite of the cherry.

32 Shortly after, the High Court in *Riviera Co, Ltd v Toshio Masui* [2023] SGHC 223 (at [14]) added an important gloss to the second stage of the three-stage analytical framework in *Wang Piao*:

> Goh JC's judgment provides a helpful overview and synthesis of the case law. I would add to his identification of the inverse relationship between stage of proceedings and the court's readiness to grant amendments the following gloss. This inverse relationship is explained by the operation of two complementary factors, one concerning the public interest in fair access to justice and the other the balance to be struck between the private interests of the parties. Fair access to justice means that litigants should not be punished for mistakes in their pleadings and should be given the opportunity to amend them where the other party can be compensated for any prejudice by an award of costs and grant of additional time or other consequential directions. But at the same time, judicial resources are scarce, which means that litigants should exercise reasonable diligence and bring forward their cases or defences at the appropriate stage of proceedings. As for the balance of private interests, the inconvenience and strain on the other party caused by an amendment worsens the later an amendment is sought. When an amendment is sought only after the original claim or defence has proved unsustainable, then the party seeking the amendment has a considerable burden of explanation concerning why it was not sought earlier.

33 In the present case, much turns on the second stage of the above framework. This is because the sixth defendant argues that the amendments

should not be allowed because they do not disclose a reasonable cause of action and hence would be struck out under O 18 r 19 of the ROC 2014.[14] Further, the sixth defendant also argues that the plaintiffs' application in SUM 1423 was made after the expiry of the relevant limitation period for the tort of conspiracy.[15] In this regard, the materiality of the proposed amendments is a related consideration as to whether the amendments sought would enable the real question or issue in controversy between the parties to be determined. This is because a court should not be asked to adjudicate on a pleading that is clearly unsupported in law.

My decision: the amendment to introduce a new "downward adjustments" conspiracy claim is not allowed

34 In my judgment, the amendment to introduce a new "downward adjustments" conspiracy claim should not be allowed for the following reasons.

The amendment does not disclose a reasonable cause of action

35 First, the amendment does not disclose a reasonable cause of action under O 18 r 19(1)(*a*) of the ROC 2014 in the sense that it "has some chance of success when only the allegations in the pleading are considered" (see the Court of Appeal decision of *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [21]). In this regard, O 18 r 7(1) of the ROC 2014 requires that every pleading contains "material facts on which the party pleading relies for his claim or defence". Facts are material when they are necessary for the purpose of formulating a complete cause of action (see the

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14 6DWS at paras 26–40.

15 6DWS at para 5(a)(i).

High Court decision of *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and others* [1992] 2 SLR(R) 382 ("*Multi-Pak*") at [29]). In this regard, the facts relevant to each element should be pleaded specifically (see the Court of Appeal decision of *V Nithia (co-administratix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [44]). If material facts are not pleaded, the pleading discloses no reasonable cause of action and may be struck out (see *Multi-Pak* at [24(a)], citing the English Court of Appeal decision of *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712).

36 What then are the elements of the plaintiffs' pleaded cause of action in the present case? To begin with, the elements of unlawful means conspiracy are set out in the Court of Appeal decision of *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 (at [112]): (a) a combination of two or more persons to do certain acts; (b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts; (c) the acts were unlawful; (d) the acts were performed in furtherance of the agreement; and (e) the plaintiff suffered loss as a result of the conspiracy.

37 In particular, to establish the requisite combination in the first element, the plaintiffs must plead the material facts of how the co-conspirators came together to take some form of concerted action in pursuit of a common object or design (see Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 15.054). Thus, it is not enough for the plaintiffs to only plead a "combination" without any particulars. Indeed, the importance of this principle was illustrated in the English Court of Appeal decision of *Elite Property Holdings Ltd and another v Barclays Bank Plc* [2019] EWCA Civ 204. In that case, the court dismissed the claimant's appeal

in an application to amend their pleadings because the proposed amendments merely stated a "combination" between the alleged conspirators without any particulars of what the conspirators combined to do (at [72]–[73]).

38 In the present case, the Draft SOC A2 merely states at para 52.1 that Ashenafi, Cheng, and/or Chooi, on the one hand, and the sixth defendant and/or Vermeulen, on the other hand, caused the first plaintiff to dispose of the AMBO Shares at an undervalue. The plaintiffs then refer to paras 20D to 21.3 of the Draft SOC A2 for the necessary particulars, which I reproduce below:[16]

> 20D. In 2016, and certainly by in or around November 2016, Ashenafi was in negotiations with [the sixth defendant] concerning the sale and purchase of the Disposed AMBO Shares, which were at the time registered to and held by the 1st Plaintiff.
>
> 21. On 15 March 2017, Ashenafi with the assistance, knowledge, acquiescence and/or consent of the other directors of the 1st Plaintiff at the time, Cheng and/or Chooi, and/or [the sixth defendant] and/or Vermeulen, caused the 1st Plaintiff to transfer the Disposed AMBO Shares to [the sixth defendant] at an undervalue pursuant to the Coca-Cola SPA.
>
> **Particulars**
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> 21.1. Pursuant to the Coca-Cola SPA (which was signed by *inter alios* Vermeulen on [the sixth defendant's] behalf), the Disposed AMBO Shares were sold by the 1st Plaintiff to [the sixth defendant] for the AMBO Share Consideration.
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> 21.2. The sale by the 1st Plaintiff of the Disposed AMBO Shares was a transaction at an undervalue because the AMBO Share Consideration was significantly less than the value of the Disposed AMBO Shares.

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16 PBOD at pp 15–20.

21.2.1. The AMBO Share Consideration was arithmetically consistent with the purchase by [the sixth defendant] of shares in AMBO Min in 2016.

21.2.2. The sole asset held by AMBO at all material times was its shareholding in AMBO Min.

21.2.3 In or around 2016, [the sixth defendant] procured AMBO to purchase a 33% shareholding in AMBO Min from the Ministry of Public Enterprises of Ethiopia for a consideration of US$19,782,807 (the "**AMBO Min Transaction**").

(a) The Plaintiffs aver that the AMBO Min Transaction was itself a transaction at an undervalue.

(b) In or around 2015, the 1st Defendant had caused, and with the support of the directors of AMBO Min and/or AMBO, adjustments to be made to the accounts of AMBO for FY2015, such that they reflected a "*small loss*" when AMBO Min had in fact made a profit of around US$4 million during the relevant period (the "**Adjusted Accounts**").

Particulars

(i) This adjustment was apparent from an email from Ashenafi to Cheng dated 25 August 2015, wherein Ashenafi said that "*For 2015, the company made a USD$4 million profit, but we had to make an accounting adjustment which shows a small loss*".

(ii) The said adjustment was made to the accounts of AMBO as at 31 March 2015.

(iii) These are the best particulars the Plaintiffs are able to plead at the present time, pending *inter alia* further and better particulars, interrogatories, and/or discovery.

> (c) The share consideration in the AMBO Min Transaction was valued on the basis of the Adjusted Accounts, which were calculated to depress the valuations.
>
> 21.2.4. Insofar as the AMBO Share Consideration was arithmetically consistent with the share consideration in the AMBO Min Transaction, the Disposed AMBO Shares were worth significantly more than the AMBO Share Consideration.
>
> 21.3. The 1st Plaintiff became insolvent as a result of the sale of the Disposed AMBO Shares to [the sixth defendant].
>
> 21.3.1. But for the sale by the 1st Plaintiff to [the sixth defendant] of the Disposed AMBO Shares for the AMBO Share Consideration (being significantly lower than the true value of the Disposed AMBO Shares), the 1st Plaintiff would have had sufficient assets and/or cash flow to fulfil its obligations … [to its creditors].
>
> [emphasis in original]

39 Before me, Mr Yap also confirmed that the plaintiffs' pleaded case regarding the tort of unlawful means conspiracy is "to cause the disposed AMBO Shares to be transacted at an undervalue".

40 However, fundamental elements of the tort of unlawful means conspiracy are missing from the pleaded facts. For example, there is no allegation that the sixth defendant or Vermeulen combined with the first defendant to commit the act of making downward adjustments of AMBO's financial statements in 2015. Similarly, the plaintiffs have not pleaded any facts to support the inference that the sixth defendant or Vermeulen had combined with the first defendant to commit the undervaluing of the AMBO Shares. Thus, the amended pleadings on the "downward adjustments" conspiracy should be

rejected for not disclosing a reasonable cause of action against the sixth defendant or Vermeulen.

The "downward adjustments" conspiracy is time-barred

41 Second, the sixth defendant is entitled to a limitation defence against the plaintiffs' new claim that it was involved in an unlawful means conspiracy to carry out the sale and purchase of the disposed AMBO Shares at an undervalue in March 2017, including by causing alleged "downward adjustments" to the AMBO Accounts in 2015.

42 As a starting point, unlawful means conspiracy is a tort. Thus, pursuant to s 6(1)(*a*) of the LA, the limitation period for bringing a cause of action in conspiracy is six years from the date on which the cause of action accrued. If the plaintiffs' new case on conspiracy is based on the sixth defendant's purchase of the first plaintiff's AMBO Shares at an undervalue, the sixth defendant would be entitled to raise a limitation defence from 23 March 2023 onwards. This would be six years from the date of the first plaintiff's sale of the AMBO Shares under the SPA.

43 Given that the limitation period for bringing a claim in a "downward adjustments" conspiracy has lapsed, the plaintiff's proposed amendments cannot be permitted under O 20 r 5(1) of the ROC 2014, which provides that the amendment of pleadings may be allowed "on such terms as to costs or otherwise as may be just and in such manner (if any)" as the court may direct. In my view, it would not be just to allow the amendments because they would prejudice the limitation defences available to the sixth defendant. In this regard, the Court of Appeal in *Management Corporation Strata Title Plan No 3322 v*

Mer Vue Developments Pte Ltd [2016] 4 SLR 351 summarised the correct operation of O 20 r 5 in a case where a question of limitation could arise (at [48]):

> (a) First, it must be determined whether the amendment, if allowed, would prejudice the other party's limitation defence … this is a question of fact that can only be answered on a case by case basis. A key consideration in this regard is whether the amendment *effectively* allows the plaintiff to prosecute a claim which would otherwise have been time-barred if it were brought under a new writ. Courts should have regard not only to the form, but also to the practical effect of the amendment.
>
> (b) If it is determined that the amendment would *not* prejudice the other party's limitation defence, the court should then consider whether it would be just to allow the amendment under O 20 r 5(1).
>
> (c) On the other hand, if it is determined that the amendment *would* prejudice the other party's limitation defence, the court can only allow the amendment under O 20 rr 5(2)–5(5). The court must first consider whether the amendment falls within one of the three categories mentioned in O 20 rr 5(3)–5(5) (*ie*, whether the amendment is an amendment to correct the name of a party, to alter the capacity in which a party sues, or to add or substitute a new cause of action based on facts already pleaded). If it does, the amendment may *only* be allowed if the requirements in the applicable paragraph are satisfied and if the court deems it just to allow the amendment. If it does not, the amendment must be disallowed.
>
> [emphasis in original]

In summary, beyond the three exceptions in O 20 rr 5(3)–5(5) of the ROC 2014, an amendment introducing a new cause of action would not be allowed after the expiry of the relevant limitation period if the amendments would prejudice a limitation defence.

44 The plaintiffs seek to escape from the limitation period by arguing that the new conspiracy claim arises out of substantially the same facts as pleaded

in the SOC A1.[17] Thus, since those facts were pleaded[18] before 23 March 2023, the limitation period would not apply to the new conspiracy claim. I disagree with this argument. This is because the plaintiffs' previous case under the SOC A1 at para 21 was that the undervalue transaction and conspiracy allegedly committed by the sixth defendant were based solely on the payment mechanics in the SPA.[19] Put differently, the SOC A1 does not contain any allegation that the true value of the AMBO Shares is more than the sale price of US$10,796,784. It also does not contain any pleadings that relate to AMBO's purchase of shares in AMBO Min in 2016, which the plaintiffs have now suggested was part of the new "downward adjustments" conspiracy. There is also nothing pleaded to suggest that Vermeulen was a conspirator in combination with the sixth defendant. Therefore, it is not the case that the plaintiffs are making explicit what was already implied in existing pleadings (see the Court of Appeal decision of *Lim Yong Swan v Lim Jee Tee and another* [1992] 3 SLR(R) 940 at [19]), which Mr Yap accepted during his oral submissions. Instead, they are seeking to circumvent the limitation period through the amendments, which should not be allowed.

The time-bar is not postponed

45 Third, and relatedly, I find that the time-bar has not been postponed so as to allow for the amendments. In this regard, the plaintiffs argue that their new cause of action should be allowed as the limitation period for bringing a

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17 PWS at paras 59–61.

18 At least in relation to facts pleaded in the original SOC dated 3 March 2021.

19 PBOD at pp 74–76 at para 21.

conspiracy claim has been postponed under ss 29(1)(*a*) or 29(1)(*b*) of the LA. These provisions provide as follows:

> **Postponement of limitation period in case of fraud or mistake**
>
> **29.**—(1) Where, in the case of any action for which a period of limitation is prescribed by this Act —
>
> (*a*) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;
>
> (*b*) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (*c*) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the claimant has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

(1) The applicable law for s 29(1)(*a*) of the LA

46 I begin with the interpretation of s 29(1)(*a*) of the LA. In my view, for s 29(1)(*a*) to be properly invoked, fraud must be an element of the cause of action. This is clear from the express wording of the provision, where the action must be "*based upon* the fraud of the defendant" [emphasis added]. In contrast, other provisions in the LA, such as s 22(1)(*a*), use the phrase "in respect of any fraud". This suggests that fraud must be the very basis of the cause of action for s 29(1)(*a*), while it may suffice for s 22(1)(*a*) if fraud is merely present but not an element of the cause of action (see the High Court decision of *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 ("*Lim Ah Leh*") at [201(a)]).

47 Given the dearth of local authority on this issue, I turn to English decisions that have interpreted substantially similar provisions, which are s 32 of the Limitation Act 1980 (c 58) (UK) (the "UK LA 1980") and its predecessor

in s 26 of the Limitation Act 1939 (c 21) (UK) (the "UK LA 1939"). Section 32 of the UK LA 1980 provides as follows:

> **32 Postponement of limitation period in case of fraud, concealment or mistake.**
>
> (1) Subject to subsection (3) subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

48 On the other hand, s 26 of the UK LA 1939 provides as follows:

> **26. Postponement of limitation period in case of fraud or mistake.**
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid, or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—
>
> > (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed, or
> >
> > (ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

49 Despite their substantial similarity with s 29(1) of the LA, there are several differences between the Singapore and the UK provisions. First, although s 29(1)(*a*) of the LA provides that fraud may be of the "defendant or his agent or of any person through whom he claims or his agent" and this is identical to s 26(a) of the UK LA 1939, s 32(1)(a) of the UK LA 1980 refers only to the "fraud of the defendant". Second, both s 29(1)(*b*) of the LA and s 26(b) of the UK LA 1939 refer to the right of action being "concealed by the fraud of any such person aforesaid", but s 32(1)(b) of the UK LA 1980 requires the right of action to be "deliberately concealed from [the plaintiff] by the defendant". It is clear that s 29(1) of the LA is *in pari materia* with s 26 of the UK LA 1939 but not necessarily with s 32 of the UK LA 1980.

50 The above differences may be explained by the fact that the earliest version of the LA – the Limitation Ordinance 1959 (Ord No 57 of 1959) – was enacted to repeal the legislation relating to limitation of actions and to adopt the UK LA 1939 (see the Court of Appeal decision of *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 at [50]). This legislative history was summarised during the second reading of the Limitation

Bill 1959 (see State of Singapore*, Legislative Assembly Debates, Official Report* (2 September 1959), vol 11 at cols 586–587 (Kenneth Michael Byrne, Minister for Labour and Law):

> Mr Speaker, Sir, in the Federation, a committee was set up in 1950 to consider the law relating to limitations. This committee recommended the adoption of the English law of limitations as contained in the Limitation Act of 1939. As a result, the Federation, in 1953, enacted the Limitation Ordinance. The Singapore Bar Committee has also considered the matter and has recommended that legislation on the lines of the English Limitation Act, 1939, and the Federation Limitation Ordinance, 1953, be enacted in Singapore.

The same was noted by the Law Reform Committee in 2007, that the "Limitation Act (Cap 163) was enacted in 1959 … and is modelled on the UK Limitation Act 1939" (see Singapore Academy of Law, *Report of the Law Reform Committee on The Review of the Limitation Act (Cap 163)* (February 2007) (Chairperson: Charles Lim Aeng Cheng) at p 4).

51 When the UK LA 1939 was repealed in favour of the UK LA 1980, some provisions in the LA had been amended accordingly (see *Singapore Parliamentary Debates, Official Report* (29 May 1992), vol 60 at col 32 (Prof Shunmugam Jayakumar, Minister for Law)). However, s 29 of the LA had not been amended to incorporate the changes in s 32 of the UK LA 1980. In this regard, where the interpretation of s 29 of the LA is concerned, the English cases that applied s 26 of the UK LA 1939 would be of greater persuasive value than the cases that applied s 32 of the UK LA 1980.

52 With that being said, the English courts have been divided on the issue of whether fraud must be an element of the cause of action in s 32(1)(a) of the UK LA 1980 or s 26(a) of the UK LA 1939. I begin with the seminal

decision of the English Court of Appeal in *Beaman v ARTS Ltd* [1949] 1 All ER 465 ("*Beaman*"), which arose out of the events of the Second World War. Prior to the war, the plaintiff entrusted five packages to the defendants. When the war broke out, the defendants gave away the packages without seeking the plaintiff's consent. The plaintiff later commenced an action in conversion for the return of her packages more than six years after the packages were disposed of. The plaintiff relied on s 26(a) of the UK LA 1939. Lord Greene MR held as follows (at 467):

> … It must be borne in mind that s 26 is a section of general application. It applies to every sort of action which is affected by the Act. Of these many can properly be said to be based on fraud, *eg*, an action for damages for deceit and an action claiming rescission of a transaction brought about by fraud. In all such cases fraud is a necessary allegation in order to constitute the cause of action. In other actions covered by the Act fraud is not a necessary allegation at all and the action of conversion is one of them. Indeed, the word 'fraudulent' in connection with conversion, however important it may be in a criminal matter, is, in the civil action of conversion, so far as regards the cause of action, nothing more than an abusive epithet. I am of the opinion, therefore, that the language of s 26, para *(a)*, means what it says and that the action was not based in fraud.

These views were echoed by Somervell and Singleton LJJ, who held that "fraud has to be proved [in any proceeding in a court of law, including an ecclesiastical court] for the plaintiff to succeed" and "[c]onversion includes fraudulently conversion, but an action for conversion is not 'based upon' fraud", respectively (at 470 and 472).

53 Many subsequent decisions have applied the holding in *Beaman*. I summarise the relevant decisions below.

(a) In the English Court of Appeal decision of *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216, the plaintiffs brought an action against, among other parties, an auditor of the defendant company for acting fraudulently and being in breach of trust. The auditor had been entrusted with £80,000 by the plaintiffs but fraudulently retained those moneys for himself. Applying *Beaman*, Danckwerts J held that s 26(a) of the UK LA 1939 applied as the action was "based on the fraud of [the auditor], because [the auditor] made the payments in fraud of the plaintiffs and, therefore, within those terms" (at 1223).

(b) In the English Court of Appeal decision of *Regent Leisuretime Ltd v Natwest Finance (Formerly County NatWest Ltd)* [2003] All ER (D) 385 (Mar) ("*Regent Leisuretime*"), a company commenced an action against a bank claiming damages for negligence and/or fraudulent misrepresentation. Jonathan Parker LJ found that the claim for damages for fraudulent misrepresentation (*ie*, a claim for deceit) fell within s 32(1)(a) of the UK LA 1980. Crucially, the learned judge held that it was immaterial that there had been an alternative claim of negligence, because the fact that damages in respect of a particular loss "may be founded on more than one cause of action does not mean that the causes of action are to be treated as the same". Further, the measure of damages for fraudulent misrepresentation was not the same as that for negligence (at [100]).

(c) In the English High Court decision of *Chagos Islanders v Attorney General and another* [2003] All ER (D) 166 (Oct), Duncan Ouseley J reiterated that an action based on fraud requires an allegation

of fraud to be a necessary part of the cause of action. Therefore, the learned judge held that "a claim for conversion, with the added but unnecessary epithet '*fraudulent*', was not a claim based on fraud" [emphasis in original] (at [619]).

(d) More recently, in the English High Court decision of *Sixteenth Ocean GmbH & Co KG v Société Généralé* [2018] EWHC 1731 (Comm) ("*Sixteenth Ocean*"), Peter Macdonald Eggers QC held that s 32(1)(a) of the UK LA 1980 "extends only to common law fraud (in the sense of a deceit) and to fraud recognised as such in equity, but does not extend to wrongs or breach of duty carried out dishonestly or involving dishonesty, but not involving fraud" (at [137]). Importantly, the learned judge discussed the policy considerations behind the postponement of limitation periods for claims based on fraud (at [137]):

> … The policy considerations which underline an extension of the running of time under the 1980 Act for claims based on fraud are based on its deceptive nature and the fact that by that nature the existence of the fraud might not emerge into the light for some time. It might be said that a similar consideration applies to at least some instances of dishonesty, but section 32(1)(a) makes no reference to any ground of claim other than fraud. Furthermore, I would not be prepared to accept that section 32(1)(a) extends to claims based on any unconscionable conduct, even if not fraudulent or dishonest, not least because the language of the statutory provision does not extend so far.

54 One decision that has not applied *Beaman* and taken a contrary interpretation of s 32(1)(a) of the UK LA 1980 is the English High Court decision of *Attorney General of Zambia (for and on behalf of the Republic of Zambia) v Meer Care & Desai (a firm) and others* [2007] All ER (D) 97 (May) ("*Meer Care*"). This was an action brought by the Attorney General of Zambia

("AGZ") against the defendants who had diverted large sums away for private purposes. There were three main claims: (a) a claim for the transfer of US$52m from Zambia to a bank account operating outside ordinary governmental processes; (b) a claim against one defendant for breach of fiduciary duty by receiving £100,000 per annum for the letting of a property owned by the Zambian government; and (c) a claim for US$20m paid by the Zambian government pursuant to an alleged arms deal. Some of the defendants raised limitation defences, but the AGZ relied on s 32(1) of the UK LA 1980. Peter Smith J held that s 32(1)(a) applied to the causes of action of fraudulent conspiracy and dishonest assistance (at [384]–[386]):

> 384. I accept that AGZ's claim as pleaded against the participating Defendants is one of dishonesty i.e. fraudulent conspiracy and dishonesty i.e. dishonest assistance. In my judgment the claims plainly fall within Section 32 LA 1980. I conclude that for two reasons. First I do not accept that the restricted wording as to be found in the cases under the earlier Act has any application. I accept the equation of fraud and dishonesty as set out in the *Gwembe* case. In other words one looks at the allegation. Not every breach of trust is fraudulent or dishonest. Nor is every conspiracy necessarily fraudulent. It seems to me that the word fraud in section 32 if equated to dishonest should look at the nature of the allegations against the person in question. It is different in the case of dishonest assistance because that is an essential ingredient of the claim.
>
> 385. There are sound reasons for this general approach. I accept the primary purpose of the Limitation Act is to provide for a claim to be brought within a reasonable period. The purpose of that is as IM says in his closing submissions to avoid people having stale actions brought against them. When a party is aware of a claim it is not inappropriate that there should be a reasonable time limit within such a claim is brought.
>
> 386. The counterpart to that however is where parties are the subject matter of dishonest conduct. It seem [*sic*] to me plain that the balancing exercise as against stale claims is that when someone is defrauded or is the subject of dishonest conduct they are not to be disadvantaged until they have an opportunity to discover the wrongful acts. The reason for that is that it would be an unsatisfactory state of law if people who behaved

> dishonestly could escape liability by successfully hiding their wrongdoings for the period of the primary limitation period. That would encourage fraudsters.

In so doing, the learned judge widened the scope of applicable claims falling within s 32(1)(a) of the UK LA 1980 to include claims where dishonesty is an essential ingredient, because the UK LA 1980 would not have allowed people who behaved dishonestly to escape liability by hiding their wrongdoings during the limitation period.

55 However, the court in *Sixteenth Ocean* observed (at [135]) that the court in *Meer Care* "did not consider itself bound by the Court of Appeal's decision in *Beaman*", given that "the Court of Appeal's interpretation was influenced by the use of the word '*fraud*' in connection with the separate provision for concealment [s 26(b)] in the 1939 Act, a word now replaced by '*deliberate*' in section 32(1)(b) of the 1980 Act" [emphasis in original]. Put differently, *Sixteenth Ocean*'s interpretation of *Meer Care* was that while ss 26(a) and 26(b) of the UK LA 1939 both contained the word "fraud", ss 32(1)(a) and 32(1)(b) of the UK LA 1980 contains the word "fraud" and "deliberate", respectively. Therefore, the court in *Meer Care* widened the scope of applicable claims under s 32(1)(a) of the UK LA 1980 by equating the meaning of "fraud" with the meaning of "deliberate", the latter of which was the focus in *Beaman*.

56 Further, the legislative purpose of the UK LA 1980 has also been the subject of differing views. Although the English High Court in *Meer Care* interpreted it widely to include dishonesty, the UK Supreme Court in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners (formerly Inland Revenue Commissioners); Test Claimants in the FII Group Litigation and others v Revenue and Customs Commissioners (formerly Inland*

Revenue Commissioners) [2020] 3 WLR 1369 ("*FII Group*") preferred a narrower interpretation. In their majority judgment, Lord Reed PSC and Lord Hodge DPSC noted that the fundamental purpose of limitation statutes is "to set a time limit for the bringing of claims" by "putting a certain end to litigation and … preventing the resurrection of old claims" (at [155], citing United Kingdom, Law Revision Committee, Fifth Interim Report on Statute of Limitations (Cmd 5334, 1936) (Chairman: Lord Wright) at para 7). However, more specifically, the purpose of s 32(1) of the UK LA 1980 "is to ensure that a claimant is not disadvantaged, so far as limitation is concerned, by reason of being unaware of the circumstances giving rise to his cause of action as a result of fraud, concealment or mistake" (at [193]). In this regard, the findings of the learned judges in *FII Group* suggest that the scope of applicable claims under s 32(1) of the UK LA 1980 is limited to the categories expressly listed in the statutory provision, *ie*, fraud, concealment, or mistake, as opposed to dishonesty as interpreted by the court in *Meer Care*.

57 Having had the benefit of reviewing the English authorities, I find that s 29(1)(*a*) of the LA requires an action to be based upon the fraud of the defendant, *ie*, that fraud is an element of the cause of action. I say this for two reasons. First, as mentioned above, this interpretation is supported by the express wording of s 29(1)(*a*), as compared to s 22(1)(*a*). It is trite that Parliament shuns tautology and does not legislate in vain; the court should therefore endeavour to give significance to every word in an enactment (see the Court of Appeal decision of *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [38], citing the Court of Appeal decision of *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR(R) 484 at [43]). Therefore, this interpretation is consistent with Parliament's choice to frame the requirement of

fraud differently in ss 22(1)(*a*) and 29(1)(*a*). Additionally, I adopt the holding in *Regent Leisuretime* that it is immaterial that there may be alternative causes of action that are not based upon fraud (see [53(b)] above).

58 Second, again in line with Parliament's intent, I do not think the scope of s 29(1)(*a*) of the LA may be expanded to include dishonesty, as suggested in *Meer Care*. In this regard, the policy considerations underlining the postponement of limitation periods are based on the deceptive nature of the cause of action, that by its fraudulent nature, may take some time to emerge. As discussed in *Sixteenth Ocean* and *FII Group*, although these considerations appear to apply to dishonest conduct, it is not clear that the UK Parliament intended as such. By virtue of the similarities between the UK and Singapore provisions, it may be inferred that our Parliament intended as such too. Further and in any event, as mentioned (see [51] above), because the cases applying s 26(a) of the UK LA 1939 are of greater persuasive value, I will apply the seminal decision of *Beaman* over *Meer Care*.

(2) The applicable law for s 29(1)(*b*) of the LA

59 I turn now to the interpretation of s 29(1)(*b*) of the LA. In contrast to s 29(1)(*a*), the applicable law is clear in Singapore, and it consists of two main requirements. First, the plaintiff must show that the defendant fraudulently concealed his right of action. In this regard, fraudulent concealment is not limited to the common law sense of fraud or deceit, and includes "unconscionability in the form of a deliberate act of concealment" if the wrongdoer "knowingly or recklessly committed a wrongdoing in secret without telling the aggrieved party" (see the Court of Appeal decision of *Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 at [27], citing the Court of

Appeal decision of *Bank of America National Trust and Savings Association v Herman Iskandar and another* [1998] 1 SLR(R) 848 at [73]–[75]). Thus, the meaning given to "fraud" in s 29(1)(*b*) should not be extended beyond the ambit of that provision, in so far as it describes a special concept of concealed fraud (see *Lim Ah Leh* at [198]–[199]). This can be traced back to the legislative history of s 26(b) of the UK LA 1939 and s 32(b) of the UK LA 1980, where the phrase "concealed by the fraud" in the former was replaced with "deliberate concealment" in the latter (see *Lim Ah Leh* at [199], citing *Armitage v Nurse and others* [1998] Ch 241 at 260H):

> … However, Millett LJ makes it clear in *Armitage* at 260H that this special concept of concealed fraud does not affect the meaning of fraud in the general sense as it is used in s 21(1)(*a*) of English Limitation Act 1980:
>
> > The meaning of the words "fraud" and "fraudulent" in section 21(1)(*a*) is not distorted by the meaning of the expression "concealed fraud" formerly used in s 26 of the Act of 1939 and which was given a very special meaning but has been replaced in the Act of 1980 by the more accurate expression "deliberate concealment."

Therefore, "fraud" in s 29(1)(*b*) of the LA extends beyond the common law meaning of fraud, which is a product of its legislative history. Crucially, this meaning of "fraud" should not be used to interpret the meaning of "fraud" in s 29(1)(*a*) of the LA.

60 Second, the period of limitation begins when the deception could have been discovered with reasonable diligence of the plaintiff (see the High Court decision of *Ong Teck Soon (executor of the estate of Ong Kim Nang, deceased) v Ong Teck Seng and another* [2017] 4 SLR 819 at [71]). This includes where there are circumstances that would give rise to a desire to investigate (see the

Court of Appeal decision of *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [97]):

> … In our judgment, the limitation period begins to run when there are circumstances that would give rise to a *desire to investigate*. The court will undertake an *objective* inquiry as to whether a reasonable person in the claimant's position had knowledge of sufficient information such that he ought to have undertaken further inquiry. This test strikes a logical balance: the law would not expect a claimant to look further if he or she had no knowledge of information that would trigger investigation (such as on the facts in *Gresport*); equally, it would be too high a threshold for the claimant to have to be put on inquiry of *the fraud* itself before time would begin to run (as the appellants in this case have sought to argue).
>
> [emphasis in original]

61 In the present case, where the parties' dispute lay is the issue of whether the fraudulent concealment must be done by the person against whom the limitation period is sought to be postponed. In this regard, the High Court decision of *Symphony Ventures Pte Ltd v DNB Bank ASA, Singapore Branch* [2021] 5 SLR 1213 ("*Symphony Ventures*") is instructive. The court held as follows (at [21]–[24]):

> 21 The plaintiff argued that the relevant limitation period only started to run when Mr Dvergsten's fraud was uncovered, because its claims against the defendant arose from the discovery of Mr Dvergsten's fraud. The fraud relied upon by the plaintiff was largely that of Mr Dvergsten: there was no allegation of fraud by the defendant itself, save for a claim in fraudulent misrepresentation.
>
> 22 The plaintiff's case that time should start running upon the discovery of Mr Dvergsten's fraud was misconceived. I accepted the defendant's arguments that for s 29(1) of the Limitation Act to operate, the fraud must be brought home to the defendant, either directly or through liability for the actions of its agent. There was nothing of that nature here which would point to Mr Dvergsten being an agent of the defendant. Even as regards the plaintiff's claim in conspiracy in the original SOC, Mr Dvergsten was a separate member of that alleged conspiracy from the defendant. The defendant also denied that

> Mr Dvergsten was its agent, and pointed out that Mr Dvergsten is a distinct person from the defendant.
>
> 23 That said, the plaintiff, in its written submissions, claimed that the defendant had concealed rights of action against itself. However, concealment on its own was insufficient: the concealment must be fraudulent. The fraud required for s 29(1)(*b*) of the Limitation Act is not limited to the common law sense of fraud or deceit, but the defendant must have at least committed a deliberate act of concealment, or knowingly or recklessly committed a wrongdoing in secret without telling the aggrieved party: *Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 ("*Chua Teck Chew Robert*") at [27]. In so far as the defendant or its agents were concerned, nothing of that nature was brought to my attention. Identifying the close relationships that Mr Kilde, the defendant's employee, shared with Mr Dvergsten and Traxiar, did not come anywhere close to satisfying the plaintiff's burden of persuasion that rights of action against the defendant had been fraudulently concealed by the defendant or its agent.
>
> 24 Thus, for a large chunk of the plaintiff's new claims (*ie*, negligence, negligent misrepresentation, unjust enrichment and lawful or unlawful means conspiracy), it would be sufficient to dispose the reliance on the fraud exception to the running of the time bar since they do not implicate the defendant or its agent in any fraudulent concealment.

62 To lend context to these passages, the brief facts of *Symphony Ventures* are as follows. The plaintiff gave an expression of interest to the defendant bank for a bridging loan for the purchase of an oil rig. The plaintiff acted on behalf of several corporate entities, who had been under the control of one Mr Dag Dvergsten ("Dvergsten"). The plaintiff commenced the action against the defendant, and in its Statement of Claim ("SOC") filed in November 2019, it claimed damages arising out of: (a) negligence; (b) negligent or fraudulent misrepresentations; (c) dishonest assistance and knowing receipt for the breach of a *Quistclose* trust; and (d) conspiracy to injury the plaintiff. Subsequently, in October 2020, the plaintiff applied to make four amendments to its SOC, to include the following new claims: (a) the defendant owed the plaintiff a duty of care in respect of "the 'end' or 'takeout' finance"; (b) the defendant made

negligent or fraudulent misrepresentations in respect of "the 'end' or 'takeout' finance"; (c) the defendant was unjustly enriched; and (d) there was a conspiracy involving one Mr Andreas Aamodt Kilde, Dvergsten, entities related to Dvergsten, and one Ms Savannah Khanna, for which the defendant was vicariously liable for.

63 The court held that the defendant had made out a *prima facie* limitation defence as the general six-year limitation period would have been applicable to the plaintiff's proposed amendments (see *Symphony Ventures* at [14]). Section 29(1)(*a*) of the LA would govern the plaintiff's proposed amendment concerning fraudulent misrepresentation, while s 29(1)(*b*) of the LA would govern its proposed amendments concerning negligence, negligent misrepresentation, unjust enrichment, and conspiracy (see *Symphony Ventures* at [20]).

64 Of relevance to the present case is the court's finding regarding the proposed amendment concerning conspiracy, which was that s 29(1)(*b*) of the LA did not apply because the conspiracy claim did not implicate the defendant or its agent in any fraudulent concealment (see *Symphony Ventures* at [24]). In my view, the fraudulent concealment must be done by the person (or his agent) against whom the limitation period is sought to be postponed. It cannot be the case that the fraudulent concealment was done by one party, but the limitation period is sought to be postponed against another party. Although the legislative purpose behind the postponement of limitation periods is to ensure that a plaintiff is not disadvantaged by a wrongdoing that he was unaware of, this should be limited to postponing the limitation period against a wrongdoer, and not a third party.

(3) Summary of applicable law for s 29(1) of the LA

65 Therefore, in summary, to establish that s 29(1)(*a*) of the LA applies, the plaintiff must show that fraud is an element of the cause of action. Although fraud may extend to common law fraud or equitable fraud, it does not extend to dishonesty.

66 Next, to establish that s 29(1)(*b*) of the LA applies, the plaintiff must show that the party against whom the limitation period is sought to be postponed fraudulently concealed the cause of action. Unlike s 29(1)(*a*), "fraud" here is not limited to the common law sense of fraud or deceit and includes unconscionability in the form of a deliberate act of concealment if the wrongdoer knowingly or recklessly committed a wrongdoing in secret without telling the aggrieved party. The period of limitation begins when the deception could have been discovered with reasonable diligence of the plaintiff.

(4) My decision: ss 29(1)(*a*) and 29(1)(*b*) of the LA do not apply

67 With the above principles in mind, I conclude that ss 29(1)(*a*) and 29(1)(*b*) of the LA do not apply to extend the relevant limitation periods for the plaintiffs. First, s 29(1)(*a*) of the LA does not apply to the conspiracy claim because it is not a cause of action based upon fraud. In this regard, the High Court in *Syed Ahmad Jamal Alsagoff (administrator of the estates of Shaikah Fitom bte Ghalib bin Omar Al-Bakri and others) and others v Harun bin Syed Hussain Aljunied and others and other suits* [2017] 3 SLR 386 (at [69]) recognised that in some conspiracy cases, fraud had been referred to as a form of unlawful means. I agree with the court's finding that those cases – *Wu Yang Construction Group Pte Ltd v Zhejiang Jinyi Group Co, Ltd and others* [2006] 4 SLR(R) 451 and *Yap Jeffrey Henry v Seow Timothy and Others*

[2006] SGHC 6 – were distinguishable and did not suggest that fraud is a necessary element for a claim of conspiracy.

68 Even if I am wrong and fraud is a necessary element for a claim of conspiracy, the plaintiffs have failed to plead their allegation of fraud with utmost particularity (see O 18 r 12(1)(*a*) of the ROC 2014 and the Court of Appeal decision of *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] 2 SLR 1256 at [116]). Nothing in the Draft SOC A2 pertaining to the new conspiracy claim suggests a fraudulent intent – or even dishonesty – on the part of the sixth defendant. The only instance where fraud is alleged is para 52.2, which states:[20]

> 52.2 In furtherance of the said conspiracy, Ashenafi, [the sixth defendant], and/or Vermeulen had taken steps to avoid and/or agreed, acquiesced to, or caused the avoidance of due diligence inquiries and reporting obligations in relation to the sale and purchase of the disposed AMBO Shares.
>
> 52.2.1 Ashenafi, [the sixth defendant], and/or Vermeulen knowingly, intentionally, and fraudulently withheld from Trident Trust, the managing agent of AMBO at the material time, the fact that payment of the Diverted AMBO Consideration was to be made to non-parties to the sale and purchase of the Disposed AMBO Shares.

69 There are several problems with this pleading. First, it alleges fraud with respect to the payment mechanics of the SPA, but not with respect to the conspiracy claim. Second, it does not explain why an alleged failure to inform Trident Trust of the payment mechanics of the SPA is fraudulent. Third, based

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[20] PBOD at p 55.

on the evidence introduced in SUM 2311, it appears that the sixth defendant informed Trident Trust of the payment mechanics of the SPA, quite contrary to this pleading.

70 Therefore, I find that s 29(1)(*a*) of the LA does not apply because the conspiracy claim is not based upon fraud, but even if it is, the plaintiffs have failed to plead fraud with utmost particularity.

71 Second, s 29(1)(*b*) of the LA does not apply to the conspiracy claim because the sixth defendant was not part of the concealment. During the hearing, Mr Yap raised the concern that the first plaintiff's liquidator (*ie*, the second plaintiff) would have no knowledge of the "downward adjustments" conspiracy if it was fraudulently concealed, especially because the first plaintiff would have previously been under the control of the alleged conspirators. However, I find that s 29(1)(*b*) *already* accounts for such practical difficulties by allowing the postponement of the limitation period against a party that engaged in fraudulent concealment. With that being said, this does not automatically give the plaintiffs a free pass to postpone the limitation period against the sixth defendant if it did not engage in the concealment. The only instance where the sixth defendant is alleged to be part of the concealment is, again, at paragraph 52.2. However, that pleading does not explain how the sixth defendant fraudulently concealed the "downward adjustments" conspiracy. Accordingly, I find that s 29(1)(*b*) of the LA does not apply to the abovementioned conspiracy claim.

72 In summary, I do not allow the amendment to introduce a new "downward adjustments" conspiracy, for the following reasons. First, the amendment does not disclose a reasonable cause of action. Second, the claim is

time-barred under s 6(1)(*a*) of the LA. Third and finally, the time-bar is not postponed under either ss 29(1)(*a*) or 29(1)(*b*) of the LA.

Whether the amendment to introduce a new "fraudulent concealment" claim should be allowed

73 In my judgment, the amendment to introduce a new "fraudulent concealment" claim should also not be allowed, for reasons similar to why I do not allow the amendment to introduce the "downward adjustments" conspiracy claim. First, since I have allowed SUM 2311, and the documents show that there was no fraudulent concealment, it must follow that this amendment cannot be allowed due to its lack of factual sustainability. In answer to this, Mr Yap submitted before me that based on a comparison of the draft SPA with tracked changes and the final SPA, it appeared that Trident Trust received incomplete information. Be that as it may, I do not agree that this establishes that there was fraudulent concealment on the part of the sixth defendant. Instead, I find that there was insufficient particularisation of the alleged fraudulent concealment.

74 Second, the "fraudulent concealment" claim is time-barred because it stems from the tort of unlawful means conspiracy, for which a limitation defence would arise from 23 March 2023 onwards. Further, as mentioned above, s 29(1)(*b*) of the LA does not apply because the sixth defendant was not part of the fraudulent concealment.

75 Accordingly, I disallow the amendment to introduce a new "fraudulent concealment" claim.

Whether the amendment to introduce Vermeulen should be allowed

The applicable law

76 I turn finally to the amendment to introduce Vermeulen as a party. An application to join a party must be made pursuant to O 15 rr 4(1) or 6(2) of the ROC 2014, which provides as follows:

> **Joinder of parties (O. 15, r. 4)**
>
> **4.**—(1) Subject to Rule 5(1), 2 or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where —
>
> (*a*) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and
>
> (*b*) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.
>
> **Misjoinder and nonjoinder of parties (O. 15, r. 6)**
>
> …
>
> (2) Subject to the provisions of this Rule, at any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just and either of its own motion or on application —
>
> (*a*) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party; or
>
> (*b*) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon;

> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

77 As explained in the Singapore International Commercial Court decision of *Mohamad Shiyam v Tuff Offshore Engineering Services Pte Ltd* [2021] 5 SLR 188 (at [35]–[37]), O 15 r 6(2) has a wider operation than O 15 r 4(1). For O 15 r 4(1), there must be some common question of law or fact that would arise if separate actions were brought against the defendants. Also, the rights and relief claimed against the defendants are in respect of or must arise out of the same transaction or series of transactions. However, for O 15 r 6(2), the court will consider: (a) a non-discretionary element of whether it is necessary, and not merely desirable to order a joinder; and (b) a discretionary element of whether a joinder for the purpose of deciding the issue will be just and convenient.

My decision: the amendment to introduce Vermeulen is not allowed

78 I do not allow the amendment to introduce Vermeulen, either on the plaintiffs' unamended case or on their amended case in the Draft SOC A2 as granted in SUM 1423.

79 First, I am satisfied that there is no reasonable cause of action against Vermeulen. The plaintiffs claim that he is involved in the "downward adjustments" conspiracy, which is therefore a "shared factual inquiry and common question of law akin to the conspiracy claim against … [the sixth

defendant]".[21] However, I do not think the plaintiffs have provided sufficient particulars of the alleged conspiracy that sufficiently demonstrate Vermeulen's involvement. Further, although the plaintiffs allege that the conspiracy took place in 2015, I note that Vermeulen only became a director of AMBO from 10 November 2016 onwards. Even if I accept the plaintiffs' argument that Vermeulen was closely involved in the events leading to the SPA in 2017 in his capacity as a representative of the sixth defendant, I do not see why Vermeulen should be joined in his personal capacity.

80 Second, I am satisfied that Vermeulen is entitled to a limitation defence against the tort of unlawful means conspiracy. As mentioned (see [42] above), a limitation defence on this tort would arise from 23 March 2023 onwards. I am also satisfied that the plaintiffs have not established that either ss 29(1)(*a*) or 29(1)(*b*) of the LA applies against Vermeulen.

Conclusion

81 In conclusion, I allow both SUM 2311 and RA 143.

(a) For SUM 2311, I find that the sixth defendant has satisfied the *Ladd v Marshall* requirements and I accordingly admit the documents exhibited in Mr Thobeka Nozuko Makaula's Fifth Affidavit dated 31 July 2023.

(b) For RA 143, I find that the plaintiffs should not be allowed to make the amendments in the Draft SOC A2 to: (i) introduce a new allegation of a conspiracy involving downward adjustments to

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[21] PWS at para 63.

the AMBO Accounts in 2015; (ii) introduce a new allegation of fraudulent concealment; and (iii) add Vermeulen as a party to the proceedings. I find that the amendments disclose no reasonable cause of action and are, in any event, time-barred, and the limitation period is not postponed by the application of ss 29(1)(*a*) and 29(1)(*b*) of the LA.

82 Unless the parties can agree on costs, they are to file their submissions on costs within 14 days of this decision, limited to seven pages each.

83 In closing, I thank Mr Yap and Mr Zhu, as well as their respective teams, for all their helpful submissions.

Goh Yihan
Judicial Commissioner

Salem bin Mohamed Ibrahim, Yap Zhan Ming, Kimberly Ng Qi Yuet and Kong Hui Xin Annette (Salem Ibrahim LLC) for the plaintiffs;
The first defendant absent;
The second defendant absent;
Ow Yong Wei En James (Kalco Law LLC) for the third defendant (watching brief);
The fourth defendant absent;
The fifth defendant absent;
Zhu Ming-Ren Wilson, Lye Yu Min and Naomi Lim Bao Bao (Rajah & Tann Singapore LLP) for the sixth defendant.