Quality Assurance Management Asia Pte Ltd *v* Zhang Qing and others [2013] SGHC 96

Case Number	: Suit No 715 of 2010 (Registrar's Appeal No. 391 of 2012)
Decision Date	: 03 May 2013
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy JC
Counsel Name(s)	: See Tow Soo Ling (Colin Ng & Partners) for the plaintiff; Kelvin Tan (Gabriel Law Corporation) for the defendants.
Parties	: Quality Assurance Management Asia Pte Ltd — Zhang Qing and others

Equity – Equitable compensation – Principles in assessing

3 May 2013

Vinodh Coomaraswamy JC:

Introduction

1 When an employee who is in a fiduciary relationship with his employer uses his employer's business opportunities, time and revenue-generating equipment to earn a secret profit for himself, what are the principles on which the court will assess the employee's obligation to pay equitable compensation to his employer? That is the principal question raised on this registrar's appeal.

Procedural history

2 Quality Assurance Management Asia Pte Ltd ("QAM") commenced this action on 17 September 2010 against three defendants. The first defendant is Zhang Qing ("Zhang"), their former employee and fiduciary. The second defendant is Feng Guiyu ("Feng"), Zhang's wife. The third defendant is Pinnacle Microelectronic Pte Ltd ("Pinnacle"), the corporate vehicle by which Zhang earned his secret profits. On 25 November 2010, QAM applied for summary judgment against the defendants with damages to be assessed. When that application came up for hearing on 24 January 2011, the defendants consented to interlocutory judgment with damages to be assessed.

3 The discovery exercise for the assessment of damages commenced in March 2011 and concluded in December 2011. The parties exchanged affidavits of evidence in chief for the assessment in early March 2012. QAM adduced the evidence of two witnesses: (a) Benjamin Wright Brown ("Brown"), the managing director of QAM; and (b) Tan Kah Leong, a manager of Tecbiz Frisman Pte Ltd ("Tecbiz"). QAM engaged Tecbiz to provide the computer forensic and digital investigation services it needed to uncover Zhang's wrongdoing which forms the subject-matter of these proceedings. The evidence on behalf of the defendants came from Zhang and Feng, each of whom filed an affidavit of evidence in chief on their own behalf and on behalf of Pinnacle. The defendants called no other witnesses.

4 The Assistant Registrar ("AR") heard evidence in the assessment on 19 March 2012 and 20 March 2012. By her decision on 10 September 2012, she assessed the damages which the defendants were to pay to QAM at a total of $72,462.10 plus, as is usual, interest and costs. The defendants appealed to a judge in chambers against the entirety of the AR's award of damages by way of

Registrar's Appeal No. 391 of 2012. I heard the defendants' appeal on 16 November 2012. I dismissed the defendants' appeal, save in one relatively minor respect.

5 On 14 December 2012, the defendants appealed to the Court of Appeal against my decision. I now give my reasons for my decision.

The parties

6 The following introduction of the parties is taken from the oral grounds of decision of the AR given on 10 September 2012: [note: 1]

> 1 Quality Assurance Management Asia Pte Ltd ("the Plaintiff") is a company incorporated in Singapore in the business of providing testing and inspection services to the semiconductor and other electronics industries. The first defendant, Zhang Qing ("1st Defendant"), is an ex-employee of the Plaintiff who was in the Plaintiff's employ from June 2002 to September 2010. He was hired as a project engineer in 2002, and was promoted to become the project manager of the Plaintiff on 1 March 2006. The second defendant, Feng Guiyu ("2nd Defendant") is the 1st Defendant's wife. The third defendant, Pinnacle Microelectronic Pte Ltd, ("3rd Defendant") is a company incorporated in Singapore in 2007, whose sole shareholder and director up to 31 August 2010 was the 2nd Defendant. From 1 September 2010, the 1st Defendant has become the sole director of the 3rd Defendant. The 3rd Defendant's registered address is also the residential address of the 1st and 2nd Defendants. On 17 September 2010, the Plaintiff brought claim against the 1st Defendant for breach of employment contract and fiduciary duties by diverting contracts from some of the Plaintiff's existing customers to the 3rd Defendant during the period between November 2007 and September 2010. The Plaintiff also brought a claim against each of the Defendants for an inquiry as to damages for misuse [of] confidential information and conspiracy to defraud the Plaintiff, and further or alternatively, an account of all the profits made by the Defendants.

1st defendant's employment history

7 Zhang joined QAM as a project engineer on 1 June 2002. [note: 2] QAM promoted him to the position of project manager on 1 March 2006. [note: 3] His duties as a project manager included: [note: 4]

> (a) Leading projects on behalf of QAM including planning, coordination, supervision and mentoring of site technicians and engineers.
>
> (b) Administering and supervising project billings, cost control and budgeting to ensure successful project completion.
>
> (c) Serving as the primary point of contact with QAM's clients assigned to him for all technical, commercial and scheduling issues that arise during the course of a project.

8 Just over 6 months later, on 17 September 2006, QAM promoted Zhang to the position of branch cum general manager. In his new position, Zhang was the second most senior operations personnel in QAM. The promotion meant that Zhang became responsible for: [note: 5]

> (a) All local sales activity.

(b) The acquisition and maintenance of QAM's equipment inventory.

(c) The planning and execution of site testing and analysis services.

(d) Recruiting, training and deploying field personnel.

9 Zhang's rapid promotion and the duties which QAM entrusted to him on each promotion make clear that QAM saw Zhang as a highly trusted and valued employee. [note: 6] Indeed, in March 2009, just 18 months before QAM was compelled to commence this action against Zhang, it presented him with its Employee of the Year Award 2008 together with a monetary award worth $8,000. [note: 7] QAM also supported Zhang's application for permanent residence in Singapore and later, Zhang's application to become a citizen of Singapore. [note: 8]

10 The wrongdoing which Zhang engaged in was an especially cynical betrayal of the deep trust and confidence which QAM reposed in him.

Pinnacle Microelectronics Pte Ltd

11 Pinnacle was incorporated in 2007. Initially, Feng was the sole shareholder and director. In 2009, QAM discovered Pinnacle's existence and about its connection to Zhang through Feng. [note: 9] When confronted about this, Zhang represented falsely to QAM that Pinnacle traded in industrial supplies unrelated to QAM's business and that there was no conflict in Feng managing the business of Pinnacle. [note: 10]

12 Zhang maintained the charade that Pinnacle was not his alter ego in cross-examination. He insisted that Pinnacle was his wife's company, that he merely helped her out and that he did not run Pinnacle's business, even unofficially. [note: 11] But the truth emerged in Feng's evidence. She confirmed in her affidavit of evidence in chief [note: 12] and in cross-examination [note: 13] that she did not participate at all in the business of Pinnacle; it was Zhang who was solely responsible for preparing all of Pinnacle's quotations and purchase invoices and for carrying out the work of Pinnacle. Feng was nothing more than a front for Zhang from the outset. Zhang eventually conceded in his cross-examination that Pinnacle was his business. [note: 14]

Zhang resigns

13 On 15 August 2010, Zhang resigned [note: 15] from QAM, saying that he intended to go into a business similar to QAM's but on a smaller scale. [note: 16] QAM then noticed that Zhang had been coming to its office in the late hours of the night. [note: 17] QAM discovered that Zhang had wrongfully downloaded its confidential information into a thumb drive. [note: 18]

14 Most significantly however, QAM discovered that Zhang had, during his employment with QAM and contrary to his representations, been operating the business of Pinnacle in direct competition with QAM.

15 Zhang's wrongdoing was audacious in the extreme. While he was still employed by QAM, he conducted Pinnacle's business from QAM's office premises during QAM's office hours. He secretly diverted to Pinnacle for his own benefit customers of QAM who clearly intended to deal with QAM (see [65] to [68] below). He conducted the testing work for these diverted customers using QAM's very

own testing equipment at QAM's very own place of business. [note: 19] He corresponded with QAM's customers on Pinnacle's business during his working hours at QAM. He used QAM's very own office equipment in QAM's very own office to generate quotations, test reports and tax invoices from Pinnacle to these diverted customers. [note: 20] He gave as his contact numbers on Pinnacle's quotations and tax invoices his direct line at QAM's office and his mobile telephone number paid for by QAM. [note: 21] He even returned to QAM's premises furtively on Sundays to carry out testing for these customers. He kept secret from QAM and retained for his own benefit all of the revenue and profits which he, through Pinnacle, earned by means of this diversion.

16 Zhang was candid in cross-examination: [note: 22]

Q: Paragraph 13 [of your AEIC] – ["]apart from my initial approach, I had never actively sought out these contracts.["] Can you explain what you mean by your ["]initial approach["]?

A: At the beginning when we were preparing [these] contracts, I did not secure these contracts for [Pinnacle], but the customers they came to approach me.

Q: My question was, what do you mean by ["]initial approach["]?

A: ["]Initial approach["] is I request for quotations, and I give them the quotations.

Q: Are you trying to tell the court that [QAM's] customers tried to approach you for quotations, and you gave [Pinnacle's] quotations to them?

A: Yes.

Q: You said earlier that you did the work on Sundays. As the second most senior person in Plaintiff's company, the branch general manager, wasn't it up to you to allocate your team to carry out work which Plaintiff's customers had wanted done? Why did you think it was all right to do the work yourself and keep the fees for yourself?

. . .

A: Because Plaintiff did not have enough manpower to carry out the job, so I have to carry it out on Sundays.

Q: You are Plaintiff's employee – so what do you mean there was not enough manpower, [so] you did the work?

A: If I do not do this job, nobody do this job.

Q: I am asking you in relation to the work you had done as [Pinnacle] on Sundays, that you claim that you did.

Ct: When you did work on Sundays, were you doing work for the [Pinnacle], or for [QAM]?

A: For the [QAM].

Q: So I misunderstood your answer. I asked, when the customers approached you, they were approaching you as a representative of [QAM], and your answer was yes? Do you agree you decide to keep the job for [Pinnacle] even though you were approached by customers as if

you were a representative of the [QAM]?

A: At first, I keep job for [QAM]. But after a few works later, I keep for [Pinnacle].

Q: Having consented to judgment on 24 January 2011, do you agree that you should not have kept the jobs from these three companies for [Pinnacle]?

A: Yes, I should not.

17 Zhang's conduct was disgraceful. I have no hesitation in characterising it as dishonest.

QAM elects to claim damages

18 For these admitted perfidies, QAM sought various relief against the defendants including injunctions, damages and account of profits. [note: 23] Damages are, of course, relief assessed based on the loss suffered by QAM. An account of profits is relief based on the gain achieved by one or more of the defendants. It is clear that QAM could not pursue *both* a loss-based measure of relief *and* a gain-based measure of relief arising from the same wrongful conduct.

19 So, following the consent judgment on liability, QAM was put to an election as to whether it wished to claim damages against all three defendants or an account of profits against all three defendants. On 27 August 2012, QAM elected to claim damages. The assessment therefore proceeded on the basis that QAM sought only damages against Zhang for breach of his employment contract and for breach of his fiduciary duties; and that QAM sought only damages against all three defendants for misuse of confidential information.

20 The only claims for relief which are relevant for present purposes are therefore QAM's prayers relating to damages. These prayers comprised the following:

(a) Against Zhang, damages;

(b) Against Zhang, a declaration that he is not entitled to any remuneration including his salary up to 15 September 2010;

(c) As against each defendant, an inquiry as to damages for misuse of confidential information and conspiracy to defraud QAM.

21 On 10 September 2012, the AR granted QAM leave to amend its Statement of Claim to include the following further specific claims: [note: 24]

(a) Against Zhang, the return of all the remuneration which QAM had paid to him from November 2007 to September 2010 comprising salary, allowances, bonus for the years 2008 and 2009 and the $8,000 cash award paid to him in March 2009 for being its Employee of the Year 2008; [note: 25]

(b) Special damages of $17,581.10 [note: 26] being the sum which QAM had paid to Tecbiz to conduct the forensic IT investigation into Zhang's clandestine activities.

Leave to amend pleadings

22 The AR granted QAM leave to amend as part of her decision assessing the quantum of

damages. [note: 27] Obviously, that was *after* the conclusion of the evidential phase of the assessment of QAM's damages. Zhang's counsel therefore claimed that the late grant of leave had caused Zhang prejudice in the evidential phase and that this prejudice could not be compensated by costs. Zhang therefore appealed by way of Registrar's Appeal No. 390 of 2012 against the AR's decision granting QAM leave to amend. I heard that appeal together with Zhang's appeal against the AR's decision on quantum. I found that appeal unmeritorious also. Inserting these two additional heads of relief by amendment caused Zhang no prejudice whatsoever for which he could not adequately be compensated by costs. First, they were merely amplifications of the relief already pleaded for damages and for the declaration. Second, even though the leave to amend came after the evidential phase, the substance of the amendments was foreshadowed to Zhang's counsel at the very outset of the evidential phase. Zhang's counsel therefore cross-examined QAM's two witnesses on the issues raised by the amendment. Third, Zhang's counsel was unable to point to any specific evidence that he would have called in the evidential phase but did not call in reliance on the pleadings as they then stood. I therefore held that the AR was right to have granted leave to amend and dismissed Zhang's appeal.

23 The introductory words of Zhang's notice of appeal to the Court of Appeal dated 14 December 2012 refers to both Registrar's Appeal No. 390 of 2012 (grant of leave to amend) and Registrar's Appeal No. 391 of 2012 (assessment of damages). But Zhang has not sought or obtained leave to appeal to the Court of Appeal against my decision on the amendment appeal, as is required. Further, the body of Zhang's notice of appeal does not list my decision to uphold the amendments as one of the orders on which he appeals to the Court of Appeal. The correctness of the AR's decision to allow QAM's application to amend and of my decision to dismiss Zhang's appeal from that decision are therefore no longer live issues on this appeal. I therefore need say no more on the issue of amendment.

Employee as fiduciary

Not every employee is a fiduciary

24 QAM and Zhang were employer and employee. The relationship of employer and employee – or master and servant as it used to be known – is often said to be one of the well-established categories of fiduciary relationships. As Gibbs CJ said in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 69:

> "The archetype of a fiduciary is of course the trustee, but it is recognized by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship to one another – e.g., partners, principal and agent, director and company, master and servant, solicitor and client, tenant-for-life and remainderman. There is no reason to suppose that these categories are closed.

25 But that should not be taken to mean that *every* employee is a fiduciary for *every* employer in *every* respect. If that were true, then every employee – no matter how junior his status or how limited his responsibilities – would owe the whole range of fiduciary obligations to his employer. That cannot be correct. The true position is that the employer/employee relationship is one of the well-established categories of legal relationships which is *capable* of giving rise to a fiduciary relationship. But it does not *ipso facto* do so: whether a fiduciary relationship in fact arises will depend on the facts of a particular case. "[C]ircumstances may arise in the context of an employment relationship, or arise out of it, which, when they occur, will place the employee in the position of a fiduciary": see *University of Nottingham v Fishel* [2000] ICR 1462 at 1490.

Zhang admits he is a fiduciary

26 QAM sought the relief listed at [20] and [21] above on the basis of Zhang's breaches of his contractual *and* fiduciary duties to QAM. QAM expressly pleaded that Zhang owed it certain express contractual duties. [note: 28] It further pleaded that he owed it the following fiduciary duties superimposed by implication on those contractual duties: [note: 29]

(a) A duty of good faith and fidelity;

(b) A duty not to act so as to place himself in a position in which his personal interest did or might conflict with the interest of QAM;

(c) A duty to act bona fide in the interests of QAM; and

(d) A duty to act for the proper purposes of QAM in relation to its affairs.

27 Zhang admitted that he owed these fiduciary duties to QAM. [note: 30] He therefore admitted that he was a fiduciary for QAM. Zhang consented to interlocutory judgment being entered against him on the basis of the assertions in QAM's pleadings. He therefore also admitted that he had breached those fiduciary duties. All these concessions were rightly made. Given Zhang's position in QAM, given the scope of his responsibilities and given the degree of trust and confidence which QAM reposed in him, there can be no doubt that Zhang as employee was in a fiduciary relationship with QAM as employer. There can be no doubt that Zhang owed QAM the specific fiduciary duties listed at [26] above. There can be no doubt that Zhang breached his fiduciary duties and betrayed that trust and confidence.

28 It is true that "[t]he phrase fiduciary duties is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case.": see *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 at 206. It is also "obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty": see *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16C. These two observations are of especial application to employees. But these observations pose no difficulties on the facts of this case. QAM helpfully pleaded the precise fiduciary duties (see [26] above) on which it based its claim. These duties are the very hallmarks of a fiduciary. They are the core prescriptive duties of good faith and loyalty which are peculiar to fiduciaries and which lie at the heart of the fiduciary obligation: see Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214. Moreover, as I have pointed out, Zhang admitted that he owed these fiduciary duties and that he had breached them.

Consequences of Zhang being a fiduciary

29 Zhang's admissions have significant consequences for his liability.

30 First, the duties of a fiduciary are high and onerous duties. As GP Selvam J said in *Kumagai-Zenecon Construction Pte Ltd and another v Low Hua Kin* [1999] 3 SLR(R) 1049 ("*Kumagai-Zenecon*") at [13]:

> The standard of duty imposed by law on a fiduciary is the highest standard known to the law. It is a duty to act for someone else's benefit by sacrificing one's own personal interest to that of the other. If the fiduciary is not prepared to make such sacrifice he will never be able to protect and advance the interest of the other. Selfishness is the antithesis of selflessness. The office of

a fiduciary is founded on selflessness. Selfishness is absolutely prohibited.

Although GP Selvam J's decision went on appeal to the Court of Appeal (see *Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd (in liquidation) and another* [2000] 2 SLR(R) 689), these propositions of law were not challenged and the appeal was dismissed.

31 Second, because fiduciary duties are the province of equity, a breach of fiduciary duty is an equitable wrong and unlocks access to a range of equitable remedies. Chief amongst these remedies are an account of profits and what is sometimes called – and what QAM in this case called – damages.

32 It is necessary at this point to be more precise in our terms. Damages are not, of course, available as a remedy for an equitable wrong. Equity has historically had no power to award damages. Only the common law awards damages. It was not until the English legislature intervened in 1858, through the Chancery Amendment Act 1858 (21 & 22 Vict. c. 27) – commonly known as Lord Cairns' Act – that the English courts of equity gained the power to award damages. In Singapore, the relevant provision is found in paragraph 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). To avoid confusion, the term "equitable damages" should be confined to damages awarded in equity in exercise of this statutory power. But even this statutory innovation permits equity to award damages only in lieu of or in addition to the equitable remedy of an injunction or an order for specific performance. Equity still does not have a general power to award "damages". I note also in passing that a common law court has a power to award damages in lieu of the equitable remedy of rescission pursuant to section 2(2) of the Misrepresentation Act (Cap 390, 1994 Rev Ed).

33 What equity has historically had the power to award is an order to a trustee who has breached his duties to the beneficiary of a trust to pay *equitable compensation* to the beneficiary. As James LJ said (Baggallay LJ concurring, Bramwell LJ dissenting) in *Re Collie ex p. Adamson* (1878) 8 Ch D 807 at 819:

> The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated.

34 A word of caution. The word "restitution" is used here – and in the modern cases on equitable compensation – not as a legal term of art but purely as an ordinary word of the English language meaning "recompense for injury or loss." The word "restitution" is therefore not used in these cases to signify the restoration to its rightful owner of property which has been lost or stolen. Nor is the word "restitution" used in these cases in the same sense as it is used today in the modern law of restitution – as being the law's response to reverse unjust enrichment at the expense of another. Put simply: equitable compensation is neither a proprietary remedy nor a remedy in the law of restitution. It is a personal remedy in equity.

35 Although equitable compensation began as a remedy for breach of trust, the English courts fairly quickly made it available for a breach of fiduciary duty by any fiduciary, not just by the archetypal trustee: *Nocton v Lord Ashburton* [1914] AC 932.

36 The distinction between "damages" and "equitable compensation" is not mere semantics: it is a distinction with a difference, even today. Although common law and equity are administered concurrently in the same courts (see s 3 of the Civil Law Act (Cap 43, 1999 Rev Ed)), it remains the case that the courts (or at least the High Court) remain precluded by precedent from awarding a

common law remedy for an equitable wrong. Equity supplements the common law by making available in common law claims certain equitable remedies (such as injunction, specific performance and rescission). Historically, equity has also appropriated for itself and adapted certain common law remedies. Indeed, in the case of two such examples – tracing and the account – equity's appropriation has been so successful that these remedies are now thought of as equitable remedies. But the common law cannot and does not supplement equity. So it remains the case today that common law damages is neither an available nor an appropriate remedy for equitable wrongs. More importantly, as I will show in the following paragraphs, there remains to this day a distinction of substance between common law damages and equitable compensation rooted in the differing approaches of the common law and equity to wrongdoing. Maintaining the distinction in terminology is therefore not adherence to anachronism but assists in focusing attention on this distinction of substance.

37 The distinction of substance arises from the view which each branch of the law takes of the innocent party and of the wrongdoer. The starting point of the common law is that both the innocent party and the wrongdoer are equal and independent actors, each capable of acting in his own self-interest and each capable of safeguarding its own position. To that extent, both stand before the common law on equal footing. The common law therefore holds a balance between the two: see *Canson Enterprises Ltd v Broughton & Co* (1991) 85 DLR (4th) 129 at 154e *per* McLachlin J (as she then was) (Lamer CJ and L'Heureux-Dubé J concurring). So although the common law acts to vindicate the rights of the innocent party, it nevertheless has regard to the interests of the wrongdoer by keeping the wrongdoer's liability within reasonable limits. The common law extends a measure of protection even to a wrongdoer. It does this by hedging about the wrongdoer's liability with qualifiers based on causation, foreseeability and remoteness.

38 Equity's starting point is quite the opposite. Equity takes as its starting point the trust and confidence which the innocent party reposes in the wrongdoer. Equity therefore most emphatically does not regard the innocent party and the wrongdoer as standing on equal footing. The innocent party depends on the wrongdoer to act in the best interests of the innocent party, and is thus especially vulnerable to the wrongdoer's breach of duty. When a fiduciary betrays the innocent party's trust and confidence, therefore, equity's balance naturally favours the wronged over the wrongdoer: see *Canson Enterprises Ltd* at 154g *per* McLachlin J.

Equitable compensation contrasted with common law damages

39 This difference of approach follows through into the underlying purpose of each remedy. The primary function of both remedies is to compensate the innocent party for a breach of duty by the wrongdoer. It is not the core purpose of either remedy to punish the wrongdoer: see *Harris v Digital Pulse Pty Ltd* (2003) 197 ALR 626. But focusing on these commonalities is apt to mislead. The distinction of substance leads directly to a practical differences between the two remedies.

40 It is no part of the core purpose of an award of damages at common law to deter wrongdoing. Common law damages compensate the plaintiff – to the extent that money can do so – for the loss he has suffered. How that loss is characterised will depend on the particular branch of the common law in question. In wholly exceptional cases, damages may be available at common law to strip a wrongdoer of his gains where other common law remedies are perceived to be inadequate: see *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 at [52] to [56] discussing *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR(R) 202 and *Attorney-General v Blake (Jonathan Cape Ltd, Third Party)* [2001] 1 AC 268. Despite these innovations, however, the core purpose of common law damages remains purely compensatory.

41 By way of contrast, it is part of the core purpose of all remedies for equitable wrongs – including equitable compensation – to deter the breaching fiduciary as well as other errant fiduciaries and thereby to operate prophylactically. It is true that equitable compensation, like common law damages, is assessed by reference to the amount of money necessary to restore the victim of a breach of fiduciary duty to the position the victim would have been in if not for the breach. But in doing so, as the High Court of Australia explained in *Maguire and another v Makaronis and another* (1997) 188 CLR 449 ("*Maguire*") at 465, "Equity intervenes (…) not so much to recoup a loss suffered by the plaintiff as to hold the fiduciary to, and vindicate, the high duty owed to the plaintiff." This policy of deterrence explains equity's especially stringent principles governing the remedy of an account of profits: see *Boardman and another v Phipps* [1967] 2 AC 46 and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; and governing the remedy of tracing: see *In re Hallett's Estate* (1880) 13 Ch D 696.

42 The deterrent function of equitable compensation means that the common law rules of causation, foreseeability and remoteness – all designed to limit the law's encroachment on the freedom of action of common law wrongdoers by keeping their liability within certain limits – do not readily apply to equitable wrongdoers. The strict approach of equity is typified by the decision of the Privy Council on appeal from the Supreme Court of Canada in *Brickenden v London Loan & Savings Company of Canada et al* [1934] 3 DLR 465 ("*Brickenden*"). In that case, Brickenden, a solicitor, had lent money to a borrower against mortgages. The solicitor then acted for both the borrower and the holder of a prior mortgage in a refinancing transaction. When the prior mortgagee advanced the money to the borrower against the new mortgage, Brickenden retained part of the money and applied it to redeem the mortgages which he held personally. Brickenden did not disclose to the mortgagee his own personal interest in the transaction. Brickenden was held liable to compensate the mortgagee, his client, for the loss suffered when the borrower defaulted. Lord Thankerton, delivering the advice of the Privy Council, said as follows (at [16]):

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the [company], on disclosure, would have taken is not relevant."

4 3 *Brickenden* is therefore authority for the proposition that a claim for equitable compensation arising from a breach of fiduciary duty will succeed so long as the wronged party can show that the fiduciary's breach of duty is in some way connected to the loss, even if it was simply to set the occasion for the loss rather than by being the cause of the loss in any legal sense of the word. *Brickenden* read literally would therefore hold a fiduciary liable to pay equitable compensation even if the principal would have suffered the loss in any event: that is, if the principal would have suffered the loss even if the fiduciary had not breached his duty. Such an approach could be justifiable on the grounds that equity should protect the interests of innocent parties who are owed fiduciary duties pursue deterrence even if that means over-compensating the innocent party. But does *Brickenden* really go that far?

44 In *Target Holdings Ltd v Redferns (a firm) & Another* [1996] 1 AC 421("*Target Holdings*"), Lord Browne-Wilkinson made clear that that it did not, at least in England. Equity required the fiduciary's breach of duty to be a cause of the innocent party's loss on the "but for" test. Thus, at 432E Lord Browne-Wilkinson said:

> At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put "in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation:" *Livingstone v. Rawyards Coal Co.* (1880) 5 App.Cas. 25, 39, per Lord Blackburn. Although, as will appear, *in many ways equity approaches liability for making good a breach of trust from a different starting point*, in my judgment those two principles are applicable as much in equity as at common law. Under both systems liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. *The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law*. But the principles underlying both systems are the same. On the assumptions that had to be made in the present case until the factual issues are resolved (i.e. that the transaction would have gone through even if there had been no breach of trust), the result reached by the Court of Appeal does not accord with those principles. Redferns as trustees have been held liable to compensate Target for a loss caused otherwise than by the breach of trust.
>
> [emphasis added]

45 The italicised words above make clear that Lord Browne-Wilkinson was not asserting in this passage that *all* of the liability-limiting principles which apply to an award of common law damages apply equally to an award of equitable compensation. The following passage at 434C shows that of the various common law qualifiers on damages, Lord Browne-Wilkinson was concerned with establishing only that the common law "but for" test applied equally to equitable compensation:

> (…) [T]he basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting *in personam*, ordered the defaulting trustee to restore the trust estate: see *Nocton v. Lord Ashburton* [1914] A.C. 932, 952, 958, per Viscount Haldane L.C. If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed: *Caffrey v. Darby* (1801) 6 Ves. 488; *Clough v. Bond* (1838) 3 M. & C. 490. Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred: see Underhill and Hayton, Law of Trusts & Trustees 14th ed. (1987), pp. 734-736; *In re Dawson, decd.; Union Fidelity Trustee Co. Ltd. v. Perpetual Trustee Co. Ltd.* [1966] 2 N.S.W.R. 211; *Bartlett v. Barclays Bank Trust Co. Ltd. (Nos. 1 and 2)* [1980] Ch. 515. *Thus the common law rules of remoteness of damage and causation do not apply. However there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable*, viz. the fact that the loss would not have occurred but for the breach: see also *In re Miller's Deed Trusts*(1978) 75 L.S.G. 454; *Nestle v. National Westminster Bank Plc.* [1993] 1 W.L.R. 1260.
>
> [emphasis added]

46 These principles have been adopted and applied in Singapore. As GP Selvam J said in *Kumagai-Zenecon* at [35]:

> (…) The following equitable concepts can be culled from the judgment of Street J, in *In re Dawson; (…) Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211:

> 1 If a breach of a fiduciary obligation has been committed then the fiduciary is liable to make restitution — that is restore the wronged person [to] the same position as he would have been [in] if no breach had been committed. Consideration of causation, foreseeability and remoteness do not readily enter into the matter.
>
> 2 The test of liability is whether the loss would have been [suffered] if there had been no breach. In other words, the fiduciary can escape liability only if he can demonstrate that the loss or suffering would have happened even if there [had] been no breach.
>
> 3 The right to restitution and compensation of a beneficiary or sufferer which the Court of Equity have imposed on an errant fiduciary is more of an absolute nature than the common law of obligation to pay damages for tort or breach of contract.
>
> 4 The beneficiary or sufferer under the concept of restitution or equitable compensation is entitled to full indemnity and equity will award such interest as may be necessary to create full restitution and compensation.

47 Although this decision went on appeal to the Court of Appeal (see [30] above), these propositions of law were not challenged and the appeal was dismissed.

48 Andrew Ang J in *Firstlink Energy Pte Ltd v Creanovate Pte Ltd* and another action [2007] 1 SLR(R) 1050 endorsed and applied these principles at [85]. These propositions of law were likewise not challenged on the unsuccessful appeal in that case (see *Creanovate Pte Ltd and another v Firstlink Energy Pte Ltd and another appeal* [2007] 4 SLR(R) 780).

49 I make one final point: the cases I have cited above have focused on the inapplicability of the common law principles of causation, foreseeability and remoteness to the assessment and award of equitable compensation. But the common law has other rules which serve to limiting a wrongdoer's liability to compensate one whom he has injured. Examples of these rules are the rules relating to mitigation and comparative fault. To what extent do these rules apply to equitable damages?

50 The key to this question lies in appreciating another distinction between equitable compensation and common law damages. It will be recalled that equity characterises equitable compensation as "an equitable debt or liability in the nature of debt": see [33] above. This is significant. A claim in debt at common law is a money claim. If it succeeds, it amounts to court-ordered enforcement of the performance of a *primary* obligation. A claim for damages is also a money claim. But if it succeeds, it gives rise to a court order that the wrongdoer pay damages to the innocent party. This is the creation of a *secondary* obligation: an obligation which comes into existence only by virtue of the court order. So at common law, if a creditor claims $100 in debt against a debtor, it is a nonsense for the debtor to raise as defences issues of causation, foreseeability or remoteness. It is equally a nonsense for the debtor to raise as defences the creditor's failure to mitigate his loss or the creditor's comparative fault. Equity follows the law. When equity awards equitable compensation, it deems by a fiction that it is decreeing performance of a primary obligation, ie, the defaulting fiduciary's obligation to pay an equitable debt. So on that basis, none of the common law limiting principles – including mitigation and comparative fault – ought to apply in a claim to recover equitable compensation.

When does equity take the strict approach in assessing equitable compensation

51 It will be noted at once that there is a tension between Lord Browne-Wilkinson's absolute and unqualified statement that "the common law rules of remoteness of damage and causation do not

apply" (see [45] above) and GP Selvam JC's qualified formulation, itself taken from the formulation of Street J in *In re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 at 215, that limiting principles "do not readily enter into the matter."

52 This tension arises from two unique features of claims against fiduciaries. First, the categories of fiduciaries are not closed. Fiduciary duties can and are now found to arise from a variety of relationships. Many of these relationships are far removed from the traditional trustee/beneficiary relationship in which equitable compensation first became available. It is not readily apparent that equity should be as stringent with all fiduciaries as it is with the trustee fiduciary. Second, the strictness of equity in protecting the innocent party means that a breach of fiduciary duty can arise independently of any fault or culpability in any moral sense on the part of the fiduciary. Both these features can give rise to cases in which the strict *Brickenden* principle – even if it is controlled by "but for" causation as imposed by *Target Holdings* – may operate unnecessarily harshly against a non-trustee fiduciary. In these cases, the argument for equity tilting the balance in favour of the innocent party at the expense of the wrongdoer is significantly attenuated.

53 The High Court of Australia in *Maguire* was troubled by these two features. Its solution was to hold that *Brickenden* applies with all its rigour where the fiduciary *is* in one of the well-established categories and where the fiduciary commits a *culpable* breach of an obligation which stands at the very *core* of that fiduciary relationship – such as the duty of loyalty. The High Court of Australia said (at 474):

> Yet the policy of the law to hold the trustee up to the obligation to perform the trust is strongly manifested in cases where loss is occasioned upon breach arising from conflict between duty and interest. What one might call that heightened concern is manifested also, as we have sought to indicate earlier in these reasons, in the treatment of disloyalty by non-trustee fiduciaries. It may be that concern with respect to the apparent rigour of the reasoning in *Brickenden* reflects what has been seen as a tendency apparent in some recent decisions too readily to classify as fiduciary in nature relationships which might better be seen as purely contractual or as giving rise to tortious liability. Whilst that be so, it is not self-evident that the response should rest in a general denial of the applicability of the reasoning in *Brickenden* to delinquent fiduciaries, particularly solicitors and other professional advisers.

54 Quentin Loh J considered this issue, *obiter*, in the case of *Then Khek Khoon and another v Arjun Permanand Samtani and another* [2012] 2 SLR 451 ("*Then Khek Khoon*") at [51] to [68]. Following a wide-ranging survey of Commonwealth case law and the academic literature, Loh J concluded as follows at [67]:

> *Kumagai Zenecon* and *Firstlink Energy* are correct on their facts and generally, but they do not lay down an absolute rule that all loss and damage, no matter how it is caused, lie at the doorstep of a party in breach of its fiduciary obligations. In the latter case, this is what Andrew Ang J meant when he said that causation, foreseeability and remoteness "… do not *readily* enter into the matter …" [emphasis added]. There may be circumstances, as in *Canson Enterprises* ([62] supra) where there are limits to the applicability of such an absolute rule. It is best not to lay down any hard and fast rules. There are a significant number of cases on equitable compensation in the other common law jurisdictions from which guidance can be obtained. Strict rules and rigid criteria are not the inherent nature of equity nor should it be for equitable compensation which is but a part of the whole.

55 In my view, it aids certainty and predictability to specify boundaries for the rigour of the principle in *Brickenden* rather than to hold that the principle is a discretionary one to be applied or

disapplied on a case by case basis. It will no doubt be a difficult task to ascertain what the boundaries of the principle should be.

56 Fortunately, that is not my task. This case is nowhere near the boundaries of *Brickenden*: it is at the very core. It is therefore not necessary for me on the facts of this case to decide what the precise boundaries of *Brickenden* are. Whatever those may be, *Brickenden* should and does apply with full stringency, at the very least, to: (1) a fiduciary who is in one of the well-established categories of fiduciary relationships; (2) who commits a culpable breach; (3) who breaches an obligation which stands at the very core of the fiduciary relationship. Brickenden was one such person.

57 Zhang is another such person. First, Zhang was admittedly a fiduciary for QAM. Even without Zhang's admission, there would be no novelty or innovation in holding him, as a senior employee, to be a fiduciary for his employer. Second, the duties which Zhang breached (see [26] above) are all aspects of the duty of loyalty. This duty stands at the very core of the fiduciary relationship. It is the highest of the fiduciary duties and is entitled to the highest protection. Third, Zhang's breach was highly culpable. It constituted conscious, deliberate and flagrant wrongdoing (see [7] to [17] above). It was done for personal gain. It was dishonest. It was only one technical step removed from putting his hand in his employer's till and stealing his employer's money.

58 In *Then Khek Khoon*, Loh J said this at [64] in the context of a director of a company:

> It lies ill in the mouth of a company director who flagrantly breaches his fiduciary duties for personal gain to say that the damage suffered by the wronged party should be reduced because of principles of law relating to causation or remoteness or that the innocent party was contributorily responsible. In *Kumagai-Zenecon*, the CA gave short shrift to the attempts by the fiduciary director to argue that the action by provisional liquidators in selling off certain shares *en bloc* inflated the loss as they should have sold off only that amount of shares necessary to pay the bank. The CA held that the action of the provisional liquidators was reasonable in the circumstances then prevailing and a subsequent rise in the market was unforeseen and unforeseeable. The CA also said that bad faith or unreasonableness was not established even though the provisional liquidator had not made inquiries with stockbrokers or investment bankers before effecting the en bloc sale of the shares. The CA was clearly not prepared to place too heavy a burden on the actions of the party who was wronged or its provisional liquidator.

59 Conceptually, it makes perfect sense for equity to tilt the balance in favour of the innocent party and against the wrongdoer in cases at the core of the *Brickenden* principle. Doing so permits equity to advance its policy through its remedies (see [38] above). Pragmatically also, it makes sense also to tilt the balance in favour of the innocent party. By the very nature of a fiduciary relationship, there will be informational asymmetries between the fiduciary and the principal in these cases which will make the breach of fiduciary duty harder to detect and harder to prove. The difficulties of detection mean that equity's additional stringency in these cases is warranted to ensure that the award of equitable compensation serves its deterrent purpose. The harder wrongdoing is to detect, the harsher the deterrent must be to achieve its intended effect. The difficulties of proof mean that it is perfectly justifiable for equity to advance its policy of deterrence by disentitling an equitable wrongdoer from relying on the principles which limit the liability of a wrongdoer at common law.

60 I conclude with some general principles on the assessment of equitable compensation. The legal burden of proving but-for causation remains on the plaintiff throughout: *Ohm Pacific Sdn Bhd v Ng Hwee Cheng Doreen* [1994] 2 SLR(R) 633 at [27]. The plaintiff must show that the loss would not have occurred but for the breach, or that there was "an adequate or sufficient connection between the equitable compensation claimed and the breach of fiduciary duty": see *Maguire* at 473. Equitable

compensation is assessed with the full benefit of hindsight and is quantified as at the date of recoupment, not as at the date of the breach of duty.

61 When a case comes within the boundaries of the *Brickenden* principle, several additional plaintiff-friendly consequences follow. Once the plaintiff adduces *some* evidence to connect the breach to the loss, equity will readily shift the evidential burden on causation to the breaching fiduciary: *John While Springs (S) Pte Ltd and Another v Goh Sai Chuah Justin and Others* [2004] 3 SLR(R) 596 ("*John While Springs*") at [6]. The court "does not allow an examination into the relative importance of contributory causes" *per* Spigelman CJ in *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 adopting the principle from the law of duress per Lord Cross of Chelsea speaking for the majority in the case of *Barton (Alexander) v Armstrong (Alexander Ewan)* [1976] AC 104. Causation will therefore be determined shorn of the common law rules of foreseeability, remoteness and *novus actus interveniens*: see *Maguire* at 470. Principles of mitigation and comparative fault have no role to play.

Plaintiff's heads of damages

62 QAM adduced evidence of losses which it had suffered by reason of the defendants' breaches under six heads:

(a) Loss of profits on diverted business; [note: 31]

(b) Loss of opportunity on project for Cypress Semiconductor Inc; [note: 32]

(c) Repayment of salary, bonus and monetary award; [note: 33]

(d) Misuse of confidential information, [note: 34]

(e) Loss of Met One condensation nucleus counter; [note: 35]

(f) Professional fees of Tecbiz. [note: 36]

63 The AR held that QAM had failed to show that it had suffered any loss arising from misuse of QAM's confidential information by any of the defendants. [note: 37] As such, she awarded QAM no damages under this head. QAM did not appeal against the AR's decision. The only issues on the appeal before me, therefore, were whether the AR correctly assessed the loss-based compensation – to use a neutral term – which Zhang ought to pay to QAM for his breach of employment contract and fiduciary duties under the remaining five heads listed at [62] above.

64 After hearing and considering the evidence, the AR awarded QAM the following amounts under those five heads of loss:

(a)	Loss of profits on diverted business	$8,825.00	[note: 38]
(b)	Loss of opportunity (Cypress Decatech project)	$20,857.00	[note: 39]
(c)	Repayment of bonuses and monetary award	$23,300.00	[note: 40]

(d)	Loss of Met One condensation nucleus counter	$1,900.00 [note: 41]
(e)	Professional fees of Tecbiz	$17,580.10 [note: 42]
	Total	**$72,462.10**

Loss of profits on diverted business

65 While Zhang was employed by QAM, he diverted testing jobs from three customers of QAM to Pinnacle. These contracts had total values as follows:

(a)	Domnick Hunter Group Pte Ltd	$2,850.00 [note: 43]
(b)	Parker Hannifin Singapore Pte Ltd	$2,600.00 [note: 44]
(c)	TUV SUD PSB Corporation Pte Ltd	$12,200.00 [note: 45]
	Total	**$17,650.00** [note: 46]

66 Zhang admitted that he acted in breach of his duties and obligations to QAM. [note: 47] He therefore admitted that his conduct amounted to breaches of his admitted *fiduciary* duties and obligations to QAM (see [28] above) as well as of his admitted *contractual* duties and obligations to QAM.

67 In his affidavit of evidence in chief, Zhang took the position that the representatives of these three customers of QAM approached him in his capacity as a representative of Pinnacle [note: 48] and therefore that the jobs which they had offered him were not jobs that would have otherwise been awarded to QAM. [note: 49] The truth emerged in cross-examination. Zhang admitted that these three customers of QAM approached Zhang as a representative of *QAM* and not as a representative of Pinnacle. He also admitted that he diverted these jobs to Pinnacle in his own self-interest. It is worth setting out in full Zhang's evidence on this: [note: 50]

Q: Having set up [Pinnacle], you approached [QAM's] customers, namely Parker, Hennifin (sic), Hunter and TUV?

A: [QAM's] customers approached me.

Q: Why did they approach you?

A: Because they have jobs, and they know me, so they called me.

Q: So when they approached you, were they approaching you as a representative of [QAM]?

A: Yes.

Q: And then you decided to keep the job for [Pinnacle]?

A: At first, I kept the job for [QAM]. But sometimes I work on Sunday. But Sunday there is no overtime pay. And some customers said why don't you take jobs by yourself. So I decided to take some myself.

Q: How would these customers know you have a business with [Pinnacle]?

A: When I work, we talk and discuss, and I told them that my wife had a company.

Q: So you did tell them you had a company?

A: Yes.

. . .

Q: Are you trying to tell the court that [QAM's] customers tried to approach you for quotations, and you gave [Pinnacle's] quotations to them?

A: Yes.

68 By reason of QAM's election of remedies, the measure of QAM's loss is not Pinnacle's gain but the profit which QAM would have earned on the contracts which Zhang diverted to Pinnacle in breach of his fiduciary duties. Zhang submitted that QAM would have obtained only 50% of these contracts for itself. [note: 51] The submission was fatally undermined by Zhang's admission in cross-examination (see [67] above). His admission showed that it was Zhang who diverted all these contracts to Pinnacle. QAM's customers did not approach Pinnacle of their own accord. All of these contracts were destined for QAM and would have been performed by QAM but for Zhang's wrongful diversion to Pinnacle. If he had not intervened, the ensuing revenue and profits would have been earned by QAM. The AR was right to reject Zhang's submission. She relied on Zhang's admission to hold that QAM would have earned all of this revenue on all of these contracts had Zhang not diverted them. The AR held that QAM had therefore proved that it had lost $17,650 in revenue. Further, the AR held that QAM had also proved that the "but for" test was satisfied: its loss of revenue of $17,650 was attributable directly to Zhang's breach of fiduciary duties. [note: 52]

69 From this revenue figure, the AR then assessed QAM's loss of profits as 50% of $17,650, or $8,825. She did this by applying Brown's evidence that QAM's profit margin was 50%. [note: 53] In doing so, she adopted the approach suggested – albeit as an alternative submission – by Zhang's counsel in his written closing submissions. [note: 54]

70 I saw no reason to interfere with the AR's reasoning or conclusion in awarding this sum as equitable compensation for Zhang's admitted breach of the *fiduciary* duties [note: 55] which he owed to QAM.

Cypress Semiconductor, Inc

71 Cypress Semiconductor Inc ("Cypress") is a customer of QAM. As early as 2 August 2010, Zhang knew that there was a potential project for QAM to undertake in the Philippines for Cypress known as the Cypress Decatech project. Cypress's main process contractor for the Cypress Decatech project was a company known as Ellipsiz Ltd ("Ellipsiz"). The subcontractor for the project was J+J Technology Pte Ltd ("J+J"). QAM has a good relationship with Cypress, both organisations being headquartered in Texas. [note: 56] Further, Zhang admitted that Ellipsiz and J+J were existing

customers of QAM. [note: 57]

72 The Cypress Decatech project comprised two parts. The first part was preparing a quality assurance report. The quality assurance contract was the smaller part of the whole Cypress Decatech project and was to be awarded by Ellipsiz. [note: 58] The second part was the testing contract. This was the major part of the Cypress Decatech project and was to be awarded by J+J.

73 Zhang came to know of the Cypress Decatech project in his capacity as an employee of QAM and at a time when he was still employed by QAM and still owed fiduciary duties to QAM. If Zhang had performed his fiduciary duties to QAM faithfully, he would have attempted to sell to Cypress, Ellipsiz or J+J for the Cypress Decatech project, the suite of services which QAM could offer. [note: 59] Instead, Zhang kept the information to himself out of his own self-interest. [note: 60]

74 On or about 2 August 2010, Zhang caused QAM to submit a quote of $17,000 to Ellipsiz, but only for the smaller quality assurance contract. Zhang earmarked one of QAM's quality assurance engineers, Terence Chew, to perform the quality assurance contract.

75 When Brown discovered this, he questioned Zhang. He asked Zhang why he had not tried to sell QAM's services as a package to Cypress or to Ellipsiz or J+J. [note: 61] Zhang was not cooperative and referred Brown to read for himself the documents relating to the Cypress Decatech project. [note: 62] Two days later, Terence Chew resigned from QAM's employ. [note: 63] There is a strong inference to be drawn that this was not a coincidence. QAM was due to have commenced performance of the quality assurance contract at the end of August 2010, just as Zhang was coming to the end of his notice period. But Ellipsiz told QAM that the quality assurance contract had been put on hold. [note: 64] QAM never did get an opportunity to perform the quality assurance contract and thereby to earn a profit under it.

76 Without informing QAM, [note: 65] Zhang tendered a quote to Cypress through Pinnacle at $49,500 for the testing contract. [note: 66] The computer forensic investigation done by Tecbiz showed that Zhang tendered this quote on or about 21 August 2010. Although he had by then tendered his resignation from QAM, [note: 67] he was still an employee and therefore a fiduciary for QAM. Zhang's reason for not putting a quote in for the testing contract on behalf of QAM was the same poor excuse that he had given in relation to his other diversions of business opportunities: that QAM did not have sufficient manpower and equipment to do the job. [note: 68] But he conceded he had no evidence to prove this. [note: 69] While still employed by QAM, Zhang went to J+J's office in his capacity as an employee of Pinnacle to solicit the testing contract from J+J. Zhang admitted that he did this in breach of his employment contract. [note: 70]

77 J+J belatedly asked QAM to submit a quote for the testing contract. [note: 71] This came at the last possible minute to tender a quote. QAM submitted a quote on 9 September 2010. [note: 72] J+J even told QAM that the testing contract had been awarded to QAM. [note: 73] But no contract ever materialised. [note: 74] QAM did not undertake the Cypress Decatech project.

78 If Zhang had told QAM about the Cypress Decatech opportunity – as he should have – in early August 2010, QAM would have had more lead time to mobilise its resources for the testing contract. QAM's quote would have been more competitive than it was. As it was, QAM's costs increased

because its mobilisation time was shortened. [note: 75] This was caused by Zhang's breach of his fiduciary duties in diverting the Cypress Decatech opportunity for his own benefit.

79 QAM claimed against Zhang the losses they had suffered by his diversion of the Cypress Decatech project away from QAM. [note: 76] The value of the Cypress Decatech project was $66,500 comprising $17,000 for the quality assurance contract plus $49,500 for the testing contract. The figure $49,500 is taken from Zhang's quote of $49,500 to J+J through Pinnacle for the testing contract. QAM claimed that the entire value of the quality assurance contract would have been pure profit for it. Performing the quality assurance contract involved nothing more than deploying an existing QAM engineer to the job. His salary had already been entirely absorbed as part of QAM's overhead. [note: 77] The quality assurance contract also involved no out of pocket expenses, which the customer would bear in full. As regards the testing contract, QAM submitted that its profit margin would have been 50%, [note: 78] leaving 50% of $49,500 or $24,750 as its lost profit. QAM therefore submitted that it could have earned a profit on the Cypress Decatech project of $41,750 [note: 79] comprising the entire $17,000 for the quality assurance contract plus $24,750 profit on the testing contract.

80 But QAM did not claim in these proceedings this entire lost profit of $41,750. QAM accepted that what it really lost on the Cypress Decatech project was a 50% chance of securing it and of earning the overall profit of $41,750. So it claimed instead $20,875, being 50% of the lost profit representing the value of its lost chance to win these contracts.

81 Zhang submitted that QAM failed to satisfy the prerequisites for an award of damages for a loss of a chance because: [note: 80]

(a) QAM did not lose the chance to secure the contracts for the Cypress project. [note: 81] QAM in fact had the chance to put in a quote for the Cypress project and took that chance by putting in a quote.

(b) Even if QAM did lose the chance, it failed to establish that the chance that it lost was real and substantial. [note: 82]

(c) Even if QAM lost a real and substantial chance, it failed to prove a causal link between Zhang's conduct and the loss of that chance. [note: 83]

(d) Even if there was such a causal link, QAM failed to adduce any evidence to support the AR's finding that the chance it had lost was a 50% chance.

(e) Even if it had lost a 50% chance, the AR failed to make an appropriate deduction for QAM's notional costs of pursuing the Cypress project in assessing the notional lost profit. [note: 84]

(f) There was no evidence to show QAM's profit margin. [note: 85]

(g) QAM actually entered into a quality assurance contract with Ellipsiz at a contract price of $17,000. If QAM indeed lost profit on that contract, it was because of Ellipsiz's breach and not because of anything done by Zhang. [note: 86]

82 Zhang also submitted that QAM's claim should fail because there was no evidence that Pinnacle

had secured the Cypress Decatech project. [note: 87] This point is the easiest to dispose of. QAM's claim was a claim for compensation measured by its own loss, not by Pinnacle's gain. It matters not, therefore, whether Pinnacle made a gain on the Cypress Decatech project by securing and performing the underlying contracts. The question is what, if any, loss Zhang's breaches of fiduciary caused to QAM applying the "but for" test. In any event, if it was indeed true that Pinnacle did not secure the Cypress Decatech project, it was only because QAM had commenced these proceedings and secured injunctive relief to protect their position. [note: 88]

83 To dispose of Zhang's remaining points, one must bear in mind that what is being assessed is the equitable compensation which Zhang ought to pay to QAM for breach of fiduciary duty. That breach is the foundational breach which he committed when he received the Cypress Decatech business opportunity as an employee of QAM in early August 2010 and decided not to pursue it in its entirety for QAM's benefit but to divert the substance of it for the benefit of Pinnacle. If Zhang had pursued that opportunity to the maximum extent possible for the benefit of QAM – as it was his fiduciary duty to do – the evidence I have summarised above showed that there was indeed a real and substantial chance that QAM would have had sufficient time to put in a competitive quote to Cypress, not just for the quality assurance contract but also for the testing contract as a total package.

84 Further, I bear in mind the principles I have identified at [61] above. QAM adduced evidence relating to: (a) Zhang's connection with Chew, the engineer who mysteriously resigned; (b) Zhang's secret communications with Cypress, Ellipsiz and J+J; (c) the very close timing of the events relating to the Cypress Decatech project and Zhang's notice of resignation and eventual departure from QAM; and (d) the fact that both Ellipsiz and J+J on paper awarded contracts to QAM but both very unusually failed to follow through by permitting QAM an opportunity to perform the contracts. All of this left a strong inference that the hand of Zhang was behind this lost opportunity. This inference was sufficiently strong to shift the evidential burden of proof to Zhang. He failed to discharge that burden.

85 Bearing all of this in mind, I have no hesitation in finding that the loss which QAM suffered on the Cypress Decatech project was caused by Zhang on the "but for" analysis. It was not necessary for QAM to establish that Zhang had diverted the Cypress Decatech project to Pinnacle: it sufficed to show that but for Zhang's conduct, QAM lost the Cypress Decatech Project or lost a real and substantial chance to earn a profit on the Cypress Decatech project. Beyond that, in a case within the *Brickenden* principle such as this, the law "does not allow an examination into the relative importance of contributory causes" see [61] above.

86 I note finally that the sum awarded by the AR as equitable compensation under this head incorporated proper deductions for QAM's costs and to reflect the fact that all it lost was a chance. First, the AR discounted the equitable compensation awarded under the testing contract by 50% to account for the costs that QAM would have incurred in earning the profit on this contract. The equitable compensation under the quality assurance contract required no discount for costs because the full revenue under this contract would have gone straight to QAM's bottom line, the associated costs already having been incurred and paid as part of its overhead or to be paid by the customer. Finally, the AR applied a discount of 50% to the lost profit to reflect the fact that the overall award was ultimately for the loss of a chance rather than for outright loss.

87 One final point: the equitable compensation to which QAM is entitled under this head is $20,875, calculated as I have set out in [79]-[80] above. However, the AR awarded under this head $20,857. This was an obvious arithmetical or typographical error, albeit *de minimis*. Because this error was in favour of Zhang, and because QAM did not appeal to me to increase the award under this

head by the $18 necessary to arrive at $20,875, I did not vary this amount but left it as the AR had awarded it.

Repayment of bonuses

88 During Zhang's employment from November 2007 to 15 September 2010, [note: 89] QAM paid him total remuneration of $174,067.69. [note: 90] This comprised gross salary of $138,067.69, bonus of $15,300 and transport allowance of $20,700. [note: 91] Because of the depth, scale and duration of Zhang's breaches of fiduciary duty during the period of his employment, QAM sought a refund of 50% of this salary. [note: 92]

89 The AR rejected this claim. She held that QAM failed to prove that Zhang diverted his attention and energies from his duties to QAM during the period in question. [note: 93] QAM did not appeal against this finding.

90 But the AR held [note: 94] that QAM was entitled to recover the total sum of $23,300 from Zhang. This comprised the sum of $15,300 being bonuses it had paid Zhang for 2008 ($11,100) [note: 95] and 2009 ($4,200) [note: 96] as well as the monetary award QAM paid to Zhang when he was named Employee of the Year 2008 ($8,000: see [9] above).

91 The factual basis for the AR's decision is found in the cross-examination of Zhang: [note: 97]

Q: Do you agree that if [QAM] had known you were diverting business since September 2007, it is possible that they would have terminated your employment immediately?

A: Impossible.

Q: They should not have?

A: Should have.

Q: They would have terminated your employment if they found out?

A: Yes.

Q: Can you turn to page 139 of Tab 2, PBOA? Do you agree that this is the remuneration you received for those years?

A: Yes.

Q: You received a bonus of $11,100 and $4,200?

A: Yes.

Q: Page 450 – letter from Plaintiff giving you cash award of $8,000, employee of the year?

A: Yes.

Q: Do you agree [QAM] would not have given you these bonuses if they had known that you

had been diverting business away from them?

A: Yes.

92 Zhang's candid admission that QAM would not have paid him these bonuses totalling $23,300 if they had known the truth conforms with common sense and with Choo J's analysis in *John Whiles Springs* (see [98] above) of a reasonable employer's approach on bonuses.

93 Counsel for Zhang argued before me that the AR had erred in allowing QAM to recover these bonuses on three grounds:

(a) QAM's claim for return of bonuses and for the monetary award of $8,000 was not pleaded; [note: 98]

(b) QAM failed to show what the bonuses were paid for and the extent to which Zhang's breaches of duty undermined that basis and therefore justified repayment; [note: 99]

(c) QAM's election to claim damages precludes a claim for restitutionary relief as that would amount to double recovery; [note: 100]

Zhang's first ground

94 On 10 September 2012, the AR granted QAM leave to plead by amendment its claim for the return of the bonuses and the monetary award (see [21(a)] above). I dismissed Zhang's appeal against the AR's decision to permit the amendment. Zhang does not appeal further against that decision. The first ground raised by Zhang before me is therefore no longer a live ground.

Zhang's second ground

95 QAM's statement of claim, in its final amended form, pleaded an express prayer for the recovery of the $23,300 paid to Zhang in bonuses. Its statement of claim, however, did not plead the precise basis on which it alleged it was entitled to recover this sum. It is difficult to characterise this sum either as damages at common law or compensation in equity. This is because it is difficult as a matter of logic to say that Zhang's admitted breaches of duty *caused* – in any sense of the word – QAM to pay this money to Zhang. QAM did not even know about Zhang's breaches of duty at the time of payment. Establishing the necessary "but for" connection requires QAM to show that Zhang owed QAM a duty to disclose his own wrongdoing. If there were such a duty, either at common law or in equity, then it could be said that but for Zhang's breach of his duty to disclose his own wrongdoing, QAM would never have paid the $23,300 to him. Is there such a duty?

96 At common law, an employee has in general no implied duty to confess his own misdeeds to his employer. But in the context of a particular contract and on the facts of a particular case, an employee may have an implied duty to report the misdeeds of *other* employees: see *Bell v Lever Brothers Ltd* [1932] AC 161 at 228; *Sybron Corporation and Another v Rochem Ltd and others* [1984] 1 Ch 112 cited in *Chua Choon Cheng and others v Allgreen Properties Ltd* [2009] 3 SLR(R) 724 at [87] - [88].

97 In equity, the position is different. An employee who is also a fiduciary and who owes his employer a general fiduciary duty of loyalty – that is, a duty to act in good faith in the best interests of his employer – is obliged pursuant to that general duty to disclose his own wrongdoing to his employer: see *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244 at [41] - [44]. By his own

admission, Zhang was a fiduciary who owed a duty of loyalty to QAM. So QAM could, and probably should, have based its claim to recover from Zhang a sum equivalent to the bonuses they had paid to him as being equitable compensation for Zhang's breach of his duty of loyalty in failing to disclose his own wrongdoing to QAM. But that is not how QAM based its claim.

98 QAM based its claim on the fact that QAM had paid the bonuses to Zhang while labouring under a causative mistake of fact. [note: 101] QAM relied on the following passage in the decision of Choo J in *John Whiles Spring* at [7]:

> A bonus is generally a payment fashioned as a reward as well as an incentive. No reasonable employer would have offered a bonus to a cheating employee, or one who was in breach of his fiduciary duty as was the case here. This would be a fair inference of fact from the admitted facts at trial and is not dependent on any assessment of the reliability of witnesses.

99 The AR accepted this submission [note: 102] and based her decision to permit QAM to recover the bonuses explicitly on this passage. [note: 103] She relied on Zhang's admissions as establishing the "but for" test of causation. QAM was therefore entitled to recover the sum of $23,300 from Zhang as money had and received, having been paid to Zhang without obligation – being *ex gratia* payments outside his employment contract – and while labouring under an admittedly causative mistake of fact. This is a restitutionary claim, in the modern and technical sense of the word. There was no evidence from Zhang that he had changed his position, that QAM was estopped or that he had any other defence to QAM's restitutionary claim. All of the foregoing suffices to ground recovery. Given that the mistake was fundamental and by Zhang's own admission operative, there is thus no room for any further inquiry into why and for what reason QAM paid these bonuses to Zhang. Zhang's second ground failed.

Zhang's third ground

100 The gist of Zhang's third ground was that awarding QAM both equitable compensation under the other heads which the AR allowed and awarding him a sum equivalent to these bonuses amounted to double recovery. This argument is misconceived. There was no overlap between any of the other heads of loss and the recovery of the bonuses. Each head of damage which the AR awarded compensated QAM for a distinct and separate loss. QAM did not recover more than it lost.

101 Zhang's counsel also submitted that it was an abuse of process in an assessment where a plaintiff has elected to claim damages to advance a claim in restitution. [note: 104] He relied for this proposition on the decision of Assistant Registrar Shaun Leong in *ABB Holdings Pte Ltd and others v Sher Hock Guan Charles* [2010] SGHC 267. That decision does not stand for the proposition advanced. In that case, a plaintiff elected to claim damages and then attempted to recover restitutionary damages at the assessment. That decision rightly makes the point that where a plaintiff is put to an election between what is commonly referred to as damages and an account of profits, the substance of the election is between a loss-based measure of recovery and a gain-based measure of recovery. Although restitutionary damages and an account of profits are distinct remedies, they are both gain-based measures of recovery. A plaintiff who elects damages without any reservations or qualifications elects to pursue a loss-based measure of recovery and is thereby precluded from pursuing a gain-based measure of recovery, whatever it may be called. It is therefore an abuse of process for that plaintiff to attempt later to circumvent his election for a loss-based measure of recovery by advancing a claim for restitutionary damages.

102 That principle has no application to this case. Zhang's gain of $23,300 was mirrored exactly by

QAM's loss of $23,300. The conceptual basis for the award of $23,300 was to compensate QAM for the wealth subtracted from it by the mistaken payment. The conceptual basis of recovery was not to strip Zhang of his gain. There was no abuse of process in QAM seeking to recover all the money it had lost by reason of Zhang's misconduct or in its mistaken belief in the propriety of his conduct. The money it lost included the $23,300 awarded to it under this head.

Met One condensation nucleus counter

103 QAM uses a device known as a Met One condensation nucleus counter to verify the cleanliness of high purity gas lines. The cost of servicing a Met One counter is prohibitively high. QAM therefore buys used Met One counters to cannibalise for spare parts to keep its own Met One counters in running condition. At the time of the assessment, it had eight Met One counters of which only one was working. [note: 105]

104 QAM's evidence was that it was limited in how much testing business it could source because it had only one Met One counter. [note: 106] So in June 2008, Brown instructed Zhang to buy a used Met One counter on eBay. [note: 107] Zhang eventually found and bought a Met One counter on eBay. He paid $1,900 for it. He paid this sum out of his own pocket. [note: 108] He did not recover this sum from QAM. But he procured an invoice for the Met One counter addressed to QAM. The Met One counter was delivered to QAM's premises in June 2008. Zhang immediately intercepted it and diverted it for his own use. He informed Brown that he had had to return this Met One Counter to its seller because it was damaged and could not be serviced. [note: 109] That was a deliberate deception. What Zhang did instead was to transfer possession of the Met One counter to a company known as UPM Technology Pte Ltd ("UPM"). UPM later rented the same Met One counter back to QAM at $1,000. Zhang admitted in cross-examination that he then secretly pocketed this $1,000 for himself. [note: 110] UPM also, while Zhang was employed by QAM, rented the same Met One counter to a direct competitor of QAM who approached Zhang seeking a Met One counter in his capacity as an employee of QAM. Zhang secretly pocketed $4,000 as a result of that other transaction. [note: 111] I emphasise again the audacity of Zhang's conduct.

105 Further, Brown's evidence was that used Met One counters were rarely on the market and, in any event, this particular model had been discontinued. QAM therefore claimed $50,000 being the cost of a new Met One counter or, alternatively, $1,900 being the cost of a used Met One counter. The AR allowed this head of claim, awarding QAM $1,900 being the cost of a used Met One counter.

106 I allowed Zhang's appeal on this point. QAM were of course precluded from recovering Zhang's secret profits totalling $5,000 because of its election to claim damages instead of an account of profits. That gain of $5,000 was also not matched by any loss on QAM's side for which loss-based compensation could be awarded. It is true that QAM paid $1,000 in rental to UPM. But QAM received the benefit of the use of the Met One counter in exchange. There was no subtraction of QAM's wealth. Further, Zhang paid for the Met One counter. The Met One counter never became the property of QAM. QAM led no evidence on any other losses it suffered by having been deprived of the use of the Met One counter or of the opportunity to purchase a used Met One counter. I therefore held that QAM was not entitled even to recover the $1,900 under this head as awarded by the AR.

Professional fees of Tecbiz

107 Zhang downloaded confidential information before he left his employment with QAM. [note: 112] He and Pinnacle thereafter made unlawful use of that confidential information to solicit clients of QAM

and to compete unfairly with QAM. [note: 113] This information included detailed and in some cases specially-customised test procedures developed by QAM and its American parent company, company specifications issued to QAM's employees to perform QAM's work, quality plans prepared by QAM for their clients or issued to QAM for particular projects, a master compilation of all of QAM's pricing to its clients in Singapore since 2005, a complete copy of QAM's technician training manual and a list of quotations from QAM's vendors. [note: 114]

108 The defendants failed to deliver up all of this confidential information despite being ordered to do so by an interlocutory injunction obtained in this action on 30 September 2010 and by a permanent injunction which formed part of the consent judgment on 24 January 2011. [note: 115]

109 On 10 June 2011, QAM obtained an order for specific discovery and for forensic inspection of a hard drive, two thumb drives and a laptop computer belonging to the defendants. Tan Kah Leong of Tecbiz carried out this forensic inspection. He discovered that the defendants had indeed failed to deliver up all the documents in their possession containing QAM's confidential information and continued to use and disseminate these documents to third parties without QAM's knowledge, consent or approval. [note: 116]

110 QAM paid Tecbiz a total of $17,580.10 [note: 117] for the computer forensic and investigation services it carried out. These services were reasonably necessary to uncover Zhang's breaches of his contractual and fiduciary obligations of confidence to QAM as well as of the interlocutory and final injunctions to deliver up QAM's confidential material.

111 There can be no doubt that QAM would not have incurred this expense but for Zhang's breaches of his contractual and fiduciary duties.

112 Zhang submitted that QAM could not recover the fees paid to Tecbiz because that claim had not been properly pleaded and particularised. The pleading issue is no longer a live issue on this appeal as there is no further appeal against QAM's successful application to amend its pleading to claim this head of recovery.

113 Zhang submitted that Tecbiz's invoice supporting QAM's claim for fees was ambiguous, contained duplicated work [note: 118] and was excessive, at least in part. [note: 119] Zhang's counsel cross-examined Tan Kah Leong on all of these issues. The AR did not accept as valid any of the points made by Zhang's counsel in cross-examination. She held that QAM was entitled to recover the sum of $17,580.10 which QAM paid to Tecbiz as damages flowing from Zhang's breach of duties: *Chun Cheng Fishery Enterprise Pte Ltd v Chuang Hern Hsiung* [2010] SGHC 298 at [13] [note: 120] (this decision was appealed against but not on this point in *Chun Cheng Fishery Enterprise Pte Ltd v Chuang Hern Hsiung and another* [2011] SGHC 167).

114 I characterise QAM's recovery under this head as equitable compensation and not as damages. I make the point also that Zhang's liability must be considered in the light of the plaintiff-friendly principles I have summarised at [61] above. Subject to those two points, I agreed entirely with the AR that this sum was recoverable.

Conclusion

115 For the reasons set out above, the outcome of the appeal before me was that the defendants were obliged to pay QAM the following sums together with, as is usual, interest and costs:

(a)	Loss of profits on diverted business	$8,825.00
(b)	Loss of opportunity (Cypress Decatech project)	$20,857.00
(c)	Repayment of bonuses and monetary award	$23,300.00
(d)	Loss of Met One condensation nucleus counter	nil
(e)	Professional fees of Tecbiz	$17,580.10
	Total	**$70,562.10**

[note: 1] Transcript, 10 September 2012at page 1 line 40 para [1].

[note: 2] Brown's affidavit filed on 17 September 2010, at para 9

[note: 3] Brown's affidavit filed on 17 September 2010, at para 9

[note: 4] Brown's affidavit filed on 17 September 2010, at para 11.

[note: 5] Brown's affidavit filed on 17 September 2010, at paras 14-16.

[note: 6] Brown's affidavit filed on 17 September 2010, at para 16.

[note: 7] Brown's affidavit filed on 17 September 2010, at para 18.

[note: 8] Brown's affidavit filed on 17 September 2010, at para 17.

[note: 9] Brown's affidavit filed on 17 September 2010, at para 19.

[note: 10] Brown's affidavit filed on 17 September 2010, at para 20.

[note: 11] Transcript, 19 March 2012 at page 34 line 26 to 31.

[note: 12] Feng's affidavit of evidence in chief filed on 2 March 2012, at para3.

[note: 13] Transcript, 19 March 2012 at page 31 line 21 to page 32 line 24.

[note: 14] Transcript, 19 March 2012 at page 41 line 12 to 14.

[note: 15] Zhang's affidavit filed on 2 March 2012, at para 6.

[note: 16] Brown's affidavit filed on 17 September 2010, at para 22.

[note: 17] Brown's affidavit filed on 17 September 2010, at para 24.

[note: 18] Brown's affidavit filed on 17 September 2010, at para 25.

[note: 19] Brown's affidavit filed on 17 September 2010, at para 27.

[note: 20] Brown's affidavit filed on 17 September 2010, at para 32.

[note: 21] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 49.

[note: 22] Transcript, 19 March 2012 at page 35 line 4 to page 36 line 19.

[note: 23] Statement of Claim (Amendment No. 1) filed 22 October 2010.

[note: 24] Transcript, 10 September 2012 at page 3 to 5, [4] to [7].

[note: 25] Statement of Claim (Amendment No. 2) filed on 27 Nov 2012 at prayer 5.

[note: 26] Statement of Claim (Amendment No. 2) filed on 27 Nov 2012 at prayer 9.

[note: 27] Transcript, 10 September 2012 at page 3 to 5, [4] to [7].

[note: 28] Statement of Claim (Amendment No. 1) filed 22 October 2010 at para 7.

[note: 29] Statement of Claim (Amendment No. 1) filed 22 October 2010 at para 8.

[note: 30] Defence and Counterclaim filed on 10 November 2010 at para8.

[note: 31] Brown's affidavit of evidence in chief filed on 16 March 2012, at paras 16 to 28.

[note: 32] Brown's affidavit of evidence in chief filed on 16 March 2012, at paras 29 to 48.

[note: 33] Brown's affidavit of evidence in chief filed on 16 March 2012, at paras 49 to 53.

[note: 34] Brown's affidavit of evidence in chief filed on 16 March 2012, at paras 54-66.

[note: 35] Brown's affidavit of evidence in chief filed on 16 March 2012, at paras 67-80.

[note: 36] Brown's affidavit of evidence in chief filed on 16 March 2012, at paras 81-85.

[note: 37] Transcript, 10 September 2012 at page 12 line 20 to 29, para 30.

[note: 38] Transcript, 10 September 2012 at page 9 line 27 to 30, para 22.

[note: 39] Transcript, 10 September 2012 at page 8 line 18 to 19 para 19.

[note: 40] Transcript, 10 September 2012 at page 10 line 1 to 16, para 23.

[note: 41] Transcript, 10 September 2012 at page 5 line 33 to34, para 11.

[note: 42] Transcript, 10 September 2012 at page 5 line 14 to 15, para 9.

[note: 43] Zhang's affidavit of evidence in chief filed on 2 March 2012,at para 15.

[note: 44] Zhang's affidavit of evidence in chief filed on 2 March 2012, at para 18.

[note: 45] Zhang's affidavit of evidence in chief filed on 2 March 2012, at para 21.

[note: 46] Zhang's affidavit of evidence in chief filed on 2 March 2012, at para 22.

[note: 47] Zhang's affidavit of evidence in chief filed on 2 March 2012, at paras 14, 17 and 20.

[note: 48] Zhang's affidavit of evidence in chief filed on 2 March 2012, at paras 13, 16 and 19.

[note: 49] Zhang's affidavit of evidence in chief filed on 2 March 2012, at paras 14, 17 and 20.

[note: 50] Transcript, 19 March 2012 at page 34 line 1 to page 35 line 18.

[note: 51] Defendant's closing submissions filed 30 April 2012, at para93(b).

[note: 52] Transcript, 10 September 2012 at page 9 line 4 to 6, para 21.

[note: 53] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 48.

[note: 54] Defendant's closing submissions filed 30 April 2012, at para93(c).

[note: 55] Transcript, 10 September 2012 at page 9 line 1-4, para 21.

[note: 56] Brown's affidavit filed on 17 September 2010, at para 38.

[note: 57] Transcript, 19 March 2012 at page 36 line 21 to 23.

[note: 58] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 32.

[note: 59] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 33.

[note: 60] Brown's affidavit filed on 25 November 2010, at para 27.

[note: 61] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 33.

[note: 62] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 33.

[note: 63] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 34.

[note: 64] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 36.

[note: 65] Brown's affidavit filed on 19 January 2011, at para 11.

[note: 66] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 37.

[note: 67] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 37.

[note: 68] Transcript, 19 March 2012 at page 37 line 22 to 25; page 38 line 8 to 14.

[note: 69] Transcript, 19 March 2012 at page 38 line 20 to 22.

[note: 70] Transcript, 19 March 2012 at page 38 line 8 to 11.

[note: 71] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 38.

[note: 72] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 39.

[note: 73] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 40.

[note: 74] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 40.

[note: 75] Brown's affidavit filed on 19 January 2011, at para 8.

[note: 76] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 30.

[note: 77] Bundle of Documents, page 84 and 85.

[note: 78] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 48.

[note: 79] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 48.

[note: 80] Appellant's submissions dated 16 November 2012, at para47.

[note: 81] Appellant's submissions dated 16 November 2012, at paras 49 to50.

[note: 82] Appellant's submissions dated 16 November 2012, at para 53.

[note: 83] Appellant's submissions dated 16 November 2012, at para 54.

[note: 84] Appellant's submissions dated 16 November 2012, at para 57.

[note: 85] Appellant's submissions dated 16 November 2012, at para 57.

[note: 86] Appellant's submissions dated 16 November 2012, at paras 58 to 59.

[note: 87] Appellant's submissions dated 16 November 2012, at para 52.

[note: 88] Transcript, 19 March 2012 at page 43 line 9 to 13.

[note: 89] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 43.

[note: 90] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 52.

[note: 91] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 53 and p139.

[note: 92] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 53.

[note: 93] Transcript, 10 September 2012 at page 10 line 19 to page 12 line 14, at paras 25 to 29.

[note: 94] Transcript, 10 September 2012 at page 10 line 1 to 17, paras 23 to 24.

[note: 95] Transcript, 10 September 2012 at page 10 line 2, para 23. The figure of $11,110 stated in the transcript is incorrect. See page 139 of Brown's affidavit of evidence in chief filed on 16 March 2012.

[note: 96] Transcript, 10 September 2012 at page 10 line 2, para 23.

[note: 97] Transcript, 20 March 2012 at page 10 line 16 to page 11 line 8.

[note: 98] Defendants' submissions dated 16 November 2012 at para 42.

[note: 99] Defendants' submissions dated 16 November 2012 at para 68.

[note: 100] Defendants' submissions dated 16 November 2012 at para 69.

[note: 101] Transcript, 20 March 2012 at page 11 line 18 to 20.

[note: 102] Transcript, 10 September 2012 at page 10 line 15 to 17, para 24 .

[note: 103] Transcript, 10 September 2012,at page 10, line 1 to 14, at para 23.

[note: 104] Defendants' Submissions dated 16 November 2012 at para 42.

[note: 105] Transcript, 19 March 2012 at page 23 line 14 to 15.

[note: 106] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 69.

[note: 107] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 70.

[note: 108] Zhang's affidavit of evidence in chief filed on 2 March 2012, at para 39; Transcript, 19 March 2012 at page 24 line 23 to 27.

[note: 109] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 72.

[note: 110] Transcript, 19 March 2012 at page 45 line 1 to 16.

[note: 111] Transcript, 20 March 2012 at page 1 line 39 to page 3 line 7.

[note: 112] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 56.

[note: 113] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 59.

[note: 114] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 56.

[note: 115] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 62.

[note: 116] Brown's affidavit of evidence in chief filed on 16 March 2012, at para 64.

[note: 117] Transcript, 19 March 2012 at page 6 line 20; page 12 line 26.

[note: 118] Defendants' submissions dated 16 November 2012, at para 78.

[note: 119] Defendants' submissions dated 16 November 2012, at para 79.

[note: 120] Transcript, 10 September 2012 page 4 line 16 to page 5 line 15, paras 8 to 9.