IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 205

Suit No 244 of 2013

Between

Danial Patrick Higgins

… *Plaintiff*

And

(1) Philippe Emanuel Mulacek
(2) Carlo Giuseppe Civelli
(3) Pacific LNG Operations Pte Ltd

… *Defendants*

Suit No 733 of 2014

Between

Singapore Air Charter Pte Ltd

… *Plaintiff*

And

Danial Patrick Higgins

… *Defendant*

And

Danial Patrick Higgins

… *Plaintiff by counterclaim*

And

(1) Philippe Emanuel Mulacek
(2) Carlo Giuseppe Civelli

(3) Nicholas Johnstone
(4) Daniel Chance Walker
(5) Stefan Wood
(6) Singapore Air Charter Pte Ltd

… Defendants by counterclaim

JUDGMENT

[Contract] — [Contractual terms]

[Companies] — [Directors] — [Duties]

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v
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26 September 2016 Judgment reserved.

Edmund Leow JC:

Introduction

1 These two suits concern the purchase and management of a Gulfstream III Corporate Jet ("the Aircraft"). The Aircraft was purchased by AirLNG Ltd ("AirLNG"), a company registered in Labuan, Malaysia, at a price of US$2m in March 2011.[1] Mr Danial Higgins ("Mr Higgins") acted for AirLNG in the purchase. Shortly after the Aircraft was acquired, AirLNG entered into an Aircraft Management Services Agreement ("the AMS Agreement") with Singapore Air Charter Pte Ltd ("SAC"), a Singapore incorporated company of which Mr Higgins was the Managing Director ("MD"). In February 2012, the AMS Agreement was terminated but Mr Higgins continued to do further work in relation to the Aircraft until May 2012, when AirLNG concluded an aircraft management contract with another company. Meanwhile. Mr Higgins

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[1] 1 ABD 132–133.

continued as the MD of SAC until he resigned his position in July 2012.[2]

2 This, in a nutshell, forms the background to the suits. Most of the events which are material to this judgment took place between March 2011, when the Aircraft was purchased, and July 2012, when Mr Higgins left SAC. I will examine the facts in greater detail later but it suffices for now to sketch the broad outlines of each suit.

(a) In Suit No 244 of 2013 ("Suit 244"), Mr Danial Higgins alleges that he had entered into an oral contract with Mr Philippe Emanuel Mulacek ("Mr Mulacek"), Mr Carlo Guiseppe Civelli ("Mr Civelli"), and Pacific LNG Operations Pte Ltd ("PacLNG") (which was beneficially owned by Mr Civelli) under which he was to be remunerated for work done in relation to the management of the Aircraft. In the alternative, and in the event the court finds that there was no such oral contract, he brings a claim in restitution, arguing that he ought to be given a reasonable sum in compensation for the work he did on behalf of the defendants.

(b) In Suit No 733 of 2014 ("Suit 733"), SAC brings a claim against Mr Higgins for breach of fiduciary duty. SAC's case is that Mr Higgins had actively worked to undermine SAC's interests by, among other things, procuring the termination of the AMS Agreement for his own benefit and by making secret profits which he is not entitled to keep. In response, Mr Higgins counterclaims against Mr Mulacek, Mr Civelli, SAC, as well as the remaining directors of SAC – Mr Nicholas Johnstone ("Mr Johnstone"), Mr Danny Walker ("Mr Walker"), and

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[2] Plaintiff's closing submissions at para 16.

Mr Stefan Wood ("Mr Wood") – for unpaid directors fees and salary for the period between April and July 2012.

3 After careful consideration of the evidence presented, I dismissed Suit 244 in its entirety. As for Suit 733, I allowed SAC's claim in full and Mr Higgins's counterclaim in part. For ease of exposition, I propose to deal with the issues in each suit in sequence, rather than to go through the matters chronologically. As will be clear in the course of my judgment, the matters in both suits are closely inter-related and proceeding in this fashion will allow a fuller picture of the relevant facts to be presented.

The facts

4 I begin with a more detailed recitation of the background facts. I will refer to the parties by their names instead of their designations in the suits (*eg*, "plaintiff", "defendant" etc) for ease of exposition.

5 Mr Wood[3] and Mr Johnstone[4] were both pilots and in 2010, they decided to incorporate a company to provide, among other things, air chartering services.[5] Mr Johnstone invited Mr Higgins, who was also a pilot and whom he first met in 2001, to join them as the MD of SAC as he had experience in the corporate aviation industry.[6] At that time, Mr Higgins was the MD of Montreal Asset Management ("MAM"), a company involved in the

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3 Affidavit of Stefan Wood in CWU 97/2014 dated 21 July 2014 at para 8 (Bundle of CWU Affidavits ("BCA") at Tab 2).

4 Affidavit of Nicholas Johnstone in CWU 97/2014 dated 25 July 2014 at paras 19–22. (BCA Tab3).

5 *Ibid* at para 24.

6 *Ibid* at para 19, 25–28.

shipping and oil trading business but which also provided aviation consultancy services. SAC was incorporated on 7 September 2010 and its founding directors were Mr Johnstone, Mr Wood, Mr Higgins, and Mr Higgins's wife.[7]

Purchase of the Aircraft

6 On 26 November 2010, Mr Higgins attended a networking event at the Fullerton Hotel where he met Mr Mulacek, who was the Chief Executive Officer of Interoil Corporation, a company publicly listed in the United States ("US").[8] During that meeting, they discussed, among other things, the possibility that Mr Mulacek might purchase a pre-owned corporate jet to fulfil his business travel requirements. Three days after that meeting, on 29 November 2010, Mr Higgins wrote to Mr Mulacek to explain that a Gulfstream aircraft might suit Mr Mulacek's needs. Mr Higgins proceeded to outline different purchasing options and explained that "we" (by which he meant SAC) might be able to assist through the provision of, among other things, air chartering services. At the end of the email, he wrote:[9]

> I hope this brief outline will assist you in your decision making process. Please feel free to contact me or my Business Managing Nick Johnstone at any time on the phone numbers shown on my business card. You can get me personally on H.P. 9XXXXXXX …
>
> We hope to be of service to InterOil in the future.
>
> Yours truly
>
> Danial Higgins

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7 Affidavit of Evidence in Chief of Danial Patrick Higgins dated 3 February 2016 at paras 8 and 40 (Bundle of AEICs ("BOAEIC"), Vol 1, p 10).

8 *Ibid* at para 43; Affidavit of Evidence in Chief of Philippe Emanuel Mulacek at para 8 (BOAEIC, Vol 4, p 718).

9 1 ABD 118–119.

M.D. Singapore Air Charter

7 Over the next two months (December 2010 and January 2011), Mr Higgins wrote several emails to Mr Mulacek in which he detailed the specifications and prices of various Gulfstream aircraft which were available for sale. All of these emails (save for one, in which he simply signed off as Dan Higgins) were sent from Mr Higgins's email account with SAC and he consistently identified himself as the MD of SAC. Mr Johnstone was also copied in the correspondence.[10] Further discussions then took place between Mr Higgins, Mr Civelli (who was an investor in InterOil) and Mr Mulacek. Following these discussions, it was decided that the Aircraft was to be purchased from OK Consultants, an aircraft dealer based in California, and that it would be beneficially held in the name of a company which would be specifically incorporated for this purpose.[11]

8 On 8 March 2011, AirLNG was incorporated in Labuan, as Malaysia had a double-taxation agreement with Papua New Guinea ("PNG").[12] AirLNG's two founding directors were Mr Civelli and one Mr Henry Edmond Aldorf ("Mr Aldorf").[13] Shortly after, Mr Jack Kendall ("Mr Kendall") of OK Consultants Ltd sent a draft Letter of Intent ("LOI") to Mr Higgins. After an exchange of correspondence, the LOI was amended by Mr Higgins and it was eventually signed on 23 March 2011. The emails received by Mr Higgins during this period, unlike that in the previous two months, were all addressed to his MAM email account instead of his SAC email account.[14]

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10 1 ABD 120–127.

11 AEIC of Philippe Emanuel Mulacek at paras 13–15 (BOAEIC, Vol 4, p 720).

12 NE (29 March 2016, p 89, lines 20–25).

13 1 ABD 129.

9 On 26 April 2011, Mr Aldorf granted Mr Higgins a power of attorney to act on behalf of AirLNG and PacLNG in the purchase of the Aircraft.[15] In preparation for the sale, approximately US$2.3m had been deposited in an escrow account by Mr Civelli.[16] On 17 May 2011, Mr Higgins, on behalf of AirLNG, and Mr Jack Kendall, on behalf of OK Consultants, gave detailed instructions on how the money in the escrow account was to be disbursed. On the completion date of 18 May 2011, a sum of $1.35m, representing the purchase price of the plane, was to be transferred to an account specified by OK Consultants (the undisputed evidence was that the Aircraft was owned by the Saudi Royal Family and OK Consultants only acted as their brokers in the sale[17]). Thereafter, a series of payments were to be made to "[r]eimburse expenses" and they were as follows:[18]

(a) $15,000 was to be transferred to SAC.

(b) $316,500 was to be transferred to MAM.

(c) $316,500 was to be transferred to OK Consultants.

(d) $1,690 was to be retained as escrow fees

(e) $4,400 was to be transferred to Mr Higgins for "payment for pre-buy inspection instructions".

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14 1 ABD 140–146.

15 1 ABD 184.

16 1 ABD 230–232; AEIC of Danial Higgins at para 80 (BOAEIC, Vol 1, p 19); NE (29 March 2016), p 101 at lines 9–13.

17 1 ABD 157.

18 P5, p 2.

(f) $2,325 was to be transferred to OK Consultants.

10 I pause to note that the escrow documents referred to above ("the Escrow documents") were not disclosed during the general discovery process but were only disclosed following a keenly contested application for specific discovery taken out *during* the course of the trial. The circumstances under which the documents came to light is vital to Suit 733 and I will return to it later (see [101] below). It suffices to note for now that under the purchase and sale agreement for the Aircraft, the purchase price of the Aircraft was expressed to be US2m and beneficial title passed to AirLNG.[19] It was explained that OK Consultants remained the legal owners of the Aircraft as the United States Federal Aviation Authority ("FAA") required all aircraft on its register be registered either in the name of a US citizen or a US registered entity.[20]

AMS Agreement

11 On 25 April 2011, shortly before the purchase of the Aircraft was finalised, the AMS Agreement was concluded between SAC and AirLNG. SAC was responsible for the use, management, operation, and maintenance of the Aircraft for AirLNG's exclusive use. In return, AirLNG was to pay SAC a sum of US$25,000 a month in addition to paying each "Primary Flight Crew member" (*ie*, the pilots) $11,875 a month.[21]

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19 1 ABD 187.

20 AEIC of Benjamin Yan Eng Ng dated 3 February 2016 at paras 6–7 (BOAEIC, Vol 3, p 455); AEIC of Philippe Emanuel Mulacek at para 22-23 (BOAEIC, Vol 4, p 722).

21 1 ABD 176–181 at cll 1, 10, and 13.

12 For the first few months, matters ran smoothly and the Aircraft was used by Mr Civelli, Mr Mulacek, and Mr Aldorf on a regular basis. During this time, Mr Johnstone and Mr Walker – who joined SAC in April 2011 and received the title of "Manager, Flight Operations" – served as the primary pilots.[22] In the main, the Aircraft was used to ferry employees and potential investors to Papua New Guinea ("PNG"), where both Mr Civelli (through PacLNG, which he owned[23]) and InterOil had substantial business interests.[24] Mr Higgins served as the primary point of contact between SAC and would arrange for the charters with Mr Walker covering for him in his absence.[25]

13 Sometime in August 2011, Mr Mulacek proposed that SAC assist him with the running of an aircraft management company in Papua New Guinea – National Air Services ("NAS"). The correspondence reveals that the directors of SAC discussed the NAS proposal actively[26] and it featured on the agenda of their meetings.[27] However, it eventually came to naught as none of the directors in SAC wished to be based permanently in PNG.[28] This proved to be the beginning of many disagreements between the directors of SAC. These disagreements ran the gamut from Mr Higgins's remuneration and the extent of his commitment to SAC to the proposed salary increases for Mr Johnstone and Mr Walker.[29] Relationships deteriorated, to the point where Mr Higgins

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22 AEIC of Danial Higgins at para 88 (BOAEIC, Vol 1, p 21).

23 NE (29 March 2016) at p 90, lines 9–15; NE (29 March 2016), p 99, line 3 to p 100, line 16.

24 Suit 244 Defendants' closing submissions at para 147.

25 AEIC of Philippe Emanuel Mulacek at para 23 (BOAEIC, Vol 4, p 723).

26 5 ABD 1127.

27 2 ABD 367–368.

28 AEIC of Danial Higgins at paras 90–93 (BOAEIC, Vol 1, p 22).

was no longer on speaking terms with Mr Walker and Mr Wood, leaving Mr Johnstone to act as the intermediary between them.[30]

14 Matters came to a head at the end of 2011, when the Aircraft was grounded for scheduled maintenance. Due to corrosion which was detected at the wing of the Aircraft, it was grounded for longer than expected, much to Mr Mulacek's dissatisfaction,[31] and it only returned to service on 13 February 2012.[32] At the end of December 2011, Mr Johnstone resigned from his position as a pilot on the ground of ill health though he indicated his willingness to fly until May 2012 if necessary.[33] Mr Walker also returned to Australia for a four week vacation over the Christmas/New Year period.[34]

15 On 25 January 2012, Mr Higgins wrote to the other directors in SAC explaining that he had just met Mr Mulacek and Mr Civelli last week. He explained that both of them were unhappy with, among other things: Mr Johnstone's resignation as a pilot, Mr Walker's extended vacation, and the fact that neither Mr Johnstone nor Mr Walker showed much interest in dealing with the issues arising from the maintenance of the Aircraft. He informed them that Mr Mulacek had proposed two possible courses of action. First, Mr Mulacek would buy into SAC and retain Mr Higgins's as the MD. Second, the AMS Agreement would be terminated and the contract would be reassigned to

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29 AEIC of Nicholas Johnstone at paras 19–26 (BOAEIC, Vol 2, pp 364–366); Suit 244 Plaintiff's closing submissions at paras 88–89.

30 AEIC of Nicholas Johnstone at para 26 (BOAEIC, Vol 2, p 366).

31 2 ABD 446–451.

32 AEIC of Philippe Emanuel Mulacek at para 26 (BOAEIC, Vol 4, p 723).

33 2 ABD 428.

34 AEIC of Danny Chance Walker dated 3 February 2016 at para 20 (BOAEIC, Vol 2, p 312).

a new company (which Mr Higgins would head) and this new company would manage both the [Aircraft] as well as "all of the PNG flight operations". This was referred to during the trial as the "two-options email".[35]

16 On 27 January 2012, Mr Higgins, Mr Civelli, and Mr Mulacek met at the offices of InterOil Corporation in Singapore to discuss, among other things, the termination of the AMS Agreement. This meeting is central to Mr Higgins's case in Suit 244 and I will return to it later. On 29 January 2012, Mr Walker tendered his resignation as the manager of SAC's flight operations but offered to continue serving as a pilot.[36] His resignation was accepted by Mr Higgins but his offer to continue as a pilot was turned down.[37]

Termination of AMS Agreement

17 On 9 February 2012, Mr Benjamin Ng ("Mr Ng"), a Financial Controller with PacLNG who assisted Mr Mulacek and Mr Civelli with matters relating to the Aircraft, sent a draft notice of termination to Mr Higgins.[38] Prior to this, Mr Higgins and Mr Ng had been corresponding on a range of matters and this draft was sent to Mr Higgins at his personal email address at his request.[39] The termination was expressed to take effect from 22 December 2012 and in the third paragraph of the notice, it was stated that the AMS Agreement was being terminated because "the management and pilots failed to work together to minimise the down time and damage to the owners

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35 5 ABD 1167–1169.

36 2 ABD 523.

37 2 ABD 541–542.

38 2 ABD 574–575.

39 5 ABD 1178–1179.

in a poor execution of duties, with extensive holidays". The next day (10 February 2012), Mr Higgins and Mr Ng met. Mr Ng printed a copy of the notice and Mr Higgins signed it in Mr Ng's presence.[40]

18 However, Mr Higgins did not inform his fellow directors that the AMS Agreement had been terminated. Indeed, he said nothing to his fellow directors about the notice of termination until 28 February 2012, when he sent them an electronic copy of the *draft notice of termination* (that is to say, the one sent to him on 9 February 2012 instead of the one he had signed and returned on 10 February 2012).[41] On 29 February 2012, Mr Johnstone wrote to Mr Ng on behalf of SAC to inform him that Mr Higgins would be signing the notice behalf of SAC. Mr Ng forwarded this email to Mr Higgins.[42] During the trial, Mr Higgins maintained, first, that he did not communicate with Mr Ng in relation to the draft termination letter[43] and second, that he first received the draft termination letter on 28 February 2012.[44] As is clear from the foregoing, both of these averments are false.

Post termination events

19 Following termination, the Aircraft continued to be managed by SAC until 22 March 2012, for that was when the termination would took effect.[45] During this time, Mr Higgins continued to correspond with both Mr Ng and

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40 D19 at paras 4–5; D20, pp 20–21.

41 5 ABD 1186 and 1191.

42 5 ABD 1242.

43 NE (18 March 2016), p 26, lines 3–6.

44 NE (18 March 2016), p 29, line 12 to p 30, line 13.

45 Cl 14 of the AMS Agreement (1 ABD 181).

Mr Mulacek on a range of matters relating to the Aircraft.

Registration in Malaysia

20 On 12 March 2012, Mr Kendall of OK Consultants sent an urgent email to Mr Higgins to inform him that his company was under significant pressure from the US tax authorities as a result of the Aircraft. He insisted that the Aircraft be transferred to another registry or, if it was to remain on the US registry, that it be registered in the name of another company.[46] This triggered an exchange of emails between Mr Mulacek and Mr Higgins at the end of which Mr Mulacek approved of Mr Higgins's plan for the Aircraft to be flown to Malaysia and parked pending re-registration in another jurisdiction.[47] The precise reasons why it was decided that the Aircraft was to be deregistered from the US were keenly disputed,[48] and I will return to it later. It suffices to say for now that the Aircraft was moved to Malaysia on 16 March 2012 and efforts were made for it to be registered there. However, it was soon discovered that registration in Malaysia was not viable as the Aircraft would be the first of its type registered in the jurisdiction and the process would therefore be prohibitively expensive and time-consuming.[49] Efforts to register the Aircraft in Malaysia were then abandoned.

21 Apart from the efforts to register the Aircraft in Malaysia, there were several emails in which Mr Higgins broached the possibility that the Aircraft might be registered in other jurisdictions.[50] However, nothing came of these

46 3 ABD 664-665.

47 3 ABD 663.

48 Suit 244 Plaintiff's closing submissions at paras 273-274; Suit 244 Defendants' closing submissions at paras 85-87.

49 NE (21 July 2016), p 88, line 1 to p 89, line 18.

efforts and the Aircraft remained stateless. Between 19 March 2012 and 31 July 2012, after it was restored to the US Register and had received a certificate of airworthiness (see [23] below), the Aircraft was grounded for over four months.[51]

The incorporation of SAM and the resignation of Mr Higgins

22 On 28 March 2012, Mr Higgins incorporated Singapore Aircraft Management Pte Ltd ("SAM").[52] The next day, 29 March 2012, Mr Higgins submitted a draft aircraft management contract to Mr Ng with instructions that it was to be sent on to Mr Mulacek, Mr Civelli, and Mr Aldorf.[53] The terms of the draft, which I shall refer to as the "draft SAM management contract" were almost identical to the AMS Agreement. This draft was duly forwarded to Mr Aldorf, who responded swiftly to Mr Ng to state that the draft was "not acceptable to us" and that Mr Higgins "must be dreaming".[54] In the event, no agreement was concluded with SAM.

23 The parties continued to correspond over the next few months. The contents of these communications will be discussed later but it suffices to note for now that these conversations related mostly to Mr Higgins's attempt to conclude a new contract for the management of the Aircraft. These efforts proved unsuccessful and no written contract was concluded. At the start of May 2012, Mr Higgins was asked to stop all the work he was doing in relation

50 3 ABD 807; AEIC of Danial Patrick Higgins at p Tab 39 (BOAEIC, Vol 1, p 237).

51 AEIC of Philippe Emanuel Mulacek at para 40 and 46 (BOAEIC, Vol 4, pp 727 and 729).

52 4 ABD 1047.

53 3 ABD 699–703.

54 3 ABD 705.

to the registration of the Aircraft[55] and he did.[56] Meanwhile, Mr Ng took steps to engage another aircraft management company.[57] On 8 May 2012, AirLNG signed an aircraft management contract with Asia Aviation Company Pte Ltd ("AAC"),[58] which promptly took steps to re-register the Aircraft in the US. This was done on 11 July 2012 and the certificate of airworthiness was granted on 31 July 2012, after which the Aircraft returned to active service.[59]

24 Eventually, the other directors of SAC found out that Mr Higgins had set up SAM. On 22 June 2012, Mr Wood requisitioned an extraordinary general meeting ("EGM") for the purpose of removing Mr Higgins and his wife from their directorships. An EGM was scheduled for 19 July 2012 and a notice was circulated to this effect.[60] On the appointed day, Mr Higgins and his wife arrived before the commencement of the EGM to tender their resignations and left immediately afterwards. Nevertheless, the resolution for their removal as directors was passed unanimously and their voluntarily resignations were also duly recorded in the minutes of meeting.[61]

Suit 244

25 In Suit 244, Mr Higgins brings a claim for breach of contract. His case is that Mr Mulacek and Mr Civelli, whom he says were the true beneficial owners of the Aircraft,[62] were unhappy with SAC's performance and wanted

55 3 ABD 778 and 799.

56 NE (17 March 2016), p 122, line 19 to p 123, line 19; 3 ABD 800–801.

57 3 ABD 790.

58 4 ABD 877–885.

59 AEIC of Philippe Emanuel Mulacek at paras 45–48 (BOAEIC, Vol 4, pp 729).

60 5 ABD 1203–1204.

61 4 ABD 999–1000.

him to take over. To this end, they met at the offices of InterOil Corporation in Singapore on 27 January 2012 and orally agreed that Mr Higgins was to incorporate a new company to take over the management of the Aircraft after the termination of the AMS Agreement.[63] The contracting parties to this oral contract were himself, Mr Mulacek, Mr Civelli, and PacLNG and the terms of this oral contract were to mirror those of the AMS Agreement save only that its scope would be expanded to include certain projects which Mr Mulacek and Mr Civelli were carrying out in PNG. Mr Higgins pleads that he is therefore contractually entitled to, among other things, a sum of $532,209,59 for consultancy services rendered between February 2012 and March 2013.[64]

26 In his submissions (though not in his pleadings), Mr Higgins also submits that the oral contract was "re-entered into on 8 May 2012 and applied from that date on". He explains that at this meeting, which also took place at Interoil's office, he was instructed that he would not be involved in the projects which the defendants were undertaking in PNG (chiefly, the NAS Project, which he had originally been promised under the alleged oral agreement concluded on 27 January 2012) but that his services would be retained and he would be paid a sum of US$25,000 a month.[65]

27 In the alternative, Mr Higgins submits that he is entitled to be given a reasonable sum in recompense for the work he had undertaken in relation to

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62 Suit 244 Plaintiff's closing submissions at paras 21 and 27.

63 Suit 244 Plaintiff's closing submissions at paras 170 and 186; Statement of Claim (Amendment No 2) in S 244/2013 ("SOC (S 244)" at para 28 (Bundle of Consolidated Pleadings at Trial ("BOP") at p 57).

64 SOC (S 244) at para 75 (BOP at p 85).

65 Suit 244 Plaintiff's closing submissions at paras 204–208 and 217; Suit 244 Plaintiff's reply submission at para 16.

the Aircraft which he argues benefitted the defendants. These included, among other things, the efforts he made towards getting the Aircraft registered and the efforts he made to procure an alternative pilot for the Aircraft.[66] Mr Higgins advances his claim on both contractual and restitutionary grounds.[67]

28 Against this background, three issues arise for decision:

(a) Whether there was an oral contract on 27 January 2012;

(b) whether there was an oral contract on 8 May 2012; and

(c) whether Mr Higgins is entitled to be given a reasonable sum for the work he did in relation to the Aircraft.

No oral contract on 27 January 2012

29 There is no question that contracts need not be in writing and that oral contracts can give rise to binding obligations. However, it is settled law that in order for there to be a contract, there must be a "meeting of minds to be bound by terms which are both *certain and complete*" [emphasis added] (see *Likpin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 ("*Likpin*") at [42]). It does not matter, for this purpose, whether the contract was agreed orally or whether it was written. After examining the evidence, it is clear to me that there was no such meeting of minds on 27 January 2012.

30 First, I find it highly improbable that Mr Mulacek, Mr Civelli, and PacLNG would have concluded an agreement for the management of the

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66 Suit 244 Plaintiff's closing submissions at paras 246–250; 266.

67 *Ibid* at para 261.

Aircraft without the involvement of AirLNG. As noted at [7]–[8] above, AirLNG was a special purpose vehicle incorporated in Labuan for tax reasons. AirLNG was the contracting party to *both* the AMS Agreement as well as the subsequent management agreement with AAC and it paid all the invoices rendered by SAC during the subsistence of the AMS Agreement.[68] While it is undisputed that the Aircraft was used mostly to further the defendants' business interests in PNG, it is clear that they had always done so *through the agency of AirLNG*. I find it highly unlikely that Mr Mulacek and Mr Civelli, as experienced businessmen, would have concluded an agreement with Mr Higgins in their personal capacities when this would undo all the tax advantages gained from the setting up of AirLNG in the first place.

31 For this reason, the defendants submitted that Suit 244 must fail *in limine* because it ought to have been taken out against AirLNG instead.[69] As a technical argument, this fails. It is open for Mr Higgins to run the argument that the contracting parties were persons other than the original parties to the AMS Agreement and to hold them liable for breach of contract. However, as a factual matter, the defendants' argument reveals how factually incongruous Mr Higgins's case is and it is a factor I took into account in assessing the veracity of Mr Higgins claim that there was such an oral contract.

32 Second, I find that the correspondence exchanged between the parties between February and May 2012 clearly shows that they were – even taking Mr Higgins's case at the highest – still in the midst of negotiations and that there could not possibly have been a concluded oral agreement on 27 January

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68 D14; NE (19 July 2016) at p 115, line 14 to p 117, line 2.

69 Suit 244 Defendants' closing submissions at paras 144–145.

2012. When Mr Higgins sent Mr Ng the draft SAM Agreement on 29 March 2012, he wrote in his covering email that this was a "*Draft* contract for operation of [the Aircraft] for the next 12 months" [emphasis added]. I have emphasised the word "Draft" because it is clear to me that even Mr Higgins did not think that there was any concluded agreement and, more importantly, he did not allude to the fact that the draft merely reflected what had previously been agreed on 27 January 2012. This was not, as Mr Higgins now submits, an attempt to regularise the oral contract in writing; rather, it was an attempt to conclude an agreement where none previously existed.[70] This is consistent with the position taken by Mr Aldorf who said, perhaps somewhat unkindly, that Mr Higgins "must be dreaming" (see [22] above).

33 Over the next few months, Mr Higgins continued to make further efforts to conclude a new management agreement. On 10 April 2012, he wrote to Mr Ng saying that he was "doing lots of work trying to get the aircraft re-registered, essentially for free at the moment". In the same email, he also explained that he had paid the salaries of the contract pilots and that it was only right that "when the new contract is signed it should be backdated."[71] Two things are clear from this: first, there was no agreement between the parties at the time; second, the parties were still in the midst of negotiations. On 15 April 2012, Mr Higgins wrote to Mr Mulacek as follows:[72]

> Would you be so kind as to produce and have signed, on an AirLNG letterhead, something along the lines of the attached draft. *I cannot currently sign any documents relating to the GIII or the Malaysian registration,* ***as do not have a contract with AirLNG.*** (In fact I have already done so, but it has no legal

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70 Plaintiff's closing submissions at para 196.

71 5 ABD 1253.

72 3 ABD 773.

> validity until I have written authority from AirLNG).
>
> *If you want to postpone the singing of a new contract, pending further discussion on my involvement in the newly formed AirLNG (Singapore) Ltd., that is OK*. However, for the time being I need a short term Consultancy Agreement, backdated to 22nd March to allow me to proceed with both the Malaysian DCA and Jet Aviation. Shall we say 6 months at USD$35,000 plus expenses? I sent a draft copy of a Consultancy Agreement to yourself and Ben a few days ago.
>
> [emphasis added in italics and bold italics]

Mr Higgins was making *two* requests: first, he wanted a letter of authority to enable him to represent AirLNG in negotiations with the Malaysian aviation authorities; second, he wanted to conclude a contract to formalise his relationship with the newly-formed AirLNG (Singapore) Ltd. Mr Higgins specifically clarified, in relation to his second request, that in the absence of a firm agreement on his long term involvement, he was happy for a *short term* consultancy agreement to be signed first.

34 In response, a signed letter of authority was duly provided. It was a brief letter with an AirLNG letterhead that was signed by Mr Mulacek and addressed to the Department of Civil Aviation in Malaysia. It read:[73]

> This letter confirms that Danial Higgins… is employed as Consultant to AirLNG Ltd. Furthermore, this letter constitutes full authority from our company to Mr Higgins to approve and sign all documents relating to our aircraft. Mr Higgins is authorized to represent our company in all aspects relating to the certification and registration in Malaysia of our company aircraft […]

35 Despite the language of employment, however, it is clear that there was no agreement on the request for a consultancy agreement. The very next day (16 April 2012), Mr Ng wrote to Mr Higgins to suggest that when he had

[73] 3 ABD 772.

a chance, he ought to have a "chat with [Mr Mulacek] on the temp consultancy" and that he believed that they "may have an understanding moving forward".[74] However, there is no evidence that this proposed discussion with Mr Mulacek ever took place. On 17 April 2012, Mr Higgins wrote to Mr Ng in relation to, among other things, his request to be paid in advance for a Gulfstream III "Simuflite" pilot training course which he intended to enroll a prospective pilot on. At the end of the email. He wrote in frustration, "I have to pay for a GIII pilot training course for a new Captain, by end of this week. *I don't have any contract with AirLNG* so I don't see how I can be expected to finance this" [emphasis added].[75]

36 On 30 April 2012, Mr Higgins sent Mr Ng an invoice for $22,000 for the Simuflite course. On the same day, Mr Ng replied to state categorically that "we have not committed to a new management agreement and definitely have not committed to hiring and training a new pilot".[76] Separately, Mr Mulacek also wrote to Mr Higgins shortly afterwards to say that it would be best to "look at placing items on Hold with the [Aircraft]". In the concluding paragraph of the email Mr Mulacek wrote, "[t]he contracts are too high to go forward and we will take over the core management going forward."[77] On 1 May 2012, Mr Higgins replied to indicate that he would be placing matters on hold until a decision was taken as to how matters should proceed.[78]

37 On 2 May 2012, Mr Higgins wrote to Mr Ng (not copying Mr

74 3 ABD 773.

75 3 ABD 776.

76 3 ABD 798.

77 3 ABD 799.

78 3 ABD 800–801.

Mulacek) to request that he be given a formal letter of appointment with his conditions of service or his salary. He explained that he had a letter signed by Mr Mulacek confirming that he was employed by AirLNG (he was referring to the letter of authority given to him on 14 April 2012) but had never received a letter confirming the terms of his employment. He ended by stating, rather curtly, "[s]urely you do not expect me to work for nothing."[79] Mr Ng expressed surprise at this and explained that he was aware that Mr Higgins had been authorised to represent AirLNG in relation to the registration of the aircraft but did not recall "any letter stating you are employed by AirLNG or promising any form of employment condition."[80] Mr Higgins replied shortly afterwards as follows:[81]

> Clearly there are some crossed wires here. I attach my request for a short term Consultancy agreement at US$35,000 per month for six months, pending further discussions on the way forward for AirLng. I received the attached letter signed by Phil. This clearly states I am employed by AirLng as a Consultant.

38 Mr Ng quickly replied to agree that there was a misunderstanding. He reiterated his point that the letter of authority did not constitute an employment contract and stressed that Mr Higgins was not to incur further expenses without express authorisation.[82] This was followed by a lengthy email sent by Mr Mulacek to Mr Higgins on 7 May 2012 in which it was explained that the understanding had always been that Mr Higgins would work for AirLNG *if* an agreement could but reached, but none could because of issues over costs. This was consistent with Mr Higgins's email of 15 April 2012, in which it was

79 3 ABD 803.

80 3 ABD 803.

81 3 ABD 806.

82 3 ABD 808.

said that no agreement had yet been reached on the terms of Higgins's future relationship with the Aircraft. However, Mr Mulacek adverted to the possibility that they might yet cooperate in the future if such an agreement could be reached, though he stressed that it would not be a comprehensive management agreement, but would instead be one of more limited scope.[83]

39 In my judgment, the evidence points overwhelmingly towards the conclusion that the parties did not conclude an oral agreement on 27 January 2012. Instead, the most that could be said was that there was a hope and an expectation, at least on the part of Mr Higgins, there would be an agreement and that he was actively working towards making that a reality. This cannot form the basis of a contract. In *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332, the Court of Appeal held that in order for there to be a concluded contract, the negotiations between the contracting parties must have "crystallised into a contractually-binding agreement in which there is no uncertainty as to the terms of the contract concerned" (at [47]). This is far from the case here.

40 Third, I find it inexplicable that Mr Higgins never once mentioned the existence of the alleged oral contract in the correspondence he exchanged with Mr Ng or with Mr Mulacek. In fact, as the defendants pointed out, the *first* time Mr Higgins mentioned the existence of any oral contract was on 21 June 2012 when he emailed Mr Ben Ng on 21 June 2012 to say that he "shook hands with [Mr Mulacek] on an agreement to manage the jet just before I left Singapore".[84] However, even then, the reference was not to an agreement in

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83 4 ABD 867–868.

84 Suit 244 Defendant's reply submissions at para 13(2); 4 ABD 982.

January 2012, but to a meeting which took place in May 2012, before Mr Higgins left for a vacation.[85] This is a glaring gap in Mr Higgins's case and it points towards the conclusion that his attempts to obtain a contract were not, as Mr Higgins now submits, attempts to regularise the oral contract in writing; rather, they represented Mr Higgins's efforts to conclude an agreement where none previously existed.[86]

41 Fourth, I note that up until the eve of the trial, Mr Higgins's case was that the oral contract had been concluded on *25 January 2012*. In Mr Higgins's Affidavit of Evidence in Chief ("AEIC"), he explained that he had met Mr Mulacek, and Mr Civelli at the Executive Lounge at Changi International Airport and they came to an agreement on the terms of their future cooperation. The narrative of events in the AEIC was presented in dialogic form, and Mr Higgins set out in great detail the specific concerns which were raised by Mr Mulacek and the responses he gave to each of these queries. In the AEIC, he averred that at the end of the conversation, it was agreed that he would continue managing the aircraft, initially through MAM, but eventually through a new company which would be specially incorporated to take over the management of the Aircraft.[87]

42 Mr Higgins only applied for leave to amend his statement of claim one day before the trial began and filed a supplemental AEIC to explain that after having sight of the emails disclosed by the defendants, he was able to "refresh [his] memory of events."[88] What really happened, he now said, was that he had

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85 4 ABD 871.

86 Suit 244 Plaintiff's closing submissions at para 196.

87 AEIC of Danial Patrick Higgins at para 109–116; 120–128 (BOAEIC, Vol 1, pp 27–32).

met Mr Mulacek and Mr Civelli on *23 January 2012* at Changi Airport but *no agreement had been reached then*. Instead, after hearing of the problems at SAC, Mr Mulacek and Mr Civelli had proposed two options: either Mr Mulacek was to buy into SAC or the AMS Agreement would be terminated. This formed the basis of the "two options" email Mr Higgins sent his fellow directors on 25 January 2012. It was only when they met again at Interoil's Singapore office on 27 January 2012 that an agreement was concluded[89]

43 While I am mindful that a trial is not a contest of memories (see *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 at [77]), this is not simply a matter of Mr Higgins misremembering the date of the meeting or its location. In amending his SOC and filing the supplemental AEIC, he was effectively disavowing the long and detailed exposition of events which he had set out in his AEIC. This is no small matter. As I noted at the outset, in order for there to be a contract, there must be a *consensus ad idem* on terms which are both certain and complete. This is not the case here. When Mr Higgins's AEIC and supplemental AEIC are read together, the overall picture of events is murky. It is not clear what exactly was said, when it was said, or how the parties could possibly have come to an binding agreement – the entire account reads like a confused farrago of misremembered truths, half-truths taken out of context, and outright untruths.

44 Finally, by Mr Higgins's own case, there was no agreement as to the terms of his remuneration on 27 January 2012.[90] In my judgment, this is fatal

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88 P1 at para 4.

89 P1 at paras 5–14.

to his case. Depending on the circumstances, there can still be a binding contract even though there are peripheral terms which have not been agreed on; however, this is qualified by the rule that if there is no agreement as to a *material* term of the contract, there can be no binding agreement (see *Foley v Classique Coaches Ltd* [1934] 2 KB 1 at 13 *per* Maugham LJ). In *Grossner Jens v Raffles Holdings Ltd* [2004] 1 SLR(R) 202, for example, the High Court found that there was no binding brokerage contract as the parties had failed to agree on, among other things, the terms of the plaintiff's remuneration, which would be a material term of the contract (at [16]). Likewise, in *Likpin*, the High Court held that could not have been a concluded charterparty as the parties had, even by the plaintiff's case, only agreed on an "approximate" rate of hire. The court explained that the rate of hire was an essential term of a charterparty and that the use of an approximate rate of hire was entirely inconsistent with the existence of a concluded charterparty.

45 In my assessment, the quantum of Mr Higgins's remuneration would be a material term of the alleged oral agreement. Under the AMS Agreement, upon which the oral agreement was putatively modelled, AirLNG was to pay a monthly management fee of $25,000 each month in addition to paying each member of the flight crew an hourly wage (see [11] above).[91] This was AirLNG's key obligation under the AMS Agreement and it would be the defendants' central obligation under the alleged oral contract as well. Without agreement on this, there cannot be any binding contract.

No oral contract on 8 May 2012

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90 Plaintiff's closing submissions at paras 211–212.

91 Clause 10 of the AMS Agreement (1ABD 180).

46 I turn to consider Mr Higgins's first alternative argument, which was that a separate oral contract in *exactly the same terms* was concluded on 8 May 2012. In his AEIC, Mr Higgins explained on the day in question, he met Mr Mulacek and Mr Civelli at InterOil's Singapore office "fully prepared for the hatchet". However, in the course of the discussions, he explained how he was able to persuade them that many of the problems were not his fault. At the end of the discussion, he was told that his services would be retained on the same terms as in the AMS Agreement although he would not have anything to do with the NAS Project in PNG. In his submissions, Mr Higgins referred to an email which he sent Mr John Roche (a friend whom he had intended to hire to assist with the operation of the Aircraft in PNG) the very next day in which he described this "abrupt turn of events" in detail.[92]

47 As a preliminary point, I note that the existence of an oral contract on 8 May 2012 was never pleaded. As the Court of Appeal stressed in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [37], adherence to the rules on pleadings is essential not just for good case management but also to maintain substantive fairness. It is also no good to say that this account of events is set out in his AEIC. It is a settled principle of law that defects in pleadings cannot be cured by averments in affidavits (see *Abdul Latif bin Mohammed Tahiar (trading as Canary Agencies) v Saeed Husain s/o Hakim Gulam Mohiudin (trading as United Limousine)* [2003] 2 SLR(R) 61 at [7]). For this reason alone, I would dismiss this argument.

48 In any event, I am of the view that the evidence *clearly* shows that no

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92 Plaintiff's closing submissions at paras 204–208; 4 ABD 887.

contract was entered into on 8 May 2012. I note the following:

(a) First, if there were an oral contract on 27 January 2012, I cannot see how or why it would be "re-entered" on 8 May on exactly the same terms. Indeed, it is not clear what the position would be as a matter of law: Mr Higgins did not elaborate if this new agreement was intended to supersede the old or if it was intended to give rise to an entirely new set of obligations which would operate in parallel (the latter of which would be a puzzling result, to say the least).

(b) Second, on the same day that this second oral contract was to have been concluded, AirLNG signed an agreement with AAC. I cannot see why the defendants would have wanted to hire Mr Higgins to do exactly the same thing as AAC. In cross-examination, Mr Mulacek described this as a commercially absurd result which "no prudent business person" would do.[93] I think he was putting it somewhat mildly, for one need not be a prudent business person to say that this is a result which offends common (not just commercial) sense.

(c) Third, the correspondence exchanged between the parties in the two months before 8 May 2012 (which I discussed at [30]–[39] above) plainly reveals that there had been no agreement between the parties. In particular, I note that Mr Mulacek had written to Mr Higgins on 7 May 2012 to state that the terms of their future partnership (if any) would be far more restricted. It certainly would not take the form of a comprehensive management agreement as the AMS Agreement was or the alleged oral contract was alleged to be (see [38] above).

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[93] NE (31 March 2016), p 98, lines 1–14.

49 In my assessment, the email sent to Mr Roche on 9 May 2012 does not go very far towards supporting Mr Higgins's case. For a start, it only represents Mr Higgins's subjective perceptions of what transpired at the meeting. It was not sent to Mr Mulacek[94] or to Mr Civelli[95] and during cross examination both of them disavowed what was said in the email. Furthermore, the context of the letter must be borne in mind. Mr Higgins had been corresponding with Mr Roche with a view towards engaging him to work in PNG.[96] This was why Mr Higgins was emailing Mr Roche to update him of the outcome of the discussion and the main point that Mr Higgins sought to make was that he would no longer be able to hire Mr Roche. This is clear from the penultimate paragraph of the email, where he wrote, "this is a great relief for me, but leaves me with the dilemma of my promise to employ you."[97] In the circumstances, the overall impression that I received was that Mr Higgins was trying to let Mr Roche down gently while avoiding the embarrassment of having to tell his friend that he had been let go as well.

The claim for a reasonable sum in compensation

50 I turn to Mr Higgins's second alternative argument, which is that even if there were no oral contract, he is entitled to be given a reasonable sum for the work which he had done. As the Court of Appeal set out comprehensively in its recent judgment in *Eng Chiet Shoong and others v Cheong Soh Chin and others and another appeal* [2016] SGCA 45 ("*Eng Chiet Shoong*") at [28] and [41], recovery for compensation for work done in situations where there is no

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94 NE (31 March 2016) at p 99, line 19 to p 100, line 10.

95 NE (30 March 2016) at p 67, line 16 to p 69, line 16.

96 5 ABD 1243.

97 4 ABD 887.

express contact may be mounted either in contract or in restitution.

Recovery pursuant to contract

51 If the argument is framed in contract, the claim may either be premised on (a) an implied contract or (b) if there is an express contract with no agreed term as to remuneration, then it will proceed on the basis that there is an implied term that a reasonable sum will be paid. In either of these two sub-cases, the touchstone is necessity – the claimant must show that it was necessary for the contract or the term, as the case may be, to be implied (see *Eng Chiet Shoong* at [30]). It is clear that Mr Higgins's claim cannot be based on an implied term since I have found that there is no express contract. Thus, the question is whether a contract may be implied. In my judgment, it may not.

52 As the Court of Appeal stressed in *Eng Chiet Shoong* at [29], contracts are not lightly to be implied. It will only be done in situations where it is clear that the parties *intended* to contract and where it is *clear* what they intended to contract to. This is far from the case here. I have found that Mr Higgins had proceeded on the basis of a hope or an expectation that an agreement would eventually be concluded, but this is not enough for a contract to be implied. As the Court of Appeal held in *Eng Chiet Shoong* at [36] and [86], citing Prof Ewan McKendrick, "[t]he anticipation of a contract is not the same thing as the existence of a contract." It is abundantly clear from the correspondence that there was deep disagreement over the terms of Mr Higgins's participation in the defendants' work. It is simply not possible for a contract to be implied in these circumstances.

Recovery pursuant to restitution

53 This leaves Mr Higgins's case in restitution. As a preliminary point, I reject the defendants' submission that this claim should be rejected *in limine* because it is inconsistent with Mr Higgins's pleaded claim in contract.[98] It is settled law that parties may plead inconsistent causes of action in the alternative as long as the inconsistency does not, on the facts, offend common sense (see *Ng Chee Wee Weng v Lim Jit Meng Bryan* [2012] 1 SLR 457 at [37]). I see no inconsistency of this nature here. Mr Higgins's case is that in the event the court finds that there is no contract, he claims a sum in restitution. There is no fatal inconsistency here – I have found that there is no contract so the question which arises for discussion is whether he can nevertheless succeed in his alternative claim in restitution. My finding that there is no contract also disposes of the defendants' alternative preliminary objection, which is that the plaintiff's claim in restitution cannot exist in parallel with his claim in contract. It is settled that there cannot be a claim in restitution which exists in parallel with an inconsistent contractual promise (see *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 665 at [123]). However, since I have found that there is no contract, any potential inconsistency falls away.

54 It is now settled law that the juridical basis for recovery under a claim in restitutionary *quantum meruit* is the doctrine of unjust enrichment (see *Benedetti and another* v *Sawiris and others* [2013] WLR (D) 286 ("*Benedetti*") at [9]); *Eng Chiet Shoong* at [33]. Thus, in order to make good his case, Mr Higgins has to show the following three things: (a) a benefit had been received or the defendants had been enriched; (b) this benefit or enrichment was at his expense; and (c) the enrichment was "unjust". If these

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98 Defendants' closing submissions at paras 90–92.

three elements are satisfied, the further question to consider is whether there are any defences to the claim (see *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 at [90]).

55 In his amended Statement of Claim ("SOC (S 244)"), Mr Higgins puts forward six distinct heads of claim, but they can conveniently be merged into four main categories. These are: (a) private flight services;[99] (b) pilot training;[100] (c) aircraft management services[101]; and (d) aircraft registration services.[102] Of the four, only the last merits in-depth discussion.

(1) The first three heads of claim

56 The claim in relation to flight services relate to eight separate flights which took place between 13 February 2012 and 24 April 2012. Of the eight, six took place before 22 March 2012, when the AMS Agreement was terminated.[103] On the stand, Mr Higgins categorically stated that he was withdrawing these claims because he was not entitled to and therefore would not be claiming for anything prior to the termination of the AMS Agreement).[104] As for the remaining two charters, these relate to flights which had been arranged to Makassar and Ambon in April 2012, when the Aircraft was grounded. The documentary evidence shows that these flights had already been fully paid for and that Mr Higgins (through MAM) received a profit of

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99 SOC (S 244) at paras 55–67, 70 (BOP at pp 75–81).

100 SOC (S 244) at paras 67–68 (BOP at pp 82).

101 SOC (S 244) at paras 72–76 (BOP at pp 83–86).

102 SOC (S 244) at paras 40–54 (BOP at pp 61–75).

103 SOC (S 244) at paras 62(1)–62(6) (BOP at pp 77–79).

104 NE (22 March 2016), p 75, lines 3–9; Services attributable to SAC: NE (22 March 2016), p 106, line 22 to p 107, line 3.

US$24,000 for arranging the charter. This is clear from the following:

(a) Elite Jets Sdn Bhd ("Elite Jets"), the service providers, informed Mr Higgins that the flights would cost US$116,000.[105]

(b) Mr Higgins informed Mr Mulacek that the charters would cost US$140,000.[106]

(c) AirLNG transferred US$90,000 directly to Elite Jets[107] while Mr Higgins (through MAM) transferred the balance of US$26,000 to Elite Jets.[108]

(d) AirLNG subsequently transferred, at Mr Higgins's request,[109] a sum of US$50,000 to MAM.[110]

57 Mr Higgins submits that the difference between the quoted price of US$140,000 and the cost of the charter (US$116,000) was paid to one Mr Chapman Freeborne, who arranged the charter.[111] I reject this argument as it flies in the face of the documentary evidence, which clearly shows that MAM received a surplus of US$24,000 (being the difference between the US$50,000 transferred to MAM by AirLNG and the outstanding sum ofUS$26,000 owed to Elite Jets). There is no evidence that MAM later transferred this sum of

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105 3 ABD 737.

106 AEIC of Danial Patrick Higgins at para 162 (BOAEIC at p 42)

107 3 ABD 756

108 3 ABD 747.

109 3 ABD 755, 769–770.

110 3 ABD 782.

111 Suit 244 Plaintiff's reply at para 124.

money to anyone else. The US$24,000 made by MAM is the subject of a claim in Suit 733 and I shall say more of it later. For now, it suffices to say that the charters had been paid for and there is no basis for Mr Higgins to mount a claim in restitution in respect of them.

58 The claim in relation to pilot training relates to a sum of $22,000 incurred for a simulator training course. In my judgment, this is a non-starter. On 17 April 2012, Mr Higgins emailed Mr Ng to informed him of his intention to enrol the pilot on the simulator course and asked for a decision "one way or the other" failing which he would take the pilot off the course.[112] Mr Higgins did not receive an affirmative reply but nevertheless went ahead and enrolled the pilot on the course. In the circumstances, there is no unjust factor that justifies recovery. Where a defendant informs a claimant that he does not wish to receive a benefit but the claimant nevertheless proceeds to confer the benefit anyway, the defendant is under no obligation to pay for it (see *Leigh v Dickeson* (1884) 15 QBD 60 at 64–65 *per* Brett MR).

59 Mr Higgins had argued that he had acted "reasonably" in a situation of "urgency" in sending the pilots for training.[113] I am not persuaded. The common law does not, outside of cases involving emergencies (mostly involving accidents at sea), permit recovery for expenses incurred in the unsolicited management of the affairs of another (see Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) ("*Goff & Jones*") at para 18-02–18-03). The "urgency" Mr Higgins refers to does not fall within any of the

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112 3 ABD 776.

113 Plaintiff's closing submissions at paras 243–245.

recognised categories in which recovery has been permitted.

60 The claim in relation to management services must also fail. The claims falling in this head, itemized at para 74 of the SOC (S 244), relate to a miscellany of different things, most of which overlap with the substance of the other claims for pilot training and private flight services. Insofar as this is the case, the reasons I give in respect of those categories will serve to dispose of the claims under to management services).[114] The only claim that is unique is the claim for consultancy services at a rate of $25,000 a month. In my judgment, this claim is also a non-starter. It is plain that what Mr Higgins seeks here is the payment of his remuneration under the alleged oral agreement. However, the law of unjust enrichment acts to reverse benefits unfairly derived at the expense of another, it *cannot* be used to enforce a party's expectation interest – that is the realm of contract. I have already rejected that claim at [52] and need not say more.

(2) The Aircraft registration

61 I now turn to the work done in relation to aircraft registration. I begin with the requirement of benefit. The crux of the inquiry is whether *objectively* construed, that all the work Mr Higgins did in relation to the registration was of benefit to the defendants (chiefly Mr Mulacek in this case): see *Benedetti* at [15]–[16]. It is common ground that Mr Higgins did work in relation to the registration of the Aircraft, but the defendants' point is that everything he did came to naught, because, among other things, he had pursued registration in Malaysia when it was a non-starter.[115] As against this, Mr Higgins's essential

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114 SOC (S 244) at para 74 (BOP at pp 84–85).

115 Defendants' closing submissions at paras 103, 114, 116, 122–123.

case was that he had worked on registration *at the defendants' request* and should therefore now be remunerated accordingly, even if the defendants did not derive any tangible benefits from the work he did.[116]

62 The difficulty with the claim in this case (as encapsulated in the defendants' submissions) is that it involves a claim for "pure" services – that is to say, services which do not redound in tangible monetary benefits. [It is complicated by the fact that the services were rendered in anticipation that a contract would be concluded, but I will deal with that when I come to the unjust factors analysis at [68]). As pointed out in Man Yip & Yihan Goh, "Liability for work done where contract is denied: contractual and restitutionary approaches" [2012] LMCLQ 289 ("*Yip & Goh*") at 303, the law has long drawn a distinction between monetary benefits and non-monetary benefits. The former is the currency of economic value and is the quintessential example of an incontrovertible benefit. However, it is not always clear whether the provision of goods and services objectively benefits the recipient. This is particularly the case here, where it is undisputed that Mr Higgins's efforts came to naught, because it was subsequently discovered that it was unfeasible for the Aircraft to be registered in Malaysia (see [20] above).

63 There have been cases in which claims in unjust enrichment for the provision of pure services have been allowed (see the cases cited in *Goff & Jones* at para 5-21). The common thread in these cases appears to be that the defendants there conceptualized of the benefit as the rendering of the *service itself*, and not the attainment of a particular *result or end-product*. One way in which this can be shown is if it could be shown that the defendants had

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116 Plaintiff's closing submissions at para 266.

accepted responsibility for the cost of the work (see *Goff & Jones* at para 5-25). For example, in *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428, the parties were negotiating for a lease. Before negotiations concluded, the defendants requested that the plaintiff-landlord carry out some alterations to the premises and undertook to pay for them. Negotiations broke down and the plaintiff brought suit to recover the cost of the alterations. The English Court of Appeal granted judgment in favour of the plaintiff even though the defendants never came into possession of the premises. As *Yip & Goh* suggest at 304–305, this is best seen as a case in which the defendants must – in requesting for the work to be done even before the lease was granted – objectively be taken to have valued the benefits in terms of the provision of the services themselves and therefore must be seen as having benefitted whether they came into possession of the premises or not.

64 In this connection, the two strongest points in favour of Mr Higgins's claim would appear to be the fact that Mr Mulacek had specifically given Mr Higgins the green light to proceed with efforts to register the Aircraft in Malaysia on 13 March 2012[117] and subsequently wrote a letter to the Department of Civil Aviation in Malaysia to inform them that Mr Higgins was authorised to represent AirLNG in relation to matters relating to the registration of the Aircraft in Malaysia on 14 April 2012.[118] Taken together, these two facts would seem to suggest that he had accepted responsibility for the cost of the work done in relation to the registration of the Aircraft in Malaysia and could objectively be taken as having viewed the benefit in terms of the efforts taken towards registration rather than as the actual registration

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117 3 ABD 663

118 3 ABD 772

itself.

65 However, when the context is examined, this argument loses much of its force. As I noted above at [20], on 12 March 2012, Mr Kendall wrote to Mr Higgins to insist that the Aircraft no longer be registered in the name of his company. Mr Kendall gave Mr Higgins two options: (a) either the Aircraft would be registered in another jurisdiction or (b) the Aircraft would remain on the US register but under the name of a different company. Mr Higgins wrote to Mr Mulacek on the same day and he asked for instructions as to "what country register you want me to arrange on an interim basis".[119] Notably, there is no mention of the possibility of the Aircraft remaining on the US register. The reason for this was heavily disputed, but I find that this decision was taken as a result of advice given by Mr Higgins. I note the following:

(a) On 20 September 2011, about 6 months after the Aircraft was purchased, Mr Higgins wrote to inform Mr Mulacek that the FAA had introduced "rather onerous rules pertaining to the ownership and registration of US registered aircraft" and stated that an "acceptable alternate jurisdiction" would have to be found.[120] Mr Mulacek replied to acknowledge the point about the difficulties with registration in the US.[121]

(b) On 7 February 2012, Mr Ng wrote to Mr Higgins to ask why it was necessary to change the registration of the plane. The next day, on 8 February 2012, Mr Higgins replied to state that the reason for the re-

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119 3 ABD 664.

120 2 ABD 381.

121 2 ABD 382.

registration was that "the US Federal Aviation Agency no longer allow[s] foreign entities to own a US registered aircraft". He further explained that up till that point, the Aircraft had continued to be registered in the name of OK Consultants but this would not be viable, since the grace period given by the FAA for a change of registration had expired and the "tax authorities" were looking into the matter.[122]

(c) It was later revealed in evidence that Mr Higgins had informed Mr Civelli and Mr Mulacek that the FAA stipulated that US registered aircraft would have to fly in the US 60 per cent of the time.[123] However, it turned out that this was incorrect as the rule in question only applied to non-US corporations. On the stand, Mr Higgins admitted that all would have been well if the Aircraft had been registered through a US trustee, as was eventually done when the Aircraft was restored to the US Register by AAC (see [14] above).[124]

66 In his evidence, Mr Mulacek testified that he had trusted Mr Higgins implicitly on this and had proceeded with deregistration on this basis.[125] I accept his testimony. I reject Mr Higgins's argument that the plane was deregistered from the US because Mr Civeilli did not want it to be registered there.[126] The evidence put forward by Mr Higgins on this point is slender and it is falsified by the fact that, eventually, the Aircraft was restored to the US Register and there is no evidence that Mr Civelli demurred.

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122 5 ABD 1180.

123 NE (29 March 2012), p 134 to p 135, line 8; 3 ABD 800.

124 NE (17 March 2016), p 85, line 16 to p 86, line 2.

125 NE (31 March 2016), p 7, lines 1–21; p 17, lines 14–25.

126 Plaintiff's reply submissions at para 36(5).

67 The point, for present purposes, is that Mr Mulacek's agreement to having Mr Higgins proceed with the registration of the Aircraft is intimately tied to the advice that Mr Higgins had given prior to that, namely, that continued registration in the US would not be possible and that alternative registration in another jurisdiction was necessary. This was the basis upon which Mr Mulacek had accepted responsibility for the work done by Mr Higgins and it turned out to be wrong (and egregiously so). Or, to put it another way, the common basis upon which the parties had approached the matter was that Mr Higgins would be conferring a benefit to Mr Mulacek in the form of the taking of *necessary* efforts to securing the Aircraft's re-registration in another jurisdiction. This was manifestly not the case as it was not necessary for the Aircraft to be taken off the US register. In the circumstances, my judgment is that it cannot be said that Mr Mulacek had derived any objective benefit from the work done. What was worse, Mr Higgins admitted on the stand that he had not made any preliminary inquiries with the Malaysian authorities before recommending that the Aircraft be registered in Malaysia. It was only *after* he had flown the Aircraft to Malaysia that he reached out to the Malaysian authorities and quickly discovered that registration in Malaysia was not feasible. I cannot see how Mr Higgins can claim, in these circumstances, that his work was of benefit to the defendants.[127] This is sufficient to dispose of Mr Higgins's claim in unjust enrichment. However, for completeness, I will go on to explain why I do not think that the third element – that enrichment was "unjust" – has been satisfied.

68 The relevant context is that the work done here was done in anticipation that a contract would eventually be concluded. This much is clear

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[127] NE (21 July 2016) p 88, line 1 to p 92, line 9.

from what I have found thus far. In this context, the authorities suggest that the key question is: who ran the risk of the contract not materialising? The general position is that it is the claimant. In *M.S.M. Consulting v United Republic of Tanzania* [2009] EWHC 121 (QB), Christopher Clarke J summarised the position in the authorities as follows (at [171(b)]–[171(e)]):

> (b) Generally speaking a person who seeks to enter into a contract with another cannot claim to be paid the cost of estimating what it will cost him, or of deciding on a price, or bidding for the contract. Nor can he claim the cost of showing the other party his capability or skills even though, if there was a contract or retainer, he would be paid for them. The solicitor who enters a "beauty contest" in the course of which he expresses some preliminary views about the client's prospects cannot, ordinarily expect to charge for them. If another firm is retained; he runs the risk of being unrewarded if unsuccessful in his pitch.
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> (c) The court is likely to impose such an obligation where the defendant has received an incontrovertible benefit (e.g. an immediate financial gain or saving of expense) as a result of the claimant's services; or where the defendant has requested the claimant to provide services or accepted them (having the ability to refuse them) when offered, in the knowledge that the services were not intended to be given freely;
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> (d) But the court may not regard it as just to impose an obligation to make payment if the claimant took the risk that he or she would only be reimbursed for his expenditure if there was a concluded contract; or if the court concludes that, in all the circumstances the risk should fall on the claimant: *Jennings & Chapman*;
>
> (e) The court may well regard it as just to impose such an obligation if the defendant who has received the benefit has behaved unconscionably in declining to pay for it;

69 In this case, it is clear to me that Mr Higgins had clearly run the risk of the contract not materialising. This much is clear from the extracts from the correspondence, all of which point towards the conclusion that Mr Higgins had been trying to put himself in the best possible position to sign a new contract to replace the AMS Agreement. As the defendants put it, "[Mr]

Higgins was auditioning for an aircraft management contract, an audition on the evidence, he failed."[128] It also seems to me that this was what Mr Higgins himself thought, for on 30 March 2012 he wrote to Mr Roche as follows:[129]

> Tried to meet [Mr Ng] today but he was tied up. Going to KL Sunday and will work on the re-registration on the assumption that AirLNG will sign the new contract. Otherwise, I will concentrate on the Sapura deal. …

70 This email is telling because it was private correspondence exchanged between Mr Higgins and a friend in confidence. It is telling that there is nothing in the email which suggests that Mr Higgins was at all certain that a new contract would be signed. Instead, he clearly perceived that there was a risk that everything he did would come to nothing (which is consistent with what he said in his email of 10 April 2012 to Mr Ng: see [33] above), and contemplated the possibility that he might switch to pursuing other business opportunities instead. But he did not. Instead, Mr Higgins elected to continue working on the Malaysian registration and in so doing he had, in my judgment, run the risk that there would be no contract and the work that he did would be unremunerated. Furthermore, when I considered the facts – chiefly, the fact that the work he did came to naught and the fact that he gave wrong advice without ascertaining its viability (both in relation to the deregistration from the US as well as his recommendation that the plane be registered in Malaysia) – I do not find that there is anything unconscionable about the defendants declining to pay him for the work that he did.

71 For the foregoing reasons, I dismiss Mr Higgins's claims in Suit 244 in their totality. I will deal with the question of costs at the end of this judgment.

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128 Defendants' reply submissions at para 47.

129 3 ABD 708

Suit 733

72 In Suit 733, SAC brings a claim against Mr Higgins for breach of fiduciary duty. It is not disputed that as an MD, Mr Higgins owed SAC a number of core fiduciary duties. These include the duty to act honestly and in SAC's best interests, to avoid and disclose conflicts of interest, a duty not to make secret or improper profits, and a duty to disclose wrongdoings (see *Beyonics Techology Ltd and another v Goh Chan Peng and others* [2016] SGHC 120 ("*Beyonics*") at [40]). SAC's case is that Mr Higgins had acted in breach of all of these core duties by doing the following:

(a) First, he had worked to procure the termination of the AMS Agreement in order that he could set up a new company to take over SAC's existing businesses.[130]

(b) Second, he had made secret profits in the purchase of the Aircraft and through the misappropriation of corporate opportunities which rightly belonged to SAC.[131]

(c) Third, he had retained critical documents relating to the Aircraft when he had no right to do so.[132]

73 I propose to examine each of SAC's contentions in turn and will divide my analysis of each issue into two parts. First, I will consider whether Mr Higgins was in breach of a relevant fiduciary duty; second, I will consider

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130 Statement of Claim (Amendment No 3) in S 733/2014 ("SOC (S733)") at paras 11(1)–11(9), 16.

131 SOC (S 733) at paras 11(11), 18

132 SOC (S 733) at paras 21–27.

what remedies SAC is entitled to claim consequent to that breach, if any.

Procuring the termination of the SAC Agreement

74 The troubles which SAC was facing have been set out at [13]–[15]. At the start of January 2012, Mr Mulacek was unhappy because the Aircraft was grounded for longer than he expected. This much is common ground. What is heavily disputed, however, is whether it was Mr Higgins who proposed that the AMS Agreement be terminated and be reassigned to another company or whether it was Mr Mulacek and Mr Civelli who initiated this. SAC contends that it was the former;[133] Mr Higgins contends that it was the latter.[134] After examining the evidence, I find in favour of SAC on this point.

Breach – who proposed the termination of the AMS?

75 In their evidence, both Mr Mulacek and Mr Civelli explained that when they met in January 2012, Mr Higgins had said that SAC was "incompetent and unable to provide its services as set out in the AMS [Agreement]" and that AirLNG ought to terminate their services. They further testified that Mr Higgins told them that he intended to form a new company to provide aircraft management services in place of SAC.[135]

76 I accept their evidence. Under cross-examination, they maintained their positions unwaveringly and were clear and consistent – Mr Civelli, for example, explained that Mr Higgins had described SAC as "dysfunctional".[136]

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133 Suit 733 Plaintiff's closing submissions at paras 29–30.

134 Suit 733 Defendant's closing submissions at para 185.

135 AEIC of Philippe Emanuel Mulacek at paras 27–29 (4 BAEIC 723); AEIC of Carlo Giuseppe Civelli at paras 20–22 (3 BOAEIC 649).

Their position was that in the early days of the relationship, they trusted Mr Higgins without question because he was their only point of contact in SAC and they had no way of knowing otherwise. This is consistent with the correspondence exchanged at the initial stages of the partnership, where it is clear that they relied heavily on the advice given by Mr Higgins (see [66] above). Apart from this, I find that it is corroborated by at least two further points of circumstantial evidence that suggest that Mr Higgins had deliberately worked to procure the termination of the AMS Agreement.

77 The first concerns the two-options email of 25 January 2012 (see [15] above) in which it was said that Mr Mulacek and Mr Civelli had suggested that Mr Mulacek might invest in SAC. I do not accept Mr Higgins's evidence that this proposal was mooted by them. Indeed, as SAC points out, steps were immediately taken for the AMS Agreement to be terminated without the possibility of a buy-out ever having been pursued.[137] There is no evidence in any subsequent email correspondence of Mr Mulacek ever mentioning the possibility that he might buy into SAC or even that he would request to examine SAC's accounts in preparation for a buy-out.[138] If Mr Mulacek and Mr Civelli were the ones who proposed the termination of the AMS Agreement in the terms set out in the two-options email, one would have expected them to have alluded to it in their correspondence. The omission is conspicuous. When cross-examined, Mr Civelli denied that either he or Mr Mulacek had proposed anything along the lines of that stated in the two-options email.[139] It is telling that the same question was not put to Mr Mulacek.

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136 Mr Mulacek: NE (31 March 2016), p 131, line 8 to p 133, line 14;Mr Civelli: NE (30 March 2016), p 8, lines 8–12; p 18, lines 6–13

137 Suit 733 Plaintiff's closing submissions at para 33.

138 NE (29 March 2016), p 19, line 23 to p 20, line 3.

78 The second concerns the circumstances surrounding the termination of the AMS Agreement in February 2012. As I detailed at [17]–[18] above, it is clear that Mr Higgins had concealed the fact that he had accepted the termination of the AMS Agreement on 10 February 2012, prior to the Board of SAC having come to an agreement on the way forward. In and of itself, it is a serious breach of his fiduciary duty for Mr Higgins to have acted unilaterally in this regard when the AMS Agreement was SAC's only contract at the time and, in the words of Mr Walker, "not to be taken lightly".[140] Even if it were the case that the termination agreement had to be accepted as a matter of urgency, as Mr Higgins contends, it would have been incumbent upon Mr Higgins to have explained the situation to his fellow directors as soon as he had signed it but he did not. Instead, he surreptitiously received a draft of the termination agreement in his private email and did not tell his fellow directors about this and behaved as if the termination agreement had not been signed. This speaks volumes about Mr Higgins's wrongdoing and his desire to see the end of the AMS Agreement as soon as possible.

79 When I considered these two points together with the testimony of Mr Civelli and Mr Mulacek, I find, on a balance of probabilities, that Mr Higgins had been the one who proposed the termination of the AMS Agreement and I reject Mr Higgins's submissions that he had only been "stating facts at all times".[141] In doing so, he had manifestly failed to act honestly and *bona fide* in the best interests of his principal. January 2012 was a critical time for SAC, for that was when it encountered its first serious setback as a company. In that

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139 NE (30 March 2016), p 17, lines 7–14.

140 AEIC of Danny Chance Walker dated 3 February 2016 at para 18 (2 BOAEIC 311).

141 Suit 733 Defendant's reply submissions at para 99.

situation, it was incumbent upon Mr Higgins, as the MD, to have acted to regain the trust of Mr Mulacek and Mr Civelli but he did not. What Mr Higgins did went beyond mere reportage of the travails faced by SAC. Instead, he actively worked to undermine SAC's interests by representing to Mr Mulacek and Mr Civelli that SAC was dysfunctional and ought to be replaced. It is quite irrelevant, as Mr Higgins submits, that Mr Mulacek might have been able to discover the true state of affairs had he inquired.[142] The point was that Mr Higgins had a duty not to undermine the interests of his principal and he had breached that duty.

80 This brings me to what I consider the most egregious breach of all, which is the incorporation of SAM on 28 March 2012 by Mr Higgins,[143] which was swiftly followed by the submission of a draft SAM management contract on 29 March 2012.[144] During this time, Mr Higgins was still SAC's MD and it was plainly wrong of him to have set up a company, which he admitted on the stand, was in direct competition with that of his principal .[145] Even if it were the case that Mr Mulacek and Mr Civelli had requested that he do so, as Mr Higgins submits, this would not exonerate him.[146] As a fiduciary, he had a duty of undivided loyalty and should not have set up SAM while still in SAC's employ. It did not matter that the AMS Agreement had been terminated at the time. The point is that Mr Higgins had moved into a corporate space occupied by SAC and placed himself in direct competition. While this might not

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142 Suit 733 Defendant's reply submissions at para 100–101.

143 4 ABD 1047.

144 3 ABD 699–703.

145 NE (18 March 2016), p7, line 13 to p 8, line 13.

146 Affidavit of Evidence in Chief of Danial Patrick Higgins at paras 123–127 (BOAEIC Vol 1, pp 29–31).

directly be related to the termination of the AMS Agreement, I find that it speaks volumes of the general disregard with which Mr Higgins's viewed SAC and its interests.

81 In the circumstances, I find that Mr Higgins had not only failed to act in SAC's best interests because he was privileging his own, but also that he had also put himself in a hopeless position of conflict.

Remedies

82 SAC argues that Mr Higgins's breaches led it to lose the AMS Agreement and it should consequently be entitled to claim equitable compensation in the sum of at least $1,218,750 for the lost profits from the AMS Agreement from the time of its termination in March 2012 to the present day.[147] Mr Higgins's argument, in response to this, is that he had not caused the termination of the AMS Agreement. He argues that the proximate cause of the termination was SAC's poor performance caused chiefly by the failure of SAC's directors to work together.[148] I do not accept Mr Higgins's argument.

83 In essence, the dispute centres on the issue of causation. The law in this area was recently summarised by Hoo Sheau Peng JC in *Beyonics* at [131]–[137] where she explained that where there has been a culpable breach of a core fiduciary relationship, the approach to causation set out in the decision of the Privy Council in *Brickenden v London Loan & Savings Co of Canada* [1934] 3 DLR 465 ("*Brickenden*") applies. To summarise, the *Brickenden* approach does not obviate the requirement for the principal to

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147 SOC (S733) at para 17 and Suit 733 Plaintiff's closing submissions at para 199.

148 Suit 733 Defendant's closing submissions at paras 307–318.

prove causation, but it eases the evidential burden. Under this approach, the principal does not have to satisfy the "but-for" test of causation – that is to say, the principal does not have to show that but for the defendant's breach of his fiduciary duties, the losses would not have occurred. Instead, the principal only has to establish that the losses are "caused by or linked to" the breaches of fiduciary duty. Thereafter, the evidential burden *shifts* to the fiduciary to show that the principal would have suffered these losses *even if there had been no breach*. In addition, under the *Brickenden* approach, causation will be determined without regard to the rules of foreseeability, remoteness, and *novus actus interveniens*; and there will also not be any examination of the contributory fault of the principal.

84 Based on what I have found, it is clear that Mr Higgins's breaches of duties had paved the way for the termination of the AMS Agreement. As I noted above, I do not accept that Mr Higgins was only "stating facts at all times".[149] Instead, he had gone beyond that to undermine SAC by suggesting that the agreement might be terminated and transferred to another company. This is consistent with the evidence of Mr Mulacek and Mr Civelli. Both of them testified that AirLNG would not have terminated the AMS Agreement had it not been for Mr Higgins's evidence that SAC was dysfunctional.[150] The question is whether Mr Higgins has shown that these losses would have been sustained irrespective of his breaches. In my judgment, he has not done so.

85 Mr Higgins's main argument in this regard is that SAC had, by its conduct, effectively rejected the AMS Agreement. He argues that instead of

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149 Suit 733 Defendant's reply submissions at para 99.

150 Suit 733 Plaintiff's closing submissions at para 200.

fighting to retain the contract, Mr Walker and Mr Johnstone had instead "resigned themselves… to the impending fate of termination." In essence, this is an argument founded on contributory fault. As a matter of law, it is not open for Mr Higgins to run this argument. In *Beyonics*, the defendant was the former Chief Executive Officer ("CEO") of a company who had, during his tenure, wrongfully diverted business away to a competitor. In his defence, he argued that the business had been lost not because of his breaches but because of mismanagement on the part of the new executives who took over from him. Hoo JC rejected this argument both as a matter of law and on the facts. She held, first, that this argument was legally unsustainable because the *Brickenden* approach did not allow for consideration of the contributory fault of the principal and, second, that the defendant was the CEO of the company at the time the contract was lost and so his argument that he was not factually responsible for the loss of the contract could not be accepted.

86 These same points can be made in response to Mr Higgins's argument. First, his argument cannot be accepted as it is an impermissible attempt to invoke the contributory fault of SAC in order to avoid liability. Second, it also cannot be accepted on the facts. At the material time, Mr Higgins was the MD of SAC and he was the primary point of contact in relation to matters concerning the AMS Agreement (see [12] above). It was incumbent upon him to act in SAC's best interests by trying to retain the AMS Agreement, but he plainly failed to do so and instead strived to procure its termination in order that he might secure the business for himself. In the premises, I conclude that Mr Higgins's breaches caused SAC to lose out on the profits it would otherwise have made under the AMS Agreement.

87 This brings me to the question of quantification. There are two

components to this inquiry. The first is to determine the period of time in respect of which the loss should be calculated ("the period of loss", which is used as the multiplier); the second is to determine the *profits* that SAC would have made during the relevant period (the multiplicand).

88 On the issue of the period of loss, it must first be stressed that the *Brickenden* approach only applies in the area of causation; it does not apply in the quantification of loss (see *Beyonics* at [222]). Thus, even though I have held that Mr Higgins had caused the termination of the AMS Agreement, this does not, without more, mean that he is liable for all the lost revenue arising thereto in perpetuity. At the end of the day, the court still has to decide, based on the evidence, what the relevant period of loss ought to be. This is not a question which can be answered with precision as it involves a degree of prognostication. SAC's case is that the AMS Agreement would continue in perpetuity, for it has brought a claim for lost profits from the effective date of termination (22 March 2012) until the present day. Mr Higgins's position is that the AMS Agreement would have been terminated immediately, or at least in the immediate future. I accept neither of these arguments.

89 It is undisputed that at the time Mr Higgins committed the breaches in question, SAC was facing or would imminently be facing headwinds in the form of (a) the resignation of Mr Johnstone as a pilot (although he stated his willingness to fly if necessary), (b) disagreements between the directors; and (c) Mr Walker's resignation as the flight operations manager: see [13] and [14] above. These would have negatively affected SAC's performance. However, I also do not accept Mr Higgins's argument that the AMS Agreement would have been terminated imminently. Even before the termination of the AMS Agreement, SAC had hired contract pilots;[151] in fact, Mr Walker was hired as a

contract pilot even after the termination of the AMS Agreement, which contradicts Mr Higgins's assertion that Mr Mulacek and Mr Civelli were unhappy with Mr Walker's performance).[152] It seems to me that SAC would have been able to continue performing its obligations under the AMS Agreement, perhaps with the assistance of contract pilots. Taking all these matters into account, it is my judgment that the AMS Agreement would have subsisted until the end of the contractual period (24 April 2014).[153] This means that the period of loss is 25 months (23 March 2012 to 24 April 2014).

90 As for the profits that SAC would have made during that period of time, the calculations are not straightforward. I begin with two general points. First, I do not accept that SAC is entitled to claim for the cockpit crew income (that is, the pilots' salaries) for the period of loss at all. It is clear that the pilots' salaries were paid to the pilots themselves, and not to SAC. This is clear from the ledgers of SAC contained in the accountant's report tendered by SAC, where it is shown that the pilots (mostly Mr Johnstone and Mr Walker) were paid a sum of US$11,875 a month for flying the Aircraft.[154] All sums received by SAC in pilots' salaries would have been earmarked for onward transmission to the pilots (as was the case for the contract pilot hired by Mr Higgins, where SAC paid a sum of US$11,875 to MAM for onward transmission to the pilot[155]) and would not have formed part of SAC's profits.

91 Second, the sum of US$25,000 which SAC received in management

151 AEIC of Nicholas Johnstone at paras 51–52 (2 BOAEIC 373).

152 AEIC of Daniel Chance Walker at paras 26–28 (3 BOAEIC 313 and 314).

153 Cl 14 of the AMS Agreement (1 ABD 181).

154 D15, Tab 1, Annex A.

155 D15, Tab 1, p 5, footnote 2.

fees each month represents SAC's gross *revenue* from the AMS Agreement, but it does not account for the operating expenses would have had to be incurred in order for SAC to continue fulfilling its obligations under the AMS Agreement. In this regard, I note that SAC continued to be a going concern even after the AMS Agreement, so the crux of the inquiry is the *additional* expenses SAC would need to have incurred in order to continue performing the AMS Agreement. Mr Higgins did not address me on this issue, as his submissions were confined only to arguing that his breaches did not lead to the termination of the AMS Agreement. This case was quite unlike *Beyonics* where the parties hired accounting experts to determine the quantum of the losses suffered by the company as a result of the diversion of the business (see *Beyonics* at [189]–[190]). The only evidence which would seem to bear on this question are the audited financial statements for SAC for the financial year ending 31 August 2012. However, they do not contain a detailed breakdown of the relevant expenses incurred by SAC for the period of time and it is unhelpful to have regard to the gross expenses because the reference period for the financial statement includes five months in which the AMS Agreement was not in force (22 March 2012 to 31 August 2012).

92 In these circumstances, I conclude that there is no objective premise upon which any reduction can presently be made to account for operating expenses. There is a paucity of evidence and any reduction I make would be entirely arbitrary and be no better than a shot in the dark. However, I do not consider that it would be just, for the reasons which I have already set out above, to award the full sum of US$25,000 claimed. In the premises, I exercise my power under O 37 r 4(*a*) of the Rules of Court (Cap 322, R 6, 2014 Rev Ed) to direct that an assessment be carried out by the Registrar.

Secret profits

93 I move to SAC's claim for secret profits. It has long been held, since the old case of *Bray v Ford* [1896] AC 44, that a fiduciary is not entitled to make a profit out of his trust without the informed consent of his principal because this could give rise to a danger of a conflict of interest (at 51 *per* Lord Herschell). One particular expression of this rule is the prohibition against the usurpation, by a fiduciary (usually a director), of corporate opportunities that properly belong to his principal (which, in the case of a director, is a company): see *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443.

94 SAC's case is that Mr Higgins had breached this duty in two ways:[156]

(a) First, he had made received a "back-to-back" profit in the sum of US$316,000 from the acquisition of the Aircraft.

(b) Second, he had made undisclosed profit of US$24,000 arising out of the chartered flights to Makassar and Ambon in April 2012.

The back to back profit from the acquisition of the Aircraft

95 The background to the acquisition of the Aircraft is set out at [6]–[10] above. Mr Higgins does not deny that he made a sum of $316,000, but he argues that he did not derive these profits by virtue of his office as MD of SAC but instead had pursued it as MD of MAM and should therefore be allowed to retain it.[157] He further argues that SAC is not the proper plaintiff. If

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156 SOC (S 733) at paras 18 and 20.

157 Suit 733 Defendant's closing submissions at paras 352–359.

at all, he contends, it ought to be AirLNG, on whose behalf he was acting in the purchase of the Aircraft, who should bring suit.[158] I do not accept either of these two arguments.

96 Because the rule against the making of secret profits is aimed at protecting the integrity of the fiduciary relationship from being tainted by the prospect of a conflict of interest, it is stringently applied and bites even where the company did not, or even could not, take up the opportunity – liability arises from the mere fact that profit had been made (see *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 ("Regal") at 144–145). In *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [13]–[16], the Court of Appeal further explained that this was because the rule was a gains-based remedy aimed at disgorgement of all illicit profits obtained by the fiduciary; and therefore it did not matter that the principal would thereby gain a "windfall" in the process. It also applies, and this is particularly important for present purposes, even if the fiduciary (usually a director) had come upon the opportunity in another capacity (see Andrew Keay, *Directors' Duties* (Jordans, 2009) at para 10.94). Jonathan Parker LJ, delivering the judgment of the English Court of Appeal in *Bhullar v Bhullar* [2003] 2 BCLC 241 ("*Bhullar*"), put it thus (at [28]):

> In a case such as the present, where a fiduciary has exploited a commercial opportunity for his own benefit, the relevant question, in my judgment, is not whether the party to whom the duty is owed (the company, in the instant case) had some kind of beneficial interest in the opportunity: in my judgment that would be too formalistic and restrictive an approach. Rather, the question is simply whether the fiduciary's exploitation of the opportunity is such as to attract the application of the rule. …

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158 Suit 733 Defendant's reply submissions at paras 90–94.

97 The "rule" which Jonathan Parker LJ was referring to was the rule in *Bray v Ford* – that fiduciaries should not be allowed to place themselves into engagements in which they might have a personal interest which conflicts with, or might possibly conflict with, the interests of their principal (at [27]). At [30], Jonathan Parker LJ explained that in determining whether there was such a conflict, the test to be applied was that articulated by Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46 at 124, which was whether "reasonable men looking at the facts would think there is a real sensible possibility of conflict" between the interests of the principal and the personal interests of the fiduciary.

98 What this means, for present purposes, is that it does not matter whether Mr Higgins came upon the opportunity in his capacity as the MD of MAM (and on this point, I am prepared to assume in his favour that he was invited to the Portcullis networking event where he met Mr Mulacek as a representative of MAM). It also does not matter that SAC was not or would not be entitled to retain the back-to-back profits from the acquisition of the Aircraft. Instead, the question is whether reasonable men looking at the facts would think that there was a real sensible possibility of conflict between his interests and that of SAC's. In my judgment, there was such a conflict.

99 First, and contrary to Mr Higgins's submissions, aircraft acquisition falls within the scope of SAC's activities.[159] This comes through not just from the testimony of Mr Johnstone[160] but it was also reflected on Mr Higgins's own SAC business card, where it is plainly stated that SAC's services included

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159 Suit 733 Defendant's closing submissions at paras 343–345.

160 NE (23 March 2016), p 64, line 4 to p 65, line 24.

"Aircraft sales and Acquisitions.[161] There was some dispute as to whether Mr Higgins's had handed Mr Mulacek his MAM or his SAC business card when they first met in 2010 (see [6] above), but, in my assessment, this is neither here nor there. The point is that the business cards, which were requisitioned on 15 November 2010, is clear evidence that SAC thought of itself as being in the business of aircraft acquisition from its inception.[162] Second, when Mr Higgins first pursued the acquisition, he did so *qua* MD of SAC. This is clear from the fact that when Mr Higgins first contacted Mr Mulacek, he not only signed off as MD of SAC but also asked that Mr Johnstone be contacted to assist in matters relating to the acquisition of the Aircraft and continued copying Mr Johnstone in the correspondence concerning the acquisition of the Aircraft for the next two months (see [7] above). Third, it is clear that SAC had an interest in the acquisition for it was allocated a "finders' fee" of $15,000 for the acquisition.[163] I reject Mr Higgins's explanation that this was merely a "gesture" given to SAC because Mr Johnstone had "moaned and… groaned".[164] Instead, I find that the explanation which is more consistent with the evidence is that proffered by Mr Johnstone, which was that he had asked Mr Higgins if there would be a finder's fee because he perceived aircraft acquisition to be within SAC's business and had therefore sought a finder's fee on SAC's behalf.[165] This is consistent both with what I found about SAC's initial involvement in the acquisition as well as the subterfuge concerning the disclosure of the Escrow documents, which is a point which I shall come to

161 D 18.

162 *Ibid*.

163 NE (19 July 2016), p 86, line 1 to p 89, line 5; NE (21 July 2016) p 108, line 3 to p 109, line 7.

164 NE (21 July 2016), p 111, line 24 to p 114, line 22 (especially at p 113, line 22).

165 NE (19 July 2016) p 86, lines 2–22.

shortly.

100 In my judgment, the work done by Mr Higgins in the course of his work in the acquisition falls within the ambit of his fiduciary obligations. In the ordinary course of things, this would be the end of the matter, and Mr Higgins would be subject to an obligation to account for all of the profits he received. However, Mr Higgins argued that he is absolved of liability because he had made full and frank disclosure to SAC on three occasions, of which the most significant was on 11 August 2011 when he allegedly informed SAC's board of directors of his intentions to set up an aircraft acquisition business. This was recorded in a document which was purportedly the minutes of a meeting between the directors of SAC on 11 August 2011. It reads in material part as follows:[166]

> DH announced intention to set up a Singapore based aircraft acquisition business with Jack Kendall of OK Consultants, California. DH suggested that SAC would benefit from new business by way of aircraft management contracts for aircraft sourced by the new business. DW proposed DW and NJ receive shares at a 50% discount in lieu of salary in the amount of $5000 per month. *Item under review.*
>
> [emphasis added]

101 SAC disputed the authenticity of these minutes pointing to, among other things, the lateness of the disclosure, the fact that it was unsigned, and the fact that there is no record of such a meeting in SAC's minute book.[167] In my judgment, there are serious doubts as to whether the minutes are genuine and I decline to place any weight on them. In any event, I note that there was no agreement reached at the meeting; instead, all that was said was that the

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166 P 13, p 2.

167 Suit 733 Plaintiff's closing submissions at paras 11 and 12.

item – by which it can only mean *both* Mr Higgins's proposal to set up an aircraft business with Mr Kendall *and* the proposal that Mr Walker and Mr Johnstone receive a monthly salary – was under review and there is no evidence that it was taken up on another occasion.

102 I am further fortified in my conclusion by the facts leading up to the disclosure of the Escrow documents, which I adverted to at [10] above. Mr Higgins first alluded to the existence of the transfer for $15,000 to SAC (which was referred to as a finder's fee) during the trial. Thereafter, SAC sought disclosure of these documents but only a redacted copy of the Escrow Report was released which revealed that $15,000 had been transferred to MAM. Critically, what was redacted were the transfers of US$316,500 to MAM and a further US$316,500 to OK Consultants. What followed was a vigorous exchange of correspondence in which Mr Higgins continued to resist disclosure. This culminated in the filing of Summons No 3381 of 2016, which was an application for specific discovery of an unredacted copy of the Escrow Report. I heard this application and granted it on the first day of the second tranche of the trial. If it were the case that Mr Higgins had the consent of the board of SAC to pursue the acquisition through MAM (and if it were the case that SAC had merely been given the finder's fee as an undeserved gratuity), there would have been no need for the titanic struggle to hide the contents of the Escrow Report. The fact he did, in my judgment, is eloquent of a clear consciousness of wrongdoing.

103 In the result, I conclude that Mr Higgins is liable to account to SAC in the sum of $316,500 for the profits he obtained from the acquisition of the Aircraft. For avoidance of doubt, I clarify that since AirLNG was not a party before me, my judgment does not affect whatever rights it might have against

Mr Higgins or SAC.

Makassar-Ambon Charter

104 As for the claim relating to the Makassar-Ambon Charter, there is no question that the chartering of flights is part of SAC's core business. As its MD, Mr Higgins ought not to have profited personally from this. Mr Higgins's only response was that he had not profited from the charter and that the sums received went to someone else instead. I have already dealt with this at [56]–[57] above. I therefore find that Mr Higgins is to account to SAC in the sum of US$24,000.

Retention of documents

105 Finally, I come to the third alleged breach, which is that Mr Higgins had acted against SAC's interests in retaining – among other documents – one of the logbooks relating to the maintenance and servicing history of the Aircraft (the "Logbook"). I will briefly set out the background to this claim. On 30 April 2012, after the termination of the AMS Agreement, SAC had delivered all of the Aircraft's records to AirLNG, believing these to be the complete set of technical documents relating to the Aircraft which was in their possession. However, during the trial, it transpired that – much to the surprise of the directors of SAC – Mr Higgins had the Logbook in his possession and that he had been holding onto it for the past four years. Mr Higgins initially resisted delivery up of the Logbook on the ground that he had a lien over it but complied after a summons was filed.[168]

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168 Affidavit of Daniel Chance Walker in Summons No 1513 of 2016 dated 17 March 2016 at paras 6–11.

106 Under cl 4(b) of the AMS Agreement, SAC was to arrange for "appropriate maintenance of Aircraft technical records, logs and other materials required by the FAA and to make the same available to [AirLNG] on request."[169] After the termination of the AMS Agreement, SAC was clearly required to turn over all records relating to the Aircraft. I completely reject Mr Higgins's argument that he had a lien over the logbook.[170] Mr Higgins has not cited any authority to support his contention that a lien may arise under these circumstances nor has he even specified what type of lien he is asserting. On the assumption that it is a common law possessory lien that he claims, this argument cannot succeed. At common law, a possessory lien, arises in respect of goods owned by the debtor (see *Halsbury's Laws of Singapore* vol 5 (LexisNexis, 2013 Reissue) at para 60.363). The Logbook belongs to AirLNG while Mr Higgins's case is that it is SAC which owes him money. I fail to see how he can assert a lien over the Logbook in these circumstances. In holding onto the logbook for four whole years, Mr Higgins placed SAC in breach of contract and had thereby fallen short of his duty to act in SAC's best interests.

107 I turn to the question of the remedy, and this is where I find that SAC's claim falters for want of proof of loss. By SAC's own case, the losses were borne by AirLNG, and there is no evidence that AirLNG had, at the date of the trial, sued SAC.[171] However, the remedy of equitable compensation, which SAC seeks in this case,[172] serves either as reparations for damages suffered or as a monetary substitution for the loss of a trust asset (see *Snell's Equity* (John

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169 1 ABD 178.

170 Suit 733 Defendant's closing submissions at para 395.

171 Suit 733 Plaintiff's closing submissions at paras 139–142.

172 Suit 733 Plaintiff's reply submissions at para 116–118.

McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at para 20-028). Either way, it functions as restitution for the *loss* which is suffered as a result of the breach of trust (see *Target Holdings Ltd v Redferns* [1996] 1 AC 421 at 434C–E *per* Lord Browne-Wilkinson). In this way, while the remedy of equitable compensation may be analogised to the award of damages, there are important differences (see, generally, *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [39]–[50]. One important difference, it seems to me, is that it is not possible to make a nominal award. It stands in contrast with actions in contract (or torts which are actionable *per se*, such as defamation),where a nominal sum may be awarded in damages even if there is no proof of actual loss. In such cases, the award of nominal damages serves a vindicatory function, it "mark[s] the fact that there has been a breach of contract" (see *Andrew Mappouras v Waldrons Solicitors* [2002] EWCA Civ 842 at [15] *per* Kay LK). No authority has been cited to me to demonstrate that the remedy of equitable compensation may play this vindicatory, rather than compensatory, function. In the circumstances, therefore, I find that SAC is not entitled to the remedy of equitable compensation which it has claimed.

108 In concluding my analysis of the main claim in Suit 733, I will state that, contrary to what was submitted, it is clear from what I have found that there is no basis to for Mr Higgins to be granted relief under s 391(1) of the Companies Act (Cap 50, 2006 Rev Ed), which permits the court to excuse a director from liability for breach of fiduciary duty if it can be shown that the director had "acted honestly and reasonably".[173] It is plain from what I have found that the breaches in question were not the sins of carelessness and imprudence but were conscious, culpable, and egregious. Mr Higgins acted

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173 Suit 733 Defendant's closing submissions at paras 289–292.

throughout with a singular object, which was to advance his own interests at the expense of his principal's.

Mr Higgins's counterclaim for unpaid salary

109 I move to Mr Higgins's counterclaim. He submits that he is entitled to a sum of US$42,520.16 in salary which he says was due to him for work done between 1 April 2012 and 18 July 2012.[174] This claim can be fully disposed of on the basis of admissions made during the trial.

110 During the trial, Mr Higgins conceded, through his counsel, that he accepted the contents of two reports produced by accountants[175] engaged by SAC which showed that he is only owed a sum of US$14,351.90.[176] SAC accepted that Mr Higgins is owed this amount but sought to set it off against other amounts which they claim they are owed.[177] While Mr Higgins belatedly sought to challenge these reports in his closing submissions, I do not think it is open for him to do so now, given the admissions which were made at trial and his *categorical* acceptance of the contents of the reports.[178] In any event, Mr Higgins has not led any evidence to suggest that he had not been paid those sums so there would not be any evidence to contradict the correctness of the accountants' reports, in any event. In the premises, I grant Mr Higgins judgment on his counterclaim in the sum of US$14,351.90.

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174 Suit 733 Defendant's reply submissions at para 177.

175 NE (18 July 2016, p 24, line 22 to p 25, line 4)

176 D15, Tab 2 at para 8.2.

177 Suit 733 Plaintiff's closing submissions at para 151–152.

178 Suit 733 Defendant's closing submissions at paras 173–175.

Conclusion

111 In summary, my decision is as follows:

(a) Suit 244 is dismissed in its entirety.

(b) I allow SAC's claim in Suit 733 and order:

(i) That an assessment be carried out to determine how much it ought to receive in respect of its claim for the termination of the AMS Agreement; and

(ii) That SAC shall be awarded a sum of US$340,500 in relation to the secret profits claim.

(c) I allow Mr Higgins's counterclaim in Suit 733 and award him a sum of US$14,351.90.

112 The result in both suits has gone substantially against Mr Higgins. Even though Mr Higgins succeeded in part in his counterclaim, SAC had never disputed its liability in respect of such and had in fact informed Mr Higgins of this fact from an early stage. As a consequence, I order that Mr Higgins pay the costs, both of the trial as well as that of every interlocutory application in respect of which costs have been reserved. Given that everyone save for Mr Higgins was represented by Mr Salem Ibrahim, only one set of costs will be paid, the quantum of which shall be taxed, if it is not agreed.

Edmund Leow
Judicial Commissioner

Peter Low, Raj Mannar, and Elaine Low (Peter Low LLC) for the plaintiff in Suit No 244/2013 and defendant in S 733/2014; Salem Ibrahim, Kulvinder Kaur, and Jeriel Lam (Salem Ibrahim LLC) for the defendants in S 244/2013, the plaintiff in S 733/2014, and the defendants in the counterclaim in S 733/2014.
