IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 45

Civil Appeal No 97 of 2014

Between

(1) ENG CHIET SHOONG
(2) LEE SIEW YUEN SYLVIA
(3) C S PARTNERS PTE LTD

… *Appellants*

And

(1) CHEONG SOH CHIN
(2) WEE BOO KUAN
(3) WEE BOO TEE

… *Respondents*

Civil Appeal No 99 of 2014

Between

(1) CHEONG SOH CHIN
(2) WEE BOO KUAN
(3) WEE BOO TEE

… *Appellants*

And

(1) ENG CHIET SHOONG
(2) LEE SIEW YUEN SYLVIA
(3) C S PARTNERS PTE LTD

… *Respondents*

In the matter of Suit No 322 of 2012

Between

(1) CHEONG SOH CHIN
(2) WEE BOO KUAN
(3) WEE BOO TEE

… *Plaintiffs*

And

(1) ENG CHIET SHOONG
(2) LEE SIEW YUEN SYLVIA
(3) C S PARTNERS PTE LTD

… *Defendants*

JUDGMENT

[Contract] — [Implied contracts] — [Quantum meruit]
[Restitution] — [Quantum meruit]
[Restitution] — [Unjust enrichment]

TABLE OF CONTENTS

Eng Chiet Shoong and others
v
Cheong Soh Chin and others
and another appeal

[2016] SGCA 45

Court of Appeal — Civil Appeals Nos 97 and 99 of 2014
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Quentin Loh J
3 February 2016

13 July 2016 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 Under what circumstances will the law award compensation for work done by a particular party where there is no express contract? It is clear that, if an award is to be made, it must be premised on legal principle as opposed to some vague and general notion that it is simply just and fair to award such compensation. This ostensibly simple issue belies a number of difficult legal questions and even more difficult issues of application. As we shall see, the former is (fortunately) not the focus of the present appeal although the latter is. Indeed, the present appeal illustrates once again the crucial importance of a granular analysis of the relevant facts in order to arrive at a just and fair result that is simultaneously grounded in sound legal principle.

2 We pause to observe (parenthetically) that there has in fact been much academic writing on the legal principles relevant to this appeal. This stems – in large part – from an "industry growth" in the law of unjust enrichment. As this court observed in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 (at [99]), "[t]he law of unjust enrichment is still developing and there remain … many unresolved issues (and even controversies)" (see also generally, from the Singapore perspective, Rachel Leow and Timothy Liau, "Unjust Enrichment and Restitution in Singapore: Where Now and Where Next?" [2013] Sing JLS 331 ("*Leow & Liau*")). Whilst this is inevitable in a relatively fledgling area of the law, the court – in dealing with real facts and real parties – must nevertheless have a stable base of legal principles from which to apply the relevant law to the relevant facts of the case before it.

3 On occasion, though, where the law is unclear and must be resolved in order to resolve (in turn) the case at hand, the court will have to lay down a clear set of legal principles (which will guide the courts in future cases as well). It is on occasions such as these that *relevant* academic literature can – and often is – of considerable assistance to the courts.

4 As alluded to above, the present appeal – fortunately – does not require a resolution of thorny legal issues. However, as some of them were canvassed in the course of the parties' written and oral submissions, we will touch briefly on them although we will not endeavour to resolve them until they are next raised directly before the court for decision.

5 The basic facts of the present case are relatively straightforward. Indeed, the case may not inaccurately be described as a sad tale of "fall outs". There was, first, the financial fall out that resulted from the global financial

crisis of 2008, which was a major factor in leading to the fall out between the parties who had hitherto been family friends. Put simply, the Engs and the Wees decided to combine their resources and expertise in order to bring to fruition a funds business concept, which was termed “the WWW concept” and was first mooted in early 2004. It was an ambitious project, which, if successful, would have yielded enormous financial profits. The Wees, who are high net worth individuals, were to provide the financial resources which the Engs would manage. The Engs comprised a husband and his wife. The husband, Eng Chiet Shoong (“ECS”) had considerable experience in fund management. The WWW concept sought to leverage his expertise and the Wees’ capital to the financial benefit of all concerned. To this end, ECS introduced in late 2004 or early 2005 five private equity (“PE”) funds to the Wees (“the initial PE funds”), who committed up to US$30m to these funds (the Engs point out that the actual commitment amount for the initial PE funds was over US$14m). During the subsequent months, the Wees committed another US$100m to ten PE funds (“the additional PE funds”). The Wees also took stakes in five direct investments, which included a hotel project (“Project Plaza”). Management fees calculated at 1.5% per annum on a US$30m commitment were set in respect of the initial PE funds (this yielded fees of US$450,000 per annum). There were no agreements with respect to management fees in relation to the additional PE funds as well as Project Plaza. The WWW concept ultimately failed to materialise, owing in part to the 2008 global financial crisis. Relationships between the parties frayed and deteriorated. By December 2011, the Wees were demanding the transfer of the investments to them. By February 2012, they pressed the Engs for proper accounting. The Wees filed a claim against the Engs, seeking a return of their investments with the latter. The Engs, on the other hand, filed a counterclaim against the Wees for management fees and expenses. The High Court judge ("the Judge") held in favour of the Wees with respect to the main claim and dismissed the Engs' counterclaim (see *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2015] SGHC 173 ("the GD")). The Engs filed the appeal in Civil Appeal No 97 of 2014 ("CA 97"), whilst the Wees filed the appeal in Civil Appeal No 99 of 2014 ("CA 99") with regard to the timeframe during which they had to pay management fees in respect of the initial PE funds. So much by way of a brief snapshot of the proceedings. Before we turn to a more detailed rendition of the facts, it might be apposite to note that the issue which raises the most difficulties (and which was alluded to at the outset of this judgment) relates to CA 97 – in particular, what was the *legal basis* (if any) upon which a claim for management fees could be successfully claimed by the Engs (and this, in turn, raised the related (as well as important) issue as to the *capacity* in which the Engs had done the work and incurred the expenses which are the subject matter of their counterclaim against the Wees)?

Facts

6 The relevant facts have been helpfully set out in some detail by the Judge in the GD and we have therefore, *inter alia*, drawn from there for the purposes of the present judgment.

7 The Wees are members of a prominent banking family in Singapore. Cheong Soh Chin ("CSC") is the mother of Wee Boo Kuan ("BKW") and Wee Boo Tee ("BTW"). The Wees inherited considerable wealth from CSC's husband, who passed away in 1992.

8 ECS's wife, Sylvia Lee Siew Yuen ("Sylvia"), was the trusted private banker to CSC's husband for many years. Over time, the Wees came to regard Sylvia as a trusted family friend. Even after CSC's husband died in 1992,

Sylvia remained in touch with the Wees. ECS came into the picture in 2003, when Sylvia introduced him to the Wees. At that time, ECS worked for the Government of Singapore Investment Corporation ("GIC") as a senior vice-president of GIC Special Investments Pte Ltd, which is the arm of GIC that specialises in PE investments.

9 The Wee brothers, while already sophisticated investors, were nevertheless relative strangers to PE funds. ECS told them about the "obscene" profits that could be reaped from this asset class and obliged them when they wanted to learn more. In 2003 and 2004, ECS schooled the Wee brothers on PE funds, including how they were structured and how fund managers and investors made profits. He shared his expertise in investing in PE funds and told them of the close personal relationships he enjoyed with the world's leading PE fund managers. He offered to introduce them to these managers so that they could invest directly in PE funds rather than through intermediaries, which would entail another layer of fees. Impressed by ECS's knowledge and fascinated by the prospect of investing in PE funds, the Wee brothers came to see ECS as their trusted mentor in this field.

10 By early 2004, ECS hit upon the WWW concept. Under this funds business concept, ECS, BKW and BTW would set up their own investment fund, seeded with the Wees' capital, find other investors for the fund, and collect management fees from running the investment fund. The WWW concept was essentially a way for the Wee brothers and ECS to combine the latter's industry knowledge and personal relationships with the former's considerable capital and appetite for risk to enable all parties involved to profit from PE investments both as a fund manager and as an investor. As the WWW concept was a long-term vision and due to their close personal relationship, the parties did not enter into any contractual

arrangements governing their rights and obligations in connection with the steps they would take towards fulfilling the WWW concept and what would happen if it failed.

11 The first step was to build a name and track record for themselves in PE investments. To this end, the Wee brothers and ECS started to work towards setting up their own PE fund. The Wees were to supply all the necessary capital for the fund, while ECS would provide the industry expertise and relationships, and oversee as well as manage the fund's investments. This initial fund was to be a fund of funds, *ie*, a fund that invested in other PE funds. Once the fund had a history of good performance, it would become the first fund under the WWW concept and the Wees would sell down part of their investment to external investors.

12 In late 2004 or 2005, ECS introduced BKW and BTW to investment opportunities in PE funds which were managed by some of the world's leading fund managers. The Judge found that the Wees made an initial investment of US$30m in the initial PE funds and that over the subsequent months, the Wees committed another US$100m to the additional PE funds. After ECS left his former employer in August 2005, C S Partners Pte Ltd ("CSP") was set up the following month by Sylvia to provide "integrated services to families on wealth protection and wealth creation".

13 The Wees agreed to pay ECS an annual management fee that was calculated at 1.5% of an initial commitment amount of US$30m, or US$450,000, for managing the initial PE funds. The initial PE funds were meant to be the Wees' personal fund of funds, which brought it *outside* the WWW concept. However, no agreement was made to pay management fees in relation to the additional PE funds.

14 The Wees also took stakes in five direct investments, so termed as these investments involved the acquisition of equity through special purpose vehicles ("SPVs") and not through investments in PE funds. The direct investments included Project Plaza, which concerned the purchase, demolition and redevelopment of a hotel called the Esplanade Hotel in Albany, Western Australia. As was the case with the additional PE funds, no agreement on management fees was made in relation these direct investments, including Project Plaza.

15 The initial PE funds, the additional PE funds and the five direct investments (including Project Plaza) were held through a network of 24 SPVs controlled by the Engs but established and maintained using the Wees' funds. The holding structure was designed to mimic how a PE fund would hold these investments and to facilitate an eventual sale of all or part of the Wees' interests in these investments to incoming PE investors.

16 For various reasons, partly to do with the global financial crisis, the WWW concept failed to take off. The parties' personal and professional relationships became increasingly strained. In July 2009, Project Plaza was terminated by the Wees, in particular, BKW. By November 2011, the Wees had decided to wind down and divest all their holdings in all of the investments. In December 2011, the Wees demanded that the Engs transfer to them all rights, title and interest in their investments, including control of the SPVs that held the Wees' investments. By the start of 2012, the parties' relationship, though once close, had broken down beyond repair. On 15 February 2012, the Wees demanded full accounting and reconciliation of their investments in the PE funds and the five direct investments. No account had been provided by April 2012 and the Wees commenced court action on 18 April 2012. The Wees sought, *inter alia*, the transfer to them of the

ownership and control of their investments, including all the SPVs holding their investments, an account of all the money that they had entrusted to the Engs or to the SPVs, an order allowing them to trace all such money, and an order that the Engs pay all sums that were found to be due on the taking of the account.

17 The Engs accepted that the 15 PE funds, the five direct investments and the majority of the SPVs through which the Wees' entire portfolio was held belonged to the Wees, but nevertheless opposed the Wees' claim. They also mounted a counterclaim in response, the result of which is the subject of the present appeals. In the court below, the Engs' counterclaim concerned about US$17m in management fees and related expenses connected to their work done in relation to the Wees' investments over the years.

Decision in the court below

18 The Judge ruled substantially in favour of the Wees in relation to their claim, granting them all the orders sought except for the tracing order, which he regarded as premature (see the GD at [4]).

19 Of relevance to these appeals is the Judge's dismissal of substantially the whole of the Engs' counterclaim. The Judge found that the parties were not in a client-service provider relationship. Rather, they were joint risk-runners working together towards the WWW concept (see the GD at [51]), with the expectation that all their rewards would come when the WWW concept succeeded (see the GD at [69]). This explained why the parties never had an agreement on fees (beyond the agreement to pay management fees for the initial PE funds).

20 In the premises, he found that the Engs were not entitled to management fees for the additional PE funds. There was no basis to imply a contract that the Wees would pay the Engs management fees of 1.5% of the commitment amount of the additional PE funds (see the GD at [82]). Neither were the Engs entitled in restitution on a *quantum meruit*. Among other reasons, he found that the Engs had performed their services speculatively, in anticipation of being compensated out of the profits of the WWW concept. They therefore took the risk that future compensation would not materialise (see the GD at [87]).

21 However, the Judge ordered that the Wees pay, as expressly agreed, management fees of US$450,000 per annum from August 2009 until the date on which the SPV holding the PE funds – Woolverstone Private Fund of Funds (LP) Limited ("WPFOF") – was transferred to the Wees, pro-rated for any part of a year. He held that the Engs had a continuing contractual right to payment under the parties' agreement to pay annual management fees of 1.5% of the initial PE commitment amount of US$30m. The Engs had managed and administered the initial PE funds since 2005 (see the GD at [70]). Payments had been made for the years 2005–2006, 2006–2007, 2007–2008 and 2008–2009 (see the GD at [72] and [76]). While the Engs subsequently failed to ask for management fees, their right to payment was unaffected by the mere failure to do so (see the GD at [77]).

22 The Judge determined that Project Plaza was also part of the WWW concept. Therefore, he rejected the Engs' claim for management fees and expenses for Project Plaza in restitution on a *quantum meruit*. The Engs worked and incurred expenses with the expectation of recovering compensation through the rewards that would come with the anticipated success of a hotel fund as part of the WWW concept (see the GD at [98]). In

so far as the expenses were concerned, he found no overarching agreement for the Wees to foot all the expenses incurred by the Engs for Project Plaza. Instead, the parties had entered into specific agreements from time to time to cover specific expenses (see the GD at [99]). Therefore, the Engs had to bear all the expenses incurred in connection with Project Plaza, except where there had been specific agreements that the Wees would bear these expenses. These specific agreements would be factored in during the taking of the account.

23 The Judge also rejected the Engs' claim for US$0.5m in breakup and facilitation fees for the sale of certain funds (the CVC funds and PEP funds) (see the GD at [93]–[95]), which had been sold in 2010, and another claim for about US$319,150 for work done in administering the Wees' other investments (see the GD at [107]–[108]).

24 On 27 June 2014, the Engs filed CA 97 to appeal the dismissal of their counterclaim. On the same day, the Wees filed CA 99 to appeal that part of the Judge's decision that required the Wees to pay management fees for the initial PE funds even after they commenced their claim on 18 April 2012 and until the date that their investments were returned to them.

Issues

25 In so far as CA 97 is concerned, the key issues are as follows:

(a) whether the Engs are entitled to management fees for the additional PE funds either on an implied contract or in restitution; and

(b) whether the Engs are entitled to management fees for Project Plaza.

If we answer either question in the affirmative, an ancillary issue is the quantification of the fees.

26 In so far as CA 99 is concerned, the issue is whether the Wees are obliged to pay management fees for the initial PE funds after the commencement of legal proceedings on 18 April 2012.

Our decision

General Principles

Introduction

27 As alluded to at the outset of this judgment, this particular sphere of law does present a number of difficult legal issues. In the apt words of Prof Ewan McKendrick (see Ewan McKendrick, "Work Done in Anticipation of a Contract which does not Materialise" in ch 11 of W R Cornish, Richard Nolan, Janet O'Sullivan & Graham Virgo (eds), *Restitution Past, Present and Future – Essays in Honour of Gareth Jones* (Hart Publishing, 1998) ("*McKendrick*") (at p 163):

> … The difficulty with this topic lies, not so much in the results which the courts reach, but in the reasoning which gets them to that conclusion. I think we would all accept that work done prior to the formation of a contract is often done at the risk of the party doing the work so that he or she will have no claim in the event that a contract fails to materialise. But there comes a time (and it is difficult to determine that time with great precision) when the work done is of such magnitude or of such a nature that the party doing the work is entitled to look to the other party for recompense. The difficult question is: what is the legal basis of the claim of the party doing the work? Is it a restitutionary claim or not? If it is restitutionary, what is the ground upon which restitution is sought? If it is not a restitutionary claim, does the claim lie in the law of contract, tort, or estoppel? Or is it to be found in some "no man's land", partaking of different elements of the law of restitution, contract and tort? …

In the essay just referred to, Prof McKendrick focuses (correctly, in our view) on the contractual and restitutionary approaches. The other possible legal routes towards recovery (including tort, equitable or promissory estoppel and breach of a duty of good faith and fair dealing) were then – and still are – in a relatively embryonic state (and in so far as the last-mentioned doctrine is concerned, see the decisions of this court in *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 and *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 at [44]).

28 Generally speaking, recovery of compensation for work done in situations where there is no express contract may, as we have just noted, be premised on either contractual or restitutionary grounds. The former is generally premised on an *implied* contract since, *ex hypothesi*, there is (subject to one possible situation which will be mentioned below (at [30])) no *express* contract to begin with. The general principles which are potentially applicable were in fact helpfully explored in a relatively recent joint article to which we are greatly indebted: see Man Yip & Yihan Goh, "Liability for work done where contract is denied: contractual and restitutionary approaches" [2012] LMCLQ 289 ("*Yip & Goh*"). Indeed, in this article, the learned authors argue that the possible approach that may be adopted is not necessarily a binary one – and that both contractual and restitutionary approaches could possibly be adopted (the suggested common element being the defendant's assumption of the risk of financial responsibility) – but that the contractual approach should take precedence over the restitutionary approach.

Contract

29 In so far as the *contractual* approach is concerned, we agree with *Yip & Goh* that the *implied* contract under which compensation for work done

is recoverable will not be implied unless it is *necessary* to do so (see *Yip & Goh* at 291). And as the learned authors note (at 292; see also the decision of this court in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [38] (and the authorities cited therein)):

> [N]otwithstanding the utility of the contractual model, it should not be overstretched. The key to implied contracts is the finding of an intention to contract. In particular, … there is a need to be clear as to what the parties intended.

Conceptually, at least, such an implied contract could also take the form of a *collateral contract* (see also generally K W Wedderburn, "Collateral Contracts" [1959] CLJ 58 ("*Wedderburn*"), Paul S Davies, "Anticipated Contracts: Room for Agreement" [2010] CLJ 467 ("*Davies*") at 471−474, *Yip & Goh* at 293−295 as well as the decision of this court in *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 ("*Ang Sin Hock*") at [73]−[76]). However, the key motif remains the same – the courts will only locate an implied contract in very limited circumstances based on necessity and having regard to the intentions of the parties. What this means in practical terms is that the *precise facts and circumstances* of each case will be of the first importance. Indeed, Prof Hedley's vigorous response to *McKendrick* and his extremely enthusiastic reliance on the contractual approach appears to *presuppose a favourable fact situation to begin with* (see Steve Hedley, "Work done in Anticipation of a Contract which does not Materialise: A Response" in ch 12 of W R Cornish, Richard Nolan, Janet O'Sullivan & Graham Virgo (eds), *Restitution Past, Present and Future – Essays in Honour of Gareth Jones* (Hart Publishing, 1998) ("*Restitution Past, Present and Future*")). However, as just mentioned, the contractual approach ought not to be applied liberally. Notwithstanding, for example, Wedderburn's observation that the collateral contract had "value" as a "weapon of justice" (see *Wedderburn* at 85), the countervailing need for certainty should also be borne in mind. And, as this court observed in *Ang Sin Hock* at [76]:

> There is, admittedly, the danger of too much commercial uncertainty being generated. However, this danger can be met by the court requiring clear proof that the legal requirements of a binding contract have, indeed, been satisfied on the facts … as well as (from an attitudinal perspective) being generally reluctant to find a collateral contract which ought to remain a finding of last resort.

30 It will be noted that we have hitherto referred to possible recovery of compensation pursuant to ***an implied contract***. As already alluded to above, there could not, *ex hypothesi*, be recovery pursuant to an *express* contract which does not exist to begin with. However, it is ***also*** possible that there *might* be an *express* contract which does *not* contain an *express term* with regard to the remuneration that ought to be paid for work done by the plaintiff. In such a situation, it is entirely conceivable that the court concerned might ***imply a term*** that *a reasonable sum* be paid by the defendant to the plaintiff (see, for example, the decision of this court in *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* [2000] 3 SLR(R) 386 ("*Lee Siong Kee*") at [30], the Singapore High Court decision of *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 ("*MGA International Pte Ltd*") at [113]−[116] and the UK Supreme Court decision of *Benedetti and another v Sawiris and others* [2014] AC 938 ("*Benedetti*") at [9]; though *cf* the decision of this court in *Gold Coin Ltd v Tay Kim Wee* [1985−1986] SLR(R) 575 ("*Gold Coin Ltd*") at [9]−[10] (where both an implied contract as well as implied terms are mentioned)). As is the case with implied *contracts*, the *implication* of a *term* in this last-mentioned situation will also be based upon *necessity* by reference to the traditional "business efficacy" and "officious bystander" tests (and see generally the decisions of

this court in *Lee Siong Kee* at [30], *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267 and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193).

31 In the present case, it should be noted that the Engs relied, in the main, on *an implied contract* in relation to the additional PE funds. Although counsel for the Engs, Mr Alvin Yeo SC ("Mr Yeo"), also submitted on the *alternative* basis premised on work done pursuant to an anticipated contract that had failed, he clarified during oral submissions before this court that the anticipated contract that had failed was *not* the contract based on *the WWW concept* but, rather, on a contract to pay management fees. This last-mentioned point brings us to the next set of possibly applicable principles centring on the *restitutionary* approach.

Restitution

32 From an historical perspective, a claim for a reasonable sum for work done based on the doctrine of *quantum meruit* in a situation where there was *no contract (whether express or implied)* found its source in what was known as *quasi-contract*. The concept of *quasi-contract* itself was a nebulous creature and claims based on this concept (including *quantum meruit*) involved the use of a *fiction* (see generally J H Baker, "The History of Quasi-Contract in English Law" in ch 3 of *Restitution Past Present and Future*, especially at pp 37, 42−44 and 53−54, John H Langbein, "The Later History of Restitution" in ch 4 of *Restitution Past, Present and Future*, ch VIII of A W B Simpson, *A History of the Common Law of Contract – The Rise of the Action of Assumpsit* (Clarendon Press, Oxford, 1987), especially at pp 489 and 496−499; as well as Warren Swain, *The Law of Contract 1670−1870* (Cambridge University Press, 2015) at pp 121−126).

33 It is now generally acknowledged that the doctrine of *quantum meruit* is more appropriately classified under a claim in *restitution* or (perhaps more accurately) *unjust enrichment* (see also, for example, *Benedetti* at [9]). As, for example, has been observed in Charles Mitchell, Paul Mitchell & Steven Watterson (eds), *Goff & Jones – The Law of Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) at para 1-06:

> … Many of the rules collected in this book were previously thought to form part of the law of "quasi-contract", and were shakily conceptualised as a part of the law of contract, or else were treated as isolated incidents of equitable doctrine. The theory that all "quasi-contractual" claims rested on an implied contract between the parties was notably articulated in *Sinclair v Brougham* [[1914] AC 398], but it was decisively rejected in *Westdeutsche Landesbank Girozentrale v Islington LBC* [[1996] AC 669], and the implied contract theory is now unequivocally "a ghost of the past". …

34 And, in a similar vein, Prof Peter Birks has observed thus (see Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd Ed, 2005) at p 284):

> The everyday work of the law of unjust enrichment was never left entirely undone. It was picked up under a variety of heads, principally, on the common law side, under money had and received, money paid, *quantum meruit*, and *quantum valebat*, and, on the Chancery side, under constructive trust, resulting trust, and equitable lien. … Their persistence would in some cases be inexplicable were it not that, until the language of unjust enrichment became available, there was nothing which could satisfactorily replace them. … *Quantum meruit* and *quantum valebat*, for example, are usually responses to contract, but they also respond to unjust enrichment. …

35 Whilst there has been some academic discussion as to the *basis* for the award of a claim in *quantum meruit* in the context of unjust enrichment, it is notable that there has been no real controversy that such a claim does indeed exist as part of (formerly) the law of quasi-contract and (presently) the law of unjust enrichment. One persuasive reason for such an award has been suggested by Prof McKendrick who observed thus (see *McKendrick* at p 181):

> What is suggested is the basis for intervention is the expectation of both parties that a contract would be concluded and the fact that that expectation has not been fulfilled.

36 A slight digression might be in order at this particular juncture: we have already noted that there might be possible recovery for work done pursuant to an *implied contract*. We have also just noted that recovery (as an *alternative* (see also *Yip & Goh* at 316)) might be possible pursuant to a claim in *quantum meruit* under the *restitutionary* approach. In this last-mentioned regard, we note that the law of restitution or unjust enrichment is generally critical of the concept of the implied contract but this is only in relation to its earlier (and more general) use as a ***rationale*** for that entire branch of the law, which criticism is understandable as it led to artificiality. When, however, we refer to the concept of an implied contract in the context of recovery pursuant to the law of *contract*, we are referring to an implied contract as ***a specific doctrine*** *in itself* (based on necessity and having regard to the intentions of the parties (see also above at [29])). As Prof McKendrick aptly observed, "[t]he anticipation of a contract is not the same thing as the existence of a contract" (see *McKendrick* at p 167). Admittedly, the distinction may not always be clear, depending on the precise facts and circumstances concerned (and see, for example, the different possible characterisations of the English High Court decision of *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 in *McKendrick*, especially at pp 169−171 and *Davies*, especially at 469−470 and 474). Conceptually, however (and returning briefly to the present case), whilst the (primary) claim by the Engs for fees in relation to the additional PE funds is based on an implied contract, their (secondary and *alternative*) claim is premised (in *restitution*) on a claim in *quantum meruit* based on an *anticipated* contract that had *never materialised*. In so far as Project Plaza is concerned, the Engs' claim for fees appears to be largely premised (in *restitution*) on a claim in *quantum meruit* based on an *anticipated*

contract that never materialised. This would be an appropriate juncture at which to apply the principles set out briefly above to the facts of the present case (in particular, in relation to CA 97). However, before proceeding to do so, a slight digression on the issue pertaining to *terminology* might be appropriate.

A slight digression with regard to terminology

37 As we have already noted, the plaintiff can be compensated for work done in *contract* pursuant to either an implied contract *or* an implied term (see above at [28] and [30]). In both situations, however, the amount of remuneration or compensation payable to the plaintiff concerned will be *a reasonable sum*. On a plain reading, such an award would be *consistent with* the *literal meaning* of the term "*quantum meruit*", which when translated from the Latin means "as much as he has deserved" (see Bryan A Garner (ed in chief), *Black's Law Dictionary* (Thomson Reuters, 10th Ed, 2014) ("*Black's Law Dictionary*") at p 1437; David M Walker, *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980) ("*The Oxford Companion to Law*") at p 1022; and J A Simpson & E S C Weiner (eds), *The Oxford English Dictionary* (Clarendon Press, Oxford, 2nd Ed, 1989), vol XII ("*OED*") at p 982). Not surprisingly, perhaps, this particular mode of recovery has been referred to as ***contractual*** *quantum meruit* – which has been contrasted with recovery pursuant to what has been referred to as ***restitutionary*** *quantum meruit* (which was the topic of the preceding part of this judgment). This distinction between contractual *quantum meruit* and restitutionary *quantum meruit* is, in fact, well-established in Singapore case law (see, for example, the decisions of this court in *Gold Coin Ltd* at [9]–[10] and *Lee Siong Kee* at [29]–[37], the Singapore High Court decisions of *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655 at [122]–[124], *MGA International Pte Ltd* at [113] and *Sim Kim Seng (trading as Kim Seng Ship*

Building) v New West Coast Shipyard Pte Ltd [2016] SGHCR 2 at [15]; as well as *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (Butterworths Asia, 1998) at pp 1127−1130).

38 However, whilst the distinction between contractual *quantum meruit* on the one hand and restitutionary *quantum meruit* on the other appears to be clearly established (see also, for example, G H L Fridman, "*Quantum Meruit*" (1999) 37 Alberta Law Rev 38), the concept of *quantum meruit* appears to be more appropriate terminology in the context of *the latter* (as opposed to the former). This is reflected, for example, in *Black's Law Dictionary*, where *quantum meruit* is defined as follows (at p 1437):

> **quantum meruit** …. [Latin "as much as he has deserved"] (17c) **1.** The reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship. **2.** A claim or right of action for the reasonable value of services rendered. **3.** At common law, a count in an assumpsit action to recover payment for services rendered to another person. **4.** A claim for the market value of a party's performance under an implied-in-fact contract or an express contract that does not specify a price. **5.** A claim for the value of benefits provided without a contract, as when the plaintiff brings a claim for restitution and that value provides the measure of recovery. •The typical applications in restitution are to cases when the defendant asked for the benefits supplied, but when the claimant, for one reason or another, cannot recover on the basis of contract, express or implied. The term has long been, ambiguous between senses 4 and 5, leading to confusing references in judicial opinions. *See* Restatement (Third) of Restitution and Unjust Enrichment § 49 cmt. f (2011). Cf. *implied-in-law contract* under CONTRACT.

It can be immediately seen that, whilst there is a fleeting reference to contract, the focus is really on *restitution or unjust enrichment*. One explanation is perhaps that this is a publication that emanates from the United States of America (where restitution and unjust enrichment are very well-established compared to its continuing development in the Commonwealth (including Singapore (see generally *Leow & Liau*)) – although the *OED* also appears to adopt a similar focus (at p 982 ("A reasonable sum of money to be paid for services rendered or work done, when the amount due is not determined by any provision constituting, or forming part of, a legally enforceable contract") – albeit doing so as a *general* (as opposed to a law) dictionary). That having been said, the current editor in chief of *Black's Law Dictionary*, Prof Garner, does, in another work, acknowledge that *quantum meruit* is a term that may in fact be "ambiguous" inasmuch as it might also refer to recovery on a contractual basis (see Bryan A Garner, *A Dictionary of Modern Legal Usage* (Oxford University Press, 2nd Ed, 1995) ("*A Dictionary of Modern Legal Usage*") at p 724):

> **quantum meruit** … *Quantum meruit* means literally "as much as he or she had earned," and shows no signs of waning in legal use. The term, however, "is ambiguous; it may mean (1) that there is a contract 'implied in fact' to pay the reasonable value of the services, or (2) that, to prevent unjust enrichment, the claimant may recover on a quasi-contract (an 'as if' contract) for that reasonable value." *Martin v. Campanaro,* 156 F.2d 127, 130 n.5 (2d Cir. 1946).

39 There are, admittedly, also ***other*** definitions which appear to be *neutral* (see, for example, Daniel Greenberg (ed), *Stroud's Judicial Dictionary of Words and Phrases* (Sweet & Maxwell, 8th Ed, 2012) at p 2414 ("*Quantum meruit* is the reasonable amount to be paid for services rendered or work done, when the price therefore is not fixed by contract …")). These definitions do not – at least on a literal reading – preclude premising an obligation on the defendant to pay the plaintiff on the basis of an *implied contract*. However, in another work, the same editor appears to treat the concept of *quantum meruit* as focusing more on restitution or unjust enrichment instead (see Daniel Greenberg (gen ed), *Jowitt's Dictionary of English Law* (Sweet & Maxwell, 3rd Ed, 2010), vol 2 at p 1857; see also the preceding paragraph):

> **Quantum meruit.** … In its early history the action for quantum meruit was, no doubt, a genuine action in contract,

> based on a real promise to pay, although the promise had not been expressed in words and the amount of the payment had not been agreed. Subsequent developments have, however, considerably widened the scope of this form of action, and the action now-seems to be founded on a desire to address unjust enrichment. …

40 There are ***yet other*** definitions which are *wholly consistent with* the *distinction* between contractual *quantum meruit* and restitutionary *quantum meruit*. The following definition in David Hay (gen ed), *Words and Phrases Legally Defined* (LexisNexis, 4th Ed, 2007), vol 2 at p 717 is an example:

> **QUANTUM MERUIT**
>
> The terms 'quantum meruit' or 'quantum valebat' are used in three distinct senses at common law, namely as denoting: (1) a claim by one party to a contract, for example on breach of the contract by the other party, for reasonable remuneration for what he has done; (2) a mode of redress on a new contract which has replaced a previous one; (3) a reasonable price of remuneration which will be implied in a contract where no price or remuneration has been fixed for goods sold or work done.
>
> Of these three types of claim, the second and third are clearly contractual, whereas the first is not based on contract …

Reference may also be made, in this regard, to *The Oxford Companion to Law* at p 1022 ("Another possible measure of restitution in case of unjust enrichment …, or measure of payment where a contract has not fixed a price.") as well as *A Dictionary of Modern Legal Usage* at p 724 (above at [38]).

41 To ***summarise***, perhaps the most practical and commonsensical approach is to look to the *substance* rather than the form. In this regard, it is clear that there are two alternative approaches toward the award of a reasonable sum for work done by a plaintiff. The first is *contractual* in nature and can be premised on the basis of either an implied contract *or* an implied

term (depending on the precise facts before the court). The second is premised on *restitution or unjust enrichment* (the more historical basis being that of *quasi-contract*). The first will take precedence over the second. From a *terminological* perspective, it might be more appropriate – particularly when viewed from *an historical perspective* − to reserve the use of the term "*quantum meruit*" only for the second (*ie*, restitutionary) basis, whilst referring to the first (*ie*, contractual) basis simply as recovery pursuant to "contract" (whether by way of an implied contract or an implied term). This last-mentioned approach was, in fact, adopted in *Yip & Goh*.

42 Let us turn now to apply the principles to the facts of the present case.

CA 97

The additional funds

43 It is of the first importance to recapitulate as well as understand the precise nature of the arguments that were made by Mr Yeo on behalf of the Engs in support of their counterclaim (which included work done with respect to both the additional PE funds and Project Plaza).

44 It will be recalled that Mr Yeo had argued, first, that there was *an implied contract* between the Engs and the Wees that the latter would pay the former management fees in return for the former managing the additional PE funds (on top of managing the initial PE funds for which it was common ground that a fee arrangement existed). As Mr Yeo put it during oral submissions before this court, there was a simple management contract between the Engs and the Wees and the WWW concept was not part of this relatively simple arrangement, although the parties conducted their affairs in broad alignment with this idea. He further argued that either party could have

pulled out of the WWW concept at any time. This last-mentioned argument was, in fact, related to Mr Yeo's alternative argument that even if an implied contract between the parties is not found, the parties had nevertheless intended that such a (management) contract would ultimately have been entered into and that, to this end, the Engs had managed the additional PE funds pursuant to an anticipated (management) contract that had not ultimately materialised and were thus entitled to remuneration for such work done with regard to the additional PE funds on the basis of a claim in *quantum meruit*.

45 It is clear that, central to *both* of Mr Yeo's arguments, as set out briefly in the preceding paragraph, is the fact that either the alleged implied contract or the work done in managing the additional funds in relation to an anticipated (management) contract that had not ultimately materialised was (as Mr Yeo was also at pains to emphasise during the course of oral submissions before this court) *completely outside the scope or purview of the WWW concept*, which was simply a vision and a plan. This was, presumably, to *completely distance* the Engs from the Judge's finding in the court below that the counterclaim by the Engs was bound to fail owing to the fact that they (*ie*, the Engs) had embarked upon *a risk-running exercise* with a view towards being remunerated *only upon the fruition of the WWW concept* – that, in other words, the work performed by the Engs in the meantime was done at their own risk as the material rewards would only crystallise once the WWW concept had come to fruition.

46 With respect, we are unable to accept Mr Yeo's arguments. Based on the evidence before us, it is clear that the parties *had* – at least in relation to the additional PE funds – the WWW concept in view. Let us elaborate.

47 The key document is the e-mail from ECS to BKW dated 24 October 2007 ("the 24 October 2007 e-mail"). Before examining this document, we embark on a slight detour of sorts to lay out the preceding exchange of e-mails, which will enable us to obtain a clearer understanding of the 24 October 2007 e-mail. Around October 2007, as the parties' involvement with one another deepened, CSC (described in the correspondence as the chairman) became concerned about the fees and other arrangements. This led BKW to forward a list of "Chairman Questions" to ECS on 8 October 2007. These queries touched on various aspects, including ownership and agreements. ECS replied four days later to BKW and BTW (copying Sylvia) to explain as follows ("the 12 October 2007 e-mail"):

> …
>
> The GP / LP arrangement is one that is used by all the major global PE firms, including the Blackstone group, CVC and Carlyle. This arrangement calls for LPs (Limited Partners) investing into a fund (via an L.P. Agreement – LPA), with the fund managed by a GP.
>
> *In our case, we are establishing 3 LPAs: the FOF, PE direct investments; RE/Hotel direct investments.*
>
> *Each of the above 3 pools of capital is managed by a separate GP, an SPV held by G1.*
>
> …
>
> [emphasis added]

48 ECS was, however unclear, by what CSC meant by agreements. Thereafter, BKW explained on 16 October 2007 in an e-mail to ECS (copying BTW and Sylvia) that his mother would like to formalise agreements to "prevent potential misunderstanding". On 22 October 2007, BKW wrote an e-mail titled "G1 package" to ECS, again stating that "Chairman wants me to formalize agreement with you to prevent potential misunderstanding … So need you to put on your thinking cap again!" On 24 October 2007, BKW sent

yet another reminder to ECS, telling him that CSC was "still chasing me for this" so "perhaps you could just pen down some key points". This led to ECS's 24 October 2007 e-mail, to which we presently return.

49 The material part of the 24 October 2007 e-mail reads as follows:

> We are preparing LPA [Limited Partnership Agreements] to be signed off by LPs [Limited Partners] and the GP [General Partner] (the latter is WWW owned).
>
> For *the FOF 30*, had suggested *1.5% annual management fee* on commitment.
>
> Had given you *a broad termsheet* which I shall pull out for revisit.
>
> …
>
> [emphasis added]

50 It is significant that the very first paragraph of the 24 October 2007 e-mail quoted in the preceding paragraph refers to the WWW concept – in particular to the Limited Partnership Agreements which relate to *third party investors* and which (in turn) would signal the fruition, so to speak, of the WWW concept – at least in an incipient manner. In particular, this paragraph sets the backdrop against which the rest of the e-mail ought to be interpreted. Having referred to the WWW concept (for which, it will be recalled, there would be no remuneration forthcoming to the Engs until the concept itself came to fruition), the second paragraph of the e-mail provides an ***exception or carve-out*** inasmuch as it *does* in fact *specify a* ***separate*** *method of remuneration by way of* ***a management fee***. In this regard, "the FOF 30" is, in fact, a reference to ***the <u>initial</u> PE funds*** – where it was indeed *common ground* that these funds were ***outside the scope or purview of the WWW concept***. That "the FOF 30" refers to the *initial* PE funds can be gleaned from e-mail correspondence which segregated the Wees' investment in the initial PE funds

from their investment in the additional PE funds. On 23 October 2007, a day before the 24 October 2007 e-mail, ECS informed the Wees that:

> …
>
> As discussed. *The amount that is being underwritten for a third party fund* is now USD48m, excluding a potential commitment of USD15m to PEP (Bain Aus). In addition, *we have USD18m of the house fund (being USD30m) currently committed.*
>
> …
>
> [emphasis added]

51 Indeed, the 1.5% annual *management fee* for "the FOF 30" mentioned in the 24 October 2007 e-mail was precisely the fee agreed upon by the Wees and the Engs in respect of the management of *the* ***initial*** *PE funds*. If, in fact, ***the additional funds*** were also to be subject to the same arrangements as the *initial* funds, this ought ***also to have been indicated in the 24 October 2007 e-mail as well*** – but, significantly, in our view, was ***not***. Mr Yeo had no convincing explanation for this. We note that the 24 October 2007 e-mail came after repeated requests for ECS to consider his remuneration. It is also significant that, by this this time, the commitment amount had risen to about US$83m. Even by August 2008, by which time the commitment amount had risen to US$129m, the management fees continued to be paid based on 1.5% of US$30m (see the GD at [77] and [84]). ***This in fact supports the Wees' case that the <u>additional</u> PE funds were <u>not</u> subject to a <u>separate</u> management contract but were, instead, intended to be <u>part of the WWW concept</u> (for which any remuneration would be forthcoming <u>only upon the fruition of that part of the concept itself</u>).***

52 This brings us to the third – and final – paragraph of the 24 October 2007 e-mail, which refers to a "***termsheet***". For the period preceding the 24 October 2007 e-mail, the only term sheet available on record is one that

was handed to the Wees on *13 August 2005* ("the 2005 term sheet"). This term sheet contained details relating to three funds and two deals. ***What is of signal importance is that the 2005 term sheet, while obviously a draft, was intended to be <u>an at least rough outline of what would constitute the WWW concept</u>***. It is significant, in our view, that the 2005 term sheet refers to *both* the initial PE funds *and* the additional PE funds. The column relating to "Fund 1" must be taken to relate to the *initial* PE funds. For example, the fund size for "Fund 1" is stated to be US$30m – which matches the initial commitment amount that the Wees had already committed to as of the date of the term sheet. Potential investors were stated to be "N/A" to "Fund 1", which suggests that this fund was not intended to draw capital from other investors. In particular, "Fund 1" states that the management fee for those funds is 1.5% per annum – which is *what the parties had in fact* **agreed** *to for the initial PE funds*. More importantly, it was common ground between the parties that the *initial* PE funds were ***not*** intended to be *part of the WWW concept.* ***The natural inference, therefore, is that <u>Fund 1</u> was (as already mentioned) intended to be <u>an exception to (or carve-out from)</u> the overall WWW concept.***

53 There is, admittedly, no clear (and, more importantly, *specific*) reference to the *additional* PE funds although there are two further columns which refer to "Fund 2" and "Fund 3", respectively. However, the particulars of both "Fund 2" and "Fund 3" contemplated, *inter alia*, potential investors, a management company and investment in the management company (with two or three-way splits in its shareholdings). Mr Yeo's case was that the additional PE funds were not "Fund 2" in the 2005 term sheet. "Fund 2" was only to be started after the parties had established a track record in "Fund 1", which would be some years down the road owing to the nature of PE funds.

However, it is difficult to ignore the fact that “Fund 2” was stated to have a fund size of US$100 to US$150m, which is comparable to the commitment amount of the additional PE funds. Mr Yeo also made the point that, even though the initial PE funds were to involve a US$30m commitment, the Wees subsequently committed to more funds without segregating between the initial PE funds and the additional PE funds. There was never any point in time where the commitment amount stood at US$30m. On this view, the additional PE funds should be seen as a mere extension of the initial PE funds. However, this is contradicted by e-mail documentation that shows that the Engs demarcated the PE funds into house funds (the initial PE funds) and third party funds (additional PE funds) (see above at [50]).

54 Bearing in mind the relatively early days in which the 2005 term sheet was produced, it is sufficiently clear, in our view, that the additional PE funds were clearly envisaged to be part of “Fund 2” *or* even “Fund 2” and “Fund 3”, combined. ***What is important for the purposes of the present appeal is the fact that, unlike*** “***Fund 1***”***, the particulars of*** “***Fund 2***” ***and/or*** “***Fund 3***” (see above at [53]) ***suggest that they were intended to be part of the WWW concept – which, in turn, means (consistent with the analysis just proffered) that the additional PE funds were (contrary to what Mr Yeo had argued) in fact intended to be part of the WWW concept.*** In our view, these are eminently reasonable inferences to draw simply because ***it could not possibly have been within the contemplation of the parties that none of the three funds mentioned in the 2005 term sheet would form part of the WWW concept.*** Indeed, as we have already noted, ***even*** “***Fund 1***” was *prima facie* to form part of the WWW concept – ***until*** *that* prima facie *assumption was displaced by* ***an agreement by the parties to the contrary***. Indeed, there has clearly been *no express* agreement to the contrary *vis-à-vis* the ***additional***

PE funds. It will be recalled that Mr Yeo has premised the Engs' case for recovery under either an *implied* contract *or* on a restitutionary *quantum meruit* premised on a *specific* management contract between the parties with respect to *the additional PE funds* that had *failed to materialise*. With respect, we find these (alternative) arguments unpersuasive. Indeed, if this court were to *imply* a contract, that would mean – in substance – that the 2005 term sheet would *not reflect what it was in fact intended to reflect in the first place,* viz, *the WWW concept. Put simply, the exception (as was the situation with regard to* "*Fund 1*"*) would become the (overwhelming) rule instead – a rule which would run* ***wholly contrary to*** *the* ***common intention of the parties <u>to work towards the fulfilment or fruition of the WWW concept</u>***.

55 In the circumstances, it is clear, in our view, that the ***additional PE funds*** were ***<u>within</u>*** *the scope or purview of the WWW concept*, and the Engs' arguments with regard to this particular issue therefore fail.

56 Let us turn now to consider the Engs' arguments with regard to Project Plaza.

Project Plaza

57 It would appear that the same conclusion which was arrived in respect of the additional PE funds ought also to be arrived at with regard to Project Plaza. In particular, it will be recalled that hotel investments were one category in the initial categories formed for the purposes of the WWW concept. In the 12 October 2007 e-mail (see above at [47]), ECS stated that the parties were establishing three Limited Partnership Agreements or LPAs, including one for "RE/Hotel direct investments". The very first paragraph of the 24 October 2007 e-mail conceivably refers to these same

LPAs which, as explained above (at [50]), sets the backdrop against which the rest of that e-mail ought to be interpreted. In the light of these two e-mails, the fact that ECS failed to ask for management fees for Project Plaza *prima facie* suggests that, unlike the initial PE funds, there was to be no carve-out for the work done in relation to Project Plaza.

58 This lends credence to the theory that the Engs were to be remunerated for their work in relation to Project Plaza only through the fruition of the WWW concept. The original plan, according to the Wees, was that they would provide only seed capital of US$25m, with ECS promising to obtain bank loans and/or interested investors – limited partners ("LPs") – to fund the redevelopment of the hotel. When the hotel was re-developed, it would form the "nucleus of a [h]otel [f]und". The "unique selling proposition" to attract potential LPs was that the hotel fund would have an "actual physical hotel built and run as a working model". Indeed, there is evidence that the Engs attempted to seek such external financing. Moreover, the words "Project Plaza" and "hotel fund" were occasionally mentioned in the same breath.

59 But whilst this is *literally* and ostensibly the case that hotel investments constituted one of the categories created for the purposes of the WWW concept, it should also be recalled that the central plank of Mr Yeo's argument on behalf of the Engs is that the work done for, *inter alia*, Project Plaza was (as he *also* argued was the case for the *additional PE funds*) *outside the scope or purview of* the WWW concept. The fact that Project Plaza was a project that related (literally) to a hotel *might* suggest that it fell within the scope of the WWW concept inasmuch as there would be no argument to be made on behalf of the Wees if this particular project did not fall within a stipulated category for the purposes of the WWW concept. *However*, this merely means that a *prerequisite or threshold condition* has been met. As

mentioned at the outset of this judgment, a *granular* approach must be taken in order to ascertain whether (and in this situation) *Project Plaza* did ***in fact*** fall within the scope of the WWW concept.

60 As is the situation generally in so far as the present case is concerned, there is an unfortunate dearth of evidence and this court will have to do the best it can with the little evidence that is in fact available. However, it is sufficiently clear that the work done on Project Plaza was not necessarily in furtherance of the WWW concept, even though Project Plaza was linked to a hotel fund and the relevant SPV structures had been set up.

61 We turn, first, to the relevant e-mail correspondence. Perhaps the most important e-mail is that sent by ECS to BKW dated 22 July 2008 ("the 22 July 2008 e-mail"), as the *plain language* of that particular e-mail refers to ***the management*** of Project Plaza by the Engs. The material part of the e-mail reads as follows:

> ***…***
>
> ***As discussed***, to cover the above opex *we* ***<u>agreed</u>*** *to set aside* ***USD 2 million per annum*** – ***based on 2% on the Plaza Fund size of USD 100 million***. *This will be reflected in the books as* ***USD 2 million <u>fee</u> per annum <u>for managing</u> the WCP Plaza Fund***.
>
> In this regard, please remit for the period Jul to Dec the sum of USD 1 million to the following account …
>
> [emphasis added in italics, bold italics and underlined bold italics]

62 There does not appear to be any written response by BKW to ECS, which would militate against the plain meaning contained in the words of the e-mail quoted in the preceding paragraph. Leaving aside for the moment the precise amount which the Engs are entitled to, it does appear to suggest that there was in fact ***a separate agreement*** to the effect that ***the Engs would be***

paid management fees for the management of <u>this</u> particular project. This would, *ex hypothesi*, take this project ***<u>outside</u> the scope and purview of the WWW concept,*** which (it will be recalled) was premised on (and as the Judge also found in the court below) ***the concept of <u>risk-running</u>***, which (in turn) was premised on the understanding between the Wees and the Engs that any work done by the latter would ***not*** be *separately remunerated* but would ultimately witness both parties being able to reap the benefits by ***sharing in the fruits of the WWW concept when it did in fact materialise***. At this juncture, it should be noted that it was unclear – to this court at least – what precisely the parties envisaged were the "fruits" of the WWW concept. *However*, this is *immaterial* for the purposes of the present appeal given the fact that Mr Yeo had – in his case theory in support of recovery of compensation for the Engs – ***eschewed the relevance of the WWW concept altogether***. In particular, Mr Yeo had argued that the Engs were entitled to compensation on the basis that the work that they had rendered with regard to both the additional funds as well as Project Plaza were ***<u>outside</u> the scope and purview of the WWW concept altogether***.

63 In fairness to the Wees, however, it should be noted that BKW's testimony during cross-examination suggests that the amount mentioned in the e-mail referred to in the preceding two paragraphs related to the *operating expenses* with regard to Project Plaza. In his affidavit of evidence-in-chief, BKW had similarly said that the "clear understanding between [the parties] was that this amount was to be used for Project Plaza expenses". *Even if* this is indeed the case, the e-mail suggests, at the very least, that the Engs had nevertheless sought management fees for work done on Project Plaza. For while the Engs appear to accept that the US$1m was for expenses, they make the larger point that the Wees had agreed to set aside funds for the operating

expenses *only after the parties failed to reach an agreement on management fees*. The relevant part of BKW's cross-examination is reproduced as follows:

> Q. My instructions are that Mr Eng raised the issue of management fees, but all you were prepared to agree to at that point in time -- you didn't say yes, you didn't say no -- was you agreed to cover the operating expenses.
>
> A. I agreed to pay the 1 million as per his e-mail. Yes.
>
> Q. A bit more than that. Mr Wee, I'm not suggesting to you that you agreed to any particular management fee. That's not my instructions. But I am suggesting to you that you agreed to cover the operating expenses of what is described as operating expenses of TTO, that is the CS Partners' employees who were housed at Thong Teck office working on the family's investments.
>
> A. All right. Based on the understanding that the fund was set up, that's part of the management fee, right, the WCP Plaza fund.

64 BKW did not deny that the agreement to cover operating expenses arose directly from the failure to agree on management fees on Project Plaza. On further questioning, he characterised the US$1m which the Wees paid towards the operating expenses of Project Plaza as "part of the management fee" (albeit of the "WCP Plaza fund"). Whether the true situation is that the parties made a separate agreement to the effect that the Engs would be paid management fees or that the US$1m payment was simply a "fall back" to cover operating expenses after the parties discussed management fees, the salience of management fees in either case suggests that Project Plaza was ***outside*** the scope of the WWW concept.

65 Our findings so far are in fact, supported by ***the relevant context as well***. Let us elaborate.

66 First, whilst we have already noted that it was *possible* for Project Plaza to have fallen within the WWW concept, it is significant, in our view,

that the only term sheet which was in evidence (*viz*, the 2005 term sheet which we had referred to earlier in the context of the issue relating to the additional PE funds), ***whilst referring to*** *the initial funds* **as well as** *the additional funds*, ***did <u>not</u> refer to Project Plaza at all***. This is consistent with the Engs' argument that Project Plaza was a *discrete* project that was *outside* the scope and purview of the WWW concept.

67 The 24 October 2007 e-mail, which, as we have found, made reference to the 2005 term sheet, did not refer to Project Plaza as well. At this juncture, we digress to address an argument that may be made, as Mr Philip Jeyaretnam SC ("Mr Jeyaretnam") did on behalf of the Wees, that ECS had not provided a carve-out for management fees for Project Plaza in that particular e-mail. This would suggest that Project Plaza was akin to the additional PE funds in that both investments would be remunerated under the WWW concept. However, as we have observed, the 2005 term sheet, which ECS said he would pull out for a "revisit", did not even refer to Project Plaza. This indicates that the fee arrangements that were being contemplated at the relevant time did not cover Project Plaza. This is plausible as the discussions on remuneration in October 2007 concerned the "G1 package", *ie*, ECS's fees, and did not address Sylvia's remuneration, even though she was in the thick of the project. Indeed, it might not have been an opportune time to seek fees for Project Plaza. Although the parties bought Esplanade Hotel by August/September 2006 and demolished it around February 2007, the nature and scope of the Engs' involvement in Project Plaza remained hazy even in October 2007. In February 2007, BKW relinquished his role as the Project Plaza Consultant ("the PPC") because his wife fell seriously ill. Following that, Sylvia was forced to step up to the plate and take on more work while discussions and attempts were made to find a replacement for BKW.

Moreover, issues with, *inter alia*, the design of Project Plaza meant that Project Plaza had not even gotten off the ground. As BKW said in cross-examination, "things were stuck" and the project "was not moving". To compound matters, Project Plaza had run into funding issues, which led BKW to ask on 8 October 2007 if the parties should "wait for more positive signs or [get] someone else to start [the hotel fund] or … initiate this?"

68 In view of all this, it is understandable that Sylvia herself did not broach the topic of management fees even when the parties were on the subject of the Project Plaza expenditure (In an e-mail on 22 October 2007, Sylvia informed ECS that the total amount spent on Project Plaza to date (excluding land cost) was about S$2.475m. She stated that this sum excluded the costs that CSP had incurred (about $700,000 to date), which included staff costs, administrative expenses and rental costs. However, she was silent on management fees). In any event, as we have found, the parties did eventually discuss (at the very least) the topic of management fees for Project Plaza at or around the time of the 22 July 2008 e-mail.

69 Secondly, we note that BKW was very involved in, *inter alia*, the *design* of the hotel as evidenced, for example, in e-mail correspondence to both ECS and Sylvia dated 5 September 2008 and 6 September 2008 – a degree of both *direct as well as substantive involvement* that went *beyond* the mere provision of seed money. As also evidenced from the relevant e-mail correspondence, it appears that BKW was very concerned about the *costs* of Project Plaza – not from the standpoint of a party who was providing only seed money but, rather, as a party who had *a direct interest* in the *overall (and substantive) development* of the project (which is also consistent with BKW's direct involvement in the *design* of the hotel, as also just noted). This is seen

in, for example, an e-mail dated 25 September 2008, which BKW sent to ECS and copied to Sylvia. the material parts of which read as follows:

> Hi Shoong
>
> I hear your point on budget.
>
> But my question remains: other than waiting for QS numbers, how can the team come out with *alternative* [*sic*] *to cut cost*?
>
> No one seems willing or able to go through the line by line except to 'bargain' for cheaper prices …
>
> *And I keep harping on pre-fab the entire building* but perhaps that's repeated so frequently that it has been lost in the wind…
>
> [emphasis added]

70 In fact, there is much to be said in favour of the Engs' contention that BKW was the "key decision maker" for Project Plaza in many respects. Notwithstanding BKW's insistence that he was just part of the approval process and that the Engs had the final say in major decisions, the preponderance of evidence suggests that he was heavily involved in charting the vision for Project Plaza, selecting the team, approving the appointment and termination of service providers and ensuring that the *feng shui* master's requirements were complied with (although BKW insisted that he was merely the interface between the *feng shui* master and the other parties). As Mr Yeo put it in the court below, he who pays the piper calls the tune, and BKW's relationship with Sylvia could in several ways be described as that between a client and his service provider. For example, BKW confirmed that Sylvia never differed from him when it came to the appointment of the various consultants or contractors (although he claimed that this was because ECS was also involved in the process). And as the Judge found, it was BKW's "flighty and wholly impractical design choices and his inability or unwillingness to accept they could be translated only with difficulty, delay and expense" that

contributed to the eventual failure of Project Plaza (see the GD at [105]). Even in April 2008, when the project was facing a two-year delay in completion, BKW was still raising points related to the issue of *feng shui*. The evidence, in our view, is sufficient to suggest that BKW was more concerned with achieving the right vision and design for Project Plaza than with the creation of the hotel fund, even though the original plan under the WWW concept was to get Project Plaza up and running in order to launch the hotel fund. For example, in an e-mail in December 2006, BKW suggested that "construction will begin once the hotel project design is fine-tuned and the attendant construction methodology is determined". Yet, he was cognisant that delays in the hotel construction would also push back the timeline for the hotel fund. In other words, BKW's *specific* preoccupation with various aspects of the project, including its vision and design, contributed to delays and disruptions that are inconsistent with the purported aim of realising the WWW concept. Contrary to his own assertions, BKW's vision did not seem to consist in the hotel fund. Rather, his sights were trained on the development of an actual physical hotel that accorded with what appeared to be his *personal* ideas of what would provide a "transformative experience".

71 Thirdly, it has been clearly established that the heavy lifting for Project Plaza was in fact, undertaken by the Engs – in particular ECS's wife, Sylvia. Indeed, BKW had to leave active participation in Project Plaza as the PPC owing to unexpected (and unfortunate) circumstances, as his wife had been taken critically ill. This was in February 2007, when she was unfortunately diagnosed with cancer. In an e-mail dated 15 March 2007, BKW told Sylvia that he would continue to provide strategic input for a maximum of one to two hours a week but would not be dealing with day to day matters. In BKW's own words, "Sylvia took over and ran the project". It was only at the end of

January 2009, when Sylvia asked him to return to Project Plaza, that he decided to do so. That Sylvia undertook the heavy lifting in the interim is evident from the e-mail correspondence, such as that between BKW and her in April 2008, as well as further e-mail correspondence thereafter. And as Mr Yeo rightly pointed out in oral closing arguments before the Judge:

> After [BKW] stepped back because of his wife's unfortunate illness, he became a backseat driver, and that, in some ways – many ways – was worse. We got to a situation where he wanted certain things, but he wasn't there to implement it, and he would just reject many and many times.

Consonant with the extent of her role, Sylvia herself also expressed her concern about the need for funds; in an e-mail dated 14 August 2008 to BKW, for example, she stated as follows:

> I hope that the two of you [presumably also a reference to ECS to whom the e-mail had also been sent] do not do the disappearing act on me if things turn rough. I have been giving my assurance to all related parties. *I became the face for two of you who started all this. I too need confirmation from both of you on $$$ to fulfill this vision of PPM* [Project Plaza]. [emphasis added]

In another e-mail dated 25 September 2008, Sylvia wrote to BKW as follows:

> *Funding of PP* [Project Plaza] *has always been my major concern. Everything* that we do ***outside*** *building the structure* ***involved funding as well***. Until today ***I still do not know exactly the source of funds <u>for the construction of the building</u>***. How do [*sic*] one instill the confidence to commit more *until I am certain that* ***I have the funds <u>to build the structure first</u>***? [emphasis added in italics, bold italics and underlined bold italics]

72 Fourthly, ***BKW's version*** of events with regard to Project Plaza was – understandably – *quite different*. He stated in his affidavit of evidence-in-chief that it was never the agreement that the Wees would be funding the entire redevelopment costs for Project Plaza. The agreement between him and ECS

was that the Wees would provide the initial "seed money" of US$25m, while the remaining developmental costs would be taken care of by bank loans and the hotel fund to be created. This was, presumably, in line with the WWW concept which envisaged the injection of third party funds; in BKW's words:

> Because the beginning of this was supposedly the setting up of a hotel fund, where this particular hotel, which is codenamed Project Plaza, was supposed to be the first sort of model -- working model to differentiate itself from other hotel funds, which only sort of gave a concept. So in this case, the idea was actually to build something concrete, okay, show to the potential limited partners to the hotel fund, so that they can come on later on.

BKW later stated that as the estimated costs for Project Plaza shot up to more than US$100m, the understanding between the parties evolved to one where the hotel fund would contain only Project Plaza. He claimed that ECS represented to him that it was nevertheless possible to obtain bank loans and investors even before the hotel was re-developed, *ie*, before it was up and running. Therefore, even under the evolved plan for the hotel fund, the Wees were presumably still expected to put in only US$25m in "seed money". There appears to be some support for BKW's version in an e-mail dated 25 September 2008 in which he wrote to Sylvia ("the 25 September 2008 e-mail"), the material parts of which read as follows:

> Hi ED [this was how BKW often addressed Sylvia]
>
> We have gone through this before ie *originally the understanding was US$25m for PP* [Project Plaza] with the rest coming from bank financing.
>
> However I have repeated [*sic*] stressed the importance of building a financial model backed by contracts, strategic alliance (marketing for guest, apartments, events/programmes/functions) and workable ideas.
>
> [emphasis added]

73 Indeed, BKW also expressed his concerns during cross-examination that Sylvia had allegedly misrepresented to his mother (the first plaintiff in the main claim) the fact that US$100m was required inasmuch as the Wees would be funding Project Plaza in its entirety, thus giving her (his mother) the wrong impression (which was also contrary to what he stated was his own perception as briefly set out in the preceding paragraph).

74 However, BKW's concerns were not borne out by the relevant e-mails from Sylvia (as set out above) and are, in fact, *contradicted* by them. We do note, in this regard, that there was an e-mail dated 25 September 2008 from Sylvia to BKW, which stated as follows:

> I spoke to your mum yesterday morning before I left and realised that your mum is very much against PP [Project Plaza]. She is also not aware of what we are doing and the commitment that PP is incurring. Can I speak with you later?
>
> …

BKW responded to the above e-mail on the same day, and which stated as follows:

> Hi ED [*ie*, Sylvia]
>
> She [BKW's mother] is against PP [Project Plaza] because she now has the perception that we have to come out with US$100M for PP (hotel fund).
>
> I have already briefed her on this and she wanted to know application of funds – which was why I was asking you for those details before my brother's drama began.
>
> See you later then
>
> Boo Kuan

75 But what, then, about the 25 September 2008 e-mail (which has been quoted above at [72])? At first blush, this particular e-mail would appear to

support *BKW's* version. *However*, a closer reading of this e-mail suggests that it is, *at best*, *neutral*.

76 In fact, while the Wees' case is that the Engs only started to press them to fund the entire project when they failed to secure project financing, there does not appear to have been any agreement on the exact funding arrangements for Project Plaza. In particular, it is unclear that there was an original understanding that the Wees' involvement was to be limited to an injection of US$25m in seed capital. This figure only appeared in e-mail correspondence in June 2008, at a time when the cost to redevelop Project Plaza had skyrocketed and parties were discussing ways to fund Project Plaza from external sources. The 25 September 2008 e-mail was preceded by an e-mail from BKW to ECS on 12 June 2008 titled "PP Financing", the material parts of which read as follows ("the 12 June 2008 e-mail"):

> …
>
> As spoken, please think about various ways we can finance PP (from external sources) from getting LPs to using the stream of revenues from the Funds that we have participated in[.]
>
> The US$25[m] net budget for PP is over the next two years is over the next 2 years until the project is completed. Is this understanding correct?
>
> …

77 ECS responded to this e-mail on 13 June 2008 as follows ("the 13 June 2008 e-mail"):

> …
>
> You: As spoken, please think about various ways we can finance PP (from external sources) from getting LPs to using the stream of revenues from the Funds that we have participated in
>
> Me: we discussed @ the American yesterday afternoon.

> The key is timing for such fund to be made available / put another way reduction of our commitment. If Chairman approves a 6 month period – then this puts much pressure on the portfolio returns.
>
> Developmental risk would deter most LPs to sign up to PPM now. This risk is exacerbated as the potential LPs are not in the driver's chair.
>
> Using the stream of revenues from FOF is a good idea. This stream of revenue will however shape up only in the next 3 years.
>
> In the shorter term (ie up to 6 months), we are better placed to "sell down" the FOF positions and @ the same time exit the investments in RedSpot and Gina.
>
> You: The US$25 net budget for PP is over the next 2 years until the project is completed. Is this understanding correct?
>
> Me: this is my back of the envelope calculation based on total gross construction cost of PPM@ A$70m and on the ability to sell the current number of apartments @ a reasonable price to the market (ie not a stretched price target!). The number is the max outlay before bank debt kicks in …… So cost containment is critical – let's see what the team @ PPM can do ….
>
> …

78 In cross-examination, BKW stated that the mention of US$25m in the 12 June 2008 e-mail was in reference to the seed funding for the hotel fund. However, as Mr Yeo pointed out to him, the 12 June 2008 e-mail was in fact the *first* document which referred to a US$25m net budget. This casts doubt on whether the parties had in fact agreed that the Wees would limit their involvement in Project Plaza to "seed money" of US$25m. Given that at the time, the parties were discussing ways to finance the project externally, it is plausible, notwithstanding BKW's disagreement, that the US$25m figure was in fact derived from their estimates of the external funding that they could secure for the project (see the preceding paragraph where ECS's response to the 12 June 2008 e-mail is quoted).

79 Related to the last-mentioned point is the fact that the creation of a hotel fund in relation to Project Plaza appears to have been *just one option* on the table. The first paragraph of the 12 June 2008 e-mail shows that BKW was open to "various ways" of financing Project Plaza, including methods that *did not envisage the creation of a hotel fund at that point*. In ECS's response to BKW's e-mail, he expressed pessimism on the prospects of recruiting LPs to sign on to Project Plaza due to the risks entailed in investing during the project's developmental stage (see the fourth paragraph of the 13 June 2008 e-mail). In fact, ECS's "back of the envelope" calculation of the US$25m net budget for Project Plaza factored in the sale of Project Plaza apartments and bank debt, but *excluded* investment from LPs. We also pause to observe that, by this time, the nature of the hotel fund appears to have deviated from the parties' original plan of having the redeveloped hotel up and running in order to present a "unique selling proposition" to potential LPs (see above at [58]).

80 As Project Plaza wore on (and the fall-out from the global financial crisis intensified), the parties were still far from reaching a landing on the hotel fund as it related to Project Plaza. This is evident from an e-mail discussion in October 2008 between BKW and ECS following CSC's query on the "budget requirements from WWW for [Project Plaza] before making a decision":

> …
>
> 2. She wants to know budget requirements from WWW for PP before making a decision
>
> Me [ECS]: [Project Plaza Modified] – may have to seriously consider pushing back then the timeline and build more slowly. 3 years to build? Budget requirements would definitely be a function of several things: project size, complexity etc …
>
> [BKW] – Suggest ED [Sylvia] does not call bro or mother about committing $50M to PP – it would just rock the boat further
>
> Meme [ECS]: suggest you speak w/ED [Sylvia]

> [BKW:] 3 years to build? What is the longer term plan – are you still considering hotel fund?
>
> Meme [ECS]: chicken and egg I am afraid. No first deal etc … Difficult to point to track record, hire folks etc …
>
> 3 years to build would buy more time, delay equity outflow etc …
>
> …

81 In cross-examination, BKW confirmed that, at that point, there remained no agreement on the hotel fund and he was asking ECS if the hotel fund was still part of the plan. BKW further confirmed that ECS, through his "chicken and egg" comment, was making the point that the parties needed a first project with a track record in order to successfully launch the fund. It is evident that the preoccupation of the parties was with securing funding for Project Plaza; the creation of a hotel fund was at the highest, a funding option, and one which became increasingly unviable as time wore on. While ECS's comment was a clear indication that a hotel fund was not possible at that particular point in time, Project Plaza continued for about nine more months before the Wees decided to terminate the project in July 2009. This suggests to us, once again, that Project Plaza was not necessarily synonymous with the creation of a hotel fund.

82 In fairness to the Wees, though, a couple of (closely related) points in their favour with regard to this particular issue ought to be dealt with at this juncture. It should be noted, first, that the parties, including BKW, did refer, on occasion, to a "hotel fund" (see, for example, his e-mail dated 25 September 2008, reproduced above at [74]). Before the full effects of the global financial crisis set in, ECS had, in an e-mail on 29 October 2007, also informed BKW that one of his friends had set up his first fund of funds which raised US$440m. This friend was "now shooting for USD 1 billion". In response, BKW asked, rather exuberantly, if they could "make the quantum

leap even for doing FOF and H Funds (ie everything we do!)?" To that, ECS replied: "Clearly that is doable. First step PP / Branded hotel fund, then the 'direct investment programme' followed by FOF. …"

83 ***However***, such references must be viewed against ***the backdrop and context*** set out in the preceding paragraphs – in particular, the fact that Sylvia had been shouldering the bulk of the work for Project Plaza which (together with, *inter alia*, the substantive attention as well as input of BKW (especially with regard to the design of the hotel)) pointed to the conclusion that this particular project was a ***discrete*** project for which management fees were indeed payable. Whilst it did have some resonance with the WWW concept (and, hence, the parties' reference to a "hotel fund", as just noted), it appears, in our view, to be ***<u>akin to</u>*** *the* ***<u>initial</u>*** ***PE*** *funds* ***inasmuch as it appeared to constitute <u>a test bed</u> of sorts*** *in so far as a "hotel fund" was concerned* (it being common ground, as we have already noted, that the initial PE funds ought therefore to be remunerated *separately*). Looked at in this light, there is no inconsistency as such between the parties' reference to a "hotel fund" on the one hand and the discrete nature of Project Plaza itself on the other.

84 Secondly, and also in fairness to the Wees, we also note that Sylvia had also referred to the need to utilise Project Plaza to establish a "brand strategy" with regard to the WWW concept. For example, in an e-mail dated 24 September 2008 to BKW, she stated as follows:

> Dear BK
>
> All of us knows [*sic*] *in theory that we must have* ***the brand strategy*** before we can have the PR and the rest.
>
> …
>
> [emphasis added in italics and bold italics]

However, as stated in the preceding paragraph, such a view is *not inconsistent with* Project Plaza being contemplated by the parties as ***a test bed*** for the long term development of the "hotel fund" component of the WWW concept.

85 However, this is not the end of the matter. Assuming that the Engs ought to be remunerated with regard to their work on Project Plaza, it still has to be determined whether or not the Engs ought to be remunerated on the basis of either an implied contract or on a *quantum meruit* for an anticipated (management) contract that did not ultimately materialise.

86 In our view, it would be somewhat artificial to locate an implied contract between the parties. Hence, we find against the Engs on this aspect of their case as we have described it at [36] above. We are also satisfied that no concluded contract came into being on this aspect of the work done by the Engs and it is therefore not a case of our implying a term into a contract that is silent on the question of remuneration. That being said, in our judgment, it would be more consistent with the relevant facts to find (and we do in fact find) that the Engs had, in fact, undertaken the task of managing Project Plaza *with the expectation (or anticipation) that a management contract would be finalised*. This was the alternative way in which the Engs case was put and it would necessarily mean that there was *an (accompanying) expectation on the part of the Engs that they would be separately remunerated for the work done* vis-à-vis *this particular project*. In our view, this is *a fortiori* the case as, with the unfortunate (and serious) illness which BKW's wife was stricken with (as noted above), BKW had himself to take a break from the project and left much of the heavy lifting with respect to this project to the Engs (although, as we have observed, he continued to exert significant control). As it turned out, no separate management contract ultimately came into being and the Engs are, in

our view, therefore entitled to be paid a reasonable sum for the work done pursuant to Project Plaza.

87 It remains for us to determine what a reasonable sum to be awarded to the Engs ought to be. The Wees had previously relied on their own expert witness to support the view that a sum of about US$8m as management fees for the administration and supervision of Project Plaza from 2005 to 2008 was reasonable. Before us however, Mr Yeo referred to *the Wees' expert's views* as a reference point to determine the amount that ought to be awarded. The Wees' expert, Mr Anthony Brand ("Mr Brand"), was of the view that the role of CSP (of which Sylvia was the executive director) over the course of 3 ½ years was most properly described as that of project coordinator. To him, a reasonable amount of fees would range from 3% to 5% of the estimated project cost of A$100m. This estimation was underpinned by his opinion that Project Plaza was neither a unique nor a complex project. While the Engs continue to assert that Project Plaza was in fact complex and unique due to, *inter alia*, BKW's constant interference in what was originally supposed to be a two-year project, Mr Yeo stated that a reasonable sum would be at least 5% or A$5m, since he had no evidence on how much higher the work should be valued.

88 Mr Jeyaretnam, however, pointed out that the assessment of 3% to 5% of the estimated cost was on the basis of *full* project completion. Mr Brand had found that only 30% of the work had been done, which meant that the reasonable amount would be pro-rated to about 1% to 1.5% of the estimated project cost of A$100m. The design development phase should have been completed around the third quarter of 2007 but this milestone had not been reached even when the project was terminated in July 2009.

89 In cross-examination, Mr Brand explained as follows:

> Sir, if it was just a standard project, it's more likely to be around 3 per cent because if it's a slightly -- your Honour, if it's a slightly higher quality design and requires more effort, you might go to 4 per cent. And if it's something that is complicated, outstanding, you might go to 5 per cent. That is one way of assessing the 3 to 5 per cent. …

90 Mr Brand's evidence was that, even if Project Plaza was unique or complex (which he vehemently disagreed with), the fees would still be capped at 5% at the highest, ostensibly because uniqueness or complexity would mean that the estimated cost would be concomitantly higher and therefore yield a higher absolute fee. In other words, he was not of the view that the percentage could breach 5%, *whether or not a project was unique or complex*.

91 Turning to the facts of the present case, while Mr Brand was of the view that Project Plaza was neither unique nor complex, we are of the view that even if this was the case as viewed from an external standpoint, the involvement and interference of BKW must have complicated the project coordination efforts. For example, BKW was insistent on complying with the *feng shui* master's requirements, even in the face of delays and budgetary issues. Mr Brand maintained that it was properly the role of the project coordinator to ensure that the *feng shui* master "kept up to mark and … was with the design phase all the way". However, he did not have the benefit of sitting through the trial in preparing his report. In fact, he did not have the affidavits of the Wees, the Engs and all their correspondence over the years. Indeed, he agreed that if BKW did not play a "normal role" as a client, it would have made a difference to his opinion. On this basis, we are of the view that the Engs' fees for Project Plaza would be at the highest end of the 3% to 5% range of A$100m.

92 However, we recognise that some adjustment should be made to reflect the reality that the project was stillborn. That having being said, we are not of the view that the fees should be pro-rated to A$1.5m (being 30% of A$5m) to reflect the incipient stage that Project Plaza was in. Given that the Project Plaza stretched for about 3 ½ years (instead of the projected two years) before the plug was pulled, but also bearing in mind that the Engs themselves must bear some responsibility given their inexperience in overseeing construction projects (see also the GD at [105]), we think that a reasonable sum for the fees should be A$2m (being 40% of A$5m).

Conclusion

93 For the reasons set out above, we allow CA 97 in part inasmuch as the Engs are entitled to be compensated for work done with regard to Project Plaza (albeit not with regard to the additional PE funds). We decline to interfere with the Judge's findings on the other aspects of the Engs' counter-claim.

CA 99

94 This particular appeal raises a discrete issue: whether the Wees are obliged to pay the Engs management fees of 1.5% of US$30m per annum for the initial PE funds even after the Wees commenced proceedings on April 2012 and until the PE funds were transferred to them in September 2014.

95 The Wees contend that the obligation to pay management fees terminated upon their directing the Engs to return the interests being managed, by transferring the structure holding the PE funds – WPFOF – to the Wees. As will be recalled, the only express term of the oral agreement is that the Wees would pay the Engs management fees of 1.5% of the initial commitment

amount of US$30m for the initial PE funds annually. The parties never agreed on a termination mechanism.

96 Implicit in the Wees' case is the argument that the agreement is terminated *once* they direct the Engs to return the initial PE funds to them. It is not disputed that the Wees, being the beneficial owners of these funds, had every right to demand their return. Indeed, this would have formed part of the relevant background of which the agreement was entered into. It must also be beyond dispute that the agreement – and the attendant entitlement to management fees – would have terminated, at the latest, with the actual return of the funds as there will no longer be any funds to manage.

97 However, we disagree that once the direction to return the funds is given, the agreement is *ipso facto* terminated at that particular juncture. On the other hand, to hold as the Judge did appears to us, with respect, to be wrong in principle. To allow the agreement to subsist until the funds are transferred to the Wees could lead to the invidious situation where the Engs continue holding on to the PE funds for an unjustifiably long period of time before returning them, while continuing to charge management fees in the interim.

98 In the circumstances, it is necessary to imply a term that should the Wees require the transfer of the initial PE funds (in the exercise of their undisputed right to do so) thereby terminating the agreement, they must furnish reasonable notice of this to the Engs. Where a contract is silent as to its manner of termination by the parties, a party may terminate the contract by giving reasonable notice to the other: see, for example, the decision of the English High Court in *Hamsard 3147 Limited Trading as "Mini Mode Childrenswear", J S Childrenswear Limited (in liquidation) v Boots UK Ltd*

[2013] EWHC 3251 (Pat) (at [64]) ("*Hamsard v Boots*"), where it was common ground that the period of notice must be "reasonable".

99 Two questions arise from the implication of this term. First, the identification of the notice. Second, the determination of a reasonable duration from the time of the notice, which must always depend on the particular facts of the particular case (see *Hamsard v Boots* at [65]). On the first question, we find that the notice to terminate the arrangement *by requiring the transfer of the PE funds* was unequivocally evinced on 2 April 2012, when BKW wrote to Sylvia and ECS (copying BTW) stating, *inter alia*, the following:

> Dear ED & Shoong
>
> I refer to our previous correspondence.
>
> …
>
> Given that you have also clearly breached my instructions to proceed expeditiously with the liquidation of the equity portfolio held through and under [WPFOF], *I also insist that you immediately transfer to me, all control, all rights and all interests in and through [WPFOF] so that I can proceed with the liquidation of the portfolio myself.* Please let me know what documents I have to sign to effect the transfer.
>
> …
>
> [emphasis added]

100 On 15 April 2012, BKW sent another e-mail to Sylvia (copying BTW and ECS), stating, *inter alia*, as follows:

> Dear ED
>
> …
>
> Please also kindly clarify, on an immediate basis, your statement in the last paragraph of your email that states "except for the sale of the PE portfolios by the GPs". I have given no such instruction. *My terms as per my email dated 2 April 2012 are for you to relinquish all control of the relevant entities back to me as I will be handling the disposal of the PE portfolio myself.* Please let me have this confirmation by

> 17th April and if so, all the necessary paperwork for the transfer of control must be completed no later than the final deadline of 31 April 2012. …
>
> [emphasis added]

101 On 18 April 2012, the Wees commenced action against the Engs, seeking, *inter alia*, the transfer all of their investments, including PE investments and the SPVs through which such investments were held.

102 We considered the Wees' contention that the direction of the Engs to return the interests being managed was in fact first given on 10 December 2011, when BKW wrote to the Engs (copying BTW) asking them to "arrange the necessary documentation to transfer the ownership back to [the Wees]". However, the subsequent e-mails until 2 April 2012 demonstrate that another option being contemplated was the liquidation of the portfolio through the appointment of a sales agent instead of the Wees receiving the ownership of the funds in order to liquidate their interests themselves. For example, on 28 January 2012, BKW proposed paying a 2% transaction fee if the entire PE portfolio could be sold within three months at US$70m on the basis that Sylvia was to source for a buyer, negotiate and complete the sale, or appoint a broker to undertake the task. It seems to us that it would only be when the Wees had finally settled on requiring the transfer of the funds to them that the reasonable notice for termination through the acquisition of the initial PE funds would commence.

103 The question that remains is the determination of the period of reasonable notice before the agreement terminates and, consequently, when the Engs' entitlement to management fee ends. On the facts of this case, a reasonable notice period must factor in the time required for the Engs to complete the transfer of the PE funds to the Wees after receiving notice.

Before us, Mr Jeyaretnam, working on the premise that the notice to terminate was given on 10 December 2011, suggested that a reasonable time for the Engs to transfer the PE funds (during which the entitlement to management fees subsists) had elapsed by the time the action was commenced on 18 April 2012. This works out to a period of about four months. He made the point that much of the dispute over the transfer arose over the insistence of the Engs to transfer individual ownership of the PE funds to the Wees instead of simply transferring the SPVs holding them. The former method created more administrative hassle due to the need to, *inter alia*, inform the various fund managers, which would bog down the transfer process.

104 In this regard, we see no legitimate reason for the Engs to have refused to transfer WPFOF outright to the Wees. The incorporation, set-up and maintenance costs of the SPVs were paid using the Wees' funds. We agree with the Judge's finding that their refusal to transfer the disputed SPVs to the Wees, including WPFOF, arose from nothing more than a desire to hold these SPVs hostage as leverage for the Engs' counterclaim. ECS had admitted as much in cross-examination (see the GD at [46]).

105 The Judge delivered judgment on 27 May 2014 ordering, *inter alia*, the transfer of WPFOF to the Wees. Upon his order, the transfer was duly completed on 2 September 2014 – three months and six days after the order, a duration that fell within the window of about four months put forward by Mr Jeyaretnam. On this basis, the period of reasonable notice, which commenced from 2 April 2012, would have expired by 8 July 2012 (that is, three months and six days from 2 April 2012). It is now common ground that the Wees had made payments of the agreed management fees four times. These are for the periods August 2005 to July 2006, August 2006 to July 2007, August 2007 to July 2008 and July 2008 to June 2009. In view of the rough

coincidence between the expiry of the period of reasonable notice and the payment cycles, we hold that the Engs are entitled to charge annual management fees for three further annual periods: 2009/2010, 2010/2011 and 2011/2012, with no pro-rating necessary. Before we conclude this part of the judgment, we note that in his oral closing submissions in the court below, Mr Yeo had also submitted that, in view of the action having commenced in 2012, the Engs were not asking to be paid management fees for 2012/2013 and 2013/2014 (although he later sought a greater entitlement upon the Judge's questioning).

Conclusion

106 For the reasons set out above, we allow both CA 97 and CA 99 in part. The appellants in CA 97 are entitled to 50% of the costs both here and below. The appellants in CA 99 are entitled to 50% of the costs both here and below. There will be the usual consequential orders.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Quentin Loh Judge

Alvin Yeo SC, Koh Swee Yen, Jared Chen, Ho Wei Jie and Jill Ann Koh (WongPartnership LLP) for the appellants in Civil Appeal No 97 of 2014 and the respondents in Civil Appeal No 99 of 2014;
Philip Jeyaratnam SC, Foo Maw Shen, Daryl Ong, Chu Hua Yi, Charmaine Kong and Ooi Huey Hien (Rodyk & Davidson LLP) for the respondents in Civil Appeal No 97 of 2014 and the appellants in Civil Appeal No 99 of 2014.
