IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 258

Originating Summons 876 of 2018

Between

Ho Yew Kong

… Plaintiff

And

(1) ERC Holdings Pte Ltd
(2) KPM Holdings Pte Ltd

… Defendants

JUDGMENT

[Trusts]— [Express Trusts] — [Certainties]
[Trusts]— [Express Trusts] — [Beneficiaries] — [Disclaimer of Trust]
[Trusts]— [*Quistclose* Trusts]
[Trusts]— [Constructive Trusts]
[Trusts]— [Resulting Trusts]

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v
ERC Holdings Pte Ltd and another

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26 September 2018; 31 October 2018

27 November 2018 Judgment reserved.

Valerie Thean J:

Introduction

1 The present interpleader action concerns one million shares of Gryphon Real Estate Investment Corporation Pte Ltd ("GREIC") held by the plaintiff, Ho Yew Kong. Both defendants, ERC Holdings Pte Ltd ("ERCH") and KPM Holdings Pte Ltd ("KPMH"), claim ownership of the shares, each using the narrative advanced by the other in previous litigation.

2 ERCH and KPMH are private investment companies. It is not disputed that an individual by the name of Andy Ong is the controlling mind of ERCH; another individual by the name of Douglas Foo is the controlling mind of KPMH; and that $1,000,000 was paid by KPMH on 23 November 2009 arising out of an arrangement between the two men. GRIEC is an investment holding company whose shareholders included Mr Ong and Mr Ho. KPMH relies upon

prior evidence given by Mr Ong that, pursuant to an oral agreement with Mr Foo and upon the receipt of $1,000,000, ERCH set up a trust of the GREIC shares for KPMH's benefit. KPMH now asks for the transfer of the shares, on the premise that there is either an express trust, a *Quistclose* trust or a constructive trust.

3 ERCH, on the other hand, relies upon the previous testimony of Mr Foo that the sum of $1,000,000 was advanced merely as a loan, contending that Mr Foo, while advancing this former narrative, had disclaimed his interest in the trust. ERCH contends that because the attempt to constitute an express trust failed, a resulting trust arises over the shares in favour of ERCH.

4 The truth may be obscure but the known facts that are key to resolving the question of entitlement are largely not in dispute. It is common ground that interpleader relief should be granted and that I should summarily determine the issue between the two competing defendants.

Background

5 The value of the one million GREIC shares ("the GREIC shares") lies in their link to ownership in a commercial development named Bugis Cube, situated at 470 North Bridge Road, Singapore. GREIC and Sakae Holdings Ltd ("Sakae"), a public listed company of which Mr Foo is founder and chairman, set up Griffin Real Estate Investment Holdings ("GREIH") as a joint venture company in late 2009 in order to acquire and develop Bugis Cube.[1] Both GREIH and GREIC are being wound up as a result of decisions of the Court of Appeal in prior litigation between parties, in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Ho Yew Kong v Sakae*

[1] 1st Defendant's Bundle of Documents ("1DBOD"), p 199.

CA") and *Foo Peow Yong Douglas v ERC Prime II Pte Ltd and another appeal and other matters* [2018] SGCA 67.

6 The documents relied upon by KPMH are not in dispute. A share transfer form for the transfer of the GREIC shares by ERCH to Mr Ho was signed on 19 September 2010.[2] While the share transfer form stated that Mr Ho had paid $1,000,000 for the GREIC shares, ERCH did not receive the sum of $1,000,000 from Mr Ho.[3] It is common ground that KPMH issued a cheque for the sum of $1,000,000 in favour of GREIH on 23 November 2009.[4] During this period, the management of GREIH was left to Mr Ong (see *Ho Yew Kong v Sakae CA* at [12]). The GREIC board of directors passed a resolution approving transfer of the shares from ERCH to Mr Ho dated 19 September 2010.[5] Subsequently, on 9 March 2012, an email sent from an employee of GREIC to its shareholders explained that ERCH had held shares on behalf of Mr Ho and the shares were to be transferred back to Mr Ho.[6] The transfer was approved at an Extraordinary General Meeting ("EGM") of GREIC held on 11 June 2012. A certificate of stamp duty payment was obtained on 9 July 2012.[7] Based on ACRA records, Mr Ho was registered as a shareholder of GREIC as of 9 July 2012.[8] Mr Ho signed an undated Trust Deed where he declared that he held all the shares on trust for KPMH. This Deed was not signed by any representative of KPMH.[9]

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2 1DBOD, p 66.

3 1DBOD, p 45.

4 1DBOD, p 200; 1DBOD, p 45; 1DBOD, p 68.

5 1DBOD, p 70.

6 1DBOD, pp 575 and 595.

7 1DBOD, p 46.

8 2nd Defendant's Bundle of Documents ("2DBOD") Tab 9, p 31.

9 1DBOD, pp 81–82.

Mr Ho also signed an undated GREIC Director Resolution as a director of GREIC for a transfer of the GREIC shares from himself to KPMH.[10]

7 The evidence given in three of the multiple lawsuits between the parties that involved GREIH is of relevance in shedding light on these documents. In Originating Summons No 124 of 2013 ("OS 124/2013"), Mr Foo and Sakae Holdings Ltd sought leave to commence a derivative action on GREIH's behalf against Mr Ho and Mr Ong. This was subsequently discontinued on 3 May 2013. Prior to the discontinuance of OS 124/2013, Mr Ong filed an affidavit on 19 February 2013 describing a trust arrangement where the GREIC shares were held on trust for KPMH by Mr Ho. Mr Foo filed several affidavits on 12 April 2013, where he disavowed knowledge of any such trust arrangement.[11]

8 Subsequently, Sakae commenced two suits which were tried together in 2016. Suit No 122 of 2013 was brought against Mr Ong as the sole defendant. Suit No 1098 of 2013 ("Suit 1098/2013") was brought by Sakae as minority shareholder in GREIH, alleging minority oppression against GREIH, its majority directors and shareholders, and various other companies controlled by Mr Ong. Again, Mr Ong attested to the trust arrangement in an affidavit,[12] and Mr Ho referenced the trust arrangement in his pleadings.[13] In 2016, when the two suits were tried together, Mr Foo was cross-examined on this trust arrangement and denied it. His evidence was that the $1,000,000 was advanced as a personal loan.[14] Mr Foo was told in the course of his cross-examination in Suit 1098/2013 that the $1,000,000 was not entered into the books of GREIH.[15]

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10 1DBOD, p 47.

11 1DBOD, pp 86, 93 and 170.

12 2DBOD Tab 5, pp 201–202

13 2DBOD Tab 5, pp 212–213.

14 2DBOD Tab 5, pp 183–184 and 187.

After hearing both suits, the High Court ordered that GREIH be wound up in *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd and others (Foo Peow Yong Douglas, third party) and another suit* [2017] SGHC 73. The appeals were thereafter dealt with by the Court of Appeal on 29 June 2018 in *Ho Yew Kong v Sakae CA*.

9 The issue of the $1,000,000 paid by ERCH to GREIH remained at large. On 12 June 2017, KPMH filed a proof of debt for a $1,000,000 loan made on 23 November 2009 in GREIH's winding up.[16] But subsequently, on 3 July 2018, KPMH's solicitors wrote to Mr Ho's solicitors to request the transfer of the GREIC shares to KPMH. After receiving a competing claim from ERCH, Mr Ho filed this interpleader action on 17 July 2018.

10 On 13 September 2018, subsequent to the filing of the interpleader application, the GREIH liquidators wrote to inform KPMH's solicitors that there was a cheque deposit of $1,000,000 on 24 November 2009, which was identified in the GREIH general ledger as a "[l]oan from ERC Holdings". Mr Foo, in now seeking the transfer of shares, undertakes to withdraw KPMH's proof of debt if he is successful in these proceedings.[17]

Parties' positions and issues presented

11 Mr Foo's version of events is that Sakae originally intended to invest $5,000,000 in Bugis Cube. Pursuant to Mr Ong's advice to limit Sakae's risk exposure however, Sakae invested $4,000,000 instead. This meant that Mr Ong was still short of $1,000,000 in funds. Because they were close friends at the time who had known each other for more than 20 years, Mr Foo promised Mr

15 1DBOD, p 201.

16 1DOB, p 455.

17 3rd Affidavit of Douglas Foo Peow Yong dated 20 September 2018, pp 2–3.

Ong a loan of $1,000,000, to be used for the purposes of acquiring Bugis Cube. Unknown to him, his wife who is also a director at KPMH, issued the cheque to GREIH, rather than to Mr Ong, at Mr Ong's instruction.[18] In reliance on Mr Ong's past statements that the money was used to set up a trust for the benefit of KPMH in respect of the 1,000,000 GREIC shares and share documents stating that Mr Ho held the shares as trustee, KPMH's contention is that an express trust was created over the GREIC shares, and KPMH is the beneficiary of the trust. In the alternative, a resulting trust had arisen over the $1,000,000 from the misuse and unauthorised use of money that was loaned for a specific purpose. This kind of trust, termed in law as a *Quistclose* trust, is explained more fully below. As a final alternative argument, KPMH argues that in the circumstances, even if Mr Foo's expectation did not amount to a condition as required in a *Quistclose* trust, a constructive trust had arisen over the $1,000,000 shares because Mr Ong was aware of Mr Foo's expectation.

12 Mr Ong's explanation for the share documents, in contrast, is that sometime in late 2009 or 2010, he reached an oral agreement with Mr Foo under which KPMH would purchase shares from ERCH to be held on trust by Mr Ho.[19] He also described how Mr Ho held the shares on trust for KPMH in an affidavit filed in Suit 1098/2013 on 23 November 2015.[20] Nevertheless, as Mr Foo had no intention to set up a trust, none was created. Further, the effect of Mr Foo's evidence is that the money was loaned for no specific purpose, and Mr Foo's only recourse would be to pursue the debt, which he has done in filing a proof of debt with the liquidators of GREIH.

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18 1DBOD, pp 199–200.

19 1DBOD, p 45.

20 2DBOD Tab 5, pp 201–202.

13 Initially, ERCH contended that KPMH sought double recovery, in that KPMH earlier sought the return of the $1,000,000 loan in GREIH's liquidation. Mr Foo has since clarified that he would forego claims against the loan if the shares are returned to him. The issues, therefore, are the following:

(a) Whether KPMH may claim the shares under an express trust. The two sub-issues presented by ERCH's arguments are whether such a trust was created; and if so, whether KPMH has disclaimed its interest.

(b) Alternatively, whether the $1,000,000 payment was for a specific purpose which was diverted, giving rise to a *Quistclose* trust such that KPMH's interest may be traced to the shares.

(c) In any event, whether the circumstances were such that a constructive trust had arisen such that KPMH's interest may be traced to the shares.

14 For the reasons that follow, I hold that no express trust, *Quistclose* trust or constructive trust is applicable on the facts.

The express trust arguments

Was an express trust created?

15 It is not disputed that a trust may be created once three certainties are fulfilled: that of subject matter, object and the settlor's intention. Only the last mentioned is disputed. KPMH contends that ERCH was the settlor and KPMH was only a beneficiary. Hence, the fact that a representative from KPMH did not sign the Trust Deed was immaterial as the trust was fully constituted without the signature of the intended beneficiary. ERCH, on the other hand, contends that there was no express declaration of trust. The oral arrangement between Mr

Foo and Mr Ong assumed that Mr Foo was the settlor. ERCH argues that, in the light of his prior evidence, Mr Foo plainly had no intention to set up the trust, the trust failed.

16 The Court of Appeal considered the issue of certainty of intention in *Guy Neale and others v Nine Squares Pty Ltd* [2015] 1 SLR 1097 ("*Guy Neale*"). In that case, a partnership that operated a restaurant in Bali was disputing the beneficial ownership of certain "Ku De Ta" marks ("contested marks") that were registered in Singapore by a company called Nine Squares. One issue was whether Nine Squares held the contested marks on express trust for the partnership (see *Guy Neale* at [49]). The key dispute under this issue was whether Nine Squares intended to hold the contested marks and the benefits derived therefrom on trust for the partnership, hence demonstrating sufficient certainty of intention (see *Guy Neale* at [61]). The Court of Appeal made clear that certainty of intention requires proof that a trust was intended by the settlor. However, no particular form of expression is necessary to prove an intention to create a trust (see *Guy Neale* at [52]). Such an intention may be inferred from the alleged settlor's words and conduct, as well as from the surrounding circumstances (see *Guy Neale* at [58]). The court inferred that there was an intention on the part of Nine Squares to hold the contested marks on trust for the partnership. I highlight two strands of evidence which the Court of Appeal relied on in coming to their decision. First, the representatives of Nine Square seemed to acquiesce or at least not object to the position taken in emails from the founders of the partnership that "Ku De Ta" marks registered outside of Indonesia, including the contested marks, were being held for the benefit of the partnership as a whole (see *Guy Neale* at [90]). Second, the affidavit of a representative of Nine Square and Nine Square's defence filed in Australian proceedings expressly stated that the contested marks were being held on trust for the partnership as a whole (see *Guy Neale* at [100] and [115]).

17 From the decision in *Guy Neale* it is clear that in the search for an intention to create a trust, the relevant intention is that of the settlor and such intention may be inferred from the words and conduct of the settlor. Another point from that case that is pertinent to the present one is that the admissions and statements made in prior legal proceedings may be relevant in discerning the intention of the settlor.

18 In the present case, I accept KPMH's position that ERCH was the settlor of the alleged trust. It is not disputed that the money was first advanced by KPMH on 23 November 2009 to the account of GREIH at Mr Ong's request.[21] It was then entered on the general ledger of GREIH as a loan from ERCH on 24 November 2009. The shares in dispute were initially in the name of ERCH. ERCH then procured the transfer of the shares to Mr Ho, the trustee, and thereby constituted the trust (see [6] above). In *Guy Neale*, Nine Squares, as the registered proprietor of the disputed marks, was the settlor. Similarly, as the original legal owner of the disputed GREIC shares, ERCH must be the settlor of any alleged trust over the same shares. In contrast, at no point was Mr Foo the legal owner of the disputed GREIC shares.

19 ERCH's contention that KPMH is the settlor is premised on Mr Ong's prior evidence that parties agreed that KPMH would purchase the disputed GREIC shares and Mr Ho would hold the shares on trust for KPMH, with the trust being formalised by way of a Trust Deed signed by Mr Ho and KPMH.[22] ERCH augments this position in its written submissions by suggesting that the parties envisaged Mr Foo to be the "putative settlor".[23] A distinction, however, must be drawn between a contractual analysis of the parties' relationship, and

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21 1DBOD, p 200; 1DBOD p 45.

22 1DBOD pp 45–47.

23 1st Defendant's Further Submissions, pp 4–5.

the analysis with respect to the creation of the express trust. While the former looks at the terms the parties had agreed on and whether there was a breach of such terms, the latter is concerned with whether a settlor manifested an intention to create a trust with certainty of subject and object. Even if there was some contractual agreement for a trust to be set up in a particular manner, the manner in which the trust is set up is a different issue. Based on the undisputed evidence, ERCH, as the legal owner of the shares, had taken a certain course of conduct and made Mr Ho trustee over the shares for the benefit of KPMH. The proper question is therefore whether ERCH had manifested an intention to create a trust over the disputed GREIC shares in favour of KPMH, regardless of any agreement between the parties.

20 I find that ERCH did manifest such an intention, as evidenced by its conduct and the various statements that were made by Mr Ho and Mr Ong in prior lawsuits. Mr Ho in his Defence for Suit 1098/2013 filed on 21 July 2015 stated that he was "approached by Mr Andy Ong" to hold the shares for Mr Foo or his nominee.[24] In Mr Ho's Further and Better Particulars for the same suit, Mr Ong's request is again reflected.[25] Mr Ong, in an affidavit for OS 124/2013, stated that Mr Ho was holding the disputed GREIC shares on trust for KPMH.[26] In his affidavit of evidence in chief for Suit 1098/2013 filed on 23 November 2015, Mr Ong averred to the trust, and explained that Mr Ho had signed the undated transfer forms in order for the shares to be returned to KPMH at any time.[27] It is clear that Mr Ong was of the view that the trust had been fully constituted. Indeed, Mr Ong's affidavit filed in this suit also attests to the same

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24 2DBOD Tab 5, p 213.

25 1DBOD, pp 585–586.

26 1DBOD, pp 86 and 93.

27 2DBOD Tab 5, pp 201–202.

trust arrangement,[28] but only qualifies the arrangement by suggesting that while he had the intention to create a trust, Mr Foo did not share the same intention.

21 These statements, coupled with the conduct of ERCH as expressed through documents such as the signed share transfer form, the board resolution approving the transfer, the EGM resolution and stamp fee paid for the transfer (see [6] above), make it clear that on the facts and circumstances, ERCH was the settlor, it had manifested an intention to create a trust, and a trust was thereby constituted when ERCH transferred the shares to Mr Ho.

Has the trust been disclaimed by its beneficiary?

22 The trust having been constituted, the issue remains as to whether Mr Foo had, by his protestations, renounced his interest in the trust. I detail his prior evidence here, for ease of analysis.

23 In Mr Foo's 4th affidavit filed in OS 124/2013 on 12 April 2013 he stated:[29]

> 2.3.9 Prior to reading Andy's affidavit, I had no knowledge that Ho Yew Kong was allegedly holding any GREIC shares on trust for KPM Holdings.
>
> …
>
> 2.4.10 The remaining S$1 million was a loan by KPM Holdings to GREIH. This was not referable to any shares or interest in GREIC. I am not aware that KPM Holdings owns any interest in GREIC, whether legal or beneficial…

24 In response to documents produced by the defendants in OS 124/2013 to support the existence of a trust in respect of the disputed GREIC shares, Mr Foo stated that:[30]

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[28] 2DBOD Tab 3, pp 6–8.

[29] 1DBOD, pp 93 and 97.

> 2.3.11 I am advised and verily believe that these documents do little to support the allegation that a valid trust has been created in favour of KPM Holdings, or that KPM Holdings had ever held any interest in GREIC … KPM Holdings never had knowledge of the existence of any such trust, as evidenced by the alleged trust deed that Andy has exhibited to his affidavit which was unsigned by KPM Holdings and signed only by Ho Yew Kong.

25 At paragraph 2.5.1 of the same affidavit, Mr Foo stated that he and Mr Ho were "strangers" and that he "categorically" denied the "false allegations" that, amongst others, he had asked Mr Ho to hold shares in GREIC on trust for KPMH.[31]

26 In Mr Foo's 5th affidavit filed in OS 124/2013 on the same day as his 4th affidavit, he stated:[32]

> 2.7.2 Before I read Andy and Ho's affidavits, I had no knowledge that Ho Yew Kong was purportedly holding any GREIC shares on trust for KPM holdings.
>
> 2.7.3 In any case, I am advised and verily believe that the undated trust deed exhibited at "HYK-3" of Ho's affidavit do little to support the allegation that a valid trust has been created in favour of KPM Holdings…
>
> 2.7.4 Furthermore, the cheque dated 23 November 2009 from KPM for $1,000,000 exhibited at "HYK-3" of Ho's affidavit is misleading. It is not evidence of monies paid by KPM in exchange for shares in GREIC as alleged by Ho Yew Kong. Instead, the cheque evinces a loan given to GREIH to put them in funds to purchase Bugis Cube. KPM never received any shares as a result of the loan…

27 On 20 January 2016, under cross-examination during the trial of Suit 1098/2013 about his conduct in November 2009, when the board of Sakae was discussing its $4,000,000 investment into GREIH, Mr Foo's evidence was that

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30 1DBOD, p 94.

31 1DBOD, pp 97–98

32 1DBOD, at p 131.

the loan, for Mr Ong's benefit, was made out to GREIH at Mr Ong's request. According to Mr Foo, the sum of $1,000,000 was a loan given by KPMH to Mr Ong because "[Mr Ong] needed the extra $1 million to complete the deal … at that point in time when he asked for the 1 million, I wrote a $1 million cheque and gave it to him".[33] The loan of S$1,000,000 was made to Mr Ong but the cheque was made payable to GREIH because Mr Ong had asked that the cheque be made payable to GREIH.[34] The loan was thus to GREIH.[35]

28 When asked about the Trust Deed and whether it was his evidence that he knew nothing about the trust, Mr Foo's answer was: "Yes, your Honour, and I don't even at this point of time know who Ho Yew Kong is."[36]

29 Mr Foo was also adamant that he had no shares in GREIC:[37]

> Q: So you have never had shares in GREIC?
>
> A: No, your Honour.
>
> Q: Never?
>
> A: No, your Honour.

30 Mr Foo further revealed that on 4 March 2010, Sakae's Chief Financial Officer ("CFO") at the time had "asked [him] to confirm that [he had] no shareholdings in any of the interested party, related parties" which were involved in the Bugis Cube deal. This was because the CFO had discovered that his name was listed in GREIC's share register as one of its shareholders. In

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33 1DBOD, pp 177–178.

34 1DBOD, p 178.

35 1DBOD, p 180.

36 1DBOD, p 181.

37 1DBOD, p 181.

response, Mr Foo had confirmed to the CFO that everything was in order.[38] He explained:[39]

> … if I have any shareholdings in these companies, I will have to disclose it.
>
> …
>
> As far as I know, I have never owned any shares in GREIC and that's why we have never do [*sic*] any disclosure in our circular to the Stock Exchange.

31 An argument as to disclaimer was attempted and dismissed by the House of Lords in *Lady Naas and another v Westminster Bank, Limited* [1940] 1 AC 366 ("*Lady Nass*"). This was a case involving a settlor, Mr Strauss, and a beneficiary, Lady Nass. Mr Strauss had executed a settlement deed in favour of Lady Nass that was signed, sealed and unconditionally delivered (see *Lady Nass* at 381–382). The executed settlement deed was sent to Lady Nass. Sir George Lewis, the solicitor who acted on behalf of Mr Strauss, wrote to Sir John Withers, the solicitor who acted on behalf of Lady Nass, and gave the impression that Mr Strauss had offered to make a settlement, but the offer had been revoked. Sir George Lewis requested that the settlement deed be returned to Mr Strauss. The fact that the settlement deed was signed, sealed and unconditionally delivered was not highlighted by Sir George Lewis (see *Lady Nass* at 392–394). Sir John Withers was thus under the impression that the settlement was somehow incomplete and of no binding effect, and thus advised Lady Nass to return the settlement deed. Lady Nass eventually complied (see *Lady Nass* at 394–396). The House of Lords held that Mr Strauss, by signing, sealing and unconditionally delivering the settlement deed, was bound by it. The question was whether Lady Nass's actions after the settlement deed was

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38 1DBOD, pp 181–183.

39 1DBOD, p 184.

delivered to her amounted to a disclaimer of the settlement (see *Lady Nass* at 390–391).

32 Lord Russell of Killowen explained at 396-7:

> In my opinion disclaimer can only be made with knowledge of the interest alleged to be disclaimed, and with an intention to disclaim it. So far as her legal advisers were concerned they were misled by the statements insisted upon by Sir George Lewis. They had not, and could not have, any knowledge of the unconditional delivery of the deed, and must have believed that in the circumstances the deed was inoperative, and that the whole matter was capable of revocation and had been effectively revoked, with the result that there could be no interests to disclaim. In this they were misinformed and mistaken; but their mistake cannot affect the rights of the beneficiaries under the deed. As regards the first appellant herself, so far from finding any intention on her part to give up her rights under the deed, the evidence points the other way. She had settled her difficulty with the settlor by the end of 1925, and ever since then was prepared to execute the document.

33 KPMH's argument rests on *Lady Naas*. It is that Mr Foo's prior evidence does not amount to a disclaimer, because those reflect Mr Foo's views in the light of the legal advice he was given at the time. He was, in any event, represented by a different set of solicitors, and his knowledge and belief rested on their advice. The present solicitors argue that only after the final conclusion of Suit 1098/2013 in *Ho Yew Kong v Sakae CA* was Mr Foo able to focus on the shares and his entitlement in them. Because he had no knowledge, he also did not possess the intention to unequivocally reject his entitlement under the trust. Once he had been duly educated by his present set of solicitors, he realised that the trust property was his.

34 ERCH relies upon the English Court of Appeal decision of *In re Paradise Motor Co Ltd* [1968] 1 WLR 1125 ("*Paradise Motor*"). This was a case involving a man named Mr Watson and another man named Mr Johns, who was Mr Watson's stepson. Mr Watson executed a transfer of 350 shares in

Paradise Motor Co Ltd to Mr Johns. The transfer was defective, but Mr Watson had done everything which was needed to complete the gift of the shares, and hence Mr Johns was the equitable owner of the shares by virtue of the principle in *In re Rose, Rose and another v Inland Revenue Commissioners* [1952] Ch 499 ("*re Rose*") (see *Paradise Motor* at 1140–1141). The issue before the court was whether Mr Johns had disclaimed Mr Watson's gift.

35 The English Court of Appeal held that Mr Johns had sufficient knowledge of the possible claim, and had disclaimed Mr Watson's gift. The court was satisfied that Mr Johns had disclaimed the gift based essentially on two incidents. The first was upon receipt of the second of two liquidators' letters sent to Mr Johns. The liquidator included brief facts pertaining to the liquidation of Paradise Motor Co Ltd and informed Mr Johns that his name was on the share register. This incident was, on Mr Johns's evidence, the first time he came to know that he had a claim to certain shares. He answered "no" to each of the four questions in the liquidator's letter, which included a query as to whether he claimed to be a shareholder of the company (see *Paradise Motor* at 1141C–G). The second incident concerned a message he sent to Mr Watson through a half-brother, Ronald, to the effect that he had no shares and he wanted no shares from Mr Watson. This was done in the context of a request by Mr Watson for Mr Johns to sign a transfer of 50 shares back to Mr Watson (see *Paradise Motor* at 1141–1142). Dankwerts LJ disagreed with Pennycuick J's assessment in the court below in the following terms at 1142C-E:

> Pennycuick J. was unable to find a disclaimer either in the answer to the letter or in the message to Watson via Ronald. In the case of the message, he doubted whether Ronald could properly be treated as having given the message to Watson on behalf of Johns, but the evidence appears to us to be quite clear on that point. In the case of both, he considered that, for a disclaimer of a gift to be effective as such, the donee must possess reasonably full information as to the nature and amount of the gift. We do not think, with respect, that that

> generalisation is of universal application, and we do not think that it applies here. The message to Watson was quite plainly couched in language which showed that he was in no circumstances accepting entitlement to any shares.
>
> That that was then his attitude is made the more likely by the fact that, in his evidence (when he knew for certain the value of the subject-matter), he asserted that he did not want any of the money for himself if he won, but would give it to charity, to someone who needed it.

36 *Lady Nass* was referred to and distinguished at 1142H as a case in which the person alleged to have disclaimed had been led to believe that she had no interest to disclaim, in the following terms:

> [*Lady Nass*] was a case in which the person allegedly disclaiming had been led to believe that she had no interest to disclaim; that the deed was no deed. Here, as we have said, there was sufficient knowledge of the nature of the possible claim …

37 The two cases do not contradict each other, nor do they raise unconventional propositions of law. These propositions of law may be summarised as follows. A beneficiary may only renounce his interest if he is in possession of the full facts and circumstances of his actions. Nevertheless, once the beneficiary has sufficient knowledge of the relevant facts, his statements stating that he has no interest would be sufficient to effect a disclaimer.

38 By Mr Foo's account, he had loaned Mr Ong $1,000,000 in 2009 for the acquisition of Bugis Cube. He did not query how the acquisition was made. Subsequently, he was informed as early as 4 March 2010 by his CFO at Sakae, that his name was on a list of shareholders of GREIC as the owner of 1 million shares (see [30] above). This was a serious context, and not a light-hearted one: he was legally obliged to disclose personal interests if he had any. The CFO's email to him stated clearly that she wanted to "caution [Mr Foo] first" as she did not "feel good about this deal".[40] His response at the time was to make sure

that his wife "followed up to make sure that the GREIH cheque have got [*sic*] a loan supporting document."[41] In 2013, Mr Ong asserted the existence of a trust in OS 124/2013, and again in an affidavit filed in 2015 for Suit 1089/2013 (see [7]–[8] above). Mr Foo consistently denied the existence of the trust arrangement in his reply affidavits in OS 124/2013 (see [23]–[26] above). Mr Foo had sufficient facts to inquire on the nature of KPMH's shareholding in GREIC but did not do so even when it was his responsibility to do so in 2010. He did not care to know, either then, or after he was expressly told in 2013, or again in 2015.

39 As late as at 20 January 2016, Mr Foo's stance on cross-examination remained as such: "As far as I know, I have never owned any shares in GREIC and that's why we have never do [*sic*] any disclosure in our circular to the Stock Exchange."[42] This was an affirmation, in 2016, that he did not own any GREIC shares. His caveat, "[a]s far as I know", does not assist him, because he knew all the facts that would have given rise to an inquiry he reasonably could have made, in the light of the questions posed by his CFO and the express statements made in affidavits that he had read and responded to. Nor does KPMH's contention at the hearing that Mr Foo was simply focused on Sakae's business during the various lawsuits help him: the argument glosses over the fact that Sakae's business required him to investigate and to declare his shareholding if any. The responsibility was his to verify the facts and make appropriate disclosure. Adopting a stance that amounted to wilful blindness towards the trust arrangement, he confirmed that he had no shares. In my view, a fair assessment is that KPMH, through Mr Foo, has disclaimed its interest in the GREIC shares.

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40 2DBOD Tab 5, p 188.

41 2DBOD Tab 5, p 188.

42 2DBOD Tab 5, p 190.

The *Quistclose* trust arguments

40 The *Quistclose* trust takes its name from the House of Lords case of *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] 1 AC 567 ("*Quistclose Investments*"). In that case, a company, Rolls Razor Ltd, was indebted to Barclays Bank, and was in need of a sum of money to pay dividends which had been declared on its shares. Rolls Razor Ltd borrowed money from a company by the name of Quistclose Investments Ltd. At a board meeting of Quistclose Investments Ltd, a resolution was passed that stated that the loan was to be made "for the purpose of [Rolls Razor Ltd] paying the final dividend due on July 24". Quistclose Investments Ltd drew a cheque in favour of Rolls Razor Ltd, and sent the cheque to Barclays Bank. A representative from Quistclose Investments Ltd called Barclays Bank to confirm that the money would "only be used to meet the dividend due on July 24, 1964". This confirmation was repeated in the covering letter enclosed with the cheque. On Quistclose Investments Ltd's instructions, the money was paid into a separate account at Barclays Bank. Before the dividend was paid, Rolls Razor Ltd went into liquidation. The question before the House of Lords was whether Rolls Razor Ltd held the money on trust for Quistclose Investments Ltd (see *Quistclose Investments* at 578–579).

41 Lord Wilberforce, with whom the rest of the court agreed, held that a trust had arisen over the money. He explained at 581–582:

> [W]hen the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose … when the purpose has been carried out … the lender has his remedy against the borrower in debt: if the primary purpose cannot be carried out, the question arises if a secondary purpose (i.e., repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for recovery of a loan. …

> In the present case the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it.

42 Lord Wilberforce's analysis envisages two successive trusts arising in a *Quistclose* trust situation. The first is a primary purpose trust and the second is a secondary trust that arises in favour of the lender if the primary purpose is not carried out. The two successive trusts analysis was reviewed in the House of Lords decision of *Twinsectra Ltd v Yardley and others* [2002] 2 AC 164 ("*Twinsectra*").

43 *Twinsectra* was a case that involved a lender that was only prepared to grant a loan if the borrower secured repayment by a solicitor's personal undertaking. Such an undertaking was eventually provided to the lender's satisfaction (see *Twinsectra* at [54]–[58]). The undertaking provided, *inter alia*, that:

> 1. The loan moneys will be retained by [the solicitor] until such time as they are applied in the acquisition of property on behalf of our client.
>
> 2. The loan moneys will be utilised *solely* for the acquisition of property on behalf of our client *and for no other purpose*.
>
> [emphasis added in *Twinsectra*]

44 One question before the court in *Twinsectra* was whether the undertaking created a *Quistclose* trust over the loan moneys. Lord Millet at [73]–[74] was careful to highlight that the mere fact that money is paid for a particular purpose is insufficient to constitute a *Quistclose* trust:

> 73 A Quistclose trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often inquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. ***He may be said to lend the money for the purpose in question,***

> ***but this is not enough to create a trust; once lent the money is at the free disposal of the borrower***. Similarly payments in advance for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and may be used as part of his cashflow. Commercial life would be impossible if this were not the case.
>
> 74 ***The question in every case is whether the parties intended the money to be at the free disposal of the recipient*** … His freedom to dispose of the money is necessarily excluded by an arrangement that the money shall be used *exclusively* for the stated purpose …
>
> [emphasis in original in italics; emphasis added in bold italics]

45 Lord Millet examined the nature of the *Quistclose* trust and rejected the two successive trusts explanation provided by Lord Wilberforce (see *Twinsectra* at [78]–[99]). Instead, at [100] he characterised the *Quistclose* trust as a resulting trust:

> 100 … the *Quistclose* trust [is] an entirely orthodox example of the kind of default trust known as a resulting trust. The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and in so far as he does not it is held on a resulting trust for the lender from the outset … it is the borrower who has a very limited use of the money, being obliged to apply it for the stated purpose or return it. He has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions. When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money.

46 Lord Millet thus held at [75] and [103] that a *Quistclose* trust had arisen in favour of the lender in *Twinsectra*:

> 75 In the present case paragraphs 1 and 2 of the undertaking are crystal clear. [The solicitor] undertook that the money would be used *solely* for the acquisition of the property *and for no other purpose*; and was to be retained by his firm until so applied. It would not be held by [the solicitor] simply to

> [the borrower's] order; and it would not be at [the borrower's] free disposition. Any payment by [the solicitor] of the money, whether to [the borrower] or anyone else, otherwise than for the acquisition of property would constitute a breach of trust.
>
> …
>
> 103 In my opinion the Court of Appeal were correct to find that the terms of paragraphs 1 and 2 of the undertaking created a *Quistclose* trust. The money was never at [the borrower's] free disposal. It was never held to his order by [the solicitor]. The money belonged throughout to [the lender], subject only to [the borrower's] right to apply it for the acquisition of property …
>
> [emphasis in original]

47 Lord Millet's explanation for the *Quistclose* trust remains the dominant model in England (see *Challinor v Juliet Bellis & Co* [2013] EWHC 347 (Ch) at [543]; *Raymond Bieber and others v Teathers Ltd (in liquidation)* [2012] EWCA Civ 1466 at [14]-[15]). This model was also recently endorsed by Quentin Loh J in the High Court decision of *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 ("*AG v AHPETC*") at [108]–[110] as the model that should be adopted in Singapore. In that decision, Loh J made several other important observations, two of which I highlight here.

48 First, there is nothing in principle preventing the constitution of an express trust that operates in the same manner as a resulting *Quistclose* trust (see *AG v AHPETC* at [111]). While a resulting *Quistclose* trust corresponds to the lack of intention to benefit the recipient of the money, an express *Quistclose* trust arises out of an intention by the donor to constitute the recipient as a trustee, and confer a power or duty on the recipient-trustee to apply the money exclusively in accordance with the stated purpose. Regardless of whether a *Quistclose* trust is in the nature of an express or resulting trust, a crucial element of any *Quistclose* trust is the fact that the lender intends for the loan money to be used for a specified purpose (see *AG v AHPETC* at [114]).

49 Second, the relevant intention is that of the lender of the money and does not depend on the bilateral intentions of the lender and the borrower. This is the natural corollary of the distinction between a *Quistclose* trust on the one hand, and a contractual agreement to use the money in a certain manner on the other. The former is based on either the lender's intention to constitute a trust, or a lack of intention to benefit the borrower. The latter is based on the objectively ascertained intentions of the parties to the agreement (see *AG v AHPETC* at [112]).

Was a* Quistclose *trust created?

50 The need for a specified purpose is not a low threshold to cross. The settlor's very specific intention is that which causes the beneficial interest to remain with him. The mere fact that a lender inquires about the purpose of a loan is insufficient. In each case, the question is "whether the parties intended the money to be at the free disposal of the recipient" (*Twinsectra* at [74]). In *Quistclose Investments*, this intention was demonstrated by the board resolution, the covering letter and the instructions given by Quistclose Investments Ltd to the bank (see [40] above). In *Twinsectra*, the solicitor's undertaking sought by the lender was clearly phrased to restrict the use of the money to the sole specified purpose and no other (see [46] above).

51 In my view, the present case does not reveal the specific intention required for a *Quistclose* trust. Aside from Mr Foo's bare assertion, he proffers no evidence that he expressed any intention to Mr Ong that the loan be used for the acquisition of Bugis Cube. The documentation for the loan, which during his cross-examination in 2016 he contended was verified with his wife (see [38] above), was not adduced. The facts indicate that Mr Foo had no intention to retain the beneficial interest. The evidence, rather, shows that the money was at

the absolute and free disposal of Mr Ong. No attempt was made by Mr Foo to restrict GREIH's use of the $1,000,000. Nor was any query posed to Mr Ong as to whether a specific purpose had been fulfilled, as highlighted at [38]–[39] above. Indeed during Mr Foo's cross-examination, his position was that the loan was one on which there were no terms:[43]

> Q: What were the terms of this loan?
>
> A: No terms.
>
> Q: No terms?
>
> A: It was just a loan – Andy has asked me before for 500,000, 100,000, 50,000, I just write a cheque...we never talk about terms.

52 I find, on a totality of the evidence, that there is insufficient evidence of a trust for a specific purpose. Mr Foo had no serious desire to restrict GREIH's use of the loan moneys. In fact, it was inconvenient for him to know and he did not care to know what had happened to the $1,000,000. He was informed that KPMH possibly owned GREIC shares in 2010, by his CFO. In 2013 Mr Ong gave the specific details of what had happened to the $1,000,000 in the course of OS 124/2013. Again, the same details were given by Mr Ong and Mr Ho in their affidavits and pleadings filed for Suit 1098/2013. In that context, Mr Foo adopted the stance that he had no shares during his cross-examination in 2016. When asked whether he had checked to see whether the loan of S$1,000,000 was reflected in GREIH's books or whether he had asked for repayment of the loan, Mr Foo's answer was that he did not do either of those things.[44] After the trial of Suit 1098/2013, KPMH then followed up to file a proof of debt in GREIH's liquidation. In this regard, the liquidator's recent information that the loan was entered in GREIH's general ledger as a loan from ERCH supports,

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43 2DBOD Tab 5, p 191.

44 2DBOD Tab 5, p 196.

somewhat ironically, Mr Foo's former evidence that the $1,000,000 was intended by him as a personal loan to Mr Ong and nothing more.

53 This finding is sufficient to dispose of the arguments on the purported existence of a *Quistclose* trust. Three other arguments were advanced by ERCH in the course of the hearing. These apply only on the premise of a *Quistclose* trust. I deal with them below for completeness.

Has its purpose been fulfilled?

54 First, ERCH contends that in the event that the $1,000,000 was advanced with a specific purpose, the money was not misappropriated but used to fulfil its purpose. Mr Foo's contention was that the loan was to enable Mr Ong to complete the acquisition of Bugis Cube. This was effected through the purchase of GREIC shares, which was a joint venture partner in GREIH, the company which acquired Bugis Cube. The purpose had been fulfilled, albeit through indirect means. Hence, Mr Foo's recourse is to seek the return of his loan. Counsel for KPMH's rejoinder is that notwithstanding this, the money can still be traced into the asset purchased, the GREIC shares. This link was not clearly established at the hearing before me, and on reflection, is not self-evident. The authorities are in agreement, on the contrary, that the effect of a *Quistclose* trust upon the fulfilment of the specified purpose is that the lender would only have a claim in debt. This is made clear in the passage in *Quistclose Investments* cited above at [41], where Lord Wilberforce states that "when the purpose has been carried out … the lender has his remedy against the borrower in debt". Similarly in *Twinsectra* at [69], Lord Millet explains:

> 69 …When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the

> designated purpose is still capable of being carried out. *Once the purpose has been carried out, the lender has his normal remedy in debt…*
>
> [emphasis added]

Has it been disclaimed?

55 Second, ERCH suggests that, in the event that a *Quistclose* trust had arisen, it had been disclaimed by KPMH, in the same way that the express trust has been disclaimed. I add that this argument is only significant if I come to the opposite conclusion on the two previous issues, that there is in fact a loan on a specific trust, and that its purpose has not been fulfilled by the investment in GREIC shares. KPMH insists that trusts that arise by operation of law cannot be disclaimed and cites *Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others* [1997] 2 SLR (R) 296 in support of its position. The context of that case, however, was that of an express trust, and nothing was said in relation to the issue of whether trusts that arise by operation of law could be disclaimed. I note, moreover, that the case of *Paradise Motor* (which the parties relies on for the point on disclaimer of an express trust) implicitly suggests that trusts that arise by operation of law can be disclaimed. This is because while Mr Johns's name was on the share register of Paradise Motor Co Ltd, the transfer of the shares was procedurally defective, and Mr Johns was only the equitable owner of the shares by virtue of the principle in *re Rose* (see [34] above). This meant that a constructive trust had arisen over the shares in favour of Mr Johns. Yet, the English Court of Appeal allowed the argument on disclaimer.

56 In my judgment, I see no reason why a trust which arises by operation of law may not be disclaimed. KPMH's assumption rests on the fact that trusts that arise by operation of law are not understood by their beneficiaries at the time of disclaimer to be trusts. As a matter of logic, and applying *Paradise Motor*, such a disclaimer may be made so long as the beneficiary is aware of the

facts that give rise to the trust and, being sufficiently informed, renounces any beneficial interest in it. In this particular case, however, this possibility does not arise because the very factual circumstances that give rise to the disclaimer of the express trust obviates, entirely, consideration of a *Quistclose* trust. Mr Foo's protestations that are relevant to the issue of disclaimer support the conclusion that he did not intend to restrict the use of the $1,000,000.

Does limitation bar any claim?

57 A final point is whether, even if a *Quistclose* trust is established, any relief would be time-barred under s 22(2) of the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act"). The relevant portion of s 22 of the Limitation Act reads:

> **Limitation of actions in respect of trust property**
>
> **22.**—(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (*a*) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (*b*) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.

58 Mr Ho is not the trustee, and hence the action to compel Mr Ho to transfer the shares to KPMH is not an action to "recover from the trustee" and thus falls outside of s 22(1)(*b*) and falls within s 22(2) of the Limitation Act. ERCH argues that more than 6 years have passed since the right accrued.

59 KPMH attempts two arguments to assert that s 22(2) does not apply, which I do not, upon consideration, find convincing. First, that *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 establishes that Class 1 constructive trusts fall under s 22(1)(*b*) and have no limitation period. The authority is not apposite. Constructive trusts are not in issue; a *Quistclose* trust is a resulting trust. The trustee in the purported *Quistclose* trust alternative relevant to s 22(1)(b) of the Limitation Act, moreover, is ERCH and not Mr Ho, from whom return is sought, bringing the action within subsection (2) rather than subsection (1)(*b*). The second argument is that the limitation period should run only from the time of discovery, on the basis of s 29 of the Limitation Act. That section, however, requires fraud or mistake and none is alleged here.

60 Parties did not argue this limitation point fully. In the light of my finding on the three bases above that dispose of the issue, I would only highlight that ERCH's reliance on s 22 of the Limitation Act is consistent with the approach of Vinodh Coomaraswamy J to treat resulting trusts as trusts to which section 22 of the Limitation Act is applicable, in *Tan Chin Hoon and others v Tan Choo Suan (in her personal capacity and as executrix of the estate of Tan Kiam Toen, deceased) and others and other matters* [2016] 1 SLR 1150 at [247]–[251]. Without the benefit of argument, I make no holding on this issue.

The constructive trust argument

61 KPMH relies on the case of *Re Pinkroccade Educational Services Pte Ltd (formerly known as PDA Pink Elephant Pte Ltd) (in creditors' voluntary winding up)* [2002] 2 SLR(R) 789 ("*Pinkroccade*") to mount the argument that a constructive trust had arisen over the $1,000,000.

62 *Pinkroccade* was a case involving a claimant company which had mistakenly paid moneys into the bank account of Pinkroccade Educational Services Pte Ltd ("PES"). Due to human error, money was paid into PES's account instead of the account of another similarly named company. The parties in effective control of PES were informed that the moneys were paid by mistake. The money was kept in a separate account and was identifiable from the rest of the funds of PES (see *Pinkroccade* at [2]–[4]). Lee Seiu Kin JC (as he then was) highlighted that (a) the money was paid under a mistake, (b) the persons in control of PES had knowledge that the moneys were paid by mistake and (c) the moneys were an identifiable fund in a separate account that was not mixed with the other funds of the company. In the circumstances, Lee JC held that a constructive trust had arisen the moment PES was made aware of the mistaken payment as it became unconscionable for PES to retain the moneys (see *Pinkroccade* at [21]–[22]).

63 The present case is distinguishable from the facts of *Pinkroccade*. There is no mistaken payment to speak of. Mr Foo's evidence was that the money was promised to Mr Ong as a loan. No complaint is made of the fact that Mrs Foo made out the cheque for the loan as a director of KPMH to GREIH, at Mr Ong's instruction. The loan, paid to the correct party, is recorded on the general ledger of GREIH as a loan, albeit from ERCH instead of KPMH (see [6] and [10] above). Without a mistaken payment, a constructive trust of a similar nature to that of *Pinkroccade* cannot arise.

Conclusion

64 In summary, I hold that ERCH, as the settlor, transferred the shares to Mr Ho to hold on trust for KPMH. KPMH, however, through various statements made by Mr Foo, has disclaimed any interest in the trust. The same protestations

also rule out a finding of a *Quistclose* trust. As there is a lack of intention to benefit Mr Ho, the GREIC shares are held on resulting trust in favour of ERCH (see *In re Vandervell's Trusts (No 2)* [1974] 1 Ch 269 at 294G). ERCH is entitled to the return of the shares.

65 I shall hear counsel on costs and any consequential orders required.

Valerie Thean
Judge

Samuel Chacko, Lim Shack Keong, Anne-Marie John and Too Fang Yi (Legis Point LLC) for the plaintiff;
Vikram Nair and Foo Xian Fong (Rajah & Tann Singapore LLP) for the first defendant;
Koh Swee Yen, Ong Pei Chin, Margaret Huang and Nicholas Liu (WongPartnership LLP) for the second defendant.