IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 273

Originating Summons No 1004 of 2017
Summons No 5460 of 2017 (Registrar's Appeal No 377 of 2017)

Between

Griffin Real Estate Investment Holdings Pte Ltd (in liquidation)

… *Plaintiff*

And

ERC Unicampus Pte Ltd

… *Defendant*

JUDGMENT

[*Res Judicata*] — [Issue estoppel]

[*Res Judicata*] — [Doctrine of abuse of court]

[Equity] — [Remedies] — [Account] — [Third party liability]

[Equity] — [Remedies] — [Account] — [Expenses]

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v
ERC Unicampus Pte Ltd

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High Court — Originating Summons No 1004 of 2017 and Summons No 5460 of 2017 (Registrar's Appeal No 377 of 2017)
Chua Lee Ming J
22 January, 9 April 2018

18 December 2018

Chua Lee Ming J:

Introduction

1 In this Originating Summons, the plaintiff, Griffin Real Estate Investment Holdings Pte Ltd (in liquidation) ("GREIH"), seeks to recover a share of the proceeds of the sale of a property at 200 Middle Road #01-00, Singapore 188980 known as the Big Hotel. GREIH claims that

(a) in 2011, certain directors of GREIH had wrongfully caused it to extend an unauthorised loan of $10 million ("the $10m Loan") to the defendant, ERC Unicampus Pte Ltd ("ERCU"); and

(b) ERCU knowingly received the $10m Loan and used the monies to help it complete its purchase of the Big Hotel (then known as the Prime Centre).

2 Registrar's Appeal No 377 of 2017 ("RA 377") is GREIH's appeal against the decision of the Assistant Registrar dismissing its application in Summons No 5460 of 2017 ("SUM 5460") for specific discovery of documents relating to the costs, expenses, and other liabilities allegedly incurred by ERCU in respect of the investment in the Big Hotel.

Facts

3 The detailed background leading to the present dispute can be found in the High Court's judgment 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 ("*Sakae Holdings (HC)*") and the Court of Appeal's judgment in *Ho Yew Kong v Sakae Holdings Ltd and other appeals* [2018] 2 SLR 333 ("*Sakae Holdings (CA)*"). For present purposes, the salient facts are set out below.

4 In 2009/2010, Mr Ong Siew Kwee ("Andy Ong") led other investors in investing in two properties which came to be known as the Bugis Cube and the Big Hotel. The Bugis Cube investment involved acquiring an old commercial complex at 470 North Bridge Road, Singapore 188735 (then known as the North Bridge Commercial Complex), redeveloping it into a new shopping mall and selling it. The Big Hotel investment involved acquiring an old commercial building at 200 Middle Road, Singapore 188980 (then known as the Prime Centre), redeveloping it into a mid-range hotel and selling it. In this judgment, I will use the terms "the Bugis Cube" and "the Big Hotel" to refer to the

respective properties both before and after the redevelopment of each property.

5 Andy Ong set up a complex structure using special purpose vehicles ("SPVs") to hold (directly or indirectly) the investment in each property. GREIH and ERCU were two of these SPVs. Another company, ERC Holdings Pte Ltd ("ERC Holdings") was set up as the ultimate holding company of the SPVs.

6 GREIH was the SPV that was used to acquire the Bugis Cube. Sakae Holdings Ltd ("Sakae") was one of the shareholders of GREIH. Subsequently, in November 2010, ERCU acquired the Big Hotel at a purchase price of $103m.[i] On 17 January 2011, ERCU obtained a loan from the United Overseas Bank Limited ("UOB") for $77.25m to fund part of the purchase price for the Big Hotel ("the UOB-ERCU Loan").[ii] The UOB-ERCU Loan was secured by a mortgage over the Big Hotel and by guarantees given by Andy Ong and ERC Holdings. One of the conditions precedent in the UOB-ERCU Loan was that ERCU had to pay the balance of the purchase price before it could draw down on the loan.

7 On 21 January 2011, UOB granted GREIH a six-month short term loan of $10m for the express purpose of financing its working capital requirements ("the UOB-GREIH Loan"). The loan was secured among other things, by a mortgage over the Bugis Cube property and a guarantee from Andy Ong.

8 The completion date for the sale and purchase of the Big Hotel was 14 March 2011. As ERCU had not received payment in full from the investors in the Big Hotel project, Andy Ong and Mr Ong Han Boon ("Han Boon") arranged for the $10m Loan from GREIH to ERCU to enable the latter to complete its

purchase of the Big Hotel from the sellers, Garden Estates (Pte) Ltd ("Garden Estates").

9 Andy Ong and Han Boon issued a letter to UOB dated 3 March 2011 to draw down the UOB-GREIH Loan and to disburse the $10m to Garden Estates.

10 On 14 March 2011, GREIH drew down on the UOB-GREIH Loan. On GREIH's instructions, UOB paid the $10m to Garden Estates. The balance of the purchase price for the Big Hotel was paid by ERCU using the UOB-ERCU Loan and $15.48m in cash contributions (part of which had been paid earlier upon the signing and exercise of the option to purchase).

11 The Big Hotel was sold in September 2015 for $203m. The sale completed on 17 November 2015. The proceeds of sale have been returned to the investors save for

(a) a security deposit that was returned by the purchaser of the Big Hotel to ERCU; and

(b) the sum of $33.45m held in escrow ("the Escrow Sum") by M/s Rajah & Tann Singapore LLP who are the solicitors for ERCU.

12 The Bugis Cube and Big Hotel investments spawned several other legal proceedings. One of these proceedings was Suit No 1098 of 2013 ("S1098"), in respect of which the judgments in *Sakae Holdings (HC)* and *Sakae Holdings (CA)* were issued. One of the orders made in S1098 was that GREIH be wound up.

13 Before me, it was not disputed that Andy Ong and Han Boon were directors of GREIH at the material time.

14 The following findings in S1098 are relevant:

(a) Andy Ong and Han Boon breached their fiduciary duties to GREIH by causing GREIH to extend the $10m Loan to ERCU: *Sakae Holdings (HC)* at [315] ("the Breach Finding").

(b) $7.9m remained outstanding on the $10m Loan: *Sakae Holdings (HC)* at [315] ("the Repayment Finding").

Both findings will be referred to in this judgment collectively as "the S1098 Findings".

15 Before the Court of Appeal, Andy Ong and Han Boon did not challenge the Breach Finding: *Sakae Holdings (CA)* at [131]. It appears that the Repayment Finding was also not challenged before the Court of Appeal.

GREIH's case

16 GREIH submitted as follows:

(a) ERCU is estopped from challenging the S1098 Findings on the grounds of (i) issue estoppel and/or (ii) abuse of process.

(b) In any event, the evidence supports the S1098 Findings.

(c) ERCU is liable as a knowing recipient of the $10m Loan and should be construed as a constructive trustee of the balance amount outstanding.

(d) GREIH is entitled to its proportionate share of the proceeds of sale of the Big Hotel.

Whether ERCU is estopped from challenging the S1098 Findings

Issue estoppel

17 GREIH submitted that issue estoppel applies with respect to the S1908 Findings. The requirements of issue estoppel are as follows:

(a) There must be a final and conclusive judgment on the merits of the issue which is said to be the subject of an issue estoppel.

(b) The judgment must be made by a court of competent jurisdiction.

(c) There must be identity between the parties to the two actions that are being compared.

(d) There must be an identity of subject matter in the two proceedings.

See *Lee Tat Development Pte Ltd v MCST Plan No 301* [2005] 3 SLR(R) 157 at [14]–[15].

18 It is clear that the S1098 Findings satisfy the first two requirements. The fact that ERCU made a submission of no case to answer in S1098 does not in any way alter the fact that the judgment in that case was final and conclusive on the merits.

19 The third requirement is that there must be identity between the parties involved in the present proceedings and in the previous litigation. GREIH and ERCU are the parties in the present proceedings. In S1098, GREIH and ERCU

were co-defendants. I accept that issue estoppel may operate between defendants: *Spencer Bower and Handley: Res Judicata* (LexisNexis, 4th Ed, 2009) ("*Res Judicata*") at para 9.08. GREIH, being the company in respect of which Sakae's oppression action was brought, was a nominal defendant in S1098 but I agree with GREIH that that does not matter. What does matter, in my view, is that there must be identity of parties with respect to the S1098 Findings. In other words, the identity of parties must be in relation to the issues which are alleged to be the subject of issue estoppel.

20 S1098 was a minority oppression action by Sakae as a minority shareholder of GREIH. Sakae made numerous allegations against, among others, Andy Ong and Han Boon for wrongfully diverting moneys from GREIH. Sakae also claimed against ERCU, among others, for the repayment of moneys diverted from GREIH and for declarations that constructive trusts be imposed on assets purchased using moneys from GREIH. See *Sakae Holdings (HC)* at [4].

21 The relevant defendants to Sakae's claim in relation to the $10m Loan were Andy Ong, Hang Boon and ERCU: *Sakae Holdings (HC)* at [87]. The High Court found that Andy Ong and Han Boon had breached their fiduciary duties to GREIH in relation to the $10m Loan: *Sakae Holdings (HC)* at [315]. As against ERCU, the High Court declined to grant a declaration that ERCU was a knowing recipient of the $10m Loan or that ERCU held a proportionate share of the proceeds of sale of the Big Hotel on trust for GREIH, on the ground that Sakae had no standing; only GREIH could bring that claim: *Sakae Holdings (HC)* at [317].

22 On the face of it, it was Sakae (not GREIH) that sought the declaration against ERCU. GREIH referred me to *Goh Nellie v Goh Lian Teck and others*

[2007] 1 SLR(R) 453 ("*Goh Nellie*") where it was pointed out (at [32]) that the courts have not taken a narrow view of what identity between the parties means and the courts have concluded that issue estoppel may arise if the "effective parties" were the same, or as between "the same parties or their privies".

23 GREIH submitted that in S1098, Sakae was effectively acting for the benefit of GREIH in relation to the $10m Loan, and therefore, GREIH (not Sakae) and ERCU were the effective parties to the S1098 Findings. I agree with GREIH. I therefore find that the third requirement is satisfied.

24 However, GREIH faces a bigger hurdle. Only determinations which are necessary for the decision, and fundamental to it, will create an issue estoppel: *Res Judicata* at para 8.23. This principle is contained within the fourth requirement, *ie*, an identity of subject-matter: *Goh Nellie* at [35].

25 In S1098, the High Court in effect dismissed Sakae's claim against ERCU on the ground that Sakae had no standing. That being the case, it became unnecessary for the High Court to make the S1098 Findings as between Sakae/GREIH and ERCU. The fourth requirement for issue estoppel (*ie*, identity of subject-matter) is therefore not satisfied in the present case.

26 I therefore conclude that issue estoppel does not arise in relation to the S1098 Findings.

Abuse of process

27 GREIH next submitted that it is an abuse of process for ERCU to attempt to re-litigate the S1098 Findings. Where neither cause of action estoppel nor issue estoppel is available, a litigant may rely on the extended doctrine of *res*

judicata, or as it is more popularly known, the doctrine of abuse of process: *Goh Nellie* at [19].

28 To determine whether there is an abuse of process, the court looks at all the circumstances of the case, including

(a) whether the later proceedings in substance are nothing more than a collateral attack upon the previous decision;

(b) whether there is fresh evidence that might warrant re-litigation;

(c) whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and

(d) whether there are some other special circumstances that might justify allowing the case to proceed.

The absence or existence of these non-exhaustive factors is not decisive and the court should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive. See *Goh Nellie* at [53].

29 In the present case, re-litigating the S1098 Findings would clearly be a collateral attack on the High Court's findings in S1098. In addition, I note that the relevant persons who can give evidence on behalf of ERCU on the $10m Loan are Andy Ong and Han Boon, both of whom were defendants in S1098 and both of whom chose to offer no evidence. Both Andy Ong and Han Boon have also not challenged the S1098 Findings before the Court of Appeal.

30 However, before me, ERCU made two submissions as to why the

present case is not an abuse of process.

31 ERCU's first submission was with respect to the Breach Finding. ERCU referred to *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 ("*Intraco*") in which the Court of Appeal (at [28]–[29]) accepted that it is permissible for directors (especially directors of a holding company) to consider the interests of the group as a whole when making decisions as long as they do not sacrifice the interests of any company within the group. ERCU argued that the present case is analogous to one involving a group of companies and that Andy Ong and Han Boon did not breach their fiduciary duties when they arranged for GREIH to extend the $10m Loan to ERCU. It will be recalled that GREIH held the Bugis Cube but the $10m Loan was extended to ERCU for purposes of ERCU's acquisition of the Big Hotel. ERCU submitted that the $10m Loan was nevertheless in the best interests of GREIH and the Bugis Cube investors because a substantial number of the Bugis Cube investors were also investors in the Big Hotel.[iii] ERCU sought to justify the $10m Loan as a commercially defensible decision that was not detrimental to GREIH.

32 ERCU explained that this submission was not made in S1098 because ERCU could not do so since it had submitted no case to answer in relation to Sakae's claim based on knowing receipt.

33 I disagree with ERCU. In my view, it cannot be said that there was any group interest to speak of. The fact that there were *some* common investors in both projects is not sufficient to justify treating the present case as one involving a group of companies. GREIH was not an investor in the Big Hotel; neither was Sakae which held 24.69% of the shares in GREIH. The $10m Loan sacrificed the interests of investors in GREIH who did not invest in the Big Hotel (including Sakae), in favour of the interests of the investors in the Big Hotel

(including Andy Ong). In my judgment, *Intraco* cannot apply in the present case.

34 Further, in my view, ERCU cannot rely on the fact that it made a submission of no case to answer in S1098, as an excuse for not making the submission based on *Intraco* in S1098. The submission of no case to answer precluded ERCU from adducing evidence in S1098, including evidence necessary to support a submission based on *Intraco*. However, a submission of no case to answer is not one to be made lightly and having made a deliberate decision to take that course of action, ERCU cannot now be heard to argue that its decision to submit no case to answer prevented it from making certain submissions. On the contrary, in my view, it would be an abuse of process to allow ERCU to do so.

35 ERCU's second submission was in respect of the Repayment Finding. ERCU submitted that there is fresh evidence that the $10m Loan has been repaid in full. In S1098, Andy Ong, Han Boon and ERCU argued that the $10m Loan had been repaid by various entities. The High Court was of the view that "Sakae's position, that $7.9m remained outstanding, was [not] inherently incredible". The High Court noted that the evidence merely showed that related entities made various cash transfers of "close to $10m" to GREIH, and that this amount was subsequently used to pay UOB. However, only $2.1m of these transfers had been recorded as payments to GREIH. The remaining cash transfers had first been recorded as loans to GREIH, but were subsequently reclassified in GREIH's accounts as loans to ERCU thereby cancelling out the debt owed by ERCU to GREIH. The High Court found no documents which indicated that these other entities had agreed to novate or assign GREIH's debts to ERCU. See *Sakae Holdings (HC)* at [96].

36 The actual amount of the remaining cash transfers was $7.94m. Subsequent to the issuance of the High Court's judgment in S1098, three SPVs which were shareholders of ERCU and which had made the remaining cash transfers (amounting to $7.94m) to GREIH, wrote to the liquidators of GREIH to confirm that their transfers were repayments, on ERCU's behalf, towards the $10m Loan with interest.[iv] I accept ERCU's submission that this constituted fresh evidence that was not before the Court in S1098. I also agree with ERCU that the evidence shows that the whole of the $10m Loan has in fact been repaid.

37 The confirmations by ERCU's SPV shareholders removed any doubt as to what the payment of $7.94m was intended for. The confirmations were also consistent with ERCU's explanation that Andy Ong and Han Boon had arranged for the $10m Loan from GREIH because full payment from some of the investors in the Big Hotel was not received in time. It is not disputed that the payment of $7.94m by the SPV shareholders was in fact used by GREIH to repay the UOB-GREIH Loan. The entries in GREIH's general ledger are also consistent with the fact that the sum of $7.94m received from ERCU's SPV shareholders was applied towards ERCU's repayment of the $10m Loan.

38 All the evidence points to the sum of $7.94m being repayment of part of the $10m Loan with interest, on behalf of ERCU. GREIH has not offered any other explanation for GREIH's receipt of the $7.94m. GREIH has also not given me any reason to doubt the confirmations given by ERCU's SPV shareholders. In addition, having given these confirmations, the three SPV shareholders who made the payments cannot subsequently claim otherwise either.

39 GREIH was content to rest its case on the Repayment Finding made in S1098. However, as the High Court expressly recognised in S1098, the Repayment Finding was made "[i]n the absence of other evidence to the

contrary" (*Sakae Holdings (HC)* at [99]). Having made a submission of no case to answer in S1098, ERCU could not adduce evidence to explain that the $7.94m was meant as repayment towards the $10m Loan on behalf of ERCU. In my view, there is before me sufficient evidence to the contrary that ERCU's SPV shareholders paid GREIH the sum of $7.94m as repayment towards the $10m Loan on behalf of ERCU. In the circumstances, it would be unjust to prevent ERCU from challenging the Repayment Finding.

40 In conclusion, it would be an abuse of process for ERCU to re-litigate the Breach Finding. However, it is not an abuse of process for ERCU to re-litigate the Repayment Finding and I find that the sum of $7.94m paid by the three SPV shareholders of ERCU, was repayment towards the $10m Loan. The $10m Loan has therefore been repaid in full.

41 I need only add that even if ERCU is not estopped from re-litigating the Breach Finding, I would have concluded on the evidence that Andy Ong and Han Boon breached their fiduciary duties to GREIH in arranging for the $10m Loan to be extended to ERCU.

ERCU's liability as a knowing recipient

42 GREIH seeks declarations that, among other things,

(a) ERCU is a knowing recipient of the $10m transferred to it by GREIH;

(b) ERCU is a constructive trustee and holds on trust for GREIH

(i) the sum of $7.9m, or any other amount the court may determine, being the outstanding balance of the $10m Loan; and

(ii) GREIH's share of the proceeds from the sale of the Big Hotel.

43 Before me, ERCU accepted (in my view, properly) that it would be a knowing recipient of the $10m Loan if I came to the conclusion (as I have) that Andy Ong and Han Boon had breached their fiduciary duties to GREIH in arranging for the $10m Loan to be extended to ERCU.

44 As I have found that the $10m Loan has been repaid in full, GREIH's claim with respect to the sum of $7.9m falls away. In any event, as explained below, ERCU is not a trustee.

45 A knowing recipient is not a trustee. His liability is that of an accessory to the breach of trust. A knowing recipient is liable to give restitution of the value of the property received by him and his liability is fixed at the value of the property when he first received it: *Snell's Equity* (John McGhee, Ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at para 30-071. A knowing recipient may also be required to account for profits gained as a result of his knowing receipt: *Snell's Equity* at para 20-043, citing *Novoship (UK) Ltd and others v Mikhaylyuk and others* [2015] QB 499 ("*Novoship*") at [93]; *Von Roll Asia Pte Ltd v Goh Boon Gay and others* [2018] 4 SLR 1053 at [112]–[114].

46 Although a knowing recipient is often described as a constructive trustee, that description merely indicates that he is liable to account for profits in equity as if he had been a true trustee. The expression "constructive trustee" as applied to a knowing recipient is "nothing more than a formula for equitable relief". See *Snell's Equity* at para 26-004; *Selangor United Rubber Estates Ltd v Cradock (No. 3)* [1968] 1 WLR 1555 at 1582; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [142].

47 In the present case, ERCU's liability as a knowing recipient is to return the $10m to GREIH. In this respect, I have found that the $10m has been repaid to GREIH. In addition, ERCU may also be held liable to account for profits gained as a result of its knowing receipt of the $10m. Before me, ERCU accepted that if there was a breach of fiduciary duties, then the fact that the $10m Loan has been repaid does not affect GREIH's claim. That must be correct. The repayment of the $10m Loan and an account of profits gained as a result of ERCU's knowing receipt of the $10m, are not inconsistent remedies.

48 Two issues arise in connection with ERCU's liability to account for profits:

(a) Whether an order for an account of profits should be made?

(b) What are the principles applicable to an account of profits by a knowing recipient?

Whether account of profits should be ordered

49 ERCU referred me to *Novoship*. In that case, the English Court of Appeal held that an account of profits may be ordered against a dishonest assistant, even where no corresponding loss has been suffered by the beneficiary. However, the court noted that in principle a dishonest assistant is different from a fiduciary (at [104]–[105]) and held that different considerations apply to a dishonest assistant (at [114]). The court went on to hold that the remedy of an order for an account of profits against a dishonest assistant is available subject to the following:

(a) First, a sufficiently direct causal connection is required between the dishonest assistance and the resulting profits (at [103] and [115]); and

(b) Second, the court has a discretion to withhold the remedy of an account of profits against someone who is not a fiduciary and does not owe fiduciary duties; one ground on which the court may withhold the remedy is that it would be disproportionate in relation to the particular form and extent of wrongdoing (at [119]).

50 In *Novoship*, the claimants (Novoship) were shipowning companies. The dishonest assistant entered into charters for Novoship's vessels at the market rate. The charters were negotiated with Novoship's general manager and director who was held to be acting in breach of his fiduciary duties to Novoship. On the claim for an account of profits against the dishonest assistant, the Court of Appeal noted that (a) the real and effective cause of the dishonest assistant's profits was the unexpected change in the market and that the dishonest assistant had judged the market well (at [114]); and (b) the dishonest assistant's profits were the kind of profits that the shipowning companies deliberately decided to forgo in that shipowning companies necessarily wished to lay off the risks of fluctuating rates for freight on the charterer (at [117]). The court declined to make an order for an account of profits on the grounds that there was no sufficiently direct causal link and because an order for an account of profits would be disproportionate (at [120]).

51 Although *Novoship* concerned dishonest assistance, as a matter of principle, the personal remedy of an account of profits must also be available against a knowing recipient. GREIH did not argue otherwise and I note that the Privy Council has also held that the remedy is available against a knowing

recipient: *Akita Holdings v Attorney General of the Turks and Caicos Islands* [2017] AC 590.

52 ERCU submitted that

(a) there is no direct causal link between the $10m Loan and ERCU's profits from the Big Hotel investment; and

(b) the profits from the Big Hotel investment were the kind of profits that GREIH had decided to forego.

Whether there is a direct causal link

53 ERCU's case was that there is no direct causal link between its receipt of the $10m Loan and the profits from the Big Hotel investment because the profits should be seen as attributable primarily to ERCU's efforts and resources as well as Andy Ong's business acumen. I disagree.

54 First, the whole idea behind the Big Hotel investment project was to acquire the old commercial building (then known as the Prime Centre), redevelop it into a mid-range hotel and sell it at a profit. The successful acquisition of the property was absolutely crucial to the investment idea.

55 Second, the evidence is clear that without the $10m Loan, ERCU would not have been able to draw down on the UOB-ERCU Loan to complete the purchase of the property. One of the conditions precedent in the UOB-ERCU Loan was that ERCU had to pay the balance purchase price before it could draw down on the loan. By ERCU's own admission, it did not have sufficient funds to do so and that was why the $10m Loan was effected. It is clear then that

ERCU would not have been able to satisfy the condition precedent without the $10m Loan.

56 ERCU argued that the condition precedent requiring payment of the balance purchase price before the UOB-ERCU Loan could be drawn upon, was a boilerplate clause found in all standard mortgage loan documents. That may be so but the fact remains that it was a condition precedent that had to be complied with and without the $10m Loan, ERCU would not have been able to comply with it and consequently would not have been able to draw down on the UOB-ERCU Loan.

57 In my view, there is a sufficiently direct causal connection between ERCU's knowing receipt of the $10m Loan and the profits from the Big Hotel investment.

Whether GREIH had decided to forego profits from the Big Hotel investment

58 ERCU submitted that from the outset, GREIH and ERCU were set up solely for the Bugis Cube investment and the Big Hotel investment respectively. As GREIH had deliberately limited its undertakings to the Bugis Cube investment, it had deliberately foregone and never intended to make profits from any undertaking other than the Bugis Cube investment.

59 In my view, ERCU's submission is unmeritorious. In *Novoship*, the result of the dishonest assistance was that the dishonest assistant obtained the charters of the shipowners' vessels at the market rate. Had there been no breach of fiduciary duty and hence no dishonest assistance, the shipowners would still have chartered out their vessels at the market rate. It was in this context that the Court in *Novoship* said that the profits made by the dishonest assistant were the kind of profits that the shipowners deliberately decided to forgo.

60 In the present case, there was no intention that GREIH should invest in the Big Hotel. However, GREIH's money was wrongfully used by ERCU for the Big Hotel investment. The relevant question to ask is whether it can be said that GREIH would not have intended to share in the profits if GREIH had decided to invest the $10m in the Big Hotel investment. The answer is an obvious "no".

An order for an account of profits is appropriate

61 In my judgment, it is wholly appropriate that ERCU be ordered to account for the profits that it made as a result of its knowing receipt of the $10m Loan. There is a sufficiently direct causal link. Without the $10m Loan, ERCU would not have been able to draw on the UOB-ERCU Loan, and consequently would not have been able to complete its acquisition of the Big Hotel. That would have spelt the end of the investment idea. In my view, an account of profits would not be a disproportionate remedy.

Scope of an account of profits by ERCU

62 In my view, on the facts of this case, the profits gained by ERCU as a result of its knowing receipt of the $10m Loan would be a proportionate share of the profits from the Big Hotel investment. Two issues arise. The first relates to how the profits should be computed, specifically, what are the expenses that can be deducted? The second relates to the computation of GREIH's percentage share of the profits, specifically, what can be considered as contributions by ERCU.

Computation of "profits"

63 GREIH claimed a proportionate share of the gross sale proceeds, *ie*, without deducting costs and expenses incurred in respect of the Big Hotel

investment ("the Expenses"). The effect of computing GREIH's share based on the gross sale proceeds is that the Expenses would be borne entirely by ERCU.

64 ERCU's case before me is that the Expenses comprise

(a) costs incurred in redeveloping the property ("Redevelopment Costs")'

(b) interest expenses incurred in 2014 and 2015 on loans obtained to finance the redevelopment of the property ("Interest Payments"); and

(c) management fees incurred in 2014 and 2015 for the management of the Big Hotel ("Management Fees").

I therefore need only to deal with the Expenses as particularised above.

65 GREIH relied on the doctrine of just allowance which is also referred to as an equitable allowance. The doctrine of just allowance gives the court a discretion to grant fiduciaries an allowance for their work and skill in producing the profits. The reason why GREIH submitted that the Expenses should be treated as a matter of just allowance is that, under this doctrine, the court has the discretion not to allow the deduction. GREIH submitted that the discretion should not be exercised in ERCU's favour because ERCU was controlled by Andy Ong and Han Boon and therefore "had the exact same 'guilty' knowledge" as they had.[v]

66 It was not argued before me that the doctrine of just allowance does not apply to knowing recipients and indeed, I see no reason why it should not. Knowing recipients are not fiduciaries and should not be treated less favourably than fiduciaries.

67 However, I disagree with GREIH that the Expenses should be dealt with under the doctrine of just allowance. I cannot see how it can be right or equitable that in an account of *profits*, a trustee or knowing recipient should be required to bear the expenses that had to be incurred in order to produce those very profits. For example, suppose an account of profits is ordered in respect of a business. Applying GREIH's submission, the profits of the business should be computed without any deductions for cost of goods or labour. This cannot be correct.

68 The doctrine of just allowance is meant to give the court the discretion to grant *further* deductions in favour of the accounting party because it would be equitable to do so on the facts of the case. Thus, at first instance in *Phipps v Boardman and others* [1964] 1 WLR 993, Wilberforce J held (at 1017–1018) that the trustees were liable to account for the proportionate profit attributable to the beneficiary's share in the trust fund, and said as follows: "…account must naturally be taken of the expenditure which was necessary to enable the profit to be realised. But, in addition to expenditure, should not the [trustees] be given an allowance or credit for their work and skill?" The Court of Appeal (*Phipps v Boardman and others* [1965] Ch 992) and the House of Lords (*Boardman and another v Phipps* [1967] 2 AC 46) affirmed the decision. Clearly, Wilberforce J did not treat expenses incurred in enabling the profit to be realised as a matter falling under the doctrine of just allowance.

69 GREIH relied on four cases – *Paul A Davies (Australia) Pty Ltd (in liquidation) v Davies and another* [1983] 1 NWSLR 440 ("*Davies*"), *In re Jarvis, dec'd* [1958] 1 WLR 815 ("*Jarvis*"), *In the Marriage of Wagstaff: Gruber (Intervener)* (1990) 14 Fam LR 78 ("*Wagstaff*") and *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 ("*Mona*").

70 *Davies* involved directors who had purchased property using a mixture of the company's monies (in breach of fiduciary duties) and a mortgage loan secured on the property. The fiduciaries did not contribute any of their own monies to the purchase price. The issue before the Court was whether the mortgage loan could be considered to be the fiduciaries' contribution towards the purchase price such as to give the fiduciaries a proportionate share of the gain in the value of the property. GREIH relied on the following passage in Moffitt P's judgment (at 447F):

> …The gain … could not be attributed to putting in the mortgage money. If it were due to the improvement of the property by the personal efforts of the respondents or by the provision by them of other moneys, that would be a matter for separate proof or a matter for just allowances, but would provide no basis to attribute to the provision of the mortgage money the gain to which I have just referred.

71 In *Jarvis*, a testator gifted his business, including the lease of the premises, to his daughters who were the plaintiff and defendant, subject to payment by them of annuities to his wife. The plaintiff and defendant were also appointed as the executors and trustees under the will. At the time of the father's death, the lease had some two and a half years to run. The premises had been badly damaged by enemy bombing in 1940 and virtually no business was carried on until they were completely restored in 1944. The plaintiff took little part in the administration of the estate but the defendant paid the business debts out of her own pocket, the business being insolvent. In 1943, the landlords obtained judgment by default for arrears of rent and possession of the premises. The defendant paid the judgment debt by instalments. In May 1944, the landlords granted the defendant a new tenancy of the same premises, for her own business. The defendant obtained supplies, as far as she was able, from the suppliers of the former business. In 1951, the plaintiff sued claiming an account in respect of the defendant's occupation of the premises as well as the profits

carried on there. The defendant conceded that she was a constructive trustee of the leasehold interest and the Court granted an inquiry into the rent that ought to be charged on her beneficial occupation.

72 As to the claim for the profits of the business, the court noted that the defendant had "reincarnated the testator's own business on the same premises" and held (at 820) that, subject to laches, acquiescence and delay, the defendant was accountable as a constructive trustee of the business and its profits "subject to all just allowances for her own time, energy and skill, for the assets she has contributed, and the debts of the testator which she has paid, and for her mother's annuity".

73 In *Wagstaff,* a trustee wrongfully used trust monies to purchase a piece of property. The property was paid for using the trust monies, a loan from a third party and a mortgage loan. The property was subsequently sold at a profit. The Court said (at 86) "that there should be proper allowances in the final accounting for the contributions by the trustee and in this case, the husband, for any expenses relating to the running and improvement of the property."

74 GREIH also relied on *Mona* in which the Court of Appeal noted the more generous approach towards just allowance that was taken in *Davies* and stated (at [21]) that

> … this should not be seen as an indication that in all cases where the defaulting fiduciary has invested his own efforts and resources in reaping illegitimate profits, the court is obliged to grant him a liberal allowance.
>
> …

GREIH argued that this showed that the Court of Appeal took the view that both efforts and monies expended by a wrongdoing fiduciary would fall to be considered under the doctrine of just allowance.

75 In my view, these cases are not inconsistent with the distinction between expenses incurred in producing the profits being accounted for and other contributions (both monetary and non-monetary); the former should be deducted in determining the profits whilst the latter are further deductions which may be allowed by the court under the doctrine of just allowance. None of these cases go so far as to say that the beneficiary is entitled to the profits or a proportionate share of the profits without deduction for the expenses incurred in producing those profits.

76 In conclusion, in the account of profits, ERCU is entitled to deduct the Expenses from the profits. What the amounts should be in respect of each head of the Expenses are matters to be dealt with in the taking of accounts.

Computation of GREIH's percentage share of the profits

77 GREIH submitted that the UOB-ERCU Loan is to be disregarded and not to be counted as part of ERCU's contribution towards the purchase price of the Big Hotel. Accordingly, its share of the profits should be computed as follows:

$$\frac{\$10m}{(\$10m + X)}$$

where:

- X represents the total cash contributions made by ERCU towards the purchase of the Big Hotel (excluding the UOB-ERCU Loan and the $10m Loan);

78 ERCU submitted that GREIH's share of the profits should take into account the UOB-ERCU Loan as well as the Expenses. ERCU argued that the Expenses form part of the total cost of the Big Hotel and should be taken into account because they were monies applied by ERCU to the Big Hotel investment. According to ERCU, GREIH's share should be computed as follows:

$$\frac{\$10\text{m}}{(\$103\text{m} + \text{Expenses})}$$

The amount of $103m refers to the purchase price of the property and, thus, takes into account the UOB-ERCU Loan.

Whether the UOB-ERCU Loan should be counted

79 GREIH submitted that where a trustee has acquired property using trust monies and monies obtained through a mortgage loan on the security of property, and the property could not have been acquired without the use of the trust monies, the trustee is not entitled to a share of profits attributable to the use of the mortgage loan monies. Applied to the present case, this means that the UOB-ERCU Loan cannot be regarded as ERCU's contribution towards the purchase price for purposes of distributing the profits.

80 GREIH cited several cases to me. These cases establish the following:

(a) Where a trustee pays for property with his own monies and trust monies in breach of trust, the beneficiaries are entitled to a proportionate share of the increase in the value of the property: *Scott v Scott* [1964] VR 300 ("*Scott*"). In that case, the trustee had earlier repaid the trust the amount taken from the trust.

(b) Where a trustee does not contribute his own monies but uses trust monies in breach of trust to pay part of the purchase price of property, and on completion uses a mortgage loan secured on the property to pay the balance of the purchase price, the trustee is not entitled to any share in the profits. See *Davies* which was followed in *Wagstaff* and *Australian Postal Corporation v Lutak and others* [1991] 21 NSWLR 584 ("*Australian Postal*").

(c) Where a trustee pays for property using trust monies in breach of trust, his own monies and a mortgage loan secured on the property, the beneficiaries and the trustee share the profits from the sale of the property in proportion to the amount of the trust monies and the trustee's own monies. Any money provided by way of a mortgage loan on the security of the property is not to be taken into account. In addition, the beneficiaries are entitled to a return of the trust monies. See *JGM Nominees Pty Ltd v Caveat Finance Pty Ltd (in liq)* [2009] VSC 604 (*"JGM Nominees*"). *JGM Nominees* applied *Davies*.

81 ERCU, on the other hand, argued that mortgage loan monies are excluded from consideration only where trust monies are used to acquire an equitable interest in the property that is subsequently used to secure a mortgage loan to pay the remainder of the purchase price. ERCU relied on *Davies* in which Moffitt P reasoned (at 448B) that the principle in *Scott* should not apply

> … where the fiduciary does not provide his own money, but, having used trust money to provide the deposit and/or part of the purchase money so as to acquire an equitable interest in the property provide the balance by a mortgage loan on the security of the property. … The provision of this money itself depends on the gain flowing from the breach of trust…

82 ERCU referred to two cases in support of its contention. The first was *Mavaddat v Lee* [2007] WASCA 141 ("*Mavaddat*"), in which trust monies were used to pay for the property and the balance of the purchase price was provided by the trustee from funds borrowed from the bank in circumstances in which there was no contention that the funds were obtained only through misuse of trust property, whether by mortgage or otherwise (at [23]). The court held that there was no basis for a declaration of trust over the whole property and, applying *Scott*, declared that the trustee held the property on trust for the beneficiary only to the extent of its proportionate contribution (at [24]–[25]).

83 The second case that ERCU referred to was *Telnet Pty Ltd v Linton* (unreported) BC9807776 (14 May 1998) ("*Telnet*"). In *Telnet*, Mrs Linton bought a property and paid part of the purchase price using monies from a loan obtained by her husband from Telnet. Mr Linton was a director of Telnet. Mrs Linton also obtained a mortgage loan secured on the property. At first instance, the court found that the loan was obtained in breach of Mr Linton's fiduciary duty. However, the court found that Mrs Linton did not have the necessary knowledge to constitute her a constructive trustee when she obtained the mortgage loan. In the circumstances, the court decided that the mortgage loan should go to the credit of Mrs Linton in determining the respective interests of herself and Telnet in the property. The case went on appeal where the Court of Appeal allowed the appeal on the ground that there was no breach of trust: *Linton v Telnet Pte Ltd* (1999) 30 ACSR 465.

84 ERCU submitted that in the present case, ERC Holdings obtained the option to purchase the property on 14 October 2010 using its own monies. On 3 November 2010, ERCU exercised the option to purchase and paid the deposit with monies provided by ERC Holdings. ERCU therefore obtained an equitable interest in the property with its own monies. ERCU submitted that since the

ERCU-UOB Loan was obtained without the $10m Loan having been used to acquire an equitable interest in the property, ERCU should be entitled to the benefit of the UOB-ERCU Loan.

85 What is the principle that can be drawn from the cases? It would be useful to start with an examination of the reasons for the decision in *Davies*. In *Davies,*

(a) Moffitt P reasoned (at 448B) that where the fiduciary, having acquired an equitable interest in the property using trust monies, provided the balance by a mortgage loan on the security of the property, the provision of the monies from the mortgage loan itself depended on the gain flowing from the breach of trust.

(b) Hutley JA reasoned (at 450C–D) that when the contract for the purchase of the property was made, the breaching directors became trustees of the property for the beneficiary and mortgaging the property without the beneficiary's consent was another breach of trust. The mortgage loan, having been gained by the further breach of trust, could not be treated as the trustee's own resources.

(c) Mahoney JA reasoned (at 457C) that for the breaching directors to retain part of the profit which is proportionate to the mortgage loan would be inconsistent with the principle that a trustee must account for any unauthorised profit that he has made from the trust or his position as trustee. Mahoney JA also gave reasons similar to those of Hutley JA (at 458D).

86 *Wagstaff* adopted Moffitt P's reasoning (at 86). *Australian Postal* adopted the reasoning of both Moffitt P and Mahoney JA (at 597G). The

judgment in *JGM Nominees* did not make any specific reference to the reasons in *Davies* (at [34]).

87 *In Mavaddat*, the case before the court was that the funds from the mortgage loan were *not* obtained through the misuse of trust property, whether by way of mortgage or otherwise (at [23]). In *Telnet*, the court emphasised that the case was *not* one where the security for the loan from the bank was, or was derived from, monies affected with fiduciary obligations (at 24).

88 In my view, the cases referred to by both GREIH and ERCU illustrate the broader general principle that the law will not allow any person (including trustees) to benefit from his own wrong. In *Davies*, *Australian Postal*, *Wagstaff*, and *JGM Nominees*, the mortgage loans were obtained by the trustees in breach of trust or as a result of a breach of trust. Allowing the trustee the benefit of the mortgage loan in such a case is to allow the trustee to benefit from his own breach. That would be wrong. On the other hand, *Mavaddat* and *Telnet* are illustrations of cases where the mortgage loan was not itself a breach of trust and was not tainted by any antecedent breach of trust. It is not surprising that in both cases, the court allowed the trustee the benefit of the mortgage loan.

89 Turning to the present case, ERCU was a knowing recipient, not a trustee. It owed no fiduciary duties to GREIH. ERCU did not obtain the $10m Loan in breach of trust; it merely received the monies knowing that it had been obtained by Andy Ong and Han Boon in breach of their fiduciary duties. However, the fact that ERCU was not a trustee does not matter. The general principle is that a party cannot benefit from its own wrong; he does not have to be a trustee. I note also that in *Telnet*, the claim was not that Mrs Linton was a trustee but that she knowingly assisted in her husband's breach of fiduciary duties or was the knowing recipient of the funds. However, the court (at 24) was

clearly of the view that *Davies* was relevant since it considered and distinguished *Davies*.

90 The facts in the present case are clear. As discussed earlier (at [55] above), without the $10m Loan, ERCU would not have been able to draw on the UOB-ERCU Loan and consequently would not have been able to complete the purchase of the Big Hotel.

91 ERCU's knowing receipt of the $10m was wrongful. This wrongful act enabled ERCU to satisfy the condition precedent and draw on the UOB-ERCU Loan. In my judgment, the UOB-ERCU Loan cannot be treated as ERCU's contribution in the determination of GREIH's share of the profits of the Big Hotel investment. To do so would be to allow ERCU to benefit from its own wrong.

Whether the Expenses should be counted?

92 ERCU submitted that the Expenses were monies applied by ERCU to the Big Hotel investment and therefore should be treated as part of the cost of the Big Hotel investment. I agree. It will be recalled that the Big Hotel investment involved the acquisition of the property, redeveloping it and selling it at a profit. It would be artificial to limit the capital costs of the project to just the purchase price. The Expenses were clearly a necessary part of the funds needed to bring the investment to fruition.

Computation of GREIH's fractional share

93 GREIH's fractional share of the profits is to be computed as follows:

$$\frac{\$10\text{m}}{\text{---------}}$$

[($103m - UOB-ERCU Loan) + Expenses]

RA 377

94 RA 377 is GREIH's appeal against the Assistant Registrar's dismissal of its application in SUM 5460. In SUM 5460, GREIH sought specific discovery of documents relating to "costs, expenses, and other liabilities" which ERCU claimed to have incurred in respect of the Big Hotel investment.

95 One of the grounds relied on by GREIH was that the documents sought were relevant in determining the amount of just allowance to be granted to ERCU. As I have rejected GREIH's arguments on just allowance, this ground must fail.

96 In the present case, ERCU is to give an account of the profits made from the sale of the Big Hotel which are attributable to the $10m Loan. The Expenses (as particularised at [64] above) are relevant to the computation of GREIH's share of the profits. However, ERCU is yet to lodge its account. In the circumstances, in my view, the application for specific discovery is premature. Any request for documents may be made and dealt with in the course of the taking of accounts.

97 RA 377 is therefore dismissed with costs.

Conclusion

98 GREIH is entitled to the following declarations:

(a) That ERCU knowingly received a sum of $10m on or around 14 March 2011 from GREIH which was loaned from GREIH to ERCU in breach of fiduciary duties owed by Han Boon and Andy Ong to GREIH.

(b) That ERCU is liable to account for the profits that it gained in the Big Hotel investment as a result of its knowing receipt of the sum of $10m from GREIH.

99 The profits attributable to the sum of $10m from GREIH are to be computed as follows:

$$\frac{\$10\text{m}}{[(\$103\text{m} - \text{UOB-ERCU Loan}) + \text{Expenses}]} \times (\$203\text{m} - \$103\text{m} - \text{Expenses})$$

and are to be paid to GREIH.

100 RA 377 is dismissed with costs.

101 I will hear parties on costs and on any directions that may be required with respect to the taking of accounts. Given the conclusions that I have arrived at, the taking of accounts will involve only the amount of Expenses that should be allowed as having been properly incurred in connection with the Big Hotel investment.

Chua Lee Ming
Judge

Abraham S Vergis, Nawaz Kamil, and Kenny Lau
(Providence Law Asia LLC) for the plaintiff;
Vikram Nair, Gan Eng Tong, and Foo Xian Fong
(Rajah & Tann Singapore LLP) for the defendant.

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[i] 1st affidavit of Ong Han Boon filed on 24 October 2017, at p 83.
[ii] 1st affidavit of Aaron Loh Cheng Lee filed on 31 August 2017, at p 285.
[iii] Defendant's Written Submissions, dated 18 January 2018, at paras 6–9.
[iv] 1st affidavit of Aaron Loh Cheng Lee filed on 31 August 2017, at pp 316–325.
[v] Plaintiff's Written Submissions dated 18 January 2018, at para 150.