IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 117

Suit No 830 of 2019

Between

Daniel Fernandez

… *Plaintiff*

And

(1) Edith Woi
(2) EPS Worldwide Trade Pte Ltd

… *Defendants*

JUDGMENT

[Agency] — [Duties of agent] — [Breach]
[Contract] — [Illegality and public policy] — [Common law]
[Equity] — [Fiduciary relationships] — [Duties]
[Equity] — [Remedies] — [Account]
[Equity] — [Remedies] — [Equitable compensation]

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v
Edith Woi and another

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17–18, 20, 24–26 November 2020, 7 January, 4 May 2021

17 May 2021 Judgment reserved.

Ang Cheng Hock J:

Introduction

1 This is a case where the first defendant, who is alleged to have been the sole nominee director and shareholder of the plaintiff in respect of a company incorporated in Singapore, faces a claim for the recovery of moneys that had been transferred out of the company's bank account to the tune of approximately US$1m. Despite the advantage of anonymity they can provide, the risks in such nominee arrangements are quite clear and the trust reposed in the nominee can often be easily exploited in a variety of ways, especially for wrongful financial gain. As I will detail, this judgment serves as a cautionary tale for those who engage such nominees.

Facts

The parties

2 The plaintiff is a British citizen who resides in London, United Kingdom. He describes himself as an internet entrepreneur and financial services professional with a background in card acquiring and banking.[1]

3 The first defendant is a Bahamian citizen who is currently residing in Vienna, Austria. She describes herself as "an entrepreneur" who has been "involved in online sales for some time since 2007".[2]

4 The second defendant is a company that was incorporated in Singapore in 2018 for the purpose of selling health, wellness and fashion products.[3] The first defendant is the sole shareholder and a director of the second defendant.[4]

Background to the dispute

5 The first defendant owned a company, Tasmania Ltd, incorporated in the United Kingdom,[5] which primarily provided fiduciary services.[6] As far as I can tell from the evidence, she was the only director and employee, and part of the services she offered was acting as a nominee.[7] On or about 8 March 2017,

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1 Daniel Fernandez's Affidavit of Evidence-in-Chief ("AEIC") dated 12 October 2020 ("P's AEIC") at [3].

2 Edith Woi's AEIC dated 6 November 2020 ("D1's AEIC") at [4].

3 D1's AEIC at [10(a)] and p 19.

4 D1's AEIC at [4].

5 P's AEIC at [119].

6 Plaintiff's Bundle ("PB") 36–37.

7 Transcript, 25 November 2020, p 19 line 24–p 20 line 14 and p 20 line 24–p 21 line 24.

the first defendant contacted Mr Thomas Jackson and offered her services.[8] Mr Jackson was then the group legal counsel for DeMontford Bell Ltd ("DMB"),[9] a company incorporated in Hong Kong[10] which provided company incorporation, corporate secretarial, and nominee director and shareholder services.[11] Mr Jackson resides in the United Kingdom.

6 Mr Jackson suggested the use of the first defendant as a nominee shareholder and director to one of DMB's clients, who wanted to set up a company in Dubai, United Arab Emirates. Eventually, the first defendant was given the assignment. She signed a non-disclosure agreement with DMB.[12] She travelled to Dubai to incorporate the company as instructed. This assignment was completed in or around June 2018, and the first defendant ceased being a director and shareholder of the Dubai company. The first defendant was paid for her nominee services.

7 In early June 2018, the first defendant approached Mr Jackson for a personal loan of €5,000.[13] Mr Jackson declined to extend a loan, but offered instead to look out for any new assignments as a nominee.[14]

8 By 2018, the plaintiff had been acquainted with Mr Jackson for a number of years. While he was working with SafeCharge International Group Limited ("SafeCharge"), an IT service management company specialising in providing

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8 PB 26–27.

9 Thomas Noel Collister Jackson's AEIC dated 12 October 2020 ("TJ's AEIC") at [6].

10 Transcript, 20 November 2020, p 13 line 16–p 14 line 4.

11 TJ's AEIC at [4]–[6].

12 Defendant's Bundle ("DB") 6; Transcript, 25 November 2020, p 27 lines 5–8.

13 PB 529.

14 PB 529.

e-commerce payment solutions, the plaintiff had recommended various clients of his to DMB for its corporate services, including nominee services.[15] The plaintiff also provided consultancy services on his own to various clients who needed advice on setting up e-commerce businesses.

9 At around this time, the plaintiff wanted to set up an e-commerce business involving an online platform for the direct sale and marketing of health and beauty products to consumers. It was to be a virtual "market place", where products from Europe and the United States were to be sold, mainly targeted at Asian consumers, particularly from China. The kinds of products sold would include anti-wrinkle creams, moisturisers, weight-loss supplements and the like.[16] The plaintiff's plan was to call the online platform "Eat Pray Shop".[17]

10 The plaintiff discussed his business plan with Mr Jackson. He wanted Mr Jackson and DMB to handle the corporate managerial and secretarial aspects of his new business.[18] He also wanted the use of a nominee shareholder and director for the Eat Pray Shop companies he was going to set up. This was because he wanted to keep his involvement with the new business private, so that he would not be seen as competing with his clients from SafeCharge, other clients for which he was providing consultancy services, and his business partners.[19]

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15 P's AEIC at [12]–[14].

16 P's AEIC at [16].

17 P's AEIC at [18].

18 P's AEIC at [19].

19 P's AEIC at [20].

11 Mr Jackson recommended the first defendant's services to the plaintiff.[20] After reviewing the first defendant's CV, the plaintiff proceeded to authorise and instruct Mr Jackson to negotiate the terms of engagement with the first defendant as the nominee the plaintiff would appoint.[21] According to the plaintiff's case, the first defendant agreed to act as a nominee, although she was not told of the identity of the plaintiff until much later. That the first defendant agreed to act as a nominee for the plaintiff is disputed by her, but I will get into the specifics of that area of contention later in this judgment.

12 Pursuant to instructions conveyed by Mr Jackson, the first defendant travelled to Hong Kong to set up a company in that territory. The company was called "EPS Worldwide Limited" ("EPS Hong Kong"), which was incorporated on or about 18 June 2018.[22] "EPS" is an abbreviation for "Eat Pray Shop".[23] The first defendant was registered as the sole shareholder and director of EPS Hong Kong.[24] She also acted on Mr Jackson's instructions to open a bank account for EPS Hong Kong with DBS Bank.[25] However, there were issues with opening a bank account with DBS Bank for EPS Hong Kong,[26] and it seems that this was the reason why a bank account was opened with Standard Chartered Bank instead.

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20 P's AEIC at [22]–[23].

21 P's AEIC at [24]–[26].

22 P's AEIC at [37]; TJ's AEIC at p 116.

23 P's AEIC at [18].

24 P's AEIC at [37]; TJ's AEIC at [41].

25 P's AEIC at [32]; TJ's AEIC at [43]–[45]; Plaintiff's Opening Statement at [18]–[19]; PB 614.

26 P's AEIC at [44] and [48(c)]; TJ's AEIC at [49] and [56(c)].

13 Subsequently, Mr Jackson instructed the first defendant to travel to Singapore to set up a company here.[27] The first defendant did so, and that was how the second defendant came to be incorporated on 27 July 2018, with her as the sole shareholder and a director.[28] As in the case of EPS Hong Kong, the first defendant also opened a bank account with DBS Bank in Singapore for the second defendant.[29]

14 The plaintiff's case is that, for all matters relating to EPS Hong Kong and the second defendant, the first defendant had agreed to take his instructions, which were to be conveyed via Mr Jackson.

15 From 9 to 15 October 2018, there were four transfers of funds to the DBS Bank account of the second defendant, totalling the amount of approximately US$1,028,455 (see [20] below).[30] According to the plaintiff, these were payments received as a result of sales of products to the second defendant's customers.[31] From 25 October 2018 to 1 November 2018, these sums were transferred out of the second defendant's DBS Bank account without the approval, knowledge or instructions of the plaintiff or Mr Jackson (see [21] below).[32] On 1 November 2018, the first defendant informed Mr Jackson and his associate, Ms Sophie Flynn ("Ms Flynn"), that all the moneys in the second

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27 TJ's AEIC at [56(e)].

28 TJ's AEIC at [61]–[62]; D1's AEIC at p 20.

29 TJ's AEIC at [71] and p 309.

30 PB 481.

31 P's AEIC at [74].

32 P's AEIC at [113] and pp 152–154, 158.

defendant's bank account were lost because they were fraudulently transferred out of the account by some unknown person.[33]

16 The plaintiff contends that the first defendant had taken these funds or had transferred them out to various recipients. In essence, his claim against the first defendant is that she has to account for these withdrawn sums and repay them.

The parties' cases

The plaintiff's case

17 The plaintiff's case is factually straightforward. He argues that he entered into an agreement, through the agency of Mr Jackson, with the first defendant in the period from 7 June to 16 July 2018, pursuant to which she agreed to act as his nominee director and shareholder for EPS Hong Kong and the second defendant. In consideration for her services as a nominee, the first defendant would be entitled to the sum of US$30,000. She would also be reimbursed for any sums she expended for the setting up of the companies and the bank accounts of these companies.[34]

18 As part of her role as a nominee, the first defendant was to comply with all instructions given by the plaintiff in relation to the companies and their bank accounts, which may be conveyed through Mr Jackson.[35]

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33 P's AEIC at [92].

34 Statement of claim (amendment no. 2) dated 24 November 2020 ("SOC Amd 2") at [7]; plaintiff's closing submissions dated 7 January 2021 ("PCS") at [17]–[18].

35 PCS at [70(a)].

19 In accordance with the agreement, the first defendant duly incorporated EPS Hong Kong and the second defendant in Hong Kong and Singapore respectively. Bank accounts for both these companies were also set up. The first defendant admitted that she was remunerated and reimbursed for her expenses in respect of the setting up of the companies as follows:

s/n	Date	Amount	Reason
1)	11 June 2018	£5,000[36]	Advance on fees
2)	12 June 2018	US$9,360[37]	Expenses
3)	2 July 2018	US$5,233.86[38]	Expenses
4)	19 July 2018	€6,000[39]	Expenses
5)	27 July 2018	€5,000[40]	Expenses
6)	31 July 2018	€1,000[41]	Expenses
7)	14 August 2018	US$2,500[42]	Expenses
8)	4 September 2018	£5,000[43]	Advance on fees

36 P's AEIC at p 62; TJ's AEIC at pp 105 and 340; Transcript, 25 November 2020, p 81 lines 2–9.

37 P's AEIC at p 63; TJ's AEIC at pp 107, 111, and 341; Transcript, 25 November 2020, p 99 lines 24–25 and p 100 lines 1–6.

38 P's AEIC at p 66; TJ's AEIC at pp 127 and 344; Transcript, 25 November 2020, p 107 lines 18–21 and p 108 line 13–25.

39 P's AEIC at p 67; TJ's AEIC at pp 227 and 339; Transcript, 25 November 2020, p 122 lines 17–22.

40 P's AEIC at p 70; TJ's AEIC at pp 229–230 and 347; Transcript, 25 November 2020, p 123 lines 19–21.

41 TJ's AEIC at p 288; Transcript, 25 November 2020, p 123 lines 22–25.

42 P's AEIC at p 72; TJ's AEIC at pp 290–291 and 350; Transcript, 25 November 2020, p 127 lines 23–25 and p 128 lines 1–7.

43 P's AEIC at p 62; TJ's AEIC at pp 313 and 340; Transcript, 25 November 2020, p 132 lines 15–23.

s/n	Date	Amount	Reason
9)	4 September 2018	€2,134.22[44]	Advance on fees
10)	10 September 2018	£1,900[45]	Advance on fees
11)	28 September 2018	US$7,231.21[46]	Advance on fees
12)	5 October 2018	£1,606.66[47]	Advance on fees
13)	8 October 2018	US$200	Advance on fees
14)		£2,455.28[48]	Advance on fees

20 Between 9 October 2018 and 15 October 2018, a total sum of US$1,028,455.00 was deposited into the second defendant's DBS account (the "Funds"). These monies were received by the second defendant for various orders of beauty products from its customers, and the customers' payments were processed through "MeikoPay" and paid to the second defendant's DBS account via a third party called Secret Rise Electronic Technology Limited ("Secret Rise").[49] MeikoPay is a licensed payment processing solutions brand operated by Shenzhen Hongzhanzheng Trading Co Ltd, a company incorporated in China.

s/n	Date	Amount	Transferor

44 P's AEIC at p 76; TJ's AEIC at p 353; Transcript, 25 November 2020, p 134 lines 1–6.

45 P's AEIC at p 78; TJ's AEIC at pp 318 and 355; Transcript, 25 November 2020, p 135 lines 1–4.

46 P's AEIC at p 80; TJ's AEIC at p 357.

47 P's AEIC at p 81; TJ's AEIC at p 358; Transcript, 25 November 2020, p 138 lines 13–17; p 143 lines 3–7.

48 P's AEIC at p 62; TJ's AEIC at p 340; Transcript, 25 November 2020, p 143 lines 23–25 and p 144 line 1.

49 P's AEIC at [74] and [75], and Exhibit "DF-48".

s/n	Date	Amount	Transferor
1)	9 October 2018	US$310,709	Secret Rise
2)	12 October 2018	US$237,918	Secret Rise
3)	15 October 2018	US$230,418	Secret Rise
4)		US$249,410	Secret Rise

21 In breach of her obligations under the agreement, the first defendant acted without the knowledge and approval of the plaintiff and, from 25 October 2018 to 1 November 2018, transferred sums totalling the amount of approximately US$1,070,950.02 (the "Unauthorised Transfers") out of the DBS Bank account of the second defendant to various recipients. The plaintiff alleges that the recipients of the Unauthorised Transfers were accounts owned and/or controlled by the first defendant. The Unauthorised Transfers were as follows:[50]

s/n	Payment Date	Amount	Amount in US$	Recipient	Bank account
1)	25 October 2018	£49,301.00	64,605.40	ESP Worldwide	Starling Bank Limited (UK)
2)		£72,603.00	95,140.98	Tasmania Limited	Starling Bank Limited (UK)
3)	25 October	US$49,349.00		EPS Hong Kong	Standard Chartered

[50] PCS, Annex A; P's AEIC at pp 152–155.

s/n	Payment Date	Amount	Amount in US$	Recipient	Bank account
	2018				Bank (Hong Kong)
4)		€186,291.00	214,151.85	Second defendant	Deutsche Handelsbank AG (Germany)
5)	26 October 2018	US$47,266.00		EPS Hong Kong	Standard Chartered Bank (Hong Kong)
6)		US$27,908.00			
7)		£121,904.00	157,475.59	Second defendant	Deutsche Handelsbank AG (Germany)
8)		€196,614.06[51]	225,260.66		
9)		US$140,000.00		EPS Hong Kong	Standard Chartered Bank (Hong Kong)
10)	1 November 2018	HK$384,346.00	49,792.56		

22 While the plaintiff originally pleaded and attested that the transfer on 1 November 2018 to EPS Hong Kong was a sum of US$7,297.52,[52] it was then clarified at the trial that this was actually a sum of US$49,792.56, as shown in the second defendant's DBS statement.[53]

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51 P's AEIC at p 177.

52 P's AEIC at [113]–[114]; SOC Amd 2 at [16].

53 Transcript, 17 November 2020, p 36 lines 8–11; Transcript, 26 November 2020, p 34 line 22–p 36 line 7.

23 However, there were also corresponding returns to the second defendant's DBS bank account from 9 November 2018 to 12 November 2018 amounting to approximately US$498,332.37.[54]

s/n	Date	Amount	Amount in USD	Transferor
1)	9 November 2018	£49,301.00	US$62,915.23	ESP Worldwide
2)	9 November 2018	£72,603.00	US$92,651.96	Tasmania Ltd
3)	31 October 2018	US$47,244.00		EPS Hong Kong
4)	2 November 2018	£121,904.00	US$155,567.18	Second defendant
5)	12 November 2018	US$139,954.00		EPS Hong Kong

24 I highlight, for completeness, that the plaintiff has mis-stated the inward transfer on 12 November 2018 in Annex A of his closing submissions as US$178,601.60 rather than US$139,954.00 (by erroneously treating the US$139,954.00 as GBP, thereby mistakenly converting "GBP" 139,954.00 into US$178,601.60). Based on the above estimated converted sums in USD, this means that the *net* unauthorised transfers out of the second defendant's DBS bank account from 9 November 2018 to 12 November 2018 was US$572,617.65 (US$1,070,950.02 minus US$498,332.37) ("Net Unauthorised Transfers").[55]

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54 See PCS, Annex A.

55 See PCS, Annex A.

25 The plaintiff alleges that the first defendant attempted to conceal her unauthorised transfers of funds by informing the plaintiff and Mr Jackson that the DBS Bank account had been frozen by the authorities in Singapore and that she had lost access to the account. She later claimed that the account had been "hacked" and that all the moneys were lost. As a result, the plaintiff only discovered the details of the Unauthorised Transfers out of the second defendant's DBS Bank account in May 2019, after the relevant documents were provided by DBS Bank Ltd to the plaintiff pursuant to the latter's pre-action disclosure application in HC/OS 1564/2018.[56] The plaintiff also alleges that the first defendant has wrongfully refused to acknowledge that he is the beneficial owner of the shares in EPS Hong Kong and the second defendant, and to hand over the share certificates and other relevant documents relating to the companies that are in her possession.

26 Further, the plaintiff also discovered that, from 12 November 2018 to 15 April 2019, there were various additional unauthorised transfers, aside from the Unauthorised Transfers, from the second defendant's DBS account amounting to a total of US$877,135.16 (collectively referred to as the "Continuous Unauthorised Transfers" by the plaintiff in his statement of claim, which I will adopt in this judgment, even though I think that "Continuing Unauthorised Transfers" is probably more accurate).[57]

s/n	Payment Date	Amount	Recipient	Bank account
1)	12 November 2018	£100,583.00	EPS Hong Kong	Standard Chartered

[56] SOC Amd 2 at [18]–[20]; P's AEIC at [116]; TJ's AEIC at p 407.

[57] See PCS, Annex A; P's AEIC at pp 157–169.

s/n	Payment Date	Amount	Recipient	Bank account
				Bank (Hong Kong)
2)		£100,582.90	EPS Hong Kong	DBS Bank (Hong Kong)
3)		£7,882.51	Otto C Meier	UBS Switzerland
4)	13 November 2018	US$143,586.95	EPS Hong Kong	DBS Bank (Hong Kong)
5)	17 December 2018	€115,050.98	EPS Hong Kong	Standard Chartered Bank (Hong Kong)
6)	19 December 2018	€168,977.91	EPS Hong Kong	DBS Bank (Hong Kong)
7)	11 January 2019	€96,553.20		
8)	15 April 2019	€30,000.00		

27 The plaintiff pleaded that, by virtue of the foregoing, the first defendant was the agent and trustee of the plaintiff, and the first defendant had acted in breach of her express and/or implied contractual duties as nominee owed to the plaintiff. Alternatively, the first defendant had acted in breach of her fiduciary duties owed as nominee to the plaintiff. Consequently, the plaintiff has suffered loss of control over the shares of the second defendant; loss in value of the shares of the second defendant; costs and expenses of approximately S$30,000.00, £64,585.00, and US$5,325.00 incurred in investigating and

uncovering the misappropriation of the above sum; and the sum of the Funds amounting to US$1,028,455.00.[58]

28 In addition, two further inward transfers totalling €382,693.00 (approximately US$435,066.28), which were not highlighted to me in the plaintiff's closing submissions, were made into the second defendant's DBS bank account.[59]

s/n	Date	Amount	Amount in USD
1)	28 November 2018	€186,149.00	US$211,624.34
2)		€196,544.00	US$223,441.94

29 The amount in USD highlighted above was made by applying the conversion rate of US$1: €0.87962 as at 28 November 2018, which is the rate applied by the plaintiff in his closing submissions. This means that the *net* Continuous Unauthorised Transfers would amount to about US$442,068.88 (US$877,135.16 minus US$435,066.28) ("Net Continuous Unauthorised Transfers"). I should add that the plaintiff has also raised (a) a claim in conspiracy against the first and second defendants for having conspired wrongfully with intent to injure him by unlawfully misappropriating funds from the second defendant's DBS Bank account,[60] and (b) a claim against the first defendant for unjust enrichment by her receipt of the funds withdrawn from the DBS Bank account without providing any consideration.[61]

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58 SOC Amd 2 at [2] and [21]–[22].

59 P's AEIC at p 156; PB 485 and 506–507; Transcript, 26 November 2020, p 61 lines 6–11.

60 SOC Amd 2 at [21(iii)–(iv)].

61 SOC Amd 2 at [21(v)].

The defendants' case

30 The first defendant's pleaded case is that she never agreed to be a nominee shareholder or director in relation to EPS Hong Kong or the second defendant. Instead, she claims that, in or around September 2017, she entered into an agreement with Mr Jackson, which she described as an "online outsourcing agreement". Under this agreement, Mr Jackson would set up an online "health, wellness and fashion" business for the first defendant at his own expense, and also assist her in growing and operating this business. In exchange for his help in setting up and developing the first defendant's online business, Mr Jackson would be entitled to 50% of the profits from the business.[62]

31 The first defendant's online business was operated through entities like EPS Hong Kong and the second defendant, which she claims were owned entirely by her. As such, she claims that she set up these companies for her own purposes, and not for the plaintiff.

32 The first defendant's case is that, after she set up the DBS Bank account of the second defendant, she handed control of the account over to Mr Jackson and Ms Flynn, who is an accountant. Because she claimed not to have any control over the DBS Bank account, the first defendant denied that she was in any way responsible for the Unauthorised Transfers of funds from the DBS Bank account.[63]

33 Further, the first defendant also raises an alternative defence that the plaintiff's claims should not be allowed as a matter of public policy. This is because it is alleged that the plaintiff, Mr Jackson and Ms Flynn had

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62 Defence (amendment no. 2) dated 29 September 2020 ("Defence Amd 2") at [5]–[6].

63 Defence Amd 2 at [9] and [13]–[16].

incorporated EPS Hong Kong and the second defendant to facilitate money laundering and the Eat Pray Shop online platform did not carry out any *bona fide* business. As such, the first defendant alleges that the funds received into the DBS Bank account of the second defendant were "suspicious" in nature.[64]

The trial and closing submissions

34 The trial of this matter was heard remotely over the online platform "Zoom" from 17 to 26 November 2020. This was because the plaintiff, his two factual witnesses (Mr Jackson and Ms Flynn) and the first defendant were all based overseas, and would have found difficulty travelling to Singapore because of the Covid-19 restrictions.

35 At the end of the trial, I gave directions for the parties to file and exchange their written closing submissions and reply submissions. Just two days before the closing submissions were due, the defendants' solicitors and counsel, Mr Keith Hsu and Mr Edison Tam from Emerald Law, applied to discharge themselves. An Assistant Registrar made an order granting that application on the next day. The plaintiff duly filed his closing submissions on time, but the defendants did not. When contacted by the Registry, the first defendant then replied by email to state that she did not "wish to hold up the courts any further and so will not file the written submissions". As such, I was left unassisted by the defendants in terms of submissions on the issues that I had to decide in this matter.

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64 Defence Amd 2 at [22].

The issues

36 From my review of the parties' cases, the central issues that I have to decide in order to resolve the dispute between the parties are as follows.

(a) Had the first defendant agreed to act as the nominee of the plaintiff in relation to the setting up of the second defendant?

(b) If so, had the first defendant breached her obligations by causing the Unauthorised Transfers and Continuous Unauthorised Transfers to be transferred out of the DBS Bank account of the second defendant and refusing to relinquish control of the second defendant to the plaintiff?

(c) Does the doctrine of illegality bar the plaintiff's claims against the defendants?

37 There are also other issues which arise from the alternative claims made by the plaintiff, namely whether the first defendant has been unjustly enriched and whether the defendants are liable for unlawful means conspiracy. I will proceed to determine those issues only if it becomes necessary to do so.

The applicable law

38 The plaintiff pleaded that the first defendant acted as agent and trustee of the plaintiff and that she breached both her contractual and fiduciary duties as nominee. It is trite that an agency refers to a relationship, often undergirded by a contractual agreement, where one party is able to act for another party: see *Tonny Permana v One Tree Capital Management Pte Ltd and another* [2021] SGHC 37 ("*Tonny Permana*") at [91], citing Tan Cheng Han SC, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) ("*Tan Cheng Han*") at para 01.008. The issue of whether an agency relationship exists is a matter to

be determined *objectively* as a matter of law from what the parties said and did. Thus, the parties will be deemed to have consented to such a relationship even if they were ignorant of or did not intend the consequences of their action: *Ding Auto Pte Ltd v Yip Kin Lung and others* [2019] SGHC 243 ("*Ding Auto*") at [131], citing *Tan Cheng Han* at para 01.011. Whilst a defining characteristic of agency is the control exerted by the principal over the scope of the agent's authority, an agency relationship can arise even if the agreement between the parties gives full discretion to the agent in the exercise of the agent's authority: *Ding Auto* at [132], citing *Tan Cheng Han* at para 01.020.

39 As a result of being able to act for the principal, and thereby affect the principal's position and interests, the law imposes various duties on agents for the protection of the principal, such as fiduciary duties, duties of skill and care, and any contractual duties stipulated in the agreement between the agent and principal. Each unique agency relationship will be accompanied by distinct sets of rights and obligations. For instance, while the relationship of agent and principal is one of the established categories of fiduciary relationships, not every agent will owe fiduciary duties, and the presumption that a fiduciary relationship exists in an agency relationship can be rebutted by the particular facts of the case: *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 ("*Susilawati*") at [40]. The three common features of a fiduciary relationship are that (*Susilawati* at [41]):

(a) the fiduciary has scope for the exercise of some discretion or power;

(b) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and

(c) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

40 Therefore, the "critical feature" of a fiduciary relationship is that (*Susilawati* at [41], quoting Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97):

> … the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. [emphasis in original omitted]

41 Therefore, in general, the more extensive the agency relationship, *ie*, the greater an agent's authority or ability to affect the principal's interests, the more onerous the duties imposed upon the agent will be: *Tonny Permana* at [94]. Where an agent is able to unilaterally and significantly affect his principal's position or interests and has been conferred such powers in trust and confidence, extensive fiduciary duties may arise. On the other hand, where the agent has limited authority and discretion, the agent will owe few, if any, fiduciary duties: *Tonny Permana* at [99].

42 An agent may have "actual authority", either express or implied, or "apparent authority" (also known as "ostensible authority") to bind his principal. The plaintiff has relied on actual authority in this case (see [27] above). Express actual authority flows from the parties' explicit agreement on what the agent is authorised to do on behalf of the principal. The scope of an agent's implied authority depends on the circumstances of each case, including the parties' words and conduct towards each other. Where authority is implied, it is usually because it is "necessary to enable the agent to effectively perform

the task for which the agent had been appointed": *Lew, Solomon v Kaikhushru Shiavax Nargolwala and others and another appeal* [2021] SGCA(I) 1 at [47], affirming *Alphire Group Pte Ltd v Law Chau Loon and another matter* [2020] SGCA 50 at [7] and *Singapore Salvage Engineers Pte Ltd v North Sea Drilling Singapore Pte Ltd* [2016] SGHC 5 at [14].

43 With these applicable legal principles outlined, I now turn to examine (a) whether an agency agreement existed between the plaintiff and the first defendant because the first defendant agreed, whether explicitly or impliedly, to be a nominee for the plaintiff; and, if so, (b) whether the first defendant breached any of her duties as agent (contractual or fiduciary) owed to the plaintiff by making the Unauthorised Transfers and the Continuous Unauthorised Transfers. The determination of the second question necessarily involves an examination of what the first defendant, as agent for the plaintiff, was authorised – expressly or impliedly – to do on behalf of the plaintiff.

Did the first defendant agree to be a nominee for the plaintiff?

44 The plaintiff pleaded and attested that the terms of the plaintiff's engagement of the first defendant were set out in WhatsApp messages exchanged between Mr Jackson, on behalf of the plaintiff, and the first defendant from 7 June 2018 to 16 July 2018 (the "Agency Agreement"), and included but were not limited to the following.[65]

(a) Mr Jackson and the first defendant would share equally the sum of US$50,000.00, excluding disbursements, payable by the plaintiff.

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65 SOC Amd 2 at [7]; P's AEIC at [30] and [48]; TJ's AEIC at [30] and [56].

(b) The first defendant's share of US$50,000 would be in consideration for the first defendant's services as a nominee director and shareholder of a Hong Kong company; she was to take instructions from the plaintiff on matters relating to the said company and its bank accounts.

(c) The first defendant would assist, including by travelling to Hong Kong, to set up a Hong Kong company and open bank account(s) on its behalf.

(d) Mr Jackson and the first defendant would share equally an additional sum of US$10,000.00 excluding disbursements, payable by the plaintiff.

(e) The first defendant's share of US$10,000 would be in consideration for the first defendant's services as a nominee director and shareholder of a Singapore company; she was to take instructions from the plaintiff on matters relating to the said company and its bank accounts.

(f) The first defendant would assist, including by travelling to Singapore, to set up a Singapore company and open bank account(s) on its behalf.

(g) The first defendant would be the nominee director and shareholder of the companies incorporated in Hong Kong and Singapore. The share(s) of the companies were to be held for the absolute benefit of the plaintiff.

45 I find that the plaintiff's case in relation to the arrangements which Mr Jackson made with the first defendant concerning the setting up of EPS Hong Kong and the second defendant is overwhelmingly made out on the evidence before me. In particular, I find the following pieces of evidence to be the most illuminating.

The WhatsApp exchanges

46 Mr Jackson, who is based in the United Kingdom, and the first defendant, who resided in Austria at the material time, communicated mainly through WhatsApp messages. These electronic messages between Mr Jackson and the first defendant were adduced in evidence and provided an unambiguous picture of what transpired. They were entirely consistent with Mr Jackson's evidence that the first defendant had agreed to be a nominee for one of his clients on or around 7 June 2018 by setting up EPS Hong Kong.[66]

47 The WhatsApp messages also set out the terms of the nominee arrangement to which the parties had agreed. The first defendant would share equally in the sum of US$50,000 with Mr Jackson that would be paid by the client. She would also be reimbursed for all her expenses for travelling to Hong Kong to set up a company and its bank account. The first defendant agreed to serve as a shareholder and director of the company, as a nominee of Mr Jackson's "client", whose identity was not revealed to her.[67] Following from this, the messages show that the first defendant then travelled to Hong Kong to incorporate EPS Hong Kong and open a banking account, and she kept Mr Jackson updated throughout the process.[68]

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66 TJ's AEIC at [30].

67 See TJ's AEIC at pp 94–97.

68 See TJ's AEIC at pp 98–116.

48 In her oral evidence, the first defendant appeared to be taking the position that, since the identity of the plaintiff was not revealed to her, she could not have agreed to act as his nominee.[69] In my judgment, this was an untenable position to take. It is quite clear from the WhatsApp messages that the first defendant knew and agreed to be a nominee for one of Mr Jackson's "clients". Critically, she did not ask whom the client was, nor did she appear to care. That being the case, it does not lie in her mouth now to rely on her own nonchalance and disinterest in ascertaining the identity of this client to assert that she did not agree to act as his nominee. As for the authority of Mr Jackson to agree on terms with the first defendant on behalf of the plaintiff, that is established by the evidence of both Mr Jackson and the plaintiff.[70] As such, I find that the first defendant had agreed to act on behalf of the plaintiff as a nominee in respect of EPS Hong Kong.

49 Then, the WhatsApp messages go on to show that, on or around 16 July 2018, the first defendant agreed with Mr Jackson to be a nominee for his "client" in the setting up of the second defendant. She and Mr Jackson agreed to share an additional sum of US$10,000 to be paid by his "client". She would have to travel to Singapore to set up the second defendant and to open a bank account, and would also serve as a shareholder and director of the second defendant as a nominee of the "client". She would be reimbursed for all her expenses.[71] As in the case for EPS Hong Kong, the WhatsApp exchanges show that the first defendant travelled to Singapore, and she carried out the instructions to set up the second defendant and to open a bank account in its name. She was in

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69 Transcript, 25 November 2020, p 74 line 23–p 75 line 9; see also Transcript, 25 November 2020, p 87 lines 1–8.

70 Transcript, 18 November 2020, p 107 lines 3–12; TJ's AEIC at [27]–[31].

71 TJ's AEIC at pp 137–142.

constant communication with Mr Jackson. She would seek his instructions when problems arose and updated him regularly of what she did.[72]

50 The first defendant admitted that she was reimbursed for all her expenses for travelling to Hong Kong, and later to Singapore, for the setting up of EPS Hong Kong and the second defendant respectively (see [19] above).[73] She also admitted that she received payments of the agreed amounts due to her for her services. In fact, many of these payments to the first defendant were referred to in the WhatsApp exchanges.

51 I should point out that, while the defendants disputed the authenticity of all the WhatsApp messages between her, Mr Jackson and Ms Flynn through a notice of non-admission of documents dated 18 November 2019, it appeared to me that she eventually accepted that these messages were authentic. This is because, first, the defendants' counsel did not put to Mr Jackson or Ms Flynn during cross-examination that their WhatsApp exchanges with the first defendant were fabricated or had been tampered with, despite Mr Jackson and Ms Flynn giving evidence as to such WhatsApp messages.[74] Second, and more significantly, when the first defendant was cross-examined on her WhatsApp exchanges with Mr Jackson and Ms Flynn, she never once claimed that the messages that she had sent them, or had received from them, were not authentic. Instead, the first defendant spent most of her oral evidence attempting to explain away what she had said in her WhatsApp exchanges and to give a different "spin" on them, as I will explain below.

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72 TJ's AEIC at pp 225–230.

73 Transcript, 25 November 2020, p 131 lines 1–7.

74 See Transcript, 20 November 2020, p 173 lines 2–14.

52 When referred to her WhatsApp exchange with Mr Jackson, the first defendant tried to claim initially that she did not know that she was being asked to be a nominee for a client of Mr Jackson's. But, when she was pressed further, she admitted that Mr Jackson was indeed asking her to be a nominee on behalf of one of his clients.[75] When referred by counsel to particular statements in those exchanges, the first defendant often asserted that they were discussions about other nominee arrangements with other potential clients, and not the plaintiff.[76] But, simply reading those messages would show that the first defendant could not have been talking about anything else. It was patently obvious to me that the first defendant was just trying to obfuscate and confuse matters.

The Mandatory Declaration

53 The plaintiff adduced in evidence a one-page document titled "MANDATORY DECLARATION" dated 27 July 2018 which was executed by the first defendant, and where she declares that the sole share that she held in the second defendant was held as a nominee for "absolute benefit of the Beneficial Owner".[77] Mr Jackson gave evidence that he had requested this form from the first defendant by email.[78] When the form was executed by the first defendant, the name and details of the "Beneficial Owner", *ie* the plaintiff, was not set out in the form. That portion of the form where the name of the "Beneficial Owner" should appear was left blank. The first defendant replied by email on 29 August 2018 to ask, amongst other things: "Who shall I put as

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75 Transcript, 25 November 2020, p 73 line 14–p 76 line 7.

76 Transcript, 25 November 2020, p 74 lines 9–22.

77 P's AEIC at p 54.

78 TJ's AEIC at [70] and pp 296–304.

BO?", and the email reply from Mr Jackson on the same date was that: "you [can] leave BO blank but fill up the rest – backdate to formation please".[79] This was consistent with the fact that the first defendant was only told that she would be a nominee for one of Mr Jackson's clients and she was not told of the plaintiff's identity. As already mentioned, the first defendant expressed no interest in the identity of this client.

54 There was then an email from the first defendant to Mr Jackson dated 29 August 2018 where she attached a scanned copy of the signed Mandatory Declaration. In that email, she stated: "Here you go! I will fedex the original."[80] Subsequently, Mr Jackson received by courier a set of documents from the first defendant, which included the signed original copy of the Mandatory Declaration. However, the signed original copy was not produced by the plaintiff or Mr Jackson in evidence because it had been misplaced.[81]

55 The first defendant's position is that she never signed the Mandatory Declaration. She alleges that the signature that appears in the copy of the signed form produced in evidence by the plaintiff, which resembles her signature, was forged.[82] At trial, counsel for the defendants drew my attention to the fact that they served a notice of non-admission dated 18 November 2019 in relation to the Mandatory Declaration. The first defendant also claims that the email exchanges with Mr Jackson about the Mandatory Declaration, and the email attaching the scanned signed copy of that document, were doctored.[83]

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79 PB 218; TJ's AEIC at p 296.

80 TJ's AEIC at p 296.

81 Transcript, 20 November 2020, p 66 lines 11–21.

82 Transcript, 26 November 2020, p 102 lines 12–23.

83 Transcript, 26 November 2020, p 99 line 14–p 101 line 21.

56 I was not able to accept the first defendant's objections about the authenticity of the signed Mandatory Declaration or the email exchanges with Mr Jackson about this document. The plaintiff has produced a copy of the signed Mandatory Declaration. There has been a reasonable explanation by the plaintiff and Mr Jackson as to why the original signed version could not be produced. From a visual comparison of the signature on the copy of the Mandatory Declaration adduced in evidence with the first defendant's signature in her affidavit of evidence-in-chief, it would appear that the first defendant's signature closely resembles the signature that is on the signed Mandatory Declaration. In such circumstances, I find that the evidential burden had shifted to the defendants to adduce evidence to show that the signature in the disputed document is a forgery. Indeed, this is also consistent with *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [157], where the Court of Appeal held that the burden of proof is on the party alleging forgery to prove the forgery. This could have been done, for instance, with expert handwriting evidence. For reasons best known to the defendants, this was not done.

57 In fact, despite such a serious allegation that there has been forgery of her signature, I find it puzzling that the first defendant did not make a police report in Singapore. When asked by the plaintiff's counsel why she did not do so, I find that the first defendant could not come up with any credible explanation – the only excuse she could muster was that she "spen[t] all [her] money and [her] efforts to clear [her] name".[84] This is not only a convenient excuse but also, more importantly, illogical and incredible, since filing a police report would not incur much, if any, extra cost for the first defendant. As such,

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84 Transcript, 26 November 2020, p 102 line 25–p 103 line 2.

I was not inclined to believe her allegation that her signature had been forged on the Mandatory Declaration.

58 Significantly, the defendants' treatment of the email evidence is more damaging to their case. The plaintiff gave discovery of the email exchanges of 29 August 2018 between the first defendant and Mr Jackson. The native copies of the emails have been with Mr Jackson all this while. However, the defendants did not even bother to inspect the native copies of the emails. Neither did they call any forensic expert to prove their rather serious allegations that the emails were doctored. That being the case, it is quite clear to me that the defendants have utterly failed to prove that the first defendant did *not* sign the Mandatory Declaration and email a scanned copy of the document over to Mr Jackson, as the emails show quite starkly.

59 The terms of the Mandatory Declaration spell out the first defendant's acknowledgment that she is a nominee in respect of her shareholding in the second defendant. It also sets out the obligations she had undertaken as a nominee, including to comply with all the instructions of the "Beneficial Owner", *ie* the plaintiff. That being so, there can be little doubt that there is absolutely no merit to the first defendant's denial that she was not a nominee. There was similarly no merit to the first defendant's claim that she owned the second defendant absolutely.

Communications from Dr Otto C Meier-Boeschenstein

60 By early November 2018, after the loss of the funds from the second defendant's DBS Bank account, the first defendant was facing demands from Mr Jackson to hand over control of the second defendant to the plaintiff by

executing the necessary board resolutions and share transfer forms.[85] On 9 November 2018, Mr Jackson received an email from one Dr Otto C Meier-Boeschenstein ("Dr Meier"), an attorney based in Zurich, Switzerland, who stated that he had been entrusted by the first defendant to represent her in all matters relating to the second defendant.[86]

61 Dr Meier then wrote a detailed email on 14 November 2018 to Mr Jackson setting out the first defendant's position.[87] In essence, Dr Meier stated that the first defendant had agreed to Mr Jackson's request to be a nominee shareholder and director in relation to the second defendant for one of his clients. In exchange, 20% of the sales revenue of the second defendant would remain in the second defendant and be shared equally between herself and Mr Jackson. The first defendant was purportedly unaware of the substantial banking transactions that had taken place in the DBS Bank account of the second defendant in October 2018 because these were all effected by Mr Jackson or Ms Flynn. Amongst other things, Dr Meier demanded, on behalf of the first defendant, proof of the identity of the "ultimate beneficial owner" and also for her "part of the margin of the transactions".

62 In my view, the email of 14 November 2018 from Dr Meier contained clear admissions on the part of the first defendant that she was merely a nominee in respect of her shareholding and directorship in the second defendant. When cross-examined on this email, the first defendant made what can only be described as an outrageous attempt to explain away its contents. She claimed that it was not Dr Meier who wrote and sent the email in question. Instead, she

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85 P's AEIC at [98]–[103]; TJ's AEIC at [106]–[110] and pp 410–412.

86 PB 242–243.

87 PB 245–247.

had asked someone to impersonate Dr Meier and to compose and send the email. When pressed, she could not even name the person she had purportedly asked to impersonate Dr Meier. She claimed that she did not even know the imposter's last name. She claimed that she did not give the imposter instructions about what exactly to state in the email. She tried to disassociate herself from the email's contents by claiming that it was all thought up by the imposter, and that she did not even read a draft of the email before he sent it out.[88] I find these claims patently unbelievable.

63 In his email of 14 November 2018, Dr Meier refers to a phone conversation that he had with Mr Jackson on 12 November 2018.[89] When referred to this, without skipping a beat, the first defendant glibly replied that the imposter must have pretended to be Dr Meier in the phone call with Mr Jackson.[90] In my judgment, the first defendant's evidence in this regard borders on absurdity.

64 Therefore, needless to say, I have little hesitation in rejecting the first defendant's incredible explanations about Dr Meier. As the counsel for the plaintiff pointed out, it is undisputed that there was a transfer of CHF 10,000 (or £7,882.51) from the second defendant's DBS Bank account to Dr Meier on 12 November 2018.[91] This is clear evidence that the first defendant had instructed Dr Meier around this period of time to represent her in dealing with the demand made by the plaintiff and Mr Jackson. That the transfer of funds to Dr Meier was on 12 November 2018, and the dates of Dr Meier's abovementioned emails

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88 Transcript, 26 November 2020, p 84 line 12–p 90 line 19.

89 PB 245.

90 Transcript, 26 November 2020, p 96 lines 4–25.

91 Transcript, 26 November 2020, p 50 line 5–p 51 line 6.

to the plaintiff were on 9 and 14 November 2018, is too much of a coincidence. I thus reject the first defendant's claims regarding Dr Meier.

The alleged online outsourcing agreement with Mr Jackson

65 A significant part of the first defendant's case was that Mr Jackson had agreed to set up an online business for her, and this was done using, amongst other companies, EPS Hong Kong and the second defendant. Hence, the first defendant claimed that the second defendant (and EPS Hong Kong) belonged entirely to her. In return, the first defendant and Mr Jackson would allegedly share in the profits generated by the online business.[92]

66 The difficulty with the first defendant's evidence about the online outsourcing agreement with Mr Jackson is that it is completely unsupported by any written evidence. As already mentioned, the first defendant's communications with Mr Jackson were mostly in the form of WhatsApp messages and emails. But there is nothing in those written communications that even hinted at the existence of such an agreement between Mr Jackson and the first defendant that he would set up these companies for her benefit. In fact, quite the contrary, as I have already found, the written communications are entirely consistent with Mr Jackson's evidence that the first defendant was acting as a nominee for one of his clients. Further, despite the first defendant's claims that she was actively running an online business involving the sale of health and beauty products, she was not able to show *any* documents at all to substantiate her claims. In fact, she could not even name any of her suppliers or service providers that she used, let alone produce any documents from any of these entities.

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92 D1's AEIC at [8]–[12].

67 Not only that, the first defendant's evidence as to the terms of the alleged agreement with Mr Jackson fluctuated over time. Dr Meier's email of 14 November 2018, which I have already referred to above, stated that 20% of the sales generated by the second defendant's business would be shared equally with Mr Jackson. In her email of 5 April 2019 sent to the plaintiff's solicitors in response to their letter before action, the first defendant claimed that Mr Jackson and her had agreed that she would get "10% of GROSS revenues from the online business".[93] However, in the defendants' pleaded case and the first defendant's affidavit of evidence-in-chief, she claimed that she was entitled to 50% of the profits from the online business.[94] When confronted in cross-examination about this inconsistency, the only answer the first defendant could muster was that the reference to 10% of the gross revenues in her email of 5 April 2019 was a typographical error, and should read 50%.[95] I reject this explanation as being all too convenient. Further, that might explain the figure of 10% but it did not explain why there was a reference to gross revenues instead of profits.

68 Critically, and worst of all, the first defendant's allegation that she had an agreement with Mr Jackson for him to set up an online business with her was not even put to Mr Jackson when he was cross-examined, even though this is an important part of the first defendant's case. As such, it ought to have been put to Mr Jackson for him to be given the opportunity to respond. It is trite that the rule in *Browne v Dunn* (1893) 6 R 67 requires parties to put to a witness important points of contention about the witness or the evidence given by the witness in order to give the witness a fair opportunity to meet that contention.

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93 PB 251–253.

94 Defence Amd 2 at [6.4]; Edith's AEIC at [9].

95 Transcript, 26 November 2020, p 108 line 3–p 109 line 7.

Failure to do this may preclude the party concerned from making that submission: *Michael Vaz Lorrain v Singapore Rifle Association* [2021] 1 SLR 513 at [26], citing *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 at [48]; see also *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [17]. Consequently, I find that it is not open to the defendants to claim that the first defendant had an agreement with Mr Jackson for him to set up an online business with her.

69 In summary, for all the above reasons, I find the evidence of the first defendant to be highly unsatisfactory. On the other hand, the plaintiff's case is corroborated by the WhatsApp exchanges, emails and other communications that emanated from the first defendant or her lawyers. As such, I am left to conclude that the plaintiff has established his case that the first defendant was a nominee in relation to her position as a shareholder and director of the second defendant. This means that, pursuant to the Agency Agreement between the plaintiff (through Mr Jackson) and the first defendant, the first defendant acted as agent for the plaintiff on the terms outlined at [44] above. I now turn to the question of the specific duties owed by the first defendant to the plaintiff pursuant to the Agency Agreement.

Duties owed by the first defendant as agent of the plaintiff

70 The plaintiff pleaded that the first defendant owed contractual and fiduciary duties to the plaintiff. The plaintiff did not specify the fiduciary duties owed by the first defendant.[96] As for the contractual duties, the plaintiff pleaded

[96] See SOC Amd 2 at [14].

that, on a "true construction" of the Agency Agreement, the first defendant owed the following duties to the plaintiff.[97]

(a) Notwithstanding that the first defendant would be a nominee director and the sole shareholder of the second defendant, the first defendant held the shares of the second defendant on trust for the plaintiff. At all material times, the plaintiff was and is the beneficial owner of the shares of the second defendant.

(b) The first defendant was to take instructions from the plaintiff or his agent on matters relating to the second defendant and its DBS Bank account. Therefore, whilst the first defendant had exclusive access to the second defendant's DBS Bank account, the first defendant was only to use the DBS Bank account on express instructions from the plaintiff, and to transfer such funds to the plaintiff or third parties upon its instructions.

(c) The plaintiff would provide outgoing remittance instructions to the first defendant. The first defendant would remit outgoing remittance(s) upon the plaintiff's express instructions. The first defendant would notify the plaintiff or his agent of any incoming fund remittance as and when received.

(d) Upon the plaintiff's request, the first defendant was to render a true and complete account of all funds deposited in the second defendant's DBS Bank account, including by providing to the plaintiff true and accurate statements of outstanding balances in the DBS Bank account as well as the DBS Bank account's transaction history.

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97 SOC Amd 2 at [13].

(e) The first defendant owed a duty to act *bona fide* in the interest of the plaintiff.

(f) The first defendant owed a duty to act for the proper purposes of the plaintiff in relation to its affairs and/or the affairs of the second defendant.

71 I find the plaintiff's foregoing list to be a bit unclear. First, while the foregoing points were framed as "duties" owed by the first defendant to the plaintiff pursuant to the Agency Agreement, it is evident that not all of them are "duties" *per se*. For instance, the proposition in [70(a)] above that the first defendant held the shares of the second defendant on trust for the plaintiff is *not* a "duty". Instead, it concerns the state of the beneficial *ownership* of the shares of the second defendant, and the relationship between the first defendant (as trustee) and the plaintiff (as beneficiary). If this relationship exists, then the question arises as to *what duties* the first defendant, as trustee, owes to the plaintiff, as beneficiary. Similarly, the propositions at [70(b)] and [70(c)] are also not duties. Rather, they pertain to the *scope* of the first defendant's authority to act for the plaintiff.

72 Second, while the plaintiff's pleading gives the impression that these "duties" are *contractual* duties arising from the Agency Agreement, it is apparent that the duties listed at [70(e)] and [70(f)] above are actually *fiduciary* duties: see *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Ho Yew Kong*") at [134]–[135]; and *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 at [40]. The core character of a fiduciary duty is that it is imposed to exact loyalty from the agent: see *Ho Yew Kong* at [135]. On the other hand, as aforementioned, the plaintiff omitted to specify the particular fiduciary duties

owed by the first defendant to the plaintiff; the plaintiff only pleaded broadly that, "alternatively, the [first defendant] owed fiduciary duties as an agent and trustee to the [p]laintiff in relation to the shares of [the second defendant] held by the [first defendant] on trust for the [p]laintiff".[98] This is apt to confuse.

73 Third, the duty to account listed at [70(d)] above is not, strictly speaking, a "duty". Rather, the taking of an account is merely the first step of a *process* that enables the beneficiary to identify and quantify any deficit in the trust fund and seek the appropriate remedy by which it may be made good: see *UVH and another v UVJ and others* [2020] 3 SLR 1329 at [22], citing *Libertarian Investments Ltd v Thomas Alexej Hall* [2013] HKCFA 93 ("*Libertarian Investments*") at [167]–[168] (per Lord Millett NPJ).

74 Nevertheless, the plaintiff did at a minimum plead that:

(a) the first defendant held the second defendant's shares on trust for the plaintiff;

(b) the scope of the first defendant's authority to act on behalf of the plaintiff in relation to the second defendant is limited only to what the plaintiff expressly authorises the first defendant to do; and

(c) the first defendant owed fiduciary duties to act *bona fide* in the interest of the plaintiff and to act for proper purposes.

75 The purpose of pleadings is to ensure that each party is aware of the case against it, and that the key consideration in this context is the need to prevent surprises arising at the trial: see *Tuitiongenius Pte Ltd v Toh Yew Keat and*

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98 See SOC Amd 2 at [14].

another [2021] 1 SLR 231 at [65]. While the plaintiff's pleadings were not drafted with precision, it is clear that the defendants were not at all taken by surprise by the plaintiff's claims at [74] above because these were pleaded, attested, and run at trial. The next question is whether these claims are made out on the evidence.

76 I find that these three propositions at [74] above flow from the terms of the Agency Agreement, as outlined at [44] above. It also bears clarifying that, in my view, the first defendant's fiduciary duties to act *bona fide* in the interest of the plaintiff and to act for proper purposes arise not only from the first defendant's position as trustee of the second defendant's shares *vis-à-vis* the plaintiff (per [74(a)] above) but also from the Agency Agreement. I note that it is the plaintiff's case that the first defendant was not given any discretion to affect the plaintiff's position, but instead had to act according to the strict instructions of the plaintiff. Applying the considerations at [39] to [41] here, this means that the first defendant had not been conferred broad powers and discretion in trust and confidence. Thus, I accept that the first defendant does not owe the plaintiff "extensive" fiduciary duties.

77 However, this does not mean that the first defendant owes the plaintiff *no* fiduciary duties at all; even if granted limited discretion, an agent can owe a "few" fiduciary duties (see [41] above). In this case, the first defendant had *exclusive* access to the second defendant's bank account. The first defendant was also travelling to a foreign country to act for the plaintiff as nominee director and shareholder of the second defendant. Critically, the first defendant was entrusted with funds in her position as agent. In these circumstances, the relationship between the plaintiff and the first defendant is therefore one which gives the first defendant a special opportunity to act to the detriment of the plaintiff, who is accordingly vulnerable to abuse by the first defendant's

position as the plaintiff's agent. This is squarely within the consideration listed at [39(c)] and [40], and, for this reason, I find that, as the plaintiff's agent, the first defendant owes, minimally, the fiduciary duties to act *bona fide* in the plaintiff's interest and to act for proper purposes.

78 I also note, for completeness, that I do not find that the first defendant was a trustee of the second defendant's funds in the DBS Bank account. This will be explained further at [112] below.

79 It is undisputed that the plaintiff did not authorise the first defendant to effect the Unauthorised Transfers from the second defendant's bank account. Therefore, the Unauthorised Transfers would be a breach of the Agency Agreement (per [74(b)] above) and also the first defendant's fiduciary duty to act *bona fide* in the interest of the plaintiff and to act for proper purposes of the plaintiff's (per [74(c)] above), *if* the Unauthorised Transfers were indeed effected by the first defendant. This leads me to the next question.

Did the first defendant effect the transfer of funds from the second defendant's bank account?

80 The next issue that I have to decide is whether the first defendant was the person who effected the transfer of the funds from the second defendant's DBS Bank account in the period from October 2018 to April 2019. If so, the first defendant would be liable to the plaintiff for breach of her obligations as a nominee, since it is undisputed that she did not act on any instructions of the plaintiff or his agents in effecting such transfers.

81 There can be no dispute between the parties as to the precise inflows and outflows of moneys to and from the second defendant's DBS Bank account. This is because a full set of the bank statements and documents showing the

bank transfers have been obtained by the plaintiff from DBS Bank through the process of pre-action discovery. As these documents show, from 9 to 15 October 2018, there were four transfers of moneys to the DBS Bank account – *viz*, the Funds – totalling the amount of approximately US$1,028,455 (see [20] above).[99] The plaintiff gave evidence that these were the proceeds from the sale of products through the online business of Eat Pray Shop.[100]

82 From 25 October to 1 November 2018, there were outflows of funds – *viz*, the Unauthorised Transfers – from the second defendant's DBS Bank account to various recipients (see [21] above). Some of the transfers were converted into GBP, EUR and HKD.[101] The bank account balance was reduced to almost zero.[102] The first defendant denies any involvement with these outward transfers, the sum of which totalled almost all the funds in the account.

83 From 31 October 2018 to 12 November 2018, a portion of these funds were returned by the recipients to the second defendant (see [23] above). During this period, there were five transfers of funds to the second defendant's DBS Bank account totalling the amount of US$498,332.37.[103]

84 Then, from 12 November 2018 to 15 April 2019, the funds in the second defendant's DBS Bank account were once again depleted through transfers to various recipients – *viz*, the Continuous Unauthorised Transfers (see [26]

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99 PB 481.

100 P's AEIC at [74].

101 PCS, Annex A.

102 PB 487.

103 PCS, Annex A.

above).[104] As such, the balance in the bank account was again reduced to only a small sum (€9,545.15 and £122.73).[105]

Continuous Unauthorised Transfers from 12 November 2018 to 15 April 2019

85 At trial, the first defendant broadly admitted that she was the one who effected the transfers out of the account during the period from 12 November 2018 to 15 April 2019 referred to at [84] above.[106] Her evidence as to the reasons for these transfers ranged from the incredible to the incoherent. She said that she caused moneys to be transferred to EPS Hong Kong's Standard Chartered Bank account in Hong Kong because she knew that she needed to build up a legal fund to defend the case that would be brought by the plaintiff against her. She claimed that she already knew then that she was being "set up" by the plaintiff and Mr Jackson.[107] Not long later, the first defendant changed her evidence and claimed that she transferred the moneys to EPS Hong Kong to secure them, so that she could use the moneys to pay for the expenses of her online business conducted through the second defendant.[108] Yet, at the same time, she claimed that the bank account of EPS Hong Kong was now closed and the moneys are all gone, but she refused to explain how all the moneys had been expended and, if not fully used, where the balance of the moneys are now.[109]

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104 PB 486–498.

105 PB 498; P's AEIC at pp 99 and 147.

106 Transcript, 26 November 2020, p 36 line 22–p 38 line 10, p 43 line 21–p 45 line 4, p 50 line 1–p 52 line 11, p 52 line 22–p 53 line 22, p 61 line 18–p 62 line 19, p 64 line 20–p 66 line 8, p 69 line 18–p 70 line 12, p 72 lines 8–19.

107 Transcript, 26 November 2020, p 36 line 22–p 38 line 24.

108 Transcript, 26 November 2020, p 41 line 19–p 42 line 4.

109 Transcript, 26 November 2020, p 42 lines 11–25.

86 The first defendant did deny though that she was responsible for effecting the Unauthorised Transfers in the earlier period from 25 October to 1 November 2018 referred to at [82] above. Under cross-examination, the first defendant's evidence was that someone had "hacked" the bank account and transferred the sums out in the period from 25 October to 1 November 2018.[110] However, she claimed that she got the moneys back and "secure[d] those funds". By that, she explained that she had transferred out from the bank account the moneys that had been returned, as I have recounted above. She estimated that she had transferred out around US$800,000, although the figure was closer to US$500,000 as is clear from the bank statements.[111] I should add that the first defendant also claimed that she is entitled to the amounts that she had transferred out. This is because of the purported agreement with Mr Jackson concerning the profits of her online business of the second defendant, which was in operation and doing well.[112]

87 Given my findings above that there was in fact no such agreement with Mr Jackson, I find that the first defendant was not entitled to effect the Continuous Unauthorised Transfers out of the DBS Bank account of the second defendant, which she has admitted to carrying out, in the period from 12 November 2018 to 15 April 2019. Her excuses about needing to set up a fund for her legal expenses do not provide any legal justification for the withdrawals.

88 The only remaining factual dispute before me concerning these transfers out of the second defendant's DBS Bank account is whether the first defendant

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110 Transcript, 25 November 2020, p 10 lines 4–6; Transcript, 26 November 2020, p 8 line 1–p 10 line 6.

111 Transcript, 25 November 2020, p 11 lines 3–24.

112 D1's AEIC at [43]; Transcript, 25 November 2020, p 8 line 21–p 9 line 25.

was the person who had effected the Unauthorised Transfers out of the account from 25 October to 1 November 2018. It is to this issue that I now turn.

Unauthorised Transfers from 25 October to 1 November 2018

The online operation of the second defendant's DBS Bank account

89 When the second defendant's DBS Bank account was set up, the instructions given by Mr Jackson to the first defendant was that she was to obtain a separate SIM card and to register that new mobile phone number with DBS Bank. This is because, when banking transactions are effected online, apart from requiring the customer to key in the necessary login information on the DBS Bank online banking platform, the bank would also send a one-time password ("OTP") to the mobile phone number that is registered with the bank. This OTP must then be entered into the online banking platform in order for the banking transaction to be effected. Also, once the banking transaction is effected, an SMS notification of that transaction will be sent to the mobile phone number registered with the bank.[113]

90 The plan was that the SIM card would be couriered to Mr Jackson in the United Kingdom, in addition to providing him with the login details for online banking with DBS Bank. By doing so, Mr Jackson and/or Ms Flynn, who was assisting him, would be able to carry out banking transactions on DBS Bank's online platform without the first defendant's involvement. The OTP that would be sent by DBS Bank to the mobile phone number would be accessible by Mr Jackson and/or Ms Flynn since they would be in possession of the SIM card.[114]

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113 Transcript, 20 November 2020, p 92 lines 3–20.

114 Transcript, 20 November 2020, p 115 lines 19–22 and p 134 lines 18–20; Transcript, 25 November 2020, p 98 lines 20–23 and p 148 lines 1–14.

91 However, what in fact happened was that the first defendant did not obtain a separate SIM card as instructed. She admitted this.[115] Instead, it is undisputed that she registered her personal mobile phone number with DBS Bank. It is also undisputed that DBS Bank had the rest of her contact details, including her email address.[116]

92 On the instructions of Mr Jackson, the first defendant applied for access to online banking and was provided with the login details, which were an organisation ID, a user ID and a confidential PIN (collectively referred to as the "online banking login details"). It is not disputed that the first defendant passed on the online banking login details to Mr Jackson and Ms Flynn. With that information, Ms Flynn was able to access the online banking platform and she then changed the confidential PIN to one that was not known to the first defendant. Through this online access, Ms Flynn could view the balances and transactions in relation to the second defendant's DBS Bank account on the online banking platform.

93 The WhatsApp group chat among the first defendant, Mr Jackson and Ms Flynn called "EPS" was then set up. It was to enable Ms Flynn to effect transactions on the second defendant's account on the online banking platform with the assistance of the first defendant, who was supposed to quickly pass on any OTPs she received. The first defendant would do this by using the WhatsApp group chat.

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115 Transcript, 25 November 2020, p 151 lines 2–22.

116 Transcript, 25 November 2020, p 151 lines 5–6 and p 146 line 19–p 148 line 5; PB p 454.

94 In her oral evidence, the first defendant adamantly denied that her assistance was needed to effect transactions on the account through online banking. Under cross-examination, she claimed for the first time that Mr Jackson had asked her to install an application on her mobile phone that would automatically forward any SMS she received to an email address at DMB to which Mr Jackson and/or Ms Flynn had access. She claimed that she did install such an application, which was called "SMS forwarder".[117] However, the first defendant failed to adduce any evidence at all to show that "SMS forwarder" was ever installed on her mobile phone.[118] This is even though this would be easy for her to do given that, according to her, the application can be found on *her* mobile phone. I also find this evidence to be less than credible because this explanation that "SMS forwarder" had been installed in her mobile phone was not mentioned anywhere in her affidavit of evidence-in-chief.

95 While it is true that, in the WhatsApp messages between the first defendant and Mr Jackson, there was a brief discussion about possibly using "SMS forwarder",[119] Mr Jackson's and Ms Flynn's evidence was that it was never eventually installed.[120] I find it significant that it was also never put to Mr Jackson or Ms Flynn, when they were cross-examined, that the SMS messages sent to the first defendant's mobile number were also received by them through the use of the "SMS forwarder" application. Neither was there any reference in the "EPS" WhatsApp group chat or any WhatsApp exchanges or emails between the first defendant and Mr Jackson and/or Ms Flynn that "SMS

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117 Transcript, 25 November 2020, p 153 lines 16–19; TJ's AEIC at p 329.

118 Transcript, 26 November 2020, p 24 lines 3–17.

119 TJ's AEIC at p 329.

120 Transcript, 20 November 2020, p 147 lines 15–22; Transcript, 24 November 2020, p 72 lines 10–21.

forwarder" or any similar application had ever been installed or was being used.[121] Given the state of the evidence before me, I reject the first defendant's evidence about the use of "SMS forwarder" as yet another fabricated excuse.

96 I should add that the undisputed facts and the exchanges in the "EPS" WhatsApp group chat support the conclusion that the first defendant's assistance was vital before any transactions could be effected over the online platform in relation to the second defendant's DBS Bank account. There were at least two occasions when Ms Flynn had to urgently contact the first defendant over the group chat to ask for the OTP so that Ms Flynn could effect a transaction online for the DBS Bank account. If there was an "SMS forwarder" application being used, there would have been no need for Ms Flynn to seek the first defendant's assistance to effect transactions on the account.[122]

Loss of control over the DBS Bank account

97 As already mentioned at [20] above, from 9 to 15 October 2018, the second defendant's DBS Bank account was credited, in four separate transfers, with a total amount of approximately US$1,028,455. Through the "EPS" WhatsApp group chat, the first defendant was informed of these funds being credited to the account.

98 On 18 October 2018, Ms Flynn was instructed by the plaintiff to make a payment of €198,000 from the second defendant's account to Digimark Inc, a Canadian-registered company that had provided online advertising services for Eat Pray Shop. Ms Flynn then contacted the first defendant and told her of the intended payment, because she needed her assistance by providing the OTP that

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121 Transcript, 25 November 2020, p 165 lines 12–25.

122 See Transcript, 25 November 2020, p 166 line 10–p 167 line 18.

she received from the bank. The first defendant sent a WhatsApp message to Ms Flynn with the OTP that the bank had sent her. She later also sent a message to the "EPS" WhatsApp group chat that she had received an SMS text from the bank to notify her that the payment to Digimark Inc had been effected.[123]

99 This turned out to be untrue because, on 19 October 2018, Ms Flynn accessed the online banking platform and it showed that the balance of US$1,028,455 was intact. There had been no payment to Digimark Inc.[124]

100 Then, on 22 October 2018, Ms Flynn found that she could no longer access the online banking platform to view the balances and transactions in relation to the second defendant's bank account. The online banking login details were no longer working.[125] In short, she had been locked out of online access to the second defendant's bank account.

101 From the evidence that emerged at the trial, it is now clear what had transpired. The first defendant gave evidence that, on or prior to 20 October 2018, she had requested DBS Bank for new login details to access online banking. In fact, since the login details arrived by a letter dated 20 October 2018, the first defendant's request must have been made prior to that date. This request caused the bank to automatically invalidate the confidential PIN that had been set up by Ms Flynn and to reset it with a new confidential PIN.[126] That explains why Ms Flynn was not able to access the online banking platform to

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123 Sophie Flynn's AEIC dated 13 October 2020 ("SF's AEIC") at [11]–[12], [16]; PB 624, 647.

124 SF's AEIC at [13].

125 SF's AEIC at [14].

126 Sophie Flynn's supplementary AEIC dated 9 November 2020 ("SF's SAEIC") at [12]–[13]; Transcript, 25 November 2020, p 192 lines 1–4.

view the balances and transactions on the second defendant's bank account on 22 October 2018 and thereafter.

102 In this regard, the first defendant's oral evidence that she requested the bank for a new confidential PIN shows two possibilities. One is that the first defendant had told a blatant untruth in both her affidavit of evidence-in-chief and an affidavit sworn by her on 2 December 2019 for an interlocutory application for summary judgment. In both affidavits, the first defendant had unequivocally stated: "I did not request a new Organisation ID, User ID and/or PIN prior to 20 October 2018".[127] The other possibility is that the first defendant is, for reasons only known to herself, lying now in her oral evidence. I find the former to be more likely to be the case. Either way, it is quite clear to me that the first defendant has no qualms about lying on oath. She is a witness with little to no credibility at all.

103 According to the first defendant's claim at the trial, the new confidential PIN requested by the first defendant was sent to the registered address of the second defendant. Under cross-examination, the first defendant further admitted that, once the new confidential PIN was received at the registered office of the second defendant on 24 October 2018, it would have been sent to her by In.Corp, which was providing company secretarial services for the second defendant. She further conceded that, once she was in possession of the new confidential PIN, she would be able to log in and access the online banking platform.[128]

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127 Edith Woi's affidavit dated 2 December 2019 at [34]; D1's AEIC at [40].

128 Transcript, 26 November 2020, p 7 lines 5–16; Transcript, 25 November 2020, p 182 lines 10–24, p 191 lines 2–12; see SF's SAEIC p 14.

104 Given these facts, I find that, from 24 October 2018 onwards, it was the first defendant who was in control of the second defendant's DBS Bank account, in that she had free rein to effect transfers out of the account using the online banking platform. This is because of the indisputable fact that she had the new login details to carry out online banking on the second defendant's bank account and, more significantly, the fact that her mobile phone number was registered with DBS Bank. She was the one who was able to receive the OTPs sent by the bank that would have been required for the transactions to be effected online.

105 It follows from my findings above that the transfers of funds out of the second defendant's bank account that took place from 25 October to 1 November 2018 must have been effected by the first defendant. I do not accept her evidence that the account had been "hacked" as she claimed. If it were true that the first defendant discovered sometime on or around 31 October 2018 that the account had been "hacked", one would expect that the first defendant's natural reaction would have been to lodge a police report or, at least, to raise an alarm to the bank, who would then have frozen the account, so that the funds in the bank account would not be siphoned off. Yet, nothing of this sort was done, as there is no evidence at all before me that the first defendant had lodged a police report or complained to DBS Bank that there had been any unauthorised access or "hacking" of the second defendant's bank account.[129]

106 In her oral evidence, the first defendant conceded that she did not file a police report.[130] However, the first defendant claimed that DBS Bank had advised her to file a police report, and she thus called the police in Vienna, but

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129 Transcript, 26 November 2020, p 9 line 10–p 10 line 18.

130 Transcript, 26 November 2020, p 77 line 2.

was told by the police in Vienna that this was a "civil matter".[131] I find this to be an incredible explanation. If this were true, it is unbelievable that the first defendant would then leave the matter hanging and not pursue some recourse to reclaim the dissipated moneys, or inform Mr Jackson and/or Ms Flynn immediately and ask for their instructions, or, at the very least, update DBS Bank about what the police in Vienna told her so that she can be advised on the next steps, since it is *the first defendant's case* that it was *DBS Bank* who advised her to call the police. In any event, there is not a shred of evidence to show that the first defendant ever communicated to DBS Bank that the bank account had been "hacked" and that the second defendant's moneys had been "stolen". The critical point here is that the first defendant's evidence that the account had been "hacked" is highly improbable.

107 In any event, I reject the first defendant's evidence that she discovered the transfers out of the second defendant's bank account only on 1 or 2 November 2018. The first defendant admitted that she would receive SMS notifications whenever a transaction had been effected in the second defendant's bank account.[132] As such, the first defendant would have received SMS notifications for all ten transfers of funds out of the second defendant that took place from 25 October to 1 November 2018. It is utterly unbelievable for the first defendant to claim as she did that she did not check her text messages that time.[133] That cannot be accepted as the truth because, in this very period, she was in constant communication over the phone with Ms Flynn, who was desperate to find out why she had been locked out of online access to the second defendant's account.

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131 Transcript, 26 November 2020, p 76 line 16–p 77 line 18.

132 Transcript, 26 November 2020, p 5 line 25–p 6 line 2.

133 Transcript, 26 November 2020, p 6 lines 3–6.

108 An examination of the recipients of the funds transferred out in the period from 25 October to 1 November 2018 (see [20] above) also leads one to the conclusion that the first defendant must have been the one behind the transfers. The first defendant did not dispute that the recipients of the moneys were "accounts held by the [first defendant] and/or accounts controlled by the [first defendant]".[134] For instance, of the ten transfers, six of them were to EPS Hong Kong, the Hong Kong company which the first defendant set up and controlled. There was one transfer of US$95,140.96 to Tasmania Ltd, which is a company that the first defendant admitted to owning and controlling. There were even transfers to the second defendant's separate, *German* bank account,[135] which clearly were not set up pursuant to either the plaintiff's or Mr Jackson's instructions.

109 The first defendant's conduct when Mr Jackson and Ms Flynn were frantically trying to find out what happened to the funds in the second defendant's bank account is also telling. She was reluctant to assist them in obtaining information from the bank as to the alleged "hacking" and where the funds had been transferred to. She started making accusations against Mr Jackson and Ms Flynn that they had involved her in criminal activities. She was often unresponsive to their texts and emails. She refused to execute the necessary documents for the transfer of ownership and control of the second defendant to the plaintiff.[136] It is obvious that all this was done with the devious intent of delaying the discovery of her dishonest actions and impeding the recovery of the funds.

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134 See P's AEIC at [114].

135 Transcript, 26 November 2020, p 19 lines 16–22.

136 See SF's AEIC at [21]–[29]; TJ's AEIC at [97]–[110].

110 In my judgment, given my assessment of the totality of the evidence before me, I find that the first defendant had acted to deliberately prevent Ms Flynn and Mr Jackson from having online access to the second defendant's DBS Bank account, so that she could then effect the transfers out of the account. To put things bluntly, she had schemed to get her hands on the funds in the second defendant's account and she succeeded in doing so.

111 Therefore, I find that the Unauthorised Transfers and the Continuous Unauthorised Transfers were effected by the first defendant out of the second defendant's DBS bank account, and that this was done without any actual authority – whether express or implied – conferred by the plaintiff. Consequently, the first defendant breached her duty under the Agency Agreement. I also find that, by effecting the Unauthorised Transfers and the Continuous Unauthorised Transfers to dissipate the funds from the second defendant's DBS bank account to unauthorised recipients (controlled by the first defendant, no less), the first defendant had clearly breached her fiduciary duties to act *bona fide* in the plaintiff's best interests and to act for proper purposes.

112 For completeness, I note that, while the plaintiff pleaded that the first defendant acted as a trustee (of the second defendant's shares and the second defendant's funds), the plaintiff did not plead that the first defendant committed a breach of trust in relation to the second defendant's funds (see [27] above). This is correct because the first defendant is not, strictly speaking, a trustee of the funds in the second defendant's DBS bank account. This is because the first defendant is only the nominee director and shareholder of the second defendant for the plaintiff. Consequently, title to the second defendant's assets is not vested in the first defendant *herself*, but rather is vested in the second defendant: see *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 ("*Sim Poh Ping*") at [109]. Therefore, the first defendant

did not commit any breaches of trust by misapplying those funds. Instead, she committed custodial breaches of fiduciary duty.

113 Before I turn to the question of the appropriate relief below, I shall first consider the question of illegality raised by the first defendant.

Is the plaintiff's claim barred by illegality or considerations of public policy?

114 Given my findings above, the first defendant is *prima facie* liable to the plaintiff for breach of her obligations as a nominee by (a) making unauthorised withdrawals from the second defendant's DBS Bank account, and (b) refusing to relinquish control of the second defendant to the plaintiff. She has no claim to ownership of the second defendant or its funds.

115 In the defence, the defendants plead that the plaintiff's claim should not be allowed as a matter of public policy. It goes on to aver that the second defendant did not carry out any *bona fide* business; that the plaintiff, Mr Jackson and Ms Flynn were engaged in money laundering; and hence that they were involved in illegal acts. It was also averred that the first defendant was unaware of this illegality because she had been misled by Mr Jackson into thinking that the second defendant was set up for a legitimate online business.[137]

116 The defendants' submissions on this issue engages the doctrine of illegality. The principles on the doctrine of illegality have been clarified and summarised by the Court of Appeal's decision in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid Trading*"). The Court of Appeal set out a two-stage

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137 Defence Amd 2 at [22]–[23].

framework to determine if an agreement may be unenforceable due to illegality (*Ochroid Trading* at [64] and [65]).

117 At the first stage, the court ascertains whether the contract (and not the conduct) is prohibited either pursuant to a statute ("statutory illegality") or an established head of common law public policy ("common law illegality") (*Ochroid Trading* at [22] and [64]). If the contract is so prohibited by statute, then there can be no recovery whatsoever pursuant to the illegal contract, as the contract is void and unenforceable. This is not relevant in this case, as the defendants are not alleging that the Agency Agreement *itself* is illegal and prohibited by statute. Rather, the defendants' argument is that the Agency Agreement is *tainted* by illegality as it seeks to commit a crime, *viz*, money laundering.

118 Therefore, the relevant issue at hand is not statutory illegality but common law illegality. If the contract falls foul of established heads of common law public policy, then that would also render the contract unenforceable on the basis that it is contrary to public policy. Examples of the contracts rendered unenforceable under established heads of common law public policy include contracts prejudicial to the administration of justice (such as contracts to stifle a prosecution) and contracts to commit a crime, tort or fraud (*Ochroid Trading* at [29]).

119 Where the contract is not unlawful *per se* but is tainted by illegality in that it nevertheless involves the commission of a legal wrong in their formation, purpose or manner of performance, the enforcement of such a contract is subject to the limiting principle of proportionality (*Ochroid Trading* at [39] and [64]). This means that the court has to consider if it would be a proportionate response to the illegality to refuse to enforce the contract.

120 If the contract is prohibited, the court then moves on to the second stage of the inquiry to ascertain whether, notwithstanding the fact that there can be no recovery pursuant to the (illegal) contract, there might, nevertheless, be restitutionary recovery of the benefits conferred thereunder (as opposed to recovery of full contractual damages) (*Ochroid Trading* at [42] and [65]). As for such other independent causes of action (such as unjust enrichment, tort and trusts), the guiding principle is stultification. To stultify is to "make nonsense of". Thus, the independent cause of action will be precluded where allowing it will undermine the fundamental policy that rendered the underlying contract void and unenforceable in the first place (*Ochroid Trading* at [145] and [168]).

121 As already mentioned, statutory illegality is irrelevant here. The potentially applicable head of common law public policy raised by the defendants is the category of contracts stated at [119] above – contracts entered into with the object of committing an illegal act: see *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*") at [42]–[43]. The application of this principle depends upon "*proof of the intent*, at the time the contract was made, to break the law" [emphasis in original omitted; emphasis added in italics]. If the intent is mutual, the contract is not enforceable at all. If the intent is unilateral, the contract is unenforceable at the suit of the party who is proved to have it: *Ting Siew May* at [43], citing *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 at 283.

122 Needless to say, it is *the defendants* who shoulder the burden of proving their allegations of illegality: specifically, that the plaintiff (if not both parties) harboured the intent to enter into the Agency Agreement to commit money laundering.[138] This follows from ss 103 and 105 of the Evidence Act

[138] Defence Amd 2 at [22.1].

(Cap 97, 1997 Rev Ed), as it is the defendants who are seeking to persuade this Court that the Agency Agreement was entered into with the object of committing money laundering, which are acts prohibited by statute in Singapore (see, for instance, ss 46–47 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed)).

123 Bearing this in mind, I was surprised that, at trial, counsel for the defendants did not even put their case of illegality to the plaintiff, Mr Jackson or Ms Flynn, save to broadly suggest to the plaintiff that the source of the funds in the second defendant's bank account was "potentially illicit",[139] and to suggest to Mr Jackson that the DBS Bank account was to be used for an illicit purpose.[140] In fact, all of the plaintiff's and his witnesses' evidence as to how the Eat Pray Shop business operated, how the business was marketed, how the sales took place, who were the customers, and how the sales revenue was processed and then paid to the second defendant, were substantially unrebutted at trial.

124 It will also be recalled that it was the first defendant's evidence that she was operating the online business set up by Mr Jackson *for her*, and hence she was entitled to the moneys in the second defendant's bank account (see [65] above). The glaring inconsistency between the first defendant's evidence and the pleaded case of illegality, which involved showing that the second defendant had no legitimate business, was irreconcilable. In this regard, it bears emphasising that, while a party in civil proceedings in Singapore has a common law right to plead and advance factually inconsistent claims, the inconsistency "cannot – particularly in relation to the facts pleaded – offend common sense":

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139 Transcript, 18 November 2020, p 127 lines 4–6.

140 Transcript, 20 November 2020, p 163 lines 19–24.

Ng Chee Weng v Lim Jit Ming Bryan and another [2012] 1 SLR 457 ("*Ng Chee Weng*") at [31]–[37]. For instance, while alternative claims of fraud and negligence are acceptable, it would be impermissible for a party to plead that the party has actual knowledge of two opposite alternative facts: see *Ng Chee Weng* at [36]–[38]. Essentially, therefore, alternative factual claims are permissible if one claim is the *subset* of the other alternative claim. On the other hand, alternative claims are impermissible if they are logical *opposites*. This is the case for the first defendant's claims that (a) the agreement was that the second defendant was a legitimate online business was set up *for her* and that (b) the business of the second defendant was set up for *the plaintiff's illegal acts*. Indeed, at one point of her oral evidence, the first defendant even unequivocally stated that the second defendant was "[her] business" and "has nothing to do with [the] plaintiff".[141] Thus, the plaintiff cannot make the inconsistent claim that the second defendant was set up for the plaintiff's illegal acts.

125 The defendants also did not lead any evidence to show that the plaintiff was involved in any illegal activities. It seemed to me that the defendants were merely resting their case on vague allegations by the first defendant of criminal wrongdoing on the part of the plaintiff, Mr Jackson and Ms Flynn, without any kind of substantiation. While counsel for the defendants made some suggestion during cross-examination that the plaintiff and Mr Jackson had not produced enough documents to corroborate their oral evidence that Eat Pray Shop was a *bona fide* business,[142] this was far from sufficient to discharge the defendants' evidential burden. The defendants also chose not to file any submissions after trial, which certainly did not assist me in showing how the defence of illegality

141 Transcript, 26 November 2020, p 38 lines 23–24.

142 Transcript, 17 November 2020, p 101 line 10–p 103 line 16.

or public policy has been made out on the evidence. There is simply no basis, on the state of the evidence, for me to find that there was intent on the plaintiff's part to enter into the Agency Agreement to commit money laundering, or that the second defendant had in fact been used by the plaintiff for money laundering purposes.

126 I should point out that, at the trial, counsel for the defendants did spend some time cross-examining the plaintiff on his use of "MeikoPay",[143] which is a licensed payment processing solutions brand operated by Shenzhen Hongzhanzheng Trading Co Ltd, a company incorporated in China. The plaintiff had given evidence that he used MeikoPay as the payment processing solutions provider for the Eat Pay Shop business.[144] The defendants' counsel's suggestion appeared to be that the plaintiff did not actually use MeikoPay as the payment processing solutions provider,[145] and that the MeikoPay documents disclosed by the plaintiff were not authentic.[146] In other words, counsel appeared to be suggesting that the payments received by the second defendant into its bank account were not actually from MeikoPay or its agents, but from elsewhere.

127 However, as I pointed out to counsel, the defendants had not challenged the authenticity of several MeikoPay statements issued to the second defendant that had been discovered by the plaintiff in his list of documents dated 29 October 2019. There was no inspection of these documents. It was only on 16 November 2020, the day before the commencement of the trial, that the

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143 Transcript, 17 November 2020; Transcript, 18 November 2020.

144 P's AEIC at [72]–[76].

145 Transcript, 18 November 2020, p 9 lines 4–24.

146 Transcript, 17 November 2020, p 139 line 18–p 140 line 10; Transcript, 18 November 2020 p 26 lines 3–7.

defendants issued a notice of non-admission of the MeikoPay statements. In this regard, O 27 rr 4(1)–4(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") provide:

> **Admission and production of documents specified in list of documents (O. 27, r. 4)**
>
> **4**.—(1) Subject to paragraph (2) and without prejudice to the right of a party to object to the admission in evidence of any document, a party on whom a list of documents is served in pursuance of any provision of Order 24 or any order made thereunder shall, unless the Court otherwise orders, *be deemed to admit* —
>
> (*a*) that any document described in the list as an original document is such a document and was printed, written, signed or executed as it purports respectively to have been; and
>
> (*b*) that any document described therein as a copy is a true copy.
>
> This paragraph does not apply to a document the authenticity of which the party has denied in his pleading.
>
> (2) If *before the expiration of 14 days after inspection* of the documents specified in a list of documents or after the time limited for inspection of those documents expires, whichever is the later, the party to whom the list is served serves on the party whose list it is a notice stating, in relation to any documents specified therein, that he does not admit the authenticity of that document and requires it to be proved at the trial, he shall not be deemed to make any admission in relation to that document under paragraph (1).
>
> [emphasis added]

128 As explained by the Court of Appeal in *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 at [73]:

> … O 27 r 4(1) expressly provides that subject to r 4(2), a party is deemed to admit the authenticity of the documents in his opponent's lists of documents. This suggests that the default position under the Rules of Court is that provided for in r 4(1), namely, that a party is deemed to admit the authenticity of a document contained in his opponent's lists. That being the

> case, a party is generally deemed to admit authenticity unless he can bring himself within O 27 r 4(2) by showing that he had actually issued a notice of non-admission *within the requisite window of time*. … [emphasis added]

129 Thus, the defendants are deemed to admit to the authenticity of the MeikoPay documents that are now being objected to since (a) the defendants did not deny the authenticity of these documents in their pleadings and (b) the defendants did not issue a notice of non-admission within the requisite 14 days.

130 When I queried the defendants' counsel as to how he planned to overcome the fact that, by operation of the ROC, the defendants had already lost their right to challenge the authenticity of the MeikoPay statements through their failure to file notices of non-admission within the time permitted by the ROC, he replied to say that the plaintiff would suffer no prejudice.

131 I am unable to agree. No reasonable explanation has been provided by the defendants as to why this notice of non-admission was filed so late. Critically, the first defendant did not even deny the authenticity of the relevant MeikoPay documents in her AEIC. In these circumstances, it is certainly far too late to raise objections of authenticity on the eve of the trial for documents discovered more than a year ago. If such late objections are allowed, parties might have to scramble to search for an appropriate witness to prove the authenticity of documents even as the trial is progressing. This might lead to trial dates being vacated, or trials being part-heard because a witness that is needed to prove the authenticity of a documents is not available at short notice. In this case, the plaintiff would suffer prejudice because he would then have to locate and persuade someone from Shenzhen Hongzhanzheng Trading Co Ltd to agree to give evidence as to the provenance of the MeikoPay documents before he would be able to close his case, and all this while the trial is already ongoing.

132 In any event, I find that the suggestions by the defendants that MeikoPay was not really used, and that the MeikoPay documents were of doubtful authenticity, are without basis. Mr Jackson gave evidence that he received documents directly from MeikoPay.[147] He then sent, amongst other things, the first defendant the MeikoPay Credit Card Online Payment Merchant Agreement (the "MeikoPay agreement") by WhatsApp. From her messages in response, she acknowledged receipt of the MeikoPay agreement, signed it and sent the signed copy back to Mr Jackson and Ms Flynn.[148] These WhatsApp exchanges took place in the "EPS" WhatsApp group chat.

133 While the defendants, again, attempted a last minute objection to the authenticity of these WhatsApp exchanges, the forensic expert in information technology called by the plaintiff, Mr Gino Bello, gave evidence that the messages, and its attachments, were authentic, and had in fact been transmitted and had not been tampered with.[149] Mr Bello was not cross-examined on his expert report. Neither was there any contradictory expert evidence adduced by the defendants. Furthermore, it was never put to Mr Jackson and Ms Flynn during their cross-examination that these messages were fabricated or had been doctored with. When she took the stand, the first defendant also did not deny that these messages were sent by her during her cross-examination. As such, I accept that the plaintiff has proven that the MeikoPay documents, including the MeikoPay agreement, are authentic.

134 In sum, the defendants have failed to show that Eat Pray Shop is not a *bona fide* business, that there was criminal activity or money laundering

147 See P's AEIC at [73].

148 PB 656–659; Gino Bello's AEIC dated 4 September 2020 at pp 52–57, 61–66.

149 Transcript, 17 November 2020, p 29 lines 12–22.

involved, or that the payments received by the second defendant originated from dubious sources. I also find that the defendants have failed to show that the plaintiff intended to enter into the Agency Agreement to commit money laundering or any illegal act for that matter. As such, I find that the defendants have not established their case that the plaintiff's claims should be barred by public policy because of illegality.

Remedies

135 Given my findings that the first defendant, by her actions, was clearly in breach of the agreement that she would act as a nominee in relation to her position as a shareholder and director of the second defendant, and that she had also thereby breached her fiduciary duties, there is no need for me to deal with the alternative claims in conspiracy and unjust enrichment. These other claims do not add anything in terms of the remedies to which the first plaintiff is entitled.

136 I now turn to the appropriate remedies in this case. It is trite that double recovery is impermissible, so the plaintiff cannot be compensated twice for the same loss stemming from the breaches of the Agency Agreement and fiduciary duties: see *Tonny Permana* at [117]. The plaintiff seeks the following remedies:[150]

(a) a declaration that the first defendant holds the shares of the second defendant on trust for the plaintiff;

(b) an order that the first defendant, within 14 days, transfer free from encumbrances the shares of the second defendant to the plaintiff;

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150 SOC Amd 2 at prayers 1–6.

(c) an order that the second defendant, within 14 days, register its shares held by the first defendant under the name of the plaintiff;

(d) an order that the first defendant, within 14 days, return all bank tokens, cheques, financial statements, email accounts and documents relating to the second defendant;

(e) an order that:

> … the 1st Defendant does account on a wilful default basis of the Unauthorised Transfers and return to the Plaintiff for the Funds, Unauthorised Transfers and/or Continuous Unauthorised Transfers *amounting to USD $1,028,455.00*, and any and all profits, benefits, gains and/or assets arising from, relating to and/or in connection with the Funds and/or the Unauthorised Transfers and/or the Continuous Unauthorised Transfers (the "Assets"), and an order that all such Assets be paid over and/or delivered up upon such account to the Plaintiff. [emphasis added]

(f) and damages to be assessed.

137 I have already found that the true beneficial owner of the shares of the second defendant is the plaintiff. Therefore, I grant a declaration that all the shares in the second defendant are held on trust by the first defendant for the plaintiff. Consequent to this, I order the first defendant to, within 14 days hereof, transfer all the shares in the second defendant to the plaintiff. The defendants are also to return all bank tokens, cheques, financial statements, email accounts and all other documents which belong to the second defendant to the plaintiff.

138 For the breach of the Agency Agreement, the plaintiff is entitled to damages, and it is trite that this would generally be on an expectation measure: see *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [125]. On the other hand, the

appropriate remedy for a breach of fiduciary duty depends on the specific circumstances of the breach. Breaches of fiduciary duties can be divided into custodial and non-custodial breaches. A non-custodial breach does not involve the stewardship of assets already entrusted to the fiduciary, while a custodial breach results in the misapplication of the principal's funds: *Sim Poh Ping* at [104]–[106]. The usual remedy for a breach of a non-custodial fiduciary duty would be the compensatory monetary award of equitable compensation.

139 As for a custodial breach, the Court of Appeal in *Sim Poh Ping* (at [108]–[109]) observed that there is "good reason for the remedial principles targeting the misapplication of funds to apply to a custodial breach" [emphasis in original omitted], as the wrong is done to the principal's funds placed under the fiduciary's custody. The remedy for a custodial breach is substitutive in that it seeks to restore the trust fund or the fund of the principal either *in specie* or by a monetary sum in lieu. For a custodial breach, there should be a causal link between the breach and the subject matter of the breach that is sought to be restored. However, the role which causation plays in the situation of a custodial breach is a limited one, meaning that the court will not go further to determine whether the loss would still have occurred in the absence of the trustee's or custodial fiduciary's breach of duty. On the other hand, equitable compensation and surcharging are reparative in nature, and thus seek to "repair" the loss that has been caused to the principal or the trust fund. In particular, the term "equitable compensation" should be used only by reference to the reparative remedy sought for non-custodial breaches of fiduciary duty, and not for the remedy sought for a custodial breaches or for a breach of the management stewardship duty of a trustee: *Sim Poh Ping* at [114]–[115] and [124]–[126].

140 It is evident from the reliefs sought by the plaintiff that he has claimed remedies that flow from the breach of fiduciary duty. As already mentioned,

the remedy of damages that flow from the contractual breach of the Agency Agreement is allowed, but double recovery will not be permitted. I shall turn my attention now to the former.

141 It is clear that the present case involves a custodial breach of fiduciary duty. There is a clear causal link between the breach and the quantum of the Unauthorised Transfers and Continuous Unauthorised Transfers.

142 However, it is very unclear what *exactly* was the total quantum of money that was misapplied by the first defendant. The plaintiff's pleadings and closing submissions are very loosely drafted on this issue.

(a) The quantum of the Funds, which were deposited into the second defendant's DBS bank account from 9 October 2018 to 15 October 2018, is US$1,028,455.00. This was stated in the plaintiff's statement of claim (amendment no. 2) at paragraphs 15 and 16, closing submissions at paragraph 186, and a letter to court at paragraph 3(a) dated 4 May 2021 ("the 4 May letter"). The 4 May letter to court was in response to this Court's questions for clarification.

(b) The quantum of Unauthorised Transfers from 25 October 2018 to 12 November 2018 is US$1,070,950.02. This was clearly stated in Annex A of the plaintiff's closing submissions and at paragraph 3(b) of the 4 May letter.

(c) However, the plaintiff has, at numerous points of his statement of claim and closing submissions, *equated* the Unauthorised Transfers with the sum of US$1,028,455.00.

(i) At paragraph 186 of the plaintiff's closing submissions, the plaintiff confusingly equated the sum of US$1,028,455.00 and the Funds with "the Unauthorised Transfers and/or Continuous Unauthorised Transfers":

> 186. Further and/or alternatively, the Plaintiff seeks an order that the 1st Defendant does account on a wilful default basis of *the Unauthorised Transfers and/or Continuous Unauthorised Transfers amounting to the Funds i.e. USD $1,028,455.00*. [emphasis added]

(ii) At paragraph 198(5) of the plaintiff's closing submissions, the plaintiff even more explicitly asked for a return of the Unauthorised Transfers and/or Continuous Unauthorised Transfers "amounting to USD $1,028,455.00", even though neither the Unauthorised Transfers nor the Continuous Unauthorised Transfers tally with the sum of US$1,028,455.00 (the Unauthorised Transfers are US$1,070,950.02; the *Net* Unauthorised Transfers, after deduction of the various corresponding returns during the same period, are US$572,617.65; the Continuous Unauthorised Transfers are US$877,135.16; and the Net Continuous Unauthorised Transfers are US$442,068.88, which means that the total sum misappropriated from the second defendant's DBS bank account would be US$1,014,686.53 (US$572,617.65 plus US$442,068.88)).

> 198. The Plaintiff therefore claims: … (5) An order that the 1st Defendant returns *the Unauthorised Transfers and/or Continuous Unauthorised Transfers amounting to USD $1,028,455.00*. [emphasis added]

(iii) Similarly, at paragraph 198(6) of the plaintiff's closing submissions, the plaintiff asked for an account of the Funds,

Unauthorised Transfers and/or Continuous Unauthorised Transfers "amounting to USD $1,028,455.00",

> 198. The Plaintiff therefore claims: … (6) An order that the 1st Defendant does account on a wilful default basis of *the Funds, Unauthorised Transfers and/or Continuous Unauthorised Transfers amounting to USD $1,028,455.00*, and any and all profits, benefits, gains and/or assets arising from, relating to and/or in connection with the Funds and/or the Unauthorised Transfers and/or the Continuous Unauthorised Transfers (the "Assets"), and an order that all such Assets be paid over and/or delivered up upon such account to the Plaintiff. [emphasis added]

(iv) At page 14, point (5), of the plaintiff's statement of claim (amendment no. 2), the plaintiff sought an order that the first defendant "account on a wilful default basis of the Unauthorised Transfers and *return to the Plaintiff for the Funds, Unauthorised Transfers and/or Continuous Unauthorised Transfers amounting to USD $1,028,455.00*" (emphasis added; see [136(e)] above). This is, again, confusing. On one hand, the use of the conjunctive word "and" suggests that the *total* quantum of the Funds, Unauthorised Transfers and Continuous Unauthorised Transfers is US$1,028,455.00. This is inaccurate. The use of the conjunctive word "or" is equally unhelpful, because that suggests that the Unauthorised Transfers and/or the Continuous Unauthorised Transfers amount to US$1,028,455.00 (which is also not accurate).

143 Therefore, it is quite unclear what exactly is the total sum that was misapplied and misappropriated by the first defendant from the second defendant's DBS account. If only US$1,028,455.00 was deposited into the account, then I agree that it seems, logically, that only that amount could have

been misapplied and misappropriated by the first defendant. It is perhaps for this reason that the plaintiff is only claiming for a return of US$1,028,455.00. *However*, as already highlighted, the Unauthorised Transfers amount to US$1,070,950.02; the Net Unauthorised Transfers amount to US$572,617.65; the Continuous Unauthorised Transfers are US$877,135.16, and the Net Continuous Unauthorised Transfers are US$442,068.88. If so, it would seem that the total sum misappropriated from the second defendant's DBS bank account should be about US$1,014,686.53 (US$572,617.65 plus US$442,068.88). Indeed, there appears to be €9,545.15 (about US$10,851.45) and £122.73 (about US$156.62), which amount to a total amount of about US$11,008.07, left in the second defendant's DBS account.[151]

144 Nevertheless, it is clear that *at least* US$1,028,455.00 has been misapplied and misappropriated from the second defendant's DBS bank account, since the total sum of the Unauthorised Transfers and the Continuous Unauthorised Transfers amount to more than the sum of the Funds, and the second defendant's DBS bank account has been almost completely depleted. While there is a need for a causal link, the sense in which causation appears in the situation of a custodial fiduciary breach is a limited one, meaning that the court does not go further to determine whether the loss would still have occurred in the absence of the breach of duty. Therefore, subject to what I will say about the remedy of an account of profits, the plaintiff is entitled to a claim of substitutive compensation to the plaintiff, as the principal, for the sum of US$1,028,455.00. This is, in any event, the quantum of the sum which the plaintiff is seeking to be returned to him.

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151 PB 498; P's AEIC at pp 99 and 147.

145 The plaintiff also seeks an account on a wilful default basis by the first defendant of the Unauthorised Transfers so that all profits arising from the Unauthorised Transfers can be determined and delivered to the plaintiff (see [136(e)] above). There appears to be a conflation between an account on a wilful basis and an account of profits here.

146 An account on a wilful default basis and a common account are procedures for the accounting of funds. A common account does not depend on wrongdoing, so the beneficiary is entitled "as of right" to be given a common account of the trustee's stewardship of the trust assets (*ie*, an account for what was actually received and the trustee's disbursement and distribution of it). An account on a wilful default basis is premised on misconduct by the trustee and is not available to a beneficiary as of right. Thus, the beneficiary must prove at least one act of wilful neglect or default. The scope of an account on a wilful default basis is wider than that of a common account, as the trustee is not only required to account for what he has received, but also for what he *might* have received had it not been for the default. Following the taking of an account, the beneficiary is entitled to ask for an inquiry to discover what the trustee did with any money that was misappropriated: see *UVJ and others v UVH and others and another appeal* [2020] 2 SLR 336 ("*UVJ*") at [23]–[27].

147 The account, once furnished, may by challenged because it discloses discrepancies. The beneficiary may then decide whether to seek an order for the falsification of a discrepant entry or for the surcharging of the account. For the latter order of surcharging, the asset will be treated as if the trustee had performed his duty and obtained it for the benefit of the trust, so the trustee will be "ordered to make good the deficiency in the trust by payment of a monetary award": see *Sim Poh Ping* at [120]; *UVJ* at [24] and [28].

148 As alluded to above, it appears that what the plaintiff is presently seeking is an account on a wilful default basis, even though he also refers to an account of the unauthorised profits made by the first defendant (see [136(e)] above). Unlike the taking of accounts, which is a *procedure*, an account of profits is a *remedy* that arises as an alternative to equitable compensation, and is available when a fiduciary makes unauthorised profits: see *Sim Poh Ping* at [105]. An account of profits is conceptually distinct from a surcharge, as the former is focused on the gain to the fiduciary while the latter is focused on the loss to the trust fund: see *UVJ* at [28]; *Sim Poh Ping* at [120]–[121].

149 As the plaintiff's primary claim is for the return of the sum of US$1,028,455.00, I shall focus not on the remedy of an account of profits, but rather on whether an account on a wilful default basis is appropriate. In any event, the taking of accounts may also reveal breaches of fiduciary duty for which an inquiry and account of profits may subsequently be ordered: see *UVJ* at [27] and [29].

150 Though the cases generally discuss the taking of accounts in the context of a trustee's breach, the taking of accounts is also available against a custodial fiduciary: see *UVJ* at [29], endorsing *Lalwani Shalini Gobind and another v Lalwani Ashok Bherumal* [2017] SGHC 90 at [26]. Therefore, the first defendant, as a custodial fiduciary, is also liable to account. Given the egregious nature of the first defendant's conduct, I find that the account by the first defendant is more appropriately to be conducted on a wilful default basis rather than on a common basis. The fact that the total sum misappropriated seems to be larger than the sum deposited into the second defendant's DBS bank account (see [143] above) also reinforces my conclusion that an account on a wilful default basis is clearly necessary.

151 However, I note that there is a potential inconsistency between the remedies sought by the plaintiff. Substitutive compensation of the sum of US$1,028,455.00 would require the first defendant to restore those unauthorised transfers to the plaintiff's fund either *in specie* or by a monetary sum in lieu (see [139] above). However, the plaintiff seeks, through the account on a wilful default basis, to ultimately disgorge the unauthorised profits earned by the first defendant as a result of the Unauthorised Transfers (see [136(e)] above). This is permissible, as explained by Lord Millet in *Libertarian Investments* at [169], as endorsed by the Court of Appeal in *UVJ* at [27]:

> 169. *But the plaintiff is not bound to ask for the disbursement to be disallowed. He is entitled to ask for an inquiry to discover what the defendant did with the trust money which he misappropriated and whether he dissipated it or invested it, and if he invested it whether he did so at a profit or a loss.* If he dissipated it or invested it at a loss, the plaintiff will naturally have the disbursement disallowed and disclaim any interest in the property in which it was invested by treating it as bought with the defendant's own money. If, however, the defendant invested the money at a profit, the plaintiff is not bound to ask for the disbursement to be disallowed. ***He can treat it as an authorised disbursement, treat the property in which it has been invested as acquired with trust money, and follow or trace the property and demand that it or its traceable proceeds be restored to the trust* in specie**. [Court of Appeal's emphasis in *UVJ* in italics; emphasis added in bold italics]

152 However, therein lies the potential inconsistency which might arise. If it transpires that the plaintiff recovers the unauthorised disbursement, *ie*, US$1,028,455.00, by, *eg*, the first defendant paying the plaintiff that sum, then he might no longer be entitled to elect to treat the misapplied disbursement as an authorised disbursement and demand that it or its traceable proceeds be restored to the plaintiff's funds *in specie*.

153 In this regard, I find Lord Millett's observations in *Libertarian Investments* at [172], which were endorsed by the Court of Appeal in *UVJ* at [27], to be instructive:

> 172. At every stage the plaintiff can elect whether or not to seek a further account or inquiry. ***The amount of any unauthorised disbursement is often established by evidence at the trial, so that the plaintiff does not need an account but can ask for an award of the appropriate amount of compensation***. Or he may be content with a monetary award rather than attempt to follow or trace the money, in which case he will not ask for an inquiry as to what has become of the trust property. *In short, he may elect not to call for an account or further inquiry if it is unnecessary or unlikely to be fruitful, though the court will always have the last word.* [Court of Appeal's emphasis in *UVJ* in italics; emphasis added in bold italics]

154 The present situation is exactly that as stated at [172] of *Libertarian Investments*: the unauthorised disbursement has already been established by evidence at the trial, and the plaintiff is in fact seeking substitutive compensation of the full amount of the unauthorised transfers of US$1,028,455.00, which I will grant. While I will order the first defendant to account on a wilful default basis, the plaintiff should bear in mind the foregoing considerations and carefully elect how he wishes to proceed, if and after such an account is provided.

155 Finally, the plaintiff also submitted that this Court should make a disclosure order requiring the first defendant to disclose her assets in aid of tracing and recovery of the misapplied Funds.[152] I find that this is in order and accordingly order so.

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152 PCS at [192].

Conclusion

156 In conclusion, I grant the following orders.

(a) I grant a declaration that all the shares in the second defendant are held on trust by the first defendant for the plaintiff.

(b) Consequent to this, I order the first defendant to, within 14 days hereof, transfer all the shares in the second defendant to the plaintiff. The defendants are also to return all bank tokens, cheques, financial statements, email accounts and all other documents which belong to the second defendant to the plaintiff.

(c) I order the first defendant to return the amount of US$1,028,455.00 to the plaintiff, with interest at the rate of 5.33% from the date of the writ to the date of judgment. I order this sum to be paid to the plaintiff rather than the second defendant's bank account because the custodial fiduciary breach did not arise out of the first defendant's position as director of the second defendant, but out of her role as agent to *the plaintiff*, so the funds should be compensated to him.

(d) I order the first defendant to provide an account of the second defendant's funds to the plaintiff on a wilful default basis.

(e) The first defendant is to disclose her assets to the plaintiff by the filing of an affidavit within 14 days hereof.

(f) The first defendant is to pay the plaintiff damages to be assessed.

157 I will deal with the issue of costs separately.

Ang Cheng Hock
Judge of the High Court

Isaac Tito Shane, Lee Koon Foong Adam Hariz and Isabel Chew Maggie (Tito Isaac & Co LLP) for the plaintiff;
The first and second defendants unrepresented.
