IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 121

Suit No 410 of 2016

Between

Innovative Corporation Pte Ltd

… *Plaintiff*

And

(1) Ow Chun Ming
(2) Clydesbuilt (Holland Link) Pte. Ltd.

… *Defendants*

JUDGMENT

[Companies] — [Directors] — [Duties] — [Breach of fiduciary duties]
[Trusts] — [Accessory liability] — [Knowing receipt]
[Trusts] — [Accessory liability] — [Dishonest assistance]

TABLE OF CONTENTS

Innovative Corp Pte Ltd
v
Ow Chun Ming and another

[2019] SGHC 121

High Court — Suit No 410 of 2016
Ang Cheng Hock JC
16–19, 22–25 October 2018; 1 February 2019

13 May 2019 Judgment reserved.

Ang Cheng Hock JC:

Introduction

1 This case concerns the alleged diversion of a valuable development project from a company to its former director. Having acquired knowledge of the project in his capacity as a company representative, the director then successfully tendered for the project and managed to acquire it for himself. At the time he did this, it is said that he had already resigned as a director and also that the company had no chance securing the project itself. The director set up a corporate vehicle to execute the project. His principal, the aggrieved company, has now brought a claim against him and his corporate vehicle. This raises issues as to the duties of directors in respect of corporate opportunities as well as accessory liability of the corporate vehicle in relation to the alleged breach of fiduciary duties.

Background

The parties

2 The plaintiff, Innovative Corporation Pte Ltd, was incorporated in Singapore on 16 August 2004.[1] From its inception, Ms Annie Chen Liping ("Ms Chen"), was a director, major shareholder and served as the company's major decision-maker.[2] Ms Chen emigrated from the People's Republic of China to Singapore in 1995 and became a Singapore citizen. Prior to her move to Singapore, she worked with a state-sponsored building construction company in Tianjin, China, known as Tianjin Heping Construction Group Co Ltd, ("THC"), on several construction projects in China. THC was established in 1952 and its total assets are in the region of S$85 million.[3] It is also registered in Singapore as a foreign company.

3 Ms Chen maintained her association with THC after her move to Singapore. On 13 June 2001, she incorporated China Heping Construction (Far East) Pte Ltd ("CHC") as THC's Singapore subsidiary and assumed the position of its managing director.[4] As already mentioned, the plaintiff was later incorporated. Initially, the plaintiff's business was to organise events to introduce investors from China to potential business opportunities and investments in Singapore. The focus of the plaintiff's business later shifted to property development and building construction, which is similar to that of CHC's.[5]

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1 Ow's Affidavit of Evidence-In-Chief ("AEIC") para 11, pp 196-198.

2 Notes of Evidence ("NE"), 16 October 2018, p 8, lines 13-15.

3 Chen's AEIC para 3, CLP-1 p 24.

4 Agreed Bundle ("AB") volume 5 1429-1432

5 Annie's AEIC para 3.

4 The first defendant, Mr Ow Chun Ming, also known as Mr Victor Ow, is a real estate developer with 30 years of experience in the industry. He is the Chairman and CEO of the Clydesbuilt Group of companies, including the second defendant, which was incorporated on 17 May 2010 for the purpose of developing the project which is the subject matter of this action.[6] The first defendant also became a director and the 50% shareholder of the plaintiff in circumstances which will be explained in the course of this judgment. He has since ceased to be a shareholder and a director, although the date of when he stopped being a director of the plaintiff is a matter of some dispute in this case.

The Project

5 The Fong Yun Thai Association ("FYTA") is an umbrella organisation made up of three Hakka clan associations – Foong Shoon Fui Kuan Association, Char Yong (Dabu) Association and Eng Teng Association.[7] FYTA is managed by its board of directors comprising representatives from all three of these associations. At the material time, FYTA's principal asset was the property at 33 Holland Link in Singapore. This land was registered in the names of four trustees, who held it for FYTA's benefit.[8]

6 In late 2007, FYTA decided to embark on a project to build a residential housing development on the land which would comprise of 82 units of semi-detached houses and a Hakka Memorial Museum and Cultural Centre ("the Project").[9] FYTA's construction committee was overseeing the Project. Mr Liu Cho Chit ("Mr Liu") was the chairman of the construction committee.[10] Mr Liu

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6 Annie's AEIC para 19; Ow's AEIC para 131; 6AB 1472-1476.

7 Chen's AEIC para 3; Chan's AEIC para 5.

8 3AB 766.

9 Chan's AEIC para 10.

is a retired property developer with business interests in Singapore and elsewhere. He has been involved with FYTA for more than 20 years. He is a former president of FYTA and was also one of the four trustees in which title to the land was registered. At the material time, he was an honorary president of Foong Shoon Fui Kuan Association.

7 I should just mention here that parties have also sometimes referred to the construction committee as the "Project committee". After Mr Liu resigned from the construction committee and it was then dissolved in February 2010, the new committee formed by FYTA to oversee the Project was consistently referred to by parties as the "Project committee".

8 FYTA appointed ATI Architects ("ATI") for the Project. ATI prepared a proposal for the Project which was submitted to the authorities for planning approval. On 6 March 2008, the Urban Redevelopment Authority of Singapore ("URA") approved ATI's proposal and FYTA was granted Provisional Permission ("PP").[11] As things turned out, the PP had to be extended three times for six months each because Written Permission for the Project was not obtained until sometime in the second half of 2010. The final extension of six months was granted by URA following a meeting on 2 March 2010, which will be explained later in this judgment.[12]

9 In late 2008 or early 2009, Ms Chen was introduced as a representative of THC to Mr Liu. She learnt about the Project from Mr Liu and told him that she was interested in taking on the Project with THC as the developer.[13]

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10 Annie's AEIC para 18.

11 Ow's AEIC para 28, p 103-115; Chan's AEIC para 11, CSM-2 pp 38--49.

12 NE, 22 October 2018, p 16, lines 7-11.

13 Chan's AEIC para 13.

Negotiations followed. Mr Liu, the architect from ATI and other members of FYTA, that is, Mr Chan Sen Meng ("Mr Chan"), Mr Ho Kiau Seng ("Mr Ho") and Mr Lew Chee Beng ("Mr Lew"), travelled to Tianjin, China and visited THC for meetings to assess THC's capability. They met with Mr Chen Xin, one of THC's directors.[14] I pause here to mention that Mr Chan was the president of Eng Teng Association and a vice-president of FYTA. Mr Lew was the president of Char Yong (Dabu) Association and the other vice-president of FYTA. Mr Ho was the president of Foong Shoon Fui Kuan Association, and also the president of FYTA. In short, the three most senior officer-bearers in the FYTA travelled to China to visit THC, together with Mr Liu, who headed the construction committee. Ms Chen did not travel with them to China for this trip.

10 The discussions culminated in an agreement in Chinese titled "Cooperation Agreement" signed on 9 July 2009 (the "Cooperation Agreement"). The Cooperation Agreement was signed on behalf of FYTA by its president and vice-presidents (Messrs Ho, Lew and Chan). Mr Chen Xin signed on behalf of THC.[15] The Cooperation Agreement was a brief one-page document stating that the parties "agree to jointly develop" the Project.[16] FYTA was required to obtain all the necessary approvals for the Project. The construction work would be carried out by CHC, which was described as a subsidiary of THC. The Project cost was stated to be S$115 million, and it was expected to be completed in two and a half years. There was also a statement that, of the 82 units of semi-detached houses to be constructed, FYTA would be allocated ownership of 27 units, and THC allocated 55 units. The Cooperation

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14 Chan's AEIC paras 15-17; NE, 24 October 2018, p 7, lines 19-24.

15 Ow's AEIC para 41, pp 117-118; NE, 24 October 2018, p 4, lines 17-22.

16 1AB 73.

Agreement ended with, "[o]ther matters not discussed in this agreement shall be negotiated separately. This agreement (…) shall become effective on the date of signing".

11 In his evidence, Mr Liu explained FYTA's thinking behind the Cooperation Agreement. He said that the idea was that FYTA would not have to mortgage the land at 33 Holland Link for financing, so the developer who partnered with them, that is, THC, would have to finance the entire cost of the Project. In return, it would be given 55 units of the semi-detached houses to be built. This was why the allocation of the units was provided for in the Cooperation Agreement, and it was also stated that "[FYTA] shall not mortgage the property nor incur debts".

12 At a meeting of the board of directors of FYTA, an update was given to them on the Cooperation Agreement. The minutes of the meeting record Mr Chan as saying that "[FYTA] cannot be developer itself. Therefore [FYTA] entrusted the entire development project to the developer – [THC]".[17] In the same minutes, it was also recorded that "[w]ith regard to the cooperation agreement with [THC], the directors who attended do not have any opinion, they unanimously approved it".[18]

13 Following the signing of the Cooperation Agreement, preparatory works started at the site. By a letter of award dated 16 July 2009, ATI engaged CHC to undertake the excavation works which commenced on or around 17 August 2009.[19]

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17 1AB 138, 140.

18 1AB 138, 141.

19 Chan's AEIC paras 27-28, CSM-6 pp 66-69.

14 Not long after, as Mr Liu explained, FYTA's lawyers advised them that it would be better for a Singapore company to be the developer of the Project instead of THC. This was because it would be more convenient legally and administratively to deal with a local entity.[20] THC and Ms Chen were informed of this. Mr Chen Xin then signed a letter of authority on behalf of THC which "irrevocably authorise[d] and directe[d]" FYTA to deal with the plaintiff and Ms Chen in place of THC.[21] Ms Chen explained that THC had decided that the plaintiff would be used as the vehicle to collaborate with FYTA on the Project.

15 Following this, a document titled "Joint Venture Agreement" dated 23 September 2009 ("Joint Venture Agreement") was drafted.[22] This was in English. The plaintiff was identified in the Joint Venture Agreement as the developer appointed by THC.[23] The stated counterparties were three of the four trustees of the land. The Joint Venture Agreement referred to the parties' intention to "enter into a joint venture" and documented additional details as to the Project's scope, the period of completion and the management of the Project. The Joint Venture Agreement was never executed formally by the parties. There was no evidence before me showing that the plaintiff had executed it and, of the three named trustees, only Mr Liu signed it.

16 For reasons which are not entirely clear, Messrs Lew, Ho and Chan, who signed the Cooperation Agreement, also appended their signatures to the Joint Venture Agreement although it is not stated in the document in what capacity they were doing so. In my view, they probably did so to acknowledge their agreement to the terms of that document. Subsequently, in the period from

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20 Annie's AEIC para 12.

21 NE, 24 October 2018, p 12, lines 13-16; Annie's AEIC, CLP-4, p 39.

22 1AB 115-119.

23 Ow's AEIC para 45, p 119-123; Annie's AEIC, CLP-5, p 41-45.

November 2009 to January 2010, several other drafts of a more detailed Joint Venture Agreement were prepared and exchanged between FYTA and the plaintiff but they too were never executed.

The first defendant's involvement with the Project

17 Ms Chen first met the first defendant in or around 2006 through a mutual friend.[24] According the first defendant, Ms Chen had expressed interest in being a sub-contractor for one of his construction projects, but this did not come to fruition. He also gave evidence that, in or around 2007, he sought Ms Chen's help for a contact in Tianjin, China, because he was encountering some difficulties in one of his projects there. Thereafter, they did not keep in touch.

18 Sometime in September 2009, the first defendant drove by the site of the Project on his way home. He lived nearby at his bungalow on Old Holland Road. He saw Ms Chen there. She was supervising the land excavation works which were underway. He stopped to speak to her and she briefly told him about the Project.[25] It is not disputed that the pair subsequently met at his home to talk about the Project in more detail, although the first defendant's evidence was that Ms Chen showed up at his home uninvited.

19 In their discussion, the first defendant found out more about the Project. Ms Chen showed him the Joint Venture Agreement, but not the Cooperation Agreement because it was in Chinese, and the first defendant could not read Chinese.[26] The first defendant discovered that the plaintiff did not have a housing developer's licence and requisite approvals from the relevant regulatory

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24 Annie's AEIC para 19; Ow's AEIC para 31.

25 Ow's AEIC para 36.

26 NE, 17 October 2018, p 14, lines 7-15.

authorities had not been sought.[27] According to him, he gave friendly advice to Mr Chen in the form of a Chinese saying, which translates to "don't wear such a big hat if your head is not big enough".[28] He explained in his evidence that what he meant was that she should not be taking on such a significant project on her own without the proper experience and qualifications.

20 Nevertheless, sensing a good business opportunity, the first defendant suggested collaborating with the plaintiff as a joint venture partner.[29] He was offering to extend his expertise as a developer to Ms Chen and the plaintiff to help see this Project through. Ms Chen's evidence was that she was impressed by the first defendant's experience and knowledge of the industry. She had a high regard for him and believed that he was sincere.

21 Talks continued between Ms Chen and the first defendant. Eventually, the first defendant set out the terms of his proposal for a 50% stake in the plaintiff in an email to Ms Chen dated 4 December 2009:[30]

> Personally, I will be the 50% shareholder together with you holding the rest of the registered shares in Innovative Corporation Pte Ltd.
>
> Clydesbuilt Group will jointly with your Tianjin(Heping) undertake the construction and sucessful [*sic*] completion of the project.
>
> In other words, we(including you and me and our respective Singapore companies and staff will jointly develop, construct, supervise, finance, including banking facilities, complying with all Govt. requirements, marketing for sales and the project etc till the successful completionof [*sic*] the proposed development.)

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27 Ow's AEIC para 49.

28 Ow's AEIC para 50.

29 NE, 24 October 2018, p 81, lines 10-12.

30 Annie's AEIC CLP-7 p 69; 2AB 326.

> ie. Making sure A-Z of the project is Professional executed to the satisfaction of all parties concerned…. including the end purchasers and ensuring "tip top" quality too.
>
> [emphasis in original]

22 Ms Chen agreed to his proposal. She believed that he would a "valuable partner".[31] Things then moved quickly. The first defendant advised that the plaintiff sign a more comprehensive agreement than the Joint Venture Agreement and instructed his lawyer, Ms Maria Anne Ng ("Ms Ng"), to assist with the documentation.[32] Ms Ng sent a revised draft of the Joint Venture Agreement ("revised JVA") to the first defendant and Ms Chen.[33] Ms Ng also prepared a letter of authority for THC to expressly authorise the first defendant to deal with the plaintiff as a "joint venture partner" on a 50% basis.[34] This was executed by Mr Chen Xin on behalf of THC.

23 Following this, in December 2009, the first defendant executed his consent to act as a director for the plaintiff and also the share transfer as transferee of half of the issued capital of the plaintiff. The first defendant's evidence was that he believed that he already became a director and shareholder of the plaintiff in December 2009.[35] But, the first defendant was actually reflected as a director of the plaintiff in the records only on 18 February 2010 when the relevant forms were lodged with the Accounting and Corporate Regulatory Authority ("ACRA"). On 24 February 2010, he was transferred 500,000 shares in the plaintiff, which was 50% of the company's issued share capital.[36] It appears to me that the delay in registering the first defendant as a

31 Annie's AEIC para 20.

32 Maria's AEIC para 10; Ow's AEIC para 60.

33 Maria's AEIC para 20, pp 20-23.

34 Annie's AEIC para 22, CLP-8 p 72.

35 NE, 24 October 2018, p 116, lines 3-5.

shareholder and director was probably because the first defendant had agreed to contribute S$500,000 for the increase in the share capital of the company but he never did so.[37] When the first defendant became the plaintiff's shareholder, the other two shareholders in the plaintiff were Ms Chen and one Mr Wayne Yang ("Mr Yang"), each holding 40% and 10% of the shareholding in the plaintiff respectively.

Subsequent developments

24 Towards the end of 2009, FYTA expressed concerns over the progress of the Project. In December 2009, FYTA terminated ATI's retainer, bringing work on the Project to a halt.

25 In the meantime, several drafts of the revised JVA (prepared by Ms Ng) were exchanged between FYTA and the plaintiff but none were actually executed.[38] As mentioned earlier, Ms Chen's and the first defendant's plan was to negotiate and sign a more comprehensive agreement with FYTA to set out parties' respective obligations in relation to the Project. Mr Liu gave evidence that FYTA had also appointed lawyers to work on finalising the revised JVA to be executed. There was a time-sensitive element to these discussions as the PP was due to expire in March 2010 and work would have to recommence before then. Otherwise, there was a risk that the PP would not be extended by the URA.

26 On 1 January 2010, the first defendant left Singapore for a five-week holiday to Paris. In his absence, Ms Chen continued negotiations with FYTA.

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36 Annie's AEIC para 23.

37 NE, 24 October 2018, p 82, lines 9-17.

38 Ow's AEIC para 83.

However, this was hampered by internal disputes that had arisen within FYTA. Mr Liu's influence as the construction committee chairman had waned in the past few months. He formally resigned as the chairman on 11 February 2010 and stepped down from the construction committee, which was then dissolved.[39] He gave evidence that there was a new president of FYTA and the members of FYTA were not cooperating with him. He testified that ATI's services as the Project architect had been terminated without any good reason, and without his approval.

27 A new "Project committee" was formed, headed by Mr Leow Soon Guan ("Mr Leow").[40] This committee began to express reservations over the competency of the plaintiff as the developer for the Project.[41] The main concern expressed was about Ms Chen's and the plaintiff's experience to take on the Project. FYTA had also discovered, in or around October 2009, that the plaintiff's paid-up capital was S$100,000, which was well below the requisite S$1 million required for a housing developer's licence.[42] This was another sticking point in their discussions as FYTA believed that Ms Chen had misrepresented her credentials and experience in real estate development.[43] In response to this, on 11 January 2010, the plaintiff's issued share capital was increased to S$1 million through cash injections from Ms Chen and Mr Yang.[44] There was evidence to the effect that Mr Yang had paid S$500,000 for the

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39 NE, 19 October 2018, p 3, lines 2-8. See also 3 AB 694.

40 Leow's AEIC para 9; NE, 23 October 2018, p 5, lines 3-5.

41 Leow's AEIC para 18.

42 Ow's AEIC para 88; Chan's AEIC para 34; Leow's AEIC para 14(1); NE, 16 October 2018, p 93, lines 18-21.

43 Chan's AEIC para 34.

44 NE, 16 October 2018, p 93 line 22 to p 94 line 4. NE, 17 October 2018, p 4 line 19 to p 5 line 24.

issuance of 500,000 shares intended for the first defendant, but which were first allotted to Ms Chen and then later transferred by her to the first defendant.

28 Discussions over emails while the first defendant was away in Paris between him and Ms Chen showed that she was increasingly disheartened by the change in attitude by FYTA.[45] She was afraid that the plaintiff might lose the deal. The first defendant encouraged her in his emails. In one email, he stated that "[w]e, are very close to an agreement, I hope you will be able to persuade the Association Committee as to our seriousness, sincerity and commitment and hope for their cooperation. We are near and yet so far".[46] In another email, he told Ms Chen "[w]e are almost there".[47] He explained in his evidence that his main concern at that stage was to get a Joint Venture Agreement that was "bankable", meaning that the plaintiff would be able to rely on it to raise financing. In the meantime, even though he was overseas, the first defendant started reaching out to several banks to seek possible avenues of financing for the Project.[48]

29 Ms Chen had a lunch meeting with FYTA's new Project committee on 11 February 2010, where she met Mr Leow for the first time. Mr Leow's evidence is that, on questioning Ms Chen on her experience during the lunch, she admitted that she did not have any experience in local residential development projects. Ms Chen's evidence was that she told Mr Leow about THC's capabilities and that the plaintiff could carry out the Project with THC's support. She also mentioned that she had a local partner, although she did not mention the first defendant by name.

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45 See for e.g. her email of 10 January 2010 at 2AB 532.

46 2AB 532-533.

47 3AB 592.

48 See for e.g. 3AB 630.

30 Ms Chen and the first defendant agreed that he should meet with FYTA upon his return to Singapore to salvage the plaintiff's chances of getting FYTA to appoint it as the developer for the Project. Ms Chen introduced the first defendant at a lunch with FYTA's representatives on 24 February 2010 as one of her friends who was a developer. He was seated next to Mr Leow during the lunch which was at Raffles Town Club. According to Mr Liu, Ms Chen said that the first defendant was a potential partner for the Project. I should mention that it does not appear from the evidence that, during this lunch, the first defendant's involvement with the plaintiff as its 50% shareholder and director was revealed to FYTA's representatives.

31 After lunch, the first defendant showed FYTA's representatives around a project he had recently completed at 18 Lornie Road ("Lornie 18").[49] His evidence was that this was a way to try to help the plaintiff get appointed as the developer of the Project.[50] I would just observe here that this must surely mean that there was must have been suggestion at the lunch that the first defendant might be partnering with Ms Chen for the Project. Two to three days after the lunch, some FYTA representatives, including Mr Leow, also visited the first defendant at his newly renovated bungalow, which was just a stone's throw away from the Project site. On both the visit to Lornie 18 and to the first defendant's home, Ms Chen was not present.

32 According to the first defendant's evidence, while at his home, Mr Leow and Mr Lew suddenly told him that FYTA wanted him to bid for the role as developer for the Project. It appeared that FYTA was going to invite for tenders from developers for the Project despite their arrangements with the plaintiff.

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49 Leow's AEIC para 38.

50 NE, 25 October 2018, p 43, lines 21-23.

The first defendant's evidence was that he was happy to hear that FYTA was going to invite him to bid, but he told them he was going to tender with the plaintiff. He was then told unequivocally by Mr Leow that, if he colluded with or worked with Ms Chen, he would not be considered. To this, the first defendant then said to FYTA representatives that he would proceed on his own to bid for the Project. He did this because, in his words, "[he is] a businessman"[51], and he knew that the plaintiff had no chance of getting the Project.

33 I should add that the first defendant's account of what happened at his home and his discussions there with FYTA's representatives was disputed by Mr Leow, who was called as a witness by the defendants. According to Mr Leow, there was no such visit by FYTA's representatives to the first defendant's home at all. His evidence was that, after the lunch on 24 February 2010, the first defendant had phoned him two days later and expressed an interest in becoming the developer for the Project. This is a point I will come back to later in this judgment.

34 Within a week of that lunch meeting, on 2 March 2010, Mr Leow and the first defendant attended a meeting with the URA to seek the approval for the PP to be extended by another six months.[52] The first defendant brought his architect, Mr Ho Seow Hui ("Mr Ho"), along to assist in the process. According to Mr Ho's evidence, Mr Leow did most of the talking at the meeting. Mr Leow was trying to convince the URA that the work at the Project site, which had stalled, would be proceeding again soon. The suggestion was that the first defendant would be on board as the new developer and Mr Ho the new architect.

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51 NE, 24 October 2018, p 81, line 3.

52 NE, 22 October 2018, p 12 line 18 to p 13 line 21.

Effectively, the new project development team was being presented to the URA.[53] Ultimately, the URA agreed to extend the PP by another six months.

35 It was clear that, by this time, FYTA did not wish go ahead with the plaintiff as the developer for the Project. The plaintiff accepts that, by the end of February 2010 and in early March 2010, Mr Leow had suggested to Ms Chen on more than one occasion that the plaintiff should voluntarily withdraw from the Project.[54] On 27 March 2010, Mr Leow sent Ms Chen an email attaching a draft termination agreement to be executed by THC and the plaintiff.[55] It is disputed whether Ms Chen had orally communicated to Mr Leow and the other FYTA representatives that THC and the plaintiff would withdraw from the Project. What is not in dispute is that the draft termination agreement was never executed by either THC or the plaintiff.

36 On or around 7 April 2010, the first defendant received an official invitation to tender for the Project.[56] The first defendant submitted his bid on 19 April 2010 and, on 4 May 2010, the board of FYTA accepted his proposal.[57] The second defendant was incorporated on 17 May 2010 as the vehicle to carry out the Project.[58]

37 In the meantime, on 23 August 2010, the first defendant's resignation as director of the plaintiff was lodged with ACRA. It is a matter of dispute when

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53 NE, 22 October 2018, p 17 line 9 to p 18 line 3.

54 Plaintiff's Closing Submissions ("PCS"), para 23.

55 Annie's AEIC - CLP-11.

56 Ow's AEIC para 125; pp 404-409.

57 Chan's AEIC, CSM-12 pp 156-167.

58 Ow's AEIC, para 22.

the first defendant gave notice of his intention to resign as a director of the plaintiff. This will be dealt with later in the judgment.

38 On 7 October 2010, the defendants, Clydesbuilt Investment Pte Ltd (in which the first defendant held 95% of its shareholding) and FYTA entered into a joint venture agreement.[59] In summary, the arrangement between the parties was as follows.

(a) The second defendant had a paid-up share capital of S$1 million, which was provided by its sole shareholder, Clydesbuilt Investment Pte Ltd. Representatives of FYTA were issued 1,000,000 preference shares at a par value of S$0.01 each, totalling the amount of S$10,000.

(b) At the time of its incorporation, the first defendant and his brother were appointed to the board of directors of the second defendant. On 20 October 2010, four more directors were appointed – the first defendant's sister, and three representatives from FYTA, including Mr Chan and Mr Leow.

(c) FYTA was entitled to 25 of the 82 residential units that would be built, while Clydesbuilt Investment Pte Ltd was entitled to 57 units.

(d) On 20 October 2010, pursuant to a sale and purchase agreement, the second defendant acquired from the trustees of FYTA the land on which the residential units would be built. The purchase price was S$70 million, and it would be paid by setting off against FYTA's share of the development costs for the Project.

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[59] 4AB 1069-1144.

39 The Project was completed sometime in 2014. Subsequently, a dispute arose between the parties to this joint venture. Legal proceedings were commenced by FYTA in 2017 against the two defendants and Clydesbuilt Investment Pte Ltd but were then later withdrawn. There was presumably some form of settlement reached.

40 On 31 July 2018, 21 of the 25 units (as four had been sold earlier on) earmarked for FYTA were transferred to them pursuant to a sale and purchase agreement entered into between the second defendant and FYTA on 26 February 2018. Thereafter, the 1,000,000 preference shares held by FYTA were cancelled, and FYTA's representatives resigned as directors from the second defendant's board.

41 As at the time of the trial of the matter before me, only Clydesbuilt Investment Pte Ltd remained as the shareholder of the second defendant. The second defendant's board presently comprises the first defendant, his daughter and his brother. According to the defendants, the second defendant still holds 48 of its earmarked 57 residential units, with nine units having been sold.

The plaintiff's case

42 The plaintiff's primary case against the first defendant is founded on a breach of director's duties. Its claim that the first defendant breached his duties is based on several key arguments: as a director of the company, the first defendant owed fiduciary duties not to act in a manner contrary to the interests of the plaintiff, the Project had been a maturing business opportunity which the plaintiff had been actively pursuing and the first defendant tendered his resignation with the intention of procuring the Project for himself.

43 The plaintiff alleges that, in procuring the Project for the second defendant, the first defendant usurped a maturing business opportunity in breach of his fiduciary duties as a director.[60] The Project was a concretised commercial opportunity which the plaintiff had been pursuing for about a year. Following the deterioration of her relationship with FYTA, Ms Chen had placed her confidence in the first defendant to conduct discussions with FYTA on the plaintiff's behalf.[61] The first defendant had undertaken to see the Project through for the mutual benefit of the company and himself.[62] As such, Ms Chen did not seek or receive updates from him. It was only several months later when she discovered the first defendant's true intentions but, by then, the plaintiff had lost the Project to the defendants.

44 According to the plaintiff, the first defendant's behaviour was also particularly egregious because he remained a director of the plaintiff whilst redirecting the Project to himself and the second defendant. Although the first defendant returned his 500,000 shares in the plaintiff in March 2010, he only resigned from his directorship in August 2010.[63] His shares had been transferred earlier because the first defendant had not paid for them and said that he was not "particularly interested" in having them.[64] The plaintiff claimed that there were no discussions between Ms Chen and the first defendant with regards to his resignation prior to August 2010.[65]

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60 Statement of Claim Amendment No. 1 ("SOC1") para 36(i).

61 NE, 18 October 2018, pp 97-98.

62 Annie's AEIC para 22; SOC1 para 36(d).

63 NE, 17 October 2018, p 96, lines 11-17; 18 October 2018, p 65, lines 5-12.

64 NE, 17 October 2018, p 94, lines 6-7.

65 NE, 17 October 2018, p 120, lines 1-18.

45 The plaintiff also claims that the first defendant is liable to it for inducing FYTA's breach of a binding contract made between the plaintiff and FYTA for the plaintiff to be appointed as the developer of the Project. The plaintiff argues this contract was an oral agreement on terms which are evidenced by a whole series of documents, including the Cooperation Agreement and the Joint Venture Agreement.[66] It was argued that the various documents showed an intention to create legal relations, and contained sufficient detail in relation to the parties' obligations to prove that the plaintiff and FYTA had a valid and binding contract in relation to the development of the Project.[67]

46 Apart from its primary claims, the plaintiff also claims that the first defendant is liable to hand over half of the Project's profits on the basis that there was a profit sharing agreement concluded between the plaintiff and the first defendant on 25 July 2010 ("the profit-sharing agreement"). This oral agreement was apparently reached following a meeting on that day where FYTA's representatives, the first defendant and the plaintiff's representatives were all present. The minutes of this meeting were documented by one of the plaintiff's representatives, Ms Esther Laska ("Ms Laska").

47 As for the second defendant, the plaintiff argues that it was complicit in the first defendant's wrongdoing and is liable on the ground of knowing receipt. It is claimed that being the successful tenderer for the Project, the company was the recipient of the plaintiff's property. Further, the second defendant possessed a sufficient degree of knowledge to make it unconscionable for it to retain the profits of the Project. The plaintiff also argues that the second defendant "knowingly participated in [the first defendant's] breach of duties", which is to

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66 PCS, paras 94-95. Set Down Bundle, SOC1, paras 15, 21.

67 PCS, pp 41-48.

say that the second defendant is liable for dishonest assistance.[68] The plaintiff's case is that the second defendant was incorporated by the first defendant to assist in carrying out the Project. Since the first defendant was its controlling mind and will,[69] the second defendant was dishonest in entering into the agreement with FYTA to develop the Project.

The defendants' case

48 The defendants claim that the first defendant was not in breach of his director's duties since he had already resigned when he tendered for the role as developer of the Project. There was also no maturing business opportunity that was being actively pursued because FYTA had called for a tender, for which the plaintiff was not invited. FYTA therefore had no intention of continuing negotiations with the plaintiff. The first defendant's resignation was also not prompted by a desire to acquire the Project for himself but because his purpose for teaming up with the plaintiff could no longer be fulfilled.

49 The defendants maintain that the first defendant was never an emissary for the plaintiff in any of its dealings with FYTA. The first defendant first met FYTA's representatives on 24 February 2010 at the lunch mentioned at [30] above. He showed them around Lornie 18 and his newly renovated bungalow home with the intention of helping the plaintiff secure the Project.[70] He was surprised when Mr Leow informed him during the visit to his house that FYTA was going to call for a tender and invited him to submit a bid.[71] He emphasised that Mr Leow had cautioned him that if he "tender[ed] or collude[d] or in any

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68 PCS, para 133.

69 PCS, para 132.

70 Ow's AEIC para 99; NE, 25 October 2018, p 43, lines 15-23.

71 Ow's AEIC, para 105.

way participate[d] with Innovative" he would be disqualified from the tender.[72]

50 According to the first defendant, within a few days of this meeting, he had informed Ms Chen of FYTA's invitation to him to participate in the tender.[73] He was fully cognisant of that the fact that, if he were to submit a bid for the Project, this would plainly conflict with his duty as the plaintiff's director.[74] To avoid this, he informed Ms Chen of his intention to transfer his shares in the plaintiff and resign as director immediately, to which she agreed.[75] She also consented to him going ahead on his own to bid for the role as the developer of the Project. In any event, once the first defendant tendered his resignation, his fiduciary duties as a director ceased, and he was free to pursue the Project on his own.

51 The first defendant claims that, in early March 2010, he signed a blank undated share transfer form in respect of his 50% shareholding in the plaintiff and a letter giving notice of his intention to resign as a director of the plaintiff.[76] He had a "gentleman understanding" with Ms Chen that the documents would be dated correctly.[77] Between 18 March 2010 and 24 August 2010, on his instructions, Ms Ng conducted multiple ACRA searches to ascertain whether his resignation as a director had been effected.[78] The first defendant orally reminded Ms Chen on several occasions to effect his resignation with ACRA as he had been asked about his directorship by the office-bearers of FYTA who

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72 Ow's AEIC para 107; NE, 24 October 2018, p 88, lines 9-12.

73 Ow's AEIC para 109; NE, 24 October 2018, p 84, lines 2-5.

74 NE, 24 October 2018, p 103, lines 1-5.

75 Ow's AEIC, para 120.

76 Ow's AEIC para 122; DCS para 180.

77 NE, 24 October 2018, p 103, lines 19-24.

78 Maria's AEIC para 30.

were concerned about the further involvement of the plaintiff in the Project.[79] According to Mr Leow's evidence, it was in the first half of April 2010 when he first found out from an ACRA search on the plaintiff that the first defendant was one of the plaintiff's directors and shareholders. Eventually, the first defendant instructed Ms Ng to write a letter to the plaintiff dated 24 August 2010 to demand that his resignation as a director be effected by lodging the required documents with ACRA.[80]

52 In respect of the claim for inducement of breach of contract, the defendants' approach was to argue that each of the various documents relied upon by the plaintiff did not constitute any binding contractual commitments between the plaintiff and FYTA for the development of the Project. So, for the Cooperation Agreement and the Joint Venture Agreement, the defendants argue that these were nothing more than incomplete, non-binding agreements and or memoranda of understanding "outlining the parties' intentions to continue in their efforts to negotiate a valid and binding contract".[81] In any case, the plaintiff agreed to withdraw from the Project.[82] The draft termination agreement sent by Mr Leow evidenced this in writing and Ms Chen did not subsequently contact Mr Leow to express a contrary intention.[83] Moreover, the first defendant did not do anything to cause FYTA to decide not to continue with dealing with the plaintiff.[84] As such, there is no basis for the plaintiff's claim against the first defendant for inducement of breach of contract.

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79 Leow's AEIC para 62.

80 Maria's AEIC p 70.

81 Chan's AEIC para 19.

82 Leow's AEIC para 50.

83 Leow's AEIC para 51.

84 Defendants' Closing Submissions ("DCS"), paras 52-59.

53 In respect of the claim on the profit-sharing agreement, the defendants argue that this claim is simply not made out on the evidence before the court.[85]

54 Lastly, the defendants dispute the second defendant's liability on the basis that the requirements for knowing receipt and dishonest assistance are not made out on the facts of this case.[86]

Issues to be determined

55 The plaintiff's claims for breaches of fiduciary duties, inducement of breach of contract, breach of the profit-sharing agreement, and accessory liability on the part of the second defendant, as well as the defences raised, throw up a number of issues to be decided, namely:

(a) when the first defendant resigned as a director of the plaintiff;

(b) whether the first defendant breached his fiduciary duties as a director to the plaintiff;

(c) whether there was a binding contract between the plaintiff and FYTA in relation to the development of the Project, and whether the first defendant had induced FYTA to breach this contract;

(d) whether the plaintiff has proven that the existence of the profit-sharing agreement;

(e) whether there was knowing receipt of the plaintiff's property and/or dishonest assistance by the second defendant; and

(f) the appropriate remedies against the defendants if any of the plaintiff's claims are made out.

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85 DCS, pp 97-100.

86 DCS, pp 100-107.

56 The issues at (a) to (d) relate the plaintiff's claims against the first defendant, while (e) relates to the second defendant. I will deal with these issues in turn.

When did the first defendant resign from his position as a director of the plaintiff?

57 The first defendant's resignation was lodged with ACRA on 25 August 2010. The defendants submit that this date is inconclusive and rely on s 173(8) of the Companies Act (Cap 50, 2006 Rev Ed) which sets out that entries in the register of directors only constitute *prima facie* evidence of the truth of the matters therein.

58 The defendants assert that the first defendant actually resigned in early March 2010 by way of an undated resignation letter and transferred his shares at the same time (see [51] above). On the other hand, Ms Chen maintained that the first defendant handed over his shares in April and only resigned in August 2010 when he tendered his resignation at that time.[87]

59 In my judgment, there are several difficulties with the defendants' account. I find it odd that the first defendant would sign undated documents on the basis of there being a "gentleman understanding" as he claimed.[88] As he explained in his oral evidence, he was acutely aware that remaining a director would put him in a position of conflict if he were to bid for the Project independently.[89] This prompted him to urgently inform Ms Chen of FYTA's plans to invite him for a tender and sign the relevant documents as soon as possible.[90] If this was all true, it would have been in the first defendant's interest

87 PCS, para 57.

88 NE, 24 October 2018, p 103, lines 19-24.

89 NE, 24 October 2018, p 103, lines 1-5.

to finalise his resignation by dating his resignation letter to assure himself that he had indeed properly resigned *before* he engaged any further with FYTA.

60 According to the first defendant, he also instructed his solicitor, Ms Ng, to conduct multiple ACRA searches to confirm that his resignation had been effected by the necessary lodgement with ACRA. If it were true that he was anxious to cease being a director of the plaintiff as soon as possible, I find it surprising that he would wait until August 2010 before he instructed Ms Ng to send a letter to the plaintiff to ask that his resignation be effected without delay. There was no documentary evidence to show any earlier attempt to inform Ms Chen to effect his resignation. I should also point out that Ms Ng's letter of 24 August 2010, which asserted that the first defendant had tendered his resignation as a director in "March/April 2010",[91] was responded to by the plaintiff's solicitors' letter of 30 August 2010, which asserted that the first defendant's letter of resignation was only received by the plaintiff in early August 2010.[92]

61 Another point raised by the defendants was that it would have been illogical for the first defendant to have transferred his shares and resigned at different points in time.[93] However, Ms Chen provided a logical explanation for this. As of March 2010, the first defendant still had not paid for his 500,000 shares in the plaintiff. He had agreed to pay S$500,000 for this 50% stake in the plaintiff.[94] When he was asked by Ms Chen to produce the relevant sum, he offered to return the shares instead.[95] This was probably because, by then, the

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90 NE, 24 October 2018, p 88, lines 17-22.

91 Maria Ng's AEIC, p 70.

92 Maria Ng's AEIC, p 71.

93 DCS, para 187(c)(ii).

94 NE, 17 October 2018, p 5 line 16 to p 6 line 7.

first defendant had already decided to pursue the Project on his own rather than with the plaintiff. I would also observe that the earlier return of his shares would have allowed the first defendant to slowly extricate himself from the plaintiff without putting Ms Chen on notice that anything was amiss.

62 It also bears mentioning that the first defendant's account of when he resigned has varied throughout the proceedings:

(a) His solicitor's letter dated 3 January 2013 stated that the first defendant tendered his resignation in August 2010.[96]

(b) In his defence dated 19 May 2016, the pleaded case was that the first defendant resigned "sometime in or around late March or early April 2010".[97]

(c) During cross-examination, he said that the date of resignation "should be early March".[98]

63 These discrepancies raise doubts as to his credibility. On the one hand, Ms Chen was able to recall, with some detail, the circumstances in which the first defendant signed his resignation letter in August 2010.[99] Her evidence was that she did not meet the first defendant at his house over coffee or tea, which is where and how they would usually meet to discuss things. Instead, she was sitting in her car while the first defendant signed the letter on the bonnet of her car. On the other hand, however, when pressed about the details concerning his

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95 NE, 17 October 2018, pp 93-94.

96 5AB 1345, para 14.

97 Defence, para 7(a)(ii).

98 NE, 24 October 2018, p 98, lines 21-22.

99 NE, 17 October 2018, p 96 lines 11-17.

letter of resignation, the first defendant claimed that his memory was "not so good".[100]

64 Furthermore, the defendants' pleaded case is that the first defendant only discovered that his resignation was not reflected in the ACRA records in August 2010.[101] But this is completely inconsistent with his evidence that the ACRA searches had alerted him to the plaintiff's supposed inaction. According to his evidence, there were at least five searches done on his instructions in the period from March to June 2010. A more likely explanation is that these searches were conducted with the intention of monitoring the status of the plaintiff whilst the defendants were in the process of securing the Project from FYTA. I find that, contrary to his evidence, the first defendant did not appear to be too concerned that he was still a director of the plaintiff while he was tendering for the Project for himself. In my judgment, the evidence points to the first defendant making the conscious decision to only resign in early August 2010. This was only after he was certain that he was going to be the developer for the Project.

65 The plaintiff argued that the date of the first defendant's resignation was an important aspect of this case.[102] While this is true to a certain extent, ultimately, it did not affect my findings as to the scope of his fiduciary duties. Even if the first defendant had resigned in early March 2010, as he now says, the first defendant's liability for breach of his fiduciary duties would largely be dependent on the motivation behind his resignation. If he had resigned for the purpose of pursuing the Project on his own, and it is shown that in doing so, he had appropriated a maturing corporate opportunity of the plaintiff's that it was still pursuing, he would nonetheless be in breach of his fiduciary duties owed to

100 NE, 17 October 2018, p 96, lines 11-17; NE, 24 October 2018, p 99, lines 10-13.

101 Defence, p 16, para 42.

102 PCS, para 31(1).

the plaintiff. Put another way, simply resigning as a director of the company would not absolve him of liability for his actions. This issue is discussed in more detail below.

Did the first defendant breach his fiduciary duties to the plaintiff?

66 As a preliminary point, I make a brief observation as to the scope of the first defendant's fiduciary duties. A fiduciary is "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence" (*Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 ("*Turf Club Auto*") at [42]. Put another way, a fiduciary is a party who has voluntarily assumed power over, and responsibility for, the affairs of another party. This relationship generates a legitimate expectation that a fiduciary will not utilise his or her position in a manner that is adverse to the interests of the principal. Directors fall within the settled categories of fiduciary relationships and there is a strong rebuttable presumption that they consequently owe fiduciary duties to their companies (*Turf Club Auto* at [43]). However, ultimately, whether such duties exist and their extent turns on the *nature and scope* of the parties' relationship as shown by the facts of the case. This is important because a director may not be liable for profits derived by him outside the scope of the company's business or be obliged to protect the company's interests outside such scope.

67 The defendants submit that the first defendant's duties were limited to the agreement to collaborate with Ms Chen and THC, and would only arise *upon the award of the Project to the plaintiff*, which never happened.[103] In other words, even though the first defendant became a director of the plaintiff, he did

103 DCS, para 80.

not have the usual fiduciary duties that a director would normally have because there was no general relationship of trust and confidence between the first defendant and the plaintiff. Duties were only undertaken in respect of the Project.

68 In my judgment, I find that this submission is not supported by the evidence. While the defendants rely on the first defendant's email to Ms Chen dated 4 December 2009 (see [21] above), there is nothing in the email which seeks to limit the scope of the first defendant's duties such that they arise only when the Project is awarded to the plaintiff. There is also nothing in the correspondence between the parties which suggests that the first defendant's duties as a director of the plaintiff were so limited.

69 Quite apart from this, it is important to note that the first defendant only gained access to FYTA's representatives through the introduction of Ms Chen *after* he and Ms Chen had come to an agreement that they would collaborate through the auspices of the plaintiff and *after* the first defendant became a director of the plaintiff. This is relevant because this shows that this was not an opportunity which the first defendant would have been able to exploit on his own if he had not become a director of the plaintiff. There is no suggestion that the first defendant was someone that FYTA was aware of as a developer and would have invited to tender for the Project even if he had not been introduced to them by Ms Chen in February 2010. The fact that this was the case indicates that the first defendant must have fully understood that the expectation on him was that he would have to act in the best interests of the plaintiff and subordinate his own interests to that of the plaintiff's.

70 Further, I find that the defendants' submission about the limited scope of the first defendant's fiduciary duties is contradicted by the first defendant's

own evidence under cross-examination that he was fully aware of his fiduciary duty as a director of the plaintiff not to place himself in a position of conflict of his interest and his duty. He explained that this was why he wanted to resign from the plaintiff as quickly as possible before he pursued the Project for himself, even though by then, it was clear to him that FYTA would not be awarding the Project to the plaintiff.

71 For the above reasons, I find that the first defendant owed the usual fiduciary duties that are imposed on individuals when they become directors of companies. While it is true that the first defendant only became a shareholder and director of the plaintiff because of the likelihood at that time that the plaintiff would become the developer of the Project, it does not change the fact that, when appointed as a director, he would have assumed the obligations and duties of a director of the company. These included the duty of loyalty, to act honestly, in the best interests of the plaintiff and not to place himself in a position of conflict.

72 I turn now to whether there was a breach of these duties. A director is not allowed to obtain for himself any property or business advantage which "properly belongs to his company or for which it has been negotiating" (Tan Cheng Han *et al*, *Walter Woon on Company Law* (Sweet & Maxwell Ltd, 3rd Ed, 2009) ("*Walter Woon*") at [8.58]). This duty is a confluence of the rules that a director must not place himself in a position where his personal interests would conflict with his duty to the company and that a director must not abuse his position to make an unauthorised profit. This fiduciary obligation of loyalty is an inflexible one that persists even after the director's resignation. A former director would be in breach of his duties to a company in respect of his resigning to procure a corporate opportunity of the company, if three conditions are satisfied, as explained by the Supreme Court of Canada in the oft-cited

Canadian Aero Service Ltd v O'Malley (1973) 40 DLR (3d) 371 at 382 ("*Canadian Aero Service*"):

(a) first, there must be a "maturing business opportunity";

(b) secondly, the company must have been "actively pursuing" that opportunity; and

(c) thirdly, the director's resignation may "fairly be said to have been prompted or influenced by a wish to acquire for himself" that opportunity.

The conditions laid in *Canadian Aero Service* have been accepted in a number of English and local decisions, including by the Court of Appeal in *Tokuhon (Pte) Ltd v Seow Kang Hong and others* [2003] 4 SLR(R) 414 at [50] and by Judith Prakash J, as she then was, in *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [56].

Was the Project a maturing business opportunity?

73 For there to be a maturing business opportunity, the company must have invested its efforts and resources in attempting to secure that opportunity. There must therefore be a concretised opportunity, and the mere prospect of future business is insufficient: *Canadian Aero Service* at 390. A director would not be precluded from exploiting general knowledge acquired in the course of his directorship upon assuming a new position.

74 In their closing submissions, the defendants have relied on two decisions which they argue illustrate that a proper application of this principle would show that the Project was not a maturing business opportunity. However, when I

examined the facts of these two decisions, I found them to be quite clearly distinguishable from the facts in this case.

75 The first was the Hong Kong Court of Appeal decision in *Akihiro Oba and others v Kishimoto Sangyo Co Ltd and another* [1996] HKCA 581 ("*Akihiro*"). In that case, the plaintiff companies alleged that the actions of a former director had prevented them from obtaining a significant number of contracts from a Taiwanese company. The director had developed goodwill with this company whilst he was employed by the plaintiffs. Through his efforts, the plaintiffs had secured two contracts from the company for a pilot production plant project. Upon the director's resignation, he then entered into his own discussions with the company for a mass-production project. The Court found that the plaintiffs' anticipation of obtaining further contracts from the company was too remote for equitable relief to bite as these contracts were "nowhere in sight" when the director resigned (at [46]). There was no connection between the opportunity that enured to the former director's benefit and the opportunities he gained knowledge of whilst he remained in the plaintiffs' employment. The mass-production project in *Akihiro* was thus more akin to an "embryonic", rather than maturing, opportunity.[104]

76 The reasoning of the Court in *Akihiro* is also found in the English High Court decision in *Island Export Finance Ltd v Umunna and another* [1986] BCLC 460 ("*Island Export*"), the other case relied on by the defendants. There, the managing director of the plaintiff company had secured a contract for postal caller boxes from Cameroon's postal authorities. He later resigned and formed him own company. The former director then obtained, for his own company, two contracts from the postal authorities. Hutchinson J found that at the

104 DCS, para 83.

material time, the plaintiff company had not been actively seeking new orders for postal caller boxes. Thus, the mere hope of further orders could not be regarded as a maturing business opportunity.

77 In this case, the nature of the opportunity in relation to the Project differed significantly from the facts in *Akihiro* and *Island Export*. It was an identifiable opportunity that was clearly particularised in the Cooperation Agreement and the Joint Venture Agreement, that is, the development of the site at 33 Holland Link into a residential project and a cultural centre. Money had also been expended for the Project's excavation works. I should add that it is the first defendant's own evidence that the financial institutions that he had approached were prepared to give an indicative term sheet for financing even without a finalised agreement between the plaintiff and FYTA.[105] From a commercial perspective therefore, this was clearly a real, and not a speculative, business opportunity for the plaintiff.

78 Also, one could not say that the opportunity was at an embryonic stage given that there is no dispute that the plaintiff and FYTA were in the midst of trying to finalise the terms of the revised JVA when FYTA decided that it did not wish to proceed with the plaintiff as the developer. Most importantly, it was the *same* opportunity that was subsequently acquired by the first defendant. I therefore reject the argument that the Project was not a maturing business opportunity of the plaintiff's.

Was the Plaintiff actively pursuing the Project?

79 This inquiry ties into the foregoing point. As noted at [73], for an opportunity to be maturing, a company would have to pursue it in some way.

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105 Ow's AEIC, para 71.

The defendants submit that it was impossible that the plaintiff was actively pursuing the Project at the material time. This was because FYTA had lost confidence in the plaintiff and, even if it had secured the Project, it lacked the requisite experience and financial resources to complete the development.[106]

80 In *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 ("*Industrial Development Consultants*") at 453G, Roskill J, as he then was, held that, in determining whether there is an active pursuit of an opportunity, the likelihood of the company actually acquiring that opportunity for itself is *irrelevant*. The inherent nature of fiduciary obligations compels directors to disregard their personal interests. On the facts of *Industrial Development Consultants*, the former managing director of the plaintiffs withheld information that the Eastern Gas Board was willing to offer him a project which the plaintiffs had been unsuccessfully pursuing. Although there was no possibility of the plaintiffs obtaining the project in question, this did not exonerate the director's conduct. His fiduciary obligations took precedence.

81 Roskill J explained that "[i]t is an over-riding principle of equity that a man must not be allowed to put himself in a position in which his fiduciary duty and his interests conflict" (at [453H]). He also referred to language used in *Regal (Hastings) Ltd v Gulliver and others* [1967] 2 AC 134 ("*Regal*") that a director "must account for any benefit which he obtains in the course of and owing to his directorship" (at [453G]). In *Regal*, the House of Lords rejected the argument that the impossibility of the company to realise the corporate opportunity was in any way a defence to the claim against the directors for acquiring the opportunity for themselves (see 149G).

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106 DCS, para 105.

82 The view in *Industrial Development Consultants* was affirmed locally in *Hytech Builders Pte Ltd v Tan Eng Leong and another* [1995] 1 SLR(R) 576 at [58]. Warren L H Khoo J found that the fact that a company cannot take advantage of a corporate opportunity "does not make it any the less a diversion if the director takes that opportunity for himself" (at [59]). In my view, this conclusion flows from the underlying rule that a director must account for any unauthorised profits, and that a constructive trust will be imposed on such profits or their traceable proceeds. It is not relevant in such an analysis that the company itself could not have made those profits or would have suffered no loss. That being case, and following that reasoning, in the case of a diversion of a corporate opportunity, it is irrelevant that the company could not have ultimately exploited the opportunity for itself.

83 An exception to this would be the scenario in *Peso Silver Mines Limited (NPL) v Stanley E Cropper* [1966] SCR 673 ("*Peso Silver Mines*") where the Supreme Court of Canada found that Peso's board of directors had expressly considered and rejected an offer from a prospector to sell mine claims to the company. The managing director's subsequent decision to form a company to acquire these claims himself was not in breach of his duties. A pillar of the Court's reasoning was also that the director had not obtained the mine claims by reason of the fact that he was a director and in the course of the execution of that office (at 682). It was therefore distinguishable from the decision in *Regal*, where the directors obtained the opportunity "by reason and only by reason of the fact that they were directors of Regal" and were therefore accountable for profits gained in the course of the execution of their office (per Lord Russell of Killowen at 149F).

84 The reasoning in *Peso Silver Mines* has no application in this case. The first defendant only acquired knowledge of the Project through his association

with Ms Chen and then the plaintiff. His interactions with FYTA occurred through the lens of him being the plaintiff's representative even though he was not introduced to FYTA's officer-bearers at the lunch on 24 February 2010 as a director, shareholder or employee of the plaintiff. The circumstances leading to that meeting are also telling.

85 The first defendant and Ms Chen were in discussions in the last quarter of 2010 for him to participate as a 50% shareholder in the plaintiff. To that end, after agreement on the terms of their cooperation were reached, the first defendant signed the documents for him to become a director of the plaintiff. In January and February 2010, the concern that was discussed between the first defendant and Ms Chen was that the Project might not eventually be awarded to the plaintiff because of the new FYTA office-bearers in charge not being confident of Ms Chen's abilities. It was in this context that the first defendant suggested that he meet with FYTA's representatives to assure them that the plaintiff could perform as promised. Following from this suggestion, the first defendant attended the lunch meeting on 24 February 2010, and before that, he was appointed a director of the plaintiff on 18 February 2010.

86 Given the circumstances, the first defendant was well placed to cultivate the trust and confidence of FYTA and he eventually used this to his advantage. Ms Chen's evidence, which I accept, is that, after the lunch meeting on 24 February 2010 when the first defendant was introduced to FYTA's representatives, she left it to the first defendant to try to engage with and persuade them to award the plaintiff the Project. In her words, "I told [the first defendant] to deal with them because he's also a Singaporean (…) so I told him that I would be in charge of the works while he would be in charge of dealing with these Hakka people".[107] My analysis of the evidence, in its totality, is that

Ms Chen had entrusted the first defendant with the job of trying to get the Project because she believed that he could impress FYTA's representatives with his credentials and experience, and because she felt, quite rightly, that the new Project committee was less than enamoured with her.

87 In any case, there was no written evidence that the plaintiff had given any indication that it was withdrawing from the Project. I do not accept the suggestion that the draft termination agreement sent by Mr Leow to Ms Chen was a reflection of the parties' intentions to dispose with the Cooperation Agreement and the Joint Venture Agreement. Both Mr Chen Xin and Ms Chen consistently maintained that they did not approve or confirm the plaintiff's withdrawal from the Project.[108] I accept Ms Chen's evidence that she communicated to Mr Leow that THC did not agree to end the parties' arrangement.[109] Ms Chen also continued to rely on the first defendant to engage with FYTA after February 2010, believing that he was trying to secure the Project for the plaintiff.[110] Given that the plaintiff was still actively trying to pursue the Project, the ultimate likelihood of its success is immaterial for the purposes of my analysis on liability.

Was the first defendant's resignation influenced by a wish to acquire the opportunity for himself?

88 The final condition set out in *Canadian Aero Service* relates to the motivation behind a director's resignation. In *Akihiro*, the director in question resigned because of a lack of support from and unfair treatment by the company's management (at [22vii]). Somewhat similarly in *Island Export,* the

107 NE, 18 October 2018, p 97, lines 15-20.

108 NE, 24 October 2018, p 30, lines 21-22; PCS, para 25.

109 Ms Chen's AEIC, paras 36-37; NE, 17 Oct 2018, pp 1-6.

110 NE, 18 October 2018, p 97 line 24 to p 98 line 7.

company's managing director felt dissatisfied with his role and wished to branch out on his own (at 477d). The courts found their behaviour to be unobjectionable because their resignations were not influenced by ulterior motives to pursue maturing business opportunities independently.

89 Comparatively, it is clear that the first defendant's resignation was driven by his desire to acquire the Project as one can see from his answers during cross-examination, for example:[111]

> Q: … you wanted to resign because you knew that as a director of Innovative you shouldn't be bidding for the project with Clydesbuilt?
>
> A: Correct, because that's what you call fiduciary duty, and also conflict of interest…

90 Not only is the motivation for the first defendant's resignation clear, it is also quite apparent from the evidence of the defendants' own witnesses that the first defendant was already actively pursuing the Project for himself by late February 2010, even before he resigned as a director of the plaintiff. Mr Leow gave evidence, which I accept, that the first defendant called him barely two days after the lunch on 24 February 2010 to declare his interest to bid for the role as developer of the Project.[112] Following quickly from that, the first defendant volunteered his attendance at the URA meeting with Mr Leow on 2 March 2010 to assist in getting the PP for the Project extended by another six months. The evidence of the first defendant's architect, Mr Ho, another witness called by the defendants, was that the first defendant was effectively being presented to the URA as the new developer for the Project. Hence, there can be little doubt that the first defendant's plan of action to take over this business

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111 NE, 24 October 2018, p 103, lines 1-5.

112 NE, 23 October 2018, p 47, lines 14-25.

opportunity was already being executed even before he attempted to resign, on his own evidence, in early March 2010.

91 The defendants' argument that the first defendant resigned to ensure good corporate governance is misconceived and does not provide any defence. The fact remains that he resigned because he was motivated to secure the Project for himself. He had been specifically cautioned by Mr Leow that working or colluding with the plaintiff and Ms Chen would disqualify him from the tender.[113] His resignation was thus a clear move to disassociate himself with the company in order to achieve his purpose.

92 I should add that I have analysed this issue of the plaintiff's resignation on the assumption that he gave notice of his intention to resign in early March 2010, as he claimed he did. As I have explained above at [57] to [64], I found that the evidence indicated that it was more likely that the first defendant only attempted to resign as a director of the plaintiff in early August 2010. Since he still remained a director of the plaintiff in the period of April to June 2010, the first defendant's tendering for the role as the developer for the Project during this period of time was a clear breach of his fiduciary duties. Even if he had given notice of his resignation before he bid for the Project in April 2010, that would have made no difference given that his resignation was for the purpose of acquiring that corporate opportunity of the plaintiff's for himself.

93 For the above reasons, I find that the first defendant breached his fiduciary duties to the plaintiff.

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113 NE, 24 October 2018, p 88, lines 9-15.

Did Ms Chen give the first defendant her consent for him to bid for the Project?

94 In *Viking Airtech Pte Ltd v Foo Teow Keng and another* [2008] 1 SLR(R) 225*,* Judith Prakash J, as she then was, observed that the director had breached his duties in failing to inform other directors of the company's inability to carry out certain projects, thereby preventing them from "mak[ing] a consensual decision in consultation with him as to what was to be done with those contracts" (at [18]). The suggestion therefore is that, had the director not acted unilaterally, this would have legitimised his behaviour. According to the first defendant, he informed Ms Chen of FYTA's call for a fresh tender and his intention to participate on his own (at [50] above). Ms Chen then gave him her "blessing" and in fact warned him to be careful in dealing with FYTA as the plaintiff's efforts had all come to naught.[114] In doing so, the defendants argue that she would have consented to or ratified any potential breach of fiduciary duties by the first defendant. This is disputed by the plaintiff.[115] Ms Chen's evidence was that she never gave any consent for the first defendant to pursue the Project on his own. In fact, she believed that he was trying to secure the Project for the plaintiff. It was only sometime later that she found out that the first defendant had tendered for the Project on his own.

95 In my judgment, Ms Chen's conduct does not indicate that she had consented to the first defendant's independent pursuit of the Project. It does not make sense to me why she would have continued to take a backseat in the discussions with FYTA after February 2010 if she was aware of the first defendant's plans to secure the Project for himself.[116] It is more likely that she

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114 Defence paras 47-48, 178(e); NE, 24 October 2018, p 119, line 21 to p 120, line 4.

115 NE, 17 October 2018, p 98, lines 9-13; PCS, para 63.

116 NE, 18 October 2018, p 98, lines 2-11.

was ignorant of the true nature of the first defendant's discussions with FYTA. In this regard, I find it quite difficult to accept the first defendant's version that Ms Chen would have so easily agreed to give up on the Project by giving him her "blessing", when the evidence showed that she was extremely invested in this Project since the middle of 2009.

96 That Ms Chen had never consented to the first defendant going ahead on his own is also supported by her email to the first defendant dated 7 September 2010 where she lamented that she had chosen him as her business partner "because your words, your [*sic*] talking and speech really gave me a very good impression, your project is so lovely, your A-Z theory is so nice, that was a really wonderful time when I worked with you for those days … sorry i cant [*sic*] stop my stupid tears and cant [*sic*] write more …"[117] The email expressed, quite emotively, her feelings of helplessness and betrayal at the first defendant's actions of acquiring the Project for himself to the exclusion of the plaintiff. I find it unlikely that this reaction could have come from someone who had given the first defendant the green light to proceed and had given up the chance of pursuing the Project. Tellingly, the first defendant did not reply to this email to deny this rather serious allegation that he had misled Ms Chen.[118]

97 Ultimately, my finding that Ms Chen had not given her consent turned on my assessment of the credibility of her and the first defendant's evidence. While Ms Chen was certainly not the perfect witness, she came across as a straightforward and candid person, who answered the questions put to her directly whenever she could do so during the three days when she was being cross-examined. On the other hand, I had serious difficulty with the evidence

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117 4AB 997.

118 PCS para 65.

of the first defendant. He was extremely defensive throughout his cross-examination, and was keen to keep repeating the contents of his affidavit of evidence-in-chief at length instead of answering the questions directly.

98 Some parts of the first defendant's evidence also showed a lack of internal consistency. He testified that, as an experienced businessman, he knew from what Ms Chen was telling him in January 2010 about her difficulties with the new Project committee at FYTA, that the plaintiff would not be awarded the role as developer for the Project.[119] Yet, his evidence was that he was still working hard to try to get the Project for the plaintiff by, for instance, getting the legal documentation sorted out and trying to get financing.[120] He did not just call off his arrangement with Ms Chen. This suggested to me that, in truth, the first defendant was really trying to secure the Project *either* with the plaintiff *or* on his own, depending on the ultimate decision of FYTA. As such, the groundwork that he was doing in terms of legal documentation and financing would not go to waste. It was with this frame of mind that the first defendant attended the lunch on 24 February 2010 with FYTA's representatives, invited them to view Lornie 18 and also volunteered his help for the meeting with the URA on 2 March 2010. It was because he had this mindset that the first defendant's evidence was that, if things fell through for the plaintiff, "I will opt out, I will not stick around. I will opt out".[121]

99 Further, I find that the evidence led by the defendants themselves also casts serious doubts as to the credibility of the first defendant as a witness. Mr Leow gave evidence that, in April 2010, when he first discovered that the first defendant was a director and shareholder in the plaintiff, he asked the first

119 NE, 24 October 2018, p 94-95.

120 NE, 24 October 2018, p 109.

121 NE, 24 October 2018, p 109, lines 16-24.

defendant to explain his involvement with the plaintiff. Remarkably, the first defendant's response was that he had never agreed with Ms Chen to become a director or shareholder of the plaintiff.[122] This was a blatant untruth, even on the first defendant's own case. It bears reiteration that Mr Leow was the defendants' witness. If it was indeed true that Ms Chen had consented to the first defendant going ahead with the Project on his own, I find it difficult to understand why the first defendant could not have just told Mr Leow that. Instead, he falsely attempted to disavow any connection with Ms Chen and the plaintiff.

100 In any event, regardless of whether Ms Chen had given her consent to the first defendant's actions, as a matter of law, a breach of fiduciary duties by a director can only be consented to or ratified by the shareholders of the company. Generally, all the shareholders must agree, but a resolution passed by a simple majority of the shareholders may be sufficient, unless it amounts to a fraud on the minority or where it would constitute disregard of a minority shareholder's interest: *Cook v Deeks and others* [1916] 1 AC 554 ("*Cook*"). This point is well illustrated in *Cook*, where a shareholder resolution was passed to declare that the Toronto Construction Co had no interest in a corporate opportunity, which had been appropriated by the defendants. This resolution was held to be invalid by the Privy Council because it was passed by way of the voting power of the three defendants. The Court observed that the defendants had sought to make a present of the company's property to themselves and the resolution amounted to oppression of the remaining 25% minority shareholder (at 564).

101 An informal assent of all the shareholders may be sufficient to

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122 NE, 23 October 2018, p 61, lines 13-17.

effectively ratify a director's breach of his fiduciary duties. The proprietary interests of shareholders entitle them as a general body to be regarded as the company when questions of the duties of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done: *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others and other appeals* [2013] 1 SLR 374 at [45] citing Street CJ in *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 at 730.

102 Consistent with this, the Court of Appeal has held that directors may be released from their obligations to the company by unanimous or, at the very least, majority agreement of the shareholders to "forgive and approve" their conduct, provided of course there is full disclosure of the relevant facts: *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 at [59] citing *Bamford v Bamford* [1970] Ch 212 at 238B.

103 Here, there was no resolution passed by the shareholders of the plaintiff approving the first defendant's intended pursuit of the Project for himself. It is also not disputed that Mr Yang, who was known to the first defendant, became a shareholder of the plaintiff in January 2010, first holding 50,000 shares, and then in February 2010, holding 100,000 shares. In total, he paid S$100,000 for his 10% shareholding in the company. Mr Yang was also a director of the plaintiff at the material time after he became a shareholder.[123] There was no evidence before me that Mr Yang had consented to, or was even aware of, the actions of the first defendant in pursuing the plaintiff's corporate opportunity on his own. At the end of the day, it is for the defendants to show to the court's satisfaction that the shareholders had either consented to or validly ratified the

[123] 3AB 712.

first defendant's breach of fiduciary duties (*Walter Woon* at [9.20]). This burden has not been discharged.

Was there a binding contract between the plaintiff and FYTA to develop the Project and did the first defendant induce a breach of that contract?

104 I now consider whether the first defendant had procured FYTA to act in breach of a binding contact between the plaintiff and FYTA and is thus liable to the plaintiff for damages for the tort of inducement of breach of contract.

105 The elements for establishing this tort are as follows (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [17]):

(a) the procurer must have acted with the requisite knowledge of the existence of the contract;

(b) the procurer had the intention, determined objectively, to interfere with the performance of the contract; and

(c) the contract in question must be shown to be a valid one.

106 I should add at this juncture that the first defendant's liability for breach of his fiduciary duties as a director of the plaintiff is not contingent on the legal enforceability of any contract between FYTA and the plaintiff. It is clear that the requirement that the plaintiff must have lost a maturing business opportunity does not require the plaintiff to show that it had a legally enforceable agreement for it to become the developer for the Project. It is enough that the plaintiff was negotiating a maturing business opportunity (*Canadian Aero Service* at 382).

107 The plaintiff's case that there was a binding contract between it and FYTA rests on the court finding that there was an oral agreement for the plaintiff

to develop the Project on terms that were evidenced by various documents. In my judgment, the only documents that would be relevant to such an argument must be those that were signed by the parties or sent by one party to the other. In this regard, the Cooperation Agreement and the Joint Venture Agreement are the most relevant to the plaintiff's case. Documents such as the minutes of FYTA, which are internal and were never communicated to the counterparty, would be irrelevant.

108 The Cooperation Agreement was an agreement between THC and FYTA, which did not mention the plaintiff. At the time it was made, it was not even contemplated that the plaintiff would have any role in the Project. As such, while it does reflect an intention by FYTA to work with THC in relation to the Project, it cannot evidence any contract between the plaintiff and FYTA.

109 As for the Joint Venture Agreement, it is undisputed that this was never executed by all the intended parties to the agreement. In the first place, there were four trustees which held the land in question for the benefit of FYTA. Only three of them were named as intended parties in the Joint Venture Agreement. The plaintiff and two of the three named trustees did not execute the Joint Venture Agreement. Under FYTA's constitution, the trustees were empowered to deal with matters relating to the land, which would include the Joint Venture Agreement to develop the Project. Given this, I find that the Joint Venture Agreement was incomplete in the sense that there was, in law, no agreement at all. The necessary persons were not parties to and had not executed the agreement.

110 While this in itself does not suggest that there can be no binding oral contract between the parties on the essential terms of the joint venture, the fact that parties were negotiating the terms of the revised JVA suggests that parties

intended to record the terms of their eventual agreement in written form, and an enforceable legal relationship would be created only upon the execution of the written agreement.

111 In my view, when assessed holistically, the parties' conduct suggests that this was a joint venture arrangement that was still being finalised, with many terms yet to be agreed and subject to further negotiations.[124] As already mentioned, there were several irregularities in the execution of the Joint Venture Agreement and even the plaintiff anticipated that a more detailed and formalised agreement would follow. This was the reason Ms Ng was instructed by Ms Chen and the first defendant to come up with revised drafts of the Joint Venture Agreement.

112 The plaintiff points out that the draft termination agreement sent by Mr Leow to Ms Chen on 27 March 2010 states in its preamble, amongst other things, that FYTA and the plaintiff had entered into an agreement dated 23 September 2009 to develop the Project, which is a reference to the Joint Venture Agreement.[125] Clause 2.1 of that draft termination agreement goes on to provide for the termination of that agreement.[126] However, as I have mentioned earlier, I find that the Joint Venture Agreement was not a valid contract in the first place. The statements in the draft termination agreement cannot in law change that fact. In any event, the plaintiff's pleaded case is not that the Joint Venture Agreement constitutes the contract between the plaintiff and FYTA, but only that it evidences the terms of agreement that were orally agreed.[127] Thus, the plaintiff cannot take an inconsistent position in its submissions.

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124 NE, 18 October 2018, p 121, lines 3-13.

125 Plaintiff's Bundle of Documents ("PBD") p 80-82. PCS para 104.

126 PBD p 81.

127 Set Down Bundle, SOC1, p 19-20, para 21-22.

113 In any event, I find that there is little basis to argue that the first defendant had procured a breach of any contract between the plaintiff and FYTA, even if I were to accept that it was a binding contract between them. Instead, the evidence showed that Mr Leow, who was now chairman of the Project committee, and the person who would recommend to FYTA whether to move ahead with the Project with the plaintiff, had decided not long after he took over that the plaintiff was insufficiently experienced to be able to develop the Project. I do not find that there was anything that the first defendant did which caused Mr Leow to form this view of the plaintiff. In fact, by the time the first defendant first met Mr Leow at the lunch meeting on 24 February 2010, it appears to me that Mr Leow had more or less made up his mind about the plaintiff. That is why, barely a week later, he had invited the first defendant to the meeting with the URA on 2 March 2010.

Did the plaintiff and the first defendant enter into the profit-sharing agreement?

114 This issue arises from a meeting held on 25 July 2010 between FYTA's representatives (Messrs Leow, Lew, Ho and Chan), the first defendant, Ms Chen and another representative of the plaintiff, Ms Laska, as well as Mr Goh Huck Heng ("Mr Goh"), who was a friend of Ms Chen. By that time, the Project had already been awarded to the first defendant even though the formal documentation had not yet been executed between FYTA and the defendants. Having been informed of this, the plaintiff sought a sum of compensation during the meeting. According to the plaintiff, the first defendant conceded that he had been introduced to the Project through his association with the plaintiff.[128] Ms Chen and him then purportedly came to an agreement to share the amount of S$10 million that he was expecting to make as profits from his involvement in

[128] NE, 17 October 2018, p 125, lines 11-15.

the Project.[129] This was the profit-sharing agreement. In response, the defendants argued that the first defendant had made it clear at the meeting that the plaintiff was not entitled to any part of the Project.[130] In fact, at the suggestion by Ms Chen that his profits should be shared, the first defendant stormed out of the meeting.[131]

115 There is little evidence before me to support the plaintiff's version of events as to what happened at this meeting. Ms Laska had filed an affidavit of evidence-in-chief on behalf of the plaintiff. She also allegedly prepared some minutes of the meeting which supported Ms Chen's version of events. But, she did not attend the trial. I therefore ruled that her affidavit and her prepared minutes were inadmissible as evidence.

116 Mr Goh specifically recalled there being an agreement reached that the first defendant would share his profits.[132] However, his evidence is far from convincing as he had a generally poor recollection of the meeting and only seemed to be certain about the profit-sharing agreement. Ms Chen also supplied the details of this meeting only belatedly during her cross-examination. Unfortunately for her, there was no mention of the profit-sharing agreement in her affidavit of evidence-in-chief.

117 On the other hand, the first defendant and Messrs Leow and Chan from FYTA unequivocally stated in their evidence that there was no profit-sharing agreement was reached. On a balance of probabilities, I find that the plaintiff

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129 NE, 19 October 2018, p 56, lines 11-16.

130 Ow's AEIC para 146.

131 Ow's AEIC para 148.

132 NE, 19 October 2018, p 60, lines 8-12.

has not made out its case that the profit-sharing agreement existed. I thus dismiss the plaintiff's claim in this regard.

Was there knowing receipt of the plaintiff's property by the second defendant?

118 I turn now to the second defendant's involvement with the Project. The plaintiff submitted that the second defendant was liable to it on the ground of knowing receipt and dishonest assistance.[133] These will be dealt with in turn.

119 A claim for knowing receipt concerns the liability of a person who has received assets, which is subject to a trust, with the requisite level of awareness or knowledge that the assets in question are trust assets. Such a person would be a constructive trustee of the assets he has received and would be under a duty to immediately restore the assets to the beneficiary. The well-known requirements of knowing receipt are threefold and were set out by the Court of Appeal in *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 at [23] ("*George Raymond Zage III*"):

(a) there is a disposal of the plaintiff's assets in breach of fiduciary duty;

(b) there is beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and

(c) there is knowledge that the assets received are traceable to a breach of fiduciary duty and this state of knowledge makes it unconscionable for the defendant to retain the benefit of the receipt (endorsing the test in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437).

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133 SOC1, para 39.

120 I first deal with the question of whether there has been a disposal of the plaintiff's assets in breach of fiduciary duty. In this regard, it has been held by Lawrence Collins J in *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 at [96]) ("*CMS Dolphin*") that:

> In my judgment the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that *the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property.* He is just as accountable as a trustee who retires without properly accounting for trust property. In the case of a director he becomes a constructive trustee of the fruits of his abuse of the company's property, which he has acquired in circumstances where he knowingly had a conflict of interest, and exploited it by resigning from the company. [emphasis added]

121 The principle set out above in *CMS Dolphin* has been endorsed by Woo Bih Li J in *Swiss Butchery Pte Ltd v Huber Ernst and others and another suit* [2010] 3 SLR 813 at [11] ("*Swiss Butchery Pte Ltd*"). There can be no doubt as to the correctness of this principle insofar as it describes the basis of why the errant director is liable to account for trust assets. The question, though, is whether the passage from *CMS Dolphin* quoted above goes so far as to decide that maturing business opportunities *are the company's assets* to determine if there is accessory liability in knowing receipt.

122 The issue of whether maturing business opportunities would be regarded as trust assets for the purposes of knowing receipt was considered by Lewison J in *Ultraframe (UK) Ltd v Fielding & others* [2005] EWHC 1638 (Ch) ("*Ultraframe*"). The judge there found that a corporate opportunity "is to be treated as the property of the company (in the sense of an intangible asset) and hence is treated for this purpose as trust property" (at [1355(iii)]). At [1491] of *Ultraframe*, the judge stated:

> In *Satnam Investments Ltd v Dunlop Heywood* [1999] 3 All ER 652 the Court of Appeal were prepared to assume that confidential information could count as trust property. Thus in the 'corporate opportunity' cases, a director who diverts a corporate opportunity away from the company and towards himself holds any resulting chose in action (e.g. a contract enabling him to exploit that opportunity) on trust for the company, provided that there is a sufficient nexus between the property acquired and the breach of duty. It is possible that the corporate opportunity itself may be regarded as trust property, in the sense of being an intangible asset of the company. Even then, there may be difficulties in tracing the information or opportunity into the resulting chose in action for the purposes of a proprietary remedy.

123 Based on the principles set out above, in my judgment, although it was uncertain whether FYTA would ever appoint the plaintiff to be the developer of the Project, I am prepared to accept that this business opportunity was an asset of the plaintiff. The fact that there was no binding contract between the plaintiff and FYTA in relation to the development of the Project does not detract from this conclusion. The first defendant had fiduciary duties in respect of this opportunity. There was a disposal of this asset of the plaintiff's in that the first defendant had appropriated the opportunity and tendered for the Project for himself, in breach of his fiduciary duty. He thus held the fruits of the appropriation of this asset on constructive trust for the plaintiff.

124 The next question is whether there was a beneficial receipt of the plaintiff's assets by the second defendant. This is key to a finding of liability for knowing receipt – receipt of traceable trust assets. In this regard, the second defendant was incorporated by the first defendant in May 2010 as the corporate vehicle to carry out the development of the Project. Hence, the second defendant carried out the role which the plaintiff would have done if the plaintiff had been awarded the contract to develop the Project. However, while the second defendant may have benefited in this sense, I am of the view that the

second defendant cannot be said to have been in beneficial receipt of trust assets belonging to the plaintiff.

125 All the plaintiff had was a chance or opportunity to have participated as a developer for the Project. While this opportunity was appropriated by the first defendant when he tendered for the Project, the second defendant cannot be said to have received that same opportunity. Instead, the second defendant entered into a joint venture agreement with, amongst others, FYTA in October 2010 and was appointed as the developer for the Project. By doing so, the second defendant acquired a bundle of contractual rights that were enforceable against FYTA. But, these rights are conceptually quite different from the opportunity that the plaintiff had. It cannot be equated with that opportunity. Neither can it be said that the second defendant's contractual rights against FYTA are traceable to the opportunity that the plaintiff had in the period from September 2009 to April 2010. Rather, the rights spring from the contract between the second defendant and FYTA. In my judgment, I find that the plaintiff has not shown that the second defendant received a trust asset for the purpose of the claim in knowing receipt.

126 I should add that the allocation of a certain number of units in the residential development upon its completion to the second defendant was also not part of the corporate opportunity belonging to the plaintiff. Rather, it was a consequence of being the Project's developer. It is property held by the second defendant which is a product of the first defendant's breach of fiduciary duty, but it is not traceable from the plaintiff or the first defendant to the second defendant. I draw support for this view from the English Court of Appeal decision in *Satnam Investments Ltd v Dunlop Heywood* [1999] 3 All ER 652 where it was held that, even if one was to assume that confidential information and consequential corporate opportunities are assets for the purposes of a claim

in knowing receipt, one cannot trace such information and opportunities into real property acquired by a third party using such information and opportunities.

127 For the above reasons, I find that the plaintiff has not made out its claim against the second defendant for knowing receipt.

Was there dishonest assistance by the second defendant?

128 The plaintiff also claims that the second defendant is liable to it in dishonest assistance. Such a claim would be available against a person who has dishonestly assisted in the misapplication of trust property. By doing so, he becomes liable *as a constructive trustee*. He is not an actual trustee like a knowing recipient, but becomes subject to the same liabilities as if he was one, including having to account for any profits from his wrongdoing.

129 The Court in *George Raymond Zage III* provided guidance on the elements of dishonest assistance (at [20]). There must be a subsisting trust which is breached, a third party who renders assistance towards that breach and a finding that this assistance was dishonest. On the evidence, I find that the first defendant had breached his fiduciary duties and became a constructive trustee for the plaintiff in respect of the fruits of this opportunity to participate in the Project (see [123]). By retaining the Project for himself and the second defendant, he breached this trust. The issue is whether the second defendant had dishonestly assisted the first defendant's breach.

130 I first considered whether there could have been any assistance by the second defendant. The first defendant successfully tendered for the Project, in breach of his director's duties, in May 2010. However, the second defendant was only incorporated after the successful tender. What assistance then could the second defendant have rendered to the first defendant in the breach of his

duties? This was addressed by Lord Millett in *Twinsectra Ltd v Yardley and others* [2002] 2 All ER 377 at [107] where he set out the scope of liability under dishonest assistance:

> The cause of action is concerned with attributing liability for misdirected funds. Liability is not restricted to the person whose breach of trust or fiduciary duty caused their original diversion. His liability is strict. Nor is it limited to those who assist him in the original breach. It extends to everyone who consciously assists in the *continuing diversion* of the money. [emphasis added]

131 I find that it is immaterial that the opportunity to participate as developer of the Project had already been lost by the plaintiff before the time of the second defendant's incorporation. The fact remains that the second defendant assisted the first defendant in his breach of trust by subsequently carrying out the development of the Project, which was for the benefit of, amongst others, the first defendant. Put another way, it is with the second defendant's assistance that the first defendant is able to enjoy the fruits of his appropriation of the plaintiff's asset.

132 Secondly, to show dishonesty, one would require a finding that the second defendant had (*George Raymond Zage III* at [22]):

> such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them.

133 Besides incorporating the company, the first defendant was also one of the second defendant's directors. Other directors included his brother and his daughter.[134] The plaintiff had pleaded that the first defendant was the controlling mind and will of the second defendant.[135] This was admitted by defendants in

134 DCS, para 243.

135 SOC1, para 10.

their defence.[136] In the circumstances, it is appropriate that his knowledge of his breach of director's duties and the consequences therein be imputed to the second defendant. I thus find that the second defendant clearly would have possessed actual knowledge of matters that made it dishonest for it to enter into the agreement in October 2010 with, amongst others, FYTA to develop the Project.

134 For the above reasons, I find that the plaintiff's claim of dishonest assistance against the second defendant has been made out.

Remedies

135 The plaintiff claims against the first defendant damages arising from his breach of fiduciary duties *and* an account of profits. Strictly speaking, the reference to "damages" must refer to a claim for equitable compensation since the plaintiff has succeeded in its equitable claim for breach of fiduciary duties. However, the plaintiff did not elect between these remedies of equitable compensation and an account of profits in its closing submissions.[137] As noted by the defendants, compensatory and gain-based damages are inconsistent and alternative remedies (*Personal Representatives of Tan Man Sit v Capacious Investments Ltd* [1996] A.C. 514 at 521B).[138] In the usual case, the claimant must elect the relief it is seeking from the fiduciary that has breached its duties (see John McGhee *et al*, *Snell's Equity* (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at [7-052]). In *Swiss Butchery* (referred to at [121]), Woo J found that the defendants had breached their fiduciary duties for appropriating

136 Defence, para 11.

137 PCS, para 136.

138 DCS, para 248.

the plaintiff company's business opportunity, and ordered damages to be assessed or an account of profit (at [182]).

136 On the facts of this case, however, I find that the plaintiff has no realistic claim for equitable compensation. The plaintiff cannot be compensated for its loss when it appears, from the facts, that it would have suffered no loss. This is because I have found that the plaintiff would probably not have been awarded the contract by FYTA in any event given Mr Leow's antipathy towards Ms Chen from February 2010 onwards. By the time the first defendant was invited by Mr Leow to tender for the Project, the plaintiff's chances of being able to participate as developer of the Project had all but evaporated. That being the case, the plaintiff is effectively left to its remedy of an account of profits from the first defendant.

137 In this regard, the observations of Belinda Ang Saw Ean J in *Dayco Products Singapore Pte Ltd (in liquidation) v Ong Cheng Aik* [2004] 4 SLR(R) 318 are apposite. After finding the defendant there had breached his fiduciary duty as a director by acting in conflict of interest, the judge went on to state at [34]:

> The liability to account arises from the fiduciary's breach of duty. Having improperly profited or gained from his position, the defendant has to account to the plaintiff for the profits or gains he has obtained. It is no defence that the plaintiff was unlikely or unable to make the profits for which an account is to be taken. It also does not depend upon detriment to the plaintiff. Gibbs J in *Consul Development Pty Limited v DPC Estates Pty Limited* (1975) 132 CLR 373 at 394 stated:
>
> > Where the rule applies, the liability of the person in a fiduciary position does not depend on the fact that the person to whom the duty is owed has suffered an injury or loss.

138 For completeness, I make an observation on the plaintiff's claim for a 50% share of the profit made by the first defendant as mentioned in its closing submissions. It seems to me that the plaintiff would be entitled to an account for *all* the profits made by the first defendant in relation to the development of the Project. The purpose of a disgorgement of profits is not to compensate the plaintiff but to ensure that the fiduciary does not profit from his breach of duty (*United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461 at [46] – [47]). Relief by way of an account of profits "is measured by the gain made by the wrongdoer irrespective of whether the claimant has suffered a corresponding loss" (*Snell's Equity* at [20-039]). The fact that the plaintiff might receive an unexpected windfall is therefore immaterial. This was accepted by the Court of Appeal in *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [17] where Chao Hick Tin JA, as he then was, stated:

> … [T]he fiduciary should not be allowed to retain any of the profit derived from his breach of duty. A deduction for what the company would have had to pay the defendant had he dutifully secured the benefits for the company is out of place given the gains-based basis for disgorgement.

Applying this reasoning, the fact that the plaintiff would have shared half of its profits with the first defendant if it had successfully acquired the Project has no bearing on the relief claimable.

139 As for the second defendant, I have found that it is liable as a constructive trustee to the plaintiff for dishonest assistance of the first defendant's breach of fiduciary duties. The second defendant's liability "duplicates the liability of the trustee whose breach of trust [it] assisted" (Charles Mitchell, *Constructive and Resulting Trusts* (Hart Publishing, 2009) at p 150). In such circumstances, like the first defendant, the second defendant

must disgorge its profits from its involvement in the Project. The second defendant must account to the plaintiff for its profits.

140 Given that I have made this order for an account of profits against the second defendant, I do not have to consider the vexed question of whether the account of profits by the first defendant should also encompass the profits of the second defendant. In *CMS Dolphin*, Lawrence Collins J had no trouble finding that the errant director was required to account for the profit made by the corporate vehicle that had been set up by him to exploit the business opportunity. It was stated at [104] of the judgment:

> Nor in my judgment does it make a difference whether the business is taken up by the corporate vehicle directly, or is first taken up by the directors and then transferred to a company. *Imperial Mercantile Credit Association v Coleman* and *Cook v Deeks* show that a director who places the benefit of the business opportunities in a partnership or a company will be liable for the whole profit, and also make it clear that a director who is the active agent in a breach of fiduciary duty cannot evade responsibility by transferring the benefit to others. I do not consider that the liability of the directors in *Cook v Deeks* would have been in any way different if they had procured their new company to enter into the contract directly, rather than (as they did) enter into it themselves and then transfer the benefit of the contract to a new company.

However, this portion of the judgment in *CMS Dolphin* has been doubted in later decisions in England, such as in *Ultraframe* at [1550] – [1576], where Lewison J appeared to prefer the orthodox view that a fiduciary should only be liable to account for his own gains, and not that of a third party company in which the fiduciary owns shares, save where it can be shown that the company is the alter ego of the fiduciary, where it might then be appropriate to pierce the corporate veil. Since parties have not made any submissions on this point, I will say no more about it.

Conclusion

141 For the reasons above, I allow the plaintiff's claim against the defendants to the extent set out in this judgment. There shall be an account of profits by the defendants to be determined by the Registrar.

142 I will hear parties separately on the question of costs.

Ang Cheng Hock
Judicial Commissioner

Raman Gopalan (Withers KhattarWong LLP) and Chew Teck Lim (Chew Teck Lim) for the plaintiff;
Lim Kheng Yan Molly SC, Wong Si Hui Eunice and Lim Haan Hui (Wong Tan & Molly Lim LLC) for the defendants.