IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 14

Suit No 178 of 2012

Between

(1) COMPANIA DE NAVEGACION PALOMAR, S.A.
(2) COSMOPOLITAN FINANCE CORPORATION [BVI]
(3) DOMINION CORPORATION S.A.
(4) JOHN MANNERS AND CO (MALAYA) PTE LTD
(5) PENINSULA NAVIGATION COMPANY (PRIVATE) LIMITED [BVI]
(6) STRAITS MARINE COMPANY PRIVATE LIMITED [BVI]

… *Plaintiffs*

And

ERNEST FERDINAND PEREZ DE LA SALA

… *Defendants*

And

ERNEST FERDINAND PEREZ DE LA SALA

... *Plaintiff in Counterclaim*

And

(1) EDWARD ROBERT PEREZ DE LA SALA
(2) JAMES MORGAN COPINGER-SYMES
(3) MARIA CHRISTINA COPINGER-SYMES
(4) JOHN MANNERS AND CO (MALAYA) PTE LTD
(5) COSMOPOLITAN FINANCE CORPORATION [BVI]
(6) DOMINION CORPORATION S.A.
(7) JOHN MANNERS AND CO (MALAYA) PTE LTD
(8) PENINSULA NAVIGATION COMPANY (PRIVATE) LIMITED [BVI]
(9) STRAITS MARINE COMPANY PRIVATE LIMITED [BVI]

... Defendants in Counterclaim

JUDGMENT

[Trusts] — [Express trusts] — [Certainties]

[Equity] — [Remedies] — [Account]

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v
Ernest Ferdinand Perez De La Sala and another matter

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27 January 2017 Judgment reserved.

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Introduction

1 The six plaintiff companies (referred to as the "Plaintiff Companies") bring this action to recover large sums of money, said to be around US$600m to US$800m, which were transferred out of their bank accounts by the defendant, Ernest Ferdinand Perez De La Sala ("Ernest"), who is a director of the Plaintiff Companies, into his personal bank accounts. Ernest claims that the monies are all his and that he set up the Plaintiff Companies (as well as other companies) as nominees or "envelopes" or "pockets" to hold these monies and other assets belonging to him.

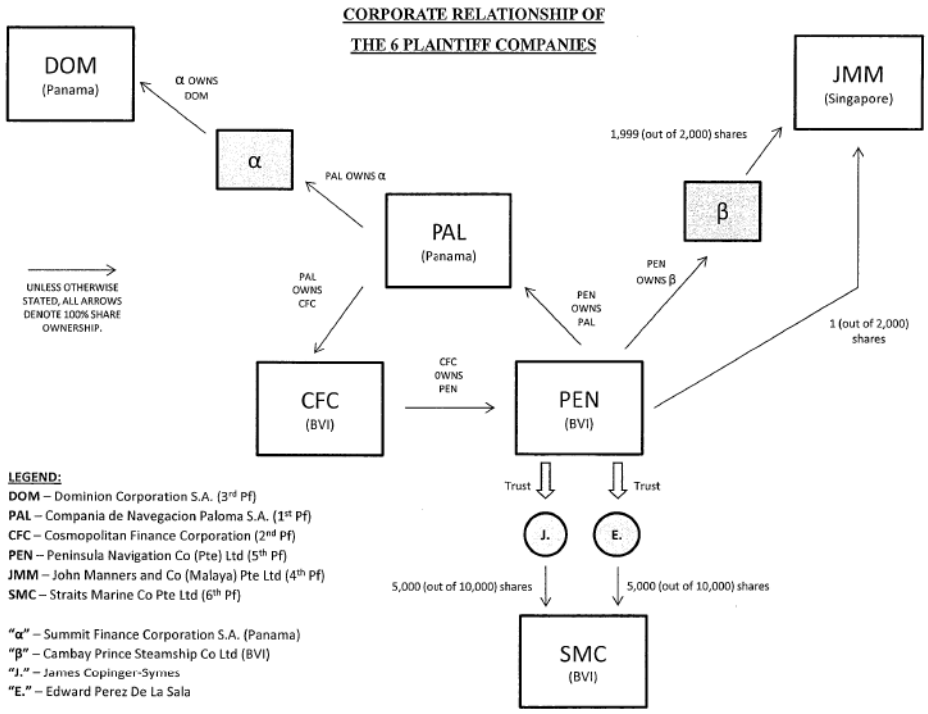
2 Ernest has in turn sued his co-directors: his nephew, Edward De La Sala ("Edward"), his niece, Christina Copinger-Symes nee De La Sala

("Christina"), and Christina's husband, James Copinger-Symes ("James"), collectively referred to as "ECJ", for breach of trust, breach of fiduciary duties and knowing assistance in the Plaintiff Companies' breach of trust, and conspiracy to injure by lawful and unlawful means. ECJ denies these allegations and counterclaims against Ernest for misrepresentation.

3 Whilst ownership of companies do not normally cause difficulties as one traces its registered shareholders, the Plaintiff Companies have been structured as an "orphan" or "circular" structure, *ie*, the 1st Plaintiff, Compania De Navegacion Palomar SA ("PAL"), a company incorporated in Panama, owns all the shares in the 2nd Plaintiff, Cosmopolitan Finance Corporation ("CFC"), a company incorporated in the British Virgin Islands ("BVI"), and CFC owns all the shares in the 5th Plaintiff, Peninsula Navigation Company Private Limited ("PEN"), a company also incorporated in the BVI, and PEN owns all the shares of PAL. This orphan structure is legal under Panamanian and BVI law but not under Singapore law. However, nothing turns on that.

4 The 3rd Plaintiff, Dominion Corporation SA ("DOM"), a company incorporated in Panama, is owned by Summit Finance Corporation SA ("Summit Corp"), which is in turn owned by PAL. The 4th Plaintiff, John Manners & Co (Malaya) Ltd ("JMM"), a company incorporated in Singapore, is owned by Cambay Prince Steamship Co Ltd (BVI) ("Cambay BVI"), which is in turned owned by PEN. PEN also owns the 6th Plaintiff, Straits Marine Company Private Limited ("SMC"), a company incorporated in the BVI. In addition, there are quite a number of companies that will be mentioned in this judgment, many of which have similar or very similar names, but are now of little relevance to the issues in this case, save for context.

5 At the commencement of this action, the corporate structure of the six Plaintiff Companies was as follows:



6 These claims arise out of a long and complex set of facts which stretch back to the 1950s. It begins with a remarkable person, Robert Perez De La Sala, ("Robert Sr") and his incorporation in April 1939 of a company in Hong Kong called Lasala Investments Limited ("LIL"), which was later renamed Northern Enterprises Limited ("NEL") in 1959. I start with the members of the De La Sala family.

Background

The De La Sala family

7 Robert Sr, the son of a British master mariner of Spanish descent, was born in Manila on 2 October 1908. He moved to Hong Kong and joined John Manners & Co Limited ("JMC"), a company incorporated in Hong Kong in 1916, as an apprentice or clerk on 22 July 1922, when he was not quite fourteen. He was a remarkable person and an astute entrepreneur with an insatiable appetite for work and languages. He worked his way up and by 1 January 1940 became the Chairman as well as the majority shareholder of JMC. He built up a sizeable fleet of vessels in JMC and a stable of companies engaged in all kinds of businesses. The coat of arms on his stationery is no pretension – it is listed in Heraldica and his grandfather was a Spanish general who fought in the Carlist Wars and sought refuge in England after its collapse in the 1870s.

8 Robert Sr married Camila Vasquez De La Sala ("Camila") and they have four children: Jerome Anthony Perez De La Sala ("Tony"), who was born on 16 December 1931, Ernest, who was born on 31 January 1933, Robert Perez De La Sala ("Bobby"), who was born on 17 October 1935, and Isabel Brenda Koutsos ("Isabel"), who was born on 10 March 1943 (there was another son, Eddy, who died of some illness sometime around 1950 or 1951). Robert Sr and Camila had all of their children educated in Australia. For ease of reference, I shall refer to Camila and the four children collectively as "JERIC", an acronym used by Robert Sr, his family and counsel.

9 Tony moved to Hong Kong after his schooling to work at JMC, but returned to Australia a few years later, married one Ann in 1956, and settled down in Sydney.[1] Although Robert Sr had hoped that Tony would work in

JMC in Hong Kong after his studies, Tony did not have any interest in shipping and business. Tony eventually ended up working in JMC's Australian subsidiary and other businesses in Australia in which Robert Sr had an interest.[2] Later on in life, his interest was running a shopping centre in Sydney owned by the family. Tony has one son, Pastor, a Latin and French teacher and a specialist in early French organ music, and two daughters, Suzanne and Elena Thasler ("Elena"), and four grandchildren.[3] Tony and Elena, who helped Tony run the shopping centre, have filed affidavits and gave evidence in these proceedings.

10 Ernest finished his schooling and public secretarial studies in Australia and started off by joining John Manners & Company (Australia) Pty Ltd ("JMC(A)") in 1951.[4] He then moved to Hong Kong and was made a director of JMC on 14 May 1953.[5] He eventually went on to manage JMC's business in Portuguese East Timor.[6] Thereafter, he returned to Hong Kong and became Joint Managing Director with Robert Sr in 1957.[7]

11 Ernest married Jennifer and had a son, Robert Ernest Perez De La Sala.[8] They were later divorced. Ernest then married Hannelore de Lasala-Debring ("Hannelore") and had another son, Ernest Edward Perez De Lasala.[9] Ernest

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1 Tony's AEIC at para 5.

2 Tony's AEIC at para 4.

3 Tony's AEIC at para 5.

4 Bobby's AEIC at para 6.

5 Bobby's AEIC at para 6.

6 Ernest's AEIC at para 16.

7 Bobby's AEIC at para 6; Ernest's AEIC at para 16.

8 Hannelore's AEIC at para 4.

9 Hannelore's AEIC at para 3.

and Hannelore were divorced in May 1970.[10] Ernest is estranged from his ex-wives and sons, and has excluded them from any inheritance. Hannelore gave evidence in these proceedings and has independently brought fresh proceedings against Ernest in Hong Kong on the basis that he had misrepresented to her during the divorce proceedings that a very large part of his assets were family assets held by him on trust.[11]

12 Bobby married Felicite Terrill Perez De La Sala ("Terrill") in 1966 and settled in Sydney, Australia.[12] They lived together with Robert Sr and Camila in New South Wales ("NSW"), until Camila passed away in July 2005.[13] Bobby and Terrill have four children: Maria-Teresa Perez De La Sala ("Teresa"), Maria-Isabel Harry ("Maria-Isabel"), Edward and Christina.[14]

13 Edward married Lyndel and had three children. Christina and James met in 1997 when James was still a Major in the Special Air Service ("the SAS"), an elite regiment in the British Army forming part of the United Kingdom Special Forces.[15] They got married in Sydney around October 1998[16] and have four children. Maria-Isabel married Richard Harry ("Richard") and the both of them have filed affidavits and gave evidence in these proceedings.

14 Isabel also settled in Sydney, Australia. She attended a secretarial and business college and then did office work in Sydney.[17] She married Cecil

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10 Hannelore's AEIC at para 1.

11 Hannelore's AEIC at paras 34–35.

12 Terrill's AEIC at para 4.

13 Terrill's AEIC at para 5.

14 Edward's AEIC (as Defendant by Counterclaim) at para 5(b).

15 James' AEIC (as Defendant by Counterclaim) at para 6.

16 James' AEIC (as Defendant by Counterclaim) at para 7.

Koutsos ("Cecil"), who was in the real estate business. They have a daughter, Nicole Corbett ("Nicole"), and two grandchildren.[18] Isabel and Nicole have filed affidavits and gave evidence in these proceedings.

The events leading up to the dispute

15 Bobby's children, Edward and Christina, and her husband James, allege that they became involved in the Plaintiff Companies as a result of Ernest asking them to join him so that he could train them to be the 'next generation' team to manage the De La Sala family assets and give them the benefit of his experience. Maria-Isabel also alleges that she and Richard had been similarly invited by Ernest, but they declined his invitation.[19]

16 Christina and James moved to Singapore in 2004 and initially stayed in an apartment at Balmoral Park, which was allegedly owned by Ernest.[20] Edward and Lyndel joined them in Singapore in 2005 but found accommodation on their own.[21] Edward had started a little earlier by becoming a director of JMC(M) on 26 July 2004, and then a director of PAL and DOM on 2 March 2005. He was also a director in CFC and PEN.

17 On 24 March 2005, ECJ and Ernest signed a memorandum recording the "arrangements for operations in Singapore".[22] It provided that:

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17 Isabel's AEIC at para 4.

18 Isabel's AEIC at para 2; Nicole's AEIC at paras 1–2.

19 Maria-Isabel's AEIC at para 15.

20 Ernest's AEIC at para 61 to 62.

21 Ernest's AEIC at para 61 to 62.

22 Ernest's AEIC at para 62 and EFL-128.

(a) The investment portfolio of CFC held at UBS Singapore would be valued as at 3 January 2005, and that value would be the basis for operations for the year up to 31 December 2005. Christina and James (referred to as "Team CJ") and Edward and Lyndel (referred to as "Team LE") would be each entitled to 10% of the profits from the portfolio for the year up to 31 December 2005. Both teams would have to meet their personal expenses out of their share of the profits.

(b) The benefit that Christina and James would derive from their use of the Balmoral apartment from 1 January 2005 onwards would be offset at market rate so that it would be fair to Edward and Lyndel.

18 ECJ worked on various schemes and drafts to structure the 'family trust' (see also below at [452]–[463]). For example, in 2006, Edward and James worked on a draft memorandum entitled "'Passing the Baton' – Providing Opportunities for Future Generations".[23] A draft was sent to Ernest on 31 July 2006 for him "to confirm whether [Edward and James] are on the right track".[24] In response, Ernest in his email dated 2 August 2006 asked Edward and James to "prepare concept for my review and comparison with others I have".[25] Later, Edward and James were asked to think about how they would structure a trust if they were seeking to protect their own assets.[26]

19 In 2008, ECJ asked Ernest to consider incorporating another company in the BVI as a vehicle for investment.[27] They had proposed that they should

23 Ernest's AEIC at paras 71–72.

24 Ernest's AEIC at EFL-144.

25 Ernest's AEIC at EFL-144.

26 Ernest's AEIC at para 73, EFL-146 and EFL-147. See also EFL-148 to EFL-153.

27 Ernest's AEIC at para 75.

be made the shareholders of this new company.[28] This was apparently to meet the problem that banks had started to require account holders to disclose the identity of the beneficial owner of an account.[29] Against this backdrop, SMC (the 6th Plaintiff) was incorporated on 26 August 2008 with Edward and James holding 5,000 shares each.[30] Both Edward and James signed blank transfer forms and this formed the basis of some controversy later (see [32] below).

20 ECJ came up with another proposal, called the Safe Straits Settlement trust ("SSS Trust"), and they forwarded a draft of the proposal to Ernest for his consideration on 17 March 2009.[31] Ernest made some changes to the SSS Trust.[32] Later, Ernest decided not to proceed with the SSS Trust.[33] Another attempt by Edward in 26 April 2010 to reintroduce the SSS Trust failed as well.[34]

21 A rift between Ernest and ECJ started when Edward received an email dated 3 August 2011 from Ernest asking for confirmation of the total sum of the US dollar deposits held in Singapore. Ernest intended to remit the sum to CFC's bank account with UBS Bank (Canada), Vancouver ("UBS Vancouver").[35] Edward felt that this was uncharacteristic of Ernest and, after consulting Christina and James, he decided nevertheless to inform Ernest of the balances and enquire if the funds should be used to purchase gold or

28 Ernest's AEIC at para 75.

29 Ernest's AEIC at para 75.

30 Ernest's AEIC at para 94.

31 Ernest's AEIC at paras 81–82.

32 Ernest's AEIC at para 82.

33 Ernest's AEIC at para 83.

34 Ernest's AEIC at para 82.

35 Edward's AEIC at para 22 and ERS-6. See also Ernest's AEIC at para 102.

Singapore dollars.[36] In response, Ernest asked Edward to remit the balance immediately.[37] ECJ complied and the transfers were made between 4 and 8 August 2011.[38]

22 On or about 5 August 2011, Edward called Ernest to ask him what was happening[39] as ECJ no longer had any funds to manage. Edward alleged that Ernest told him for the *first time* that the assets held by the Plaintiff Companies belonged to Ernest.[40] Edward then relayed these comments to Christina and James.[41] James' subsequent call to Ernest confirmed the same.[42]

23 At this point, ECJ decided to take steps to "protect" the assets of the Plaintiff's Companies so that Ernest could not "appropriate the assets without the knowledge and authority of the other directors".[43] On 8 August 2011, ECJ passed resolutions (as majority directors) for PAL, CFC and DOM to limit Ernest's authority to operate their accounts with UBS Vancouver – to authorise payments out of these accounts, Ernest would have to get Isabel and Bobby to co-sign.[44] However, Ernest would continue to have trading authority over the accounts.[45]

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36 Edward's AEIC at para 23.

37 Edward's AEIC at para 23 and ERS-8. See also Ernest's AEIC at para 102.

38 Edward's AEIC at para 24 and ERS-9.

39 Edward's AEIC at para 25. See also Ernest's AEIC at para 104.

40 Edward's AEIC at para 25.

41 Edward's AEIC at para 25.

42 Edward's AEIC at para 25. See also Ernest's AEIC at para 107.

43 Edward's AEIC at para 26.

44 Edward's AEIC at para 26.

45 Ernest's AEIC at para 109.

24 A furious Ernest contacted Isabel, who then contacted Bobby in relation to the resolution ECJ had passed.[46] After an exchange of correspondence between Bobby and ECJ, ECJ met on 9 August 2011 and passed a resolution, in effect reversing their earlier resolutions, authorising Ernest to be one of the sole signatories to the bank accounts with UBS Vancouver.[47] On the same day, Edward emailed Ernest apologising for joining with Christina and James to remove Ernest as the sole signatory for the bank accounts with UBS Vancouver.[48] Edward stated:

> Dear Uncle
>
> I regret my participation in the recent Directors' actions. I sought to immediately rectify my error of judgment, however the personal hurt I have caused has troubled me deeply.
>
> The wellbeing of the entire family has always been my primary concern, causing distress to you and others was not the intent and should never have happened.
>
> I betrayed my better judgment and offer you my sincere apology.

25 ECJ apologised for their actions in an email dated 12 August 2011.[49] They said:

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46 Ernest's AEIC at para 110.

47 Ernest's AEIC at para 110.

48 Ernest's AEIC at para 112 and EFL-189.

49 Ernest's AEIC at par 113 and EFL-190.

> Dear Uncle
>
> We sincerely apologise for hurt caused on Monday, 8 August 2011.
>
> The nature of the abrupt instruction to remit all funds from accounts in Singapore prompted us to clarify for whom the last seven years had been dedicated. The assets under management were believed to have been the continuation of a great legacy laid down by your most extraordinary father.
>
> Upon instruction from Sydney, we swiftly and wholly reversed our action.
>
> …
>
> Ever since Christina and Edward were young, they were encouraged to and aspired to carry forward the John Manners heritage which Grandpa began. As children they grew up with Grandma beside them and their fidelity to her family and her values have never wavered. James, from his earliest interactions with you and your unfailing dedication, felt imbued with a similar spirit.
>
> We have caused you personal hurt and for this we are truly sorry.

26 In the meantime, however, ECJ had obtained access to what is allegedly Ernest's private safe deposit box with UBS AG, Singapore ("UBS Singapore"). On 9 August 2011, ECJ retrieved the "corporate files" of the Plaintiff Companies from the safe deposit box.[50] Ernest claims that these were not corporate files but were his "personal files".[51] James was informed by UBS Singapore on 23 August 2011 that Ernest wanted possession of the corporate files.[52] ECJ therefore made copies of the files before returning them to UBS Singapore on 25 August 2011. However, Ernest claims that the files have not been returned.[53]

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50 Edward's AEIC at para 29.

51 Ernest's AEIC at para 115.

52 Edward's AEIC at para 29.

27 On 10 August 2011, ECJ confirmed the transfer of additional US dollar balances in Singapore (of approximately US$25m held in PAL's account) to CFC's account with UBS Vancouver.[54]

28 Over the course of the next few months, ECJ discovered that Ernest had transferred the assets held by PAL, CFC and JMM to his personal account without seeking the approval of or even notifying the respective boards. ECJ found out after they received debit advices and correspondence from UBS Singapore in September and December 2011. By 3 September 2011, the relationship between Ernest and ECJ was becoming worse. ECJ wrote to Ernest and said:[55]

> It is noted that communication you have distributed both verbally and via email contains multiple falsehoods and inaccuracies. No fraud has been committed, our actions were not criminal and we disagree that what we did was wrong and/or dishonest.
>
> The evolving concept that these accounts were your personal assets is at odds with representations you previously made – the analogy you often used was that of a ship that stayed on course, the tree that yields fruits and a baton to be passed on.
>
> The establishment of a trust-style arrangement to perpetrate your father's legacy reinforced as much. The arrangements and structures put in place were discussed, explained and agreed to by yourself.

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53 Edward's AEIC at para 29; Ernest's AEIC at para 115.

54 Edward's AEIC at para 28.

55 Ernest's AEIC at EFL-192.

> In good faith we committed ourselves to promulgating the offshore family presence you often spoke of but were left questioning the professional and ethical efficacy of having our commitment dismissed as a simple encumbrance. We are overwhelmed to have been brought into a close, trusted relationship which Edward and Christina's grandmother encouraged, only to be used and then told our services are no longer required.
>
> Edward's apology to you as a gesture of goodwill with the objective of maintaining harmony within the family was rejected and abused. His email which was written pursuant to a personal plea from Aunty Isabel demonstrated that this was not a personal attack on you and that we acted based on our concern for the well-being of the entire family.
>
> You have made allegations that are false, disparaging and distressing and you have chosen to communicate by convoluted means.

29 On 11 and 15 September 2011, ECJ wrote to Ernest to ascertain the reasons for the transfer and the whereabouts of the assets previously held by JMM.[56] Ernest did not respond.[57]

30 As there were conflicting instructions, UBS Vancouver and UBS Singapore refused to accede to ECJ's requests for, among other things, copies of transfer instructions and account statements.[58] It appeared that Ernest had instructed the banks not to provide information and documents to either the board of directors of the companies or to ECJ.[59]

31 This led ECJ to call meetings of the boards of directors to discuss the authorised signatories of the bank accounts held by PAL, CFC, DOM and SMC[60] on 8 December 2011. Three days' notice was given.[61] Ernest and Isabel

56 Edward's AEIC at para 33 and ERS-14.

57 Edward's AEIC at para 33.

58 Edward's AEIC at paras 40–43, ERS-19 to ERS-21.

59 Edward's AEIC at paras 40–43.

did not attend.[62] At the meetings, ECJ resolved to amend the signatories of the bank accounts such that instructions could be given with regard to the accounts only by the signature of the majority of directors.[63] The banks, including UBS Singapore and UBS Vancouver, were informed of these resolutions on 9 December 2011, and a request was made for the details of the account to be updated.[64] Even so, UBS Singapore replied on 15 December 2011 and said that it would not take any action in relation to the accounts in light of the conflicting instructions.[65] Similarly, UBS Vancouver, in its letter dated 13 January 2012, stated that Ernest had advised it that ECJ were not entitled to receive information on the accounts, and that it considered Ernest to be the sole beneficial owner of the accounts held by the Plaintiff Companies.[66]

32 In October 2011, Ernest took steps to have PEN's shares in SMC transferred to him.[67] At that point in time, the shares in SMC were held by Edward and James allegedly on behalf of PEN (by way of two deeds of trust dated 13 October 2008). As noted above, Edward and James had previously signed blank share transfer forms in respect of the shares in 2008. On 7 October 2011, Ernest entered his name as transferee and signed the transfer forms, thereby transferring the shares of SMC to himself.[68] Having done so, Ernest then passed resolutions as the sole shareholder of SMC on 10 October

60 Edward's AEIC at para 44.

61 Edward's AEIC at para 44.

62 Edward's AEIC at para 44.

63 Edward's AEIC at para 44.

64 Edward's AEIC at para 44 and ERS-22.

65 Edward's AEIC at para 45 and ERS-23.

66 Edward's AEIC at para 46 and ERS-24.

67 Edward's AEIC at para 47.

68 Edward's AEIC at para 51.

2011 removing ECJ as directors and making himself the sole authorised signatory in relation to all matters relating to SMC, including the operation of its bank accounts.[69]

33 ECJ found out about the steps taken by Ernest in relation to the SMC shares on or about mid-October 2011.[70] ECJ disputed the resolutions, and on 14 December 2011, passed a confirmatory resolution to acknowledge that Edward and James held the shares of SMC on trust for PEN.[71]

34 Sometime after 8 August 2011, Isabel told Tony that ECJ had blocked Ernest's access to the bank accounts and that started a dispute between them.[72] Subsequently, Bobby, Terrill, Teresa and Edward went to visit Tony. Tony alleges that Bobby asked if he had got all that he was entitled to for his NEL and JMC shares.[73] Tony replied that too much time had passed for Bobby to raise such concerns and that he should forget about the matter.[74] On 23 November 2011, Bobby, Terrill and ECJ paid a second visit to Tony.[75] James observed that ECJ, *ie*, the directors of the Plaintiff Companies, were obliged to right what they felt was wrong.[76] Tony felt that ECJ had been the victims of the whole affair and offered to speak with Isabel who could then contact Ernest to obtain an assurance that he would not start any legal action and would terminate any legal action that might be afoot.[77] However, James

69 Edward's AEIC at para 52.

70 Edward's AEIC at para 53.

71 Edward's AEIC at para 53.

72 Tony's AEIC at para 20.

73 Tony's AEIC at para 20.

74 Tony's AEIC at para 20.

75 Tony's AEIC at para 20.

76 Tony's AEIC at para 21.

declined the offer on behalf of Bobby and his family.[78] Nevertheless, Tony approached Isabel and asked her to get an assurance from Ernest that he would terminate all legal action immediately.[79] Tony then told Bobby about this, and Bobby suggested that he should contact Ernest directly rather than go through Isabel.[80] Tony did so, and relayed Ernest's response to Bobby. However, there was no response thereafter.[81]

35 On 14 December 2011, Ernest made an impromptu visit to Bobby at his home in Sydney, Australia to discuss matters.[82] It was later revealed that Bobby's wife, Terrill, had taped the conversation.[83]

36 On 5 March 2012, the Plaintiff Companies commenced an action against Ernest to recover their assets.[84] The Plaintiff Companies also filed an application for an injunction against Ernest to restrain him from interfering with their affairs and dealing with their assets ("the Injunction Application"). Ernest was served the writ of summons and the Injunction Application on 6 March 2012.[85]

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77 Tony's AEIC at para 23.

78 Tony's AEIC at para 23.

79 Tony's AEIC at para 24.

80 Tony's AEIC at para 24.

81 Tony's AEIC at para 24.

82 Ernest's AEIC at para 128.

83 Ernest's AEIC at para 128.

84 Edward's AEIC at para 56.

85 Edward's AEIC at para 56.

The parties' respective cases

The Plaintiff Companies' statement of claim: that monies removed by Ernest be returned to them

37 When the action was first brought by the Plaintiff Companies, they were represented by Wong & Leow LLC. Their case is essentially that Ernest had breached his duty as director of the Plaintiff Companies in various respects, as follows:

(a) In relation to JMM:[86]

(i) By instructing UBS Singapore to transfer all monies out of the account of JMM (which amounted to S$1,244,308.90) to an account in his own name.

(b) In relation to PEN:

(i) By diverting to himself and applying for his own benefit shares (in SMC) belonging beneficially to PEN and legally to James and Edward.[87]

(c) In general:

(i) By taking steps to transfer monies out of bank accounts in the name of the Plaintiff Companies, in particular, PAL and CFC.[88]

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86 Statement of Claim at paras 12–18.

87 Statement of Claim at paras 23–33.

88 Statement of Claim at paras 19–22.

(ii) By preventing the Plaintiff Companies (by their directors) from obtaining information about and controlling the movement of monies to and from their accounts.[89]

38 The Plaintiff Companies claim, *inter alia*:

(a) A declaration that the assets identified in the Schedule of the Statement of Claim belong beneficially and absolutely to the Plaintiff Companies; the Schedule lists the following assets of the Plaintiff Companies:

(i) 1st Plaintiff – PAL: US$185,687,621

(ii) 2nd Plaintiff – CFC: US$358,061,435

(iii) 3rd Plaintiff – DOM: US$35,010,668

(iv) 4th Plaintiff – JMM: US$2,983,989

(v) 6th Plaintiff – SMC: US$2,839,239

(b) An order that Ernest disclose all forms of communications with certain identified banks;

(c) An order that Ernest accounts for any of these assets found to have been disposed by him;

(d) An order that Ernest be restrained from taking any steps to cause or permit the disposal of these assets;

(e) An order that Ernest account for sums and assets formerly standing to the credit of certain UBS Singapore bank accounts and an

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89 Statement of Claim at para 19.

order that Ernest pay to the Plaintiff Companies such sums as are found to be due upon the taking of those accounts;

(f) That the transfer of James' and Edward's shares in SMC to Ernest dated 7 October 2011 is void, or alternatively, that Ernest holds the shares in SMC on trust for PEN absolutely; and

(g) Damages to be assessed.

Ernest's defence and counterclaim: that the assets belong beneficially to him

39 On 19 April 2012, Ernest filed his defence and counterclaim. At that point, he was represented by WongPartnership LLP (with Mr Harpreet Singh SC ("Mr Singh SC") being the lead solicitor on the file). In this defence, he essentially alleged that the Plaintiff Companies were "personal investment holding companies used by [him] to hold and invest his personal funds and assets".[90] Any transfers of money from the Plaintiff Companies to his personal accounts were therefore entirely legitimate and did not require approval from ECJ.

40 In this counterclaim, which was against the Plaintiff Companies and ECJ, Ernest averred as follows:

(a) ECJ are liable for breach of trust and/or breach of fiduciary duties *vis-à-vis* Ernest (in respect of disobeying and failing to implement his instructions for the management of his personal funds and assets held through the Plaintiff Companies, making efforts to

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90 Defence and Counterclaim at para 18.

appropriate the assets for themselves, and instituting this very suit as well as related interlocutory applications).[91]

(b) ECJ are liable for dishonestly assisting in PAL's, CFC's and SMC's breach of trust (in respect of PAL's, CFC's and SMC's refusal to comply with and/or delay in complying with Ernest's instructions to transfer funds and assets beneficially owned by him to an account held by CFC with UBS Vancouver).[92]

(c) ECJ are liable for knowing assistance in the Plaintiff Companies' breach of trust in relation to the institution of the present suit and the making of related applications.[93]

41 On 21 May 2013, Ernest amended his defence and counter-claim. By this point, he was represented by Cavenagh Law LLP (but with the same lead solicitor, Mr Singh SC). The following were the key facets of the amendments made:

(a) Between 1939 and 1967, Robert Sr had divested all the shares of NEL and some of the shares of JMC to JERIC.[94] The significance of NEL and JMC to the issue of ownership of the Plaintiff Companies' assets will be addressed below.

(b) Ernest stated that he had, through his nominee companies, San Roberto Steamship Company SA ("SR"), San Miguel Navigation Company SA ("SM") and Compass Enterprises Inc ("CE"), purchased

91 Defence and Counterclaim at paras 76–85.

92 Defence and Counterclaim at paras 86–93.

93 Defence and Counterclaim at paras 94–100.

94 Defence and Counterclaim (Amendment No 1) at paras 10.

from his mother and siblings all of their ordinary shares in NEL and JMC (and that this was how he eventually became the beneficial owner of the assets held by the Plaintiff Companies).[95]

(c) By dint of their knowledge (primarily that all the Plaintiff Companies' assets belonged beneficially to Ernest), this suit was commenced by ECJ in bad faith and amounts to an abuse of process.[96]

(d) In relation to the counterclaim, Ernest added two new causes of action against ECJ. The first was conspiracy to injure (Ernest) by lawful means.[97] The second was conspiracy to injure (Ernest) by unlawful means.[98] Both causes of action relied on the same factual substratum – the injury being the diminution in value of the assets in the Plaintiff Companies (which were, as claimed by Ernest, beneficially owned by Ernest) and the conspiracy involving essentially ECJ refusing to comply with Ernest's instructions and their eventual commencement of this suit (through the Plaintiff Companies).

42 Ernest's claimed in his amended counter-claim for, *inter alia*:

(a) A declaration that he is the sole beneficial shareholder of the Plaintiff Companies (or alternatively, of PEN, PAL and CDC);

(b) Further or alternatively, a declaration that:

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95 Defence and Counterclaim (Amendment No 1) at para 15.

96 Defence and Counterclaim (Amendment No 1) at para 30.

97 Defence and Counterclaim (Amendment No 1) at paras 164–168.

98 Defence and Counterclaim (Amendment No 1) at paras 169–174.

(i) PEN holds the entire shareholding of PAL on trust for him;

(ii) PAL holds the entire shareholding of CFC on trust for him; and

(iii) CFC holds the entire shareholding on trust for him;

(c) A declaration that he is alone entitled to exercise all rights *qua* shareholder of the Plaintiff Companies;

(d) An order that ECJ execute and deliver to him their letters of resignation from the board of directors of each of the Plaintiff Companies;

(e) A declaration that all the assets of the Plaintiff Companies were and are at all material times beneficially owned by, and held on trust by the Plaintiff Companies solely for him;

(f) Damages payable by ECJ for breaches of trust and/or fiduciary duties, and further or alternatively, damages for dishonest assistances and knowing assistance;

(g) Damages payable by ECJ for conspiracy, including exemplary damages;

(h) A declaration that Ernest is the sole beneficial owner of SMC and that the transfers dated 7 October 2011 of shares in SMC to Ernest are valid; and

(i) An order that Ernest's *and* the Plaintiff Companies' costs and disbursements in these proceedings be paid by ECJ on a full indemnity basis.

The Plaintiff Companies' reply and defence to counterclaim: that Ernest does not beneficially own them or their assets

43 The Plaintiff Companies filed their reply and defence to Ernest's counterclaim on 25 May 2012. These pleadings were amended on 6 June 2012, again on 14 June 2013, and for the third (and final) time on 14 August 2013. By the time of the second amendment, the Plaintiff Companies were no longer represented by Wong & Leow LLC; TSMP Law Corporation had taken over.

44 The Plaintiff Companies argued primarily that Ernest did not beneficially own all the assets and, in the alternative, that even if he did (and that they were holding the assets on trust for Ernest), the assets should nevertheless be returned to them.[99]

45 Expounding on its primary case, the Plaintiff Companies disagreed that Ernest had bought out the interest of his mother and siblings in NEL; rather, they asserted that Robert Sr had divested his shareholding in NEL to JERIC prior to his death, which JERIC subsequently transferred to and held through SR, which was in turn held through SM as nominees of JERIC.[100] They alternatively argued (still in support of their primary case) that even if Robert Sr did not divest his beneficial interest in his shareholdings in NEL to JERIC, that interest would have been transmitted to Camila upon his death in 1967,

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99 Reply and Defence to Counterclaim (Amendment No 3) at para 2.

100 Reply and Defence to Counterclaim (Amendment No 3) at para 15.

and would subsequently have been further transmitted through Camila's will (upon her passing) – in which case Ernest would still not have been the sole beneficial owner.[101] Rounding off their primary case, the Plaintiff Companies positively asserted that each of them is the legal "and/or" beneficial owner of all properties, funds "and/or" assets in their respective names.[102] As an alternative, they argued that "the properties, funds and/or assets were at all material times to be managed for the benefit of not any particular individual, but for the purpose of preserving and growing family wealth to benefit the family".[103]

46 In relation to their alternative (secondary) case, the Plaintiff Companies argued that "even if all or some of [the] assets [were] held by [them] as trustees for the benefit of [Ernest] solely or for the benefit of [Ernest] and/or others, the assets must still be handled by [them] as trustees", and that therefore, the assets should nevertheless be returned to them (and their applications in their Statement of Claim – cited above at [37]–[38] – should be granted).[104]

47 The crux of the Plaintiff Companies' defence to the counterclaims mounted by Ernest was that (a) they were entitled to act in the manner they did in conducting their affairs (in particular, in deploying and investing their funds and assets) prior to this suit as they were not obligated to comply with Ernest's instructions;[105] and (b) they were entitled to act in the manner they did in

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101 Reply and Defence to Counterclaim (Amendment No 3) at para 16.

102 Reply and Defence to Counterclaim (Amendment No 3) at paras 27 and 61.

103 Reply and Defence to Counterclaim (Amendment No 3) at para 27.

104 Reply and Defence to Counterclaim (Amendment No 3) at para 27.

105 Reply and Defence to Counterclaim (Amendment No 3) at paras 79–80.

commencing this suit and related applications as they were simply seeking to protect their assets (whether or not the Plaintiff Companies were the beneficial owners of those assets).[106]

ECJ's defence and counterclaim: A family legacy

48 ECJ filed their defence and counterclaim on 8 June 2012. At that point in time, they were represented by a team led by Indranee Rajah SC from Drew & Napier LLC. At trial, they were represented by a team led by Cavinder Bull SC ("Mr Bull SC"), also from Drew & Napier LLC.

49 ECJ distinguished between (a) ownership of the Plaintiff Companies and (b) ownership of assets of the Plaintiff Companies. In relation to the former, ECJ's primary case was that the beneficial owners of PEN, PAL, and CFC were JERIC and the descendants of Robert Sr, pursuant to a trust established by Robert Sr. Ernest was simply the trustee, custodian, and manager – for the De La Sala family – of their beneficial interests in the Plaintiff Companies.[107] ECJ's secondary case was that even if such a trust had not been established, the beneficial ownership of PEN, PAL and CFC did not belong solely to Ernest but to JERIC.[108]

50 In relation to the latter, ECJ's main position was that each company was the beneficial owner of all assets in its name.[109] Their secondary position was that even if each company was not the beneficial owner of all assets in its name, JERIC were the beneficial owners; not Ernest alone.[110] They further

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106 Reply and Defence to Counterclaim (Amendment No 3) at paras 72–73.

107 ECJ's Defence and Counterclaim at para 36(b).

108 ECJ's Defence and Counterclaim at para 36(c).

109 ECJ's Defence and Counterclaim at para 36(d).

argued that even if Ernest was the sole beneficial owner, he was not entitled to deal with or dispose of the assets without the approval of the Plaintiff Companies, acting through their respective board of directors.[111]

51 For these reasons, ECJ denied any breach of trust (let alone dishonest assistance in that regard) or fiduciary duties on their part *vis-à-vis* Ernest; any fiduciary duties they had owed were to the Plaintiff Companies.[112]

52 In their counterclaim, ECJ sought:

(a) An order that Ernest accounts to ECJ for the sums and assets formerly standing to the credit of the Plaintiff Companies and their subsidiaries; and

(b) An order that Ernest produce all bank records and other books of the Plaintiff Companies and their subsidiaries in his possession, custody and power.

53 ECJ's defence and counterclaim has since been amended twice – first on 14 June 2013 and then on 21 October 2013. Through the amendments, ECJ further expounded on their primary case on the ownership of the Plaintiff Companies (which was that they were part of a "family legacy").[113] They also elaborated on their alternative cases, all of which pointed away from the possibility that Ernest was the sole beneficial owner of the assets of the Plaintiff Companies.[114] Further, they alleged that they had "reason to

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110 ECJ's Defence and Counterclaim at para 36(e).

111 ECJ's Defence and Counterclaim at para 36(f).

112 ECJ's Defence and Counterclaim at para 51.

113 ECJ's Defence and Counterclaim (Amendment No 2) at paras 2A and 26.

disbelieve" Ernest's claims of sole beneficial ownership over the shares and/or assets of the Plaintiff Companies (and that, therefore, their commencement and prosecution of this suit on behalf of the Plaintiff Companies was not in bad faith).[115]

54 Crucially, they amended their counterclaim to one of misrepresentation. The counterclaim was framed as such: in the event the court found that Ernest was indeed the sole beneficial owner of the Plaintiff Companies and/or the Plaintiff Companies' assets, Ernest had misrepresented to ECJ that the Plaintiff Companies were part of a family legacy of sorts, which misrepresentation had induced them to relocate to Singapore to assist in managing the Plaintiff Companies and they had therefore suffered detriment and loss.[116] They therefore claimed for damages to be assessed and interest (along with costs).[117]

Ernest's reply (to ECJ) and defence to (ECJ's) counterclaim

55 Ernest filed his reply and defence to counterclaim on 6 July 2012, subsequently amending it twice – first on 5 July 2013 and then on 4 November 2013. In his reply, he essentially challenged ECJ's claim that they honestly believed that the assets of the Plaintiff Companies beneficially belonged to someone other than himself (thereby maintaining his case that ECJ had commenced and prosecuted this suit, in the names of the Plaintiff Companies, in bad faith).[118]

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114 ECJ's Defence and Counterclaim (Amendment No 2) at paras 27–34.

115 ECJ's Defence and Counterclaim (Amendment No 2) at paras 2C, 26 and 29–32.

116 ECJ's Defence and Counterclaim (Amendment No 2) at paras 119–122.

117 ECJ's Defence and Counterclaim (Amendment No 2) at p 76.

118 Ernest's Reply and Defence to Counterclaim (Amendment No 2) at paras 6–7.

56 In reply to the rest of ECJ's case – that the beneficial ownership of the Plaintiff Companies (or the assets therein) vested with either a "family legacy", JERIC or Camila's estate – Ernest alleges that ECJ have no standing to advance such claims (presumably on behalf of JERIC or other parties which are not before the court). Even if ECJ had standing, Ernest alleged that:

(a) "by reason of JERIC's and/or Camila's estate's acquiescence and/or laches, JERIC and/or Camila's estate are not entitled to enforce such a claim";[119]

(b) in any case, the estate of Camila and/or the residual beneficiaries under Camila's estate and/or JERIC were estopped from advancing such claims (primarily in the light of how Ernest was left to deal with the Plaintiff Companies and the assets therein as he wished);[120] and

(c) even if Ernest was not the sole beneficial owner of the shares and/or assets of the Plaintiff Companies, ECJ were estopped from making such an allegation given (primarily) that they represented by their conduct to Ernest that he was the sole beneficial owner (and that Ernest relied on that representation and thereby altered his position to his detriment by appointing ECJ as directors of PEN, PAL and CFC).[121]

57 In his defence to ECJ's counterclaim (which pertained to Ernest's alleged misrepresentation), Ernest simply denied having made any such representations (to the effect of, for instance, a family legacy),[122] but alleged

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119 Ernest's Reply and Defence to Counterclaim (Amendment No 2) at paras 8–9.

120 Ernest's Reply and Defence to Counterclaim (Amendment No 2) at para 10.

121 Ernest's Reply and Defence to Counterclaim (Amendment No 2) at para 12.

Christina and James wanted to come to Singapore to obtain experience in an international business centre and Edward and Lyndel wanted to return to Singapore.

ECJ's rejoinder

58 ECJ filed their rejoinder on 2 September 2013 (at which point they were addressing Ernest's reply and defence to counterclaim (amendment no 1)). In it, they referred to further pieces of evidence – letters in particular – that, they claimed, evinced the intention (at least on Robert Sr's part) to create a family legacy (*ie*, a trust out of the LIL/NEL shares/assets). In their rejoinder, ECJ used the phrase "sacred trust"[123] (as distinct to "family legacy", which featured in their defence and counterclaim).

59 Also, in their rejoinder, ECJ emphasised that they had in no way acquiesced in, or acted in any common assumption to, the notion that Ernest was the sole beneficial owner of the Plaintiff Companies or the assets therein.[124]

The underlying issue

60 The parties do not appear to dispute that the assets held by the Plaintiff Companies, although greatly enhanced over the years after Robert Sr's death, have their origins in the assets left behind by Robert Sr after he died, predominantly the shares and/or assets of NEL, JMC and the group of companies set up by Robert Sr. The underlying issue, after all the multiple contentions and facts are distilled, can therefore be split into two parts:

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122 Ernest's Reply and Defence to Counterclaim (Amendment No 2) at para 20.

123 ECJ's Rejoinder at para 4.

124 ECJ's Rejoinder at para 14.

(a) Did Robert Sr set up a family trust over his assets before he died? If he did, then the Plaintiff Companies and the assets therein would be held on trust for the De La Sala family (as asserted by ECJ).

(b) If Robert Sr did not set up such a family trust, does all the money in the Plaintiff Companies belong to Ernest (as asserted by Ernest)?

61 Unfortunately a very large number of factual contentions were put in issue. There were numerous interlocutory applications, including those for discovery during the course of the trial. Many objections were taken which required submissions and rulings and the trial was, unsurprisingly, a very hard fought process. A large number of witnesses were called.

(a) The Plaintiff Companies called ECJ as factual witnesses and three experts, Mr Owain Rhys Stone ("Mr Stone"), an accounting expert, Mr Richard Alphonse Ballard Vargas ("Mr Ballard"), a Panamanian law expert and Mr Anthony Thomas Pursall ("Mr Pursall"), a BVI law expert;

(b) Besides giving evidence, Ernest called Tony, Isabel, Nicole, Elena and Christian William Ostenfeld ("Ostenfeld") as factual witnesses and three experts, Mr Timothy James Reid ("Mr Reid"), an accounting expert, Mr Arturo Hoyos ("Mr Hoyos"), a Panamanian law expert and Mr Kenneth Walter MacLean ("Mr MacLean"), a BVI law expert;

(c) Besides giving evidence themselves, ECJ called Bobby, Terrill, Teresa, Richard, Maria-Isabel and Hannelore;

(d) Other witnesses were subpoenaed, Mr Chan Leng Sun SC and Mr Ian Winter QC, but after the clamour of battle subsided, they hardly featured in anyone's submissions.

62 Upon an application by the Plaintiff Companies which was supported by ECJ, and after hearing submissions, I ruled that Ernest should start the case as, *inter alia*, on the pleadings, money had been taken out of the Plaintiff Companies and the ownership of the companies was uncertain due to the "orphan" or "circular" structure. The initial burden of proof therefore fell on Ernest, in that if no evidence was called, judgment would be entered for the Plaintiff Companies.

My decision

The "legacy" of Robert Sr and whether he set up a trust

63 Six people know the truth to the underlying issue. Two of them, Robert Sr and Camila, died in May 1967 and July 2005 respectively. Today, we are left with the four other people who know the truth: Tony, Ernest, Bobby and Isabel. Ernest says there is no family trust and that he bought out everyone's share in the businesses (*ie*, NEL and JMC) in the 1960s and 1970s. Tony and Isabel agree with him. Bobby says there was a trust set up by his father, which he refers to as the "tree", that he and his siblings partook of its fruits but the tree remained to provide for subsequent generations of De La Salas.

64 Their children have no personal knowledge of the underlying question; they can only tell us what they understand the position to be or what they were told by their parents. Ernest's two sons have been disowned and disinherited by him a long time ago and would know even less. In any case, they did not give evidence before me.

Robert Sr's letters

65 Unlike many other trust cases, where the alleged settlor's voice has long fallen silent, Robert Sr, who was a prolific letter writer, speaks through his many letters written over the years to his children. Many of these letters, starting from 8 January 1947, were put in evidence before me. They provide a valuable insight into Robert Sr's shipping and other not inconsequential businesses, the business climate of the times, his hopes and aspirations for his children, how his children went to Australia for their education, his fatherly assessments of their progress and advice to them, how his family came to move from Hong Kong to Australia, what his various concerns were over the years and his plans for his family and for his retirement. These letters also chronicle the events that took place up to Robert Sr's death and act as a good guide to tracing the history of his legacy. I will therefore have to go through some of these letters in some detail.

66 I begin by setting out a brief factual sketch, derived mainly from his letters and which is not really in dispute, and where they are, I so find.

(a) As noted above, Robert Sr joined JMC Hong Kong as an apprentice when he was not quite 14 in 1922 and by 1 January 1940 had become Chairman and majority shareholder of JMC. He worked tirelessly through the years, wrote often to his family and built up a leading shipping and business empire with its headquarters in Hong Kong.

(b) Robert Sr had great hopes that his sons would follow in his footsteps, join JMC and take over the reins from him. Robert Sr planned and worked towards launching his first two sons, Tony and

Ernest, into the business, teach them the ropes and when they attained majority, he would make them directors in JMC.

(c) Tony started work at JMC after he finished schooling. However, he decided sometime before May 1952 (when he would have been about seven months short of turning 21 on 16 December 1952) that business was not for him and wanted to return to settle down in Australia. Robert Sr's hopes then turned to Ernest and Bobby to carry on the business; Robert Sr would install Ernest as a director (Ernest would have turned 21 on 31 January 1954) and would also train Bobby once he reached 18 in October 1953.

(d) On 1 July 1952, Robert Sr expressed the hope that Ernest would complete his public company secretarial course after which he intended to take Ernest on a tour of their offices in the beginning of 1953 and then install him in Hong Kong.

(e) Robert Sr originally planned to semi-retire on 30 June 1952 by making two of his lieutenants, Bertram Peter Charles Fletcher ("BPC Fletcher") and one Nissen, joint managing directors, whilst he stayed on as Chairman of the Board and Governing Director. He would then retire fully on 30 June 1958. This would give him the time to train his sons and bring them on board.

(f) Robert Sr's plans to semi-retire on 30 June 1952 and retire on 30 June 1958 were pushed back to 31 December 1958 by circumstances and the shipping business climate which had turned adverse by 1952/1953.

(g) However, despite Robert Sr laying his plans to semi-retire or retire and preparing to do so, the downturn in the shipping industry and disagreements with Ernest over the running of the businesses in the late 1950s and early 1960s caused him to continue to stay at the helm a little longer. His plans to retire were later pushed back further to 1962.

(h) In February 1964 he expressed the view that JMC's net worth was under par and he wanted to see it increased threefold (as he had done around 1952 and 1953) and for LIL (by then renamed NEL) to be completely out of shipping before his "swansong".

(i) In his letters of 10 and 11 February 1964, he expressed his firm intention to finally retire on 30 June 1967, after completing 45 years at JMC and shipping.

(j) However a ruptured blood vessel sometime before 7 November 1964 and his impaired health thereafter saw Ernest back at the helm in Hong Kong after that date.

(k) Robert Sr died rather unexpectedly in his sleep of a heart attack on 27 May 1967 at the age of 59. He was well known in Australia and several newspapers ran obituaries and articles on his life.

67 Five things stand out from these letters:

(a) First, Robert Sr had built up, amongst many other businesses, a considerable shipping business, owning and chartering out ships, headquartered in Hong Kong, but with offices and businesses around the world, including Australia, Singapore, London, New York, Japan, Indonesia, Portuguese East Timor, Papua New Guinea and far flung places like Brazil and Alaska; his flagship, JMC, was a leading

shipping and business company in Hong Kong and this part of the world;

(b) Secondly, Robert Sr was a man with a very great love for his family, as a husband and a father, who did not see his children through rose-tinted glasses but knew them well, knew their faults but also believed strongly in their potential. He attributes his modest lifestyle as an education from Camila and together they taught their children their values. His letters also show an unwavering goal, right from his earlier years, of providing for his family so that they would never be in want.

(c) Thirdly, consistent with these tenets, in all his business endeavours Robert Sr never referred to his companies and businesses as *his* but were always referred to as belonging to the family with words like "their", "our", "we" and phrases like "the family's".

(d) Fourthly, Robert Sr had a great aversion to having estate duty levied in the event of his death; this was a very big concern of his – that his hard-earned wealth should never be whittled down by hefty estate duty and should be preserved as far as possible for his family; and

(e) Fifthly, Robert Sr, not surprisingly, also had a healthy aversion to having to pay more tax than was absolutely necessary and he sought professional advice from various sources, especially when the family began having plans to settle down in Australia, to ensure he paid as little tax as possible.

68 I now turn to his letters as well as the existing corporate records and other documents where available to answer the first part of the underlying issue: did Robert Sr set up a trust in his lifetime?

69 LIL featured prominently in Robert Sr's letters. LIL was renamed NEL in 1959 for tax reasons. According to the corporate documents, Robert Sr incorporated LIL in Hong Kong on 11 April 1939. When Robert Sr incorporated LIL, he was around 31 years of age (he assumed the Chairmanship of JMC in January 1940) and he had three young children then – Tony (aged about 7 years old), Ernest (aged about 6 years old) and Bobby (aged about 3½ years old). Isabel was only born in 1943. LIL had two shareholders, Robert Sr and Camilla, from 1939 to 1947 with one share each. The corporate documents show that in 1947, the share capital was increased to $500,000 with Robert Sr and Camila holding 250 shares each. Over the years, Robert Sr put assets into LIL and this included subsidiary companies engaged in ship-owning and shipping.

70 In the first relevant letter, dated 2 November 1950 (by which time Isabel had been born and when Robert Sr was around 42 years of age), Robert Sr wrote to Ernest, who was then 17 years old:

> Yesterday, I transferred from [LIL] the 40% holdings of MANNERS GODOWNS, LTD, to [JMC] and shortly I shall transfer 25% of CAMBAY PRINCE STEAMSHIP CO. LTD. At the same time I have transferred 40% of [JMC] shares to [LIL] so that if anything ever happened to me nobody can force the 40% out of *[LIL], which will remain in the Lasala family until doom's day if my sons and sons' sons so desire it* even if they do not choose to actively work in JMC. With this arrangement I am left with 30% in JMC., in my own name and this I intend should go to such of my sons as choose to take an active part in the affairs of JMC. When Wallace kicks the bucket, his 10% will come to me and so there will be 10% for each of you if you all decide that you will be become part of JMC.
>
> I am giving you these details as you are now fast growing to be of age and you must now what I am planning for you just in case St. Peter calls me before my time.
>
> (emphasis added)

71 This letter shows three things. First, Robert Sr had set up companies under LIL which he was transferring to JMC in exchange for JMC shares. Secondly, it can be seen that Robert Sr was implementing a scheme to provide for his wife and children in case anything untoward happened to him. Thirdly (and significantly say ECJ), *his plan* was that even if anything happened to him, no one could force LIL's 40% shareholding in JMC out of LIL, which *would remain in* the *Lasala family until "doom's day"*. However, I note that the language used in this letter by itself does not evidence a trust and the expressed plan for LIL to remain in the Lasala family until "doom's day" has an important proviso tagged onto that expression, *viz*, "*if* my sons and sons' sons so desire it" (emphasis added). This clearly implies that the decision was not his to make.

72 The next relevant letter is dated 1 September 1951 and it shows Robert Sr actively working towards "launching' his sons Tony and Ernest into business. It also records his concerns over being subject to tax as a "resident" because the family was thinking of settling in Australia. Robert Sr outlined his

plans for the next few years to rotate between Sydney, Hong Kong, Singapore and Tokyo so as not to be a resident of Australia for tax purposes.

73 On 11 September 1951, Robert Sr wrote to his family from Manly, NSW, setting out his plans to avoid paying more tax than was necessary:

> Yesterday I had a long conference with Mr G.A.L. Gunn the expert on Income Tax and got from him the low-down of what I shall have to do. Fortunately in [1939] I established [LIL] and just before I left Hongkong I arranged with Ritchie to have all my shares transferred to the name of [LIL], with the exception of 30% in JMC., which are still held in my name and Camila should also transfer the 100 shares Banks and 100 shares Unions from her name to [LIL]. In this manner if and when I take up domicile in Australia, I shall only be taxable on personal exertion income besides dividends from investments which I might have in Australia. The profit which [LIL] make[s] is not taxable so long as no dividend is declared. This is the only way to beat the Tax people and when I incorporated [LIL] in 1939 I did so with a view to minimizing death duties.
>
> …
>
> According to Mr Gunn, LIL must not invest anything in Australia and so long as I do not slip up on this, after transferring the 30% of JMC shares to LIL, I shall be only liable to very little tax except on what I will earn in this country.
>
> I should like to point out that the Tax on unearned income is at present 15s/- to the pound after a certain level is reached and I am certainly in no mood to hand out this kind of money for no good reason.

This letter and the other evidence show that Camila took no active part in the running of Robert Sr's businesses. She was the dutiful and supportive home-maker and mother who brought up the children and this letter shows that although shares were put in her name, Robert Sr felt free to direct how they were to be dealt with. The few letters from Robert Sr to Camila show that she was not *au fait* with matters like business, corporations, taxation and death duties.

74 Robert Sr's letter of 16 December 1951 shows Robert Sr's varied business activities in Australia. By this time, Ernest had joined the family's Australian company, JMC(A). The letter also mentions the incorporation of an Australian holding company, Delasala Pty Ltd, with Robert Sr and JERIC as directors together with one Mr Westgarth (who appears to be a solicitor or accountant) for financing various ventures which "*we* decide to go into such as Mining etc" (emphasis added). Robert Sr's letter of 9 May 1952 to Ernest and Bobby records, *inter alia*, that:

(a) he has transferred all his shares in JMC to LIL; and

(b) after he goes into semi-retirement, it is important that LIL should always have an active director in JMC stationed at "headoffice" to "keep a tab on things" and prevent "unpleasant surprises".

75 In his letter of 13 May 1952 to Ernest, Robert Sr states that JMC owes him a "whack" of money and that he would like to see most of it paid up before he goes into semi-retirement. This letter also records:

(a) his worry that Tony did not want to carry on in JMC and that it was up to Ernest to take an active hand in it; and

(b) his last job was to train Bobby up in business once he finished schooling and then install him as a director at JMC upon Bobby attaining 21 years of age.

Robert Sr then states, towards the end of this letter, that all his shares are now in LIL:

> … so that the remuneration to each one of you will depend on the actual work you do *as PROFITS all go to LIL., which*

> ***belongs to the family***. … [emphasis added in italics and bold italics]

76 In Robert Sr's mind, LIL "belong[ed] to the family". In 1952, LIL's share capital had increased to $1,000,000 with 1,000 shares issued; 473 shares were held by Robert Sr, 475 shares were held by Camila, 27 shares were held by Benita, Camila's sister, and 25 shares were held by Tony, who was by 13 May 1952, almost 20 years and 5 months old.

77 Robert Sr made Ernest a director of JMC on 14 May 1953. On 15 July 1953, Robert Sr writes to Ernest stating that Ernest had "a life ahead of [him] to build *the family fortune* to greater heights" (emphasis added). On 16 July 1953, Robert Sr added a three-page addendum to his 15 July 1953 letter, repeating the same theme and said:

> … when you have gathered sufficient experience I would be only too pleased to shift the burden of responsibilities on your shoulders insofar as JMC is concerned *but we must keep our personal stake outside of JMC, separate and sacred as this represents the "guarantee" to the whole family.* [emphasis added]

78 On 20 September 1953, Robert Sr writes to Ernest on JMC(A) letterhead and instructs that: "As regards [LIL], any decisions must follow 'suggestions' which I make from here and the management should be left in the hands of Lowe, Bingham & Matthews [public accountants and tax advisers]".

79 Robert Sr emphasized this again to Ernest in his letter of 31 January 1954:

> …I have had my fill of work and am prepared to hand over to you the job of protecting ***our*** *investments in JMC. Other investments in* ***[LIL] will be handled by me*** *or rather I shall*

> *direct you on what we want done*. [emphasis in italics and bold-italics added].

80 In 1954, LIL's share capital was $10,000,000 with 6,000 shares issued. Robert Sr held 3,083 shares, Camila held 2,865 shares, Tony held 25 shares on trust for Robert Sr, and Ernest held 27 shares on trust for Robert Sr. Benita had dropped out as a shareholder. In 1954, Tony would have been around 22 or 23 years old and Ernest would have been around 21 years old.

81 Sometime between 1954 and 1955, Robert Sr received advice from Lowe, Bingham & Matthews that he should spread out the shareholding in LIL to as many people as possible to avoid heavy death duties. Robert Sr explains this in a letter to Camila dated 30 May 1956, and in that letter he also explains the strong financial position of China Shipping Co Ltd ("China Shipping"), another of his companies, and his moving it under LIL's ownership. Furthermore, from around 1955, LIL's shareholding changed to Robert Sr holding only 600 shares, Camila holding 3,000 shares and each of his children, Tony, Ernest, Bobby and Isabel (collectively referred to as "JERI") holding 600 shares each. On advice of Lowe, Bingham & Matthews, Robert Sr also wrote an official letter, thereby creating a paper trail for the corporate records, that the transfer of most of his shares to his children were irrevocable gifts and that JERIC were not holding the shares on trust for him. This letter was clearly written to avoid estate duty because despite this transfer, we see Robert Sr repeating again and again in his letters to Ernest and others that he is in control of LIL and its subsidiaries, especially China Shipping, and that all decisions in respect of those companies and their businesses would be made by him and no one else.

82 A letter dated 29 August 1955 from Robert Sr to Ernest chronicles a serious clash between father and son in the running of JMC. Ernest had

committed JMC to sell two ships, without checking with Robert Sr or the other two directors, BPC Fletcher and Nissen, on what Robert Sr thought were very disadvantageous terms. He sent a furious telegram to Ernest, in which he also stated:

> …I was hopeful that you might have taken over at least part of the cloak of responsibility but I am afraid I have been too optimistic.
>
> In fairness *to the family* I would be foolish to allow you to manage *their fortunes* at this stage and I have therefore to consider all the others in any decision which I am forced to make.
>
> [emphasis added]

In response, Ernest humbly apologised in writing and said he would accept any punishment Robert Sr meted out. Robert Sr relented and forgave Ernest.

83 On 18 March 1956, Robert Sr writes and records that he made Ernest a Managing Director of JMC but reminded Ernest that this was mainly "a cover" for Robert Sr to be able to say (to the Australian tax authorities) that Ernest was managing JMC and he, Robert Sr, was semi-retired and went to Hong Kong only as adviser.

84 As noted at [81] above, Robert Sr made sure Ernest and his fellow directors at JMC knew he would control and make all business decisions for LIL, and now that China Shipping was a subsidiary of LIL, the same would apply. He wrote on 9 June 1956 that "[n]aturally as regards CHINA SHIPPING CO LTD, *all decisions should have my approval first*" (emphasis added).

85 The next relevant letter is from Robert Sr to Ernest dated 5 October 1956 and it is important for three reasons. First, it can be seen that Robert Sr

was preoccupied with avoiding hefty death duties. He enclosed a long letter to Bobby (which he had also sent to Ernest) explaining his plans to avoid estate duty. He also enclosed a copy of his will, which he was of the view could be relied on as "supporting evidence regarding [his] gifts to [JERI] of shares in LIL" as part of his plan to avoid estate duty. He further asked them all to keep copies of this letter safely locked away. Secondly, Robert Sr mentions a principle of distributing money from LIL to his children which emanated from Ernest and which Robert Sr thought was a good idea and adopted. I should also mention that each of his four children, on reaching 21 years of age, received a lumpsum from Robert Sr to enable them to be "independent", but there is no mention of what this sum is in the evidence before me. With regard to the LIL dividend, Robert Sr writes:

> I think you will agree that Ernest's suggestion regarding the dividends you all derive from LIL., is a good one. You will thus have $90,000.- for the year ending 31st March 1958 and you can do what you please with this which will be paid into your current a/c with JMC., or to the Chartered Bank if you prefer. *As regards the remaining $180,000.- this together with the shares from the others will be paid to Swiss Banking Corporation, A/c H.S. 91,735, Geneva* ***for investment elsewhere. Myself and Mummy can operate this account singly or any two of you children***.
>
> As I have explained to Bobby, in the future you children will have funds of your own coming from dividends which LIL., will be paying so that any time you want to go for a holiday or buy anything for yourselves, *you can use the 1/3rd dividend without being questioned as it is your own money*. Since you are domiciled in Australia, you will have to *take special care* whenever any *funds are remitted to you* there as you might be liable to Income Tax.
>
> [emphasis added in italics and bold-italics]

Thirdly, Robert Sr gives his contemporaneous thoughts on the treatment of LIL:

> There is always the possibility of [LIL] liquidating in which case substantial funds will be available from *redistribution of*

> *Capital and assets and you children will then have to decide what to do with your share*. There is time enough to decide on this issue.
>
> One thing *I am determined* and that is that *none of you should be deprived of the shares you legally own, as a result of my death* and this might well mean that Mummy, Isabel and myself might have to take up residence in some other country outside the British Commonwealth but this will not stop us from visiting you all for periods up to six months in any one year.
>
> [emphasis added]

86 I pause to make a few observations from the letters examined thus far:

(a) First, a principle that 1/3 of the dividends from LIL could be used by the children for whatever they chose to do and the balance 2/3 would have to go back into investment elsewhere was enunciated and was later adopted.

(i) It should be remembered that all the "investments elsewhere" were controlled by Robert Sr irrespective of the shareholding in LIL.

(ii) The signing authority of those accounts show the same control; whereas Robert Sr and Camila had sole signing authority, the children could only operate the account with signatures from any two of them.

(b) Secondly, and significantly, Robert Sr does not seem to treat LIL as a "sacred trust" for the De La Sala family which will last until "doom's day". He clearly countenanced having to liquidate LIL *in which case each child* would have to decide *what to do with his or her share* of LIL's liquidation proceeds.

(c) Thirdly, an important characteristic of the person running LIL or the JMC business appears to be that that person was to remain outside of Australia for tax and estate duty purposes.

(i) In the letters, the phrase "tax exile" is commonly used. That person may also have to reside in a jurisdiction where the levying of estate duty can be minimised or better still avoided altogether.

(ii) Subsequent letters show that Robert Sr was even thinking of moving to Brazil if Hong Kong levied heavy death duties.

87 In a letter dated 2 January 1957 to Ernest (and BPC Fletcher, who was the husband of Camila's sister, Benita), Robert Sr records that by the middle of 1958, China Shipping would no longer owe any money to banks and all earnings could be reinvested in other schemes in Australia. In his letter to his sons dated 10 March 1957, Robert Sr notes that by the end of 1958, China Shipping would owe nothing to the banks, own six ships, and having earnings of US$1m per month. This placed LIL, which owned 95% of China Shipping and 60% of JMC, in a strong position. Robert Sr stated he was thus "very well satisfied" having "fulfilled" his life's work, and *should he pass away suddenly*, he would be content having carved a name for the family in Hong Kong and that his family "*will all be left well provided for*" (emphasis added). This is consistent with the idea of Robert Sr treating LIL and its investments like a life insurance policy for his family.

88 This theme is repeated in two letters. In a letter dated 28 June 1957 to Ernest, Robert Sr after talking about business, states on the third page:

> I do not mind JMC., owing the Bank a substantial overdraft but not so with CHINA SHIPPING *as this is LIL's egg-nest and our retirement fund.*

In a letter dated 6 July 1957 to Ernest, Robert Sr writes:

> I am glad we have sorted out China Shipping's affairs in a satisfactory manner *as after all* ***THIS is LIL's egg-nest*** [*sic*] *and* ***retirement fund***. Earnings from the 6 ships should more or less liquidate the Bank overdraft …
>
> …
>
> *LIL., have a very nice cash position so* ***the family is actually sitting pretty*** and the only actual headache we could have is JMC., but in this we must all put our shoulders to the wheel. ….
>
> [emphasis added in italics and bold-italics]

89 LIL's corporate records (which I should mention are not complete) show that in 1957–1958, Robert Sr had re-distributed Camila's shares to JERI. Robert Sr still held 10% of the issued share capital, *ie*, his 598 shares (with BPC Fletcher and C G Smith from Lowe, Bingham and Matthews, each holding one share on trust for Robert Sr) and Camila, Tony, Ernest, Bobby and Isabel, each held 1,080 shares or 18%, making up the balance 90%.

90 We now come to an important letter on which the Plaintiff Companies and ECJ place great reliance as evidence of a family trust. This three-page letter, written by Robert Sr on John Manners' Tokyo office letterhead on a hot, sultry afternoon on 7 July 1957, was addressed to his children; it came to be held with special regard by the De La Sala family ("Avarice Letter"). Copies of this treasured document were kept and circulated by his children and also given to Robert Sr's grandchildren. Robert Sr himself said in this letter: "I hope you will treasure this letter and read it from time to time when you feel bored with the way things are going" and again at the end "which I trust you will have occasion to read over from time to time."

91 Robert Sr's thoughtful and reflective letter expounds his views on life and values as well as some views on the businesses. He starts with something he says struck him forcibly, the "poison" which is avarice:

> HIGH PRICE OF AVARICE. Avarice is one fault which few people will admit. The dictionary defines it as "an inordinate desire for wealth, implying both miserliness and greed."
>
> ...
>
> I am indeed fortunate that in my children I hace not seen any sign of Avarice but you must never forget that JEALOUSY is a cousin which gradually can turn to AVARICE ...

92 The important part of this letter is on the second page where Robert Sr writes:

> Having gone so far I might as well continue since I have the urge to write and I shall therefore ***expound my views and objectives of LIL***. To begin with in late 1938 when I applied for additional Life Insurance for the protection of Mummy and you children I got annoyed when informed that I would be rated up to 8 years on the premium and there and then *I decided to be my own Insurer and incorporated LIL*, in April 1939 *with* ***the fixed intention of building up Funds to fully protect all of you*** in the event of my untimely death. *This I think I have now more than achieved* and I have long since divested myself of everything but 10% of LIL., on which only death dues would be payable. ***It is my wish that LIL., should always remain a FAMILY undertaking and guarantee for the livelihood and well-being firstly of ALL my descendants and then other deserving relatives.*** *If and when any dividends are paid, they should be restricted to a minimum, the object being that LIL., should grow in financial strength with the passage of time.*
>
> By the end of 1958 CHINA SHIPPING CO. LTD., should be free from any indebtedness to the Bank and the Company's position should be as solid as the "Rock of Gibraltar" with or without the famous monkeys. *This is LIL's biggest single investment and must therefore be well nursed.*
>
> [emphasis added in italics, bold-italics, and underlined bold-italics]

93 To show that Robert Sr instituted a family trust, ECJ rely heavily on the underlined words in the quote in the previous paragraph. I make the following observations of the words leading up to this phrase:

(a) Robert Sr "expounds" his *views* on the *objectives* of LIL.

(b) LIL came into being because in 1938 when he sought additional *life insurance* for the protection of Camila and his children, he was informed his premium would be significantly loaded (rated up by eight years); he therefore decided to be his own insurer and incorporated LIL in April 1939; at that time, the family he wanted to protect would have consisted of Camila and three of his children, Tony (about 7½ years old), Ernest (about 5¼ years old) and Bobby (about 3½ years old).

(c) Robert Sr's fixed intention was to build up funds in LIL so that his family would be protected in the event of his untimely death.

(d) By 7 July 1957, he had "***now*** *more than achieved*" (emphasis added) this. This meant that LIL's assets or net worth must have been very substantial, that there was more than enough to provide for his family in the event of his untimely death, *and* that he had divested himself of 90% of his shares in LIL so that the value of LIL would only be decreased by estate duty on 10% of his shares in the event of his death (presumably because the family would have drawn on the resources of LIL to pay estate duty).

94 From this, *ie*, having more than achieved the purpose of providing for his family in LIL, Robert Sr immediately follows up with the underlined words quoted above at [92]. On a first, and perhaps even a second, reading, it

does seem that Robert Sr intended to set up a family trust in LIL which was to remain a family company, *ie*, run, controlled and owned by the De La Sala family which was firstly to guarantee the "livelihood" and "well-being" (both these words being fairly clear and not given to ambiguity) of all his descendants and then, other deserving relatives. The distribution to beneficiaries by payment of minimum dividends, *if* and when they are paid, is clear, as is the object thereby of conserving capital for investment and growing LIL in financial strength over time. I pause to note that if there was a family trust, whilst the ascertainment of the former class of beneficiaries does not give rise to any difficulties, the second class of beneficiaries does give rise to questions of exactly who are "deserving" relatives and what criteria are used for deciding whether they are deserving or not. If indeed there was a trust, then the trust in relation to the latter class of beneficiaries would fail as the objects of the trust would be uncertain. That, however, does not arise on the facts here.

95 On reflection and a closer reading of the words used, however, it will be noticed that Robert Sr uses the words "it is my wish", *ie*, his desire or what he would like or what he hopes for. He is no stranger to the English language and he does not use words to the effect that this *was what was to be done* or what he wanted done or what he would be doing. There can be little doubt if that was what Robert Sr wanted to do, *ie*, set up a family trust, he could do so and no one would have opposed that, even if 90% of the shares in LIL were held by his wife and children, among whom Tony, Ernest and Bobby had all attained majority. It bears mentioning that the words used do not indicate that a trust or similar structure had already been set up by then. Indeed, to find the existence of a trust, it must be certain that the settlor intended to create a trust rather than to impose a *mere moral obligation* or to make a gift or to do some other act which was not a trust (Alastair Hudson, *Equity and Trusts*

(Routledge, 7th Ed, 2013). As Judith Prakash J, as she then was, held in *Guy Neale and others v Nine Squares Pty Ltd* [2013] SGHC 249 (at [69]):

> For there to be certainty of intention, a careful inquiry of the facts must show that the settlor clearly intended to subject the trust property to a trust obligation. This can be discerned from the language used in a trust document, or, where the language used is found to be inadequate, *a settlor's intention* deduced as a matter of "business common sense" may even be sufficient. … The settlor's intention must be clear on two fronts: that the *trustee's duties are to be legally enforceable rather than merely social or moral*, and that it would involve *trust* duties as distinct from other legal relationships such as that between debtor and creditor. … [emphasis in original]

96 From Robert Sr's letters dated 21 July 1957 (to Bobby) and 15 October 1957 (to Ernest), Robert Sr writes of his plans for the family. Tony should take charge of Delasala Pty Ltd and "our" interest in Australia as Tony intends to stay in Australia "for keeps". Ernest would stay in JMC and Bobby would be Robert Sr's assistant and look after the affairs of LIL and China Shipping. We see Robert Sr proudly setting out the record profits of China Shipping at $15,289,812 and JMC (with its 14 subsidiaries) at $18,783,163.

97 Robert Sr's letters in 1958 evidence his alarm at and preoccupation with the Hong Kong government's proposals at that time to make changes to estate duty legislation. It appears that the government was intent on being able to levy estate duty on individuals who used private investment companies, like LIL, to hold their assets, and to lengthen the gift period upon which estate duty could be levied from three years to five years. Robert Sr's big concern was that although his "gifts" to his children had crossed the three year mark (which was then in force), Camila's gifts through the re-distribution of shares had not. His letters in 1958 tell of his efforts at lobbying against these changes.

98 In his letter from Hong Kong dated 3 October 1958 to Camila, Robert Sr said:

> If the proposed Bill is adopted without amendments, then we shall probably have to eventually liquidate LIL., distribute the assets and settle down somewhere else. I shall be able to explain the position more fully to you when I see you and in the meantime Smith of Lowe, Bingham & Matthews is obtaining legal opinion from England.
>
> I told Ernest that I should not have to worry about this matter as it concerns duty payable on my estate after my death but just the same I hate to think that after all my work for the family, Government should come in and deprive them. The Estate Duty on over $30,000,000.- is 52% which means that Government take $18.- Million but a forced sale of assets might not realise as much as the value the Estate Commissioner places. Perhaps Fletcher could explain things to you in the meantime.

99 In his letter dated 4 October 1958 to Bobby, Robert Sr talks about the proposed legislation on Estate Duty and said:[125]

> Depending on the final outcome of the 2nd reading of the proposed Bill, *we might have to decide on liquidating LIL., and distributing profits and Capital to shareholders* in order to safeguard *your individual interests* against application of any new Law. …
>
> …
> … The worry should be on the shoulders of you children but just the same I would not rest satisfied to know that after all my efforts and planning to ensure *your financial welfare after my death*, that some new Law now introduced should upset my plans.
>
> [emphasis added]

100 Robert Sr called for all his family to meet in Hong Kong as there were important decisions to make for LIL in the coming months. The letters also show that Robert Sr sought advice from the Hong Kong law firm, Deacons. In another letter dated 14 October 1958 to Tony, Robert Sr said:[126]

125 2AB122.

> There are so many things to discuss when you all get here in connection with the family fortunes that I am anxious to have you all here so as to finalise everything.
>
> It is something amusing to contemplate that circumstances are forcing me to "retire" from active business and I am sure that Mummy will be happy about this providing it does not mean any of you lose much over it. Lose you will have to as I am selling shares etc., at present market prices which might be lower than cost originally.
>
> Anyway this is a lot better than having to be squeezed out by the Estate Duty eventually and there will be plenty to *take care of you all* providing *you* know how to keep *your* money.
>
> [emphasis added]

101 In a letter to Bobby, dated 15 October 1958, Robert Sr wrote:[127]

> I am having daily discussions with Smith of Lowe, Bingham on steps which I should take and I have decided to sell to you each 2% out of my 10% in LIL., so that I shall have nothing in the way of shares in my own name. This will give you each 20% in LIL. I also intend that LIL., should sell to each of you individually 12% of JMC., at LIL cost. In this way the next balance sheet of LIL., will show very greatly reduced assets.

During this period Robert Sr was working hard to sell off what he had in Hong Kong to ensure he was not caught by the proposed changes to the estate duty legislation.

102 He informed Tony in his letter dated 16 October 1958 that he had issued instructions to cash in his insurance policies and stated:[128]

> I am discussing with Smith of Lowe, Bingham about LIL., selling to the shareholders of LIL., the shares they hold in JMC., so as to cut down the size of LIL. This will leave LIL., as their main assets the 7 ships they own and the debts owing by the other shareholders of JMC., in respect of the shares they

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126 2AB151.

127 2AB150.

128 2AB158.

> bought. If my scheme goes through each of you will own in your own name 12% of JMC., Ordinary shares besides $225,000.- in preferred shares. This [is] of course in addition to what you and Ernest already have in Preferred shares. The future holdings in JMC., Ordinary shares would then be divided:
>
> | | |
> |---|---|
> | Ernest | 27% |
> | Tony | 12% |
> | Bobby | 12% |
> | Mummy | 12% |
> | Isabel | 12% |
> | Lai-yuen | 10% |
> | Williams | 5% |
> | Morrison | 5% |
> | Ostenfeld | 5% |
>
> so that even if you, Bobby, Mummy and Isabel reside in Australia, the controlling interest will be in Hongkong. Remember nothing will be decided until you are all in Hongkong.

103 In his letter dated 17 October 1958 to Bobby, Robert Sr outlined his plans for restructuring and a name change for LIL, explaining that the Financial Secretary of Hong Kong was dead set against private investment companies, but a re-named 'LASALA ENTERPRISES' "should be a horse with a different colour". As a first step, LIL would declare a dividend of $350 per share, totalling $21,000,000, to enable his wife and children to buy his 10% in LIL and their shares in JMC. These shares in JMC would be placed in trust with Strath Nominees Ltd which was operated by Lowe, Bingham & Matthews, who will then collect dividends from JMC and carry out their individual instructions. I pause to note that this step, to use a nominee company to hold their shares, was obviously to mask the true shareholders of JMC. Robert Sr then gives details of how the accounts of Lasala Enterprises would look and that it would comprise China Shipping, South Breeze

Navigation Co Ltd, North Breeze Navigation Co Ltd, Cosmopolitan Investments Ltd and if feasible, Delasala Pty Ltd.

104 This was repeated in Robert Sr's letter to Tony dated 17 October 1958 where he stated:[129]

> Thanks for your letter of 14th inst, and I am pleased to note that you appreciate the fight I have on my hands *to protect you children* in the *gifts I made to you all* years ago.
>
> …
>
> Talking things over with Armstrong and Smith today, we have come to the conclusion that it might eventually be necessary to liquidate LASALA INVESTMENTS LTD., as Government are actually gunning for all Private Investment Companies and we can therefore be no exception. My only regret would be that I formed this Company nearly 20 years ago (11th April 1939) and I would naturally be sorry to see it disappear after all I had planned BUT this is *better than see the money coming to you all disappear* in Estate Duty when I die!
>
> In my letter of yesterday, I dealt on the JMC., shares which I intend should be distributed to each of you individually and today Smith said that insofar as the shares for you or any of you residing in Australia are concerned he has a Company called STRATH NOMINEES who could handle things for each one so that you will not have to declare same in your income tax returns.
>
> [emphasis added]

105 By the end of 1958, Robert Sr had divested himself of all his shares in LIL. By that time, Robert Sr's and the business community's lobbying resulted in the Hong Kong government backing down and it was no longer an issue for Robert Sr to continue being domiciled in Hong Kong as far as estate duty was concerned.

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129 2AB161.

106 Robert Sr's letter to Bobby dated 25 December 1958 about a Mercedes car is notable because it shows Robert Sr's view of his wealth and imparting this same value to his children:[130]

> … Now son with regard to the ownership of the car, there is no need to remind anyone who it belongs to as [EVERYTHING] I have belongs to you all and you should by now know this. Ernest will be receiving his car soon and will probably be using it most of the time but anytime he wants to use mine and I am now using same, he is at perfect liberty to do so just as you would be. You must get away from this idea of THIS IS MINE and THAT IS YOURS and WHAT IS YOURS IS MINE AND what is mine is MY OWN. Concentrate more on IT IS OURS but principally for PAPPYS OR BOBBYS OR ERNESTS USE.
>
> This family must always be united and this is the only way of going about it. I think I have given you children a splendid example of this by the manner in which I have divested myself.
>
> [underline in original]

107 Robert Sr's letters in 1959 shows his active engagement in the businesses. In a letter dated 9 April 1959 to Ernest, Robert Sr asks when Ernest can make £250,000 available so that he can develop a shopping centre in Manly, NSW.[131] In these letters, Robert Sr constantly reminds Ernest (and Lowe Bingham & Matthews) that LIL belongs to the family and he, Robert Sr, is to be in sole charge of LIL and make *all* decisions in relation to LIL:

(a) In the 9 April 1959 letter he also states that he would like to see LIL's liquid funds being invested elsewhere and not being entirely dependent on shipping for growth.

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130 2AB186.

131 2AB274.

(b) In his 4 May 1959 letter to Ernest he notes that Ernest agrees to spread LIL's investments outside of Hong Kong and not only in ships and says:[132]

> … After all son we must be in the position that if Shipping really goes to HELL, the family is not stranded and we have enough elsewhere to ensure a comfortable living.
>
> … So [f]ar all LIL's assets are in ships and JMC indebtedness and it would be better to have our eggs in more than one basket.

(c) In his letter dated 12 May 1959 to Ernest, Robert Sr states:[133]

> … Under no circumstances must you extend LIL's guarantee to JMC., and in this respect you will have to seriously consider setting aside surplus funds accumulated for LIL., which I could usefully use in investing outside of Hongkong. *LIL's skin must always come first* and nothing should be left to chance and by this I mean if you have too much lying in current account with JMC., you might have difficulty withdrawing [the] same even though it is supposed to be "on call". I can get upwards of 8% in first class mortgages on real estate both in Australia & Alaska. [emphasis added]

Robert Sr continued:

> I mentioned to you all more than once before that I want the say in the appointment of Masters and Senior Officers and Engineers on LIL., ships. What you do with the other ships I do not propose to interfere. Certain officers in the Company owe personal loyalty to me and I want to keep it that way no matter what the Superintendents thinks. I hope I have made this point quite clear.
>
> Please impress upon everyone that I can easily manage LIL ships without being present in Hongkong…

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132 2AB276.

133 2AB278.

(d) In his letter to Ernest dated 13 May 1959, Robert Sr reiterated:[134]

> As regards LIL., I am positively very concerned and all vital decisions should come from me *as I represent the interests of others in the family*.
>
> In very plain language Ernest, you have been given the full run of JMC., but not so with *LIL.*, which *will always continue [to be] my responsibility*.
>
> [emphasis added]

(e) In a letter to Bobby dated 13 May 1959, Robert Sr stated:

> As regards LIL., I intend to continue having the say *so as to protect the interests of the family*. LIL., is on a good wicket and under no circumstances must this be disturbed. [emphasis added]

(f) In a letter to C G Smith dated 18 May 1959, Robert Sr states:[135]

> … Insofar as LIL is concerned, it is a totally different matter and I am determined that *in the interests of the others, I must have the final say in anything and everything*. [emphasis added]

(g) In a letter dated 18 May 1959 to Bobby, Robert Sr gives instructions to Bobby with respect to arrangements with the Swiss bankers and states:[136]

> *Ernest has assured me that he will keep his hands off LIL.*, and will arrange to liquidate JMC's indebtedness to LIL., as I was not at all happy with leaving liquid cash with them "on call" at 6% – we can do much better elsewhere and it will be a lot safer. [emphasis added]

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134 2AB280.

135 2AB285.

136 2AB284.

(h) In his letter on LIL letterhead dated 20 May 1959, Ernest, probably irritated with his father's constant reference and asking for Ernest's assurance with respect to LIL, writes to Robert Sr and Camila:

> … It is rather ironical for you to inform me that LIL is an entirely separate entity from JMC as this is what I have been preaching to you when in the past you carried JMC on LIL's shoulders.

108 I now turn to two letters in 1959 on which ECJ place heavy reliance to evidence a trust. The first is a letter dated 18 May 1959 to Ernest, where Robert Sr says:

> *I thank you for your* ***reassurance*** *that* ***LIL., will be kept "sacred"*** and in this connection I most definitely would like to see JMC's indebtedness completely cleared. I note that you expect to do so after the SHUN FUNG business has been cleared and in this respect you will have a minimum of $2,200,000.- in cash from Lai Yuen's party which should about clear JMC's debt to LIL. [emphasis added in italics and bold-italics]

Great emphasis was placed on the word "sacred" by ECJ to show that in context, along with the other letters, LIL must have been a sacred trust. As noted at [77] above, Robert Sr also used the words "separate and sacred" in his three-page addendum dated 16 July 1953.

109 The second, upon which greater importance is placed by ECJ, is a letter dated 22 May 1959 from Robert Sr to Ernest. In this letter Robert Sr states:[137]

> On 2nd October 1958 when I turned 50, I decided that for better or for worse, I would withdraw from active management of JMC., and gave you free go. In reaching this decision I was mainly prompted by Mummy's desires which your brothers and sister also agreed as they have the utmost confidence in

137 2AB288.

> you. You must therefore never lose sight of the fact that between them they hold 48% and would like to see [you] make a success of things. …
>
> ***LIL***.– ***This is a sacred trust for the sole benefit of the family*** *and something to fall back on if everything else turns sour*. I therefore think that any surplus funds should be channelled to H.S.91,735 as in this manner Estate Duty will be escaped. Any money brought into Australia for investment will be in the nature of loans from The Swiss Bank. I note that you have paid One lac US to the credit of LIL's a/c with HK.Bank in San Francisco. This is the right way to go about it as then you only need send the Swiss Bank a cheque on the HK.Bank, Frisco with instructions for them to credit 91,735. It would not be advisable to make TT transfers as the 91,735 a/c should only be known among ourselves.
>
> [emphasis added in italics and bold-italics]

110 The words emphasized in the quote above *may* (although not invariably, when taken in the wider context) be construed to mean that sometime between 7 July 1957 and 22 May 1959, Robert Sr set up the "sacred trust" for the sole benefit of the "family" and this was something they could fall back on if all else "went sour" (see [90]–[92] above). These words appear clear and are consistent with the fact that although the shares in LIL were no longer in Robert Sr's name, he continued to have sole management and control of its businesses and brooked no interference with his decisions in relation to LIL and its subsidiaries. This is emphasized repeatedly in his letters. This letter also sets out how the surplus monies will be deposited in the Swiss Bank account "H.S.91,735" to escape death duties and money for investments in Australia will be made through "loans", obviously to avoid questions and tracing to the said Swiss Bank account.

111 Robert Sr's letter dated 28 May 1959 to Ernest is a comprehensive letter of his meeting with a tax consultant.[138] According to Robert Sr, the tax

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138 2AB290.

consultant had asked detailed questions on the £250,000 Ernest must have sent to Robert Sr for their purchase of the Manly property (see [107] above), the money and detailed ownership of certain companies, including LIL and JMC, and the residence of the directors. Robert Sr also passes on the advice that the majority of directors of any Hong Kong company should not be residing in Australia and his view that Bobby and BPC Fletcher should resign as directors of JMC now that they were no longer in Hong Kong. He further suggests a change of name for LIL to something more "neutral". Robert Sr lastly points out that whilst his estate was "in the clear" as far as JMC and LIL were concerned, "any snag could only crop up if any of [his children] should die whilst domiciled in Australia." In a subsequent letter dated 19 June 1959 to Ernest,[139] Robert Sr gives his blessing for renaming LIL to NEL and gives Ernest the go ahead to do so. In another letter dated 24 October 1959 to Ernest,[140] Robert Sr states that he is going to suggest to Tony and Bobby that they transfer their holdings in NEL to Strath Nominees and resign as directors of "NELLY" (the family's informal way of referring to NEL), as in this way the control of NEL will be in Hong Kong.

112 In a letter dated 5 November 1959 to Ernest, we see the emergence of the acronym "JERIC". Robert Sr informs Ernest that he has decided on the name JERIC Pty Ltd, registered in Canberra, as the holding company of Delasala Pty Ltd. In this letter, Robert Sr also states at the beginning of his letter:

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139 2AB296.

140 2AB300.

> I received your memo enclosing clipping from the SCMP on the new building which I have read with interest. There is no harm boosting the stock of JMC., and EFL., because if you do not, NOBODY will! Since the Bank know *the inside story regarding NELLY beneficial ownership*, there can be no misunderstanding of the position and what anybody else does not know will not hurt anyone. [emphasis added]

I note that ECJ argue that the "inside story" relates to there being a family trust in LIL/NEL.[141] However, I note that is not the only possible interpretation of this letter. It can also be read to mean that the bank is aware of the true owners of the shares behind the registered legal owners and that Robert Sr continued to run and was in charge at NEL.

113 By 11 November 1959, Tony and Bobby had transferred their NEL shares to Strath Nominees Ltd (as advised by Robert Sr). BPC Fletcher's single share in LIL had also been transferred to Ernest earlier on 16 September 1958. As such, the shareholders of LIL as of 11 November 1959 (and until Robert Sr's death) were:[142]

(a) Camila with 1199 shares;

(b) Ernest and Isabel with 2400 shares each;

(c) Strath Nominees Ltd (holding on behalf of Bobby and Tony) with 2400 shares; and

(d) C G Smith with 1 share (no doubt as nominee for Camila).

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141 ECJ's Closing Submissions at para 55.

142 Edward's AEIC at para 68 and ERS-33.

The final position was thus that LIL had five shareholders, *ie*, Robert Sr's wife and his four children, each holding an equal 20% in LIL, whether in their own name or through a nominee or nominee company.

114 In a letter dated 3 May 1960 to Ernest, Robert Sr gives directions to Ernest to credit JMC dividends into Tony and Bobby's accounts with the Swiss Bank and that he will give directions for Camila and Isabel's dividends in due course.[143]

115 In a letter dated 5 July 1961 to Ernest, Robert Sr says how glad he will be when 1962 comes and he will be entirely out of JMC "as [he] gets no kick giving advice that is often times not heeded."[144] This is a reference to disagreements, which is evident from a number of letters between father and son, over Ernest's running of JMC and some of Ernest's decisions. Robert Sr also mentions selling four new ships at a handsome profit so that he does not have to think about "ships and personnel". This is repeated in a letter dated 6 July 1961 to Ernest,[145] who was then in Singapore, that NELLY would seriously consider selling the new vessels being built, *ie*, "East Breeze", "West Breeze" and "South Breeze" (30% paid up) and the "North Breeze" (5% paid up), with delivery in January 1962 with attached time charters for £2,000,000. Ernest was asked to discuss this with "the others" (which I take to be the other directors of JMC) and to let Robert Sr know their views. Robert Sr then states:

> Please do not misconstrue anything I have written above. I simply cannot see things run in a manner which is not in harmony with my own thinking unless I want to get ulcers

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143 2AB310.

144 2AB321.

145 2AB322.

> and this will not do as there are other members of the family to consider.

116 In a letter dated 21 July 1961, Robert Sr tells Ernest:[146]

> Long ago I insisted that I wanted to have my finger in the appointments to NELLY's ships and you could do what you want with the personel [*sic*] of JMC ships and you would not be bothered by me. I cannot afford to see a repetition of the Kemp fiasco.
>
> …
>
> By the time I retire from JMC., next year, you will be close to 30 years old and would have passed the learning stage and any advice from me would be of little or no value. For this reason I am anxious for Nelly to be entirely out of Shipping so that you can be the full master of your destiny.

117 A two-page letter dated 14 March 1962 on NEL's letterhead from Robert Sr to Ernest records a bitter row between father and son:

> I regret very much that what little was said between us should have been with so much bitterness and recriminations and quite frankly I am deeply disappointed as apart from anything else you showed complete disrespect for me as your father.
>
> When you take into account all I have done for you in life, it is indeed difficult to have to swallow such a bitter pill.
>
> Although you may hardly believe it in your present frame of mind the fact remains that since you were a child you have been a great source of worry to me on account of the attitude you always adopted trying to outsmart the other fellow by probably unconsciously resorting to lies and B-S to prove your point. This is not something new I am telling you – now a matured man of nearly 30 years old – but what I warned you in a letter which I wrote to you in 1946 when you embarked on the "Nellore" for Australia. You must have a copy of this letter and if not I could supply you with a copy.
>
> …
>
> In the heat of the moment we both said certain things which neither I am sure meant seriously but the only difference

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146 2AB323.

> being that as your father I might perhaps have been more entitled to do.
>
> …
>
> I have long since realised that our two natures are such that it would have been utterly impossible for us to operate together in the same office at the same time and I have so far always taken the "bow".
>
> …
>
> In a little over 3 months I shall be completely out of JMC., and I repeat the promise I made to you before that after 30th June 1962 I will be completely out of JMC., and everything will rest squarely on your shoulders. I would also like to see NELLY out of ships except in a minor way so that there will be no reason for me to "boil" if I think things are not being done correctly.

118 Ernest apologised, somewhat, to his father but more to his mother in his letter dated 26 July 1962, some four months later. It appears that other letters might have been exchanged during that period, but these letters were not introduced into the evidence. Ernest's letter dated 26 July 1962 stated:[147]

> My very dearest Mummy and Pappy,
>
> Shortly after speaking to you on the telephone this morning I received your letter of the 24th which I digested very carefully. I repeat to you Mummy that I am really very sorry for the way I behaved towards you that day when I said things I did not mean at all and I am resolved to keep the promise I made to you and Pappy and I hope Pappy will help by not "overshadowing" me too much. The more I reflect on the distasteful outbursts I have with Pappy, the more I realise how perfectly or imperfectly I have duplicated certain traits of his character.
>
> I am still feeling very uneasy about the above and my interpretation of the expression you had when you left Hongkong and hope Mummy [at least] towards your own son you will forgive and forget.

119 The next relevant letter was a year and a half later on 10 February 1964, where Robert Sr wrote to Ernest:

147 2AB336.

> I would like to point out to you that on and after 30th June 1967, I intend to FULLY RETIRE and completely divorce myself from JMC affairs. You will have my full assistance for the next 3 years or so but after then you are completely on your own as after 45 years, I will have had enough of Shipping. By then I will concentrate on liquidating NELLY's interest in SHIPPING so that I can divide the Cash between Mummy and you four children so that each can do what they please with the money.
>
> This is a definite decision on my part and has not been made in haste or confusion. I look forward to the time 3 years hence when I shall have nothing to think about except Horse Racing and Breeding.

120 Robert Sr's relationship with Ernest in 1964 was rocky. In a letter dated 11 February 1964, Robert Sr sets out how he fixed the "Troon Breeze" on a time charter on favourable terms and said:

> I just could not resist phoning this to you so that you may learn to chase after business and not just sit on your "fanny" and be the know all and expect business to chase you.
>
> …
>
> After about 5 years giving you more or less free rein in managing JMC., I have now come to the conclusion that you are not yet fit for such a job. You have never quite learnt to obey so it cannot be expected you can know how to Command properly and in the real sense of the word.
>
> During these past 5 years, times have been bad in the Shipping Industry and along with others, JMC., have suffered. However, it is during difficult times the superior business man shows up above the muck and truck and Pao heads the list.
>
> …
>
> Let me not mince words, you are in a far worse plight as you have acquired an "ego of superiority" and 9 out of 10 cases this failing is predominant in anyone who has not started life from the bottom of the steps.
>
> As I wrote in my last letter, I have definitely decided to RETIRE completely from JMC and Shipping when I complete 45 years on 30th June 1967 and up to 31st January 1966 I am prepared to manage JMC., and lift the Company up in the same manner as I did in 1953.

> I therefore suggest that you show me just what you can do on your own bat by going to Sao Paulo and managing OURINHOS where "we" have an established Peanut Oil Factory with limited resources and then come back at the end of 1966 and produce proof of your ability by making a total success of the venture.
>
> …
>
> The net worth of JMC is at present under par and this is not good enough and I want to see it up threefold before my final swansong by which time NELLY will completely be out of Shipping.
>
> So long as you remain in Hongkong any move that I decide to make or suggest making regarding NELLY requires careful consideration on my part whether it will cramp your style. With you not there, the onus will rest entirely with me and right or wrong I am able to make decisions quickly.
>
> Give all I have written deep thought as it is only meant *in the* ***best interests of the family*** *and remember you are only one out of five excluding myself.*
>
> [emphasis added in italics and bold-italics]

121 On 19 April 1964, Robert Sr wrote to Tony and Bobby keeping them informed of his plans in relation to the ships, his plan to sell five of their vessels on advantageous terms and that "[w]ith these 5 vessels sold, we can really look forward to the future with confidence and will enable JMC., to buy up NELLY's interest in Shipping in due course and thus allow me to concentrate on full retirement from JMC., on 30th June 1967".[148]

122 Robert Sr's letter dated 7 November 1964 to Ernest records that his health had been affected by sudden bleeding whilst in Djakarta due to a ruptured blood vessel, which had it been nearer his brain, would have proved fatal.[149] Robert Sr talks of tiring easily and of some permanent damage to his left eye. The letter further records his relief that Ernest was back to take

148 2AB372.

149 2AB388.

charge in Hong Kong as things would be in a mess if he had suddenly passed away when Ernest was not there. Robert Sr leaves Ernest to make decisions on the investments in Alaska and Brazil; he opines that Alaska is a good investment although it will be his grandchildren who will reap the benefit. Robert Sr then instructs Ernest:

> In order to protect your mother and brothers and sister please arrange to remit their dividends in JMC to their numbered accounts with the Swiss Bank so that they will always have something sure to fall back on.

123 In what must be one of the last letters of Robert Sr in the evidence before me, dated 13 May 1967, he writes to Williams, his long-time director at JMC noting with satisfaction that Williams has finally paid for his 7% shares in JMC from dividends.[150] Robert Sr reminisces about his life in shipping, his attempt at retirement on 30 June 1952 and his return to full service in 1954 through to 27 December 1966 when he officially announced his retirement set for 30 June 1967 upon completion of 45 years of service. He notes he never worked harder in his life in 1964 to combat the bad times for shipping, but his achievements, reflected in the balance sheet for 1966, made him feel more than satisfied. As we know, Robert Sr did not make it to 30 June 1967. He passed away unexpectedly in his sleep on 27 May 1967.[151]

The applicable law

124 It is apposite to mention at this point that in so far as ECJ assert that a trust had been instituted by Robert Sr, they bear the burden of proving their claim beyond the balance of probabilities (*Tee Yok Kiat v Pang Min Seng* [2013] SGCA 9 and *Low Ah Cheow and others v Ng Hock Guan* [2009] 3

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150 3AB30.

151 Ernest's AEIC at para 31.

SLR(R) 1079). Should ECJ fail to discharge this burden, the transfer of the shares from Robert Sr to JERIC would have resulted in the full legal and beneficial ownership in LIL being transferred to JERIC since there was no trust created over the shares, This is consistent with the position espoused in *Snell's Equity* (John McGee gen ed) (Sweet & Maxwell, 32nd Ed, 2010) ("*Snell's Equity*") at para 22-025 which states:

> …If that asset is sufficiently identified but the settlor's intention to create a trust over it is uncertain, then the person entitled to the asset holds it beneficially for himself and free of any trust.

125 An express trust is created by the actual intention of the settlor and such an intention may be apparent from the express use of the word "trust" in the relevant instrument or inferred from the settlor's words or conduct (see *Snell's Equity* at para 21-019). In this inquiry, the "[t]hree certainties *must* be present for the creation of an express trust: certainty of intention; certainty of subject matter; and certainty of the objects of the trust" [emphasis added] (per Menon CJ in *Guy Neale and others v Nine Squares Pty Ltd* [2015] 1 SLR 1097 ("*Guy Neale (CA)*") at [51]).

126 To establish the certainty of intention, the Court of Appeal in *Guy Neale (CA)* noted that a claimant must show "proof that a trust was intended by the settlor". It explained at [52]–[53] that:

> 52 The first certainty, that of intention, requires proof that a trust was intended by the settlor. The principle is that in what was said or done by the settlor, there must be clear evidence of an intention to create a trust (see *Paul v Constance* [1977] 1 WLR 527 at 531). No particular form of expression is necessary. In particular, [*Snell's Equity*] notes that it is unnecessary for the settlor to use the word "trust" before such an intention can be found (at para 22-013), and goes on to say in the same paragraph:
>
> > … [T]he court construes the substance and effect of the words used, against the background of any relevant

> surrounding circumstances … [T]he settlor need not even understand that his words or conduct have created a trust if they have this effect on their proper legal construction. …
>
> 53 The same point was also made in *Tito v Waddell* (No 2) [1977] Ch 106 by Megarry VC at 211:
>
> > … [I]t can hardly be disputed that a trust may be created without using the word 'trust.' In every case one has to look to see whether in the circumstances of the case, and on the true construction of what was said and written, a sufficient intention to create a true trust has been manifested.
>
> Therefore, there have been cases where an express trust was created by means of an informal declaration (as in *Paul v Constance*), or inferred from the acts of the settlor or the circumstances of the case (see Geraint Thomas & Alastair Hudson, *The Law on Trusts* (Oxford, 2nd Ed, 2010) at para 2.04; Alastair Hudson, Equity and Trusts (Routledge, 7th Ed, 2013) at pp 94–95)…

127 The principles elucidated above are relevant to this case given the absence of a written trust deed or instrument from Robert Sr expressly creating a trust. Thus, in examining this issue, I consider the contemporaneous correspondence from Robert Sr as well as the surrounding circumstances at the material time to determine his intentions and whether an express trust was created therefrom.

128 With respect to the certainty of subject matter and the certainty of objects, the Court of Appeal in *Guy Neale (CA)* succinctly stated the following at [59]–[60]:

> 59 The second certainty required for the creation of an express trust is certainty of subject matter. The trust must define with sufficient certainty the assets which are to be held on trust and the kind of interest that the beneficiaries are to take in them. The definition will be sufficiently certain if it enables the trustee or the court to execute the trust according to the settlor's intention (see *Snell's Equity* ([50] supra) at para 22-016).

> 60 The third certainty is certainty in the definition of the objects of the trust. The intended beneficiaries must be identifiable so that it is possible to ascertain those who have the standing to enforce the trustee's duties under the trust (see *Snell's Equity* at para 22-021).

129 In this respect, ECJ's case does not expressly identify certain *basic* features of this "family trust". For example, when was the "family trust" constituted – was LIL a trust company upon its incorporation, or did it subsequently declare a trust over its assets? Who were the exact objects of the trust – was it limited to JERIC and their successors in title or extended to other relatives of the family? These questions have not been satisfactorily answered by ECJ. Notwithstanding ECJ's lack of specificity, I give my preliminary conclusions from Robert Sr's letters.

Preliminary conclusions from Robert Sr's letters

130 The following emphasized words in Robert Sr's below-mentioned letters written over the years, when looked at in isolation and bearing in mind that this was something that was said not once but over a considerable period of time, would *suggest* that Robert Sr had set up a family trust. This trust was probably something that he had thought of by 1950 but which crystallized or came into being only sometime after 7 July 1957:

(a) 2 November 1950: "so that if anything happened to me nobody can force the 40% out of [LIL], *which will remain in the Lasala family until doom's day*" (emphasis added).

(b) 13 May 1952: "as PROFITS all go to *LIL which belongs to the family*" (emphasis added).

(c) 16 July 1953: "but we *must keep our personal stake outside of JMC, separate and sacred as this represents the "guarantee" to the whole family*" (emphasis added).

(d) 7 July 1957: "*It is my wish that [LIL] should always remain a FAMILY undertaking and guarantee for the livelihood and well-being firstly of ALL my descendants and then other deserving relatives*" (emphasis added).

(e) 18 May 1959: "I thank you for *your reassurance* that *LIL., will be kept 'sacred'*" (emphasis added).

(f) 22 May 1959: "*LIL. – This is a sacred trust for the sole benefit of the family and something to fall back on if everything else turns sour*" (emphasis added).

(g) 5 November 1959: "Since the Bank know[s] the *inside story regarding NELLY beneficial ownership*" (emphasis added).

131 Indeed, it should first be noted that the word "sacred" is used in three letters: a three-page addendum in 16 July 1953 and two letters in May 1959, after his Avarice Letter dated 7 July 1957. "Sacred" is a strong word and it means or refers to something that is set apart or dedicated for, in this case, a special purpose, and that is not to be violated. Secondly, consistent with this, we see Robert Sr's consistent and constant reminder that *all* decisions in relation to LIL and its subsidiaries were to be made by him, down to the appointment of officers for their vessels. Thirdly, we see Robert Sr's constant references to the fact that LIL belongs to the family, and this was irrespective of LIL's actual shareholding which, as noted above, changed over time. Fourthly, we see that Robert Sr adopted Ernest's suggestion and implemented

the idea of individual shareholders getting 1/3 of their dividends to spend as they wish and 2/3 going back into a pool for joint investments (*eg*, letters of 5 October 1956, 7 July 1957 (the Avarice Letter), 4 October 1958 and 3 May 1960).

132 Notwithstanding the above, I am unable to find on a balance of probabilities that Robert Sr had instituted a family trust. Despite what the phrases in [130] above, taken by themselves, suggest, there are other statements or views expressed by Robert Sr which do not comport with the conclusion, *viz*, that Robert Sr had created a family trust for all his descendants:

(a) As noted above at [71], in the 2 November 1950 letter, Robert Sr sets a proviso or condition to his pronouncement that LIL will remain in the De La Sala family until "doom's day" with the words: "if my sons and sons' sons so desire". The words of the proviso are clear and unambiguous and the decision whether LIL remains in the De La Sala family, at least to Robert Sr in November 1950, depended on the decision of his sons and their sons and not him.

(b) There are also letters where Robert Sr talks about distributing the capital and assets of LIL amongst his family, *eg*, in his letter dated 5 October 1956 to Ernest, he states: "There is always the possibility of *LIL., liquidating* in which case substantial funds will be available from *redistribution of Capital and assets and you children will then have to decide what to do with your share*" (emphasis added). The letter also refers to Camila and his children as the legal owners of the LIL shares: "One thing I am determined and that is that *none of you should be*

deprived of the shares you legally own, as a result of my death" (emphasis added).

(c) In his 17 October 1958 letter to Tony, Robert Sr emphasises that the LIL shares were *gifted* to JERIC: "I am pleased to note that you appreciate the fight I have on my hands to protect you children in *the gifts I made to you all* those years ago" (emphasis added).

(d) Significantly, on 10 February 1964, well after the 7 July 1957 Avarice Letter and use of the words "sacred" and "trust" in the May 1959 letters, Robert Sr writes to Ernest saying that he fully intended to retire on or after 30 June 1967 and then states: "By then I will concentrate on liquidating Nelly's interest in SHIPPING *so that I can divide the Cash between Mummy and you four children so that each can do what they please with the money*" (emphasis added).

133 There are also letters where Robert Sr used words or phrases or expressed views that do not sit comfortably with the existence of or the intention to form a family trust. However, I note these letters could be construed in a way that was not necessarily inconsistent with the idea or existence of a family trust. The degree of inconsistency of these excerpts are lower than those cited in the paragraph above and I do not find them to be determinative either way:

(a) In Robert Sr's 1 September 1951 letter to his family, which demonstrates his preoccupation with taxes, he expresses a different reason why LIL was incorporated: "when I incorporated LIL., in 1939 *I did so with a view to minimizing death duties*" (emphasis added). This idea was mentioned in a slightly different context in his letter dated 30 May 1956 to Camila, where he stated that he was, on Lowe,

Bingham & Matthew's advice, splitting his shares to as many people as possible to avoid "death dues". It is possible that LIL could fulfil more than one purpose and I am prepared to consider this not being entirely inconsistent with the existence of a family trust.

(b) There are also letters where Robert Sr refers to LIL as a family "nest egg" and a "retirement fund": see his letters of 28 June 1957 and 6 July 1957, and his letter of 10 March 1957 to his sons where he says that should he pass away suddenly, "you will all be left well provided for". Although it is possible to read the use of these phrases as consistent with a family trust, it must be remembered that Robert Sr was no stranger to the English language and was well-versed with various business and corporate structures. I find it odd that other than on one occasion, he never described LIL as a family trust.

(c) When there were concerns in 1958 over the Hong Kong government making changes to estate duty provisions, we see Robert Sr calling for a family meeting in Hong Kong at the end of November 1958 "to decide the future of LIL" (see Robert Sr's letter dated 17 October 1958). I also find it pertinent that at no point in time did Robert Sr consider the impact these proposed legislative changes would have on a trust. It is clear from Robert Sr's letters that his concern was directed solely at whether his and Camila's *gifts* of LIL shares to their children would be caught by the legislative changes.

134 I pause to mention that I do not think Robert Sr's letter written on 4 February 1955 (and similarly Camila's letter written on 11 July 1956)[152]

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152 2AB24.

stating that in making the transfer of his shares in LIL to his children, he was making irrevocable gifts and that the transferees were not holding the shares on trust for him (see above at [81]), bears any weight either way on this issue. This letter was clearly written on the advice of Lowe, Bingham & Matthews to create a "paper trail" to ensure death duties were avoided. This is also evident from and borne out by later correspondence.

135 The letters of Robert Sr set out in [130] above are on balance unclear as to whether he had established a trust. Given his knowledge and acumen as a businessman, and his ready resort to legal, tax and accounting advisers, I find it strange that if he intended to set up a trust, he did not do so in clearer language in his letters. Indeed, his letter of 22 May 1959 to Ernest was the *first and only time* Robert Sr used the word "trust" to describe LIL. Also, being fluent in the English language (as we see in the clear and direct language used in his letters) and meticulous by nature (as in his keeping and numbering of his correspondence), I also find it odd, if Robert Sr did indeed set up a family trust for all his descendants, that he would talk about liquidating LIL and dividing the funds amongst his children and wife so that they could do as they pleased with their share (see above at [132(b)] and [132(d)]). I also note fluidity in NEL's assets in that over the years, assets were transferred out and others transferred into NEL.

136 Furthermore, I am unable to ascertain from Robert Sr's letters alone when this "family trust" and guarantee for the livelihood and well-being of all Robert Sr's descendants was created. As noted above at [119], Robert Sr's letter of 10 February 1964 (written just over five-and-a-half years *after* his 7 July 1957 Avarice Letter), where he writes about liquidating LIL's (by then re-named NEL) interest in shipping and dividing the cash between his wife and four children, does not seem to evidence a trust that had been created

before February 1964. His subsequent letters to the time of his death on 27 May 1967 are silent on whether any trust had been created by him.

137 Taking his letters as a whole, I find on balance that they do not constitute evidence that a family trust had been created by Robert Sr for all his descendants, nor do they evince an intention of his to create one.

138 I do, however, draw the following preliminary conclusions from his letters, which of course remains to be tested against other objective evidence and the oral evidence of witnesses. It is fairly clear to me that Robert Sr, having a strong aversion to paying more taxes than was absolutely necessary and avoiding estate duty where possible, did the following:

(a) He started off with LIL as a means to self-insure his life, so that if anything untoward happened to him, his wife and children would be protected by having funds available for their livelihood and well-being.

(b) He strongly and unselfishly believed in the family and consistently treated all the wealth that his hard work produced as belonging to the family and not to him.

(c) When he had accumulated more than what was necessary, by way of a "life-insurance fund" to protect his family in the event of his untimely death, he clearly expressed his wish that LIL was to remain a family company and its assets and wealth were to remain within the family; this was to run until "doom's day" *if* his sons and sons' sons so desire it.

(d) I find that Robert Sr's relaxed approach to operating his companies in his early years (as witnessed by the way Robert Sr

swopped his companies around and reorganised them as it suited him), saw a change in 1958 when the Hong Kong Government attempted to amend estate duty legislation and look behind private family investment companies. Robert Sr's hitherto leisurely planning of divestment in LIL became suddenly threatened in 1958 by the proposed legislative changes, and his letters in 1958 clearly show him trying to quickly undo these strictures by declaring dividends to lower cash surpluses in companies and cashing in on his assets into liquid cash. After 1958, Robert Sr learnt to avoid corporate structures that were unwieldy and that could not be undone easily, ensuring opacity in the ownership of companies as well as the benefits of liquid funds that could be moved around quickly to avoid taxes and death duties.

(e) Setting up a formal trust meant a fixed structure, something that would have been more transparent and more rigid, its assets could not be taken away and taxation in its domicile would have to be paid; hence Robert Sr dealt with his wealth, residing in his companies, as something belonging to the family (and not himself), keeping assets securely in one company which was segregated from the operational businesses, but while he was alive, he considered himself the "trustee" (in a colloquial and non-legal sense of the word) of the family wealth and no one could question what he spent, *eg*, on his breeding of race horses. He ran the businesses and placed assets in LIL over the years and separated LIL from JMC. LIL could in a loose manner of speaking be considered the 'trust', or his 'life insurance policy', but unlike a true trust or a trust in the legal sense, Robert Sr had an absolute say in the running of LIL and its businesses, the distribution of proceeds and the retention of capital of the funds in LIL. He further had a free hand in deciding what assets went into or be taken out of LIL and what

remained in JMC. Over time, LIL's assets were more than what was required as a "life insurance fund" for his family in the event of his untimely death.

(f) Robert Sr, being the savvy businessman that he was, wanted flexibility to structure his companies and wealth in a way that avoided taxes, estate duty and prying eyes (as he describes in one of his letters: "what anybody else does not know will not hurt anyone"). This approach was implemented by him in his lifetime – despite divesting himself of all his shares in LIL and writing letters to evidence that they were outright gifts and not held on trust for him, he retained absolute control of LIL and its subsidiaries. This was followed through when he created Strath Nominees to hold Tony's and Bobby's shares enabling them to avoid having to declare too much in their Australian tax returns.

(g) This was clearly set out by his scheme that any money to be used for their investments in Australia was to be by way of loans from and routed through their banks in Switzerland and Canada, so as to avoid questions on the origin of the funds and enable opaque "repayment" therefor.

(h) When he passed on, it would fall on his sons to decide whether to continue this or not. However, while he was alive, he always inculcated in them that everything he had "belonged to the family" and that was clearly how he would like them to treat his wealth when he was gone.

(i) On 7 July 1957, when he wrote his Avarice Letter, he said that having achieved *more* than providing for his family by way of

insurance, it was *his wish* that LIL would always continue as a family undertaking to guarantee the livelihood and well-being of all his descendants and then to deserving relatives. As noted above at [92], he used the word "wish" which I believe was a deliberate choice on his part.

(j) Robert Sr's "wish" can clearly be seen in his exhortations to Ernest to build and raise the family fortunes to greater heights.

(k) It was a "wish" because it was up to his sons to decide if they would want to continue this "family" legacy of keeping the wealth in companies, keeping one or more of the companies holding assets securely segregated from the operational businesses, running them for the benefit of the family and consistent with this, he did not set up a formal trust because he knew laws could change in the different jurisdictions they operated in and flexibility coupled with an opaque structure which also avoided taxation were key elements in his mind.

(l) It is for this same reason that Robert Sr, at times, talked about dividing up all the money between his wife and children and they could decide what they wanted to do with their shares of the money. This is something that is contrary to the idea of a family trust that was to last for the well-being of all his descendants, and as noted above at [132(d)], this was last expressed in a letter in February 1964.

(m) It was also clear that all the wealth he had accumulated was for his wife and children in equal shares.

139 Having come to the preliminary conclusion (from Robert Sr's letters) that Robert Sr did not set up a family trust, I now turn to the oral evidence and

the other documentary evidence that post-dated Robert Sr's death to test my conclusion. While examining this evidence, I will also make findings as to the second part of the underlying issue, *viz*, whether the Plaintiff Companies and their assets belong to Ernest. Before doing so, I briefly set out some of the events that took place after Robert Sr's death in order lay the context within which the evidence is to be examined.

Events after Robert Sr's death

140 When Robert Sr passed away unexpectedly, Ernest was the obvious person to take over the mantle from him. Ernest had already been a director of JMC since May 1953, a joint managing director with Robert Sr since 1957 and had taken over the reins in JMC after Robert Sr's health deteriorated in November 1964. Tony had long disavowed any interest in business and shipping and was comfortably settled in Australia. There is little mention of Bobby's training in the business or of his business acumen. If I had to make the finding, he probably was not as astute a businessman as Ernest was. Bobby eventually also settled in Australia, assisting Robert Sr in running the Australian business as "private secretary" to Robert Sr. It was natural therefore for Ernest to take charge of the "family's businesses" after his father passed away, especially given Robert Sr's apparent practice that whoever runs LIL or the JMC business must remain outside Australia for purposes of tax and estate duty (see [72] above).

141 Camila was the sole beneficiary under Robert Sr's will. Given Robert Sr's aversion to estate duty and his careful planning over the years, there was probably nothing substantial in his estate. As noted above, LIL's shareholders, at the time of Robert Sr's death, were JERIC and this has been set out at [113]

above. Robert Sr had long divested himself of any shareholding in LIL or JMC.

Movement of NEL and JMC shares after Robert Sr's death

142 Robert Sr's company structures were relatively straightforward and perhaps reflected the simplicity of his time. The only opacity deployed was the use of Strath Nominees to hold Tony and Bobby's shares in NEL when their residence in Australia would have caused tax exposures.

143 When Ernest took full charge of NEL after Robert Sr's death, he very swiftly engaged in a complex re-structuring of the companies and shareholdings. Although NEL was a Hong Kong corporation, he moved the "ownership" of NEL out of Hong Kong by the use of BVI, Panamanian, as well as Liberian corporations. Within three months of Robert Sr's death, the following took place:

(a) On 1 and 12 August 1967, the board of directors of JMC resolved to sell its dormant subsidiaries, SR, Pan-Pacific Navigation Company ("Pan Pac"), and SM to "a party represented by Mr. E. F. De Lasala, Mr. S. B. Mitford, Mr. A. Vasquez and Mr. E. S. Velasquez".[153]

(b) On 26 August 1967, all of the NEL shares (save for the single share held by Ernest (which Smith transferred to Ernest) were then transferred to SR.[154]

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153 Ernest's AEIC at para 34, EFL-52 and EFL-53; Ostenfeld's AEIC at paras 15–19, 24, 40, 43(a), CWO-4 and CWO-8.

154 Edward's AEIC at para 70 and ERS-34; Tony's AEIC at para 73.

(c) In mid-August 1967, SM came to own all of the shares in SR (which in turn held all but one share in NEL).[155]

The reason for these transfers is a matter of dispute in the present proceedings. Ernest alleges that he acquired NEL from Tony, Bobby, Isabel and Camila ("JRIC") for US$10m and SR and SM were his nominee companies, while the Plaintiff Companies and ECJ deny any such sale having occurred and argue that the transfers were merely a restructuring process.

144 On 19 December 1969, CE was incorporated.[156] CE was wholly owned by SR.[157] Shortly thereafter, on 22 December 1969, CE acquired SM from JMC.[158] The alleged earlier sale of SM to "a party represented by Mr. E. F. De Lasala, Mr. S. B. Mitford, Mr. A. Vasquez and Mr. E. S. Velasquez" on 12 August 1967 was said to have been "abandoned".[159] CE, SM and SR were then arranged such that (a) CE owned SM, (b) SM owned SR and (c) SR owned CE.[160] This was the formation of the first "orphan" structure. At that point in time, the corporate structure was as follows:

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155 Edward's AEIC at para 73.

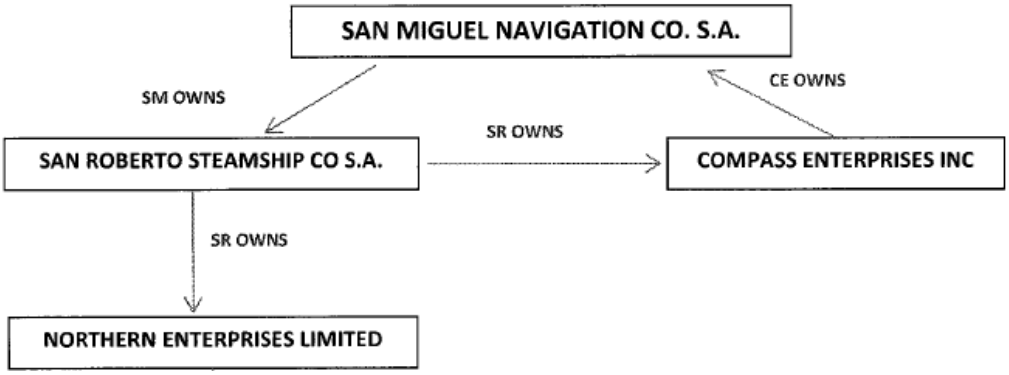
156 Edward's AEIC at para 77 and ERS-38.

157 Edward's AEIC at paras 77–78 and ERS-38.

158 Edward's AEIC at para 78 and ERS-39; Ernest's AEIC at para 42.

159 Ernest's AEIC at para 42.

160 Edward's AEIC at para 78.



145 With respect to JMC, its shareholders have been referred to in a few of Robert Sr's letters. Between the years 1964 to 1966, JRIC sold some of its JMC shares to Ostenfeld, who had become a shareholder and Deputy Managing Director of JMC. The shareholding during this period was:

(a) 3,600 shares (45% of the issued share capital) held by Overseas Nominees Ltd (on behalf of JRIC);

(b) 2,960 shares (37%) held by Ernest;

(c) 640 shares (8%) held by Ostenfeld;

(d) 400 shares (5%) held by M.B. Morrison; and

(e) 400 shares (5%) held by L.T. Williams.

146 Between 1966 and 1971, Ernest procured further changes to the shareholders of JMC.[161] Two of these changes are worth noting. First, Ernest sold some of his shares to several other directors, including Ostenfeld. Secondly, Ernest procured the transfer of the 3,600 shares held by Overseas Nominees Ltd to CE on 1 September 1970.[162] For clarity, I should add that the

[161] Ernest's AEIC at para 30; Edward's AEIC at para 92.

transfer of the JMC shares to CE was said to have been the consequence of an alleged sale of the shares from JRIC to Ernest. This is a matter of dispute. As of 1 September 1970, the shareholders of JMC were:[163]

(a) CE (allegedly holding on behalf of Ernest) with 3,600 shares;

(b) Ernest with 2,000 shares; and

(c) Five other co-directors of JMC with 2,400 shares.

Restructuring in the 1970s

147 On 24 April 1973, Ernest incorporated Dominion Inc ("DOM Inc"), Commonwealth Inc ("COM Inc"), and Sovereign Inc ("SOV Inc") in Liberia.[164] COM Inc owns the shares in DOM Inc, and also owns the shares of SOV Inc. SOV Inc in turn owns the shares of COM Inc.[165] The companies did not carry on any business.[166] According to Ernest, they were his "nominees".[167]

148 One day later, on 25 April 1973, Ernest incorporated four more companies, namely, the third plaintiff, DOM, Summit Corp, Sovereign Corporation SA ("SOV") and Commonwealth Corp SA ("COM").[168] Ernest explains that his intention was to use DOM to hold Bobby's assets, Summit Corp to hold Camila's assets, SOV to hold Tony's assets and COM to hold

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162 Ernest's AEIC at para 30; Edward's AEIC at para 92.

163 Edward's AEIC at para 92 and ERS-43.

164 Ernest's AEIC at para 88.

165 Ernest's AEIC at para 88.

166 Ernest's AEIC at para 88.

167 Ernest's AEIC at para 88.

168 Ernest's AEIC at para 91.

Isabel's assets.[169] The shares in DOM were moved around within the corporate structure and it eventually ended up being held by Summit Corp.[170] Ernest claims that Bobby eventually repatriated his funds to Australia and when he was done, Ernest used DOM to hold his assets *exclusively* as his nominee.[171]

149 In 1973, JMC transferred the fourth plaintiff, JMM, to a Hong Kong company, Cambay HK, purportedly to hold as its nominee.[172]

150 On 30 July 1975, the shares in SR were transferred from SM to the first plaintiff, PAL,[173] which had been incorporated in Panama in 1958.[174] It was one of the subsidiaries of JMC.[175] While it was previously a ship-owning company, PAL had disposed of its assets and ceased all trading activities by 1977.[176] In other words, PAL was no more than a shell company by the time it acquired the shares of SR.

151 As a result of the transfer of the shares in SR, the corporate structure changed:[177]

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169 Ernest's AEIC at para 91. See also Bobby's AEIC at para 92.

170 Ernest's AEIC at para 91.

171 Ernest's AEIC at para 91.

172 Ernest's AEIC at para 92.

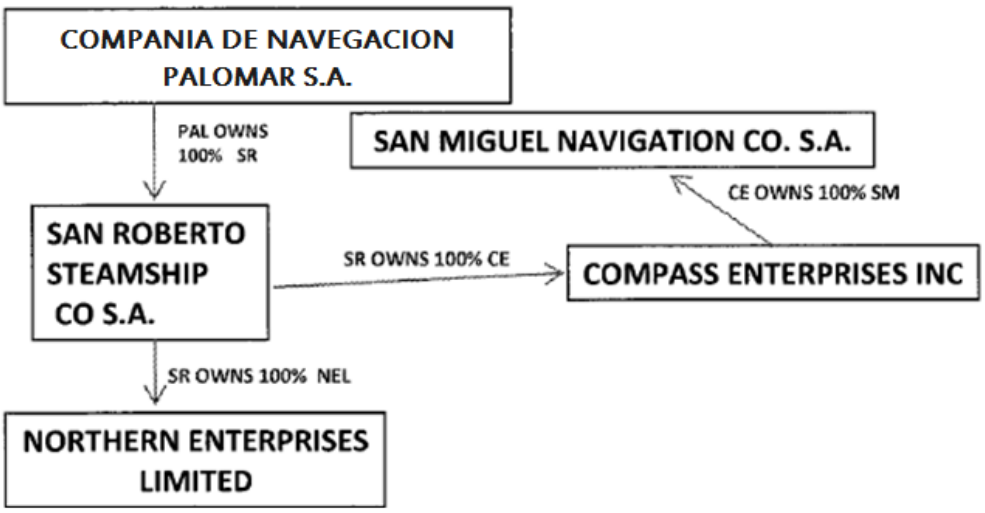
173 Edward's AEIC at para 82 and ERS-40.

174 Ernest's AEIC at para 87.

175 Ostenfeld's AEIC at para 30.

176 Ostenfeld's AEIC at para 33, CWO-12 and CWO-13.

177 Edward's AEIC at para 83.



On 22 June 1977, the board of directors of JMC resolved to sell PAL to DOM Inc.[178] After the sale, Ostenfeld was re-appointed as director of PAL.[179] Ernest asserts that after he acquired PAL using DOM Inc, he used it as an "envelope" or "container" for his assets.[180]

Further restructuring in the 1990s

152 In 1995, Ernest decided to create a new structure to replace the first "orphan" structure that had been put in place earlier. On 20 February 1995, the second plaintiff, CFC, was incorporated in the BVI.[181] Ostenfeld and others were appointed as its directors.[182] Two days later, on 22 February 1995, the fifth plaintiff, PEN, was incorporated in the BVI.[183] Like in the case of CFC, Ostenfeld and others were appointed as directors of PEN.[184]

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178 Ostenfeld's AEIC at para 31.

179 Ostenfeld's AEIC at para 35.

180 Ernest's AEIC at para 89.

181 Edward's AEIC at para 84; Ostenfeld's AEIC at para 46; Ernest's AEIC at para 90.

182 Ostenfeld's AEIC at paras 47–48; Ernest's AEIC at para 90.

153 Edward was appointed director of CFC and PEN on 19 March 1995 and 19 May 1995 respectively.[185]

154 Sometime in 1995, the second "orphan" structure was formed.[186] On 19 May 1995, PAL applied for the entire share capital in CFC; this was approved.[187] On the same day, CFC applied for the entire share capital in PEN; again, this was approved.[188] DOM Inc then transferred its shares in PAL to PEN.[189] As a result, (a) PAL owned CFC, (b) CFC owned PEN and (c) PEN owned PAL. Ernest claims that he is the beneficial owner of PEN, PAL and CFC, but this is disputed.[190] At that point in time, the corporate structure was as follows:[191]

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183 Edward's AEIC at para 84; Ostenfeld's AEIC at para 46; Ernest's AEIC at para 93.

184 Ostenfeld's AEIC at para 47 and CWO-20.

185 Edward's AEIC at para 15.

186 James' AEIC at para 85.

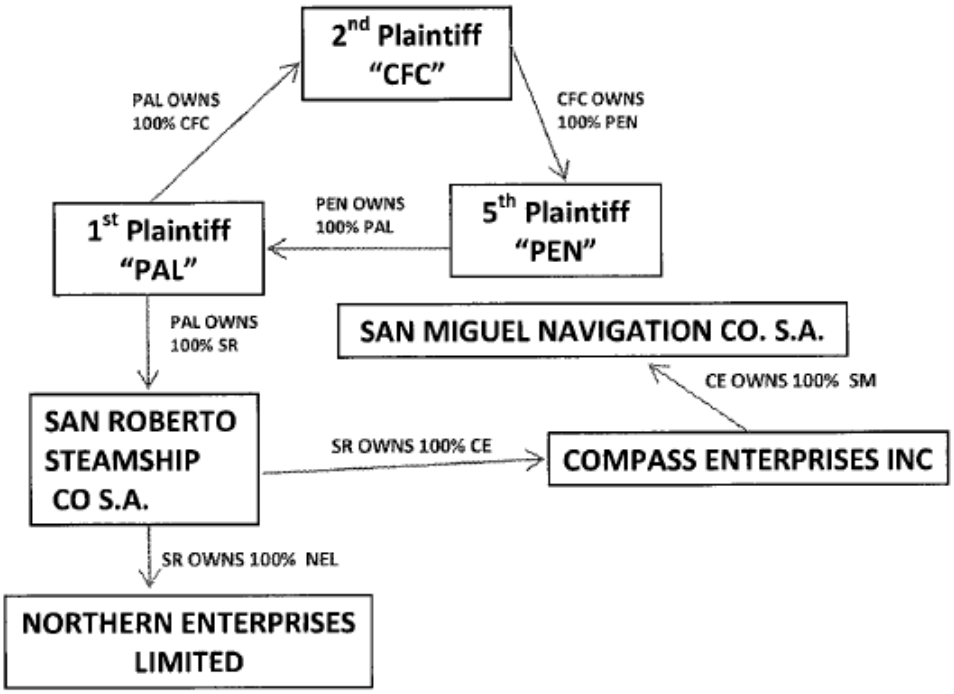
187 Ostenfeld's AEIC at para 49 and CWO-19.

188 Ostenfeld's AEIC at para 50 and CWO-20.

189 Ostenfeld's AEIC at para 51 and CWO-21.

190 Ostenfeld's AEIC at para 52.

191 Edward's AEIC at para 85.



155 In 1996, Ernest also incorporated Cambay BVI in the BVI and issued its entire share capital to PEN.[192] Later, JMC sold JMM (which was held by Cambay HK as a nominee for JMC (see [149] above)) to Cambay BVI (save for the one share which was sold to PEN)[193] for HK$379,147.[194] This was apparently because Ernest wanted to acquire JMM from JMC.[195] The sale price was said to have been paid by Ernest.[196] Ostenfeld claims that Cambay BVI was set up to hold Ernest's personal assets,[197] but this is of course a matter of much contention.

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192 Ernest's AEIC at para 92. See also Ostenfeld's AEIC at para 55.

193 Ostenfeld's AEIC at para 61.

194 Ernest's AEIC at para 92.

195 Ostenfeld's AEIC at para 61.

196 Ernest's AEIC at para 92. See also Ostenfeld's AEIC at para 58.

197 Ostenfeld's AEIC at paras 56–57.

156 The complexity of these corporate structures and restructuring have given rise to multiple facets to this dispute and complicated the picture beyond measure. I pause to note that this was probably the underlying intent in any case – to create an opacity that could not be pierced – but it has given rise to difficulties of new dimensions in this case. For a start the corporate records are incomplete and there are no ledgers or financial statements or other documents that are necessary to answer the rival contentions.

Evidence of the main witnesses

157 I now turn to the evidence of the main witnesses, Ernest, Tony, Bobby and Isabel, and my assessment of their veracity.

158 For reasons that I shall come to, I have formed the view that Ernest, Tony and Isabel, who know the answer to the underlying issue, have not told me the truth. I find Bobby to be the most reliable witness of the four, but he could not give me the necessary details as he left everything to Ernest. Ernest, Tony and Isabel, (with Bobby to a very much lesser extent), are probably united in one reason for not telling me everything – their respective exposures to queries from tax authorities.

159 Another difficulty I faced was the incomplete and fragmented documents placed before me. They came from various periods over the decades; some were in manuscript which was decipherable only with great difficulty, some were undated, others were obviously apocryphally dated, and some were written by authors who were no longer able to give evidence, like Bertram Stanley Mitford ("Mitford"), an accountant and/or comptroller of the "JMC Group" and Matthew Ku Yun Ting ("Matthew Ku"), an accountant who succeeded Mitford and was company secretary and director of JMC as well.

Many of these important documents were cryptic and raised more questions than they answered, and varying interpretations were placed on them by the witnesses. A number of these documents were given in discovery over the course of the trial, some of which came in only after a relevant witness had completed his or her evidence and there was no recall of witnesses.

160 The Agreed Bundles were admitted without formal proof but not necessarily as to contents. At the beginning of trial, I informed counsel that if the content of any of these documents were important or relevant to their case, I expected them to put it to the witnesses in the way they deemed fit. If they did not, and I came across these documents after submissions, then I was entitled to draw what conclusions I saw fit, although I would remind myself that they have not been tested in cross-examination. All counsel agreed. I therefore had to do the best I could from these documents, many of which were from long ago.

161 I should also note that all the three brothers had hearing defects to varying degrees. Many a time questions had to be repeated. This was despite counsel arranging for a computer displaying the Live-note so that the witnesses could read the question off the computer screen. However, every now and then they would get caught-up with the question-and-answer sequence and fail to look at the computer. This hearing impairment was a factor I had to keep in mind when assessing their evidence.

Ernest's evidence

162 I found Ernest to be a larger than life character; he has a strong mind, a domineering will, and is as forceful as he is stubborn. He often refused to answer questions that he did not want to answer or when he found them to be

awkward. He was quick-thinking and sharp, but unfortunately for him, he was met by pointed and searching cross-examination from two Senior Counsel on the glaring inconsistencies in his evidence.

163 However, to give Ernest his due, it is clear to me that Ernest is, if not more, as extraordinarily astute as a businessman and investor as his father, and the family is very fortunate he was there to take over from Robert Sr when death intervened.

164 Ernest's case is simple, *viz*, all the money was his. He had bought out everyone and he had set up the Plaintiff Companies and other corporate structures as "pockets" or "envelopes" to hold *his* assets and monies. There was neither an intermediate position with his assertions and claims nor an alternative case that perhaps *some* of those monies belonged to others.

165 I do not accept his evidence or his claims for quite a number of objective reasons and my subjective assessment of his evidence under cross-examination.

166 First, Ernest has sworn affidavits and filed pleadings and further and better particulars with changing versions as to how he bought everyone out. They are not simply different versions with various amendments to a central core or theme but completely different stories. I accept that as one ages, events that occurred five to six decades ago can grow dim and mistakes can occur, *eg* whether Ernest bought out his mother or siblings in 1957 or 1958 or 1964. However certain events, like whether he bought everyone out *before* or *after* his father died, are not things which one would make a mistake about. This is especially so given that:

(a) all the children adored and loved their father;

(b) Robert Sr's passing was unexpected;

(c) Isabel's wedding had to be postponed as a result of Robert Sr's sudden demise.

Indeed, Ernest's siblings had no difficulty recalling the latter two events during cross-examination, which Isabel described as "significant".[198]

167 I accept the submissions of the counsel for the Plaintiff Companies and ECJ, Mr Thio Shen Yi SC ("Mr Thio SC") and Mr Bull SC respectively, that Ernest had to keep changing stories as and when documents were produced which showed that material parts of affidavits he had just sworn were wrong or untrue. As noted above, these changes were anything but minor. Ernest really had no answer when these changes were put to him to explain.

168 Secondly, there were also pieces of evidence, some emanating from Ernest himself, written long after he claims he bought everyone out, unequivocally telling his mother and siblings of their 20% share. It defies belief that someone as astute and sharp as Ernest could have forgotten all this and swear to facts that he bought everyone out when he claimed he did. He never counted on ECJ laying their hands on such documents. The fact that these documents were discovered at different times caught him out with each round of affidavits.

169 Thirdly, Ernest was embroiled in legal proceedings with his second wife, Hannelore in 1970. He was also sued in 1976 by Mitford, along with 22 other corporate entities including NEL, JMC, CE, SM and SR, in the Superior

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198 NE 3 March 2014 at p 44 lines 18 to 23 (Isabel); NE 6 March 2014 at p 187 lines 9 to 18 (Tony); NE 13 October 2014 at p 45 lines 13 to 20 (Bobby).

Court of Alaska. In the former, he caused affidavits to be sworn on his behalf and in the latter, he gave evidence in depositions. On both occasions he stated on oath that he was managing the family business and he only owned a share in it. The evidence from these two cases, which I shall come to in greater detail, were also unearthed by ECJ fairly late in the day.

170 I now turn to deal with the changes in Ernest's evidence and storyline.

Ernest's first story

171 When the Plaintiff Companies filed an affidavit in support of the Injunction Application on 5 March 2012, Ernest filed an affidavit in response one month later ("Ernest's Injunction Affidavit"). In this Affidavit, Ernest claimed that:

(a) He bought out JRIC's interests in NEL in the late 1950s or early 1960s, *before* Robert Sr died;

(b) He did so by purchasing NEL's shareholding in JMC, which according to Ernest was NEL's sole remaining asset at that time; and

(c) He was the only family member with any interest in JMC, unlike JRIC, who were never involved in running JMC's business and were never shareholders in JMC.

Ernest's Injunction Affidavit stated as follows:

> 14. …*NEL was essentially a family owned company*, with the shareholders being myself, my siblings and my parents. It was set up to hold the assets of my late father, for the benefit of my family. *In contrast, JMC was always intended to be a business, where those running the company (i.e. the directors) were also the shareholders. As I was the only one of my siblings who was interested in the shipping business,* ***I was***

> ***and remain the only member of the family who has any interest in JMC***.
>
> 15. My father's intention as stated in his letter was what occurred. As Edward observes in paragraph 16 of his affidavit, my father divested himself of his stake in NEL by transferring his shareholding in NEL to my mother and his four children equally in or after 1957. *By or around the late 1950s or early 1960s, there was a distribution of funds within NEL whereby NEL's assets (save for certain shares which NEL owned in JMC) were sold, and the cash proceeds from this sale were distributed among its shareholdings, including my siblings (i.e. Tony, Isabel and Bobby) and I. Sometime after this distribution of funds,* ***I then proceeded to purchase from NEL its shares in JMC.*** *These shares were NEL's only remaining asset at that time. I executed this purchase by making payment for these JMC shares to the other NEFL shareholders, i.e. my mother and siblings.* ***From that point on, as far as my mother, siblings and I were concerned, their shares/interest in NEL had been bought by me.*** *Accordingly, they no longer held any interest in NEL, JMC and/or the John Manners Group. In accordance with this arrangement, my mother and siblings then subsequently proceeded to transfer their shares in NEL to me and/or my nominee companies. I was therefore the sole and exclusive shareholder of NEL.*
>
> [emphasis added in italics and bold-italics]

172 Some two weeks later, Ernest filed his original defence and counterclaim pleading the same facts as set out in his Injunction Affidavit in paras 9 to 11:

> 9. It was Robert Sr.'s policy to allocate shares in JMC to trusted employees for their hard work, whom he also made directors. *At all material times, JMC was not a family owned company and therefore did not belong to the de La Sala family. Its shareholders were also its directors*, and all dividends declared by JMC were credited into the accounts held by the directors/shareholders with JMC.
>
> 10. In or around 1939, Robert Sr. incorporated Lasala Investments Limited, later renamed Northern Enterprises Limited ("NEL"), as a corporate vehicle to hold his personal assets. NEL's assets included shares that were held by Robert Sr. in JMC.

> 11. In or around the late 1950s, Robert Sr. divested himself of his shareholding in NEL by transferring all of his shares in NEL to Camila, Tony, Isabel, Bobby and the [Ernest] in equal proportions, *which shares the [Ernest] subsequently purchased from Camila, Tony, Isabel, and Bobby*.
>
> 12. *The [Ernest] thereupon became the sole and exclusive shareholder of NEL and therefore of NEL's interest in JMC*.
>
> 13. From that time, save for the [Ernest], no other member of the de La Sala family and/or Camila and/or Robert Sr.'s family had any interest (whether direct or indirect, legal or beneficial) in NEL, JMC and/or the John Manners Group.
>
> [emphasis added]

173 Isabel also swore an Affidavit on 5 April 2012 in support of and corroborating Ernest's Injunction Affidavit ("Isabel's Injunction Affidavit"):

> 8. Shortly thereafter (i.e. *in the late 1950s/early 1960s*) Ernest bought over the shares in NEL held by my mother, Tony, Bobby and myself. We received the funds from Ernest in exchange for our shares in NEL in full and final satisfaction of any claims we had or have other the NEL shares received from our father. This process was completed *before my father passed away in 1967*. The result was that neither I nor any other member of my family had any remaining interest in or claim to the John Manners Group, except for Ernest.
>
> [emphasis added]

174 Some three weeks after Ernest and Isabel filed their Injunction Affidavits and one week after Ernest filed his defence and counterclaim, Edward filed his reply affidavit on 26 April 2012 ("Edward's 2nd Injunction Affidavit"). However, documents were subsequently exhibited which showed that Ernest's claims above and Isabel's corroboration were patently untrue:

> (a) As late as 1969, NEL still owned various companies such as China Shipping, North Breeze Navigation Co Ltd, San Jeronimo SS Co SA and Cronulla Shipping Co Ltd;

(b) In an undated handwritten note by Ernest to Bobby on or after 16 October 1969 ("the JMC 1969 Note") (this note must have been written after 16 October 1969 as it refers to one Fredrick William Levin Miller ("Mr Miller") owning 160 shares of JMC, which were transferred to Mr Miller only on 16 October 1969 (see JMC's 1970 Annual Return)[199], Ernest wrote:

> In NEL your [*ie*, Bobby's] shareholding is 20% the same as Mummy, Tony, Isabel and myself.
>
> China Shipping Co. Ltd and North Breeze Navigation Co. Ltd., San Jeronimo S.S. Co. S.A, Cronulla Shipping Co. Ltd., are wholly owned subsidiaries of NEL.

(c) References have already been made to Robert Sr's letters, especially in the 7 July 1957 Avarice Letter where he describes China Shipping as "[NEL]'s biggest single investment and must therefore be well nursed".

Accordingly, NEL's assets could not have been sold off and the cash proceeds distributed to JERIC in the late 1950s or 1960s.

175 Additionally, Ernest could not have acquired JRIC's interest in NEL before Robert Sr's death in May 1967:

(a) Robert Sr's detailed letters (set out above) never once referred to anything like this happening. On the contrary, his letters showed the exact opposite, *ie*, that JRIC retained their shares in NEL.

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199 Edward's 2nd Injunction Affidavit at p 93.

(b) As noted above at [89], the corporate records show that in 1957, each of JERIC held 1,080 shares in NEL, Robert Sr held 598 shares and individual nominees held the remaining two shares;[200]

(c) By 11 November 1959, Robert Sr had divested all his remaining NEL shares to JERIC, who consequently each held 1,200 shares with Tony's and Bobby's shares being held through Strath Nominees Ltd for tax purposes, and Camila holding 1,199 shares with C G Smith holding one (see [113] above);[201] and

(d) On 26 August 1967, some three months after Robert Sr's death, there was a reorganisation of NEL's shareholding such that all JERIC's shareholding in NEL were transferred and held through another nominee company, SR, and Ernest held one share.

176 Ernest's story that he was and remained the only member of JERIC to hold any interest in JMC, and that he purchased JMC's shares *from NEL*, was also shown to be patently untrue:

(a) In Robert Sr's letter dated 23 November 1958 to C G Smith, Robert Sr recorded that JERIC would each buy 20% of NEL's stake in JMC (*ie*, 960 JMC shares each). Thereafter, JRIC would have their JMC shares "registered … under STRATH NOMINEES".[202] There is also an undated typewritten note on a writing pad from Savoy Hotel London ("the Savoy Note") suggesting that JRIC's shares in JMC be placed in trust with Strath Nominees. The evidence shows that in 1961,

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200 Edward's 2nd Injunction Affidavit at EDLS-80 (p 81).

201 Edward's Companies' AEIC at para 68 and ERS-33.

202 2AB179.

3,840 JMC shares were held in the name of Strath Nominees Ltd. These correspond to four parcels of 960 shares each for JRIC, as per the Savoy Note and Robert Sr's letter dated 23 November 1958. Accordingly Ernest's claim that he "was and remained" the only member of JERIC to hold any interest in JMC was not true;

(b) JMC's Annual Returns in 1966 and a Memorandum of Strath Nominees dated 10 June 1964 show that JRIC's shareholding in JMC through Strath Nominees Ltd was reduced from 3,840 shares to 3,600 shares and transferred to and held by Overseas Nominees Ltd. The balance 240 shares were transferred to Ostenfeld. This corresponds to the JMC 1969 Note, where Ernest stated that JRIC held 900 shares each in JMC and 0.75% of the JMC shares (*ie*, 60 shares) each had been transferred to Ostenfeld.

(c) By 1 September 1970, the 3,600 JMC shares held through Overseas Nominees Ltd were transferred to CE, which was part of the first triangular structure created by Ernest (see [146] above) and according to JMC's Annual Return dated 27 December 2011, CE is still the registered shareholder of 3,600 shares in JMC.

Ernest's second story

177 On 8 April 2013, Ernest filed further and better particulars to his original defence. In these particulars, Ernest claimed, *for the first time*, that he bought out JRIC's shares in NEL in or around August 1967 through his nominee SR, *after* his father passed away. This acquisition was allegedly evidenced by a memorandum dated 15 December 1967, a document produced by the Plaintiff Companies in discovery on 28 September 2012.

178 As I have stated above, whether Ernest bought out JRIC's shares in NEL before or after his father died is not the kind of fact one forgets. It is unbelievable that Ernest would be confused between a buy-out many years *before* Robert Sr died and a buy-out a few months *after* his passing, especially for this family as Robert Sr's passing was sudden and unexpected, and Ernest in particular as he took over the mantle of his father. Ernest has not given any credible explanation for this big change in his evidence.

179 The memorandum dated 15 December 1967 which Ernest now says "evidenced" his acquisition of JRIC's interests in NEL, does not quite evidence this fact. What exactly that note was meant for is left unanswered. It is also linked to a "round tripping" of funds from banks through some companies and this is dealt with below at [419]–[432]. It laconically states:[203]

> Memo from EFL (E)
>
> 1. Since 8/8/67 SAN ROBERTO STEAMSHIP S.A. (SR) acquired all shares NORTHERN ENTERPRISES LTD (N) for USD 10m. 5,999 shares issued to SR (from "JERIC" – JAL, EFL, RPL, IBK, CVL), 1 share to EFL (ex Charles Smith)
>
> 2. SAN MIGUEL NAVIGATION CO SA (SM) shares issued equally to JERIC per minute 12/8/67 (*no record found) SM has an account with Hong Kong Bank San Francisco operable by EFL or joint JAL, Mitford, Enrique (CVL's brother), Beto (CVL's brother), Charles Smith and RPL.
>
> 3. SR has 2 accounts with HSBC San Francisco. No1 account per SM, No2 account Mitford can sign singly. SR has also fiduciary account with Lloyds Bank.
>
> 4. San Roberto Steamship acquired NEL by borrowing 1.5 from Lloyds Bank and 8.5 from San Miguel.
>
> In NEL's books EFL owes 1.75 which is contra-ed in San Miguel's books kept by Mitford.

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203 3AB69.

> EFL's debt to NEL will be settled when NEL pays dividends to San Roberto, which then pays back to San Miguel to repay EFL.
>
> However might be prudent for E to borrow again from NEL to deposit with San Mig so that EFL's estate shown owing in the event anything happened to him so as to reduce his real assets.
>
> 5. San Miguel owns all shares of A.C. (possibly Australaska Corp?) previously owned by NEL.
>
> San Roberto also owns Lacy's Abbotsford farm previously registered with NEL.
>
> San Roberto owns shares in AE (Alaska Enterprises?)
>
> 6. HSBC San Francisco has receipt for San Roberto shares in NEL etc. Letter dated 1/9/67 and receipt dated 5/9/67.

180 It should be noted that when Ernest filed his further and better particulars to his original defence on 8 April 2013, he still maintained part of his story in his Injunction Affidavit, *viz*, that he was and remained the only De La Sala family member to hold any shares in JMC (see [171(c)] above) and he became the sole beneficial owner of JMC by acquiring the other shares from "previous directors/shareholders" other than JRIC.[204]

Ernest's third story

181 On 21 May 2013, Ernest filed his amended defence and counterclaim. Ernest deleted the portions in his original defence and counterclaim which pleaded that "[a]t all material times, JMC was not a family owned company and therefore did not belong to the de La Sala family [and] its shareholders were also its directors", and which gave rise to the further and better particulars referred to above, *ie*, that he acquired JMC shares from previous directors/shareholders and not JRIC.

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[204] See answers (a) and (b) to Question 4, Further & Better Particulars filed on 8 April 2013.

182 In his amended defence and counterclaim, Ernest now told a new story that was completely inconsistent with his earlier story in two major respects:

(a) JRIC *had owned shares in JMC*; he even provided a background story as to JRIC's shareholdings in JMC, pleading that JRIC had acquired their shares in JMC from LIL by the end of the 1950s; and

(b) Ernest allegedly *purchased JRIC's shares in JMC* in 1970 through his nominee company CE – a transaction that *could not* have co-existed with Ernest's story in his Injunction Affidavit.

183 I accept Mr Bull SC's submissions that Ernest's new story of purchasing JRIC's shares in JMC enabled him to now ignore clearly contrary evidence brought up by Edward's 2nd Injunction Affidavit, *eg*, Ernest's JMC 1969 Note which plainly contradicted his earlier story that he was the only De La Sala family member who owned an interest in JMC. It is also clear that Ernest did not provide any explanation or reasons as to why there were such fundamental changes to his story, *ie*, that he acquired JRIC's interest in NEL in August 1967 and that he acquired JRIC's shares in JMC in 1970.

Ernest's AEIC

184 In Ernest's Affidavit of Evidence in Chief ("AEIC"), I find elements of reconstruction and embellishment. Ernest is now able to provide details and new allegations that I find surprising were never raised before:

(a) Ernest now claims that JRIC were happy to sell their shares to him because they:

(i) had no experience of the shipping business;

(ii) did not want to be subject to the vagaries and risks of the shipping business; and

(iii) held a minority position which made if difficult, if not impossible, to sell their shares in the open market.

(b) JRIC sold their shares to Ernest in accordance with an alleged convention established by Robert Sr – the price of shares reflected shareholder funds as at the end of the preceding year and they were not paid for immediately, but over time from future dividends – described by Ernest as "vendor financing".

(c) NEL's shareholder funds as at 31 March 1967 were at a record high of HK$50,932,890 and that was the basis of valuing NEL shares at US$10 million.

(d) JMC's shareholder fund had grown to HK$33,515,422 in 1970. As JRIC held 45% of JMC, their shares were sold to Ernest for HK$15,081,940 or about US$2,488,769.

(e) Ernest says he bought JRIC's NEL and JMC shares through a "round tripping" exercise ("the Round Trip Transaction") – he acquired two redundant JMC subsidiaries, SR and SM (referred to in two JMC minutes dated 1 August 1967 and 12 August 1967). He then organised a "circular" structure with shares in SR owned by SM and the shares in SM owned by SR, both as his nominees. He obtained a loan of US$10m from HKSBC, San Francisco which he lent to SM, which in turn deposited US$1.5m with HKSBC and lent SR US$8.5m. SR took a loan from Lloyds Bank of US$1.5m and combining the two, enabled SR to pay JERIC US$10m for their shares in NEL. JERIC then lent US$10m to SM which was used to repay its debt to Ernest

and then his debt to HKSBC – Ernest therefore became the beneficial owner of NEL and the obligation to pay US$8.5 million to JRIC was his because SR and SM participated in these transactions solely as his nominees. JRIC were to be paid from future dividends of NEL.

(f) As for JMC, Ernest acquired JRIC's shares in JMC through his nominee company CE which he incorporated in August 1969. Ernest then personally owed JRIC the purchase price, *ie*, approximately US$2.5m. Like the NEL shares purchase, the purchase price for the JMC shares was to be paid from the future dividends of JMC.

(g) Tony and Bobby had been fully paid out for their NEL and JMC shares in 1987 after an alleged request by Bobby. Ernest claimed for the first time that Tony and Bobby had signed a Memorandum ("the 1987 Memorandum") to acknowledge full payment for their shares.

(h) Camila's expenditures over the years and her periodic gifts to her grandchildren had reached her full entitlement coincidentally by the time of her death in 2005.

(i) I note there was no mention when Isabel was paid out.

Assessment of Ernest's evidence

185 One of the significant problems with Ernest's evidence is his total lack of an explanation in his affidavits for the many fundamental changes in his stories, the later versions of which as noted above are inconsistent with his earlier versions. It is not surprising that he was unable to explain these inconsistencies under cross-examination.

186 A typical example of his refusal to answer a question on or acknowledge his change of his story in his affidavits can be seen below:[205]

> Q: Mr De La Sala, isn't it true that your position in 10 April 2012 was that you had purchased your mother and siblings' shares in NEL before your father died?
>
> A: If that's the case, then that's wrong. It was after.
>
> Q: I want to know whether you will concede that you took the position in April 2012 that you bought those shares before you father died?
>
> A: If I have done that, it was an error, and it was after my father died.
>
> Q: Did you take that position?
>
> A: What position?
>
> Q: Did you say to the court in April 2012 that you purchased your mother and your siblings' shares in NEL before you father died?
>
> A: If I did say that, it was an error.
>
> Q: I'm not asking you why. I'm asking you did you say that in April 2012?
>
> A: If I said that, I repeat, if I said that, it was an error because the shares were bought after my father passed away.
>
> Q: Mr De La Sala, I guarantee you, I'm very patient. I will ask this as many times as it necessary and I know you are intelligent enough to accept that in April 2012, you told the court that you had purchased your mother and siblings' shares in NEL before your father died.
>
> A: I repeat, that if that was said, it was an error.

When he was pressed further, he finally came up with the incredible excuse that it was a "typographical error" or "an absent minded mistake."[206] When it was highlighted that there was a lot at stake in the Injunction Application and

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205 NE 13 March 2014 at p 136 line 9 to p 137 line 11.

206 NE 13 March 2014 at p 138 lines 15 to 23.

that he would have read his Injunction Affidavit carefully, his feeble excuse was that he had signed it at 3.00 am in the morning and was very tired.[207]

187 Ernest was then asked how it came about that Isabel's Injunction Affidavit also replicated his mistake and corroborated his Injunction Affidavit. His answer, bearing in mind his command of the English language, was quite incoherent and evasive:

> Q: … So Mr De La Sala, can you tell us why would this mistake be replicated in another witness's affidavit?
>
> A: A mistake I made that she – she picked up – she was – picked up from me, that I had –
>
> Q: Right. So she was just saying what you wanted her to say in her first affidavit, right?
>
> A: No, I don't know whether she was just saying it. It was something that I made a mistake and saying it was before when I should have said it was after.

188 When he was cornered, Ernest also made things up on the trot. When he finally had to admit the mistake, he then claimed he wanted to make the correction and then passed the blame to his lawyers:[208]

> A: I may have looked at [my Injunction Affidavit] carefully, but right now I'm saying if I did, and I – and it says that it was prior to my father's death, it was a mistake.
>
> Q: The reason –
>
> A: And I openly admit it right now. *And I vaguely recall that I wanted to make that correction.*
>
> [emphasis added]

189 This sudden desire to make a correction was quite unbelievable because he had repeatedly refused to even acknowledge that he had made a

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207 NE 13 March 2014 at p 141 lines 7 to 17.

208 NE 13 March 2014 at p 140 lines 8 to 13.

mistake. Further, he had waited one and a half years and filed 23 affidavits in these proceedings before he made the correction in his AEIC. Ernest then blamed his lawyers for "deferring" his request for the correction.[209] I find this to be totally untrue because Ernest's AEIC referred to para 15 of his Injunction Affidavit which set out his prior inconsistent story and maintained it was correct.[210] When this was put to Ernest, his answer was disingenuous:

> Q: Let's come back to the issue of your giving instructions for the correction of you first affidavit. Mr De La Sala, why is it that the falsehood in your first affidavit has been pointed out by Edward, why is it you wanted to make a correction, you asked to make a correction, but no correction was made? Why?
>
> A: I also wonder.

190 Another instance where Ernest got hopelessly mixed up in his multiple versions of his case was on a critical element of his Injunction Affidavit, *ie*, that NEL owned shares in JMC at the time of or just prior to Ernest's acquisition of NEL.[211] In contrast, his new story at the AEIC stage was that LIL/NEL had ceased to own any shares in JMC at around late 1958 and early 1959 (they were sold to JERIC).[212] Further, he purchased the JMC shares *from JRIC* (and not NEL) in 1970, *three years after* he allegedly purchased NEL in 1967. Ernest was then tied in knots over trying to keep his stories straight. During cross-examination, he first insisted that *NEL's shares in JMC* were purchased in 1970.[213] This appears to be conflating his story in his Injunction Affidavit and his story at trial. While his story at trial was that he bought the

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209 NE 13 March 2014 at p 155 lines 2 to 22.

210 See Ernest's AEIC at paras 149(d)(ii) to 149(d)(iii)

211 See Ernest's Injunction Affidavit at para 15.

212 See Ernest's AEIC at paras 22-25.

213 NE 13 March 2014 at p 146 lines 2 to 7 and p 147 lines 19 to 20.

JMC shares in 1970, those shares were purchased *from JRIC*, not NEL. It was in his original story in his Injunction Affidavit that he stated he bought *all of NEL's JMC shares before* he acquired JRIC's NEL shares. Although Ernest subsequently corrected himself and said that the JMC shares were purchased *from his siblings* in 1970,[214] he had no reasonable explanation for why his story had changed in the first place. All he could muster was that it was an "error".[215] Yet, Ernest did not make any correction until more than a year later.

191 Another glaring inconsistency, which Ernest could not explain under cross-examination, was his story in his Injunction Affidavit that JRIC were paid for their shares/interest in NEL and JMC at the time when Ernest acquired NEL's shares in JMC (*ie*, in the late 1950s or early 1960s). However his story at trial was that JRIC were paid some 20 years later. This is not the kind of fact one gets mixed up, *viz*, whether one paid for shares over a period of some 20 years to whether they were paid for in one go. Ernest eventually admitted that he would not have forgotten this fact.[216] The progress of his cross-examination and his evasive responses on this subject from "I am now recalling what I think actually happened" to "I'm trying to recall" to "I can't really recall" bears reading to see what kind of unbelievable evidence Ernest gives on the witness stand. When I finally intervened to get some progress, Ernest first tried the same evasive answers and vague recollections, but when I stopped him and asked him to read the question on the computer screen, so that there could be no misunderstanding by him as to what the question was and to answer the same, Ernest admitted that he could not understand his statement in para 15 of his Injunction Affidavit and he could not remember

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214 NE 13 March 2014 at p 154 lines 5 to 7.

215 NE 13 March 2014 at p 154 lines 23 to 24.

216 NE 14 March 2014 at p 41 lines 8 to 12.

why he made that statement. To counsel he admitted he did not understand para 15 of his Injunction Affidavit.

192 Ernest could not explain these fundamental changes in his story-lines and evidence. The fundamentally inconsistent story-lines, which I summarise below, show how totally unreliable Ernest's evidence is:

(a) First, Ernest's Injunction Affidavit claimed he had acquired all of JRIC's shares in NEL in the late 1950s or early 1960s and many years before Robert Sr's death. At trial, he had a totally different time-line – he only acquired JRIC's interests in NEL and JMC soon after Robert Sr's death.

(b) Secondly, Ernest's Injunction Affidavit specifically described his acquisition of JRIC's interests based on a single transaction, *ie*, his alleged purchase of NEL's shares in JMC in the late 1950s or early 1960s which he claimed was NEL's sole remaining asset at that time. After this key transaction, JRIC allegedly treated their shares and interest in NEL as having been bought out by Ernest. At trial, Ernest's story was that there were two separate transactions – JRIC first sold their shares in NEL to Ernest in 1967 shortly after Robert Sr's death, and then subsequently sold their shares in JMC to Ernest three years later in 1970.

(c) Thirdly, Ernest's Injunction Affidavit claimed that he had purchased NEL's shareholding in JMC thereby effectively acquiring JRIC's interest in NEL. At trial, his story was that he purchased JRIC's shareholding in NEL in 1967 and JRIC's shareholding in JMC in 1970.

(d) Fourthly, in his Injunction Affidavit, it was a necessary feature of his story that NEL owned shares in JMC at the time of or just prior to Ernest's acquisition of NEL from JRIC, since it was through Ernest's acquisition of JMC from NEL that he claimed to have effectively acquired JRIC's interests in NEL. At trial, in his new story where he claimed to have purchased JRIC's NEL shares in 1967, NEL had ceased to own any shares in JMC for almost nine years before Ernest allegedly acquired NEL from JRIC (see [182] above).

(e) Fifthly, in his Injunction Affidavit, Ernest's story was that he had bought NEL's JMC shares *before* he acquired JRIC's NEL shares and transferred the latter to his nominee companies. In his AIEC, this changed to a suggestion that JRIC had agreed to sell their NEL and JMC shares to Ernest at the same time.[217] The sequence of acquisitions was reversed in Ernest's oral evidence at trial, which involved him making a separate agreement with JRIC in 1970 to buy their shares in JMC, *three years after* he had acquired JRIC's interest in NEL.[218]

(f) Sixthly, Ernest's Injunction Affidavit alleged that JRIC were paid at the time when Ernest purchased NEL's shares in JMC (*ie*, in the late 1950s or early 1960s) and that he subsequently proceeded to transfer JRIC's shareholdings in NEL to his nominee companies. At trial, Ernest's story completely changed the timing of Ernest's payment to JRIC. His story was that JRIC were only paid many years after their shares in NEL and JMC were transferred to Ernest's nominee companies in accordance with an alleged convention whereby the

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217 Ernest's AEIC at para 32.

218 NE 20 March 2014 at p 58 line 21 to p 60 line 18.

purchase price was paid by instalments to the seller out of future dividends declared by NEL and JMC.

(g) Seventhly, Ernest's Injunction Affidavit set out facts leading to his alleged purchase of NEL's "only remaining asset" which consisted of its shares in JMC. Ernest's Injunction Affidavit attested to the sale of all NEL's assets (except for its JMC shares) and a distribution of the cash proceeds from the sale amongst NEL's shareholders in the late 1950s or early 1960s. These significant facts on which his Injunction Affidavit story-line rested simply dropped out of sight from his new story at trial.

(h) Eighthly, Ernest's Injunction Affidavit alleged that he had bought *all* of NEL's JMC shares in the late 1950s or early 1960s. In contrast, his story at trial was that he had bought only 20% of NEL's shares in JMC in 1958.

(i) Ninthly, Ernest's new story of acquiring both NEL and JMC shares through his "nominee companies" are not at all mentioned or even alluded to in his Injunction Affidavits.

193 On top of these inconsistencies, there were other aspects of Ernest's version of his case at trial which could and should have been raised in his Injunction Affidavit, but were instead conspicuously missing therefrom. They include the following:

(a) The alleged reasons why JRIC sold their shares in NEL and JMC to Ernest, *ie*, to escape the vagaries of shipping and the difficulty in selling the shares in the open market.

(b) The prices which JRIC obtained for their shares in NEL and JMC and how those prices, *ie*, US$8m and US$2m respectively, were determined via Robert Sr's convention of pegging the purchase price to the shareholder funds as at the end of the preceding financial year.

(c) The structure of the alleged purchases, *ie*, the Roundtrip Transaction referred to at [184(e)] above.

(d) The purchase price of the NEL and JMC shares was to be paid via "vendor financing", *ie*, via the future dividends declared by NEL and JMC.

194 As stated above, I have no doubt that one of the drivers for Ernest's need to change his story from time to time was due to the various stages of discovery of documents which showed his prior versions to be untrue.

195 The only conclusion I can draw from this, coupled with the following facts:

(a) that Ernest has not produced a single piece of paper evidencing these buy-outs of his family;

(b) that Ernest had himself sent documents, letters, micro-cassettes, *etc*, evidencing the 20% shares JRIC had in the funds and business ventures he managed; and

(c) the large sums of money Ernest kept sending to his siblings and siblings' children,

is, to borrow the description of Gloster J of a litigant in *Boris Abramovich Berezovsky v Roman Arkadievich Abramovich* [2012] EWHC 2463 (Comm) at

[100], that Ernest is an "unimpressive, and inherently unreliable, witness, who regarded truth as a transitory, flexible concept, which could be moulded to suit his current purposes."

196 As if this was not enough, I now turn to two court proceedings: one in Hong Kong in 1970 where Ernest adopted the position that most of his wealth did not belong to him but to the De La Sala family, and another in Alaska in 1977–1984 where he said in depositions that he was a trustee of family assets held in companies which included NEL, JMC, SR, SM, CE and JMC's subsidiaries.

Hannelore 1969/1970 divorce proceedings

197 Ernest became embroiled in divorce proceedings with his second wife, Hannelore, in November 1969 with the filing of her petition for a divorce. They were divorced in 1970. Hannelore was contacted by James around July 2012. Hannelore says James informed her of the position that Ernest has taken in these Singapore proceedings, which is quite the opposite to the position he took in their divorce proceedings in Hong Kong over 49 years ago. She filed her AEIC on 3 January 2014 and gave evidence before me.

198 I found her to be a truthful witness and accept her evidence. Her evidence was backed up by contemporaneous documents and affidavits filed in their divorce proceedings. It included an affidavit by Ernest's then-solicitor, Mr Raymond Edward Moore ("Mr Moore"), a partner in the Hong Kong law firm, Deacons, dated 5 January 1970, where he deposed, *inter alia*:

> 1. I am a partner in the firm of Messrs Deacons, Solicitors and Notaries and have the conduct of these proceedings on behalf of [Ernest].

> 2. [Ernest] is at present in Australia on business and I have his express authority by long distance telephone to make and file this Affidavit in these proceedings.
>
> …
>
> 4. I have been given by [Ernest] details of his assets and means and *on the facts and circumstances of this case known to me, I verily believe* that *the amounts offered* by [Ernest] to the [Hannelore] for the child of the marriage as set forth in the letter written by me to [Hannelore's] Solicitors … are *no less than this Honourable Court would properly order if [Hannelore] were to succeed in contested proceedings* against [Ernest] for dissolution of marriage and maintenance.
>
> [emphasis added]

199 Deacons was a leading law firm in Hong Kong at that time. Letters from Robert Sr show that he too had consulted the firm of Deacons (see [100] above), and it is telling that Mr Moore is prepared to swear an affidavit on the reasonableness of Ernest's offer to Hannelore based on Mr Moore's personal knowledge of the "facts and circumstances of this case known to [him]". I do not believe a partner from such a law firm would have sworn such an affidavit if he had reason to believe otherwise.

200 In her divorce petition, Hannelore had estimated Ernest's personal assets, as at 1 November 1969, to be in excess of HK$50m, and that his income to be in excess of HK$250,000 per annum.[219] Hannelore explains that although the De La Sala family was worth a lot more, she understood from Ernest that the vast majority of this sum belonged to the family rather than Ernest alone. She also had this understanding because in a conversation with Robert Sr one evening, he told her that he had taken steps to provide for the whole family and not just Ernest.

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219 Hannelore's AEIC at para 17 and "HDLD-1".

201 Ernest took the position in the divorce proceedings in 1969/1970 that he was only a custodian, and not the owner, of the De La Sala family assets.

202 Hannelore states that Ernest represented to her during the divorce proceedings that he personally owned assets worth much less than the HK$50m figure she and her lawyers had originally estimated. He also allegedly told her at that time that he was in financial difficulties and she should take what he offered quickly instead of running the risk of getting nothing. He offered to:

(a) pay her HK$850,000 as settlement for all her claims, including her claim for maintenance;

(b) settle, upon trust for their son, HK$500,000 contingent upon their son reaching 25 years of age with power to the independent trustee to pay income and/or capital for the advancement, benefit or education as they think fit;

(c) provide a suitably furnished residence for Hannelore during her life, purchased in the names of independent trustees in trust for her life and thereafter to their child, contingent upon his attaining the age of 25, after which the property will revert to Ernest.

203 Hannelore had no reason to doubt Ernest because, as noted above, his solicitor filed an affidavit on his behalf (as Ernest was, rather strategically I venture to think, in Australia) confirming to the court that the amounts offered by Ernest were *no less than* what the Hong Kong Supreme Court would have awarded in contested proceedings. Apparently, Hannelore's lawyer agreed and advised her to accept the offer as he too had over-estimated Ernest's personal wealth.

204 There can be no two ways about Ernest's position in 1969/1970. He was either lying through the affidavits filed by his solicitor on his behalf in the divorce proceedings in 1969/1970, or he is lying now that he bought out his mother and siblings' interests in LIL/NEL (either in the late 1950s or early 1960s (as alleged in his Injunction Affidavit) or in 1967 (as alleged in his AEIC)). If it was true that he was in dire financial straits in late 1969 and January 1970, then one wonders how he could have afforded to purchase JRIC's shares in JMC through CE, which would have occurred on 1 September 1970, the date CE became the registered shareholder of JMC shares as reflected in JMC's Annual Returns of 17 May 1971. The documentary evidence of JMC's record of dividend payments shows that in 1970, JMC had shareholder funds of HK$36m and paid an annual dividend of HK$8m. It was financially able to pay a further HK$37.6m in dividends over the next four years.

205 Under cross-examination it was pointed out to Ernest that his offer to Hannelore in the divorce proceedings was less than US$300,000. This represented less than 3% of the value of NEL and JMC shares which Ernest had allegedly acquired from JRIC by 1970. Ernest's only explanation was that the figure was arrived after consultation between lawyers and accountants and his assets had to be off-set against liabilities.[220]

206 On Ernest's own case, his personal shares in NEL were worth US$2m in 1967. Similarly in 1970 (and before the alleged acquisition of JMC shares from JRIC), Ernest had 2,160 JMC shares in his own name.[221] If JRIC's 3,600 shares in JMC were worth approximately US$2.5m in 1970, then Ernest's

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220 NE 14 March 2014 at pp 108 to 111.

221 Ernest's AEIC at para 30.

2,160 shares in JMC must have been worth at least US$1.2m at that time. US$300,000 thus represented *less than 10%* of the value of his assets *sans* liabilities.

207 There is a letter in the evidence before me dated 8 November 1969 where Ernest updated members of the family on the steps taken by him to protect the family assets at the time of his divorce with Hannelore.[222] Ernest also told them that Mitford was perfecting the "security of my assets etcetra":

> *You must <u>all</u> be very anxious to know what is happening between that bitch Hannelore and myself*, so I am sending you herewith a copy of my affidavit which I was compelled to make in defence of the sudden unexpected vile allegations the bitch made against me …
>
> …
>
> So any other useful evidence that you can lay your hands on that will show that the bitch is a scheming liar etcetra will be most helpful. I suggest you solicit the assistance of Frankie [Fletcher] to guide you.
>
> …
>
> *I am arranging for Mitford to come to H.K. at the end of this month as I want to perfect the security of my assets <u>etcetra.</u>* I shall then probably take him with me to Sydney *to audit various accounts* when the Milne Browne Hooker deal should be about ready for finalisation.
>
> *I enclose herewith latest scorecards for your guidance and safe custody.*
>
> Now Mummy, Isabel, Tony and Bobby, I don't want you to worry needlessly but be prepared as I am determined to fight for my principles fearlessly and I am confident that in life there are no great men but only great challenges.
>
> [emphasis added]

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222 Bobby's AEIC at para 55.

208 On the same day that Ernest wrote that letter to JRIC, he made a tape recording to JRIC where he made it clear that he was going to take preventive steps:[223]

> …As I mentioned in my letter, I am arranging for Mitford to come to Hong Kong as I want to go through with him very carefully to protect and perfect the security of the shares that I have and to prevent – in case anything should go wrong in this court case, that the bitch [*ie*, Hannelore] does not have any part of it.

209 I note that barely a month after Ernest's communications with JRIC, CE was incorporated on 19 December 1969 to acquire the shares of SM.[224] JERIC were the directors of CE.[225] CE, SM and SR were then put into an "orphan" structure where CE owned SM, which in turn owned SR, which in turn owned CE.[226] From 1 September 1970, CE was also the vehicle used to hold JRIC's 3,600 shares in JMC.

210 There is a SM journal voucher dated 17 October 1977 where, besides payments into JRIC's accounts for the sale of Australian land, there is a payment to "CIA ORIENTE". Mitford, who was JMC's accountant and comptroller, wrote: "USE OF CIA ORIENTE AS ALTERNATIVE NAME FOR [ERNEST] ADOPTED TO PREVENT FORMER WIFE FROM TRACING ESTATE".[227]

211 It is clear to me and I so find that Ernest created the first "orphan" structure to block the tracing of its shareholding and assets from any probes by

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223 Hannelore's AEIC at HDLD-12 (pp 360-362).

224 Ostenfeld's AEIC at para 40 and Ernest's AEIC at para 42.

225 3AB284

226 Edward's AEIC at para 78.

227 6AB25.

Hannelore and her lawyers. This was necessary to ensure that Hannelore had no way of finding out how much the family's assets were worth and what portion of those assets belonged to Ernest. As will become clear below, when Ernest referred to securing "[his] assets" in his letter dated 8 November 1969, he was referring to his portion of the family's assets. Indeed, his bank account with SM had to be renamed to "CIA ORIENTE" in order to prevent Hannelore from tracing his assets (while those of JRIC were not).

212 On the basis of the new evidence that emerged from these proceedings, Hannelore has filed an Originating Summons in the High Court of Hong Kong to set aside the Consent Order she entered into with Ernest on the basis of fraudulent misrepresentation by Ernest.

213 Ernest has, again through his lawyer, Mr Edward Richard Andrew Johnson ("Mr Johnson") of Clifford Chance, and not himself personally, filed an affidavit in these new proceedings brought by Hannelore ("Mr Johnson's Affidavit").[228] Mr Johnson's Affidavit is in support of an application that the matter proceed by way of writ action. Mr Johnson is not a partner but appears to be one of a team of solicitors under the supervision of partners. It is interesting to note what Mr Johnson deposes in this affidavit dated 27 September 2013:

> 1. I am a solicitor of the High Court of Hong Kong and am employed by Clifford Chance. With the assistance of my colleagues, I have conduct of this matter on behalf of the Defendant under the supervision of my partners. … I am duly authorised by the Defendant to make this Affidavit on his behalf, who has read and agreed with the contents of this Affidavit.
>
> 2. Unless otherwise stated, the facts stated herein are within my personal knowledge and are true. Where they are

[228] 30AB54 at para 11.

> not within my personal knowledge, they are true to the best of my knowledge, information and belief.
>
> …
>
> 11. The Plaintiff's "Broad Summary of Events drawn from the evidence filed in the Singapore Proceedings" set out in paragraph 26 of the Plaintiff's affidavit herein is a misnomer because the events are not evidence filed in the Singapore proceedings. On the contrary, the Defendant's response thereto, as filed in the Singapore proceedings is also as set out hereunder, serves to illustrate the many factual disputes that make it neither just nor convenient for the action to continue by originating Summons and affidavit.
>
> (a) The Defendant disputes the Plaintiff's allegation that Robert divested all of his shares in NEL to his wife and children on 24 November 1958.
>
> …
>
> (c) The Defendant disputes the Plaintiff's allegation that all of JERIC's shareholding in NEL was transferred to SR for US$10 million on 8 August 1967.
>
> (d) The Defendant disputes the Plaintiff's allegation that post October 1969 the Defendant continued to hold 20% of NEL through SM and SR.
>
> …
>
> 12. … the Plaintiff alleges that SM shares were issued equally to JERIC on 12 August 1967. The Plaintiff has not disclosed and the Defendant is not aware of any document that records any such issue or the circumstances in which it was made.

Mr Johnson could only have made these allegations on the instructions given by Ernest and this is expressly acknowledged in para 1 of Mr Johnson's Affidavit. First, under para 11(a), Ernest disputes Hannelore's allegation that Robert Sr divested himself of all of his shares in NEL to his wife and children on 24 November 1958. However, Ernest's AEIC exhibits a set of minutes of a LIL board meeting dated 24 November 1958 which records the board approving Robert Sr's transfer of his remaining 599 LIL shares to JERIC.[229]

[229] Ernest's AEIC at EFL-27.

Secondly, under para 11(c) above, he disputes Hannelore's allegation that all of JERIC's shareholding in NEL was transferred to SR for US$10m on 8 August 1967. Ernest makes a contrary allegation in these proceedings before me that such a transfer did take place (although on 21 August 1967) and that SR acted as his nominee.[230] Thirdly, at para 12, Ernest alleges through Mr Johnson that he is not aware of any document that records such issue of SM shares to JERIC. Yet, in the evidence before me, there is a memorandum dated 15 December 1967 drawn up by Ernest himself ("the 1967 Memo") exhibited in his AEIC which states "SM shares to be issued equally to JERIC as per minutes 12/8/67". I am cognisant of the fact that in his AEIC, Ernest for the first time put forth his explanation that this reference to SM shares being issued to JERIC was part of his "estate plan", *ie*, that it would allow his family members to gain control of his assets without having to obtain probate in the event of Ernest's sudden demise.[231] As explained below at [399], this is something that I disbelieve and reject as untrue.

214 These positions taken by Ernest, made on oath through solicitors, are clearly inconsistent, and as noted above, Ernest cannot have it both ways. He cannot switch between facts and versions as he has done in different sets of proceedings in different jurisdictions. I have noted that Ernest has used solicitors to file affidavits on his instructions in the Hong Kong matrimonial proceedings instead of filing them himself. I am of the view that he does this deliberately because he knows the consequences of perjury.[232] I have no doubt that Ernest misled the Hong Kong Courts and Hannelore's solicitor in those 1969/1970 divorce proceedings. He has his escape hatch planned and I saw it

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230 Ernest's AEIC at para 8(d).

231 Ernest's AEIC at paras 40-43.

232 NE 13 March 2014 at p 122 lines 11 to 20.

in operation in the proceedings before me. When he got into a tight spot with his inconsistent stories, he blamed his lawyers for getting it wrong.[233] He even said at one point that he instructed them to make changes to his affidavit but they failed to do so:

> Q. Mr De La Sala, this is your first affidavit. It's not your affidavit of evidence-in-chief. If you wanted to correct your first affidavit, you had a year and a half to do so, right?
>
> A. And I had given instructions to my representatives to have that corrected.
>
> Q. Amazingly --
>
> A. I gave those instructions to my legal representatives that there was an error, but I think something postponed that. That's to the best of my recollection right now.

215 Although this does not form part of my decision (and I must emphasize this fact), when I was reviewing the evidence after closing submissions, I was struck by something Robert Sr, the loving father, wrote to Ernest all those years ago that was uncannily resonant with my conclusion on the reliability of Ernest's evidence:

(a) In a letter dated 8 January 1947, Robert Sr wrote to Tony and Ernest on the eve of their departure to Australia to study, and in a postscript to Ernest, he said:

> ERNEST not so many lies, Educate yourself to be an honest and upright boy and remember lies, even "white lies" get to be a very bad habit.

(b) In a letter dated 14 March 1962, after a huge quarrel between them, Robert Sr wrote to Ernest (see [117] above):

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233 Companies' Closing Submissions at para 292.

> … since you were a child you have been a great source of worry to me on account of your attitude that you always adopted of trying to outsmart the other fellow by probably unconsciously resorting to lies and B-S to prove your point.

Mitford's Alaska proceedings

216 There is a second set of court proceedings, commenced in December 1977, where Ernest went on oath to say that he was the trustee of family assets. These proceedings were protracted. Ernest's earlier depositions took place in 1979 or 1980, but the relevant deposition took place on 11–12 January 1984.

217 Mitford, as noted above, was the accountant and/or comptroller of JMC who was brought in by Ernest. He is mentioned in Robert Sr's letter to Ernest dated 14 May 1956 where he said:

> Your idea of making Mitford a "backroom" executive might be the thing providing you are convinced that you can control him. … His best use would be in the inner office to go through accounts, statistics, etc., and to advise you on Taxation problems covering all Offices and from time to time he could be sent away to check matters for you dealing with accounts.

The evidence shows that Mitford was the trusted accountant of Ernest whom he brought into the JMC group and was therefore privy to all the structures set up by Ernest, how their assets were moved between them and the cash flows. I further note Ernest's reference to Mitford's role in his bitter divorce with Hannelore above.

218 Mitford relocated to Alaska in the early 1960s where he was employed as treasurer of Australaska Corporation ("Australaska") and Cosmopolitan Development Corporation ("CDC").[234]

219 The documents from the Mitford proceedings were tracked down by James. Initially, he could not find any trace of Mitford or his descendants. He then attempted to contact Mitford's lawyers involved in the proceedings. James succeeded in August 2012 and found out that "a great deal of the files had been retained", but was told he had to obtain a subpoena before he could inspect the documents. He did so and Edward and James travelled to Anchorage, Alaska on 29 August 2012 and with the subpoena in hand, started inspecting the documents retained by the court.

220 Mitford commenced proceedings before the Superior Court of the State of Alaska in 1977 against Ernest and 22 companies, including CE, SM, JMC, SR and NEL (the ownership of which is a major issue in these proceedings), to enforce certain terms of his employment agreement which allegedly contained a 10% profit sharing arrangement. In his deposition, Mitford stated his understanding that the John Manners Group was in the control of the De La Sala family known as the "San Miguel Partnership" or the "Jerrick (ph) Partnership", which was obviously JERIC as Mitford later went on to name the individuals represented by the acronym.[235] Mitford also described the corporate defendants as a "world group of companies controlled ultimately by the [De La Sala] family through interlocking shareholdings and directorships". When Mitford was asked whether Australaska and CDC were owned by the De La Sala family, his response was that it did not work that way. The ownership of the companies was a "triangular situation" and the family controlled them through their directorship. Ultimately, he deposed, it was the Board of Directors of CE who could draw out the profits and the Board was JERIC and himself.[236]

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234 Ernest's AEIC at para 122(e)(i).

235 14AB127 to 14AB128.

221 A few pertinent observations may be made from the Mitford proceedings. First, Ernest expressly denied any interest in the "Family Companies" named by Mitford, which as noted above include CE, SM, JMC, SR and NEL. In Mitford's Second Amended Complaint, he pleaded at para II that the "defendant [Ernest] controls or has interest in and directs defendant corporations, [Australaska], [CDC] and Alaska Enterprises Limited and their affiliated corporations".[237] In his response, Ernest denied this allegation in para 2 of his Answer to the Second Amended Complaint which he filed in 1979. I note the "defendant corporations" in the Mitford proceedings include CE, SM, SR, (*ie*, the first orphan structure), NEL, Summit Corp and JMC, companies which Ernest now claims in the proceedings before me that he owned *prior* to 1977, *ie*, at the time of the Mitford proceedings.

222 Mitford's understanding was that at that time, it was JERIC that ultimately controlled the group of companies comprising, amongst others, Australaska and CDC. His evidence was clear:[238]

> Q: In fact, you believed, did you not, that through some chain of corporations, trusts or partnerships that the de Lasala family ultimately controlled Australaska Corporation and Cosmopolitan Development Corporation?
>
> A: They ultimately controlled, yes.
>
> Q: And who were the members of the de Lasala family during this period of your employment in Alaska whom you believed to be the ultimate controllers?
>
> A: Jerome Anthony de Lasala, is the J; Ernest Ferdinand de Lasala is the E; Robert Paris be Lasala is the R, and that is the son of R.P. de Lasala Sr. …

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236 14AB129.

237 9AB379.

238 14AB128 to 14AB129.

…

Q: All right. Any others?

A: Isabelle Brenda de Lasala was the I; and I think the correct name for the last lad, who was the mother of the children, Camila – I think they used the word Camila Paris de Lasala for her.

223 When Ernest was questioned during the deposition on 11–12 January 1984 about a telex he had written on 23 July 1982, Ernest stated on oath that the shares of two entities, Australaska and CDC, were owned by trusts:[239]

Q: Did you send Plaintiff's 36, this telex back to Augestad?

A: It appears so.

…

Q: Then you say here, "and subject approval trustees." What does that mean?

A: Trustees of Australaska.

Q: Who are the trustees of Australaska?

A: *Its owned by a trust.*

Q: *The stock of Australaska is owned by a trust?*

A: *Yes.*

Q: *Is that the same for the stock of Cosmo – Cosmopolitan Development Corporation?*

A: *That's right.*

[emphasis added]

224 Ernest said clearly, and repeatedly in these depositions, that he was the trustee and the manager of the trust:[240]

Q: Are you one of the trustees?

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239 13AB223 and 13AB227.

240 13AB227 to 13AB228.

A: Yes.

Q: Are there any other trustees?

A: No, I'm the trustee.

Q: You're the trustee?

A: I'm the trustee.

Q: You said trustees, plural. Is that a mistake?

A: I was managing – I'm the manager of the trust.

Q: You have the decision making power for the trust as the trustee?

A: In this instance yes.

Q: You would have to consult or get the approval of any other trustees?

A: Not in this instant.

225 The corporate records and correspondence show that the owner of Australaska was SM and the owner of CDC was JMC:

(a) In a letter dated 17 December 1984 from accounting firm Peat, Marwick, Mitchell & Co to Ernest, it is expressly stated that "[Australaska] is owned 100 percent by [SM], a Panama corporation" while "[CDC] is owned 100 percent by [JMC], a Hong Kong corporation".[241]

(b) SM's corporate record then stated:[242]

Owns 100% Australaska Corporation

100% San Roberto Steamship Company S.A.

100% Pan-Pacific Navigation Co. Inc.

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241 15AB230.

242 30AB135.

226 Matthew Ku, who was the Comptroller after Mitford and a director of JMC, Australaska and CDC, also had his deposition taken in the Mitford proceedings. He confirmed the ownership set out above:[243]

> Q: Who were the shareholders of Australaska Corporation?
>
> A: Without having the records before me, I think it's San Miguel Navigation.
>
> Q: San Miguel?
>
> A: Yeah.
>
> Q: Was that true, the same answer in 1977?
>
> A: Again, without having the records before me, in 1977, I believe it is. I'm not sure.
>
> Q: Who are the shareholders of Cosmopolitan Development Corporation?
>
> A: I believe it is John Manners and Company Limited.
>
> Q: Was that true in 1977, too?
>
> A: To the best of my memory. I haven't a record. It is the same, I believe. I'm not sure.
>
> Q: You heard Mr de Lasala talking about a trust that existed at the present time for holding some of the shares. *Do you know anything about that trust*?
>
> A: *No.*
>
> Q: *Have you ever heard about the trust holding shares?*
>
> A: *Yeah, I heard about it.*
>
> Q: *Do you know who's in the trust?*
>
> A: *No, I have no knowledge, sorry. You have to ask Mr de Lasala.*
>
> [emphasis added]

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243 14AB16 to 14AB17.

227 From Ernest and Matthew Ku's depositions given in the Mitford proceedings in January 1984, taken with the documents in [225] above, I find that from 1977 to 1984, SM owned Australaska and JMC owned CDC.

228 Further, a partly handwritten and partly typed document found in the Mitford proceedings setting out the corporate structure, banks and authorised signatories, shows that prior to 1977, NEL owned CDC from the late 1960s, before CDC was transferred to JMC.[244] James had deposed in his AEIC, and this was not challenged during cross-examination, that the handwriting was Mitford's as were other annotations on documents retrieved from the Mitford proceedings.[245]

229 With Ernest's deposition in 1984 that the owners of the shares in Australaska and CDC are trusts, and since SM and NEL and/or JMC are or were the respective owners of these two companies, it follows, from Ernest's own evidence on oath in these depositions, that SM as well as NEL and/or JMC are trusts. Mr Thio SC's cross-examination of Ernest shows Ernest being evasive again and ignoring all his other answers he had given to the questions put to him at the depositions: [246]

> Q: …Were those truthful answers, Mr De La Sala?
>
> A: Yes, they are truthful answers.
>
> …
>
> Q; So the owner of Australaska is a trust. The owner of Cosmopolitan is a trust. San Miguel is the owner of Australaska. John Manners, or JMC, is the owner of Cosmopolitan. As far as you were concerned, San Miguel

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244 40AB5832.

245 James' AEIC para 31.

246 NE 24 March 2014 at p 130 line 10 to p 133 line 16.

> and JMC were essentially trusts, and you were the trustee?
>
> A: In that sense, yes.
>
> Q: In that sense. Well, I'm not sure what other sense that would be because if they were trusts, they have to be trusts for somebody, and I suggest –
>
> A: So I was acting for San Miguel.
>
> Q: No, I suggest that San Miguel and JMC – you were holding those shares on trust for persons other than yourself; in particular your family. Isn't that the case?
>
> A: For San Miguel, which was my nominee.
>
> Q: You see, you said San Miguel was a trust. You didn't say San Miguel belonged to you. If San Miguel was a trust and you were the trustee, you must be holding San Miguel's assets on trust for someone other than yourself, do you agree?
>
> A: I agree that San Miguel owned Australaska.
>
> Q: I've given you a chance. I'll move on …

230 The documents and corporate records retrieved from the Court in Anchorage are replete with references to JERIC having continuing interests in the Plaintiff Companies. An example is a note dated 30 June 1977 from Ernest to the Accounts Department of JMC instructing them to remit the sum of US$1,072,663.65 in nearly equal proportions to each of JERIC, for the account of SM. It was signed by Ernest. Mitford had written on the top right corner: "COMPASS ENTERPRISE DIVIDEND FROM JMC DIVERTED TO JERIC PARTNERSHIP".[247] Another was a journal voucher of SM dated 30 June 1977 (SM-1687) which record various sums being credited into JERIC's respective bank accounts. At the bottom of the voucher, Mitford had written: "VOUCHERS REFLECTING JERIC PARTNERSHIP SHARING PROFITS, LOSSES CAPITAL CONTRIBUTIONS – REPAYMENTS".[248]

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247 6AB11.

231 One record that is particularly telling is a journal voucher of SM dated 27 January 1977 (SM-1573).[249] In the particulars column, it was recorded as follows:

> Payment against Commodities:-
> SMP 45% 56,230.88
> EFL 28% 37,524.10
> MBM 9% 13,282.18
> CWO 12% 17,030.90
> FWLM 4% 7,034.30
> MYTK 2% 4,535.15
> …
> SMP + EFL = JERIC
> PARTNERSHP

SMP stands for San Miguel Partnership. The percentages recorded next to various entities match exactly the existing shareholding interests in JMC at that point in time. A perusal of JMC's annual return as at 14 July 1976 lists the following shareholders and their respective shareholding:[250]

(a) Malcolm Blair Morrison (MBM): 720 out of 8000 shares (*ie*, 9%);

(b) Christian Williams Ostenfeld (CWO): 960 out of 8000 shares (*ie*, 12%);

(c) Frederick William Levin Miller (FWLM): 320 out of 8000 shares (*ie*, 4%);

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248 6AB12.

249 32AB269.

250 4AB263.

(d) Matthew Yun Ting Ku (MYTK): 160 out of 8000 shares (*ie*, 2%);

(e) CE: 3600 out of 8000 shares (*ie*, 45%);

(f) Ernest: 2000 out of 8000 shares (*ie*, 25%); and

(g) CIA Oriente: 240 out of 8000 shares (*ie*, 3%).

232 As mentioned above at [210], CIA Oriente was used as an "alternative name" for Ernest for the purposes of the Hannelore proceedings. In other words, Ernest's share in JMC at that time was 28%, the same as that reflected in the SM journal voucher dated 27 January 1977. Similarly, CE held 45% of JMC, which corresponds with "SMP", *ie*, San Miguel Partnership's 45%. Mitford noted that SMP + EFL = JERIC. This journal voucher hence paints a very different picture from Ernest's story that he had bought out JRIC's 45% interest through CE in 1970. It shows that CE continued to hold shares in JMC on behalf of JRIC after 1970.

233 Ernest settled the Mitford proceedings just before it went for trial before a jury. According to James, Ernest told him that he settled the proceedings to "protect the family" as Mitford threatened "to expose the family".[251] I find that Ernest denied personal ownership of any of the companies including JMC, NEL, SR, SM, CE and JMC's subsidiaries during the Mitford proceedings, and the documents and corporate records uncovered from the proceedings appear to support this position.

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[251] James' AEIC for the Companies dated 2 January 2014 at para 14.

234 For the above reasons, I find Ernest evidence totally unreliable and upon which I can give little or no weight.

Isabel's evidence

235 I find Isabel's evidence to be unreliable and garbled. I find that she simply deposes to affidavits as dictated by Ernest or his advisers without any independent checking whether the information therein is correct or true. It is not surprising that she keeps getting mixed up with her answers and stories.

236 The prime example is her Injunction Affidavit where she deposes to wrong facts in support of Ernest. I find it inconceivable that Isabel could have made the mistake as to whether Ernest bought them out before or after her father died. First, his unexpected death was traumatic for all of them. In fact, Isabel was one of the first to discover his body that morning. Secondly, her wedding, which was three weeks away from that day, had to be postponed as a result. She tries to excuse her lapses by saying she is someone who "did not think",[252] "couldn't think straight" and who makes "a lot of errors"[253] and finally that her English was "not so hot",[254] although she accepts that English is her first language. But it cannot be a coincidence that she makes the same mistakes as Ernest did in her Injunction Affidavit and then tells a different story when she comes to her AEIC, which again dovetails with Ernest's new story-line.

237 She admitted in cross-examination that she got her evidence in her Injunction Affidavit "completely wrong",[255] and realised this after reading

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252 NE 3 March 2014 at p 43 lines 19 to 22.

253 NE 3 March 2014 at p 45 lines 15 to 17.

254 NE 28 February 2014 at p 151 line 12.

Edward's Reply Affidavit dated 26 April 2012 filed in the Injunction proceedings. Although Isabel says she wanted to correct her Injunction Affidavit, her second Affidavit filed on 9 May 2012, in response to Edward's Affidavit, failed to make any correction to her Injunction Affidavit. Isabel claims the changes to her evidence was that she "got the right picture" after she had looked at some papers[256] but she was not able to tell me what papers she had seen.[257]

238 Another example can be found in her evidence on Ernest's will. The swings in her answers under cross-examination bear reading to see the kind of witness she is, although it will be too long to set out here. In her Injunction Affidavit dated 5 April 2012, Isabel gives the impression she is a neutral and disinterested witness as Ernest had made a new will and she was no longer the beneficiary of Ernest's will. However, when she filed her AEIC on 3 January 2014, she stated she was Ernest's sole beneficiary at the time of signing her AEIC.[258] On cross-examination, Isabel claimed that although Ernest had made a new will, she did not know for a fact if she was the sole beneficiary of this alleged new will.[259] Isabel admitted she was deviating from her AEIC and her excuse was that she "couldn't think straight" when she signed her AEIC.[260] She then denied seeing Ernest's will at least four times. When pressed on this, she then said: "To tell the truth, in the [Injunction] affidavit, I did not know I was the beneficiary until Edward put it into discovery".[261] Her answers then

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255 NE 3 March 2014 at p 43 lines 19 to 22.

256 NE 3 March 2014 at p 42 lines 18 to 22.

257 NE 3 March 2014 at p 212 lines 19 to 23.

258 Isabel's AEIC at para 23.

259 NE 3 March 2014 at p 134 lines 11 to 25 and p 136 lines 13 to 23.

260 NE 3 March 2014 at p 137 line 14 to p 138 line 8.

swung from stating unequivocally that she stood to inherit an immense fortune from Ernest,[262] and she was not a disinterested party to the action,[263] to not knowing if she was the sole beneficiary of Ernest's will,[264] to knowing for a fact that she is not the sole beneficiary of Ernest's will.[265] While she claimed she did not see Ernest's will and only came to know she was the sole beneficiary from Edward's 1st Injunction Affidavit dated 6 March 2012,[266] Edward's 1st Injunction Affidavit neither exhibited Ernest's will nor disclosed the date of Ernest's will. Inexplicably, she was able to state the date of Ernest's will in her AEIC.

239 Isabel also clearly stated in her AEIC that JRIC had sold their NEL shares to Ernest in "the late 1960s or early 1970s". However, when cross-examined by Mr Bull SC on this, she claimed she did not know when, where or how the NEL shares had been sold to Ernest:[267]

> Q: Okay. So I come back to my question again. If your evidence is that all of you, Bobby, Tony, your mother, and yourself sold all you shares in NEL to Ernest in 1967 –
>
> A: Yes.
>
> Q: - around the same time right?
>
> A: *I don't know.* You have to ask Ernest that, because I'd be inventing if I tell you, yes, I know when I don't know.

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261 NE 28 February 2014 at p 147 lines 4 to 6.

262 NE 28 February 2014 at p 137 line 25 to p 138 line 16.

263 NE 28 February 2014 at p 140 lines 16 to 18.

264 NE 28 February 2014 at p 153 lines 17 to 21 and p 168 lines 22 to 24.

265 NE 3 March 2014 at p 136 lines 13 to 18.

266 NE 28 February 2014 at p 164 lines 12 to 18.

267 NE 3 March 2014 at p 82 line 11 to p 83 line 9.

> Q; I thought you just said a moment ago –
>
> A: I know we all sold it. *I don't know when, I don't know where, I don't know how*, but we all sold it.
>
> Q: Okay, that's helpful too. So your evidence now is that as far as Bobby's shares in NEL go, you know he sold it, but you do not know when?
>
> A: We all sold it. *I don't know* the particulars, but I know that we all sold it.
>
> Q: When did Bobby sell his shares?
>
> A: I don't know. Ask him.
>
> Q: So you don't know. And do you know when Tony sold his shares?
>
> A: We all sold at the same time and *I don't know even when I sold it* either. So the thing is, we all sold it at the same time. The same year, at least.
>
> [emphasis added]

It is significant that Isabel claims above that she *does not know* when, where or how she sold her NEL and JMC shares, not that she had forgotten with the passage of time.

240 Nevertheless, I have reason to believe that her projected persona of innocence, muddled-headedness and forgetfulness is sometimes a front used to deflect scrutiny of her inability to explain her inconsistent stories told in support of Ernest. She is also canny enough to know when not to admit something that will be very damaging by retreating behind that screen of absent-mindedness and unfamiliarity with business. A good example of this was brought out during Mr Thio SC's cross-examination regarding Ernest paying her for her NEL and JMC shares but characterising it as a gift from him.[268] She accepted Ernest kept doing that whenever he paid her or Bobby, but she refused to accept that that was an incorrect characterisation, insisting

[268] NE 4 March 2014 at pp 37 to 41.

that since she was happy to get paid, it did not matter what Ernest called it. For example, she stated: "It's his way of doing it, I don't know"; "[a]s long as we know he gave it to us, our money, and he knows it, it doesn't really matter how you say it"; "[w]ell it's not a lie to me because I think that's wonderful, he's given me my money back"; and "[l]isten, it wasn't a gift, but he gave me back my money, and to me that's more important than anything else." She only accepted it was an incorrect characterisation when I finally intervened.

241 I find that Isabel's fencing with counsel is because she *knows* why Ernest did that and why she, Tony and Bobby went along with it. It was because the Australian Tax Office ("ATO") would be very interested to know if they had funds offshore which belonged to them and which had not been declared in their income tax returns. Isabel got rather hot under the collar when Mr Thio SC linked this mischaracterisation with a letter she had written on 26 August 2011 where she wrote: "Furthermore, it might wrongly lead others, including the ATO to believe that we have an interest in the funds/money in the accounts which belongs entirely to Ernest".[269]

242 I also find that Isabel is intensely loyal to her brother Ernest and that is unsurprising for a number of reasons. One of these is that just as her father looked after her financially, provided for and protected her, Ernest had done the same and she is immensely grateful and indebted to him for that. Another reason is that Ernest is a source of huge sums of money. There were at least two large sums of money sent to her by Ernest *after* Isabel said she was paid in full for her NEL and JMC shares.

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269 Isabel's AEIC at p 25.

243 As noted above, Isabel's AEIC baldly states that JRIC sold their NEL and JMC share to Ernest "in the late 1960s or early 1970s". It did not give any details of how or when Ernest paid her for her shares in NEL and JMC. When Isabel was cross-examined on this, she introduced, for the first time, that she was paid for her NEL and JMC shares in dribs and drabs from 1978 until she was fully paid out in 2005.[270] That last payment was US$10m[271] and she specifically asked for that sum as she wanted to purchase some property. Coincidentally, or so she claimed, that was all that she was owed and that cleared her account with Ernest.[272] She said she received a total of US$28 million between 1978 and 2005 and then surprisingly said, again for the first time, that she had a list recording all these payments,[273] which needless to say she chose not to put in her AEIC or in the evidence before me.

244 Under cross-examination by Mr Thio SC, Isabel, after some fencing, confirmed that she did not receive any more payments from Ernest after 2005.[274] Her careful answers belie her professed muddle-headedness:

> Q: Mrs Koutsos, you've said that you got your full and final payout by 2005. Can I just then have you confirm that after 2005, you received no further payment from Ernest?
>
> A: Of my account, yes.
>
> Q: What do you mean by of your account? You did not receive any further payments from Ernest after 2005; is that correct?
>
> A: Of my account, I can't remember the -- of my account I didn't.

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270 NE 4 March 2014 at p 20 lines 9 to 10.

271 NE 4 March 2014 at p 21 lines 6 to 7.

272 NE 4 March 2014 at p 95 line 9 to p 96 line 4 and pp 107-108.

273 NE 3 March 2014 at pp 95 to 100.

274 NE 4 March 2014 at p 117 lines 7 to 25.

> Q; What do you mean by of your account you didn't?
>
> A: Well, the money I had with him.
>
> Q: Yes, so after 2005, you did not receive any payment from Ernest, "yes' or "no"?
>
> A: Yes [meaning "no"].

245 Having noted Isabel's carefully crafted answer to Mr Thio SC's questions, I then asked Isabel some questions after her cross-examination and re-examination:

> Court: … Now, you were also asked: after 2005, did you receive any further payment of your account? And you said no, none from my money with him.
>
> A: Yes.
>
> Court: Right? That's what you said. I've got another question for you. After 2005, did you receive any other payments from Ernest, never mind from your account or not from your account, did you receive any other payment from Ernest after 2005?
>
> A: I bought some other properties from him, and he sent me some money to pay for it. And then I sent it back the next day. But I paid the stamp duty.

My questions were to ensure that her last answer to Mr Thio SC that appeared on the transcript quoted above at [244] was true. The sudden flash in her eyes told me Isabel knew why I had asked her that question. Isabel did not answer my question directly and instead tried to obfuscate her answer first with the introduction of a purchase of properties (which was later expanded into Ernest wanting to transfer property to her by the closing down of JMC(A)). She then answered that Ernest *had* sent her some money *after 2005* to purchase the same. I also noted that Isabel is able to tell something that did not make sense with a straight face, *viz*, she bought some property from Ernest and he sends her the money to pay for it, but she sent the money back to him the following day. She nevertheless bought the properties, paid the stamp duty and now

owns those properties.[275] She later lapses into her classic muddled half-sentences: "I don't know how it's done, but that's what I did. And I paid -- for the properties that I bought from him, I paid for the stamp duties."[276] The transcript, with my further clarification to ensure there could be no mistake of what her answer to my question was, is as follows:[277]

> Court: So he did send you some more money?
>
> A: Yes, but I sent it back.
>
> Court: You didn't accept it?
>
> A: No, no, no, I accept it, and then I sent it back to him as payment. I don't know how it's done, but that's what I did. And I paid – for the properties that I bought from him, I paid for the stamp duties.
>
> Court: So some properties were transferred to you?
>
> A: Yes
>
> Court: And then you paid him for the stamp duty?
>
> A: No, no, no, I paid the Australian taxation the stamp duty. But he sent me, I think 14 -- I can't remember the exact amount, 14-something million, but I sent it back to him. I sent it back to him.
>
> Court: Right, so after 2005, except for this instance of the property transactions where he gave you 14 million which you sent back, he's never given you any other –
>
> A: Not that I know of.
>
> Court: No other sums of money?
>
> A: Not that I know of.
>
> Court: No property?
>
> A: No.

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275 NE 4 March 2015 at p 175 lines 18 to 20.

276 NE 4 March 2014 at p 175 line 25 to p 176 line 2.

277 NE 4 March 2014 at p 175 line 21 to p 176 line 18.

246 As can be seen, after all the cross-examination and re-examination was completed, Isabel suddenly brought up this payment of about $14m, muddied it up by linking it to purchase of properties, then quickly said she returned the money to Ernest the next day so as to try and preserve the truth of her earlier answer that she was paid in full by 2005 and did not receive any money after that.

247 After Isabel had been released as a witness, further discovery showed that Isabel's evidence and answer to my question set out above at [245] was false. In discovery, pursuant to an order of court dated 2 October 2014, Ernest disclosed documents which showed he transferred more than US$58m from his personal account to Isabel: [278]

(a) 6 March 2012 (1 day after the writ of summons was filed and the day the Plaintiff Companies filed their application for an injunctions) – US$50m;

(b) 30 April 2012 (approximately 3 weeks after Isabel files her 1st Injunction Affidavit on 5 April 2012) – US$200,000;

(c) 9 August 2012 – US$250,000;

(d) 5 December 2012 – US$1m;

(e) 8 January 2013 – US$300,000;

(f) 17 January 2013 – US$1m; and

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278 EFL's Supplementary Lists of Documents of 20 October 2014 and 12 December 2014.

(g) In or around 20 February 2013 (the exact date of transfer is not known) – proceeds of sale from 1,700,000 CapitaLand shares (approximate value S$6,791,500 or US$5,489,855 based on historical average share price on 20 February 2013).

By the time these documents were disclosed, Isabel and Ernest had completed their evidence and were released. I find it inconceivable that Isabel could have forgotten about these payments. These payments also explain why she tried to throw me off by answering me in the way she did (at [245] above), *ie*, prefacing her answer with the transfer of properties before mentioning the sum of money transferred.

248 I therefore do not accept Isabel's evidence. I do not find her a truthful witness at all and I cannot rely on anything that she says. After admitting she was not thinking straight when she signed her AEIC, she at least had the grace to admit as much under cross-examination by Mr Bull SC:

> Q: Mrs Koutsos, I'll only ask it once more. Would it be fair to say that this court cannot rely on anything that's stated in your affidavit of evidence-in-chief?
>
> A: No.

Tony's evidence

249 I also find Tony's evidence equally unreliable. I accept Mr Bull SC's submission that: "Isabel was not alone when it came to dishonestly tailoring evidence to suit Ernest's case". In my view, this was more than made out in the case of Tony's evidence.

250 During the time of the injunction proceedings, Tony swore an affidavit making a similar "error" as Isabel in support of Ernest's Injunction Affidavit:

> 5. The money that I received from the sale of the NEL shares which my father divested to me was paid to me by Ernest *when* Ernest bought my shares in NEL.
>
> [emphasis added]

251 By the time it came to his AEIC, Tony told quite a different story. He claimed there was a practice of "vendor finance" set up by Robert Sr, *viz*, when a shareholder bought shares from another, the buyer need not pay the seller immediately but would use the dividends that were declared from time to time to pay the seller. Accordingly, Tony was only paid off in 1987:

> 17. My father's practice for the sale of shares between insiders required the seller to provide vendor finance to the buyer in that payment would come from the dividends that the buyer would receive in the future. In my case, payments were not made to me physically but credited to my running account in Hong Kong. I had no need for funds as my assets and income in Australia more than satisfied all my needs. I believe that it was the same for Isabel, and my mother wanted for nothing.
>
> 18. I have been shown a Memorandum dated 6 April 1987 (attached as "JAPDLS-11") bearing my signature among others. My recollection is that as Bobby was being paid out, Ernest decided to pay me also. However, I did not assume control of the funds but left them were Ernest had put them. On an occasion when I was in Europe on holiday, I decided to put faces to the bankers that Ernest had talked about and called into their office. I became friendly with one of them, and when he contacted me later to say that he was working at another bank, I transferred the funds to that bank.

252 Tony tried to "correct" his Injunction Affidavit in his AEIC by explaining that he did not use "when" in a temporal sense in his Injunction Affidavit dated 4 April 2012:

> 27. … I also said that the money I received from the sale of my NEL shares was paid to me by Ernest, when he bought my shares in NEL. I did not use "when" in a temporal sense – that Ernest paid me for my NEL shares at the very time he bought them. I meant that Ernest paid me for my NEL share because he had bought them.

Tony was cross-examined and got tied up in knots over this unconvincing explanation. Tony showed he was not even familiar with the excuse given in his AEIC. For example, when he was asked what he meant by the word "temporal", his answer was that he did not "understand it very much". He then said it was "legal language to mean what I understood it to be". When he was then asked whether he understood the word "temporal", his answer was: "It's a word I don't use".[279] His inability to give any explanation was clear. Tony then sought to give a completely different explanation for his use of the word "when", claiming that his Injunction Affidavit really meant he received payment when Ernest could afford to pay him:[280]

> Q: … Paragraph 5 of your first affidavit, you say "Ernest paid me when he bought my shares."
>
> A: Yes
>
> Q: And how should it be changed?
>
> A: He bought my shares, he pays me when he has the funds. That's what I meant to say.
>
> Q: You meant to say one thing and you said something quite different?
>
> A: Maybe I didn't explain -- express myself clear enough in this thing.
>
> Q: Mr De La Sala, I'm – you see, look at paragraph 27 of your affidavit of evidence-in-chief …
>
> You see, on the witness stand, your explanation is quite different. Your explanation is that the use of the "when" was because you were trying to say, "When he could pay me, he would pay me." But in your affidavit, you say you used the word "when" because you were trying to say he paid you because he bought your shares.
>
> So which story is correct?

---

279 NE 7 March 2014 at p 142 line 19 to p 143 line 6.

280 NE 5 March 2014 at p 101 line 6 to p 104 line 7.

A: When he can.

…

Q: And that's a different explanation from paragraph 27 [of your AIEC]; correct?

A: It may be so, but that's when he can.

Q: "It may be so". It is so, isn't it, Mr De La Sala?

A: What's –

Q: It's a different explanation in paragraph 27 [of your AEIC] right?

A: Yes.

Tony's new version under cross-examination was to cater for the facts at trial, *viz*, Ernest paid Tony for his shares quite some years after the alleged sale. Upon being questioned by me, Tony conceded, after a very long pause, that the impression I would get from reading his Injunction Affidavit was incorrect.[281]

253 At another point, Tony got his story mixed up under cross-examination and said he sold his NEL shares to Ernest in 1958 – a fact that would have supported Ernest's previous story at the Injunction stage. However, claiming that he was confused, he reverted to the sale in 1967 to match Ernest's story at trial, and Ernest would pay him when he could afford to:[282]

A: I sold my shares – in, in 1958, I think. I sold my shares.

Q: Think about it, Mr De La Sala. I'll give you an opportunity. When did you sell your NEL shares to Ernest?

A: '58.

---

281 NE 5 March 2014 at p 105 line 6 to p 106 line 11.

282 NE 5 March 2014 at p 75 line 6 to p 76 line 13.

Q: Mr De La Sala, you are getting confused because your affidavits --

A: No, I'm sorry, I'm sorry. I am getting confused. I am getting confused.

Q: The reason --

A: I sold -- not that date.

Q: The reason, Mr De La Sala, that you can't keep clear in your mind your story about the sale of your shares is because you never sold you NEL shares to Ernest; isn't that right?

A: What, what -- when, when -- at what date are you talking about?

Q: You never sold your NEL shares to Ernest, isn't that right?

A: No.

Q: Mr De La Sala, just so that we have your position clear again, you said that you sold your NEL shares to Ernest in 1958 and I think you want to correct that. Please go ahead if you do. Stop looking at the lawyers. Just look at the court or look at the screen, but answer the question. When did you sell your NEL shares to Ernest?

A: I sold my NEL shares in 1967.

…

A: It was soon after my father passed away.

254 Tony's Injunction Affidavit did not mention any sale of his JMC shares to Ernest. This was consistent with Ernest's first story at the Injunction Application that JRIC never held any interest in JMC in the first place. However, Ernest then changed his story to JRIC having owned shares in JMC which Ernest allegedly bought in 1970 (see [171(c)] and [182] above). Tony in his AEIC also suddenly recalled the alleged sale of JMC shares to Ernest in 1970. Under cross-examination, however, Tony completely forgot about his evidence relating to JMC in his AEIC; it was revealed that Tony had no recollection whatsoever of any sale of JMC shares to Ernest:[283]

> Q: You have no recollection. Okay. So let me summarise. Your recollection -- your evidence is this: In 1967, you sold NEL to JM -- NEL to Ernest but you do not recall selling JMC to Ernest; correct?
>
> A: Yes, I don't recall, so.
>
> Q: Do you remember selling JMC to Ernest at any other time?
>
> A: I don't recall.

255 Even after taking into account Tony's age and recollection of events some four and a half decades ago, the fact of whether he sold his JMC shares or not and to whom is not a fact one forgets. Tony did work in JMC for a period. He could not have forgotten the two entities, NEL and JMC.

256 When he was pressed further, Tony suddenly remembered that he sold his shares in JMC as part of his interest in Hong Kong. It was then pointed out to him that he had changed his evidence four times and Tony said there must have been some documents which showed he did sell his JMC shares. However, Tony could not tell what or where those documents were:[284]

> Q: That's not what you said in your first affidavit and that's not what you said five minutes ago, so let me summarise:
>
> First affidavit, you can't remember selling JMC or you don't mention selling JMC.
>
> Second affidavit, you recall selling JMC.
>
> Five minutes ago, you can't recall selling JMC.
>
> And 30 seconds ago you now remember selling JMC because it's part of Hong Kong.
>
> A: The fact that I put in this affidavit, whether -- affidavit -- there must have been some documents I came across to say I did sell. I just don't recall -- I -- recall it.

---

283 NE 6 March 2014 at p 200 lines 8 to 16.

284 NE 6 March 2014 at p 203 line 6 to p 204 line 6.

Q: Some documents that you came across? What documents did you come across?

A: I don't know, but I had no interest in Hong Kong.

…

Q: Where are these documents, in a shoe box at home?

A: The thing is that I've sold everything. If there's some more shares there, I sold --

Q: Where are these documents?

A: I don't know where these documents are.

257 Tony's inconsistencies in his evidence and affidavits were numerous. Even after I made allowances for his age, failing memory and hearing difficulties, his evidence under cross-examination was also garbled and muddled. On the second day of his cross-examination, Tony said that he bought over the Australian properties after his mother died; his mother had willed her share in the Australian companies to him and he bought out Isabel and Bobby after she died.[285] He was very vague about Ernest's share although he had earlier said JERIC owned these Australian companies and properties:

Q: And when did you buy out Bobby and Isabel?

A: I think it was 2000 -- I think it was 2000 or thereabouts. I can't remember. About 10, 12 years ago.

Court: Was this after your mother died?

A: After my mother died, her share was, yes, her share was willed to me.

Court: Yes, so did you buy out Bobby and Isabel after that?

A: Yes, I bought out Bobby.

Court: And Ernest?

A: Bobby and Isabel out.

Court: And Ernest?

---

[285] NE 6 March 2014 at p 70 lines 3 to 21.

A: Ernest didn't have any. Ernest had really no interest in it.

Court: But did he have any share in the Australian companies.

A: If he had one, I don't know. He just gave it up. He had no interest. Virtually he's not there.

258 On the third day of his cross-examination, *ie*, 7 March 2014, whilst he was being questioned on the 1987 Memorandum, which allegedly confirmed Tony and Bobby being bought out and the assets in the Australian companies, Tony confirmed JERIC owned the Australian companies and that two properties, *viz*, the house at 27 Carrington Avenue and the farm at Branston ("the Branston Farm"), were part of those assets. He was then asked by Mr Thio SC who owned 27 Carrington Avenue in 1987:

A: In 1987, '87, it was -- well, '80 -- let's have a look. Let me think. Can I look at my notes? I looked at [them] last night. Can I look at my notes here, my notebook.

I allowed him to do so, subject to Mr Thio SC's reservation to look at the "notebook". It turned out to be a post-it note which he looked at and then said clearly without hesitation:

A: I bought the Australian asset in 1993. So in 1993, on that date, the assets were still De La Sala.

Tony was also asked who owned the Branston Farm in 1987 and he confirmed it was owned by De La Sala Pty Ltd, a company incorporated in Australia, in 1987:

A: In 1987, the company owns it because I did not buy the company until, until 19 -- companies -- 1993.

…

Court: -- Branston was still in the company?

A: I bought the Australian assets in 1993.

…

Q: So when you bought De La Sala [Pty Ltd] in 1993, did it have Carrington Avenue --

A: I didn't buy, I didn't buy De La Sala [Pty Ltd] in 19 -- I bought it in 1993.

259 Mr Thio SC then asked about Camila's share in the Australian companies and I noted that Tony got a little flustered. He insisted he did not have to buy her share because she willed her shares to him. When Mr Thio SC asked Tony to confirm Camila owned shares in De La Sala Pty Ltd and JERIC Consolidated Pty Ltd, another Australian company, until the day she died, he refused to let Mr Thio SC finish his question and said:

Q: So I'll ask this one last time. And I'm pretty sure you understand the questions.

A: I understand the questions. I repeat –

Q: No, please give me a straight answer to that question. Your mother remained an owner of De La Sala [Pty] Ltd and JERIC Consolidated --

A: My mother owned --

Q: Please Mr De La Sala, if you do me the courtesy of letting me finish my question. Can we agree that I be allowed to finish my questions, Mr De La Sala?

A: My mother owned the shares.

Q: Mr De La Sala, I haven't asked a question.

A: She died and she willed it to me. I can't explain that better than that, your Honour.

260 Mr Thio SC then asked Tony how much he paid for De La Sala Pty Ltd and JERIC Consolidated Pty Ltd in 1993. Tony's answer was that he did not really know and that Ernest paid them off and/or did the settlement for him:

> Q: And how much did you pay for De La Sala [Pty Ltd] and JERIC Consolidated in 1993? How much did you pay Bobby and Isabel?
>
> A: Ernest, Ernest paid them off.
>
> Q: No, how much did you -- you bought out Bobby?
>
> A: Ernest did the settlement for me. I said I want to own it -- I want to own the shares, and I want my freedom. I wanted the shares because I was running De La Sala, mainly the shopping centre which was the main asset-earning company. And I paid the share -- I paid them off through my funds in Hong Kong which Ernest managed for me and he settled with them. I was, I was, I was debited and they were credited. And that's all I know about it.

261 I digress at this point to note that it is clear to me, and I so find, that Tony had no knowledge of how he allegedly paid off Bobby and Isabel for the Australian properties or how much he paid them. It is important to note that it was *not that he could not remember*. What is clear from his evidence, and I so find, is that Ernest decided on how much should be paid, how that should be paid for, and "settled" the accounts between the siblings. This was, in essence, what Tony said:[286]

> A: I left it to Ernest to settle with, settle with Ernest what he thinks was the amount, and Ernest fixed it and paid them accordingly, basing on the value of the, of different assets, what he thinks it is, and Ernest settled it in Hong Kong for me and paid the accounts in Hong Kong.
>
> …
>
> A: I have an account in -- account in a Swiss Bank where Ernest had -- was looking after for me as my nominee, he can attend to these things. I was in Australia.
>
> …
>
> A: I'm not lying. I never drew money in Australia to use it. I only used it to settle it, to settle them.

---

[286] NE 7 March 2014 at p 33 line 18 to p 35 line 20.

…

A: I didn't need the money, but to pay him, I paid for -- my money out overseas.

…

A: Ernest did the settlement. Ernest settled to me my shares --

262 The foregoing finding is an important one that I shall return to. I digress again to make another finding. There were growing differences between Tony and Ernest over the years as to how De La Sala Pty Ltd, JMC(A), JERIC Consolidated Pty Ltd (collectively, "the DLS Australian Companies") were run and how the Australian assets were being managed by Tony. This resulted in a big quarrel between Tony and Ernest in 2003 and their relationship deteriorated badly after that. According to Tony, they had very little contact thereafter.[287] Tony was "fed up" with being told by Ernest what he should be doing and how he should be managing the Australian businesses and wanted his freedom from interference. This latter part surfaced in Tony's evidence (*eg*, see [260] above). I also accept Bobby's evidence that Tony was always complaining about Bobby and his family staying with Robert Sr and Camila "rent free", and that Camila was tired of this bickering and asked Ernest to settle this with the division of the Australian assets, which Ernest proceeded to do (examined in greater detail below at [448]–[451]) . There is evidence of Ernest making some tallies of properties and values in his handwriting but those notes are undated. What is clear to me, and I so find, is that Ernest proceeded to carve out a large part of the Australian properties to Tony and he "settled" the payment to the other family members.

---

287 Tony's AEIC at para 19.

263 Mr Thio SC brought Tony to his earlier evidence, given the day before, where he clearly said he bought out Bobby and Isabel and bought the Australian properties *after* his mother died. However, Tony now claimed he bought over the Australian properties in 1993:

> Q: So today, Mr De La Sala, you changed your story. Yesterday you said that you bought out the Australian properties after you mother died. Today you even have a date, 1993. You bought them up before your mother died. Which of your two versions is correct, Mr De La Sala?
>
> A: Your Honour, yesterday I was tired and confused. I went home, back to check up the record. I found out I -- I found out I may -- I found out I bought the assets in '93, before my mother, before my mother died, the property -- the assets -- her shares is not mine until she died.

264 Mr Thio SC pointed out to Tony that his "story" was given at 11.49am in the morning, but Tony insisted he was tired and confused. Mr Thio SC then shifted his questions to what were the "notes" Tony was looking at. As alluded to at [258] above, it was a post-it on his notebook. After Mr Singh SC cleared it, it was passed around. The post-it merely noted: "Hong Kong assets 1987" and "Australian Assets 1993".

265 Mr Thio SC pressed on with his cross-examination and it is important to note what Tony said he had looked at when making the notes on the post-it. His attempts to fudge his answers clearly showed to me that he knew he was entering into deep water:

> Q: Mr De La Sala, where did you refresh your memory from to get those dates?
>
> A: These dates -- I *looked at my documents*, I looked at *my files*. When I say documents, I *checked up* on *what records* I have. To get precisely the date. These are the dates I bought the shopping centre and the other date, that's the date was – the date that the Hong Kong asset

– the Hong Kong -- the Nellie shares were fully paid for. And --

Q: What records do you have, Mr De La Sala? What records do you have?

A: When I say records, I looked through *my affidavits* and *different -- whatever paper I had here*. I want to refresh my mind.

…

Q: What document refreshed your mind?

A: I say again, yesterday I was tired and confused. I went back to *look at the papers*. *My paper, whatever papers I have*. I just jot down, these are the days, this is the day I bought the shopping centre, and this is the day I became the owner of the shopping centre when my mother, until she died and then --

Q: Mr De La Sala, please do not evade --

Court: You've got to listen to the question. What papers did you look at last night to get these dates?

A: I just went through *my affidavit papers and everything*.

…

A: I had a look at my affidavit. I have my affidavit. I was looking through it.

Court: Yes. But you see, I think counsel's next question will be that you will not find the 1993 date in your affidavits. So what other documents --

A: I made notes before. I made notes before.

Q: What notes --

A: I made notes before. I have my notes.

Q: What notes?

A: The dates that, the sequence of events. I made notes.

Court: When did you make these notes?

A: I had, when I came here, I made notes just to refresh my mind.

…

A: When I came here, I made different notes to remember different things.

[emphasis added]

This resulted in a request to see the notes Tony allegedly made. I ordered that they be produced and Mr Singh SC said he would take instructions over the weekend.

266 On the Monday following, Mr Singh SC asserted that the document Tony had used to refresh his memory was privileged. It was prepared about two to three weeks ago in the run-up to trial and the document captured communications between solicitors of his firm and Tony at the time. These were allegedly materials prepared by Tony in aid of this litigation. Mr Bull SC and Mr Thio SC objected strongly to this claim of privilege given Tony's description of what he had referred on the Friday before. After hearing the submissions from counsel, I gave some indications as to what redactions could be made for the alleged privileged portions. Mr Singh SC then asked for and was given a short recess to take instructions. When we resumed, Mr Singh SC told the court he would be producing the whole document without redaction, but his client maintained his position that the notes were in fact privileged. I told Mr Singh SC that was not an acceptable condition. If his client maintained privilege, I would proceed to make a ruling. Mr Singh SC then withdrew that condition and handed copies to the court, Mr Thio SC and Mr Bull SC.

267 The document was marked "D-3", It comprised 14 pages of questions and answers and was headed "Possible Questions". When I went through "D-3", it certainly did not appear to be much of an aide memoire; there was little reference to events, dates and source documents. Many of the questions and answers were *in the nature of a script*, *eg*, a question as to why Tony was giving evidence at the trial and an answer like "I am here to tell the truth" is

hardly something someone needs to be reminded of. A sample of some of these questions and answers are as follows:

> Q: You have travelled a long way to be here to support Ernest.
>
> A: I am doing what is right. I am here to tell the truth.
>
> Q: You come from a large family. A proud family.
>
> A: Yes I do.
>
> …
>
> Q: How was Bobby when you were all growing up together?
>
> A: Bobby had a difficult personality and always wanted whatever he didn't have.
>
> Q: So you didn't get on.
>
> A: I didn't say that we did not get on.
>
> Q: So you did not like him.
>
> A: I did not say that I did not like him.
>
> Q: Then what are you saying.
>
> A: Bobby had a difficult personality and always wanted whatever he didn't have.
>
> Q: You are here to support Ernest because you dislike Bobby.
>
> A: I did not say that I dislike Bobby. I am here to tell the truth.
>
> …
>
> Q: Do you think Bobby and his children are greedy and jealous?
>
> A: I think Bobby knows that his children are now doing the wrong thing and unfortunately he is supporting them
>
> …
>
> Q: What? He didn't pay you straight away? In your first affidavit you said that he paid you for your shares when he bought them. Why would you wait so long?
>
> A: I did not mean that he paid me at the time he bought them. I meant that he bought them, as opposed to me giving them to him. He would pay me when he had the

> funds. I trusted him. I knew he would pay when he could.

268 I could find nothing in "D-3" that could be construed as being covered by litigation privilege or by way of communications passing between solicitor and client. I however gave the benefit of the doubt to Mr Singh SC that it was his clients who instructed him to make that claim. I also have little doubt that "D-3" was more than just an embarrassment to Ernest's legal team; it went to the very veracity of their witnesses and the evidential value of their evidence.

Witness coaching

269 From questions that followed to Tony and the other witnesses, it transpired that about three weeks before the start of the trial, there were group "training sessions" for some of the important witnesses in Clifford Chance's Sydney offices over five days. This involved Tony, Isabel, Nicole (Isabel's daughter), Suzanne and Elena (Tony's daughters) and sometimes Ernest. They were typically for about four hours each morning, then a break for lunch and another hour after that. Elena, who was one of Ernest's witnesses, alleged that "D-3" was created pursuant to these training sessions. Elena would make notes during the "training sessions", and after the sessions, she and Tony would attempt to recall the questions and answers Tony had given and record them in "D-3". On top of that, Elena and Tony also purported, out of their own accord they say, to come up with other potential questions that might be asked of Tony and what Tony's answers to those questions would be. This was how the 14-page document, which set out certain "possible questions" Tony could be asked and the corresponding "correct" responses to those questions, came about. Elena further alleged that during the relevant training session, no documents were shown to jog Tony's memory; the documents were shown at other sessions. This was why "D-3" did not contain references to documents.

270 From the evidence it is clear, and I so find, that Tony was not shown any documents to assist or jog his memory at the relevant training session even though Elena admitted that her father's memory needed some assistance.[288] Questions that would likely arise in cross-examination were put to Tony and if Tony made a "mistake" in his answer, no document was shown to jog his memory, though he would be led to the "correct" answer.[289] If Tony gave a "wrong" answer, *eg*, an answer like the NEL shares were sold in 1958 when he had deposed in his AEIC that they were sold in 1967, Ernest's solicitors would call "time" and "discuss with him", after which they would repeat the question so that Tony could practice giving the right answer.[290]

271 I also find that the witnesses, *ie*, Tony, Isabel, Nicole, and Elena, attended each other's training sessions;[291] Tony and Elena confirmed that Tony's training session was attended by Isabel, Elena and occasionally Nicole. Tony and Elena also confirmed that they attended Isabel's training session. Tony, Isabel and Elena attended at least one of Ernest's training sessions.[292] They would have seen and heard what Ernest's "incorrect" answers were. In effect, therefore, these witnesses "practised" their evidence in the presence of each other and Ernest's solicitors and this included Ernest at times.[293] It is also noteworthy that others who were not called as witnesses, Suzanne, Tony's daughter, and Frankie Fletcher, a retired lawyer and Ernest's cousin, (see [312] below) were also present at parts of these training sessions.

288 NE 11 March 2014 at pp 116 to 118.

289 NE 11 March 2014 at p 127 line 14 to p 128 line 20.

290 NE 11 March 2014 at p 128 lines 6 to 21.

291 NE 12 March 2014 at p 136 line 3 to p 137 line 19.

292 NE 11 March 2014 at p 125 lines 9 to 23.

293 NE 11 March 2014 at p 124 line 21 to p 125 line 23; NE 12 March 2014 at p 136 line 1 to p 139 line 6.

The law on witness coaching

272 In my view, and this is something basic that every advocate worth his salt knows, witness familiarisation is perfectly legitimate. Except for a few lucky individuals, our memories are not infallible and dim with age. Generally speaking, the further one goes back in time, the older the witness is, the more inaccurate his recall will be. This means it is permissible to take the witness through his AEIC and then to assist *his* recollection of the facts by referring him to the key documents so that he is able to refresh his memory from these documents and their contents. That is also why the drafting of an AEIC is such an important exercise and it is the solicitor's duty to ensure that what goes into that AIEC, or any affidavit for that matter, is the witness's own "uncontaminated evidence" (see *R v Momodou* [2005] 2 All ER 571 at [62] ("*Momodou*")). Lawyers should *never* put words into the witness's mouth and should refrain from language that is not that of the witness. Neither should they put in events or matters that the deponent cannot recall. Time and again we see words and elegant phrases that a particular witness deposes to in his affidavits, but when cross-examination ensues, it is obvious that the words and language used are not familiar to the witness. The lawyer then exposes his client and his client's witnesses to confusion and great uncertainty in the hands of a competent cross-examiner, all of which is to the detriment of his client's case. This also happens when two or more witnesses use exactly the same words as each other in describing an event or a fact so that when one affidavit is found to be untrue or not quite true, it affects the credibility of the other deponents. This clearly happened when Isabel and Tony aligned their initial stories with Ernest's at the injunction stage without adequate checking of the facts.

273 What is equally clear is that witness "coaching" is not permissible. Guidance and familiarisation by reference to documents becomes coaching when it seeks to supplement or supplant the witnesses' true recollection with another version of events. This includes giving advice to a witness to move away from his original answer to one which favours his case or the person calling him as a witness. It is also wrong to allow witnesses to collaborate on their answers so as to provide a version that is favourable to a party's case instead of relying on their honest recollection of what actually happened.

274 The Plaintiff Companies and ECJ both refer to *Momodou* to support their arguments. In *Momodou*, the defendants were charged with violent disorder and arson at an immigration detention centre ran by a private company. Concerned that its employees might be involved in other criminal and civil proceedings, the company arranged for witness training for some of its employees, two of whom became significant witnesses in the prosecution against the defendants. In considering the effect of the witness training on the safety of the conviction of the defendants, Judge LJ, as he then was, held as follows (at [61]):

> 61 There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of the well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness … The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids, any possibility that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite

> consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. *Where however the witness is jointly train with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated.* Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.
>
> [emphasis added]

275 Judge LJ's guidance was of course given in the context of a criminal case. The extent to which the guidance in *Momodou* should apply in a civil case, and in particular, a complex civil case such as the present, was answered in *Ultraframe (UK) Ltd v Gary Fielding and others* [2005] EWHC 1638 (Ch) ("*Ultraframe*"). Lewison J considered the application of *Momodou* in civil cases and gave the following view (at [25]):

> There are, of course, significant differences between civil and criminal procedure. Not least, in civil cases evidence in chief generally takes the form of a pre-prepared witness statement, whereas in criminal cases it is elicited by (non-leading) question and answer; and in civil cases witnesses are normally permitted to sit in court while other witnesses are giving evidence, whereas in criminal trials this does not happen until the witness has given his own evidence; and even then it is unusual. In criminal cases witnesses do not see each other's statements or depositions; whereas in civil cases it is common for witnesses to see and respond to the statements of other witnesses. *Nevertheless, the principle that a witness' evidence should be his honest and independent recollection, expressed in his own words, remains at the heart of civil litigation too.* In the light of the disappearance of oral evidence in chief from civil cases, it may be thought that the

> importance of the witness's own independent recollection in giving his evidence under cross-examination is all the greater.
>
> [emphasis added]

276 However, Lewison J ultimately held that it was unnecessary on the facts before him to decide on the permissible limits of witness familiarisation in civil cases. He was of the view that that question raised very difficult issues which must be the subject of wide consultation before any conclusions could be reached (at [31]).

277 Indeed, whether and to what extent the principles in *Momodou* apply in civil cases is currently the matter of some debate in the United Kingdom (see Charles Hollander QC, *Documentary Evidence* (Thomson Reuters, 12th Ed, 2015) at para 29-10). In fact, Hollander QC goes further to question the desirability of extending *Momodou* to civil cases on the basis that these principles are not applied in practice and it would be unrealistic to apply these principles to witnesses in civil cases. He contends that group discussion of key issues is inevitable, and if handled responsibly, can actually improve the quality of the witness' evidence rather than detract from it (at para 29-09 and 29-10).

278 With respect, I am not sure I entirely agree with that view. The core principles of *Momodou* are integral to the adversarial process in the reception of evidence leading to the finding of facts in civil proceedings and I do not think it unrealistic to apply them to civil cases; on the contrary I think they equally should apply (see *Ultraframe* at [25] cited above). What I can agree with is that with more complex civil cases, *some* group discussion early on in evidence gathering is inevitable but it always depends on the integrity of the lawyers to ensure it is handled responsibly and to remind potential witnesses of the dangers of coming to a common advantageous view when that is *not* the

recollection of some of them. A good example occurs when the chief executive, who is a witness, insists on a version and his subordinates all fall in line, whether it is the truth or not. When the chain of consistency is broken at the weakest link, or one of the witnesses has an attack of conscience, the edifice collapses spectacularly. So the experienced lawyer knows that he does not take the chief executive's proof of evidence in front of the chief executive's subordinates.

279 In the more complex cases, there are usually documents that can correct faulty memories and I can see nothing wrong if A were to say a meeting took place on a particular date and another witness, B, says that cannot be correct because a document or documents points to another date – that is entirely in the realm of accurate recall and in that context, I agree with Hollander QC that that is likely to improve the quality of the witnesses' evidence. In the Singapore practice, counsel would sometime ask a witness if he had discussed his evidence with anyone else and such questions are perfectly legitimate in cross-examination. Responsible and experienced counsel know the risks they expose their witnesses to if they allow witness training and coaching. There is also nothing wrong with a lawyer asking questions of his witness as the witness might face in cross-examination but it would be wrong to start coaching him on what is the "right" answer to be given. It is important that the answer is his own. Neither is there anything wrong in showing the witness the court room so that he can familiarise himself with his surroundings.

280 In *HKSAR v Tse Tat Fung* [2010] HKCA 156 ("*Tse Tat Fung*") (like *Momodou*, this involved a criminal matter), the Hong Kong Court of Appeal agreed with the principle set out in *Momodou* and stated, at [73]:

> The facts of *Momodou's* case differ significantly from the facts in the present case, where no group discussion sessions took place. Nevertheless the principle applied: the danger in discussing with a witness his evidence prior to trial is that the witness's recollection of events will either consciously or unconsciously alter so as to accommodate what the witness perceives as a better, for whatever reason, version of events. Obviously this is a matter of degree. A brief discussion with a witness of his proposed evidence to clarify some point of ambiguity or uncertainty may be perfectly sensible and desirable in promoting the integrity and accuracy of the trial process. *On the other hand,* ***the repetitive "drilling" of a witness to a degree where his true recollection of events is supplanted by another version suggested to him by an interviewer or other party*** *may be of a sort which justifies a judge giving the witness's evidence no weight or in extreme cases, exercising his discretion to exclude that evidence on the basis that it is more prejudicial than probative, or is in some other way, such as to preclude the defendant from receiving a fair trial.* [emphasis in italics and bold-italics]

281 Elena says that although they were witnesses to the session, they were not allowed to join in. Even if that was true, the passage in *Tse Tat Fung* cited above aptly warns of what can happen; there is a conscious or unconscious shaping of the observer's own evidence as to what is the correct or better answer. Elena, who obviously had a good command of English, was asked whether this was a "rehearsal" and her answer was: "No, it was a training session."[294]

282 In the NSW Court of Appeal decision of *Day v Perisher Blue Pty Ltd* [2005] NSWCA 110 ("*Day v Perisher Blue*"), it emerged during the course of the trial that witnesses for the defendant-tortfeasor, prior to the trial, had communications (via teleconference) with each other and other persons, including the solicitors for the defendant, with respect to the form and content of the evidence they were to provide. The defendant's solicitors had also

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294 NE 11 March 2014 at p 105 lines 5 to 6.

prepared an extensive document for the defendant outlining "possible areas of questioning (to be passed on to the respective witnesses)" and included suggestions as to the appropriate responses which would be in line with the defendant's case (at [22]). The trial judge did not address the plaintiff's attack on the credibility of these witnesses, whose evidence the trial judge accepted. On appeal, the issue was whether the trial judge erred in accepting the evidence of the defendant's witnesses in the light of the conduct of the witnesses and solicitors. The court held as follows (at [30]):

> 30 It has long been regarded as proper practice for legal practitioners to take proofs of evidence from lay witnesses separately and to encourage such witnesses not to discuss their evidence with others and particularly not with other potential witnesses. For various reasons, witnesses do not always abide by those instructions and their credibility suffers accordingly. In the present case, it is hard to see that the intention of the teleconference with witnesses discussing amongst themselves the evidence that they would give was for any reason other than to ensure, so far as possible, that in giving evidence the defendant's witnesses would all speak with one voice about the events that occurred. Thus, the evidence of one about a particular matter which was in fact true might be overborne by what that witness heard several others say which, as it happened, was not true. This seriously undermines the process by which evidence is taken. What was done was improper. The process adopted was more concerned with ensuring that all the witnesses gave evidence which would best serve their employer's case. …

The trial judge's judgment was eventually set aside and a new trial ordered.

283 The extent to which witnesses in a civil case may properly discuss their evidence with one another or the solicitors of the party that had called them as witnesses before it amounts to impermissible preparation has not been directly addressed by the Singapore courts. In my judgment, the matter is obviously one of degree and very fact sensitive and I should not lay down any hard and fast rules other than to adopt the principles espoused in the English and

Australian authorities referred to above. I accept that the line between witness coaching and training and permissible witness familiarisation can be a very fine one, but that should not prevent a court from making that call and sort the wheat from the chaff. Even though that may be a judgment call, I think there must be very few and rare cases indeed where one can say the line has disappeared. Few will argue with the principle that a witness' evidence should be his honest and independent recollection, expressed in his own words. This remains at the heart of civil litigation (see *Ultraframe* at [25]). If, like in *Day v Perisher Blue*, it became apparent that the intention of the witnesses discussing their evidence amongst themselves was to ensure that they would all "speak with one voice" such that their evidence best served one party's case, then the court is entitled to find that the credibility of the witnesses have suffered as a result. In my view, this must be correct in principle and in law.

Application of law to facts

284 In addition to his inability to give *any* details on when he sold his shares to Ernest, how much he was paid or when he was paid, and the many inconsistencies in his evidence, which I have set out above, I find that a large part of Tony's evidence should also be accorded negligible weight due to his witness "training sessions" in Sydney before the trial. There were clearly group "training sessions" and at this advanced stage when several rounds of affidavits and AEICs have been filed, I cannot see any reason for others being present in Tony's or Isabel's or Ernest's "training" sessions except to ensure they all sang the same tune. Those who were not called as witnesses, like Suzanne and Frankie Fletcher, were also present (see also [312] below). There was the clear risk, recognised in the authorities cited above, that consciously or unconsciously, the witnesses would alter their evidence to take into account the evidence of others, whether or not that was his or her recollection.

Although there may have been a reason for this, which was not articulated before me, I can see little justification for these group sessions.

285 Whilst I accept that Mr Singh SC would not have allowed the correction of witness's evidence, he would not have been present all of the time. In my view, and especially on this very fact-dependant case, the consciously silent or unconscious alteration of evidence could very well have occurred. If witness A had one recollection of an incident and saw witness B being "corrected" when expressing a similar recollection, given the facts and stakes in this case, I find it more likely than not that A will change his or her perspective and answer. The same would go when A, who would have given the same answer to a question, saw that such an answer by B was problematic or would give rise to further probing questions in an undesirable direction. I say this because Ernest has a domineering personality and condones no resistance to his wishes and views on what he thinks are important issues.

286 Ernest owns or is in control of huge sums of money. He is estranged from his two ex-wives and has disinherited his two sons. Tony and his children were not listed as beneficiaries when ECJ were drafting the trust documents on instructions from Ernest, and they stood to gain enormously if they gained Ernest's favour. The same goes for Isabel and her only child, Nicole. I have already referred to the large sums of money Isabel received even after she claimed she had been paid in full for her NEL and JMC shares.

287 Tony's reliance on "D-3" is also a serious, probably irremediable, breach of his credibility. His initially evasive answers on what he looked at to refresh his memory informs me that he *knows* "D-3" would be very damaging to his credibility:

(a) First, it is clear that some of the questions and answers were Tony's own opinion and/or position and/or belief. These surely could not be "facts" for which Tony needed to "refresh" his memory. To be kind, this can be viewed as a "model" answer, but to be more direct and candid, and this is probably the case, "D-3" was more of a scripted answer and position he should take.

(b) Secondly, "D-3" did not contain any references to documents to show dates and/or events which could have helped jog Tony's memory. So his use of "D-3" as an aide memoire is untrue.

(c) Thirdly, there were several answers like "I don't know" or "I can't remember". It does seem counter-intuitive to remind oneself that one does not know something or can't remember something. I accept Mr Bull SC's submission that these were put in to stonewall a problematic line of questions or to cut off questions with "I don't know". This is clearly shown where "D-3" indicates that if he was asked about the number of shares he had in LIL, he was to say he could not remember. But in his AEIC, filed just three months before the trial, Tony deposes that he owned 1,200 shares in LIL in 1958.

(d) Fourthly, some of Tony's evidence on the stand bore remarkable resemblance to the answers to like or similar questions in "D-3", *eg*, on the sale of his shares to Ernest. When asked about the price Ernest bought his NEL shares, he repeated the answers set out in "D-3" at page 5, *ie*, he was happy for Ernest to buy his shares, that he trusted Ernest and that he did not need the money. Similarly when asked if he and Ernest had a conversation about the sale of his NEL

shares, his answer was that it was a long time ago and he could not recall the details (similar to the proposed answer in "D-3").

288 Eventually Tony was forced to admit that his initial claim that "D-3" was created for the purposes of refreshing his memory was not true. Tony was unable to come up with an answer as to why "D-3" was created, and like Isabel, retreated to incomprehensibility:[295]

> Q: … Mr De La Sala, is it your evidence that you created the note to refresh your memory?
>
> A: No
>
> Q: Mr De La Sala, why did you create "D-3" for?
>
> A: If I want to refer to a certain thing to -- but not to read it on the -- for the heck of reading it.

Tony eventually conceded that "D-3" was *not* a record of his independent recollection, but was the fruit of his discussions with Elena and Ernest's lawyers about his evidence.[296]

289 I also find Ernest's instructions to claim litigation privilege in respect of this document very disturbing. Clearly "D-3" was not subject to litigation privilege and did not contain any communications between solicitors and clients or client's witnesses.

290 The credibility and accuracy of the important and relevant parts of Tony's evidence on the issues before me has been severely compromised and I am constrained to give negligible weight to most of his evidence.

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295 NE 12 March 2014 at p 99 lines 11 to 16.

296 NE 12 March 2014 at p 112 line 25 to p 113 line 19.

Bobby's evidence

291 Of the four siblings, I find Bobby's evidence to be the most reliable. He was very emotional when he spoke of his father's love for the family and what a principled and upright man he was. His evidence also suffered somewhat from recall of all the details and from his impaired hearing, especially when he answered questions, which he thought were being asked, without looking at the computer screen. However, his main evidence was clear and unwavering, *viz*, he did not sell his NEL and JMC shares to Ernest, he did not recall any discussions or meetings with Ernest, his other siblings or his mother relating to a sale of their interests in NEL to Ernest, his father had set up a guarantee for the De La Sala family in NEL and his father retained *full* control of NEL in his lifetime even though he held no shares in NEL. He was very clear that the "tree" that his father had established was always there. They partook of its fruit, *ie*, the dividends, but the tree was to remain for future generations.

292 Bobby also held his father's 7 July 1957 Avarice Letter in the highest regard and made sure his children read it. He deposed that it remained an important guidance for the De La Sala family even decades after his father passed away. He said that JERIC continued to refer to that letter to remind themselves of their father's philosophy, his guidance and objectives regarding his legacy for his descendants. Bobby then gave instances of this letter's subsequent circulation:[297]

(a) In a fax dated 18 April 1998, Ernest sent a copy of this letter to Isabel and copied it to Bobby, saying "if you, Tony and Bobby have lost your copies, I shall fax you a copy";

297 Bobby's AEIC at paras 22-25.

(b) In an email dated 6 May 2007, Ernest said he wanted to send a copy of this letter to James and Christina and that they could send a copy to Edward and his family;

(c) In an email from Ernest to Isabel and Cecil dated 7 May 2007, entitled "RPL Treasured Letter on Avarice 07.07.57.pdf", Ernest sent a copy of that letter to Isabel for her and her family's "perusal and guidance";

(d) Bobby also spoke to his children about this letter and in his letter to Ernest thanking him for remitting US$2,669,500 to him and Terrill on 25 March 2008, Bobby referred to the letter and its missal.

293 Bobby's evidence that he was Robert Sr's *aide-de-camp* and personal secretary was not challenged. I accept his evidence that he was very close to his father and stayed with his father and mother at 27 Carrington Avenue in Sydney. As noted above, although Robert Sr's letters mention plans to launch Bobby into the business when he comes of age, as well as sending Bobby to various places to familiarise him with the family business and to meet with bankers, there is no mention of how he fared. It is more likely than not that Robert Sr found that Bobby was not as astute in business as Ernest was and found him a role instead as his personal secretary. I also accept that Bobby gave Ernest a power of attorney and signed many documents when the latter requested that of him.

294 Given my preliminary conclusions from Robert Sr's letters (above at [130]–[139]), Bobby may have been mistaken that his father had actually set up a trust in the full legal sense of the word and on the terms of the Avarice Letter. But that is not a fatal flaw in his evidence. His AEIC explains why he held this view. He cited the many letters where his father expressed the fact

that LIL/NEL was the family's guarantee, and the many instances where it was clear that although he did not own any shares, Robert Sr had absolute control over LIL/NEL. There is ample evidence of this fact. Robert Sr must also have articulated those very same sentiments and plans that are found in his letters to his children in his lifetime. It should also be borne in mind that Camila, who of all persons would know what her husband wished and wanted, was around for some 38 years after he died. She only passed on in July 2005. The evidence shows that although Ernest ran all the businesses, she remained the matriarch of the family. I have also referred elsewhere to objective evidence of Ernest's love for his mother. What Bobby did not realise was the legal significance of those letters where Robert Sr spoke of liquidating NEL and distributing the proceeds (see above at [132(b)] and [132(d)]). Hence, no amount of cross-examination could shake Bobby from his evidence that his father had planted a tree in his lifetime that bore fruit for his descendants.

295 I also note that by the time Robert Sr passed away, certain practices had already been set in place. When dividends were declared, they had one-third of the dividend to spend as they wished and two-thirds went back into a pool for family investment, hence the reference to the "tree". Swiss Bank accounts had been opened in each of their names and JERIC each held 20% of NEL. There was also a set practice for money to be remitted into Australia either by way of loans for purchases of, *eg,* real property, or by way of "gifts".

296 As noted above, when Robert Sr passed away, Ernest naturally slipped into the driver's seat and took over his father's role in looking after *the family's* as well as his own assets and businesses. He remained the tax exile to be "bullet proof" from the Australian tax authorities. Ernest sent back "scorecards" to his siblings to inform them how their investments were doing. I have elsewhere in this judgment referred to the not insignificant number of

documents spread over the years which shows Ernest managing the businesses, assets and investments of JRIC. Ernest carried on the practice of paying out only a part of the dividends or income in each year whilst ploughing back the larger portion for re-investment. Not being legally trained, Bobby used terms like "family legacy" to describe this state of affairs and compared that to a tree and the fruit that it produced. To him that was a trust or "legacy" established by his father and Ernest had taken the place of his father as the custodian.

297 In the essential facts, Bobby never wavered even under prolonged cross-examination. Bobby held firmly to his evidence that Ernest continued to manage assets on behalf of the family after his father's death. Bobby referred to the numerous times he asked for and received sums from "his" monies, *ie*, the fruit in his Swiss bank account; he was clear that this was only the "fruit" and the tree always remained. His evidence was also very clear that he would never have sold the "tree" as his father's wish was that the "tree" was not to be touched. He testified: "And the tree had trustees … which Ernest claimed to have purchased, which I would never have done because my father said it's not to be touched".[298]

298 I also accept Bobby's evidence that it was Ernest who started creating all the complex corporate structures so that it would be difficult for anyone to identify the beneficial owners of the family assets. There is also incontrovertible evidence of Ernest sending a tape dated 5 March 1969 to Bobby explaining the structures and investments and "scorecards" of his 20%, Bobby trying to understand the intricacies of what Ernest had done, Bobby

[298] NE 13 October 2014 at p 42 line 18 to p 43 line 6; NE 14 October 2014 at p 130 lines 2-16; NE 15 October 2014 at p 28 line 20 to p 29 line 6 and p 130 line 22 to p 131 line 3.

writing back to Ernest to seek clarification and Bobby's own sketch of the companies and the bank signatories. Ernest was still sending 'scorecards' to Bobby on 14 August 1975 and 24 October 1975. These will be examined in greater detail below (at [416]–[418]).

299 It is also clear, and I so find, that *all* of the family members, including Bobby, trusted Ernest, as they trusted their father, to take complete charge of the "family's" businesses, assets and investments. We see that Ernest carefully kept "scorecards" in the decades following Robert Sr's death. Like his father, Ernest was akin to the captain of the ship and no one questioned him. I would add that I am sure Ernest relished that role. Ernest had the absolute discretion when to advance monies for investment, whether an investment would be made or not and he did turn down the grandchildren's request for funds in various ventures which he did not approve. When the grandchildren were older, they could bring "worthy" investments or projects to the "friendly banker".

300 It was never put to Bobby that he sold his NEL and JMC shares for the specific reasons alleged in Ernest's AEIC, *viz*, that Bobby did not want to be subject to the vagaries and risks of the shipping business, in which he had no experience in, that Bobby had a minority interest which would have made it difficult, if not impossible, to sell the shares on the open market or that Bobby was willing to sell his NEL/JMC shares to Ernest due to Ernest's commitment to follow an alleged "convention" established by Robert Sr. It was also not put to Bobby that Ernest had bought NEL from JRIC using the convoluted series of back-to-back loans described in Ernest's AEIC or that Ernest bought JMC through a purchase by his nominee, CE, in 1970. I accept Mr Bull SC's submission that the foregoing reasons were only introduced for the first time in Ernest's AEIC and Bobby had no opportunity to rebut the same. All these

were matters that *should have been put* to Bobby (see *Browne v Dunn* (1893) 6 R 67; and *Ong Jane Rebecca v Lim Lie Hoe and Ors* [2005] SGCA 4 at [70]), and Mr Singh SC's formulaic recitation of Ernest's case with an invitation to agree or disagree is not fairly putting the case to Bobby as required under the rule in *Browne v Dunn* (see *Hong Leong Finance v United Overseas Bank* [2007] 1 SLR(R) 292 at [42]).

301 On 14 December 2011, Ernest called without prior warning at Bobby's house. This was after ECJ had revoked his signing authority on 8 August 2011 and then reinstated it on 9 August 2011. Bobby had been asleep and was woken up. Ernest wanted to have a one-to-one talk with Bobby. Unknown to them, Terrill taped part of the conversation. A transcript was produced in the evidence. Ernest says the transcript is not complete but accepted that it contained the "gist" of their conversation. This evidence is of some importance because neither Ernest nor Bobby knew their conversation was being taped. What appears quite clearly is that the two old men were talking over each other quite often. It is also clear that their hearing affected the two-way flow in that at times they were talking at cross-purposes and were quite excited and heated at times.

302 Ernest says the transcript clearly shows there was no family trust. It shows Ernest expressing the view that Edward was the only one who was sincere in saying sorry to Ernest. The relevant portion of the transcript reads:[299]

> Ernest: But the others, the way they talk, flowery language, *the family heritage, which is a lot of – it was a lot of hogwash.* This is the great writer. He's put that there – all this, all the family heritage, all this, this is a lot of hogwash, we feel compelled as directors – okay I will wait here. This situation goes beyond …

[299] Bobby's AEIC at RPDLS-65 (p 326).

> Bobby: [unclear]
>
> Ernest: This situation goes beyond – what?
>
> Bobby: I'm listening to you, you just talk about the heritage. You just told me before, I asked you, are we going to have a family trust, you said no, all these family trusts, I don't trust the banks [with]. We've got to form it ourselves, we're going to – I said we're going to have a [tree], all the same thing, where they're going to look after the tree so it will go on and on and on.
>
> Ernest: Yes I …
>
> [Over speaking]
>
> Bobby: Right? And you were doing that. They were going to have to be trained under your – you were the mentor and you would train them, you would do all those things. They were there seven years; they should be well trained by you, because they should be. …

303 Mr Singh SC submits that when Ernest said the "family heritage" is "a lot of all hogwash", Ernest is specifically stating that there was no family heritage *and* Bobby *did not* contradict him. However, I think Mr Singh SC makes too much of the use of this phrase and it must be taken in its proper context.

304 First, these are two old men who are hard of hearing, are excited and emotional and are speaking over each other. While I accept that in the passage quoted above, they do seem to understand what the other is saying, Bobby's immediate response to Ernest is, and this is a pertinent point to note, "unclear". I have listened to the recording a number of times, but like the transcribers, I cannot make out what was said. Bobby obviously said something and that caused Ernest to stop, and repeat "This situation goes beyond", and then ask "what?"

305 Secondly, Bobby immediately goes on to refer to Ernest's talk about "family heritage" and says to Ernest: "*You just told me before, I asked you, are*

we going to have a family trust" [emphasis added]. This is significant because Bobby's response to Ernest's claim that the "family heritage" was all "hogwash" is a reference to a family trust that they had spoken about earlier, and that time must have been before ECJ fetched up in Singapore because Bobby states that they were there – to be trained by Ernest to "look after the tree so it will go on and on and on".

306 Thirdly, whilst the foregoing does seem to indicate that there was no trust as such set up, it must be taken in context with what Bobby says immediately after that: "you [meaning Ernest] said no, all these family trusts, *I don't trust the banks [with]. We've got to form it ourselves*" [emphasis added]. This plainly shows Ernest does not want to have the family trust run by banks because he does not trust them to do so. And it is of significance that Bobby immediately continues: "we're *going to have a [tree], all the same thing, where they're going to look after the tree* so that it will go on and on and on" [emphasis added]. Ernest's reply, as I find his usual evasive character coming to the fore when he is faced with something he does not like to hear, was that there was no training and that ECJ went to Singapore and were doing their own visits. This was clearly untrue. What is significant is that *Ernest did not challenge* Bobby's statement that the "tree" must be looked after "so it will go on and on and on".

307 The transcript must also be read fairly in the context of the overall history of the family. When Robert Sr died, everything he had went to his widow and four children in equal shares. Ernest took over running the businesses and NEL and soon thereafter, had it hidden behind an orphan structure. He invested the money and assets on behalf of JRIC, paid out part of the dividend or income in each year whilst retaining the larger portion for re-investment and appeared to give them periodic reports on how their share of

the investment was doing. At the time of Robert Sr's death, the main business was still shipping and Ernest was already running the shipping business. However, by this stage in December 2011, the businesses had been largely liquidated into funds and Ernest was investing the assets, *ie*, these funds. There was no clear successor to do what he was doing. Edward and Christina were the most qualified and suitable of Robert Sr's grandchildren and Ernest had initially, so I find, taken a liking to James. He was training them as the future custodians. Ernest and Bobby were in the process of carrying out Robert Sr's "*wishes"* that had been expressed in his Avarice Letter and in an earlier letter dated 2 November 1950*, viz*, "[LIL] which will remain in the Lasala family until doom's day *if my sons and sons' sons so desire it*" [emphasis added].

308 The transcript of that meeting between the two brothers reveals more than the short exchange that Ernest has picked out to support his case, which as I have found above, does not quite do that. It is very clear from this transcript that:

(a) The funds that ECJ had interfered with in Singapore were allegedly Ernest's funds, but very *significantly*, Ernest whilst emphasizing that point, never said, expressly or impliedly, that everything held in the Plaintiff Companies belonged solely to him.

(b) Bobby was upset, not so much with ECJ revoking Ernest's signing authority but for making him, Bobby, sign papers when he never wanted to sign any more things for Ernest after their differences over some business deals in the past.

(c) Bobby (and later Terrill who joined them near the end), was very annoyed that when he wanted some of his funds to be transferred

to him in Australia, Ernest sent it to him from Bobby's own account and in his name. This was denied by Ernest who insisted it was routed through Vancouver so it could not be traced to Bobby and said it was given as a "gift" to protect Bobby.

(d) What really upset Bobby, Terrill and the children was that when Bobby wanted to bring back US$20 million of "his inheritance", with US$5 million for each of his four children, Ernest kept claiming to the children that it was his (*ie*, Ernest's) money:[300]

Terrill:	…the money that Bobby gave them, five million each, you keep claiming it was your money that you gave to them?
Ernest:	Yes, that's where it came from, yes.
Terrill:	No, to the children's faces and it makes us feel embarrassed and we really felt bad for the children because – and they felt really hurt from what you said to them.
Ernest:	They got their five million each is what I …
Terrill:	No, that was what Bobby's inheritance was.
Ernest:	What?
Terrill:	Bobby's inheritance was divided to our children.
Ernest:	Let me talk to Bobby, will you.

(e) Bobby and Terrill were very upset that Ernest had called ECJ criminals and that instead of approaching them directly, he had dictated a letter and got Isabel to deliver it as her letter.

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300 Bobby's AEIC at RPDLS-65 (p 329).

309 In conclusion, of all the four siblings, I accept Bobby's evidence as containing the most truth, save for his mistaken belief that there was a trust in the full sense of the legal term set up by Robert Sr. I have set out above the reasons why he had this mistaken belief and find that he held this belief not for a dishonest reason or for some ulterior motive. The fact remains that Ernest was looking after, investing and managing JRIC's shares of the assets and funds left to them by Robert Sr. Ernest was paying out the "fruit" over the years but retained part of the "dividends" to reinvest. In doing so, Ernest did likewise for his own assets and monies outside of JERIC. Bobby understood the principle, which he thought always existed, that they would only partake of the fruit of the tree that his father had planted, but that tree was not to be touched so that it wold go on and on, producing fruit for future generations, and it was looked after by custodians like Ernest, and in time, with Ernest's training, ECJ.

Evidence of the secondary witnesses

310 I now turn to the evidence of the secondary witnesses and that of ECJ.

Elena's evidence

311 Elena, who gave evidence on behalf of Ernest, is the daughter of Tony. She describes her occupation as "secretarial and office administration" in Tony's company where she has worked for about 20 years. Elena absolutely denies telling her cousins, Edward and Christina (as they have alleged), on 22 July 2013 that the wealth of the De La Sala family was to be managed, preserved and protected for future generations. She also says Edward and Lyndel never mentioned or alluded to any trust or legacy whether created by Robert Sr or otherwise and that her father, grandmother, Ernest, Bobby or Isabel never mentioned or alluded to any trust or legacy.

312 I found Elena to be an alert but evasive witness. At times, she was hesitant and her tone and long pauses betrayed the reliability of her answer when she was asked a question which she was unsure would prejudice Ernest's case.[301] Her answers were otherwise quick but apt to either be evasive or obstructive; for example:

(a) When she was first asked about Robert Sr's Avarice Letter, her answer was, like the model answer in "D-3" which she typed out for her father Tony: "May I please see this letter you [are] referring to?" She repeated that request once more. When Mr Bull SC refused to do so and asked: "No, Mrs Thasler, I'm asking you, have you seen a 1957 letter written by your grandfather?" Elena's response was: "There's only one 1957 letter I recall." When she eventually admitted having seen that 1957 letter written by her grandfather, Mr Bull SC asked her: "Just from your memory -- and I'll show you the letter in a moment -- would this be the one that he wrote when he was in Tokyo?" She answered with little hesitation: "Yes". She knew all along about the Avarice Letter and what counsel was asking her, but she feigned uncertainty as to which letter it was. When she could no longer pretend, she could recall details.[302]

(b) Elena said that from May 2012 till the trial, no one gave her guidance on what to look for in her father's files. Mr Bull SC asked Elena whether Frankie Fletcher knew Elena was sending him documents from her father's files. Elena was quick to evasively answer: "I don't know what Frankie [Fletcher] knew." Mr Bull SC

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301 NE 10 March 2014 at p 114 lines 21 to 24.

302 NE 10 March 2014 at p 84 line 20 to p 85 line 11.

then asked: "Did you tell Frankie Fletcher where the documents [that you were sending him] came from …?" Elena then said "Yes" and to a follow-up question confirmed that she told Frankie Fletcher that the documents had come from her father's files; but then she added gratuitously "also from my aunty Isabel's files". Mr Bull SC then asked: "So you do know that Frankie Fletcher knew that these came from your father's files because you told him, right?" She had no other alternative but to admit it with a: "Yes".[303]

(c) There was another instance in relation to the search for documents where Elena said she could not recall whether she sent Frankie Fletcher any text messages. She was then shown her email to Frankie Fletcher dated 4 September 2012 where she referred to a text message that she had just sent him. Even then, when asked: "Would you agree with me, having seen this, that you did send Frankie Fletcher text messages about your search for documents?" Elena's answer was "No." When questioned further on the apparent contradiction in her answers, she explained that the question was not clear because it referred to the *plural*, but she did send *a* text message as referred to in her email and she, unbelievably, did not remember sending others.[304]

(d) I pause at this point to say more of Frankie Fletcher. He remains a shadow who fleetingly sweeps across the screen every now and then. He appears to be (and it matters not for the purposes of this judgment if he is not) the son of BPC Fletcher who married Benita, Camila's sister and who was for some time, Robert Sr's personal

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303 NE 10 March 2014 at p 109 line 1 to p 110 line 5.

304 NE 11 March 2014 at pp 80 to 81.

secretary. Ernest states that Frankie Fletcher is his cousin. Frankie Fletcher was first practising as a solicitor and then a barrister in NSW. At the time of these proceedings he had retired. He is someone whom Ernest involved quite intimately in the De La Sala businesses over the years. He was listed as a director of JMC in its prospectus for its proposed listing (which did not materialise). He also served as a director of COM Inc, DOM Inc and SOV Inc and assisted Ernest in his divorce with Hannelore back in 1969/1970. He is also mentioned in Ernest's audio recording of 8 November 1969 where he says: "If there is any legal jargon which you don't understand I suggest … you solicit the assistance of Frankie". Frankie Fletcher is also mentioned in Tony's letter to Ernest dated 11 October 1978 during Ernest's divorce hearing before the Privy Council. Ernest admitted in cross-examination that Frankie Fletcher assisted him in those divorce proceedings. Mr Singh SC also stated: "Frankie Fletcher has been acting on behalf of and assisting our client to communications for the sole purpose of this litigation".[305] From Elena's cross-examination, it appears Frankie Fletcher acted as a "co-ordinator … a link between" Elena and Clifford Chance during the search for documents.[306] Frankie Fletcher is also copied on email remittance instructions from Ernest or his bankers.[307] Ernest admitted in cross-examination that Frankie Fletcher had a hand in drafting Ernest's first affidavit[308] and as noted above, Frankie Fletcher was present during the "coaching sessions" in Sydney and was

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305 NE 6 March 2014 at p 106 lines 1 to 4.

306 NE 10 March 2014 at p 102 line 7 and p 102 line 1 to p 110 line 14.

307 See Ernest's Supplementary List of Documents dated 12 December 2014, Items No.58, 17 September 2013 and No.62, 12 October 2013.

308 NE 21 March 2014 at p 40 line 9.

> in particular with Ernest during his session. From the cross-examination of Tony, it appears that Tony learnt details of Ernest's new will, which Tony said was prepared by Frankie Fletcher, from Frankie Fletcher himself.[309] Frankie Fletcher was also in Singapore during part of the trial and staying in the same hotel as Elena and Tony. I accept Mr Thio's submission that Frankie Fletcher is someone who would have relevant evidence on the issues before me and when the possibility of the Plaintiff Companies issuing a subpoena to compel his evidence arose, it seems Frankie Fletcher coincidentally left town.[310] I also believe that Frankie Fletcher was overseeing the search for documents and not just a "co-ordinator" as Elena would have me believe. He is clearly the legal "advisor" in the background assisting and advising Ernest.

313 I have referred to parts of Elena's evidence on the creation of "D-3" and how this document came into being above; the answers also had to be painstakingly drawn out from her and I should add that I do not accept some of her answers as to how these questions came to be put down on paper. There is a clear inconsistency when she claimed the questions and answers on "D-3" came from the "training sessions" but later admitted some of them were typed up subsequently with her father after they had left Clifford Chance's office. She is clearly partisan and was behind her father's decision to support Ernest's side in this dispute. In my view, this is clearly because of the large potential benefit that she in particular, and Tony's offspring in general, will stand to gain if Ernest, who seems to have excluded Tony's offspring from his estate after Ernest's quarrel with Tony in 2003, were to succeed in these

309 NE 5 March 2014 at p 178 line 7 to p 180 line 4.

310 NE 11 March 2014 at p 120 lines 3 to 13.

proceedings. I have also noted Elena's answer that the house she is currently staying in is in the name of her parents, that it was bought from Isabel and that she does not know how they paid Isabel.[311] She was subsequently caught out in further cross-examination when Mr Thio SC showed her documents which recorded her as the owner of her house. Having painted herself into a corner, she then claimed that her parents lent her the money to buy the house and she mortgaged it to them, but she considered them to be the owners.

314 Elena acknowledged that she received fairly sizeable sums of money from Camila on the latter's birthdays – US$57,339.45 in July 2000, US$128,512.25 in July 2001, US$116,279.07 on 16 July 2002, US$100,000 on 15 July 2003 and US$100,000 on 15 July 2004. There was one final "birthday gift" to the grandchildren in 2005 after Camila's passing, but this came from Tony. Elena pretended that she did not notice that the sums of money came from CFC. Given her alertness and the nature of her work, including preparing financial documents for her father, I cannot believe she did not notice this or that the funds came through a SWIFT payment. She steadfastly maintained that it was from her grandmother during her cross-examination on 10 March 2014. Elena was also aware that Camila's other grandchildren received similar gifts on Camila's birthday.

315 I should mention that Ernest, in his eagerness to show that all the money was his (and no doubt to also bolster his claim that Camila's estate had no more money in it), claimed in his affidavit that he occasionally told the grandchildren that the money from Camila's birthday gifts actually came from his funds (however, I note Nicole's testimony was that Ernest had never informed her of this).[312]

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311 NE 11 March 2014 at p 148 lines 1 to 17.

316 Elena claimed that she had once heard Ernest say Camila's birthday gifts were actually his monies.[313] This occurred when Tony and Ernest had their big quarrel in 2003 and Ernest said, in relation to Camila's money gifts to her grandchildren on her birthday, "This is my money". Elena claimed she had no idea why Ernest said this and that she was "shocked" (she repeated this twice). She asked her father if this was true and she claimed Tony said he did not know. Mr Thio SC then referred her to an email dated 18 July 2004 from Ernest to Elena's sister, Suzanne (or Suzy), where Ernest writes:

> Greetings Suzy,
>
> For you information the present you received from Grandma are from my personal funds.
>
> You and the others benefit from my birthday present to grandma.

That email was copied to Elena, but she claimed to have forgotten it. Elena admitted that this did not sound like an angry email but she had no idea why Ernest would send such an email. When she was asked to confirm that her evidence was that she was very sure and that she always considered "the gifts from grandma to be genuinely gifts from grandma", she said: "Yes, that's right".[314]

317 I therefore do not accept her evidence. I also note, in passing, that while I have heard the evidence of Elena and Nicole, Elena's siblings, Pastor and Suzanne, were not called to give evidence. As noted above, Suzanne was also present at the "training sessions" at Clifford Chance's Sydney office.

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312 NE 13 March 2014 at p 77 lines 8 to 12.

313 NE 11 March 2014 at p 159 line 3 to p 160 line 23.

314 NE 11 March 2014 at p 161 line 1 to p 162 line 9.

However, I hasten to add that I draw no inference from this, adverse or otherwise.

Nicole's evidence

318 Nicole is the only child of Isabel and her husband, Cecil. Ernest is her godfather. Nicole's short AEIC was similar to Elena's, denying that she made representations to ECJ that the wealth of the De La Sala family was managed, preserved and protected for future generations and that her mother and father, her grandmother, Tony, Ernest and Bobby never mentioned any trust or legacy set up by her grandfather for the whole De La Sala family or that one was established after he died. Under cross-examination, she denied having read or heard about Robert Sr's "Avarice Letter". I find that hard to believe, given the importance the family placed on that letter and that Ernest had provided a copy to Isabel in case she had misplaced it.

319 When she was shown Ernest's affidavit where he claimed that he had occasionally told the grandchildren that Camila's birthday gifts came from his funds, Nicole said Ernest did not tell her this. Nicole was then asked whether she had been asked to write a thank you note to Ernest for the gifts. She recognised the danger in that question because this is the only time she hesitated in her answers and for all her good command of the language, her choice of words was deliberate:

> Q: … Did your Uncle Ernest ever tell you this?
>
> A: No.
>
> Q: Were you ever asked to write a "thank you" note to Ernest saying "thank you for the gift"?
>
> A: Grandmother would ask us to do that.
>
> Q: Grandmother would ask you to write a "thank you" note to your Uncle Ernest?

A: *Yes, because he -- she got him -- he authorised the transfers for her.*

Q: So as far as you were concerned, the "thank you" note was really just to thank your Uncle Ernest for helping arrange the transfers?

A: Yes.

Q: Right. It wasn't a "thank you" note [to] your godfather, Uncle Ernest, to say, "Uncle Ernest, thank you for the gift"?

A: No.

Q: … Why would your Uncle Ernest tell the grandchildren, your cousins maybe, that gifts came from his funds, when they were your grandma's gifts?

A: He might have told the other grandchildren, but I don't recall it.

[emphasis added]

320 Elena and Nicole's evidence on this point is noteworthy. Both started off with testifying that they believed their grandmother's birthday gifts came from her funds. However, they could not deny that *all* the grandchildren had to write "thank you" cards each year to Uncle Ernest for their grandmother's gifts. To explain this inconsistency:

(a) Elena said she was shocked when she heard for the first time in 2003 that the funds were from Ernest and not Camila. However, this does not answer why she sent the thank you cards to Ernest in the years before 2003. Elena maintained this despite being shown Ernest's email to her sister Suzanne which was copied to her.

(b) When asked about why there were "thank you" notes to Ernest thanking *him* for the gift, Nicole evidence was not that Ernest "arranged" the payments from her grandmother's money, but (after some hesitation) that he "authorised" them. This begs the question of why Ernest had to "authorise" the payment if the money belonged to

Camila. With Nicole's command of the language, she would know the different nuances in the meanings of "arrange" and "authorise".

(c) I have no doubt that Nicole and Elena would have seen, over the years, how much Camila loved Ernest and how appreciative she was of his role in the De La Sala family. So between mother and son, why was there a need to "authorise" the gifts unless it was not Camila's money or that Ernest was holding and having control of Camila's money?

321 Bobby's children, on the other hand, accepted that there was this practice and it would have been consistent with their view that there was a family trust and Camila had a beneficiary's share in that trust. At the very least, it would have meant that Ernest had some "control" over Camila's monies and Ernest's consent was needed to make those gifts. I note that *none* of the grandchildren who gave evidence before me said this practice was to ensure the money they received was seen as "gifts" from someone, *ie*, Ernest, who was not a tax resident in Australia, as compared to Camila, who was and subject to taxation on her income outside Australia as well.

322 Nicole's house was also bought with funds from her parents. She said she was an estate agent by occupation but inexplicably said, at the beginning, that her house was mortgaged back to her parents. She claimed that this was to protect her in the event of a divorce. Later, when she was asked whether she made payments to repay her "mortgage", she quickly changed her story to there only being a caveat registered against the property and that she did not have to pay her parents back. Nicole is far too sharp, and especially since she is an estate agent, to make such an error over a mortgage and a caveat.

323 On balance, I too do not accept the evidence of Nicole. She clearly was out to tell a story consistent with that of her mother. I also cannot help but think that Elena and Nicole know there is a lot of money at stake, *a fortiori*, in the case of Elena for reasons I have stated elsewhere in this judgment. In saying so I have not failed to take into account that Nicole is the only child of Isabel.

Ostenfeld's evidence

324 Ostenfeld, called by Ernest as a witness, started off in JMC in 1955 as a first mate and later became a master of JMC's vessels. He took on a shore job at the behest of Robert Sr around 1956 or 1957; he later became a director in 1958. Robert Sr made him a Deputy Managing Director of JMC in 1964. In accepting Robert Sr's offer of 12 August 1956 to take on a "landlubber's" appointment as Marine Superintendent, Ostenfeld replied on 18 August 1956, *inter alia*, and pledged: "I will endeavour to be a useful and loyal lieutenant to your son Ernest." Unsurprisingly, his AEIC supported Ernest's case. There is evidence and I find, that Ostenfeld was and remained very loyal to Ernest over the years to the point of doing whatever Ernest requested him to do, especially in signing corporate documents and saying that he never heard of any family trust in all the years he was with the JMC group.

325 In his AEIC, Ostenfeld deposed to the JMC practice of retiring directors selling their shares to the remaining directors and if the purchaser-director did not have sufficient funds to pay the outgoing director, the company would extend him a loan with 6% interest. That loan would be settled out of subsequent dividends declared on the purchaser-director's shareholding in JMC. Unfortunately for Ernest, his reference to this convention that he allegedly used to purchase JRIC's NEL and JMC shares

was different in a very material respect. Ernest said *the seller*, *ie*, JRIC was paid over time by the declaration of dividends. Ostenfeld's "practice" was that the seller got paid immediately through the company's loan to the buyer and it was the buyer who paid off the JMC loan over time. Under cross-examination, Ernest was forced to concede that Ostenfeld's description of this "practice" was different from Ernest's "vendor finance".[315]

326 Under cross-examination, Ostenfeld was driven to say there were two practices, one for directors of JMC and another for the De La Sala family.[316] This was not true because on Ernest's case, JRIC had sold their shares in NEL to Ernest in one go in 1967 and there was nothing before 1967 to establish any "practice" for the De La Sala family. Eventually, Ostenfeld admitted that in the case of the De La Sala family, there was no convention and it was a "one-off case".[317] As for Ernest, he eventually conceded that there was no existing "convention" for NEL when he allegedly acquired JRIC's shares in 1967, so the "convention" for his alleged acquisition must have come from the existing convention for JMC.[318]

327 In Ostenfeld's Injunction Affidavit filed on 5 April 2012 in support of Ernest during the injunction proceedings, Ostenfeld states that Edward first joined the JMC group as an administration manager in 1994 and left in 1999. Ostenfeld then categorically states that Edward did not at any time mention to him or assert that there was a "family legacy or trust" over the John Manners

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315 NE 20 March 2014 at p 23 lines 3 to 5.

316 NE 27 February 2014 at p 46 line 17 to p 47 line 5.

317 NE 27 February 2014 at p 48 line 17 to p 49 line 5.

318 NE 20 March 2014 at p 22 line 19 to p 23 line 2.

Group. He asserted: "I would have been very surprised by, and would certainly have remembered, any such statement."

328 However, there was a note made by Ostenfeld of a telephone call from Ernest in the morning of 4 December 1997.[319] There was a reference to Ernest flying in and out of Melbourne on the same day to attend Edward's wedding and also the following:

> … Question of making Edward a JMC director, immediately or from beginning January? Ernest favours 1 January 1998.
>
> Edward to stop procrastinating. Some shares given to him earlier have been left in nominee account instead of transferring to his own account. If he cannot look after his own assets *how can EFL trust him to look after* ***family assets***.
>
> [emphasis added in italics and bold-italics]

The emphasized words above are clear and telling. They speak plainly and unambiguously of looking after "family assets", not Ernest's assets. The contents of this paragraph was, in all probability, a reference back to Ernest's Memo dated 21 June 1995 to Isabel, Tony and Bobby where Ernest states that he has transferred Compania Nueva Oriente S.A. to Edward to familiarise him with the operation of the Panamanian, Liberian and BVI companies (see [360] below).

329 In Ostenfeld's own AEIC, he admits that his meetings with Ernest's siblings occurred when they visited the Hong Kong office where he would see one or more of them on average once or twice a year. It was less frequent when Ostenfeld was in Singapore and none at all when he was posted to Jakarta. Ostenfeld has *never* met Camila even though he worked in the JMC Hong Kong office from around 1957. His knowledge of the De La Sala family

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[319] 18AB162

and its affairs is neither extensive nor deep, confined to the office and the businesses of JMC and what he knows comes from Ernest.

330 I therefore do not accept Ostenfeld's evidence supporting Ernest's claim that all the assets in the Plaintiff Companies belong to Ernest nor his evidence that he had never heard of a family legacy or trust over all his years of service to Ernest.

Terrill's evidence

331 Terrill, Bobby's wife and Edward and Christina's mother, also gave evidence. She married Bobby in 1966. I accept her evidence as it was not strongly challenged and remained unshaken during cross-examination. She was straightforward and I found her to be an honest witness. It is telling that she was made a signatory of DOM's (the 3rd Plaintiff) bank accounts in CIBC Bank and UBS Bank. This is consistent with the evidence that Bobby's assets, whether all or only the 1/3 dividend according to the "practice" I have referred to above (at [86(a)]), were put into DOM.

332 Whilst Terrill would not have been privy to the private discussions that appeared to have taken place between Robert Sr and his children and later between Camila and her children, she nonetheless was witness to the little incidents and instances that would lead her to the conclusion that Robert Sr had provided for the entire family and that Ernest was managing the family businesses by taking over when Robert Sr died. Terrill and Bobby lived in the same house as Robert Sr and Camila and still live there today. I accept her evidence of what Camila said to her over the years, *viz*, that "poor Ernest" bore the heavy responsibility of looking after the family's interests, that Ernest was all by himself overseas to protect the family and everyone should

appreciate what Ernest was doing for the family, as well as her own daily observations of the behaviour of the family and what was said between them. This is also consistent with the evidence of some of the witnesses hearing the terms "tax exile" and "bullet-proof" being used. Terrill would have lived and dealt with as well as provided care to Camila and see to her day-to-day needs and there is no evidence that their relationship was other than close albeit not as close as between Camila and her children. I accept the evidence shows that every so often, especially when Ernest visited Sydney, the siblings would gather with Camila privately without their spouses to discuss De La Sala family matters.

333 I also accept her evidence that ECJ went to Singapore to help Ernest with managing the businesses and companies owned by the *family*, and not to manage *Ernest's* assets, businesses and companies. Hence, she was shocked to hear from ECJ in August 2011 that Ernest claimed all the funds and companies belonged to him.

334 Terrill also intervened when Ernest called on Bobby unexpectedly on 14 December 2011 and the transcript of the tape shows her indignation over Ernest's claims that the funds repatriated to Bobby and his children were *Ernest's.* As usual, Ernest responded by changing the subject. This exchange is reproduced above at [308(d)]. Terrill, like Bobby, was extremely annoyed that Ernest had called their children "criminals".

335 I accept the evidence of Terrill. I also found her to be straightforward and honest. Her evidence was not compromised by cross-examination.

Maria-Isabel's evidence

336 Maria-Isabel is the daughter of Bobby and Terrill and the sister of Edward and Christina. She lives in Sydney and is a director of Lloyd Investments (AUS) Pty Ltd. She is married to Richard and they have four children. Her evidence is much along the same lines as her siblings and I need not repeat them.

337 Maria-Isabel was employed by JMA from 1991 to 1999 and she did work for CDC in Sydney. She assisted Ernest as his personal assistant in Australia and performed administrative tasks such as bookkeeping, secretarial work, arranging interest payments and repaying loans that had been granted by the Plaintiff Companies via UBS Canada to JMC(A) and CDC. All her faxes and letters are kept in storage in Isabel's house to which she no longer has access. She also deposes how Ernest told her parents how astute he had been in selling off the ships which the family companies had previously owned and investing in stocks and bonds thus enabling the De La Sala family to be so wealthy today.

338 In February 2003, Ernest asked Maria-Isabel and her husband Richard to relocate to Singapore and copied them in many of the emails Ernest had sent to Christina and James. This included the phrases: "TO PICK UP THE BALL" and "MY HOPE IS THAT I CAN SECURE WORTHY AND CAPABLE SUCCESSORS TO CARRY THE BURDEN". However, as Richard was establishing himself in the industrial property market and they had young children and their education to consider, they decided against relocation.

339 Although not a crucial piece of evidence, but nonetheless another link in the chain, Maria-Isabel tells of her son Luke who did very well in school and obtained a scholarship for his secondary education. She proudly told Ernest of her son's achievements and Ernest's reply was that when he was next in Sydney, he would take Luke for a "sail & chat, as [his] *team needs suitable recruits for the future*" [emphasis added].

340 Maria-Isabel also tells of a family tradition where Ernest was known as the "friendly banker" to whom members could bring worthwhile projects for funding. When Maria-Isabel and Richard approached Ernest in 2005 for their first big project, a working cattle and sheep station just outside Canberra known as the "Gidleigh" farm (which also had a longer term "property play" based on the assumed growth and expansion of Canberra), Ernest did not think it was viable or a good idea and declined to advance any funds. Bobby was approached and decided to make *his* funds available and asked Ernest to make the arrangements and transfers. Ernest subsequently arranged for S$6,443,537.57 to be transferred to Maria-Isabel and Teresa (who joined in as a business partner for the project). In 2008, they approached Ernest regarding another opportunity to purchase an adjoining hotel and public bar known as the "Harp Inn", but Ernest did not think it was a good move either. So they shelved their plans to purchase the same.

341 Maria-Isabel also deposes to further sums of money drawn down from Bobby's funds which were given to his children (as set out in Bobby's AEIC). Each time, however, they had to either write "thank you" notes or letters to Ernest or Ernest would send them letters recording that he was making these "unsolicited" gifts. He further required their signature on a copy of those letters "for the sake of good order." Maria-Isabel says they always had to do that despite knowing the money was from their father because the letters

would be recorded "for income tax purposes". As the "transfers were indeed gifts, and therefore were not subject to taxation", Maria-Isabel says she was "happy enough to comply with the request".

342 Maria-Isabel also exhibited her previous signing authority for the 1st, 2nd and 5th Plaintiffs as well as Cambay HK which owns 1,999 shares in the 4th Plaintiff and which itself is wholly owned by the 5th Plaintiff. She makes the point that signatories were typically other De La Sala family members such as Bobby and Isabel.

343 I accept Maria-Isabel's evidence. She too came across as a straightforward and truthful witness and her credibility remained intact despite cross-examination.

Richard's evidence

344 Richard is Maria-Isabel's husband. He is the Group General Manager, Business Development at Goodman Limited, a listed Real-Estate Investment Trust which builds, owns and manages industrial and business space globally. Like the children of Bobby, from his communications and interactions over the years with his wife and other De La Sala family members, including Isabel, Camila, his parents-in-law and his wife's siblings, he was given to understand that Robert Sr established a family legacy that could provide for future generations of the De La Sala family. As far as he was aware, Ernest managed the family businesses ever since Robert Sr's passing. All the businesses and assets were kept offshore in tax-friendly jurisdictions to protect these investments and assets from heavy taxation in Australia. Ernest was made the "gate-keeper" or custodian because he was the only one prepared to

make the necessary personal sacrifices to live overseas to protect the family's wealth.

345 Richard also tells of Ernest being the "friendly banker" who members of the De La Sala family could approach for funding for worthy investments and endeavours. Richard also says that over all the years, he never heard Ernest refer to the assets and businesses managed by him as other than "ours" or something "we" (*ie*, the family) owned. He was also familiar with the use of the phrase "tree" which was to be managed for future generations.

346 Richard confirms Maria-Isabel's recount of their "Gidleigh" farm project as well as the "Harp Inn" project. Consistent with this background, when Ernest asked for more information on the "Gidleigh" farm project, he copied his email to Isabel, Cecil and "Centre JMC" (*ie*, ECJ in Singapore) as they were seeking to draw funds from the family legacy or tree.

347 Richard also confirms Ernest making an offer to them by email on 5 February 2003 to join as part of his team in Singapore. As he did to the other children of Bobby's, he said they would only ever earn a "pile of beans" by working for a salary and his "very exclusive offer" was the opportunity of a lifetime and something the multitude could only dream of. This was reinforced by telephone conversations Ernest had with them as the "next generation" to manage the De La Sala family assets and they could learn from his years of experience. Richard confirms that during this time Ernest never said his offer was to manage *his* own assets.

348 Richard also came across as a forthright and honest witness whose evidence remained intact after cross-examination.

Teresa's evidence

349 Teresa is the daughter of Bobby and Terrill and sister of Edward, Christina and Maria-Isabel. She is presently living in Sydney and the owner of The Book Mistress Pty Ltd. Her evidence was that from conversations with her grandmother, she learnt of her grandfather's successes as a businessman and that Ernest took over after his death. Her grandmother told her that Ernest had made sacrifices for the De La Sala by remaining in Hong Kong to manage the family's businesses and investments which future generations of the De La Sala family could benefit from. Her grandmother also told her how pleased she was that Edward and Christina had relocated to Singapore to help Ernest manage the family assets "offshore" and to be trained by him.

350 Ernest involved Teresa in the businesses somewhat and took her to Switzerland in 1994, promising that she would meet up with some Swiss bankers. However, he gave her administrative and secretarial tasks and whilst she was on one of these tasks (obtaining visas for their pending visit to Hungary and Poland), Ernest met the bankers with Christina. Teresa states that this was typical of Ernest's divisory tactics. Teresa said Ernest told her he had arranged the companies in a triangular structure and many companies had similar sounding names to maintain a high level of privacy such that it was not possible to identify the individual owners. During these conversations, Ernest told Teresa that he had to manage these investments "offshore" to avoid attracting tax obligations for the companies that owned the assets. Over all the years, Teresa says Ernest never said the companies were *his* assets and always referred to them as "our" assets.

351 Teresa says that although she was not involved in managing these investments or made a director of any of the companies, she was made a joint

signatory for bank accounts held by the 1st Plaintiff and 3rd Plaintiff. From her interactions with Camila, her parents, her siblings, Isabel and Ernest, she understood this was to ensure that the De La Sala family could still maintain control of these companies and their accounts even if Ernest was incapacitated.

352 Teresa also deposed about the gifts from her grandmother around the latter's birthday in July 2000 to 2004. She said she and her cousins, including Nicole and Elena, all knew that these funds were paid out on their grandmother's instructions from her monies held by the Plaintiff Companies and the payments were arranged by Ernest from the 2nd Plaintiff.

353 It was obvious that Teresa felt she was treated as "second class" by Ernest and complained to her grandmother. Her grandmother would make excuses for Ernest by saying "that was his way" and that he had sacrificed a lot for the family. Ernest also told Teresa in the year prior to her grandmother's death that the payments from her had to stop so as not to attract the attention of the ATO, though they had the potential to resume in future. Teresa further recounts the remittance of monies from funds of the family companies set aside for her father. These payments enabled her to buy properties with her siblings and each time she had to write an appropriate letter of thanks to Ernest to ensure the paper trail evidencing "gifts". These letters were passed to Bobby for safekeeping. Teresa exhibited the appropriate documents for these sums in her AEIC.

354 I accept the evidence of Teresa as I also found her to be an honest and forthright witness. She also recounts instances of conversations with Nicole and Elena and, as expected, there were differing views with Nicole and Elena denying they spoke to Teresa about such matters. I need not make any findings

in respect of these differences as they prove little but if I had to make a choice and finding, I would prefer the evidence of Teresa over that of her cousins, Nicole and Elena.

355 As I have noted above, the grandchildren derive their knowledge from what others had told them or said or how they had behaved over the disputed issues. At most their evidence lies on the periphery of the central issues and mainly as corroboration in a sense of consistency. Three individuals, *ie*, Edward, James and Christina, however, have played a more involved role in this dispute and the events leading up to it. It must also be remembered that Ernest has filed a counterclaim against ECJ, and ECJ themselves have filed a counterclaim against Ernest. I therefore turn to their evidence and examine it in greater detail.

ECJ's evidence

Edward's evidence

356 Edward, the eldest child of Bobby and Terrill, is one of two nephews of Ernest (the other being Tony's son, Pastor, whose interests I am told by Edward lay in studying French and Latin and playing ecclesiastical period music). Edward, who stayed in the same house as Camila, was encouraged by her to study accounting so that he could "help her" and "help the family". To obtain work experience, Edward worked for a stockbroker in Sydney after his High School and in 1988 enrolled for a two year Associate Diploma in Accounting course at a technical college to enhance his prospects for university.

357 In 1989, whilst he was in the second year of his course, Ernest arranged for Edward to start working in JMM in Singapore under Ostenfeld to

get to know the shipping, ship agency and marine safety business during his vacations. In 1990, after successfully completing his Associate Diploma in Accounting course, he gained admission to Griffith University in Brisbane for his Bachelor of Commerce course. He worked in Singapore between late 1990 and early 1991 to build up his knowledge of the business being run by Ernest. In 1991, Edward transferred to the University of Technology, Sydney, and he continued to work in Singapore during his vacations under Ostenfeld. He graduated in 1993 and arrived in Singapore on 23 October 1993 to officially begin working for JMM as an Administrative Manager under an employment pass. Edward stayed at a JMM apartment at Balmoral Park. Whilst working at JMM, Edward completed a Master of Arts in Marketing Management through the Macquarie Graduate School of Management in 1996 and in 1998 added a major in accounting through the Victoria University of Technology to his Bachelor of Commerce degree.

358 I find Edward to be a straightforward and truthful witness. He had a quiet, steady and earnest demeanour and answered questions directly. Despite prolonged cross-examination, his evidence remained intact. One of the important issues that arose was his (together with Christina and James) speedy reversal of the resolutions removing Ernest's signatory rights to the Plaintiff Companies' bank accounts in August 2011 and his email of apology dated 9 August 2011 to Ernest. Having watched him closely and considered his answers, I am satisfied that he did that not because he had a guilty conscience or that he knew he had done something wrong with regard to Ernest or that his livelihood had been removed, but because of some very deeply ingrained beliefs and De La Sala family values inculcated in him from the time he was very young, and this would also be true for Christina:

(a) First, the De La Sala family was very strongly hierarchical; respect for your elders was deeply ingrained and familial ties were paramount. Edward would have witnessed from a young age how even his father, uncles and aunt deferred to Camila. Edward would have been taught to respect and obey his grandmother, then his father and mother, uncles and aunt and never to be rude or insouciant towards them, *ie*, the older generation. Ernest acknowledges this in Edward. This is clear even with Ernest as a young man. When Robert Sr chastised him over his business decisions and his lack of decorum in making decisions without checking with Robert Sr and his co-directors, he immediately ate humble pie, apologised in writing and said he would accept any punishment Robert Sr decided upon, including being relegated to a far-flung minor business outpost. When there were differences between Robert Sr and Ernest over the handling of the businesses, Robert Sr sent Ernest packing to Brazil. I see Edward's apology to Ernest in a similar vein. I also see Ernest adopting a softer attitude to Edward when talking to Bobby in the taped conversation. He had felt Edward's apology was sincere.

(b) Secondly, their action provoked a storm of huge proportions within the family. His own father, Bobby, was furious, albeit for the different reason of having his signature tied up with Ernest again, something that had been a sore point between Ernest and Bobby in the past. Their aunt Isabel was all over them panicking over the possible reactions from Ernest and at the same time trying to placate her nephew and niece. His first instinctive reaction when the older generation reacted in this manner would therefore be to back down.

(c) Thirdly, I find that Edward was indeed sorry that he had caused so much disagreement and strife in the family and that was another trait of the De La Sala family. They may have their differences, but it was kept within the family. This is clear to me when Ernest, who took over his father's role, wrote to his siblings chastising them not to quarrel "in public" and lecturing them to stick together and sort things out. If all else failed, Camila would be approached for the final decision.

(d) Fourthly, it was only when Edward and Christina sat back to consider Ernest's shocking claim that all the assets were his, that they took action months later. I have borne in mind that they would have gone back to check with their parents about this claim of Ernest's, which was against everything they had been brought up to believe, before deciding what to do. Bobby's clear and unwavering evidence in court and also in his private conversation with Ernest referred to above about the "tree" his father had planted would have been the same factual context to Edward and Christina and it is only then that they would have come to the view that something had to be done about this untrue claim by Ernest.

359 I accept the evidence of Edward that he was considered a "male heir" of the De La Sala family and that Camila and Ernest took a special interest in him. Pastor's interests showed a disinclination towards business, perhaps like his father, because no mention is made of him by anyone of his interest or role in the family companies. Edward tells of his trips with Ernest to buy a sailing boat, Ernest spending time with him at home and giving Edward bundles of reading and reams of bond quotes on telexes. Ernest also told Edward, and I believe him, that Ernest protected everyone in the family because of his

offshore status, *viz*, by being "bullet-proof" and being manifested as the account holder of overseas bank accounts holding family assets in order to deflect any enquiries by the ATO or those trying to find out about the De La Sala family wealth. Ernest showed Edward his notebook where he kept a record of "days in Australia" so that he would never exceed his 183 days, and once Edward started working for JMM in the mid-1990s, Ernest would often tell Edward to do the same. Ernest took Edward on business trips and introduced him to several UBS bankers and an economist with Goldman Sachs.

360 I also accept that Ernest familiarised Edward with his operations, especially that shipping matters were no longer worthwhile businesses to pursue and that investment activities brought far better returns. It appears that the 1990s was the period when Ernest was selling off company assets and winding down the shipping business so that he could concentrate on such investment activities. I also accept Edward's claim that he was the "heir apparent" and was being groomed by Ernest to take over from him as custodian and manager of the family assets. Ernest sent a fax to Ostenfeld dated 25 July 1993 in relation to his employment pass where he said: "It may be prudent to stress that … [Edward] … is the designated heir apparent and nephew of our group chairman and major shareholders". Ernest also sent a fax to Edward on 18 September 1997 reminding him that: "I again reiterate it must be your paramount objective to understand your priorities and to know the primary purpose of your being in Singapore". Edward also tells of Ernest transferring a dormant Panamanian company, Compania de Nueva Oriente SA, to hold his assets and investments so that he could familiarise himself with such companies. This is also reflected in a note by Ernest to his siblings referred to above (at [328]). Ernest taught Edward that a company was a valise

which could be made in Panama or Liberia, but it was not necessary to keep its assets there.

361 Edward also visited Hong Kong and Ernest asked him to acquaint himself with the confidential corporate files maintained by his secretary, Margaret Kan ("Ms Kan"). Ms Kan prided herself in a blue loose leaf A5 folder in which she recorded and updated all matters pertaining to the offshore companies and referred to it as "her brain". It was a record of all the companies of the De La Sala family and that family members were predominantly appointed as directors of these companies and were the principal authorised signatories on the companies' bank accounts.

362 By 1999, however, Edward felt he was learning nothing under Ostenfeld. Further, Edward felt that Ostenfeld had fed misinformation about Edward to Ernest. Ernest in turn appeared to have passed negative comments about Edward's performance to other members of the family without giving Edward an opportunity to defend himself. So in 1999, feeling that his relationship with Ernest had become fractious, Edward left and moved back to Australia with Lyndel to a new beginning and to start a family. It is interesting to note that Ernest sent an email to Edward on 1 January 2002 with the subject: "Wishing the 3 of you the Nth degree for 2002". Ernest spoke kindly of Edward's daughter, Olivia's allergy and about a leading New York dermatologist he had met on a ship who would be pleased to examine Olivia when she was in Melbourne on a lecture. Ernest also mentioned articles on the economy including AMP's Chief Economist's "Ten Possible Wealth Hazards in 2002". The 5th paragraph read:[320]

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320 19AB39.

> EDWARD, WHEN YOU RETURNED TO AUSTRLIA FROM SINGAPORE, YOU DESIRED TO TELL ME SOMETHING ABOUT CHRIS OSTENFELD BUT I DECLINED TO PURSUE THE ISSUE, AS I DID NOT WANT TO MANIFEST MY HUGE [DISAPPOINTMENT] IN THE HOPES I HAD FOR YOU. IF YOU NOW DESIRED [*sic*], YOU MAY CONFIDENTIALLY FAX &/OR EMAIL ME WHAT YOU WANTED TO TELL ME ABOUT CHRIS OSTENFELD AND SINGAPORE.

At the top of that fax, Ernest had tellingly written:

> CONFIDENTIAL COPY TO BOBBY & TERRILL, EDWARD HAS NOT YET RESPONDED. WHEN IS HE GOING TO SINGAPORE.

363 Ernest, as the egotistical rich and "powerful" uncle, expected Edward to come running back to him but Edward appears not to have taken the bait. Instead he moved on and became a financial controller of Toll Holdings Ltd ("Toll Holdings"). His role as Toll Holding's divisional financial controller provided the means for him to advance himself to full CPA professional status by completing the CPA program in 2004. He was promoted to system accountant in 2003 and worked across several divisions of Toll Holdings across Australia and, from 2004, New Zealand, each division having its own business units. He was earning AU$75,000 a year and I accept that his prospects within that expanding group were bright.

364 However, as was the case with Christina and James and Maria-Isabel and Richard, Ernest started sending emails (referred to above) to Edward. Many of his emails to Christina, James, Maria-Isabel and Richard were also copied to Edward. Edward says, and I accept his evidence, that Ernest made the following representations to him:

(a) If they agreed to assist Ernest, they would eventually take over his role as custodian of the De La Sala family legacy which comprised the assets held by the "family" companies;

(b) Those who assisted Ernest could expect to be well rewarded financially; this financial reward would be substantially more than the "pile of beans" they could expect to earn in their present jobs;

(c) By relocating to Singapore to assist Ernest in the management of the family assets, they would be increasing the value of the De La Sala family's assets and this would benefit all the De La Sala family members; and

(d) The couples and their children would directly benefit from their management and enhancement of the De La Sala family's assets, as they were all descendants of Robert Sr and Camila and were beneficiaries of the De La Sala family legacy.

365 Edward met up with Ernest on 26 February 2004 in Melbourne when Ernest attended the Australian Formula One Grand Prix. Ernest told Edward that the shipping businesses had completely ceased and that if Edward joined him in Singapore, he would be managing financial investment portfolios which were held by the family companies. Ernest managed to persuade Edward to relocate to Singapore once more to join him. I note Ernest's email to Christina, copied to Edward, where Ernest says that Edward and Lyndel "expressed a desire to return to Singapore" during his recent meeting with them in Melbourne. However, all the evidence points to Ernest courting Edward, Lyndel, Christina and James (and even Maria-Isabel and Richard) to join "his team" in Singapore. I find this email to be in Ernest's character to pen such remarks to paper over his ego or as a means of masking his true intentions and for future use as a fall-back should he need it, calculating on his nephew and niece not bothering to respond on an inconsequential inaccuracy or who might consider it rude to remind their Uncle that he was the one urging

them to come to Singapore by dangling carrots before them. On 21 and 24 March 2004, Ernest got in touch with one Jenny Wong, who was retained on a "stipend" to keep the companies current, informing her not to sell the Balmoral apartment and to look into obtaining Singapore permanent residence status for ECJ. I accept Edward's evidence that it was Ernest who was pushing for the three of them to start working in Singapore as soon as possible in the new roles.

366 I also accept the evidence of Edward and Christina that Camila was very supportive of the idea that they move to Singapore to help Ernest. She told them that she was so glad they were going to do so because they would all be there together to support one another. I also accept Edward's evidence that one of the reasons for Camila's concerns was that Ernest's health was deteriorating. Edward was with Ernest in Hong Kong in 1992 when Ernest started suffering an irregular heartbeat resulting in their immediate flight to Sydney and which culminated in Ernest's heart by-pass operation. By 2004, this had multiplied into abdominal growths, stenosis of the spine, which resulted in Ernest appearing before me in a wheelchair. Ernest also suffered from a hearing impairment, tinnitus, benign paroxysmal positional vertigo, more heart problems resulting in angioplasty in 2010, fluid retention, catching double pneumonia as well as insomnia and gout.

367 Once in Singapore, ECJ learnt progressively more about Ernest's *modus operandi*. This included JMC being run as a "private company to [the] point of secrecy", JMC and JMM providing facades to create legitimate offshore presence in Singapore and Hong Kong, as well as having companies with similar names and bearer shares to prevent others finding out about ownership and sending inquisitors "barking up the wrong tree". To name a few, there were, *eg*, Dominion Corp SA of Panama and Dominion Inc of

Liberia; Sovereign Corp SA of Panama and Sovereign Inc of Liberia, Cambay Prince Steamship Co Limited (HK) and Cambay Prince Steamship Co Limited (BVI), Cosmopolitan Finance Corporation of Liberia and Cosmopolitan Finance Corporation of BVI.

368 Edward deposes that from his numerous discussions with Ernest, the "capital" base of the family assets was held within the "orphan structure" – this was strongly disputed by Ernest, who says they are all his assets and money. Edward also deposes that money and assets allocated to Tony, Bobby and Isabel are held by different offshore companies within the "orphan structure". Assets and money ring-fenced for Tony were held by SOV, those for Bobby were in DOM and those for Isabel were with COM. Edward also deposes that these companies used to maintain accounts with Lloyds Bank Switzerland until they were forced to close for failure to comply with the bank's "Know Your Client" guidelines.

369 It should be noted that ECJ spent over seven years in Singapore working with Ernest (nine years if the period up to the commencement of proceedings is taken into account). The work that they did is set out in Edward's AEIC and corroborated by Christina and James, *viz,* settling in their families, getting to know what was going on in the companies, attending meetings with bankers, attending seminars on handling family companies and a UBS three-day "Next Generation" course, analysing financial data and communicating with Ernest over investments, double-checking on taxation and clearing some slight misconceptions that Ernest had over corporate taxes and the criteria for determining the residence and domicile of corporations, explaining the subtle distinction between corporations trading in shares and corporations that bought and sold shares under a long term portfolio of assets and the differing taxation of such activities, making investments on their

respective portfolios and drafting trust concepts, possible structures and safeguards as well as draft documents therefor. That included seeing first-hand how Ernest transferred funds to his siblings or their children.

370 Edward further gave evidence that working in Singapore with Ernest was "a step backwards in [his] professional development and financial status". He was paid a meagre salary of S$2,500 per month, and while he was entitled to 10% of the profits he, Christina and James made on the portfolios they managed, this did not amount to much (approximately S$90,000 per annum), in large part due to the "trading bans" and "limitations" imposed by Ernest. Edward deposed, and I so find, that he would have been better off financially and professionally had he stayed in Australia, but he relocated and remained in Singapore out of a sense of familial duty because he knew that he would be managing and growing assets that belonged to the family, which his own family and children would benefit from one day.[321] Indeed, Edward's evidence in this regard was largely unchallenged in cross-examination.[322]

371 Finally, Edward's evidence was that one of the main tasks Ernest had assigned ECJ to do was to improve upon and/or set up a trust structure to ensure that the assets held by the Plaintiff Companies could be "maintain[ed], enhance[d] and … proper[ly] control[led] … in order to provide future generations with the necessary motivation and ammunition to fulfil their potential". Their mission was "to ensure the protection, growth and continuity of the REC legacy in order to provide the motivation and wherewithal to maximise the potential of future generations"[323], *ie*, it was time to

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321 Edward's Personal AEIC at paras 130-136.

322 NE 24 November 2014 at p 175 line 4 to p 176 line 17.

323 Edward's Personal AEIC at pp 305-306.

institutionalise the "trust". It was suggested by ECJ that REC were the initials of Robert Sr, Ernest and Camila and I have not been given reasons to believe otherwise. Many drafts were created and circulated in respect of this "trust structure" and they are extremely significant and telling in terms of what the parties believed the position to be at that point in time. I discuss this in greater detail below at [452]–[463].

Christina's evidence

372 Christina, the 3rd Defendant by Counterclaim, is the daughter of Bobby and Terrill and niece of Ernest. She graduated from the University of Sydney in 1991 with a Bachelors in Economics. Ernest encouraged her to go to London to further her education. She enrolled at the London School of Economics ("LSE") but failed to obtain her Masters in Economics because she was insufficiently focused and failed some of her exams. Ernest had arranged for her to gain some work experience at Lloyd's Bank, Madrid before her last term at university. Christina wrote a letter, dated 4 December 1990, to thank Ernest and said, *inter alia*, that she hoped to improve herself so she could achieve her goals and become a successful entrepreneur "and help continue the *family business*" [emphasis added].[324] Christina spent a period working at Swiss Bank Corporation and completed a summer internship at Commerzbank International Capital Management in Frankfurt before starting work at Mitsubishi Trust in London selling bonds.

373 In 1994, Ernest asked Christina to start working with him to assist in the investments that the Plaintiff Companies were involved in. Ernest told her she would be the "master of her own destiny" and earning more than what she

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[324] 15AB338.

did selling bonds. Ernest suggested and sponsored her course in management accounting at LSE which she successfully completed in 1994. Christina started working with Ernest in managing the family companies but she did not sign any contract nor was she given any official title. However, she found the work routine and unfulfilling; she was not making any investment decisions and Ernest did not entrust her with much responsibility. Christina wrote to Ernest sometime in April 1995 saying she wanted to be challenged, wanted an active and responsible role in financial investments in JMC or in Singapore,[325] but Ernest did not react well to that letter and sarcastically suggested that she "offer [her] talents and ability elsewhere".[326] Christina stopped working for the family companies in 1995. Christina's frank letter to Ernest dated 25 April 1995 shows that she could speak her own mind and disagree with Ernest on certain matters, but nonetheless with an element of respect.[327] When Christina complained to Camila, she made the excuse that that was Ernest's nature and that it was all right for her to work elsewhere as she could always join Ernest later on.

374 Christina moved to London and worked for a music management outfit who were the European managers for an internationally acclaimed rock band. She then moved to a music sales promotion consultancy before she got married to James in Sydney in October 1998. After their marriage, Christina and James moved to Oman where she set up a ladies' clothing company. James retired from his military career in 2001 and they moved back to London. Christina then enrolled in INSEAD in 2002 to pursue her Masters in Business Administration. In 2004, she applied to switch her Fountainbleau

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325 17AB354.

326 17AB358.

327 17AB359 to 17AB361.

campus, Paris to the Singapore campus and in August 2004 transferred to Singapore.

375 Like Terrill, everything she heard or witnessed, especially from her conversations with her grandmother, was that Ernest was managing the "family business" and that he was prepared to make the "sacrifice" of staying off-shore for the family. I accept her evidence that Camila favoured Ernest above the rest. From a letter dated 20 July 1962 from Ernest to his parents after Robert Sr had a big quarrel with Ernest, I find that Ernest too loved Camila very much. It was evident from the letter that Ernest was more upset over Camila being upset with him than Ernest was upset over the quarrel with his father.

376 I accept Christina's evidence that it was Ernest who asked her to relocate to Singapore to help him manage the family's assets. I also accept her evidence that in the beginning, Ernest took a liking to James as they had some common interests and a wider interest in world affairs. In addition to what Christina says Ernest and Camila said to her in persuading her to join Ernest in Singapore, there is objective evidence of Ernest's emails to them:

(a) first asking them to review the exchange markets to pick up "gems" at basement level (7 May 2001);[328]

(b) next, unilaterally "appointing" them to be his "elite think tank" focused on bottom fishing of potentially rewarding investments (4 June 2001);[329]

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328 18AB339.

329 18AB344.

(c) then a handwritten letter wishing to "exchange views regarding certain economic objectives I have that may interest James and yourself" (30 July 2001);[330]

(d) an email dated 15 August 2001, requesting their independent appraisals and opinions regarding investment opportunities to determine "if the team thinks" and for his appraisal of their ability;[331]

(e) an email dated 22 September 2001, approving of James' transfer of studies from Paris to Singapore because it would be "the ideal opportunity" to "dove-tail theory with practice" and that Ernest "might influence contribution in the latter aspect";[332]

(f) an email dated 24 September 2001 to James's email address but addressed to Christina stating that "the future will be focused on the financial markets which can be operated anywhere but Singapore has advantageous [*sic*]"; Christina says this was in line with Ernest's oral representations made around that time that it would be advantageous to manage the family's assets in a "low-tax" jurisdiction like Singapore as compared to Australia or the UK;[333]

(g) an email dated 26 September 2011 to inform James that Ernest was looking into arrangements for an apartment in Singapore to be made available for James and Christina's use;[334] and

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330 18AB354.

331 18AB358.

332 18AB366.

333 18AB367.

334 19AB8.

(h) an email dated 3 February 2003 to James and Christina where he stated his plan was to find "*worthy [and] capable successors to carry the burden* and enjoy what comes in abundance with success" [emphasis added].[335]

I have noted above that Ernest also sent similar emails to Maria-Isabel and Richard in an attempt to persuade them to join him as well but they eventually decided to stay in Australia.

377 Christina came across as a truthful witness who did not waver in her evidence. But more importantly, Christina's case on Ernest's representations was borne out by objective evidence and facts. She had worked with Ernest before and she parted from him on unpleasant terms; she had voiced her frustrations to Ernest that he was giving her mundane office work and she wanted more challenges to test herself. Ernest's curt response was that she was free to offer her talents elsewhere. Hence, she left and struck out on her own. The same thing happened to Edward who worked in JMC with Ernest and Ostenfeld in the 1990s before parting company with Ernest, also on not the most amicable terms. I have no doubt that *both* Edward and Christina had their measure of Ernest and found that Ernest was a difficult person to work with or for. They both went on to have their own careers and I find that their father had provided more than enough for them to lead very comfortable lives in Australia. I find that it would be very unlikely they would have left their jobs and relocate to Singapore if they were told it would be to manage Ernest's own monies, given his overbearing character and not being able to let go, and not that of the family's. I also believe Christina that Ernest's terms were not overly generous and I accept her evidence that to the contrary, what she earned

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335 21AB82.

from Ernest was insufficient to support them and she spent part of her savings for her family's stint in Singapore. There was a net deficit from what she earned managing the US$10 million Ernest made available to James and her for the eight to nine years they were with Ernest before the August 2011 blow-up.

378 I therefore accept her evidence that Ernest represented to them that they would eventually take over as custodians of the De La Sala family business, they were the next generation custodians, they would perpetuate the "legacy" of Robert Sr, they would be enhancing the family wealth as he had done, the benefit would be for the whole De La Sala family, and the descendants of Robert Sr and Camila and themselves could expect to be well rewarded financially. As for proof of that, Ernest was not slow to show them how he lived – there is an email dated 3 February 2003 where he said he was on a private floating condominium of 1,500 square feet where the rooms were very expensive ("for those with more money than sense") just to watch the America Cup races.[336]

James' evidence

379 James graduated from Bristol University and obtained his degree in Mathematics and Economics in 1988. He joined the Parachute Regiment and then enrolled with 35 officers and 150 other ranks in the gruelling selection course for the elite British special forces unit, the SAS. He was among the two officers and ten other ranks selected for the SAS. He served with distinction, including a stint in Northern Ireland with all the difficulties that entailed, and retired a Major in 2001. His testimonials bear witness to his "Excellent" rating

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336 21AB82.

by his reporting officers: "[A] highly successful tour not least because of the trust and confidence he inspired form the outset in senior police and military officers … Across UKSF [UK Special Forces] he is now one of the top 2 Staff Candidates".

380 James met Christina in 1997 in London whilst he was still in the SAS. Christina was then, as noted above, a manager for a rock band. James met Bobby and Terrill in London and they were married in Sydney in October 1998. James was introduced to the De La Sala family, including Ernest, who Christina told James was an important person in the family who "ran everything" in the family business and who took over from Robert Sr after he passed away in 1967. James tells me, and I have no reason to disbelieve him, that Ernest took a liking to him as they had common interests in history, politics, geography and economics and Ernest was interested in the places James had been during his time in the British army and SAS.

381 James enrolled at INSEAD for his MBA course; prior to that, James had scored exceptionally well at the Graduate Management Admission Test (GMAT), being placed at the top 0.5% percentile of the applicants to business schools. By 2003, James was involved in the maritime security business with a maritime security firm, Hudson Trident, and given his SAS background and rank, I have no doubt that James was set on the course of a promising career and business in that line. I have no reason to disbelieve his claim to being well paid, was in charge and had a healthy share in the profits at a time when there were very few outfits such as his with a track record and reputation. I can take judicial notice that threats from Somali pirates in the Gulf of Aden region to merchant vessels was on the rise from about that time because there were international organisations like the International Maritime Organisation expressing concern over the rising acts of piracy by 2005. James also says that

his parent company in the UK had just won a US$400 million US Government contract for security in Iraq. He handed over his maritime security business to his "number two" and suggested he teamed up with another friend from the SAS. That business grew to sales revenues in 2011 of €30,182,414 and in 2012 of €36,185,084, with earnings of €5,517,718 and €3,006,641 respectively. None of this was challenged.

382 I also found James to be a straightforward and honest witness and his evidence was steady and forthright. He was a highly intelligent person and was at times, understandably irritated with the cross-examination especially when it cast aspersions on his character. But in my view, he emerged unscathed in all material aspects from his prolonged cross-examination.

383 From his SAS testimonials about his capabilities, I note that he was praised for his ability to plan operations, gather intelligence and arrest terrorists, with an ample effective blend of tactical awareness, initiative, briefing ability and balanced perspective on the political realities of covert operations in Northern Ireland. He was therefore adept at observing and reading people and remembering the things he had heard and noted. I accept the evidence of James that:

(a) James and Ernest used to go sailing on Ernest's yacht and had long chats;

(b) Ernest told James of Robert Sr's life, that Ernest obviously held Robert Sr in very high regard and that Robert Sr had built up everything the family had;

(c) In referring to the assets and companies under Ernest's control, Ernest would always refer to these with words like "we" (*ie*, the De La Sala family) and "ours" when describing the companies and assets;

(d) Isabel professed to love her brother Ernest but she was often edgy and nervous around him; her husband Cecil was quite liked by Ernest but Ernest did not think too highly of his business acumen;

(e) When James commented that Cecil had done quite well in his property business, Ernest passed the sarcastic remark that it was easy to achieve good results when his capital was subsidised, which James took to mean that Ernest had used "family" money to subsidise Cecil's property business capital; Ernest had further referred to Cecil's boathouse as the "De La Sala boathouse" and told James he should feel free to use it any time without the need to check with Cecil;

(f) From his observations, James said that Tony clearly did not like Ernest but was afraid to voice that openly to James;

(g) Bobby and Ernest irritated each other and simply tried their best to stay out of each other's way; I note that this was backed up by the transcript of the tape recording made when Ernest called on Bobby at his home without a prior appointment (Bobby made pointed references to instances in the past where they had clashed);

(h) James observed that Camila loved Ernest as a mother would;

(i) Like the children of Bobby and their spouses, he came to firmly believe that Ernest was managing the family assets and that:

(i) He did it at a great personal sacrifice of having to be resident outside Australia;

(ii) The other members of the De La Sala family did not sufficiently appreciate the sacrifices he had made for them; and

(iii) Most of the younger generation of the De La Sala family were unmotivated and waited around for "things to fall from the sky" and into their laps, and he feared that they would come to simply expect "hand outs" without having to work for it; and

(j) It was Ernest who approached Christina and James to come and join him in the management of the family assets; this started from 2001 when he found James and Christina's interest in financial management and investments and their enrolment in INSEAD for the MBAs; James also set out the emails, mostly already referred to above in my assessment of Christina's evidence, that Ernest sent to them both as well as Ernest's emails to bankers and analysts asking them to copy James and Christina with their replies for their review.

384 I am therefore more than satisfied that Ernest represented to James, as well as Christina and Edward, that:

(a) Ernest was the custodian and managing the De La Sala Family businesses, which was couched as Robert Sr's "legacy" or the "family" legacy and Ernest characterised his role as a "burden";

(b) If they agreed to assist Ernest, they would eventually take over his role as custodian of the De La Sala family legacy which comprised the assets held by the "family" companies and which they had to

safeguard and invest wisely to enhance these assets over time, just as Ernest had done over the years;

(c) Those who assisted Ernest could expect to be well rewarded financially; this financial reward would be substantially more than the "pile of beans" they could expect to earn in their present jobs;

(d) By relocating to Singapore to assist Ernest in the management of the family assets, they would be increasing the value of the De La Sala family's assets and this would benefit all the De La Sala family members; and

(e) The couples and their children would directly benefit from their management and enhancement of the De La Sala family's assets, as they were all descendants of Robert Sr and Camila and were beneficiaries of the De La Sala family legacy.

385 I also accept James' evidence that his terms from Ernest were not generous by any means. He arrived in Singapore to find an empty, unfurnished apartment which they had to furnish at their own cost. They had to sell their house in France and ship the furniture over at their own cost. I therefore find it unbelievable that they would relocate to Singapore, knowing Ernest's egotistical and overbearing nature, suffer these losses and expenses, just to manage Ernest's own funds and assets. I have also noted the evidence that Christina and Edward's earlier working stints with Ernest both ended less than salubriously. I find they did so because they fully believed they were to be the next generation of custodians of the De La Sala family assets under the family legacy instituted by Robert Sr.

Assessment of the evidence of the foregoing witnesses

386 As I have stated above, the four people today who know the truth are Robert Sr's four children. The children's spouses, the grandchildren and their spouses can only tell me what they were told over the years and the nature of their interactions and conversations with Camila and her children. Their conclusions are inferences from what they were told, the conversations that took place from time to time between various family members and what they observed over a considerable period of time.

387 On the one hand, I have the evidence of Nicole and Elena. On the other, I have the evidence of Bobby's children and their spouses. I have no doubt, weighing their evidence and having observed their cross-examination, that the latter group are the ones who are telling me the truth for the reasons I have set out above. However, it is equally important to note that it is the truth as they perceived it to be – inferences and conclusions they drew from what others said and how others behaved. It does not conclusively prove that a trust had been set up although that is what they believed was in existence and why Ernest came to recruit ECJ to work in Singapore but failed to convince Maria-Isabel and Richard to do the same.

388 My conclusions (which should be read together with my preliminary conclusions and views set out above, including [138] and below at [464]), having heard the oral evidence from the witnesses, and I so find, are that:

(a) All the children of Robert Sr *knew* it was the wish of their father that NEL would remain a guarantee for the well-being of all his descendants. This was made clear in his letters and I have no doubt orally in his lifetime, and especially by his 7 July 1957 Avarice Letter. This was admitted and clearly accepted by all his children:

(i) Tony:

> Q: Sorry, your father had actually told you that he wanted LIL to be like an insurance policy for the De La Sala family; isn't that right?
>
> A: Yes.
>
> Q: Thank you. And your father made it clear that LIL was supposed to always be a family undertaking; correct?
>
> A: Yes.
>
> Q: And you father made it clear that LIL was supposed to be a guarantee for the livelihood and well-being of the De La Sala family, right?
>
> A: Yes
>
> Q: Thank you. So you father's hope was that LIL would always be around, correct?
>
> A: He hoped that it would always be around, yes.[337]

(ii) Isabel accepted that she had read Robert Sr's Avarice Letter a few times and "thought it was beautiful".[338] When she was referred to the words "It is my wish that LIL should always remain a family undertaking" in that letter, her answer was:

> Q: Were you aware that this was your father's wish for LIL?
>
> A: Yes, for his family, his immediate family, yes.
>
> Q: And were you aware of this wish before your father passed away?
>
> A: Yes.[339]

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337 NE 5 March 2014 at p 36 line 16 to p 37 line 6.

338 NE 4 March 2014 at p 51 line 18.

339 NE 4 March 2014 at p 55 lines 13 to 18.

(iii) Bobby, under cross-examination by Mr Singh SC, said the following when referred to Ernest managing assets in 2011 in the offshore companies:

> Q: … Who did you think those assets in the offshore accounts belonged to?
>
> A: Your Honour, I honestly believed that those were the tree, the tree which my father had stated over and over again in all his correspondence to Ernest must not be touched but the fruit we could use. So Ernest was -- they had – this is the tree that is not to be touched. It is to stay there and grow for the family, his descendants and deserving relatives, and that was very clear, absolutely clear. That was my father's intention of LIL, which he stated so many different times in different words. He just never, never said I'm going to talk – my father I'm talking about – he never said to me "I'm now talking about the tree". Ernest was -- all of us entrusted Ernest to handle that. We trusted – I trusted him.[340]

(iv) Ernest, under cross-examination by Mr Bull SC, testified as follows when referred to Robert Sr's letter to him dated 11 February 1964:

> Q: …So this letter confirms, Mr De La Sala, that your father wanted Nelly out of shipping but he expected NEL to continue existing, correct?
>
> A: He expressed dissatisfaction in that letter, right.
>
> Q: No, he said -- this letter shows that your father expected that NEL would continue even after it exited the shipping business, right?
>
> A: He wrote that.

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340 NE 10 October 2014 at p 82 lines 4 to 24.

> Q: So Mr De La Sala, we also see in this letter that your father was emphasising to you that he would be the one making decisions for NEL, correct?
>
> A: So he mentioned in this -- in this letter.
>
> Q: Right. So I'm just going to put the position to you, Mr De La Sala, and you can agree or disagree. Your father controlled LIL even after he was no longer a shareholder of LIL; do you agree or disagree?
>
> A: I agree.
>
> Q: And I put to to you that JERIC, you, your mother and you siblings, complied with every instructions given by your father in relation to LIL?
>
> A: Correct.
>
> Q: And I put it to you that your allegation that by 1964 your father had abandoned his earlier wish for NEL to be a guarantee to his descendants, that allegation is false. Do you agree or disagree?
>
> A: I can't understand you. Could you please repeat that?
>
> Q: You have alleged in your affidavit that your father had abandoned his wish that NEL would be a guarantee to his descendants, and I'm putting to you that he never abandoned that wish. Do you agree or disagree?
>
> A: I agree.[341]

(b) All the children of Robert Sr loved and honoured him very much, held him in the highest esteem and would never have disobeyed him in his lifetime and would have carried out his wishes after his passing.

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341 NE 17 March 2014 at p 25 line 25 to p 27 line 5.

(c) All the children of Robert Sr were brought up to have great respect for their father *and mother*, and of all people, their mother would be the one who knew best what her husband would have wanted or wished.

(d) Camila lived on as matriarch of the family until she passed away in July 2005 and given (a) to (c) above, the children would have honoured and respected their father's wishes, especially as their mother was still there to witness all that was going on in the family for the next 38 years following Robert Sr's death.

(e) Camila had the final say in family matters in this highly hierarchical family, although Ernest now ran all the businesses and invested all the assets. Her children and her grandchildren had all been brought up to respect the older generation.

(f) Camila and her children were very secretive and the evidence shows that when Ernest returned, they would often meet with Camila in her private area without any spouses or others around. They were also secretive because they all knew they had to be careful about taxes and death duties since all of them, save for Ernest, were Australian residents for tax purposes.

(g) As far as the other members were concerned, there was this very large family business and assets, and everyone, including Camila and her children, referred to it as such in deference to Robert Sr's wishes and his memory and that Ernest had stepped into the shoes of Robert Sr in managing the family businesses and assets, see [296].

(h) Not only were the spouses and grandchildren given to understand this state of affairs, whenever they received funds, they knew they had to and did write "thank you" letters to Ernest for "tax purposes" and not because of some quirk or eccentricity of Ernest.

(i) They were all told that they had to be appreciative of Ernest, who had made great personal sacrifices to live off-shore alone as a tax exile for the sake of the family; Ernest himself had described it in writing as a "burden".

(j) The spouses and grandchildren would have seen, first hand, the millions that were available for "investment" into Australia and the real estate the family companies in Australia owned and which came from off-shore sources.

(k) The grandchildren would know that they could and did purchase their respective houses with money from their parents, who got it from sources outside Australia.

(l) Although Robert Sr had *not* set up a formal and legal trust in his lifetime, his wishes were known and a corporate structure in LIL/NEL and its shareholders was in place when he died. As he wrote on 2 November 1950, LIL/NEL's then 40% in JMC, *ie*, LIL/NEL's assets "will remain in the Lasala family until doom's day *if my sons and sons' sons so desire it*".

(m) When Robert Sr passed away unexpectedly, all that he had went to his wife and children in equal shares. Ernest stepped into his shoes and carried on his father's role in managing the businesses and multiplying the family money *for the family*. Ernest carried on a

modified model by managing JRIC's and his own share of the businesses like his father, but did it in another dimension by hiding it behind opaque "orphan" corporate structures that he established in lax and almost non-regulated jurisdictions like Panama, Liberia and BVI.

(n) As custodian, like his father before him, he had absolute say in how the businesses were run, how much was paid out to JRIC and/or their families and how much was retained for further investment. Like his father before him, Ernest was not accountable to anyone for his expenditure and given the millions that he made for JRIC and his having to be a tax exile, that was accepted by JRIC, just as JERIC had accepted Robert Sr's analogous position in his lifetime, and no one asked any questions on that score (see [138] and [296]).

(o) The foregoing façade is what the spouses and grandchildren of Robert Sr witnessed, heard and were given to understand. As I have noted above, Camila survived Robert Sr for 38 years and until she passed away in July 2005, she was the matriarch of the family and a living witness to the carrying out of Robert Sr's "wishes".

389 The other De La Sala family members were not privy to the inner workings of the family businesses and assets. Like Robert Sr, Ernest preferred the flexibility to handle the family businesses and assets through opaque corporate structures rather than a formal and legal trust which would have been unwieldy and entail unnecessarily onerous concomitant duties and formalities. Ernest did better than his father in that he had the foresight to cash out of physical ship owning and various businesses through the 1990s and thereafter had the freedom of liquid cash to invest in, *inter alia*, stocks, other financial instruments, currencies, precious metals and the like. His exceptional

business acumen can be seen in his reading of the markets. He was extraordinarily accurate in foreseeing the September 2008 global financial crash coming and that Australia could not continue indefinitely living off the mineral and mining boom fuelled by China.

390 As Ernest aged and physical infirmities (like spinal stenosis and tinnitus) and medical interventions (like a bypass operation) cropped up, Ernest *knew* he had to get someone else to carry on his custodianship role. Unfortunately, he saw no one individual from the family like himself carrying on that important role. He distrusted trust corporations run by banks, whom he felt would live off the funds and assets. He seemed to have liked the way Bobby's children (except perhaps for Teresa) had been brought up, had tertiary education and with post graduate business and other professional degrees. He accordingly picked them to help him with his work and train them.

391 Unfortunately, they did not appear to have the same acumen and ability and/or Ernest was not ready to let go (which one it is does not matter for the issues before me, although it is likely to be a combination of both), and just as Ernest chafed at the bit held tightly by his father (the contemporaneous letters between Robert Sr and Ernest show this very clearly), Ernest continued to hold on very tightly to the reins.

The documentary evidence

392 I now turn to consider the documentary evidence in the light of the evidence of the witnesses and my assessment of their evidence. It must be remembered that it is Ernest's case that after Robert Sr died, he had purchased his mother's and siblings' shares in NEL and JMC through two transactions

involving SR, SM and CE in 21 August 1967 and 1 September 1970 respectively.

393 As a preliminary observation, I note that there is no written sale agreement and/or written record or even a note evidencing a sale and purchase between JRIC and Ernest for the NEL and JMC shares. Ernest asserts that this is unsurprising given that the transactions were not between commercial parties but between family members. Nonetheless, Ernest argues that the alleged transactions are amply documented. In my view, however, Ernest's case is not borne out on the documentary evidence. While the documentary evidence show Ernest running NEL, JMC and the other businesses including those in Australia (as Robert Sr did when he was alive), they indicate that he, like Robert Sr, was doing so *on behalf of the family*. I now turn to this evidence.

The company documents

394 As mentioned above at [143], it is undisputed between the parties that JERIC transferred their NEL shares to SR in August 1967.[342] Indeed, SR's ownership of NEL is reflected in NEL's annual return dated 29 December 1967.[343] It is also undisputed between the parties that SR's entire shareholding was acquired by SM at that time.[344] Again, this is reflected in a memorandum created by Ernest dated 15 December 1967 (*ie*, the 1967 Memo") which stated, *inter alia*, (1) that 5,999 NEL shares (the entire share capital of NEL) were issued to SR on 26 August 1967; and (2) SM simultaneously acquired *all* 100 shares of SR.[345]

342 ECJ's Closing Submissions at para 284; Companies' Closing Submissions at para 26.

343 3AB70 to 3AB73.3

344 ECJ's Closing Submissions at para 284; Companies' Closing Submissions at para 26.

395 According to Ernest, SR and SM were redundant companies under JMC that were acquired by him on 1 August 1967 and 12 August 1967 respectively.[346] To prove this, Ernest relied on two JMC minute sheets dated 1 August 1967 and 12 August 1967. The first minute sheet stated as follows:

> It was resolved to transfer [JMC's] share holdings in the said [SR], i.e. 100 shares of US$100.00 each fully paid at par together with a premium of HK$24,000.00 *to a party represented by Mr. E. F. de Lasala, Mr. S. B. Mitford, Mr. A. Vasquez and Mr. E. S. Velasquz*... [emphasis added]

The second minute sheet stated as follows:

> It was resolved to transfer [JMC's] share holdings in the said [SM], that is, 100 shares of US$100 each fully paid at par together with a premium to be agreed upon, *to a party represented by Mr. E. F. de Lasala, Mr. S. B. Mitford, Mr. A. Vasquez and Mr. E. S. Velasquz*... [emphasis added]

396 It is quite clear from both sets of minutes that JMC's shareholding in SR and SM were not transferred to Ernest *per se*, but "to a party represented by [Ernest]" and some others. Ernest makes the bare assertion that he was the undisclosed party referred to in the minutes and that everyone in the meeting knew this.[347] I am unable to accept this. First, it makes no sense for Ernest to be represented by himself. Secondly, the reason he gave for allegedly hiding his identity was because he did not want his name to be manifested. However, by representing himself, his name nevertheless appeared on the minute sheet. Thirdly, Ostenfeld was present at the meeting. However, in his AEIC, he stated that he had no personal knowledge of the identity of this "party represented by [Ernest]" and others. Although Ostenfeld stated on the stand that he knew the undisclosed party was Ernest, he also stated that he only

345 Plaintiffs' Bundle of Documents Vol 1 ("1PB") at p 47-48.

346 Ernest's AEIC at para 34.

347 NE 20 March 2014 at p 128 lines 10 to 21.

found out "subsequently", *ie*, after the meetings in August 1967. Nonetheless, the question of the identities of the undisclosed parties that JMC transferred its SR and SM shares to remains unanswered.

397 In this regard, the 1967 Memo may shed some light. The 1967 Memo stated that SM acquired all of SR's shares and "*SM shares to be issued equally to JERIC* as per minutes 12/8/67" (emphasis added). Both the Plaintiff Companies and ECJ argue that this showed that at that time, SM, SR and NEL were owned in a linear structure (*ie*, SM owned SR which owned NEL), with JERIC as the ultimate shareholders of SM in equal proportions.

398 On the other hand, Ernest alleges that the above statement in the 1967 Memo was simply part of his "estate plan", *ie*, that the SM shares were "to be issued" to JERIC if he were to pass away.[348] He asserts that this was necessary because he had, after acquiring SR and SM, organised the two companies into a circular structure, with SR holding the NEL shares (*ie*, SR owned SM; SM owned SR; and SR held the NEL shares).[349] He was afraid that if he were to die suddenly, his mother and siblings would not be paid for their NEL and JMC shares. In Ernest's view, this arrangement allowed JRIC "to succeed to SM, SR and NEL automatically without having to obtain Probate ... or be troubled by any other formalities" and thus ensuring his debt to JRIC (from the sale of the shares) was paid.[350]

399 I will first deal with Ernest's alleged estate plan. In my view, there was no such estate plan. First, the 1967 Memo makes no mention of the issuing of

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348 Ernest's AEIC at paras 40-43.

349 Ernest's AEIC at paras 34 and 40.

350 Ernest's AEIC at para 40.

shares being subject to the passing of Ernest. All the memo says is for "SM shares to be issued equally to JERIC". Secondly, the statement refers to the shares being issued to JERIC, *ie*, *including* Ernest. If Ernest were to pass away, this arrangement would have resulted in 20% of SM's shares being issued to Ernest's estate and thus subject to probate. This contradicts his alleged reason for wanting to obviate the need for his family to obtain probate or comply with other formalities. Ernest could not give a satisfactory answer to this contradiction on the stand. Thirdly, on Ernest's alleged version of the purchase, JRIC ultimately became creditors of SM (see [184(e)] above). If Ernest were to unexpectedly pass, JRIC would still be able to claim their sale proceeds as creditors of SM. It made no sense for him to have created this arrangement to ensure that his alleged debt to JRIC was paid. Lastly, Ernest adduced no evidence to show that SR and SM were placed into a circular structure.

400 To the contrary, there appears to be evidence that JERIC continued to have an interest in SR and SM, and therefore NEL, at that point in time. To begin with, there was a special meeting of the board of directors of CE on 22 December 1969 ("the 22 December 1969 CE Minutes") shortly after CE was incorporated on 19 December 1969 (as mentioned above at [144], CE was wholly owned by SR).[351] At this meeting, two matters were discussed and resolved:[352]

(a) That CE would purchase from JMC the entire issued capital of SM; and

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351 3AB202.

352 3AB194.

(b) That Ernest, at his discretion, shall have the Power of Authority to notify the company in writing that the shares in SM shall be transferred to such persons and in such numbers as he may direct.

In relation to (b) above, the minutes further stated that "[a]t this juncture, it was agreed and accepted that [Ernest's] nomination under this Power of Appointment for the present time shall be" *JERIC*, with each member receiving 20 shares (the entire issued capital of SM was 100 shares).

401 Some clarification must be made as to why CE purported to purchase SM from JMC when SM was apparently already purchased from JMC previously by an undisclosed party represented by Ernest and others (see above at [396]). Mitford, who was personally involved in the organisation of these transactions, stated in an undated note entitled "San Miguel Navigation Co. S.A." ("the Mitford Note") as follows:[353]

> In about june 1967, shortly after [Robert Sr's] death [Ernest] purchased from [JMC] the issued capital of [SR] and [SM] for US$10,000 each.
>
> [Ernest] then sold [SR's] issued capital to [SM] thereby making SR an wholly owned subsidiary of SM.
>
> In the meantime [Ernest] retained [JMC's] executed share transfer for the issued capital of SM in blank – ie bearer form until he sold the issued capital of SM to [CE] for US$10,000.
>
> [Ernest] then arranged an *option for the JERIC partners to claim 20% each of the SM* issued capital *as and when they wished.*
>
> *This situation explains why in [CE's] minutes of 22nd December 1969 the share purchase is shown from [JMC]. …*
>
> [emphasis added]

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353 43AB6677.

From the Mitford Note, it becomes clear that CE was able to "purchase" SM from JMC in 1969 because Ernest had deferred transferring the SM shares to the undisclosed party he was representing on 12 August 1967. Ernest argues that the Mitford Note mentions *Ernest* and not *JERIC* purchasing SM and SR from JMC and therefore Ernest was the owner of SM and SR.[354] I do not agree. The Mitford Note is equally consistent with Ernest purchasing SR and SM *on behalf of JERIC*. This explains why he then arranged for an option for JERIC to claim 20% each of SM's issued capital.

402 I return to the 22 December 1969 CE Minutes, which records the board resolving that CE would purchase SM from JMC, and that Ernest would have the power of authority to direct CE to transfer any number of SM shares to any person at his discretion. As mentioned above at [400], Ernest proceeded to exercise that power and nominate JERIC to be transferred 20 shares each, *ie*, JERIC would each hold 20% of SM. It is true that whether the SM shares were actually transferred to JERIC pursuant to that nomination is unclear.[355] However, in my view, the 1967 Memo, the 22 December 1969 CE Minutes and the Mitford Note, when taken together, strongly suggests that JERIC was supposed to have an equal interest in SM. It is thus likely that the "undisclosed party" that Ernest was representing in the acquisition of SM was actually JERIC. In essence, SM was merely JERIC's vehicle to hold their NEL shares for them. For reasons already set out, Ernest, or JERIC for that matter, saw it fit to hide their interest in SM (and therefore NEL). Hence the confusion.

403 Ernest argues that these documents do not reflect a "continued JERIC shareholding interest in SM".[356] He argues that JERIC's interest was a

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354 Ernest's Closing Submissions at para 445.

355 Ernest's AEIC at para 42.

contingent one, either upon his death or his nomination. I have already rejected Ernest's argument that the sentence "SM shares to be issued equally to JERIC" in the 1967 Memo was part of his estate plan (see above at [399]). In relation to the Mitford Note, although it stated that Ernest arranged for an *option* in favour of JERIC to claim 20% of SM, it was clear that JERIC could exercise that option "as and when they wished". This is more consistent with JERIC having an equal interest in SM rather than Ernest owning SM solely. It is true that the 22 December 1969 CE Minutes show that Ernest had the sole discretion to nominate who the SM shares were to be transferred to. However, it must be borne in mind that at that point in time, JRIC trusted Ernest with their affairs. Robert Sr had passed away recently and Ernest was the only person who knew the business well enough to run it.[357] It was not inconceivable that JRIC would be content leaving the power to nominate in Ernest's sole discretion with the expectation that Ernest would exercise it in their best interests just as Robert Sr had done. Indeed, the 22 December 1969 CE Minutes reflect Ernest ultimately nominating JERIC as the transferees of the SM shares.

404 This appears to be corroborated by the company particulars of SR and SM.[358] The SR company particulars recorded SM as its sole shareholder. It also recorded SR as owning 100% of NEL. Although the SR company particulars was undated, it can be concluded that it was created on or after 26 August 1967 because SR only came to own 100% of NEL on that date. Turning to the SM company particulars, it recorded *JERIC* as being its shareholders in equal proportions. It also recorded SM as owning 100% of SR,

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356 Ernest's Closing Submissions at para 473(a).

357 Bobby's AEIC at para 47.

358 41AB5853 to 41AB5854.

which occurred only after 26 August 1967. Likewise, although the SM company particulars was undated, it can be concluded that it was created on or after 26 August 1967 since SM only came to own SR on that date (see above at [394]).

405 With respect to JRIC's stake in JMC (*ie*, 45%) held by Overseas Nominees Ltd, it was transferred to CE on 1 September 1970. Ernest alleges that CE was his nominee and this transaction was his purchase of his mother's and siblings' JMC shares. However, it must be remembered that in 1970, CE, SR and SM were held in an orphan structure, with SR owning CE, CE owning SM and SM owning SR (see above at [144]). I have already found that JERIC had an equal interest in SM at that time, *ie*, they were the beneficial owners of SM (see above at [402]). Having found that one entity in the orphan structure was beneficially owned by JERIC, it must follow that JERIC owned the beneficial interest in the other two entities, *ie*, SR and CE as well. This is supported by the fact that JRIC were active directors in CE as of September 1970.[359] If CE was incorporated by Ernest for the *specific purpose* of purchasing JRIC's JMC shares, it made no sense for JRIC to be on the board of directors of CE. In my view, CE was acting on JRIC's behalf when it acquired the JMC shares. Similar to JERIC using SR/SM to hold their NEL shares, this was merely a restructuring exercise by JRIC to have CE rather than Overseas Nominees Ltd hold their JMC shares.

406 Indeed, the journal vouchers record JRIC continuing to receive dividends from JMC after 1970 (credited into their current accounts held with SM).[360] I do not accept Ernest's explanation that the JMC dividends were his

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359 31AB102A.

360 See *eg*, PBD pp 16 (Camila), 18 (Bobby), 20 (Tony) and 22 (Isabel).

payments to JRIC for the purchase of their JMC shares pursuant to Robert Sr's alleged convention of "vendor financing". Such an arrangement stands in direct contradiction to the very reason Ernest alleges why JRIC desired to sell their JMC shares in the first place. Ernest alleges that JRIC sold their JMC shares because they did not want to be exposed to the vagaries of shipping. However, if the purchase price of JRIC's JMC shares were to be paid out from JMC's dividends, this meant that JRIC's repayment would be dependent upon the performance of JMC and, consequently, the shipping industry.

Ernest's letters and tapes to his siblings

407 In keeping with Robert Sr's tradition, Ernest continued to send letters and tape-recordings to JRIC after Robert Sr's demise. This correspondence indicates that JRIC continued to have an interest in SM after 21 August 1967, the date Ernest allegedly purchased JRIC's NEL shares through SR and SM. I highlight one such piece of correspondence in early 1969.

408 It begins with a letter from Bobby to Ernest dated 11 February 1969 regarding the "scorecards" (explained in greater detail below at [416]) that Ernest had sent to him.[361] Bobby wrote:

> As suggested, I am listing the following, which I believe belongs to *my branch*, which incidentally will soon have an additional fruit. [emphasis added]

Bobby then proceeded to list out several investments and their respective returns, which included SM. Under the heading of SM, Bobby wrote:

> S.M
>
> *Branch* have 20% of S.M. (SR and N)

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361 3AB114 to 3AB115.

> SM 171035 = US$46,228.80 as per 31/12/68)…
>
> [emphasis added]

409 From this letter, it can be seen that Bobby was of the view that his "branch" (the tree metaphor was regularly used in the De La Sala family) included 20% of SM. This was confirmed in Ernest's reply to Bobby on 5 March 1969 via a tape recording. The relevant portions of the transcript provides as follows:[362]

> My dearest brother Bobby. By this tape dated 5 March I am replying to your letter dated 11 February. … You must understand that *your 20 per cent in SM* already contains this so you cannot count it twice.
>
> …
>
> SM owns PanPac and SR and SR in turn owns N for Nellie. *You have 20 per cent of SM*. Quite apart, 171035 has at present a credit balance on deposit with SM of US$46,228.80 excluding accrued and accruing interest. In the *Djati Luhur* you have an 11.25 per cent interest. The cost of the *Djati Luhur* was US$1,307,088.20, to be exact, therefore your share of the cost is about $147,047, which you've paid for from the 1968 110 per cent JMC dividend. …
>
> …
>
> I suggest that you keep this tape in a safe place and have it play to you time and again and get Mummy, Isabel and Tony to hear it *as they are, to a very large extent, similarly involved as yourself, that is in the [major] situations of SM which I repeat has SR, PanPac and N in its bag.* …
>
> [emphasis added]

410 There was another undated note from Ernest to Bobby (which Edward claims to have been written after 16 October 1969), in which Ernest said:[363]

> In NEL, your shareholding is 20% the same as Mummy, Tony, Isabel and myself. China Shipping Co Ltd and North Breeze

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362 3AB118 to 3AB121.

363 Edward's AEIC at para 74(b) and ERS-36.

> Navigation Co. Ltd., San Jeronimo SS Co. S.A., Cronulla Shipping Co. Ltd., are wholly owned subsidiaries of NEL …

411 Ernest's explanation for these references to JRIC holding a 20% interest in SM was that they were made in the context of his estate plan, *ie*, he had nominated JRIC as shareholders provisionally. Again, I do not accept this explanation. There is no mention in Bobby's letter dated 11 February 1969 or Ernest's tape recording dated 5 March 1969 of JRIC's interest in SM being contingent upon the passing of Ernest. In fact, a plain reading of both pieces of correspondence indicates that JRIC had an interest in SM at that time.

412 As mentioned above at [152], there was a further restructuring of the businesses in 1995 and the second orphan structure of PAL-CFC-PEN was created. During this period, Ernest wrote certain letters to his family and Ostenfeld. Ernest claims that in these letters, he implicitly treated the assets of PAL-CFC-PEN as *belonging to him* and this allegedly went unchallenged by his family members.[364] The first document is a handwritten letter dated 4 March 1995 to Isabel.[365] In this letter, Ernest first states that he had divested himself of most of the assets that were in his name. He then appointed Hong Kong Bank International Trustees Limited as the executor and trustee of his estate via his will dated 12 November 1998. He then says to Isabel:

> I HOPE THAT EDWARD AND CHRISTINA AND MY LOYAL SECRETARY MARGARET KAN WILL BE ABLE TO HELP YOU MANAGE THE VARIOUS PANAMANIAN ([PAL]) AND LIBERIAN ([COM INC]) AND MORE RECENTLY THE B.V.I. ([CFC]) COMPANIES, I AM MANAGING; IF YOU EVER NEED ANY ADVICE, PLEASE CALL ON CHRIS OSTENFELD AND MALCOLM MORRISON.
>
> MY PARAMOUNT DESIRE IS THAT THE CAPITAL ASSETS OF THESE COMPANIES (TREES) ARE PRESERVED AND

364 Ernest's Closing Submissions at para 163.

365 36AB2287.

> CONTINUE TO GROW THROUGH PRUDENT INVESTMENTS AND ONLY A PORTION i.e. NOT EXCEEDING 25% (1/4) OF THE ANNUAL INCOME (FRUITS) BE PERMITTED TO BE DISTRIBUTED EQUALLY TO TERESA, EDWARD, CHRISTINA, ISABEL AND NICOLE. REMEMBER MY SAYING "DON'T CHOP DOWN THE TREE JUST PICK THE FRUIT".
>
> IT IS NOT EASY TO WRITE EXACTLY AND PRECISELY HOW I DESIRE TO SEE THAT THE COMPANIES CONTINUE TO BE MANAGED AS I AM MANGINGING THEM, AS CIRCUMSTANCES MAY CHANGE BUT I HOPE THIS LETTER WILL SERVE AS A GOOD GUIDE TO ENSURE CONTINUITY i.e. THE PRESERVATION AND ENHANCEMENT OF CAPITAL ASSETS.
>
> YOU KNOW THAT I HAVE COMPLETELY DIVESTED MYSELF AS I DO NOT DESIRE MY TRUSTEES TO "LIVE ON THE FAT OF MY ESTATE WHILST THEY PROLONG THEIR EXAMINATION, INVESTIGATION AND MANAGEMENT ETC — PERENNIAL EMPLOYMENT".
>
> YOU WILL ALSO NOTE THAT I HAVE SPECIFICALLY EXCLUDED MY SONS ROBERT ERNEST AND ERNEST EDWARD FROM MY WILL SINCE THEY DO NOT DESERVE TO RECEIVE ANY MORE FROM ME.
>
> I ALSO CONSIDER TONY'S CHILDREN ALREADY WELL PROVIDED FOR, ALTHOUGH I HAVE MADE A GIFT TO HIS TWO GRAND CHILDREN COURTENAY ALEXANDRA AND ROBERT ANTHONY.

413 The next letter is dated 21 June 1995 to Tony, Bobby and Isabel and is also handwritten. It provides:[366]

> … I HAVE ALSO INCORPORATED TWO COMPANIES IN THE BRITISH VIRGIN ISLANDS TO HANDLE *MY AFFAIRS AND THOSE OF MY CHOSEN SUCCESSORS AND BENEFICIARIES*. FYI MY TWO SONS ROBERT AND ERNEST HAVE DISQUALIFIED THEMSELVES AS MY NATURAL SUCCESSORS AND WILL NOT INHERIT ANY PART OF *MY ESTATE*. [emphasis added]

414 The last letter is a handwritten one dated 26 January 1996 to Ostenfeld and copied to at least Isabel and Edward. In that letter, Ernest writes:[367]

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366 18AB18.

> DEAR CHRIS,
>
> I THANK YOU FOR AGREEING TO ACT AS ADVISER/CONSULTANT TO MY SISTER ISABEL AND EDWARD ETC, IN THE MANAGEMENT/ADMINISTRATION OF *MY ESTATE* IN MY ABSENCE.
>
> YOU ARE AWARE THAT I DO NOT DESIRE THAT *MY ESTATE*, THE "MONEY TREE", TO BE CUT DOWN AND DIVIDED UP. THE MAXIMUM ANNUAL DISTRIBUTION SHOULD BE LIMITED TO HALF OF THE ANNUAL YIELD I.E. 50% OF THE YEAR'S REVENUE OF THE OFF-SHORE COMPANIES WHICH ARE CONTROLLED BY THE TRIANGLE OF [PAL]/[CFC] AND [PEN] THE DETAILS OF WHICH ARE IN THE CUSTODY OF EDWARD & YOURSELF.
>
> I SHALL PLACE IN A SEALED ENVELOPE IN THE CUSTODY OF MY SISTER ISABEL, THE NAMES OF *MY BENEFICIARIES*.
>
> I DESIRE THAT THE OFF-SHORE HOLDING COMPANIES CONTINUE TO BE MANAGED AND SERVICED AS THEY ARE AT PRESENT ON A PERENNIAL BASIS BY AND FOR *MY BENEFICIARIES AND THEIR SUCCESSORS*.
>
> THIS IS AN INITIAL OUTLINE OF MY OBJECTIVE WHICH I SHALL REFINE & SUPPLEMENT FROM TIME TO TIME, AND ADVISE YOU ACCORDINGLY.
>
> I FEEL THAT THIS METHOD/SYSTEM IS MORE SUITABLE THAN THE COSTLY APPOINTMENT OF PROFESSIONAL TRUSTEES OF UNKNOWN ABILITY.
>
> I SHALL OF COURSE WITHOUT RESERVATION, RECIPROCATE BY ACTING FOR YOU IN THE SAME WAY.
>
> [emphasis added]

415 It is true that on the face of these letters, Ernest appears to have considered the assets of PAL-CFC-PEN as forming part of *his estate* in the event of his demise. However, Edward's explanation, which I accept, is that Ernest had a practice of describing these companies and their assets as part of his estate in order to mask the fact that the companies actually belong to the De La Sala family.[368] This was to ensure that the family assets would not be

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367 18AB71.

368 Edward's AEIC at paras 72-73.

subject to heavy tax in Australia as Ernest was the "tax exile". This practice was maintained even for internal letters to the family, as seen from how Ernest would in his other letters describe remittances to Bobby and his children as gifts from Ernest, when they were in fact Bobby's funds, and would even remind them to write him an "appropriate letter of thanks" for his "personal gifts" (see below at [444]). There were numerous documents of this nature in the evidence before me with their rather stilted wording. These included those from Ernest to his siblings with elaborate recitation of divesting his personal wealth and the making of "gifts". According to Edward, this practice of Ernest was widely known in the family and there was therefore no need to have "challenged" what Ernest was stating in these 1995–1996 letters. That the companies were family assets is consistent with a telephone memo (referred to above), by Ostenfeld recording his conversation with Ernest dated 4 December 1997:

> (5) Attending Edward's wedding Saturday. In and out of Melbourne on same day. Question of making Edward a JMC director, immediately or from beginning January? Ernest favours 1 January 1998.
>
> Edward to stop procrastinating. Some shares given to him earlier have been left in nominee account instead of transferring to his own account. If he cannot look after his own assets how can EFL trust him to look after *family assets*.
>
> [emphasis added]

Scorecards and journal vouchers

416 JRIC regularly received updates on the performance of SM and SR from Ernest post-August 1967.[369] These updates came in the form of "scorecards", which were essentially account statements that recorded the value of the investment accounts allocated to each family member.[370] These

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369 Bobby's AEIC at paras 59-69.

scorecards were constantly referred to, such as in a tape recording from Ernest to JRIC on 6 March 1969[371] and in a birthday card from Ernest to Camila.[372] At times, Ernest would also send the balance sheets of SR and SM for Bobby and Tony to "understand [and] keep".[373] These balance sheets reflected assets in SM and SR being allocated to an account named "JERIC", or to various numbered accounts which were based on the birth dates of each JERIC member.[374] If JRIC's interest in NEL was fully purchased by Ernest in August 1967 and they had no interest in SM either, it is very strange that JRIC would continue to receive updates on the performance of SM and SR from Ernest and that monies were being transferred to accounts belonging to JRIC. In my view, the explanation must be because JRIC continued to have an interest in NEL (through SM and SR).

417 Indeed, JRIC maintained current accounts with SM that were consistently credited post-August 1967. These are recorded in various journal vouchers of SM.[375] According to Ernest, the credits in these banks accounts were the NEL dividends which Ernest used to repay JRIC for his purchase of their NEL shares pursuant to Robert Sr's alleged convention.[376] Ernest also alleged that there were times where he employed the NEL dividends which JRIC were entitled to receive "to work in various investments and ventures" instead of crediting them into these accounts. He would then credit the gains

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370 Exhibit D12; Bobby's AEIC at RPDLS-35 (p 170).

371 3AB122.

372 1PB51.

373 1PB51.

374 Bobby's AEIC at RPDLS-36 (pp 172 to 191).

375 1PB9-23.

376 NE 20 March 2014 at p 25 line 12 to p 30 line 20.

from these reinvestments into JRIC's current accounts with SM. I do not accept Ernest's explanation. As the Plaintiff Companies point out, NEL declared more than US$13m in dividends from 1967 to 1974.[377] Ernest also insists that if he had reinvested the NEL dividend that was due to JRIC, the amount reinvested would also be considered repayment to JRIC for their NEL shares.[378] By 1974, the amount of dividends declared by NEL should have amply covered the alleged US$10m purchase price for the NEL shares (even factoring a 6% per annum interest that Ernest alleges was agreed upon by the parties). However, Ernest claims that Tony and Bobby were only paid out in 1987, and Isabel claimed that she was fully paid out in 2005. On the stand, Ernest had no believable explanation for this discrepancy.

418 In my view, the credits in JRIC's current accounts with SM were the dividends and/or returns on investments that they were entitled to receive as the beneficial shareholders of SM (and therefore, NEL indirectly).[379] When CE came into the picture, the three companies (*ie*, SR, SM and CE) were put into a circular structure with CE owning SM (see above at [144]). But it must be remembered that pursuant to the 22 December 1969 CE Minutes (and consistent with the Mitford Note), Ernest had the authority to transfer any number of SM shares to any person, and he nominated JERIC in equal proportions. This is consistent with JERIC continuing to possess an interest in SM, SR and NEL. The fact that some of the credits to JERIC's current accounts with SM were distributions from individual investments instead of dividends declared by SM is not inconsistent with JERIC being the beneficial shareholders of SM. In fact, some of the credits were actually distributions

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377 See Companies' Closing Submissions at para 617.

378 NE 20 March 2014 at p 9 lines 3 to 25.

379 See also Mr Stone's 1st Affidavit at p 38, paras 6.2.5-6.2.7 and 6.3.3.

from NEL, which suggest that JERIC benefited from the profits of NEL. This corroborates JERIC being the beneficial owners of SM and SR.

The accounting expert evidence

419 Ernest's story at trial was that he had purchased JERIC's shares in NEL on 21 August 1967 via the Round Trip Transaction. Both the Plaintiff Companies and Ernest called experts to give opinions on, *inter alia*, whether the documentary evidence was consistent with the Round Trip Transaction, *ie*, Ernest's version of how he had funded his alleged purchase of JRIC's NEL shares in August 1967:

(a) The Plaintiff Companies called Mr Stone, a partner at KordaMentha Pty Ltd who specialises in forensic accounting; and

(b) Ernest called Mr Reid, a director in the Singapore office of Ferrier Hodgson Pte Ltd, a company that specialises in, amongst other things, forensic accounting.

Both Mr Stone and Mr Reid were provided with the available ledgers of SM and SR, various documents pertaining to SM, SR, NEL, JMC and CE, such as minute sheets and company particulars, and other relevant documents such as internal memos written by Ernest. With respect to their opinions on the Round Trip Transaction, both experts principally relied on the ledgers of SM and SR.

420 I note that, despite their divergence in opinion, both experts agreed that the ledgers of SM and SR were not complete.[380]

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380 See S/No. 1 of the Joint Expert Report ("JER").

421 To recapitulate, Ernest's version of the Round Trip Transaction can be distilled into seven main transactions (which the experts also adopted):

(a) Transaction A: HKSBC lent US$10m to Ernest.

(b) Transaction B: Ernest lent SM US$10m.

(c) Transaction C: SM deposited US$1.5m with Lloyds Bank.

(d) Transaction D: SM lent SR $8.5m.

(e) Transaction E: Lloyds Bank lent SR US$1.5m.

(f) Transaction F: SR purchased the share capital of NEL from JERIC for US$10m.

(g) Transaction G can be split into two parts, with the second part further split into two sub-parts as follows:

(i) Part 1: JERIC lent US$10m to SM;

(ii) Part 2(a): SM repaid Ernest US$10m; and

(iii) Part 2(b): Ernest repaid HKSBC US$10m.

422 Both experts are in agreement that Transactions C, D and E are reflected on the ledgers of SM and SR. With respect to Transaction F, both experts agree that the ledgers reflect SR purchasing the shares in NEL for US$10m. However, Mr Reid was of the view that it could not be concluded from the ledgers that the NEL shares were purchased from JERIC. In contrast, Mr Stone opined that many of the documents were consistent with SR purchasing NEL from JERIC.[381] The ledger reflecting the Investment Account for SR provided as follows:[382]

Date	Contra Account	Particulars	Debit	Credit
21 Aug 67	HKSBC., S.F.	Purchase of Entire Issued Capital of [NEL] from [Ernest] as approved by Directors' Minutes dated 8 August 1967.	$10,000,000	-

423 It is true that the particulars of the above mentioned transaction indicated that the entire issued capital of NEL was purchased from Ernest. However, I have already mentioned (above at [113]) that as at Robert Sr's death, JERIC legally and beneficially owned NEL in equal proportions. Indeed, it is undisputed that JERIC at the least held the legal title to the NEL shares as of Robert Sr's death. Any alleged purchase of NEL shares shortly thereafter must have been from JERIC rather than Ernest. Therefore, while Mr Reid is not inaccurate in stating that it cannot be concluded from the ledgers that the NEL shares were purchased from JERIC, I agree with Mr Stone that the other documents point towards the NEL shares being purchased from JERIC.

424 The main divergence of opinion between the two experts lay in their views on Transaction B and Transaction G Part 1. Mr Reid was of the view that the ledgers record Ernest transferring US$10m to SM, thereby showing that Transaction B occurred. The ledger he relied on was the SM ledger reflecting its HKSBC., SF account, which recorded the following:

Date	Contra Account	Particulars	Debit	Credit
21 Aug				

381 See S/No. 7 of the JER.

382 Mr Reid's 1st Affidavit at p 74.

67				-

425 Mr Reid was also of the view that the ledgers record JERIC separately providing US$10m to SM, thereby showing that Transaction G Part 1 occurred. The ledger Mr Reid relied on was the SM ledger reflecting the current account of "[Ernest] Representing the 'JERIC Syndicate'", which recorded the following:

Date	Contra Account	Particulars	Debit	Credit
21 Aug 67	HKSBC., SF	Cash Deposited	-	$10,000,000

426 In contrast, Mr Stone opined that the two records referred to at [424] and [425] above are two sides of the same transaction, consistent with the double entry accounting concept, which means that every accounting entry will effectively have at least one debit entry and at least one credit entry, for which the combined debit value will equal the combined credit value.[383] The reason for his opinion was that the SM ledger reflecting its HKSBC., SF account only recorded *one* debit amount of US$10m on 21 August 1967.[384] If both Ernest and JERIC had separately lent SM US$10m, then the HKSBC., SF ledger should have recorded *two* debits of US$10m, one with the contra account "[Ernest] Current Account", and the other with the contra account "[Ernest] Representing 'JERIC Syndicate'". However, only the former was recorded on the HKSBC., SF ledger. Furthermore, the "[Ernest] Current Account" ledgers that were available only recorded transactions beginning from 1 March 1968 and there is no way of confirming whether there were

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383 Mr Stone's 2nd Affidavit at p 24, para 3.3.4.

384 Mr Reid's 1st Affidavit at p 66.

ledgers which recorded transactions before that. In fact, the second page of the ledgers was numbered as "Card No. 2", which suggests that the first page, which only recorded transactions from 1 March 1968 onwards, was "Card No. 1".[385] The inference that may be drawn is that there were no ledgers recording transactions prior to 1 March 1968. This is supported by the fact that the first transaction on the first page of the "[Ernest] Current Account" ledgers recorded a credit of US$72,663.02, and a balance of "US$72,663.02 [Credit]". This meant that if there were ledgers recording transactions prior to 1 March 1968, those transactions must have a net balance of zero. I find that to be unlikely. The more likely explanation is that there were no ledgers recording transactions prior to 1 March 1968.

427 Mr Stone was also of the view that it was unlikely that there was an earlier page of the HKSBC., SF ledger that recorded a separate debit amount of US$10m. This was because the first page of the HKSBC., SF ledger was unnumbered (like the "[Ernest] Current Account" ledgers), but the second page was numbered as "Card No. 2", suggesting that the first page was "Card No. 1". Furthermore, the HKSBC., SF ledger recorded three transactions on 21 August 1967 – a debit of US$10m, a credit of US$8.5m (Transaction D), and a credit of US$1.5m (Transaction C). This was followed by two transactions on 23 August 1967 – a debit of US$250,000 and a credit of US$250,000. The net value of the debits and credits between 21 and 23 August 1967 was zero and the balance recorded on the ledger was "Nil" at the end of 23 August 1967. This meant that the balance immediately prior to these transactions was also "Nil". Mr Stone thus concluded that for there to be an earlier page showing a separate debit of US$10m on 21 August 1967, there would either have to be a

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385 Mr Reid's 1st Affidavit at pp 51 to 52.

negative balance of exactly US$10m prior to that debit, or another credit for exactly US$10m on 21 August 1967 after the debit was recorded.

428 In Mr Stone's view, the more likely explanation was that the entry in the HKSBC., SF ledger which indicated a loan received from [Ernest] (reproduced at [424] above) was a recording error. The words "Representing the 'JERIC Syndicate'" was left out in the description of the contra account of that transaction. The result was that there was only *one* transaction involving US$10m, *ie*, a loan of US$10m from JERIC to SM, and this transaction was reflected via a US$10m debit in the SM HKSBC., SF ledger and a US$10m credit in the "[Ernest] Representing the 'JERIC Syndicate'" ledger. I agree with Mr Stone.

429 First, a similar error had been made before in the recording of Transaction F. SR's purchase of NEL shares was recorded as "from [Ernest]" when in actual fact, it was from JERIC (see above at [143]). It is not unlikely that such a recording error would be repeated in a different ledger. Secondly, adopting Mr Reid's analysis would require the court to assume that there were missing ledgers for *both* the HKSBC., SF account and the "[Ernest] Current Account". The court would also have to assume that these missing ledgers of the former recorded a debit of US$10m from JERIC and a credit of US$10m on 21 August 1967 (with, according to Ernest's case, the contra account being Ernest's, *ie*, Transaction G Part 2), and the missing ledgers of the latter recorded a credit of US$10m on 21 August 1967. However, there is simply no evidence other than the two ledger entries that Mr Reid relies on (at [424] and [425] above) that suggests this. Thirdly, Mr Stone's explanation is strongly supported by a letter written by Ernest to Mitford dated 26 January 1968 where he instructed Mitford as follows:[386]

> *In your SM statement you show $10m owing by SM to [Ernest] instead of the JERIC Syndicate; therefore kindly correct.* Before 31/3/68 SM will be paying NEL $350,000.00 to settle the purchase price of Australaska and remittance of $250,000.00. [emphasis added]

Therefore, I find that the two entries referred to at [424] and [425] above record the same transaction. Accordingly, there was only one loan of US$10m from JERIC to SM.

430 With respect to Transaction A and Transaction G Part 2(b), both experts are in agreement that this alleged transaction does not and would not have been recorded in the ledgers of SM and SR. Mr Reid also admitted that the reason why he concluded that these two transactions had occurred was because he was instructed by Ernest that they did. Ernest has therefore failed to show that both these transactions had occurred.

431 In sum, I prefer Mr Stone's evidence for two reasons. First, I found Mr Stone's reasons to be more sound and cogent. Further, many of Mr Reid's conclusions were *premised* upon Ernest's instructions to him, the content of which are hotly disputed between the parties. Secondly, and more importantly, I find that the ledgers do not prove that Transactions A, B and G Part 2(a) and Part 2(b) had occurred. They do, however, indicate that Transactions C, D, E, F and G Part 1 had occurred. Accordingly, I am of the view that the ledgers show that JERIC lent SM US$10m (Transaction G Part 1), which was then loaned to SR (Transaction C, D and E) which used it to purchase the NEL shares from JERIC (Transaction F). I agree with the Plaintiff Companies that this was simply a restructuring exercise by JERIC to have SR, which was incorporated in Panama, hold JERIC's NEL shares. The loan of US$10m from

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386 7AB222B.

JERIC to SM/SR which was then used to buy JERIC's own NEL shares was to create the appearance that JERIC had "sold" their NEL shares to SR, and that they did not hold any beneficial interest in NEL.

432 The Round Trip Transaction and the accompanying documents put before me therefore do not show that Ernest bought out JRIC as alleged by him.

The 1987 Memorandum

433 The 1987 Memorandum (referred to at [184(g)] above) was a document heavily relied upon by Ernest to show that he had purchased JRIC's share in NEL and JMC after Robert Sr's death. The 1987 Memorandum, which was dated 6 April 1987, provided as follows:

> **MEMORANDUM**
>
> This confirms that "J" & "R"'s share of the assets of "5-Stars" alias "JERIC" have been distributed to "J" and "R" in full in cash, resulting in "J"'s share being transferred to Sovereign Corp. S.A. in full in cash and likewise "R"'s share transferred in full in cash to Dominion Corp. S.A.
>
> "C", "I" & "E" will now beneficiary own & hold all the remaining assets of "JERIC" i.e: "5-Stars" in the name of Trinity Trust.
>
> It is recorded that in the above distribution, it was agreed that the house at 27 Carrington Avenue & the farm in Branston are now beneficiary owned by Trinity Trust but the registered owner will remain unaltered.

The 1987 Memorandum also bore the signatures of Ernest, Bobby and Tony, with Matthew Ku as a witness.

434 According to Ernest, the proceeds from JRIC's sale of their NEL and JMC shares to Ernest were amalgamated together along with some of Ernest's own funds to form what was termed as the assets of "5 Stars". Ernest alleges

that he managed these assets for JRIC. In the mid-1980s, Bobby had allegedly requested to be paid in full the proceeds of sale of his NEL and JMC shares.[387] This led Ernest to remit large sums of money to DOM, the holding company for Bobby's funds, between 1983 and 1986. The 1987 Memorandum was then signed by Bobby on 6 April 1987, by which Ernest alleges that Bobby acknowledged that his share of the "5 Star" assets, *ie*, his sale proceeds that were managed by Ernest in the 1970s and early 1980s, were paid out to him in full. Ernest also alleges that Tony was paid his share in full at the same time, and that was why Tony signed the 1987 Memorandum as well.

435 On the other hand, the Plaintiff Companies and ECJ argue that the 1987 Memorandum is unrelated to Ernest's alleged acquisitions of NEL and JMC from JERIC.[388] In fact, they argue that the 1987 Memorandum was actually a document that was created in relation to a prior family dispute over certain Australian properties.[389]

436 In my view, the 1987 Memorandum does not contradict my finding that the alleged NEL and JMC sale from JRIC to Ernest never took place. If the 1987 Memorandum, as Ernest claims, was drafted by Matthew Ku in order to record that Bobby and Tony have been paid in full for the sale of their NEL and JMC shares, I find it strange that the 1987 Memorandum makes no reference to NEL, JMC and/or to any purchase or sale of the shares of those companies. It might be the case that it was understood among the parties that the assets of "5-Stars" referred to the sale proceeds of the NEL and JMC

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387 Ernest's AEIC at para 44.

388 ECJ's Closing Submissions at para 509; Companies' Closing Submissions at para 645.

389 ECJ's Closing Submissions at p 276.

shares that Ernest had been managing on behalf of JRIC, and therefore there was no need to explicitly mention NEL and/or JMC. However, there is no evidence apart from Ernest's assertion to show that the assets of "5-Stars" comprised JRIC's proceeds from the NEL and JMC sale. I have already mentioned that Tony and Isabel's evidence with respect to the alleged NEL/JMC sale is unreliable (above at [235]–[290]). Furthermore, while Tony alleged that he was paid out along with Bobby, he maintained that he did not assume control of the funds but left them with Ernest.[390] If this were truly the case, it made no sense for Tony to have signed the 1987 Memorandum. Tony also could not adequately explain why he had been paid out when it was only Bobby who allegedly wanted his NEL/JMC sale proceeds. More importantly, both of them admitted that they did not have personal knowledge as to whether Bobby was paid the proceeds of the sale of his NEL and JMC shares.

437 In turn, Bobby's evidence in court was that he had never heard of the term "5-Stars" and that the 1987 Memorandum was merely a document created to appease Tony and/or Camila in the context of a prior family dispute regarding the Australian properties.[391] As to why the 1987 Memorandum bore Bobby's signature, his answer was that Ernest used to give him and his siblings a lot of papers to sign, and there were instances where Bobby had signed papers and forms in blank before Ernest filled in the content subsequently.[392]

438 Ernest relies on a document dated February 1984 entitled "Five Stars" which purports to break down the various assets held by "Five Stars" ("the

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390 Tony's AEIC at para 18.

391 NE 14 October 2014 at p 97 lines 4 to 7.

392 NE 14 October 2014 at p 91 lines 15 to 23.

Five Stars Memorandum") to show how he had grown JRIC's proceeds from the NEL/JMC sale.[393] However, there is nothing which indicates that the assets referred to in the Five Stars Memorandum were the result of the alleged NEL/JMC sale. In fact, the figures in the memorandum suggest that the assets were *not* the sale proceeds of the alleged NEL/JMC sale. As of 31 December 1970, "Five Stars" was recorded as having assets totalling approximately US$9.5m. It was Ernest's case that he did not pay JRIC the proceeds from the NEL/JMC sale at the time of purchase, *ie*, August 1967 and September 1970 respectively. Instead, he paid the sale price out of dividends that NEL and JMC subsequently declared. However, between 1967 and 1970, the total dividends declared by NEL were HK$18.1m,[394] while in 1970, JMC declared a dividend of HK$8m of which JERIC would be entitled to 70%, *ie*, HK$5.6m. The total dividends declared to JERIC, which on Ernest's case would form the NEL/JMC sale proceeds, hence amounted to no more than HK$24m (approximately US$4m). This is in contrast to the US$9.5m that "Five Stars" was recorded as holding as of 31 December 1970.

439 Ernest further relies on various bank statements of DOM (*ie*, the holding company for Bobby's funds) between 1984 and 1986, which show that approximately US$15m was remitted into DOM's bank account during that period.[395] Ernest alleges that these remittances were Bobby's share of the NEL/JMC sale proceeds, and were made pursuant to Bobby's wishes to be paid the sale proceeds in full. This led to Bobby signing the 1987 Memorandum.[396] In my view, however, no such conclusion can be drawn from

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393 Ernest's AEIC at para 44; 14AB102.

394 30AB278.

395 32AB200 to 32AB219.

396 Ernest's Closing Submissions at paras 157-159.

the remittances alone. The bank statements merely record sums of money being remitted into DOM's account. There is no evidence to suggest that these remittances were indeed the sale proceeds that Ernest allegedly owed to Bobby. These remittances could have been the distributions from the family assets that Ernest was managing after Robert Sr died (as I have found above at [140]). They could also have been returns from the investment of the assets of "5-Stars", which as mentioned above, have no established link to JRIC's alleged sale proceeds. Indeed, Tony, Isabel and Camila could have received these same remittances, but their bank statements have unfortunately not been adduced before the court. These remittances are therefore equivocal and do not take Ernest's case very far.

440 Ernest also sought to connect these remittances into DOM with another memorandum written by him dated 8 December 1986. The memorandum provides:

> WITH THE RECENT REMITTANCES TO LLOYDS BANK GENEVA AND SWISS BANK CORP VANCOUVER FOR THE RESPECTIVE CREDIT OF SOVEREIGN CORP S.A. AND DOMINION CORP S.A., ALL THE VARIOUS CASH DEPOSITS AND OTHER ASSETS OF PALOMAR, SOVEREIGN INC., DOMINION INC., COMMONWEALTH INC., NOW BELONG TO THE "TRINITY TRUST'.
>
> THE OBJECT OF THE 'TRINITY TRUST' IS TO AT ALL TIMES KEEP THE CAPITAL INTACT AND SAFELY INVEST ONLY THE REVENUE i.e. INTEREST AND DIVIDEND MAY BE DISTRIBUTED BY MYSELF AND IN MY ABSENCE BY MY MOTHER AND OR MY SISTER, TO WHOMEVER THEY SEE FIT.

First, I note that Bobby was not cross-examined on this memorandum at all and no questions in relation to the document were put to him. Secondly, like the 1987 Memorandum, there is nothing on the face of this memorandum that links it to any alleged sale of NEL and JMC shares. Neither does the document show that the assets of "5-Stars" were actually JRIC's sale proceeds. The

documents, even if taken together, show at the highest that there was a group of assets known as the "5-Stars" and that Bobby and Tony's share of this group of assets were paid out to them in full. The remaining assets were then owned by "Trinity Trust", *ie*, Ernest, Isabel and Camila. This, however, does not prove Ernest's case that (a) JRIC sold their NEL and JMC shares to Ernest; (b) Ernest invested the sale proceeds for JRIC under "5-Stars"; and (c) Ernest paid Bobby and Tony their share of the sale proceeds.

441 On the other hand, there is evidence which contradicts Ernest's case on the purport of the 1987 Memorandum. First, the third paragraph of the 1987 Memorandum records the house at 27 Carrington Avenue and the Branston Farm being beneficially transferred over to "Trinity Trust". Ernest, Tony and Bobby, however, gave evidence in court that in 1993, there was a segregation of certain Australian properties owned by the De La Sala family, held through the DLS Australian Companies. This segregation came about as a result of a prior family dispute regarding the Australian properties, including 27 Carrington Avenue, the Branston Farm, and a shopping centre known as Totem Shopping Centre (see above at [435]).[397] To resolve the dispute, 27 Carrington Avenue was transferred to Bobby, the Branston Farm was transferred to Isabel and Bobby's daughters, and Tony came to own the Totem Shopping Centre along with some other properties. However, there was no suggestion that Bobby, Isabel and Bobby's daughters had obtained 27 Carrington Avenue and the Branston Farm from the "Trinity Trust". In fact, Tony's evidence was that he had bought over Bobby's and Isabel's shares in the DLS Australian Companies sometime in 1993, and pursuant to that

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397 NE 25 March 2014 at p 164 lines 7-11 (Ernest); NE 7 March 2014 at p 22 line 13 to p 23 line 25, p 49 line 4 to p 48 line 25 (Tony); NE 14 October 2014 at p 88 line 19 to p 89 line 2, p 105 line 13 to p 106 line 12 (Bobby).

purchase, 27 Carrington Avenue and the Branston Farm were transferred out of the DLS Australian Companies.[398] This resulted in Tony owning the Totem Shopping Centre, which remained in the DLS Australian Companies along with other Australian properties. I therefore have grave doubts over the accuracy of the third paragraph of the 1987 Memorandum. This includes the date being obviously apocryphal. In my view, these factors significantly impact the reliability of the 1987 Memorandum in its probative value towards Ernest's case.

442 Secondly, Bobby continued to receive large sums of money from Ernest post-1987. For example:

(a) On 15 August 1989, Bobby wrote a letter to Ernest to thank him for making "$90,000" available to Bobby to purchase a property in Brisbane;[399]

(b) On 1 January 1990, Ernest wrote to Bobby's four children informing that that he had made a "gift" of US$500,000 to each of them.[400] This was allegedly on Bobby's request;[401]

(c) On 8 November 1990, Bobby informed Ernest that Edward and Teresa would each require US$200,000 to purchase property. He also asked for US$30,000 to be provided to Christina and Maria-Isabel;[402]

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398 NE 7 March 2014 at p 22 line 13 to p 23 line 25, p 49 line 4 to p 48 line 25.

399 15AB293.

400 15AB302.

401 Teresa's AEIC at para 21.

402 15AB324 to 15AB325.

(d) On 3 August 1992, Ernest wrote to Isabel, Tony and Bobby to inform them that he had given them each US$1m from "[his] assets";[403]

(e) On 7 October 1992, Ernest wrote to Isabel to ask her to pass Bobby a remittance confirmation showing that Ernest had remitted a sum of US$300,000 to each of Bobby's children;[404]

(f) On 31 January 1993, Ernest wrote to inform Bobby that he was making a "gift" to Bobby and Terrill of £356,600.60;[405]

(g) On 10 July 1997, Ernest wrote to inform Bobby that he had decided to remit US$1.6m to Bobby as a "gift";[406]

(h) On 21 December 1999, Ernest wrote to Bobby to "confirm" that he would be making Bobby a gift of up to US$10m in progressive payments;[407]

(i) On 28 January 2002, Bobby wrote to Ernest to thank him for the "further gift" of AU$2m;[408]

(j) On 31 January 2002, Ernest wrote to Bobby to inform him that he had remitted US$2m to Bobby "in line with [his] previous promise";[409]

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403 15AB361.

404 15AB362.

405 15AB374.

406 18AB133.

407 18AB248.

408 19AB58.

409 19AB60.

(k) On 29 May 2003, Ernest wrote to Bobby to notify him that he had remitted US$5,330,500 in "partial, progressive fulfilment" of his "gift to Bobby;[410]

(l) On 27 May 2005, Ernest wrote to Bobby informing him that he had made "gifts" of AU$830,000 to Teresa and Maria-Isabel;[411]

(m) On 17 March 2008, Bobby wrote to Ernest requesting the latter to transfer the remainder of the US$10m "gift";[412] and

(n) In 19 May 2008, Bobby wrote to Ernest thanking him for a US$14m gift that he was going to make to Bobby and Terrill.[413]

These transfers of funds to Bobby stand in stark contradiction to Ernest's allegation that Bobby's sale proceeds were paid out to him in 1987 and that the 1987 Memorandum recorded this.

443 Ernest's explanation for these remittances to Bobby post-1987 was that despite Bobby having been "paid out", Bobby had requested Ernest to "hold on" to the monies.[414] He argues that these remittances were simply Bobby's pay-out monies. To prove this, he relied on certain documents which showed that some of these remittances to Bobby post-1987 came from Bobby's own bank account in Switzerland or from DOM (the holding company for Bobby's funds).[415] I am unable to accept Ernest's explanation. Simply because the funds

410 21AB120.

411 22AB385 to 22AB386 and 22AB389.

412 25AB68.

413 Bobby's AEIC at pp 263 and 265.

414 NE 24 March 2014 at p 43 line 10 to p 46 line 17.

415 Ernest's Closing Submissions at paras 175-177.

came from Bobby's Swiss bank account or DOM does not show that these remittances were actually the funds Bobby was supposed to receive pursuant to the alleged pay-out in 1987. The remittances could just as well have been the "fruit" of the "tree" that Ernest had been managing on JRIC's behalf and which were transferred to Bobby's Swiss bank account or DOM previously.

444 I also note that although these transfers were described in the letters as "gifts" or originating from "[Ernest's] assets", it is clear that these descriptions were used only to create the appearance that Ernest was the source of the funds. This was necessary in order for those members of the family domiciled in Australia to avoid paying tax on these funds. For example, in a facsimile sent by Ernest to Bobby dated 21 December 1999, Ernest had reminded Bobby that a remittance of US$10 to Bobby would be a "gift" from him:

> GREETINGS MY DEAREST BROTHER BOBBY.
>
> *I AM SENDING YOU THIS FAX AS A 'AIDE MEMOIRE'. TO CONFIRM THAT I SHALL BE MAKING YOU A GIFT UP TO US$10 MILLION.*
>
> YOU MAY EXPECT TO RECEIVE THESE FUNDS PROGRESSIVELY AND NOT IN ONE AMOUNT AFTER THE 1ST JANUARY 2000. …
>
> [emphasis added]

Indeed, Ernest had on occasion specifically reminded members of the De La Sala family to write a letter to "thank" Ernest for the "gifts".[416] Furthermore, according to Maria-Isabel, some of the transfers were described as "gifts" even though they were made at the request of Bobby.[417]

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416 See *eg,* 22AB391.

417 Maria-Isabel's AEIC at para 33.

445 Thirdly, in Ernest's handwritten memo to JRIC dated 21 June 1995 (referred to above at [328]), Ernest emphasised how he had enhanced JRIC's wealth. The memo states:[418]

> EFL/IBK-JAL-RPL
>
> ENCLOSED ARE LETTERS WRITTEN BY PAPPY THAT I BROUGHT BACK FROM U.K. RECENTLY, WHICH SHOULD INTEREST YOU. I ALSO ENCLOSE RELEVANT DATA WHICH CLEARLY MANIFESTS MY CONTRIBUTION TO THE VAST ENHANCEMENT OF YOUR INDIVIDUAL WEALTH FROM ONE FIFTH OF ABOUT $9 MILLION!!
>
> …

It made no sense for Ernest to be writing such a letter if he had already paid Bobby and Tony out in 1987. I do not accept his explanation that he merely wanted to "put on record" what he did for JRIC;[419] there was no reason for him to have waited close to eight years to do so. I further note that Bobby was not cross-examined on this letter. Needless to say, the enclosed relevant data was not disclosed.

446 Lastly, I find it telling that the 1987 Memorandum was not mentioned at all in Ernest's Injunction Affidavit and only became a central part of Ernest's case at trial. Ernest admitted at trial that he had a copy of this document when proceedings were commenced.[420] His only answer when confronted with his lateness in relying as strongly as he did at trial on the 1987 Memorandum was that he had left it to his lawyers to decide what to do.[421] In fact, Ernest could not have relied on the 1987 Memorandum at the Injunction

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418 18AB17.

419 NE 24 March 2014 at p 69 line 17 to p 70 line 1.

420 NE 17 March 2014 at p 32 lines 7 to 11.

421 NE 17 March 2014 at p 38 line 21 to p 41 line 7 and p 45 lines 14-18.

Application. As mentioned above at [171], Ernest's story at the Injunction Application was that he paid JRIC for their NEL/JMC shares *before* Robert Sr died. This would have been totally inconsistent with any story that Ernest had paid Bobby and Tony out only in 1987.

447 The Plaintiff Companies and ECJ have argued that the 1987 Memorandum relates to the family's prior dispute over certain Australian properties. However, it must be borne in mind that Ernest is the party that is seeking to rely on this document. The Plaintiff Companies and ECJ have only put forward their interpretation of the document as a response to Ernest's reliance on the document. I have found that the 1987 Memorandum neither supports Ernest's case nor contradicts my finding that there was no NEL and JMC sale in 1967 and 1970 respectively. Therefore, it is not strictly necessary for me to decide whether the 1987 Memorandum was indeed related to the family's dispute over the Australian properties. But, as this is likely to be taken up elsewhere, I shall proceed to give my findings.

The settlement of the Australian properties

448 As mentioned above at [441], the Australian properties owned by the DLS Australian Companies were divided in 1993. Pursuant to this division, the house at 27 Carrington Avenue was transferred to Bobby, the Branston Farm was transferred to Isabel and Bobby's daughters and the DLS Australian Companies, which owned the Totem Shopping Centre and some other properties were transferred to Tony. Tony thus "bought" Bobby's and Isabel's shares in the DLS Australian Companies, and Camila's shares in JERIC Consolidated Pty Ltd were willed (and eventually transferred upon Camila's death) to Tony.[422] As a result, Tony came to own a large part of the Australian properties.

449 There is evidence of a share transfer instrument dated 22 February 1993 signed by Bobby transferring 16 shares in JERIC Consolidated Pty Ltd to Pan Pac.[423] Further, in a letter dated 17 May 1993 from Ernest to one David Fiddes ("Fiddes"), a lawyer practicing in Sydney, Ernest instructed Fiddes to carry out the conveyance of certain Australian properties to family members. This includes 27 Carrington Avenue to Bobby and 23 Carrington Avenue to Isabel. Other properties were conveyed to JMC(A). Ernest further wrote:[424]

> (5) NOW THAT SHARE TRANSFERS TO PAN-PACIFIC AND SOVEREIGN HAVE BEEN DULY STAMPED, PLEASE DELIVER TO [TONY] FOR ENTRY IN JERIC SHARE REGISTER.

450 This letter also contains detailed instructions to Fiddes on funds for stamp duty and in respect of valuations. It is clear to me there was a division of the Australian properties and Ernest was not only very involved in that division and settlement, he played a key role in effecting that settlement. Ernest was certainly not an "advisor" as he claims and I note Tony's evidence contradicts this when Tony states Ernest did the division and settled and effected the respective amounts to be paid. The documents clearly show this to be the case. A 21 June 1995 letter written by Ernest to Isabel, Tony and Bobby confirms the sale of Bobby's and Isabel's shares in the DLS Australian Companies to Ernest. The letter recorded:[425]

> (1) [BOBBY] SOLD HIS 16 JERIC SHARES TO PAN-PAC
>
> (2) [ISABEL] SOLD HER 17 JERIC SHARES TO SOVEREIGN

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422 Camila's will dated 11 November 1993: Bobby's AEIC at RPDLS-67 (p 340).

423 41AB6613.

424 29AB219.

425 18AB17.

451 It appears that the values of the Australian properties were not insubstantial.[426] There are handwritten sheets in Ernest's handwriting, but bear no date. They show the Australian properties in question with varying values put on them and other assets, varying options of settlement and varying sums of money to be exchanged to balance these property values. This settlement of the Australian properties is significant and I will come to it again later (see below at [464(f)(iii)]).

The REC-Hasta La Vista trust ("REC-HLV Trust") and the SSS Trust

452 It can be seen from Ernest's letters in the mid-1990s that he was concerned over the impact his absence might have on the Plaintiff Companies. In the early 2000s, Ernest had begun experimenting with various trust structures to ensure continuity in the management of the assets of the Plaintiff Companies in the event of his demise. The parties heavily rely on various documents evidencing these structures, each contending that the documents support the position they are advocating for in the present dispute. On the one hand, Ernest alleges that the documents show that these trust structures were established to manage *his* assets and estate;[427] in other words, the Plaintiff Companies and its assets belonged to Ernest. On the other hand, ECJ alleges that these trust structures were created as part of Ernest's plan to ensure that there were suitable persons who would take over his role as custodian of the family assets in the event of his demise;[428] in other words, the Plaintiff Companies and its assets belonged to the De La Sala family.

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426 41AB6628.

427 Ernest's AEIC at para 67.

428 Edward's AEIC at paras 83-98.

453 There were two main trust structures that were discussed and/or instituted. The first was known as the REC-HLV Trust, which was established by Ernest in October 2004 prior to ECJ's arrival in Singapore. The second was known as the SSS Trust, which was allegedly established in June 2009 to replace the REC-HLV Trust, and was ECJ's response to Ernest's task to them to improve the REC-HLV Trust. As a preliminary observation, I note that the parties are *not* taking the position that the assets held by the Plaintiff Companies are subject to either the REC-HLV Trust or the SSS Trust. Both parties appear to be relying on these structures only as a *reflection of what the parties understood the position to be at that point in time*. I am in agreement that these documents are relevant only to that extent.

454 I find that on balance, these trust structures are more consistent with ECJ's case that Ernest was managing family assets and was looking for suitable persons to succeed him in the event of his demise.

455 The REC-HLV Trust was established on 22 October 2004 by Ernest. The "REC" referred to "Robert Sr, Ernest and Camila" respectively. It honours and names for posterity, Robert Sr and Camila, the fount of this legacy, and Ernest, the first custodian who took over Robert Sr's mantle and who greatly multiplied the corpus. According to the Trustees Memorandum, the main features of the trust were as follows:[429]

> (a) The settlor was "Ernest". The original trustee was UBS Trustees (Jersey) Ltd, but the settlor retained the power to appoint new or additional trustees.

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429 Trustees Memorandum: Ernest's AEIC at EFL-138 (pp 504-506).

(b) The trust fund was held for the benefit of Ernest during his lifetime. Upon Ernest's death, the fund should be divided equally and distributed to the beneficiaries, which were Bobby's and Isabel's children, *ie*, Edward, Christina, Maria-Isabel, Teresa and Nicole.

(c) It was Ernest's wish that the beneficiaries should apply their respective shares of the trust fund for the benefit of each of their respective children, although they were not obliged to do so.

(d) Ernest was allowed to change his wishes relating to the trust fund from time to time.

(e) According to Edward, the REC-HLV Trust was settled with a nominal sum of S$5m, which was just enough to allow Ernest to qualify for permanent residency in Singapore.[430] It appears that these funds originated from the Plaintiff Companies. There is no other evidence of how much funds were placed into the REC-HLV Trust. Indeed, the trust document indicates that only US$10 was settled under the trust (though further property and investments could be added to the trust fund at any time (see cl 1(k)(ii)).[431]

456 As alluded to at [452] above, Ernest argues that the REC-HLV Trust shows that he considered the Plaintiff Companies and their assets as belonging to him. I am unable to accept this. First, there is evidence which suggests that the funds in the REC-HLV Trust comprised not only Ernest's assets, but Camila's assets as well. In an email dated 4 March 2006 from Ernest to

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430 Edward's AEIC at para 98; NE 24 November 2014 at p 45 lines 14 to 22.

431 Ernest's AEIC at p 489.

Teresa, Ernest had stated that Camila's birthday gifts to her grandchildren every 18 July *originated from* the REC-HLV Trust:

> GREETINGS TERESA,
>
> …
>
> WHEN YOU ARE IN SINGAPORE I WILL REITERATE WHAT YOU HAVE ALREADY BEEN BESTOWED ON EACH PAST 18 JULY BY MY HASTA LA VISTA TRUST (4 X AUD 100,000) PLUS POSSIBLE FUTURE POTENTIAL – YOU WILL UNDERSTAND IT IS IMPRUDENT TO BE TOO EXPLICIT IN THE EMAIL BUT IF YOU GOT AN IDEA WHAT I AM TALKING ABOUT JUST REPLY "OK" IN YOUR RETURN EMAIL, SO THAT I WILL KNOW THAT YOU ARE NOT AS CLUELESS AS THE OTHER 8 BENEFICIARIES.
>
> YOU MAY CARE TO DISCREETLY LET AUNTY ISABEL HAVE A COPY OF THIS EMAIL.

It is undisputed that Camila's birthday gifts did not originate from Ernest's personal funds. On Ernest's case, the gifts were Camila's proceeds from the alleged sale of her NEL and JMC shares, while on ECJ's case, the gifts were distributions from the family legacy.

457 Secondly, while Ernest is expressed to be the "settlor" of the trust and has the power to select the beneficiaries and change the terms of the trust, it must be remembered that the REC-HLV Trust was instituted by Ernest only as a trial; he had wanted to experiment with various structures and find the most suitable one to ensure that the Plaintiff Companies and their assets were properly managed in his absence. This is evident from the fact that only a small fraction of the Plaintiff Companies' assets was settled under the REC-HLV Trust, and that the trust was eventually revoked on 25 June 2009.[432] It should therefore come as no surprise that Ernest would reserve to himself the power to amend the terms of the trust. Ernest's description of himself as the

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[432] Ernest's AEIC at p 602.

"settlor" is consistent with his practice of manifesting himself as the owner of the Plaintiff Companies in order for the rest of the De La Sala family to avoid paying heavy taxes. This was also the belief of ECJ and I see no reason not to accept this. Ernest is the "settlor" insofar as he was the family custodian of the Plaintiff Companies' assets or part thereof. Indeed, Ernest considered designating Bobby and Terrill as protectors of the trusts that he was setting up.[433]

458 Thirdly, the fact that Tony's children were left out as beneficiaries is not inconsistent with Ernest managing the Plaintiff Companies on behalf of the De La Sala family. There is some evidence to suggest that Tony's "share" of the family assets had been previously settled (I am unable on the evidence before me to tell whether this was a settlement of his share of the "fruit" or his share of the assets, though there was certainly a settlement of Australian properties with a substantial value as mentioned above at [448]). If I had to come to a conclusion, then I would have found it was settlement of his share of the "fruit". Tony would also have agreed, given that Camila was still alive until July 2005, to only have claim to the "fruits" but not the "tree", which was being managed and looked after by Ernest. With the settlement of the substantial Australian properties, Tony would henceforth have no further claims to any more "fruit" from the tree as the settlement was large enough to include part of the tree. In a letter from Ernest to Isabel dated 4 March 1995, Ernest had stated:

> MY PARAMOUNT DESIRE IS THAT THE CAPITAL ASSETS OF THESE COMPANIES (TREES) ARE PRESERVED AND CONTINUE TO GROW THROUGH PRUDENT INVESTMENTS AND ONLY A PORTION i.e. NOT EXCEEDING 25% (1/4) OF THE ANNUAL INCOME (FRUITS) BE PERMITTED TO BE *DISTRIBUTED EQUALLY TO TERESA, EDWARD, CHRISTINA,*

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433 19AB40.

> *ISABEL AND NICOLE*. REMEMBER MY SAYING "DON'T CHOP DOWN THE TREE JUST PICK THE FRUIT".
>
> …
>
> YOU WILL ALSO NOTE THAT I HAVE SPECIFICALLY EXCLUDED MY SONS ROBERT ERNEST AND ERNEST EDWARD FROM MY WILL SINCE THEY DO NOT DESERVE TO RECEIVE ANY MORE FROM ME.
>
> *I ALSO CONSIDER TONY'S CHILDREN ALREADY WELL PROVIDED FOR*, ALTHOUGH I HAVE MADE A GIFT TO HIS TWO GRAND CHILDREN COURTENAY ALEXANDRA AND ROBERT ANTHONY.
>
> [emphasis added]

459 Tony himself acknowledged that he has no financial interest in the present dispute. In an email from Tony to Bobby on 24 November 2011, Tony wrote:[434]

> I am quite concerned at what you told me yesterday when you called with your family. It's come to the stage that this big family problem must be resolved once and for all for the wellbeing and harmony of the family. All legal action needs to cease forthwith. There will be no recrimination on either side. Everyone involved needs to agree to disagree, and part company as amicably as possible.
>
> Bobby and Terrill I am worried at how much distress this is causing you. Your health may be affected if it is not already, and you might become financially ruined at this stage of your lives. Please carefully consider all of what is at stake here and the ramifications of what legal action can do. *Please also remember that I am impartial and have no financial interest in the matter.* The only beneficiary of litigation will be the lawyers. …
>
> [emphasis added]

It is significant that this email was written when the dispute between Ernest and ECJ first arose and before the present proceedings were commenced. It is apparent that Tony's assertion that he has no financial interest in the matter is

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434 Tony's AEIC at p 43.

not because he believed that his NEL and JMC shares were bought out by Ernest; if that were the case, Bobby too should have "no financial interest in the matter" as his NEL and JMC shares were also allegedly purchased by Ernest. In my view, this strongly suggests that Tony's share of the family assets (whether the "fruit" or the corpus) had been settled prior to the execution of the REC-HLV Trust. ECJ's evidence was that they were told by Ernest that Tony's family had been separately taken care of and that they were content with that explanation because they trusted him then and Ernest managed the 'family' assets, and it seemed reasonable in the light of the tension between Tony and Ernest.[435] They also said that if Tony's family ever needed any assistance, there would be no doubt that ECJ would help them because they believed that was their roles as custodians.[436] In any event, it is strictly unnecessary for me to make any firm finding on this issue since Tony is not presently making a claim to the assets held by the Plaintiff Companies; it suffices to say that I do not find Tony's family being left out of the REC-HLV Trust as contrary to Ernest managing the Plaintiff Companies on behalf of the rest of the De La Sala family.

460 Lastly, and most significantly, Ernest had tasked ECJ to improve upon the REC-HLV Trust (which was eventually revoked on 25 June 2009). This followed a discussion with the UBS Trust department which highlighted that flexibility would be lost under a trust structure.[437] From the documents that follow, it is evident that Ernest's primary concern was to find a structure which ensured that:

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435 NE 31 October 2014 at p 40 line 8 to p 41 line 13.

436 NE 31 October 2014 at p 41 line 14 to p 42 line 11.

437 23AB302.

(a) the Plaintiff Companies and its assets are preserved and grown for future generations of the De La Sala family;

(b) suitable candidates are identified to manage the Plaintiff Companies for the benefit of the De La Sala family; and

(c) the beneficiaries do not become dependent or have a lack of motivation.

In my view, Ernest's concern is more consistent with ECJ's case that Ernest was managing the Plaintiff Companies on behalf of the De La Sala family, and was looking for a structure/system that would replace and institutionalise his role as family custodian. I turn to some of these documents.

461 In a memorandum dated 31 July 2006 sent from Edward and James to Ernest, it is recorded that Ernest had tasked Edward and James to suggest ways of "Passing on the Baton", *ie*, to find ways to "maintain, enhance and ensure proper control of the current 'critical mass' in order to provide *future generations* with the necessary motivation and ammunition to fulfil their potential" (emphasis added).[438] The "critical mass" was also described as the "REC legacy". The phrase "passing the baton" suggests that Ernest had received the "baton" from his father, Robert Sr, and was now looking to pass it on to the next generation, *ie*, ECJ. In an email sent by Ernest in response to this memorandum, Ernest wrote:

> … [Edward–James]
>
> SUGGEST YOU PREPARE CONCEPT FOR MY REVIEW AND COMPARISON WITH OTHERS I HAVE.

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438 23AB305.

> BASE YOUR COMPOSITION ON HOW YOU WOULD PERSONALLY DESIRE TO SEE YOUR OWN DESIGNATED ASSETS/BATON UTILISED BY WORTHY SUCCESSORS *WHO IN TURN WILL LIEKWISE PASS THE "ENHANCED" BATON/BATONS ONTO THEIR SUCESSORS ACCORDINGLY.*
>
> EMPHASISE WHAT SAFE-GUARDS YOU WOULD INSTALL TO ENSURE THE *INFINITE CONTINUITY*.
>
> [emphasis added]

I note that this harks back to what Robert Sr said in his letter dated 2 November 1950 to Ernest, that the assets of LIL "will remain in the Lasala family until doom's day if my sons and sons' sons so desire it."

462 Subsequent memoranda proposing various structures continued to emphasise that the assets are to be preserved and grown for the *family*. Some of these structures adopt certain practices that appear to mirror Ernest's present practices. For example, "distributions" were to be made in the form of "gifts" from "offshore Aunt/Uncle in memory of REC" (see memorandum dated 8 October 2008).[439] Another example is that the "custodians", *ie*, ECJ will play the role of the "friendly banker" to provide financial support for worthy ventures proposed by any descendant of the De La Sala family (see memorandum sent to Ernest on 14 August 2006).[440] These multiple memoranda eventually culminated in the SSS Trust, which in my view strongly indicates that Ernest thought of himself as the custodian of family assets who was grooming his successors. The final version of the SSS Trust, which was not only created with the close involvement of Ernest but follows his amendments in his handwriting, was signed on 26 June 2009. It provides:

THE SAFE STRAITS SETTLEMENT

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439 25AB242.

440 24AB17

HASTA LA VISTA

> THE SETTLOR [ERNEST], IN MEMORY OF HIS FATHER ROBERT AND MOTHER CAMILA, HAS FORMED A STRUCTURE TO PRESERVE ASSETS WHICH WILL SERVE AS A PERENNIAL TRUST FOR THEIR WORTHY DESCENDANTS.
>
> THE PRESENT POTENTIAL BENEFICIARIES OF THIS REVOCABLE TRUST ARE THE OFFSPRING OF [NICOLE], [MARIA-ISABEL], [CHRISTINA], [EDWARD] AND THEIR WORTHY DESCENDANTS.
>
> …
>
> THE SETTLOR HAS DECIDED [ISABEL] WILL BE THE PROTECTOR AND GUARDIAN AND [ECJ] THE JOINT CUSTODIANS WHO WILL ADVISE AND GUIDE [ISABEL] IN THE OPERATION OF THE TRUST.
>
> …
>
> THE TRUST FUNDS ARE HELD THROUGH PEN, CFC, PAL, CAM, SUM, DOM, AND SR AND WILL IN THE COURSE OF TIME INCREASE SUBSTANTIALLY TO PROVIDE FOR FUTURE GENERATIONS.
>
> THERE WILL COME A TIME WHEN THE EXISTING MANAGERS I.E. [ECJ] AND [ISABEL] WILL BE SUCCEEDED BY YOUNGER, TRUSTWORTHY AND ABLE MEMEBRS OF THE FAMILY WHO SHOULD BE PROPERLY TRAINED TO SERVE THE PURPOSE OF THIS TRUST ADVANTAGEOUSLY WHILST DOMICILED AND RESIDENT IN PLACES LIKE HONG KONG OR SINGAPORE LIKE THE SETTLOR [ERNEST].

Although Teresa appears to be left out of the SSS Trust, Christina explained that Ernest excluded Teresa from the list of beneficiaries because she had no children and did not need any more money. Christina also gave evidence that she had no doubt that if Teresa were to have children or need expensive medical treatment, she would be added back as a beneficiary.[441] It appears from these documents and drafts of the SSS Trust that ECJ were under the impression that they were developing structures to manage "family" assets. I note that there is some dispute between the parties as to whether the SSS Trust

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441 NE 29 October 2014 at p 86 lines 3 to 13.

was validly executed by Ernest on 26 June 2009, or whether it was subsequently revoked by Ernest a few days later on 30 June 2009. However, it is unnecessary for me to make a finding on this as the Plaintiff Companies and/or ECJ are not taking the position that the assets of the Plaintiff Companies are held on trust *pursuant to* the SSS Trust. What is significant about the SSS Trust is that it reflects what ECJ and Ernest understood the position to be at the time, *ie*, that they were creating a structure to manage "family" assets, at least until Ernest allegedly revoked the SSS Trust.

463 A memorandum drafted by Ernest during the period leading up to the signing of the SSS Trust reinforces my conclusion. Although Ernest conveniently claims he cannot remember drafting this, he can hardly deny doing so because he made corrections to the drafts of the memorandum in his own handwriting. The memorandum provides:[442]

> ONCE UPON A TIME [ERNEST], HIS FATHER ROBERT AND MOTHER CAMILA WISHED TO ADEQUATELY PROVIDE FUNDS FOR WORTHY DESCENDENTS OF THEIRS. THIS BECAME KNOWN AS REC.
>
> REC WAS SUCCESSFUL IN THEIR ENTERPRISE AND HAD CREATED MANY RESERVOIRS TO PRESERVE THEIR SUCCESS. THESE INCLUDE PE, CF AND SM, CA, SF DO SR AND PA. THIS STRUCTURE WAS MAINTAINED, CHANGED AND IMPROVED UPON OFTEN.
>
> FOR OVER 20 THOUGHTFUL YEARS [ERNEST] DELIBERATED LONG AND HARD ON HOW TO FORM A STRUCTURE WHICH COULD CONTINUE AND BE CHARTERED THROUGH ROCKY WATERS IF NEED BE.
>
> [ERNEST'S] OBJECTIVE WAS FOR THE SHIP (THE CAPITAL) TO SET SAIL ON A COURSE WHICH WOULD PRESERVE ASSETS IN A TAX EFFICIENT MANNER AND GIFT TO WORTHY BENEFICIARIES ALONG THE WAY.
>
> …

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442 Edward's AEIC at p 179.

> [ERNEST] THEREFORE DECIDED THAT [ISABEL] SHOULD BE GUARDIAN AND [ECJ] WERE TO BE CUSTODIANS WHO WOULD GUIDE [ISABEL] AND BE THE MANAGERS OF THE SHIP WITH THE INTENTION OF PRESERVING PRINCIPAL AND PLACING SURPLUS INTO TRIBUTARIES TO FLOW TO WORTHY DESCENDENTS WHEN THEY ARE ABLE TO RECEIVE BENEFITS IN A TAX EFFICIENT MANNER.
>
> THE EXISTING MANAGERS WILL BE REPLACED OVER TIME BY TRUSTWORTHY AND ABLE BENEFICIARIES WHO ARE WILLING TO LIVE OFFSHORE AS A TAX EXILE AND MAINTAIN AND MANOEUVRE THE SHIP IN THE RIGHT DIRECTION.
>
> [ERNEST] WORKED ARDUOUSLY TO PRESERVE THE SHIP IN TIP TOP SHAPE. THIS INCLUDED BEING A TAX EXILE AND WORKING CONSCIENTIOUSLY TO ENSURE THE PRESERVATION OF CAPITAL. HE SET A GOOD EXAMPLE TO ALL WHO ARE LUCKY TO FOLLOW IN HIS FOOTSTEPS!

It is significant that the Plaintiff Companies were described as "reservoirs" created by *both* Robert Sr and Ernest and which ECJ were to be the custodians and managers of. This strongly suggests that Ernest was managing family assets and was looking to ECJ as his successors. Indeed, the later part of the memorandum states that the custodians had, like Ernest, to "live offshore as a tax exile". This would be necessary only if the assets of the Plaintiff Companies were being held on behalf of family members living in jurisdictions that imposed high taxes on offshores assets such as Australia. That is also why, in his email dated 3 February 2003 to Christina and James, Ernest describes his role as a "burden" he bore for the family.[443] The use of that word by itself and in context is hardly consistent with all the monies and assets belonging to him. I note that during cross-examination, Ernest sought to question the authenticity of the memorandum. I find that he has no basis for doing so. First, the memorandum contains his handwritten amendments, and

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443 Edward's AEIC at p 83.

secondly, Ernest never contested the authenticity of the memorandum prior to taking the stand (unlike the case for other documents).

Conclusion on the facts

464 Weighing all the evidence before me, my conclusions and findings, in conjunction with those made above, including but not limited to [138], [296] and [388]–[390], are as follows:

(a) Robert Sr did not set up a formal trust in his lifetime.

(i) What he did set up was LIL/NEL, which he initially meant to be his insurance policy for his family should anything untoward happen to him, and over the years he put assets into LIL/NEL and increased its share capital.

(ii) LIL/NEL was always for the benefit of JERIC, as if he had taken out life insurance policies and named JERIC as his beneficiaries.

(iii) JMC, in the meanwhile, was run as a business to make money, as were the other companies, subsidiaries and businesses.

(iv) Robert Sr gradually manoeuvred LIL/NEL, in acquiring assets, paying off or eliminating debts and liabilities, collecting receivables, holding on to valuable income-producing assets without corresponding loans, such that it held a lot of assets but not much in liabilities, and later on, had no more liabilities and only assets.

(v) At that stage, Robert Sr had amassed more than enough assets in LIL/NEL by way of "insurance proceeds" to protect his family.

(vi) Robert Sr then mentioned this fact, *ie*, (v) above, and then expressed his "wish" that LIL continues to guarantee the well-being of all his descendants and deserving relatives.

(b) Robert Sr died unexpectedly on 27 May 1967.

(i) Ernest was the most naturally placed to take over Robert Sr's mantle – he already ran JMC and its subsidiaries, was adept in and, like his father, had the aptitude for business – and he did so, stepping into Robert Sr's shoes *vis-à-vis* the family.

(ii) He ran the businesses under JMC as well as all the other companies, including LIL/NEL.

(iii) Importantly, he continued to look after the family's, *ie*, JRIC's interests, just as his father did and managed their share of the assets and businesses. At that juncture, JRIC each had a 20% interest in the family assets by virtue of their NEL and JMC shares.

(iv) It was clear that JERIC owned NEL as well as NEL's subsidiaries and for a time, JMC shares, even though before Robert Sr's passing, nominee companies were introduced into the structure; *eg*, Strath Nominees held Tony's and Bobby's shares.

(v) It was also clear there were Ernest's own shareholding in JMC and its business subsidiaries outside those of NEL.

(vi) All of the family's interests in NEL and JMC (and their subsidiaries) were transferred over to Ernest and/or nominee companies for Ernest to manage on the family's behalf.

(vii) Once Ernest took over the companies, he restructured the companies in August to December 1967.

(viii) Ernest did so to create a curtain of opacity so that no one could pierce the corporate veils and ascertain ownership of the companies and its assets.

(ix) He did so openly, informing his family of all his restructuring and continually reminded them of the structure that was in existence.

(x) He set up the first "orphan" structure in December 1969, at the time of his acrimonious divorce proceedings, to ensure Hannelore would not be able to trace his assets.

(c) Ernest managed NEL after his father died, hid it behind nominee companies and an "orphan" structure, and was extremely successful in multiplying the family's wealth:

(i) Ernest managed and invested JRIC's share of the businesses and assets, as well as his own, and Ernest kept "score-cards" for each member of JRIC.

(ii) Ernest sent letters and micro-cassette recordings to his siblings reminding them of what he had been doing in relation

to the business as well as the corporate structures and bank accounts.

(iii) Ernest continued with the practice of distributing the "fruit" whilst retaining the balance to augment and strengthen the "tree" (I have noted above the practice of retaining 2/3 of the "dividend" and Ernest's Memorandum of 4 March 1995 which mentions that not more than 25% shall be distributed in any year). Ernest continued the practice of numbered bank accounts into which these distributable portions of the dividend were credited.

(iv) Ernest also continued to keep the assets and funds "off-shore" outside Australia, in tax "friendly" jurisdictions and later went on to form Panamanian, BVI and Liberian companies which he described as "pockets" or "valises" but whose funds and assets were to be deposited in banks in safe jurisdictions like Switzerland, Vancouver, Hong Kong and other financial centres. Ernest told his siblings that from his experience, so long as such companies do not actively engage in business (as compared to passively holding funds), no questions are asked as long as their registration was kept current. Further no annual returns needed to be filed for these companies.

(v) He regularly sent money to his siblings whenever they wanted to purchase properties or assets in Australia through the device of loans from banks outside Australia.

(vi) He sent money to the grandchildren in Camila's name on the latter's birthdays.

(vii) Ernest remained the "tax exile", living outside Australia and managing the businesses.

(d) Ernest never bought out the interests of JRIC.

(e) He came to be regarded with great respect as the head of the De La Sala family:

(i) When there were disputes, or differences of opinion on the businesses or the running of the businesses in Australia, he had the final say and gave instructions and directions.

(ii) When there were differences between Tony and Bobby with the former complaining about Bobby staying "rent free" at 27 Carrington Avenue with Camila, Ernest stepped in at his mother's request to resolve and settle the same once and for all. Tony also resented Ernest dictating how the Australian businesses should be run.

(iii) Ernest divided the Australian properties and businesses, and gave Tony his freedom to manage his assets, by transferring ownership of the company holding Totem Shopping Centre and other properties to Tony (as noted above, Camila's shares in JERIC Consolidated Pty Ltd were transferred, in accordance with her will, to Tony, after her death);

(iv) He had a quarrel with Tony in 2003 and they seldom talked to each other after that date.

(v) Ernest dealt with Camila's estate after she died in July 2005.

(f) Over the years, Ernest sent back large sums of money to Tony, Bobby and Isabel and/or their children whenever funds were required for various purposes:

(i) In fact over the years, his siblings had more than enough assets in Australia and their children also bought their houses and homes with money directly as a "gift" from Uncle Ernest or through their parents.

(ii) The next generation, *ie*, Robert Sr's grandchildren (other than Ernest's two sons), were all well provided for.

(iii) As noted above, Tony took over ownership of substantial assets in Australia in settlement and, to use Ernest's words in his memo, this was "to resolve current animosity between principal shareholders of De la Sala PTY LTD/JERIC CONSOLIDATED PTY LTD" (though I make no finding as to the nature and extent of this settlement given that there is a lack of evidence, and Tony and his immediate family have ostensibly disavowed any claim to the Plaintiff Companies' assets and are not parties to the present proceedings).

(iv) Bobby, on the other hand, still had part of his 20% share with Ernest.

(v) Ernest also still holds the undistributed part of Camila's Estate within the funds he controlled prior to ECJ "joining him" in Singapore.

(g) Prior to August 2011, Ernest was still holding funds and assets that belonged to Bobby as well as part of the undistributed 20% share of Camila's estate which included Bobby's share. As Tony and Isabel

disavow any such claim and are not parties to this action, there is no need for any finding in relation to them. The evidence they have chosen to put before me, and especially their allegations that Ernest had bought all of them out, I found to be unbelievable and unreliable and I reject the same.

(h) As he was getting on in years, Ernest had to start thinking of a successor. Ernest could not find a single person like himself who could manage the businesses and investments, so he recruited ECJ, who were obviously his more favoured nephew and niece (and her husband) as they were, *inter alia*, tertiary qualified, so that he could "train" them and give them the benefit of his experience in running the businesses. He had earlier asked Maria-Isabel and her husband, but they declined to do so. I totally reject Ernest's case that ECJ wanted business experience and exposure and he created the opportunity for them to do so in Singapore. In addition to my findings above and especially at, but not limited to, [371], [378], [384] and [460]:

(i) I find that he represented to ECJ that they had been selected by him as the new custodians for the "family legacy' that Robert Sr had set up, and which he had been managing and administering as "trustee", and they had to be "tax exiles" like him. He would train them up and give them the benefit of his experience in handling these assets and funds and they would eventually take over from him.

(ii) Like his father before him, Ernest had difficulty letting go of the reins and, perhaps being more astute and more experienced, did not agree with many of ECJ's business decisions.

(iii) He and ECJ had an unfortunate misunderstanding over their handling of certain funds left in their charge in August 2011 and that escalated into a full blown dispute resulting in these proceedings when he claimed, quite untruthfully, that all the monies and assets in the Plaintiff Companies, were his.

(i) At the time of the dispute and the Injunction proceedings, the Plaintiff Companies still held funds that belonged to:

(i) Bobby's original 20% at the time of Robert Sr's death. That sum has been multiplied by Ernest over the years and I am unable to tell how much it had been increased by, how much had been sent to Bobby and how much of Bobby's 20% still remained with the Plaintiff Companies as effectively no evidence of this was put before me. These sums have to be accounted for; and

(ii) Funds belonging to the estate of Camila that had yet to be distributed. This too is unascertainable on the evidence before me and Bobby would be entitled to his share of Camila's undistributed estate.

(j) After Robert Sr's death, Ernest took over, ran and managed all the businesses, their assets and the funds as Robert Sr did, *ie*, he had absolute discretion and control. He also became the tax exile. I find that whilst he would credit dividends into JRIC's accounts, and perhaps only JRI after his mother passed on, he re-invested the larger portion (whether it was 2/3 or 3/4 or some other figure) as his father did before him. He was able to refuse funding for projects which his siblings or their children brought to him.

Ownership of the Plaintiff Companies and their assets

465 It remains for me to make the necessary findings as to the ownership of the Plaintiff Companies and their assets. The 3rd, 4th and 6th plaintiffs (*ie*, DOM, JMM and SMC) are held under the triangular corporate structure of the 1st, 2nd and 5th plaintiffs (*ie*, PAL-CFC-PEN) ("the Orphan Companies"). To identify the owners of the Plaintiff Companies and their assets, certain questions in respect of the triangular corporate structure of PAL-CFC-PEN must be addressed, specifically:

(a) Whether such a structure is valid under the applicable law;

(b) How the ultimate beneficial owner of (a) the shares, and (b) the assets of the Orphan Companies is to be determined; and

(c) How the ultimate beneficial owner of the shares of the Orphan Companies may procure the transfer to himself of (a) the shares, and (b) the assets of the Orphan Companies.

466 To answer these questions, I turn to the law of the BVI and Panama, where PAL, CFC and PEN were incorporated. In this regard, the Plaintiff Companies called Mr Pursall and Mr Ballard as their respective BVI and Panamanian law expert, while Ernest called Mr MacLean and Mr Hoyos as his respective BVI and Panamanian law expert.

BVI Law

467 Both Mr Pursall and Mr MacLean are in agreement that the triangular corporate structure of PAL-CFC-PEN is a legally valid structure under BVI law.[444] Under BVI law, a company is a separate legal entity, separate from that

of its shareholders. The experts also agree that shares of the Orphan Companies could be beneficially owned by a person outside the structure, and that the assets held by the Orphan Companies could likewise be held beneficially for a person outside the structure.[445] The question of who beneficially owns (a) the shares of the Orphan Companies, and (b) the assets held by the Orphan Companies, is a *question of fact* for the court to determine applying the relevant legal principles.

468 Both experts agree that under BVI law, the beneficial owner of the shares has an enforceable right to direct the registered shareholders to transfer the shares to him. Likewise, the beneficial owner of assets held by a company has an enforceable right to direct the company to transfer the assets to him.[446] The mere fact that a person is the beneficial owner of the shares of a company does not mean *ipso facto* that he is the beneficial owner of the assets held by the company. If a person who is the beneficial owner of the shares of a company but *not* the beneficial owner of the company's assets wishes to obtain the assets for himself, he will have to do so indirectly, using his beneficial shareholding to procure that result in a manner consistent with BVI company and insolvency law.[447] This would entail the beneficial owner of the shares reconstituting the board of directors either by instructing the registered shareholders to do so, or by procuring his registration as the registered shareholder and then reconstituting the board himself.[448] The board will then effect the transfer of the assets to the beneficial owner of the shares.

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444 BVI Law Joint Expert's Report at p 2.

445 *Ibid* at p 3.

446 *Ibid* at p 6.

447 *Ibid* at pp 7-8.

448 *Ibid* at p 9.

Panamanian Law

469 Both Mr Hoyos and Mr Ballard are in agreement that the triangular structure of PAL-CFC-PEN is a legally valid structure under Panamanian law.[449] Under Panamanian law, a company is a separate legal entity, separate from its shareholders. The experts, however, take diametrically opposing views as to the beneficial ownership of the Orphan Companies and the assets held therein.

470 Mr Ballard maintains the view that under Panama corporations law, there is *no difference* between legal shareholders and beneficial owners. In other words, the registered shareholder is the ultimate owner of the shares. The only exception is if it can be shown that the shares are "held under a fiduciary mandate, trust or similar arrangement that regulates and clearly states this situation in favour of a third party".[450] Further, a company's assets belong to the company and not its shareholders.[451]

471 Mr Hoyos is of the view that Panamanian corporation law recognises that the registered shareholder may not be the beneficial owner of the shares. A Panamanian court will determine who the owner is by considering factors such as whether the corporation conducts real operational business or income producing operations; who set up the corporation; who gave instructions and paid the bills; the origins of the funds deposited in the corporation's accounts; other assets registered in the name of the corporation; where did the assets come from; who caused the appointment of directors of the corporation; and who exercised effective control of the corporation.[452] While Mr Hoyos agrees

449 Panamanian Law Joint Expert Report at p 4.

450 *Ibid* at p 4.

451 *Ibid* at p 5.

452 *Ibid* at p 6.

that the owner of the shares of a company does not mean he is the owner of the assets held by the company, he is of the view that it is not conclusive that assets held in a company's name belong to the company; there could be a beneficial owner of the assets, and a Panamanian court may determine who the owner of the assets is by considering the previously mentioned factors.

472 With respect to how the ultimate beneficial owner of the shares of each of the Orphan Companies may procure the transfer to himself of (a) the shares of the Orphan Companies, and (b) the assets of the Orphan Companies, Mr Ballard was of the view that there could be no "beneficial owner", *ie*, it is possible to create a triangular structure of companies without the existence of a particular "beneficial owner" as such.[453] He did not further comment on what the position may be *if* it could be shown that the registered shareholder was holding the shares on trust for someone else. In contrast, Mr Hoyos was of the view that the beneficial owner of the shares may simply procure the transfer of the shares to himself by directing the registered shareholder to do so.[454] If the beneficial owner of the shares was also the beneficial owner of the assets, and had authority from the company to deal with those assets, he may simply transfer the assets to himself. If the beneficial owner of the shares was not the beneficial owner of the assets, the former would have to direct the registered shareholders to pass a shareholders' resolution directing the board to transfer the assets to himself; otherwise, he could procure his registration as the registered shareholder and pass the necessary shareholder resolutions himself.[455]

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453 Mr Ballard's Report at p 10.

454 Mr Hoyos' Report at p 6.

455 *Ibid* at p 7.

473 On balance, I prefer Mr Hoyos' evidence to Mr Ballard's. It is trite law that when evaluating the evidence given by an expert, the court will take into account the credentials of the expert and the methodology by which the expert reached his or her conclusions (see *Tan Mui Teck v Public Prosecutor* [2003] 3 SLR(R) 139 at [11]). In respect of the experts' methodology, I note that Mr Hoyos' opinions, at least on the aspects of Panamanian law that I am relying on and on which Mr Ballard presents a differing opinion, are supported by numerous authorities, both statute and case law. In contrast, Mr Ballard's opinions have little or no supporting authority (*eg*, Mr Ballard's answer to question 4(d), *viz*, how may the ultimate beneficial owner of the shares of the Orphan Companies procure the transfer of the (a) shares and (b) assets of the companies to himself). I find Mr Hoyos' opinions to be more persuasive.

474 In respect of the experts' credentials, it appears to me that Mr Hoyos would have a more intimate understanding of Panamanian corporation and trust law as compared to Mr Ballard. Mr Hoyos was the Chief Justice of the Supreme Court of Justice of Panama between 1994 and 2000, has published books on private law institutions of the Panamanian Legal System, and has provided expert witness testimony on Panamanian law in multiple cases spanning different jurisdictions. While Mr Ballard is a lawyer described as a commercial law expert and has advised banks and Fortune 500 companies on transnational as well as Panamanian legal issues, I find that his exposure to Panamanian corporation and trust law would not be as extensive as Mr Hoyos.

Conclusion

475 From the experts' evidence, the following legal propositions are common between the BVI and Panama:

(a) A company is a separate legal entity, separate from its shareholders;

(b) The shares of the Orphan Companies can have a beneficial owner;

(c) The assets held by the Orphan Companies can be held beneficially for someone else;

(d) If the shares and/or assets of the Orphan Companies are held beneficially for someone else, that person may procure the transfer of those shares and/or assets to himself;

(e) The beneficial owner of the shares is not the beneficial owner of the assets held by the Orphan Companies; and

(f) If the beneficial owner of the shares wants to transfer the assets of the Orphan Companies to himself, he would have to procure the appropriate shareholder resolutions directing the board of directors to do so.

It follows from these principles that Ernest bears the initial legal burden of proving that he is the beneficial owner of the Plaintiff Companies and their assets.

476 On the facts, I note that Ernest was the one who incorporated the Orphan Companies, and had always exercised full and complete control over the companies and their affairs. The evidence adduced suggests, and I so find, that Ernest is the beneficial owner of the shares of the Orphan Companies. Furthermore, I am of the view that the Orphan Companies are not holding their assets beneficially. While the companies hold considerable assets, they

have nominal or insubstantial paid-up capital and no apparent trading operations. It is obvious that these assets are being held by the companies for some other person and/or entity. Indeed, Ernest often described the Orphan Companies as "envelopes" or "containers", not only in his AEIC and oral evidence, but also in his letters to his family. Ernest also maintained full control of the assets of the Orphan Companies. In my view, the Orphan Companies are holding the assets that were put in them by Ernest, *ie* subject to what I say below, Ernest is the putative beneficial owner of the assets.

477 However, and this is an important caveat to the foregoing, I have already found that a part of the funds and assets managed by Ernest belongs partially to JRIC. Ernest has, over the years, paid out sums of money to JRIC; that amount cannot be ascertained on the evidence before me. In my view, Ernest holds part of the beneficial interest in the shares of the Orphan Companies and their assets on behalf of JRI and Camila's estate (although I am unable to determine in what proportion). The same should apply for the 3rd, 4th and 6th plaintiffs (*ie*, DOM, JMM and SMC) since they are all owned under the triangular structure of the Orphan Companies.

478 It follows that Ernest, as the putative beneficial owner of *both* the shares and the assets of the Plaintiff Companies, was entitled to transfer to himself the assets of the Plaintiff Companies. However, he is not entitled to dispose of *all* the assets or treat them as if they belonged to him; he holds part of those assets on trust for JRIC. I also acknowledge that Tony and Isabel have come to court to say, in effect, that they have no interest in these funds as they sold their shares and/or interest to Ernest. That, however, still leaves Bobby's share as part of JRIC as well as his entitlement as a one-third beneficiary of the residuary estate under Camila's will, less any sums of money and/or assets paid out of these two components.

Camila's estate

479 As mentioned above at [12], Camila passed away in July 2005. In her will dated 11 December 1993, Camila had bequeathed all her shares in JERIC Consolidated Pty Ltd to Tony, and appointed JERI as the beneficiaries of the residue of her estate. HongKongBank International Trustee Limited was appointed as the executor of her estate.[456] By two codicils dated 13 December 2000[457] and 17 May 2011,[458] the following changes were made:

(a) Ernest was replaced as the executor, and in the event he was unable or unwilling to so act, Bobby and/or Isabel would be the executors; and

(b) Ernest was removed as a beneficiary, leaving Tony, Bobby and Isabel as the beneficiaries.

480 When Camila died, Ernest was appointed as the executor of her estate. Shortly after, on 16 September 2005, Ernest relinquished this appointment in favour of Isabel. It appears that Camila's estate had little or no assets. In a letter written by Frankie Fletcher to Ernest dated 30 August 2005, the former stated:

> You have instructed me that the only assets of your late mother at her death were shares in Jeric Consolidated Pty Ltd which she had willed to Tony, and residue comprising household furnishings, furniture and goods, and her personal effects, which her Will divides amongst her 4 children.

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456 Bobby's AEIC at p 340.

457 *Ibid* at p 346.

458 *Ibid* at p 346.

481 I find that it is more likely than not that the explanation for Camila's bare estate is that her wealth and assets were being managed by Ernest prior to her demise, presumably under the umbrella of the Plaintiff Companies and their subsidiaries. Upon Camila's death, these assets should have passed into her estate. As Tony, Bobby and Isabel are the beneficiaries under Camila's will, they would each be entitled to one-third of the undistributed estate of Camila.

482 According to Bobby, the beneficiaries (*ie*, JRI) did not receive a statement of distribution from either Ernest or Isabel.[459] Bobby has since written to Isabel on 26 September 2013, 10 and 15 November 2013, after the commencement of the present proceedings, asking for a statement of distribution. Isabel has yet to reply these letters. She refused to do so because "the matter is now in the hands of [her] solicitors" as she "expect[s] Bobby to commence proceedings against [her] … in Sydney".[460]

Registrar's Appeal No 352 of 2014 ("RA 352/2014")

483 There is one other matter I need to deal with, *ie*, RA 352/2014. This is an appeal against the decision of an assistant registrar ("the AR") granting Ernest's application to produce two documents (collectively, "the WP Documents"):

(a) A letter from Ian Winter QC dated 27 November 2013, which is marked "without prejudice" ("the IW Letter"); and

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459 Bobby's AEIC at para 110.

460 Isabel's AEIC at para 13.

(b) An email from James to Isabel dated 27 November 2013 titled "letter to Ernest De La Sala" ("James's Email").

I note at the outset that it puzzles me why Ernest insisted on producing these two documents. As can be seen from the discussion above, the WP Documents are hardly relevant to the present dispute. Indeed, Ernest's closing submissions had referred to the WP Documents in passing in *one paragraph* only (out of 767 paragraphs).

484 I set out the background to this appeal. One month before the parties exchanged AEICs, James instructed Mr Ian Winter QC to prepare the IW Letter, which was sent to Ernest's lawyers on 27 November 2013. As mentioned above, the letter was marked "without prejudice". On the same day, James emailed Isabel informing her that he had sent the IW Letter to Ernest and that she might want to discuss its contents with Ernest as the contents of the letter might affect Isabel and her interests (*ie*, James's Email). James had not attached the IW Letter to the email as he considered it privileged. No response was received from Ernest, Isabel or their lawyers.

485 The matter then proceeded to trial. On 3 October 2014, after most of Ernest's witnesses had given evidence, Ernest filed a Supplementary List of Documents disclosing the WP Documents. This was challenged by ECJ on the basis that they were inadmissible "without prejudice" communications. I expressed my disappointment and disapproval at Ernest's late attempt to adduce these documents, but to ensure that all the relevant evidence were before the court, in the event that this is taken up elsewhere, I directed Ernest to file a formal application to admit the documents.

486 The application went before the AR who allowed it, citing two brief oral grounds for her decision. The first was that the IW Letter did not contain any admission of interests against James. The second was that, even if an admission was not necessary, the letter was not written with the genuine purpose of reaching a settlement. ECJ then filed RA 352/2014. To avoid delays to the trial, the parties agreed, and I also directed parties to address the appeal in closing submissions. Ernest was entitled to cross-examine James on the WP Documents, and ECJ could call Ian Winter QC to give evidence in respect of his instructions for the preparation of the IW Letter. The parties were also in agreement that I could refer to the WP Documents insofar as it was necessary for me to decide the issue of admissibility. I turn to the parties' arguments.

487 ECJ argues that the IW Letter was a genuine invitation to negotiate settlement, and this, in and of itself, is sufficient to constitute an admission against interest which attracts the privilege. It was unnecessary for the other party to agree before without prejudice privilege would arise. Further, Ernest had not explained the extreme lateness of his attempt to adduce the WP Documents as evidence in the present proceedings. On the other hand, Ernest raises four independent grounds as to why the IW Letter does not attract without prejudice privilege: (1) the IW Letter contains no admissions as required under s 23 of the Evidence Act (Cap 97, 1997 Rev Ed); (2) the IW Letter was not made for the genuine purpose of settlement; (3) there is no evidence that Ernest at any time accepted the IW Letter as being "without prejudice"; and (4) in any event, any privilege attached to the IW Letter is lost under the broad "fraud exception".

488 I am of the view that the WP Documents are protected by "without prejudice" privilege. The "without prejudice" privilege governs the

"admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than to litigate them to the finish" (see *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1299). The privilege protects the party who seeks a compromise against the disclosure of his correspondence in the course of settlement negotiations. This principle is expressed in s 23 of the Evidence Act (see *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 ("*Mariwu*") at [24]), which provides:

> **Admissions in civil cases when relevant**
>
> **23.**—(1) In civil cases, no admission is relevant if it is made —
>
> (a) upon an express condition that evidence of it is not to be given; or
>
> (b) upon circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.
>
> (2) Nothing in subsection (1) shall be taken —
>
> (a) to exempt any advocate or solicitor from giving evidence of any matter of which he may be compelled to give evidence under section 128; or
>
> (b) to exempt any legal counsel in an entity from giving evidence of any matter of which he may be compelled to give evidence under section 128A

489 There appear to be two prerequisites before the "without prejudice" privilege may be invoked. The first is that the communication (in respect of which privilege is claimed) must arise in the course of genuine negotiations to settle a dispute, while the second is that the communication must constitute or involve an admission against the maker's interest (*Mariwu* at [29]; see also *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433 ("*Sin Lian Heng*") at [13]).

490 With respect to the first prerequisite, it is undeniable that there was a dispute between the parties when the WP Documents were sent. Ernest's contention is that the WP Documents were not made for the genuine purpose of a settlement and this brings them outside the scope of the "without prejudice" privilege. He cites three reasons in support of his contention: (1) the IW Letter is replete with threats; (2) Ian Winter does not act for Edward and Christina; and (3) IW's answers in cross-examination reveal that James's intention for sending the letter was to highlight Ernest's alleged misconduct and the ramifications for him if the matter was not settled.

491 Having perused the IW Letter, I find that it was a genuine invitation by James to negotiate a settlement between the parties. James's desire for the parties to come to a settlement agreement can be clearly seen from paragraphs 5, 9 and 52–55 of the IW Letter (which I do not propose to set out given my view that it is protected by "without prejudice" privilege). Paragraph 5 of the IW Letter further indicates that James had, prior to the sending of the IW Letter, discussed the issue of a settlement with Edward and Christina (and *a fortiori* the Plaintiff Companies), who indicated their willingness to resolve the dispute on mutually acceptable terms. It is true that the bulk of the IW Letter emphasises the weaknesses of Ernest's case and the potential consequences of the matter being litigated in open court (such as the reputational damage to the family or possible investigations by the various authorities). However, I do not think this undermines James's genuine intention to negotiate a settlement and I turn to the English High Court decision of *Schering Corporation v CIPLA Ltd and another* [2004] EWHC 2587 (Ch) to illustrate this. In that case, Laddie J had to decide whether a particular letter was protected by "without prejudice" privilege, and one of the questions he had to decide was whether the letter could be regarded as a

"negotiating document", *ie*, as indicating a willingness to negotiate. The learned judge had the following to say about the letter (at [19] and [21]):

> [19] The question here is whether or not the letter of 6 July is a negotiating document. In assessing it, I shall try and put myself in the position of the reasonable recipient so as to determine the message it conveys. In my view the message is perfectly clear. *As is common in correspondence between parties who face potential litigation, the author maximizes the strength of his case.* That is what the first two paragraphs do. They say that CIPLA is confident, on the basis of legal advice, that Schering's patent is invalid. But if that was all that CIPLA was doing, first of all, it need not have written this letter to Schering at all; it could simply have entered the market. Or it could have then stopped the letter at the end of the second paragraph. But the author did not do that. Instead, he said that he was prepared to avoid a path of confrontation if there was "an alternative commercial solution acceptable to both parties."
>
> …
>
> [21] *The fourth paragraph it seems to me is once again the sort of paragraph which one would expect from a party wishing to emphasize to its potential negotiating partner the strength of its case.* It says that absent an objection from Schering, CIPLA will feel at liberty to go ahead, presumably by importing products into the UK market. *Once again, it seems to me that it is common, indeed normal, for one party to assert that its confidence is so great in the correctness of its position, that it feels that it is safe to proceed without regard to the other side's position if negotiations are not entered into and resolved satisfactorily. But the overall message continues to be one of wishing to negotiate.* True enough, as Mr Thorley argues, this letter is expressed in terms which suggest that it is Schering who have to ask for negotiations; but that is form rather than substance. *This is an invitation, as I read it, to Schering to negotiate.* The heading "without prejudice" reinforces that message. I have no doubt at all that this was a negotiating document and for that reason is covered by the without prejudice privilege. In the result, Schering is not entitled to refer to it in its particulars of infringement and the action must be struck out.
>
> [emphasis added]

492 I also do not think that the contents of the IW Letter amount to "threats" as Ernest alleges. There is a clear distinction between highlighting to

the other party the potential risks of proceeding with litigation, which may include investigations by the relevant authorities, and threatening to report the other party to those authorities unless the other party settled. The IW Letter made it plain (no less than six times at paras 7, 8, 18, 38, 46, and 50) that James had no intention of sending any material or information to the authorities that might subject Ernest or Isabel to investigations. Furthermore, the IW Letter was drafted by an experienced Queen's Counsel, who gave evidence that he had advised James that on no account could the IW Letter contain any threat that James would do anything should the proceedings not be settled. He also testified that he would have refused to act for James if his instructions were otherwise. I further observe that neither Ernest nor his lawyers raised any objections to the IW Letter until 10 months after it was sent when Ernest indicated his intention to produce the letter as evidence. I am therefore of the view that the IW Letter arose in the course of genuine negotiations to settle the dispute between the parties.

493 I turn to the second prerequisite, *ie*, that the communication must constitute or involve an admission against the maker's interest. This prerequisite appears to originate from s 23(1) of the Evidence Act itself, which limits its applicability to "admissions". In other words, s 23 only deals with the circumstances under which an "admission" would be inadmissible (or irrelevant). The term "admission" is defined in s 17(1) of the Evidence Act as follows:

> **17.**—(1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

The Court of Appeal in *Mariwu* further added the gloss that such "admission" must be an admission against interest (at [31]) as the protection of such

admissions is the basis of the "without prejudice" privilege. In *Sin Lian Heng*, Sundaresh Menon JC (as he then was) has this to say about such admissions (at [43]):

> A statement or action that appears on its face to go against the interest of the maker might be seized upon by the opposite party as an admission. This may take the form of statements which are prejudicial in any number of ways. Where one party enters into negotiations with another to explore the possibilities of settlement, it makes sense of course to attempt to convince the opponent of the weaknesses of his position; but it is not unusual – even common – to seem to acknowledge possible weaknesses in one's own case. *Even the level of an offer may be seen as a barometer of the offering party's enthusiasm for the merits of his own position, and while that may be quite irrelevant if the communication was cloaked by the privilege, one can see that most litigants would avoid any attempt at settlement if there was a risk that their offers to settle were later going to be raised against them as a sign of weakness.* It is thus in the overall spirit of encouraging negotiations that parties be sufficiently protected when they "lay their cards on the table". … [emphasis added]

494 I agree with ECJ's submission that a genuine invitation to negotiate a settlement is sufficient, in and of itself, to constitute an admission against interest for the purposes of attracting "without prejudice" privilege. Parties should not be discouraged from initiating settlement negotiations in the fear that their willingness to negotiate might be utilised against them in the future as a sign of weakness. This would run contrary to the policy which undergirds the operation of the "without prejudice" principle. I have already found that the IW Letter is a genuine invitation by James to negotiate a settlement. It follows that the IW Letter is protected by "without prejudice" privilege. It is not necessary for James to demonstrate that the IW Letter contains material that is prejudicial to his (and Edwards and Christina's) positions.

495 I now deal with the remaining two grounds that Ernest alleges justifies admitting the WP Documents. The first ground was that Ernest did not accept

the WP Documents as being protected by "without prejudice" privilege. This argument is misconceived. Section 23(1)(a) clearly provides that an "admission" is inadmissible if it is made upon an express condition that evidence of it is not to be given. This is typically done by marking the communication expressly "without prejudice" (see *Mariwu* at [24]), which was clearly done for the IW Letter.

496 The second ground was that any privilege attached to the WP Documents was lost under the broad "fraud exception". In this regard, Ernest argues that (1) the IW Letter demonstrates that the present proceedings were brought for a collateral purpose, *ie*, to pressure Ernest to settle to avoid disastrous and ruinous consequences set out in the IW Letter; and (2) the WP Documents were unlawful for perverting the course of justice as they sought to influence Ernest and/or Isabel's evidence. I have already found that the IW Letter is a genuine invitation to negotiate a settlement and I am unable to see how it has the effect which Ernest alleges it to have. I therefore dismiss this ground.

497 In the circumstances, I allow RA 352/2014. Costs before me and below must follow the event, the order for costs below is set aside; costs are accordingly to be paid by Ernest to ECJ, such costs to be agreed or assessed pursuant to [513] below.

Conclusion

498 My findings of fact have been set out above and I will not repeat them as this judgment is long enough as it is.

The Plaintiff Companies' claims

499 For the reasons set out above, Ernest is the beneficial owner of the shares in the Plaintiff Companies. On my findings of fact of BVI and Panamanian law, Ernest is entitled to call for ECJ to effect transfers of shares as he directs and he is also entitled to call for their resignation from their directorships and appoint new directors as he may direct.

500 For the reasons set out above, and subject to my following findings and rulings, Ernest is the beneficial owner of the assets and/or funds held by the Plaintiff Companies. However, because Ernest has mixed the assets and/or funds of Camila's Estate, Tony, Bobby and Isabel with his own funds into the assets and/or funds held by the Plaintiff Companies, Ernest holds that part of those assets and/or funds on trust for his respective siblings and mother's estate, less any payments that have been made by Ernest over the years to them and Camila's estate. On the evidence that has been put before me, I am unable to ascertain the assets and/or funds that belong to Ernest and those that belong to his siblings and mother's estate.

501 For the reasons set out above, I find that Camila's estate has not been fully or properly distributed or accounted for and subject to [503] below, Ernest is liable to account for the due administration and distribution of Camila's Estate in accordance with her will and codicils.

502 Although Tony, Bobby, Isabel and the Estate of Camila are not parties before me, Tony, Bobby, Isabel and the Executors of the Estate of Camila have given evidence before me and the issues in this case are intricately intertwined with their personal interests in the assets and/or monies that came from Robert Sr to them and which were subsequently handled, invested and

multiplied by Ernest's exceptional business abilities and acumen. As I have noted above, I am also unable to tell if Tony has obtained everything that is due to him or what amounts each of these parties have already received or have yet to receive.

503 The injunction covering US$200 million is to remain in place for 60 days from the date of this judgment to enable Bobby, if he so wishes, to intervene in these proceedings and to apply for Ernest to account for his share of the assets and/or funds belonging to him less what he has already been paid. If Bobby fails to make such an application, then that injunction over the US$200 million shall be discharged on the 61st day after the date of this judgment and returned to Ernest or to such entity as Ernest shall direct and I shall then deal with consequential matters arising therefrom.

504 In the event that Bobby takes the view that his share of the assets and/or monies and/or his share of Camila's Estate exceeds the US$200 million, Bobby shall be at liberty to apply to injunct such further or other sum as the court shall deem appropriate upon appraisal of the facts presented to it. Similarly, Ernest shall be entitled to do likewise to reduce the sum.

505 Subject to the foregoing, the Plaintiffs' claims against Ernest are dismissed.

Ernest's counterclaim for breach of director's duties, etc

506 For the reasons set out above, Ernest's counterclaims against ECJ are dismissed. ECJ had acted on their *bona fide* belief that the Plaintiff Companies were holding assets which belonged to the family legacy and this was due to the personal representations of Ernest. They acted on this belief, reasonably held, in the face of Ernest's claims that the Plaintiff Companies' assets and/or

funds were all his. I reject Ernest's claims that ECJ acted in breach of their fiduciary duties owed to the Plaintiff Companies as directors or had dishonestly assisted in breaches of trust or took part in a lawful or unlawful conspiracy to injure Ernest. Ernest was in a large part responsible, by creating these triangular structures and by making the representations to ECJ as found by me, for the state of affairs in which ECJ acted, in my view, in accordance with their fiduciary duties as directors to protect the Plaintiff Companies when Ernest removed funds from them into his personal accounts. Ernest did not tell ECJ he was doing so and they found this out after the fact.

ECJ's counterclaim for misrepresentation

507 For the reasons and my findings set out above, including, but not limited to [371], [378], [384], [460] and [464], I find that ECJ have made out their case of fraudulent misrepresentation against Ernest. For the reasons that I have set out above, I find that Ernest had represented to ECJ that there was a family legacy instituted by Robert Sr which Ernest was looking after as custodian for the De La Sala family when this was, to his knowledge, false. It was false on a number of bases. It was false on his case that all the assets were his; it was false on the evidence of Tony and Isabel, who were his main witnesses and who alleged they were all bought out and had no interest in the Plaintiff Companies or their assets; it was also materially false on the facts as I have found them. On this basis, Ernest persuaded ECJ, despite Edward and Christina's prior unfavourable experience working for Ernest, to give up their personal careers, relocate to and remain in Singapore to be trained to manage the assets held by the Plaintiff Companies and to become future custodians of the family legacy at great personal cost to them.

508 For the reasons set out above and my findings (already referred to above), Ernest knew Robert Sr had not (other than to express his "wishes" which were dependent on his children taking appropriate steps to turn that into reality), set up any family trust and/or family legacy, and that after Robert Sr passed away, Ernest had merely consolidated JRIC's assets with his own and Ernest managed all their and his assets and/or funds on their behalf. Ernest made those representations orally and in his faxes falsely to induce and persuade ECJ to give up their careers and relocate and remain in Singapore at, as it turned out, a sacrifice in that what they were paid did not or barely covered their losses. I am also sure, and I so find and hold, that if ECJ knew the truth, they would not have given up their personal careers, uproot their families and relocate to Singapore at great personal expense, especially as Edward and Christina had unpleasant experiences working for Ernest before. I also find and hold that although attractive remuneration, a carrot so artfully dangled by Ernest, would have been a factor, what counted with them was that they were serving the family interests in taking up this role; a role which Ernest had described as a "burden", and which description Camila had also corroborated to Edward and Christina, and through Christina, to James.

509 Ernest is therefore liable to ECJ in damages for his false representations, such damages to be assessed.

Orders

510 The parties have two weeks from the date of this judgment to consider the same and, in consultation with each other, draw up appropriate orders in line with and to give effect to this judgment. This will include consideration of whether one of the companies should be split off to hold the balance of Bobby's share and Bobby's share of Camila's estate. I will see the parties

three weeks from today, or at such other date as the Registrar shall fix, to review the draft orders proposed and if there are any disagreements, I will make the final ruling on the same.

511 The injunction over the US$200 million shall remain on the conditions set out above. The parties are also to suggest how this sum should be held pending final resolution, if any, of the remaining issues. If any of the parties feel it should be increased or decreased, they shall make the appropriate application therefor within the three week time period and fix the same for hearing on the date indicated in [510] above.

512 I believe there are no reasons to withhold release of the sealed affidavit filed by Ernest on his bank accounts and assets, as an account has to be taken for the ascertainment of Bobby's share and entitlement under Camila's will if Bobby intervenes and takes out the appropriate application for the same, but I will hear parties' views on the same on the date fixed in accordance with [510] above; it will remain sealed in the meantime.

513 The parties are to make written submissions on costs including the numerous applications where costs were reserved, and disbursements they claim within 4 weeks from the date hereof. I will assess the costs on another date (other than that under [510]) to be fixed by the Registrar

514 These proceedings have been, most unfortunately, protracted, hard-fought and has irretrievably fractured the De La Sala family. I had at a number of stages of this hearing encouraged the parties to attempt mediation, but their differences must have been too wide and deep as this suggestion was never taken up. I can only say that Robert Sr, described in the Australian press as a

"gentle" and "trusted tycoon", a "rarity", and his wife Camila, must be turning in their graves at this public airing of their family's disputes and differences.

515 It is also unfortunate that this will not end here. There are likely to be further proceedings whether here or elsewhere as a consequence of my findings to bring this very unfortunate dispute to a conclusion. There may also be resultant investigation from the Australian tax and perhaps other authorities.

516 But what is clear is that Robert Sr's wish will now not be fulfilled. His children, Tony, Isabel and especially Ernest, have failed him. His warning of the high price of avarice and its cousin, jealousy, made on that hot sultry afternoon in Tokyo on 7th July 1957 has fallen by the wayside, forgotten after 59 years. His hopes, his dreams and his noble wish for his family and descendants have come to naught.

Quentin Loh
Judge

Thio Shen Yi SC, Samantha Lee, Karen Teo and Sharleen Eio
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Harpreet Singh SC, Lim Shack Keong, Joan Lim and Keith Han
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Cavinder Bull SC, Gerui Lim, Adam Maniam, Tan Yuan Kheng and
Kelly Lua (Drew & Napier LLC)
for 1st to 3rd defendants by counterclaim.