

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

[2021] SGHC 142

Suit No 885 of 2019

Between

OOPA Pte Ltd

... Plaintiff

And

Bui Sy Phong

... Defendant

JUDGMENT

[Companies] — [Directors] — [Duties]

[Companies] — [Directors] — [Liabilities]

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

[Trusts] — [Constructive trusts]

[Equity] — [Fiduciary relationships] — [Duties]

TABLE OF CONTENTS

INTRODUCTION.....	1
FACTS.....	2
THE PARTIES	2
BACKGROUND TO THE DISPUTE	3
PROCEDURAL HISTORY.....	5
THE PARTIES' CASES.....	7
ISSUES TO BE DETERMINED	8
ISSUE 1: THE PROPER PLAINTIFF	9
ISSUE 2: BREACH OF FIDUCIARY DUTY	11
WAS THE CSB A MATURING BUSINESS OPPORTUNITY?	11
IF THE CSB WAS A MATURING BUSINESS OPPORTUNITY, DID IT BELONG TO OOPA?	13
DID OOPA PURSUE THE CSB?	20
CONCLUSION ON ISSUE 2.....	22
ISSUE 3: EXPRESS TRUST.....	22
ISSUE 4: EXCUSE UNDER COMPANIES ACT S 391(1).....	25
ISSUE 5: CONSTRUCTIVE TRUST	30
ISSUE 6: EQUITABLE ALLOWANCE	31
ORDERS	32
COSTS.....	34

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OOPA Pte Ltd

v

Bui Sy Phong

[2021] SGHC 142

General Division of the High Court — Suit No 885 of 2019
Philip Jeyaretnam JC
9–12, 16–17 March, 10 May 2021

16 June 2021

Judgment reserved.

Philip Jeyaretnam JC:

Introduction

1 What fiduciary obligations does the director of a holding company owe that company in respect of the business undertaken by its subsidiary? That question, or variants of it, underpinned the defence in this matter. The defence contended, among other things, that the separate legal personality of the two companies meant that the proper plaintiff was the subsidiary and not the holding company.

2 This case therefore requires a close consideration of the interplay of equity and company law in the context of corporate groups.

Facts***The parties***

3 The defendant, Mr Bui Sy Phong (“Bui”), is a self-described serial entrepreneur.¹ He is from Vietnam. Bui had an idea for a start-up venture initially involving top-up tools for Vietnamese mobile subscribers to top up mobile airtime and subsequently an e-wallet application for small retailers in Vietnam.² He secured investors, including a venture capital fund, Captii Ventures Pte Ltd (“Captii”) as lead investor.³ Though Bui and the intended business were Vietnamese, the plaintiff company, OOPA Pte Ltd (“OOPA”), was set up in Singapore for the purpose of holding the Vietnamese operating company, OnOnPay Vietnam Mobile Services JSC (“OnOnPay”).⁴

4 Bui holds 72.09% of the plaintiff.⁵ However, it is common ground that upon dilution of Bui’s stake in OOPA pursuant to certain agreements, Bui’s shareholding in OOPA would be 40.15%.⁶

5 OOPA owns the whole of OnOnPay beneficially: 60% directly and 40% indirectly; 38% via Bui and 2% via OnOnPay’s Operation and Finance Manager, Ms Nguyen Thi Van (“Van”). Bui and Van assigned the shares in their names to OOPA by a Deed of Assignment dated 9 August 2017.⁷

¹ Defendant’s Opening Statement at para 1.

² Bui Sy Phong’s affidavit of evidence-in-chief (“AEIC”) at para 3.

³ Ng Sai Kit’s AEIC at para 7.

⁴ Bui Sy Phong’s AEIC at para 14; Ng Sai Kit’s AEIC at para 14.

⁵ Bui Sy Phong’s AEIC at para 4; Ng Sai Kit’s AEIC at para 10.

⁶ 3 Agreed Bundle (“AB”) 840 and 842.

⁷ Bui Sy Phong’s AEIC at para 3; Ng Sai Kit’s AEIC at para 30.

6 At the material time, the directors of OOPA were:⁸

- (a) The defendant, Bui;
- (b) Ng Sai Kit (“Ng”), representing Captii;
- (c) Kenneth Tan Wei Chin, representing another investor, Gobi MAVCAP ASEAN Investment Management Limited;
- (d) Liu Tact Yew (“Liu”); and
- (e) Helmie Anis Ashiblie.

7 Bui was also a director of OnOnPay. None of the other directors of OOPA were also directors of OnOnPay.⁹

8 One more individual should be mentioned, namely Low Zhen Hui (“Low”), who was from Captii and assisted Ng in relation to OOPA.¹⁰

Background to the dispute

9 Neither the top-up business nor the e-wallet business were successful.¹¹ A number of options for a potential exit were considered in the second half of 2018.¹² Nonetheless, at around the same time, OnOnPay began to undertake a procurement and supply business for small retailers, described as “mom and pop

⁸ Ng Sai Kit’s AEIC at para 18 and p 41.

⁹ Ng Sai Kit’s AEIC at para 11.

¹⁰ Transcript, 9 March 2021, p 48 lines 8–22.

¹¹ Bui Sy Phong’s AEIC at paras 15 and 19; Ng Sai Kit’s AEIC at para 41.

¹² Bui Sy Phong’s AEIC at para 20; Ng Sai Kit’s AEIC at para 43.

shops” in Vietnam.¹³ Known internally as the Central Supply Business (“CSB”), it certainly appeared viable, and Bui sought funding for it, both from the existing shareholders of OOPA as well as externally, from potential investors.¹⁴ Parties discussed, among other options, setting up a new entity to be incorporated in Singapore to hold a new Vietnamese operating company for the new business.¹⁵ A name, Telio, was coined for this purpose.¹⁶ Its shareholding would comprise three parts. One part would mirror the capital structure of the original Singapore company – in corporate parlance, its “cap table”, “cap” being an abbreviation of “capitalisation”. A second part would be for the founding team (*ie* Bui and perhaps other key employees). A third part would be for new investors.¹⁷ The proportions of these parts as well as the valuation to be ascribed to the new company were still being discussed, with Bui seeking a larger shareholding.¹⁸

10 A new Singapore holding company, Telio Pte Ltd (“Telio”), was incorporated by Bui as its sole shareholder.¹⁹ A new operating company, wholly owned by Telio, was then incorporated in Vietnam, namely Telio Vietnam Co Ltd (“Telio VN”). Telio was incorporated on 21 January 2019, while Telio VN was incorporated a week later on 28 January 2019.²⁰

¹³ Bui Sy Phong’s AEIC at para 29; Ng Sai Kit’s AEIC at paras 44–45.

¹⁴ Bui Sy Phong’s AEIC at paras 31–35.

¹⁵ 3 AB 675–685.

¹⁶ 3 AB 683.

¹⁷ 3 AB 683.

¹⁸ See *eg* 3 AB 687–699; Bui Sy Phong’s AEIC at paras 62–65 and pp 1324–1337.

¹⁹ Bui Sy Phong’s AEIC at para 52; Ng Sai Kit’s AEIC at para 61.

²⁰ Bui Sy Phong’s AEIC at para 52 and pp 1302–1304; Ng Sai Kit’s AEIC at para 60 and p 658.

11 Soon after, Bui applied for Telio to enter an accelerator program for start-ups known as Surge Ventures (“Surge”), which was backed by a major venture capital firm, Sequoia Capital (“Sequoia”).²¹ The upshot was that on 19 March 2019, Bui signed a term sheet and a convertible note agreement with Surge on behalf of Telio.²²

12 The other directors of OOPA did not know about Telio’s involvement with Surge until after Surge had made its investment,²³ though Liu had been approached by a representative of Sequoia about Bui and Telio for a “seed program”.²⁴ Ng called for a board meeting of OOPA that was held on 15 April 2019.²⁵ The purpose of the board meeting was to discuss the ownership of Telio and the financial situation of OOPA and OnOnPay.²⁶ Articles about Bui’s success appeared online a few days later,²⁷ and on 21 April 2019 Ng emailed the board of OOPA (excluding Bui) on a proposed action plan in respect of asserting OOPA’s rights over Telio.²⁸ As the matter could not be resolved, OOPA commenced these proceedings on 6 September 2019.

Procedural history

13 Originally, OOPA had sued Telio in addition to Bui. On 6 May 2020, by consent of all parties, Telio ceased to be a party to the suit, on its undertaking

²¹ Bui Sy Phong’s AEIC at para 67.

²² 22 AB 5946–5958.

²³ Ng Sai Kit’s AEIC at paras 64–65; see also Transcript, 17 March 2021 p 19 line 9 to p 25 line 12.

²⁴ Liu Tact Yew’s AEIC at paras 36 and p 125.

²⁵ Ng Sai Kit’s AEIC at paras 70–71.

²⁶ 22 AB 5964.

²⁷ 13 AB 3596–3615.

²⁸ 3 AB 839–843.

to take all necessary steps to give effect to any transfer of Bui's shares in it that the court might subsequently order.²⁹

14 OOPA amended its Statement of Claim on 20 January 2021. These pleadings clarified the interaction of OOPA and OnOnPay in relation to the CSB and also for the first time averred that when Bui incorporated Telio and became its sole shareholder he held the shares of Telio “as agent and/or nominee and/or constructive trustee” for OOPA.³⁰ The word “nominee” simply means a person nominated, and has two common uses that confusingly differ in meaning. Discerning the correct meaning depends on context. In a sale and purchase agreement, reference to the purchaser's right to direct conveyance to a nominee may mean that the purchaser has the right to direct conveyance to any person that the purchaser nominates after contract and before conveyance. That person could well receive the conveyance of the purchased property as its beneficial and not just legal owner. But the word “nominee” is also often used to mean a person who has been nominated to hold property on behalf of another, or, to adopt more precise legal language, as an express trustee. In OOPA's plea, the word “nominee” is being used in the second sense, *ie* as an express trustee.

15 OOPA also added that OnOnPay had assigned its intellectual property (“IP”) to OOPA, by a Deed of Assignment dated 30 July 2015, including the domain names “ononpay.com” and “ononpay.vn”.³¹ Additionally, OOPA refined its pleading concerning Bui's breach of fiduciary duty, putting its case as follows:³²

²⁹ HC/ORC 2647/2020.

³⁰ Statement of Claim (Amendment No 3) at para 18.

³¹ Statement of Claim (Amendment No 3) at para 3A.

³² Statement of Claim (Amendment No 3) at para 26.

[Bui] acted in breach of his fiduciary duties and/or in breach of trust by usurping [OOPA's] corporate opportunity, being Telio (or [the CSB]) for himself inter alia by (i) refusing and/or failing and/or neglecting to allocate and/or transfer shares in Telio Pte. Ltd and/or Telio Vietnam (whichever contains Telio) to [OOPA]; (ii) keeping for [Bui's] own use undisclosed profits from Telio represented by the shares of Telio Pte. Ltd. and/or the shares of Telio Vietnam , (iii) not informing [OOPA] of the third party investors for Telio's seed round.

16 This plea taken together with the plea that Bui held his shares in Telio as agent, nominee or constructive trustee focused OOPA's claim on the question whether Bui's shareholding in Telio is held on trust for OOPA, either by an express or a constructive trust.

The parties' cases

17 OOPA's case against Bui is that the CSB belonged to it and that when Bui incorporated Telio, he did so on OOPA's behalf. OOPA claims that Bui has diverted the CSB to Telio in breach of fiduciary duty, and has wrongly denied OOPA's ownership of Telio. OOPA's primary case is that Bui holds his shares in Telio on constructive trust for OOPA.

18 Bui contends that OOPA is not the proper plaintiff. Any resources that were used in what he calls the pilot project for the CSB (undertaken by OnOnPay from November 2018 to January 2019) belonged to OnOnPay and not OOPA, and so the proper plaintiff would be OnOnPay. Related to this contention is the argument that at most OOPA has suffered reflective loss as a shareholder of OnOnPay.

19 Bui also contends that the CSB was his idea, and so belonged to him. He denies that he incorporated Telio on OOPA's behalf. He says that while he offered the investors in OOPA the opportunity to invest in the new business, he

was not obliged to do so. Alternatively, while OnOnPay was involved in the CSB, it was at most an idea, and had not evolved into a maturing business opportunity.

20 Bui also submits that if he is found to have breached his fiduciary duty he nonetheless acted honestly and reasonably and so should be excused under Companies Act (Cap 50, 2006 Rev Ed) (“Companies Act”) s 391(1).

21 Lastly, he argues that even if the claim is made out against him, no constructive trust over the shares he holds in Telio should be imposed.

22 Bui identifies the villain behind this litigation as Captii, whom he describes as motivated by greed, and abusing this case to exert pressure on him by scaring away other investors with the aim of extracting a benefit from him.³³

Issues to be determined

23 The issues that fall to be determined are as follows:

- (a) Whether OOPA is the proper plaintiff;
- (b) Whether Bui breached his fiduciary duty to OOPA in respect of the CSB;
- (c) Whether Bui held his shares in Telio as OOPA’s nominee, *ie* on express trust;
- (d) Whether Bui should be excused from any breach of fiduciary duty, under s 391(1) of the Companies Act;

³³ Defendant’s Closing Submissions dated 14 April 2021 (“DCS”) at paras 1 and 10.

- (e) Whether the appropriate remedy is to declare a constructive trust over Bui's shares in Telio in favour of OOPA; and
- (f) Whether I should grant Bui an equitable allowance.

Issue 1: The proper plaintiff

24 Bui raises two related points. The first is that to the extent there was any misconduct on Bui's part, it was in breach of his fiduciary duty to OnOnPay and not to OOPA, because it was OnOnPay's resources that were involved in the CSB. The second is that any loss suffered by OOPA is only reflective loss, because it would be eliminated by replenishment of OnOnPay's assets.

25 During oral argument, Bui's counsel accepted that an individual who is a director of both the parent company and its subsidiary will owe separate fiduciary duties to both of them.³⁴ His point was that one must consider whether the act or omission complained of relates properly to the subsidiary and not to the parent.³⁵ For example, if the individual causes the subsidiary to pay an inflated salary to his family member, then it would be the subsidiary that should sue. Successful recovery by the subsidiary would make good any loss on the part of the parent company.

26 Bui's counsel contended that it did not matter whether OnOnPay was wholly owned by OOPA. He explained that OnOnPay had different creditors from OOPA, and thus it was important not to conflate the two companies.³⁶

³⁴ Transcript, 10 May 2021, p 14 lines 4–16.

³⁵ Transcript, 10 May 2021, p 14 lines 16–19.

³⁶ Transcript, 10 May 2021, p 16 line 31 to p 17 line 14.

27 OOPA's answer was that its claim is that the CSB belonged to OOPA, and that the decision whether and how to pursue the CSB, including by establishing a new entity to do so, was for OOPA to make. This is shown by the fact that discussions concerning the CSB took place at the level of the board of OOPA. It was for OOPA to decide whether to house the CSB within OnOnPay or to establish a new entity for this purpose.

28 I accept that the claim as framed is properly brought by OOPA. It claims in respect of what it asserts to be its asset, and in respect of loss directly suffered by it. Whether it can prove its claim is dealt with under the sections that follow.

29 As a matter of general principle, a single individual may owe fiduciary duties under different relationships or to different principals. The same act or omission may possibly constitute a breach of fiduciary duty to more than one principal. That there may have been a breach of duty to another principal does not negate or limit the first principal's rights against the defaulting fiduciary. The fiduciary's conduct will have to be measured and judged in terms of the scope and content of his duty to the principal that is bringing suit against him.

30 It is instructive to compare the situation where a particular individual is a director of both the holding company and its subsidiary with one where he is only a director of the holding company. If the individual abuses his position as director of the holding company in order to obtain a gain from the subsidiary, the holding company in both situations will have the same rights against its director. Those rights will not be impaired or diminished if the individual is also a director of the subsidiary. If he is, the subsidiary might have rights against him too, but any difficulty is resolvable by the application of the principle against double recovery.

Issue 2: Breach of fiduciary duty

31 The relevant principle on which OOPA relies is a well-established one. The director of a company is disqualified “from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing”: see the Canadian Supreme Court case of *Canadian Aero Services Ltd v O’Malley* (1974) 40 DLR (3d) 371 (“*Canaero*”) at 382, approved by the Court of Appeal in *Tokuhon (Pte) Ltd v Seow Kang Hong and others* [2003] 4 SLR(R) 414, at [50]–[51].

32 This issue requires consideration of three questions:

- (a) Was the CSB a maturing business opportunity?
- (b) If the CSB was a maturing business opportunity, did it belong to OOPA?
- (c) If it belonged to OOPA, did OOPA pursue it?

33 As Bui remained a director of OOPA until 16 June 2020, more than a year after the events in question, no concern arises, unlike in *Canaero*, of the extent to which a director remains disqualified following his resignation as a director.³⁷

Was the CSB a maturing business opportunity?

34 In considering whether the CSB had crossed the line from an idea to a concrete business opportunity, I derived assistance from the contemporaneous

³⁷ Bui Sy Phong’s AEIC at para 10.

communications that Bui had with his fellow directors of OOPA. The CSB started in late November 2018.³⁸ A month and half later, on 16 January 2019, Bui emailed the board of OOPA reporting on its progress and next steps.³⁹ The email was sent from his OnOnPay email address and bore his signature block as Founder and CEO of OnOnPay. It was addressed to the directors and shareholders of OOPA. It is worth reproducing the body of the email in full:

Dear Directors and Shareholders,

I am sending this email to summarise updates about OnOnPay which I have personally shared with each of you for the past few days.

With the vision to empower 1.5 million mom and pop shops in Vietnam, *for the recent 1.5 months, in parallel with the payment service, we have launched Telio, a central supply platform allowing our merchants to refill inventories centrally.*

Telio can solve existing inefficiencies and fragmentations in FMCG supply chain in Vietnam. Hence, it brings great value propositions to small, household merchants, and subsequently, provide us good potential profitability. *The initial launch has shown good traction in terms of revenue growth and profitability.*

The new service line on its own has attracted investment intention from investors. However, OnOnPay's current valuation, which includes the payment service line is causing hesitation for the round to be closed. *Thus, we suggest to establish a new entity to facilitate the transaction. The new entity's cap table shall fully reflect OnOnPay's current one, with a lower valuation as the investment into Telio is considered as seed funding.*

Please be informed about this and I shall update you with more concrete information as the deal proceeds on.

Thank you for your continuous support and understanding.

[emphasis added]

³⁸ Bui Sy Phong's AEIC at para 30.

³⁹ 3 AB 699.

35 The references to Telio and to a central supply platform are both references to the CSB. A few comments are apposite. First, Bui was updating the board of OOPA about the activities of OOPA’s subsidiary, OnOnPay. Secondly, Bui described the CSB as having been active for the past one and a half months and having “shown good traction in terms of revenue growth and profitability”. Thirdly, he foreshadowed the consideration of moving the business into a new entity so that it would be easier to attract new investors. Keeping it within OnOnPay would mean that new investors would have to consider and take account of any negative impact from OnOnPay’s failing e-wallet business. Fourthly, the existing investors in OOPA would have their shareholding fully reproduced in the new entity. Bui acknowledged in his oral evidence that although he had referred to OnOnPay’s cap table, what he had actually meant was OOPA’s cap table.⁴⁰ Fifthly, he promised to continue to update the directors and shareholders of OOPA.

36 This contemporaneous email from Bui undercuts his contention that the CSB was merely an idea. It is also clear that by the date of the email the CSB was being branded as Telio, while it was being carried out by OnOnPay.

If the CSB was a maturing business opportunity, did it belong to OOPA?

37 The question whether the CSB belonged to OOPA is also illuminated by contemporaneous correspondence.

38 Five days after Bui’s email of 16 January 2019 to the directors and shareholders of OOPA reporting on the CSB, Telio was incorporated. A few days after that, on 25 January 2019, Van emailed the company secretary of

⁴⁰ Transcript, 16 March 2021, p 166 line 18 to p 167 line 14.

OOPA. She requested that they prepare directors' resolutions of OOPA to approve the spin-off of the CSB into Telio.⁴¹ Bui was copied. The key section read:

2. A director resolution of OOPA Board of directors to approve:
 - The spin – off of the merchandising of goods into a new entity (Which is Telio and its later subsidiary in Vietnam)
 - The structure of the new entity to run the new spin – off business (Please see Option 2 in the attached file), and then the transfer of resources (HR, assets, liabilities from existing OOPA – OnOnPay into Telio SG – Telio VN)
 - The new investment into Telio as the new business

39 Not only does this email acknowledge that the CSB was an existing business, it also proceeds on the basis that OOPA's approval was required for the CSB to be spun-off into Telio. The reference to Option 2 is to one of two options for the new corporate structure set out in the attachment to this email. Option 1 was for the creation of a new holding company above both OOPA and Telio which would have the same shareholding as OOPA and which would be a direct shareholder of Telio. Option 2 was to keep OOPA and Telio separate, but the existing shareholders of OOPA would share a percentage (to be determined, with the placeholder "Y%") of the shareholding of Telio on a basis that mirrored their shareholding in OOPA. That last sentence was expressed not only by the diagrammatic depiction but also by a bullet point that read: "Cap table of [OOPA] is migrated to [Telio] on Y% basis".

40 This email is one of many whose authenticity Bui accepted but contended that it could not be relied upon for the truth of its contents as its maker

⁴¹ 3 AB 744–745.

did not testify.⁴² The argument was not much developed but completely lacks merit. As OOPA’s counsel noted, it is the fact that the email was sent copying Bui and he had not corrected its contents that is material. Bui accepted that he did not raise any objection to the contents of this email which he saw when it was sent out by Van.⁴³ Not only did he not object, he emailed OOPA’s company secretary three days later on 28 January 2019, copying Van and asking the company secretary to “be prepared for related actions” concerning the steps outlined in an email sent to him by Low on 24 January 2019.⁴⁴ Among the anticipated steps were resolutions from members and board of OOPA approving the structure of a new holding company that would own 100% of Telio, and which would involve a share swap with OOPA.

41 When questioned on Van’s email dated 25 January 2019, Bui claimed that he disagreed with it, even though he had not objected at the time.⁴⁵ I am not able to accept this claim. It is wholly unconvincing and implausible. Van’s email is consistent with everything else that was happening at about the same time. I hold that Bui understood and agreed with what Van had stated to OOPA’s company secretary.

42 My conclusion on this email is fortified by another email sent by Bui, this time on 30 January 2019, to Ng.⁴⁶ Not only did he attach a “transition plan from OOP [*sic*] to Telio”, but he also made comments in the body of the email to which he was responding. Among other things, he indicated that there would

⁴² DCS at para 47.

⁴³ Transcript, 16 March 2021, p 171 at lines 13–14.

⁴⁴ 3 AB 746.

⁴⁵ Transcript, 16 March 2021, p 173 line 4 to p 174 line 5.

⁴⁶ 3 AB 748–749.

be little risk of cannibalisation for Telio to reach out to the merchants currently on OOPA's payment network, because both Telio and OOPA would be "held by basically same group of shareholders". He also noted that they would be moving "all the current HR as well as other OnOnPay resources to Telio". Bui sought to explain this away on the basis that it was all contingent on additional investment from Captii.⁴⁷ I reject this explanation. The email acknowledges a current state of affairs, including an existing merchant network of OOPA's that Telio needed to access, as well OnOnPay's HR and other resources that were, again, needed by Telio.

43 I hold that Bui's contemporaneous emails reveal that in January 2019 Bui fully believed that the CSB was an active and successful business, however new and nascent, and that he fully understood that, because the CSB was being undertaken by OnOnPay, it could only be transferred to Telio with the approval of the OOPA board.

44 I also hold that emails sent by the employees of OnOnPay that were copied to him without his raising any contemporaneous objection to their contents do indeed reflect his intentions and instructions at the time. At this juncture, it is appropriate to make a clarificatory comment on a particular document that was relied on by OOPA's expert, an accountant by the name of Iain Cameron Potter. He extracted it from an Excel workbook labelled 'OOP management doc' in native form.⁴⁸ I give no weight to that document, nor do I give any weight to any part of Mr Potter's evidence that is based upon it. This document was not agreed, nor was its provenance or accuracy established by any of OOPA's witnesses. It was not even put to Bui. This is not a reflection on

⁴⁷ Transcript, 16 March 2021, p 177 line 19 to p 178 line 7.

⁴⁸ Plaintiff's Bundle of Documents dated 9 March 2021, Tab 1.

Mr Potter's work, which was itself meticulous. It is unfortunate that a critical building block of his evidence was not substantiated. Nonetheless, subtracting this disputed document, and the testimony of Mr Potter that relies on it, has no impact on my findings, as these rest on other material, including the contemporaneous correspondence. There is ample evidence to establish that OOPA's and OnOnPay's resources were used for the CSB, and it is not necessary to determine an exact dollar value.

45 I now return to the options that were under discussion in January 2019, and in particular what appears to have been Bui's preferred option, labelled Option 2.⁴⁹ The shareholding in Telio was suggested to have three components. Apart from the Y% for OOPA's existing shareholders, there was to be X% for an option pool for founders (which would include Bui and Van) as well as Z% for new investors. The values of X, Y and Z were what had to be discussed and agreed. What they would be would depend on the value ascribed to the three components necessary for Telio's flourishing, namely the involvement of the founders, the CSB to be transferred (belonging to OOPA) and lastly the new funding from new investors. All three components were necessary for Telio to be started up, and to succeed. Without new funding, the CSB could not grow. Without Bui's drive and knowledge, the business might not be executed successfully. But crucially, without the CSB there was no business at all either to execute or to grow.

46 Bui had a fiduciary responsibility to OOPA because he was a director of OOPA. The CSB fell within the ambit of that responsibility, which is why he reported on it, including in his 16 January 2019 email. A fiduciary does not have to be selfless, however, and Bui was entitled to look after his own interests in

⁴⁹ 3 AB 745.

negotiating the X value. In short, he could legitimately bargain for a higher option pool for founders. But he was not entitled to make a secret deal with new investors so as to cut OOPA out, whether by taking over the Y value (the value of the CSB) for himself or putting it at zero. This is because the core obligations of a fiduciary are candour and loyalty to his principal.

47 The irony is that Bui's interests ought to have been somewhat aligned with OOPA's, as he was its largest single shareholder even after dilution, holding 40.15%. I find that contrary to Bui's allegation that Captii was greedy, it was he who was greedy, because he was not satisfied with having 40.15% of the Y value (in addition to the lion's share of the X value, as the driving entrepreneurial force behind Telio) and instead took what belonged to OOPA for himself.

48 Counsel for Bui relied⁵⁰ on a later email sent by Ng on 21 April 2019⁵¹ in support of his argument that the CSB at most belonged to OnOnPay and not OOPA. This is because the email asserted that "[t]he interest of OnOnPay in Telio belongs to OnOnPay, this has to be recognised". However, the same email also asserted that Telio belonged to OOPA, stating that "[a]ll IP and business opportunities that are development [*sic*] and identified shall belong to OOPA. Therefore, the business of Telio, being firstly development [*sic*] within OOPA, and using funds of OOPA, shall belong to OOPA".

49 Ng was neither precise nor consistent in how he worded this email. Notwithstanding that he should have been more precise, especially given that by this time he had just discovered that Surge had entered the picture and that

⁵⁰ DCS at para 191.

⁵¹ 3 AB 839.

he acknowledged having spent some time to “complete our thoughts”, I am unable to accept that the email, read as a whole, conceded that Telio was claimed to be owned by OnOnPay in contradistinction to OOPA. Ultimately, the email returns to what had been discussed for some time between Ng and Bui, namely finding the right corporate structure that would reflect the cap table of OOPA in the new entity (the Y value). As Ng explained towards the end of the same email, “[a]ll interest of [Bui] in Telio shall be first recognised as OnOnPay’s; parties could figure how to implement mechanics to allow [Bui] to continue to hold his interest directly. In other words, [Bui] holds 40.15% of diluted interests of Telio and investors through OnOnPay holds 59.85% of diluted interest of Telio”.

50 The reference in this email to OOPA owning the IP is significant. OnOnPay had assigned all its IP to OOPA under a Deed of Assignment dated 30 July 2015.⁵² OOPA’s ownership of the IP used in Telio was also mentioned, without rebuttal, in Captii’s email of 11 January 2019 to Bui.⁵³ The IP included the merchant list and the domain name “ononpay.com”. Bui’s counsel argued that the Deed of Assignment should be disregarded, among other reasons because it was not shown to have been entered into with the intention to create legal relations, was not acted upon and would not relate to future IP of OnOnPay. I do not accept that this is the case. That OOPA protected its position by an assignment of OnOnPay’s IP to itself was a logical step as the holding company and there is no reason not to give it effect. Moreover, arguments that seek to separate what belonged to OnOnPay and what belonged directly to OOPA miss the point. OOPA wholly owned OnOnPay, and in the conduct of OnOnPay’s business had the final say. That is why Bui reported to the board of

⁵² 1 AB 37.

⁵³ 3 AB 687.

OOPA about the business of OnOnPay. It was not enough for OnOnPay's board (ie Bui) to agree to move resources of OnOnPay to Telio. OOPA's approval was also required. In fact, it was OOPA which was entitled to decide whether the CSB should remain within OnOnPay or be spun off into the new entity Telio.

Did OOPA pursue the CSB?

51 In asserting that OOPA was not pursuing the CSB, Bui makes three arguments. First, he says that OOPA's board had never agreed to pursue the Central Supply Business. It was not enough for OOPA to show that the participants in the Facebook Messenger chat group known as OOP Inner Council were keen on the CSB. This is because it only included three of the five directors of OOPA, namely Bui, Ng and Liu. Of the other two directors, only one testified and he indicated he only learned of the CSB in mid-January 2019.⁵⁴ Moreover, no board resolution had ever been passed concerning the CSB. But that is not the sum total of OOPA's case. Bui did report to the entire board of OOPA in his email dated 16 January 2019. He referred in the first paragraph of that email to speaking to each of the recipients about the CSB in the previous few days. None of the board members of OOPA objected to the pursuit of the CSB. Moreover, it is not a general rule that a company can only pursue a particular opportunity upon the making of a formal board resolution. It may well be within the authority of one director or even an employee to pursue an opportunity on behalf of a company. It is a question of fact how any particular company has organised itself in terms of levels of authority. In this case, prior to 16 January 2019 the CSB was already actively being pursued and generating revenue for OnOnPay. This could not be said to have been unauthorised. Bui, as a director of both OnOnPay and OOPA, had caused OnOnPay to pursue it,

⁵⁴ Kenneth Tan Wei Chin's AEIC at para 18.

and had consulted and kept informed two of his fellow OOPA directors, including via the Facebook Messenger chat group known as OOP Inner Council. It is illuminating to consider the flipside of Bui's arguments. If he is right that the CSB could not have been pursued without first obtaining a board resolution from OOPA to that effect, then he would have been acting without authority. No one ever said that to him about the CSB business, and had the allegation been made it would have been straightforward for him to respond that he had the support of two of the other directors of OOPA (and from mid-January 2019, the agreement or, at the very least, the acquiescence of the remaining two members of the board). It is wrong to think that a company only actively pursues a business if there is a formal board resolution to do so. Authority may be given formally or informally. It may be delegated to one or more directors. Moreover, perusal of the OOP Inner Council messages shows that it operated to facilitate discussion among a smaller group of directors who were more involved and interested in operational matters. Nothing in it suggests any element of factionalism.

52 Bui's second argument is that OOPA did not want to pursue the CSB itself but only wanted to own Telio, which would be the entity to undertake the CSB. It is correct that OOPA as a Singapore holding company never intended to carry out the CSB itself. It would necessarily have to do so through a Vietnamese operating company, whether OnOnPay or a new entity such as Telio. However, this fact does not mean that OOPA was not pursuing the CSB. That a new business, for ordinary commercial reasons, will be housed under a new subsidiary does not make that business any less of an opportunity for the holding company. Moreover, given how it had structured matters in the past in relation to OnOnPay, the plan would probably have been for OOPA (or any substituted Singapore holding company) to own the IP relating to the CSB.

53 Bui's third argument is that at most OnOnPay was pursuing the CSB business, and OOPA was not doing so. This argument again tries to use the form of separate legal personality to avoid the substance of his breach of fiduciary duty. But in accepting that a business opportunity of OOPA's may be carried out through its subsidiary it does not follow that the court would be conflating OOPA and OnOnPay or flouting the doctrine of separate legal personality of companies.

Conclusion on Issue 2

54 It follows from the answers to the three questions posed at [32] above that when Bui moved the CSB into Telio, denied OOPA's ownership of Telio and caused Telio to enter into arrangements with Surge that OOPA did not know of, let alone consent to, he usurped a maturing business opportunity pursued by OOPA and hence breached his fiduciary duties to OOPA. Bui is liable to OOPA for these breaches of duty.

Issue 3: Express trust

55 OOPA's pleadings also raise the question of whether Bui held the shares in Telio on an express trust in favour of OOPA. The creation of an express trust requires three certainties to be present. These are certainty of intention, certainty of subject matter and certainty of the objects of the trust. All three were contested by Bui.

56 The company secretary of OOPA also incorporated Telio. A review of the email correspondence shows that it was contemplated at that time in January 2019 that Bui would thereafter at OOPA's direction transfer all or part of the shareholding of Telio to such entity or entities as would fit with the new

corporate structure that would be agreed upon. It is helpful to recap some excerpts in chronological sequence:

- (a) On 16 January 2019, Bui suggested “to establish a new entity... [whose] cap table shall fully reflect OnOnPay’s current one”.⁵⁵
- (b) On 21 January 2019, Telio was incorporated.⁵⁶
- (c) On 24 January 2019, Low emailed Bui, noting the intended step of Bui transferring “100% ownership of Telio to OOPA Group holdco [*ie* holding company]”.⁵⁷
- (d) On the same day, Bui responded to Low. His email attached the diagrammatic corporate structure that Van subsequently sent to the company secretary in her 25 January 2019 email with its Option 1 and Option 2.⁵⁸
- (e) On 28 January 2019, Bui forwarded Low’s email to the company secretary for her to “be prepared for related actions”.⁵⁹

57 Bui was not entitled to do whatever he wanted with his shares in Telio or with Telio itself, regardless of OOPA’s wishes. Either Option 1 or Option 2 was to be implemented, and both involved Bui transferring his shares in Telio in accordance with what might eventually be agreed. From this contemporaneous correspondence, I hold that everyone involved, including Ng

⁵⁵ 3 AB 699.

⁵⁶ Ng Sai Kit’s AEIC at para 60 and p 658.

⁵⁷ 3 AB 734.

⁵⁸ 3 AB 733, 736.

⁵⁹ 3 AB 746.

and Bui, had the common intention that Bui was incorporating Telio on behalf of OOPA and for the purpose of the CSB. I hold that Bui understood that he would have to transfer his shares in Telio in accordance with the outcome of the discussions about the new corporate structure. Naturally, Bui would have a say in what the eventual structure would be, both because of his shareholding in OOPA and his expected role in Telio. Nonetheless, until such time as those discussions concluded, he held the shares in Telio on behalf of OOPA and subject to OOPA's direction.

58 For completeness, I consider each of the three certainties in turn, starting with certainty of intention. That Bui intended to hold his shares in Telio on trust for OOPA is clearly inferred from his 16 January 2019 email to the directors and shareholders of OOPA when he made the suggestion that he carried out a few days later of establishing a new entity to hold the CSB and whose cap table would “fully reflect OnOnPay’s current one”.⁶⁰ This can only be read as the assurance that the new entity was being established for structuring purposes, so that the CSB would be held by a company for which the CSB would be its only business and asset, and which would be free from any legacy liabilities of OnOnPay. Having a new entity to hold the CSB would facilitate attracting new investors, who would be spared having to due diligence on OnOnPay. While he did not expressly say that upon incorporation of the new entity he would hold its shares on trust, this is the only inference to be drawn. The email cannot be reasonably read as Bui saying that he would hold the shares in the new entity in his own right as beneficial owner.

59 Certainty of subject matter is also established. While the argument could be mounted that ultimately OOPA would only own one of the three components

⁶⁰ 3 AB 699.

of Telio's shares and that some would go to founders and some would go to new investors, at the point of incorporation all the shares would be held on trust for OOPA. Under Option 1, all of those shares would be transferred to the new OOPA holding company, and this would happen upon a direction from OOPA following the board resolution of OOPA that the company secretary was expected to prepare. Even under Option 2, where only some of the shares would be transferred to OOPA or OOPA's shareholders, the direction for transfer of the shares would be OOPA's to give.

60 As for certainty of objects, it was clear that the beneficial owner of Bui's shares in Telio was OOPA, and no one else. Returning to the correspondence, there is no suggestion that OnOnPay would own shares in Telio. That would not have fitted with how parties had gone about structuring the business. They followed the usual model of a Singapore incorporated holding company and a Vietnamese incorporated operating company.

61 Having determined that Bui held the shares in Telio as OOPA's nominee, it is not strictly necessary to decide whether imposing a constructive trust would be the proper remedy in respect of Bui's usurpation of the CSB. Nonetheless, for completeness, including in case some of the shares registered in Bui's name were issued to him at a later date, I will proceed to deal with that alternative. Before doing so, I need to consider whether Bui should be excused in whole or in part from liability.

Issue 4: Excuse under Companies Act s 391(1)

62 Bui sought to be excused under Companies Act s 391(1). This point was not raised in the pleadings, and Bui's counsel cited *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed) at para 8.132

for the proposition that it need not be pleaded specifically. I do not agree with this as a blanket proposition, as the section's invocation depends on first establishing honesty and reasonableness on the part of the individual seeking relief. Determining honesty and reasonableness may require examination of facts that would not necessarily have been put in issue by the plaintiff's plea of breach of duty. For this reason, I am of the view that it is good practice for a defendant to plead in his defence his intention to seek relief under this section.

63 In this case, the section was raised in Bui's opening statement,⁶¹ thus affording OOPA the opportunity to explore Bui's honesty and reasonableness at trial. OOPA did not take any pleading point, but simply rejected the section's possible application on the ground that Bui's breaches had been "conscious, culpable and egregious".⁶² Accordingly, I will determine this issue on its merits.

64 The section, which applies to directors as officers of a company, provides that:

391.—(1) If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach, the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.

65 The court's discretion to grant relief under this section only arises upon a finding that the person "acted honestly and reasonably". Thus, Bui's counsel contends that Bui honestly believed that he was the owner of the CSB and not

⁶¹ Defendant's Opening Statement at para 30.

⁶² Plaintiff's Closing Submissions dated 14 April 2021 ("PCS") at para 442.

OOPA,⁶³ that he held that belief reasonably⁶⁴ and openly and honestly negotiated with Captii about the structuring of Telio.⁶⁵

66 I do not accept that Bui acted honestly. I say this because Bui in fact knew that the CSB did not belong to him. This is evident from the contemporaneous documents. In addition to Bui's email to the board of OOPA on 16 January 2019 described at [34] above, his email of 28 January 2019 to OOPA's company secretary described at [40] above, and his email of 30 January 2019 to Ng described at [42] above, there is much else on record that shows that Bui knew the CSB belonged to OOPA. Two further examples will suffice.

67 The first example concerns how Bui reached out to potential investors for Telio. When he did so, he referred to and relied on the track record the CSB as a business undertaken by OnOnPay. On 14 January 2019, before the incorporation of Telio, Bui had a conversation via Facebook Messenger with a representative from a potential investor called Nextrans.⁶⁶ In this conversation he described the CSB, mentioning that it had been launched one and a half months previously and was now serving mom-and-pop shops and F&B outlets, with monthly revenue of US\$200,000. He talked up the high retention rate of the business, with each merchant doing at least four orders per month. He explained that it would be separated from OnOnPay and put under Telio and indicated that they were looking for \$200,000 in investment with the new entity

⁶³ DCS at para 251.

⁶⁴ DCS at para 255.

⁶⁵ DCS at para 249.

⁶⁶ 12 AB 3512–3514.

being valued at US\$1 million. Discussions with Nextrans did not reach a final conclusion.⁶⁷

68 The second example is a Facebook post that Bui made on 15 December 2018. This was more than a month before he incorporated Telio. He had this to say:⁶⁸

It's been a while since we launched telio.vn [HN and HCMC first then other cities will follow], which supplies our merchants with easy and central ordering, fast delivery, and transparent pricing.

This again confirms OOP's vision to support the growth of 1.2 mil mom-and-pop shops with supply and financing services.

69 During re-examination Mr Bui sought to explain away his open acknowledgment on Facebook that the CSB had been "OOP's vision" by claiming that he had to tell potential investors an untruth – that OnOnPay and OOPA had started the CSB – so that he could convince them to let him give the OOPA investors shares in Telio for free.⁶⁹ I reject this evidence. I find that Mr Bui was telling the truth in his Facebook post and equivocating in his evidence to the court. Mr Bui knew that the CSB had begun as a business undertaken by OnOnPay, using the IP owned by OOPA, and knew that it was not a matter of his giving the OOPA investors free shares in Telio, but a matter of Telio belonging to OOPA.

70 What is fair to say is that OOPA and its shareholders were either unwilling or unable to fund the CSB or Telio at an adequate level to facilitate its take-off. This lack of will or ability was acknowledged by OOPA's investors,

⁶⁷ PCS at para 275.

⁶⁸ 22 AB 5922.

⁶⁹ Transcript, 17 March 2021, p 140 line 14 to p 144 line 13.

including Captii, and that is why discussions were held with potential investors, including Nextrans, with the consent of all concerned. When discussions with Nextrans did not bear fruit, it is simple to infer that Bui would have felt justifiably frustrated. As noted at [46] above, a fiduciary, at least in a commercial context such as this one, of an entrepreneur who became a director of a start-up company, is not obliged to be entirely selfless. Bui was entitled to look after his own interests. For example, he could have threatened to resign (which would have made it much harder for OOPA to make a success of the CSB) or bargained for a higher percentage for himself or for new investors. But he was not entitled to conceal what he was doing, nor to deal secretly with OOPA's property as if it was his own. While OOPA and its shareholders were ready to involve potential new investors, OOPA never gave up the CSB as a business, or disclaimed its interest in pursuing it.

71 A fiduciary is under twin duties of loyalty and candour to his principal. Bui breached those duties when he dealt secretly with Surge in relation to Telio. While Bui was evasive in his answers during cross-examination, he did accept that he did not inform OOPA about his discussions with Surge or that Telio had entered into the investment agreement with Surge on 19 March 2019.⁷⁰ In any case, the evidence is clear that he did not keep OOPA informed concerning his dealings with Surge in regard to Telio. This lack of candour is different from how he had generally kept OOPA informed in the past, both about the operations of the CSB and about earlier potential investors such as Nextrans.

72 Given the evidence, I find that Bui did not act honestly or reasonably. Consequently, the question of exercising a discretion to relieve him from liability under Companies Act s 391(1) does not arise.

⁷⁰ Transcript, 17 March 2021, p 18 line 11 to p 24 line 24.

Issue 5: Constructive trust

73 Bui contends that even if he is liable for breach of fiduciary duty to OOPA by his usurping the CSB, OOPA is not entitled to a declaration that he holds his shares in Telio on trust for OOPA. Bui's counsel relied on the statement of principle in *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 at [96]:

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

The argument made is that Bui's shares in Telio are not the fruit of his usurpation of the CSB; rather, Telio is the garden in which the CSB tree was planted, with the fruit being the generated profits.⁷¹

74 This argument misses the point. The corporate opportunity of the CSB belonged to OOPA. As it proceeded, it was rebranded as Telio (see for example Bui's Facebook post described at [68] above). That is why the name of the new entity was also Telio. When Bui incorporated Telio, he did so for the purpose of taking over the CSB as an opportunity that belonged to OOPA. The shares he holds in Telio represent the gain he obtained from his breach of fiduciary duty. They are the fruits of his breach.

⁷¹ DCS at para 269.

75 This case bears a strong resemblance to the facts in *Guy Neale v Nine Squares Pty Ltd* [2015] 1 SLR 1097. That case concerned a partnership that owned and operated a restaurant, bar and club in Bali known as “Ku De Ta”. Subsequently, one of the partners incorporated a company in Singapore that then registered two trade marks for “Ku De Ta”. The Court of Appeal held that there was an express trust over the trade marks in favour of the partnership, but also considered that if an express trust had not been found to exist, they would have declared a constructive trust over the trade marks in favour of the partnership. There, the usurped corporate opportunity was the development of the “Ku De Ta” name and business in Singapore. Registering trade marks for that name in Singapore would be part of pursuing that corporate opportunity. In this sense, they were the fruits of the defendant’s usurpation of that corporate opportunity.

76 In the same way, had I not found that an express trust existed in the present case, I would have declared a constructive trust over the shares in Telio held by Bui, in favour of OOPA.

Issue 6: Equitable allowance

77 Bui sought an equitable allowance.⁷² This point was not developed very much by his counsel. I decline to exercise my discretion to grant an equitable allowance, for the reason that Bui did not act honestly or reasonably. As explained by the Court of Appeal in *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [23], “the power to grant an allowance to a fiduciary in breach should be exercised sparingly in order not to encourage fiduciaries to act in breach of their duties.”

⁷² Defendant’s Opening Statement at para 41; Defendant’s Closing Submissions at para 292.

78 Fortunately for Bui, he will share in the profits of Telio via his interest in OOPA. It is also the case that to the extent he made any loans to OnOnPay these debts would remain owing to him.

79 It is true that had Bui been candid from the start, he would probably have been able to negotiate an agreement that some of the shares in Telio should be his beneficially, and so the net result of his dishonesty is that he has ended up in a worse position than he might have been in had he acted honestly from the start. That this is so is simply the consequence of Bui's own breach of fiduciary duty. Bui's breach of fiduciary duty lay in taking for himself the shares in Telio for which he was accountable to OOPA. This was a breach of his custodial stewardship duty owed to OOPA in respect of the shares in Telio registered in his name, and by this judgment Bui is required to restore to OOPA what he took in breach of that duty. The fact that if he had not done so, he might have subsequently reached agreement with OOPA for him to have the beneficial interest in some of those shares is irrelevant, because at the time when he took them for himself they belonged to OOPA.

80 No evidence was adduced that Bui paid any part of the incorporation expenses for Telio, or contributed any equity capital to Telio in respect of the shares registered in his name. If he did so, when the shares are transferred to OOPA, OOPA must reimburse him for this expenditure by him.

Orders

81 It appears from the Accounting and Corporate Regulatory Authority records adduced in evidence that Bui holds 99,181 ordinary shares out of the

146,500 issued.⁷³ Bui has testified that he has not received any dividends from the shares.⁷⁴ No evidence was adduced concerning whether all of these shares were registered in his name from the start or whether some of them were issued by Telio subsequently, and if so when. Strictly, my finding of an express trust would only apply to such of the shares as were issued during the initial period in early 2019. Shares that were issued to him subsequently, for example at the same time as the entry of Surge into Telio, would not be held by him on express trust. However, they would be subject to an institutional constructive trust, as they are the fruits of his breach of fiduciary duty. Thus, I am able to make the declaration sought in respect of all the shares in Telio registered in Bui's name.

82 I declare that Bui received, held and continues to hold the shares registered in his name in Telio for the benefit of and on trust for OOPA, order that he transfer the same to OOPA and account for dividends (if any) derived from the shares to date. If necessary, I will hear counsel on the drawing up of the appropriate consequential orders, including the wording of any order for further or additional accounts to be taken.

83 In drawing up the order, counsel should have regard to the following determinations by me:

- (a) If, in respect of the shares, Bui has paid incorporation expenses or contributed financial capital to Telio, OOPA should reimburse him, without interest.

⁷³ 14 AB 3882–3888.

⁷⁴ Bui Sy Phong's AEIC at para 152.

(b) No allowance is to be made in this action in respect of any loans he has taken for the development of Telio, or for any non-financial contribution he has made to Telio.

(c) Bui need not account for salary or fees paid by Telio or Telio Vietnam for work done by him.

Costs

84 Both parties put in costs schedules dealing with the burden and quantum of costs. Bui sought costs of \$302,000 plus disbursements of \$20,036.80.⁷⁵ OOPA sought costs of \$87,000 plus disbursements of \$146,407.93.⁷⁶ The largest disbursement item was \$93,290.50 for the expert fees of Mr Potter.⁷⁷ OOPA also sought costs in respect of three interlocutory summonses, namely \$700 costs and \$877.52 disbursements for its application to serve out of the jurisdiction, \$750 costs and \$207.60 disbursements for the summons for directions and an unspecified amount of costs in relation to Bui's application to give evidence by video link.⁷⁸

85 Costs should follow the event, and I award costs to OOPA. I accept the costs figure of \$87,000 provided by them as eminently reasonable for the trial which took almost six days, two rounds of written submissions and a further half day for oral submissions. Its reasonableness is also supported by the fact that Bui claimed much higher costs if his defence succeeded. Turning to the disbursements, the only aspect which requires consideration is the item for Mr

⁷⁵ Defendant's Costs Schedule dated 28 April 2021 at p 14.

⁷⁶ Plaintiff's Costs Schedule dated 28 April 2021 at p 11.

⁷⁷ Plaintiff's Costs Schedule dated 28 April 2021 at p 11.

⁷⁸ Plaintiff's Costs Schedule dated 28 April 2021 at pp 14–15.

Potter's fees. As I noted at [44] above, some of his evidence rested on a document that was not proven and so I have had to disregard that part of his evidence. In the end, his evidence was not germane to my decision, as I did not need to rely on it to discern that the CSB was an active business that used OOPA's and OnOnPay's resources: Bui's own contemporaneous statements made that crystal clear. It has also not been necessary to rely on his valuation of the Telio business because I have found that the proper remedy is to declare that Bui holds the shares in Telio on trust for OOPA. This does not however mean that this disbursement was unreasonably or improperly incurred. Indeed, it was entirely reasonable for OOPA, in the face of denials and equivocation by Bui, to support its case by having an accountant review OnOnPay's records and thereafter testify on them. I therefore award OOPA its disbursements of \$146,407.93.

86 I also award OOPA costs and disbursements for the three summonses, namely \$700 costs and \$877.52 disbursements for its application to serve out of the jurisdiction, \$750 costs and \$207.60 disbursements for the summons for directions and \$200 costs in relation to Bui's application to give evidence by video link.

Conclusion

87 Bui as a director of OOPA owed it both loyalty and candour. While the success of the CSB was due in part to his efforts, he was not entitled to move the CSB into Telio and deny that he held Telio on OOPA's behalf. Having

secretly made a deal with new investors, he is accountable for the gain made by him flowing from his breach, and holds his shares in Telio on trust for OOPA.

Philip Jeyaretnam
Judicial Commissioner

Koh Choon Guan Daniel (Eldan Law LLP) (instructed), Richard
Yeoh Kar Hoe, Koong Len Sheng and Tan Kee Ming Glen (David
Lim & Partners LLP) for the plaintiff;
Thio Shen Yi SC, Niklas Wong See Keat, Nguyen Vu Lan and Uma
Jitendra Sharma (TSMP Law Corporation) for the defendant.
