IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 103

Civil Appeal No 218 of 2019

Between

Tuitiongenius Pte Ltd

… *Appellant*

And

(1) Toh Yew Keat
(2) Economics at Tuitiongenius Pte Ltd

… *Respondents*

In the matter of Suit No 453 of 2016

Between

Tuitiongenius Pte Ltd

… *Plaintiff*

And

(1) Toh Yew Keat
(2) Economics at Tuitiongenius Pte Ltd

… *Defendants*

JUDGMENT

[Contract] — [Contractual terms] — [Express terms] — [Breach]
[Contract] — [Formation]
[Equity] — [Fiduciary relationships] — [Duties] — [Breach]
[Civil Procedure] – [Pleadings]
[Tort] — [Passing off] — [Misrepresentation or confusion] — [Damage]

Tuitiongenius Pte Ltd
v
Toh Yew Keat and another

[2020] SGCA 103

Court of Appeal — Civil Appeal No 218 of 2019
Sundaresh Menon CJ, Tay Yong Kwang JA and Quentin Loh J
29 June 2020

19 October 2020 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The present appeal arises out of the breakdown of the relationship between two parties who entered into a joint venture in the private tuition business. The appellant, Tuitiongenius Pte Ltd, is a joint venture incorporated by the first respondent, Mr Toh Yew Keat ("Mr Toh"), and one Mr Keng Yew Huat ("Mr Keng") who were its directors and equal shareholders. The second respondent, Economics at Tuitiongenius Pte Ltd ("ETGPL"), is a company incorporated by Mr Toh. The appellant and ETGPL are both in the business of providing private tuition services. The appellant commenced proceedings in the High Court against the respondents, alleging that Mr Toh had breached his employment agreement and his fiduciary duties and seeking damages arising from these breaches as well as for the tort of passing off. These claims were largely dismissed by the High Court judge ("the Judge"). This is the appellant's

appeal against the Judge's dismissal of its claims. We start by setting out the background facts that led to this appeal.

Background facts

The incorporation of the appellant

2 Mr Toh began providing private tuition classes in economics in 2007. Soon thereafter, he offered these classes in a room at his parents' Housing and Development Board flat at Choa Chu Kang ("HDB Flat"). In April 2009, Mr Toh and Mr Keng incorporated the appellant. Mr Keng was a family friend of Mr Toh's parents, who evidently thought of him as a nephew or foster son.

3 The parties dispute the circumstances surrounding the incorporation of the appellant. According to Mr Keng, Mr Toh's conduct of his tuition classes in the room at the HDB Flat had proved to be unsustainable, with Mr Toh running out of space to meet the growing demand for his tuition services. Mr Keng contended that this led to their decision to enter into their first agreement, which Mr Keng referred to as the "CCK Joint Venture". Mr Keng claimed that pursuant to the CCK Joint Venture, he invested a sum of between $20,000 and $30,000 to renovate the aforesaid room where Mr Toh conducted his tuition classes. In return for this investment, Mr Keng was to receive half of the monthly tuition revenue after deducting a sum of $2,000, which would be paid to Mr Toh as his fixed monthly salary. However, Mr Keng alleged, Mr Toh never paid him his share of the revenue that was his due under the CCK Joint Venture. Despite the absence of any such payment, Mr Keng agreed to enter into a "fresh joint venture" with Mr Toh, pursuant to which the appellant was incorporated.

4 Mr Keng said that he trusted Mr Toh notwithstanding his disappointment over the CCK Joint Venture. Mr Keng further claimed that despite the "fresh joint venture" and the incorporation of the appellant, it was agreed between the parties that Mr Toh would continue to teach and retain the fees from the group of students that he was tutoring at that time until they had graduated from junior college ("JC"). Save in respect of that group of students, Mr Keng's understanding of the "fresh joint venture" was that the entirety of Mr Toh's tuition business would be transferred to and carried out *through the appellant*. In this way, it was envisaged that the tuition services provided by their joint venture could grow and, in time, be provided through more tutors and at more locations.

5 Mr Toh's account was almost entirely different. Mr Toh claimed that between 2007 and 2009, he had established himself as a popular economics tuition teacher for JC students. As a result, the demand for his classes grew. During this time, Mr Toh marketed his tuition services under the name "TuitionGenius". Mr Toh denied Mr Keng's account of the CCK Joint Venture in its entirety. Instead, Mr Toh claimed that Mr Keng had approached him and had suggested that they establish the appellant as a joint venture in order to take advantage of the reputation of "TuitionGenius". Mr Toh was initially hesitant because he lacked the means to invest any capital in a joint venture, had no experience in running one and wanted financial security as he hoped in time to start a family. To allay these concerns, the parties concluded an oral agreement to enter into a joint venture using the appellant as their vehicle, on the following terms: (a) Mr Toh would be free to continue to run his private tuition business and retain the revenue that it generated; and (b) Mr Toh would apply the expertise that he had acquired in building up a successful private tuition business to grow the appellant's business, and would participate in joint

marketing activities with the appellant. We refer to this oral agreement as the "Joint Venture Agreement".

6 One of the key differences between the parties' respective positions is the *extent* to which Mr Toh could retain the fruits of the private tuition business which he had already built up on his own. While Mr Keng contended that Mr Toh could only retain the fees from those JC students he was already teaching when they embarked on the Joint Venture Agreement, Mr Toh rejected this contention, claiming that there was no limit on his ability to grow his own private tuition business alongside the appellant's. The resolution of this central issue will have a significant bearing on the merits of the appellant's claims against the respondents. Having set out the key factual dispute, we turn to the conduct of the parties' respective businesses.

The conduct of the parties' respective businesses

7 The appellant's claim in contract arose from a written employment agreement entered into between Mr Toh and the appellant in August 2009 ("the Employment Agreement"). Under its terms, Mr Toh was to serve as a director of the appellant for a period of five years, and would be paid a salary-cum-director's fee of $7,000 a month after the appellant had recouped its initial start-up capital. The Employment Agreement included the following clauses which formed the subject matter of the contractual dispute between the parties:

> **5. DEVOTION OF TIME TO EMPLOYMENT**
>
> The Executive [meaning Mr Toh] shall devote the Executive's best efforts and substantially all of the Executive's working time to performing the duties on behalf of the Company [meaning the appellant]. The Executive shall provide services during the normal business hours of the Company as determined by the Company. Reasonable amounts of time may be allotted to personal or outside business, charitable and professional activities and shall not constitute a violation of this Agreement

> provided such activities do not materially interfere with the services required to be rendered hereunder. …
>
> …
>
> **11. EXCLUSIVE EMPLOYMENT**
>
> During employment with the Company, [the] Executive will not do anything to compete with the Company's present or contemplated business; nor will he or she plan or organize any competitive business activity. [The] Executive will not enter into any agreement which conflicts with his duties or obligations to the Company. [The] Executive will not during his employment or within ONE year after it ends, without the Company's express written consent, directly or indirectly, solicit or encourage any Executive, agent, independent contractor, supplier, customer, consultant or any other person or company to terminate or alter a relationship with the Company.
>
> …
>
> **23. ENTIRE AGREEMENT**
>
> This Agreement contains the entire agreement and supersedes all prior agreements and understandings, oral or written, with respect to the subject matter hereof. This Agreement may be changed only by an agreement in writing signed by the party against whom any waiver, charge, amendment, modification, or discharge is sought.

8 In September 2009, the appellant registered a business under the name REAL Education Centre ("REC") which operated from premises at Clementi (the "Clementi Centre"). Mr Toh taught economic classes at the Clementi Centre, but continued to conduct classes at other locations as well, including at the HDB Flat. In June 2011, the appellant opened a second branch at Bedok (the "Bedok Centre"). Mr Toh also taught some economics classes at the Bedok Centre, but the appellant ceased to operate this branch sometime in or around May 2014 as it was not profitable.

9 In September 2012, Thinktank Learning Centre Pte Ltd ("ThinkTank") was incorporated with Mr Toh, Mr Keng and one Mr Xavier Tong ("Mr Tong") as its directors, and Mr Toh and Mr Tong as its shareholders. In November 2012,

ThinkTank opened a tuition centre at Choa Chu Kang and Mr Keng attended its opening ceremony. Sometime in or around April 2014, ThinkTank took over the Bedok Centre premises and the Bedok Centre's students from the appellant. Mr Keng claimed that he was not aware of this and alleged that he would not have allowed ThinkTank to take over the Bedok Centre premises and the Bedok Centre's students allegedly at no cost, especially when the appellant had incurred expenditure to renovate the premises to make it suitable for its tuition business. Mr Keng claimed that Mr Toh had not disclosed his ownership of ThinkTank. In contrast, Mr Tong testified that ThinkTank had agreed to pay the appellant 20% of its revenue derived from the Bedok Centre premises. This is another key area of dispute that forms part of the appellant's breach of fiduciary duties claim against Mr Toh, which we will deal with later in the judgment.

10 Meanwhile, in November 2010, Mr Toh registered a sole proprietorship, Economics at Tuitiongenius ("ETG"). He explained that he did this in order to better organise his private tuition business. In April 2014, Mr Toh incorporated ETGPL to replace ETG and corporatise his private tuition business. We refer to ETG and ETGPL collectively as the "ETG Entities". Mr Toh claimed that he had informed Mr Keng of this move, and had even been encouraged by Mr Keng to develop and grow his own private tuition business and, in that context, establish the ETG Entities. In line with this, the appellant and the ETG Entities conducted joint marketing activities.

11 In contrast, Mr Keng denied that he had allowed Mr Toh to set up the ETG Entities. He claimed that in 2013, he began to suspect that Mr Toh was misappropriating money from the appellant. He procured the appellant's employment of his son, Jun Hao, in 2014, a move which was partly motivated by his wish to gather information about how the appellant's business was in fact doing. In the meantime, tensions continued to mount between Mr Keng and Mr

Toh. On 1 October 2015, Mr Toh resigned as a director of the appellant and transferred his shareholding to Mr Keng, who in turn transferred his entire shareholding to Jun Hao on 25 November 2015. While Mr Keng claimed that Mr Toh left because of Mr Keng's growing suspicions that he had misappropriated money from the appellant, Mr Toh's version was that their relationship was deteriorating by late 2014 due to rumours that Mr Keng was having an extramarital affair with Mr Toh's mother. Further, there was some evidence of mounting tensions between the members of the two families, including an incident that involved Mr Toh's mother and Mr Keng's daughter, which resulted in the latter being sentenced to a short period of imprisonment. According to Mr Toh, he resigned to avoid a further escalation of tensions between the two families.

The decision below

12 On 4 May 2016, the appellant commenced proceedings in the High Court against the respondents. The appellant alleged that by conducting his private tuition business through the ETG Entities, Mr Toh had breached the best efforts (cl 5) and exclusive employment (cl 11) clauses in the Employment Agreement as well as his fiduciary duties as a director of the appellant. Further, the appellant alleged that Mr Toh's acts of training the appellant's staff specifically to promote his economic classes and using ThinkTank to take over the Bedok Centre premises and the appellant's students at the Bedok Centre constituted further breaches of his fiduciary duties. Lastly, the appellant claimed that the respondents, by marketing their tuition services as "Economics @ TuitionGenius" ("ETG Mark"), were passing off their business as the appellant's, which was marketed as "TuitionGenius" ("TG Mark"). The appellant contends that the TG Mark in fact contained or encompassed the ETG Mark.

13 We begin by summarising the relevant findings of the Judge on these issues: see *Tuitiongenius Pte Ltd v Toh Yew Keat and another* [2019] SGHC 264 ("GD").

14 On most of the contentious factual issues, the Judge preferred Mr Toh's version of events to Mr Keng's. Thus, on the circumstances leading to the incorporation of the appellant, the Judge rejected Mr Keng's claim that his business dealings with Mr Toh began with the CCK Joint Venture. The Judge noted that Mr Keng failed to provide any documentary evidence of the expenditure of between $20,000 and $30,000 that he had allegedly incurred to renovate the room in the HDB Flat where Mr Toh conducted his classes. The Judge also found, upon inspecting photographs of that room, that it was not at all evident that any such amount could possibly have been spent (see GD at [29]). The Judge further accepted the existence of the Joint Venture Agreement as presented by Mr Toh.

15 The Judge also found that there was no breach of the best efforts (cl 5) and exclusive employment (cl 11) clauses in the Employment Agreement because he was satisfied that the appellant had no intention to enforce against Mr Toh any term of the Employment Agreement that was inconsistent with the Joint Venture Agreement. In any event, the Judge held that the appellant had unequivocally waived its rights to enforce cll 5 and 11 of the Employment Agreement. In the same vein, the Judge held that there was no breach of any fiduciary duties by Mr Toh because the parties had a subsequent oral agreement that Mr Toh could continue to run his private tuition business through the ETG Entities and retain the revenue that this generated (see GD at [48]–[51], [88]–[90] and [93]).

16 The Judge also dismissed the appellant's claim under the tort of passing off, holding that there was no evidence that the appellant had any goodwill in the TG Mark (see GD at [101]). We make a preliminary observation that the Judge appeared to have been concerned not specifically with whether there was goodwill in the appellant's *business*, but rather, with whether the appellant had acquired goodwill in the *TG Mark* itself. This is conceptually incorrect because goodwill in a passing off action is concerned not strictly with a trader's get-up (meaning its mark, brand or logo), but rather, with the attractive force of the trader's business as a whole. We will deal with this in greater detail later in this judgment.

The issues raised in this appeal

17 The appellant appealed against the Judge's dismissal of its claims, and this gives rise to the following issues for determination in this appeal:

(a) first, whether the Judge had erred in finding the existence of the parties' oral agreements;

(b) second, whether Mr Toh had breached the best efforts (cl 5) and exclusive employment (cl 11) clauses in the Employment Agreement as an employee of the appellant by conducting his private tuition business through the ETG Entities;

(c) third, whether Mr Toh had breached his fiduciary duties as a director of the appellant by: (i) conducting his private tuition business through the ETG Entities; (ii) training the appellant's staff specifically to promote his economic classes; and (iii) using ThinkTank to take over the Bedok Centre premises and the appellant's students at the Bedok Centre premises; and

(d) fourth, whether the respondents are liable for the tort of passing off.

Whether the Judge had erred in finding the existence of the parties' oral agreements

18 Although this appeal involves three distinct claims, namely, for breach of contract, breach of fiduciary duties and the tort of passing off, in our judgment, there is one central factual finding that must first be considered because it potentially has a bearing on all three issues. This relates to the Judge's foundational finding that there were ***two*** oral agreements between Mr Toh and Mr Keng as follows (see GD at [33]–[45] and [88]):

(a) First, the Joint Venture Agreement, under which Mr Toh could continue to run his private tuition business, retain the revenue that it generated and participate in joint marketing activities with the appellant.

(b) Second, a subsequent oral agreement, under which Mr Toh was permitted to set up ETG in 2010, incorporate ETGPL in 2014, and carry on teaching economics under his private tuition business through the ETG Entities and retain the revenue generated thereby. We refer to this as the "Second Oral Agreement".

We refer to the Joint Venture Agreement and the Second Oral Agreement collectively as the "Oral Agreements".

19 The Judge's finding to this effect was one that an appellate court should not and will not easily overturn (see *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [59], citing *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41]). At the hearing of this appeal, counsel for the appellant, Mr Adrian Tan Gim Hai ("Mr Tan"),

accepted that he could not meaningfully challenge the Judge's finding that the parties had entered into the Joint Venture Agreement. However, Mr Tan sought to challenge the existence of the Second Oral Agreement and argued that Mr Keng had only agreed that Mr Toh could run a limited private tuition business, which did not extend to his conducting his private tuition business through the ETG Entities. As we pointed out to Mr Tan at the hearing of this appeal, he faced a considerable hurdle, given that the Judge had made some specific findings of fact and these could not be overlooked nor the disputed issues reviewed on appeal as though no such findings had been made, as the appellant seemed to think was possible. In any case, we are satisfied that on the totality of the evidence, the Judge was amply justified to find the existence of the Oral Agreements. We elaborate.

The Joint Venture Agreement

20 The Judge's findings of fact in relation to the existence of the Joint Venture Agreement are crucial because they set the stage in terms of the parties' state of knowledge at the time of the appellant's incorporation. This in turn forms the essential background against which the parties must be taken to have entered into the Employment Agreement.

21 We first turn to the Judge's rejection of Mr Keng's claims in relation to the CCK Joint Venture. In our judgment, this finding is unimpeachable. Central to Mr Keng's claims in this regard is his allegation that he had spent a substantial sum of between $20,000 and $30,000 to renovate the room in the HDB Flat where Mr Toh conducted his tuition classes. Yet, Mr Keng failed to produce any documentary evidence in support of this allegation, save for an invoice for the supply and installation of an air-conditioning system for $3,619 with a $400 trade-in for the existing air-conditioning unit in the HDB Flat. The

Judge found that while Mr Keng might have paid for the new air-conditioning system, he had gifted it to Mr Toh and his family in view of their close relationship. This had to be seen in the context of the wider claim that was advanced by Mr Keng, which was that there had been a significant and substantial renovation of the aforesaid room in the HDB Flat to help with Mr Toh's growing business. The Judge examined photographs of that room and noted that it was a simple air-conditioned room with basic furniture. Further, the absence of evidence of such a large payment having been made or even of any such renovations having been carried out was compelling when weighed against Mr Keng's assertion to the contrary, and this gravely undermined his claims as regards the CCK Joint Venture.

22 Importantly, no other reason was advanced to explain why Mr Toh would otherwise have parted with a half-interest in a successful private tuition business that he had built up on his own in favour of Mr Keng, who had no expertise in the tuition industry at all and no evident value to add to the enterprise. Mr Keng's response to this was that he had not bothered to inspect the aforesaid room in the HDB Flat after its renovation. However, in our judgment, that is not relevant because regardless of whether Mr Keng did or did not inspect that room, there was simply no evidence to substantiate the payment that he claimed he had made and no sign of any such alleged renovation work having been done in that room. Having found that there was no such expenditure in the circumstances, unsurprisingly, the Judge found it incredible that Mr Toh would agree to limit his monthly salary to $2,000 and to split half of the remaining income from his tuition classes in return for an investment of a small sum to renovate the room in a way that was ultimately unnecessary. This is because, as the Judge noted, it was evident from the single invoice that Mr Keng did produce that there had been an air-conditioning unit in place which had been

traded in for the new air-conditioning unit (see GD at [29]–[45]). We agree with the Judge's conclusion on this and with his reasons for coming to that conclusion.

23 This then leaves us with Mr Toh's account of how the Joint Venture Agreement came into existence. We find the evidence that Mr Keng knew all along that Mr Toh would continue to operate his own private tuition business and retain the revenue that it generated compelling. In particular, there was evidence from Mr Lim Gim Siong ("Mr Lim"), a former employee of the appellant and a friend of Mr Toh, that he was present at a meeting between Mr Keng and Mr Toh in March 2009 at which they had discussed and agreed on the terms of the Joint Venture Agreement, which evidence the Judge accepted. Mr Toh had also taped a number of his conversations with Mr Keng, and the transcripts of the conversations suggested that Mr Keng knew that Mr Toh would continue his private tuition business after the appellant's incorporation. In addition, there was a considerable body of documentary evidence showing that Mr Keng knew about Mr Toh's conduct of his private tuition business through the ETG Entities. As the documentary evidence is more relevant to the existence of the Second Oral Agreement, and as certain aspects of this evidence is heavily challenged by the appellant on appeal, we will touch on this when we consider whether the Judge had erred in finding the existence of the Second Oral Agreement.

24 The crux of the appellant's submissions against the existence of the Joint Venture Agreement is that it disadvantaged the appellant and Mr Keng, and therefore made no commercial or business sense. However, this ignores the fact that Mr Toh had already built up a successful and growing private tuition business by the time of the Joint Venture Agreement. In line with this, the Judge accepted Mr Toh's evidence that it was Mr Keng who had wished to leverage

on his popularity as a tuition teacher as well as his knowledge of the tuition industry (see GD at [40]). Further, the appellant would benefit even if Mr Toh was concurrently involved in his own private tuition business, given that his students could be expected to and did sometimes take up tuition for other subjects with the appellant. There was thus a degree of referral business from this arrangement. It is evident to us that the joint venture would not have been viable without Mr Toh's participation because, as Mr Keng himself admitted, he was "not familiar with the tuition business" and clearly depended on Mr Toh's network and expertise.

25 The appellant also relied on the fact that the Joint Venture Agreement was not in writing, but this seems to us to be immaterial because even on Mr Keng's case, various aspects of the arrangements between the parties would not have been documented. For instance, there was no documentation of either the CCK Joint Venture or the alleged agreement between the parties that Mr Toh could continue to teach and retain the fees from those students whom he was tutoring at the time of the Joint Venture Agreement until they graduated from JC. Yet, this did not prevent Mr Keng from contending that these were the arrangements between the parties. The short point is that the parties had a close relationship and operated on an informal basis, and the fact that some aspects of the arrangements between them were not documented is not a weighty fact in the final analysis.

26 At the hearing of this appeal, Mr Tan accepted that he would face considerable difficulty in challenging the existence of the Joint Venture Agreement. This was a logical concession in the light of the compelling evidence we have referred to above.

The Second Oral Agreement

27 We turn to the Second Oral Agreement. Mr Tan challenged the existence of this agreement on the ground that Mr Keng was unaware that the ETG Entities were separate and distinct entities owned by Mr Toh and, hence, could not have agreed to allow Mr Toh to conduct his private tuition business through the ETG Entities. Having reviewed the evidence, we are satisfied that the Judge's finding as to the existence of the Second Oral Agreement is similarly unimpeachable. In reaching this conclusion, the Judge made two crucial findings. First, he was satisfied that Mr Keng knew about the ETG Entities because Mr Toh had set up the ETG Entities in a completely transparent manner. Second, the Judge accepted Mr Toh's evidence that Mr Keng had encouraged him to set up the ETG Entities so as to organise his private tuition business in a more professional manner as well as "[insulate the shareholders] from any business losses that may be incurred under the company". We shall analyse the key pieces of evidence that the Judge relied upon in coming to these findings because they are crucial to the determination of the issues presented in this appeal.

Cheque payments to Mr Toh

28 First, Mr Keng had personally approved and then signed cheques in favour of Mr Toh for the economics classes that he taught at the Clementi and Bedok Centres at various times between January 2012 and October 2015. But for the Oral Agreements, these payments would not have been warranted. The Judge rejected Mr Keng's claim that he had signed these cheques blindly or that he had been too busy to seek details of why they were being made to Mr Toh personally, because he found this claim to be clearly contradicted by other evidence. Specifically, the Judge found that Mr Keng was meticulous, a fact

evidenced, for example, in a claim form dated 19 July 2011 that he had signed and on which he had written "[w]hat are the claims on this sheet for?" Former employees of the appellant also attested in their affidavits of evidence-in-chief ("AEIC") that when they prepared cheque payments for Mr Keng's approval, he would *always* review the supporting documents and would at times ask questions about the payments to the tutors and to Mr Toh. This belied Mr Keng's assertion that he had signed the cheques in favour of Mr Toh blindly.

29 At the hearing of this appeal, Mr Tan submitted that the respondents had only been able to produce one cheque in support of their claim that payments were made personally to Mr Toh, and, further, that that particular cheque had been drawn in favour of Mr Toh and not the ETG Entities. Mr Tan argued on this basis that Mr Keng would not have known that Mr Toh was running a competing business through the ETG Entities. Counsel for the respondents, Mr Ng Lip Chih ("Mr Ng"), explained that the respondents had, by way of HC/SUM 1509/2018 ("SUM 1509"), sought specific discovery of copies of the cheque payments made in favour of Mr Toh, but this had been disallowed by the Judge. The Judge's dismissal of the respondents' specific discovery application in SUM 1509 must be put in context. The respondents' application was dismissed not because the appellant did not have the documents sought. Instead, it was dismissed because the Judge found that given the *appellant's* allegation that the cheque payments had been wrongfully made to Mr Toh, the burden of proof fell on the appellant, and not the respondents, to produce the cheques in question to prove its case. This was noted in the minute sheet as follows:

> Court: The cheques pertain to payments made by the Plaintiff to the 1st Defendant which the *Plaintiff alleges were made wrongfully and is claiming for these monies to be refunded.* It seems to me that the Plaintiff is the party bearing the burden of proof for such refund. The

> Defendant has claimed that the cheques will show that Keng Yew Huat had signed the cheques as the joint signatory along with the 1st Defendant. The documents requested are within the power of the Plaintiff to procure. Defendant's application dismissed because it is not necessary for Defendant's case.

[emphasis added]

30 In that light, at the hearing of this appeal, Mr Tan was in no position to challenge the respondents to produce more evidence of cheque payments to Mr Toh when he ought to have known the basis on which their application for specific discovery in SUM 1509 had been denied. Having resisted that specific discovery application, which had been made in order to show that Mr Keng had been a co-signatory of cheques in favour of Mr Toh, and having then chosen not to produce the cheques in question, the appellant could be taken to have impliedly accepted the respondents' contention that Mr Keng had personally approved and then signed cheques in favour of Mr Toh.

The "Admin Guide" and student registration forms

31 Second, there was a clear demarcation between the respective businesses of the appellant and the ETG Entities as distinct entities. A document titled "Admin's Guide for Dummies" ("the Admin Guide") dated November 2014 was produced at the trial. This served as an internal manual for the appellant's finance staff. The Admin Guide was evidently meant to explain the various entities to the staff, and to this end, it clearly set out the various partners and the different branches they were associated with as follows:

(a) The partners of the Clementi Centre were listed as "Mr Keng and [Mr Toh]".

(b) The partners of ThinkTank were listed as "[Mr Toh] and [Mr Tong]". ThinkTank had two listed branches, one at Choa Chu Kang and another at the Bedok Centre premises.

(c) Mr Toh was listed as the sole partner of ETGPL.

32 The Admin Guide also demarcated the mode and method of payment in relation to fees collected: (a) at the Clementi Centre; (b) at the Bedok Centre; (c) by ThinkTank; and (d) for classes conducted by ETGPL. In particular, the Admin Guide specified that for fees collected for classes conducted by ETGPL, the "Finance department [is] to transfer [the fees] to [ETGPL] after deducting 0.8% charge". An administrative form titled "List of Bank Accounts" provided a separate bank account for ETGPL as follows:

> Economics At TuitionGenius Pte Ltd
>
> All Mr Toh's classes
>
> OCBC [Bank account number ending-001]

33 Further, there were separate student registration forms used for Mr Toh's classes. These forms stated that the cheques for Mr Toh's classes should be made payable to ETGPL. In an email to the appellant's staff dated 26 December 2011, Mr Toh informed them that students who had signed up for his classes were required to complete the "TG Registration Form", and that payment for his classes should be made separately to "TuitionGenius" as follows:

> Registration Form:
>
> Students who sign up for [Mr Toh's] classes will have to fill in this *TG Registration Form* …
>
> For students who are signing up for 2 subjects (Economics under [Mr Toh], GP under REC for example) will just need to fill up ONE form. But advise the parent to make *2 separate payments. One cheque for [REC], one cheque for Economics at TuitionGenius*.

[emphasis added]

34 It is evident from all this that there was a structured and transparent system in place for the appellant's staff to channel payments for classes taught by Mr Toh to ETGPL. Former employees who had worked at the appellant at the relevant time also testified that they knew of Mr Toh's private tuition business (through the ETG Entities) and regarded this as a separate business from the appellant's. In our judgment, this evidence is unsurprising given the transparent manner in which Mr Toh conducted his private tuition business through the ETG Entities. In that light, the Judge was persuaded, as we similarly are, to accept Mr Toh's claim that the existence and operations of the ETG Entities were made known to Mr Keng and the appellant's staff (see GD at [77]).

Jun Hao's involvement in the appellant

35 Third, the evidence established that Jun Hao was trained by Mr Toh to direct the fees for Mr Toh's classes to ETGPL's bank account. We reiterate that according to Mr Keng, Jun Hao had been brought in to work with the appellant in order to enable *Mr Keng* to get a better understanding of how the appellant's business was doing. In particular, Mr Keng said that he wished to determine whether, as he suspected, Mr Toh was misappropriating money from the appellant. Jun Hao said that he started working in the appellant as an administrator. He claimed that although Mr Toh had instructed him on the handling of finance-related matters, he had no access to the appellant's account, had no information as to how money was being paid to Mr Toh and did not know that the ETG Entities were distinct businesses owned by Mr Toh. In contrast, Mr Toh asserted that he, along with the appellant's finance staff, had informed Jun Hao that the appellant and the ETG Entities were separate and distinct business entities with different owners, and that the revenue generated by the ETG Entities had to be recorded separately. Mr Toh further said that Jun

Hao had been additionally tasked with the preparation of the appellant's daily reports and the issuance of receipts for tuition fees received from students.

36 In our judgment, Jun Hao's claim that he had no idea how money flowed to Mr Toh is simply incredible. This claim is inconsistent not only with his own testimony, but also with the evidence of the appellant's former employees as well as the documentary evidence. We elaborate. Jun Hao admitted at the trial that he had handled the student registration forms for Mr Toh's classes and knew that he was to deposit money generated from Mr Toh's classes into ETGPL's bank account:

> Q: Yes. Now, apart from REC's account number, would you ---do you have any other bank account numbers for [the] purposes of depositing cash or cheques?
>
> …
>
> A: *[Mr Toh's] classes would be deposited into this "Economics at TuitionGenius" account.*
>
> Ct: Right. So there are two accounts?
>
> A: Correct. Yes, Your Honour.
>
> …
>
> Q: At 1058 to 1059 is another copy of Economics at TuitionGenius registration form. If you look under "for official use only", "personnel: Jun Hao", Mr Keng, can I ask you, is that your handwriting?
>
> A: Yes.
>
> …
>
> Q: Alright. *So you were the one who handled this registration form, correct?*
>
> A: *Yes.*
>
> [emphasis added]

37 Further, Mr Lim, Mr Wong Jing Yong, Ms Ang Lee Theng ("Ms Ang") and Ms Teo Shin Fung ("Ms Teo"), all former employees of the appellant,

attested in their AEICs that they had trained Jun Hao on the finance procedures that were to be understood and followed by a "finance staff" or "general administrator" of the appellant, and that they had emphasised to him that the revenues received for the ETG Entities were to be kept separate from the revenues received for the appellant. Ms Teo and Ms Ang further stated that they had used the Admin Guide to train Jun Hao, and found it "odd and surprising" that Jun Hao claimed that he did not know of the existence of the ETG Entities or that Mr Toh would retain the revenue generated from his economic classes.

38 The documentary evidence also demonstrates that Jun Hao was involved in the administration of the appellant's financial matters, and, in particular, that he knew ETGPL was Mr Toh's business which was separate and distinct from the appellant's business. The documents in question include:

(a) A copy of a cash deposit sheet with Jun Hao's signature, confirming that he had, on 30 September 2014 and 18 December 2014, deposited a sum of $1,320 and $890 respectively into ETGPL's bank account.

(b) Receipts issued by Jun Hao for payments received for Mr Toh's economics classes and an "Economics Essence Workshop" conducted by Mr Toh. These receipts were marked as "TG [reference number]". In contrast, receipts issued by Jun Hao for the appellant's classes were marked as "REC [reference number]".

(c) Flyers distributed by Jun Hao for the aforesaid "Economics Essence Workshop" by Mr Toh. On 10 September 2014, Jun Hao had sent an email to the appellant's staff attaching the "schedule and artwork for the [flyer] distribution" and inviting volunteers to join him in the

distribution of the flyers. The flyers for Mr Toh's workshop specified that payment was to be made to ETGPL.

39 In the light of the foregoing analysis, it is evident that Jun Hao knew that Mr Toh owned a separate and distinct tuition business that operated alongside the appellant's business and this was carried out using the ETG Entities or, more particularly, ETGPL, and that Jun Hao had been trained by former employees of the appellant to separate the revenues received from Mr Toh's classes from the revenues received from the appellant's classes. Jun Hao had even helped to facilitate some payments to Mr Toh and/or the ETG Entities. Mr Toh's conduct in relation to the establishment and operations of the ETG Entities was completely transparent, and all of this information was freely available to Jun Hao. Given Mr Keng's claim that he had tasked Jun Hao to investigate the appellant's business and, in particular, whether Mr Toh was misappropriating money from the appellant, there is no doubt that Jun Hao's knowledge in this regard should be attributed to Mr Keng.

Name cards

40 Lastly, Mr Toh printed and issued three separate name cards for the tuition businesses conducted by the appellant, ThinkTank and the ETG Entities respectively. These name cards were passed to Mr Keng and placed at the front desk of the Clementi Centre. At the hearing of this appeal, Mr Tan argued that these name cards did not establish Mr Keng's knowledge of the fact that Mr Toh ran the ETG Entities as separate business entities because the name cards did not specify whether Mr Toh was merely teaching economics under the ETG Entities or whether he in fact owned the ETG Entities. We find this contention unpersuasive for the following reasons. First, the ETG Entities' name card referred to Mr Toh as the "Principal Tutor & Director" of the ETG Entities and

fell barely short of naming him as the owner. Second, this name card included the HDB Flat among its places of business, and it is not disputed that Mr Keng knew that Mr Toh had conducted his private tuition business at the HDB Flat before the appellant's incorporation and he continued to do so thereafter under the Joint Venture Agreement. Therefore, this name card would have strongly indicated to Mr Keng that the ETG Entities belonged to Mr Toh. Third, as we have elaborated above, the Judge did not rely on the name cards as a solitary piece of evidence, but looked at the totality of the evidence (including the cheque payments to Mr Toh and the clear and transparent demarcation of payments between the appellant and the ETG Entities) to arrive at his conclusion that Mr Keng knew about the ETG Entities and about Mr Toh's conduct of his private tuition business through these entities. The appellant did not meaningfully advance its case by attempting to unravel and isolate the various strands of evidence.

41 In all the circumstances, we are satisfied that the Judge was correct to find that the parties had entered into the Second Oral Agreement. The crux of the Oral Agreements was that Mr Toh was allowed to continue his private tuition business through the ETG Entities and retain the revenue that it generated, and would participate in joint marketing activities with the appellant. Having affirmed this crucial finding of fact, we now turn to the appellant's claims, which in our judgment, have no merit.

The breach of contract claim

The contextual approach

42 The law on the proper approach to construing a contract is set out in two seminal decisions of this court: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*") and

Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal [2013] 4 SLR 193 ("*Sembcorp*"). These cases entrench the contextual approach to contractual interpretation in our law and explain how this is to be applied. An issue raised by the appellant in this appeal is whether the Joint Venture Agreement should be regarded as extrinsic evidence to aid in the interpretation of the Employment Agreement. To address this issue, we will consider the principles pertaining to the interplay between the contextual approach to contractual interpretation and the admissibility of extrinsic evidence under s 94(*f*) of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA").

43 This court specifically held in *Zurich* that the contextual approach to contractual interpretation is *statutorily embedded in s 94(f)* of the EA (at [121]). We subsequently endorsed and reiterated this in *Sembcorp* at [45] and [63]. Section 94 of the EA generally prohibits the admission of evidence of an oral agreement or statement for the purposes of contradicting, varying, adding to or subtracting from the terms of the instrument being construed. But this is subject to the provisos under s 94 which serve as specific exceptions, qualifications or limits to the general rule in s 94. Proviso (*f*) specifically permits recourse to extrinsic evidence to show how the language of a document relates to the existing facts, and in the context of contracts, this has been held to permit the admission of evidence of circumstances surrounding the making of a contract and of facts known to the parties, save for evidence of the drafter's subjective intentions, and subject to certain safeguards which we will come to (see *Sembcorp* at [48], [63] and [65(d)]; see also *BNA v BNB and another* [2020] 1 SLR 456 at [81]). The court must, of course, be vigilant to ensure that in interpreting a contract, extrinsic evidence is employed only to illuminate the contractual language and not as a pretext to contradict or vary it. The goal of construing a contract is to ascertain from an objective viewpoint what the parties

agreed upon, and extrinsic evidence is admissible under proviso (*f*) to aid in the interpretation of the written words of the contract (*Zurich* at [122], [127] and [132(c)]).

44 The following safeguards guide the court in determining whether extrinsic evidence should be admitted:

(a) First, extrinsic evidence is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context. Such extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. Relevance is established if the evidence would have affected the way in which the language of the document would have been understood by a reasonable man situated as the contractual parties were (*Zurich* at [125], [127] and [132(d)]; *Sembcorp* at [64] and [72]).

(b) Second, to adopt a different interpretation from that suggested by the plain language of the contract, the context of the contract should be clear and obvious. This strikes the right balance between commercial certainty and the imperative of giving effect to the objective intentions of the contracting parties (*Zurich* at [129]).

(c) Third, the following requirements of civil procedure are essential and entirely consonant with the limits prescribed in *Zurich* at [44(a)] above (*Sembcorp* at [73]):

(i) parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;

(ii) the factual circumstances in which the facts in (i) were known to both or all the relevant parties must also be pleaded with sufficient particularity;

(iii) parties should specify in their pleadings the effect which such facts will have on their contended construction; and

(iv) the obligation of parties to disclose evidence would be limited by the extent to which the evidence is relevant to the facts pleaded in (i) and (ii).

(d) Fourth, extrinsic facts which were placed before the court in a manner that is not consistent with the requirements at [44(c)] above may not be accorded any weight when the court is construing the contract. The key point is that parties should be clear about the specific aspects and purpose of the factual matrix which they intend to rely on (*Sembcorp* at [74]).

45 Having set out the relevant legal principles, we turn to the appellant's submission that we should not have regard to the Joint Venture Agreement in interpreting the Employment Agreement. The appellant proffered three reasons in support of its submission, which we find unpersuasive.

46 First, Mr Tan argued at the hearing before us that s 94(*f*) of the EA is not applicable in the present circumstances because it would only allow the court to look at extrinsic evidence if there was ambiguity in the provision, and, according to Mr Tan, there was no ambiguity in cll 5 and 11 of the Employment Agreement. This argument is incorrect in law. As was clearly stated in *Zurich* at [130] and [132(c)], "ambiguity is no longer a prerequisite for the court's consideration of extrinsic material".

47 Second, Mr Tan suggested that the respondents were attempting to rely on the Joint Venture Agreement to contradict or vary the terms of the Employment Agreement. In support of this contention, Mr Tan cited the decision of this court in *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 ("*Latham Scott*"). There, the appellant entered into a written contract of employment with the respondent, the terms of which included a discretionary bonus in addition to a base salary. The appellant was subsequently dismissed by the respondent. The appellant claimed that the terms of his employment were also constituted by an oral contract ("alleged Oral Contract") that *guaranteed* a bonus to be paid to him prior to the signing of the written contract. The court refused to admit evidence of the alleged Oral Contract because: (a) its terms were inconsistent with the employment contract and thus fell outside the ambit of s 94(*b*) of the EA; and (b) it was not a condition precedent of the employment contract and fell outside the ambit of s 94(*c*) of the EA (at [19]–[22]). Further, the court also held that the evidence did not establish the existence of the alleged Oral Contract under which the respondent supposedly promised the appellant a guaranteed bonus (at [41]).

48 In our judgment, *Latham Scott* does not assist the appellant here. First, the appellant in *Latham Scott* did not rely on s 94(*f*) of the EA and the applicability of that provision was therefore not considered at all. Further, that decision preceded our decisions in *Zurich* ([42] *supra*) and *Sembcorp* ([42] *supra*). More fundamentally, the court not only found in *Latham Scott* that there was no alleged Oral Contract; it was also clear that the alleged Oral Contract, which guaranteed a bonus, was contrary to and inconsistent with the discretionary bonus term in the employment contract and, hence, inadmissible pursuant to s 94 of the EA. In contrast, the terms of the Joint Venture Agreement in the present case do not, in our judgment, contradict the Employment

Agreement; nor do we rely upon it to vary the Employment Agreement. Rather, the Joint Venture Agreement assists us to interpret the Employment Agreement by helping us ascertain what the parties had in mind, at the time they entered into the Employment Agreement, as to the meaning and scope of the following italicised words in cll 5 and 11:

> (a) "*reasonable amounts of time* may be allotted to *personal or outside business* … and shall not constitute a violation of this Agreement …" [emphasis added] (cl 5); and
>
> (b) "[Mr Toh] will not do anything to compete with the [appellant's] *present or contemplated business* …" [emphasis added] (cl 11).

49 We do not ignore or disregard these provisions at all. On the contrary, the task before us is to determine their true meaning and intent, and in that regard, we consider it a matter of importance that the parties had, as we have found, entered into the Joint Venture Agreement subject to the key terms set out at [18(a)] above. This was a fact known to both parties at the time the Employment Agreement was entered into and forms part of its factual matrix. The latter therefore inevitably falls to be construed in that light, and we are satisfied that the Joint Venture Agreement is admissible under s 94(*f*) of the EA and meets the requirements set out at [44(a)]–[44(b)] above.

50 We digress to note that the appellant also argued that the Joint Venture Agreement could not have been in force at the time of the Employment Agreement because Mr Toh had admitted under cross-examination that he would have deleted cl 11 had he thought he was entitled to carry out his private tuition business:

> Q: So, we see that when you prepared your own employment agreement, you did apply your mind to

> both Clauses 5 and Clauses 11 because you amended those clauses, correct?
>
> A: Correct.
>
> Q: You amended those clauses because you expected those clauses to be binding, correct?
>
> A: In some sense, yes.
>
> …
>
> Q: If, at the time, you thought that you were entitled to carry on your own private business, you would have said at Clause 11, "Hey, this is not my understanding. I'm going to delete the whole thing." True?
>
> A: True.

51 This court has cautioned against declarations of subjective intent, which remain inadmissible except for the purpose of giving meaning to terms which are *latently* ambiguous, that is to say, terms whose ambiguity is apparent only when the contractual language is applied to the particular factual situation in issue (*Zurich* ([42] *supra*) at [50] and [132(d)]–[132(e)]). As we will establish, there is neither any latent ambiguity in this case (see [55]–[56] below), nor any application before the court to go outside the terms of the Employment Agreement. Mr Toh's declaration of subjective intention is hence inadmissible. In any event, Mr Toh is a layperson and his admission in cross-examination as to what he might *subjectively* have thought could be the meaning of cll 5 and 11 is not helpful in interpreting the *objective* intention of the parties *at the time* they entered into the Employment Agreement.

52 Third, the appellant contended that the respondents could not rely on the Joint Venture Agreement to qualify or aid in the interpretation of the Employment Agreement because they did not specify in their pleadings the effect which the Joint Venture Agreement would have on their contended construction of the Employment Agreement (see [44(c)] above). As to this, it

has to be said, first, that the argument that the Joint Venture Agreement was part of the relevant factual matrix was not put in quite this way by Mr Ng on behalf of the respondents. Perhaps, as a result, the pleading objection in relation to the factual matrix was first raised at the hearing of the appeal. Reference to our judgment in *Sembcorp* ([42] *supra*) will demonstrate that the real rationale for the rule outlined at [44(c)] above is to prevent *excessive* discovery and wastage of time on cross-examination at the trial in an attempt to reconstruct the subjective intent of the parties. In this case, extensive cross-examination *did* take place at the trial. And there was certainly no want of notice of these matters or any demonstrable prejudice in our considering these matters on appeal. The purpose of pleadings is, in the final analysis, to ensure that each party is aware of the respective arguments against it, and that no party is therefore taken by surprise (see *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd and other appeals and another matter* [2020] 1 SLR 606 at [16]). In that light, notwithstanding the respondents' failure to plead *how* cll 5 and 11 of the Employment Agreement should be construed in the light of the Joint Venture Agreement, we are not foreclosed from having regard to the latter in interpreting the Employment Agreement. To put it bluntly, the appellant clearly was not, and could not have been, taken by surprise. This is because the respondents had, from the outset, asserted the existence of the Joint Venture Agreement, and this has been found and is no longer seriously challenged in this appeal.

53 Aside from the existence of the Joint Venture Agreement, we think it is also relevant to take into account the fact that the Employment Agreement was not drafted by solicitors, but by Mr Toh, a young businessman who had just started his university education and who attempted to prepare a legal document by working off a template that he had obtained from the Internet. Mr Toh claimed that Mr Keng knew that the Employment Agreement was based off a

free template that he had obtained from the Internet, but Mr Keng denied this under cross-examination. We do not accept Mr Keng's account since he plainly knew that Mr Toh lacked the capital to make any substantial investment (see [5] above) and was therefore unlikely to have incurred legal expenditure to hire lawyers to draft the Employment Agreement. In fact, Mr Toh explained at the trial that he had downloaded a free template off the Internet to save as much cost as possible. In the circumstances, we adopt a "common sense approach" to ascertain the reasonable and probable expectations that the parties would have had, rather than seeking to analyse the Employment Agreement in an unduly technical and legalistic manner (see *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") at [74]). We note that consistent with this, cl 17 of the Employment Agreement provides that the language in the agreement is to be "construed according to its fair meaning and not strictly for or against the [appellant] or [Mr Toh]".

54 For all these reasons, we are satisfied that the relevant terms of the Employment Agreement are to be interpreted in the light of the Joint Venture Agreement. We next analyse the individual clauses.

Whether Mr Toh had breached cll 5 and 11 of the Employment Agreement

55 Clause 5 of the Employment Agreement provides that Mr Toh may spend "reasonable amounts of time" on "personal or outside business [which] shall not constitute a violation of the [Employment Agreement]". This recognises that notwithstanding the obligation on Mr Toh's part to expend best efforts and devote most of his time to the appellant's business, there was an express understanding that he could not only keep alive but continue to grow his private tuition business as a "personal or outside business" distinct from the appellant's. When one considers this language in the light of the relevant factual

matrix, specifically, the existence of the Joint Venture Agreement, this construction becomes compelling. We therefore find there was no breach of this clause.

56 Next, we consider cl 11 of the Employment Agreement, which provides that during his employment with the appellant, Mr Toh "will not do anything to compete with the [appellant's] present or contemplated business". In our judgment, the key question is the scope of the appellant's "present or contemplated business". In the light of the Joint Venture Agreement and, specifically, the agreement that Mr Toh could continue teaching economics as part of his own private tuition business, the appellant's contemplated business did not envisage cutting into Mr Toh's business, and *vice versa*. This interpretation is consistent with the fact that the appellant had allowed and even facilitated Mr Toh's conduct of his economics classes at the appellant's premises. This is borne out not only by the evidence of a structured and transparent payment arrangement that was in place to direct payments to the ETG Entities for economics classes taught by Mr Toh (see [31]–[39] above), but also Mr Keng's personal involvement in approving cheques in favour of Mr Toh and/or the ETG Entities for the classes taught by Mr Toh (see [28]–[30] above). Further, Mr Toh's private tuition business *complemented* rather than *competed* with the appellant's business. Mr Toh was a key draw for the appellant in its effort to build its business because Mr Toh not only provided his expertise and reputation in the tuition industry, but also presented business opportunities arising from his current students taking up tuition for other subjects offered by the appellant. The parties even conducted joint marketing activities. For these reasons, we find that there was no breach of this clause.

57 Given our conclusion that there was no breach of cll 5 and 11 of the Employment Agreement by Mr Toh, we need not find, as the Judge did, that

there was a specific agreement not to enforce against Mr Toh terms of the Employment Agreement that were contrary to the Joint Venture Agreement. In our view, the question simply does not arise in these terms because, for the reasons we have already set out, the terms of the Joint Venture Agreement were not in fact contrary to those of the Employment Agreement. For the same reason, there is no need to consider the parties' submissions on the entire agreement clause (cl 23) in the Employment Agreement.

The claim for breach of fiduciary duties

58 We now turn to the appellant's claim that Mr Toh had breached his fiduciary duties as a director of the appellant to act honestly, use reasonable diligence in the discharge of his duties, act in the appellant's best interests, not make improper use of his position as a director, avoid any conflict of interest and uphold his duty of loyalty to the appellant. We shall refer to these duties collectively as the "fiduciary duties". According to the appellant, breaches of these fiduciary duties arose out of the following three acts by Mr Toh: (a) conducting a competing private tuition business through the ETG Entities; (b) training the appellant's staff to specifically promote his economics classes; and (c) using ThinkTank to take over the Bedok Centre premises at no cost and to transfer the appellant's students at the Bedok Centre to ThinkTank. We will deal with these in turn.

Running a private tuition business through the ETG Entities

59 The appellant submitted that Mr Keng was unaware that the ETG Entities were separate and distinct entities owned by Mr Toh. It contended that Mr Toh had always presented the ETG Entities as though they were part of the appellant's business, and the diversion of business from the appellant to the competing ETG Entities was therefore in breach of the fiduciary duties which

Mr Toh owed to the appellant. The respondents, on the other hand, submitted that the Judge had correctly found that the parties were bound by the Oral Agreements and these "excused" Mr Toh from any breach of his fiduciary duties.

60 At the outset, we note that the appellant's contention rests on the notion that Mr Keng was unaware of the use of the ETG Entities by Mr Toh to run his own private tuition business. In the light of the Judge's findings as to the existence of the Oral Agreements, which findings we have affirmed, this argument cannot stand. Aside from this, the hallmark of a fiduciary is the duty to act in the best interests of another person. A fiduciary cannot act for his own benefit without the *informed consent* of his principal (see *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 at [192], citing *Bristol and West Building Society v Mothew* [1998] Ch 1). Given the agreement between Mr Keng and Mr Toh, who were the promoters of the appellant, as to the basis on which the appellant's and Mr Toh's respective businesses would co-exist under the Oral Agreements, there cannot be any question of Mr Toh acting in breach of his fiduciary duties in running his private tuition business through the ETG Entities. In doing this, he was acting in line with what had been agreed.

Training the appellant's staff to specifically promote his classes

61 At the hearing of this appeal, Mr Tan submitted that even if the Oral Agreements exist, Mr Keng had not agreed that Mr Toh could use the appellant's staff to divert its business to the ETG Entities. Having reviewed the evidence, we are satisfied that Mr Toh's instructions to the appellant's staff to promote his own economics classes were not in breach of his fiduciary duties. In this regard, it is helpful to reiterate the line drawn between the appellant's

business and Mr Toh's private tuition business as set out above at [56]. It follows from this that Mr Toh was entitled to maintain and run his own business alongside the appellant's.

62 We first note that the evidence shows that Mr Toh had trained the appellant's administrative staff to promote his classes. There was an instruction manual, titled the "Intern's Phone Guide", setting out the procedures for the appellant's interns to follow when handling phone calls, and this manual suggested that the interns were to encourage prospective students to join Mr Toh's classes where possible.

63 However, the evidence reviewed (at [28]–[40] above) also shows that the parties operated informally and did not record the specifics of their agreement. Importantly, Mr Toh had kept Mr Keng informed about the development of his private tuition business throughout his employment with the appellant, and Mr Keng had encouraged Mr Toh to set up the ETG Entities. Once it becomes evident that the parties were proceeding on the basis of the Oral Agreements, it is untenable for the appellant to contend that Mr Toh was doing anything impermissible in developing his own business. This is especially so because the appellant's own success as a tuition centre was heavily tied to the growth of Mr Toh's own business. Relative to Mr Keng, Mr Toh had much more knowledge of and experience in the tuition industry, and his personal popularity as a tutor helped to draw in students who might then go on to take classes in the other 12 subjects for which tuition services were offered by the appellant at the primary, secondary and JC levels. We therefore found no merit in this contention.

ThinkTank's taking over of the Bedok Centre premises at no cost and the transfer of the Bedok Centre's students to ThinkTank

64 Mr Tan also argued that the Oral Agreements did not justify Mr Toh using ThinkTank to take over the Bedok Centre premises at no cost and to transfer the appellant's students at the Bedok Centre premises to ThinkTank. An important preliminary issue raised in this appeal is whether the appellant had sufficiently pleaded the particulars of this claim as a breach of Mr Toh's fiduciary duties.

Whether the appellant had sufficiently pleaded the particulars of its claim pertaining to the Bedok Centre

65 It is trite that he who asserts must prove, and it is in the pleadings that one finds the material facts that each party asserts to establish its claim or defence (see *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [31]). This ensures that each party is aware of the case against it and allows it to meet that case. It is common ground that if the appellant wished to claim that Mr Toh had breached his fiduciary duties by causing ThinkTank to take over the Bedok Centre premises at no cost and then transferring the appellant's students at the Bedok Centre to ThinkTank, this ought to have been specifically pleaded. However, as we have noted at [52] above, a balance must be struck between imposing procedural discipline in civil litigation and permitting the parties to present the substantive merits of their respective cases. We reiterate that the purpose of pleadings is to ensure that each party is aware of the case against it, and that the key consideration in this context is the need to prevent surprises arising at the trial (see *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 at [46]). In that light, we consider whether the appellant had sufficiently pleaded the

particulars of its claim in relation to the Bedok Centre, and if not, whether the respondents were taken by surprise by this claim.

66 The appellant did not plead in its Statement of Claim (Amendment No 1) dated 28 March 2017 ("Statement of Claim") that *ThinkTank's* taking over of the Bedok Centre premises and the transfer of the appellant's students at the Bedok Centre to ThinkTank without Mr Keng's consent constituted a breach of *Mr Toh's* fiduciary duties. Notwithstanding this pleading defect, Mr Tan submitted that Mr Keng had particularised the necessary information in his AEIC as follows:

> 37. I found out much later, after [Mr] Toh left [the appellant], that [Mr] Toh continued to use the Bedok Centre premises for another entity, [ThinkTank], apparently owned by [Mr] Toh and [Mr Tong].
>
> 38. It is wrong of [Mr] Toh to use another company, ThinkTank, to take over premises that had been renovated and fitted out at [the appellant's] cost. [Mr] Toh never disclosed that the assets of [the appellant] were being appropriated by his company, ThinkTank (*he never even disclosed that he had such a company*). Had [Mr] Toh said so, I would have objected … I would not have allowed ThinkTank to take over the Bedok Centre free of charge …
>
> [emphasis added]

67 Mr Tan's contention cannot succeed because it runs contrary to the settled principle of law that defects in pleadings cannot be cured by averments in the affidavits (see *Yap Son On* ([53] *supra*) at [52]; citing *Abdul Latif bin Mohammed Tahiar v Saeed Husain s/o Hakim Gulam Mohiudin* [2003] 2 SLR(R) 61 at [7]). In any case, Mr Keng's assertion that he was ignorant of ThinkTank's existence and, presumably on this basis, of ThinkTank's affairs could not have been further from the truth and is wholly against the weight of the evidence that was adduced at the trial. First, Mr Keng was a director of ThinkTank from September 2012 to October 2015, which covered the period

when ThinkTank took over the Bedok Centre premises in April 2014. He also attended the opening ceremony of ThinkTank's first tuition centre at Choa Chu Kang in November 2012. Second, Mr Keng testified that Mr Toh had informed him that he had incorporated ThinkTank as part of their business plan, and he had operated on the assumption that ThinkTank was his and Mr Toh's business:

> Q: … Can you tell us, right, firstly, how did you become a director of ThinkTank?
>
> A: I was the boss, I was not the manager. There were two bosses, me and [Mr Toh]. He said this was our third company.
>
> Q: I see.
>
> A: [Mr Toh] said according to our agreement, we will … set up three companies and that this was the third one.
>
> …
>
> Q: So in September 2012, according to you, [Mr Toh] basically told you that he has incorporated ThinkTank as *part of this business plan that he discussed with you back in 2009.* Correct?
>
> A: Yes.
>
> …
>
> Q: Alright, but just to confirm you---but at all times *you thought that ThinkTank was your business together with [Mr Toh].* Correct?
>
> A: Yes.
>
> [emphasis added]

68 However, this was inconsistent with Mr Keng's denial of having any knowledge of ThinkTank's existence in his AEIC (see [66] above). When this was put to him during cross-examination, Mr Keng claimed that Mr Toh had never mentioned "ThinkTank" and that all he knew was that there was a "third company". Mr Keng further claimed that even though he had attended the opening ceremony of ThinkTank's Choa Chu Kang tuition centre, he did not notice that the centre was called "ThinkTank" as he just "ate and left"

immediately after the opening ceremony. Mr Keng's claim that he was ignorant and oblivious to ThinkTank's existence was simply not credible. There was a prominent "ThinkTank Learning Centre" signboard at the entrance of the premises when Mr Keng attended the aforesaid opening ceremony. Further, Mr Tong attested in his AEIC that he had met Mr Keng *before* ThinkTank's incorporation to formalise and appoint Mr Keng as a director of ThinkTank. This was not challenged by the appellant.

69 In addition to all this, we note from the following documentary evidence that Mr Toh had operated ThinkTank in an open and transparent manner. This belies Mr Keng's claim that he was unaware of ThinkTank's existence and only found out about it after Mr Toh left the appellant in October 2015:

(a) The Admin Guide set out the partners of ThinkTank as "[Mr Toh] and [Mr Tong]" and specifically stated that ThinkTank had two branches, one at Choa Chu Kang and another at the *Bedok Centre premises* (see [31] above).

(b) The List of Bank Accounts provided a separate bank account number for the transfer of funds to ThinkTank with the annotation "CCK + Bedok". The annotation suggested that that specific bank account covered revenue generated from ThinkTank at *both* the Choa Chu Kang and Bedok Centre premises (see [32] above). Former employees of the appellant also gave evidence that they had gone through the List of Bank Accounts with Jun Hao to teach him the protocol for separating payments due to the appellant from payments due to the ETG Entities. Given Mr Keng's evidence that he had tasked Jun Hao to investigate Mr Toh's alleged misappropriation of money from the appellant and find out how the appellant's business was doing, Mr Keng cannot plausibly

deny that he knew about the existence of the separate banking arrangements for funds due to ThinkTank and, in turn, about the existence of ThinkTank (see [37] and [39] above).

(c) Mr Toh had printed separate name cards for ThinkTank, the appellant and the ETG Entities, which he made available to Mr Keng (see [40] above). ThinkTank's name card reflected Mr Toh as the "managing director" of ThinkTank and included the address of its Choa Chu Kang premises.

(d) Mr Keng's daughter, Xiang Qi, said in her AEIC that when Mr Keng learnt that she was struggling with her studies, he "suggested that [she] consider taking tuition classes for Economics" and that she contact Mr Toh. Xiang Qi eventually attended Mr Toh's economics classes at ThinkTank at the Choa Chu Kang premises from May 2013 to November 2013. At the trial, Xiang Qi said that she *knew* that the tuition centre she attended was called "ThinkTank Learning Centre". This again demonstrates that Mr Toh was open about his involvement in and operation of ThinkTank.

70 We highlight the implausibility of Mr Keng's claim that he had no knowledge of ThinkTank's existence and, presumably, of its affairs. This will be significant when we consider whether Mr Toh had breached his fiduciary duties by causing ThinkTank to take over the Bedok Centre premises and the appellant's Bedok Centre students. But first, we return to the consequences resulting from the appellant's failure to plead the particulars of its claim in respect of the Bedok Centre.

71 At the trial, the only evidence led in relation to the circumstances of ThinkTank's allegedly wrongful takeover of the Bedok Centre premises was in the course of the cross-examination of Mr Tong, who was giving evidence for Mr Toh. In short, the appellant adduced no evidence on ThinkTank's takeover of the Bedok Centre premises. As for Mr Tong, he testified, among other things, that: (a) there was an agreement for ThinkTank to pay the appellant 20% of its revenue after taking over the Bedok Centre premises ("the alleged revenue agreement"); and (b) ThinkTank took over those premises at no cost but had to spend $5,000 to $7,000 on renovations:

> Q: How much did ThinkTank pay to take over from the plaintiff? Was it zero?
>
> A: The clause---the agreement that I remember is, the cost was, I think, zero but we agreed to pay them 20% of any existing students' revenue. Is it 20%? I think 20%. Okay, I---I cannot remember the percentage. Okay. But there was a sum agreed, a percentage - I think is 20 - that we---of existing students that we would pay to [the appellant] every month until these students either cease to be with us or the end of the academic year. Yes. In the event where, I think, it is a JC1 student enrolled in March that year, then we would continue to pay the legacy cost---
>
> …
>
> Q: Okay. And I have to say to you---I'm suggesting this to you that ThinkTank benefitted because they took over an operational premises [*sic*] without having to spend any time or money to set it up. Do you agree?
>
> A: Okay.
>
> Q: And ThinkTank benefitted in that it had a ready pool of students that were already registered for classes at the Bedok branch. Do you agree?
>
> A: Okay.
>
> …
>
> Q: Alright. Do you recall how much you all had to spend in doing renovations?
>
> A: I think it was about 5 to 7 thousand dollars …

72 It was suggested that this cross-examination of Mr Tong as to the benefits that *ThinkTank* had obtained would have manifested the appellant's *intention* to pursue a distinct claim against *Mr Toh* for breach of his fiduciary duties arising from ThinkTank's takeover of the Bedok Centre and the transfer of the appellant's Bedok Centre students to ThinkTank. We disagree. First as noted, the appellant did not plead such a claim and adduced no evidence on this. Second, Mr Tan did not squarely challenge Mr Tong's evidence on the alleged revenue agreement, the furthest he went being to "suggest" various hypotheses. Third, the claim itself rests on Mr Keng's contention in his AEIC that he was ignorant and oblivious of ThinkTank's existence, which was simply untenable for the reasons explained at [66]–[70] above.

73 But perhaps most importantly, it is also evident that because of the appellant's failure to plead the particulars of its claim as regards the Bedok Centre, Mr Toh was under the impression that ThinkTank was not part of the appellant's claim at all. For instance, Mr Toh stated in his AEIC as follows:

> 87. [The appellant had] *not referred to ThinkTank as an example of* my Alleged Breaches Of Employment Contract, Alleged Failure To Account Profits and Alleged *Breach Of Director's Duties*. The reason is obvious. In view of [Mr Keng]'s *directorship in ThinkTank*, [Mr Keng] would not be able to disavow his knowledge that I was also providing economic classes pursuant to the Continuation of TG Business Agreement at ThinkTank. [The appellant's] *deliberate omission of ThinkTank in this Suit* clearly demonstrates [the appellant's] mala fides in this Suit … [emphasis added]

Mr Toh was not cross-examined on this aspect of his evidence, and it is therefore not surprising that Mr Toh did not adduce any evidence on the circumstances pertaining to ThinkTank's takeover of the Bedok Centre premises and the transfer of the appellant's Bedok Centre students to ThinkTank.

74 If the appellant, being aware that Mr Toh was operating on this assumption, intended to pursue a claim arising from the above matters against Mr Toh, it was bound to amend its Statement of Claim by *particularising* its pleadings to include Mr Toh's allegedly wrongful use of ThinkTank to take over the Bedok Centre premises and the appellant's Bedok Centre students as a breach of Mr Toh's fiduciary duties. This, the appellant did not do.

75 We turn to the appellant's closing submissions at the trial below where it advanced, for the first time, the contention that ThinkTank's takeover of the Bedok Centre premises at no cost and the transfer of the appellant's Bedok Centre students to ThinkTank constituted a breach of Mr Toh's fiduciary duties. In rebuttal, the respondents submitted at the trial that ThinkTank's takeover of the Bedok Centre premises was proper because Mr Tong had explained that the appellant still received payments from ThinkTank under the alleged revenue agreement. In this context, the Judge found that Mr Toh's conduct in this respect was in breach of his fiduciary duties principally because the respondents' claim that the appellant had received payments from ThinkTank was not supported "by documentary evidence or anywhere in the [respondents'] affidavit" (see GD at [63]). With respect, we consider that the Judge should have entirely *disregarded* the appellant's claim in relation to the Bedok Centre. The respondents did not need to adduce any documentary evidence evidencing payments from ThinkTank to the appellant because these payments did not form part of any pleaded claim by the appellant. Nor had any evidence to the contrary been led by the appellant. In these circumstances, the appellant's claim in relation to the Bedok Centre, not having been pleaded, should not have been allowed to proceed in the first place.

Whether Mr Toh had breached his fiduciary duties

76 In any event, *even if* we were to consider the merits of the appellant's claim in relation to the Bedok Centre, we are satisfied that Mr Toh had not breached his fiduciary duties by causing ThinkTank to take over the Bedok Centre premises and the appellant's Bedok Centre students.

77 Mr Keng's case was that had no knowledge of ThinkTank's existence and so could not have agreed to allow ThinkTank to take over the Bedok Centre premises at no cost or to transfer the appellant's Bedok Centre students to ThinkTank. No alternative case could be or was advanced suggesting that he would have actively disagreed with this arrangement had he known about it. We have rejected his primary case as we have found that Mr Keng well *knew* about ThinkTank's existence, given the open and transparent manner in which Mr Toh conducted ThinkTank's affairs (see [67]–[69] above). Having displaced the premise of Mr Keng's ignorance as to ThinkTank's existence, it was unnecessary for the respondents to have cross-examined Mr Keng on a case he had never advanced as to what his position would have been had he been aware of ThinkTank's existence. Given that the parties operated informally and that Mr Toh had kept Mr Keng informed about the conduct of his private tuition business throughout his employment with the appellant, we are satisfied that as part of the Oral Agreements, Mr Keng knew about ThinkTank's operations and affairs, and had agreed or at least acquiesced in ThinkTank's taking over of the Bedok Centre premises and the appellant's Bedok Centre students given that the appellant was not able to run the Bedok Centre profitably.

78 We are therefore satisfied that Mr Toh had not breached any of the fiduciary duties he owed to the appellant.

The tort of passing off claim

79 We turn to the final issue: the appellant's claim under the tort of passing off. This case presents an unusual factual scenario. In essence, contrary to what is claimed by the appellant (see at [12] above), Mr Toh started a successful private tuition business marketed using the TG Mark. He then teamed up with Mr Keng and incorporated the appellant to provide tuition services. As part of their joint venture, the parties entered into the Oral Agreements, which allowed Mr Toh to continue to run his private tuition business through the ETG Entities and conduct joint marketing activities with the appellant. Mr Toh used the ETG Mark when he marketed his tuition services through the ETG Entities. After the relationship between Mr Toh and Mr Keng deteriorated, the appellant sued Mr Toh for passing off, claiming that the TG Mark was distinctive of *its* services and that the respondents' use of the ETG Mark, which contains the TG Mark, diluted the latter. The following issues arise for our consideration:

(a) whether the appellant has sufficient goodwill attached to its business;

(b) if so, whether the respondents have misrepresented their business to be the same as or connected with the appellant's business, which also encompasses the threshold question as to whether the TG Mark is distinctive of the appellant's business; and

(c) if there was misrepresentation by the respondents, whether it has caused or is likely to cause damage to the appellant's goodwill.

Whether the appellant has sufficient goodwill attached to its business

80 Passing off is concerned with protecting a trader's goodwill in his business, which has been described as the attractive force which brings in

customers (see *Hai Tong Co (Pte) Ltd v Ventree Singapore Pte Ltd and another and another appeal* [2013] 2 SLR 941 ("*Hai Tong*") at [111], citing *The Commissioners of Inland Revenue v Muller & Co's Margarine, Limited* [1901] AC 217 at 224). The basic principle undergirding the law of passing off is that a trader should not sell his or her goods or services under the pretence that they are the goods or services of another. Liability attaches when the tortfeasor, in doing so, unlawfully diverts the goodwill or the attractive force of another trader's business (see *Singsung Pte Ltd v LG 26 Electronics Pte Ltd (trading as L S Electrical Trading)* [2016] 4 SLR 86 ("*Singsung*") at [26], [28] and [32]–[33]).

81 It is trite that for an action under the tort of passing off to succeed, the claimant must prove the "classic trinity" of goodwill, misrepresentation and damage (see *Novelty Pte Ltd v Amanresorts Ltd and another* [2009] 3 SLR(R) 216 ("*Amanresorts*") at [37]). Goodwill is the legal property that the law of passing off protects, and describes the state of the trader's relationship with his or her customers. Pertinently, goodwill in a passing off action is not concerned specifically with the get-up (meaning the mark, brand or logo) used by the trader, but rather, is concerned with the trader's business as a whole (see *Singsung* at [32]–[34], citing *CDL Hotels International Ltd v Pontiac Marina Pte Ltd* [1998] 1 SLR(R) 975 at [45]; *Lifestyle 1.99 Pte Ltd v S$1.99 Pte Ltd* [2000] 1 SLR(R) 687 at [20]–[24]). This was laid down by Lord Parker of Waddington in *AG Spalding & Bros v A W Gamage Ltd* (1915) 32 RPC 273 at 284*:*

> There appears to be considerable diversity of opinion as to the nature of the right, the invasion of which is the subject of what are known as passing off actions. The more general opinion appears to be that the right is a right of property. This view naturally demands an answer to the question – property in what? Some authorities say property in the mark, name, or get-up improperly used by the defendant. Others say, property in

> the business or goodwill likely to be injured by the misrepresentation. Lord Herschell in *Reddaway v Banham* (LR (1906) AC 139) expressly dissents from the former view; and if the right invaded is a right of property at all, there are, I think strong reasons for preferring the latter view.

82 In the court below, the Judge found that there was no evidence that the appellant had used the TG Mark to promote its tuition services, and consequently, it did not have any goodwill in the TG Mark (see GD at [101]). On appeal, the appellant submitted that it owns the goodwill associated with the TG Mark because it had invested time, money and effort to promote that mark. In contrast, the respondents submitted that the appellant had not incurred any expenditure to promote its business in association with the TG Mark. Instead, any advertising and marketing expenses incurred by the appellant was for tuition classes associated with the name "REAL Education Centre" instead of the TG Mark, even though the latter might have appeared in some of the appellant's marketing materials.

83 In our judgment, it appears from the Judge's findings and the parties' submissions that there has been a conflation of the element of goodwill with the threshold requirement of distinctiveness under the element of misrepresentation. The Judge appeared to have been concerned not specifically with whether there was goodwill in the appellant's *business*, but rather, with whether the appellant had acquired goodwill in the *TG Mark* itself. In this connection, the parties' submissions focused solely on, and the Judge only considered, whether the TG Mark was sufficiently associated with the appellant's business, which, as a matter of analytical clarity, should best be dealt with as a threshold issue under the element of misrepresentation (see *The Singapore Professional Golfers' Association v Chen Eng Waye and others* [2013] 2 SLR 495 ("*Chen Eng Waye*") at [20] and [36]; *Amanresorts* at [39]). This distinction clarifies that the tort of passing off is concerned with and

protects the appellant's goodwill in its business as a whole, and not specifically with its right to use the TG Mark. It is apposite to set out what we said in *Singsung* at [37]–[38]:

> 37 In most cases, when and under which element the inquiry as to distinctiveness is undertaken will be of no consequence. The elements of the tort of passing off are connected and interdependent. But, as a matter of both principle and conceptual clarity, ***the issue of whether a mark or get-up is distinctive of the plaintiff's products or services is, in our judgment, a question that is best dealt with in the context of the inquiry as to whether the defendant had made a misrepresentation***. For one thing, ***this makes it clear that the tort of passing off protects the plaintiff's goodwill in his business and not specifically his right to the exclusive use of a mark, get-up, or logo, as the case may be.*** The mark, get-up or logo will feature prominently in the analysis because this will usually be the *means* by which the tort or misrepresentation is committed; but it is not the *ends* for which the tort exists …
>
> 38 In our judgment, ***the issue of distinctiveness is best understood as a threshold inquiry in the context of determining whether the defendant has committed an actionable misrepresentation***. Simply put, if a mark or get-up is not distinctive of the plaintiff's products or services, the mere fact that the defendant has used something similar or even identical in marketing and selling its products or services would not amount to a misrepresentation that the defendant's products or services are the plaintiff's or are economically linked to the plaintiff …
>
> [emphasis in italics in original, emphasis added in bold italics]

84 In *The Audience Motivation Company Asia Pte Ltd v AMC Live Group China (S) Pte Ltd* [2016] 3 SLR 517 ("*AMC*"), the appellant, an events management company ("the Appellant"), registered the "AMC Asia Mark", which comprised the characters "amc!asia" in lowercase letters, in 2012. The respondent, also an event management company, marketed its services under the mark "AMC Live Mark", which was registered in 2013. The High Court judge dismissed the Appellant's claim against the respondent for passing off, holding that the Appellant had failed to establish that it had acquired goodwill

in the AMC Asia Mark (at [87]). On appeal, we held that the High Court judge had erred because instead of considering whether there existed specific goodwill in the "amc" name or in the Appellant's registered mark, the real question the High Court judge should have considered was whether the goodwill in the Appellant's *business* was sufficiently associated with the *identifiers* that it had used (at [88]). Such an analysis avoided the risk of conflating the issue of goodwill with the separate issue of whether there had been actionable misrepresentation (at [82] and [83]):

> 82 The Judge appeared to have been concerned not specifically with goodwill in the Appellant's business but with whether the Appellant had acquired "goodwill in the words 'amc' and 'AMC', the [Appellant's] Marks and [its] domain name" … He seemed to have found that the Appellant had failed to establish such goodwill as it could not prove that it was identified by the name "amc" or "AMC" and by its registered marks. To the extent this is so, in our judgment, as a matter of analytical clarity, it would be neater to deal with this, *not at the stage of determining whether goodwill has been shown to exist, but rather … at the stage of inquiring whether there has been misrepresentation …*
>
> 83 We make this point because in our judgment, if the inquiry as to whether the plaintiff's goodwill is associated with a name or mark is analysed at the goodwill stage, there is *a risk of conflating the issue of goodwill with the separate issue of whether there has been misrepresentation and consequently, damage to the goodwill of the plaintiff's business …*
>
> [emphasis added]

85 We therefore first consider whether the appellant has established the requisite goodwill in its business to found an action in passing off against the respondents. Such goodwill may be proved by evidence of the appellant's revenue from its tuition business or expenses it incurred in promoting its tuition services (see *Chen Eng Waye* at [22]; *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc and another and another appeal*

[2014] 1 SLR 911 ("*Staywell*") at [141]). It bears emphasising that the goodwill, at this stage, is concerned with the appellant's tuition business *as a whole*.

86 In our judgment, there is sufficient evidence of goodwill in the appellant's business. It is not disputed that the appellant has had a business presence in Singapore since April 2009, and at one stage, operated two branches in Singapore (namely, the Bedok and Clementi Centres). The appellant adduced evidence of its revenue from 2010 to 2014, in the total sum of approximately $1.7m, which was generated from 70 students in 2010 and approximately 200 students per year from 2011 to 2014. The appellant's financial position fluctuated between profits and losses during the period from 2010 to 2014, but the profitability of a company is not a prerequisite to the establishment of goodwill (see, for example, *Staywell* at [145] in relation to pre-trading activity). The appellant had also spent a considerable amount on marketing and advertising its tuition business during the same period, in the sum of approximately $138,000. This included advertisement expenditure on "Google Adwords" and on its Facebook page. In relation to the appellant's Facebook page, there were reviews, comments and "likes", presumably from the appellant's students, which is evidence of public exposure of its business. As regards the "Google Adwords" advertisements placed by the appellant, the extent of public exposure cannot be determined because no evidence was led as to the number of views or revenue generated from "Google Adwords". Nevertheless, goodwill clearly exists in the appellant's business, given that it has offered tuition services since April 2009, generated substantial revenue and incurred substantial marketing and advertising expenses in the promotion of its tuition services.

Misrepresentation

87 We turn then to the element of misrepresentation.

Whether the TG Mark is distinctive of the appellant's business

88 The element of misrepresentation requires proof that the respondents' tuition services were held out to be, or to be connected with, the appellant's business, thereby giving rise to confusion (see *Amanresorts* ([81] *supra*) at [77]; *AMC* ([84] *supra*) at [86]). In connection with this, the threshold issue is whether the appellant's goodwill is sufficiently associated with the TG Mark. Sufficient association will be established if the appellant can show that the TG Mark is *distinctive* of its tuition business (see *AMC* at [87]–[88]; *Hai Tong* ([80] *supra*) at [115]), such that the public, being potential students or the parents of such students, view that mark as an *indicator of origin* (see *Rovio Entertainment Ltd v Kimanis Food Industries Sdn Bhd* [2015] 5 SLR 618 at [172]).

89 We agree with the Judge that direct evidence of the appellant's use of the TG Mark was thin. The Judge found that the words "REAL Education Centre" rather than "TuitionGenius" stood out from the appellant's advertisements. The Judge also considered that the internal company documents exhibited by the appellant were not relevant because they were not marketing documents and the appellant had not used the TG Mark to promote its services (see GD at [101]).

90 In our judgment, the TG Mark is *not* distinctive of the appellant's tuition business because the appellant had marketed its tuition business predominantly under the "REAL Education Centre" mark (the "REC Mark"). On the appellant's Facebook page, the appellant used *only* the REC Mark in the course of marketing and promoting its tuition classes. The appellant's signboard at the

entrance of its Clementi and Bedok Centres also stated "REAL EDUCATION CENTRE". Further, the appellant's former employees testified that the appellant had never used the TG Mark to market its tuition business. Having reviewed the marketing materials exhibited by the former employees, we are satisfied that the appellant had advertised its tuition services using the REC Mark rather than the TG Mark.

91 Crucially, it appears that this came about because the parties had made a *deliberate* choice to market the appellant's tuition business under the REC Mark, instead of under the TG Mark. According to Mr Toh, Mr Keng had suggested using the TG Mark as part of the appellant's *corporate name*. Mr Toh, however, had concerns that this might result in confusion between his private tuition business and the appellant's business. To allay Mr Toh's concerns, Mr Keng agreed to use the TG Mark only in the appellant's corporate name for the purposes of attracting investors, with the appellant's business marketed under a different name. This was what led to the adoption of the REC Mark to market the appellant's business. Mr Keng accepted that the parties had a discussion on the appellant's corporate name, but claimed that it was Mr Toh who had decided to use the TG Mark as the appellant's corporate name, and who had then later decided to use the REC Mark to market the appellant's business. The appellant also submitted that the parties did not have an agreement to confine the use of the TG Mark only to the appellant's corporate name. Mr Toh's account was not only corroborated by Mr Lim at the trial, but also commercially sensible, given that the parties had agreed under the Oral Agreements that Mr Toh could continue to conduct his private tuition business. Mr Toh's account is also entirely consistent with the evidence showing the demarcation between the businesses of, respectively, the appellant and the ETG Entities as distinct entities (see [31]–[40] above), as well as with the fact that

the appellant had advertised its tuition services using the REC Mark rather than the TG Mark (see [90] above).

92 Notwithstanding this, the appellant submitted that the relevant public came to associate the TG Mark with it because it had used the TG Mark to promote its services in the following instances:

(a) Any parent or student who wished to learn more about its business would write to "enquiry@tuitiongenius.com" ("the Email Domain") and would receive an email reply from "TuitionGenius RealEducation". This, the appellant claimed, led students to identify the TG Mark with its business.

(b) The receipts issued by the appellant used both the TG Mark and the REC Mark. The class lists on which the appellant's students marked their attendance also set out both the TG Mark and the REC Mark.

(c) Testimonials provided by students who had attended lessons with the appellant identified the TG Mark with the appellant's business.

93 We deal with each contention in turn. First, Mr Toh clarified under cross-examination that the Email Domain was a *shared* domain for potential students who wished to learn more about *either* the appellant's business *or* his private tuition business under the ETG Entities. This is not disputed by the appellant, and is consistent with the Oral Agreements whereby the parties agreed, among other things, that they would conduct joint marketing activities. The Email Domain is therefore neutral in that it does not go towards establishing the distinctiveness of either the appellant's or Mr Toh's respective tuition businesses.

94 Next, turning to the receipts and the class lists, the appellant relied heavily on Mr Toh's concession at the trial that the receipts and class lists might have led the appellant's students to believe that there was some form of association between the appellant and the "TuitionGenius" brand:

> Q: Right. Do you think that the students who sign their class list will think that REAL Education Centre is associated with TuitionGenius?
>
> A: Some form of association maybe.
>
> …
>
> Q: Okay. The use of the registration forms, the terms and conditions and the receipts, would reinforce the view that Economics at TuitionGenius is associated with REAL Education Centre, correct?
>
> A: Association and ownership are two different things.
>
> Q: I've never used that word "ownership".
>
> A: Yah, so I already previously agreed with you that there was association.
>
> …
>
> Q: … The TuitionGenius brand has become associated with the [appellant's] business, do you agree?
>
> A: There's an association, yes.

95 We note Mr Toh's concession that the receipts and the class lists might have led to some association between the "TuitionGenius" brand and the appellant's business. This is inevitable given that the parties had agreed, pursuant to the Oral Agreements, to promote their businesses through joint marketing activities, and also given that Mr Toh had conducted some of his classes at the appellant's premises. However, the receipts and class lists, in our view, are insufficient to show that the appellant's current and/or prospective students and/or their parents would identify the TG Mark as distinctive of the appellant's business. Crucially, as the Judge found, these were not marketing documents used to promote the TG Mark, but were instead internal documents

of the appellant (see GD at [101]), which were presumably used for *current* students. Mr Lim also testified that the appellant's students would not have been under the impression that Mr Toh's classes were being conducted under the appellant's auspices because these students registered for Mr Toh's classes using a separate "TuitionGenius" registration form (see [33] above) and the study notes that were given to them contained the TG Mark, and not the REC Mark. Mr Lim testified as follows:

> Q: Right. So let's talk about the customers for a minute. So does it matter to the customer that payments for Mr Toh's classes are made to the payee, REAL Education Centre? *Will the customer then imagine or guess that Mr Toh's classes are conducted under the auspices of the plaintiff?*
>
> A: No. They will still know that Mr Toh's classes are conducted and they---and that it's Mr Toh's classes.
>
> Q: Yes.
>
> A: Because when they rent---when they register, they will be *registering using a TuitionGenius registration form. Notes given to them for Mr Toh's class are rendered with the TG logo rather than the REC logo.* So it's very clear for the students, right, that if they are signing up for [Mr Toh's] lessons, these notes and all belong to Economics at TuitionGenius.
>
> [emphasis added]

96 We turn finally, to the students' testimonials, which, in our view, do not assist the appellant because they mainly vouched for Mr Toh's skills as a tutor and his method of teaching.

97 In conclusion, a deliberate choice was made to market the appellant's tuition business under the REC Mark. Given that the parties had agreed to work closely together and even to conduct joint marketing activities, it was inevitable that there were instances where the TG Mark and the REC Mark were featured alongside one another (for example, in the Email Domain, class lists and

receipts). This, as Mr Toh rightly conceded at the trial, might have led to some form of association. But this alone is insufficient to show that the appellant's enrolled students, its prospective students and/or their parents had identified the TG Mark as distinctive of the appellant's business. This must also be viewed in the light of the Judge's finding that Mr Toh had used the TG Mark to promote his tuition business even *before* the appellant was incorporated (see GD at [99] and [101]). The appellant submitted that the Judge erred in so finding because there was no evidence that Mr Toh had used the TG Mark to promote his private tuition business before the appellant's incorporation. We reject this submission as the evidence suggests otherwise:

(a) First, Mr Toh registered the domain name "tuitiongenius.com" in October 2007. Between October 2007 and February 2009, he advertised his tuition business on online forums and distributed physical flyers which directed recipients to visit his website.

(b) Second, Mr Toh prepared economic notes for his students, which included the header "Economics @ TuitionGenius" in mid-2007.

(c) Third, Mr Toh also claimed that he had set up a Facebook page using the TG Mark under the name "Economics at TuitionGenius", although, given that he could not remember when this was done, we do not take this into account.

98 In the circumstances, we find that the TG Mark is not distinctive of the appellant's business, and is therefore not sufficiently associated with the appellant's goodwill to sustain a claim under the tort of passing off.

Whether there is misrepresentation

99 In any case, we are satisfied that there is no misrepresentation at play here because the appellant had *consented* to the respondents' use of the ETG Mark (which contains the TG Mark) to market its business. We emphasise that the essence of passing off is that no person is permitted to steal another's trade by *deceit* (*Singsung* ([80] *supra*) at [28]). The elements of misrepresentation and confusion which constitute deception were referred to by Lord Diplock in *Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 740 in the following terms (see also *Amanresorts* ([81] *supra*) at [77]):

> … [The] cases make it possible to identify five characteristics which must be present in order to create a valid cause of action for passing off: (1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is *calculated to injure the business or goodwill of another trader* (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so. [emphasis added]

100 In this case, pursuant to the Oral Agreements, the parties agreed to allow Mr Toh to continue conducting his private tuition business through the ETG Entities and to participate in joint marketing activities with the appellant. In that light, there was simply no deception, misrepresentation or intention to injure the interests of the appellant to speak of. For this reason also, the appellant's claim against the respondents in passing off fails.

Damage to the appellant's goodwill

101 We make a brief observation in relation to the final element of a passing off claim, which is damage. A misrepresentation is actionable only if it has caused or is likely to cause damage to the plaintiff's goodwill (see *Amanresorts* at [94]; *AMC* at [94]). Having found that there was no misrepresentation, this is

not an issue that we need to contend with. Nevertheless, we note that the appellant had not shown any evidence, apart from a bare assertion of dilution, that Mr Toh had diverted any business from the appellant. There was nothing to suggest that Mr Toh had only obtained students because of the attractive force or goodwill of the *appellant's* business. On the contrary, the evidence demonstrates that Mr Toh's business developed precisely in line with the basis agreed on in the Oral Agreements, and there was no doubt that he was the key draw for the appellant's business. We therefore doubt that the element of damage could in any case be said to have been established.

Conclusion

102 For all these reasons, the appeal is dismissed. The respondents will have their costs of the appeal, inclusive of their disbursements, which we fix in the aggregate sum of $57,000. We also make the usual order for the payment out of the security for the costs of the appeal.

Sundaresh Menon Chief Justice	Tay Yong Kwang Judge of Appeal	Quentin Loh Judge

Tan Gim Hai Adrian, Ong Pei Ching, Hari Veluri, Yeoh Jean Ann and Jason Hong (TSMP Law Corporation) for the appellant;
Ng Lip Chih and Goh Hui Hua (Foo & Quek LLC) for the respondents.