IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 59

Suit No 398 of 2018

Between

(1) Compañia De Navegación Palomar, S.A.
(2) Cosmopolitan Finance Corporation [BVI]
(3) Dominion Corporation S.A.
(4) John Manners and Co (Malaya) Pte Ltd
(5) Peninsula Navigation Company (Private) Limited [BVI]
(6) Straits Marine Company Private Limited [BVI]

… *Plaintiffs*

And

Isabel Brenda Koutsos

… *Defendant*

JUDGMENT

[Trusts] — [Accessory liability]
[Companies] — [Directors] — [Duties]
[Restitution] — [Unjust enrichment]
[Tracing] — [Equity]
[Limitation of Actions] — [When time begins to run]

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v
Koutsos, Isabel Brenda

[2020] SGHC 59

High Court — Suit No 398 of 2018
Tan Siong Thye J
9, 10 January, 7 February; 2 March 2020

23 March 2020 Judgment reserved.

Tan Siong Thye J:

Introduction

1 This suit was commenced by the six plaintiff companies (collectively, the "Plaintiff Companies") against the defendant, Isabel Brenda Koutsos ("Isabel"), for the recovery of US$2.75m, which belongs to the Plaintiff Companies. This action represents the latest salvo in a long-running family dispute. The breakdown in familial ties involves multiple generations and concerns massive sums of money and assets.

2 The Plaintiff Companies had previously brought Suit No 178 of 2012 ("S 178") against Ernest Ferdinand Perez De La Sala ("Ernest"), who was a director of each of the Plaintiff Companies at the material time, for the misappropriation of moneys and assets that were valued at

CAD 663,033,557.61 as at August 2011.[1] In S 178, Quentin Loh J was the judge at first instance and he found in favour of the Plaintiff Companies in *Compania De Navegacion Palomar, S.A. and others v Ernest Ferdinand Perez De La Sala and another matter* [2017] SGHC 14 ("the S 178 HC Judgment"). The Singapore Court of Appeal ("CA") in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 ("the S 178 CA Judgment") heard collectively a number of appeals and summonses relating to S 178.

3 Arising from S 178, the Plaintiff Companies commenced this action against Isabel for the recovery of the US$2.75m that was transferred from Ernest to Isabel. It is necessary to explain the complex relationships amongst the Plaintiff Companies. The relevant findings in the S 178 HC Judgment and the S 178 CA Judgment will also be germane to this case.

4 I would like to mention that Isabel chose not to testify in these proceedings and her counsel has submitted that there was no case to answer at the close of the Plaintiff Companies' case.[2] The Plaintiff Companies called only one witness, namely, James Copinger-Symes ("James").

The background facts

5 The Plaintiff Companies are the same plaintiffs in S 178, namely:

(a) the first plaintiff, Compañia De Navegación Palomar, SA ("PAL"), a Panamanian company incorporated in 1958;

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1 Plaintiffs' Closing Submissions, para 6; Defendant's Closing Submissions, para 2.

2 Defendant's Closing Submissions, para 5.

(b) the second plaintiff, Cosmopolitan Finance Corporation ("CFC"), a company incorporated in the British Virgin Islands ("BVI") in 1995;

(c) the third plaintiff, Dominion Corporation SA ("DOM"), a Panamanian company incorporated in 1973;

(d) the fourth plaintiff, John Manners & Co (Malaya) Ltd ("JMM"), a Singapore company incorporated in 1948;

(e) the fifth plaintiff, Peninsula Navigation Company Private Limited ("PEN"), a company incorporated in the BVI in 1995; and

(f) the sixth plaintiff, Straits Marine Company Private Limited ("SMC"), a company incorporated in the BVI in 2008.

6 The structure of the Plaintiff Companies is relatively complex. PAL owns all the shares in CFC, CFC owns all the shares in PEN, and PEN owns all the shares in PAL. In the S 178 HC Judgment at [3] and the S 178 CA Judgment at [10], they referred to this as an "orphan" or circular structure. This circular structure is legal under Panamanian and BVI laws but not under Singapore law. Further, DOM is owned by a company, Summit Finance Corporation SA, which in turn is owned by PAL. PEN additionally owns SMC, and also owns a company, the Cambay Prince Steamship Co Ltd (BVI), which in turn owns JMM.[3]

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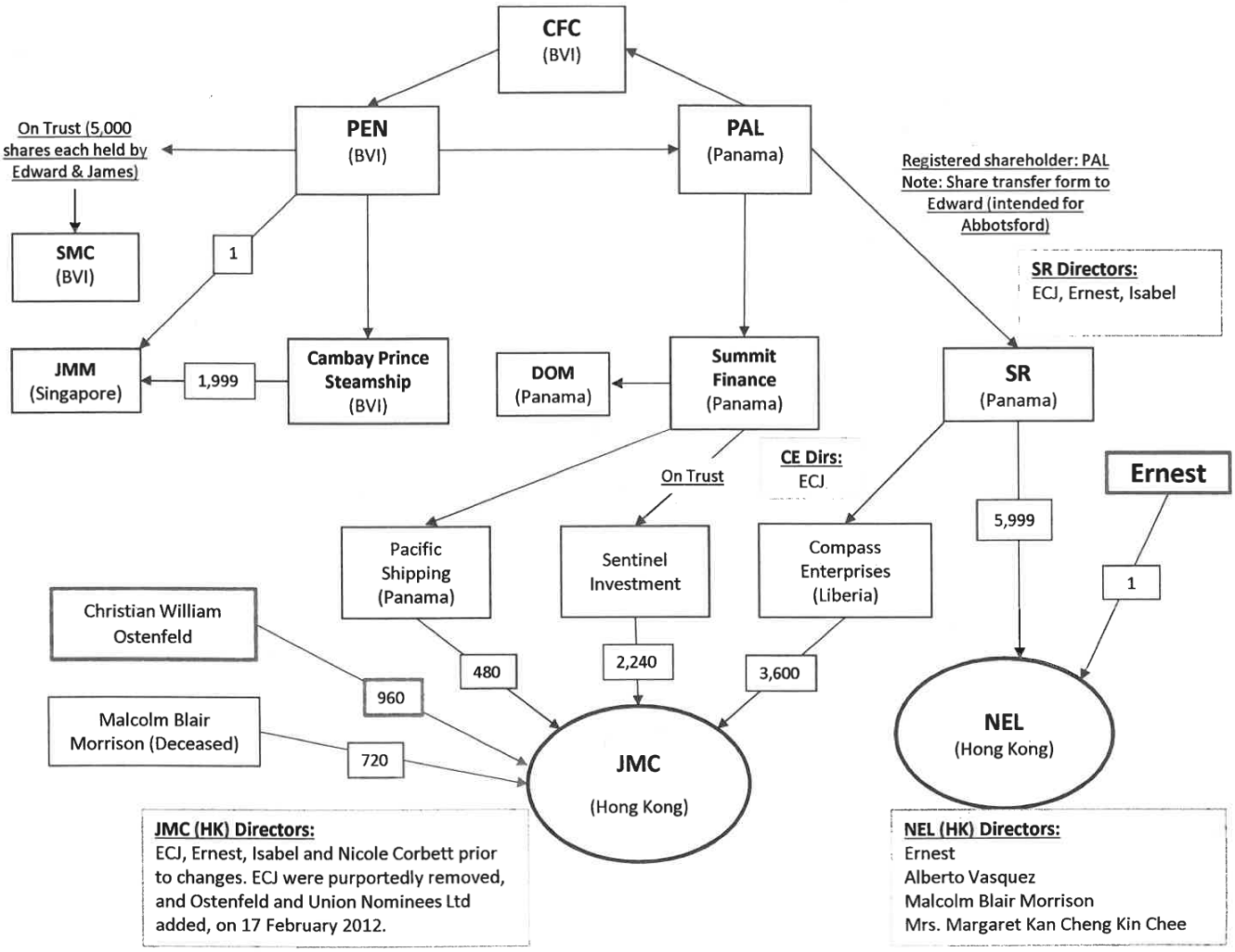
[3] Bundle of Affidavits of Evidence in Chief ("BAEIC") Vol. 1 pp 8–9; Plaintiffs' Closing Submissions, para 5; S 178 HC Judgment, [3]–[4]; S 178 CA Judgment, [9]–[10].

7 The diagrammatic organisational corporate structure of the De La Sala family companies, including the Plaintiff Companies, is reproduced from the Plaintiff Companies' documents:



8 Isabel is a director in each of the Plaintiff Companies, save for JMM.[4] She is also the sister of Ernest and she had testified as a witness for Ernest in S 178. The rest of the relationships in the De La Sala family have been meticulously addressed in the S 178 HC Judgment at [7]–[14]. For the present purposes, it is relevant to know the relationships between the key members of the De La Sala family. These were set out in the S 178 CA Judgment at [11]–[12] as follows:

> 11 The [S 178 HC Judgment] sets out the relationships in the De La Sala family in great detail (at [7]–[14]). Since many of these background facts are not disputed and not material for the purposes of the present appeals, we will not repeat them except to introduce the key members of the family who are involved in the present state of affairs:
>
> (a) Robert Perez De La Sala Sr ("Robert Sr") and Camila Vasquez De La Sala ("Camila") were the patriarch and matriarch of the De La Sala family before their deaths in 1967 and 2005, respectively. Camila was the sole beneficiary of Robert Sr's will. Robert Sr was the reason for the family's tremendous wealth as he was a successful self-made businessman. He rose to become the chairman and majority shareholder of the shipping company John Manners and Company Limited (Hong Kong) ("JMC"), which was to be one of the key assets of the De La Sala family. Robert Sr also incorporated Lasala Investments Limited ("LIL") in 1939, which was an investment company under his control. LIL was renamed North Enterprises Limited ("NEL") some time after June 1959. In his later years, Robert Sr was preoccupied with reducing his exposure to estate duty as evidenced by his correspondence with his sons prior to his death. By the time of Robert Sr's death, he had long divested himself of his shareholdings in JMC and NEL, which held much of his wealth.
>
> (b) Robert Sr and Camila had four children in the following order: Jerome Anthony Perez De La Sala ("Tony"), Ernest, Robert Perez De La Sala ("Bobby") and Isabel Brenda Koutsos ("Isabel"). Camila and the four

[4] Affidavit of evidence-in-chief ("AEIC") of James Copinger-Symes, BAEIC Vol. 1 p 9.

children were known collectively as "JERIC". We will refer to Camila, Bobby, Isabel and Tony as "JRIC". Ernest, apparently the most commercially astute of the four children, took over the management of the family's business interests and assets after the death of Robert Sr, and was the de facto head of the De La Sala family after Camila's passing. Ernest was the one who was responsible for heavily restructuring the family's business interests and assets after Robert Sr's death. As de facto head of the family, he was based outside of Australia, unlike the rest of the family, for tax planning purposes, and disbursed funds to the rest of the family regularly. Ernest was married to Hannelore de Lasala-Debring ("Hannelore"), but they were divorced in May 1970. Hannelore gave evidence in S178 and independently brought fresh proceedings in HCMP1029/2013 against Ernest in Hong Kong ("the Hong Kong proceedings") on the basis that he had misrepresented to her during the divorce proceedings that a very large part of his assets were family assets held by him on trust. Ernest's witness statements in the Hong Kong proceedings are the subject of some summonses filed in these appeals (see [71] below).

(c) Edward De La Sala ("Edward") and Christina De La Sala ("Christina") are Bobby's children, and the nephew and niece of Ernest. Christina married James Copinger-Symes ("James"). They are the defendants in counterclaim in S178 and will be referred to collectively as "ECJ". ECJ came to Singapore in 2004–2005, having allegedly been invited by Ernest to come here to join him in the management of the Companies (and by extension, the De La Sala family's assets). The nature and effect of Ernest's representations to ECJ are issues on appeal.

12 The directors of the Companies are all members of the De La Sala family. ECJ, Isabel and Ernest are directors of CFC, PEN, PAL, DOM and SMC. ECJ and Ernest are the directors of JMM. Edward and James were also shareholders with 5,000 shares each in SMC, but they purportedly held these shares on trust for PEN pursuant to deeds of trust.

Serious disputes between Ernest and the other De La Sala family members

9 The main rift in the family arose as a result of a breakdown in relationship between two factions sometime in August 2011.[5] This was between Ernest and Edward De La Sala ("Edward"), Christina De La Sala ("Christina") and James, collectively known as "ECJ".

10 Between 2004 and 2011, ECJ had actively been managing the assets held by the Plaintiff Companies, under the direction of Ernest, as it was time for the next generation to "take on the baton" to run the family business.[6] The relationship between ECJ and Ernest took a nose dive in August 2011, when Ernest instructed ECJ to remit all US dollar deposits held in Singapore to CFC's account with UBS Bank (Canada) Vancouver, which was under Ernest's control.[7] Although ECJ were puzzled at these instructions, which left no funds for them to manage in Singapore, Edward testified that they complied as they trusted Ernest and were "generally deferential" to him.[8] However, Ernest then informed ECJ that they were placed on "permanent holiday, [and that] he had made a burden for himself (in reference to [ECJ])".[9] It was also at this point that Ernest alleged that the Plaintiff Companies' assets belonged to him.[10] This allegation spurred ECJ to pass resolutions on 8 August 2011 to limit Ernest's

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5 Agreed Statement of Facts, at [6].

6 James' Cross-Ex Notes of Evidence ("NEs") 9 January 2020 pp 105–106.

7 Agreed Bundle of Documents ("ABOD") Vol. 1 p 329 [Exhibit EDLS-27 (Edward's Affidavit in S 178)]; ABOD Vol. 1 pp 48–51 (Edward's Affidavit in S 178).

8 ABOD Vol. 1 pp 48–51 (Edward's Affidavit in S 178).

9 ABOD Vol. 1 p 50 (Edward's Affidavit in S 178, para 36).

10 ABOD Vol. 1 p 50 (Edward's Affidavit in S 178, para 36).

authority to operate as sole signatory for the accounts of PAL, CFC and DOM with UBS Bank (Canada) Vancouver.[11] The effect of these resolutions sent Ernest into a rage, who then complained to Isabel who in turn contacted Edward and Christina's father, Robert Perez De La Sala ("Bobby"). Eventually, after Isabel had spoken to Bobby, ECJ relented and reversed their earlier resolutions.[12]

11 Subsequently, in an email marked "*lo siento mucho*" (translated to mean "I'm very sorry" in Spanish),[13] Edward apologised to Ernest for the role that he had played in passing the resolutions,[14] but Ernest did not respond. ECJ then collectively emailed Ernest to apologise.[15] This also elicited no reply from Ernest. However, ECJ received, *inter alia*, an email from Isabel *via* Bobby, berating them for their actions.[16] Over the next few months, ECJ discovered that Ernest had been transferring assets from the various family companies to his UBS Bank (Canada) personal account (the "Personal UBS Account"). These were done without the knowledge of the respective board of directors of the Plaintiff Companies, much less approval. Moreover, Ernest continued to remain silent when ECJ queried him about the assets that were transferred to his Personal UBS Account. However, by then, Ernest had already transferred assets worth a total of CAD 663,033,557.61 (at the material time) into his Personal

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11 ABOD Vol. 1 pp 52–53 (Edward's Affidavit in S 178, para 39).

12 ABOD Vol. 1 pp 54–56 (Edward's Affidavit in S 178 at paras 41–43); ABOD Vol. 1 pp 384 – 386 [Exhibit EDLS – 32 (Edward's Affidavit in S 178)].

13 ABOD Vol. 1 pp 56 – 57 (Edward's Affidavit in S 178, para 44); ABOD Vol. 1 p 379 [Exhibit EDLS-31 (Edward's Affidavit in S 178)]

14 ABOD Vol. 1 p 379 [Exhibit EDLS-31 (Edward's Affidavit in S 178)].

15 ABOD Vol. 1 p 381 [Exhibit EDLS-31 (Edward's Affidavit in S 178)].

16 ABOD Vol. 1 p 62 (Edward's Affidavit in S 178, para 49).

UBS Account. On 5 March 2012, the Plaintiff Companies eventually commenced S 178 in order to recover the assets from Ernest.

Suit 178

The Plaintiff Companies' claim

12 The legal basis for the Plaintiff Companies' claim in S 178 was essentially that Ernest had breached his fiduciary duties as a director of the Plaintiff Companies by transferring the assets of the Plaintiff Companies into his Personal UBS Account without notifying or seeking the approval of the respective boards of the Plaintiff Companies. There were three main grounds of the claim, namely:

(a) Ernest instructed UBS (Singapore) to transfer approximately S$1,244,308.90 out of JMM's UBS account to himself, and thereafter to close the JMM UBS account.

(b) Ernest instructed UBS (Singapore) to close the UBS accounts belonging to PAL and CFC, with the balance sums in these accounts likely diverted to Ernest or applied for his benefit.

(c) Ernest diverted to himself, and applied for his own benefit, shares in SMC that belonged beneficially to PEN, and legally to James and Edward.

13 On these bases, the Plaintiff Companies sought, *inter alia*, a declaration that the assets listed in the Schedule of Statement of Claim belonged "beneficially and absolutely to the [Plaintiff Companies]" (as found in the S 178 HC Judgment at [38]). These assets were valued at CAD 663,033,557.61 as at

August 2011.[17] Crucially, the Plaintiff Companies also sought orders for Ernest to account for the assets that were disposed by him, and also to account for the assets formerly standing to the credit of the JMM, PAL and CFC UBS accounts.

Ernest's defence and counterclaims

14 Ernest's defence in S 178 was essentially a denial of any breaches of director's duties. He alleged that all the money transfers from the Plaintiff Companies were legitimate as the Plaintiff Companies were his "personal investment holding companies used…to hold and invest his personal funds and assets" (as summarised in the S 178 HC Judgment at [39]).

15 In Ernest's counterclaims against the Plaintiff Companies and ECJ, he alleged that ECJ were in breach of trust and their fiduciary duties as they had failed to comply with his instructions in managing his personal assets that were held by the Plaintiff Companies. He also alleged that ECJ had knowingly assisted the Plaintiff Companies in breach of trust by instituting S 178 and the related applications. Ernest further claimed that ECJ was engaged in a conspiracy to injure him by lawful and unlawful means.

16 Thus, Ernest sought, *inter alia*, declarations that he was the sole beneficial shareholder of the Plaintiff Companies (in the alternative, of PAL, CFC and PEN), and that the Plaintiff Companies' assets were beneficially owned by him and held on trust solely for him.

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17 Plaintiffs' Closing Submissions, para 6.

The findings of the CA and the Singapore High Court

17 The CA and the Singapore High Court ("HC") in S 178 dealt with an extensive number of issues (both factual and legal). However, only some findings are material to the instant case either directly or by way of context.

18 Firstly, the central plank in S 178 was to ascertain the owner of the assets that Ernest had removed from the Plaintiff Companies. The CA in S 178 found that the moneys and assets that went into the Personal UBS Account did not belong to him. This was clearly expressed in the S 178 CA Judgment at [116]:

> 116 Viewing the evidence in the round, we are unable to agree with Ernest's submissions. We find that the Companies are the legal owners of their assets and that Ernest is not the sole beneficial owner of the assets; rather, the assets are held on trust for NEL and JMC, for reasons we shall elaborate upon below. Moreover, even if Ernest were the sole beneficial owner of the assets, this would not have entitled him to deal with those assets in the manner in which he did. Further, we find that Ernest's alternative defence that he is the sole beneficial owner of the *shares* of the Companies, even if he were not the sole beneficial owner of the Companies' *assets*, also fails. …
>
> [emphasis in original]

19 Secondly, the CA's finding that Ernest was not the beneficial owner of the Plaintiff Companies' assets meant that he was in breach of fiduciary duties by dealing with the assets in the manner as listed above at [12]. The corollary is that Ernest was required to disclose to the Plaintiff Companies all correspondences with the banks relating to the relevant bank accounts and account to the relevant Plaintiff Companies the assets that were removed by Ernest, including what had become of the same, what interest had been earned thereon and what profits had been made from these assets. He was also required to return the same to the Plaintiff Companies (S 178 CA Judgment at [155] and

[231]). An Order of Court dated 22 March 2018 was issued, requiring him to account to the Plaintiff Companies (the "Accounting Order").

20 Thirdly, as a result of the above, Ernest's counterclaims against ECJ failed. As stated in the S 178 CA Judgment at [159]: "[t]he lynchpin of Ernest's claims against ECJ is his ownership of the Companies' shares and/or assets. Without that, the factual basis for a fiduciary relationship falls away."

21 Finally, in the course of the proceedings, Loh J made certain findings and observations regarding the credibility of various witnesses in S 178. This included Ernest, Isabel, James, amongst others, and his observations were affirmed in the S 178 CA Judgment. I shall make references to these comments in this case at appropriate junctures.

Events following Suit 178

Events leading to the current suit

22 Following the S 178 CA Judgment, the Plaintiff Companies wasted no time and, in a series of letters all dated 29 March 2018, informed Isabel of the CA's findings that Ernest had breached his fiduciary duties as director of the Plaintiff Companies.[18] At the same time, the Plaintiff Companies, relying on the findings of the CA in S 178, requested Isabel to return the sum of US$2.75m that was transferred to her by Ernest in breach of his fiduciary duties as director of the Plaintiff Companies.

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18 BAEIC Vol 5, pp 2832, 2833, 2834, 2835 and 2965.

23 In S 178, Isabel had initially testified that she had not received any money from Ernest after 2005. However, she subsequently conceded that she had received a sum of approximately $14m that was related to a property transaction (see the S 178 HC Judgment at [239]–[246]). However, this was proven to be a prevarication by subsequent discovery, as stated in the S 178 HC Judgment at [247]:

> 247 After Isabel had been released as a witness, further discovery showed that Isabel's evidence and answer to my question set out above at [245] was false. In discovery, pursuant to an order of court dated 2 October 2014, Ernest disclosed documents which showed he transferred more than US$58m from his personal account to Isabel:
>
> (a) 6 March 2012 (1 day after the writ of summons was filed and the day the Plaintiff Companies filed their application for an injunctions) – US$50m;
>
> (b) 30 April 2012 (approximately 3 weeks after Isabel files her 1st Injunction Affidavit on 5 April 2012) – US$200,000;
>
> (c) 9 August 2012 – US$250,000;
>
> (d) 5 December 2012 – US$1m;
>
> (e) 8 January 2013 – US$300,000;
>
> (f) 17 January 2013 – US$1m; and
>
> (g) In or around 20 February 2013 (the exact date of transfer is not known) – proceeds of sale from 1,700,000 CapitaLand shares (approximate value S$6,791,500 or US$5,489,855 based on historical average share price on 20 February 2013).
>
> By the time these documents were disclosed, Isabel and Ernest had completed their evidence and were released. I find it inconceivable that Isabel could have forgotten about these payments. These payments also explain why she tried to throw me off by answering me in the way she did (at [245] above), *ie*, prefacing her answer with the transfer of properties before mentioning the sum of money transferred.

24 It is notable that, as stated above in the S 178 HC Judgment at [247(a)], Ernest had attempted to transfer US$50m to Isabel on 6 March 2012. On the very same day, the Plaintiff Companies filed an interim injunction against him. This was one day after S 178 had commenced. As explained by the Plaintiff Companies' counsel, this attempted transfer had failed to go through only because of banking issues, the large sum of US$50m might also have caused certain "red flags" to be raised.[19] When this transfer failed, Ernest decided to transfer relatively smaller sums to Isabel and these successfully went through.

25 The sum of US$2.75m is the subject matter of this suit. It is derived from an aggregate of the five transfers from Ernest to Isabel listed in the S 178 HC Judgment from [247(b)] to [247(f)]. When Isabel failed to pay, the Plaintiff Companies commenced the current action against her.

Actions taken by Ernest

26 On 31 July 2018, Ernest filed an affidavit ("Ernest's Accounting Affidavit") to comply with the Accounting Order.[20] In it, Ernest revealed transactions involving two personal accounts namely, the Personal UBS Account and the account with UBS AG (Singapore). Given that the Plaintiff Companies base their claim in the current action on the Personal UBS Account, I shall focus solely on the transactions processed therein.

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19 NEs dated 9 January 2020, p 17 lines 10–15.

20 ABOD Vol. 6 p 2388 to Vol. 7 p 3030.

27 The sums and transactions in the Personal UBS Account, as detailed in Ernest's Accounting Affidavit,[21] may be broadly categorised into seven categories:

(a) As at 1 July 2011, there were assets valued at CAD 4,035,697.02 ("CAD 4m") standing to the credit of Ernest's Personal UBS Account.

(b) In August 2011, assets valued at CAD 663,033,557.61 were transferred into the Personal UBS Account. These assets, as mentioned above at [19], were those that Ernest had transferred from the Plaintiff Companies to himself in breach of his fiduciary duties.

(c) A total sum of CAD 227,795,690.00 was withdrawn from the Personal UBS Account and transferred to the stake-holding account in JMM's name with Credit Suisse bank. This was the aggregate sum of a series of transactions to satisfy various court orders, which are as follows:

(i) On 1 April 2013, CAD 201,430,000.00 (US$200m) was transferred in compliance with the Order of Court dated 12 March 2013 (HC/ORC 1709/2013) in Summons No 1098 of 2012.

(ii) On 31 May 2017, CAD 67,522,500.00 (US$50m) was transferred in compliance with the Order of Court dated 19 May 2017 (HC/ORC 3180/2017) in Summons No 672 of 2017.

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21 ABOD Vol. 6 pp 2422–2434.

(iii) On 6 June 2017, CAD 8,818,240.00 (US$6.8m) was transferred to top-up the funds in the stake-holding account to US$250m, as the funds in the stake-holding account stood only at US$243,205,578.00 owing to previous withdrawals having been made.

(iv) On 6 July 2017, CAD 24,950.00 (US$20,000.00) was transferred to ensure that the funds in the stake-holding account remained above US$250m in compliance with the Order of Court dated 19 May 2017 (HC/ORC 3180/2017) in Summons No 672 of 2017.

(d) On 28 February 2017, a sum of CAD 236,980.00 was withdrawn from the Personal UBS Account and transferred to Rajah & Tann LLP. This was the deposit for the transferee's engagement to act on behalf of the Plaintiff Companies.

(e) Between 29 July 2011 and 30 June 2018, a total sum of CAD 28,564,674.63 was withdrawn from the Personal UBS Account for Ernest's personal and legal expenses which included the US$2.75m. He had further annexed a table of withdrawals, which will be further elaborated on below (at [56]–[60]).

(f) From 23 February 2012 to 7 June 2017, a total sum of CAD 109,813.53 was withdrawn from the Personal UBS Account allegedly for various expenses relating to the Plaintiff Companies.

(g) From 17 October 2011 to 30 April 2018, a total sum of CAD 1,637,520.78 was withdrawn from the Personal UBS Account

allegedly for safekeeping fees for precious metals held in the custody of UBS Bank (Canada).

The parties' cases

The Plaintiff Companies' claim

28 The Plaintiff Companies argue that they are the owners of the US$2.75m, and that Isabel's receipt from Ernest and continued retention of the money are without any legitimate basis. Isabel had all along known that the US$2.75m originated from assets belonging to the Plaintiff Companies and that Ernest had no authority to transfer this sum to her. Therefore, Isabel cannot argue that the US$2.75m is a gift from Ernest and is thus liable to pay back this sum to the Plaintiff Companies.

29 The Plaintiff Companies base their claim on three legal grounds. Firstly, they submit that Isabel is liable for knowing receipt of the US$2.75m from Ernest's misappropriation of moneys and assets from the Plaintiff Companies because she had been aware of the dispute that arose from the management of the assets in the De La Sala family companies since 2012. She had, at various points in time, been informed of the family conflicts either by Ernest or ECJ. As director of the Plaintiff Companies, save for JMM, she also ought to have known that the US$2.75m did not belong to Ernest. This is because she had testified in the HC proceedings in S 178. She had also received two letters dated 29 March 2018 from the Plaintiff Companies' lawyers; these had the effect of alerting her that Ernest was in breach of his fiduciary duties. Thus, she should return the US$2.75m to the Plaintiff Companies.

30 In support of their claim for knowing receipt, the Plaintiff Companies argue that the US$2.75m transferred to her by Ernest is traceable to assets that belong to them. They submit that the US$2.75m was withdrawn from the CAD 663,033,557.61 that Ernest had misappropriated from the Plaintiff Companies' UBS Bank (Canada) account. Regarding Isabel's allegation in court that the US$2.75m did not come from the CAD 663,033,557.61 of the Plaintiff Companies' assets but from Ernest's pre-existing CAD 4m in his Personal UBS Account, the Plaintiff Companies submit that the pre-existing CAD 4m did not belong to Ernest but rather to CFC and PAL of the Plaintiff Companies.

31 Secondly, the Plaintiff Companies submit that Isabel was unjustly enriched at their expense, as the transfer of the US$2.75m was made without the Plaintiff Companies' knowledge and/or consent.

32 Finally, the Plaintiff Companies submit that Isabel is also liable for breach of her fiduciary duties to the Plaintiff Companies, save for JMM. They allege that Isabel had failed to act *bona fide* in the best interests of the companies in which she was a director and breached her duty to avoid a conflict of interest when she had actively sided with Ernest, who had misappropriated the Plaintiff Companies' assets, in the course of the dispute with ECJ and the Plaintiff Companies. Further, the Plaintiff Companies allege that she was not authorised to receive the US$2.75m from Ernest and was, thus, in breach of the no-profit rule.

Isabel's Defence

33 Isabel, in her pleaded defence, submits that the US$2.75m was a gift from Ernest. Further, she argues that the US$2.75m is not traceable to any assets

belonging to the Plaintiff Companies. Instead, she asserts that the US$2.75m transferred to her was from the pre-existing CAD 4m, which she claims belonged to Ernest personally. She submits that there is a presumption that when a fiduciary makes withdrawals from a mixed fund, he does so from his own moneys. In her view, the Plaintiff Companies are not entitled to "pick and choose"[22] whether the US$2.75m is from trust moneys or Ernest's personal funds as there is sufficient balance from Ernest's personal funds in his Personal UBS Account to satisfy the US$2.75m.

34 Isabel's counsel also submits at trial that the Plaintiff Companies are not entitled to argue that the US$2.75m could be traced to the pre-existing CAD 4m, which also belongs to CFC and PAL of the Plaintiff Companies as this issue had not been pleaded in their statement of claim and, therefore, cannot be raised.

35 Additionally, Isabel argues that the Plaintiff Companies are not entitled to recover the claimed sum from her, as they already have a claim against Ernest for CAD 663,033,557.61, which the US$2.75m is alleged to have been derived from. To allow further recovery of the US$2.75m would be contrary to the rule against double recovery.

36 In response to the Plaintiff Companies' claim for knowing receipt, Isabel submits that she did not know that the US$2.75m was the result of Ernest's breach of fiduciary duties. She was not involved in the day to day management of the Plaintiff Companies as Ernest had absolute say in the running of the business. As Ernest frequently sent large sums of money to his family members,

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22 Defendant's Closing Submissions, para 28.

including Isabel herself, it was "therefore not out of the ordinary for the Defendant … to receive a gift of US$2.75m from Ernest over the course of two years."[23] Ernest would also regularly gift sums of money to Isabel "throughout her life".[24] Further, she argues that knowledge of S 178 is not a sufficient basis to make out a claim for knowing receipt. She also submits that she was only a peripheral witness in S 178, and the 29 March 2018 letters from the Plaintiff Companies' counsel that were sent to her lacked sufficient details to affix her with the requisite knowledge.

37 In Isabel's pleaded defence, she merely denies that the Plaintiff Companies are entitled to claim unjust enrichment and breach of fiduciary duties. In court, Isabel's counsel submits that the enrichment had not come from the Plaintiff Companies' assets and the benefit she obtained was thus not at their expense. Her counsel also argues that there is no unjust factor as a matter of law, as lack of consent, ignorance and want of authority are factors that have not been recognised or have been rejected in Singapore.

38 Isabel further argues that she was not in breach of her duty to act in the best interests of the Plaintiff Companies (except for JMM) by reiterating that her "position as a director was entirely nominal" and the transfers were gifts from Ernest. She also did not breach the no-conflict rule as she believed the US$2.75m originated from Ernest's personal funds. In any event, the Plaintiff Companies had implicitly consented to her position of conflict as they were well aware that she had been receiving funds from Ernest since 1978. Lastly, her counsel argues that she did not breach the no-profit rule as director of the

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23 Defendant's Closing Submissions, para 94.

24 Defendant's Closing Submissions, para 94.

Plaintiff Companies (except for JMM) since the US$2.75m did not have sufficient causal connection to, nor did it arise by reason of, her position as fiduciary of the Plaintiff Companies.

My decision

Issues to be determined

39 The issues in this case are as follows:

(a) firstly, whether there is a basis for the Plaintiff Companies' claim against Isabel when Ernest intends to return the CAD 663,033,557.61, which the US$2.75m allegedly came from, to the Plaintiff Companies ("Issue 1");

(b) secondly, whether the US$2.75m was withdrawn from Ernest's pre-existing CAD 4m within the Personal UBS Account, or whether it had come from the misappropriated CAD 663,033,557.61 ("Issue 2");

(c) thirdly, if the US$2.75m was withdrawn from Ernest's pre-existing CAD 4m, whether the Plaintiff Companies were the beneficial owners of the pre-existing CAD 4m ("Issue 3");

(d) fourthly, whether Isabel is liable for knowing receipt of the US$2.75m ("Issue 4");

(e) fifthly, whether Isabel is in breach of her fiduciary duties to the Plaintiff Companies ("Issue 5"); and

(f) lastly, whether Isabel is unjustly enriched by the US$2.75m ("Issue 6").

The witness and evidence available

40 Before I address the above issues, I would like to comment on the evidence that is before me. At the trial, the only witness who testified on behalf of the Plaintiff Companies was James. The Plaintiff Companies tried to secure Ernest as their witness but was not successful. Isabel opted not to give evidence and she also did not call Ernest who is the key witness to her defence. Instead she instructed her counsel to make a submission of no case to answer.

41 The legal implication of this course of action is that the Plaintiff Companies need only establish a *prima facie* case in order to succeed in their claim. As the CA stated in *Lena Leowardi v Yeap Cheen Soo* [2015] 1 SLR 581 at [23]–[24]:

> **A preliminary observation on the implications of a submission of no case to answer**
>
> 23 At the trial below, the Respondent made a submission of no case to answer. The test of whether there is no case to answer is whether the plaintiff's evidence at face value establishes no case in law or whether the evidence led by the plaintiff is so unsatisfactory or unreliable that its burden of proof has not been discharged (see *Lim Eng Hock Peter v Lin Jian Wei* [2009] 2 SLR(R) 1004 ('*Lim Eng Hock*') at [209]). The Respondent relied on the former limb of the test.
>
> 24 Three important implications flow from this submission. First, the Appellant only had to establish a *prima facie* case as opposed to proving her case on a balance of probabilities (see *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [37]). Second, in assessing whether the Appellant has established a *prima facie* case, the court will assume that any evidence led by the Appellant was true, unless it was inherently incredible or out of common sense (see *Relfo Ltd v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 ('*Relfo*') at [20]). Third, if circumstantial evidence is relied on, it does not have to give rise to an irresistible inference as long as the desired inference is one of the possible inferences (see *Relfo* at [20]). The evidence adduced by the Appellant will be examined in accordance with these principles.

42 James' testimony was, thus, the only direct evidence that was before me, save for documentary records. While Isabel's counsel is certainly correct that the court is "in fact under no obligation" to simply take James' word for it,[25] Isabel did not provide direct evidence to contradict James' testimony on a number of critical issues. Isabel's counsel had intensively and extensively cross-examined James and his evidence had substantially remained unscathed. The robust cross-examination did not weaken his testimony and his answers were generally convincing and consistent. I scrutinised and observed James' demeanour when he testified in court. He convinced me that he is a truthful and candid witness. He did not attempt to be evasive, for instance, when questioned by Isabel's counsel in relation to the letters sent by Edward and ECJ to apologise to Ernest:[26]

> Q: "I sought to immediately rectify my error of judgment, however the personal hurt I have caused has troubled me deeply."
>
> At that point, did you share same sentiment or you thought differently from Edward?
>
> …
>
> A: I didn't regret my participation.
>
> Q: You did not regret?
>
> A: No.
>
> Q: So does that mean you also did not regret the personal hurt that you must have caused Ernest?
>
> A: No, I regretted that. I didn't want to have a falling out with people over nothing. But, it was over something quite big but, yeah, I would have

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25 Defendant's Closing Submissions at para 61.

26 James Cross-Ex NEs 10 January 2020, p 42 line 3 to p 43 line 24.

> rather we could have settled it without all the angst.
>
> Q: And as far as you're aware, what was your wife Christina's position?
>
> A: She would have been closer to my position than Edward's.
>
> …
>
> Q: Do you agree and believe this is what Edward honestly felt at the time?
>
> A: Yes, I think that's – and that will be closer to my position as well.
>
> Q: This was a sincere statement on Edward's part as far as you know?
>
> A: Yes, the well-being of the entire family, yes, that's his primary concern.
>
> Q: And the third sentence: "I betrayed my better judgment and offer you my sincere apology."
>
> Did you similarly feel that you had betrayed your better judgment and were you then prepared to apologise to Ernest for what had happened?
>
> A: Um, I don't think I betrayed my better judgment. But for the sake, you know, of being nice, I would have apologised if we could come around to some sensible solution.

43 My observations cohere with Loh J's evaluation of James' evidence in the S 178 HC Judgment, in which he stated at [382]:

> 382 I also found James to be a straightforward and honest witness and his evidence was steady and forthright. He was a highly intelligent person and was at times, understandably irritated with the cross-examination especially when it cast aspersions on his character. But in my view, he emerged unscathed in all material aspects from his prolonged cross-examination.

44 I accept James' testimony. I shall now deal with each of the issues sequentially.

Issue 1: Whether there is a basis for the Plaintiff Companies' claim against Isabel when Ernest intends to return the CAD 663,033,557.61, which the US$2.75m allegedly came from, to the Plaintiff Companies

45 Isabel asserts that the US$2.75m should rightly be claimed from Ernest as the Plaintiff Companies allege that the US$2.75m is part of the CAD 663,033,557.61 that was misappropriated by Ernest and further, he intends to return it to the Plaintiff Companies. The present suit against Isabel, if successful, would be tantamount to double recovery as Ernest is now in the process of returning CAD 663,033,557.61 as ordered by the CA in S 178. Ernest had already instructed UBS Bank to transfer all the assets in his Personal UBS Account to an account belonging to JMM. Further, she argues that the value of the assets being transferred to JMM is more than sufficient to restore the amounts taken from the Plaintiff Companies.

46 The rule against double recovery is axiomatic. The CA in *Chew Kong Huat and others v Ricwil (Singapore) Pte Ltd* [1999] 3 SLR(R) 1167, citing *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 522, stated at [36]:

> Faced with cumulative remedies a plaintiff is not required to choose. He may have both remedies. He may pursue one remedy or the other remedy or both remedies, just as he wishes. It is a matter for him. He may obtain judgment for both remedies and enforce both judgments … There are limitations to this freedom … A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss … [O]nce a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery.

47 It is, therefore, the prerogative of a claimant to commence overlapping actions to pursue multiple remedies. The caveat to this is that the remedies obtained in a subsequent suit will naturally be limited if the enforcement of a former judgment already satisfies the claimant's loss.

48 In the circumstances, I find that the current action does not run afoul of the rule against double recovery. Isabel's counsel adduced a letter dated 11 December 2019 that was sent from Ernest's lawyers, Clifford Chance Asia, to one Julie Blazevski from UBS Bank. In that letter, Clifford Chance Asia wrote to confirm Ernest's instructions to transfer all the assets in the Personal UBS Account to an account belonging to JMM, in compliance with the Order of Court dated 8 July 2019 (HC/ORC 4764/2019).

49 Isabel produced this letter from Clifford Chance Asia to support her arguments that the Plaintiff Companies are being paid, without calling any witness. Neither Ernest nor his lawyers from Clifford Chance Asia appeared as a witness in these proceedings. Thus, the contents of this letter are technically hearsay and inadmissible.

50 It is also doubtful whether Ernest's instruction to his lawyers can be accepted at face value as he has been observed to have displayed a perennial profligacy with the truth in the past. In the S 178 HC Judgment at [195] and [234], Loh J made very scathing remarks about Ernest and the unreliability of his evidence. The CA made similar observations at [132] of the S 178 CA Judgment:

> 132 We find that there is nothing to demonstrate that the Judge's determination of the witnesses' credibility was so glaringly improbable or against the weight of the evidence so as to be plainly wrong. The Judge was entitled to find that Ernest was unreliable because of the various changes that he made to

> his case, some of which were fundamental, such as whether he had paid JRIC at the point of their sale of their shares in NEL and JMC, and whether this buyout occurred *before or after* Robert Sr's death (a simple and central fact which ought to have been easy to recall despite the passage of years). We share the Judge's view that Ernest's explanation of all these inconsistencies as errors due to age and poor memory or the lack of documentation, are, on balance, unsatisfactory – and, even if we did not share the Judge's view, we would not be prepared (and would not be entitled, under the principles of appellate intervention) to substitute our view for his on these facts. We do not think it necessary to go further to either agree or disagree with the admittedly harsh characterisation of Ernest at [195] of the Judgment. What matters for present purposes is *whether* the Judge was entitled to conclude that Ernest's testimony *was unreliable*, regardless of whether its unreliability came from premeditated fabrication, free-flowing embellishment, simple confusion and poor recall, or some combination of these. The fact remains that Ernest's testimony *could not be relied upon* to prove the facts which he needed to prove in order to succeed in his defence.
>
> [emphasis in original]

51 Furthermore, although James acknowledged that his lawyers were in contact with Ernest's lawyers to effect the transfer of assets to the Plaintiff Companies, he testified that, in truth, Ernest had been very tardy and placed challenges to procrastinate the return of the assets of the Plaintiff Companies.

52 Isabel's counsel argues that the total sum that will be restored to the Plaintiff Companies will be about CAD 740,348,628.90, which is "*more than CAD 80 million over their original position of CAD 663,033,557.61*" [emphasis in original].[27] However, that is a claim that is based on inadmissible hearsay evidence. Further, this claim was totally unsubstantiated by any evidence before me.

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27 Defendant's Closing Submissions, para 82.

53 Additionally, James testified that the CAD 740,348,628.90 would be valued at approximately US$560m, when the assets Ernest misappropriated were valued at US$670m at the material time.[28] This means that even if Ernest had returned the full CAD 663,033,557.61 to the Plaintiff Companies, there would still be a shortfall in value of more than US$100m due to the fluctuations in the exchange rate between CAD and US$ in the intervening years.[29] Additionally, James testified that the misappropriation also resulted in lost profits amounting to US$350m.[30]

54 In any case, the fact of the matter is that CAD 663,033,557.61 has not been fully returned to the Plaintiff Companies. Hitherto, Ernest has only returned US$250m to the Plaintiff Companies.[31] Hence, Isabel cannot argue that the Plaintiff Companies' right to claim the US$2.75m has already been extinguished or covered by S 178. If the Plaintiff Companies recover the US$2.75m from Isabel, they will naturally not be able to claim this sum from Ernest, and *vice versa*, a point that both parties agree upon.[32] However, if and until Ernest fully complies with the Accounting Order and returns all of the assets misappropriated, the Plaintiff Companies are entitled to trace the sums of money and elect to commence proceedings against Isabel.

Issue 2: Whether the US$2.75m was withdrawn from Ernest's pre-existing CAD 4m or the misappropriated CAD 663,033,557.61

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28 James' Re-Ex NEs 10 January 2020, p 91 lines 13–16, p 121 lines 6–9.

29 James' Re-Ex NEs 10 January 2020, p 91 lines 6–25, p 117 line 19 to p 121 line 3.

30 James' Re-Ex NEs 10 January 2020, p 91 lines 17–20.

31 NEs 10 January 2020, p 24 lines 1–7, p 25 lines 1–6, p 26 lines 16–25.

32 Defendant's Closing Submissions, para 87.

55 Isabel argues that the US$2.75m came from Ernest's own funds of CAD 4m in his Personal UBS Account before the Plaintiff Companies' CAD 663,033,557.61 was transferred into this account. Therefore, the key question is: when Ernest transferred the US$2.75m to Isabel, where did the money come from?

56 The process of tracing normally acts as the precursor to a claim. As Lord Millet explained in *Foskett v McKeown* [2001] 1 AC 102 at 128:

> Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. …

57 A finding that the US$2.75m was withdrawn from the misappropriated CAD 663,033,557.61 would set the Plaintiff Companies' claim on firm ground. This is because it had been established that CAD 663,033,557.61 rightfully belongs to the Plaintiff Companies, which was the CA's finding in S 178. It should be noted, however, that a finding that the US$2.75m was withdrawn from the pre-existing CAD 4m does not automatically defeat the Plaintiff Companies' claims against Isabel, as I shall elaborate on below (at [61]–[90]).

58 I find that the US$2.75m is traceable to the CAD 663,033,557.61 that Ernest had misappropriated and transferred into the Personal UBS Account. The five separate transfers made to Isabel, aggregating US$2.75m, were part of a sum of CAD 28,564,674.63 which Ernest had withdrawn from the

CAD 663,033,557.61 for his "personal and legal expenses"[33], including transfers to Isabel. These spanned from 2011 to 2018, totalling 198 instances of withdrawals.[34] However, save for the first three withdrawals, all other instances of withdrawals started only on or after 30 September 2011, which was *after* CAD 663,033,557.61 had been deposited into Ernest's Personal UBS Account on 30 September 2011. These withdrawals include the five transfers made to Isabel, as listed in [23] above, which were done only in 2012 and 2013. This is highly indicative that all the five transfers to Isabel were from the CAD 663,033,557.61 and not the pre-existing CAD 4m.

59 It should also be recalled that Ernest had transferred these five sums of money to Isabel soon after his previous attempt to transfer US$50m to her had failed. The circumstances surrounding these transfers are highly suspicious for, as stated at [24] above, Ernest had attempted to transfer the US$50m the day after S 178 had commenced. It is clear from Ernest's actions that through the transfers to Isabel, he intended to dissipate part of the CAD 663,033,557.61. The transfers aggregating US$2.75m were also part of his plan to put the sums beyond the reaches of the Plaintiff Companies.

60 Therefore, I find that the US$2.75m was withdrawn from the CAD 663,033,557.61, which provides a basis for the Plaintiff Companies' claim against Isabel.

Issue 3: Who was the beneficial owner of the pre-existing CAD 4m

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33 ABOD Vol. 6 p 2393 (Ernest's Accounting Affidavit).

34 ABOD Vol. 6, pp 2421–2434 [Exhibit EFL-250].

61 For completeness, I turn to deal with Isabel's submission that the US$2.75m was withdrawn from the pre-existing CAD 4m, which in turn allegedly belongs to Ernest. According to James' testimony, the pre-existing CAD 4m in Ernest's Personal UBS Account, before the Plaintiff Companies' assets worth CAD 663,033,557.61 were unlawfully deposited into this Personal UBS Account, belongs to CFC and PAL of the Plaintiff Companies. Therefore, whether the US$2.75m came from the pre-existing CAD 4m or the CAD 663,033,557.61, the US$2.75m still belongs to the Plaintiff Companies.

Whether the issue about the pre-existing CAD 4m has been sufficiently pleaded

62 I pause to first deal with a preliminary issue in relation to the pleaded case. Although Isabel alleges that the CAD 4m came from Ernest's pre-existing funds, Isabel's counsel argues that the Plaintiff Companies' counsel is not allowed to explain that the pre-existing CAD 4m belongs to the Plaintiff Companies as this has not been pleaded. Isabel's submission is that the Plaintiff Companies' pleadings are based on the premise that the US$2.75m came from the misappropriated CAD 663,033,557.61.[35] Isabel's counsel submits as follows:[36]

> It almost goes without saying that the Companies cannot be allowed to raise an entirely unpleaded new alternative cause of action against the Defendant by way of an oblique reference to it at the AEIC stage, and then glibly attempt to pass it off as a "*fourth level*" argument in the alternative …
>
> [emphasis in original in italics and underline]

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35 NEs 9 January 2020 p 88 line 13 to p 89 line 25.

36 Defendant's Closing Submissions, para 52.

63 With due respect, I disagree with the submissions of Isabel's counsel. The issue of the US$2.75m being traceable to Ernest's pre-existing CAD 4m rightly should have been raised *by Isabel* in her pleadings. This was not done and she now turns around and argues that the Plaintiff Companies cannot rebut her defence as the Plaintiff Companies had not pleaded the rebuttal. If Isabel had properly pleaded it in her defence, the Plaintiff Companies would be able to respond to this allegation. In her pleadings, she merely alleges that the US$2.75m was a gift from Ernest. It would be grossly unfair and prejudicial to disallow the Plaintiff Companies to rebut Isabel's allegation.

64 I also disagree with Isabel's counsel's argument that a pleaded denial is sufficient because the Plaintiff Companies bear the burden of proving the case.[37] It is not sufficient to *simply deny* the claims that have been put forth by the Plaintiff Companies.[38] As stated by Choo Han Teck J in *Sharikat Logistics Pte Ltd v Ong Boon Chuan and others* [2011] SGHC 196 at [8]: "… so long as the defendant knows what cause of action is alleged and what remedies are sought from him, he should file the appropriate defence to deny and demur…". To allow Isabel's assertion that she does not have to particularise the defence and then to deny the Plaintiff Companies the opportunity to respond would be grossly unfair. It would also prevent the issues from being properly ventilated.

65 In any case, I agree with the Plaintiff Companies' submissions that their pleadings are broad enough to encompass the current issue. In the Plaintiff Companies' statement of claim, the US$2.75m was referred to as the "Claimed

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37 Defendant's Closing Submissions at para 56.

38 NEs 9 January 2020 p 89 lines 14–16.

Sum",[39] upon which the Plaintiff Companies based their substantive claim for knowing receipt, unjust enrichment and breach of fiduciary duties. They had not limited such a claim to the CAD 663,033,557.61, which they referred to as "Misappropriated Assets".[40] In fact, the statement of claim makes clear that the Plaintiff Companies owned "substantial assets", which they simply referred to as "Assets".[41] Such assets presumably go beyond the CAD 663,033,557.61. It is, thus, entirely possible for the "Claimed Sum" to be based on the broader "Assets" and not simply the "Misappropriated Assets".

The pre-existing CAD 4m were Plaintiff Companies' assets

66 Regarding the pre-existing CAD 4m in Ernest's Personal UBS Account, Isabel argues that it belongs to Ernest as it was there even before the CAD 663,033,557.61 was deposited into the account.

67 It bears mentioning that this argument (*ie,* that the US$2.75m is traceable to Ernest's personal money of CAD 4m) was only raised for the first time at trial. Prior to this, Isabel had always maintained the simple position that the sums amounting to US$2.75m were gifts from Ernest. In fact, in her affidavit of evidence-in-chief, her first reference to the US$2.75m is as follows:[42]

> **The Claimed Sum**
>
> 12 I do not specifically recall when Ernest transferred the [US$2.75m] to me as they were gifts and I did not ask for the money. …

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39 Statement of Claim, at para 8.

40 Statement of Claim, at para 5(a).

41 Statement of Claim, at para 5(a).

42 AEIC of Isabel Brenda Koutsos at BAEIC Vol. 6 p 2974.

68 It was only at trial that this new allegation was sprung upon the Plaintiff Companies. In my view, this is an afterthought and should not be accorded any weight, particularly as Isabel did not testify or call any witness to testify in this trial.

69 Even taking Isabel's case at its highest, I find that the Plaintiff Companies have adequately proven that the assets worth CAD 4m belong to them. Weighing all the evidence before me, I believe James' testimony that the assets worth CAD 4m originated from the revocation of a family trust structure, known as the REC-Hasta La Vista trust. The transfer of the CAD 4m to Ernest's Personal UBS Account only occurred because UBS Bank would not allow the trust money to be returned to the rightful owners, *ie,* CFC and PAL, but allowed it to be transferred to Ernest's Personal UBS Account as he was the settlor in the trust instrument. Hence, the CAD 4m, at all times, belong to CFC and PAL and was not meant for Ernest's personal use. Ernest and ECJ knew that eventually the CAD 4m has to be returned to the Plaintiff Companies as it is not Ernest's personal money. I shall now explain in greater detail.

70 It would be helpful to first understand the REC-Hasta La Vista trust and the context behind it. This was dealt with extensively in S 178, and is succinctly summarised by James in his testimony as well as in the S 178 HC Judgment at [452]–[454] and [457] as follows:

> **The REC-Hasta La Vista trust ("REC-HLV Trust") and the SSS Trust**
>
> 452 It can be seen from Ernest's letters in the mid-1990s that he was concerned over the impact his absence might have on the Plaintiff Companies. In the early 2000s, Ernest had begun experimenting with various trust structures to ensure continuity in the management of the assets of the Plaintiff Companies in the event of his demise. The parties heavily rely on various documents evidencing these structures, each

contending that the documents support the position they are advocating for in the present dispute. On the one hand, Ernest alleges that the documents show that these trust structures were established to manage *his* assets and estate; in other words, the Plaintiff Companies and its assets belonged to Ernest. On the other hand, ECJ alleges that these trust structures were created as part of Ernest's plan to ensure that there were suitable persons who would take over his role as custodian of the family assets in the event of his demise; in other words, the Plaintiff Companies and its assets belonged to the De La Sala family.

453 There were two main trust structures that were discussed and/or instituted. The first was known as the REC-HLV Trust, which was established by Ernest in October 2004 prior to ECJ's arrival in Singapore. The second was known as the SSS Trust, which was allegedly established in June 2009 to replace the REC-HLV Trust, and was ECJ's response to Ernest's task to them to improve the REC-HLV Trust. As a preliminary observation, I note that the parties are *not* taking the position that the assets held by the Plaintiff Companies are subject to either the REC-HLV Trust or the SSS Trust. Both parties appear to be relying on these structures only as a *reflection of what the parties understood the position to be at that point in time*. I am in agreement that these documents are relevant only to that extent.

454 I find that on balance, these trust structures are more consistent with ECJ's case that Ernest was managing family assets and was looking for suitable persons to succeed him in the event of his demise.

…

457 Secondly, while Ernest is expressed to be the "settlor" of the trust and has the power to select the beneficiaries and change the terms of the trust, it must be remembered that the REC-HLV Trust was instituted by Ernest only as a trial; he had wanted to experiment with various structures and find the most suitable one to ensure that the Plaintiff Companies and their assets were properly managed in his absence. This is evident from the fact that only a small fraction of the Plaintiff Companies' assets was settled under the REC-HLV Trust, and that the trust was eventually revoked on 25 June 2009. It should therefore come as no surprise that Ernest would reserve to himself the power to amend the terms of the trust. Ernest's description of himself as the "settlor" is consistent with his practice of manifesting himself as the owner of the Plaintiff Companies in order for the rest of the De La Sala family to avoid paying heavy taxes. This was also the belief of ECJ and I see no

> reason not to accept this. Ernest is the "settlor" insofar as he was the family custodian of the Plaintiff Companies' assets or part thereof. Indeed, Ernest considered designating Bobby and Terrill as protectors of the trusts that he was setting up.
>
> [emphasis in original]

71 The REC-Hasta La Vista trust was thus an experimental structure to ensure the continuity of the De La Sala family legacy. James also testified that although the REC-Hasta La Vista trust was an "off the shelf type", it served an additional function of being a "fall-back plan" to ensure management of the De La Sala family assets in the event that Ernest was taken out of the picture.[43] However, with the arrival of ECJ in 2004, the REC-Hasta La Vista trust was no longer necessary and the decision was taken to revoke the trust.[44]

72 The crucial questions that arise then are: firstly, where did the assets in this trust fund originate from; and secondly what happened to these assets after the trust was revoked? Based on the letters written and signed by Ernest, dated 1 March 2005, the assets were transferred to the REC-Hasta La Vista trust from CFC and PAL. This occurred across two transactions:[45]

(a) the amount of US$700,000.00 (value as at 4th March 2005) belonging to CFC was transferred to UBS AG Singapore in the name of REC-Hasta La Vista Corp;

(b) assets belonging to PAL were transferred to UBS AG Singapore in the name of REC La Vista Corp, comprising:

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43 James' Cross-Ex NEs 9 January 2020 p 116 lines 9–10 and pp 125 -126.

44 James' Cross-Ex NEs 9 January 2020 p 117.

45 BAEIC Vol. 5, pp 2151 – 2152.

(i) US$1,000,000.00 100% Capital Protected Note 02-17.09.2007 on UBS Currency Portfolio; and

(ii) 1,588.184 units of O'Connor-UBS Currency Portfolio shs J Series 1.

73 When questioned in cross-examination, James acknowledged that he was not aware of the exact value of the assets and only that Ernest had told him that "5 million" had been placed in the trust.[46] However, the value of these assets at the time the trust was revoked is clear. This is seen from the email from Laurent Rossier, a manager at UBS Bank, to Ernest, dated 27 Apr 2011.[47] It states:

> Dear Mr de LaSala,
>
> **Centralisation Issue**
> In addition to the copy sent to you again this morning, shall I also send a fax copy to your Singapore fax at 6333 8249 for your easy reference?
>
> **REC Hasta La Vista**
> For the execution of the transfer request to your personal account at UBS Bank (Canada) I will request for a new and updated letter from the trustees.
> I would expect to receive the updated copy over night. Thereafter, we would require your signature on the transfer request.
>
> In terms of the account balance, please note, that the amount booked at REC Hasta La Vista *is USD4'125'631.53 plus accrued interest, and not USD5mio.*
> A copy of the latest account statement dated 26.04. is attached hereunder. Do I interpret correctly, that you would want *to transfer all funds (including accrued interest) and thereafter close the account*?

---

46 James' Cross-Ex NEs 9 January 2020 p 129 line 9 to p 132 line 5.

47 BAEIC Vol 5, p 2154.

> Lastly, I will send a message to Wolfgang Harder requesting for complete account information.
>
> Kindest regards,
> Laurent
>
> [emphasis added in italics]

This email was acknowledged by Ernest in a return email, slightly over an hour later.

74 The email from Laurent Rossier also made reference to a transfer of all funds and closing of the account, which essentially meant the revocation of the REC-Hasta La Vista trust. That statement was made in response to Ernest's preceding email that has been sent earlier in the day:

> AHOY LAURENT,
>
> I HASTEN TO RESPOND TO YOUR EMAIL I JUST RECEIVED TO ADVISE THAT I DID NOT RECIVE YOUR EMAIL OF 7TH APRIL, 2011.
>
> FYI, I PLAN TO LEAVE SINGAPORE FOR HONGKONG NEXT WEEK.
>
> IN THE MEANTIME WITHOUT FURTHER ADO, PLEASE IMMEDIATELY *REMIT TO UBS BANK (CANADA) USD FIVE MILLION FOR CREDIT OF MY PERSONAL ACCOUNT No. 610630*, BEING RETURN OF MY FUNDS FOR THE INCOMPLETED REVOCABLE DISCRETIONARY TRUST I DECIDED PRUDENT TO REVOKE.
>
> KINDEST REGARDS.
>
> Ernest F. de LaSala
>
> Sent from my iPad
>
> [emphasis added in italics]

75 From this email thread, it is, thus, clear that upon the revocation of the

REC-Hasta La Vista trust, the assets were transferred to Ernest's Personal UBS Account. This is confirmed by a subsequent letter signed by Ernest dated 29 April 2011, where UBS Trustees (Jersey) Ltd was instructed as follows:[48]

> Dear Sirs
>
> **REC Hasta La Vista Corp (the "Company")**
>
> I refer to the letter signed by myself on 26 January 2011 in relation to the liquidation of the Company ("Liquidation Letter").
>
> As the beneficial owner of the above Company, please take this as my revised instruction to *transfer the net liquidation proceeds*, after adding back USD 43,623.01 for fees erroneously charged during the period 2005-2010 for services never rendered and furthermore disservice halted only by my intervention, in specie to the following account:
>
> | | |
> |---|---|
> | Transfer to: | UBS AG Stamford |
> | Swift: | UBSDWUS33 |
> | For: | UBS Bank Canada |
> | | Swift: UBSWCATT |
> | | acct. 101WA165328000 |
> | Favour | #610.630 |
> | | Ernest F. de LaSala |
>
> Thereafter, please arrange for the Directors to do all that is necessary to effect the liquidation of the Company.
>
> [emphasis added in italics]

76 The assets arising from the liquidation of the REC-Hasta La Vista trust were thus transferred into Ernest's Personal UBS Account, forming the pre-existing CAD 4m. I also accept James' evidence that these company assets *remained company assets* at all times and were not meant for Ernest's personal use. His oral evidence on this point was as follows:[49]

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48 BAEIC Vol 5 p 2161

49 NEs 9 January 2020, p 161 line 6 to p 164 line 12.

COURT: So if you want to liquidate your trust account then you have -- then the next issue is what you are going to do with the money. Are you going to still have the money remain in UBS, or to return the money back to CFC and PAL --

A: Yeah.

COURT: -- or what?

A: So we had tried to put it back to Palomar.

COURT: Yes, and?

A: We were going to transfer it back to Palomar.

COURT: UBS said cannot because Palomar is not a beneficiary?

A: No, they said the beneficial ownership of Palomar is different from the beneficial ownership of the trust account. So Hasta La Vista trust, because Ernest was the settlor, he was, therefore, listed down as the beneficial owner.

COURT: So the money of S$5 million minus the US$700 can only go into Ernest because he was the bank beneficiary of the trust.

A: No, not beneficiary, it's – my understanding what they said – so beneficial owner of bank accounts –

COURT: He was a settlor, sorry.

A: Yes, he was a settlor. So had to go to an account that had the same beneficial ownership as that. And UBS trustees said, but Palomar has got different beneficial ownership. So even though they allowed the money to go in, they wouldn't let it come back out to the same place. That's why it ended up in Ernest's personal UBS account in Canada.

COURT: Yes.

A: That was the only place it could be moved to. It couldn't go back to Palomar because of banking compliance rules.

COURT: So ECJ knew about this issue?

A: Yes, we were aware -- we were CC'ed on the previous emails that Ernest had decided, "Right, I'll just put it into that account into Canada."

COURT: So is it with the consent of ECJ that the money goes into Ernest's account and any plan for Ernest to eventually transfer the money back to CFC and PAL?

A: Yes, in course of time. I mean, the way we operated -- so there was another account, the SMC account, which was one of the plaintiffs -- I forget, the 6th plaintiff, that Edward and I were listed as the beneficial owners. And we had $80 million in there at the time but there was no suggestion that Edward and I won't going to give back the 80 million. So it was put in there for a period of time because it suited to have that bank account up and running and as likewise this five that went to Ernest is -- we all knew where the money was and the bank accounts kept track of it for us and we can move the money back and forwards as we wished.

…

A: In due course of time, my understanding is it could then be put into one of the corporate accounts. It was just UBS trustees they get sensitive about winding up a trust is why is it going to a corporate account first. So there's nothing stopping a person then transferring into a corporate account.

77 James again asserted that Ernest was not the beneficial owner in his further cross-examination:[50]

Q: Now, you had given a reason that the UBS trustees were not comfortable remitting the sum of money remaining in the Hasta La Vista Trust Company upon its liquidation to PAL because PAL's beneficial owner was not Ernest?

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50 James' Cross-Ex NEs 10 January p 4 lines 13–19.

> A: Yes, that's what they explained to us, your Honour.

78 The assets derived from the revocation of the trust were initially intended to be transferred back to the companies that they had come from (*ie,* PAL and CFC). However, this was not possible as UBS Bank only allows the assets to be returned to the individual or entity listed as the settlor of the trust (in this case, Ernest). It was, thus, only for this reason that the assets were transferred to Ernest's Personal UBS Account and not because they were intended for his personal use.

79 Although Isabel does not dispute that the assets originally placed in the REC-Hasta La Vista trust originated from CFC and PAL, she asserts that the assets within the trust now belong to Ernest. She bases this assertion on the wording of the REC-Hasta La Vista trust deed. Specifically, Clause 7(a) of the REC-Hasta La Vista trust deed states:

> 7. Settlor's power of revocation
>
> (a) During the Trust Period and whilst the Settlor is living and not suffering from Incapacity the Settlor may revoke by Deed this Settlement as to all or part of the Trust fund and the income thereof provided that notice of such revocation shall be given to the Trustees and the revocation shall only be effective from the date of the receipt of such notice by the Trustees. On any such revocation the Trust Fund or the *assets to which the revocation relates shall vest absolutely beneficially in the Settlor.*
>
> [emphasis added in italics]

80 At first blush, the wording of Clause 7(a) does appear to vest the assets arising out of revocation in the settlor, *ie* Ernest. Clause 7(a), however, cannot be read *in vacuo*. Clause 7(a) has to be read in the context of the surrounding circumstances of the trust and the manner in which the Plaintiff Companies operated. James' evidence demonstrates that the manner in which the Plaintiff

Companies and the De La Sala family operated was to allow various assets to be held by different members at varying points in time for different reasons. However, this was always done on the basis or assumption that the assets held by the family members would have to eventually be returned to the Plaintiff Companies. The vesting of assets in Ernest by Clause 7(a), thus, does not translate to granting him full beneficial ownership of the assets. The clear understanding was that these assets were always held for or on behalf of the Plaintiff Companies.

Time-barred

81 I also reject Isabel's argument that the Plaintiff Companies are time-barred in the present action. Isabel argues that claims for equitable relief of the CAD 4m cannot be brought after the expiration of six years from the date on which the cause of action accrued.[51]This argument by Isabel is totally baseless and must fail for several reasons.

82 Firstly, this argument completely misses the essence of this suit. The Plaintiff Companies are not seeking an equitable relief against Ernest for the CAD 4m, but a return of the US$2.75m from Isabel. The Plaintiff Companies have the right to rebut Isabel's latest allegation that the CAD 4m came from Ernest's own funds. This, in itself, is untrue as the CAD 4m also belongs to the Plaintiff Companies.

83 Secondly, Isabel's argument rests on a fundamentally erroneous calculation of time. The present action was commenced by the Plaintiff

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51 Defendant's Closing Submissions, at paras 77–80.

Companies on 18 April 2018.[52] This was still within the acceptable time-limits for the claim, given that the very first successful transfer to Isabel was made on 30 April 2012, as seen in the S 178 HC Judgment at [247(b)] reproduced above at [23]. I note that in the Agreed Statement of Facts at para 12(a), parties have stated that the first transfer had actually occurred on 23 May 2012. If that is the case, the present action would be well within the time limit of six years.

84 Thirdly, the argument on time-bar had neither been pleaded by Isabel nor was it raised throughout the entire trial. Instead, this argument surfaced for the very first time in her closing submissions. It is for this very reason that any possible time-bar does not operate to bar the Plaintiff Companies' claim, as stated in s 4 of the Limitation Act (Cap 163, 1996 Rev Ed) (the "Limitation Act"):

> **Limitation not to operate as a bar unless specifically pleaded**
>
> 4. Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

85 Fourthly, the Plaintiff Companies' claim against Isabel is for the return of the US$2.75m as they are the beneficial owners when Ernest had fraudulently misappropriated the CAD 663,033,557.61. Ernest then dissipated US$2.75m of this sum to Isabel. This made Isabel the constructive trustee of the US$2.75m. Accordingly, the Limitation Act does not apply to the Plaintiff Companies by virtue of s 22 of the Limitation Act:

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52 Writ of Summons.

> **Limitations of actions in respect of trust property**
>
> 22.—(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (*a*) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (*b*) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

86 Isabel submits that a beneficiary cannot bring an action to recover trust property or in respect of any breach of trust after the expiration of six years from the date on which the right of action accrued. Section 22(2) of the Limitation Act was cited to support the argument, and this provision states:

> (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.

87 This argument is wholly erroneous. Firstly, the facts of this case come within s 22(1) of the Limitation Act; this means that the prescribed limitation periods under the said Act do not apply. Secondly, when the Plaintiff Companies found out that Ernest transferred the US$2.75m to Isabel arising from S 178, which would be the date in 2018 that "the right of action accrued", they immediately acted to recover this sum from Isabel (at [82] above). This action was commenced when Isabel refused to return the US$2.75m. Therefore, there was no delay and s 22(2) of the Limitation Act does not apply.

88 For the above reasons, I find that the CAD 4m belongs to the Plaintiff Companies and remained so. As a corollary, I reject Isabel's arguments in

relation to the presumption of mixed funds, *ie,* that when the fiduciary's personal funds are mixed with trust moneys in the same bank account, there is a presumption that the fiduciary uses his own money first. In such instances, it is presumed that in dealing with the moneys in the account (specifically in relation to withdrawals or leaving money in the account), the intention of the fiduciary is to "preserve the value contributed by the claimant to the mixed fund in the bank account at the expense of the value contributed by the wrongdoer." (*Snell's Equity*, John McGee QC (gen ed), (Sweet & Maxwell, 32nd Ed 2010) at para 30-057). The presumption has been applied to different effects in the oft-cited cases of *Re Tilley's Will Trusts* [1967] Ch 1179, *In re Hallet's Estate; Knatchbull v Hallett* [1880] 13 Ch D 696, *In Re Oatway; Hertslet v Oatway* [1903] 2 Ch 356 and *Shalson and others v Russo and others (Mimran and another, Part 20 Claimants)* [2005] Ch D 281. In analysing these cases, the CA in *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 stated at [63]:

> However, these are cases that concern the process of tracing, itself an evidential process governed by its own unique set of rules in the situation where wrongfully misappropriated trust money is mixed with the trustee's money and the mixed funds are used to purchase an asset***. Because of the difficulty facing a claimant who must prove that the asset was purchased by trust money rather than money belonging to the wrongdoer, formalised rules of identification have been conceived to address this evidential difficulty***: *Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015) *("Snell's Equity")* at para 30-056. These include punitive presumptions, such as that in *Re Oatway*, which were conceived with the aim of preserving the misappropriated trust money at the expense of the wrongdoer. But these presumptions do not apply simply because the wrongdoer has behaved deplorably; they apply because the wrongdoer *directly caused* the evidential "black hole": *Snell's Equity* at para 30-057. That is not the case here. The appellant's case is merely that the evidential uncertainty would have been *prevented* had the respondent acted properly in its dealings with her. This seems to us to conflate an issue of improper dealing with a punitive evidential consequence that is not logically connected to the improper dealing.

> [emphasis in original in italics; emphasis added in bold italics]

89 The presumption of tracing is, therefore, relied upon in instances where there is an evidential difficulty. More fundamentally, it is invoked in instances where there is a mixed fund that consists of moneys belonging both to a claimant and to a fiduciary. However, in the present case, no such difficulty arises. Following from my findings that the CAD 4m *also* belongs to the Plaintiff Companies, *all* of the assets in Ernest's Personal UBS Account belonged to the Plaintiff Companies. With there being no mixed fund, or any evidential difficulty, there is no need to rely on any presumptions of tracing.

90 Given that the CAD 4m belongs to the Plaintiff Companies, Ernest would not be entitled to deal with the assets as if they were his own. He would, thus, not be entitled to transfer the US$2.75m to Isabel. The very fact that he had done so was a breach of the fiduciary duties that he owed, as a director, to the Plaintiff Companies.

Issue 4: Whether Isabel is liable for knowing receipt of the US$2.75m

91 The constituents of liability for a claim in knowing receipt were set out by the CA in *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*George Raymond*") at [23]:

> … (a) a disposal of the plaintiff's assets in breach of fiduciary duty; (b) the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and (c) the knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty …

92 I am satisfied that the first two elements of disposal and receipt (*ie,* elements (a) and (b) in the quote above) are made out. The CA in S 178 CA

Judgment had specifically found that the assets, valued at CAD 663,033,557.61, were transferred to Ernest's Personal UBS Account in breach of his fiduciary duties (at [155] and [231]). Furthermore, for reasons explained above, I find that the US$2.75m was transferred to Isabel out of the Plaintiff Companies' assets of CAD 663,033,557.61. Alternatively, even on Isabel's submissions that the US$2.75m was from the pre-existing CAD 4m, this sum was not Ernest's personal money and it belongs to the Plaintiff Companies. Hence, Ernest's transfer of the CAD 4m would be in breach of his fiduciary duties.

93 In respect of the last element of knowledge, the relevant consideration is that "[t]he recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt" (see *George Raymond* at [23], citing the observations by Nourse LJ in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437. This concept of unconscionability is not to be determined rigidly but is highly fact-centric and flexible (*George Raymond* at [32]).

94 In the present case, the question then is whether Isabel was aware that the US$2.75m that she received was traceable to Ernest's breach of fiduciary duties, such that it would be unconscionable for her to retain this sum. It is imperative to first clarify the law relating to knowing receipt. Isabel's counsel argues that what is required is for the Plaintiff Companies to show that Isabel "*actually knew at the time she received the [US$2.75m]* from Ernest that the money in fact belonged to the [Plaintiff Companies], and was wrongfully taken by Ernest and transferred to her". This submission, however, makes two fundamental errors in law.

95 Firstly, in proving the type of unconscionability that would establish the element of knowledge, the inquiry is not confined to one of *actual* knowledge. This was established by the CA in *George Raymond* ([91] *supra*), where the court in cautioning against adopting a rigid approach, stated at [32] as follows:

> … [U]nconscionability is a malleable standard that is not free from difficulty in its application. The degree of knowledge required to impose liability will necessarily vary from transaction to transaction. In cases where there is no settled practice of making routine enquiries and prompt resolution of the transactions is required it seems to us clear that clear evidence of the degree of knowledge and fault must be adduced. We are also inclined to agree that the test, as restated in *Akindele*, *does not require actual knowledge*. This would be contrary to what we believe was the spirit and intent of Nourse LJ's formulation: it seems to us that *actual knowledge of a breach of trust is not invariably necessary to find liability, particularly when there are circumstances in a particular transaction that are so unusual, or so contrary to accepted commercial practice, that it would be unconscionable to allow a defendant to retain the benefit of receipt*. The test of unconscionability should be kept flexible and be fact centred.
>
> [emphasis added in italics]

96 Secondly, the relevant time period in assessing knowledge is not fixed *at the point of receipt* by the beneficiary. The requisite knowledge may be formed at a subsequent stage, and that would still be relevant for knowing receipt. As stated in *Comboni Vincenzo and another v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR(R) 1020 at [78]–[79]:

> 78 The defendant had no knowledge of the fraud when it received the money, and did not receive them as a constructive trustee. However, a party's state of knowledge is not static and it may change. In this case, when Mr Comboni recounted the manner in which he was drawn into the fraud, the defendant did not challenge the fact that a fraud was perpetrated. The defendant's case was that Mr Comboni was careless in allowing himself to be deceived, and that the defendant had no knowledge of the fraud when it received the remittances.

> 79 By the end of trial, the defendant must have known that these remittances were tainted by fraud. If it still did not know that, it knows now, in view of my decision.

97 Applying these principles to the present case, I find that the last element of knowledge is established. Isabel's argument here is essentially that she could not have been aware that the funds were transferred in breach of fiduciary duties because she was "not involved in the day to day management of the [Plaintiff Companies]",[53] and that she had left the entire running of the business to Ernest. As such, she had not questioned when Ernest sent these "gifts" to her. In my view, this is hearsay evidence and is inadmissible as she did not testify.

98 Be that as it may, Isabel's assertion is unbelievable. It is true that in S 178, the HC and the CA found that Ernest had become the *de facto* head of the De La Sala family (see the S 178 CA Judgment at [11] and the S 178 HC Judgment at [388(m)]–[388(n)]). However, that does not establish that Isabel did not have any knowledge whatsoever in relation to his management of assets.

99 At the outset, it is unlikely that Isabel truly believed that the transfers to her were genuine gifts from Ernest. The practice of describing remittances or transfers to family members as "gifts" appears to have been Ernest's way of conducting his nefarious activities. This was observed by Loh J in the S 178 HC Judgment at [415] and [444] as follows:

> 415 It is true that on the face of these letters, Ernest appears to have considered the assets of PAL-CFC-PEN as forming part of his estate in the event of his demise. However, Edward's explanation, which I accept, is that Ernest had a practice of describing these companies and their assets as part of his estate in order to mask the fact that the companies actually belong to the De La Sala family. This was to ensure that the

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53 Defendant's Opening Statement, at para 28.

family assets would not be subject to heavy tax in Australia as Ernest was the "tax exile". This practice was maintained even for internal letters to the family, as seen from how Ernest would in his other letters describe remittances to Bobby and his children as gifts from Ernest, when they were in fact Bobby's funds, and would even remind them to write him an "appropriate letter of thanks" for his "personal gifts" (see below at [444]). There were numerous documents of this nature in the evidence before me with their rather stilted wording. These included those from Ernest to his siblings with elaborate recitation of divesting his personal wealth and the making of "gifts". According to Edward, this practice of Ernest was widely known in the family and there was therefore no need to have "challenged" what Ernest was stating in these 1995–1996 letters. …

…

444 I also note that although these transfers were described in the letters as "gifts" or originating from "[Ernest's] assets", it is clear that these descriptions were used only to create the appearance that Ernest was the source of the funds. This was necessary in order for those members of the family domiciled in Australia to avoid paying tax on these funds. For example, in a facsimile sent by Ernest to Bobby dated 21 December 1999, Ernest had reminded Bobby that a remittance of US$10 to Bobby would be a "gift" from him:

> GREETINGS MY DEAREST BROTHER BOBBY.
>
> *I AM SENDING YOU THIS FAX AS A 'AIDE MEMOIRE'. TO CONFIRM THAT I SHALL BE MAKING YOU A GIFT UP TO US$10 MILLION.*
>
> YOU MAY EXPECT TO RECEIVE THESE FUNDS PROGRESSIVELY AND NOT IN ONE AMOUNT AFTER THE 1ST JANUARY 2000. …
>
> [emphasis added]

Indeed, Ernest had on occasion specifically reminded members of the De La Sala family to write a letter to "thank" Ernest for the "gifts". Furthermore, according to Maria-Isabel, some of the transfers were described as "gifts" even though they were made at the request of Bobby.

[emphasis in original]

100 Furthermore, although Isabel was not involved in the day to day management of the Plaintiff Companies, she had always remained as a director in all of them, save for JMM. She would have been kept *informed*, even if not *consulted* on the running of the companies. An example of this is the fact that she is listed as a signatory of the bank accounts of several of the Plaintiff Companies.[54] While Isabel's counsel sought to draw a distinction between the day to day management and the more formal activity of providing a signature, that does not detract from the fact that Isabel would have been kept abreast of the events within the companies. Further, in James' testimony, her argument of a passive director with no knowledge runs counter to the very allegation that she put forth in a separate suit in Hong Kong:[55]

> Q: She was really there as Ernest's younger sibling, wasn't she? She wasn't really intended to be actively involved in the management of the companies; am I right?
>
> A: I didn't see her taking that much part. But, your Honour, there is a case in Hong Kong at the moment over John Manners Hong Kong and Ernest and Isabel are trying to argue that Edward and I weren't properly appointed because she didn't properly authorise our appointments so I don't think it would be fair to say it was entirely just her making. Or, they're trying to argue in Hong Kong anyway that she had an active role and needed to give permission.

101 Far from being a passive member in the family's business affairs, she had on various occasions, intervened or attempted to intervene. For instance,

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54 James' Cross-Ex NEs 9 January 2020 p 110 lines 16–18.

55 James' Cross-Ex NEs 9 January 2020 p 108 lines 4–17.

following the resolutions by ECJ on 8 August 2011 to remove Ernest as a sole signatory, Isabel wrote to Edward as follows:[56]

> I just had a very distressing phone call from Uncle Ernest in which he wanted me to tell you all that you MUST IMMEDIATELY WITHDRAW ALL THE MINUTES OF THE MEETING REGARDING ALL YOUR EMAIL AND LETTERS TO UBS Vancouver regarding his 3 companies, and giving Uncle Ernest SOLE SIGNATORY of all his accounts, after all it is HIS MONEY.

102 This was an obvious intervention on her part to salvage the situation in favour of Ernest after Ernest had informed her of ECJ's resolutions.[57] She had also actively chosen to take Ernest's side in the running of the business after ECJ had personally phoned her to explain that the resolutions passed were measures to protect the Plaintiff Companies' assets from Ernest.[58]

103 Further, it is difficult to believe that she had remained completely unaware and had not asked when Ernest transferred to her the sums of money on five separate occasions. She has a good relationship with Ernest, as observed in the S 178 HC Judgment at [242]:

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

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56 BAEIC Vol. 6 p 3445.

57 BAEIC Vol. 6, p 2979 (Isabel's AEIC, para 20)

58 BAEIC Vol. 1, p 32 (James' AEIC, paras 53(a)-(b) and 54).

104 It is hard to imagine that Ernest had not bothered to explain the reason for his transfers and that Isabel had unquestioningly received the US$2.75m into her account. In fact, in her previous testimony in S 178, she had admitted that any such gifts would always be accompanied by a note from Ernest:[59]

> Q: Now, you were making your affidavit of evidence-in-chief. You were correcting the fact that you had said that the money had been paid to you before your father's death. And when you came to correct that you didn't bother to tell the court when you were actually paid?
>
> A: I didn't know I had to. I don't understand law at all.
>
> Q: Mrs Koutsos, is there any document that you have that shows Ernest paying you for your shares?
>
> A: Yes, I do.
>
> Q: You have? Okay.
>
> A: Because whenever he sends me the money, he would write a letter saying it was a gift to me.
>
> Q: Okay. So are these documents attached to your affidavit of evidence-in-chief?
>
> A: No, it's not.
>
> Q: Okay. Not attached. Why not?
>
> A: It didn't occur to me to attach it.
>
> Q: Okay.
>
> COURT: Sorry, while we're here, can I just check something, Mrs Koutsos.
>
> A: Yes.
>
> COURT: You say: 'Because whenever he sends me the money, he would write a letter saying it was a gift to me.'

[59] ABOD Vol. 3 at pp 1354–1355 (Isabel's Cross-Ex, NEs 3 March 2014, p 89 line 13 to p 92 line 8).

A:	That's how it kept the record of it.
COURT:	I haven't finish my question.
A:	Sorry.
COURT:	You said it was a gift to you.
A:	Of my money. Of my money. But he sent it in like that. He always said it that way.
COURT:	You know what's a gift?
A:	It was my money.
COURT:	All right.
A:	But he always wrote a letter so I can keep a tab on what I got.
…	
Q:	But they don't say so on their face, right?
A:	I knew it was for my payment.
Q:	Can you answer the question?
A:	What's the question?
Q:	On the face of the document, the documents do not say that these payments are for your NEL shares, right?
A:	But I knew it was for it.

105 It suffices to say that Isabel had not provided evidence of such notes of the gift payments from Ernest in this instance, despite contrary practice in the past. In fact, this begs the question: if Isabel had clear and consistent evidence or testimony of being left out of the running of the companies, why had she not appeared as a witness in these proceedings?

106 Isabel's assertions of her lack of involvement and unawareness must also be seen in the context of her personal attributes. As stated in *Re Clasper Group Services Ltd* [1989] BCLC 143 at 152: "in considering whether a particular person may be treated as having had knowledge of any of these kinds,

the court must have regard to… the 'attributes' of that person". Isabel's assertions here are also consistent with that in S 178. However, those same assertions were resoundingly rejected by Loh J in the S 178 HC Judgment, with particular reference to her character as follows:

> ***Isabel's evidence***
>
> 235 I find Isabel's evidence to be unreliable and garbled. I find that she simply deposes to affidavits as dictated by Ernest or his advisers without any independent checking whether the information therein is correct or true. It is not surprising that she keeps getting mixed up with her answers and stories.
>
> …
>
> 240 Nevertheless, I have reason to believe that her projected persona of innocence, muddled-headedness and forgetfulness is sometimes a front used to deflect scrutiny of her inability to explain her inconsistent stories told in support of Ernest. *She is also canny enough to know when not to admit something that will be very damaging by retreating behind that screen of absent-mindedness and unfamiliarity with business*. A good example of this was brought out during Mr Thio SC's cross-examination regarding Ernest paying her for her NEL and JMC shares but characterising it as a gift from him. She accepted Ernest kept doing that whenever he paid her or Bobby, but she refused to accept that that was an incorrect characterisation, insisting that since she was happy to get paid, it did not matter what Ernest called it. For example, she stated: "It's his way of doing it, I don't know"; "[a]s long as we know he gave it to us, our money, and he knows it, it doesn't really matter how you say it"; "[w]ell it's not a lie to me because I think that's wonderful, he's given me my money back"; and "[l]isten, it wasn't a gift, but he gave me back my money, and to me that's more important than anything else." She only accepted it was an incorrect characterisation when I finally intervened.
>
> …
>
> 248 I therefore do not accept Isabel's evidence. I do not find her a truthful witness at all and I cannot rely on anything that she says. After admitting she was not thinking straight when she signed her AEIC, she at least had the grace to admit as much under cross-examination by Mr Bull SC…
>
> [emphasis added in italics]

107 It is also telling that, as mentioned above at [23], the sums transferred to Isabel only came to light in S 178 after she had testified that she had received no further sums from Ernest.

108 The above goes to show that Isabel, assuming she did not have actual knowledge, must have had constructive knowledge *at the time of the transfers* that the sums could be traced to Ernest's breach of fiduciary duties.

109 However, even if she did not have knowledge at the point of transfers, following the conclusion of S 178, the Plaintiff Companies' lawyers wrote to Isabel informing her of Ernest's breach. In the letters, it was also highlighted to Isabel that since she had disclaimed any further entitlement to the assets belonging to the Plaintiff Companies, she would not be entitled to the US$2.75m.[60] Contrary to Isabel's assertions,[61] I find that these letters contained sufficient particulars for her to be aware that the US$2.75m she possessed were transferred to her under unconscionable circumstances. At this point in time, she would be affixed with the requisite knowledge.

110 In the remotest possibility that Isabel harboured a genuine belief that the US$2.75m was not traceable to company assets, she must know now or soon after S 178 that Ernest's breach of fiduciary duties has tainted the US$2.75m. Isabel must, therefore, fulfil the primary duty to return these assets to the Plaintiff Companies as she was a director in all the Plaintiff Companies except JMM.

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60 Plaintiffs' Closing Submissions at para 58.

61 Defendant's Closing Submissions at para 99.

Issue 5: Whether Isabel is in breach of her fiduciary duties to the Plaintiff Companies

111 A director's duty to act *bona fide* in the interests of the company is axiomatic. In the words of Lord Green MR in *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306: "[directors] must exercise their discretion *bona fide* in what they consider – not what a court may consider – is in the interests of the company". This duty is also enshrined in s 157 of the Companies Act (Cap 50, 2006 Rev Ed) (see *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR at [35], citing *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1994] 1 SLR(R) 513 at [22]).

112 I find that Isabel was in breach of her duty to act *bona fide* in the interests of the Plaintiff Companies (except JMM) and she was also in breach of the no-conflict rule. Isabel is aware that the US$2.75m is an asset belonging to the Plaintiff Companies. Despite such knowledge, she retains the money for her own benefit. Further, when the Plaintiff Companies requested the return of the US$2.75m after the conclusion of S 178, she refused and insisted that they were gifts from Ernest.

113 I disagree with Isabel's arguments that the Plaintiff Companies had "implicitly consented and authorised" the existence of the conflict simply because she had always been receiving sums from Ernest since 1978.[62] The evidence is clear that the US$2.75m is made up of transfers from Ernest in breach of his fiduciary duties. The fact that the Plaintiff Companies had commenced S 178, coupled with the findings in S 178, makes it evident that the

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62 Defendant's Closing Submissions at para 126.

transfers aggregating US$2.75m were not authorised by the Plaintiff Companies in any instance.

114 The breaches of her duty to act *bona fide* in the interest of the Plaintiff Companies (except JMM) make Isabel liable to pay the US$2.75m to the Plaintiff Companies.

Issue 6: Whether Isabel is unjustly enriched by the US$2.75m

115 Given that I have found that Isabel is liable for knowing receipt and is also in breach of her fiduciary duties, the Plaintiff Companies have succeeded in establishing their claim for the US$2.75m. For completeness, however, I shall examine the merits of the Plaintiff Companies' claim in unjust enrichment.

116 The elements required to successfully maintain a claim in unjust enrichment are whether: (a) the defendant has been enriched or benefitted; (b) the enrichment is at the expense of the plaintiff; (c) the enrichment was unjust; and (d) there are any defences (see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*") at [98]–[99]).

117 The Plaintiff Companies raise this argument on unjust enrichment as a parallel claim to that of knowing receipt. They argue that Isabel is unjustly enriched by US$2.75m and that "the transfer was without their knowledge and/or consent".[63] In my view, two contentious issues have to be dealt with as a result of their claim: (a) whether it was at the expense of the Plaintiff

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63 Statement of Claim, at para 16.

Companies; and (b) whether lack of knowledge and/or consent is a valid unjust factor.

Isabel's receipt of the US$2.75m was at the expense of the Plaintiff Companies

118 In relation to the first issue, as noted by the CA in *Anna Wee* at [112]: "the rule that the benefit must have been at the expense of the claimant is less straightforward in a situation involving multiple parties, especially where the defendant is not the immediate recipient of the benefit from the claimant." That being said, such claims are still possible, as stated in *Anna Wee* at [113] and [115]–[116]:

> 113 This may be described, alternatively, as the requirement of a nexus between the value that was once attributable to the claimant and the benefit received by the defendant, *ie*, the defendant has received a benefit from a subtraction of the claimant's assets. It has been said that unjust enrichment can only take place in the context of 'direct transfers', although the meaning of "direct transfer" has been extended to three-party cases where the transfer of the benefit from the claimant to the defendant is not immediate and exceptions are recognised in the form of 'indirect transfers' (see *Goff & Jones* at para 6-18). In particular, the courts have generally allowed recovery in a three-party "indirect transfer" situation where the claimant transferor can trace his money into the pocket of the eventual defendant transferee although the money has passed through the hands of intermediate recipients…
>
> …
>
> 115 In our view, there are two interpretations of the basis for this element:
>
> (a) the defendant received an immediate benefit from the claimant, establishing a direct personal link; or
>
> (b) the defendant received a benefit traceable from the claimant's assets, establishing an indirect link through the value in the defendant's hands that once belonged to the claimant.

> 116 Both these interpretations would create a nexus between the parties satisfying the "at the expense of" requirement, either because the moneys could be traced into the pocket of the defendant or because there is a direct *in personam* transfer between the parties.

119 The difficulty in claims involving third-party scenarios is naturally that it will be harder to prove a relevant nexus between the plaintiff's loss and the benefit received by a third-party defendant. This was demonstrated in the case of *Anna Wee* itself where the plaintiff, Anna Wee ("Wee"), was married to Ng Hock Seng ("Ng") for 10 years. Throughout the marriage, Wee supported Ng and the family financially as she believed that he was a man of modest means while she came from a wealthy family. When the parties divorced, Wee agreed not to seek a division of assets, allegedly on the basis of representations made by Ng. Subsequently, Wee discovered that Ng had accumulated vast assets, which he placed in offshore companies and trusts. Wee brought a claim, *inter alia*, against the trustees for unjust enrichment. However, her claim failed, with one of the reasons being that because she had no legal or equitable claim or entitlement to the moneys in the trust, there was no nexus established (see *Anna Wee* at [155], [158]–[160]).

120 A similar difficulty arose in the case of *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 ("*Alwie Handoyo*"). In that case, Tjong Very Sumito ("Sumito"), the seller of shares in two Indonesian companies, had contracted with the buyer, Antig, such that a portion of the purchase price would be paid to a third-party offshore entity. This entity was controlled by Alwie Handoyo ("Handoyo") at the time. Sumito subsequently asserted that he was entitled to receive the entirety of the purchase price and sued Handoyo, *inter alia,* for unjust enrichment over the portion that Handoyo had received from Antig. For the claim in unjust enrichment, the CA

held that Handoyo's enrichment was not at the expense of Sumito, as the money had come from Antig. Sumito's proper recourse was to sue Antig under the law of contract.

121 I note also that in situations involving more than two parties, there are differing approaches to dealing with this element of benefit at the plaintiff's expense. While the CA in *Anna Wee* did not purport to make a definitive finding on the correct approach (*Anna Wee* at [123]), it rejected the application of a "causal connection" approach that has been advocated by certain commentators (see Peter Birks, *Unjust Enrichment* (Oxford: Oxford University Press, 2nd Ed, 2005) at p 89; also Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) at pp 160–161). The preferable view according to the CA, with which I agree, is as stated in *Anna Wee* at [123], [126] and [128]:

> 123 The words "on the way" imply that the passing of hands was the last step in the chain of legal entitlement which the claimant would be entitled to demand. It is at this last step that interception is made on Prof Birks's theory of interceptive subtraction. We thus note that even on Prof Birks's theory of interceptive subtraction, certainty is still required. In our tentative view, the preferable position is that the claimant must show some form of *legal (and not merely factual) entitlement* to the property which is received by the recipient. However, until such issue arises squarely for determination by this court and we have had the benefit of hearing full arguments from parties, we do not take a definitive position.
>
> …
>
> 126 The third category of sequential transfers deals with the case where the claimant confers a benefit on the third party which is then given to the defendant. Alternatively, the third party confers a benefit on the defendant which it claims from the claimant. *Goff & Jones* identify three types of such cases. The first is where the payment or receipt of money is by an agent, and the second is where transactional links satisfy the law's rules on following and tracing. Both these categories easily fit within the traditional analysis, where a benefit has been

> conferred on the defendant *out of the assets of the claimant*, or out of *assets to which the claimant has an entitlement.* In the second category, the proprietary link is *even stronger* than where a simple transfer of value has been made. The third category *Goff & Jones* identify is the happening of other causally connected events. We note, however, that the examples provided for the third category (see *Goff &Jones* at paras 6-48–6-51) can also be explained by reference to the fact that property belonging to the claimant had passed to the defendant. …
>
> …
>
> 128 The requirement that the benefit is given to the recipient 'at the expense of' the claimant is therefore not a *carte blanche* to substitute any sort of connection, causal or otherwise, between the gain and the loss. It refers specifically to the requirement that the claimant (here, the Appellant), must prove that she had lost a benefit *to which she is legally entitled or which forms part of her assets* and which is reflected in the recipient's gain, regardless of whether that gain is one of traceable property or of a transfer of value.
>
> [emphasis in original]

122 It is, therefore, clear that when a plaintiff establishes links *via* the tracing process, such that a pre-existing equitable title exists, this element of benefit at the expense of the plaintiff is established. The findings in Issues 2 and 3 (at [55]–[90]) are relevant in this regard, such that Isabel's receipt of the US$2.75m was at the expense of the Plaintiff Companies, as there is the requisite proprietary link.

The unjust factor

123 This element, that the enrichment was unjust, is one that must be pleaded with sufficient particularity, pointing to a specific unjust factor. As stated in *Anna Wee* at [134], there is no freestanding claim on the abstract basis that it is "unjust" for the defendant to retain the benefit – there must be a certain recognised unjust factor or event which gives rise to the claim. The Plaintiff

Companies rely on the factor of lack of consent to establish their claim. Isabel argues that this is not a recognised unjust factor.

124 The very existence of this unjust factor of lack of consent is indeed a questionable one, as a matter of Singapore law. I recognise that arguments have been made that lack of consent should be rejected as an unjust factor, drawing on the CA's rejection of the factor for want of authority in *Alwie Handoyo* ([120] *supra*) (see for instance Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 1st Ed, 2019) at 05.018).

125 However, in *Anna Wee* ([116] *supra*), after noting the academic debate surrounding the recognition of lack of consent, Andrew Phang Boon Leong JA observed at [139] as follows:

> 139 … The cases imposing strict liability at common law for the receipt of a benefit have often been analysed *ex post facto* by commentators on the basis of the unjust factor of ignorance (see *Birks's Introduction* ([119] *supra*) at pp 140–146 and *Burrows* ([108] *supra*) at ch 6) or lack of consent (see, generally, *Goff & Jones* at ch 8); it has been argued that if mistake (vitiation of consent) or failure of consideration (qualification of consent) can constitute unjust factors, the same conceptual justification must apply *a fortiori* where there is no consent. We should note, however, that there is *no* authority that has expressly acknowledged the unjust factor of ignorance or lack of consent … and we do not express any conclusive opinion as to whether both fall within the present catalogue of unjust factors. …
>
> [emphasis in original]

126 It, thus, can be seen that the CA did not express a conclusive view as it was not necessary on the facts of *Anna Wee*. Since then, there is a High Court decision, *AAHG, LLC v Hong Hin Kay Albert* [2016] SGHC 274 ("*AAHG, LLC*"), that appears to be in support of this being an unjust factor.

127 In *AAHG, LLC*, Universal Medicare Pte Ltd ("Universal") obtained a loan from Medical Equipment Credit Pte Ltd ("MEC"). As part of the agreement, 10% of the shares in Universal were registered in the name of MEC's parent company, DVI Inc ("DVI"). The remaining shares in Universal were held by the defendant, Hong Hin Kay Albert ("Albert"), his brother and a third party. Albert and his brother subsequently cancelled the DVI shares and registered Albert as the holder of these shares instead. When DVI subsequently became insolvent, the assets were transferred to AAHG, LLC, who commenced an action against Albert for conversion and in the alternative, for unjust enrichment. Chua Lee Ming JC (as he then was) allowed the claim for conversion and went on to analyse the alternative claim, observing at [74]:

> 74 There is much force in the argument (which the Court of Appeal noted in *Anna Wee* at [139]) that if mistake (vitiation of consent) or failure of consideration (qualification of consent) can constitute unjust factors, the same conceptual justification must apply *a fortiori* where there is no consent. In my view, lack of consent ought to be recognised as an unjust factor.

128 Subsequently, in *Ong Teck Soon (executor of the estate of Ong Kim Nang, deceased) v Ong Teck Seng and another* [2017] 4 SLR 819 ("*Ong Teck Soon*"), Steven Chong JA recognised *AAHG, LLC* as having applied lack of consent as a factor (at [24]). There was, however, no need for Chong JA to express an opinion on the facts of *Ong Teck Soon*.

129 I can accept that lack of consent should be recognised as an unjust factor. On the facts of this case, there is a clear lack of consent from the Plaintiff Companies in relation to the five transfers aggregating US$2.75m to Isabel. As mentioned above at [22], it was only on Isabel's testimony in S 178 that the

Plaintiff Companies came to know about the transfers. This was confirmed by James who testified as follows:[64]

> COURT: Mr Copinger, when did you first come to know that Ernest had transferred five transactions totalling 2.75 million to the defendant, Isabel?
>
> A: It was only after trial, your Honour. So --
>
> COURT: What trial?
>
> A: The 178 trial. So in that, we didn't have discovery of Ernest's personal bank accounts at that stage. It was only after the trial that we were then able to see what had actually happened. So, during trial, she denied that she had had anything and lied to the judge about it, but after trial, we got the bank statements and then we saw what had happened.
>
> COURT: So before that, you all are not aware of this payment?
>
> A: No.

130 If the Plaintiff Companies had not even been aware of the transactions, they would surely have been unable to provide their consent. I, thus, find that the transfer of the US$2.75m amounts to an unjust enrichment for Isabel.

Conclusion

131 In summary, I agree with the findings in S 178 that Ernest had misappropriated the CAD 663,033,557.61 from the Plaintiff Companies and he was ordered to return this sum to them. The sum of US$2.75m that was transferred to Isabel came from the CAD 663,033,557.61. Therefore, the Plaintiff Companies have the right to claim against Isabel for the return of the US$2.75m. Her argument that the rule against double recovery prevents the

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64 Questions by the Court, NEs 10 January 2020 p 124 lines 3–18.

Plaintiff Companies from claiming the sum from her because Ernest intends to return more than CAD 663,033,557.61 to the Plaintiff Companies is unmeritorious. Furthermore, Ernest has been very tardy in his repayment to the Plaintiff Companies since the CA made the order in S 178. As at the date of this present case, Ernest has yet to make full repayment to the Plaintiff Companies. The Plaintiff Companies are not confident that Ernest will make full repayment due to the reasons stated above in [51].

132 Isabel's defence that the US$2.75m was a gift from Ernest and that it came from Ernest's pre-existing assets of CAD 4m and not from the Plaintiff Companies' CAD 663,033,557.61 has been refuted by evidence which shows that even the CAD 4m belongs to the Plaintiff Companies. Hence, the Plaintiff Companies' claim against Isabel is made out.

133 I also find that Isabel, being director of the Plaintiff Companies, save for JMM, is liable for knowing receipt as she knew and ought to have known that the US$2.75m belongs to the Plaintiff Companies. This is particularly the case after the outcome of S 178 was known and after the Plaintiff Companies' lawyers informed her of Ernest's breach of fiduciary duty and that she had to return the US$2.75m.

134 Isabel also breached her fiduciary duties as director of the Plaintiff Companies, save for JMM, as she had breached the no-conflict rule when she received and retained the US$2.75m belonging to the Plaintiff Companies without their consent.

135 Isabel also unjustly enriched herself at the expense of the Plaintiff Companies as the US$2.75m was not given to her with the consent of the

Plaintiff Companies.

136 Accordingly, for the above reasons, I am satisfied that the Plaintiff Companies have made out a *prima facie* case, on a balance of probabilities, requiring Isabel to respond. As she fails to testify and submits on a no case to answer, I order that Isabel return the sum of US$2.75m to the Plaintiff Companies with interest at 5.33% from the date of the writ with costs to be agreed or taxed.

Tan Siong Thye
Judge

Thio Shen Yi SC, Koh Li Qun, Kelvin, Niklas Wong See Keat, Benjamin Niroshan Bala, Hannah Alysha Binte Mohamed Ashiq and Nguyen Vu Lan (TSMP Law Corporation) for the plaintiffs;
Vergis S Abraham, Zhuo Jiaxiang, Loo Yinglin Bestlyn (Providence Law Asia LLC) for the defendant.