IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 317

Suit No 982 of 2013

Between

(1) M.K.C. Associates Co Ltd
(2) Infoworks Co Ltd

… *Plaintiffs*

And

(1) Kabushiki Kaisha Honjin
(2) Honjin Singapore Pte Ltd
(3) Honjin Daeboo Financial Korea Co Ltd
(4) Global Investment Initiative Singapore Pte Ltd
(5) Hide Yamamoto Holdings Pte Ltd
(6) Eat & Smile Asia Pte Ltd
(7) Fumiki Global Holdings Pte Ltd
(8) Appleway Investments Limited
(9) Chuo Business Form Inc
(10) Karna Brata Lesmana
(11) Muchsin Ciputra Tjoe
(12) Ni Weiqun
(13) ASO F&B Holdings (Asia) Pte Ltd
(14) Liu Pingfang
(15) Junichiro Yamada
(16) Akitoshi Horie
(17) Nariaki Kawai
(18) Wong Lock Chee
(19) Neo Lay Hiang Pamela

(20) Carole Boo Meow Siang
(21) Next Capital JV Pte Ltd

… *Defendants*

And

(1) Neo Lay Hiang Pamela
(2) Carole Boo Meow Siang

… *Third Parties*

And

(1) Honjin Singapore Pte Ltd
(2) Global Investment Initiative Singapore Pte Ltd
(3) Eat & Smile Asia Pte Ltd
(4) Next Capital JV Pte Ltd

… *Fourth Parties*

JUDGMENT

[Contract] — [Interpretation of terms]
[Credit and security] — [Equitable mortgage]
[Trusts] — [Accessory liability] — [Requisite mental state]
[Trusts] — [Recipient liability] — [Personal liability] — [Proprietary liability]

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MKC Associates Co Ltd and another
v
Kabushiki Kaisha Honjin and others (Neo Lay Hiang Pamela and another, third parties; Honjin Singapore Pte Ltd and others, fourth parties)

[2017] SGHC 317

High Court — Suit No 982 of 2013
Woo Bih Li J
29–31 August; 1–2, 5–9, 13–14, 22–23, 26–30 September; 3 October; 12 December 2016; 9 October 2017

13 December 2017 Judgment reserved.

Woo Bih Li J:

Introduction

1 The two plaintiffs extended loans to the 1st defendant. As security for the loans, the plaintiffs received and held certain share certificates, and later also the blank transfer forms executed by the registered shareholders (*ie*, the 2nd and 3rd defendants), in respect of 3.3 million shares in the 21st defendant. After the 1st defendant defaulted on the loans, the plaintiffs realised that the shares that were the subject of their security had been sold by the 2nd and 3rd defendants to various purchasers, who thereafter on-sold the shares to various sub-purchasers. The purchasers and sub-purchasers are the 4th to 14th defendants.

2 The two plaintiffs in this action claim as equitable mortgagees of the 3.3 million shares in the 21st defendant. On the premise that a trust arose over those mortgaged shares, the plaintiffs claim against the defendants for dishonest assistance, knowing receipt, and also for the return of the shares. On the other hand, the defendants submit that the plaintiffs are only equitable chargees of these shares, and that in any event the causes of action in dishonest assistance, knowing receipt and for the return of the shares based on general property principles fail as they were *bona fide* purchasers of these shares for value without notice of the plaintiffs' interest.

3 For ease of reference, a skeletal table of contents is produced as follows:

The parties

The plaintiffs

4 The 1st and 2nd plaintiffs are M.K.C. Associates and Co. Ltd ("MKC") and Infoworks Co. Ltd ("Infoworks") respectively. Both companies were incorporated in Japan. At the material time, Yuki Sato ("Sato") was a director of both plaintiffs.[1]

5 Hiroyoshi Akimoto ("Akimoto") was Sato's assistant.[2] Akimoto was an employee of MKC,[3] but did not hold any particular title in MKC.[4]

The defendants

6 There are several defendants in this action. They may be categorised as follows:

(a) The company whose shares are in dispute (*ie*, the 21st defendant);

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1 Yuki Sato's Affidavit of Evidence-in-Chief ("AEIC"), para 1.

2 Junichiro Yamada's AEIC, para 9; Notes of Evidence ("NE"), 30/08/16, 57:18–57:23.

3 Hiroyoshi Akimoto's AEIC, para 1.

4 NE, 30/08/16, 36:2–36:8.

(b) The borrower of monies lent by the plaintiffs (*ie*, the 1st defendant);

(c) The registered shareholders of the 3.3 million shares in the 21st defendant, those shares forming the subject of the dispute (*ie*, the 2nd and 3rd defendants);

(d) Alleged purchasers and sub-purchasers of the 3.3 million shares (including the 4th, 6th, 8th, and 9th to 14th defendants); and

(e) Directors and corporate secretaries of the 21st defendant who were in various ways involved in issuing new share certificates in respect of the 3.3 million shares to alleged purchasers or sub-purchasers despite the fact that the previously-issued share certificates had not been returned for cancellation (*ie*, the 16th to 20th defendants).

Next Capital JV Pte Ltd: the company whose shares are in dispute

7 The 21st defendant is Next Capital JV Pte Ltd ("NCJV"), a company incorporated in Singapore. NCJV manages a Japanese restaurant located in Marina Bay Sands, Singapore, known as the Hide Yamamoto Restaurant ("HY Restaurant").[5] HY Restaurant is helmed by Hidemasa Yamamoto ("Yamamoto"), the chef and the face of the restaurant.[6]

8 The directors of NCJV at the material time were:

(a) Yamamoto;

(b) Junichiro Yamada ("Yamada"), the 15th defendant; and

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5 Junichiro Yamada's AEIC, para 5; Wong Lock Chee's AEIC, para 2.1.1.

6 Junichiro Yamada's AEIC, para 5.

(c) Wong Lock Chee ("Wong"), the 18th defendant.

9 The corporate secretaries of NCJV at the material time were:

(a) Neo Hay Liang Pamela ("Neo"), the 19th defendant; and

(b) Carole Boo Meow Siang ("Boo"), the 20th defendant.

10 Neo and Boo were employees of Strategic Alliance Corporate Services Pte Ltd ("SACS").[7] On 10 August 2009, SACS was appointed the secretarial agent for NCJV by virtue of an NCJV Board of Directors' resolution, and Neo and Boo were appointed as NCJV's corporate secretaries.[8] They were assisted by Valena Lailanie De Guzman ("Lanie"), a corporate secretarial executive employed by SACS.[9]

11 Of all the officers in NCJV, Yamada (*ie*, the 15th defendant) appears to feature the most prominently in the dispute.

The Honjin Group

12 The 1st defendant is Kabushiki Kaisha Honjin ("HJP"), a company incorporated in Japan. At the material time, Hitomi Kawai ("Ms Kawai") was a director of HJP.

13 The 2nd defendant is Honjin Singapore Pte Ltd ("HJS"), a company incorporated in Singapore. At the material time, Neo and Akitoshi Horie ("Horie") were directors of HJS.[10]

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7 Wong Lock Chee's AEIC, para 2.1.4.

8 Agreed Bundle ("AB") vol 1, pp 3–6.

9 Valena Lailanie De Guzman's AEIC, para 1.

10 Neo Lay Hiang Pamela's AEIC, paras 3 and 12(a).

14 The 3rd defendant is Honjin Daeboo Financial Korea Co Ltd ("HJK"), a company incorporated in South Korea.

15 I refer to these three defendants collectively as the "Honjin Group".

16 The 17th defendant, Nariaki Kawai ("Kawai"), is the beneficial owner of the Honjin Group.[11] Kawai's assistant was Horie, the 16th defendant.[12]

The purchasers and sub-purchasers

17 The 3.3 million shares in NCJV were purchased by different companies and individuals at various points in time. I introduce a glossary here for easy reference:

S/N	Abbreviation	Description
1	GIIS	Global Investment Initiative Singapore Pte Ltd, the 4th defendant. At the material time, its directors were Yamada, Neo, and Sho Naganuma ("Naganuma").[13] Its corporate secretaries were Neo and Boo.
2	HYH	Hide Yamamoto Holdings Pte Ltd, the 5th defendant. At the material time, its directors included Yamada, Yamamoto, and Wong.[14] Its corporate secretary was Neo.
3	E&S	Eat & Smile Asia Pte Ltd, the 6th defendant. The plaintiffs discontinued their action against E&S on 21 September 2016.

11 Junichiro Yamada's AEIC, para 8.

12 NE, 30/08/16, 19:6–19:7.

13 Neo Lay Hiang Pamela's AEIC, para 12(b).

14 Wong Lock Chee's AEIC, p 41.

4	FGH	Fumiki Global Holdings Pte Ltd, the 7th defendant. At the material time, its Chief Executive and director was Fumiki Shiragami ("Shiragami").[15]
5	AI	Appleway Investments Limited, the 8th defendant.
6	CBF	Chuo Business Form Inc, the 9th defendant.
7	Karna	Karna Brata Lesmana, the 10th defendant.
8	Muchsin	Muchsin Ciputra Tjoe, the 11th defendant.
9	Ni	Ni Weiqun, the 12th defendant.
10	ASO	ASO F&B Holdings (Asia) Pte Ltd, the 13th defendant. The plaintiffs discontinued their action against ASO on 22 September 2016.
11	Liu	Liu Pingfang, the 14th defendant.

18 Hereinafter, for the purposes of this judgment, I refer to GIIS and HYH collectively as the "Purchasers"; and I refer to FGH, AI, CBF, Karna, Muchsin, Ni, and Liu collectively as the "Sub-purchasers".

The facts

Background

19 Yamada became acquainted with Kawai sometime in March 2010. Kawai agreed to invest S$3.3 million in HY Restaurant. The investment was done through HJS and HJK which, as mentioned, were beneficially owned by Kawai (see [16] above). HJS and HJK would acquire 67.35% of the total issued shares in NCJV[16] – it will be recalled that HY Restaurant was operated by NCJV

[15] NE, 09/09/16, 30:15–30:17; Fumiki Shiragami's AEIC, para 1.

(see [7] above). In this manner, HJS and HJK came to hold 3.3 million shares in NCJV.

The loans

20 Subsequently, in early 2011, Kawai requested Sato to provide loans to HJP to assist in its factoring business.[17] Sato agreed. Accordingly, between 9 May 2011 and 10 April 2012, the plaintiffs provided HJP with loans amounting to a total aggregate amount of JPY 313 million ("the Loans"). These Loans were evidenced by four loan agreements ("the Loan Agreements"):

(a) One loan agreement between Infoworks and HJP, dated 1 September 2011, for JPY 63 million ("the Infoworks Loan");[18] and

(b) Three loan agreements between MKC and HJP, dated 9 March 2012, 16 March 2012 and 10 April 2012, for a total of JPY 250 million (collectively, "the MKC Loans").[19]

21 Pursuant to cl 1.3 of the Infoworks Loan, HJP was supposed to repay Infoworks in full on 31 May 2012.[20] By a supplemental agreement dated 31 May 2012, the repayment date for the Infoworks Loan was extended to 30 June 2012. Separately, HJP was also supposed to repay MKC in full on 30 June 2012 pursuant to cl 1 of each of the MKC Loans.[21] On 29 June 2012, Infoworks and HJP agreed to further extend the repayment date for the Infoworks Loan to

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16 Junichiro Yamada's AEIC, para 7.

17 Yuki Sato's AEIC, para 17.

18 AB1 125–127; Hiroyoshi Akimoto's AEIC, paras 21–24.

19 AB1 152–154, 158–160, 194–196; Hiroyoshi Akimoto's AEIC, paras 25–26.

20 AB1 126.

21 AB1 153, 159, 195.

31 July 2012. That same day, MKC and HJP also agreed to extend the repayment date for the MKC Loans to 31 July 2012. I shall refer to these supplemental agreements to extend the repayment date of the Infoworks Loan and the MKC Loans collectively as the "Extension MOUs".[22]

22 When the various Loan Agreements were concluded, HJS was the registered shareholder of 2 million NCJV shares and HJK was the registered shareholder of 1.3 million NCJV shares. Around the same time, Sato (representing the plaintiffs) and Kawai (representing HJP) agreed that these 3.3 million NCJV shares, collectively held by HJS and HJK, would be used as security for the Loans provided by the plaintiffs to HJP.[23]

23 Thus, on 7 May 2012, Akimoto (representing the plaintiffs) emailed Horie (representing HJP) requesting for "signatures of the directors for approval toward share transfer in advance to smoothly execute use of the shares for a security". He also informed Horie that he "would like to keep the actual share certificates",[24] which in that context referred to the share certificates of the 3.3 million NCJV shares registered in HJS's and HJK's names.

The issuance of the NCJV share certificates in HJS's and HJK's names

24 Although HJS and HJK had been registered as shareholders of NCJV since 14 May 2010 and 30 November 2011 respectively,[25] no NCJV share certificates had been issued in either of their names. On 18 May 2012, Horie informed Akimoto of this fact.[26] Akimoto insisted, by way of his email reply to

22 AB1 631–632, 633–634; Hiroyoshi Akimoto's AEIC, paras 60–61.

23 AB1 308–318; Hiroyoshi Akimoto's AEIC, para 28; Yuki Sato's AEIC, paras 35–37.

24 AB1 234.

25 Wong Lock Chee's AEIC, para 4.1.1, Exhibit WLC-4.

26 AB1 317.

Horie on the same day, that he "would like to get the share certificates at any rate."[27]

25 Accordingly, Akimoto and Horie enlisted Yamada's assistance to procure the NCJV share certificates issued in HJS's and HJK's names. In turn, Yamada enlisted Wong's assistance and Wong enlisted the assistance of Neo, Boo, and Lanie. The email exchanges between the parties were extensive. As parties were located in Singapore and Japan, it was not always clear whether the timing of each email was reflected in Singapore or Japan time. In the summary below of the key exchanges between the parties, I have included the time zone where it is clear, and indicated where it is either probable or unknown:

(a) On 22 May 2012, Akimoto emailed Horie regarding the issuance of the NCJV share certificates in HJS's and HJK's names, indicating that "Mr. Yamada is going to Singapore on 26th and deal with [the issuance]."[28]

(b) On 29 May 2012, Yamada emailed Horie informing the latter that he was "presently checking when share certificates can be issued".[29]

(c) On 30 May 2012, Yamada emailed Horie, copying Akimoto, that "the share certificates will be ready on Monday". [30]

(d) On 4 June 2012, at 9.54 am (probably Japan time, which is 8.54 am Singapore time), Akimoto emailed Horie and Yamada stating: "When the share certificates are ready, could you scan and send them in

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27 AB1 317.

28 AB1 316.

29 AB1 315.

30 AB1 314.

PDF format?"[31] In Yamada's reply on the same day, he informed Akimoto that his "partner [*ie*, Wong] is coming back from Europe on weekend and will be ready to sign the share certificates". Yamada also asked where he should send the originals of the relevant share certificates.[32] Eventually, it was confirmed via an email from Horie to Akimoto and Yamada later that day that the share certificates were to be "sent to [Horie] once, and then [sent] to [Akimoto]".[33]

(e) Separately, on 4 June 2012, at 10.30 am (probably Singapore time), Yamada emailed Wong requesting him to sign and send to Yamada the NCJV share certificates issued in HJS's and HJK's names. Yamada also mentioned that "Kawai-san has been waiting for a week and called again this morning."[34] In reply at 3.19 pm (Singapore time) that day,[35] Wong sent an email addressed to Yamada, Boo, and Lanie. To Yamada, he said: "I have checked and cannot locate share certificates." To Boo and Lanie, he said: "Please arrange to issue new cert if you do not have it. Yamada san needs it by today. I am available to sign".[36]

(f) Later that day on 4 June 2012, Lanie emailed Yamada asking whether it would "be ok if [she emailed] to [him] tomorrow the share certificates nos. 6 and 8 issued to [HJS] and [HJK]" as Neo's signatures

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31 AB1 314.

32 AB1 314.

33 AB1 313.

34 AB1 307.

35 NE, 14/09/16, 18:24–19:3.

36 AB1 306–307.

were required on the share certificates and she would only be in the office the next day.[37] Yamada confirmed this.[38]

(g) On 6 June 2012, at 3.03 pm (probably Japan time, which is 2.03 pm Singapore time), Wong emailed Yamada stating: "Previous cert declared loss. New cert been issued and signed. Pamela will email you scanned copy today. Please let com sec know if you would like to keep original."[39] In his reply at 3.15 pm (probably Japan time, which is 2.15 pm Singapore time), Yamada emailed Wong saying: "Wong-san, can you FedEx Kawai-san's certificates to his Japan office?"[40] At 6.11 pm (Singapore time),[41] Wong replied that "Carole will arrange [for this to be done]", copying Boo in the email.[42]

(h) Separately, on 6 June 2012, at 2.54 pm (probably Singapore time), Lanie emailed Yamada the scanned copies of the NCJV share certificates in HJS's and HJK's names.[43] Wong was copied in this email.

(i) On 8 June 2012, at 8.49 am (probably Singapore time), Yamada emailed Wong asking whether he had "receved JV's stock certifivates [*sic*]" and that he "[needed] to give copies today possibley [*sic*]".[44] Yamada's email to Wong was the latest in a chain of emails ("the Email Chain"). The subject title of Yamada's email was

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37 AB1 306.

38 AB1 306.

39 AB1 341.

40 AB1 341.

41 NE, 14/09/16, 43:21.

42 AB1 341.

43 AB1 334.

44 AB1 364.

"シンガポール社株式担保の件". It was not disputed that this translates to "Re: Singapore company's share collateral". Aside from the email addressed to Wong, the rest of the contents of the Email Chain were in the Japanese language.[45] As I will elaborate on later, the plaintiffs relied on the subject title of Yamada's email in their claim against Wong.

(j) On the same day at 9.17 am (probably Singapore time), Wong forwarded Yamada's email to Boo stating: "Please confirm with Yamada if you have send JV share cert by FedEx [*sic*]."[46] Subsequently at 10.31 am (unknown time zone), Wong sent an email addressed to Yamada, Boo, Lanie, and several others. To Yamada, he said: "[S]orry for the delay. Replacement share certificates has been signed. I was not aware that [Boo] been on leave since Monday. I have instructed [Lanie] to send original share cert to you via FedEx by today." To Boo and Lanie, he said: "[P]lease let Yamada know once document pick up by FedEx and address you send to [*sic*]".[47]

(k) Separately, on 8 June 2012, at 10.44 am (probably Japan time, which is 9.44 am Singapore time), Lanie emailed Yamada informing him that she would "courier the original share certificate nos. 6, 7 and 8 issued to [HJS and HJK] by Fedex today to the following address: K&A Inc. […] Attn.: Mr. Kawai".[48] Later that day at 1.18 pm (unknown time zone), Lanie emailed Yamada and Horie informing them that FedEx had

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45 AB1 350–363; 364–371.

46 AB1 364.

47 AB1 364.

48 AB1 372.

picked up the physical share certificates from the SACS office; Wong was copied in this email.[49]

26 It transpired that sometime between 4 and 6 June 2012, while the above email exchange was occurring, Lanie had prepared the NCJV share certificates in HJS's and HJK's names, pursuant to Wong's instructions:

(a) Share Certificate No. 6, dated 14 May 2010, issued in HJS's name for 1 million shares;[50]

(b) Share Certificate No. 7, dated 30 November 2010, issued in HJS's name for 1 million shares;[51]

(c) Share Certificate No. 8, dated 30 November 2010, issued in HJK's name for 1.3 million shares.[52]

27 I refer to the above three certificates collectively as the "Original Share Certificates". As can be seen, although the Original Share Certificates were dated 2010, they were *in fact* only prepared and signed by Wong and Neo sometime between 4 and 6 June 2012.[53] In other words, the Original Share Certificates had been backdated to 2010.

28 Scanned copies of these Original Share Certificates were sent by Lanie to Yamada via email on 6 June 2012 (see [25(h)] above). The physical Original

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49 AB1 376.

50 AB1 36.

51 AB1 93.

52 AB1 94.

53 NE, 14/09/16, 26:4–27:5; 29:17–29:19.

Share Certificates were sent to Kawai's office in Japan via FedEx on 8 June 2012 (see [25(k)] above).

29 Subsequently, the Original Share Certificates were then sent or handed to Akimoto (who received the certificates on behalf of the plaintiffs) on or about 14 June 2012,[54] and remain in the plaintiffs' possession until the time of the present proceedings.[55]

The share charge agreements

30 On 14 June 2012, HJS and HJK entered into Share Charge Agreements with the plaintiffs (collectively, the "SCAs"). The SCAs were signed by Horie (for and on behalf of HJS and HJK) and Sato (for and on behalf of Infoworks and MKC), with Kawai and Akimoto as witnesses.[56]

31 The number of NCJV shares provided as security to each of the plaintiffs is set out in the table below:

Date of SCAs	**Chargor**	**Chargee**	**Number of shares**
14/06/12	HJS	Infoworks	500,000
14/06/12	HJS	MKC	1,500,000
14/06/12	HJK	Infoworks	400,000
14/06/12	HJK	MKC	900,000
Total			3,300,000

54 Hiroyoshi Akimoto's AEIC, para 48.

55 Hiroyoshi Akimoto's AEIC, para 50.

56 AB1 451–462, 463–474, 475–486, 487–498.

32 I refer to these SCAs as the "HJS-IW SCA", "HJS-MKC SCA", "HJK-IW SCA" and "HJK-MKC SCA" respectively. In this judgment, I on occasion refer to HJS and HJK as "chargors", MKC and Infoworks as "chargees", and the 3.3 million NCJV shares forming the subject matter of the SCAs as the "Charged Shares". For the avoidance of doubt, such terminology is used without prejudice to arguments as to whether the SCAs in fact created a "charge", in the legal sense of the term, over the 3.3 million NCJV shares in question.

33 At this juncture, it suffices for me to observe that most of the material terms in the SCAs are substantially identical, save for the names of the parties and the number of NCJV shares charged to the respective plaintiffs. I will set out the precise phrasing of these clauses only where necessary. It should be highlighted, however, that one material term differs: this is cl 5, which relates to the validity period of each SCA. I elaborate more on this later.

34 It is not disputed that the plaintiffs' alleged charge over the 3.3 million NCJV shares was not registered under s 131 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act").[57]

The letters of undertaking

35 On 14 June 2012, Akimoto emailed Yamada asking him to sign on four Forms of Letter of Undertaking ("the Undertakings"), each of which was annexed as schedule 1 to each of the SCAs.[58] Save for the parties to whom they were respectively addressed, the Undertakings were substantially identical. Yamada complied with Akimoto's request.[59] By signing the Undertakings in his

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57 Junichiro Yamada's AEIC, para 43; Wong Lock Chee's AEIC, para 5.1.5.

58 AB1 526.

capacity as director of NCJV, Yamada "irrevocably [undertook] to vote in favour of any resolution approving that the Shares (as defined in the Share Charge) be registered in [the chargee's] name and, after the Security (as defined in the Share Charge) constituted by the Share Charge becomes enforceable, in the name of any purchaser of those shares or their nominee(s)."[60] On 21 June 2012, Akimoto received the Undertakings, which had been duly signed by Yamada.[61]

The defaults and the breaches

The bulk share sale and purchase agreement

36 However, in the meantime and apparently unknown to the plaintiffs, HJS and HJK entered into a Bulk Share Sale and Purchase Agreement ("BPA") dated 20 June 2012 with the Purchasers, *ie*, GIIS and HYH.[62] The BPA was signed by Horie (on behalf of HJS and HJK), Yamada (on behalf of GIIS), and Yamamoto (on behalf of HYH).

37 Under the BPA, GIIS and HYH jointly agreed to purchase 3.3 million NCJV shares from HJS and HJK.[63] There was no price fixed for the purchase of the NCJV shares, except that cl 2.1 of the BPA stipulated the average price per share to be "at least S$1.10".[64]

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59 Junichiro Yamada's AEIC, para 18.

60 AB1 461, 473, 485, 497.

61 Hiroyoshi Akimoto's AEIC, para 55.

62 AB1 535.

63 Hidemasa Yamamoto's AEIC, para 9.

64 AB1 531.

38 Furthermore, the BPA did not specify the number of shares that each of the Purchasers was to acquire. There was also no specification as to what each of the vendors would be paid by each of the Purchasers. In other words, it was not clear from the BPA how many shares were being purchased by each of the Purchasers, at what price, and from whom.

HJP defaults on the Loans

39 As mentioned above (at [21]), the repayment dates of the Infoworks Loan and the MKC Loans had been extended, by virtue of the Extension MOUs, to 31 July 2012.

40 In June and July 2012, HJP repaid JPY 6,592,602 due under the Loan Agreements, with JPY 3 million being part repayment of the principal sum under the Infoworks Loan and the remainder being interest chargeable under the Loan Agreements.[65]

41 However, as of 31 July 2012, JPY 60 million and JPY 250 million remained due and payable under the Infoworks Loan and the MKC Loans respectively.[66]

42 It was not disputed that HJP's failure to make full payment of the amounts due and owing by 31 July 2012 constituted an event of default under the Loan Agreements and the SCAs. Accordingly, the plaintiffs were entitled to enforce their security under the SCAs. However, they did not do so immediately and instead engaged in discussions with Kawai as to how to resolve the issue of the default, as elaborated on below.

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65 Hiroyoshi Akimoto's AEIC, paras 61(b) and 72.

66 Hiroyoshi Akimoto's AEIC, para 73.

Kawai's proposal to find a buyer for the Charged Shares

43 On or around 12 September 2012, Kawai met with Akimoto and Sato. Kawai suggested that instead of taking steps to register the Charged Shares in the plaintiffs' names, the Honjin Group could help the plaintiffs find a buyer for the Charged Shares. This would allow the plaintiffs to avoid the trouble of first having the Charged Shares registered in their names and thereafter looking for buyers of the same. Akimoto and Sato agreed.[67]

44 Throughout September and December 2012, Kawai continued to represent to Akimoto that he was searching for a buyer for the Charged Shares. He purportedly found potential buyers on several occasions, but these proposed sales fell through.[68]

The plaintiffs take steps to enforce their security

45 On 21 December 2012, Akimoto emailed Yamada stating that he would like to "discuss flow of funds to Honjin [*sic*]".[69] Yamada did not respond to this email.[70] On 8 January 2013, Akimoto emailed Yamada, stating that the plaintiffs would like "to have [NCJV] shares that were secured by [HJS] and [HJK] previously be ready for immediate transfer of title as soon as possible", and requesting that Yamada "ask [his] company secretary to prepare documents necessary for transfer of title as well as minutes of a board of directors after speaking to other directors about the situation and obtaining their approval as quickly as possible" as the plaintiffs would "like to get ready for immediate registration".[71] Again, Yamada did not reply to this email.[72]

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67 Hiroyoshi Akimoto's AEIC, paras 75–77; Yuki Sato's AEIC, paras 58–59.

68 Hiroyoshi Akimoto's AEIC, paras 84–94.

69 AB2 1039–1040.

70 Junichiro Yamada's AEIC, para 20.

46 It transpired that since November 2012, the plaintiffs had been consulting with their lawyers on how to enforce their security over the Charged Shares. Their lawyers advised them to obtain a power of attorney and to "conclude the memorandum of understanding" and "obtain the necessary documents, including the blank share transfer forms."[73]

47 On 18 January 2013, Akimoto emailed Horie several documents, including the draft supplemental deeds to each of the SCAs ("the Supplemental Deeds"). In his cover email, Akimoto explained that "this agreement is made to confirm all facts and to agree on extension of the period of agreement, serving as a memorandum of the previous agreement." Akimoto also proposed that he meet with Horie on 21 January 2013 to explain the contents of the Supplemental Deeds, and that Horie sign the Deeds after that meeting.[74]

48 Apparently, a meeting did take place at Akimoto's office, but on 22 January 2013 instead.[75] At that meeting, Horie (representing HJS and HJK) signed the Supplemental Deeds, but no representative of the plaintiffs (*eg*, Akimoto or Sato) signed the same.[76] The Supplemental Deeds are important because an allegation was made by the 7th and 18th defendants (*ie*, FGH and Wong) that the SCAs had expired by 31 December 2012. If that is correct, then a question arises as to whether the Supplemental Deeds did effectively extend the SCAs even though they were signed on behalf of HJS and HJK only and not by any representative of the plaintiffs.

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71 AB2 1083–1084.

72 Hiroyoshi Akimoto's AEIC, para 96; Junichiro Yamada's AEIC, para 23.

73 NE, 31/08/16, 40:22–42:6.

74 AB2 1130.

75 Hiroyoshi Akimoto's AEIC, para 114; Exhibit P1, p 2; NE, 31/08/16, 36:14–38:19.

76 AB2 1174, 1182, 1190, 1199; NE, 02/09/16, 43:3–44:3.

49 At the same meeting of 22 January 2013, Horie and Kawai also signed blank share transfer forms and handed them over to the plaintiffs on 22 January 2013.[77] I refer to these as the "Blank NCJV Share Transfer Forms". They also remain in the plaintiffs' possession until the time of present proceedings.[78]

50 On 25 January 2013, the plaintiffs discovered from an Accounting and Corporate Regulatory Authority ("ACRA") search conducted by their lawyers that the total number of NCJV shares held by HJS and HJK had decreased to less than 3.3 million.[79] However, apparently, this information did not ring any alarm bell for the plaintiffs.

Discovery of the breaches

The plaintiffs discover that all of the Charged Shares had been sold

51 From mid-January to March 2013, Kawai continued to represent to Akimoto that he was looking for a suitable buyer for the Charged Shares.[80] On 27 March 2013, Akimoto told Kawai that the Charged Shares should be transferred to the plaintiffs in the event that no buyer could be found.[81]

52 On 22 April 2013, Kawai called Akimoto and told him that HJS and HJK had sold all the Charged Shares, and that he would not be able to transfer the Charged Shares to the plaintiffs. Kawai also said that he was unable to pay the sale proceeds received from these sales to the plaintiffs.[82]

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77 Hiroyoshi Akimoto's AEIC, para 55; NE, 31/08/16, 36:14–38:19.

78 Hiroyoshi Akimoto's AEIC, para 55.

79 NE, 31/08/16, 10:25–13:19.

80 Hiroyoshi Akimoto's AEIC, paras 99, 116.

81 AB2 1260; Hiroyoshi Akimoto's AEIC, para 117.

82 Hiroyoshi Akimoto's AEIC, para 119; NE, 31/08/16, 46:21–46:23.

The share transfers pursuant to the BPA

53 It transpired that in November 2012, two transfers of NCJV shares from HJS had taken place pursuant to the BPA (see [36] above). These transfers are diagrammatically represented in Appendix A to this judgment, and elaborated on below. Appendix A is adapted from Annex A to the plaintiffs' statement of claim, with one difference: in their Annex A, the plaintiffs made reference to dates on which various ACRA searches were conducted to show that the respective transferees had become registered shareholders *by those dates*. However, in Appendix A, the dates indicated (in the second row of the table) are the dates of effective transfer, and not the dates on which the ACRA searches were conducted. I elaborate on this at [191] below.

(1) Transfer to HYH

54 The first transfer was for 350,000 NCJV shares from HJS to HYH for consideration of S$525,000 ("the HJS-HYH Transfer").

55 Lanie had been instructed by one Jason Wong (a professional accountant for Next Capital Pte Ltd who monitored NCJV's accounts and reported to Wong[83]), and by Yamada on 23 October 2012 to facilitate the HJS-HYH Transfer.[84]

56 Accordingly, the following documentation was prepared and signed sometime in early November 2012:

(a) An NCJV Board of Directors' ("BOD") Resolution approving the HJS-HYH Transfer, signed by Wong, Yamada, and Yamamoto;[85]

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83 NE, 13/09/16, 31:10–31:15, 88:12–89:5.

84 AB2 772, 823.

(b) An HYH BOD Resolution approving the purchase of the shares, signed by Wong, Yamada, and Yamamoto;[86]

(c) An HJS BOD Resolution approving the sale of the shares, signed by Horie and Neo;[87] and

(d) A share transfer form executed by HJS (signed by Horie and Neo) in favour of HYH (signed by Yamada and Yamamoto).[88]

57 As the NCJV BOD Resolution mentioned above at [56(a)] was backdated to 15 October 2012 on Yamada's instructions,[89] the share transfer form and other BOD Resolutions were similarly backdated to 15 October 2012. Thus, on NCJV's register of members, HYH was reflected as a holder of 350,000 NCJV shares as of 15 October 2012.[90]

(2) Transfer to GIIS

58 The second transfer was for 750,000 NCJV shares from HJS to GIIS for consideration of S$1,125,000 ("the HJS-GIIS Transfer").

59 On 17 November 2012, Boo was informed by Yamada that GIIS would purchase 750,000 NCJV shares from HJS.[91]

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85 AB2 845–846.

86 AB2 849.

87 AB2 848.

88 AB2 847.

89 AB2 823.

90 AB4 2586, 2594.

91 AB2 900–901.

60 Accordingly, the following documentation was prepared and signed in late November 2012:

(a) An NCJV BOD Resolution approving the HJS-GIIS Transfer, signed by Wong, Yamada, and Yamamoto;[92]

(b) A GIIS BOD Resolution approving the purchase of the shares, signed by Yamada and Neo;[93]

(c) An HJS BOD Resolution approving the sale of the shares, signed by Horie and Neo;[94] and

(d) A share transfer form executed by HJS (signed by Horie and Neo) in favour of GIIS (signed by Yamada and Neo).[95]

61 All the above documents were dated 17 November 2012. On NCJV's register of members, GIIS was reflected as a holder of 750,000 NCJV shares as of 17 November 2012.[96]

62 The NCJV BOD Resolutions mentioned at [56(a)] and [60(a)] above stated that the board had resolved "that the old certificate in the name of the transferor be cancelled and a new certificate in the name of the transferee be issued and that the common seal be thereto affixed."[97] Therefore, in relation to the HJS-HYH Transfer, Share Certificate No 7 for 1 million NCJV shares in HJS's name *should have been* cancelled. In relation to the HJS-GIIS Transfer,

92 AB2 920–921.

93 AB2 924.

94 AB2 923.

95 AB2 922.

96 AB4 2586, 2591.

97 Wong Lock Chee's AEIC, Exhibit WLC-7, pp 93–94.

Share Certificate No. 6 for 1 million NCJV shares in HJS's name *should have been* cancelled.

63 However, at the time of each Transfer, neither Share Certificate No. 6 nor No. 7 was returned to NCJV for cancellation.[98] The relevant share certificates also had not been returned to NCJV for cancellation at the time when Lanie updated the requisite shareholder details with ACRA on 9 November 2012 (following the HJS-HYH Transfer)[99] and again on 30 November 2012 (following the HJS-GIIS Transfer).[100]

64 Also, as mentioned at [57] and [61] above, NCJV's register of members had been updated to show that these transfers had been effected such that HYH and GIIS were reflected as new shareholders of 350,000 and 750,000 shares respectively and HJS's shareholding was correspondingly reduced.

65 Furthermore, at the time of each Transfer, no new share certificates were issued in the transferees' names nor balance share certificates issued in the transferor's name. It transpired that these were eventually issued after 20 June 2013,[101] but backdated to match the date on the documentation and NCJV's register of members:

(a) In relation to the HJS-HYH transfer, Share Certificate No. 23 for 350,000 NCJV shares in HYH's name,[102] and Share Certificate No. 22

98 NE, 26/09/16, 11:25–12:1.

99 NE, 26/09/16, 23:25–24:23.

100 NE, 26/09/16, 54:23–55:7.

101 NE, 26/09/16, 92:24–93:4; Exhibit P19.

102 AB2 801.

for the balance 650,000 NCJV shares in HJS's name were issued eventually.[103] Each was backdated to 15 October 2012.

(b) In relation to the HJS-GIIS transfer, Share Certificate No. 25 for 750,000 NCJV shares in GIIS's name,[104] and Share Certificate No. 24 for the balance 250,000 NCJV shares in HJS's name were issued eventually.[105] Each was backdated to 17 November 2012.

The share transfers to various purchasers and sub-purchasers

66 Subsequent to the HJS-HYH and HJS-GIIS Transfers, a total of 2.95 million NCJV shares were transferred to various companies and individuals.

67 One was a transfer of 450,000 NCJV shares from GIIS to HYH.[106]

68 The remaining transfers (involving a total of 2.5 million NCJV shares) originated from HJS and HJK. These took place pursuant to sale and purchase agreements ("SPAs") entered into between 30 November 2012 and 1 April 2013 (both dates inclusive). These SPAs were as follows:

S/N	Abbreviation	Description
1	FGH SPA	SPA dated 30 November 2012 between FGH and GIIS, under which FGH agreed to purchase 500,000 NCJV shares from GIIS for consideration of S$990,000.[107]

103 AB2 800.

104 AB2 903.

105 AB2 902.

106 AB4 2567, 2570.

107 AB2 974–980.

2	AI SPAs	Two SPAs both dated 30 November 2012 between AI and GIIS, under which AI agreed to purchase a total of 500,000 NCJV shares from GIIS for consideration of S$990,000.[108]
3	Karna SPA	SPA dated 31 December 2012 between Karna and GIIS, under which Karna agreed to purchase 250,000 NCJV shares from GIIS for consideration of S$495,000.[109]
4	Muchsin SPAs	Two SPAs both dated 31 December 2012 between Muchsin and GIIS, under which Muchsin agreed to purchase a total of 500,000 NCJV shares from GIIS for consideration of S$990,000.[110]
5	E&S SPA	SPA dated 28 February 2013 between E&S and GIIS, under which E&S agreed to purchase 150,000 NCJV shares from GIIS for consideration of S$297,000.[111]
6	Ni SPA	SPA dated 28 February 2013 between Ni and GIIS, under which Ni agreed to purchase 350,000 NCJV shares from GIIS for consideration of S$693,000.[112]
7	CBF SPA	SPA dated 1 March 2013 between CBF and GIIS, under which CBF agreed to purchase 250,000 NCJV shares from GIIS for consideration of S$495,000.[113]

69 In each of the aforementioned SPAs, GIIS was named the vendor, and Yamada and Yamamoto as joint and several guarantors of certain returns to the respective purchasers. As can be seen, GIIS was named as the vendor of a total of 2.5 million NCJV shares in these SPAs even though it had become the

108 AB2 958–965; 966–973.

109 AB2 1064–1071.

110 AB2 1049–1055, 1056–1063.

111 AB2 1235–1241.

112 AB2 1227–1234.

113 AB2 1247–1252.

registered shareholder of only 750,000 shares on 17 November 2012, following the HJS-GIIS Transfer.

70 Boo was instructed by Yamada on 9 January 2013 and 14 February 2013 to prepare the necessary documentation for the abovementioned transfers of shares, and Boo in turn instructed Lanie to do so.[114]

71 These transfers (*ie*, the transfer from GIIS to HYH and the transfers pursuant to the SPAs listed at [68]) are diagrammatically represented in Appendix A. It is not necessary for me to set out the details of each transfer. However, I highlight the following points:

(a) Yamada, Yamamoto, and Wong signed an NCJV BOD Resolution dated 1 April 2013 by which they approved the aforementioned transfers.[115]

(b) Although the named vendor in each SPA was GIIS, not all of the share transfer forms were executed by GIIS in favour of the transferee. That would not have been correct since, as mentioned at [69], GIIS was the registered shareholder of only 750,000 NCJV shares at the material time. It transpired that the share transfer forms relating to most of these SPAs were in fact executed by HJS or HJK, instead of GIIS. I detail these as follows:

(i) FGH SPA: the share transfer form was executed by HJK, for 500,000 shares.[116]

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114 AB2 1085, 1165; NE, 26/09/16, 59:15–60:19; 67:10–68:24

115 AB2 1263–1264.

116 AB2 1270.

(ii) AI SPAs: the share transfer form was executed by HJK, for 500,000 shares.[117]

(iii) Karna SPA: there were two share transfer forms – one executed by HJK for 100,000 shares, and another by GIIS for 150,000 shares.[118] I refer to these as the "HJK-Karna Share Transfer Form" and "GIIS-Karna Share Transfer Form" respectively.

(iv) Muchsin SPAs: the share transfer form was executed by HJS, for 500,000 shares.[119]

(v) E&S SPA: the share transfer form was executed by GIIS, for 150,000 shares.[120]

(vi) Ni SPA: the share transfer form was executed by HJS, for 350,000 NCJV shares.[121]

(vii) CBF SPA: there were two share transfer forms – one executed by HJK for 200,000 shares, and another by HJS for 50,000 shares.[122]

(c) Again, none of the Original Share Certificates (*ie*, for shares registered in HJS's and HJK's names) was returned to NCJV for cancellation prior to the share transfers pursuant to the SPAs, nor at the

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117 AB2 1294.

118 AB2 1268–1269.

119 AB2 1273.

120 AB2 1267.

121 AB2 1295.

122 AB2 1271–1272.

time when Lanie updated the requisite shareholder details with ACRA on 16 April 2013.[123]

(d) Yet, NCJV's register of members was updated to show that these transfers had been effected such that each transferee was a new shareholder in NCJV as of 1 April 2013.[124] HJS's, HJK's, and GIIS's respective shareholdings in NCJV were correspondingly reduced (see Appendix A).

(e) Furthermore, at the time of each transfer, no new share certificates were issued in the transferees' names nor balance share certificates issued in the transferors' names. The relevant share certificates were eventually issued after 20 June 2013, but backdated to 1 April 2013.[125]

The plaintiffs make further repayment between June and August 2013

72 On 18 June 2013, Ms Kawai entered into a share assignment agreement with MKC and HJP. Under this agreement, Ms Kawai confirmed her agreement to assign her shares in a company known as MTK Servicer Co. Ltd ("MTK") to MKC. This assignment was intended to serve as payment towards the outstanding MKC Loans. MTK approved the assignment on 20 June 2013. MKC then credited a repayment of JPY 65,497,983 in favour of HJP in respect of the MKC Loans.[126] Additionally, around end July to early August 2013, the plaintiffs recovered a sum of JPY 339,562 from HJP and Kawai.[127] However, even with these repayments, the Loans were still not fully paid.

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123 AB2 1373.

124 AB4 2562–2563, 2567, 2570–2577.

125 AB2 1297–1305.

126 Hiroyoshi Akimoto's AEIC, paras 122–125.

More share transfers pursuant to sale and purchase agreements

73 It transpired that transfers of the NCJV shares were *still* taking place even in June and July 2013. These took place pursuant to the following SPAs:

S/N	Abbreviation	Description
1	Liu SPA	SPA dated 16 June 2013 between Liu and GIIS, under which Liu agreed to purchase 250,000 NCJV shares from GIIS for consideration of S$495,000.[128]
2	ASO SPA	SPA dated 30 June 2013 between ASO and HYH, under which ASO agreed to purchase 200,000 NCJV shares from HYH for consideration of S$390,000.[129]

74 In each of these SPAs, Yamada and Yamamoto were again the guarantors of certain returns to the respective purchasers. In the Liu SPA, GIIS was named as the vendor of a total of 250,000 NCJV shares. However, it will be recalled that GIIS had, by this time, transferred its entire previous shareholding of 750,000 NCJV shares away: GIIS transferred 450,000 shares to HYH, 150,000 shares to Karna, and 150,000 shares to E&S (see [67], [71(b)(iii)] and [71(b)(v)] above). Pursuant to those transfers on 1 April 2013, GIIS's shareholding as reflected in NCJV's register of members was correspondingly reduced to zero.[130] In other words, although GIIS was named as the vendor of 250,000 NCJV shares in the Liu SPA, it did not in fact hold any NCJV shares at the time. It should be noted that this was not the case for the ASO SPA as the named vendor of the 200,000 NCJV shares, HYH, was at the material time the registered holder of 800,000 NCJV shares. These shares

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127 Hiroyoshi Akimoto's AEIC, para 126.

128 AB2 1432–1439.

129 AB3 1523–1532.

130 AB4 2567.

had been previously transferred to HYH from HJS and GIIS (see [54] and [67] above).

75 Lanie was instructed by Jason Wong and Yamada on 14 June 2013 and 16 July 2013 respectively to prepare the necessary documentation for the transfers pursuant to the Liu and ASO SPAs.[131]

76 The transfers pursuant to the Liu and ASO SPAs are diagrammatically represented in Appendix A. Again, it is not necessary for me to set out the details of each transfer and I highlight only the following points:

(a) Yamada, Yamamoto, and Wong signed an NCJV BOD Resolution dated 17 July 2013 by which they approved the transfer of 200,000 NCJV shares to ASO,[132] and another dated 19 July 2013 by which they approved the transfer of 250,000 NCJV shares to Liu;[133]

(b) Although the named vendor in the Liu SPA was GIIS, the share transfer form was not executed by GIIS. That would not have been correct since, as mentioned at [74], GIIS did not hold any NCJV shares at the time. It transpired that the relevant share transfer form was executed by HYH in favour of Liu for 250,000 shares.[134] As for the ASO SPA, the relevant share transfer form for 200,000 NCJV shares in favour of ASO was executed by HYH, the named vendor in the ASO SPA.[135]

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131 Valena Lailanie De Guzman's AEIC, para 6; AB2 1430; AB3 1792.

132 AB3 1818–1819.

133 AB3 1835–1836.

134 AB3 1841.

135 AB3 1850.

(c) NCJV's register of members was updated to reflect these transfers such that Liu and ASO were new shareholders in NCJV as of 19 July 2013.[136] HYH's shareholding in NCJV was correspondingly reduced (see Appendix A).

(d) The share certificates issued in Liu's and ASO's names were each dated 19 July 2013.[137]

(e) Lanie updated the requisite shareholder details with ACRA on 29 July 2013.[138]

The present proceedings

Commencement of present proceedings

77 The plaintiffs' solicitors sent letters of demand titled "Claim by Infoworks Co. Ltd & M.K.C. Associates Co. Ltd" dated 16 August 2013 (collectively, the "Letters of Demand") to the following entities, for the attention of the following persons in their capacities as stated:

(a) HJS, for the attention of Neo (director and secretary) and Horie (director);[139]

(b) HJK, for the attention of "Director(s) and Secretar(ies)";[140]

(c) GIIS, for the attention of Yamada (director), Naganuma (director), Neo (director), and Boo (secretary);[141]

136 AB4 2570, 2578–2579.

137 AB3 1854–1855.

138 AB3 1868.

139 AB3 1947–1949.

140 AB3 1964–1966.

(d) HYH, for the attention of Toshiyuki Sato (director), Yamamoto (director), Yamada (director), Naganuma (director), Wong (director), and Neo (secretary);[142]

(e) E&S, for the attention of Yamada (director), Neo (director and secretary), Boo (secretary), and Ichikawa Satoru (director);[143]

(f) FGH, for the attention of Shiragami (director) and Mitani Masatoshi (secretary);[144]

(g) AI, for the attention of "Director(s) and Secretar(ies)";[145]

(h) CBF, for the attention of "Director(s) and Secretar(ies)";[146]

(i) Karna;[147]

(j) Muchsin;[148]

(k) ASO, for the attention of Isozaki Eiichi (director), Aso Iwao (director), and Ang Lee Lee (secretary);[149]

(l) Ni;[150] and

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141 AB3 1970–1972.

142 AB3 1976–1978.

143 AB3 1956–1958.

144 AB3 1950–1952.

145 AB3 1973–1976.

146 AB3 1967–1969.

147 AB3 1953–1955.

148 AB3 1980–1982.

149 AB3 1944–1946.

150 AB3 1983–1985.

(m) Liu.[151]

78 Broadly, each Letter of Demand informed the addressee of the following: that the plaintiffs had provided HJP with the Loans; that HJS and HJK had charged the NCJV shares originally registered in their names to the plaintiffs; that HJP had defaulted on the Loans; that the plaintiffs were the beneficial owners of the Shares and/or were entitled to enforce their security; that various share transfers were carried out without the plaintiffs' knowledge and/or consent; and that the addressee had been wrongfully transferred, or come into possession of, these shares having known or ought to have known of the plaintiffs' prevailing beneficial interests in the NCJV shares.

79 On 19 August 2013, Eiichi Isozaki of ASO emailed Yamada informing Yamada that he had received a Letter of Demand and sought an explanation.[152] Yamada responded on 20 August 2013, and excerpts from his email are replicated below:[153]

> First, I will explain the background.
>
> The company that received the complaint is a Japanese company, and a former major shareholder which held 3.2 million shares at its Singaporean and South Korean corporations [*ie*, HJS and HJK] when [HY Restaurant] started operating.
>
> I was told by that former shareholder that they wanted to exit and to sell all of their shares.
>
> …
>
> Those events led to us having a good relationship with that manager, and we have reached this point while building a great deal of trust with that manager.

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151 AB3 1959–1961.

152 AB3 2007.

153 AB3 2005–2006.

> The above shares were 65% of all the share and that former shareholder consented to selling those shares to our acquaintances and we handled a series of sales.
>
> Those were not direct transactions with that shareholder, and we took an approach of having our company's group corporation acquire shares once [*ie*, the BPA], and then having those shares acquired by you.
>
> …
>
> Our company's environment:
>
> For these shares, share certificates have been issued and registration is complete …
>
> Of course, we were unaware of the fact that former shareholder had placed a mortgage over the shares we held. (No mortgage procedures have been conducted.)

80 On 22 August 2013, Yamada, in his capacity as director of NCJV, addressed a letter to NCJV shareholders titled "Response to Letters of Demand issued by Rodyk & Davidson LLP on Behalf of Infoworks Co. Ltd and M.K.C. Associates Co. Ltd and Engagement of Shook Lin & Bok LLP".[154] I set out excerpts below:

> This letter, sent by Rodyk & Davidson LLP on behalf of [the plaintiffs] has alleged that:
>
> (a) [The plaintiffs] had collectively provided [HJP] with loans; and
>
> (b) As security for the provision of such loans, HJP had procured its subsidiaries to charge all their shares in [NCJV] to [the plaintiffs].
>
> Accordingly, demands have been made against a number of our shareholders to return their shares in [NCJV] to [the plaintiffs].
>
> …
>
> At present, we have engaged, Mr. David Chan of Shook Lin & Bok LLP, as our solicitor, to look into the matter and will vigorously defend on your behalf any proceedings that may be initiated against you, as bona fide purchasers, in respect of your shareholders in [NCJV].

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154 AB3 2051.

> …
>
> Finally, we would like to assure all shareholders that the Board of Directors is currently actively looking into the matter and will endeavour to resolve this dispute as soon as possible, the costs of which would be indemnified by [NCJV].

81 Subsequently on 4 November 2013, Yamada addressed another letter to NCJV shareholders titled "Re: Explanation on the English letter from RODYK, a law firm, regarding shares in NCJV and Lawyers of SHOOK LIN & BOK LLP who will represent shareholders and us in this case".[155] I set out excerpts below:

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155 AB4 2132.

> At first, we sincerely apologise that you might feel unpleased due to such wrong claim. As our shareholders have obtained the shares as bona fide third parties and fulfilled the necessary conditions up till now, please do not worry about this.
>
> …
>
> The borrower shown in the letter was a major shareholder at the time of the establishment of our company, and he helped us very much. From some time in 2012, he made several offers to us to borrow money on security of our shares or sell our shares for funding due to business funding needs, but he informed us that such transactions did not take place eventually. In such situation, to avoid the dissipation of the shares, we entered a share blanket purchase agreement with [GIIS] and [HYH] which are our group companies and transferred the shares to you, as new shareholders.
>
> …
>
> Until when I read the letter from RODYK and the court claim, our company had no way of knowing that he had borrowed money by charging our shares, because it was rather that he had asked us to sell the shares as such transaction was failed therefore, we really feel regrettable on such possible use.

More share transfers after the Letters of Demand were sent

82 However, even after the Letters of Demand were sent in August 2013, dealings with the Charged Shares continued. The transfers that were effected after the date of the Letters of Demand are described below in chronological order:

(a) Muchsin entered into a SPA dated 15 July 2013 with HYH. On Yamada's instructions,[156] Muchsin agreed to transfer 250,000 NCJV shares to HYH for consideration of S$495,000.[157] However, Muchsin subsequently executed a share transfer form dated 28 October 2013 for 250,000 NCJV shares, not in favour of HYH, but a company known as

156 Muchsin Ciputra Tjoe's AEIC, paras 8–10.

157 AB3 1787–1791.

Gao Ventures Pte Ltd ("Gao Ventures") for 250,000 NCJV shares.[158] This transfer was approved by an NCJV BOD Resolution (signed by Yamada, Yamamoto, and Wong).[159] Gao Ventures did not furnish consideration for this transfer. NCJV's register of members was updated to show that Gao Ventures was a new shareholder of 250,000 shares in NCJV as of 28 October 2013 while Muchsin's shareholding in NCJV was correspondingly reduced.[160] Thus, at the time of the proceedings, Muchsin held 250,000 of the Charged Shares.

(b) CBF entered into a SPA dated 30 November 2013 with HYH. CBF agreed to transfer 50,000 NCJV shares to HYH for consideration of S$50,000.[161] However, CBF subsequently transferred *not* 50,000, but 200,000 NCJV shares to HYH for consideration of S$396,000. CBF executed a share transfer form dated 28 October 2013 in favour of HYH, for 200,000 NCJV shares.[162] This transfer was approved by an NCJV BOD Resolution (signed by Yamada, Yamamoto, and Wong).[163] NCJV's register of members was updated to show that HYH's shareholding in NCJV had increased by 200,000 shares while CBF's was correspondingly reduced.[164] Thus, at the time of the proceedings, CBF held 50,000 of the Charged Shares.

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158 AB3 2095.

159 AB3 2094.

160 AB4 2576, 2580.

161 AB4 2145–2148.

162 AB3 2097.

163 AB3 2096.

164 AB4 2570, 2575.

(c) On 31 December 2013, Liu transferred 250,000 NCJV shares to Hua Lien Pte Ltd ("Hua Lien"). Hua Lien is wholly-owned by Liu and is her investment holding company.[165] There was no SPA involved. This transfer was approved by an NCJV BOD Resolution signed by Yamada and Yamamoto.[166] It was not clear when NCJV's register of members was updated. However, the requisite shareholder details were updated with ACRA subsequently, showing that from 27 June 2014, Hua Lien was the registered shareholder of 250,000 NCJV shares.[167] Thus, at the time of the proceedings, Liu did not hold any NCJV shares.

(d) On 28 October 2014, HYH transferred 397,000 NCJV shares to HYWW Holdings Pte Ltd ("HYWW"). There was no SPA involved. This transfer was approved by an NCJV BOD Resolution signed by Yamamoto.[168] Again, it is not clear when NCJV's register of members was updated but the requisite shareholder details were updated with ACRA subsequently: from 12 April 2014, HYH was no longer a registered shareholder of NCJV.[169] Thus, at the time of the proceedings, HYH did not hold any NCJV shares.

(e) On 28 October 2014, E&S transferred 150,000 NCJV shares to HYWW. There was no SPA involved. This transfer was approved by an NCJV BOD Resolution signed by Yamamoto.[170] Again, it is not clear when NCJV's register of members was updated but the requisite

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165 Liu Pingfang's AEIC, para 13.

166 AB4 2170.

167 AB4 2211.

168 AB4 2250–2251, 2253.

169 PBD 2646–2648.

170 AB4 2250.

shareholder details were updated with ACRA subsequently: from 12 April 2014, E&S was no longer a registered shareholder of NCJV.[171] Thus, at the time of the proceedings, E&S did not hold any NCJV shares.

83 Other recipients of the Charged Shares entered into share swap agreements with Hide Yamamoto Dining Pte Ltd ("HY Dining"), each dated 15 December 2014 (collectively, the "Share Swap Agreements"). The details are set out below:

(a) FGH agreed to transfer 500,000 NCJV shares to HY Dining in exchange for S$990,000 Series B Preference Shares in HY Dining.[172] Thus, FGH no longer holds any NCJV shares.

(b) AI agreed to transfer 500,000 NCJV shares to HY Dining in exchange for S$900,000 Series A Preference Shares in HY Dining.[173] Thus, AI no longer holds any NCJV shares.

(c) Karna agreed to transfer 250,000 NCJV shares to HY Dining in exchange for S$495,000 Series A Preference Shares in HY Dining.[174] Thus, Karna no longer holds any NCJV shares.

(d) Ni agreed to transfer 350,000 NCJV shares to HY Dining in exchange for S$693,000 Series A Preference Shares in HY Dining.[175] Thus, Ni no longer holds any NCJV shares.

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171 AB4 2646–2648.

172 AB4 2311–2327.

173 AB4 2277–2293.

174 AB4 2328–2344.

175 AB4 2345–2361.

Amount outstanding under the Loan Agreements

84 As of the first day of trial on 29 August 2016, the total amount outstanding under the Loan Agreements was JPY 395,304,220 (or approximately S$5,305,302.92 on the exchange rate of JPY 1 to S$0.013), after taking into account accrued interests and part repayments made.[176]

The plaintiffs' case

85 The plaintiffs' case varied significantly across the course of the proceedings, from their statement of claim, to their closing submissions, and then to their further submissions.

86 In their statement of claim, the plaintiffs relied on several causes of action against the various defendants and also sought multiple forms of relief. However, some of the causes of action originally pleaded and reliefs originally sought appear to have been abandoned in the plaintiffs' closing submissions. For example, the plaintiffs are no longer proceeding against HJP for breach of contract and are not seeking repayment of the outstanding loan amount, or continued interest and late charges on that outstanding amount.[177] The plaintiffs are also no longer seeking a declaration that the beneficial interest in the Charged Shares remains with them.[178]

87 Based on their closing submissions, the plaintiffs' three causes of action against the various defendants are:[179]

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176 Plaintiffs' Opening Statement, para 3(f).

177 Statement of Claim (Amendment No. 2) ("SOC"), Prayer 1.

178 SOC, Prayer 2.1.

179 Plaintiffs' Closing Submissions dated 31 October 2016 ("PCS"), para 412.

(a) Yamada, Wong, Neo, and/or Boo are liable for dishonest assistance of breach of trust by HJS and HJK;

(b) HYH, FGH, AI, CBF, Karna, Muchsin, Ni, and/or Liu are liable as knowing recipients of the Charged Shares received by them; and

(c) In respect of CBF, Muchsin, and Liu who continue to retain relevant Charged Shares, they are liable to return the Charged Shares and the benefits received whilst in possession of these shares, even if they are not liable in knowing receipt. According to the plaintiffs, this claim arises as a consequence of the plaintiffs' equitable interest in the Charged Shares which "entitles the [p]laintiffs to maintain a claim in specie over the Charged Shares or to claim against the recipient of the Charged Shares for the value thereof".[180] In their further submissions (tendered subsequent to their closing submissions), the plaintiffs referred to this cause of action as a claim based on "general property principles".[181] For ease of reference, I will refer to this cause of action as the "equitable proprietary claim".

88 As per their closing submissions, the plaintiffs seek the following reliefs:[182]

(a) Against HYH:

(i) the sum of S$390,000 received for the sale of 200,000 NCJV shares to ASO under the ASO SPA; and

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180 PCS, para 300.

181 Plaintiffs' Further Submissions dated 13 September 2017 ("PFS"), paras 72–74.

182 PCS, paras 413–414.

(ii) the value of the remaining 800,000 NCJV shares that HYH received, such value to be assessed (subject to the reduction of 250,000 Charged Shares if Liu is held liable);

(b) Against FGH, the value of the 500,000 NCJV shares that it received under the FGH SPA, such value to be assessed;

(c) Against AI, the value of the 500,000 NCJV shares that it received under the AI SPAs, such value to be assessed;

(d) Against CBF, the value of the 50,000 NCJV shares that it received under the CBF SPA, such value to be assessed; but if this court does not find CBF liable for knowing receipt, the plaintiffs seek the transfer of the 50,000 NCJV shares currently held in CBF's name into the plaintiffs' name (or that of their nominee(s));

(e) Against Karna, the value of the 250,000 NCJV shares that he received under the Karna SPA, such value to be assessed;

(f) Against Muchsin, the value of the 500,000 NCJV shares that he received under the Muchsin SPAs, such value to be assessed; but if this court does not find Muchsin liable for knowing receipt, the plaintiffs seek the transfer of the 250,000 NCJV shares currently held in Muchsin's name into the plaintiffs' name (or that of their nominee(s)), and that Muchsin be liable to pay S$70,950 to the plaintiffs, being the benefits received by him whilst he was in possession of the 500,000 NCJV shares,[183] and interest;

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183 Muchsin Ciputra Tjoe's AEIC, para 15.

(g) Against Ni, the value of the 350,000 Charged Shares that she received, such value to be assessed;

(h) Against Liu, the value of the 250,000 Charged Shares that she received, such value to be assessed; but if this court does not find Liu liable for knowing receipt, the plaintiffs seek the transfer of the 250,000 Charged Shares currently held in Hua Lien's name into the plaintiffs' name (or that of their nominee(s)), and that Liu be liable to pay S$24,750 to the plaintiffs, being the benefits received by her whilst she was in possession of the Charged Shares,[184] and interest;

(i) Against Yamada, Wong, Neo, and Boo, to be jointly and severally liable for the value of the 3.3 million Charged Shares, such value to be assessed;

(j) Interests and costs to be determined by the Court; and

(k) Such consequential orders as may be necessary against NCJV.

89 For completeness, I should note that apart from the changes to the plaintiffs' causes of action and reliefs sought between their statement of claims and their closing and further submissions, the manner in which the plaintiffs have framed and pleaded their case to meet these causes of action have also changed, in particular between their closing submissions and their further submissions. These changes in the plaintiffs' case will be explained and explored below (see [159] and [275] below).

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184 Liu Pingfang's AEIC, para 12.

The issues

90 Before setting out the specific issues to be dealt with in this judgment, I first discuss the context of these issues and the manner in which I propose to deal with them.

91 The plaintiffs raise three causes of action: (a) dishonest assistance, (b) knowing receipt, and (c) an equitable proprietary claim in respect of some of the Charged Shares. As will be seen (see [182] and [284] below), the first two causes of action are premised on there being a trust or a fiduciary relationship between the plaintiffs on the one hand, and HJS and HJK on the other hand, in respect of the Charged Shares. The first section of this judgment will therefore explore the various arguments raised by the plaintiffs in relation to the existence of such a trust or fiduciary relationship. If no such trust or fiduciary relationship exists, the plaintiffs' first two causes of action must fail from the outset.

92 Even assuming that there is a trust or fiduciary relationship, the other elements of the causes of action in dishonest assistance and knowing receipt respectively and the defences thereto must also be addressed in order to determine whether the plaintiffs have established either of their first two causes of action. These issues are discussed in the second section of this judgment.

93 The third section of the judgment considers the plaintiffs' third cause of action which is framed as an equitable proprietary claim for the return of the relevant Charged Shares which are in the hands of CBF, Muchsin, and Liu.

94 Based on the overview stated above, the issues to be considered in this case are as follows:

(a) Whether HJS and HJK held the Charged Shares on trust for the plaintiffs, or alternatively, whether HJS and HJK owe fiduciary obligations to the plaintiffs in relation to the Charged Shares. In this regard, the constitutive sub-issues include:

(i) Based on the plaintiffs' closing submissions, whether the plaintiffs' security interest in the Charged Shares still subsists; if so, whether that security interest can properly be characterised as an equitable mortgage; if so, whether a trust relationship arises by mere virtue of an equitable mortgage (collectively, "Issue 1").

(ii) Whether the plaintiffs can rely on their case that a trust or a fiduciary relationship arose based on the alleged unconscionable conduct of HJS and HJK ("Issue 2").

(b) Even assuming that there is a trust or a fiduciary relationship in respect of the Charged Shares between the plaintiffs on the one hand, and HJS and HJK on the other hand, the following issues arise:

(i) Whether the other elements of the claim for dishonest assistance of breach of trust against Wong, Neo, and/or Boo are satisfied ("Issue 3").

(ii) Whether the other elements of the claim for knowing receipt are satisfied in respect of HYH and/or the Sub-purchasers; and in this connection, it is relevant to consider whether HYH and/or any of the Sub-purchasers are *bona fide* purchasers of the relevant Charged Shares for value without notice of the plaintiff's interest therein (if any) (collectively, "Issue 4").

(c) If the plaintiffs fail in their claim for knowing receipt against CBF, Muchsin, and/or Liu, whether the plaintiffs have established their alternative equitable proprietary claim for the return of the relevant Charged Shares that remain with CBF, Muchsin, and/or Liu ("Issue 5").

95 The final section of the judgment deals with certain other claims and proceedings that do not fall neatly within the sections and issues set out above.

Issue 1: Whether the plaintiffs have a subsisting security interest in the Charged Shares and if so, whether it gives rise to a trust

96 First, I consider the plaintiffs' case as developed in their closing submissions. In the closing submissions, the plaintiffs' case was that there existed a trust over the Charged Shares held by HJS and HJK for the plaintiffs' benefit. This proposition had three conjunctive premises, all of which must be satisfied in order for the proposition to stand: (a) that the plaintiffs have a subsisting security interest in the Charged Shares; (b) that the security interest should be properly characterised as an equitable mortgage and not an equitable charge; and (c) that a trust relationship arises from an equitable mortgage by virtue of the separation of legal and beneficial interests. I turn now to examine each of these premises in turn.

Whether the plaintiffs' security interest in the Charged Shares still subsists

97 The first issue of whether the plaintiffs have a valid and subsisting security interest in the Charged Shares is fundamental because the plaintiffs' claims in dishonest assistance, knowing receipt, and even their equitable proprietary claim for the return of the Charged Shares, all rested on the premise that they have such an interest in the Charged Shares. This turns on several

sub-issues, including: (a) the terms and construction of the SCAs creating the plaintiffs' security interests in the Charged Shares, (b) the terms and construction of the Supplemental Deeds which purport to extend the period of validity of those security interests and whether they bind the parties named therein, and (c) the construction and adequacy of the pleadings.

What interpretation should be accorded to each version of cl 5

98 I turn first to the SCAs. The period of validity for each of the SCAs is governed by cl 5 of the respective SCAs. Clause 5 of the HJK-IW SCA reads as follows:[185]

> 5. TERM
>
> The term of this Deed is from the date hereof to 31 December 2012 unless otherwise terminated earlier in accordance with the provisions of the Loan Agreement and/or this Deed.

99 Clause 5 of the HJS-IW SCA reads as follows:[186]

> 5. TERM
>
> The commencement date of this Deed is the date hereof and the expiry date is 31 December 2012 unless otherwise discharged or terminated earlier in accordance with the provisions of the Loan Agreement and/or this Deed.

100 In my view, despite the slight difference in wording, cll 5 of the HJS-IW and HJK-IW SCAs (the "Infoworks SCAs") are identical in substance. I refer to this version of cl 5 as the "short version".

101 On the other hand, cll 5 of the HJS-MKC SCA and HJK-MKC SCA (the "MKC SCAs") are identical and each state:[187]

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185 AB1 456.

186 AB1 492.

> 5. TERM
>
> The term of this Deed is from the date hereof to 31 December 2012 unless otherwise terminated earlier in accordance with the provisions of the Loan Agreement and/or this Deed.
>
> The Security created under this Deed shall be a continuing security for payment of all moneys from time to time owing by [HJP] to MKC, and shall not be considered as satisfied by any partial or intermediate payment or satisfaction thereof, but shall be a continuing security and shall extend to cover all or any sum or sums of money which shall for the time being constitute the balance due or owing by [HJP] to MKC and shall remain in full force and effect until the repayment in full and the Security ceases to be available.

102 I refer to cl 5 of the MKC SCAs as the "long version". I add that no one explained how these different versions came about.

103 In respect of the short version of cl 5 found in the Infoworks SCAs, its effect is clear. As the underlying agreement ceases after 31 December 2012, the security created under that agreement also ceases to exist after that date. It is admittedly unusual and unfavourable to the plaintiffs as security holders that the SCAs have a fixed expiry date that is independent of the repayment of the underlying debt, but that is what the provision states.

104 The long version found in the MKC SCAs is more problematic. The first paragraph provides that the MKC SCAs expire on 31 December 2012. However, the second paragraph provides that the security created under each MKC SCA is a "continuing security for payment of all moneys from time to time owing by [HJP] to MKC" and remains "in full force and effect until the repayment in full and the Security ceases to be available". There is a *prima facie* inconsistency between these two paragraphs: if the SCA itself has expired, how

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[187] AB1 468, 480.

is it possible that the "continuing security" created under the SCA can continue "in full force and effect until the repayment in full" if HJP makes repayment only after 31 December 2012?

105 When faced with seemingly inconsistent contractual provisions, the court's approach is to reconcile these provisions if that result can conscientiously and fairly be achieved (per Steyn J in *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 1 All ER 81 at 89, upheld on appeal in *Pagnan SpA v Tradax Ocean Transporation SA* [1987] 3 All ER 565). However, if the inconsistency cannot be resolved by ordinary processes of construction, the court will attempt to discern the overall intentions of the parties from the remainder of the contract and determine which portion of the contract should be given effect to (see Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at paras 4.12–4.13).

106 In my view, the two paragraphs of the long version of cl 5 can be reconciled by adopting a contextual approach to contractual interpretation. The proper interpretation to be accorded to the long version of cl 5 is this: the continuing security created under each MKC SCA subsists until repayment in full, or until 31 December 2012 which is the contractually stipulated date of expiry of the SCA, whichever is the earlier date.

107 This interpretation is supported by cl 6.1 of the MKC SCAs, both of which read as follows:[188]

> 6.1 Final Redemption
>
> Upon the full and irrevocable satisfaction by [HJP] of the Secured Obligations *prior to or on the termination of this Deed,*

[188] AB1 469, 480–481.

> MKC shall release, reassign or discharge (as appropriate) the shares from the charge at the request and cost of the Chargor.
>
> [emphasis added]

108 What does the reference to "the termination of this Deed" in cl 6.1 mean? Looking at the long version of cl 5, the term of the deed is up to 31 December 2012 unless otherwise terminated earlier. Therefore, cl 6.1 makes it clear that repayment in full was contemplated to take place either "prior to or on" 31 December 2012. It appears that the parties did not expect repayment of the Loans to take place after 31 December 2012; no mention was made about redemption of the security thereafter. This buttresses the conclusion that the parties' intention was indeed for the MKC SCAs, and the security interests created thereunder, to expire on 31 December 2012. Accordingly, the long version of cl 5 should be interpreted as providing that the security interests created under the MKC SCAs subsist only until 31 December 2012 at the latest, rather than for an indeterminate and indefinite period until repayment in full.

109 Such a construction gives rise to an unusual state of affairs again. A lender takes security to safeguard its interests in the event that the borrower defaults on its repayment obligations. A security interest that subsists only for a fixed period of time is very disadvantageous to the lender if it expires upon a certain fixed date as the lender may not have received payment by that date. One would therefore have expected the plaintiffs to avoid any fixed date of expiry for its security documentation. This is particularly so in light of the fact that the SCAs were entered into after HJP had *already* defaulted on its initial repayment obligations under the Infoworks Loan. It will be recalled that HJP was supposed to repay JPY 63 million on 31 May 2012, but failed to do so then (see [21] above). The plaintiffs must have been well aware of this default when they entered into the SCAs on 14 June 2012. Yet, based on the documents, they

apparently agreed to a security interest that could potentially expire before repayment in full.

110 However, notwithstanding this unusual state of affairs, I am of the view that that is the correct construction for the long version of cl 5 which, as mentioned at [103] above, is also the construction of the short version of cl 5. In other words, whether based on the long or the short versions of cl 5 of the SCAs, the plaintiffs' security interest in the Charged Shares ceased to subsist after 31 December 2012.

Whether cl 5 of each SCA was effectively amended by the Supplemental Deeds

111 In their closing submissions, the plaintiffs suggested that the effect of cl 5 of the SCAs was not the end of the matter. They relied on the Supplemental Deeds, which had been executed by Horie on behalf of HJS and HJK, and returned to the plaintiffs on 22 January 2013 (see [47]–[48] above). Save for the names of the security holder and the definition of the "Share Charge", cl 3 of the four Supplemental Deeds are identical in substance. They each read as follows:[189]

> 3. AMENDMENT TO THE SHARE CHARGE
>
> The Parties agree that with effect from 31 December 2012, Clause 5 of the Share Charge shall be deleted in its entirety and replaced with the following:
>
> 5. TERM
>
> The Security created under this Deed shall be a continuing security for payment of all moneys from time to time owing by [HJP] to [MKC or Infoworks], and shall not be considered as satisfied by any partial or intermediate payment or satisfaction thereof, but shall be a continuing security and shall extend to cover all or any sum or sums of money which shall for the time being constitute the balance due or owing by [HJP] to [MKC or

189 AB2 1172, 1180, 1188, 1196.

> Infoworks] and shall remain in full force and effect until the repayment in full and the Security ceases to be available.

112 The plaintiffs argued that cl 3 of the four Supplemental Deeds amended cl 5 of each of the four SCAs by deleting the fixed expiry date in the SCAs.[190] Thus, the SCAs continue to have full force and effect, and the plaintiffs' security interest created thereunder continues to subsist for an indeterminate period until HJP makes repayment in full.

113 I agree that if the amendment were effective, the SCAs would continue to subsist until terminated by agreement or by full and irrevocable satisfaction. The terms "continuing security" and "repayment in full" should be given their meanings as ordinarily understood. The deletion of the fixed expiry date in cl 5 would also mean that cl 6.1 of the SCAs, which refers to the satisfaction of the secured obligations "prior to or on the termination of this Deed", should no longer be read in a restrictive manner to mean "prior to or on" 31 December 2012. Rather, "termination" would take place either by agreement or by full and irrevocable satisfaction and until then, the SCAs would continue to subsist.

114 However, the plaintiffs only pleaded the SCAs and did not mention the Supplemental Deeds in their statement of claim. Neither did they plead that the validity of the SCAs had been extended by the Supplemental Deeds. The Supplemental Deeds were mentioned only in evidence and in the closing submissions of the plaintiffs. Accordingly, I am of the view that the plaintiffs are not entitled to rely on the Supplemental Deeds. That being the case, as the SCAs expired on 31 December 2012, the plaintiffs' security interest in the Charged Shares no longer subsists. Therefore, insofar as the plaintiffs' claims

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190 PCS, para 38.

are premised on their having at least a security interest in the Charged Shares, such claims must fail from the outset.

115 Even if the plaintiffs' pleadings do not preclude the plaintiffs from relying on the Supplemental Deeds, there is a further obstacle. The Supplemental Deeds had only been executed by a representative of the chargors (Horie, and witnessed by Kawai), but not by any representative of the chargees (*eg*, Akimoto or Sato),[191] even though the Supplemental Deeds were between the chargors and the chargees and the format of the documents suggested that the Deeds were supposed to be executed by both sides.

116 However, the plaintiffs argued that the Supplemental Deeds nonetheless have legal effect, relying on the sole authority of *Wayne Edward John Streat v Fantastic Holdings Limited* [2011] NSWSC 1097 ("*Wayne Edward*").

117 The facts of *Wayne Edward* are these. The defendant had been the plaintiff's tenant since 1 July 2002. From September 2010, parties commenced negotiations for a new lease. Most of these negotiations took place in September and October 2010 over emails. On 20 January 2011, the plaintiff sent the defendant a formal lease document embodying the terms proposed by the defendant on 20 October 2010, as well as other standard terms that were identical to or materially the same as the existing lease. The defendant executed the lease and returned it to the plaintiff on 1 March 2011. However, the plaintiff did not execute the lease. Subsequently, the plaintiff attempted to withdraw from the lease. The defendant sought an order for specific performance. In response, the plaintiff contended that the parties had not intended to be bound by the lease until both parties had executed it.

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191 NE, 02/09/16, 43:3–44:3.

118 The New South Wales Supreme Court observed that in determining whether the parties intended not to be bound until execution by both parties, it was necessary to assess "the objective intention of the parties as disclosed in their correspondence and communications viewed in light of the subject matter and the surrounding circumstances" (see *Wayne Edward* at [11]).

119 The court found that by 1 March 2011, if not also by 20 January 2011, the parties had come to an agreement on all of the terms of the lease. No terms remained for further negotiation, and nothing remained outstanding other than execution. When the plaintiff provided the defendant with the lease document, it was making a final offer in a form capable of acceptance, leaving nothing for further negotiation. The defendant's subsequent execution of the lease and return of it to the plaintiff signified its unqualified acceptance of that offer. In such circumstances, "a reasonable bystander would regard the due execution of the document by the lessor as a formality; whose inevitable likelihood went without saying": *Wayne Edward* at [13]. Thus the court inferred from the objective facts that the parties would have regarded themselves bound by the terms of the lease document that had been executed by the defendant and returned to the plaintiff.

120 I would caution against applying such an approach in a mechanistic manner. The offer and acceptance analysis may be simplistic. It does not follow that when a party sends a document to be signed by the counter-party and the counter-party signs it without objection, there would necessarily be an offer and acceptance constituting an agreement without the need for the first party to sign the agreement. Indeed the more persuasive view may be that the signature of the counter-party is the offer and the signature of the first party, if provided, would constitute the acceptance.

121 Further, in the context of commercial relationships, I would have thought that the parties to a written agreement would normally expect each party to sign that agreement in order for it to come into effect and be binding on all the parties. There is no evidence to suggest a departure from this expectation at the time Horie (representing the chargors, HJS and HJK) signed the Supplemental Deeds. The decision in *Wayne Edward* should be confined to its facts.

122 After closing submissions were exchanged, the parties in the present case were invited to make further submissions on the relevance of the Scottish case of *W S Karoulias, SA Pursuer v The Drambuie Liqueur Co Ltd (No.2)* 2005 SCLR 1014 ("*Karoulias*").

123 In *Karoulias*, the plaintiff brought an action seeking specific implementation of an exclusive distribution agreement that had been allegedly concluded with defendant on 5 February 2003. The plaintiff's basis for this was the fact that the plaintiff had sent an email to the defendant on 5 February 2003, in response to a final draft agreement sent by the defendant. That email stated: "Many thanks for the above final draft which is ok with thanks from us. So pls. send us two copies for signing." However, the defendant never sent the signing copies to the plaintiff and the agreement ultimately remained unsigned by both parties (*Karoulias* at [8]).

124 The court held that the parties had reached *ad idem* on 5 February 2003 in the sense that there was nothing further to be discussed or agreed. However, the court held that there was nonetheless no *binding* agreement because the parties did not intend to be bound by the agreement until it had been formally executed. In arriving at this conclusion, the court evaluated the way in which the parties had conducted their contractual dealings in the past, and observed

that they regulated their contractual arrangements with a significant degree of formality. The court had before it three written agreements between the parties dating back to 1990, all of which had been signed by both sides. From this, the court noted that "[t]here was certainly nothing in the way that the parties had dealt with each other, in the past, to lead [the plaintiff] to believe that they would consider themselves bound before formal execution of the relevant agreement" (see *Karoulias* at [50]).

125 I agree with the proposition stated in *Karoulias* at [50] that the question of whether there is a binding agreement without execution by one party depends on whether it was the intention of both sides that execution by that party is not necessary.

126 In the present case, the parties' past contractual dealings makes clear that they had consistently chosen to regulate their contractual arrangements with a significant degree of formality. There were at least 20 agreements or legal documents which preceded 22 January 2013 (the date that the Supplemental Deeds were entered into) that were in evidence before this court. All of these agreements or legal documents had been formally executed by either the first or second plaintiff on the one hand, and either a member of the Honjin Group (comprising the first, second and third defendants) or Kawai (the beneficial owner of the Honjin Group) on the other. These 20 documents, which included the four SCAs, were set out in FGH's further reply submissions at para 29.[192] It is not necessary for me to reproduce the entire list here. It suffices to say that these 20 agreements, which spanned the period from June 2010 to June 2012, demonstrated that the plaintiffs and the Honjin Group had a clear and consistent practice of formally executing agreements.

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192 D7's Further Reply Submissions dated 25 September 2017 ("D7 FRS"), para 29.4.1–29.4.20.

127 Insofar as the plaintiffs argue that the Supplemental Deeds are binding despite the lack of execution by both sides, the burden is on them to show that parties had intended to depart from this practice of formally executing agreements. In my view, they have not discharged this burden. The plaintiffs have not shown that the parties had intended, at the time the Supplemental Deeds were entered into, to treat the Supplemental Deeds any differently from the 20 agreements or legal documents that preceded them.

128 In fact, it appears that the objective evidence contradicts the plaintiffs' case. The Supplemental Deeds had been prepared by the plaintiffs, apparently with legal assistance from Rajah & Tann Singapore LLP. Akimoto emailed Horie on 18 January 2013, attaching drafts of the four Supplemental Deeds. In his cover email, Akimoto requested Horie to examine the drafts attached and told Horie that the plaintiffs "[would] like to have signatures on this agreement". Thus, he would "like to visit [Horie] to explain the contents and discuss the future before signing, if possible."[193] In my view, this strongly suggests that, at least, the plaintiffs had no intention of departing from the practice of both sides having to formally execute each agreement between them for that agreement to be binding.

129 There is another point to be made. The plaintiffs argued that equity treats as done what ought to be done: all that was left for them to do was to sign on the Supplemental Deeds, and there was no uncertainty at any time as to the subject matter of the SCAs or the Supplemental Deeds. Thus, the Supplemental Deeds should be considered binding even if the plaintiffs did not sign them.[194] This argument does not add anything to *Wayne Edward* because it does not

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193 AB2 1130.

194 Plaintiffs' Reply Submissions dated 28 November 2016 ("PRS"), para 51(d).

adequately answer the question as to what is meant by "ought to be done". Furthermore, if the equitable maxim is indeed applicable in the manner suggested by the plaintiff, it must mean that so long as the counter-party signs a document received from the first party, a contract would *necessarily* be concluded and binding at that time without the first party countersigning it. That, in my view, is too broad a legal proposition to be correct.

130 In my view, where the party who has not executed the contract is alleging that the contract is nonetheless effective and binding, equity will intervene to assist in a limited number of ways. The first is through the doctrine of part performance: despite the parties' failure to comply with the requisite formalities in executing the contract, equity may intervene if the party who alleges that the contract is binding has partly-performed his obligations under the contract. However, the plaintiffs did not plead part performance and it was never part of their case.

131 The second manner in which equity may intervene is through the doctrine of estoppel by convention. As set out in *Singapore Telecommunications v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 at [28], estoppel by convention arises where the parties to a transaction act on an assumed state of affairs, the assumption being one which both parties share or one that is made by one party and acquiesced in by the other. If these requirements are satisfied then the parties are precluded from denying the truth of that assumption if it would be unjust or unconscionable to allow them (or one of them) to go back on it. The plaintiffs appear to allude to this in their further submissions: it was argued that because HJS and HJK had never sought the return of the Charged Shares after 31 December 2012, this was a "clear acknowledgment" on their part that the plaintiffs were entitled to retain the Charged Shares until the Loans have been fully repaid.[195]

132 It is true that neither HJS nor HJK had asked the plaintiffs to return the Original Share Certificates which they had delivered to the plaintiffs on 14 June 2012. It seems to me that if HJS and HJK had truly thought that the plaintiffs' security interests in the Charged Shares had expired, they would have made such a request of the plaintiffs. To the contrary, HJS and HJK signed and delivered the Blank NCJV Share Transfer Forms to the plaintiffs on 22 January 2013 (see [49] above). This suggests that HJS and HJK thought that the plaintiffs' security interests under the SCAs still subsisted even after 31 December 2012. However, again the plaintiffs did not specifically plead that HJS's and HJK's conduct subsequent to 31 December 2012 gave rise to an estoppel by convention. Therefore, they would have been precluded from relying on this estoppel. As the High Court in *Sarah Ellen Mulholland v Roger Philip Edmonds* [1998] SGHC 8 observed (at [17], citing Edward Bullen *et al*, *Bullen & Leake & Jacob's Precedents of Pleadings* (Sweet & Maxwell, 13th Ed, 1990) at p 1148):

> Every estoppel must be specifically pleaded, not only because it is a material fact, but also because it raises matters which might take the opposite party by surprise, and usually raises issues of fact not arising out of the preceding pleadings. … It is not, however, necessary to plead estoppel in any special form so long as the matter constituting the estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer. … On the other hand, where a party omits to plead the defence of estoppel, when he has the opportunity of doing so, he cannot thereafter rely on it.

133 To summarise, my findings above are as follows:

(a) Based on the proper interpretation of both the short and long versions of cl 5, the plaintiffs' security interest in the Charged Shares

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195 PFS, para 37.

ceased to subsist after 31 December 2012 because the SCAs had expired as of that date.

(b) The plaintiffs are not entitled to rely on the Supplemental Deeds to argue that their security interests in the Charged Shares under the SCAs were extended beyond 31 December 2012 because they did not plead the existence of the Supplemental Deeds, let alone their effect on the SCAs.

(c) In any event, even if the plaintiffs were entitled to raise the Supplemental Deeds for the above proposition, the Supplemental Deeds were not binding on the parties thereto because the plaintiffs did not sign the same.

134 Accordingly, the plaintiffs do not have any subsisting security interest in the Charged Shares at present. Since the plaintiffs' causes of action in dishonest assistance, knowing receipt, and their equitable proprietary claim for the return of the Charged Shares are all premised on the subsistence of their security interest in the Charged Shares, their claims necessarily fail at the outset.

Whether the plaintiffs' security interest in the Charged Shares is an equitable mortgage or an equitable charge

135 However, even assuming that the plaintiffs *do* have a subsisting security interest in the Charged Shares, the plaintiffs have to establish that they have a beneficial interest (in the trust sense) in the Charged Shares. This would raise the question whether the plaintiffs' security interest should be properly characterised as an equitable mortgage or an equitable charge. However, I do not propose to delve substantively into this issue because even if I were to

assume that it were an equitable mortgage, that would not without more give rise to a trust relationship, as I elaborate on below.

Whether a trust relationship arises by mere virtue of the equitable mortgage

136 This brings me to the third premise upon which the plaintiffs argue that a trust relationship exists between them and HJS and HJK in respect of the Charged Shares: that such a trust relationship arises by mere virtue of the equitable mortgage (which I assume to be) subsisting between the parties.

137 I first set out some basic legal principles relating to mortgages. Broadly speaking, there are two kinds of mortgages – legal and equitable. A legal mortgage over a subject property involves a transfer of legal *and* equitable ownership from the mortgagor to the mortgagee, subject to the mortgagor's retained equity of redemption. In contrast, for an equitable mortgage, only the equitable ownership of the subject matter of the security is transferred to the mortgagee; legal ownership as well as the equity of redemption remain with the mortgagor (William Gough, *Company Charges* (Butterworths, 2nd Ed, 1996) ("*Gough*") at pp 16–18). An equitable mortgage can arise in various situations, including: (a) where the parties intend to create a legal mortgage but fail to comply with the necessary formalities to transfer the legal title in the property; (b) where there is an agreement to give a legal mortgage in the future over the asset in question; or (c) where the mortgagor merely had an equitable interest and could therefore only transfer an equitable interest (see Hugh Beale *et al*, *The Law of Security and Title-based Financing* (Oxford University Press, 2nd Ed, 2012) at para 6.07).

138 The plaintiffs argued that because the SCAs created an equitable mortgage over the Charged Shares, the legal and equitable ownership in the

Charged Shares had separated. HJS and HJK therefore held the Charged Shares on trust for the plaintiffs. However, the plaintiffs were unable to cite any authority that stands directly for the proposition that a trust relationship arises between an equitable mortgagor and an equitable mortgagee in respect of the mortgaged property merely by virtue of that equitable mortgage. The plaintiffs first pointed to *Walter Woon on Company Law* (Tan Cheng Han, ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) ("*Woon*") at paras 11.111–11.112:

> Where shares have been sold but have not been registered in the name of the purchaser, the person whose name is on the register of members remains the legal owner of the shares …
>
> The delivery of a share certificate with a blank transfer to a purchaser gives him an equitable interest in the shares. In such a case, *the person whose name is on the register remains the legal owner of the shares and holds them on trust for the purchaser*. The purchaser has an inchoate title to the shares which can be perfected by registration.
>
> [emphasis added]

139 This proposition in *Woon*, however, was made in the context of a *sale* of shares. Similarly, the other two authorities cited by the plaintiffs, *Hawks v McArthur and others* [1951] 1 All ER 22 and *Lim Eng Yong v Lim Chin Swee* [1898–9] V SSLR 4, also concerned sales of shares. I am of the view that those authorities do not assist the plaintiffs as the present case concerns a mortgage of shares. Purchasers and mortgagors stand in quite different positions. A purchaser acquires an *absolute* interest in the subject property. However, a mortgagee only acquires a *limited* interest in the subject property – his interest in the mortgaged property is only co-extensive with his interest in the underlying debt obligation in respect of which the mortgage was given as security. I elaborate more on this below.

140 The plaintiffs' submission rests on the premise that the separation of the legal and equitable ownership in an asset *always* creates a trust. To that end,

they relied on extra-judicial observations made by Lord Peter Millett in "Restitution and Constructive Trust" (1998) 114 LQR 399 (at pp 403–404):

> It is necessary to begin with two elementary observations. *The first is that a trust exists whenever the legal title is in one party and the equitable title in another. The legal owner is said to hold the property in trust for the equitable owner.* Lord Browne-Wilkinson denied this in the *Westdeutsche Landesbank* case and gave examples where he said this was not the case. Of these examples, however, only two were cases where one party held the bare legal title and the other the entire beneficial interest, and with respect neither is convincing. One was the case where title to land is acquired by estoppel as against the legal owner. If the estoppel operates at law, however, then the full legal and beneficial title is in the party holding by estoppel, while if it operates in equity only it is a classic example of a constructive trust. The other is the case of the mortgagor who has paid off the mortgage. Lord Browne-Wilkinson pointed out that the mortgagor enforces his right to recover the mortgaged property by a redemption action and not by an action for breach of trust. But this proves nothing. The purchaser of land enforces his right to obtain the land by an action for specific performance, not by an action for breach of trust; but the vendor holds the land on a constructive trust for the purchaser. Indeed, the right to specific performance demonstrates the existence of the constructive trust. The form of action is irrelevant. What matters is the nature of the obligation which is enforceable by equity.
>
> [emphasis added]

141 I note that this section of Lord Millett's lecture criticising Lord Browne-Wilkinson's *obiter* comments in *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961 ("*Westdeutsche*") has been accorded judicial recognition by the English Court of Appeal (see *Independent Trustee Services Ltd v GP Noble Trustees Ltd and others* [2012] 3 All ER 210 at [82]).

142 The plaintiffs also cited Gary Watt, *Trusts and Equity* (Oxford University Press, 7th Ed, 2016) at pp 25–26 to support the proposition that a trust arises whenever there is a separation of legal and equitable ownership:

> To put it another way, *whenever there is a split between legal and beneficial ownership there will inevitably be a trust as a matter of property law*, but as a matter of obligations law, the parties will frequently be bound by sets of obligations, whether established by contract or statute, more sophisticated than the crude obligation of a bare trustee to account to his beneficiary for the trust property on demand.
>
> The creation of trusts must be distinguished from their effects on third parties. *The separation of legal title from equitable property necessarily creates a trust* – it might be helpful to picture trust creation as the process of splitting the formal/external legal title from the beneficial/inner equitable interest, as if one were peeling the skin off a banana.
>
> [emphasis added]

143 It is not clear to me that the proposition stated by Lord Millett and Professor Watt was intended to apply in the context of equitable mortgages. In disclaiming that a trust exists whenever legal title is in one party and equitable title in another party, Lord Browne-Wilkinson in *Westdeutsche* observed (at 988) that a mortgagor who has repaid his debt reclaims his property by way of a redemption action and not a claim in breach of trust (see [140] above). I accept that there is force in Lord Millett's observation that this example does not, in itself, negate the possibility that a trust exists as between that mortgagor and mortgagee. However, with respect, Lord Millett's observations equally did not go so far as to suggest that a trust arises between an equitable mortgagor and an equitable mortgagee by mere virtue of the existence of an equitable mortgage. At most, taking Lord Millet's and Lord Browne-Wilkinson's observations together, the fact that a mortgagor reclaims his property by a redemption action and not a claim in breach of trust neither proves nor disproves the existence of a trust between the mortgagor and the mortgagee. In relation to Professor Watt's comments, with respect, it is not clear whether and how the distinction should be drawn between a trust arising "as a matter of property law", and some "more sophisticated" set of obligations arising "as a matter of obligations law".

144 In any event, I am hesitant to adopt the plaintiffs' broad proposition that a trust relationship arises in every equitable mortgage.

145 First, there are at least three ways in which an equitable mortgage can arise (see [137] above). In relation to an equitable mortgage that arises because the mortgagor only had an equitable interest in the subject property to begin with, there must *ex hypothesi* be a third party who is neither the mortgagor nor the mortgagee, but who holds the legal interest in the subject property. In such a situation, to hold that a trust relationship necessarily arises out of an equitable mortgage would mean that the third party (who is *ex hypothesi* the trustee) holds the subject property on trust for the mortgagee (who would *ex hypothesi* be the beneficiary) even though the third party may not even be aware of the existence of the mortgage or the mortgagee.

146 Secondly, it does not appear principled or appropriate to impose on equitable mortgagors additional fiduciary duties which a legal mortgagor would not bear, when it is not always within the control of the mortgagor to determine the nature of the mortgage. To hold that a trust arises by virtue of every equitable mortgage would mean that an equitable mortgagee would be protected by fiduciary obligations, while a legal mortgagee is not. To the extent that the law should encourage proper compliance with the formalities of a mortgage, to place an equitable mortgagee in a more favourable position than a legal mortgagee may create distortive incentives.

147 Thirdly, it is not clear what the nature of this trust would be. Consequential issues arise depending on the response. If this is an express trust, given the absolutist position taken by the plaintiffs that a trust arises in every equitable mortgage, a question arises as to whether every mortgage document evinces the requisite certainty of intention to create a trust. If this is a

constructive trust, the basis on which the court should or would superimpose such a trust on an equitable mortgage is unclear (see, generally, Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at pp 152–159). These unresolved issues do not necessarily negate the plaintiffs' submissions, but they raise serious questions as to the scope and precision of the proposition that a trust arises in every equitable mortgage.

148 More importantly, there appears to be a fundamental and principled distinction between a creditor-debtor relationship and a trust relationship. A mortgage, whether legal or equitable, is a security interest. In this context, the term "security", while perhaps susceptible of more than one meaning, has a "narrower primary meaning" of security for the payment or claim, either by "a right to resort to some fund or property for payment or by a guarantee to some person t*o satisfy the debt or claim for which another person is primarily liable*" [emphasis added] (see *Gough* at p 3). On this definition, the mortgage, being a right to resort to a subject property in assurance of an underlying debt obligation, is ancillary upon and inseparable from the underlying creditor-debtor relationship. In short, if there is no debt, there can be no mortgage.

149 On this premise, even though the mortgagee may be described in some texts as the "equitable owner" of the subject property, or as holding the "beneficial interest" in, or the "beneficial title" to, the subject property, the mortgagee's interest in that property is only co-extensive with his interest in the underlying debt obligation.

150 The concept of a trust is quite different. First, the existence of a trust is not necessarily dependent on the co-existence of an underlying debt obligation. Second, even though a security and a trust may share functional similarities as

assurances to the secured creditor and beneficiary in the event of the debtor's or trustee's insolvency, the nature of the interest held by a beneficiary is conceptually distinct from that held by a secured creditor. The beneficiary's interest is in, and to the extent of, the *trust property*; the secured creditor's interest is in and to the extent of, the *underlying debt obligation*. The secured creditor does not strictly speaking "own" the subject property. Rather, he or she has a *priority* to the subject property to satisfy the underlying debt. Thus, in the event of default by the debtor, if the amount of the debt is less than the value of the security, the excess proceeds upon realisation of the security belong to the debtor (or his estate) and not the secured creditor; however, if the amount of the debt exceeds the value of the security, the outstanding sum after realisation of the security remains due and owing by the debtor to the secured creditor.

151 The distinctions between the interest under a security and the interest under a trust are described in *Goode on Legal Problems of Credit and Security* (Louise Gullifer ed) (Sweet & Maxwell, 5th Ed, 2013) (at para 1-36):

> It is … possible for a person to grant an interest in his asset which is not a security interest but an absolute interest. The difference between the two types of interest has two aspects. First, a security interest is always granted to secure an obligation, whereas an absolute interest may be (but need not be) transferred in fulfilment of an existing or future indebtedness or other obligation. Thus, if an interest is to be a security interest, it is necessary to identify a separate obligation which is secured by the grant. Secondly, the security interest is limited to its security function, so that it is defeasible if the secured obligation is paid, and only extends as far as is necessary to secure the obligation, so that on enforcement the grantor is entitled to any surplus value. Further, if, on enforcement, the amount realised is less than the obligation secured, the balance remains payable [by the debtor to the secured creditor].

152 Further support for the conceptual distinction between a mortgage (including an equitable mortgage) and a trust can be found in *Halsbury's Laws*

of Singapore, vol 9(3) (LexisNexis, 2017 Reissue) ("*Halsbury's*") (at para 110.434):

> A trust may be distinguished from a mortgage in the same way as a charge. A mortgage may be constituted by way of charge or by a transfer of the property to the mortgagee subject to a re-transfer on payment or satisfaction or discharge of the mortgage debt. *Unless the mortgage instrument expressly so states, the mortgagee does not hold the property on trust for the mortgagor, although the mortgagor has an equity of redemption … In the case of an equitable mortgage, whether constituted by agreement or by deposit of the title deeds to the property, it is not uncommon for the mortgagor to declare that he holds the legal estate on trust for the mortgagee* so that the mortgagee may call for the legal estate to be vested in the mortgagee with a view to selling the property in the event of default by the mortgagor.
>
> [emphasis added]

153 The statement in *Halsbury's* that "it is not uncommon" for an equitable mortgagor to declare that he holds the legal title to the subject property on trust for the equitable mortgagee implies two things. First, it is not *necessarily the case* that a trust relationship arises between an equitable mortgagor and an equitable mortgagee. Secondly, the concepts of trusts and equitable mortgages are not mutually exclusive – the parties to an equitable mortgage may agree to the creation of a trust which concurrently governs their relationship, and *vice versa*. However, again, there is no necessary causation between the two concepts.

154 I come now to the English Court of Appeal decision of *Re Lehman Brothers International (Europe) (No. 2)* [2009] EWCA Civ 1161 ("*Lehman Brothers*"). The issue in *Lehman Brothers* was whether certain persons fell within the scope of s 899 of the Companies Act 2006 (c 46) (UK) which empowered the court to sanction a scheme of arrangement proposed between a company and its "creditors". The English Court of Appeal held that the term "creditors" in that provision ought to be given its plain meaning –

which the court defined to be "someone to whom money is owed" (at [59]). The court then unanimously held that clients of the company who had beneficial interests in property held by the company on trust for them were not "creditors", and stood in a distinct position from secured creditors of the company (at [65] and [75]).

155 Even though *Lehman Brothers* was, strictly speaking, only concerned with the determination of whether a beneficiary is a "creditor" (and not the converse question of whether a secured creditor is a beneficiary), the principles therein are broad enough for extrapolation and application to the present case. In particular, Lord Neuberger MR (as he then was) held (at [82]) that "a secured creditor *merely has the right to look to his security to enable his debt to be repaid, but unlike the beneficiary in relation to the trust property, he does not own the security*." Interestingly, this was the same paragraph that the plaintiffs cited in their further submissions when they appeared to accept that a creditor-debtor relationship does not give rise to a trust relationship.[196] To get around this, the plaintiffs pursued a different approach to establish a trust in their favour, as I will elaborate on later (see [162] below).

156 The decision of *Lehman Brothers* therefore affirms the fundamental conceptual distinction between the nature of the interest held by a secured creditor of a debt in relation to the subject property, and that held by a beneficiary of a trust in relation to that property. In short, a secured creditor is not a beneficiary of the subject property in the trust sense.

157 For the foregoing reasons, I would have dismissed the arguments raised in the plaintiffs' closing submissions that a trust arose over the Charged Shares by virtue of the equitable mortgage created by the SCAs.

196 PFS, para 40.

158 In the circumstances, the plaintiffs' first two causes of action against the various defendants in dishonest assistance and knowing receipt must fail, since the shared premise of both of these causes of action has not been established: HJS and HJK did not hold the Charged Shares on trust for the plaintiffs.

Issue 2: Whether the plaintiffs can rely on their case that a trust or fiduciary relationship arose by virtue of HJS's and HJK's alleged unconscionable conduct

159 As mentioned at [87] above, the plaintiffs claimed against Wong, Neo, and/or Boo for dishonest assistance of breach of trust, and against HYH and/or the Sub-purchasers for knowing receipt. The shared premise for these two causes of action was that HJS and HJK held the Charged Shares on trust for the plaintiffs and had acted in breach of trust when HJS and HJK sold these shares without the consent of the plaintiffs.

160 Initially, in their closing submissions, the plaintiffs argued that when the Original Share Certificates were delivered to the plaintiffs on 14 June 2012, an equitable mortgage, and not an equitable charge, arose over the Charged Shares in favour of the plaintiffs.[197] According to the plaintiffs, under this equitable mortgage, beneficial ownership of the Charged Shares was transferred to the mortgagees (*ie*, the plaintiffs) while legal ownership was retained by the mortgagors (*ie*, HJS and HJK). The plaintiffs argued that the separation of legal and equitable title in an asset always and necessarily creates a trust.[198] Thus under this analysis, the equitable mortgagors HJS and HJK were the trustees of the Charged Shares, holding them on trust for the plaintiffs, who were the equitable mortgagees and beneficiaries.

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197 PCS, paras 25–26.

198 PRS, para 29.

161 In view of the manner in which the plaintiffs had advanced their case, the defendants' reply submissions focused on whether the plaintiffs' security interest in the Charged Shares, as created by the SCAs, should be characterised as an equitable charge or an equitable mortgage.

162 After closing submissions were filed and served, parties were invited to make further submissions, including submissions on the relevance of *Lehman Brothers*. It was then that the plaintiffs took a very different position. As I mentioned above at [155], the plaintiffs cited the following proposition found at [82] of *Lehman Brothers* in their further submissions:[199]

> [A] secured creditor merely has the right to look to his security to enable his debt to be repaid: unlike the beneficiary in relation to the trust property, he does not own the security.

163 Agreeing with this proposition, the plaintiffs said that "no express trust arises by virtue only of the [SCAs] and/or the equitable mortgage over the Charged Shares. In other words, HJS and HJK as equitable mortgagors do not hold the legal title in the Charged Shares on trust for the [p]laintiffs."[200]

164 Additionally, the plaintiffs relied on an article by Professor L S Sealy "Fiduciary Relationships" (1962) Cambridge Law Journal 69. That article discussed four categories of situations in which a fiduciary relationship may arise. The plaintiffs highlighted the first category and stated as follows in their further submissions:[201]

> Category 1: Where one person has control of property which (whatever may be the position at law) in the view of a court of equity is the property of another, the fiduciary position of the

199 PFS, para 40.

200 PFS, paras 40–41.

201 PFS, para 49.

> former is very close to that of a trustee. *No trust can exist when there is a debtor-creditor relationship.*
>
> [emphasis added]

165 Professor Sealy's observation that "[n]o trust can exist when there is a debtor-creditor relationship" should not be read absolutely to mean that a debtor-creditor relationship and a trust relationship are necessarily mutually exclusive. Rather, it stands for the proposition that a debtor-creditor relationship does not, in and of itself, give rise to a trust relationship. This latter proposition, as I have explained, is not controversial (see [148]–[157] above).

166 In any event, reading these two parts of the plaintiffs' further submissions together, it appears that the plaintiffs were not only saying that no *express* trust arose, but more broadly that *no trust of any kind* arose over the Charged Shares merely by virtue of their security interest in the Charged Shares. According to the plaintiffs, this would be the case *regardless* of whether their security interest was to be characterised as a charge or a mortgage.

167 This was a significant about-turn in the plaintiffs' case. It will be recalled (see [160] above) that the plaintiffs' argument in their closing submissions was that HJS and HJK held the Charged Shares as trustees *merely* by virtue of the security interest created by the SCAs, which they argued should be characterised as an equitable mortgage. However, in their further submissions, the plaintiffs conceded that a creditor-debtor relationship does not, in and of itself, give rise to a trustee-beneficiary relationship.

168 Instead, the plaintiffs in their further submissions maintained that a constructive trust arose over the Charged Shares on two alternative bases:

(a) By reason of the circumstances, including their unconscionable conduct, HJS and HJK were "constituted as [the plaintiffs'] fiduciaries in holding the legal title in the Charged Shares pending an interested buyer being found for the intended sale of the Charged Shares". Since HJS and HJK misappropriated assets (*ie*, the Charged Shares) in breach of their fiduciary duties, those assets would be held on constructive trust.[202]

(b) By reason of HJS and HJK's unconscionable conduct, HJS and HJK were constituted as constructive trustees of the Charged Shares, in favour of the plaintiffs.[203]

169 Although the plaintiffs said these were alternative bases, there appears to be a significant overlap insofar as both bases were premised on HJS's and HJK's alleged unconscionable conduct.

170 To establish unconscionability on the parts of HJS and HJK, the plaintiffs referred mainly to the events of September 2012. Then, Kawai had suggested to the plaintiffs that instead of registering the Charged Shares in the plaintiffs' names, the Honjin Group could help the plaintiffs to find a buyer for the Charged Shares so that the proceeds of sale could be used to repay the Loans owed, thereby saving the plaintiffs the inconvenience of first registering the Charged Shares and then having to look for a buyer themselves (see [43] above). This induced the plaintiffs not to register the Charged Shares in their names and to refrain from enforcing their security. In turn, this gave HJS and HJK the opportunity to sell the Charged Shares to the Purchasers and Sub-purchasers. Kawai continued to assure the plaintiffs that he was looking for a buyer of the

202 PFS, paras 43(a), 45–55.

203 PFS, paras 56–63.

Charged Shares for the benefit of the plaintiffs, all the way until March 2013 (see [44]–[51] above). According to the plaintiffs, Kawai did so to keep the sales of the Charged Shares under wraps and to convince the plaintiffs that nothing was amiss.[204] Such conduct was unconscionable and equity would give rise either to a fiduciary relationship between the plaintiffs on the one hand and HJS and HJK on the other, or a constructive trust over the Charged Shares.

171 In response to the aforementioned argument raised by the plaintiffs in their further submissions, FGH submitted that any constructive trust or fiduciary relationship arising out of the SCAs would have come to an end on 31 December 2012 when the SCAs expired.[205] Responding in their further reply submissions, the plaintiffs stated that FGH's argument that the constructive trust "arose out of the [SCAs]" was "fundamentally flawed".[206] Rather, the constructive trust "arose out of the unconscionable conduct on the part of the HJS and HJK and is not founded on the breach of the [SCAs] *per se*."[207]

172 This was a significant divergence from the plaintiffs' pleadings as developed in their closing submissions. The plaintiffs had not pleaded unconscionability as the basis for the trust over the Charged Shares or a fiduciary relationship between the parties. In fact, the plaintiffs' case had been premised on the SCAs.

173 First, I refer to the salient portions of the Statement of Claim (Amendment No. 2). In para 18, the plaintiffs pleaded that HJS and HJK had "charged" to the plaintiffs their total beneficial ownership of 3.3 million NCJV

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204 PFS, para 61(7).

205 D7 FRS, para 64.

206 Plaintiffs' Further Reply Submissions dated 9 October 2017 ("PFRS"), para 16.

207 PFRS, para 17.

shares. The particulars in para 18 then set out details relating to the four SCAs: how many shares were charged, the identities of the chargors and chargees, and the dates of the SCAs.

174 In para 46, under the header "Knowledge of the plaintiffs' prevailing interest", the plaintiffs pleaded that at all material times, Yamada, Horie, Wong, Neo, and Boo knew and/or ought to have known of the plaintiffs' "interests in the [SCAs] mentioned at paragraph 18 above".

175 In para 48.1(b), the plaintiffs pleaded that several of the defendants were "in knowing receipt of the Charged Shares in NCJV which they knew and/or ought to have known were subject to the [plaintiffs'] prevailing interests." The phrase "prevailing interests" was not defined in the statement of claim. The only other time that this phrase is used in the statement of claim is in the header of para 46. As mentioned, para 46 in turn refers back to para 18.

176 It seems clear from the foregoing that para 18 of the statement of claim is the foundation of the plaintiffs' various causes of action in knowing receipt, dishonest assistance, and their equitable proprietary claim. But para 18 only pleaded the existence and terms of the four SCAs. There was no mention of any alleged unconscionable conduct on the part of HJS and HJK in para 18.

177 The other paragraphs of the statement of claim referred to above were vague. When the plaintiffs mentioned their "interests" or "prevailing interests" in the Charged Shares, were they referring to *security* interests or *equitable* interests? Or were they referring specifically to a trust? This was not clear from the statement of claim. Nevertheless, it is clear from para 18 that the plaintiffs were pleading that their interest in the Charged Shares (however it was to be characterised) had arisen *by virtue of the SCAs*. The plaintiffs did not plead in

para 18 or any other part of the statement of claim that a trust or a fiduciary relationship had arisen *by virtue of unconscionable conduct of HJS and HJK*.

178 Although the plaintiffs did plead the alleged unconscionable conduct of HJS and HJK at paras 27 to 31A of the statement of claim, the plaintiffs did not plead that such conduct formed the basis of the constructive trust over the Charged Shares, or that such conduct gave rise to a fiduciary relationship between HJS and HJK on the one hand, and the plaintiffs on the other. This point only surfaced very belatedly in the plaintiffs' further submissions and was then repeated in their further reply submissions.

179 Accordingly, I am of the view that the plaintiffs are not entitled to rely on HJS's and HJK's alleged unconscionable conduct as creating a constructive trust over the Charged Shares, or as giving rise to a fiduciary relationship. That being the case, I say no more about the merits of the plaintiffs' arguments as developed in their further submissions and further reply submissions.

180 For avoidance of doubt, this means that I have only considered the plaintiffs' case as pleaded and developed in their closing submissions – that their security interest in the Charged Shares created by the SCAs subsists, should be characterised as an equitable mortgage, and gives rise to a trust over the Charged Shares in the plaintiffs' favour (see [96]–[158] above). I have found that the plaintiffs' security interest in the Charged Shares no longer subsists (see [134] above). Even if their security interest subsisted and were to be characterised as an equitable mortgage, a trust over the Charged Shares in the plaintiffs' favour did not arise merely by virtue of the equitable mortgage over the same (see [158] above). On either of these bases, the plaintiffs' first two causes of action in dishonest assistance and knowing receipt would fail.

Issue 3: Whether Wong, Neo, and/or Boo are liable for dishonest assistance of breach of trust

181 Even assuming that a trust and/or fiduciary relationship existed between the plaintiffs on the one hand, and HJS and HJK on the other, in respect of the Charged Shares, I do not think that the outcome would be any different. In my view, Wong, Neo, and Boo did not act *dishonestly* and the claim for dishonest assistance would have failed on this independent basis.

The law on dishonest assistance of breach of trust

182 The elements required to establish a claim for dishonest assistance of a breach of trust are as follows: (a) there was a trust; (b) there was a breach of that trust; (c) the defendant rendered assistance towards that breach; and (d) the assistance rendered by the defendant was dishonest: *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*GRZ III*") at [20], citing *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 2 SLR(R) 94 ("*Caltong*").

183 I have found that no trust or fiduciary relationship arose (see [157]–[158] above). However, proceeding on the assumption that there was a trust and/or fiduciary relationship and therefore that the first element is fulfilled, I turn to discuss the remaining three elements of dishonest assistance.

Whether there was a breach of trust

184 If HJS and HJK are trustees of the Charged Shares, they owe certain fiduciary obligations to the plaintiffs. The question is what these obligations are and whether they have been breached.

185 The plaintiffs submitted that the fiduciary obligations owed by HJS and HJK were two-fold: first, the duty not to transfer the legal title in the Charged Shares without reference to the Plaintiffs; and secondly, the duty not to undermine the plaintiffs' equitable interest in the Charged Shares.[208]

186 In my view, any fiduciary obligations that HJS and HJK owe as trustees would necessarily be shaped by the contractual obligations contained in the SCAs. In the present case, some of the relevant contractual obligations in the SCAs are as follows:[209]

(a) Clause 4.1, which imposes a duty on HJS and HJK not to create or permit to subsist any security over the Charged Shares nor do anything else prohibited by the Loan Agreements;

(b) Clause 4.2, which imposes a duty on HJS and HJK not to enter into a single transaction or a series of transactions (whether related or not and whether voluntary or involuntary) to sell, lease, license, sub-license, transfer or otherwise dispose of the Charged Shares; and

(c) Clause 7.1, which imposes a duty on HJS and HJK not to do, or permit to be done, anything which could prejudice the validity, enforceability or priority of the security created under the SCAs.

187 In my view, if HJS and HJK are trustees, they would owe the plaintiffs an obligation not to deal with or dispose of the Charged Shares without the plaintiffs' consent. I add that this may or may not be the full extent of the fiduciary obligations that HJS and HJK would owe the plaintiffs. However, for

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208 PFS, para 54.

209 AB1 456–457, 468–469, 480–481, 492–493.

present purposes, it is not necessary for me to deal with the other aspects of their fiduciary obligations and I say no more.

188 Accordingly, any absolute sale or transfer of the Charged Shares for the sole benefit of HJS and/or HJK, without reference to the plaintiffs' purported security interest in those shares, and without the plaintiffs' consent, would constitute a breach of trust by HJS and HJK.

189 It is not disputed that the following share transfers occurred:[210]

S/N	Transferor	Transferee	Number of NCJV shares transferred	Date of effective transfer
1	HJS	HYH	350,000	15/10/12
2	HJS	GIIS	750,000	17/11/12
3	HJS	Muschin	500,000	01/04/13
4	HJS	Ni	350,000	01/04/13
5	HJS	CBF	50,000	01/04/13
6	HJK	Karna	100,000	01/04/13
7	HJK	FGH	500,000	01/04/13
8	HJK	CBF	200,000	01/04/13
9	HJK	AI	500,000	01/04/13

190 The plaintiffs maintained that they did not have any knowledge of, nor did they consent to, the aforementioned transfers.[211] Wong did not dispute that

210 Plaintiffs' Table of Supporting Documents to Annex A & NCJV Registers ("PTSD"), pp 1–21.

211 SOC, paras 30–38.

if there was in fact a trust over the Charged Shares, these transfers were done in breach of trust.[212] Neither do Neo and Boo appear to dispute this element. Accordingly, each of the transfers listed in the table at [189] above would constitute a breach of trust.

191 There is one more point to be made about the table above. The last column, labelled "Date of effective transfer", lists the dates from which each respective transferee was reflected as a member on NCJV's register of members. Where registered shares are concerned, legal title in a share of a company incorporated under the Companies Act is vested in the person to whom the share is issued or transferred *and* whose name is on the register of members in respect of that share: *Woon* at para 11.108. Accordingly, the date from which the transferee is reflected as a member on the company's register is the date from which legal ownership in the transferred shares vests in the transferee. Presumably, this is so even though the new share certificates were not issued or were issued later, and shareholder details were only updated with the ACRA subsequently. In any event, the parties proceeded on the premise that the date of transfer stated in the register of members was the date of effective transfer and I will proceed on that basis. Therefore, the breaches of trust by HJS and HJK (*ie*, the transfers of Charged Shares originating from HJS and HJK) are to be taken as having occurred on the date of effective transfer.

Whether Wong, Neo, and/or Boo rendered dishonest assistance towards the breach of trust

The law on dishonesty

192 Dishonesty is established if the defendant has such knowledge of the irregular shortcomings of the transactions that ordinary honest people would

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212 D18's Closing Submissions dated 14 November 2016 ("D18 CS"), para 4.3.1(a).

consider it to be a breach of standards of honest conduct if he failed to adequately query them: *GRZ III* at [22], affirming *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2006] 1 All ER (Comm) 478 ("*Barlow Clowes*").

193 The Privy Council in *Barlow Clowes* clarified that although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant assesses himself based on different standards (at [10]).

194 *Barlow Clowes* also affirmed the prior Privy Council decision of *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 ("*Royal Brunei*") where it was observed that acting dishonestly means simply not acting as an honest person would in the circumstances (at 389C). The Privy Council noted that dishonesty was concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety (at 389D). Following from this, the Privy Council observed that acting in reckless disregard of other's rights or possible rights could also be a tell-tale sign of dishonesty (at 390G), but that acting negligently would generally not suffice for the purpose of liability in dishonest assistance (at 392C).

195 Subsequent to *Royal Brunei*, the House of Lords decision of *Twinsectra Ltd v Yardley* [2002] 2 All ER 377 ("*Twinsectra*") confirmed that negligence is not a sufficient condition for liability in dishonest assistance (at [111]–[113]):

> Behind the confusion there lay a critical issue: whether negligence alone was sufficient to impose liability on the accessory. If so, then it was unnecessary to show that he possessed actual knowledge of the relevant facts. Despite a

> divergence of judicial opinion, by 1995 the tide was flowing strongly in the favour of rejecting negligence. It was widely thought that the accessory should be liable only if he actually knew the relevant facts. It should not be sufficient if he ought to have known them or had the means of knowledge if he did not in fact know them.
>
> There was a gloss on this. It is dishonest for a man deliberately to shut his eyes to facts which he would prefer not to know. If he does so, he is taken to have actual knowledge of the facts to which he shut his eyes. Such knowledge has been described as "Nelsonian knowledge", meaning knowledge which is attributed to a person as a consequence of his "wilful blindness" … *But a person's failure through negligence to make inquiry is insufficient to enable knowledge to be attributed to him* (see *Agip (Africa) Ltd v Jackson* [1992] 4 All ER 385 at 405, [1990] Ch 265, 293).
>
> In his magisterial opinion in [*Royal Brunei*], every word of which merits close attention, Lord Nicholls firmly rejected negligence as a sufficient condition of accessory liability. The accessory must be guilty of *intentional wrongdoing* …
>
> [emphasis added]

196 Consistent with the English position that *intentional* wrongdoing is required, the Singapore High Court in *Banque Nationale de Paris v Hew Keong Chan Gary and others* [2000] 3 SLR(R) 686 ("*Banque Nationale*") held (at [166]):

> [The defendants] were foolish and woefully imprudent to have provided the additional collaterals. But foolishness, credulity and imprudence, which unfortunately were the besetting flaws of both Nancy and Tan, are not the same as dishonesty. They were both, in my opinion, and if I may say so of them, more fools than knaves …

197 Returning to the phrasing adopted by the Court of Appeal in *GRZ III* (at [192] above), the question is whether the transaction was so irregular that an honest person would have queried the transaction. If the defendant in question had known of these irregularities, but intentionally or with wilful recklessness failed to query the transaction consciously, then he is dishonest. In deciding this question, the court will look at all the circumstances known to the defendant at

the time, and also have regard to his personal attributes such as his experience and intelligence, and the reason(s) why he acted as he did (see *Royal Brunei* at 391B).

Wong

198 Wong admits to signing off on various BOD resolutions and share transfer forms in connection with the transfer of NCJV shares:[213]

(a) An NCJV BOD Resolution dated 15 October 2012 for the HJS-HYH Transfer;

(b) An NCJV BOD Resolution dated 17 November 2012 for the HJS-GIIS Transfer; and

(c) An NCJV BOD Resolution dated 1 April 2013 for, *inter alia*, the transfers under the FGH, AI, Karna, Muchsin, E&S, Ni and CBF SPAs.

199 In my view this is sufficient to establish the element of assistance: Wong assisted in HJS's and HJK's breaches of trust by signing the aforementioned NCJV BOD Resolutions, in his capacity as director of NCJV. Wong also does not dispute the element of assistance.[214]

200 The crux is whether Wong's assistance was dishonest, applying the principles set out above at [192]–[197].

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213 Wong Lock Chee's AEIC, paras 3.2.1, 4.2.3, 4.3.3.

214 D18 CS, para 4.3.1(b).

(1) The parties' cases

201 The plaintiffs submitted that Wong knew as of 8 June 2012 that the Original Share Certificates were required for an arrangement creating some security interest in favour of a third party.[215] They relied on the following facts:

(a) On 4 June 2012, Wong received an email from Yamada requesting his assistance in locating the NCJV share certificates for registered in HJS's and HJK's names. Yamada also informed Wong that Kawai had been waiting for the share certificates for a week and had called Yamada to chase for them.[216] Wong testified that Yamada's request was "unusual"[217] and that he was surprised to receive such a request since HJS and HJK had, by then, been shareholders for two years.[218] Wong also thought that Yamada sounded very urgent in his email.[219] Wong, being an experienced businessman,[220] was well aware that share certificates are important documents and documents of title.[221] Yet, he did not ask Yamada why Kawai was seeking these share certificates.[222]

(b) On 8 June 2016, Yamada forwarded Wong the Email Chain (see [25(i)] above). The subject title and the content of the Email Chain were entirely in the Japanese language. The email subject title,

215 PCS, paras 184–194.

216 AB1 307, 334–335, 341–343.

217 NE, 14/09/16, 13:4–14:7.

218 NE, 14/09/16, 9:4–9:21.

219 NE, 14/09/16, 13:1–13:3.

220 NE, 13/09/16, 51:18–51:21.

221 NE, 14/09/16, 30:8–30:12.

222 NE, 14/09/16, 12:12–12:23.

"シンガポール社株式担保の件", translates to "Re: Singapore company's share collateral". Two of these characters ("担保") resemble the Chinese characters for "guarantee".[223] Wong testified that he did not apply his mind to the subject title when he received the email.[224] Wong also made no attempt to understand what was said in those emails.[225] However, he agreed that if he had checked with Yamada then, he would have realised that the content of the Email Chain concerned guarantees of some sort.[226]

(c) Wong testified that he was an organised person and had the habit of retitling emails and filing them away according to their subject titles in order to locate them easily in the future.[227] The plaintiffs therefore argued that in keeping with this habit, Wong would have read and understood the subject title of Yamada's email on 8 June 2012.

(d) Although Wong admitted to noticing that an unknown person "Akimoto" from "MKC" had been copied in the Email Chain, he did not ask Yamada who this person was.[228] Wong said it did not occur to him that there was anything unusual about Yamada forwarding him an entire email chain involving this stranger,[229] and also did not check with Yamada what those emails were about.[230]

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223 Exhibits P14 and P15.

224 NE, 14/09/16, 65:4–66:6.

225 Wong Lock Chee's AEIC, para 5.1.3.

226 NE, 14/09/16, 66:3–66:6.

227 NE, 14/09/16, 39:5–39:16; 45:2–45:10.

228 NE, 14/09/16, 52:21–53:20.

229 NE, 14/09/16, 55:23–56:21.

230 NE, 14/09/16, 57:24–58:23.

(e) In the same email of 8 June 2012, Yamada asked Wong: "Have you receved [*sic*] JV's stock certifivates [*sic*]. I need to give copies today possibley [*sic*] since this is Friday. I appreciate if you can look into them."[231] Wong did not know who Yamada intended to give these copies to, but he did not ask Yamada.[232]

(f) Wong's office was located at the same location as Jason Wong and one Paul Ng. The former is an accountant monitoring, *inter alia*, NCJV's accounts (see [55] above); the latter is an accounts executive employed by NCJV. Wong testified that although he did not personally monitor NCJV's accounts, Jason Wong and Paul Ng would notify him if there was anything unusual about NCJV's top or bottom lines.[233] At the material time, NCJV's accounts showed massive debts owing by HJS and HJK.[234] The plaintiffs said that Wong must have been informed of this by Jason Wong and/or Paul Ng.

(g) Additionally, Wong knew that Kawai was in financial difficulties.[235] In fact, around September 2012, Yamada informed Wong that Kawai needed money and had approached Yamada to discuss the possibility of HYH purchasing NCJV shares from HJS and HJK. Yamada asked Wong to check whether HYH had monies to purchase NCJV shares. By way of an email on 24 September 2012, Wong confirmed that HYH could purchase up to S$500,000 worth of NCJV shares.[236] The plaintiffs said that it should have occurred to Wong that

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231 AB1 364.

232 NE, 14/09/16, 50:8–50:13.

233 NE, 13/09/16, 88:12–89:5.

234 AB4 2498; NE, 07/09/16, 48:23–50:2.

235 NE, 14/09/16, 75:14–76:1, 80:23–81:3.

Kawai may have charged or disposed of the NCJV shares in HJS's and/or HJK's names to raise funds.

202 Given that the request for the share certificates in HJS's and HJK's names was sudden, unusual and urgent, and involved an unknown third party, the plaintiffs said that Wong would have known that the Original Share Certificates were sought by Yamada in order to be delivered to that third party, *ie*, Akimoto from MKC. From the Email Chain and Wong's knowledge that HJS, HJK and Kawai were facing financial difficulties, the plaintiffs also said Wong would also have known that some sort of security interest involving the Original Share Certificates was being put together.[237]

203 The plaintiffs further averred that given Wong's knowledge that the NCJV shares were encumbered, he knew of the irregular shortcomings of the transfers of the Charged Shares pursuant to the BPA (*ie*, the HJS-HYH and HJS-GIIS Transfers). The plaintiffs pointed to the following facts:

(a) Wong knew that the Original Share Certificates had been sent via courier by Lanie to Kawai's office on 8 June 2012.[238] He also knew that in order to effect to a transfer of NCJV shares, the original share certificates in the transferor's name had to be returned for cancellation before the issuance of new share certificates in the transferee's name.[239] However, at no point did he ask for the Original Share Certificates to be returned and produced for cancellation.

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236 Wong Lock Chee's AEIC, para 4.2.4.

237 PCS, para 194.

238 NE, 22/09/16, 18:9–18:23.

239 NE, 22/09/16, 10:3–10:12.

(b) Wong knew that his approval as director of NCJV was required for the transfer of any shares in NCJV. He also knew that prior to giving such approval, he had to be satisfied that each transfer was in compliance with Article 23 of NCJV's Memorandum and Articles of Association ("Article 23"),[240] which reads as follows:[241]

> The instrument of transfer must be left for registration at the registered office of the company together with such fee, not exceeding $1.00 as the directors from time to time may require, accompanied by the certificate of the shares to which it relates and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer, and thereupon the company shall subject to the powers vested in the directors by these articles register the transferee as a shareholder and retain the instrument of transfer.

(c) Wong knew that each Original Share Certificate states, "NOTE: No transfer of any portion of the SHARES comprised in this certificate will be registered unless accompanied by this certificate."[242] I refer to this as the "Note".

(d) The terms of the NCJV BOD Resolutions dated 15 October 2012 and 17 November 2012 both required "the old certificate in the name of the transferor be cancelled".[243] Since Wong claimed to read carefully before signing on documents,[244] the plaintiffs said that Wong must have known of these terms in each BOD Resolution.

(e) Despite (b)–(d) above, Wong signed the NCJV BOD Resolution approving the HJS-HYH Transfer without having seen either Share

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240 NE, 22/09/16, 8:6–8:23.

241 Wong Lock Chee's AEIC, p 287.

242 NE, 22/09/16, 21:2–21:14.

243 AB2 845–846.

244 NE, 14/09/16, 38:6–38:8.

Certificate No. 6 or 7.[245] Wong also conceded that because he knew the Original Share Certificates were with Kawai since June 2012, and that they were also required for the transfer, he would have been put on notice as to whether this intended transfer from HJS to HYH should go through.[246]

(f) Despite (b)–(d) above, Wong signed the NCJV BOD Resolution approving the HJS-GIIS Transfer without having seen either Share Certificate No. 6 or 7.[247]

204 Further, given Wong's knowledge that the NCJV shares were encumbered, the plaintiffs averred that Wong knew of the irregular shortcomings of the seven transfers of the Charged Shares pursuant to the subsequent SPAs. The plaintiffs relied on the following facts:

(a) On 9 January 2013, Wong was copied in an email from Yamada. In this email, Yamada instructed Boo to transfer all the 1.3 million NCJV Shares registered in HJK's name, and the remaining 900,000 NCJV Shares registered in HJS's name, to various third parties.[248] This transfer of the *entire* shareholding in NCJV was arguably not "in the ordinary course of business".[249] Yet, Wong did not ask Yamada any question about these intended transfers.[250]

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245 NE, 22/09/16, 20:6–21:1; 21:22–22:7.

246 NE, 22/09/16, 25:19–25:22.

247 NE, 22/09/16, 28:14–28:19; 28:25–29:5; 29:25–30:7.

248 AB2 1085.

249 PCS, para 222(g).

250 NE, 22/09/16, 31:11–33:6.

(b) Again, despite his knowledge of the internal requirements governing share transfers (see above at [203(b)–(c)]), Wong signed the NCJV BOD Resolution dated 1 April 2013 approving the transfer of 1.3 million NCJV shares from HJK and 900,000 NCJV shares from HJS to various third parties,[251] without having seen any of the Original Share Certificates.[252]

205 In sum, the plaintiffs said that Wong actually knew that some sort of security interest involving the Original Share Certificates was being put together. He also knew that NCJV's internal requirements required the transferor's share certificates to be returned for cancellation before new shares could be issued. However, without having seen or ensured the return of Original Share Certificates, Wong nonetheless signed the NCJV BOD Resolutions approving the transfers of the NCJV shares from HJS and HJK, pursuant to the BPA and the subsequent SPAs. The plaintiffs thus argued that Wong failed to query the irregular shortcomings of the transaction, satisfying the element of dishonesty.

206 Wong's pleaded defence was that at all material times, he had no knowledge of and/or could not have known of any alleged or purported charge or any other encumbrance on the NCJV shares transferred under the HJS-HYH and HJS-GIIS Transfers pursuant to the BPA.[253] He pleaded the same in respect of the seven transfers made pursuant to the subsequent SPAs (see [68] above).[254] Accordingly, Wong did not dishonestly assist in any breach of trust.

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251 AB2 1263–1264.

252 NE, 22/09/16, 35:22–37:8.

253 Defence of the 18th Defendant (Amendment No. 1) ("D18's Defence"), para 7.1.4.

254 D18's Defence, para 8.1.2.

207 Wong relied on the following facts in support of his assertion that he did not know and could not have known that the NCJV shares were encumbered:

(a) Wong was not a signatory to the BPA. Therefore, he did not know of the arrangement to use HJS's and HJK's NCJV shares as security for the Loans.

(b) Wong would not have known of the plaintiffs' interest in the Charged Shares from Yamada's email of 8 June 2016, forwarding the Email Chain.

(i) The email's subject title was in the Japanese language.[255] Since Wong does not understand written Japanese,[256] he did not understand the subject title.

(ii) Wong testified that when he received the email on 8 June 2012, he did not know what the characters "担保" meant, if they were indeed Chinese characters.[257] Wong said that although he ran Chinese restaurants and encountered menus written in the Chinese language, he only had limited proficiency.[258]

(iii) There was no evidence that Wong specifically understood the characters "担保" to mean "guarantee" in the Chinese language. Even if he did, there was no reason to assume that they would bear the same meaning in Japanese.[259]

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255 NE, 31/08/16, 63:14.

256 Wong Lock Chee's AEIC, para 5.1.3; NE, 13/09/16, 55:20–56:2.

257 NE, 14/09/16, 63:21–64:5.

258 NE, 14/09/16, 64:6–64:11.

259 D18 CS, para 8.2.7(b).

(iv) The English content of the Email Chain did not refer to or suggest that the plaintiffs (or any third party) might have an interest in the NCJV shares.[260]

(v) It did not follow that because the Original Share Certificates were delivered to Kawai, and that one Akimoto from MKC was copied in the Email Chain, Wong should have concluded that there was some sort of security interest involving the Original Share Certificates in favour of MKC.[261]

(c) As a local resident director, Wong only had a limited involvement in running NCJV. His responsibilities were limited to securing the lease for the HY Restaurant and assisting Yamada in administrative matters such as the application for employment permits for foreign staff.[262] NCJV was almost exclusively run by Yamada, Yamamoto and their Japanese associates – a "Japanese clique",[263] with Wong on the outside. Wong explained that he did not check with Yamada whether he was required to do anything concerning the Email Chain because he trusted that Yamada was "doing the right thing".[264]

(d) Although Wong knew that the transferor's share certificates had to be produced for cancellation before any *issuance* of new shares, he testified that he did not know that they needed to be specifically shown to the directors for them to *approve* a share transfer.[265] For that reason,

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260 D18 CS, para 8.2.3(c).

261 D18 CS, para 8.2.5(b).

262 Wong Lock Chee's AEIC, paras 2.1.3, 2.2.3; NE, 13/09/16, 73:13–73:23.

263 NE, 13/09/16, 63:25.

264 NE, 14/09/16, 59:8–59:11.

265 NE, 22/09/16, 12:14–12:16; 30:23–31:10.

he signed the NCJV BOD Resolutions without having sight of the Original Share Certificates.

(e) At the time of signing the NCJV BOD Resolutions approving the various share transfers, Wong did not know that the Original Share Certificates in the plaintiffs' possession had *not* in fact been returned to HJS and HJK for cancellation.[266] He relied on Neo and Boo, the company secretaries, to ensure that the Original Share Certificates were returned for cancellation to effect the transfers of the NCJV shares.[267] Wong testified that he only became aware that the plaintiffs were holding onto the Original Share Certificates after they had filed their claim in the present proceedings on 23 October 2013.[268]

(f) It is not unusual to dispose of one's shareholding especially if such disposal is done in exchange for valuable consideration. Further, Wong had known since September 2012 that Kawai was in financial difficulties and intended to sell the NCJV shares held by HJS and HJK.[269] Accordingly, the share transfers *per se* were not so extraordinary an occurrence.

(2) Application of law to the facts

208 Having regard to all the evidence, I am of the view that although Wong did sign the various NCJV BOD resolutions and share transfer forms in connection with the BPA and subsequent SPAs, he was not dishonest.

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266 D18 CS, para 9.2.

267 NE, 22/09/16, 29:15–29:20.

268 NE, 22/09/16, 53:14–53:19.

269 AB2 760–761; NE, 14/09/16, 75:14–75:23.

209 The first pillar of the plaintiffs' case is that Wong *should have* realised from the Email Chain (or at least its subject title) that some arrangement involving the use of the NCJV shares registered in HJS's and HJK's names as security was being put together.

210 It appears from the evidence that Wong did not in fact apply his mind to the subject title of the Email Chain or the substantive content of the Email Chain until the commencement of the present proceedings. The question that then arises is whether Wong *should have* read and attempted to understand the Email Chain and its subject title.

211 I do not think that Wong should have been expected to do so. Although Wong was a director of NCJV, I accept his evidence that he was ultimately an outsider to the "Japanese clique" comprising Yamada, Yamamoto and other Japanese associates. More importantly, the Email Chain, being entirely in the Japanese language, was clearly intended to be communication amongst only those recipients who read the Japanese language and Wong was not one of them. Wong could not be expected to read through a lengthy email chain not intended for him, in a language foreign to him, just to look out for phrases that he might recognise as being identical to certain Chinese characters. His omission to do so, in my view, would not even be considered negligent. But even if it were negligent, as earlier observed at [194]–[195], that does not suffice to render Wong dishonest.

212 Thus I am of the view that as of 8 June 2012, all that Wong knew and could be expected to know was that the Original Share Certificates had been delivered to Kawai. He did not know that such delivery was in fact in connection with an arrangement to use HJS's and HJK's NCJV shares as security for the Loans. He also did not know that those Certificates would be, and were in fact

subsequently conveyed to the plaintiffs on 14 June 2012, where they remain until this day in the plaintiffs' possession (see [207(e)] above).

213 I would add that even if Wong knew of the plaintiffs' security interest, which he did not, this did not necessarily mean that he had acted dishonestly.

214 It is not disputed that the Original Share Certificates should have been returned to NCJV for cancellation prior to any subsequent transfers involving those shares. I also accept that Wong knew as much. Although Wong said he was not aware of Article 23, what he meant was that he was not aware of the details in that provision. He did not pretend to be unaware that each Original Share Certificate had to be returned for cancellation to effect a transfer. However, Wong's evidence was that until 23 October 2013 when the present proceedings were commenced, he did not know that the Original Share Certificates had not in fact been returned to NCJV for cancellation. I accept his evidence.

215 This brings me to the second pillar of the plaintiffs' case, which is that Wong should have ensured the return of the Original Share Certificates for cancellation, or asked to see the cancelled Original Share Certificates *prior* to approving the share transfers pursuant to the BPA or the subsequent SPAs. The plaintiffs say that because Wong failed to do so, he was dishonest.

216 Critically, however, there was no evidence to prove that it is in the ordinary course of conduct for directors to personally ensure that the share certificates in the name of the transferor are returned for cancellation before approving a share transfer. There was also no evidence that directors are ordinarily expected to ask to see the cancelled share certificates before approving a share transfer. Neo and Lanie, who were present to give evidence

at trial, were not asked whether such would be expected of a director, particularly one who had the benefit of being assisted by professional secretaries whose jobs were precisely to deal with these administrative matters. Neither was it put to Wong during cross-examination that a director, acting honestly, would have adopted such a course of conduct.

217 In the absence of any evidence that it is in the ordinary course of conduct for directors to personally ensure the return of share certificates for cancellation, or to ask to see the cancelled share certificates prior to approving a share transfer, I cannot conclude that Wong was acting dishonestly by omitting to do so in respect of the Original Share Certificates. Rather, I am of the view that Wong was entitled to rely on Neo and Boo, the professional company secretaries (and by extension, Lanie), to ensure that these administrative matters were taken care of.

218 There remains one point for me to address. The plaintiffs argued that Wong had admitted in cross-examination that he would have been put on notice as to whether the intended transfer of 350,000 NCJV shares from HJS to HYH would go through, given that he knew that the Original Share Certificates were with Kawai, and that they were required in order to effect a share transfer, but they had not in fact been produced.[270] This point was mentioned at [203(e)] above.

219 I set out below Wong's evidence which the plaintiffs were relying on:[271]

> Q: You see, Mr Wong, by June 2012 you knew that the shares had been sent to Kawai, correct?
>
> A: Correct.

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270 NE, 22/09/16, 25:19–25:22.

271 NE, 22/09/16, 25:19–25:22.

> Q: You knew that the [O]riginal [S]hare [C]ertificates were required for the transfer, correct?
>
> A: Correct.
>
> Q: Yet no [O]riginal [S]hare [C]ertificate was ever tendered or produced. Surely you were put on notice that there may be a question as to the good title.
>
> Ct: No, no, don't confuse the question. What do you mean by, "There will be a question as to good title"? Surely, you would have been put on notice as to whether this intended transfer from [HJS] to HYH should go through.
>
> Q: Yes, your Honour. I will read the question in entirety. Mr Wong, surely you would have been put on notice as to whether this intended transfer from HJS to HYH should go through. Correct?
>
> A: Correct.
>
> Q: You would also have been put on notice as to whether HYH would be acquiring good title in the 350,000 shares from HJS.
>
> Ct: If what?
>
> Q: If no share certificate had been produced. If no share certificate in HJS's name, your Honour. Correct? Mr Wong, can we have an answer?
>
> A: It did not occur to me.

220 It seems to me that the plaintiffs were trying to take undue advantage of Wong's "admission". How could he have been put on notice merely because no Original Share Certificate was produced for cancellation? The plaintiffs were conflating two different points. The fact that the Original Share Certificates were not returned did not necessarily mean that Wong knew of the fact. Indeed the plaintiffs did not suggest that Wong knew of the omission.

221 In the circumstances, I do not consider Wong's omission to check with Neo, Boo and Lanie as to the whereabouts of the Original Share Certificates to even be careless, negligent or imprudent, let alone dishonest. Wong therefore cannot be said to have *dishonestly* assisted in HJS and HJK's breaches of trust.

222 In addition to the plaintiffs' primary arguments (set out at [201]–[205] above), the plaintiffs made two alternative arguments. The first was that even if Wong did not have actual knowledge that the NCJV shares were the subject of the plaintiffs' security interest, he had *failed to infer* from the facts known to him that a share charge was being created in favour of Akimoto or MKC.[272]

223 There is some doubt in my mind as to whether "failure to infer" is a species of knowledge sufficient to ground liability for dishonest assistance. First, the Court of Appeal in *GRZ III* only mentioned this species of knowledge in the context of knowing receipt, not dishonest assistance (*GRZ III* at [40]). While the court observed that the thresholds for knowledge in both causes of action are very similar, they nonetheless remain conceptually distinct (*GRZ III* at [43]). Secondly, it is clear from case law that conscious or intentional impropriety is required. A failure to infer from the available facts, unless amounting to wilful blindness, is more akin to negligence, carelessness or a failure to make inquiries, which is undoubtedly insufficient to constitute dishonesty for the purposes of dishonest assistance (see [194]–[196] above).

224 In any event, the plaintiffs' first alternative argument can be disposed of on the same basis discussed at [211] above. Wong could not have been expected to read the Email Chain in a foreign language and discover from it that the plaintiffs had security interests in the NCJV shares held in HJS's and HJK's names. Wong therefore cannot be held liable for his alleged "failure" to infer.

225 The plaintiffs' second alternative argument was that Yamada's knowledge of the SCAs and the plaintiffs' security interest in the Charged Shares can be imputed to Wong.[273] The plaintiffs relied on *Kwee Seng Chio*

272 PCS, paras 195 and 212.

273 PCS, paras 166–169.

Peter v Biogenics Sdn Bhd [2003] 2 SLR(R) 482 ("*Peter Kwee*"), which they said stands for the proposition that if a director has failed to exercise his own independent discretion or volition, and willingly followed the instructions of another director who knew the facts, the latter's knowledge should be imputed to the former.[274]

226 In *Peter Kwee*, the plaintiff commenced an action to recover a loan he had advanced to the defendant company. The loan had been arranged by one Ricky Goh – he was not a director of the defendant company, but had procured its incorporation to hold property for his other business plans. Goh had also appointed nominee directors in the defendant, who professed to know nothing of the plaintiff's loan. In holding that the nominee directors could be imputed with Goh's knowledge, the High Court held (at [14]):

> Should a different view be taken as to their knowledge of the loan as a matter of law, Ang and Liow as nominee directors would be imputed with the knowledge of the loan transaction that Goh, their puppet master, possessed. If a person allows himself to be a mere nominee of, and acts for, another person, without the exercise of his own discretion or volition, in utter disregard for his duties as a director of the company, that nominee director must be bound by the notice which the other person, for whom he acts, has of the nature of the transaction.

227 I am of the view that *Peter Kwee* stands for the narrower proposition as contended on Wong's behalf, *ie*, a nominee director appointed by and acting at the direction of a third party to the company may be imputed with the knowledge of that third party.[275] I do not accept the broader proposition of law suggested by the plaintiffs (at [225] above). That broader proposition is, in my view, inconsistent with the position that it is generally proper for a director to leave matters to another director of the company, and that he is under no obligation to

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274 PCS, paras 166–167.

275 D18 CS, para 5.3.5.

test the accuracy of anything that he is told by such a person or even to make certain that he is complying with the law (see *Huckerby v Elliot* [1970] 1 All ER 189 at 194). In these circumstances, the court should be slow to impute the knowledge of one director to another. *Peter Kwee* might have been an appropriate case for the imputation of knowledge to a director, but the present case is far removed from that factual scenario.

228 Even if the principle in *Peter Kwee* could be extended to cover non-nominee directors, it only goes so far as to allow for imputation of knowledge. However, mere knowledge of a certain state of affairs does not equate to dishonesty. There must first be evidence that an honest director, with that knowledge, would have adopted a certain course of conduct, and secondly it must be proved that the defendant had consciously or intentionally not taken that course of conduct. As I have mentioned, the plaintiffs have not adduced any evidence of the former. Accordingly, the plaintiffs' second alternative argument must fail.

229 In conclusion, although Wong did assist in HJS's and HJK's breaches of trust (listed at [189] above), he was not dishonest. Therefore, on this basis alone, Wong would not have been liable for dishonest assistance.

Neo

230 Neo held multiple positions in various defendant companies, and facilitated the transfer of the Charged Shares in several different ways:

(a) In her capacity as NCJV's secretary, Neo allowed her subordinate, Lanie, to effect the various transfers of NCJV shares.

(b) In her capacity as HJS's director, she signed the HJS BOD Resolutions approving the HJS-HYH Transfer, the HJS-GIIS Transfer, and the transfers to various third parties, as well as the related share transfer forms.[276]

(c) In her capacity as GIIS's director, she signed the GIIS BOD Resolution approving the HJS-GIIS Transfer.

231 In my view, the element of assistance is clearly established. Again, the only question is whether Neo's assistance was dishonest.

(1) The parties' cases

232 The plaintiffs said that Neo (and Boo) facilitated the transfer of the NCJV shares registered in HJS's and HJK's names in circumstances where they wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make. Additionally, they proceeded with the transfer of the Charged Shares, and allowed their subordinate, Lanie, to transfer the Charged Shares at Yamada's bidding.[277]

233 It is apposite to first set out several key background facts relating to SACS, the company engaged to provide corporate secretarial services for NCJV. These are relevant to determining both Neo's and Boo's state of knowledge at the relevant times.

(a) Amongst Neo, Boo, and Lanie, Neo was the most senior and Lanie was the most junior.[278]

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276 Neo Lay Hiang Pamela's AEIC, para 12.

277 PCS, para 226.

278 NE, 22/09/16, 59:20–60:9.

(b) SACS has several internal procedures and policies. One such procedure requires staff to print out hard copies of incoming client emails, stamp them with an internal circulation stamp and then circulate these emails to the respective staff handling the corporate secretarial services for that client. When such emails were circulated to Neo or Boo, they would initial against the hard copy to indicate the date, and that they had read the email ("the Initialling Procedure"). This was to ensure that all relevant staff handling the same client were "on the same page".[279]

(c) Another procedure required Neo's subordinates to copy her on all outgoing client emails. This was to allow Neo to monitor her staff's work and to make sure that what they were doing was "correct and proper".[280]

(d) The process for issuing new share certificates was as follows. Upon receipt of the signed directors' resolution, share transfer form and share certificate(s) to be cancelled, Lanie would e-stamp the transfer form, update the ACRA register, and then prepare a new share certificate in the transferee's name (and the transferor's name, if there was any balance).[281] Thereafter, Lanie would inform Neo that she would be sending the new share certificates for the directors to sign. After the return of the signed certificates, Lanie would obtain Neo's signature on the share certificates. Finally, she would affix the company seal on the share certificates.[282] I refer to this as the "Share Certificate Issuance Procedure".

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279 NE, 22/09/16, 70:8–71:21.

280 NE, 23/09/16, 4:13–4:23.

281 NE, 26/09/16, 32:4–32:12; 34:22–34:25.

(e) Neo, Boo and Lanie had access to the corporate secretarial files, including the register of transfers and members. They were therefore able to find out the status of the shareholdings in NCJV at all material times.[283] Any cancelled share certificates would also be kept in the register of transfers. Thus, they were also able to check if old share certificates had been returned for cancellation.[284]

(f) The email <pamelaneo@pacific.net.sg> is the company's email account accessible by Neo, Boo, and Lanie.[285] I refer to this as "the Company's Email Account".

234 The plaintiffs submitted that Neo had knowledge of the irregular shortcomings of the transfers of the NCJV shares pursuant to the BPA. They pointed to the following facts:

(a) Neo had close to 30 years of experience as a company secretary.[286] Neo was aware that share certificates had to be produced for cancellation before a share transfer could be effected.[287] She was also familiar with Article 23 and the Note on each Original Share Certificate.[288]

(b) On 8 June 2012, Wong emailed Yamada, copying Neo, Boo and Lanie. He informed Yamada that he had "instructed Lani[e] to send

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282 NE, 26/09/16, 39:17–40:14.

283 NE, 26/09/16, 33:19–34:19.

284 NE, 26/09/16, 32:17–32:23.

285 NE, 26/09/16, 15:20–15:24.

286 NE, 22/09/16, 59:1–59:11.

287 NE, 23/09/16, 36:10–36:20.

288 NE, 23/09/16, 37:11–37:23.

original share cert to [Yamada] via FedEx by [that day]."[289] As Wong's email continued a prior chain of correspondence between Yamada and himself, Neo would have been able to view the Email Chain. Neo admits that she knew that Lanie had in fact sent the Original Share Certificates to Kawai by FedEx.[290]

(c) By virtue of the Initialling Procedure, Neo knew by 23 October 2012 that the HJS-HYH Transfer would be taking place:

(i) On 26 September 2012, Jason Wong sent an email to Lanie and Neo, instructing Lanie to prepare the necessary documents for a transfer of 200,000 NCJV shares from HJS to HYH. Neo initialled against this email on 26 September 2012.[291]

(ii) Subsequently, on 23 October 2012, Yamada sent an email to Lanie indicating that the correct number of NCJV shares to be transferred was 350,000, not 200,000. Yamada also indicated that the effective date of transfer ought to be 15 October 2012. Neo initialled against this email on 23 October 2012.[292]

(d) On 9 November 2012, Lanie sent an email to Yamada informing him that the ACRA register had been updated in relation to the transfer of the 350,000 NCJV shares from HJS to HYH. The Company's Email Account was copied in this email.[293] The plaintiffs said that if Neo had

289 AB1 343.

290 NE, 23/09/16, 37:20–37:23.

291 AB2 772.

292 AB2 823.

293 AB2 867.

been notified of an update to the ACRA register, but did not subsequently receive a new share certificate in HYH's name for her signature, this would have been a red flag putting Neo on notice that no new share certificate in HYH's name was issued then, and therefore that the Original Share Certificates had not been produced for cancellation.

(e) In early November, Neo signed the HJS BOD Resolution approving the HJS-HYH Transfer.[294] The actual date of signing is unknown but this must have been sometime between 2 to 7 November 2012 (inclusive).[295] However, Neo admitted that she did not see or have at hand either Share Certificate No. 6 or 7 then.[296] She also did not ask Horie or Yamada where they were. She simply signed the resolution and left it to Lanie to "complete this transaction".[297] The plaintiffs said that if Neo had queried Lanie as to the whereabouts of the Original Share Certificates, or checked the register of transfers for the cancelled share certificates, she would have realised that no share certificates had in fact been produced for cancellation.

(f) By virtue of the Initialling Procedure, Neo *must have* known that the HJS-GIIS Transfer would be taking place.

(i) On 16 November 2012, Yamada sent an email to Boo instructing her to transfer 500,000 NCJV shares from HJS to GIIS.[298]

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294 AB2 848.

295 AB2 834, 842, 844, 848; NE, 26/09/16, 17:22–18:3.

296 NE, 23/09/16, 35:13–36:6.

297 NE, 23/09/16, 37:24–39:5.

298 AB2 901.

(ii) Subsequently, on 17 November 2012, Yamada sent an email to Boo indicating that the number of NCJV shares to be transferred was to be increased to 750,000.[299] Although Neo did not in fact initial against this email, the plaintiffs said that this email *must* have been printed and circulated to Neo, as per the Initialling Procedure.

(g) Neo signed on the HJS and GIIS BOD Resolutions approving the HJS-GIIS Transfer.[300] The actual date of signing is unknown but this must have been sometime between 21 and 28 November 2012 (inclusive).[301] However, she admitted that she did not see any share certificate in HJS's name being produced for cancellation then.[302] She presumed that the share certificates would be returned for cancellation.[303] The plaintiffs said that if she had queried Lanie as to the whereabouts of the Original Share Certificates, or checked the register of transfers for the cancelled share certificates, she would have realised that no share certificates had in fact been produced for cancellation.

(h) On 30 November 2012, Lanie sent an email to Yamada informing him that the ACRA register had been updated in relation to the HJS-GIIS Transfer. The Company's Email Account was copied in this email.[304] The plaintiffs said that if Neo had been notified of an update to the ACRA register, but did not subsequently receive a new share

299 AB2 900.

300 AB2 923–924.

301 AB2 915, 918–919, 923–924; NE, 26/09/16, 53:20–54:13.

302 NE, 23/09/16, 50:12–50:20.

303 NE, 23/09/16, 50:21–50:23.

304 AB2 1006.

certificate in GIIS's name for her signature, this would have been a red flag putting Neo on notice that no new share certificate in HYH's name was issued, and therefore that the Original Share Certificates must not have been produced for cancellation.

235 The plaintiffs submitted that Neo also had knowledge of the irregular shortcomings of the subsequent transfers of the NCJV shares pursuant to the subsequent SPAs. They pointed to the following facts:

(a) By virtue of the Initialling Procedure, Neo knew by 9 January 2013 that there would be a transfer of 900,000 NCJV shares from HJS and 1.3 million NCJV shares from HJK to various third parties. On 9 January 2013, Yamada had sent an email to Boo instructing her to prepare the necessary documents for a transfer of 1.3 million NCJV shares held in HJK's name and 900,000 NCJV shares held in HJS's name to various third parties (*ie*, HYH, FGH, AI, Karna, Muchsin, and GIIS). Neo initialled against this email on 9 January 2013.[305]

(b) On 25 February 2013, Lanie sent an email to Yamada attaching the documents she had prepared in order to facilitate the transfer of 1.3 million shares from HJK and 900,000 shares from HJS.[306] The Company's Email Account was copied in this email; this was so Neo could see the documents Lanie was emailing to Yamada, and so that she would know what Lanie was doing.[307] Neo did not raise any query regarding the propriety of the transfers.

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305 AB2 1085.

306 AB2 1209.

307 NE, 26/09/16, 61:7–61:21.

(c) Neo signed the HJS BOD Resolution dated 1 April 2013 approving the transfer of the 900,000 NCJV shares registered in HJS's name.[308] She did so without asking for the Original Share Certificates to be produced.

236 To summarise, Neo knew that the Original Share Certificates had been sent to Kawai in Japan in June 2012. She also knew that they had to be produced for cancellation before a transfer of shares in HJS's and/or HJK's names could be effected. However, the Original Share Certificates were never returned to NCJV for cancellation at any time. The plaintiffs submitted that the absence of Original Share Certificates meant that they might have been in the possession of a third party, or that there might have been other subsisting interests over the shares.[309] Yet, Neo – in her various capacities – facilitated the transfers of the Charged Shares pursuant to the BPA and the subsequent SPAs, leading to the dissipation of all of the Charged Shares. The plaintiffs submitted Neo was wilfully blind as to the existence of another party's interest over the Charged Shares, and that she failed to adequately inquire into the irregularity of the transfers. She was therefore dishonest.[310]

237 The plaintiffs also argued that by *allowing* her subordinate Lanie to do Yamada's bidding in effecting the various transfers of NCJV shares, Neo acted with wilful blindness and completely disregarded the possibility of there being other existing interests over the Original Share Certificates. Alternatively, Neo acted recklessly.[311] The plaintiffs raised the following points:

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308 AB2 1274.

309 PCS, para 266(f).

310 PCS, paras 266–267.

311 PCS, para 285.

(a) Neo accepted that it was her responsibility as company secretary, and not Lanie's, to ensure the return of the Original Share Certificates for cancellation.[312] Yet at no point did she make enquiries with Horie, Kawai, Yamada, HJS, HJK or even Lanie herself as to the whereabouts of the Original Share Certificates.

(b) Although Lanie testified that she did not disclose to Neo (and Boo) the fact that the Original Share Certificates had not been returned until August 2013, Neo (and Boo) did not explain how their strict internal control procedures, which they do not claim have broken down, failed to alert them to the fact that these Original Share Certificates had not been returned.[313]

(c) Lanie testified that she facilitated the transfer of the NCJV shares without production of the Original Share Certificates because she believed that Yamada would return them as he promised to her on various occasions.[314] However, the plaintiffs submitted that Lanie's assertion that she had requested Yamada to return the Original Share Certificates is untrue. They made the following arguments:[315]

(i) There was no documentary evidence that Lanie had requested Yamada to return the Original Share Certificates.

(ii) Lanie was a conscientious worker with a practice of following up on her work – for instance, in March 2013, she sent reminders to Yamada to return the signed transfer documents to

312 NE, 23/09/16, 38:23–39:1.

313 PCS, paras 243–250.

314 NE, 26/09/16, 19:21–22:2; 55:18–57:14.

315 PCS, paras 272–275.

her to enable her to carry out the transfers.[316] Yet she told Neo that she did not send Yamada any written reminders asking him to return the Original Share Certificates for cancellation.[317] If there was no written evidence of such reminders, the plaintiffs suggested that it was more likely that Lanie *did not* make such requests of Yamada at all.

(iii) In Lanie's letter to Yamada on 20 June 2013 enclosing newly-issued share certificates, she made no mention about the return of the Original Share Certificates.

(iv) Neo, Boo and others received the Letters of Demand on 16 August 2013 (see [77] above). The plaintiffs' implicit suggestion in raising this point was that since legal troubles were on the horizon, it was a prime time for Lanie to remind Yamada to return the Original Share Certificates. Yet, apparently, Lanie did not tell Yamada that his failure to return the Original Share Certificates had gotten them into trouble. Neither did she ask of their whereabouts. She was content to think that "everything [was] still okay".[318]

(d) By the Letters of Demand on 16 August 2013, Neo, Boo, and Lanie had been expressly notified of the plaintiffs' equitable interest in the Charged Shares. Yet, with Neo's full knowledge and assent, Lanie took the view that she could still proceed to prepare the necessary documents for transfers of NCJV shares. As long as the *immediate prior share certificates* were returned for cancellation, Lanie could issue new

316 AB2 1253, 1283.

317 NE, 23/09/16, 45:4–45:13.

318 NE, 26/09/16, 131:16–132:4.

share certificates in the transferees' name, even if the Original Share Certificates had not been returned for cancellation.[319] The plaintiffs said this shows that Lanie was not acting on a frolic of her own; if she had been, Neo would have instructed Lanie to cease all transfers of the NCJV shares after 16 August 2013. Yet, Neo *allowed* Lanie to continue following Yamada's instructions even after that.

238 Finally, the plaintiffs argued that Neo had also assisted in her capacity as a director of HJS – they submitted that if Neo had left the transfers to Horie, a fellow director, Horie's knowledge of the plaintiffs' equitable interest in the Charged Shares can be imputed to Neo based on their understanding of *Peter Kwee*.[320]

239 The submissions on behalf of Neo did not make for easy reading. The main arguments can be summarised as follows:

(a) As a preliminary point, the present proceedings should not have been commenced against her in her personal capacity. Rather, the action should have been brought against SACS, her employer at the material time.[321]

(b) When Neo did the acts which "assisted" HJS's and HJK's breaches of trust, she did not know of the plaintiffs' equitable interest in the Charged Shares. This is because:

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319 NE, 26/09/16, 120:9–121:16.

320 PCS, para 268.

321 D19 and D20's Closing Submissions dated 14 November 2016 ("D19–20 CS"), para 22.

(i) She had not been given any copies of, nor had she been involved in the discussion or matters relating to the Loan Agreements, the SCAs, the Undertakings, the Blank NCJV Share Transfer Forms, the Supplemental Deeds, the BPA or the subsequent SPAs.[322]

(ii) The plaintiffs never informed her of their equitable interest in the Charged Shares although this could easily have been done via email or a letter.[323]

(c) When Neo did the acts which "assisted" HJS's and HJK's breaches of trust, she also did not know that the Original Share Certificates had not been returned to NCJV for cancellation. All along, she had simply assumed that Lanie would take care of the cancellation of the Original Share Certificates. Lanie confirmed that until August 2013, only Lanie herself knew that the Original Share Certificates had been never been returned for cancellation.[324]

(d) Even after receiving the Letters of Demand on 16 August 2013, Neo was not made aware of any charge over the NCJV shares in the plaintiffs' favour. This was because the Letter only stated that as security for a loan, HJP, HJS and HJK had charged the NCJV shares. The Letters of Demand did not disclose *how* the charge was created. On reading of this letter, Neo would not necessarily have thought that it was obvious that the Original Share Certificates had not been returned.[325] Thus, even after August 2013, Neo thought that there was nothing wrong.[326]

322 D19–20 CS, para 5.

323 D19–20 CS, para 6.

324 NE, 26/09/16, 11:15–12:11.

325 NE, 26/09/16, 114:10–117:5.

(e) Only upon receipt of the plaintiffs' writ of summons dated 23 October 2013 did Neo realise that the claim was in relation to the NCJV shares held in HJS's and HJK's names. At that point, Neo queried Lanie as to the whereabouts of the Original Share Certificates. Lanie then told Neo that the last known person to whom she had sent the said certificates was Kawai, and that she had expected Yamada to return the Original Share Certificates for cancellation as he had promised her.[327]

(f) In general, Neo claimed that she did not have complete supervision over what Lanie was doing. Therefore, she did not know that new share certificates had been issued in the transferees' names without the prior cancellation of the Original Share Certificates. Specifically, Neo pointed to the following facts:

(i) Lanie worked independently.[328] Neo confirmed that Lanie did not report back to her on corporate secretarial work in NCJV, since it was part of her routine work.[329]

(ii) Lanie issued the new certificates in the various transferees' names without having the Original Share Certificates produced for cancellation. Lanie testified that she was simply following the client's (Yamada's) instructions, and had not sought approval from Neo and Boo to do so.[330]

(iii) Lanie testified that after she updated the register of transfers or the register of members (in their soft copies), no one

326 NE, 26/09/16, 124:4–124:25.

327 NE, 23/09/16, 40:24–41:19.

328 D19–20 CS, para 8.

329 NE, 23/09/16, 7:24–9:15.

330 NE, 26/09/16, 47:18–47:25.

> else would check them. She also would not send a copy of the register of transfers to Neo or Boo.[331]

240 Finally, Neo argued that the knowledge of Horie, a fellow director of HJS, cannot be imputed to her. The case of *Peter Kwee* could be differentiated because Neo had been *deliberately* kept away from the knowledge of the Loan Agreements, SCAs, Supplemental Deeds and Blank NCJV Share Transfer Forms.[332]

(2) Application of law to the facts

241 I will first address Neo's argument that the proper defendant is SACS, not Neo herself. The short point is that it is for the plaintiffs to decide who they wish to sue. Additionally, there is no legal principle stating that employees can *never* be sued in their own right if, in the course of their employment, they perform acts that would otherwise amount to dishonest assistance in breach of trust. There is no reason why Neo and Boo cannot properly be made defendants to the plaintiffs' claim.

242 As for the plaintiffs' argument on imputation of Horie's knowledge to Neo, I repeat my reasoning above at [227]–[228] that *Peter Kwee* is not of assistance to the plaintiffs. Accordingly, Horie's knowledge cannot be imputed to Neo.

243 I turn now to address the plaintiffs' main case against Neo. Having regard to all the evidence, I am of the view that although Neo did assist in HJS's

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331 NE, 26/09/16, 41:16–42:5.

332 D19–20 CS, para 20.

and HJK's breaches of trust in her various capacities through various means, she was not dishonest.

244 Like Wong, Neo knew that the Original Share Certificates were delivered to Kawai on 8 June 2012 and also had the opportunity to read the Email Chain. However, I do not think that an honest person in Neo's position would have attempted to read and understand the substantive content of the Email Chain or its subject title. As with Wong, the Email Chain in a foreign language was clearly not intended for Neo's reading, especially when there were other addressees of the Email Chain who could read that foreign language. Her omission to read and query did not constitute negligence, let alone dishonesty.

245 Accordingly, Neo would not have known and could not be expected to know that the Original Share Certificates had been delivered to Kawai on 8 June 2012 as part of an arrangement involving the creation of a security interest in the plaintiffs' favour, over the NCJV shares registered in HJS's and HJK's names. There was also no evidence that Neo knew that the Original Share Certificates were subsequently delivered to the plaintiffs on 14 June 2012. I am satisfied that at the time, she had no reason to think that HJS's and HJK's NCJV shares were encumbered in any way.

246 I accept that as of 23 October 2012, Neo was made aware of the upcoming HJS-HYH Transfer through the Initialling Procedure. Subsequently, sometime in early November, she signed the HJS BOD Resolution approving this transfer although the document itself was backdated to 15 October 2012 (see [57] above). Although Neo signed the HJS BOD Resolution without having sight of the returned and cancelled share certificates in HJS's name (*ie*, either Share Certificate No. 6 or 7), I do not think that this constitutes dishonest conduct.

247 As mentioned above, Neo's position was that she left it to Lanie to complete the transaction. I accept Lanie's evidence, which was not challenged by the plaintiffs, that she did not inform Neo (and Boo) that the Original Share Certificates had not been returned for cancellation until August 2013 when the Letters of Demand were issued. I also accept Lanie's evidence that she had not sought Neo's (or Boo's) approval before issuing new share certificates in the transferee's names without having the Original Share Certificates being produced for cancellation. She was content to do so on Yamada's instructions alone. This evidence was also not challenged by the plaintiffs. Having regard to this, I am satisfied that Neo did not in fact know that Share Certificates No. 6 or 7 had not been returned for cancellation prior to the HJS-HYH Transfer.

248 Whether Neo ought to have personally taken steps to confirm that the Original Share Certificates had been returned for cancellation is a separate matter. In my view, Neo should not be expected to query Lanie on whether the Original Share Certificates had been returned for cancellation prior to the transfers. This was routine work. Clearly, Lanie knew, even without any supervision or direction by Neo, that the Original Share Certificates should have been returned for cancellation. In any event, even if Neo should have queried Lanie as to the same but failed to do so, this would at most amount to negligence, but not dishonesty.

249 I turn now to consider the HJS-GIIS transfer. I accept that as of 30 November 2012, Neo was made aware of the completed HJS-GIIS transfer through an email from Lanie to Yamada informing him that the ACRA register had been updated to reflect the HJS-GIIS Transfer. This email had been copied to the Company's Email Account. Again, there is no evidence that Neo knew, at this point in time, that the share certificates in HJS's name (*ie*, either Share Certificate No. 6 or 7) had not actually been returned and cancelled prior to the

share transfer to GIIS. Again, I do not think that she should be expected to check on this matter for herself. Therefore she was not negligent, let alone dishonest.

250 Finally, I turn to consider the various transfers pursuant to the subsequent SPAs. I accept that as of 9 January 2013, Neo was made aware of the upcoming transfers of 900,000 NCJV shares from HJK and 1.3 million NCJV shares from HJS to various third parties, through the Initialling Procedure. As before, there is no evidence that she knew by this point in time that the Original Share Certificates had not actually been returned to NCJV for cancellation. Again she was content to leave the matter to Lanie, and again she failed to personally ensure the return and cancellation of the Original Share Certificates. Yet, this falls short of dishonesty.

251 In my view, Neo only realised that the Original Share Certificates had never been returned to NCJV for cancellation sometime on or after 16 August 2013, when Neo received the Letters of Demand from the plaintiffs' solicitors. Neo testified that after receiving the Letters of Demand, she queried Lanie as to the whereabouts of the Original Share Certificates and Lanie confessed that they had never been returned to NCJV for cancellation.[333] I note that this was a change from Neo's earlier oral evidence that she had only confronted Lanie after receiving the writ of summons on 23 October 2013. However, as Lanie also gave evidence that she told Neo of this fact in August 2013, I am satisfied that Neo had queried Lanie on the Original Share Certificates, for the first time, on or after 16 August 2013.

252 I wish to make an observation on the transfers of NCJV shares that took place after 16 August 2013 (see [82]–[83] above). By this point in time, Neo had clearly been made aware that the plaintiffs claimed some sort of security

333 NE, 23/09/16, 81:14–82:14; 90:7–90:11.

interest in the Charged Shares and that the Original Share Certificates had not been returned for cancellation. Yet, Neo told Lanie that she could continue to prepare the necessary documents to facilitate these share transfers as long as the immediate prior share certificates were returned. To my mind, such conduct clearly constitutes negligence on Neo's part. As a provider of professional corporate secretarial services, she ought to have known that a company cannot continue to issue new share certificates in transferees' names if the underlying certificates (*ie*, the Original Share Certificates) had never been returned for cancellation. She must have known that the omission to insist on the return of the Original Share Certificates and the plaintiffs' claims could result in competing claims to ownership and further subsequent transfers would only complicate matters unnecessarily. For all the pride that Neo appeared to have in what she perceived as her professionalism, she was in fact acting unprofessionally when she allowed Lanie to continue to issue new share certificates so long as the immediate prior share certificates were returned even though the Original Share Certificates still had not been returned for cancellation. She needs a wakeup call.

253 However, the relevant share transfers under consideration took place prior to 16 August 2013 (see [189] above). This was prior to Neo finding out that the plaintiffs claimed some sort of security interest in the shares. Thus, although Neo had assisted in HJS's and HJK's breaches of trust, she had not done so dishonestly. On this basis alone, Neo would not be liable for dishonest assistance.

Boo

254 Boo, as NCJV's company secretary, allowed her subordinate, Lanie, to effect the various transfers of NCJV shares. Boo was not a witness at trial. In

her written submissions, Boo did not appear to dispute the element of assistance. Thus, the only question is whether Boo's assistance was dishonest.

(1) The parties' cases

255 As earlier mentioned, the plaintiffs submitted that Boo (and Neo) facilitated the transfer of the NCJV shares registered in HJS's and HJK's names in circumstances where they wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make. Additionally, they allowed Lanie, their subordinate, to transfer the Charged Shares at Yamada's bidding.[334]

256 Specifically, the plaintiffs' case against Boo was premised on the following facts:

(a) Boo was in charge of the corporate secretarial department. It is unlikely that she would not know of a basic and fundamental requirement for the transfer of shares – the return and cancellation of share certificates in the transferor's name. This requirement would also have been highlighted to her in NCJV's company constitution, various company resolutions and share certificates.

(b) Boo was Lanie's direct superior in SACS.[335] On at least one occasion she directed Lanie to carry out Yamada's instructions (see [256(f)] below). It was inconceivable that Lanie did not report back to *at least* Boo, contrary to Neo's and Lanie's assertions.

334 PCS, para 226.

335 PCS, para 233.

(c) On 4 June 2012, Boo knew that Yamada was looking for the Original Share Certificates.

(i) On 4 June 2012, at 11.42 am, Wong replied to an email from Yamada indicating that he would, as requested by Yamada, procure NCJV share certificates to be issued in HJS's and HJK's name. Boo was copied in this email.[336]

(ii) Later that day, at 3.19 pm, Wong sent a further email to Boo requesting her to locate the share certificates in HJS's and HJK's names, and that if she could not locate them, to issue new ones. He also said that "Yamada san needs [the share certificates] by today."[337]

(d) Boo was heavily involved in procuring the Original Share Certificates and sending them to Kawai's office in Japan.

(i) On 6 June 2012, at 8.02 am, Yamada emailed Boo asking whether there was any "progress" in locating the NCJV share certificates registered in HJS's and HJK's names.[338] Wong replied to this email at 3.03 pm stating that "new cert been issued and signed [*sic*]" and "Pamela will email you scanned copy today." Boo was copied on this email.[339] Yamada then replied at 3.15 pm requesting that the certificates in HJS's and HJK's names be faxed to Kawai's office in Japan.[340] Wong replied at 6.11 pm: "Ok, Carole will arrange."[341]

336 AB1 307.

337 AB1 307.

338 AB1 341–342.

339 AB1 341.

340 AB1 341.

(ii) On 8 June 2012, at 8.49 am, Yamada emailed Wong and forwarded the Email Chain. At 9.17 am, Wong emailed Boo asking her to "[p]lease confirm with Yamada if [she had sent] JV share cert by FedEx."[342] Because Wong's email continued the prior chain of correspondence with Yamada, Boo would have been able to view the Email Chain.

(iii) On the same day at 9.30 am, Wong emailed Yamada, copying Neo, Boo and Lanie, continuing the same chain of correspondence as before. Addressing "Carole / Lani", he instructed them to let Yamada know when FedEx had picked up the documents for delivery.[343] At 9.44 am,[344] Lanie emailed Yamada informing him that the Original Share Certificates would be couriered to Kawai's office in Japan by the end of that day, 8 June 2012.[345] At 1.18 pm, Lanie emailed Yamada informing him that FedEx had picked up the Original Share Certificates from their office.[346]

(e) On 17 November 2012, Yamada sent an email to Boo instructing her to transfer 750,000 NCJV shares from HJS to GIIS. Boo initialled against this email.[347] Thus, by virtue of the Initialling Procedure, Boo knew that there would be a transfer of 750,000 NCJV shares from HJS to GIIS.

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341 AB1 341.

342 AB1 343.

343 AB1 343.

344 NE, 26/09/16, 6:17–6:21.

345 AB1 372.

346 AB1 376.

347 AB2 900.

(f) On 9 January 2013, Yamada sent an email to Boo instructing her to prepare the necessary documents for a transfer of 1.3 million NCJV shares held in HJK's name and 900,000 NCJV shares held in HJS's name to various third parties (*ie*, HYH, FGH, AI, Karna, Muchsin, GIIS).[348] Boo had written on the hard copy of the email: "Lanie, For your action".[349] By this instruction, she directed Lanie to proceed with the share transfers as per Yamada's instructions.

257 To summarise the plaintiffs' allegations, Boo knew that the Original Share Certificates had been sent to Kawai in June 2012. She *should have known* that they had to be produced for cancellation before a transfer of shares in HJS's and/or HJK's names could be effected. However, the Original Share Certificates were never returned to NCJV for cancellation at any time. The plaintiffs submitted that the absence of Original Share Certificates meant that they might have been in the possession of a third party, or that there might have been other subsisting interests over the shares.[350] Yet, Boo facilitated transfers of the Charged Shares pursuant to the BPA and the subsequent SPAs, leading to the dissipation of all of the Charged Shares. The plaintiffs said Boo was wilfully blind as to the existence of another party's interest over the Charged Shares, and that she failed to adequately inquire into the irregularity of the transfers. She was therefore dishonest.[351]

258 Additionally, the plaintiffs relied on *Cheong Ghim Fah and another v Murugian s/o Rangasamy* [2004] 1 SLR(R) 628 ("*Cheong Ghim Fah*") to argue that an adverse inference should be drawn against Boo as she did not give

348 AB2 1085.

349 NE, 26/09/16, 59:15–60:19.

350 PCS, para 266(f).

351 PCS, paras 266–267.

evidence at trial. The plaintiffs said that given her role in handling NCJV's corporate secretarial matters, she could be expected to have material evidence to give on an issue in the action.[352] However, in their closing submissions, the plaintiffs did not specify *what* adverse inference they were asking this court to draw. I elaborate more on this point later.

259 As was the case for Neo, the submissions on behalf of Boo did not make for easy reading. Boo made the following arguments:

(a) Like Neo, she argued that the present proceedings should not have been commenced against her in her personal capacity, but instead against SACS, her employer at the material time.[353]

(b) Boo did not know of the plaintiffs' equitable interest in the Charged Shares. This was because:

(i) She had not been given any copies of, nor had she been involved in the discussion or matters relating to the Loan Agreements, the SCAs, the Undertakings, the Blank NCJV Share Transfer Forms, the Supplemental Deeds, the BPA or the subsequent SPAs.[354]

(ii) The plaintiffs never informed her of their equitable interest in the Charged Shares although this could easily have been done via email or a letter.[355]

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352 PCS, paras 288–294.

353 D19–20 CS, para 22.

354 D19–20 CS, para 5.

355 D19–20 CS, para 6.

(c) Boo also did not know that the Original Share Certificates had never been returned to NCJV for cancellation. Lanie confirmed that until August 2013, only Lanie herself knew that the Original Share Certificates had been never been returned for cancellation.[356]

(d) In general, Boo did not have complete knowledge of what Lanie was doing.

(i) Lanie was generally left to work on her own. Lanie testified that if Yamada gave her instructions to prepare documentation to facilitate share transfers, she would not check with Boo before proceeding to do so. This was because such document preparation was considered "ordinary secretarial work".[357] Similarly, Lanie would not send such documentation to Boo for checking before proceeding to send it to Yamada.

(ii) Lanie issued the new certificates in the various transferees' names without having the Original Share Certificates produced for cancellation. Lanie testified that she was simply following the client's (Yamada's) instructions, and had not sought approval from Neo or Boo to do so.[358]

(iii) Lanie testified that after she updated the register of transfers or members (in their soft copies), no one else would check them. She also would not send a copy of the register of transfers to Neo or Boo.[359]

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356 NE, 26/09/16, 11:15–12:11.

357 NE, 26/09/16, 14:11–15:4.

358 NE, 26/09/16, 47:18–47:25.

359 NE, 26/09/16, 41:16–42:5.

(e) Finally, no adverse inference should be drawn against Boo. From 7 July 2016 when Neo filed her AEIC, it was clear that Boo would not be appearing as a witness to testify.[360] If the plaintiffs considered Boo's role in the communication structure to be so central, then they could have served a subpoena on Boo to give evidence; yet, they chose not to do so.[361]

(2) Application of law to the facts

260 I first address Boo's argument that the proceedings should have been brought against SACS and not Boo personally. As held above at [241], I do not think this argument is meritorious.

261 Turning to the plaintiffs' case against Boo, I accept that Boo knew that the Original Share Certificates had been couriered to Kawai on 8 June 2012. She was intimately involved in this process, as evidenced by the contemporaneous email correspondence mentioned at [256(c)] and [256(d)] above. However, as was the case with Wong and Neo, I do not think that the plaintiffs have proved their case that Boo knew that this was part of an arrangement to create a security interest in the plaintiffs' favour over the NCJV shares registered in HJS's and HJK's names. Again there was no evidence that Boo knew that the Original Share Certificates had been subsequently delivered to the plaintiffs on 14 June 2012.

262 As for the HJS-HYH Transfer in November 2012, I note that there was no direct evidence that Boo knew of this transfer. The plaintiffs asked this court to draw the inference that because Boo was Lanie's direct superior, Lanie must

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360 Neo Lay Hiang Pamela's AEIC, para 1.

361 D19–20 CS, para 21.

have reported back to Boo, and therefore that Boo must have known of this transfer. However, this was directly contradicted by Lanie's own evidence that although Boo was her direct superior, she would not seek Boo's approval for effecting such transfers, nor inform her that the registers of transfers or members had been updated.

263 Even if Boo knew of the HJS-HYH Transfer, the more important question is whether Boo knew that the Original Share Certificates had not been returned for cancellation prior to such a transfer. Again, as was the case with Neo, there was no evidence that Boo knew, at that point in time, that the Original Share Certificates had not in fact been returned to NCJV for cancellation. The same may be said of the HJS-GIIS Transfer, which took place sometime later in November 2012; and also of the various transfers made pursuant to the subsequent SPAs sometime around April 2013.

264 I am of the view that Boo only realised that the Original Share Certificates had not been returned to NCJV for cancellation sometime on or after 16 August 2013, when she received the Letters of Demand from the plaintiffs' solicitors. Also, when Neo queried Lanie about the whereabouts of the Original Share Certificates and learned that such certificates had not been returned for cancellation, it was likely that Boo would also have been informed of this discovery.

265 Like Neo, Boo appeared to have been content to leave it to Lanie to carry out the various share transfers. Boo never personally took any steps to confirm that the Original Share Certificates had been returned for cancellation. However, as was the case for Neo, I do not think that Boo was required to query Lanie on what was routine work for a professional provider of corporate

secretarial services. My tentative view is that Boo's conduct was not negligent, let alone dishonest.

266 At this juncture, it is apposite to consider the plaintiffs' argument that an adverse inference should be drawn against Boo because she did not give evidence at trial. Under s 116 of the Evidence Act (Cap 97, 1997 Rev Ed), illustration (*g*) states that the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. In other words, the court may draw an adverse inference from the absence or silence of a witness who might be expected to have material evidence to give on an issue in action (*Cheong Gim Fah* at [42]). The principles applicable to absentee witnesses were laid out by the High Court in *Cheong Gim Fah* at [42]–[43], which cited with approval *Wiesniewski v Central Manchester Health Authority* [1998] 5 PIQR P324 at P340:

> (a) If a court is willing to draw an adverse inference, it may go towards strengthening the evidence adduced on that issue by the other party, or towards weakening the evidence (if any) adduced by the party who might reasonably have been expected to call the witness.
>
> (b) There must be some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference, *ie*, there must be a case to answer on that issue.
>
> (c) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it not wholly satisfactory, the potentially detrimental effect of his absence or silence may be reduced or nullified.

267 As earlier mentioned, the plaintiffs in their closing submissions did not specify what adverse inference they wished this court to draw. They only stated in broad terms that "this Court is entitled to draw [an adverse inference] *from the absence of Carole Boo who might be expected to have material evidence to give on an issue in an action*" [emphasis original].[362] However, they did suggest that Boo ought to have given evidence as to what instructions she had received from Yamada and then passed on to Lanie. Boo's failure to do so created an "unexplained gap in the chain of communication" between Neo and Lanie.[363]

268 It seems to me that the plaintiffs' suggestion missed the point. The issue was not so much what instructions Yamada had given but whether Boo was aware that the Original Share Certificates had not been returned for cancellation. The plaintiffs stopped short of asking this court to draw an inference that Boo had the same knowledge as Lanie, who knew that the Original Share Certificates had not been returned for cancellation. Accordingly, I will not draw that inference.

269 I also find that although Boo assisted in HJS's and HJK's breaches of trust, she too was not dishonest. She would therefore not be liable for dishonest assistance.

270 It may even be difficult to conclude that Lanie had a dishonest intention. When Lanie prepared the documents for the HJS-HYH Transfer sometime in early November 2012, she knew that the Original Share Certificates had not been returned to NCJV for cancellation. She testified that she continued to facilitate the Transfer because she trusted that Yamada would return the Original Share Certificates for cancellation as he had promised (see [239(e)]

362 PCS, para 294.

363 PCS, paras 292–293.

above). Because of this trust in Yamada, Lanie unquestioningly accepted his instructions to issue new share certificates in the transferees' names without having the Original Share Certificates produced for cancellation. This belief persisted throughout in respect of the HJS-GIIS Transfer and the other transfers pursuant to the subsequent SPAs.

271 As evidence of her trust in Yamada, she did not tell Yamada that his failure to return the Original Share Certificates had caused trouble even after the Letters of Demand were received on 16 August 2013. Indeed, instead of realising that legal troubles were afoot, it appears that Lanie thought that "everything [was] still okay".[364] She continued to wait for Yamada to fulfil his promise and return the Original Share Certificates. Her attitude was that as he was the client, she had to comply with his instructions. Otherwise, he might complain about her.[365] Apparently, SACS was also providing corporate secretarial services for other companies in which Yamada was in one way or another and she did not want to antagonise a client who was giving other work to them.[366]

272 It seems to me that Lanie was naïve in trusting Yamada to return the Original Share Certificates. However, much like the defendants in *Banque Nationale*, it appeared that Lanie was more a fool than a knave. She should not have trusted Yamada so much, but she did. In my view, her conduct was clearly negligent and fell far short of the professional standard expected of her as a corporate secretarial executive providing professional services to NCJV. Still, foolishness and imprudence is not dishonesty. This is not a case where Lanie had decided not to make an inquiry or to inquire further because she suspected

364 NE, 26/09/16, 131:16–132:4.

365 NE, 26/09/16, 73:24–74:6.

366 NE, 26/09/16, 75:7–75:14.

that something was wrong and did not want to know the truth. Lanie was not dishonest because she did not even suspect that something was amiss.

Issue 4: Whether HYH and/or the Sub-purchasers are liable for knowing receipt, and in this connection, whether they are *bona fide* purchasers for value without notice

273 I come now to the plaintiffs' claims against HYH and the Sub-purchasers in knowing receipt.

274 As I have found earlier, no trust arose between the plaintiffs on the one hand, and HJS and HJK on the other, in respect of the Charged Shares (see [158] above). However, even assuming that a trust or fiduciary relationship arose and that HJS's and HJK's disposal of the Charged Shares was a breach of trust or fiduciary duty, that does not necessarily mean that the plaintiffs' claim in knowing receipt is satisfied. As I have done in relation to Issue 3 (involving dishonest assistance), I shall consider the other elements of the cause of action in knowing receipt and the relevant defences.

The plaintiffs' case against HYH and the Sub-purchasers

275 The plaintiffs' case against HYH and the Sub-purchasers morphed significantly during the course of proceedings. I first consider the case as pleaded in the statement of claim.

276 At para 48 of the statement of claim, the plaintiffs pleaded the following:

> As regards parties who are currently in wrongful receipt of the Charged Shares
>
> 48.1 [The 5th to 14th defendants]:
>
> (a) did not obtain beneficial interest in the Charged Shares since the beneficial interest therein remained with the plaintiffs;

> (b) alternatively, they are in knowing receipt of the Charged Shares in NCJV which they knew and/or ought to have known were subject to the plaintiffs' prevailing interests.
>
> 48.2 Insofar as any of the defendants who had received the Charged Shares pursuant to the First Transfer, Second Transfer, Third Transfer and/or Fourth Transfer has disposed of any of the Charged Shares (after the commencement of these proceedings), they are liable to the plaintiffs for all proceeds received from such transfers.
>
> 48.3 Insofar as any of the defendants continue to hold any Charged Shares, the plaintiffs shall have the right (at their election) to such shares or the value thereof.

277 The "First Transfer" and "Second Transfer" are the HJS-HYH Transfer and HJS-GIIS Transfer respectively (see [54] and [58] above). The "Third Transfer" refers collectively to the transfer of 2.95 million NCJV shares, made pursuant to the various transfers mentioned at [67]–[68] above. The "Fourth Transfer" refers collectively to the transfer of 450,000 NCJV shares, made pursuant to the various SPAs mentioned at [73] above.

278 It appears from para 48.1(a) of the statement of claim that the plaintiffs' primary case was that the "beneficial interest" in the Charged Shares had always remained with the plaintiffs. However, the plaintiffs did not link their claim that they always had the beneficial interest in the Charged Shares to any specific cause of action. It was only in their alternative case, in para 48.1(b) of the statement of claim, that the plaintiffs pleaded a specific cause of action – that the 5th to 14th defendants are in knowing receipt of the Charged Shares.

279 Paragraphs 48.2 and 48.3 of the statement of claim then mention certain types of relief, differentiating between defendants who are currently holding Charged Shares and those who are not. However, the plaintiffs did not clearly state the relationship between paras 48.1, 48.2 and 48.3. Is the relief mentioned

in the latter two paragraphs premised on the primary case in para 48.1(a) or the alternative case in para 48.1(b) or both?

280 This ambiguity followed on into the prayers section of the statement of claim. The plaintiffs prayed for the following:

> 2. Against the [5th to 14th defendants]:
>
> 2.1 a declaration that the beneficial interest in the Charged Shares remain with the plaintiffs; and
>
> 2.2 insofar as the 5th to 14th defendants (or any one of them) have, subsequent to the date of this writ, transferred any of the Charged Shares to other parties:
>
> (a) to account to the plaintiffs for proceeds received pursuant to these transfers [...]
>
> (b) to pay to the plaintiffs moneys, and all profits, dividends, benefits and/or assets, including simple interest; and
>
> (c) there be an inquiry to trace the assets or proceeds into which the proceeds received pursuant to these transfers had been converted; or
>
> (d) alternative to the above, the value of such shares be paid to the plaintiffs;
>
> 2.3 insofar as any of the defendants continue to be the registered holder of the Charged Shares, an order that any such shares (including any rights or dividends issued under such shares) be transferred to the plaintiffs or alternatively, the value of such shares be paid to the plaintiffs.

281 The plaintiffs' case in its closing submissions was relatively clearer. I summarised this briefly at [87(b)] and [88] above, but for ease of reference re-state it here:

> (a) HYH and the Sub-purchasers are liable for knowing receipt. In general, the plaintiffs sought the value of the Charged Shares received by each of them. The exception was HYH, against which the plaintiffs sought an additional $390,000 (being the amount it received under the ASO SPA).

(b) If the court declined to grant the plaintiffs relief in respect of their claim in knowing receipt as against Muchsin, CBF, and/or Liu, the plaintiffs sought, by way of an equitable proprietary claim, the return of the relevant Charged Shares which they still retain and such benefits that they each received whilst in possession of the Charged Shares.

282 As can be seen, the plaintiffs' closing submissions clarified that their equitable proprietary claim for the return of the Charged Shares as against Muchsin, CBF, and Liu was *not* premised on their cause of action in knowing receipt; rather, it was an alternative.

The law on knowing receipt and* bona fide *purchaser defence

283 I will first set out, as a broad overview, the legal principles relating to knowing receipt and the *bona fide* purchaser defence. Thereafter, I will summarise the approach that this court will adopt in determining the liability of HYH and the Sub-purchasers.

Knowing receipt

284 Knowing receipt is a ground to impose personal liability on a third party in equity. The elements required to establish a claim for knowing receipt are: (a) a disposal of the plaintiff's assets in breach of trust or fiduciary duty; (b) beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and (c) knowledge on the part of the defendant that the assets received are traceable to a breach of trust or fiduciary duty: *GRZ III* at [23], citing *Caltong* at [31].

285 In relation to the third element, the defendant's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt:

GRZ III at [23], citing *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437. 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 transaction is required, clear evidence of the degree of knowledge and fault must be adduced: *GRZ III* at [32]. Actual knowledge of a breach of trust or fiduciary duty is not invariably necessary, 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 the receipt: *GRZ III* at [32].

286 I should add that the defendant need not *know* that *as a matter of law*, the property had been transferred in breach of trust or fiduciary duty. It suffices that the defendant knows all the *facts* necessary for him to conclude that there was *prima facie* something so unusual or so contrary to accepted commercial practice, and fails to make inquiries under such circumstances. In *Barlow Clowes*, the Privy Council held at [28] that "[s]omeone can know, and can certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or what a trust means." Although *Barlow Clowes* was a case involving dishonest assistance, I am of the view that the same principle is applicable in the context of knowing receipt.

287 If the defendant is a company, the company will be attributed with the state of mind of the person who is its directing mind and will: *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2015] 2 WLR 1168 ("*Bilta*") at [67]. A person may be the directing mind and will for all purposes, or only for the purpose of performing a particular function; the question is who had management and control over the company in relation to the act or omission

in question: *Bilta* at [67]–[68], citing *El Ajou v Dollar Land Holdings Ltd* [1994] 2 All ER 685 ("*El Ajou*").

288 If a defendant is found liable for knowing receipt, that defendant comes under *personal liability* to account: Alastair Hudson, *Equity & Trusts* (Cavendish Publishing Limited, 7th Ed, 2013) ("*Equity & Trusts*") at para20.3.7 and Jill Martin, *Hanbury & Martin's Modern Equity* (Sweet & Maxwell, 19th Ed, 2012) ("*Hanbury & Martin's*") at pp 341–342.

The bona fide *purchaser defence*

289 I turn now to consider the principles relating to the defence of *bona fide* purchaser for value without notice.

290 HYH and the Sub-purchasers each pleaded the *bona fide* purchaser defence in response to both (a) the plaintiffs' claim for knowing receipt and (b) their equitable proprietary claim for the return of the Charged Shares.[367]

291 Before discussing the law on the *bona fide* purchaser defence, I first examine the relationship between this defence and the plaintiffs' claims in knowing receipt and the equitable proprietary claim.

(1) Relationship between the defence and the plaintiffs' claims

292 Beginning with the claim against CBF, Muchsin, and Liu for the return of the Charged Shares, this equitable proprietary claim is subject to those Sub-purchasers being able to prove the *bona fide* purchaser defence. If any of these defendants succeed in establishing the defence, that defendant's legal title

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367 Defence of 5th, 6th, 9th – 12th and 14th Defendants (Amendment No 3) ("D5–6, 9–12 and 14's Defence"), paras 7.1.4, 7.1.13 and 11.1.10; Defence of the 7th Defendant (Amendment No. 1) ("D7's Defence"), paras 8.1.8, 8.1.9, 10.1.4 and 11.3.

will defeat the plaintiffs' equitable interest in the property in which case the plaintiffs' proprietary claim must fail. This was correctly acknowledged by the plaintiffs in their closing and further submissions.[368]

293 Similarly, for the plaintiffs' personal claim in knowing receipt, as correctly pointed out by FGH in its further reply submissions,[369] it is established law that the *bona fide* purchaser defence will defeat a claim in knowing receipt (see *Equity & Trusts* at para 20.4.1 and *Hanbury & Martin's* at p 341). This is because the basis of a person's liability in knowing receipt is that he received property in which the plaintiff had a *subsisting* equitable interest: *Snell's Equity* (John McGhee, ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at para 30-071. If the plaintiff's equitable interest is extinguished from the point when the defendant purchased the property, he cannot then later rely on thence non-existent equitable interest to sustain a claim for knowing receipt. The claim must fail from the outset.

(2) Requirements of the *bona fide* purchaser defence

294 To successfully establish the *bona fide* purchaser defence, the defendant must establish the following elements: (a) that he acted in good faith; (b) that he had paid valuable consideration; and (c) that he obtained the legal interest in the property; and (d) that he had no notice of the plaintiff's equitable interest in the property: *Snell's Equity* at paras 4-021–4-035.

295 In this regard, notice may take the form of either actual or constructive knowledge. A person has *actual* notice of another's interest in that property if he has actual personal knowledge of it. On the other hand, *constructive* notice

368 PCS, paras 300–304; PFS, para 73.

369 D7 FRS, para 91.1.

is notice which a reasonable man in the position of the person dealing with the property in question would have acquired if there were facts putting him on inquiry and he should have, acting reasonably, carried out inquiries to dispel or confirm the existence of another's adverse interest in the property; however, a purchaser is not required to act on the slightest suspicion as to the existence of a prior equitable interest (see *Halsbury's Laws of Singapore* vol 9(3) (LexisNexis, 2003) at paras 110.80–110.081).

296 Although the element of absence of notice is distinct from that of good faith, it has been suggested that it is difficult to imagine a case in which the purchaser does not have notice and yet is not acting in good faith: *Snell's Equity*, para 4-021.

297 It should be mentioned that there is a significant overlap between the element of "notice" in the *bona fide* purchaser defence and the element of "knowledge" in knowing receipt (see *Papadimitriou v Crédit Agricole Corpn and Investment Bank* [2015] 1 WLR 4265 at [33]; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] 3 WLR 835 at [131]). I note that in the present case, none of the parties has suggested that there is a significant difference between the concepts of "notice" and "knowledge". Indeed, the parties acknowledge that they are broadly similar.[370]

298 For the same reason, there would also be a practical overlap in respect of the "*bona fide*" element of the *bona fide* purchaser defence and the element of "knowledge" in knowing receipt. It is difficult to imagine a case in which a person who knew that the assets he received were traceable to a breach of trust or fiduciary duty, and had a state of knowledge making it unconscionable for

370 PFS, paras 78–80; D5, D9–12 and D14's (Further) Closing Submissions dated 25 September 2017 ("D5, 9–12, 14 FCS"), paras 100–102.

him to retain the benefit of his receipt, could be described as having acted *bona fide*.

299 On the issue of notice and knowledge, a preliminary point of law should first be dealt with. The plaintiffs sought to argue that even if a person *initially* received assets as a *bona fide* purchaser without notice, he could become liable in knowing receipt if that person's conscience was *subsequently* affected by knowledge of fraud, breach of trust and/or breach of fiduciary duties. The plaintiffs relied on the High Court decision of *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR(R) 1020 as the sole authority for this proposition.[371] In my view, this reliance was misplaced. The issue of the *bona fide* purchaser defence was not even before the court there and it therefore did not have the opportunity to consider the question of whether the defence could be trumped by the defendant's subsequently acquired knowledge of the fraud, breach of trust or breach of fiduciary duties.

300 Further, the plaintiffs' unqualified submission on the effect of subsequently acquired knowledge on a *bona fide* purchaser would render the defence too easily negated by, for instance, a letter of demand from the plaintiff or news publicity of a breach. On this point, the comments of Professor Robert Chambers in his article "The End of Knowing Receipt" (2016) 2(1) Canadian Journal of Comparative and Contemporary Law 1 at p 14 are relevant:

> Since liability for knowing receipt depends on receiving assets held in trust, it cannot arise if recipients take the assets free of the trust as *bona fide* purchasers for value without notice. This will not change if they later acquire notice or knowledge of the breach. They are free to continue to use and enjoy the assets as they please and can sell them to others who know of the breach of trust. Otherwise, the defence of bona fide purchase would fail to protect them adequately, and a well publicised breach of trust would destroy the market value of the assets.

371 PFS, paras 76–77.

(3) The innocent volunteer

301 I turn now to briefly discuss the scenario of the innocent volunteer. Such a person has acted *bona fide* and without notice, but is a "volunteer" (as opposed to a purchaser) in the sense that he has not furnished any consideration for the property. For that reason, he is unable to rely on this defence to the plaintiff's proprietary claim. The innocent volunteer takes the property subject to a plaintiff's prior equitable interest.

302 Is an innocent volunteer then necessarily liable for the claim in knowing receipt? As a matter of law, his liability depends on whether the plaintiff can establish the three elements of knowing receipt stated at [284]. One of these elements concerns the defendant's state of knowledge. Given the significant overlaps between the "knowledge", "notice", and "*bona fide*" elements (as mentioned above at [297]–[298]), an innocent volunteer will in all likelihood *not* be liable as a knowing recipient. Nonetheless, because he cannot establish the *bona fide* purchaser defence (as mentioned at [301] above), in respect of the plaintiff's proprietary claim, he may take the property subject to the plaintiff's equitable interest.

303 The following passage from *Hanbury & Martin's* at pp 341–342 aptly summarises the above:

> Not every transferee who fails to prove that he was a bona fide purchaser of the legal estate without notice is subjected to the additional personal liability. An "innocent volunteer", for example, who took without notice that the property was trust property transferred in breach of trust cannot take free of the trust, but, on the present state of authorities, does not incur personal liability.

The approach

304 I now set out the approach I will take for this section of the judgment. It will be recalled that my main finding was that the plaintiffs do not currently have any subsisting security interest in the Charged Shares (see [134] above), but even if they did, no trust had arisen over the Charged Shares in their favour by virtue of that security interest (see [158] above). However, for the purposes of the present analysis, this section of the judgment proceeds on the *assumption* that the SCAs did not expire and there was a trust or fiduciary relationship in respect of the Charged Shares (see [274] above).

305 If so, then HYH and the Sub-purchasers do not dispute the first two elements of knowing receipt, *ie*, they do not dispute that there has been (a) a disposal of the plaintiffs' assets in breach of trust or fiduciary duty, and (b) beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiffs.[372] Accordingly, at this stage, the only dispute is whether these defendants have the requisite state of knowledge to be liable in knowing receipt. As mentioned at [297]–[298], this state of "knowledge" overlaps significantly with the "notice" and "*bona fide*" elements in the *bona fide* purchaser defence.

306 My approach is as follows:

(a) The first question is whether the plaintiffs' equitable interest in the Charged Shares has been extinguished by the *bona fide* purchaser defence. Each defendant bears the burden of proving that defence. If the

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372 D7's Closing Submissions dated 14 November 2016 ("D7 CS"), para 52; D5, D9–12 and D14's Closing Submissions dated 28 November 2016 ("D5, 9–12, 14 CS"), paras 135, 181.

defence is successfully established, then the plaintiffs' claim in knowing receipt fails from the outset.

(b) If the defence fails, the reason for which it fails would be important. If it fails because the defendant was not *bona fide* and/or had notice of the plaintiffs' interest in the Charged Shares, then he will also have the requisite state of knowledge to be liable for knowing receipt. Given that the remaining two elements are not in dispute (see [305] above), such a defendant is liable in knowing receipt.

(c) If the defence fails even though the defendant was *bona fide* and without notice, *ie,* because the defendant was a volunteer and not a purchaser for value, then he will not have the requisite state of knowledge to be liable for knowing receipt. This is the situation of the innocent volunteer mentioned above at [301]–[303]. While such a defendant will not be liable in knowing receipt, he may still be liable to return the Charged Shares or assets received in exchange for these shares.

307 I turn now to consider each relevant defendant, beginning with HYH.

HYH

308 It will be recalled that HYH was involved in the following transfers of Charged Shares:[373]

[373] PTSD, pp 1–21.

S/N	Transferor	Transferee	Number of Charged Shares received	Date of effective transfer
1	HJS	HYH	350,000	15/10/12
2	GIIS	HYH	450,000	01/04/13
3	CBF	HYH	200,000	28/10/13
4	HYH	Liu	250,000	19/07/13
5	HYH	ASO	200,000	19/07/13

309 I will refer to these transfers by their serial number in subsequent paragraphs of this section of the judgment (*eg*, "S/N 1").

310 To recapitulate, the plaintiffs seek the following relief against HYH:

(a) The sum of S$390,000 received for the sale of 200,000 NCJV shares to ASO under the ASO SPA; and

(b) The value of the remaining 800,000 NCJV shares it received, such value to be assessed (subject to the reduction of 250,000 Charged Shares if Liu is held liable).

311 In its pleaded defence, HYH argued that it was a *bona fide* purchaser for value without notice: it did not know, nor could it have known of the plaintiffs' security interest in the Charged Shares nor that they were encumbered in any way.[374]

312 However, in its closing submissions, HYH did not pursue this argument. I thus consider that HYH has failed to discharge its burden to establish the *bona*

[374] D5–6, 9–12 and 14's Defence, paras 7.1.4, 7.1.13 and 11.1.10.

fide purchaser defence. HYH's only arguments were directed against the plaintiffs' claim in knowing receipt.[375]

313 First, HYH argued that the SCAs expired on 31 December 2012 and so the plaintiffs no longer had any interest in the Charged Shares.[376] My main finding (at [134] above) was indeed that the plaintiffs no longer have a subsisting interest in the Charged Shares and on that basis I dismissed the plaintiffs' claims at the outset. However, as mentioned, I have continued in the analysis on the assumption that the plaintiffs have a subsisting security interest and that security interest gave rise to a trust over the Charged Shares or a fiduciary relationship.

314 Secondly, in the alternative, HYH argued that the plaintiffs' equitable interest in the Charged Shares arose only on 22 January 2013 when the Supplemental Deeds removed the fixed expiry date of the SCAs, and the Original Share Certificates and the Blank NCJV Share Transfer Forms were all delivered to the plaintiffs. This took place only *after* HYH acquired its equitable interest in the Charged Shares by virtue of the BPA dated 20 June 2012. Therefore, HYH's equitable interest in the Charged Shares took priority over the plaintiffs' later equitable interest.[377] However, in my view, any trust or fiduciary relationship would have arisen on 14 June 2012, the date that the SCAs were entered into. Furthermore, cl 3 of the Supplemental Deeds states that each amendment to the SCAs (*ie*, deletion of cl 5) takes place "with effect from 31 December 2012" (see [111] above). In other words, rather than expiring and "reviving" on 22 January 2013, the plaintiffs' security interest created under

375 D5, 9–12, 14 CS, para 171.

376 D5, 9–12, 14 CS, paras 172–178.

377 D5, 9–12, 14 CS, paras 179–180.

the SCAs should be taken as having subsisted continuously from 14 June 2012 onwards.

315 Thirdly, as a further alternative, HYH argued that it did not have the requisite knowledge to incur liability in knowing receipt.[378] This was the only element of knowing receipt in dispute: as mentioned at [305], HYH accepted in its closing submissions that if the plaintiffs had a trust over the Charged Shares, then the first two elements would be satisfied.[379]

316 As the burden lies with the plaintiffs to establish HYH's knowledge, it would be apposite to first consider the plaintiffs' arguments. The plaintiffs argued that Yamada's knowledge could be imputed to HYH.[380] They also argued that Yamada knew that the Charged Shares that HYH received were traceable to a breach of trust and that his knowledge made it unconscionable for HYH to retain the benefit of the receipt. I consider these arguments in turn.

Whether Yamada's knowledge can be imputed to HYH

317 Yamada, Yamamoto and Wong were directors of HYH at the material time (see [17] above). Following *Bilta* and *El Ajou* (see [287] above), imputation of Yamada's knowledge to HYH is permissible if Yamada were the directing mind and will in relation to HYH's receipt of Charged Shares on the various instances. On balance, I am satisfied that this was the case.

318 S/N 1 was the HJS-HYH Transfer pursuant to the BPA (see [54]–[57] above). It was Yamada who first raised the issue of having the BPA. Although it was Yamamoto who signed the BPA on HYH's behalf, it was Yamada who

378 D5, 9–12, 14 CS, paras 183–192.

379 D5, 9–12, 14 CS, paras 135 and 181.

380 PCS, para 158.

had procured Yamamoto to do so.[381] Yamamoto did not ask Yamada why he (Yamamoto) was signing and neither did Yamada offer any explanation. It appeared that Yamamoto had signed the BPA in blind faith without even reading it.[382] He was not even aware that HYH was buying 3.3 million NCJV shares under the BPA.[383] As for Wong, he had signed on the HYH BOD Resolution approving the HJS-HYH Transfer without asking to see the underlying SPA.[384] He did not even know how HYH had come to be the purchaser of the NCJV shares from HJS.[385] It is Wong's evidence that everything was run by Yamada and he did not question Yamada.[386] Given the above, I accept that Yamada was the directing mind and will in relation to the transfer in S/N 1.

319 S/N 2 was the transfer of 450,000 NCJV shares from GIIS to HYH (see [67] above). It was Yamada who signed the share transfer form dated 1 April 2013 on behalf of GIIS and HYH.[387] He had also signed on the HYH BOD Resolution dated 1 April 2013 approving HYH's purchase of the same, along with Wong and Yamamoto.[388] S/N 3 was the transfer of 200,000 NCJV shares from CBF to HYH (see [82(b)] above). Yamada had instructed Boo to prepare the documents necessary for this transfer.[389] He had also signed on the share transfer form dated 28 October 2013 on behalf of HYH, together with

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381 NE, 06/09/16, 65:15–65:23.

382 NE, 06/09/16, 67:13–68:13; 74:5–74:21.

383 NE, 06/09/16, 68:17–68:20.

384 NE, 22/09/16, 5:10–6:13.

385 NE, 14/09/16, 71:6–71:15.

386 NE, 14/09/16, 94:10–94:12.

387 AB2 1266.

388 AB2 1276.

389 AB3 1876–1877.

Yamamoto.[390] From the above, it can be seen that Yamamoto and Wong were also somewhat involved in S/N 2 and 3. However, I am of the view that Yamada was the directing mind and will behind these transfers, and that Yamamoto and Wong were simply content to do as he instructed. This is evident from how even *after* they received the Letters of Demand on 16 August 2013 which expressly notified them that the Charged Shares were not unencumbered, Yamamoto testified that he "left it entirely to Mr Yamada" and "trusted him absolutely".[391] Similarly, Wong said that he continued to trust and believe in Yamada "unless proven guilty".[392] Given their unquestioning faith in Yamada, I accept that Yamada was the directing mind and will in relation to S/N 2 and 3.

320 Accordingly, I am of the view that Yamada's knowledge may be imputed to HYH in relation to the above three transfers of Charged Shares to HYH. I further note that there is no need to consider the plaintiffs' argument based on *Peter Kwee* that Yamada's knowledge may be imputed to Yamamoto and Wong – it suffices that Yamada's knowledge be imputed to HYH for the purpose of founding HYH's liability in knowing receipt.

Whether Yamada had the requisite knowledge

321 In my view, as early as 8 June 2012, Yamada knew that the NCJV shares registered in HJS's and HJK's names were the subject of a security interest in the plaintiffs' favour to secure the Loans. This is because he had been *personally involved* in the creation of the plaintiffs' equitable interest in the Charged Shares. Akimoto and Horie had approached him regarding the execution of the SCAs. Yamada had also assisted in the issuance of the Original Share

390 AB3 2097.

391 NE, 06/09/16, 93:4–93:9.

392 NE, 13/09/16, 62:5–62:16.

Certificates and their subsequent delivery to Kawai, with the knowledge that they were to be handed over to Akimoto.[393]

322 HYH accepted that the documentary evidence showed Yamada was aware that a charge had been created over the shares.[394] However, HYH argued that Yamada did not know that HJS and HJK were dealing with the Charged Shares in a manner that was tantamount to a breach of trust. HYH raised the following points:

(a) Yamada must have felt that the transfers to the Sub-purchasers were truly legitimate. Otherwise, he would not have personally guaranteed returns to the Sub-purchasers under their respective SPAs. That would have been "financial suicide".[395]

(b) Under the SCAs, the plaintiffs had the power to "get the NCJV shares sold". Yamada may have believed that the plaintiffs had duly authorised Kawai and/or Horie to sell the Charged Shares.[396]

323 HYH also suggested that Yamada was only trying to help the Honjin Group resolve its financial problems. If GIIS and HYH agreed to enter the BPA, this would have given the Honjin Group the money needed to pay off the Loans owed to the plaintiffs.[397] I can address this last point quickly. Yamada's motive for arranging the BPA is irrelevant to the question of whether Yamada *knew* that under the BPA, HYH would receive NCJV shares transferred in breach of trust.

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393 AB1 313–318.

394 D5, 9–12, 14 CS, para 185.

395 D5, 9–12, 14 CS, paras 185–186.

396 D5, 9–12, 14 CS, para 189.

397 D5, 9–12, 14 CS, para 187.

324 As to the remaining two arguments, these are mere assertions. HYH has not offered any concrete evidence in support of either point. But if one looks to the objective evidence that *is* before the court, in my view, it is clear that Yamada knew full well that the NCJV shares registered in HJS's and HJK's names were subject to a security interest in the plaintiffs' favour. Even if Yamada might not have realised that a transfer of those shares amounted to a breach of trust or fiduciary duties in law, that knowledge alone made it unconscionable for HYH to retain the benefit of the receipt of the NCJV shares.

325 The SCAs were entered into on 14 June 2012. Sometime between then and 21 June 2012, Yamada signed the Undertakings in his capacity as director of NCJV (see [35] above). By signing, Yamada undertook that if the security constituted by the SCAs became enforceable, he would vote in favour of any resolution approving that the Charged Shares be registered in either of the plaintiffs' names. From that, as well as the terms of the SCAs, he must have known that HJS and HJK were not entitled to deal with the Charged Shares in a manner that would defeat the plaintiffs' security.

326 Yamada's knowledge of the plaintiffs' interest in the Charged Shares would have been reinforced on 8 January 2013 when Akimoto emailed him indicating that the plaintiffs "[would] like to have [the NCJV shares] that were secured by [HJS] and [HJK] previously be ready for immediate transfer of title as soon as possible." This email had been sent to Yamada at the address <yamada@nextcapital.asia>.[398] Although Yamada did not acknowledge Akimoto's email, Yamada emailed Boo from that *same* email address the next day on 9 January 2013.[399] Yamada must have seen Akimoto's email received

398 AB2 1084.

399 AB2 1085.

just the day before. Yet, the transfer in S/N 2 took place on 1 April 2013, pursuant to instructions he had sent to Boo in his email on 9 January 2013.

327 Yamada's knowledge would again have been confirmed on 16 August 2013, when he received the plaintiffs' Letters of Demand in his capacity as director of GIIS, HYH and E&S (see [77] above). His knowledge is also evidenced by his reference to a "mortgage" and a "charge" in his reply to ASO on 20 August 2013 and in his NCJV shareholder letter on 22 August 2013, respectively (see [79]–[80] above). Yet, the transfer in S/N 3 took place on 28 October 2013.

328 It must be emphasised that Yamada was central to all transfers involving the Charged Shares. He had instructed Boo to prepare documentation for the transfers and signed off on various BOD resolutions and share transfer forms. This was despite his knowledge from as early as June 2012 that the plaintiffs had a security interest in the Charged Shares and that HJS and HJK were not entitled to sell, transfer or otherwise dispose of the same. To direct the share transfers (and instruct his fellow directors to approve the same) is conduct that is entirely contrary to accepted commercial practice. Under these circumstances, given that Yamada's knowledge is to be imputed to HYH, I find that it is unconscionable to allow HYH to retain the benefit of the receipt of the 1 million NCJV shares (*ie*, the transfers in S/N 1, 2 and 3 listed at [308] above).

329 In the circumstances, HYH would have been liable for:

(a) The sum of S$390,000 received for the sale of 200,000 NCJV shares to ASO under the ASO SPA; and

(b) The value of the remaining 800,000 NCJV shares it received, such value to be assessed (subject to the reduction of 250,000 Charged Shares if Liu is held liable).

The Sub-purchasers

330 It will be recalled that the Sub-purchasers were involved in the following transfers of Charged Shares:[400]

S/N	Transferor	Transferee	Number of Charged Shares received	Date of effective transfer
3	CBF	HYH	200,000	28/10/13
6	HJK	FGH	500,000	01/04/13
7	HJK	AI	500,000	01/04/13
8	HJK	Karna	100,000	01/04/13
9	GIIS	Karna	150,000	01/04/13
10	HJS	Muchsin	500,000	01/04/13
11	GIIS	E&S	150,000	01/04/13
12	HJS	Ni	350,000	01/04/13
13	HJS	CBF	50,000	01/04/13
14	HJK	CBF	200,000	01/04/13
4	HYH	Liu	250,000	19/07/13
5	HYH	SO	00,000	19/07/13

400 PTSD, pp 1–21.

331 Again, I will refer to these transfers by their serial number in subsequent paragraphs of this section of the judgment. It should be noted that the serial numbers in this table are not in running order as some of the transfers overlap with those listed in the table at [308].

332 Each of the Sub-purchasers have pleaded that they are *bona fide* purchasers for value without notice.[401] This includes AI. Although AI did not attend the trial, AI entered an appearance and filed a defence pleading the *bona fide* purchaser defence.[402]

333 It is undisputed that the burden is on each defendant to establish each element of the *bona fide* purchaser defence. However, given that the plaintiffs' case against each defendant on the two closely-related elements of good faith and absence of notice are highly intertwined, I shall first set out below the plaintiffs' general argument against each Sub-purchaser on those two elements ("the Notice Argument") for convenience. Thereafter, I will address each of the Sub-purchasers separately to consider the more specific arguments raised, if any.

The Notice Argument

334 The plaintiffs' Notice Argument can be summarised as follows:[403]

(a) It is part of an established principle of law and/or practice that a purchaser must see and check for the vendor's or transferor's share

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401 D7's Defence, paras 8.1.8, 8.1.9, 10.1.4 and 11.3; D5–6, 9–12 and 14's Defence, para 11.1.10.

402 Defence of the 4th–12th, 14th–15th, 18th and 21st Defendants, para 11.1.10.

403 PCS, paras 314 and 319.

certificate. It must do so in order to be considered not to have notice of any potential equitable interest in the shares.

(b) In the ordinary course of dealing with shares, a *bona fide* purchaser ought to come into possession of the share certificates. A purchaser who accepts a share transfer without the original share certificates of the vendor or transferor cannot be said to be acting *bona fide*.

(c) A purchaser who does not call for documents of title of the vendor or transferor and makes no enquiry into it cannot be said to be acting *bona fide*.

(d) A purchaser who makes no enquiries whatsoever and does not ask for the vendor or transferor for documents of title cannot be in a better position than one who makes inadequate enquiries.

(e) Given that an equitable mortgage is created by the deposit of share certificates with the mortgagee, a purchaser who fails to obtain the share certificates from the vendor or transferor, or completely fails to ask for the same, will be affixed with constructive notice of a prior equitable interest in those shares.

335 The plaintiffs submitted that none of the Sub-purchasers had asked to see the share certificates corresponding to the shares they were seeking to purchase. Thus, based on the above principles, the Sub-purchasers are fixed with constructive notice of the plaintiffs' prior equitable interests in the NCJV shares (*ie*, the equitable mortgage over the shares).[404]

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404 PCS, paras 320–321.

336 In my view, the plaintiffs are wrong. I address each of the five propositions that they have put forward.

337 Regarding the propositions set out in [334(a)]–[334(c)] above, I am not persuaded that there is an established principle of law or practice that purchasers of shares must ask or invariably ask the vendor or transferor for share certificates in order to be considered *bona fide* and avoid being affixed with constructive notice. I first address the plaintiffs' argument on the alleged "established practice".

338 The plaintiffs argued that the "established practice" for ensuring that the transferor has the right to sell shares is "enshrined" in Article 23 of NCJV's Memorandum and Articles of Association, which is in turn drawn from Article 21 of Table A in the Fourth Schedule to the Companies Act.[405] For convenience, Article 23 is reproduced below:

> The instrument of transfer must be left for registration at the registered office of the company together with such fee, not exceeding $1.00 as the directors from time to time may require, accompanied by the certificate of the shares to which it relates and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer, and thereupon the company shall subject to the powers vested in the directors by these articles register the transferee as a shareholder and retain the instrument of transfer.

339 In my view, the plaintiffs' reliance on Article 23 is misplaced. That article says nothing about a *purchaser* of shares having to ask the vendor or transferor for evidence of title. Rather, it merely states that the director of a company whose shares are the subject of a transfer must be satisfied that the transferor has the right to transfer before he will register that share transfer.

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405 PCS, para 316.

Aside from Article 23, the plaintiffs did not point to any other evidence of such a practice.

340 Aside from a general commercial practice, the plaintiffs pointed to the fact that it was a completion requirement under cl 3.2 of each SPA that "the Vendor shall deliver to the Purchaser a duly executed transfer form in respect of the Sale Shares in favour of the Purchaser, accompanied by the relevant share certificate(s) for all such Sale Shares."[406] However, this clause merely imposes an obligation on the vendor to deliver certain documents for completion to occur. I do not think that the purchaser's omission to request for these share certificates necessarily precludes him from being considered "*bona fide*". I therefore reject the argument that there is an established practice requiring the Sub-purchasers to have asked the vendor or transferor for evidence of title.

341 I come now to the plaintiffs' argument that there is an "established principle of law" that purchasers must ask the vendor or transferor for evidence of title. The plaintiffs relied on several case authorities in support.

342 The first case was *Tham Wing Fai Peter v Public Prosecutor* [1988] 1 SLR(R) 349.[407] The plaintiffs cited the following portions of the judgment:

> 33 The holder of a share certificate has a right to register his interest and is a condition precedent to the passing of title, as a share certificate cannot be registered without its production to the Registrar of the company.
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> …
>
> 36 The share certificates of AHL stated that no transfer of the shares or any portion represented by the certificate could be registered without the production of the certificate to the Registrar of the company. Every share transfer is therefore complete without the share certificate.

406 Plaintiffs' Reply Submissions dated 12 December 2016 ("PRS2"), para 14(b).

407 PCS, para 307.

> …
>
> 43 The importance of the share certificate is clear. Without it, legal title does not pass. It gives the holder or possessor of the certificate the right to demand to be registered as a shareholder.

343 In my view, the excerpts from this case only stand for the proposition that a share transfer is incomplete without the production of the share certificate to the company for registration.

344 The plaintiffs next relied on *Société Générale de Paris and G. Colladon v Janet Walker and others* (1886) 11 App Cas 20 at 29:[408]

> … That transfer was not accompanied by the certificates which, in companies of this kind, are the proper (and, indeed, the only) documentary evidences of title in the possession of a shareholder, and which, according to the usual course of dealing with such shares, ought to come into the hands of a *bona fide* transferee for value …

345 By way of background, the above statement was made in the context of deciding whether the appellants (the transferees) had an absolute and unconditional right to be registered as shareholders despite the transfer being unaccompanied by the relevant share certificates. It transpired that those share certificates were actually with the respondents, who had taken prior security. The court held that the appellants did not have an absolute and unconditional right to be registered as shareholders – pursuant to Article 35 of the company's articles of association, it was entitled to refuse to register a transfer unless the share certificates corresponding to those shares were first produced for cancellation.

346 While the court did observe that in the usual course of dealing, a *bona fide* transferee for value ought to come into possession of the share

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408 PCS, paras 308–311.

certificates, that is still several steps removed from the plaintiffs' argument that the purchaser has an obligation to ask for the share certificates at the time the sale agreement is entered into, and that if he fails to do so, he is not *bona fide* and should be affixed with notice of a prior interest in those shares. Moreover, the court was concerned with the issue of whether the *company* was entitled to refuse to register a transfer if it was not accompanied by the relevant share certificates. The issue of what the *purchaser* ought to have done was not before the court. This authority therefore does not assist the plaintiffs much.

347 The plaintiffs also cited *Société Générale de Paris and another v The Tramways Union Company Ltd, Limited, and others* (1884) 14 QBD 424 at 458 for the proposition that a purchaser who did not get the share certificates would not be treated as *bona fide* purchasers without value.[409] That is not entirely accurate. Rather, the court said (at 458–459):

> Again, if the plaintiffs had made inquiries of the company and had ascertained that J. M. Walker was the apparent owner of the shares, and had then advanced money to him on the faith of his being the owner of the shares, the plaintiffs' case would have been stronger than it is. But the plaintiffs did not do this; they merely took a blank transfer as the best security they could get for a pre-existing debt. This does not prevent the plaintiffs from being *bona fide* purchasers for value; but as they did not even get the certificates, I doubt whether they can be treated as *bona fide* purchasers without notice.

348 All the court said was that it would be *doubtful* whether purchasers who do not get the share certificates can be considered *bona fide* purchasers without notice. It does not state that purchasers *must* ask for share certificates at the time the sale agreement is entered into. Neither does it state a general principle that all such purchasers will *never* be treated as *bona fide* purchasers for value. In my view, whether the omission to ask for share certificates prevents a purchaser

409 PCS, para 312.

from establishing the *bona fide* purchaser defence depends on the facts of the case.

349 Thus, I reject the propositions stated at [334(a)]–[334(c)] that there is an established principle of law or practice requiring a purchaser of shares to request the vendor or transferor to produce share certificates, and that a purchaser's failure to do so necessarily means that he is not acting *bona fide*.

350 I turn now to consider the proposition in [334(d)] that a purchaser who makes no inquiries of the vendor or transferor for evidence of title should not be a better position than one who makes inadequate inquiries. The plaintiffs cited the following remarks of Romer J in *Oliver v Hinton* [1899] 2 Ch 264 at 269:[410]

> … It would indeed be strange if a purchaser who has an abstract delivered and neglects to call for production of the deeds there appearing should be considered in a worse position than a purchaser who calls for production of no title-deed whatever because he knows nothing about the title and makes no inquiry as to it. …

351 I agree that as a general principle, a purchaser should not be allowed to take the benefit of its own inaction. However, that proposition does not answer the anterior question of whether the purchaser should even be expected to make inquiries of the vendor or transferor at all. As I have explained, I do not think so. There is no established principle of law or practice in Singapore to that effect.

352 That said, if there were indeed some unique facts or circumstances that should have put an individual Sub-purchaser on inquiry and yet it failed to make inquiries, then I agree that such a Sub-purchaser should not be in a better

410 PCS, para 313.

position than one who makes inadequate inquiries. I will return to this point later in relation to each Sub-purchaser.

353 Finally, I turn to consider the plaintiffs' proposition in [334(e)] that a purchaser will be fixed with constructive notice of a prior equitable mortgage over those shares if the vendor or transferor fails to produce share certificates corresponding to those shares. I am of the view that this proposition should be considered carefully.

354 The vendor's or transferor's omission to produce the share certificates is a separate issue from whether the purchaser should be affixed with constructive notice. I do not think that the former *alone* would be sufficient to put the purchaser on inquiry such that he would be expected to carry out inquiries to dispel or confirm the existence of another's adverse interest in the property. As mentioned above at [295], a purchaser is not required to act on the slightest suspicion as to the existence of a prior equitable interest.

355 In summary, I am not persuaded by the general Notice Argument mounted by the plaintiffs against all the Sub-purchasers. My decision on whether the *bona fide* purchaser defence is established will therefore turn on an examination of the facts and circumstances in relation to each Sub-purchaser, as mentioned at [352] above.

356 Before moving on, I note that the plaintiffs raised the argument at several points that for some of the share transfers to the Sub-purchasers, the name of the vendor in the SPA(s) did not match with the name of the transferor in the share transfer form for the transfer pursuant to the SPA. They suggest that this was a discrepancy that should have put the Sub-purchasers on inquiry.

357 I do not think that this takes the plaintiffs very far, because as observed in *Woon* at para 11-111, it is fairly commonplace for a vendor to sell shares that are not registered in its name:

> Where shares have been sold but have not been registered in the name of the purchaser, the person whose name is on the register of members remains the legal owner of the shares. In Singapore, as elsewhere, it is not uncommon for shares to be sold without the purchaser registering himself as holder in the register of members. …

358 Having said the above, I turn now to consider the arguments raised in respect of each Sub-purchaser.

FGH

359 To recapitulate, the plaintiffs argued that FGH is liable in knowing receipt, and seek the value of the 500,000 NCJV shares that FGH received under the FGH SPA, such value to be assessed.

360 In its closing submissions, FGH addressed the plaintiffs' claim against it for knowing receipt before seeking to establish the *bona fide* purchaser defence.[411] However, as I have mentioned, the correct approach requires the *bona fide* purchaser defence to be considered first (see [306] above).

361 Before doing so, I briefly address two preliminary arguments raised by FGH. The first argument concerns the equitable doctrine of laches. In summary, FGH argued that there were significant delays between the time when the plaintiffs discovered the transfers of the Charged Shares and the time when the plaintiffs took positive action to prevent further transfers or recover the transferred Charged Shares. Therefore the plaintiffs should not be granted equitable relief.[412] However, equitable defences must be specifically pleaded

411 D7 CS, paras 22–23.

and FGH did not plead laches in its defence. FGH is therefore not entitled to raise this argument.

362 The second argument concerns when FGH's equitable interest in the Charged Shares arose. FGH argued that its interest in the Charged Shares arose on or around 10 to 15 January 2013, when FGH and GIIS made arrangements for the 500,000 NCJV shares to be purchased by FGH, under the FGH SPA. This date falls in the interim period between the expiry of the SCAs (31 December 2012) and the execution of the Supplemental Deeds (22 January 2013). It was argued that because the plaintiffs had no interest in the Charged Shares during this interim period, FGH took the 500,000 NCJV shares free of the plaintiffs' interests in the same.[413]

363 However, FGH had never pleaded in its defence that it became an equitable owner of the 500,000 NCJV shares during this interim period. The date of January 2013 never featured. Instead, the date that featured was 30 November 2012, *ie*, the date of the FGH SPA.[414] Hence, I need not address this argument that FGH had acquired its interest in the shares in the interim period.

364 Turning now to the *bona fide* purchaser defence, it was not disputed that FGH had paid valuable consideration and had obtained the legal interest in 500,000 NCJV shares. The only question was whether FGH had acted in good faith and without notice of the plaintiffs' equitable interest in the Charged Shares. It was common ground that Shiragami's knowledge, as the Chief Executive and director of FGH, was relevant to this inquiry.[415] I agree, and I

412 D7 CS, paras 82–89.

413 D7 CS, paras 32–37.

414 D7's Defence, para 8.1.1.

elaborate more on this later. It was also common ground between parties that good faith and absence of notice are separate elements in the legal test. However, given that the arguments made in respect of each element were largely similar, I will address the two disputed elements holistically.

365 FGH first submitted that it did not have *actual* notice of the plaintiffs' interest in the 500,000 NCJV shares that it purchased.[416] I agree that the evidence did not show that Shiragami had actual personal knowledge of the plaintiffs' interest in the Charged Shares.

366 However, the crux of the plaintiffs' argument was that Shiragami had *constructive* notice of the plaintiffs' prior equitable interest in the Charged Shares. In addition to the Notice Argument above (at [334]–[335]), the plaintiffs made the following submissions:

> (a) Shiragami was aware that the transfer of scripted shares in private companies should be accompanied with due diligence on the vendor.[417] This was because on 28 June 2012, prior to the FGH SPA, Marusan LPC Pte Ltd ("Marusan") – a company that Shiragami was the Chief Executive of[418] – had entered into a similar SPA with GIIS for the purchase of 500,000 NCJV shares ("Marusan SPA").[419] Lawyers from Rajah & Tann Singapore LLP and Shiragami's secretary Takako Endou ("Endou") were engaged in drafting and reviewing the documentation. For instance, there was documentary evidence that Endou had checked

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415 PCS, paras 325–337; D7 CS, paras 73 and 77.

416 D7 CS, para 73.

417 PCS, paras 326–327.

418 NE, 09/09/16, 30:16–17.

419 AB1 608–613.

with Kai Yasuhiko ("Kai", who was Shiragami's private banker from Daiwa Capital, who had introduced the investment opportunity to Shiragami) on why GIIS, the stated vendor in the Marusan SPA, was not listed on NCJV's register of members.[420] In contrast, no such due diligence was conducted for the FGH SPA. For instance, FGH undertook no checks to confirm that GIIS was the registered shareholder of 1 million NCJV shares as stated at Recital (B) of the FGH SPA. The plaintiffs suggested that Shiragami was content to go ahead without conducting such due diligence because Yamada and Yamamoto had personally guaranteed the purchase. Under such circumstances, FGH must bear the risk of and any resultant loss arising from fraud.[421]

(b) Shiragami ought to have noticed the discrepancy between the FGH SPA and the corresponding share transfer form.[422] The former stated the vendor to be GIIS while the latter stated the transferor to be HJK (see [71(b)(i)] above). From this, it would have been clear that GIIS was *not* the legal owner of the shares it was purporting to sell under the FGH SPA. It was also a blatant contradiction of cl 4.1.3 of the FGH SPA.[423] That clause was a representation and warranty by GIIS that it was "the legal and beneficial owner of the Sale Shares", *ie*, the 500,000 NCJV shares that FGH was purchasing.[424] According to the plaintiffs, an honest and reasonable purchaser would have enquired with GIIS as to why shares were being transferred from a third party. Furthermore, in this case, the third party was entirely unknown to Shiragami, who

420 AB6 2675; NE, 09/09/16, 62:19–62:21, 63:7–63:19.

421 PCS, paras 328–330.

422 PCS, paras 331–332.

423 PRS, para 70.

424 AB2 983.

testified that he only came to know of the name "HJK" in August 2013 after receiving the Letter of Demand.[425] However, at the time of the transfer, Shiragami made no inquiries and simply signed the share transfer form.

(c) Shiragami never saw the share certificate(s) representing the 500,000 NCJV shares.[426] Neither did he instruct Rajah & Tann Singapore LLP to ask for it.[427] This was despite cl 3.2 of the FGH SPA, which stipulated a completion requirement that GIIS deliver to FGH a duly executed transfer form in respect of the 500,000 NCJV shares, accompanied by the relevant share certificate(s) for all such shares.[428] If he had asked GIIS for the share certificate, GIIS would not have been able to produce it. If he had further asked to see the share certificate belonging to the transferor HJK, HJK would also have been unable to produce the same. This was because the only share certificate for NCJV shares registered in HJK's name, Share Certificate No. 8, was in the plaintiffs' possession (see [26]–[29] above). The irregularity of the transfer and the probability of the plaintiffs' prior equitable interest in the NCJV shares would then have come to Shiragami's attention.[429]

367 In their reply submissions, however, the plaintiffs shifted the focus away from Shiragami's knowledge, saying that his knowledge only formed a "part of the entire factual matrix". The plaintiffs suggested that FGH ought to have called Endou or Kai to give evidence as it was them, and not Shiragami himself,

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425 NE, 09/09/16, 45:22–46:8.

426 NE, 13/09/16, 13:5–13:9.

427 NE, 13/09/16, 10:1–10:10.

428 AB2 983.

429 PCS, paras 337–339.

who were actually involved in the documentary and/or administrative aspects of the FGH SPA.[430] I do not think that this argument takes the plaintiffs very far. First, the plaintiffs stopped short of asking the court to draw an adverse inference against FGH and I will not do so. Secondly, I do not think that either Endou or Kai's knowledge can be attributed to FGH. Applying the principles set out at [287], only the knowledge of the person who represents the directing mind and will of a company may be attributed to the company. Shiragami was clearly the directing mind and will of FGH in relation to the FGH SPA. It was Shiragami who decided to enter the FGH SPA after some initial discussions with Kai.[431] Shiragami also admitted that in relation to the purchase of NCJV shares, he was "involved at a big picture level, mainly where executive decisions were required to be made."[432] Thus, although Shiragami was less involved than Endou and Kai in the documentary and/or administrative aspects of the FGH SPA, he was still the directing mind and will of the company in relation to the FGH SPA. It is his knowledge that is relevant to the inquiry, and not Endou's or Kai's. I proceed on this basis.

368 Returning to the plaintiffs' main argument at [366], I am unable to accept the plaintiffs' arguments against FGH insofar as they are premised on the Notice Argument. As I have said, I do not think that FGH was under any obligation to ask for GIIS for evidence of title. I also do not accept that the discrepancy between the named vendor (GIIS) and the named transferor (HJK) would suffice to put Shiragami on notice. As mentioned in the excerpt from *Woon*, para 11-111 at [357] above, it is fairly commonplace for shares to be sold by one party when they are held in the name of another. Thus even if Shiragami

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430 PRS, paras 65–68.

431 Fumiki Shiragami's AEIC, paras 10, 15–16, 22.

432 Fumiki Shiragami's AEIC, para 30.

had noticed the discrepancy, that alone would not have been sufficient to put him on notice as regard another party's interest in the shares.

369 One pillar of FGH's defence was that there was nothing unusual about the circumstances of the FGH SPA to alert it to the possibility of any wrongdoing. In particular, FGH emphasised that nothing set the FGH SPA apart from the Marusan SPA, pursuant to which the earlier share transfer in June 2012 was completed without any issues.[433] To appreciate this argument, it is important to understand how the FGH SPA came about. This is explained in Shiragami's AEIC at paras 21 to 29, and was not disputed. As mentioned above at [366(a)], the Marusan SPA was concluded in June 2012. Marusan was successfully issued with Share Certificate No. 16 and was reflected as the registered holder of 500,000 shares by 2 August 2012.[434] Later in November 2012, Kai suggested that Shiragami purchase another 500,000 NCJV shares on the same price and terms as the Marusan SPA. Shiragami agreed. Thus, on 30 November 2012, Marusan entered into a second SPA to purchase 500,000 NCJV shares from GIIS ("second Marusan SPA"). Marusan also paid the consideration sum of S$990,000 to GIIS. However, it appears that this transaction was not reflected in NCJV's company registers at the time: Marusan's shareholding was never correspondingly increased by 500,000.[435]

370 Thereafter in December 2012, Shiragami was advised that Marusan should not hold too many shares in NCJV so as to avoid having to do consolidated accounting. In light of this, Shiragami decided that the 500,000 NCJV shares (that were the subject of the second Marusan SPA) should be purchased and held by FGH instead. This was to be achieved by the cancellation

433 D7 CS, paras 77.3 and 77.4.2–77.4.3.

434 AB2 702, 708–713.

435 AB4 2568.

of the second Marusan SPA, the purchase price of S$990,000 to be credited in FGH's favour, FGH entering directly into a new SPA with GIIS, and FGH remitting the sum of S$990,000 to Marusan in repayment. Thus in January 2013, FGH and GIIS entered into the FGH SPA and backdated it to 30 November 2012 (*ie*, the original date of the second Marusan SPA). On 14 January 2013, FGH repaid Marusan the sum of S$990,000.[436]

371 Evidently, Shiragami was not dealing with an unfamiliar party. He had previously dealt with GIIS in relation to the Marusan SPA. As mentioned, that transaction had proceeded without problems. Shiragami had been assisted in the Marusan SPA by Endou and Kai. The same two persons later assisted Shiragami in relation to the FGH SPA. Shiragami understood the terms of the FGH SPA to be essentially identically to the second Marusan SPA,[437] which he in turn understood to be on the same terms as the first Marusan SPA.[438] These included GIIS's warranties as to title and Yamada and Yamamoto's involvement as guarantors of certain returns. Simply put, he understood the FGH SPA to be a replacement of the second Marusan SPA.[439] It is thus plausible that Shiragami's perception of the FGH SPA might have been shaped, to a certain extent, by his experience with the Marusan SPA. He might have believed that the FGH SPA would be no different. However, this point on the similarities between the FGH and Marusan SPAs was not specifically raised with Shiragami.

372 Shiragami's evidence was that he believed the transaction under the FGH SPA to be unproblematic for three reasons. First, Shiragami said that the fact that Yamada and Yamamoto had provided personal guarantees was a "go-

436 Fumiki Shiragami's AEIC, paras 25–29.

437 Fumiki Shiragami's AEIC, para 31.

438 Fumiki Shiragami's AEIC, para 21.

439 NE, 13/09/16, 1:21–2:1.

ahead sign" to proceed with the purchase.[440] He could "rest assured that only valid shares will be sold [*sic*]."[441] Secondly, cl 4 of the FGH SPA provided warranties as to title.[442] Such warranties had also been provided under the Marusan SPA[443] – which, as mentioned, had gone through without problems. Thirdly, like the Marusan SPA, the entire investment opportunity in the FGH SPA had been personally introduced to Shiragami and arranged by Kai, his personal banker from Daiwa Capital.[444] Although a recommendation or introduction by a personal banker is not necessarily an assurance that a proposed vendor has legal title, it is still a factor to be considered in the question of notice.

373 In the circumstances, I do not think that that there were sufficient facts to have put FGH on inquiry. Thus, although FGH did not ask GIIS to produce the share certificates representing the 500,000 NCJV shares, that does not affix it with constructive notice of a prior equitable interest in the shares. For the same reason, I am of the view that FGH was acting *bona fide*.

374 Accordingly, FGH has established the *bona fide* purchaser defence in respect of the 500,000 NCJV shares under the FGH SPA. As mentioned at [293] above, this defence defeats a claim for knowing receipt. Therefore, the plaintiffs' claim against FGH for knowing receipt would have failed.

AI

375 In their statement of claim, the plaintiffs named knowing receipt as the cause of action against AI.[445] They sought as relief the value of the 500,000

440 NE, 09/09/16, 88:2–88:7.

441 NE, 09/09/16, 89:6.

442 Fumiki Shiragami's AEIC, para 34.

443 AB1 610–611.

444 Fumiki Shiragami's AEIC, para 10.

NCJV shares that AI received under the AI SPA, such value to be assessed. AI entered an appearance and filed a defence. Subsequently, however, Shook Lin & Bok LLP ceased to act for AI. In the end, AI did not attend at trial.

376 The plaintiffs maintained their claim for knowing receipt against AI in their closing submissions.[446] However, the plaintiffs did not raise any arguments to establish AI's liability. Accordingly, I would have dismissed the claim against AI.

CBF

377 The plaintiffs argued that CBF is liable in knowing receipt for the value of the 50,000 NCJV shares that it received under the CBF SPA and currently holds, such value to be assessed. In the alternative, the plaintiffs seek the transfer of the 50,000 NCJV shares currently held in CBF's name into the plaintiffs' name (or that of their nominee(s)). Applying my approach as set out above at [306], I will first consider whether CBF has successfully established the *bona fide* purchaser defence.

378 It was not in dispute that CBF had obtained the legal title to the 250,000 shares that it purchased under the CBF SPA, and that it now only holds 50,000 of those in its name. However, it was disputed whether CBF was a purchaser, and whether it had acted in good faith and without notice. As mentioned, the plaintiffs have confined their claim to the 50,000 NCJV shares currently held by CBF and not the entirety of the 250,000 shares allegedly purchased under the CBF SPA.

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445 SOC, para 48.1(b).

446 PCS, para 413(c).

(1) Whether CBF was a purchaser of 250,000 NCJV shares

379 Under cl 2.1 of the CBF SPA, CBF was supposed to pay GIIS a consideration sum of S$495,000.[447] The witness for CBF, its president Kuniko Ara ("Ara"), gave evidence that CBF did not pay GIIS any monies under the CBF SPA. Instead, that consideration sum was allegedly set off against a previous loan extended by CBF to Singapore F&B Marketing and Consultation Services Pte Ltd ("Singapore F&B").[448] This loan was pursuant to an agreement between CBF and Singapore F&B dated 16 December 2011 for the sum of S$160,000, which is roughly equivalent to USD$125,000 ("CBF Loan Agreement").[449]

380 Ara testified that although this arrangement with Singapore F&B was labelled a "loan", CBF in fact viewed it as an investment.[450] The arrangement entailed the payment of interest on the principal amount of US$125,000 sometime in December 2016. The investment in Singapore F&B was for the development of a Hide Yamamoto restaurant in Hawaii. It later became apparent that the business proposal would not succeed.[451] However, since the loan had already been disbursed to Singapore F&B, Ara testified that she felt that CBF's only option of recouping any part of that monies was to accept Yamada's proposal that the loan amount be converted to shares in NCJV.[452]

381 This explanation advanced by CBF was problematic on several counts. First, on the evidence, it was doubtful whether CBF did in fact provide a "loan"

447 AB2 1249.

448 Kuniko Ara's AEIC, paras 5–8.

449 AB1 149–150.

450 NE, 30/09/16, 26:18–27:25.

451 Kuniko Ara's AEIC, para 6.

452 NE, 30/09/16, 31:15–32:19, 45:9–45:14.

to Singapore F&B. The only copy of the CBF Loan Agreement in evidence is unsigned; Ara was unable to recall whether it was ever signed by herself or Yamamoto.[453] Further, the authorised signatory of Singapore F&B on that copy of the CBF Loan Agreement is stated to be Yamamoto, in his capacity as Executive Director of Singapore F&B. However, this directly contradicts Yamamoto's evidence that he was *not* a director of Singapore F&B in 2011 and did not recall ever seeing this document.[454]

382 Secondly, even assuming that CBF had provided a loan to Singapore F&B, the question is whether there was any set-off arrangement at all. As is evident from [379], the alleged set-off arrangement is on a tripartite basis: the CBF SPA is between CBF and GIIS, but the CBF Loan Agreement is between CBF and Singapore F&B. The burden of proof is on CBF to show some express or implied agreement for such a set-off arrangement (see *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [34]). In my view, CBF has not discharged this burden. Other than Ara's bare assertions of the same at trial, there is no other evidence – let alone documentation, which would be expected of commercial parties – suggesting that such an arrangement exists.

383 In fact, CBF contradicted itself about whether the consideration sum under the CBF SPA was truly set off against the loan to Singapore F&B. If there was truly a tripartite set-off arrangement as alleged, the debt owed by Singapore F&B under the CBF Loan Agreement should be extinguished with CBF's purchase of the 250,000 NCJV shares from GIIS. However, puzzlingly, CBF insisted that it had "yet to be repaid for this loan of USD$125,000."[455] Under

453 NE, 30/09/16, 21:18–21:25.

454 NE, 08/09/16, 50:13–51:6.

455 Kuniko Ara's AEIC, para 19.

cross-examination, Ara was evasive as to whether the CBF Loan Agreement was "considered legally still effective or not effective".[456] In my view, if there had been a proper set-off arrangement between the three parties, CBF would have taken a firm and consistent stance on the matter. Its failure to do so strongly suggests that no such set-off arrangement had in fact been discussed, let alone decided upon.

384 In conclusion, the evidence does not demonstrate that CBF had extended a loan to Singapore F&B. Even if there was such a loan, I do not accept that the loan was set off against the consideration sum of S$495,000 owed by CBF to GIIS in the absence of any evidence that this set-off arrangement was sanctioned by all the three parties involved. Thus, in my view, CBF did not furnish valuable consideration for its purchase of 250,000 NCJV shares and this defeats the *bona fide* purchaser defence.

(2) If it were a purchaser, whether CBF acted in good faith and without notice in respect of the 250,000 NCJV shares it purchased

385 If I am wrong as regards whether CBF had furnished valuable consideration, the next issue that arises for determination is whether CBF had acted in good faith and without notice of the plaintiffs' prior equitable interest in the NCJV shares it received.

386 In their closing submissions, the plaintiffs relied mainly on the Notice Argument. As I have mentioned, I am not persuaded by the Notice Argument (see [334]–[355] above).

387 The plaintiffs also pointed to Ara's lack of familiarity with the details of the CBF SPA.[457] CBF explained in its closing submissions that this was because

456 NE, 30/09/16, 33:19–37:2.

Yamada made all the arrangements and that CBF just "went along".[458] I agree that Ara's lack of familiarity alone is insufficient to establish that CBF had actual or constructive notice of the plaintiffs' prior equitable interest in the shares.

388 However, crucially, in its closing submissions, CBF accepted that Yamada had signed the share transfer form on CBF's behalf, and that it ratified and adopted Yamada's act of signing that share transfer form.[459]

389 Relying on this concession, the plaintiffs submitted that Yamada was an agent of CBF and therefore that Yamada's knowledge of the plaintiffs' interest in the Charged Shares can be imputed to CBF.[460] The plaintiff made the same argument in respect of Karna, Muchsin, Ni and Liu. To avoid undue repetition, I address the plaintiffs' argument on imputation of knowledge in the paragraphs below ("the Imputation Argument").

390 The effect of ratification by a principal is to make an act of an agent, which would otherwise be invalid for want of authority, valid and effectual as though the original unauthorised act was done with authority. Ratification has thus been described as the retrospective clothing of an agent with authority. A principal would therefore be bound by the terms of any such transaction: *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [27].

391 The case of *Jessett Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138 ("*Jessett Properties*"), cited by the plaintiffs, usefully sets out the principles

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457 PCS, paras 342(a), 343–347.

458 D5, 9–12, 14 CS, para 71.

459 D5, 9–12, 14 CS, paras 75–79.

460 PRS2, para 33.

governing when an agent's knowledge can be properly imputed to his principal. In general, knowledge acquired *before* the agency began, or during its currency but *outside* the scope of engagement should not be imputed to the principal. There are two exceptions: first, where the principal "purchases" the previously obtained knowledge of the agent in relation to the particular subject matter; and secondly, where the agent is an "agent to know" (at 143).

392 In support of their argument that Yamada's knowledge should be imputed to his principal CBF, the plaintiffs first rely on broad principles set out in [87]–[90] of *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* [2001] 187 ALR 380 ("*Permanent Trustee*"). However, it is clear from [86] of *Permanent Trustee* that those principles were laid down in relation to agents to insure. Given that the present case is not concerned with this class of agents, *Permanent Trustee* does not assist the plaintiffs much.

393 The plaintiffs next rely on *Jessett Properties*, which is of more relevance to the present case. The dispute was between two creditors, one of whom (the principal) attempted to defeat the earlier unregistered interest of the other (the third party) by registering its lease interest. The Wellington Court of Appeal held that the holder of the subsequent interest had knowledge of the earlier unregistered interest. This was because it had employed as its agent, one Wallis, to negotiate the sale and act as manager of the property. Wallis had been the manager of the property at the time of the creation of the earlier unregistered interest, of which he had been aware. In deciding that Wallis' knowledge could be imputed to his principal, it highlighted one significant feature: Wallis had been *specifically appointed* to negotiate the purchase of the property from the bank because of his knowledge of the property and the business. There was thus a strong case for concluding that he was an "agent to know", and that his principals had "purchased" (a word to be understood broadly) the knowledge he

had. Therefore, his knowledge of a third party's interest in the property purchased became that of his principals (at 143–144).

394 The language of the agent being "specifically appointed" does not sit comfortably with the present case since the agency relationship was created retrospectively through ratification. Nonetheless, one must first examine the nature and scope of authority conferred upon Yamada. Since CBF ratified the share transfer itself as well as Yamada's act of signing the CBF SPA,[461] CBF conferred upon Yamada the authority to enter into the CBF SPA and sign the share transfer form on CBF's behalf. It appears that Yamada was allowed to handle the CBF SPA on CBF's behalf because of his greater knowledge and familiarity with the matter. The CBF SPA was, after all, his idea.[462] CBF remained passive throughout – this is evident from Ara's complete lack of familiarity with the details of the CBF SPA. Thus I take the view that CBF has "purchased" Yamada's knowledge in relation to this particular transaction, and that Yamada is akin to an agent to know. Accordingly, any prior knowledge that Yamada has concerning the 250,000 NCJV shares to be transferred under the CBF SPA can be properly imputed to CBF.

395 While accepting that the court should be slow to impute knowledge acquired by an agent before the agency began or outside the scope of his authority, I think it is appropriate in the present case for the agent's knowledge to be imputed to the principal. Where it is clear that it is *only* through the auspices of the agent that the principal could have obtained the property or rights that are now contested by the claimant, it would be wrong to allow the principal to adopt the agent's actions whilst disowning the agent's knowledge of the

461 PRS2, para 56.

462 Kuniko Ara's AEIC, para 7.

claimant's prior rights: *Bowstead & Reynolds on Agency* (Peter Watts, ed) (Sweet & Maxwell, 20th Ed, 2014) at p 546. I do not think it lies in CBF's mouth to, on the one hand, claim ownership over the NCJV shares through Yamada's conduct, and on the other hand, disclaim any knowledge that its agent Yamada had in relation to *those very shares*.

396 As found above at [321]–[328], Yamada was clearly aware of the plaintiffs' equitable interest in the NCJV shares. This knowledge is to be imputed to CBF. In light of this, I find that CBF has failed to establish that it was acting *bona fide* and without notice. The *bona fide* purchaser defence therefore fails on two grounds: CBF was neither a purchaser nor was it acting *bona fide* and without notice in respect of the 250,000 NCJV shares.

397 Accordingly, CBF would have been liable in knowing receipt for the value of the 50,000 NCJV shares that it received under the CBF SPA, such value to be assessed.

Karna

398 The plaintiffs argued that Karna is liable in knowing receipt for the value of the 250,000 NCJV shares that he received under the Karna SPA, such value to be assessed. Applying my approach as set out above at [306], I will first consider whether Karna has successfully established the *bona fide* purchaser defence.

399 It was not in dispute that Karna had obtained the legal title to the 250,000 shares that it allegedly purchased under the Karna SPA. However, it was disputed whether Karna was a purchaser, and whether he had acted in good faith and without notice.

(1) Whether Karna was a purchaser of 250,000 NCJV shares

400 Karna claimed that he furnished the requisite consideration sum of S$495,000 for his purchase of 250,000 NCJV shares.[463] However, he could not produce any documentary evidence that he had paid the consideration sum.[464] Nonetheless, it is clear from GIIS's Oversea-Chinese Banking Corporation bank statement for the month of December 2012 that the following deposits were made:[465]

S/N	Transaction date	Value date	Description	Deposit
1	18/12/12	18/12/12	Cash Deposit	S$70,181
2	18/12/12	18/12/12	Fund Transfer	S$120,000
3	18/12/12	18/12/12	Cash Deposit	S$50,000
4	18/12/12	18/12/12	Cash Deposit	S$54,819
5	18/12/12	18/12/12	Transfer CT0003971649 Lyana 18 Dec 12	S$200,000
6	26/12/12	6/12/12	Transfer CA	S$495,000

401 Muchsin was able to prove that the payment in S/N 6 was made by himself.[466] The remaining five payments in S/N 1–5 add up to S$495,000. It is also, coincidentally, the same amount of consideration that Karna was required to furnish under cl 2.1 of the Karna SPA. However, Karna was not able to identify which payments in the bank statement were made by him.[467] He was not

463 Karna Brata Lesmana's AEIC, para 10.

464 NE, 29/09/16, 5:13–5:25.

465 AB2 1072.

466 NE, 29/09/16, 11:2–12:21; Exhibit 11D1.

467 NE, 28/09/16, 42:2–42:13.

able to produce documentary proof that the deposits in S/N 1–5 were payments he had made pursuant to the Karna SPA. Additionally, those payments were made on 18 December 2012, which preceded the date of the Karna SPA (*ie*, 31 December 2012).

402 Karna insisted that he had paid but, at trial, his position on how the payments were made was unclear. He first said that the payments were made through "Daiwa", probably a reference to Daiwa Capital. When he was unable to locate any documentary evidence, he then suggested that he might have paid cash to GIIS directly, using his casino winnings.[468] While this aspect of Karna's evidence was not satisfactory, that was, in my view, a result of the fact that his counsel appeared to have been unaware that his client ought to be ready with documentary evidence to prove that he had paid the consideration. When this issue was raised during trial, his counsel was surprised and there was a scramble by Karna to try and locate documentary evidence after many years. Consequently, Karna was unable to do so.

403 I also add that it was Karna who had recommended investing in NCJV to Muchsin.[469] That being the case, it was unlikely that Muchsin paid for his shares but Karna did not.

404 Finally, in the answer to interrogatories filed by Ms Hisako, a representative of GIIS, it was stated that payment had been made by Karna.[470]

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468 NE, 29/09/16, 2:9–3:1.

469 NE, 29/09/16, 29:6–30:4.

470 Answer to Interrogatories filed by Ms Hisako on 13 February 2015, on behalf of D4–12, D14–15, D18 and D21, p 15.

405 In my view, on a balance of probabilities, Karna did furnish consideration of S$495,000 to GIIS. In this respect, it is irrelevant whether the consideration originated directly from Karna. A simple example demonstrates this: a person may decide to buy a car, but his actual source of funds may be his father. But that does not make the father the "purchaser"; neither does it mean that the son did not furnish consideration.

406 I would also add that the apparent inconsistency between the dates of the deposits (*ie*, 18 December 2012) and the Karna SPA (*ie*, 31 December 2012) does not trouble me unduly. I note that Muchsin – who *was* able to prove that the transfer in S/N 6 was made by him – had paid the consideration due under the Muchsin SPAs on 26 December 2012 despite the date of the Muchsin SPAs being 31 December 2012. In other words, the date of payment preceded the date of the Muchsin SPAs. I accept that this was likely the case for Karna as well. Therefore in my view Karna was a purchaser of 250,000 NCJV shares.

(2) Whether Karna acted in good faith and without notice in respect of the 250,000 NCJV shares he purchased

407 The next issue is whether Karna had acted in good faith and without notice of the plaintiffs' prior equitable interest in the NCJV shares he received.

408 In their closing submissions, the plaintiffs argued that Karna's "nonchalant attitude" allowed the Charged Shares to be transferred to him.[471] Under the Karna SPA, he was supposed to receive 250,000 NCJV shares from GIIS. However, there were in fact two transfers pursuant to the Karna SPA, effected by separate share transfer forms: the GIIS-Karna Share Transfer Form for 150,000 shares and the HJK-Karna Share Transfer Form for 100,000 shares

471 PCS, para 363.

(see [71(b)(iii)] above). Karna signed the latter but not the former.[472] It appeared that Karna was willing to accept that Yamada had signed the GIIS-Karna Share Transfer Form on Karna's behalf.[473] This point on Yamada's signing has significance and I will return to it later.

409 The plaintiffs say that an honest and reasonable purchaser in Karna's shoes would have realised at the time of signing that the HJK-Karna Share Transfer Form only reflected 100,000 NCJV shares, and that the transferor (HJK) was not the vendor (GIIS).[474] Further, by Karna's own evidence, HJK was an unknown entity to Karna.[475] Yet, Karna signed the HJK-Karna Share Transfer Form without requesting to see the relevant NCJV share certificate(s) issued in either GIIS's or HJK's names.[476]

410 Again, I do not accept the plaintiffs' argument insofar as it is premised on the Notice Argument. I do not think that Karna was under any obligation to ask for GIIS or HJK for evidence of title.

411 It is true that Karna admitted at various points to being "a bit careless"[477] and not having "[paid] special attention"[478] to the transaction. However, it was clear to me that his attitude was a result of the fact that he trusted Yamada, Yamamoto and his private banker.

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472 NE, 28/09/16, 42:14–43:7.

473 D5, 9–12, 14 CS, para 62.

474 PCS, para 365.

475 NE, 28/09/16, 45:2–45:20.

476 PCS, paras 366, 369–370.

477 NE, 28/09/16, 31:24.

478 NE, 28/09/16, 31:25–32:1.

412 Karna explained that he was a regular patron at the HY Restaurant. He had been introduced by his private banker, Kai, to Yamamoto and Yamada. The two asked whether Karna wanted to make a half-a-million dollar investment with a guaranteed return and the ability to exit at any time, and Karna agreed.[479] Karna said that he signed the HJK share transfer form without asking for more information because he trusted Kai, Yamamoto and Yamada.[480]

413 In my view, even if Karna had been careless in carrying out the share transfer under the Karna SPA, I do not think that that crosses the line to bad faith. It is also my view that there was no basis to find that Karna himself had actual notice or constructive notice of the plaintiffs' prior equitable interest in the shares.

414 However, in his closing submissions, Karna submitted that Yamada had signed the GIIS-Karna Share Transfer Form (relating to 150,000 NCJV shares) and that Karna ratified this transfer by his words and/or conduct.[481] Indeed, in response to the query of whether he "[had] any problems with [the] two transfer to [him]", Karna's response was that he did not.[482] Relying on this concession, the plaintiffs repeated the Imputation Argument (see [390]–[393] above).

415 I agree that Karna's ratification of Yamada's acts means that Yamada's knowledge is to be imputed to Karna. Yamada was clearly aware of the plaintiffs' equitable interest in the NCJV shares. This knowledge is to be imputed to Karna. In light of this, I find that Karna has failed to establish that he was acting *bona fide* and without notice in respect of the transfer of 150,000

479 NE, 28/09/16, 12:8–12:15.

480 NE, 28/09/16, 31:12–32:11.

481 D5, 9–12, 14 CS, paras 62, 100.

482 NE, 29/09/16, 8:3–8:20.

NCJV shares under the GIIS-Karna Share Transfer Form. Accordingly, Karna would have been liable in knowing receipt for the value of 150,000 NCJV shares that he received under the Karna SPA.

416 However, in respect of the transfer of 100,000 NCJV shares under the HJK-Karna Share Transfer Form, I am of the view that the Imputation Argument does not apply. Karna had signed this share transfer form himself. This was not a situation where Karna sought to enjoy the benefits of an agent's actions while disowning the agent's knowledge of the claimant's prior rights. Thus, I accept that Karna has established the *bona fide* purchaser defence in respect of the 100,000 NCJV shares transferred to him under the HJK-Karna Share Transfer Form. Therefore, the plaintiffs' claim against Karna for knowing receipt of 100,000 NCJV shares would have failed.

Muchsin

417 The plaintiffs argued that Muchsin is liable in knowing receipt for the value of the 500,000 NCJV shares, such value to be assessed. It will be recalled that Muchsin first received 500,000 NCJV shares under the Muchsin SPAs and then transferred 250,000 NCJV shares to Gao Ventures on 28 October 2013 (see [82(a)] above). Thus, in the alternative, the plaintiffs seek the transfer of the 250,000 NCJV shares still held in Muchsin's name into the plaintiffs' name (or that of their nominee(s)). Finally, the plaintiffs ask that Muchsin be liable to pay S$70,950 to the plaintiffs, being the benefits received by him whilst in possession of the 500,000 NCJV shares, and interest.

418 Applying my approach as set out above at [306], I will first consider whether Muchsin has successfully established the *bona fide* purchaser defence.

419 It was not in dispute that Muchsin had obtained the legal title to the 500,000 shares that he purchased under the Muchsin SPAs, and that he now only holds 250,000 of those in his name. However, it was disputed whether Muchsin had paid valuable consideration for the 500,000 NCJV shares, and whether he had acted in good faith and without notice.

(1) Whether Muchsin was a purchaser of 500,000 NCJV shares or 250,000 NCJV shares

420 The plaintiffs argued that Muchsin had only furnished consideration in respect of 250,000 shares and was a volunteer in respect of the remaining 250,000 shares.[483]

421 It will be recalled that there were two Muchsin SPAs, each for the sale of 250,000 NCJV shares from GIIS to Muchsin (see S/N 4 at [68] above). Under cl 2.1 of each of the Muchsin SPAs, the consideration sum due to GIIS was S$495,000.[484] Hence, the total consideration payable to GIIS for 500,000 NCJV shares should have been S$990,000. However, Muchsin paid only S$495,000 but received the full 500,000 shares.[485]

422 Muchsin claimed that this was an "error" and that the situation had been rectified by his transfer of 250,000 NCJV shares to Gao Ventures on 28 October 2013, without receiving consideration (see [82(a)] above).[486]

423 Be that as it may, that does not change the fact that Muchsin did not furnish consideration for 250,000 out of 500,000 NCJV shares transferred into

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483 PCS, para 374.

484 AB2 1051, 1058.

485 Muchsin Ciputra Tjoe's AEIC, paras 5–7.

486 Muchsin Ciputra Tjoe's AEIC, para 10; D5, 9–12, 14 CS, para 107.

his name. This means that he has established that he purchased 250,000 out of 500,000 NCJV shares.

(2) Whether Muchsin acted in good faith and without notice in respect of the 250,000 NCJV shares he purchased

424 I turn now to consider whether Muchsin had acted in good faith and without notice of the plaintiffs' prior equitable interest in 250,000 NCJV shares since that defence is available only to a purchaser.

425 In their closing submissions, the plaintiffs argued that Muchsin had signed the two Muchsin SPAs blindly. They point to the fact that although his stated intent was to purchase only 250,000 NCJV shares,[487] Muchsin in fact signed two SPAs, each for the purchase of 250,000 NCJV shares from GIIS.[488] Muchsin also signed a share transfer form corresponding to the transfer of 500,000 NCJV shares from HJS to himself (see [71(b)(iv)] above).

426 The plaintiffs argued that an honest and reasonable purchaser would have realised at the time of signing that he was purchasing more shares that he intended, and also noticed that the transferor named in the share transfer form (HJS) was *not* the vendor under the SPA (GIIS) but instead an entirely unknown third party.[489] Yet, Muchsin did not request to see the relevant NCJV share certificate(s) issued in either GIIS's or HJS's names.[490]

427 The plaintiffs also said that if Muchsin had conducted a simple ACRA search, he would have realised that GIIS was not the legal and beneficial owner

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487 Muchsin Ciputra Tjoe's AEIC, para 5.

488 NE, 29/09/16, 40:18–40:25.

489 PCS, paras 375–384.

490 NE, 29/09/16, 40:2–40:17, 43:1–43:5.

of 1 million NCJV shares at the time, contrary to Recital (B) of the Muchsin SPAs. However, Muchsin did not, and the plaintiffs alleged this was simply because Muchsin was content to do whatever Karna or Kai told him to do.[491]

428 Again, I do not accept the plaintiffs' argument insofar as it is premised on the Notice Argument. I do not think that Muchsin was under any obligation to ask for GIIS or HJS for evidence of title.

429 Muchsin's evidence that was that he was content to follow Karna's lead and Kai's instructions because he trusted them.[492] For instance, he did not read the SPA documents or share transfer form but signed them because Karna and Kai asked him to. This may have been in part due to Muchsin's unfamiliarity with English. However, apparently, Muchsin's son (who understood English) was also present and he read through the documents. But after doing so, Muchsin's son did not discuss the content of the SPAs with Muchsin.[493]

430 I accept that Muchsin was comforted by the involvement of his son, Karna and Kai in the process and that was why he did not see the need to become personally familiar with the documents or the details of the transaction. Although he did not personally act diligently, I do not think that that crosses the line to bad faith. It was also my view that there was no basis to find that Muchsin himself had actual notice or constructive notice of the plaintiffs' prior equitable interest in the shares.

431 In his closing submissions, Muchsin appeared to accept that it was Yamada and not he who signed the share transfer form. If it were Yamada who

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491 PCS, para 380.

492 NE, 29/09/16, 34:1–34:7; 42:3–42:11.

493 NE, 29/09/16, 39:7–39:20.

had signed, Muchsin ratified the transfer.[494] That left room for the plaintiffs to raise the Imputation Argument (see [390]–[393] above), which they did.

432 This aspect of Muchsin's argument may have arisen by error. It contradicted Muchsin's unchallenged evidence at trial that Muchsin had signed the share transfer form on Kai's instructions.[495] Since Muchsin had signed the share transfer form himself, there was no act of Yamada's that he could ratify. The Imputation Argument did not apply because this was not a situation where Muchsin was adopting an agent's actions while disowning the agent's knowledge of the claimant's prior rights. Thus, I accept that Muchsin was acting *bona fide* and without notice.

433 Accordingly, in respect of the 250,000 NCJV shares that Muchsin *did* purchase with consideration, I am of the view that he has successfully established the *bona fide* purchaser defence. This defeats the plaintiffs' claim in knowing receipt in respect of 250,000 NCJV shares.

434 As for the remaining 250,000 NCJV shares, in my view Muchsin was an innocent volunteer: although he did not purchase these shares, he was acting *bona fide* and had no notice of the plaintiffs' prior equitable interest in these shares. As discussed at [302] above, he is not liable for knowing receipt. I will therefore have to consider the plaintiffs' alternative equitable proprietary claim against Muchsin for the return of the Charged Shares (see [462] below).

435 One point remains to be addressed. Muchsin received four payments over the course of 2013 and 2014, pursuant to the Muchsin SPAs:[496]

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494 D5, 9–12, 14 CS, paras 62 and 106.

495 NE, 29/09/16, 41:8–41:22.

496 Muchsin Ciputra Tjoe's AEIC, para 15.

S/N	Date of payment	Amount received
1	30/09/13	S$24,750
2	Sometime in 2013	S$4,125
3	31/03/14	S$24,750
4	30/09/14	S$17,325
Total		S$70,950

436 It will be recalled that Muchsin transferred 250,000 NCJV shares to Gao Ventures on 28 October 2013 (see [82(a)] above). From the dates of the payments in the table at [435], it is clear that the payment in S/N 1 was received when Muchsin held all 500,000 NCJV shares. In contrast, it is not clear exactly when in 2013 the payment in S/N 2 was received – it might have been before or after the transfer to Gao Ventures on 28 October 2013. This point was also not clarified at trial. Therefore, I will proceed on the assumption that the payments in S/Nos 2, 3 and 4 were received when Muchsin only held 250,000 NCJV shares.

437 In other words, Muchsin received S$24,750 by virtue of being a holder of 500,000 NCJV shares, and S$46,200 by virtue of being a holder of 250,000 NCJV shares. As my conclusion above is that Muchsin is a *bona fide* purchaser of 250,000 shares and an innocent volunteer in respect of the other 250,000 shares, I am of the view that Muchsin would only be entitled to retain benefits that accrued to him by virtue of being the holder of shares which he *did* purchase.

438 This, however, runs into some difficulty. It is not clear whether the 250,000 NCJV shares that Muchsin transferred to Gao Ventures were shares

that he had purchased (in respect of which he was a *bona fide* purchaser), shares that he did not purchase (in respect of which he was an innocent volunteer), or a mixture of both. It is therefore not clear whether and how much of the S$46,200 he received after 28 October 2013 is attributable to NCJV shares that he did purchase.

439 One possible approach is that Muchsin is entitled to the full S$46,200 because such payment arose from 250,000 NCJV shares, and Muchsin in fact did pay for 250,000 NCJV shares. However, he would only be entitled to 50% of S$24,750 since that payment arose from 500,000 NCJV shares, of which he only purchased half. However, given that my main conclusion is that the plaintiffs' claim against Muchsin must fail from the outset (see [134] above), I need say no more.

Ni

440 The plaintiffs argued that Ni is liable in knowing receipt for the value of the 350,000 NCJV shares that she received under the Ni SPA, such value to be assessed. Applying my approach as set out above at [306], I will first consider whether Ni has successfully established the *bona fide* purchaser defence.

441 It was not disputed Ni that had paid valuable consideration and had obtained the legal title to 350,000 NCJV shares. However, it was disputed whether Ni had acted in good faith and without notice.

442 In their closing submissions, the plaintiffs pointed to the fact that Ni testified that she did not recognise the name NCJV,[497] suggesting that at the time when she signed the Ni SPA, she did not even know she was purchasing shares

[497] NE, 27/09/16, 27:16–28:5.

in NCJV.[498] She also could not recall whether Yamada had told her the name of the shareholder she was buying the shares from.[499] She also did not ask to see the vendor's share certificate.[500] The plaintiffs submitted that if Ni had, she would have found out that GIIS was not the registered holder of 1 million NCJV shares, contrary to Recital (B) of the Ni SPA.[501]

443 Further, the plaintiffs pointed to the fact that Ni could not recall having seen or signed the share transfer form.[502] The plaintiffs submitted that if Ni had "bothered to complete the formalities for the transfer of shares to her name", she would noticed that the transferor named in the share transfer form (HJS) was not the vendor under the SPA (GIIS) and that should have put her on inquiry, and led her to ask for HJS's share certificate.[503]

444 Again, I do not accept the plaintiffs' argument insofar as it is premised on the Notice Argument. I do not think that Ni was under any obligation to ask for GIIS or HJS for evidence of title.

445 It is true that Ni was not fully apprised of details such as the identity of the vendor of shares and the number of shares she was purchasing. It may also be true, as the plaintiffs argue, that she was "only concerned about the dividends which she would be receiving under the Ni SPA".[504] However, in my view, that does not cross the line to bad faith. Any *bona fide* investor would be concerned

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498 PCS, para 390.

499 PCS, para 390.

500 NE, 27/09/16, 32:12–32:14.

501 PCS, para 391.

502 NE, 27/09/16, 35:23–36:4.

503 PCS, paras 393, 396.

504 PCS, para 395.

about whether an investment delivers a good return. At least in that regard, Ni was clearly diligent: she knew the value of the shares that she was purchasing, and the return she was getting on her investment.[505] Prior to her decision to invest, she even checked the accounts for NCJV in 2011 and the "condition" of the restaurant.[506]

446 It was thus my view that Ni had acted *bona fide* and that there was no basis to find that Ni had actual notice or constructive notice of the plaintiffs' prior equitable interest in the shares.

447 However, in her closing submissions, Ni submitted that Yamada had signed the share transfer form on her behalf, and that she ratified the transfer.[507] Relying on this concession, the plaintiffs repeated the Imputation Argument (see [390]–[393] above).

448 I agree that Ni's ratification of Yamada's act means that Yamada's knowledge is to be imputed to Ni. Yamada was clearly aware of the plaintiffs' equitable interest in the NCJV shares. This knowledge is to be imputed to Ni. In light of this, I find that Ni has failed to establish that she was acting *bona fide* and without notice in respect of her purchase of 350,000 NCJV shares under Ni SPA.

449 Accordingly, Ni would have been liable in knowing receipt for the value of the 350,000 NCJV shares that she received under the Ni SPA.

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505 NE, 27/09/16, 29:16–29:18; 30:14–30:21.

506 Ni Weiqun's AEIC, para 13.

507 D5, 9–12, 14 CS, para 115.

Liu

450 The plaintiffs argued that Liu is liable in knowing receipt for the value of the 250,000 NCJV shares that she received under the Liu SPA, such value to be assessed. In the alternative, the plaintiffs seek the transfer of the 250,000 NCJV shares currently held in Hua Lien's name into the plaintiffs' name (or that of their nominee(s)) and that Liu be liable to pay S$24,750 to the plaintiffs, being the benefits received by her on 31 March 2014 whilst in possession of the NCJV shares and interest.

451 As a preliminary point, I note that the plaintiffs assert that Liu currently holds 250,000 Charged Shares through Hua Lien,[508] and so are seeking the return of the shares from Hua Lien.[509] This is an incorrect approach. Even if Hua Lien is wholly owned by Liu, the fact remains that the two are separate legal entities. The plaintiffs have proffered no reasoning as to why the corporate veil should be lifted; in any event, I would not consider the present case an appropriate one for me to do so. I do not think it appropriate for the plaintiffs to pursue a proprietary claim against Liu when she does not have any NCJV shares registered in her name. If the plaintiffs are seeking the transfer of the NCJV shares currently held by Hua Lien to themselves, they should have done so by joining Hua Lien as a defendant.

452 Leaving aside that point, applying my approach as set out above at [306], I will first consider whether Liu has successfully established the *bona fide* purchaser defence.

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508 PCS, para 398.

509 PCS, para 414.

453 It was not disputed Liu that had paid valuable consideration and had obtained the legal title to 250,000 NCJV shares. However, it was disputed whether Liu had acted in good faith and without notice.

454 In their closing submissions, the plaintiffs pointed to the fact that Liu did not even know the name of the company she was buying shares in.[510] She also did not inquire into the identity of the vendor of the shares. The plaintiffs argued that if she had done so and conducted an ACRA search, she would have found that GIIS was not a registered shareholder in NCJV at the time.[511] An honest and reasonable purchaser would have taken steps to verify GIIS's title to the shares, such as by requesting for evidence of title.[512]

455 Again, I do not accept the plaintiffs' argument insofar as it is premised on the Notice Argument. I do not think that Liu was under any obligation to ask for GIIS for evidence of title.

456 It indeed appeared that Liu did not know that she was buying shares in a company called NCJV,[513] from a vendor called GIIS.[514] However, this must be viewed in context. Liu had come to know of the potential investment in HY Restaurant through one Joel Lim, her relationship manager from the Bank of Singapore.[515] She said that she attended two meetings at HY Restaurant, both times with Joel Lim. She signed the Liu SPA on the second meeting. Again, although a recommendation or introduction by a relationship manager is not

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510 NE, 03/10/16, 22:25–23:8.

511 PCS, paras 403–405.

512 PCS, para 410.

513 NE, 03/10/16, 22:25–23:8.

514 NE, 03/10/16, 20:5–20:8.

515 NE, 03/10/16, 3:3–3:6.

necessarily an assurance that a proposed vendor has legal title, it is still a factor to be considered in the question of notice.

457 Liu perhaps acted less than prudently in signing the Liu SPA without being fully apprised of details such as the identity of the vendor. However, I do not think that that crosses the line to bad faith. It is also my view that there was no basis to find that Liu had actual notice or constructive notice of the plaintiffs' prior equitable interest in the shares.

458 However, Liu testified that she did not sign the share transfer form and realised only on the day she was to give evidence that her signature had been forged on the form.[516] It was submitted on Liu's behalf that even if it was Yamada who signed the share transfer form, Liu ratified the transfer.[517] Relying on this concession, the plaintiffs repeated the Imputation Argument (see [390]–[393] above).

459 I agree that Liu's ratification of Yamada's acts means that Yamada's knowledge is to be imputed to Liu. Yamada was clearly aware of the plaintiffs' equitable interest in the NCJV shares. This knowledge is to be imputed to Liu. In light of this, I find that Liu has failed to establish the *bona fide* purchaser defence in respect of the 250,000 NCJV shares she purchased under the Liu SPA.

460 Accordingly, Liu would have been liable in knowing receipt for the value of 250,000 NCJV shares that she received under the Liu SPA. In the circumstances, there is no need to consider the plaintiffs' alternative equitable proprietary claim against Liu for the return of the 250,000 NCJV shares. In any

516 Liu Pingfang's AEIC, para 13; NE, 03/10/16, 25:13–25:24.

517 D5, 9–12, 14 CS, para 123.

event, as earlier mentioned at [451], I would not have ordered that Hua Lien transfer the 250,000 NCJV shares currently held in its name into the plaintiffs' name (or that of their nominee(s)) since Hua Lien is not named as a defendant to these proceedings.

461 There is one final point to be addressed. While holding 250,000 NCJV shares, Liu received S$24,750 on 31 March 2014, being her guaranteed returns under cl 5.1 of the Liu SPA.[518] I am satisfied that this financial benefit only accrued to Liu because she was a holder of NCJV shares. It would therefore be unconscionable for her to retain the benefit of this S$24,750 as well. Thus, I would have found that Liu is liable to pay S$24,750, being the benefits received by her on 31 March 2014 whilst in possession of the NCJV shares.

Issue 5: Whether the plaintiffs succeed in their equitable proprietary claim such that CBF, Muchsin, and/or Liu are liable to return the relevant Charged Shares which they still retain

462 In contrast to the claim for knowing receipt, the plaintiffs' equitable proprietary claim for the return of the relevant Charged Shares is *proprietary* in nature. As mentioned above at [94(c)] and [282], the plaintiffs have raised this proprietary claim *only* against three of the Sub-purchasers: specifically, CBF, Muchsin, and Liu (each of whom has, according to the plaintiffs, retained some Charged Shares in their names). This claim was framed as an alternative to the plaintiffs' claim in knowing receipt.

463 In this context, I need not consider the positions of CBF and Liu because, based on my foregoing analysis, I have found that these two defendants failed to establish the *bona fide* purchaser defence and thus would have been liable in knowing receipt (if there had been a trust over the Charged Shares or fiduciary

518 Liu Pingfang's AEIC, para 12; AB2 1435–1436.

relationship between the plaintiffs on the one hand, and HJS and HJK on the other) (see [397] and [460] above). However, it is still necessary to consider the claim as against Muchsin because I have found that in respect of 250,000 NCJV shares, he is an innocent volunteer and not liable for knowing receipt (see [434] above).

464 The plaintiffs' claim against Muchsin is for the return of the 250,000 NCJV shares that he presently holds. It will be recalled that:

(a) There were two Muchsin SPAs, each dated 31 December 2012, entered into between Muchsin and GIIS, under which Muchsin agreed to purchase a total of 500,000 NCJV shares from GIIS for consideration of S$990,000 (see [68] above).

(b) Subsequently, the share transfer form giving effect to the Muchsin SPAs was executed by HJS for 500,000 NCJV shares (see [71(b)(iv)] above).

(c) Although Muchsin received the 500,000 NVJC shares, he had only furnished consideration of S$495,000 for half of those shares (see [421] above).

(d) To rectify this "error", Muchsin acting on Yamada's instructions transferred 250,000 NCJV shares to Gao Ventures without receiving any consideration. NCJV's register of members was updated to show that Gao Ventures was a new shareholder of 250,000 shares in NCJV as of 28 October 2013 while Muchsin's shareholding in NCJV was correspondingly reduced.[519] Thus, at the time of the proceedings, Muchsin held 250,000 of the Charged Shares (see [82(a)]). It is in these

519 AB4 2576, 2580.

250,000 shares that the plaintiffs seek to assert their subsisting equitable proprietary interest.

465 In order to establish their equitable proprietary claim, the plaintiffs must first establish that they have a subsisting equitable interest in the particular property against which they claim. This interest is the "proprietary base" on which the plaintiffs' equitable proprietary claim is founded.

466 In the present case, I have found that: (a) there is no subsisting security interest held by the plaintiffs in respect of the Charged Shares (see [134] above), and (b) there is no trust over the Charged Shares in the plaintiffs' favour (see [158] above). There is thus no basis on which the plaintiffs may claim to have any equitable interest in any of the shares held by Muchsin. For this reason alone, the plaintiffs' claim for the return of the 250,000 NCJV shares presently held by Muchsin must fail.

Observations

467 I make three additional observations in relation to the plaintiffs' equitable proprietary claim.

Whether the plaintiffs can rely on equitable tracing

468 Given that the plaintiffs have mounted an equitable proprietary claim for the Charged Shares held by Muchsin, they must rely on the process of equitable tracing to support their claim that the Charged Shares originally held by HJS and HJK (in respect of which the plaintiffs allegedly have a subsisting equitable interest) are traceable to the shares presently in Muchsin's hands. Yet, the plaintiffs are unable to show that the orthodox pre-requisite for such equitable tracing is satisfied: that the property in which they claim an equitable

proprietary interest has passed through the hands of a fiduciary or quasi-fiduciary in breach of duty (see Graham Virgo, *The Principles of Equity and Trusts* (Oxford University Press, 2012) ("*Virgo*") at p 641). In this regard, I accept that there is some controversy as to the continued relevance of this pre-requisite, which is not required for common law tracing and therefore distinguishes common law tracing from equitable tracing. In the absence of arguments by parties, and since no clear position was taken by the plaintiffs, I will say no more on this.

Whether a lesser equitable interest than a beneficial interest under a trust can ground an equitable proprietary claim

469 In assessing the viability of the plaintiffs' equitable proprietary claim, another issue is whether it is sufficient for the plaintiffs to have an equitable interest in the Charged Shares *qua* equitable mortgagees, even if the plaintiffs do not have a beneficial interest in the Charged Shares *qua* beneficiaries in the trust sense.

470 According to the plaintiffs, their equitable proprietary claim does not depend on there being a trust over the Charged Shares; it suffices for the plaintiffs to establish that they are equitable mortgagees with a corresponding equitable interest in the Charged Shares.[520] Some of the defendants suggested otherwise but their arguments were rather brief.[521]

471 Subject to full arguments in a subsequent case, my tentative view is that the plaintiffs can rely on their equitable interest as equitable mortgagees of the Charged Shares to ground their equitable proprietary claim for the return of the relevant Charged Shares that are currently in the hands of CBF, Muchsin, and

520 PCS, para 300; PFS, para 6.

521 D7 FRS, para 85; D5, 9–12, 14 FCS, paras 93–97.

Liu, even if that equitable interest does not amount to a beneficial interest in the trust sense. However, the specific nature of the plaintiffs' interest in the Charged Shares may affect the type of relief that may eventually be awarded by this court in order to give effect to that equity.

472 In our present case, by asking for the "return" of the Charged Shares the plaintiffs are presumably asking the court to declare that CBF, Muchsin, and Liu each holds the Charged Shares on constructive trust for the plaintiffs, and to order that each of them transfer those shares to the plaintiffs. However, although equitable ownership is vested in the equitable mortgagee, the nature of the equitable mortgagee's interest is not in or to the extent of the mortgaged property itself; rather, the mortgagee's interest is only co-extensive with the underlying debt obligation which the mortgage was intended to secure. This is fundamentally different from the nature of the beneficiary's interest in the trust property. In most situations, a beneficiary would be entitled to lay claim to trust property that is currently being held by third parties; the return of the trust property would be an appropriate form of relief given the nature and extent of the beneficiary's interest in the property. However, where an equitable mortgagee relies on its interest in the mortgaged property to bring a proprietary claim, the appropriate relief may not be the unconditional return of the mortgaged property. For instance, where the current value of that property significantly exceeds the underlying debt obligation, it may not be appropriate to allow the equitable mortgagee to be unconditionally "returned" the mortgaged property. The nature (*eg*, real or personal property) and state (*eg*, whether it is fungible and mixed with other property) of the subject property, as well as the election of the plaintiff, would also be of importance.

473 In the circumstances, however, it is not necessary for me to come to a conclusive view on whether an equitable proprietary claim is premised on there

being a beneficial interest in the trust sense. Nor is it necessary for me to come to a view as to what relief is appropriate to satisfy the plaintiffs' equity.

Whether an intervening bona fide purchaser precludes the plaintiffs' claim

474 As the plaintiffs have rightly acknowledged, their equitable proprietary claim is subject to the various defendants' ability to establish the *bona fide* purchaser defence.[522] This is because, to establish their claim, the plaintiffs must among other things show that they have a subsisting "proprietary base" in the property the return of which they seek (see *Virgo* at p 631). However, on our facts, it is not clear whether GIIS, from whom Muchsin appears to have obtained his NCJV shares under the Muchsin SPAs, is entitled to raise the *bona fide* purchaser defence. If GIIS can successfully establish the defence, it would provide a further ground to reject the plaintiffs' case: the plaintiffs' equitable interest in the relevant Charged Shares, even if it existed, would no longer subsist by virtue of the intervening party (GIIS) whose *bona fide* purchaser defence extinguishes the plaintiffs' equitable "proprietary base".

475 GIIS was unrepresented and did not attend trial. However, on their part, the plaintiffs also did not make any allegation against GIIS that it was not a *bona fide* purchaser. Arguably, GIIS would not have been able to establish the "without notice" and "*bona fide*" elements given that Yamada was its director and his knowledge of the plaintiffs' prior equitable interest in the Charged Shares would have been attributable to GIIS. However, I need not make any further comment in this regard given that this issue was not argued before me.

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522 PCS, paras 300–305; PFS, paras 72–74.

Other claims and proceedings

Claims against Yamada and AI

476 As mentioned, the plaintiffs have named causes of action and claimed reliefs against Yamada and AI in dishonest assistance and knowing receipt respectively (see above at [87]). Yamada and AI have each entered an appearance and filed a defence but neither defendant attended the trial. They were also unrepresented. Nevertheless, the plaintiffs do not appear to have pursued their causes of action against Yamada and AI. In the plaintiffs' closing and further submissions, no mention was made of these causes of action and how the requisite elements are satisfied. I thus consider that the plaintiffs have abandoned their claims against Yamada and AI, and dismiss them accordingly.

Third party proceedings

477 The third party proceedings are brought by Yamada and Wong against Neo and Boo. After the conclusion of the trial, I gave instructions for the plaintiffs in the third party proceedings to file and serve written submissions by 14 November 2016. On 14 November 2016, solicitors for Wong wrote in to court saying that Wong would not be continuing with the third party proceedings against Neo and Boo, although no notice of discontinuance was filed.

478 Yamada was unrepresented and absent from the trial, although I note that he had been *initially* represented by the same firm representing Wong, at the time when third party proceedings were commenced. There was no submission from Yamada.

479 In the circumstances, I need not make a decision on the issues raised in the third party proceedings. I grant Wong leave to discontinue his third party claim. I dismiss Yamada's third party claim.

Fourth party proceedings

480 The fourth party proceedings are brought by Neo and Boo against HJS, GIIS, E&S, and NCJV. On 14 October 2015, the Assistant Registrar held in HC/JUD 650/2015 that GIIS was liable to indemnify Neo and Boo against all sums that they may be adjudged liable to pay to the plaintiffs whether by way of damages, interest, costs and alternatively, such contribution hereto as may be just, pursuant to *inter alia* s 15 of the Civil Law Act (Cap 43, 1999 Rev Ed). Costs of the fourth party action against GIIS and costs of the application were to be paid to Neo and Boo, to be agreed or taxed.

481 Prior to the commencement of trial, the plaintiffs in the fourth party proceedings filed notices of discontinuance against E&S and NCJV on 22 and 23 August 2016 respectively. Counsel for Neo and Boo orally informed the court on the first day of trial that HJS had not yet been served in relation to the fourth party proceedings.[523] In the circumstances, I also need not make a decision on some of the issues raised in the fourth party proceedings since there is already a judgment against GIIS.

Summary of conclusions

482 I set out a summary of my conclusions above:

(a) The SCAs have expired, without a valid extension by the Supplemental Deeds, and thus the plaintiffs do not have a security

[523] NE, 29/0809/16, 3:10–3:16.

interest in the Charged Shares that subsists at present. Therefore, all the plaintiffs' claims must fail at the outset. Even if the plaintiffs do have a subsisting security interest in the Charged Shares that could be characterised as an equitable mortgage, the plaintiffs' causes of action in knowing receipt and dishonest assistance both fail because they are premised on the existence of a trust and the plaintiffs did not establish that a trust relationship arises by mere virtue of an equitable mortgage subsisting between the parties.

(b) The plaintiffs cannot rely on the arguments raised in their further submissions that as a result of HJS's and HJK's alleged unconscionable conduct, a constructive trust over the Charged Shares, or fiduciary relationship between the plaintiffs on the one hand and HJS and HJK on the other, had arisen. This was not pleaded.

(c) Even if a trust over the Charged Shares or fiduciary relationship between the plaintiffs on the one hand and HJK and HJK on the other had arisen:

(i) Wong, Neo and Boo are not liable for dishonest assistance because they did not act dishonestly.

(ii) HYH, CBF, Karna, Ni and Liu are liable for knowing receipt.

(iii) FGH and Muchsin (in respect of 250,000 NCJV shares) are not liable for knowing receipt as they are *bona fide* purchasers for value without notice.

(d) As for the alternative equitable proprietary claim against Muchsin for the return of the relevant Charged Shares, the claim must

fail on the basis that the SCAs have expired and thus the plaintiffs do not have a subsisting security interest in the Charged Shares, and hence have no ground to claim any subsisting equitable interest in the relevant Charged Shares.

Conclusion

483 For the foregoing reasons, I dismiss the plaintiffs' claims in their entirety.

484 I will hear parties on costs.

485 I make one final observation. While I have some sympathy for the plaintiffs, they themselves should have been more careful with the documentation and, also, they should have acted sooner to protect their rights. For example, as mentioned at [50] above, an ACRA search conducted by their lawyer on 25 January 2013 revealed that the total number of NCJV shares held by HJS and HJK had decreased to less than the 3.3 million shares which the plaintiffs were supposed to be holding. Yet, the information did not ring any alarm bell for the plaintiffs.

Woo Bih Li
Judge

Foo Maw Shen, Chu Hua Yi, Tan Yee Siong and Michelle Lee
(Dentons Rodyk & Davidson LLP) for the plaintiffs;
Kelvin Lee and Samantha Ong (Wnlex LLC)
for the 5th, 9th–12th and 14th defendants;

Suresh Divyanathan, Kristine Koh and Rachael Leong
(Oon & Bazul LLP) for the 7th defendant;
David Chan, Justin Chan and Lam Zhen Yu (Shook Lin & Bok LLP)
for the 18th defendant;
Andrew Tan Tiong Gee (Andrew Tan Tiong Gee & Co)
for the 19th and 20th defendants;
Andrew Goh and Chong Jiar-Ming (Fortis Law Corporation)
for the 21st defendant.

Appendix A

	No. of Charged Shares held				
	As of 14 June 2012	**As of 15 October 2012**	**As of 17 November 2012**	**As of 1 April 2013**	**As of 19 July 2013**
HJK	1,300,000	1,300,000	1,300,000	0	0
HJS	2,000,000	1,650,000	900,000	0	0
HYH		350,000	350,000	800,000	350,000
GIIS			750,000	0	0
E&S				150,000	150,000
FGH				500,000	500,000
Karna				250,000	250,000
Muchsin				500,000	500,000
Ni				350,000	350,000
AI				500,000	500,000
CBF				250,000	250,000
Liu					250,000
ASO					200,000
Total	**3,300,000**	**3,300,000**	**3,300,000**	**3,300,000**	**3,300,000**