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

[2023] SGHC 12

Suit No 371 of 2020

Between

B High House International Pte Ltd

… *Plaintiff*

And

(1) MCDP Phoenix Services Pte Ltd
(2) Michael Carbonara

… *Defendants*

GROUNDS OF DECISION

[Agency — Principal — Undisclosed]
[Agency — Third party and principal's relations — Contractual relations]
[Commercial transactions — Sale of services — Breach of contract]
[Contract — Breach]
[Contract — Illegality and public policy — Gaming and wagering]
[Trusts — Accessory liability — Acts amounting to assistance]
[Trusts — Breach of trust]
[Trusts — Constructive trusts]

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v
MCDP Phoenix Services Pte Ltd and another

[2023] SGHC 12

General Division of the High Court — S 371 of 2020
Mavis Chionh Sze Chyi J
19, 20, 21, 22, 25, 26, 27, 28, 29 April, 4 August, 27 September 2022

17 January 2023

Mavis Chionh Sze Chyi J:

Introduction

1 Where contractual obligations are concerned, it is trite that only parties to the contract have the standing to sue and enforce those contractual obligations: see Timothy Liau, "Privity: Rights, Standing, and the Road Not Taken" (2021) 41(3) Oxford Journal of Legal Studies 803; *The "Dolphina"* [2012] 1 SLR 992 at [185]. In any contractual dispute, it is therefore prudent to ask, as a starting point, who the parties to the contract are – or if there is indeed a contract between the parties – if one seeks to base their cause of action in contract; and this is especially pertinent in the context of modern contracts, where parties often deal through intermediaries (see *eg*: *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [127] and [131]. See also Paul S Davies and Tan Cheng-Han, *Intermediaries in Commercial Law* (Hart Publishing, 2022) ("*Intermediaries in Commercial Law*")).

2 This was, more or less, the crux of the dispute in the present case notwithstanding the multitude of ways in which the Plaintiff chose to frame its case in its pleadings. In gist, the Plaintiff claimed that it had entered into a contract with the 1st Defendant for the provision of payment processing services, and that the 1st Defendant had breached its contractual obligations. The Plaintiff's case against the 2nd Defendant was that he had induced the 1st Defendant to breach its contractual obligations. In response, the Defendants claimed that there was no contract between the Plaintiff and the 1st Defendant. They contended that the action should have been brought against a Mr Daniel Berger ("Mr Berger") who was actually the contracting party to the contract with the Plaintiff. The 1st Defendant denied that Mr Berger was its agent and/or that he had the authority to enter into the contract with the Plaintiff on their behalf.

3 After considering the evidence adduced at trial and parties' written submissions, I dismissed the Plaintiff's claim. These are the reasons for my decision.

Facts

The parties

4 The Plaintiff is B High House International Pte Ltd – a company incorporated in Singapore. The Plaintiff is in the business of managing and collecting payments for the group of companies to which it belongs. To that end, the Plaintiff processes payment transactions and manages, collects and recovers payments from customers ("third party customers") of its principal affiliates. Specifically, in respect of the monies claimed by the Plaintiff in these proceedings, it is not disputed that these monies were from payments made by customers of the Plaintiff's principal, Blue High House SA ("Blue SA") on the latter's website BetOnline.ag. To facilitate the collection and processing of

payments from third party customers, the Plaintiff maintains a worldwide network of third-party processing agents.[1]

5 The 1st Defendant is MCDP Phoenix Services Pte Ltd – a company incorporated in Singapore. It is a full service global financial services provider, and provides, amongst other things, payment processing services, software solutions in respect of financial services and remittance services.[2] The 2nd Defendant is Mr Michael Carbonara ("Mr Carbonara"), an American national. He is the sole shareholder, Chief Executive Officer ("CEO") as well as the Managing Director of the 1st Defendant.[3] While the Plaintiff alleged that Mr Carbonara was the alter ego of MCDP,[4] both the Defendants denied this.[5]

6 The parties presented starkly different accounts of their relationships, as well as their relationship with the Third Party to this suit, Mr Berger, during the period 2019 to 2020. Mr Berger did not appear in these proceedings. As I will explain in these written grounds, whether the Plaintiff could succeed in its claim ultimately turned on whether it could adduce sufficient evidence to support its account of the relationships between the parties and the obligations they owed each other.

7 Before I set out the parties' respective accounts of events, I outline briefly below how payment processing works in general.

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1 Statement of Claim (Amendment No. 1) at para 1, Set Down Bundle ("SDB") at p 5.

2 Michael Carbonara Affidavit of Evidence-in-Chief dated 30 January 2022 ("Michael Carbonara AEIC") at para 10.

3 Michael Carbonara AEIC at para 1.

4 Statement of Claim (Amendment No. 1) at para 3, SDB at p 6.

5 1st Defendant's Defence (Amendment No. 3) at para 5, SDB at p 33; 2nd Defendant's Defence (Amendment No. 2) at para 5, SDB at p 70.

A brief explanation of payment processing

8 For the majority of consumers in the modern world, cashless payment has all but become the norm. The ubiquitous card reader or QR code awaits at the checkout counter: with a simple tap of a credit card or mobile phone, payment has been made, and the consumer is free to depart with their purchases. But behind the simple act of tapping of one's card on a payment terminal lies an entire system which supports the simple convenience of cashless payment. In its simplest form, a payment processing service is one which enables credit card or online payments to be made to a merchant.[6] There are numerous service providers in the payment processing ecosystem, and they differ in both the scope and suite of services provided. Some service providers may provide the entire range of services necessary to enable payments from a customer to a merchant whilst others may only cater to a specific type of service.[7] A service provider does not necessarily need to provide a particular service themselves – they may engage the functions of other service providers in order to do so on their behalf.

9 These are the basic stages of payment processing:

(a) The customer purchases goods or services from the merchant by either entering his card details into a point-of-sale terminal or an online payment gateway, or tapping his credit or debit card on the card reader.

(b) The payment information will be sent to the acquiring bank. The acquiring bank processes the payment transaction for the merchant. It does so by sending the payment information to the respective card networks (*ie*, Visa or Mastercard) who in turn sends the information on

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6 Plaintiff's Closing Submissions at para 51.

7 Plaintiff Closing Submissions at para 51, Mr Hartung's AEIC at 2AEIC p 475.

to the issuing bank (*ie*, the bank which issued the credit or debit card to the customer).

(c) The acquiring bank identifies which transactions belong to a particular merchant, or payment processor, through the issuance of a Merchant Identification Number ("MID") to the relevant merchant or payment processor. This MID is associated with a merchant account.

(d) The issuing bank decides whether to approve or decline a particular transaction based on its own parameters. The card networks, the acquiring bank, the merchant and the customer are eventually notified as to whether the transaction has been approved or declined.

(e) If the payment transaction is approved, the issuing bank then sends the funds to the acquiring bank which then remits these funds (less any fees charged) to the merchant.

(f) The role of the payment processor is to act as the intermediary between the merchant and the acquiring bank.[8]

Plaintiff's account of events

Mr Berger's role

10 The Plaintiff claimed that Mr Berger was a sales representative who would match, arrange or refer online merchant clients to the Defendants in return for a commission.[9] The Plaintiff claimed to have been approached by Mr Berger on or around 15 August 2019 and to have been told by him that he was the representative of various interrelated companies which provided payment

8 Plaintiff's Closing Submissions at para 54.

9 Statement of Claim (Amendment No. 1) at para 4.

processing services. Mr Berger said he could procure one of these entities to provide payment processing services to BHH.[10] This arrangement would involve the use of merchant accounts with an acquirer bank in Mexico.[11] This Mexican bank was Banco Ahorro Famsa SA[12] ("Famsa Bank"), and it was used to collect and receive customers' credit and debit card payments.[13]

How MCDP came to be appointed as the Plaintiff's payment processing entity

11 On the same day, 15 August 2019, Mr Berger and the Plaintiff's representative, Ms Vanessa Meza ("Ms Meza", who appears to have gone by the alias "Sloane Stone" in all the communications relevant to this suit), held a Skype teleconference in which they discussed and agreed on the terms of the engagement ("the Payment Processing Agreement").[14] According to the Plaintiff, the essential terms of the Payment Processing Agreement were as follows:

(a) Mr Berger was to procure a company ("the Processing Entity") to process payments for and on behalf of the Plaintiff. It was understood by the parties that the identity of the Processing Entity was to be confirmed subsequently.

(b) The processing entity would be responsible for providing the Plaintiff with payment processing services through MIDs which would be made available to the Plaintiff. That said, the Plaintiff was not

10 Statement of Claim (Amendment No. 1) at para 4.

11 Statement of Claim (Amendment No. 1) at para 4.

12 Statement of Claim (Amendment No. 1) at paras 4 and 13, SDB at p 20.

13 Statement of Claim (Amendment No. 1) at para 3, SDB at p 6

14 Statement of Claim (Amendment No. 1) at para 6.

informed at the time whether the MIDs provided would be maintained by the Processing Entity itself, or whether sub-processing agents which maintained the MIDs would be engaged.

(c) The Plaintiff would pay the Processing Entity the following:

(i) A set-up fee of US$2,500 in respect of each MID and a weekly maintenance fee of US$25 for each MID;

(ii) A "merchant discount rate" equivalent to 7.5% of the value of each processed transaction;

(iii) An additional flat charge of US$0.75 for each transaction;

(iv) A flat charge of US$2.00 for each refund;

(v) A flat charge of US$35.00 for each chargeback (While this was the fee agreed on for each chargeback, the Plaintiff alleged that the 1st Defendant charged a higher sum of US$55.00 for each chargeback from 30 August 2019 to 4 February 2020).

(d) The processing entity was entitled to retain a "rolling reserve" amounting to 10% of the total volume of transactions processed for a period of 180 days, as security to ensure that the processing entity would have sufficient liquidity to return payments to customers in the event of a high number of chargebacks;

(e) Settlement was to be conducted for each MID on a weekly basis. This process involved the following:

(i) On a weekly basis, the Processing Entity was to post all data processed through the MID for the week on a web portal ("the Merchant Control Panel"), to which the Plaintiff was to be

given access. The Merchant Control Panel was to contain information concerning all relevant payment transactions.

(ii) The Processing Entity was to issue weekly settlement reports which set out its applicable fees and charges as well as the sums to be paid to the Plaintiff.

(iii) The Processing Entity would then collect all payments made by third party customers and processed through the relevant MIDs for the week and pay the Plaintiff within seven days after deducting its applicable fees and charges.[15]

12 The Plaintiff claimed that in reliance on Mr Berger's representations, the 1st Defendant was engaged as the abovementioned Processing Entity under the Payment Processing Agreement.[16] Between 30 August 2019 and 4 February 2020, the 1st Defendant processed payments made by third party customers.[17]

13 Before the 1st Defendant could begin processing payments on the Plaintiff's behalf, certain technical details had to be ironed out. Again, Mr Berger had a role to play. On 19 August 2019, Mr Berger provided Ms Meza with the following Uniform Resource Locator ("URL"): "Devcenter.txpmnt.com" and informed her that this was where she could access the Application Programming Interface ("API"). The API was a necessary component in order for the Plaintiff to integrate the payment gateway of its principal affiliates with that used by the 1st Defendant. On 21 August 2019, Mr Berger also sent Ms Meza a message in

15 Statement of Claim (Amendment No. 1) at para 6, SDB at pp 8–10.

16 Statement of Claim (Amendment No. 1) at para 5, SDB at p 7.

17 Statement of Claim (Amendment No. 1) at para 5, SDB at p 7.

their Skype group chat, forwarding further details such as a hash key and merchant number, which were required to complete the integration process.[18]

14 On 29 August 2019, Mr Berger introduced Daphne Alfaro ("Ms Alfaro") to the Plaintiff's representatives via their Skype Group Chat and stated that she would be assisting him.[19] On the Plaintiff's version of events (which the Defendants disputed), Ms Alfaro was at all material times an employee and authorised representative of the 1st Defendant. She was the person in charge of setting up the MIDs and making them available for use by the Plaintiff's affiliated merchants. She also informed the Plaintiff, on the 1st Defendant's behalf, of the corresponding descriptors (which were basically a means of identifying all transactions processed through a particular MID).[20]

15 On 30 April 2019, Ms Alfaro provided Ms Meza with access to a Merchant Control Panel (with the URL "merchants.txpmnt.com/Website/").[21] The Merchant Control Panel had been procured by the 1st Defendant from a third-party vendor and "rebranded" to appear as a service offering by the 1st Defendant. In particular, the Plaintiff claimed that the Merchant Control Panel bore features indicating that it was the 1st Defendant's platform: specifically, its URL and the fact that it showed the 1st Defendant's sailboat emblem on its web interface.

16 On Mr Berger's instructions, Ms Alfaro set up the following MIDs for the Plaintiff:

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18 Statement of Claim (Amendment No. 1) at para 6A, SDB at pp 10–11.

19 Statement of Claim (Amendment No. 1) at para 7, SDB at p 11.

20 Statement of Claim (Amendment No. 1) at para 7A.

21 Statement of Claim (Amendment No. 1) at para 7A(a).

(a) The PeakPay MID was set up and payment processing commenced through it on 30 August 2019. Payments channelled through the PeakPay MID initially bore the descriptor "FEE%2AMHSERVICE". Shortly after the Plaintiff had begun to channel payments through the PeakPay MID, Ms Alfaro informed Ms Meza on 31 August 2019 *via* Skype group chat that a new descriptor, "FEE*GERSON HDZ MARTINE" would be used.[22]

(b) The House MID was set up and payment processing commenced through it on 3 September 2019. Payments processed through this MID bore the following descriptors: "FEE%2AMHSERVICE", "FEE%2AMHSERVI" or "FEE*MHSERVI".[23]

(c) The IPTV MID was set up and payment processing commenced through it on 28 November 2019. There was, however, a hiccup. Mr Berger informed Ms Meza that the IPTV MID was disabled on or around 7 December 2019 and that he was trying to find a solution.[24] A few days later, on or around 13 December 2019, Mr Berger informed the Plaintiff's representatives that the Plaintiff could resume channelling payments through the IPTV MID, and payments through this MID would bear the descriptor "connectapp*IPTV".[25]

17 Mr Berger, Ms Alfaro and Ms Meza communicated mainly *via* Skype Group Chat. In between setting up the various MIDs, on 27 September 2019, Ms Alfaro added two individuals, Elliot and Mario Alvarez, to their Skype Group

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22 Statement of Claim (Amendment No. 1) at para 7A(b) – (d).

23 Statement of Claim (Amendment No. 1) at para 7A(e) – (g).

24 Statement of Claim (Amendment No. 1) at para 7A(k).

25 Statement of Claim (Amendment No. 1) at para 7A(l).

Chat and stated that they would be assisting her. The Plaintiff claimed that both Mario Alvarez and Elliot were employees and/or representatives of the 1st Defendant at the material time (though the Defendants denied this).

18 Ms Alfaro oversaw the payment processing on the 1st Defendant's behalf. To that end, she had access to the backend of the 1st Defendant's payment processing gateway and system.[26] The Plaintiff cited two examples of the control exerted by Ms Alfaro over the payment processing system. First, when Ms Meza highlighted that there were technical issues relating to payments which were being processed *via* the PeakPay MID, Mr Berger directed the issue to Ms Alfaro who proceeded to follow up and to resolve it. Second, when Mr Berger requested that Ms Alfaro increase the processing capacity for the PeakPay and House MIDs to USD 1m per month, Ms Alfaro confirmed a mere three minutes later that this had been done.[27]

19 Apart from the 1st Defendant, there were other entities involved in the process which had been set up to facilitate the processing of payments on the Plaintiff's behalf. According to the Plaintiff, the 1st Defendant used the sub-processing agents Feenicia and ConectApp when processing payments for the Plaintiff through the PeakPay MID, the House MID and the IPTV MID.[28] Payments made by customers were processed by the 1st Defendant in the following manner:

(a) The electronic gateway (*ie*, API) of the Plaintiff's principal affiliates was integrated with that used by the 1st Defendant.

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26 Statement of Claim (Amendment No. 1) at para 8, SDB at p 15.

27 Statement of Claim (Amendment No. 1) at paras 8.1–8.2, SDB at p 16.

28 Statement of Claim (Amendment No. 1) at paras 9–9A, SDB at pp 16–17.

(b) Credit and debit card payments made by customers were transmitted through these integrated gateways to merchant accounts maintained by the sub-processing agents engaged by the 1st Defendant, Feenecia and ConectApp.

(c) The settlement proceeds would be remitted by the acquirer bank either directly to the 1st Defendant, or to the sub-processing agents engaged by the 1st Defendant who would then remit these sums to the 1st Defendant.

(d) The 1st Defendant was responsible for ensuring that the nett settlement proceeds (less any fees or charges due to them) were remitted to the Plaintiff's bank account, the details of which were provided to Mr Berger in an email dated 5 September 2019.[29]

20 The Plaintiff received its weekly settlement payments in respect of the PeakPay and House MIDs from a remittance company called WorldFirst Singapore ("WorldFirst"), which made these remittances on the 1st Defendant's behalf. The Plaintiff received 38 settlement payments from WorldFirst between 12 September 2019 to 6 January 2020.[30]

21 The Plaintiff claimed that the Processing Entity under the Payment Processing Agreement was indeed the 1st Defendant because the latter was mainly responsible for carrying out the payment processing services – and also because of various representations which the 1st Defendant allegedly made.[31]

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29 Statement of Claim (Amendment No. 1) at para 9A.

30 Statement of Claim (Amendment No. 1) at paras 9B–9C, SDB at p 18.

31 Statement of Claim (Amendment No. 1) at para 9D.

Late and deficient payments by the 1st Defendant

22 According to the Plaintiff, from as early as 12 September 2019, the 1st Defendant began making late and deficient settlement payments in respect of the PeakPay and the House MIDs. When confronted about this, Mr Berger and Ms Alfaro gave several reasons for the delay and shortfall in payments. Amongst other things, they told the Plaintiff that the payment might not have reached the Plaintiff's bank account, and that the settlement reports had not been accurately updated. Ms Alfaro also claimed that Famsa Bank had withheld these funds from the 1st Defendant and closed the bank account.[32] However, neither Mr Berger, nor Ms Alfaro was able to provide any documentation or details to support their explanations as to why the payments of sums due to the Plaintiff were late.

23 On 10 January 2020, Mr Berger sent Ms Meza a report prepared by the 1st Defendant which indicated that it had fallen behind on its payment obligations in respect of the PeakPay and House MIDs to the tune of at least €821,534.46.[33] Ms Meza responded to the email on the same day, seeking clarification as to why these funds had not been paid. When no response was forthcoming from Mr Berger, Ms Meza sent another email on 13 of January 2020. Mr Berger was evasive and said that he would forward Ms Meza's email to Ms Alfaro. No further details were provided in relation to the missing funds.[34]

24 A day later, on 14 January 2020, Ms Meza emailed Mr Berger seeking clarification as to when Famsa Bank had closed the 1st Defendant's merchant account. She requested a copy of the notification from Famsa bank which stated that the account had been closed and inquired when the funds would be released.

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32 Statement of Claim (Amendment No. 1) at para 13, SDB at p 20.

33 Statement of Claim (Amendment No. 1) at para 14, SDB at pp 20–21.

34 Statement of Claim (Amendment No. 1) at paras 15.1 – 15.2.

However, Mr Berger and Ms Alfaro continued to ignore Ms Meza's requests.[35] On 29 January 2020, Ms Meza followed up with another email to Mr Berger, repeating her request for information concerning the Famsa bank account. Mr Berger continued to ignore her emails. Later, on 4 February, the Plaintiff ceased all payment processing through the 1st Defendant.[36]

25 In its amended Statement of Claim, the Plaintiff pleaded that the total outstanding sum owed to it by the 1st Defendant stood at US$2,680.535.21. This comprised the sum of US$1,735,949.69 which was due in respect of the PeakPay and House MIDs, and the sum of US$944,585.52 which was due in respect of the IPTV MID (the "Trust Monies").[37]

Fraud and misappropriation or diversion of the Outstanding Settlement Payments

26 Concerned as to where its funds had gone, the Plaintiff conducted its own investigations. According to the narrative which the Plaintiff put forward in this suit, it was the 1st Defendant who – through Mr Berger and Ms Alfaro – had misappropriated or diverted the funds.[38] Based on a company profile search, the Plaintiff learnt that the 2nd Defendant was the sole owner of the 1st Defendant, as well as one of its directors (specifically the Managing Director) and Chief Executive Officer. The Plaintiff claimed that this was bad news for it as it knew the 2nd Defendant to be a fraudster. On the Plaintiff's telling, the 2nd Defendant had in 2014 utilised an entity known as SecCom or Kreysha to defraud the

35 Statement of Claim (Amendment No. 1) at para 15.3.

36 Statement of Claim (Amendment No. 1) at para 16.

37 Statement of Claim (Amendment No. 1) at para 17, SDB at p 22.

38 Statement of Claim (Amendment No. 1) at para 18.

Plaintiff's principal affiliate, BetOnline, and had misappropriated some US$1,139,056.45 in a similar fashion.[39]

27 On the Plaintiff's version of events, it had once again been defrauded by the 2nd Defendant, who had utilised the 1st Defendant this time as a vehicle to defraud and dishonestly misappropriate or divert monies belonging to the Plaintiff.[40] Contrary to Ms Alfaro's representation that Famsa Bank had withheld the Plaintiff's payments, the Plaintiff alleged that Famsa Bank had released these payments to Feenicia (one of the sub-processing agents engaged by the 1st Defendant) and that Feenicia had duly transferred the Plaintiff's funds to the 1st Defendant.[41] Instead of transferring these funds to the Plaintiff, the 1st Defendant had squirreled them away. Further, in respect of a portion of the payments amounting to MXN 12,450,876.14 which had been held back by Feenicia as a reserve to settle any disputed payments, chargebacks or fines, this portion of the funds had also been paid by Feenicia into the 1st Defendant's account with the First Finance International Bank ("FFIB") on or around 13 April 2020 ("FFIB funds"). Instead of paying the FFIB funds to the Plaintiff, the 2nd Defendant had attempted to have these funds transferred to an account with JP Morgan London, UK which the Plaintiff alleged was his personal bank account.[42] The Plaintiff claimed that the FFIB funds were traceable to payments by the third party customers, which had been processed and/or received by the 1st Defendant for and on behalf of the Plaintiff, and that the Plaintiff therefore had a proprietary interest in these funds.[43] Finally, the Plaintiff also alleged that payments

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39 Statement of Claim (Amendment No. 1) at para 20, SDB at p 23.

40 Statement of Claim (Amendment No. 1) at para 21, SDB at p 25.

41 Statement of Claim (Amendment No. 1) at para 20A(a), SDB at p 24.

42 Statement of Claim (Amendment No. 1) at paras 20A(b)–20A(c), SDB at pp 24–25.

43 Statement of Claim (Amendment No. 1) at para 20A(c), SDB at p 25.

channelled through the IPTV MID had been released by the relevant acquirer bank and/or the sub-processing agent, ConectApp, to the 1st Defendant as well; and that the latter had similarly failed to pay these sums to the Plaintiff.[44]

The Defendants' account of events

Mr Berger's role

28 In contrast, the Defendants took the position that it was Mr Berger who had been the 1st Defendant's client. The 1st Defendant had provided Mr Berger with remittance services, and allowed him to set up and use its software platform and payment management system. However, it was understood between the Defendants and Mr Berger that he would not transact or make any representation on behalf of the 1st Defendant. To that end, Mr Berger had his own portfolio of clients and managed them on his own. At no point in time did Mr Berger act as the 1st Defendant's employee or agent.[45]

29 In 2019, the professional and business relationship between the Defendants and Mr Berger took a turn for the worse: Mr Berger appeared to be plagued by personal issues: he was intoxicated and belligerent when communicating with the Defendants and colleagues, proclaimed he had taken on a mistress, and sent sexually harassing messages to female colleagues.[46] At the end of 2019, the 1st Defendant and Mr Berger parted ways professionally. Notwithstanding their professional differences, as Mr Berger was at this point not yet able to continue doing business without the 1st Defendant's software

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44 Statement of Claim (Amendment No. 1) at para 20A(d), SDB at p 25.

45 1st Defendant's Defence (Amendment No. 3) at paras 4(a)–4(c).

46 1st Defendant's Defence (Amendment No. 3) at para 4(d).

platform and payment management system, the latter continued to allow him to use the software platform and payment management system.[47]

30 Despite the 1st Defendant's goodwill, Mr Berger continued to harass their employees (including the 2nd Defendant). In the aftermath of the breakdown of their professional and business relationship, he even threatened to cause damage to the Defendants. According to the Defendants, they had come to realise that Mr Berger was working in concert with the Plaintiff in this action to cause damage to the Defendants after receiving *inter alia* text messages from Mr Berger[48] demonstrating his possession of information about the present proceedings which he could only have obtained from the Plaintiff.[49]

The 1st Defendant was not engaged as the Plaintiff's processing entity

31 The Defendants denied that the 1st Defendant had been engaged by the Plaintiff as its payment processing agent or that it had processed on the Plaintiff's behalf those payments made by third-party customers. They contended that the 1st Defendant was not bound by the acts of Mr Berger insofar as it was alleged that he had acted on the 1st Defendant's behalf in entering into contracts or in making representations.[50] The Defendants further contended that they had no knowledge of, and did not agree to the terms of engagement allegedly discussed *via* Skype teleconference on 15 August 2019.[51]

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47 1st Defendant's Defence (Amendment No. 3) at para 4(e).

48 Michael Carbonara AEIC at paras 57 – 58.

49 1st Defendant's Defence (Amendment No. 3) at para 4(f).

50 1st Defendant's Defence (Amendment No. 3) at para 6d.

51 1st Defendant's Defence (Amendment No. 3) at para 7.

32 The Defendants also took the position that the Plaintiff either knew, or must reasonably have known that Mr Berger was not the 1st Defendant's authorised representative for the following reasons. First, Mr Berger had not communicated with the Plaintiff using any account or email address belonging to the 1st Defendant. In fact, Mr Berger, who owned an independent business by the name of "MCC Code",[52] would communicate with the Plaintiff through an email address with the domain name "mcccode.com", and he would also use the MCC Code logo as his profile picture in his communications with the Plaintiff.[53] Second, Mr Berger did not purport to be acting on the 1st Defendant's behalf in his communications with the Plaintiff: that much was clear from the fact that other entities such as "SM Marketing" and "Kings Road Capital Corp Private Limited" had been named as the contracting party in the draft contracts which Mr Berger sent to the Plaintiff.[54] Third, there was no mention of or reference to the 1st Defendant in any of the terms reached between Mr Berger and the Plaintiff under the alleged Payment Processing Agreement, or in any of the emails, text messages, group chats and draft contracts exchanged between Mr Berger and the Plaintiff.[55] Finally, on the Plaintiff's own case, there was no suggestion that the Plaintiff itself was even aware of the 1st Defendant's existence and/or identity when it allegedly entered into the Payment Processing Agreement.[56]

Ms Alfaro was not the 1st Defendant's employee or authorized representative

33 As for Ms Alfaro, the Defendants asserted that she was not an employee and authorised representative of the 1st Defendant at all material times in the

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52 1st Defendant's Defence (Amendment No. 3) at para 6(c).

53 1st Defendant's Defence (Amendment No. 3) at para 8(a).

54 1st Defendant's Defence (Amendment No. 3) at para 8(a).

55 1st Defendant's Defence (Amendment No. 3) at para 8(b).

56 1st defendant's Defence (Amendment No. 3) at paras 8(a)–(d).

dealings with the Plaintiff. Instead, Ms Alfaro was an employee of a different company, SecureTeller, which was owned by her husband, one Oscar Bermuda. SecureTeller had, on previous occasions, provided other services to the 1st Defendant and had done the same in relation to Mr Berger's dealings with the Plaintiff.[57] Insofar as Ms Alfaro had communicated with the Plaintiff, she had done so on Mr Berger's behalf and not the 1st Defendant.[58]

The Merchant Control Panel

34 The Merchant Control Panel was a software procured by the 1st Defendant from a third-party vendor, Coriunder. Mr Berger was the one who had introduced the 1st Defendant to Coriunder. The Merchant Control Panel was a piece of software which enabled merchants to track and view the transactions being processed through MIDs by payment processors on a single webpage – in other words, an informational tool. The Merchant Control Panel could be provided to the 1st Defendant's various clients for their use, but ultimately, the 1st Defendant had no control over how their clients actually used it. The Merchant Control Panel which was set up and operated by Mr Berger had the following URL: "merchants.txpmnt.com/Website/".[59]

The 1st Defendant played no part in setting up the MIDs, payment processing and transfers

35 In relation to the PeakPay, House and IPTV MIDs, the Defendants claimed that the 1st Defendant was not involved in processing the payments through these MIDs. The 1st Defendant did not own or control any of the merchant accounts or MIDs. Instead, it was Mr Berger who had set up these

57 1st Defendant's Defence (Amendment No. 3) at para 9.

58 1st Defendant's Defence (Amendment No. 3) at para 9A(b).

59 1st Defendant's Defence (Amendment No. 3) at para 9A(c).

MIDs – and he was able to do so because the 1st Defendant had allowed him to set up and use its software platform and payment management system.[60] Following from this, insofar as Ms Alfaro appeared to have access to the 1st Defendant's system, this was premised on the fact that the 1st Defendant had actually granted Mr Berger permission to use their systems. This, however, did not mean that Ms Alfaro was either the 1st Defendant's employee or representative. The Defendants also asserted that Elliot and Mario Alvarez were not the 1st Defendant's employees or representatives.[61]

The 1st Defendant was not responsible for the missing sums which were owed to the Plaintiff

36 The Defendants gave several explanations as to why it was not responsible for the sums which the Plaintiff alleged had gone missing. First, in relation to the remittances made by WorldFirst to the Plaintiff, the 1st Defendant had acted on Mr Berger's instructions and made these payments on his behalf. The 1st Defendant had only provided Mr Berger with remittance services at the material time, and this included using WorldFirst's services to remit funds.[62]

37 Second, the 1st Defendant denied that it had prepared a report on 10 January 2020 indicating that it had fallen behind on its payment obligations in respect of the PeakPay and House MIDs (see above at [23]).[63] The 1st Defendant denied that it was liable to the Plaintiff for the sum of at least €821,534.46 in respect of the "PeakPay MID" and the "House MID".

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60 1st Defendant's Defence (Amendment No. 3) at para 10.

61 1st Defendant's Defence (Amendment No. 3) at paras 9A(d)–(e).

62 1st Defendant's Defence (Amendment No. 3) at paras 11A–11B.

63 1st Defendant's Defence (Amendment No. 3) at para 13, SDB at p 39.

38 Third, the Defendants denied that the 1st Defendant had received any of the Trust Monies owed to the Plaintiff, or that the 1st Defendant had misappropriated and/or diverted funds received from Feenicia or ConectApp which were meant for the Plaintiff.[64] Specifically, in relation to the FFIB funds, the 1st Defendant had used Feenicia as a sub-processor to process payments made in Mexico on behalf of *the 1st Defendant's own clients (who did not include the Plaintiff)*. While the 1st Defendant would receive the funds in Mexican Peso ("MXN"), it had to remit the funds to its clients in United States Dollars ("USD").[65] As part of the sub-processing services provided to the 1st Defendant, Feenicia was entitled to maintain a portion of the processed transactions as a reserve to settle any disputed payments, chargebacks and/or fines.[66]

39 In or around April 2020, Feenicia was obliged to release these reserves to the 1st Defendant in respect of transactions processed for the 1st Defendant's clients. To mitigate against currency exchange loss, given that the MXN had devalued against the USD in or around March 2020, the 1st Defendant directed Feenicia to transfer the reserves to an account with FFIB. This was done to take advantage of FFIB's offer of a USD loan using the received MXN as collateral. The 1st Defendant could then use the USD loan to fulfil its obligations to its clients and vendors, and repay the loan when MXN increased in value.[67]

40 After FFIB received the funds from Feenicia, the 1st Defendant discovered that FFIB was in fact unwilling to extend the USD loan. Morgan Stanley Smith Barney LLC ("Morgan Stanley"), with which the 2nd Defendant

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64 1st Defendant's Defence (Amendment No. 3) at para 19A.

65 1st Defendant's Defence (Amendment No. 3) at para 19A(a).

66 1st Defendant's Defence (Amendment No. 3) at para 19A(c).

67 1st defendant's Defence (Amendment No. 3) at paras 19A(d)–(f).

had an account at the material time, indicated its willingness to grant the 1st Defendant such a loan to hedge against currency exchange fluctuations between the MXN and USD. As such, the 1st Defendant instructed FFIB to transfer the same funds to Morgan Stanley. Instead of doing so, however, FFIB froze the FFIB funds, claiming that it had received a complaint against the 1st Defendant regarding the source of the funds, and that it needed to investigate .[68]

41 In the circumstances, the Defendants denied that the FFIB funds were traceable to payments from the Plaintiff's third-party customers which had been processed and/or received by the 1st Defendant for and on behalf of the Plaintiff. The Defendants also denied that the Plaintiff had a proprietary interest in these funds.[69]

The Parties' Cases

42 Having set out each side's account of events, I summarise below their respective cases.

The Plaintiff's case

43 The Plaintiff's case was that it had entered into the Payment Processing Agreement with the 1st Defendant. Flowing from this, the 1st Defendant was said to owe the Plaintiff a duty to transfer payments received on a timely basis, and to render a true and complete account of all funds payable to the Plaintiff (including outstanding unpaid sums).[70] Further and in the alternative, the 1st Defendant was said to also owe fiduciary duties to the Plaintiff in relation to all payments processed and received on behalf of the Plaintiff in its capacity as the

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68 1st Defendant's Defence (Amendment No. 3) at para 19A(g).

69 1st Defendant's Defence (Amendment No. 3) at para 19A(h).

70 Statement of Claim (Amendment No. 1) at para 10.

Plaintiff's payment processing agent, or as the party who had power and control over funds that were meant to be allocated to and/or that belonged beneficially to the Plaintiff. The 1st Defendant was thus obliged to act *bona fide* in the Plaintiff's interests and for the proper purposes of the Plaintiff in relation to funds paid by third party customers, by duly transferring these payments to the Plaintiff (subject to the deduction of fees and charges owed to it).

44 The Plaintiff claimed that in failing to pay over the Trust Monies of US$2,680,535.21, the 1st Defendant had acted in breach of its contractual duties under the Payment Processing Agreement. The Plaintiff also claimed that the 2nd Defendant had knowingly induced or procured the 1st Defendant's breach of its contractual duties.

45 Further or in the alternative, the Plaintiff claimed that as the 1st Defendant owed it fiduciary duties in relation to all payments processed and received on its behalf, the 1st Defendant's failure to pay over the US$2,680,535.21, and/or to account for these Trust Monies, constituted a breach of the 1st Defendant's fiduciary duties. The 2nd Defendant was alleged to have knowingly assisted in the 1st Defendant's breach of fiduciary duties.[71]

46 Further or in the alternative, the Plaintiff claimed that regardless of whether it had entered into the Payment Processing Agreement with the 1st Defendant, the 1st Defendant had clearly received the payments processed through the PeakPay, House and IPTV MIDs with full knowledge that the payments were meant to be allocated to and/or belonged beneficially to the Plaintiff (subject to the deduction of processing fees and charges).[72] However,

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71 Statement of Claim (Amendment No. 1) at paras 22–23.

72 Statement of Claim (Amendment No. 1) at para 23A.

the Defendants had misappropriated and/or diverted the Trust Monies from the Plaintiff. In the circumstances, the Plaintiff contended that the Defendants must have held the payments processed through the PeakPay, House and IPTV MIDs and/or their traceable proceeds on constructive trust for the Plaintiff.

47 In addition and/or alternatively, the Plaintiff made the following other claims:

(a) That the Defendants had wrongfully and with intent to injure the Plaintiff by unlawful means, conspired and combined to misappropriate the Trust Monies, and to defraud and conceal such fraud from the Plaintiff; and/or

(b) That the Defendants had jointly defrauded the Plaintiff by falsely representing that the 1st Defendant would provide payment processing services to the Plaintiff in accordance with the Payment Processing Agreement, knowing that this representation was false and with the intention that the Plaintiff would, in reliance on such representation, enter into the Payment Processing Agreement and cause payments from third party customers to be channelled through the MIDs[73];

(c) That the Defendants had benefited from and/or been enriched as a result of the misappropriation and/or diversion of the Trust Monies, at the expense of the Plaintiff, and that this benefit or enrichment was unjust because the misappropriation and/or diversion of the Trust Monies had been done without the Plaintiff's consent, there had been a total failure

[73] Statement of Claim at para 24–25, SDB at pp 27–28.

of consideration, and/or the Defendants knew that the Trust Monies rightfully belonged to the Plaintiff.[74]

48 The Plaintiff sought the following reliefs:

(a) A declaration that the alleged Trust Monies in the sum of US$2,680,535,21 are held on trust by the 1st Defendant for the Plaintiff, including but not limited to the FFIB funds;

(b) An order that the Defendants do, jointly and severally, account to the Plaintiff for the alleged Trust Monies and any profits, benefits, gains and/or assets arising from, relating to and/or in connection with the Trust Monies ("the Assets"), and an order that all Trust Monies and/or Assets be paid over and/or delivered up upon such account to the Plaintiff;

(c) A declaration that the Plaintiff would be entitled to trace the Outstanding Settlement Payments and Assets held on constructive trust for the Plaintiff into whose hands they may be found, wherever located;

(d) Further or alternatively, an order that the Defendants pay to the Plaintiff the sum of US$2,680,535.21;

(e) Further or alternatively, damages to be assessed;

(f) Compound interest at a commercial rate from the date of the defendants' wrongful actions and/or breaches of fiduciary duties to the date of judgment;

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74 Reply (Amendment No. 4) at para 12AAAA.

(g) Alternatively, interest pursuant to the Civil Law Act 1909 (2020 Rev Ed) ("CLA") from the date of commencement of these proceedings to the date of judgment;

(h) Costs; and

(i) Such further and/or other relief as this Court deemed fit.[75]

The Defendants' case

49 The Defendants, on the other hand, contended that the Plaintiff's claim should have been properly brought against Mr Berger and not the Defendants.[76] Because the 1st Defendant was never a party to the Payment Processing Agreement and did not owe the Plaintiff any contractual duties, it could not be said to have breached any such duties. The corollary of this was that the Plaintiff's claim against the 2nd Defendant for inducing breach of contract must also fail.

50 Even assuming for the sake of argument that the 1st Defendant was a party to the Payment Processing Agreement, the Defendants argued that the Payment Processing Agreement was unenforceable as the payments processed by the Plaintiff were paid by customers of online gambling websites, and this made the agreement an illegal contract under the Remote Gambling Act 2014 (No. 34 of 2014) ("RGA").[77]

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75 Statement of Claim (Amendment No. 1) at pp 24–25.

76 1st Defendant's Defence (Amendment No. 3) at para 21.

77 1st Defendant's Defence (Amendment No. 3) at para 20(a).

51 In the alternative, the Defendants sought to characterise the Plaintiff's claim for the recovery of the Trust Monies as being an action brought to recover monies won on a wager – and thus unenforceable under s 5(2) CLA.[78]

52 Apart from the above, the Defendants contended that the 1st Defendant did not owe the Plaintiff any fiduciary duties and could not be said to have breached such duties; and that the 2nd Defendant did not knowingly assist the 1st Defendant's alleged breach of fiduciary duties.[79] Finally, the 1st Defendant denied that it had received the payments processed through the three MIDs on behalf of the Plaintiff and/or with full knowledge that the payments were meant to be allocated to and/or belonged beneficially to the Plaintiff.

Some procedural history:

Applications pertaining to documents from US deposition of Ms Alfaro

53 On or about 22 December 2021, the Plaintiff commenced an Application for Judicial Assistance against Ms Alfaro in the United States, purportedly to obtain "documentary and testimonial evidence for use" in this Suit.[80] Ms Alfaro eventually disclosed over 18,000 documents to the Plaintiff.[81] The Defendants made the following applications to restrain the production of some of these documents at the main trial.

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78 1st Defendant's Defence (Amendment No. 3) at para 20(g).

79 1st Defendant's Defence (Amendment No. 3) at para 20(b).

80 Michael Carbonara's 19th affidavit dated 10 April 2022 at MC-54 p 16; Defendants' Written Submissions for HC/SUM 1386/2022 para 4.

81 Defendants' Written Submissions for HC/SUM 1386/2022 para 7; Michael Carbonara's 19th affidavit dated 10 April 2022 at para 16.

HC/SUM 1386/2022

54 In SUM 1386, the Defendants sought orders to restrain the Plaintiff from receiving or using some 765 of these documents which they said were protected by legal professional privilege, and to restrain the Plaintiff from continuing to depose Ms Alfaro in the US.[82] As I was of the view that Ms Alfaro was ultimately subject to a valid US court order which she had to comply with, I made no order on the Defendant's application. Instead, counsel for the Plaintiff gave an undertaking that they would not receive or use these documents for the purposes of this trial without leave from the court.[83]

HC/SUM/1514/2022

55 In SUM 1514, the Defendants applied to restrain the Plaintiff from adducing 22 documents in the main trial on the basis that they were protected by legal professional privilege and had been disclosed by the Plaintiff in breach of confidence. These documents comprised emails between the 2nd Defendant, Ms Alfaro and one Mr David Parr. According to the 2nd Defendant, the communications had arisen after the commencement of the suit and related to issues in the suit, and the Defendants had not waived any privilege over any documents or communications exchanged between themselves and any third parties for the dominant purpose of preparing for this litigation.[84] Having found that these documents were protected by legal professional privilege and had been

82 HC/SUM 1386/2022 Summons for Injunction filed 11 April 2022.

83 HC/ORC/2322/2022 filed 5 May 2022.

84 Michael Carbonara's 20th affidavit dated 18 April 2022 at para 11.

disclosed by the Plaintiff in breach of confidence, I ordered that the Plaintiff be restrained from adducing these documents in evidence at trial.[85]

Issues to be determined

56 The following issues arose for my determination:

(a) Whether the Plaintiff's claim was statutorily barred under the CLA and/or the Remote Gaming Act;

(b) Whether the Plaintiff and 1st Defendant had entered into a contract for the provision of payment processing services by the latter to the former; and if so, whether the 1st Defendant had breached its contractual duties to the Plaintiff, and whether the 2nd Defendant had knowingly induced or procured such breach;

(c) Whether, in addition or alternatively, the 1st Defendant owed fiduciary duties to the Plaintiff in respect of the processing of the latter's funds; and if so, whether the 1st Defendant had breached such fiduciary duties, and whether the 2nd Defendant had knowingly assisted in such breach;

(d) Whether the Plaintiff could make out its other alternative claims in respect of unlawful means conspiracy, fraudulent misrepresentation, constructive trust, and/or unjust enrichment.

57 In the paragraphs that follow, I address these issues *seriatim*.

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85 HC/ORC 2274/2022 filed 30 April 2022.

My Decision

Whether the Plaintiff's claims are statutorily barred under either the CLA

s 5(2) CLA

58 I address first the Defendants' submission that the Plaintiff's action in S 371/2020 was barred under s 5 of the CLA. The Defendants argued, firstly, that s 5(2) CLA applied to the present case because this was an action brought to "recover money won on a wager".[86]

59 In response, the Plaintiff contended that the Defendants' submission must fail as the claims in the present suit were not for any sum of money or valuable thing alleged to be won upon any wager: rather, the present claims were for sums due to the Plaintiff from the 1st Defendant under a contract for payment processing services.[87]

60 For ease of reference, I set out below s 5(2) CLA:

> **Agreement by way of gaming or wagering to be null and void**
>
> (2) No action shall be brought or maintained in the court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made.

61 Having considered the parties' submissions and the authorities relied on, I was not persuaded by the Defendants' submissions on the application of s 5(2) CLA to the facts of this case.

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86 D1's Defence (Amendment No 4) at para 20(g).

87 Plaintiff Closing Submissions at para 370.

62 In their written submissions, the Defendants placed great emphasis on the fact that the payments which the Plaintiff alleged were received by the 1st Defendant for processing were "deposits into customer accounts" of the website of the Plaintiff's affiliate Blue SA. The Defendants argued that the customers were crediting their accounts on BetOnline.ag with the intention of using such credit for gaming and wagering transactions on BetOnline.ag: *ergo*, the "core of the transactions were the gaming contracts entered into on BetOnline.ag and the funds paid in respect thereof thus fall within the ambit of section 5(2) of the CLA".[88]

63 It is not disputed that ss 5(1) and 5(2) CLA are *in pari materia* with s 18 of the UK Gaming Act 1845 which provided:

> All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and ... no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.

64 In *Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 2 SLR(R) 183 ("*Star Cruise*"), Selvam J noted that s 18 of the UK Gaming Act 1845 was split into three limbs: (a) Contracts of gaming and wagering are null and void ("the first limb"); (b) the winner is prevented from bringing an action to recover his winnings ("the second limb"); and (c) the winner is prevented from suing the stakeholder ("the third limb"). Section 5(2) CLA corresponds to the second and third limbs of s 18 of the UK Gaming Act 1845. What the Defendants had to show, therefore, was that the Plaintiff's action was a suit brought by the winner

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88 Defendants' Closing Submissions at para 15.

in a gaming or wagering contract, either to recover his winnings or to sue the stakeholder.

65 It will be recalled that in its amended statement of claim, the Plaintiff pleaded a number of claims in the alternative. Based on the 1st Defendant's alleged failure to pay over the Trust Monies, the Plaintiff claimed – alternatively – breach of contract by the 1st Defendant; breach of fiduciary duties to the Plaintiff; a constructive trust over the monies; unlawful means conspiracy; fraudulent misrepresentation; and unjust enrichment. The Defendants' submissions appeared to assume that *all* of the Plaintiff's pleaded claims were caught by s 5(2) CLA. However, there was no real attempt to analyze the language of s 5(2) and to demonstrate why it applied to each of the Plaintiff's claims. Instead, the Defendants' submissions appeared to consist of a series of sweeping generalizations which paid no regard to the actual wording of s 5(2). This was, with respect, unfortunate, because on a plain reading of s 5(2), it was not at all apparent that any of the Plaintiff's pleaded claims could be characterized as an action "for recovering any sum of money… alleged to be won upon any wager". The very words used in s 5(2) make it clear that the provision is concerned with actions to recover gaming or wagering debts. None of the Plaintiff's pleaded claims could be described as such without violence being done to the language of s 5(2). None of its claims was concerned with recovering gaming debts due on the gaming contracts between Blue SA and its customers.

66 Nor could the monies paid by Blue SA's customers be properly described as monies "deposited in the hands of any person to abide the event on which any wager has been made". The fact that the monies allegedly received by the 1st Defendant for processing originated from customers of Blue SA intending to credit their BetOnline accounts for gaming purposes was really incidental to the

Plaintiff's claims. While the Defendants contended that the customers making these payments must have intended to utilize the credit in their BetOnline accounts to gamble on the website, this did not change the fact that the 1st Defendant's role in the entire process was (on the Plaintiff's pleaded case) that of the intermediary between the acquiring banks who received the funds from customers' credit card payments on the one hand, and the Plaintiff who collected the funds paid on behalf of Blue SA on the other hand. In this context, it would make no sense at all to say that the customers' payments had been "deposited" in the 1st Defendant's hands for the 1st Defendant to act in effect as a stakeholder ("to abide the event on which any wager has been made").

67 Apparently eschewing the plain meaning of the words of s 5(2), the Defendants sought to persuade me instead that our courts have "interpreted section 5 of the CLA widely and purposefully";[89] and that based on this "wide" and "purposeful" interpretation, the scope of s 5(2) extended to the Payment Processing Agreement relied on by the Plaintiff in this action. Having reviewed the authorities, however, I agreed with the Plaintiff that none of them provided any support for the Defendants' submissions.

68 In *Star City Pty Ltd v Tan Hong Wan* [2002] 1 SLR(R) 306 ("*Star City*"), the appellant had attempted to recover what they alleged were unpaid loans given to the respondent for the purpose of gambling. The respondent had signed, and handed over to the appellant, five cheques for a total of A$250,000 in exchange for chip purchase vouchers. These vouchers were used to purchase chips for gambling. The respondent proceeded to lose the entire sum. When the appellant attempted to cash in the cheques, all five were dishonoured. The respondent repaid some A$55,160 – leaving the sum of A$194,840 unpaid. The appellant

[89] Defendants' Closing Submissions at para 7.

sought to recover this sum as unpaid loans made to the respondent. The trial judge had disallowed the claim on the basis that this was in fact a gaming contract, and thus irrecoverable under s 5 CLA. The Court of Appeal ("CA") held that s 5(2) CLA was procedural in nature and that the court was bound to apply it as part of the *lex fori*. As to whether the appellant's claim was barred by s 5(2) CLA, the court noted that the principle enshrined in s 5 CLA was that a wagering contract which "was valid by its governing law is valid in Singapore", but no action would lie in Singapore to recover any sum of money won on such a contract. Whether the appellant's claim ran afoul of s 5(2) CLA turned, therefore, on the characterisation of the transaction in question (*Star City* at [15]).

69 Applying the *lex fori* (which was Singapore law) to determine the true substance of the transaction in this case, the CA was of the view that the transaction in question was a wagering contract and not a genuine loan: *Star City* at [29] and [37]. It was a claim by the casino operator to recover debts owed to it by a losing punter under the wagering contract between them. The whole point of allowing customers to deposit cheques in exchange for chip purchase vouchers which could then be used to obtain chips for gambling was to enable these customers to gamble on credit. In contrast, in the present case, the Plaintiff's claim was not concerned with enforcing the wagering contracts entered into between its affiliate Blue SA and the third-party customers of Blue SA's BetOnline website. As the Plaintiff pointed out in its closing submissions, the Plaintiff's claims "are not for any sum of money or valuable thing alleged to be won upon any wager": its claims "are for sums due to it from [the 1st Defendant] under a contract for payment processing services".[90]

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90 Plaintiff's Closing Submissions at para 370.

70 In *Star City*, the CA referred to the High Court's decision in *Star Cruise.* In *Star Cruise*, the plaintiff Star Cruise Services Ltd sued on three cashier's orders issued by the defendant OUB in its favour. The payments were made in respect of gambling transactions which had taken place aboard a cruise ship. Summarizing the evidence led at trial, Selvam J noted that the typical mode of operation of the casino required that when a gambler was ready for the game, he would provide the casino with either a cashier's order or a cheque for an amount which marked the limit which the casino was willing to allow. If the gambler won at the gaming table, the cashier's order or cheque would be returned to him. If he lost, the casino would retain the cashier's order or cheque. In either case, the document represented the amount of his loss, and it was security to be realized . As Selvam J put it, the cashier's order or cheque represented the losses of the gambler: in the words of the then s 6 of the CLA (our present s 5 CLA), "when the play is over and the account is settled it is money won by way of gaming, nothing more and nothing less" (at [98] of *Star Cruise*).

71 Selvam J dismissed the plaintiff's claim, holding that the three cashier's orders were not bills of exchange as claimed. Instead, the "final effect of the transactions taken in their totality" was that the amounts represented by the cashier's orders were "moneys won by way of gaming"; and by reason of ss 6(1), 6(2) and 6(5) of the CLA (our present ss 5(1), 5(2) and 5(6) CLA), the entire transaction was void (*Star Cruise* at [105] and [108]). As Selvam J explained (at [68]):

> (T)he purpose of s 6 is not to prohibit games and wagering or make them illegal. Putting aside the provisions of the Common Gaming Houses Act all gaming and wagering are lawful. At the same time they are not valid. They are all void. Section 6 recognises the social and entertainment value of gaming and betting and does not seek to suppress them… All gaming and wagering debts are debts of honour. The law does not interfere with or proscribe honour among the players. There is no

> prohibition against payment of the loss provided the debt is met with honest money. However, what the law does object is their coming to the courts to settle their disputes and it manifests its objection by making all contracts and agreements by way of gaming void. In the result they are devoid of all legal effect. Gaming debts are not legal debts. The courts of justice are out of bounds to claims based on gaming or wagering because no action can be brought or maintained to enforce them. The doors of justice are closed to them. Sections 6(2) and 6(5) have clamped down on credit gambling by denying legal remedy to enforce gaming debts and securities based on them. It has done so for public policy reasons with a history of some 450 years.

72 Selvam J's decision in *Star Cruise* was cited again in *Poh Soon Kiat v Desert Palace Inc (t/a Caesars Palace)* [2010] 1 SLR 1129 ("*Desert Palace*"), this time by a differently constituted CA from the court which had issued the judgment in *Star City*. In *Desert Palace*, the CA was primarily concerned with whether a foreign judgment obtained in 2001 by the respondent in the Superior Court of the State of California was enforceable in Singapore by way of a common law action. The CA held that the 2001 California judgment was not a foreign money judgment. In the course of its judgment, the CA also examined s 5(2) CLA and made a number of observations about the provision. Noting that the earlier coram in *Star City* had asserted that "gambling *per se* is no longer considered to be contrary to the public interest [of Singapore]" (which assertion was repeated in the judgment issued in *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR(R) 690), the CA in *Desert Palace* demurred. The CA referenced the judgment in *Star Cruise* for its helpful review of the history and public policy of the gaming legislation in the UK which, together with the gaming statutes in India, had been responsible for influencing the shape which ss 5(1) and 5(2) CLA took in Singapore. At [83] of its judgment, the CA noted that Selvam J had correctly highlighted that the public policy underlying the UK gaming legislation leading to (and including) the 1845 UK Gaming Act was two-fold: to suppress gambling on credit (and not gambling *per se*) and protect property from capture by gamblers; and to declare that courts of justice were closed to gamblers and

that the courts would not help to settle or collect gambling debts. The CA noted that the 1848 Indian Act was based on and had the same substantive effect as s 18 of the 1845 UK Gaming Act: the public policy encapsulated in the Indian Act was identical to the public policy of the 1845 UK Gaming Act. The current ss 5(1) and 5(2) of our CLA were collectively a re-enactment of s 7(1) of the Civil Law Ordinance which was itself a combination of the 1848 Indian Act with part of s 18 of the 1845 UK Gaming Act. In the CA's view, the public policy encapsulated in s 5(2) of the CLA had subsisted for more than 160 years (from the time of the 1848 Indian Act) and still subsists today, as is evident from the continued existence of s 5(2) itself. The CA cited the remarks by Selvam J on the purpose of the then s 6 CLA (now s 5 CLA, as reproduced above in [60]) and stressed that it disagreed with the previous CA's statement in *Star City* that "gambling *per se* is no longer considered to be contrary to the public interest [of Singapore]". In the CA's view (at [112]):

> … s 5(2) is a statutory prohibition against the recovery of gambling debts which was imposed in the public interest.

73 At [127(b)] of its judgment, the CA stated the provisional view that s 5(2) CLA would bar a common law action on a foreign judgment (whether emanating from a Commonwealth country or non-Commonwealth foreign country) whose underlying cause of action is a gambling debt.

74 The decisions in *Star City*, *Desert Palace* and *Star Cruise* were discussed in Cooke IJ's decision in *The Star Entertainment QLD Ltd v Wong Yew Choy and another matter* [2020] 5 SLR 1 ("*The Star Entertainment*"). In that case, the plaintiff operated a casino – The Star Gold Coast – and provided gaming services. The defendant was a patron at that casino. According to the plaintiff, the defendant had agreed to the use of a "blank replacement cheque" – which he had previously provided to The Star Sydney but which had not been utilised

there – as a means of paying for any losses he suffered at The Star Gold Coast. However, the cheque was subsequently dishonoured when completed by the plaintiff. The plaintiff sued to recover a sum of some A$43m and applied for summary judgment. In response, the defendant applied to strike out the claim on the ground (*inter alia*) that s 5(2) CLA precluded the plaintiff from bringing an action to recover money won on a wager. The plaintiff argued that the public policy of Singapore did not require s 5(2) to be applied in its case because (*inter alia*) the gaming had taken place in Queensland under effective regulation and licence and was therefore controlled; the contract under which the suit was brought was governed by the law of Queensland where the contract was valid and enforceable; and the cheque was a valid negotiable instrument in and of itself.

75 Cooke IJ dismissed the application for summary judgment and struck out the plaintiff's claim. In so deciding, Cooke IJ acknowledged (at [48]) that the CA's comments on ss 5(1) and 5(2) CLA in *Desert Palace* were strictly *obiter* – but noted that nevertheless, those comments had been forcefully and clearly expressed with full consideration of the public policy which was said to underlie the Act. Cooke IJ summarized the elements of public policy to which the CA in *Desert Palace* had drawn attention as follows: (a) to suppress gambling on credit as opposed to gambling *per se*; (b) to protect property from capture by gamblers; (c) to declare that the courts of justice were closed to gamblers and the courts would not help to settle or collect gambling debts; and (d) the need to distinguish between social gambling as part of a leisure activity, state-sponsored lotteries and sweepstakes and the like, on the one hand, and what the public regarded as effectively "hard-core gambling" on the other. As the CA in *Desert Palace* had also made clear, the legislation has created specific exceptions to the application of ss 5(1) and 5(2) CLA: these exceptions were drawn in specific terms which

did not allow for casinos operating abroad, as opposed to casinos falling within the provisions of the Casino Control Act.

76 In the light of the CA's discussion in *Desert Palace* of the public policy underlying ss 5(1) and 5(2) CLA, therefore, Cooke IJ held that the plaintiff's reasons for contending that public policy in Singapore did not require the application of s 5(2) to its case must fail. The result was that the clear words of s 5(2) must take effect in the manner that the *Star City* and *Star Cruise* decisions required: the court was not able to countenance a claim brought for sums allegedly won on a wager. The defendant was entitled to have the claim struck out under O 18 r 19 of the Rules of Court because it was a claim that fell afoul of s 5(2) CLA and thus disclosed no reasonable cause of action ([53]-[57] of *The Star Entertainment*).

77 To sum up, therefore, the facts of the present case were clearly not on all fours with those in the authorities examined above. In each of these cases, the claimant was the casino operator, and the nature of its claim was an action to recover a debt owed to it by a losing punter – *ie*, to enforce the payment obligations under the wagering contract between itself and the punter. This was found to be so even in a case where the casino operator's claim was framed as a claim for monies due on bills of exchange (*Star Cruise*). In contrast, in the present case, none of the litigants were parties to the gaming contracts entered into between the operator of the BetOnline gaming site (Blue SA) and the punters who engaged in gaming transactions on this gaming site. Instead, the Plaintiff – who was in the business of managing and collecting payments on affiliates such as Blue SA – was suing the Defendants for the alleged misappropriation of payments allegedly received by the 1st Defendant for processing pursuant to the Payment Processing Agreement. While these payments might have been made by the online punters in relation to gaming activities on BetOnline.ag, to describe

the Plaintiff's claim against the Defendants as being (somehow) a claim to recover gambling debts would require unbearable contortion of the language of s 5 CLA as well as severe distortion of the facts. Further, while the Defendants have tried to surmount such obstacles by urging a "wide" and "purposeful" interpretation of ss 5(1) and 5(2) CLA, they have not been able to explain – in the light of the CA's observations in *Desert Palace* on the public policy underlying these provisions – the "wide purpose" to be served by bringing contracts such as the Payment Processing Agreement within the scope of these provisions.

78 For the reasons set out above at [61] to [77], I rejected the defendant's argument that the Plaintiff's action should be barred under s 5(2) CLA.

s 5(6) CLA

79 I next address the Defendants' alternative argument that the Plaintiff's action should be barred under s 5(6) CLA because it was for payments made in respect of contracts or agreements rendered null and void under s 5(1) CLA; specifically, agreements for the customers to pay Blue SA for credit in their BetOnline.ag accounts.[91] In particular, the Defendants pointed to the fact that Ms Meza had confirmed in cross-examination that payments were made to Blue SA by its customers "pursuant to agreements between the same parties whereby Blue High House SA would credit customer accounts on Betonline.ag in exchange for payment of the same sum by its customers. The customers would then be able to use the credit in their accounts for gaming transactions or wagering".[92] The Defendants argued that these agreements between Blue SA and its customers fell within s 5(1) of the CLA as they were contracts by way of gaming or wagering;

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91 Defendants' Closing Submissions at para 18.

92 Defendants' Closing Submissions at para 20.

and that it followed that insofar as the gaming transactions arose "as a result of and in the process by which such agreements for gaming and wagering are effected, the gaming transactions also fall within section 5(1) of the CLA".[93]

80 Sections 5(1) and 5(6) of the CLA state:

> **Agreement by way of gaming or wagering to be null and void**
>
> (1) All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void.
>
> …
>
> ***Promises to repay sums paid under such contracts to be null and void***
>
> (6) Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by subsections (1) and (2), or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

81 It is not disputed that s 5(6) CLA is *in pari materia* with s 1 of the UK Gaming Act 1892. Any attempt to construe s 5(6) and to ascertain its scope should accordingly take into account the background to the enactment of s 1 of the UK Gaming Act 1892. This was explained in detail by Selvam J in *Star Cruise.* As Selvam J noted, it was the English Court of Appeal's decision in *Read v Anderson* [1884] 13 QBD 779 (CA) which first presented a major problem of construction of the Gaming Act 1845. In *Read v Anderson*, the plaintiff was a middleman (known as a "turf commission agent") who placed bets with the betting house on behalf of punters. The wagering contract was thus between the betting house and the agent, who received the commission on the turnover. The plaintiff placed a number of bets in his own name at the defendant's request and

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93 Defendants' Closing Submissions at para 20.

paid them. The defendant subsequently tried, but failed, to withdraw the bets before the results were known. The bets were lost and the defendant refused to pay. The plaintiff sued him to recover the losses as an indemnity, pursuant to the law of agency. The plaintiff's action succeeded at first instance and the defendant's appeal was dismissed by majority decision of the English Court of Appeal. Brett MR, the dissenting judge, opined that the law in force at that time – *ie*, s 18 of the Gaming Act 1845 – rendered the wagering debt and the indemnity based on it null and void, and prohibited any action on the same. In Brett MR's words:

> It is true [the plaintiff's business] is not illegal but it is a business to which the law has an objection, and the law will not allow contracts made in such a business to be enforced. It seems to me that it is a business of which the law should not take notice, and therefore, that the law should disregard the inconvenience to which the plaintiff would be put if he did not pay and were turned out of the betting ring.

82 In *Cohen v Kittel* [1888] 2 QBD 680 (Div Ct), the defendant was also a turf commission agent who had been employed by the plaintiff to bet on commission. The defendant having failed to make certain bets pursuant to the plaintiff's instructions, the plaintiff sued him for breach of contract as his agent, claiming as damages the excess of gains over losses which should have been received by the defendant (after deducting his commission) had he made the bets in question. At first instance, the plaintiff obtained judgment for the full amount claimed. However, the defendant's appeal was allowed by the Divisional Court (Huddleston B and Manisty J). Manisty J, in his judgment, held that the position of the agent in such a case did not differ from that of a stakeholder under the third limb of s 18 of the Gaming Act 1845. He expressed agreement with Brett MR's dissenting judgment in *Read v Anderson*. In his view:

> A decision in favour of the plaintiff in this case would still further defeat the object of this statute which as the preamble shews,

> was to add to the strictness of the law with regard to gambling. Since the Act passed, however, and in consequence, as I cannot help but think, of some of the decisions upon it, the practice which it was intended to discountenance has greatly increased, and with results of a most disastrous character, as regards both horse-racing and transactions in stock. The contracts avoided by the 18th section are not, it is to be observed, "contracts of gaming and wagering", but "contracts *by way of gaming and wagering*".

83 As Selvam J noted in *Star Cruise*, the UK Parliament subsequently intervened to set the law right by enacting s 1 of the UK Gaming Act 1892, which effectively reversed the majority decision in *Read v Anderson*. In subsequent decisions, the English courts elucidated the scope of this provision.

84 In *Tatam v Reeve* [1893] 1 QB 44 ("*Tatam*"), the defendant was indebted to four persons for bets on horse races which the defendant had made and lost. At the defendant's request, the plaintiff paid off these debts. The defendant then refused to repay the plaintiff the amounts paid off, and the plaintiff brought an action to recover the amount paid. Before the Divisional Court (Lord Coleridge, CJ and Wills J), the plaintiff argued that his claim did not fall afoul of s 1 of the UK Gaming Act 1892 because that Act had been passed to strike at transactions in which the person who paid money was a party, as agent, to the gaming contract – *ie*, "to get rid of the decision in *Read v Anderson*". This argument did not find favour with the Divisional Court. The court held that the plaintiff's claim for repayment was caught by s 1 of the UK Gaming Act 1892 as the plaintiff was suing upon an implied promise by the defendant to repay monies paid by the plaintiff in respect of contracts or agreements rendered null and void by the Gaming Act 1845. In dealing with the 1892 Act, Wills J held that the words "in respect of" must have been put in purposely by the legislature and must mean something different from "under": in his view, if the words were to be given any meaning at all, they must have been intended to strike at transactions such as the one between the plaintiff and the defendant.

85 In *Saffery v Meyer* [1901] 1 KB 11 ("*Saffery*"), the defendant claimed to have "invented" a system for backing horses at races. A bankrupt paid the defendant £500 to be applied to putting in operation this system for "backing horses". All of the money was lost by the defendant on bets made pursuant to the arrangement he had with the bankrupt. The defendant was subsequently sued by the trustee in bankruptcy upon three promissory notes made previously in favour of the bankrupt by the defendant. In bringing the action, the trustee in bankruptcy alleged that it had been agreed between the bankrupt and the defendant that profits and losses were to be shared equally. In defending the claim, the defendant asserted that there was no consideration for the making of the promissory notes, these having been given in respect of gaming transactions which were void under the 1845 and the 1892 Gaming Acts.

86 The defendant's argument was accepted by the court. Referencing *Tatam*, the court held that the case really involved an implied promise by the defendant to pay to the bankrupt a sum of money in respect of contracts or agreements made by way of gaming or wagering – *ie*, in respect of contracts rendered null and void by the 1845 Gaming Act; and as such, the case came exactly within the words of s 1 of the 1892 Act.

87 In *De Mattos v Benjamin* [1894] 42 WR 284 ("*De Mattos*"), the question was whether, when an agent had received the amount of a bet placed by him on behalf of a principal, the principal could recover from the agent the amount so received by him. The plaintiff, De Mattos, had employed the defendant Benjamin as his agent to make bets for him. The account provided by the defendant showed a balance due to the plaintiff, which the former failed to pay. The plaintiff brought an action against the defendant for monies had and received. At first instance, it was held that the plaintiff was deprived by the operation of the 1845 and the 1892 Gaming Acts of his right to recover the

monies. On appeal, this decision was reversed. The appellate court (Lord Coleridge, CJ and Day J) accepted that the 1892 Act made illegal all parts of the transaction included in its scope, including the act of a person who, as a commission agent, effected an illegal contract. However, it "did not enact that, if a sum of money is paid by A to C to pay over to B, B may set them both at defiance, and put the money into his own pocket".

88 *De Mattos* and the various cases that came after it (*eg*, *Thomas Cheshire & Co v Vaughan Brothers & Co* [1920] 3 KB 240) were cited and followed in *Close v Wilson* [2010] EWCA Civ 5 ("*Close*"). In *Close*, the plaintiff claimed that he had paid the defendant £20,000 for the purpose of the defendant placing bets on horses to lose certain races. According to the plaintiff, it was agreed that his "capital investment" of £20,000 was guaranteed to be paid back no matter what happened to the bets placed, and that he would also receive a set percentage return on the value of his investment. No money was repaid by the defendant, and the plaintiff sued for the recovery of his £20,000. The plaintiff asserted that a large part of the £20,000 had gone into the defendant's personal bank account and had been used for his personal benefit. At first instance, the court held that the plaintiff could not sue to recover the £20,000 because his dispute with the defendant was really "a squabble about betting and gaming", and their arrangement was null and void under the two Gaming Acts of the 1800s.

89 On appeal by the plaintiff, the English Court of Appeal reversed the first-instance decision. Toulson LJ, with whose judgment Wilson LJ and Arden LJ agreed, held that it did not matter ultimately whether the relationship between the plaintiff and the defendant was regarded as one of agency, loan or a joint venture of an individual kind: on any view, the defendant's (assumed) promise to repay the £20,000 was a promise to repay money paid by the plaintiff in respect of bets which were to be placed. The promise was therefore void under

s 1 of the 1892 Act. However, if part of the money was used for bets which were successful, it followed from authorities such as *De Mattos* that the plaintiff would be entitled to the proceeds under the law of restitution. If part of it had been used by the defendant for his own purposes, the plaintiff would likewise be entitled to recover that sum under ordinary principles of restitution. The explanation of the principle established in *De Mattos* was –

> 25 …(A)lthough an agreement by an agent to place a bet for the principal is an agreement to enter into a void contract, and therefore the agent cannot be sued for failing to do so, any money which he in fact receives through placing the bet is nonetheless money which he receives on behalf of his principal. The principal is therefore entitled to recover that money from the agent as money had and received or, in modern terminology, under the law of restitution. It is no answer for the agent to say that he received it in respect of a null and void contract…
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> 31 …[This case] would be simply a case in which Mr Wilson had used money outside the scope of the agreement under which it had been provided. The unenforceable nature of the agreement itself would be no bar to the Mr Close's restitutionary claim if the money was used for a purpose extraneous to the agreement. Mr Close's claim would not amount to enforcement of the agreement. It would be for the recovery of money put by Mr Wilson to his own use.

90 Turning back to the present case, the Defendants' submissions about the application of ss 5(1) and 5(6) CLA to the Plaintiff's action contended that the payments made by the customers of Blue SA were payments made "in respect of" contracts for gaming transactions on the BetOnline website. However, this submission ignored the actual wording of s 5(6), which expressly addresses "(a)ny promise, express or implied, *to pay any person any sum of money paid by him* in respect of any contract or agreement rendered null and void by [ss 5(1) and 5(2)]". The italicised words make it clear that what s 5(6) is concerned with is cases where A has promised to pay B any sum of money paid *by B* under or in respect of any contract rendered null and void by s 5(1) / s 5(2). As may be seen from the cases of *Tatam, Saffery* and *Close,* the Plaintiff was not quite correct in

asserting that s 5(6) CLA "is limited in its ambit to preventing an agent from advancing a claim for losses from gambling carried out for a principal". Nevertheless, the bottom-line (as Toulson J pointed out in *Close*) is that s 1 of the 1892 Gaming Act, which is *in pari materia* with our s 5(6), renders void any promise by A to repay B money paid by B in respect of bets to be placed – regardless of whether the relationship between A and B is regarded as one of agency, loan or a joint venture of an individual kind. In the present case, none of the Plaintiff's claims was premised on a promise by the 1st Defendant to repay the Plaintiff monies which it (the Plaintiff) had paid in respect of any gaming or wagering contracts.

91 For the reasons set out at [79] to [90], I also rejected the Defendants' submissions on the application of s 5(6) CLA to the present action.

Whether the alleged contract between the Plaintiff and 1st Defendant was illegal pursuant to the RGA

92 I next address the Defendants' submission that any alleged agreement between the Plaintiff and 1st Defendant for payment processing services would be illegal under the RGA.[94] The whole purpose of the RGA, according to the Defendants, is expressed in s 7 of the RGA and includes, *inter alia*, regulating remote gambling and remote gambling services affecting Singapore, with the object of preventing remote gambling from being a source of crime or disorder, or being associated with crime or disorder, or being used to support crime or disorder. Parliament's intention was for the RGA to tackle law and order issues associated with remote gambling, and to prohibit remote gambling operators

94 Defendants' Closing Submissions at para 90.

from establishing operations in Singapore even if they did not offer their services to the Singapore market.

93 In particular, the Defendants pointed to s 9(2) of the RGA which makes it an offence for a person to distribute money or money's worth paid or staked by others in remote gambling in accordance with arrangements made by a principal of the agent (s 9(2)(*c*)), or to facilitate participation by others in remote gambling in accordance with arrangements made by a principal of the agent, thereby facilitating one or more individuals outside Singapore to gamble using remote communication (s 9(2)(*d*)).[95] The Defendants submitted that the Plaintiff, by collecting payments from gamblers, had run afoul of s 9(2)(*a*)(ii) of the RGA; and that if one considered this together with the parliamentary intention behind the RGA, it was clear that any alleged agreement between the Plaintiff and the 1st Defendant must be illegal and unenforceable.

94 Locally, the CA has dealt in detail with the law of illegality and public policy in relation to contracts in its decisions in *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*") and *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid*"). As the CA noted in *Ochroid* (at [22] and [64]–[65]), the law of illegality and public policy in the law of contract has traditionally been divided into two broad (or general) areas – statutory illegality and illegality at common law (see *Ting Siew May* at [27]). The common thread running through both areas is this: the first stage of the inquiry is to ascertain whether the contract (as opposed to merely the conduct) is prohibited. If indeed the contract is prohibited, then there can be no recovery whatsoever pursuant to the (illegal) contract; put simply, the contract concerned is void and unenforceable and

95 Defendant's Closing Submissions at para 91.

cannot be "saved" by any balancing (or, indeed, any other) process. This is subject to the caveat that, in the general common law category of contracts which are not unlawful *per se* but entered into with the object of committing an illegal act (and only in this category), the proportionality principle laid down in *Ting Siew May* ([4] *supra*) ought to be applied to determine if the contract is enforceable. However, that may not be the end to the matter as a party who has transferred benefits pursuant to the illegal contract might be able to recover those benefits on a restitutionary basis (as opposed to recovery of full contractual damages): this is the second stage of the inquiry.

95 In the present case, the Defendants relied on statutory illegality and not common law illegality. The principles relevant to statutory illegality were summarised by the CA in *Ochroid* as follows (at [27]–[28]):

> 27 … Where it is alleged that *the contract* is *prohibited* by statute, the court will have to examine the *legislative purpose* of the relevant provision in order to determine whether the provision was intended to prohibit *the contract* (and not merely the illegal *conduct*). This is a question of *statutory interpretation*.
>
> 28 In *Ting Siew May* ([4] *supra*), this court approved the seminal judgment of Devlin J in *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 ("*St John Shipping*"), and the nuanced approach to statutory illegality laid down in that case (see, generally, *Ting Siew May* at [103]−[116]). The fundamental question is whether the statutory provision concerned is intended to prohibit only *the conduct* of the parties or whether it is, instead, intended to prohibit not only the conduct *but also the contract* (see *Ting Siew May* at [106]). Where the statutory provision is clear, this would be a situation of "*express* prohibition" (see *Ting Siew May* at [107]–[109]). In so far as the category of "*implied* prohibition" is concerned, the court will be slow to imply the statutory prohibition of contracts. Thus, it will not be held that any contract or class of contracts is impliedly prohibited by statute unless there is a "clear implication" or "necessary inference" that this was what the statute intended (see *Ting Siew May* at [110]). Judicial reticence in this particular regard is warranted as *statutory illegality generally takes no account of the parties' subjective intentions or relative culpability* and could render contracts unenforceable even where the

> infraction was committed unwittingly. The restricted approach to implied prohibition is also justified given the proliferation of administrative and regulatory provisions in modern legislation (see *Ting Siew May* at [111]). At the same time, any concern that contracts involving statutory contraventions might go unpunished will be addressed by the common law principles on contractual illegality…

96 In their amended defences, the Defendants – invoking s 9(2)(*c*) RGA – pleaded that "the payments processed by the Plaintiff on behalf of its principal affiliates are paid by customers of online gaming websites". According to the Defendants, the alleged Payment Processing Agreement "facilities the distribution of money or money's worth paid or staked by others in remote gambling in accordance with arrangements made by the Plaintiff and/or its principals, and as a result facilitates one or more individuals in and/or outside Singapore to gamble using remote communication". In their closing submissions, the Defendants also purported to rely on s 9(2)(*d*) and s 9(2)(*a*)(ii) RGA.[96]

97 Insofar as the Defendants purported to rely on s 9(2)(*a*)(ii) RGA, this was apparently based on their assertion that the Plaintiff was "collecting *gambling bets* from gamblers".[97] However, this was an assertion without any factual basis whatsoever. As the Defendants themselves acknowledge elsewhere in their closing submissions,[98] the evidence adduced from the Plaintiffs' witnesses showed that the payments were made by customers of Blue SA to ensure their BetOnline accounts were in credit. While it might be true that these customers intended to utilise the credit to engage in subsequent online gaming transactions, it would be factually and linguistically incorrect to say that by making the

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96 Defendants' Closing Submissions at paras 91 and 93.

97 Defendants' Closing Submissions at para 93.

98 Defendants' Closing Submissions at paras 11 – 13.

payments to top up their BetOnline accounts, they were thereby placing or making bets on BetOnline.ag – or that the Plaintiffs, by arranging for the processing and eventual collection of such payments – was thereby "receiving or accepting bets" within the meaning of s 9(2)(*a*)(ii) RGA.

98 As for the Defendants' apparent reliance on s 9(2)(*c*) RGA and/or s 9(2)(*d*), apart from reproducing the words of these two provisions in their closing submissions, the Defendants failed to explain why the Plaintiff – in arranging for the processing and collection of the payments – should be regarded as having engaged in the activity of *distributing "*money or money's worth paid or staked by others in remote gambling in accordance with arrangements made by [its] principal". I agreed with the Plaintiff that it was not possible to say, on a plain reading of these provisions, that they extended to the Plaintiffs' action.

99 More fundamentally, even assuming for the sake of argument that the Plaintiff's conduct fell within one of the categories of conduct proscribed in s 9(2) RGA, this was not enough to establish the defence of statutory illegality. As the Defendants themselves accepted, in order to invoke successfully the defence of statutory illegality, they needed to establish not only that the statutory provision concerned was intended to prohibit the illegal conduct – but also that it was intended to prohibit *the contract*. Here, again, the Defendants' closing submissions failed to provide any elucidation: there was no explanation as to how s 9 RGA had the effect of prohibiting the alleged Payment Processing Agreement. I agreed with the Plaintiff that a plain reading of s 9(2) RGA revealed no such express prohibition.

100 Rather oddly, the Defendants made no submissions on whether s 9(2) contained an implied prohibition of the alleged Payment Processing Agreement. In this connection, as seen from the CA's judgment in *Ochroid*, the court will be

slow to imply the statutory prohibition of contracts. The Defendants did not explain why I should find a "clear implication" or "necessary inference" that the prohibition of the Payment Processing Agreement was what the RGA intended. Indeed, the Ministerial articulation of the legislative intention behind the RGA during the relevant Parliamentary debates militated against any such implication or inference. In the Second Reading of the Remote Gambling Bill (Bill No 23/2014) (Singapore Parliamentary Debates, Official Report (7 October 2014) vol 92) ("RGA Debates"), the Second Minister for Home Affairs Mr S Iswaran stated that the purpose of the RGA legislation was as follows:

> … first, to tackle the law and order issues associated with remote gambling; second, to protect young persons and other vulnerable persons from being harmed or exploited by remote gambling.

101 Explaining further in his speech what the Bill was designed to do, the Minister stated:

> The Bill will criminalise the entire spectrum of remote gambling, from individual gamblers to facilitators, agents and runners, to operators. The Bill also provides for website and payment transaction blocking measures, as well as advertising bans. It has provided for exemption under stringent conditions.

102 The legislative purpose and policy considerations articulated in the RGA Debates provided no basis at all for any implication or inference that the legislation was intended to outlaw contracts for the processing of payments which might eventually be followed by online gambling transactions. In fact, the Minister made it clear that insofar as payment transactions were concerned, the stoppage of such transactions was intended to be dealt with – not by the prohibition of contracts for payment processing services – but by payment blocking orders which would be applied for on a case-by-case basis by

authorised officers and issued against the financial transaction providers specified in such orders (see in this respect s 21 RGA).

103 I add that although the Plaintiff made submissions on the doctrine of stultification in relation to their non-contractual claims, the Defendants did not plead that the application of the doctrine in this case should render the non-contractual claims unenforceable. Nor did the Defendants make any submissions on this issue. In any event, the question of whether allowing the non-contractual claims would give rise to stultification of policy would only arise if the alleged Payment Processing Agreement were found to be illegal. For the reasons stated at [92] to [102], I did not find the defence of illegality to be made out.

Whether there was a contract between the Plaintiff and 1st Defendant for the provision of payment processing services

104 Although I rejected the Defendants' submissions on ss 5(2) and 5(6) of the CLA and on the defence of illegality under the RGA, the Plaintiff still bore the burden of proving its case against the Defendants on a balance of probabilities. To recapitulate: the first of the multiple causes of action pleaded by the Plaintiff (and the one which it spent the most time and effort seeking to establish at trial) was in contract: the Plaintiff claimed that there was a contract between it and the 1st Defendant – *ie*, the Payment Processing Agreement, which (according to the Plaintiff) was concluded on 15 August 2019 between its representative Ms Meza (alias "Sloane Stone") and Mr Berger who allegedly acted on behalf of the 1st Defendant.[99] In its amended reply, the Plaintiff pleaded that Mr Berger had actual authority, or alternatively, apparent authority, to "act on behalf of the 1st Defendant" and "as its representative" in "agreeing to offer payment processing services to the Plaintiff". Alternatively, the 1st Defendant

99 Statement of Claim (Amendment No 1) at para 6.

was said to have "ratified" the Payment Processing Agreement negotiated and entered into by Mr Berger and to be "estopped from denying that it is bound" by the said agreement.[100] The Plaintiff claimed that the 1st Defendant breached its contractual duties under the Payment Processing Agreement by failing to pay over to the Plaintiff the sum of US$2,680,535.21, and that the 2nd Defendant knowingly induced or procured the 1st Defendant's breach of contract.[101]

105 On the Defendants' part, as seen earlier, they contended that the 1st Defendant was not the contracting party to the Payment Processing Agreement: their case was that the Plaintiff had contracted with Mr Berger, and that the latter had in turn made use of services from other entities -including the 1st Defendant – so as to fulfil his contractual obligations to process the third-party customer payments.

Ascertaining the parties to a contract: General approach

106 By way of general principle, whether or not a particular entity is party to a contract turns on an issue of contractual formation. In *iVenture Card Ltd and others v Big Bus Singapore City* Sightseeing *Pte Ltd and others* [2022] 1 SLR 302 ("*iVenture*"), the CA set out the general approach to be taken. In that case, the appellants, iVenture Card Ltd ("iVenture Card"), iVenture Card International Pty Ltd ("iVenture International") and iVenture Card Travel Ltd ("iVenture Travel") were part of the iVenture Group which was in the business of developing and marketing tourist packages globally. The 1st and 2nd respondents – Big Bus Singapore City Sightseeing Pte Ltd and Singapore Ducktours Pte Ltd respectively – were part of the Duck and HiPPO Group (a Singapore tourism business). iVenture Card and the respondents entered into a business

100 Reply (Amendment No. 4) at para 5.5.

101 Statement of Claim (Amendment No 1) at para 22.

collaboration to develop a co-branded tourist pass (the "iVenture Pass"). In the course of their dealings with each other, parties entered into an informal oral "Reseller Arrangement" under which entities in the iVenture Group were permitted to resell the iVenture Pass on the 1st Respondent's behalf in exchange for commissions. The parties' working relationship later broke down, and the appellants sued the respondents for breach of contract, breach of confidence, as well as the torts of inducing breach of contract and conspiracy. One of the disputed issues was whether it was iVenture Card or iVenture Travel who was the contracting party to the Reseller Arrangement. In considering this issue, the CA started by pointing out (at [26]) that:

> This issue [whether iVenture Card or iVenture Travel was the contracting party to the Reseller Arrangement] turns on a question of contractual formation, *ie*, whether, at the material time, the parties intended iVenture Travel or iVenture Card to be the contracting party to the Reseller Arrangement: see *ST Group Co Ltd and others v Sanum Investments Ltd and another appeal* [2020] 1 SLR 1 at [59]-[60].

107 In *iVenture*, the CA affirmed the trial Judge's finding that it was iVenture Card and not iVenture Travel who was the proper party to the Reseller Agreement. The CA held that on the evidence available, there were three reasons for this finding. First, the Reseller Agreement had been entered into around the time of the Licence and Service Level Agreements which had been concluded between iVenture Card and Big Bus. Given the number of transactions and the modest sums involved, it only made business sense if these sales were aggregated to one entity within the iVenture Group, and that was most likely to be iVenture Card. The business being transacted under the Reseller Agreement was accessory or incidental to the Licence Agreement which was between iVenture Card and Big Bus (*iVenture* at [31]). Further, there was no evidence that Big Bus was even aware of iVenture Travel's existence prior to the Reseller Agreement. The CA also noted that the appellants themselves had originally

pleaded that iVenture Card and not iVenture Travel was the contracting party to the Reseller Agreement; and that the contractual clause in the Licence Agreement which iVenture Card relied on actually created no legally binding contract in itself.

108 It is hornbook law that the courts take an objective approach in considering the question of contractual formation (Andrew Phang Boon Leong (gen ed) *The Law of Contract in Singapore* (Academy Publishing, 2nd Ed, 2022) at [03.006] – [03.020]; Goh Yihan, *The Interpretation of Contracts in Singapore* (Sweet & Maxwell, 2018) at [2.040]). Accordingly, the same objective approach applies in determining who the proper parties to a contract are.

109 As Jason Coppel QC (sitting as a Deputy High Court Judge) ("Coppel QC") in *Diane Lumley v Foster & Co Group Ltd and ors* [2022] EWHC 54 (TCC) ("*Lumley*") has noted (at [6] and [22], citing *Hamid t/a Hamid Properties v Francis Bradshaw Partnership* [2013] EWCA 470 and *Estor Ltd v Multifit* (UK) Ltd [2009] EWHC 2565):

> The question of who were the parties to the contract is one to be determined by the Court on the basis of an objective test. "The question is what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible"…
>
> ".. Where, as here in this case, one cannot ascertain from the offer and acceptance who the employing party was, it must be legitimate to consider what the parties said to each other and what they did in the period leading up to the acceptance in order to determine who that party was intended to be. It was accepted, properly, by both Counsel, that in determining a factual issue such as this, the court needs to adopt an objective approach and to consider the facts known to both parties and what was said orally or in writing between the relevant individuals. The fact that one individual went to or left a meeting, believing privately that the contract was to be with a particular party, would be of little or no weight or assistance in determining who the contract was with, unless there was reliable evidence that that belief was

> expressed to others at the meeting. Obviously, where there was an issue as to the identity of a party entering into a contract, if there was evidence that representatives of each party had met before the contract was signed and had said to each other that the contract was to be between X and Y, that would be admissible and relevant in determining who the parties to the contract were to be. If however the evidence about what was said and done was not as explicit and clear as that, one needs to construe or infer objectively what reasonable parties would have assumed would be the position based on what was said or done. Thus, it might well be the case that, if one party said that payments would be made by X, that would be evidence which would point, objectively albeit not necessarily conclusively, to X being one of the parties. Similarly, if X and Y in their discussions and correspondence prior to the creation of the contract only talked about X and Y in the context of their discussions, that might well be a factor which objectively pointed to those two parties being parties to the contract."

110 The decision in *Lumley* is instructive for our present purposes. In that case, the claimant had brought a claim against the six defendants for breach of a contract whereby one or more of the defendants had agreed to carry out construction works on her home. The works were performed in an allegedly sub-standard manner with the result that the property was scarcely habitable, and as a result, the value of the property had diminished and substantial remedial works were required. It was common ground between the parties that a contract had been concluded at a meeting at the property itself on 21 June 2016 which was attended by the claimant and the 2nd defendant: the dispute was as to which individual or entity among the defendants was the contracting party. The claimant pleaded that the contract had been concluded by the 2nd defendant on behalf of all the defendants; alternatively, that she had contracted with the 2nd defendant, Mr Foster, or with both Mr Foster and his wife who together traded as Foster & Co or The Foster & Co Group. The pleaded defence was that the contract had been concluded between the claimant and the 5th defendant instead. If the defendants were correct, then the claim was worthless, as the 5th defendant had ceased trading and was in the process of being wound up. Directions were

given for a trial of the preliminary issue as to which of the defendants was a contracting party to the contract with the claimant.

111 At the trial of this preliminary issue, Coppel QC held that the central question was whether the objective facts surrounding the meeting on 21 June 2016 indicated that Mr Foster had entered into the contract in a personal capacity, or whether he had done so on behalf of a company. On the evidence available, he noted that Mr Foster had been "concerned to give every impression that the claimant was reaching agreement with him, that she could trust him and that he would be personally responsible for the project". It was "far from clear" that Mr Foster had attended the 21 June 2016 meeting on behalf of the 5th defendant or another corporate entity. Coppel QC also noted that on the one hand, there was some evidence that a Ms Moore whom the claimant had dealt with post 21 June 2016 was an employee of the 1st defendant, and that there were certain corporate entities who carried out work for the Foster & Co business, in at least one of which Mr Foster held the position of director. On the other hand, Mr Foster's *modus operandi* was to present himself as the face of the Foster & Co brand, whilst leaving opaque the network of entities who did the work which he brought in. The suspicion that that opacity was a deliberate tactic was heightened by what appeared to have been a pattern of group companies ceasing to trade and/or becoming insolvent, only for other entities to be used in their place. Whatever the reason for this tactic, the fact remained that there were many respects in which Mr Foster appeared to present himself as "Foster & Co", an unincorporated entity. Coppel QC noted that it might be unconventional for a sole trader to operate on an unincorporated basis alongside corporate entities – but nothing was clear about Mr Foster's business arrangements either before or after the meeting on 21 June 2016, or about the capacity in which Mr Foster attended that meeting, when the onus lay upon him to make it so. Indeed, once he had established rapport and trust between himself

and the claimant, he had made multiple representations to the claimant at the meeting on 21 June 2016 in order to induce her to enter into the contract, without any indication that the contract would in fact be with the 5th defendant, or any other corporate entity. On his own admission, he had also failed to follow his usual practice of formalising a written contract with the customer which would make clear which entity the customer was contracting with. For these reasons, Coppel QC found that the objective meaning and effect of Mr Foster's representations was that he personally was reaching agreement with the claimant.

Preliminary issues

Reliance on evidence of subsequent conduct

112 In the preceding paragraphs (at [106]–[111]), I have set out the objective approach which the courts will adopt when it seeks to ascertain whether a particular entity is party to a contract. The general principles I set out above informed my approach to the issue of whether the 1st Defendant was the contracting party to the Payment Processing Agreement with the Plaintiff. Before I explain my findings on this issue, I address three other preliminary issues relating to the evaluation of the evidence adduced by both sides.

113 The first issue relates to the use of evidence of subsequent conduct. This is relevant because in the course of the proceedings, the Plaintiff sought to rely on their dealings with Ms Alfaro subsequent to 15 August 2019 as evidence that the 1st Defendant was the contracting party to the Payment Processing Agreement. According to the Plaintiff, Ms Alfaro was really an employee of the 1st Defendant, and the assistance she rendered to the Plaintiff on various payment processing matters was in pursuance of the 1st Defendant's obligations under the Payment Processing Agreement. I will address this submission in due course in

these written grounds. Insofar as the Plaintiff sought to rely on this evidence, regard should be had to the recent judgment of the CA in *The Luna and another appeal* [2021] 2 SLR 1054 ("*The Luna*").

114 In *The Luna*, the CA held (at [30]–[31]) that there was a difference between the approach towards ascertaining the formation of a contract, and the approach to be taken in interpreting the terms of a contract:

> 30 It is important to bear in mind that in this case, the court is not simply construing a particular term of the Vopak BL. Instead, it is ascertaining the parties' intentions behind the issuance of the Vopak BLs, specifically, whether the parties had intended for the Vopak BLs to have contractual force and to operate as documents of title. This goes towards the existence of a contract, rather than its interpretation. This is an important distinction. Despite the close similarity in the techniques used in interpretation cases and formation cases, as well as the overarching emphasis on the objective principle and contextualism (see Gerard McMeel, *McMeel on the Construction of Contract*s (Oxford University Press, 3rd Ed, 2017 ("*McMeel*") at paras 14.01–14.02), there remain significant differences between the approaches that are employed in the two situations. In cases involving interpretation, the parol evidence rule and the principles governing the admission of extrinsic evidence set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") undoubtedly apply. In cases involving contract formation, however, the "approach to background is wider as there is no restriction on the evidence which the court may consider" (see *McMeel* at paras 14.01–14.02).
>
> 31 Such a distinction between formation and interpretation cases is sound as a matter of principle. Although the court in both cases is concerned with ascertaining the parties' objective intentions, the circumstances surrounding such an exercise are fundamentally different. ***In interpretation cases, the court is ascertaining "what the parties, from an objective viewpoint, ultimately agreed upon" [emphasis added] (see Zurich Insurance at [132(d)]). The underlying premise is therefore that the parties had reached an agreement. Accordingly, the parol evidence rule and the Zurich Insurance principles apply because the parties' mutual understanding of such agreement and its terms can only be based on matters that were relevant, reasonably available***

> ***to both parties and related to a clear or obvious context. This premise obviously does not apply in formation cases, where the court is considering the anterior question of whether the parties had even reached an agreement in the first place***.
>
> [emphasis added]

115 In the CA's view, the appropriate approach to contract formation cases was that adopted by VK Rajah JC (as he then was) in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258. In that case, the dispute was over whether an oral tenancy ease agreement had been concluded between the plaintiff and the defendant. In finding that such an agreement had been concluded between the parties, the court had regard to the defendant's subsequent conduct in paying the reduced rent pursuant to the alleged oral agreement. The court noted (at [39]) that although the defendant had delayed signing the written tenancy agreement, his subsequent conduct only reinforced the plaintiff's conviction that an agreement had been reached. At [52] of his judgment, VK Rajah JC observed (which observation the CA endorsed in *The Luna*):

> … In the final analysis, the touchstone is whether, in the established matrix of circumstances, the conduct of the parties, objectively ascertained, supports the existence of a contract. Reduced to its rudiments, it can be said that this is essentially an exercise in intuition. Legal intentions, whether articulated or unarticulated, should not be viewed in isolation but should be filtered through their factual prism. …

116 In light of the above authorities, I was satisfied that in the present case, I was entitled to consider the subsequent conduct of the parties and their alleged representatives in determining the contracting parties to the Payment Processing Agreement.

Reliance on Ms Alfaro's AEIC evidence

117 I next address the second preliminary issue – the Defendants' reliance on Ms Alfaro's AEIC evidence. Shortly before she was due to testify at the trial of this action, Ms Alfaro elected to retract her AEIC and declined to attend as a witness in the trial. This led to the Defendants filing an application (HC/SUM 1515/2022) for leave to admit Ms Alfaro's AEIC as a statement pursuant to s 32(1)(*j*)(iv) of the Evidence Act 1893 ("EA"). The Plaintiff consented to the application but reserved its right to make submissions at the close of trial on the weight that this court should assign to it, pursuant to s 32(5) of the EA.

118 According to the Plaintiff, the court should give no weight whatsoever to Ms Alfaro's AEIC, because the Plaintiff had not been able to cross-examine her on contentious matters in her AEIC, and the Court itself had also not had the opportunity to observe her demeanour so as to assess the credibility of her evidence. The Plaintiff also argued that the contents of Ms Alfaro's AEIC were "wholly unreliable", because not only had the AEIC been retracted by Ms Alfaro, it was also inconsistent with her deposition evidence and disclosed documents.[102]

119 In considering the amount of weight (if any) to be given to a statement which has been admitted under one of the limbs of s 32(1) EA, the court should consider "all the circumstances of the case, including the evidence which is specifically admitted to undermine or support the credibility of the persons involved and to corroborate or weaken the force of the statement itself…[and] whether or not the maker of the statement had any incentive to conceal or

[102] Plaintiff's Closing Submissions at paras 39, 41–42.

misrepresent the facts" (Jeffrey Pinsler, *Evidence and the Litigation Process* (Singapore: LexisNexis, 7th Ed, 2020) at [6.054]).

120 In *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 ("*Gimpex*"), the plaintiff Gimpex had contracted to buy coal of a specified quality from the first defendant Unity. A dispute arose over whether the coal received was of satisfactory quality. In the proceedings it brought for breach of contract, the plaintiff sought to rely *inter alia* on an unfavourable report on the quality of the coal – the Intertek Report; whereas the defendants – citing s 32(3) EA - argued that this report should not be admitted. The court accepted that the sample size taken should have been "significantly more" than what was indicated in the Intertek Report: the plaintiff's own expert witness and the relevant sampling standards both indicated that more samples were required. However, apart from there having been an inadequate number of samples taken in producing the Intertek Report, there was no other complaint that could be raised against it. Indeed, that was the only challenge raised by the defendants against the report's reliability. There was no proof or, indeed, any allegation that the Intertek Report had been tampered with. Nor did the defendants take issue with the fact that the coal discharged at Karachi was not the coal that was sampled in preparing the Intertek Report. All in all, the countervailing factors against the admission of the Intertek Report did not clearly outweigh the benefit that would be gained by its admission (*Gimpex* at [131]). Instead, having regard to the need under s 32(5) EA to assign the appropriate weight to evidence admitted under s 32(1), the CA held that the Intertek Report "should be accorded less weight".

121 In *Soh Guan Cheow Anthony v Public Prosecutor* [2017] 3 SLR 147 ("*Anthony Soh*"), the Commercial Affairs Department had enlisted the help of the Securities Commission of Malaysia to record statements from individuals who allegedly knew about the SCBJ account ("the MSC Statements"). On

appeal, the High Court noted that the MSC Statements contained out-of-court statements that could not be tested under cross-examination. While the statements had been admitted under the exception to the hearsay rule under s 32(1)(*j*)(ii) of the EA, the court retained a discretion under s 32(5) of the EA to assign such weight as it deems fit to the statements in question. Ultimately, the court found that little weight (if any) should be granted to these statements, as they were "of highly doubtful probative value" (at [118]): for example, the statements of one of the individuals were internally and externally unreliable; and one of the individuals was effectively the accused's accomplice and had every reason to misrepresent the facts (at [116] – [117]).

122 In the present case, I noted first of all that insofar as Ms Alfaro's position and her motives could be gleaned from statements made by her in the US proceedings, her refusal to testify in Singapore and the retraction of her AEIC did not appear to be due to fear of cross-examination in the Singapore proceedings. Nor did I find her decision to withdraw from participation in the Singapore trial to be in any way an implicit acknowledgement that her AEIC was unreliable. Instead, from the statements made by Ms Alfaro in the US proceedings, it appeared that Ms Alfaro had experienced a not inconsiderable amount of angst and stress as a result of the Plaintiff's efforts to depose her in the US and to compel her to produce various documents. Ms Alfaro had filed her AEIC in this suit on 5 October 2021; and for months afterwards, there was no indication that she had changed her mind about testifying in the Singapore proceedings. On 26 January 2022, however, the Plaintiff – through their US lawyers – served on her a subpoena requiring her to testify at a deposition the following month. There followed further motions in the US proceedings, as Ms Alfaro initially sought to quash the subpoena but did not succeed. In the course of the deposition on 6 April 2022, Ms Alfaro described the US proceedings as being "very stressful" and as having caused her "personal problems" not just in

her work but also in her marriage.[103] On top of the depositions, Ms Alfaro also found herself the subject of a motion for sanctions filed by the Plaintiff on 11 April 2022, arising from the disclosure of allegedly privileged materials.

123 It would appear that alongside the angst and stress resulting from these developments, Ms Alfaro also became increasingly resentful towards the 1st and the 2nd Defendants because of a perceived lack of support from them in relation to her (involuntary) role in the litigation. On 5 April 2022, for example, in filing her response to a second motion by the Plaintiff to compel the production of documents, Ms Alfaro alluded to the financial hardship she had been subjected to as a result of the subpoena issued against her by the Plaintiff; and she had lamented that the 1st Defendant had failed to hire a US attorney for her in the US proceedings or to assist with the legal expenses she was obliged to incur. It was in these circumstances that Ms Alfaro made it known in her response to the motion for sanctions on 12 April 2022 that she no longer intended to testify in the Singapore proceedings. Notably, she complained in her response that neither the 1st Defendant nor the 2nd Defendant had stepped forward to assist her with "the legal fees and costs" which she had incurred "as a result of the two affidavits that [she] submitted in the Singapore Proceedings". In her own words (from her response to the motion for sanctions on 12 April 2022):

> …I feel as though I am simply collateral damage in the ongoing legal dispute between BHHI [the Plaintiff] and MCDP / Carbonara [the Defendants]. I wish for this nightmare to be over soon. I will continue to abide by any Orders entered by this Honourable Court [*referring to the US courts*], but I will not be a witness in the upcoming trial in the Singapore Proceedings.

124 Second, although the Plaintiff attempted to persuade me that Ms Alfaro's AEIC evidence was manifestly unreliable, it appeared to me that the Plaintiff

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103 Defendants' Closing Submissions at para 59(h); 6ABAEIC at p 217.

was simply making a great deal out of a number of apparent discrepancies between Ms Alfaro's AEIC and her responses in the US deposition which were in my view not significant in nature and moreover, entirely explicable.

125 For example, the Plaintiff contended that while Ms Alfaro had stated in her AEIC that she was only *assisting* Mr Berger in his provision of payment processing services to the Plaintiff, in the US deposition she had stated that she was paid by the 1st Defendant and not Mr Berger, and she had confirmed that the 1st Defendant was in fact the payment processor.[104] In the first place, given that Ms Alfaro had stated in her AEIC that Mr Berger had instructed her to invoice the 1st Defendant and not MCC Code for her services,[105] I did not see any inconsistency in that regard.

126 Moreover, in respect of the two portions of the deposition which supposedly showed Ms Alfaro confirming the 1st Defendant to be the payment processor, it appeared to me that the Plaintiff had somewhat disingenuously cherry-picked segments of Ms Alfaro's deposition and quoted them out of context. In one of the quoted segments where Ms Alfaro was shown apparently confirming that the Plaintiff's "transactions were being processed through MCDP's MIDs",[106] she had *also* stated just a few lines above the quoted segment that *she thought "it was Mr Berger's customers that were being processed*". As for how the reference to "MCDP's MIDs" should be interpreted, that was (properly speaking) a bone of contention in this suit rather than grounds for finding Ms Alfaro's AEIC unreliable. As for the other quoted segment where Ms Alfaro apparently confirmed that "for the purposes of focussing [*sic*] on BHH's

104 Plaintiff's Closing Submissions at para 46.

105 Daphne Alfaro AEIC dated 31 January 2022 at para 24.

106 6ABAEIC at p 763 ln 19 to p 764 ln 9.

transactions, the payment processor was MCDP"[107], while this particular segment did appear to contradict her AEIC evidence, I noted that Ms Alfaro also appeared to express general confusion over the entities involved in the payment processing arrangements, and did not have visibility into the arrangements between the 1st and 2nd Defendants and Mr Berger.[108]

127 Insofar as the Plaintiff submitted that they would be prejudiced by their inability to cross-examine Ms Alfaro if any weight were to be given to her AEIC, as the Defendants pointed out, a copy of Ms Alfaro's AEIC had already been in the Plaintiff's possession for some months prior to the proceedings for the US deposition were commenced. If indeed there had been significant inconsistencies between Ms Alfaro's AEIC and the answers she gave in the US deposition, it was open to the Plaintiff to ask her about such inconsistencies: the Plaintiff's US attorney, Ms Nyana Abreu Miller ("Ms Miller") accepted in cross-examination in this trial that it was open to the Plaintiff to explore Ms Alfaro's evidence on the issues in dispute during her US deposition.[109] I accept that this would not be quite the same as cross-examining Ms Alfaro in this trial: as the Plaintiff observed in its submissions, a deposition is "exploratory" in nature, rather than being designed for the specific purpose of testing a witness' evidence. In this connection, however, it must also be pointed out that even as it urged me to give no weight to Ms Alfaro's AEIC, the Plaintiff was content to place weight on her answers in the US deposition – despite the fact that the evidence recorded in the deposition was similarly not tested in cross-examination in this trial.[110] In my view, what the Plaintiff really wanted was for the court to accord weight to

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107 6ABAEIC at p180 ln 13 to ln 17.

108 6ABAEIC at p 180 ln 7 to p 185 ln 4; p 190 ln 7 to ln 25.

109 Transcript dated 22 April 2022 at p 23 ln 10 – p 24 ln 12.

110 Plaintiff's Closing Submissions at para 40.

untested deposition statements by Ms Alfaro which the Plaintiff considered more favourable to its case, while ignoring untested affidavit statements which seemed disadvantageous to its case. In my view, this was an illogical and (again) somewhat disingenuous position to take.

128 For the reasons set out above, I rejected the Plaintiff's argument that Ms Alfaro's AEIC should be given no weight at all under s 32(5) EA. At the same time, I acknowledged that since the contents of the AEIC had not been tested in cross-examination in this trial, the weight to be given to this evidence should be somewhat less than the weight given to other evidence which had been tested in cross-examination.

Relevance of the Plaintiff's Expert Witness's Testimony

129 The third preliminary issue I address is the relevance of the evidence given by the Plaintiff's expert witness, Mr Richard L. Hartung ("Mr Hartung"). Mr Hartung is a cards and payments consultant based in Singapore. In his expert report,[111] Mr Hartung stated that he had been engaged by the Plaintiff to do two things: first, to provide an "overview and explanation of payment processing"; second, to address the 1st Defendant's role in the processing of payments made by third-party customers.

130 In respect of the first matter, Mr Hartung provided what was essentially an elaboration on the process summarised at [8] to [9] of these written grounds. In respect of the second, an examination of Mr Hartung's report revealed that what he had sought to do was to volunteer his opinion on matters which were factual in nature and which fell outside his remit as an expert witness. For example, based on his interpretation of the agreement between the 1st Defendant

111 Richard L. Hartung's AEIC at RH-1.

and Feenicia (an entity which operated and made available a number of MIDs), Mr Hartung opined that the 1st Defendant "appears to be the party that had access to the relevant MIDs through which the third party funds were processed". From this, he also purported to draw the conclusion that "it appears that [the 1st Defendant] was the intermediary between the acquirer and [the Plaintiff]".[112] As another example: based on his interpretation of the 1st Defendant's contract with Coriunder (the entity from which the 1st Defendant purchased the Merchant Control Panel software), Mr Hartung opined that given the contractual requirements for the 1st Defendant to maintain various aspects of software usage and to use the software platform solely for its business, it "would not make sense or be reasonable" for the 1st Defendant to permit Berger to manage the software platform and use it for his business as well.[113] In yet another example, Mr Hartung stated that Settlement Reports which he had been given appeared to show the 1st Defendant receiving fees such as "Approved and Declined Transaction Fees", "Chargeback Fees", "Refund Fees" and "Weekly maintenance fees", which – according to him – were "typically" fees for services rendered by a payment processor. He then opined that this "indicates" that the 1st Defendant was "the entity providing payment processing services".[114]

131 The expression of such opinions by Mr Hartung in his expert report was a cause for concern because as the Defendants have pointed out, it is the function of the trial judge is to make findings of fact; and where expert evidence is concerned, there is a prohibition against arrogating the court's fact-finding function to the expert. This is known as the ultimate issue rule which finds its

112 Richard L. Hartung's AEIC at RH-1, paras 58 & 61.

113 Richard L. Hartung's AEIC at RH-1 para 40; BAEIC pp 478–479.

114 Richard L. Hartung's AEIC at RH-1 para 48; BAEIC p 482.

roots in English law and which has also found expression in a number of Singapore cases.

132 In *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2019] 4 SLR 714, Vinodh Coomaraswamy J was concerned with the taking of an account on wilful default basis from the defendants, who had been ordered to render an account to the plaintiffs of their dealings with the plaintiffs' assets, and to return those assets. The plaintiffs falsified certain disbursements made by the defendants as being unauthorised use of trust monies, and surcharged the account for monies that the plaintiffs claimed should be credited to the corpus of the trust. Both parties had engaged forensic accountants as expert witnesses who proceeded to express their views on various matters, including, *inter alia*, whether an expense was incurred, whether money was paid out for a valid reason, and whether a disputed expense should be allowed or disallowed. Coomaraswamy J held that in expressing these views, the experts had ventured beyond the remit of an expert, not only because "questions as to whether any specific expense should be allowed or disallowed when taking an account on a wilful default basis [was] outside the realm of a forensic accountant's expertise", it also contravened the ultimate issue rule. As Coomaraswamy J put it (at [35]):

> …That rule prohibits an expert from giving his opinion on the very issue which the court has to decide. While the rule has lost some force today, especially in civil cases, it remains live. On this point, the Court of Appeal's observations in *Eu Lim Hoklai v PP* [2011] 3 SLR 167 at [44] bear repeating:
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> > Ultimately, all questions – whether of law or of fact – placed before a court are intended to be adjudicated and decided by a judge and not by experts. An expert or scientific witness is there only to assist the court in arriving at its decision; he or she is not there to arrogate the court's functions to himself or herself …

133 Coomaraswamy J's decision was cited in the recent case of *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business*

Consulting Services Pte Ltd and others [2022] 3 SLR 252 ("*Michael Baker*"). In *Michael Baker*, the defendants had been ordered to provide the plaintiff with a detailed account of all transactions that had taken place in respect of the Trust Assets and/or Trust Monies which the defendants had earlier been held to be holding on trust for the plaintiff. The plaintiff disputed the account provided by the defendants, whereupon the defendants attempted to rely on the fact that certain outgoings on the account had been verified by their expert, Mr Arora. The court held (at [56]) that insofar as Mr Arora was expressing "a view that certain expenses were documented to his satisfaction as a matter of accounting practice", such evidence could be taken into account as part of the factual background. However, his opinion would not and could not be "determinative of any matter that [was] properly for [the] court to decide, including whether outgoings were in fact incurred, and more importantly, whether they were properly incurred". His evidence had no real bearing on the latter question at all, since the question of falsification (which was a matter of the court's supervision of the accounting process) was not one that was properly within his expertise.

134 In the present case, the question of whether the Plaintiff had contracted with the 1st Defendant for it to provide payment processing services was a key issue on which I had ultimately to make a finding of fact. Insofar as Mr Hartung sought to put forward his opinion on the identity of the party with whom the Plaintiff had contracted, such opinion evidence was in contravention of the ultimate issue rule and had no bearing on the factual issue which I had to decide.

Agency principles: The law relating to actual and apparent authority

135 I next set out the legal principles relating to actual authority and apparent authority. It will be recalled that the Plaintiff pleaded that Mr Berger had actual

or apparent authority from the 1st Defendant to negotiate and enter into the Payment Processing Agreement.

The law on actual authority

136 In *Alwie Handoyo v Tjong Very Sumito & another* [2013] 4 SLR 308 ("*Alwie Handoyo*"), the CA explained the essence of an agency relationship and the concept of actual authority as follows:

> 148 Clearly and self-evidently, the agent itself needs to *consent* to being the agent. The essence of consent between the principal and agent was captured succinctly by Lord Pearson in *Garnac Grain Company Incorporated v H M F Faure & Fairclough Ltd* [1968] AC 1130 at 1137:
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> > The relationship of principal and agent can only be established *by the consent of the principal* ***and*** *agent*. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it … . *But the consent must have been given* ***by each of them****, either expressly or by implication from their words and conduct*. Primarily, one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. *Later words and conduct may have some bearing, though likely to be less important*. [emphasis added in italics and bold italics]
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> 149 Consent by the agent is indisputably required to form an agency relationship. Even the Respondents' own authority, *Leo Vincent Pola v Commonwealth Bank of Australia* [1997] FCA 1476, adopted the same position (at 12–13 of the unreported judgment):
>
> > In general, no formality is necessary for the appointment of an agent to act on behalf of his principal … . It is only necessary that the principal ***and*** agent consent to the relationship … If the facts fairly disclose that one party is acting for or representing another by the latter's authority, the agency exists: *Fields* at 103. … With respect to the agent's consent, if the principal requests another to act for him with respect to a matter and

> indicates that the other is to act without further communication ***and the other consents so to act***, the relation of principal and agent exists. If the other does the requested act, it is inferred that he acts as agent unless the circumstances dictate otherwise … [emphasis added by the Respondents underlined; emphasis added in bold italics]

137 In *Alwie Handoyo*, the parties were involved in three transactions for the sale and purchase of shares in two Indonesian companies. As part of the agreement for the first transaction, a substantial portion of the purchase price of US$18m was paid to two companies, "Aventi" and "OAFL", in the form of cash and shares in a Singapore public-listed company known as "MEGL". However, the respondents subsequently claimed that it was the first respondent Tjong – and not Aventi and OAFL – who should receive the full US$18m. One of the questions which the CA dealt with in its decision was whether OAFL had received the MEGL shares as an agent of the respondents. Aventi and OAFL were authorised under the sale and purchase agreements to receive the payments for and on behalf of the respondents. At first instance, the trial judge made a finding that OAFL had consented to becoming an agent by virtue of the phrase "for and on behalf of [the respondents]" in the sale and purchase agreements. On appeal, the CA disagreed with the trial judge's finding. The CA held (at [150]) that even if the phrase "for and on behalf of [the respondents]" could be "strained to mean consent", the "basic fact [was] that OAFL was not even a party to the relevant agreements". As such, any agency relationship between OAFL and the respondents must be found outside of the relevant agreements.

138 In this connection, it is instructive to examine how the CA evaluated the evidence put forward by the respondents in support of their agency argument. First, it was submitted by the respondents that in his pleadings, the appellant Alwie – who was the directing mind and will of OAFL – had admitted that the purchase price was to be "paid to the [respondents] partly by way of cash, and

partly by way of the issuance and allotment of shares in MEGL". The CA held, however, that this averment by Alvie in his pleadings simply showed that the full purchase price of US$18m was to be paid to the respondents partly in cash and partly in shares: it was "not unequivocal evidence that OAFL had agreed to receive the MEGL shares as an *agent* of the Respondents" ([151]–[152] of *Alwie Handoyo*). Second, the respondents sought to rely on a Letter of Statement purportedly signed by Alwie in which he undertook to return the OAFL payments to Tjong. The CA held, however, that even if the letter were authentic (which Alwie disputed), it again did not support an inference that OAFL had consented to acting as the respondents' agent: at most, Alwie had given an undertaking to return the OAFL payments. Third, the respondents pointed to Alwie's purported admission in cross-examination that the OAFL payments were payable to the respondents. The CA noted that the respondents appeared to have taken Alwie's answers in cross-examination out of context – but also went on to hold (at [155]) that:

> Be that as it may, while Alwie appeared to have conceded that the pleadings did not reveal any reason why OAFL was entitled to the OAFL Payments apart from the fact that the first SPA [sale and purchase agreement] provided for it, it is not evidence that OAFL acted as the Respondents' agent in receiving the OAL Payments. There is a missing link. Even if OAFL knew that it was not entitled to keep the OAFL Payments or was obliged to account to the Respondents because it knew that the OAFL Payments rightfully belonged to the Respondents (which OAFL denies anyway), this is insufficient to establish an agency relationship. Something else is required to show that OAFL had agreed to be an agent. Once again, it is to be recalled that the phrase "for and on behalf" in the Amended Clause 4.02(2) has no real legal effect vis-à-vis OAFL, a non-party to the first SPA. OAFL may be liable in trust (which ground was dismissed and not appealed against) or other causes of action, but that it not the basis upon which an agency relationship may be implied.

139 In the present case, based on its pleadings and submissions, it was clear that the plaintiff was not alleging express actual authority, which – as Lord

Denning MR noted in *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at 583 ("*Hely-Hutchinson*") – "is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques". Instead, the plaintiff appeared to rely on implied actual authority, which (to quote Lord Denning MR again) is "implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their numbers to be managing directors. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office" (*Hely-Hutchinson* at p 583).

140 *Alphire Group Pte Ltd v Law Chau Loon and another* [2020] SGCA 50 ("*Alphire*") illustrates how the court approaches the evaluation of evidence relied on by a party alleging implied actual authority. In *Alphire*, the appellant (Alphire Group) appealed against the High Court's decision to grant a declaration that the settlement agreement reached between the appellant and the respondent was valid and binding. The appellant was a Singapore-incorporated company while the respondent Law was a former director of the appellant. The disputed settlement agreement related to a separate suit (Suit 822) between the same parties in which the appellant was awarded judgment for monies which the respondent had collected from certain clients but had failed to pay over. Three individuals – Han, Loh and Wong (referred to as "the Investors" in the CA's judgment) – had a meeting with the respondent on 2 February 2019. The respondent claimed that at this meeting, he and the Investors reached a settlement of the judgment debt in relation to Suit 822 on various terms which included the payment of $1.4m by him, with an initial payment of $1m. It was not disputed that at this meeting, the respondent passed the Investors $1m in cash. Shortly after the meeting, Han sent the respondent a WhatsApp message, stating *inter alia* that if he (the respondent) paid $1m plus $400,000 in 4 instalments of $100,000 each, the Investors would agree to the settlement and would withdraw

the pending bankruptcy petition against the respondent. There followed a series of email correspondence between the appellant's solicitors and the respondent's solicitors in relation to the alleged settlement and its terms. At first instance, the High Court held that the Investors had implied actual authority to bind the appellant to the settlement agreement, which could be inferred from the parties' conduct and the overall circumstances of the case.

141 On appeal, the appellant argued that the Investors did not have implied actual authority, and that, as a result of the correspondence between the parties' solicitors after 2 February 2019, which were marked as "without prejudice" or "subject to contract", there was no "full and final settlement" on 2 February 2019 between it and the respondent. In rejecting these arguments, the CA noted that (at [7]) "in making a finding of implied actual authority, the court must imply from the parties' conduct and the surrounding circumstances both the existence of the agent's authority and the scope of that authority". With these principles in mind, the CA found that the particular facts and circumstances of the case before it clearly showed that the Investors had the implied actual authority to bind the appellant to the settlement agreement. The court noted that the appellant had failed to rebut several material assertions in the respondent's affidavit, including assertions that the Investors had invested $8m in the appellant during its incorporation; the Investors had personally guaranteed the appellant's credit; and the appellant's annual meetings were held together with the Investors who would discuss the appellant's financial affairs together with the respondent and one Alicia (a director of the appellant). Even more significantly, the appellant did not challenge – and thus must be deemed to have accepted – the respondent's account of the circumstances of his meeting with the Investors on 2 February 2019. This included the fact that he had passed the Investors $1m in cash at the meeting and he had been informed by the Investors that they were willing to agree to "full and final settlement" of the judgment debt on condition that he

perform certain other obligations apart from his paying the $1m. The appellant could have, but failed to, tender any evidence from any of the Investors; and it was some five months after the meeting on 2 February 2019 that the appellant first raised objections to the Investors' authority to enter into the settlement agreement. Given these circumstances, the CA agreed with the High Court that the appellant's objection to the Investors having the necessary authority was a "tactical decision" for the appellant to distance itself from the settlement agreement; and that there could be "no doubt that the Investors had implied actual authority to bind the appellant to the settlement agreement" (*Alphire* at [8]–[11]).

The law on apparent or ostensible authority

142 Turning next to the Plaintiff's alternative argument of apparent or ostensible authority, as Judith Prakash J (as she then was) noted in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another* (2009) 4 SLR(R) 788 ("*Skandinaviska (HC)*") (at [77]), quoting Lord Denning MR in *Hely-Hutchinson*), apparent or ostensible authority "is the outward appearance of the authority of the agent as others see it". The onus of proving apparent authority lies on the party who relies on it; and in this connection, as Prakash J pointed out in *Skandinaviska (HC)* (at [80]), it is important to bear in mind that there are four factors to be satisfied, as set out in the judgment of Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 ("*Freeman*", at 506):

> (1) … a representation that the agent has authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
>
> (2) … such a representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

> (3) … he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it;
>
> (4) … under its Memorandum or Articles of Association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

143 The following other passages from Diplock LJ's judgment in *Freeman* (which Prakash J also cited in *Skandinaviska (HC)*) are also helpful:

> In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the 'actual' authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal that is, apparent authority or upon the representation of the agent, that is, warranty of authority.
>
> …
>
> It follows that where the agent upon whose 'apparent' authority the contractor relies has no 'actual' authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his actual authority. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.
>
> The commonest form of representation by a principal creating an 'apparent' authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have 'actual' authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the 'actual' authority of the board of directors, and unless

> the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such 'apparent' authority that the agent had authority to contract on behalf of the company.

144 In *Skandinaviska (HC)*, one Chia Teck Leng ("Chia") had – for more than four years, whilst employed as the Finance Manager of Asia Pacific Breweries (Singapore) Pte Ltd ("APBS") – deceived the Singapore branch offices of five international banks by using his employer's name to obtain substantial credit and loan facilities purportedly made to APBS which he misappropriated. Four of the banks sued APBS for the frauds practised on them by Chia. Two of these suits, Suit 774 and Suit 763, were heard before Prakash J. In both suits, the plaintiff banks sought *inter alia* the repayment of the loans misappropriated by Chia on the basis that he had actual or ostensible authority to enter into the various credit and loan facilities on behalf of APBS. The undisputed evidence at trial was that the banks had required the credit and loan facilities discussed with Chia to be referred to the APBS board for approval; and that Chia provided mandates purportedly as satisfactory assurance that the board had approved the transactions and given him specific authority to execute the relevant contracts singly on its behalf. In reality, however, there were no such board approvals: Chia had forged all the documents himself.

145 At trial, the nub of the banks' case on apparent or ostensible authority was the "alleged representation or holding out by APBS (which was intended to be acted on and was in fact acted on by them) that it was within Chia's apparent authority to warrant the genuineness of the documents presented to them or to communicate the [APBS] board's approval of the transactions". The starting point, then, as Prakash J pointed out, was "the representation of the agent's apparent authority must be by the principal, and this means by the person who

has actual authority to manage or conclude that part of the business of the corporation to which the contract relates" (*Skandinaviska (HC)* at [104]). In this respect, the banks were unable to identify or name such a person. The banks sought to rely on the English case of *First Energy (UK) Ltd v Hungarian International Bank* [1993] 2 Lloyd's Rep 194 ("*First Energy*") to support a "narrow exception to the principle that the representation must be by the employer". In support of their contention that there had been a holding out by APBS of Chia's authority to represent that APBS had accepted the credit facilities and that the forged board resolutions were genuine, the banks relied on several pieces of evidence, including the fact that Chia was (apart from being the most senior finance officer in APBS) a member of APBS' senior management, and he frequently dealt with banks and acted as the point of communication between APBS and banks.

146 The facts of *First Energy* are summarised by Prakash J at [110] of her judgment. In gist, there was a dispute in *First Energy* as to whether a letter written by one Jamieson (the senior manager of the Manchester office of the Hungarian International Bank), offering a loan facility to the plaintiff, was an offer which could be accepted (as the plaintiff had done). Jamieson had not been held out as having any authority to sanction loan facilities of any particular size; and he had told the plaintiff that he had no authority to sanction a loan facility. No head office approval was obtained prior to the said letter being sent. The trial judge found that Jamieson had no ostensible authority to enter into the transaction, but nevertheless held that he had the authority to communicate an offer by somebody within the bank who did have authority; and once that offer was accepted, then the bank was bound. On appeal, the English Court of Appeal agreed with the trial judge's decision that the letter constituted an offer which was accepted and that there was a contract formed. In the appellate court's view,

the bank had put Jamieson in a position where he had apparent authority to make a representation that he had been given authority to sanction the loan.

147 As Prakash J noted in *Skandinaviska (HC)*, the decision in *First Energy* has been criticised by various academic sources. Professor Reynolds, for example, in suggesting that the case should be "regarded as exceptional on the facts", has observed that "to allow a person known to have no authority in effect to give himself authority by wrongly purporting to notify a decision of someone else that the act is authorised is virtually to abandon the idea that the doctrine of apparent authority rests on manifestation by the principal" ("The Ultimate Apparent Authority" (1994) 110 Law Quarterly Review 21). Locally, the High Court had in *Hongkong & Shanghai Banking Corp Ltd v Jurong Engineering Ltd* [2000] 1 SLR(R) 204 ("*HSBC v Jurong Engineering*") characterised *First Energy* as standing for the "narrow exception" that "if the company has expressly authorised the agent to make representations on its behalf, then any representation made by that agent that he himself has authority to do an act is a good representation for the purposes of conferring apparent authority on the agent to do that act, even if he has been expressly prohibited to do it, and even if it is not something that agents in his position usually have power to do". In *Skandinaviska (HC)*, however, as Prakash J highlighted, adoption of this narrower reading would still render *First Energy* inapplicable on the facts – because there was simply no express authorisation whatsoever by APBS that Chia could make the alleged representation of fact on its behalf.

148 Importantly, Prakash J also disagreed that *First Energy* could be said to stand for "the proposition that the representation as to authority made by the principal was completely not required so as to advance the public policy consideration of protecting third parties". Such an argument departed "too radically from the conceptual basis of the doctrine of apparent authority, as *the*

doctrine is premised fundamentally on such representation having been made" (emphasis added). On the evidence before her, she held that the banks had not established a holding out by APBS that Chia was clothed with authority to warrant the genuineness of the certified extracts of the board resolutions, or to communicate the board's approval of the transactions. Their case on apparent authority thus failed on the basis of a lack of representation. In addition, it was held that evidence of the banks' standard requirements for board resolution – which they imposed as a condition precedent of the loan facilities – effectively undermined their arguments on apparent authority: clearly, the banks appreciated and knew that Chia had no actual authority to bind APBS (at [31]). Their impression that the documents were properly executed was based entirely on their own limited verification of these documents, and they had willingly assumed the risk of fraud and of Chia's lack of authority. They could not therefore claim to have been misled, and no estoppel would be held to arise in their favour.

149 On appeal by the banks, the CA (in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another* [2011] 3 SLR 540 ("*Skandinaviska (CA)*")) upheld Prakash J's decision. Insofar as the banks' reliance on *First Energy* was concerned, the CA reiterated the established principle that "the law does not recognise the notion of what is commonly termed a 'self-authorising' agent – *ie*, under the law of agency, an agent who has no authority, whether actual or ostensible, to perform a certain act cannot confer upon himself authority to do that act by representing that he has such authority". This was a principle well illustrated by the House of Lords' decision in *Armagas Ltd v Mundogas SA* [1986] AC 717 ("*Armagas*"). Noting that all three members of the English CA in *First Energy* had expressly stated that their rulings were entirely consistent with *Armagas*, the CA distinguished *First Energy* on the facts. The CA pointed out that in that case, it had been made

abundantly clear that Jamieson – as senior manager of the bank's Manchester office – had overall responsibility of that office; and that it made "good commercial sense" in those circumstances that a customer of the bank's Manchester office should be able to rely on what was conveyed to him by Jamieson. As such, the court's decision in *First Energy* was based on a specific finding of fact that the principal concerned had held out its agent as having authority to make, in relation to the transaction in question, representations of the class or kind of representations that the agent actually made, even though the agent knew he had no actual authority to enter into the transaction itself. In contrast, in *Skandinaviska*, Chia was merely the finance manager of APBS – a title which did not connote possession of any specific authority; and the senior management of APBS, including its board, was also within easy reach of the banks (*Skandinaviska (CA)* at [51]). On the evidence, therefore, the CA affirmed Prakash J's finding that APBS had not held out to the banks – whether by its actions or by Chia's position as finance manager – that Chia had any authority to make on its behalf any representations of the class or kind of representations that Chia actually made.

150 The doctrinal basis of apparent or ostensible authority was further elaborated upon by the CA in its subsequent decision in *Guy Neale and others v Ku De Ta SG Pte Ltd* [2015] 4 SLR 283 ("*Guy Neale v Ku De Ta*"). As the CA explained (at [93] and [97]):

> 93 Apparent authority is a species of estoppel. The doctrine in effect estops a principal from asserting that an agent acted without authority even though this is in fact the case. The basis of such an estoppel is a representation *by the company* that the agent does have that authority…
>
> 97 …Where the representation is constituted by conduct, that must consist of the principal "permitting the agent to act in some way in the conduct of the principal's business with other persons … [so that it represents to] anyone who becomes aware

> that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting … has usually "actual' authority to enter into" (Freeman at 503–504). Furthermore, such a representation must have been made to or at least received by the party who then deals or continues to deal with the agent on the basis of that representation.

151 Referring to the English case of *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 ("*Freeman*"), the CA cited the following passages from the judgment of Diplock LJ (as he then was) in that case (at 503):

> An 'apparent' or 'ostensible' authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

152 In *Freeman*, as the CA pointed out, the focus was on what the agent Kapoor had been doing *with the permission of the principal*. In that case, Kapoor – who was one of the directors of the defendant company – had instructed the plaintiff firm of architects to carry out certain works in relation to an estate purchased by the defendant. A dispute arose as to whether the liability for the plaintiff's fees were to be borne by the defendant company or by Kapoor. The trial judge gave judgment for the plaintiff against the defendant. On appeal, the English Court of Appeal upheld the trial judge's decision. The Court of Appeal held that although Kapoor had no actual authority to employ the plaintiff, he had

ostensible authority as he had acted throughout as managing director to the knowledge of the defendant's board of directors; and his act in engaging the plaintiff was within the ordinary ambit of the authority of a managing director. The court held that if in the case of a company, the board of directors who have actual authority under the company's memorandum and articles of association permit the agent to act in the management and conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority on behalf of the company to enter into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to usually enters into the ordinary course of business. Unless the company's memorandum and articles of association either make such contract *ultra vires* the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such "apparent" authority that the agent had authority to contract on behalf of the company (*per* Diplock LJ at 505 of *Freeman*).

153 In *Guy Neale v Ku De Ta*, one of the issues in contention was whether "Ellaway" – who purported to act on behalf of a partnership named Nine Squares – had actual, usual or apparent authority to bind Nine Squares to a Licence Agreement which he had entered into with an individual named "Au". This Licence Agreement was negotiated by Au's associate, "Patel", and eventually assigned to the respondent. Before the CA, the respondent's case insofar as apparent authority was concerned was that at the time of the Licence Agreement, based on their dealings with Ellaway and Nine Squares, Au and Patel had believed that Ellaway was duly authorised to enter into the Licence Agreement and that Chondros (the other director of Nine Squares) was on board with this deal. In rejecting the respondent's case, the CA highlighted that there was no evidence of any representation whether by words or conduct – other than from Ellaway himself – which could have led Au and Patel to believe that Ellaway

had the authority to enter into the Licence Agreement; or that Chondros was aware of Ellaway's dealings with Au and Patel on this matter and permitted it to carry on. Moreover, Patel was aware that it was Chondros who controlled the creative aspects of the business, and there was no basis for him to think that Ellaway's authority extended so far that he could make unilateral decisions on branding and expansion. Indeed, having reviewed the correspondence between Ellaway, Au and Patel, the court found that Au and Patel had been aware all along that Ellaway was acting on his own accord, even though they might have thought that they would eventually be able to persuade Chondros to join them.

Agency by estoppel: whether a separate doctrine from apparent authority

154 In its amended reply, the Plaintiff expressly pleaded apparent authority as an alternative to actual authority.[115] In its closing submissions, however, the Plaintiff failed to address the four factors which needed to be satisfied for apparent authority (see [142] above, *per* Diplock LJ in *Freeman* at 506). Instead, the Plaintiff couched its submissions in the following terms:[116]

> Even if it is found that Mr Berger did not have actual authority to enter into the Payment Processing Agreement with [the 1st Defendant], [the 1st Defendant] is estopped from denying that it is bound by it. This is because it had, by its conduct of providing [the Plaintiff] with payment processing services in accordance with the terms of the Payment Processing Agreement, ratified, affirmed and/or acquiesced to being bound by it".

155 The above submission appeared to be no more than a repetition of the Plaintiff's assertion in its amended reply that further and/or as an alternative to its pleaded reliance on actual authority and/or apparent authority, the 1st Defendant should be "estopped from denying that it [was] bound by the Payment

115 Reply (Amendment No. 4) at para 5.4.

116 Plaintiff's Closing Submissions at para 287.

Processing Agreement" because it had "provided payment processing services to the Plaintiff in accordance with the terms agreed between Berger and Sloane [the Plaintiff's representative]", and had thereby "ratified Berger's conduct in negotiating and agreeing to such terms" on its behalf. In making the above submission, the Plaintiff purported to rely on two cases: *Hong Leong International Hotel (Singapore) Pte Ltd and another v Chotek (Pte) Ltd and another* [1995] 1 SLR(R) 105 ("*Hong Leong*") and *Wilson v West Hartlepool Railway Company* [1865] 46 ER 459 ("*Wilson*"). Regrettably, no attempt was made to explain how these two cases supported the above submission in the context of the specific facts of the present case. More fundamentally, the Plaintiff failed to explain in its closing submissions why – having expressly pleaded apparent authority – it was making no attempt to elucidate how apparent authority was made out in the present case. The brief single paragraph in its closing submissions (above) gave no clue as to whether – in pleading that the 1st Defendant was "estopped" from denying its liability under the Payment Processing Agreement – the Plaintiff was relying on some doctrine other than that of apparent authority.

156 Given the lack of clarity in the Plaintiff's submissions, I will set out below the key local authority dealing with agency by estoppel before I deal with the two cases cited by the Plaintiff.

157 The issue of agency by estoppel was raised before Judith Prakash J (as she then was) at first instance in *The "Bunga Melati 5"* [2015] SGHC 190 ("*Bunga Melati (HC)*"). In that case, there was a dispute as to whether the defendant (a shipowner and operator) was liable to pay the plaintiff (a marine fuel supplier) for bunkers supplied to the defendant's ships. These bunkers had been ordered from the plaintiffs by an entity called "MAL"; and the main bone of contention was over MAL's role. The plaintiff took the position that MAL

had either actual authority or apparent authority to enter into the contracts on the defendant's behalf for the delivery of the bunkers, and to bind the defendant to those contracts. According to the plaintiff argued, in addition to actual authority and/or apparent authority, an agency by estoppel arose on the facts.

158 Prakash J noted that the authors of *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) ("*Bowstead*") had drawn a distinction between agency by estoppel and apparent authority, in that the former could still arise through the application of orthodox estoppel principles even where the four factors necessary for apparent authority could not be satisfied – "in particular, where no representation as conventionally defined is made by the principle". Prakash J also noted that *Bowstead* had identified two subsets of agency by estoppel: the first being one where "the principal makes no manifestation of authority but, by conduct (usually before the operative transaction) intentionally or carelessly causes the belief that the agent is authorised"; the second being one where "the principal, having notice of such a belief and that it might cause others to change their position, did not take (often after the operative transaction) reasonable steps to notify those others of the facts". *Bowstead* cited the Australian case of *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 251 ("*Pacific Carriers*") as an example of the first subset of agency by estoppel, and the English case of *Spiro v Lintern* [1973] 1 WLR 1002 ("*Spiro*") as an example of the second.

159 In arguing for agency by estoppel, the plaintiff in *Bunga Melati (HC)* purported to rely on *Spiro*. In *Spiro*, one Mr Lintern had told his wife to put a house which he owned in the hands of estate agents, which she did. He did not give her authority to sell the house. When his wife was informed by the estate agent of an offer from a Mr Spiro, she instructed the estate agent to accept the offer; and in the ensuing interactions between the Linterns and Mr Spiro, Mr

Lintern acted as if he had authorised the transaction. Subsequently, however, he gave his wife a power of attorney which she used to convey the house to a different purchaser. In an action by Mr Spiro for specific performance of the contract to convey the house to him, the English Court of Appeal upheld the decision of the first-instance judge. Buckley LJ, delivering the judgment of the court, held:

> (I)f A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with the existence of such an obligation, which would be to B's disadvantage if A were thereafter to deny the obligation, A is under a duty to B to disclose the non-existence of the supposed obligation.

160 In *Bunga Melati (HC)*, Prakash J pointed out that she had considered *Spiro* in her earlier decision in *Everbright Commercial Enterprises Pte Ltd v AXA Insurance Singapore Pte Ltd* [2000] 2 SLR(R) 287 ("*Everbright*") and had held in that case that a duty to speak would only arise where "silence would create an erroneous impression which leads the prospective representee to alter his position for the worse". She did not consider that *Spiro* provided any support for the plaintiff's position in *Bunga Melati (HC)*. In her view:

> I do not think that in an agency situation a duty to speak can arise in the absence of a pre-existing relationship or dealings between the purported agent and the party claiming under the contract. To impose such a duty would impose onerous obligations on would-be principals who would then bear the responsibility of correcting all misrepresentations made by parties claiming to be their agents despite playing no role in the relevant transactions. It must be remembered that the husband in *Spiro* met the would-be purchaser and allowed him to carry out work on the house and garden knowing that the purchaser thought there was a valid sale and purchase agreement. It was such dealings that led to the duty to speak arising, not just the knowledge on the husband's part of the purchaser's mistaken belief.

161 Prakash J dismissed the plaintiff's claim, and the plaintiff filed an appeal. In dismissing the appeal in *The "Bunga Melati 5"* [2016] 2 SLR 1114 ("*Bunga Melati (CA)*"), the CA stated that the difference between agency by estoppel and apparent authority was not that apparent. The CA pointed out (at [8]) that neither *Pacific Carrier* nor *Spiro* shed any real light on the difference(s) between the two doctrines, or indeed on whether the doctrine of agency by estoppel stood as an altogether separate doctrine for holding the principal liable. In respect of *Pacific Carriers*, the High Court of Australia had applied the general principles concerning the apparent authority of an officer of a company dealing with a third party (as enunciated in *Freeman*) in concluding that a representation may be found to have been made where the putative principal, in this context a company, equips one of its officers with a certain title, status and facilities. As for *Spiro*, what was of particular significance was that all the parties, namely Mr and Mrs Lintern and Mr Spiro, were privy to the following facts: (a) that the property in question belonged to Mr Lintern; (b) that Mrs Lintern was dealing with Mr Spiro on the terms of the intended sale; and (c) that each of the parties knew that the other parties were aware of the foregoing two facts. In those circumstances, *Spiro* could very well have been analysed under the traditional doctrine of apparent authority: there was no difficulty in finding that Mr Lintern had a duty to correct Mr Spiro's mistaken belief that Mrs Lintern had authority to negotiate the sale of the property on Mr Lintern's behalf, and his failure to do so amounted to a representation that Mrs Lintern did have such authority.

162 Having analysed the decisions in *Pacific Carriers* and *Spiro* as being premised on apparent authority, the CA stated that it did not find it necessary to decide in the appeal before it whether there was a real difference between the two doctrines. For the purposes of our present case, having regard to the arguments on "estoppel" raised by the Plaintiff in its closing submissions, the following passages from the CA's judgment are especially pertinent:

> 12 … In our judgment, it is uncontroversial that unconscionability underlies equity's intervention to make a putative principal liable even in the absence of actual authority. The doctrine of apparent authority has itself been analysed as an instance of estoppel: see *Freeman & Lockyer* at 503; and see also *Guy Neale and others v Ku De Ta SG Pte Ltd* [2015] 4 SLR 283 at [95]-[97]. At the broadest level, equity intervenes to estop the putative principal from denying as against a third party that another was its agent if in the circumstances, it would be unconscionable for the putative principal to do so. But such a broad articulation is analytically unhelpful because it fails to draw out the essential requirement that unconscionability must comprehend not only the element of hardship on the part of the third party but also responsibility on the part of the putative principal. In other words, there must be some act or omission on the part of the principal that leads to the third party acting or continuing to act in a particular way to his detriment or suffering hardship and it is this which gives rise to the requisite finding of unconscionability. This is why the inquiry is correctly to be undertaken within the traditional framework of estoppel that examines three elements which must be found to be satisfied, namely, (i) a representation by the person against whom the estoppel is sought to be raised; (ii) reliance on such representation by the person seeking to raise the estoppel; and (iii) detriment: see *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 ("*Hong Leong*") at [192]; and see also *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR(R) 57 at [18].
>
> 13 … One can look at this from the point of view either of an affirmative representation or more generally, a holding-out of the agent as authorised; or from the point of view of a principal, who with the knowledge that the third party is operating on a certain misapprehension of the factual position does nothing to correct that misapprehension in circumstances where one would reasonably regard him as bound to correct it. In the latter case, though he has made no affirmative representation, by his omission or failure to correct the misapprehension when the law regards him as being bound to do so, he is taken to have represented that the misapprehended state of affairs is in fact true.
>
> 14 This is consistent with the well-established rule that silence or inaction will count as a representation where there is a *legal* (and not merely moral) duty owed by the silent party to the party seeking to raise the estoppel to make a disclosure: see *Hong Leong* at [194]; and see Wilken & Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford, 3rd Ed, 2012) at para 9.55. For our part, we would be content to state that the rule would apply where in all the circumstances, there was a legal or equitable

> duty to make the disclosure, communication or correction, as the case may be.
>
> 15 The question of when such a duty arises does not lend itself to easy answers. Bingham J in *Tradax Export SA v Dorada Compania Naviera SA (The "Lutetian")* [1982] 2 Lloyd's Rep 140 (at 157) regarded Lord Wilberforce's decision in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 980 as persuasive authority for the proposition that:
>
> > … the duty necessary to found an estoppel by silence or acquiescence arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations. …
>
> 16 The court thus has to decide the onus and ambit of responsibility of the silent party, by reference to whether a mistaken party could *reasonably* have expected to be corrected. This will inevitably depend on the *precise circumstances* of the case and whether they were of such a nature that it became incumbent upon the silent party, who is taken to be acting honestly and reasonably, to correct the mistaken party's belief. Given the myriad of circumstances that may arise in commerce and the desirability of maintaining flexibility in the doctrine of estoppel, it would neither be appropriate, nor ultimately helpful, for us to attempt to draw neat circles delineating precisely when a duty to speak may arise.
>
> 17 However, having articulated the principle on which liability may be founded in these situations, it is appropriate for us to emphasise one important predicate that is especially relevant to the disposal of this matter. For such a duty to arise at all, it must be shown, at least, that the silent party *knew* that the party seeking to raise the estoppel was in fact acting or proceeding with its course of conduct on the basis of the mistaken belief which the former is said to have acquiesced in (see *Hong Leong* at [197]).
>
> [emphasis in bold italics added]

163 In *Bunga Melati (CA)*, the plaintiff's case was that the defendant knew MAL had entered into the disputed bunker contracts *representing itself as the defendant's agent* and failed to correct the plaintiff's mistaken belief that MAL was entering into the contracts on this basis and not in its own right. Before the

CA, the plaintiff's counsel accepted that the plaintiff was in no position to prove directly that the defendant knew any of these specific things. Instead, he sought to base his claim on the wider proposition that the defendant knew MAL was conducting *all* its transactions with *all* its bunker suppliers on the basis that it was the defendant's agent. Even as to this wider proposition, the plaintiff had no direct evidence to prove such knowledge. Instead, it argued that the court should *infer* that the defendant possessed such knowledge arising from the following facts: (a) the suspicious circumstances surrounding MAL's appointment as the defendant's registered vendor of bunkers; (b) the early bunker confirmations sent by MAL to the defendant which had described MAL as a "broker" and five occasions when bunker suppliers sent invoices directly to the defendant; and (c) the defendant's response (or lack of response) when MAL was unable to service the payments to its suppliers and it became evident that large sums of money were being claimed by bunker suppliers directly against the defendant. For the purposes of our present case, it is instructive to examine how the CA dealt with these arguments.

164 In respect of the circumstances of MAL's appointment as the defendant's registered vendor of bunkers, the plaintiff's main contention was that MAL did not have the financial resources, credit standing or expertise to engage in bunker trading services; and that accordingly, the defendant should have known that no bunker supplier would have supplied bunkers on credit to MAL as principal and would only have supplied bunkers to the defendant's vessels if they believed that MAL was contracting on the defendant's behalf. The CA rejected this contention. It highlighted that knowledge of MAL's lack of capital and financial resources could not in itself amount to knowledge that bunker suppliers would only be willing to deal with MAL if they believed that MAL was contracting on the defendant's behalf. First, MAL had represented to the defendant that it was entering into the bunker supply business together with a partner, and in

association with two other companies, all of which were bunker suppliers. Second, it was completely speculative how bunker suppliers in general dealt with or viewed MAL. The plaintiff was the only bunker supplier that gave evidence, and although it claimed that it would not have contracted with MAL had it known MAL was operating as a bunker trader, this was a position it took with the clarity of hindsight. It could equally well have been the case that bunker suppliers were prepared to deal with MAL as a trader because they knew that MAL was a registered vendor of the defendant, and that the defendant, being a well-known ship owner, would reliably pay MAL who therefore would then be able to pay the bunker suppliers. Third, and most importantly, it was not within the defendant's realm of knowledge how MAL dealt with its bunker suppliers; nor was it incumbent on the defendant to find out. In fact, from the defendant's perspective, the fact that MAL had a credit facility with a bank in connection with which the defendant gave an undertaking to make payments into a specific account, suggested that MAL was negotiating bunker supplies on the basis of its own credit lines.

165 In respect of the bunker confirmations sent by MAL to the defendant in 2005 and early 2006 which described MAL as a broker, the CA held that Prakash J was entitled to accept the evidence given by the defendant's employees who had been copied on these bunker confirmations, to the effect that they had been unaware of the nuances and had failed to appreciate the legal difference between referring to a party as a broker and as a trader. Prakash J was also justified in finding that these terms could have been used in error, especially since there were other errors found in the bunker confirmations.

166 As for the five occasions when invoices were sent by the bunker suppliers directly to the defendants, while the plaintiff argued that this should have made the defendant aware that bunker suppliers believed they had contracted with the

defendant through MAL, the CA found this evidence at best neutral. First, none of these invoices came directly from the plaintiff itself. Second, it was important to see these incidents in their broader context: these were five discrete instances that took place over a period of 24 months, during which significant amounts of bunker fuel were supplied by various bunker suppliers to the defendant's vessels. This would suggest that the vast majority of the invoices never came directly to the defendant (which was the effect of the defendant's evidence). The fact that a mere handful did come to it could easily be explained as errors. It was also instructive to have regard to the actions that were subsequently taken in relation to the invoices. It appeared that MAL had, either on its own accord or pursuant to the defendant's directions, resolved the matter with some of the bunker suppliers directly, whereas others had been reminded by MAL not to send invoices directly to the defendant – or there were simply no further instances of their sending further invoices directly to the defendant, presumably as a result of having been informed by MAL not to do so. Taken in the round, there was therefore nothing that could be said to have put the defendant on inquiry as to whether MAL had been conducting all its transactions with all its bunker suppliers on the basis that it was the defendant's agent.

167 As for the defendant's alleged lack of response to the various payment demands that were directed to it by bunker suppliers in November and December 2008, the CA found that the defendant's responses to the bunker suppliers did not lead to an "irresistible inference" that it knew that MAL had acted as its broker and that it was liable to the suppliers. The CA also found the evidence relied on by the plaintiff to be at best equivocal. For example, while it was true that upon receiving a payment demand from the plaintiff, the defendant did not question the plaintiff as to why the latter was asking it for payment, the defendant did send an email to MAL asking MAL to check if the plaintiff was a supplier of MAL. The email exchanges that followed did not lead to the *sole* inference

that prior to receiving the plaintiff's demands for payment, the defendant *already* knew that MAL had consistently been contracting with *all* its bunker suppliers as the defendant's agent. Rather, the defendant's response was at least *equally explicable* on the basis that it needed to investigate the matter further before coming to any conclusion. Furthermore, when considered against the background of the relatively stable and incident-free dealings between the parties over the course of the preceding three years, it did not seem unusual that the defendant's initial response would be to attempt to clarify matters, rather than to assume MAL had been acting improperly. As for the defendant's standard replies to subsequent payment demands from other bunker suppliers, these also did not support the inference that the plaintiff argued for. While it was true that the defendant did not expressly ask the question why payment was being sought from it, its reply made it plain that it was drawing a line between itself and MAL and that as far as it was concerned, having itself paid MAL, it was under no liability to the bunker suppliers. Indeed, the defendant had proceeded to suspend MAL for all its spot purchases. It had additionally issued a letter to MAL expressing its disappointment and stating that it would hold MAL "totally liable" for all consequential losses" and that it "[might] not consider MAL in any future businesses." In the letter, the defendant also described MAL as its "vendor".

168 I turn now to the two cases cited by the Plaintiff in support of its brief submission on "estoppel". In *Hong Leong*, the plaintiffs were members of the Hong Leong Group of companies who claimed from the first defendants in both suits ("Chotek" and "Darimbi" respectively) contributions for the losses to the capital of Apollo Hotel Development Ltd ("AHDL") under three agreements – a joint venture agreement ("the JVA"), an agreement for the compensation of loss ("the compensation agreement") and a novation agreement ("the novation agreement"). Alternatively, the plaintiffs also claimed as against the second defendant in both suits ("AEL") breach of warranty of authority in entering into

these three agreements on behalf of Chotek and Darimbi. Chotek, Darimbi and AEL were the original shareholders of AHDL, which was incorporated to develop and operate a hotel. Hong Leong Group was approached to participate in the project after AHDL incurred losses and the project stalled. AEL took the position that it was authorised by Chotek and Darimbi to negotiate and enter into the three agreements with Hong Leong Group on their behalf; alternatively, that Chotek and Darimbi had acquiesced to or ratified or confirmed or were otherwise estopped from denying the same. Chotek and Darimbi, on the other hand, alleged that they were not parties to the agreements and had never authorised AEL to negotiate and enter into these agreements on their behalf. They also denied having any knowledge of the terms of the agreements at the material time. The major shareholders of AEL were one CP Chan and his family members, while the shareholders of Chotek and Darimbi were "OEH" and his family members.

169 Goh Joon Seng J held that Chotek and Darimbi were bound by the three agreements even if they had not *expressly* authorised AEL to negotiate and conclude these agreements on their behalf. Goh J referred (at [57]) to the two companies having "ratified or affirmed or acquiesced" to the three agreements – but it is clear that this reference was in the context of his finding that there was *implied actual authority*: in his judgment, he stated (at [49]) that he was "satisfied that CP Chan was duly authorised to negotiate and conclude the three agreements on behalf of Chotek and Darimbi". In coming to this conclusion, Goh J referred *inter alia* to evidence that showed OEH's attendance at numerous meetings where discussions were held on the Hong Leong Group's participation as a shareholder in accordance with the JVA, as well as the liability of the old shareholders of AHDL (*ie*, Chotek, Darimbi and AEL) to reimburse Hong Leong Group for the existing losses to AHFL's capital in accordance with the compensation agreement. Moreover, contrary to OEH's claim that he had never been given copies of the agreements, Goh J found that he was provided with a

copy each of the JVA and the compensation agreement shortly after they were executed; and that he even requested English translations of the same. Chotek, Darimbi and OEH subsequently executed the deeds of assignment on 10 February 1987 assigning to the first plaintiff ("HLIH") their rights to subscribe for the AHDL shares – in compliance with the terms of the three agreements with the Hong Leong Group. Minutes of an AHDL directors' meeting also set out the apportionment – as among Chotek, Darimbi and AEL – of the contributions due from them for the payment of compensation to the Hong Leong Group. No objections were raised by Chotek and Darimbi upon receipt of these minutes: indeed, evidence of a Chotek board meeting held shortly after this AHDL directors' meeting showed that OEH had advised the Chotek board that "negotiations with the Hong Leong Group have been completed" and that work on AHDL's hotel project was expected to start the following week. HLIH went on to discharge its obligations under the JVA and the compensation agreement, subscribing for the AHDL shares at par when the value of the same was below par because of losses previously incurred by AHDL. AEL also went on to discharge its apportioned liability. The hotel project was thus revived, and the investments of Chotek and Darimbi were saved from forfeiture.

170 I have summarised above the evidence in order to make clear the circumstances in which Goh J found that "CP Chan was duly authorised to negotiate and conclude the three agreements on behalf of "Chotek and Darimbi". It was also in these circumstances that Goh J found (at [58]) that:

> Further by acting as though they agreed to be bound, Chotek and Darimbi are also estopped from contending otherwise. Spencer Bower and Turner on *The Law Relating To Estoppel By Representation* (1977 Ed) at p 52 state:
>
> > Where A and B are parties to a negotiation or transaction, and, in the course of the bargaining or dealings between them, A perceives that B is labouring under a mistake as to some matter vital to the contract

> or transaction, he may come under an obligation to undeceive B, at all events if the circumstances are such that his omission to do so must inevitably foster and perpetuate the delusion. In such cases silence is in effect a representation that the facts are as B mistakenly believes them to be, and A is accordingly estopped from afterwards averring, as against B, any other state of facts. A duty of this kind may arise when B, or even a third person, in the presence or to the knowledge of A, states or does something which indicates to A that B is being, or will be, misled unless the necessary correction be made, whereupon, an omission on A's part to make the correction amounts to a tacit adoption by him of the incorrect statement as his own.

171 From the above, it would appear that in addition to finding implied actual authority on the facts, Goh J also applied what the CA in *Bunga Melati (CA)* described as "uncontroversial" equitable principles to find Chotek and Darimbi estopped from denying the agreements.

172 *Wilson* was referenced by Goh J in his judgment in *Hong Leong*. In *Wilson*, an agent of a railway company (one Chester), without any direct authority, agreed to sell to the plaintiff a piece of land of the company. The terms of the contract required *inter alia* that the company should lay down a branch railway to the land and that the plaintiff (who intended to erect ironworks on the land) should use the company's railway in preference to others. Actions were taken by both the company and the plaintiff to perform the contract: for example, the company's surveyor measured the land and its engineer laid down the branch railway to it, while the plaintiff was let into possession and his machinery was brought in the company's wagons to the land. Subsequently, the company refused to complete the sale. The plaintiff applied successfully for an order of specific performance, and the company's appeal was dismissed by the English Court of Appeal. Turner LJ pointed out (at p 465) that both parties had carried out acts in conformity with the contract, and that they amounted to "a

representation by the Defendants [the company] to the Plaintiff that the contract was a subsisting and valid contract". Although the company claimed that it was not aware of the contract until 5 December 1859 and that it had "dissented" from the contract and made its dissent known to its solicitors after that date, the court noted that not only had it omitted to communicate its "dissent" to the plaintiff, the company's officers had also continued to assist the plaintiff in accordance with the terms of the contract beyond 5 December 1859. Turner LJ held that based on the evidence, this was a contract that had not merely been ratified; it had been in part performed; and the plaintiff would suffer prejudice if the contract were not upheld, as he had already been let into possession on the faith of the contract. In Turner LJ's view (at p 466), it was "a fraud to set up the absence of agreement when possession [had] been given on the faith of it".

173 I reiterate that it is important to appreciate the evidence on which the court in *Hong Leong* and in *Wilson* determined that the putative principal should be bound by the disputed contract despite the absence of express authority. Whether the Plaintiff in this case relied on implied actual authority or apparent authority or agency by estoppel (or simply on the more traditional formulation of the equitable doctrine of estoppel), the onus lay on the Plaintiff to satisfy the court that the various sets of facts it was advancing – either taken individually or collectively – provided a sufficient basis to draw the inference being argued for (to borrow the words of the CA in *Bunga Melati (CA)*).

Applying the law to the facts: The Plaintiff's case on actual authority

174 I now address the evidence which the Plaintiff relied on in arguing that Mr Berger had actual authority to enter into the alleged Payment Processing Agreement on the 1st Defendant's behalf. As I noted earlier, it was evident from their pleadings and submissions that the Plaintiff was alleging implied actual

authority and not express actual authority. In this connection, it will be recalled that the CA in *Alwie Handoyo* has held (at [148], quoting Lord Pearson in *Garnac Grain Company Incorporated v H M F Faure & Fairclough Ltd* [1968] AC 1130 at p 1137) that what is of primary importance is what the principal and agent each said and did at the time of the alleged creation of the agency: earlier words and conduct may provide evidence of a course of dealing in existence at the time and may more generally at be taken into account as historical background; later words and conduct may have some bearing, but are likely to be less important.

175 In the present case, the Plaintiff cited four pieces of evidence which, according to them, proved actual authority on Mr Berger's part to enter into the Payment Processing Agreement on the 1st Defendant's behalf:[117]

(a) Ms Alfaro, whom the Plaintiff alleged was acting on the 1st Defendant's behalf, had provided Mr Berger with an update on the 1st Defendant's cost of providing the payment processing services on the same day that the Payment Processing Agreement was entered into with the Plaintiff.

(b) After Mr Berger successfully negotiated the Payment Processing Agreement with the Plaintiff, the 2nd Defendant Mr Carbonara had supplied him with a draft Merchant Services Agreement, which Mr Berger then forwarded to the Plaintiff.

(c) Mr Berger was being paid commissions by the 1st Defendant in relation to the processing of the Plaintiff's funds.

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117 Plaintiff Closing Submissions at para 284.

(d) The fees that the 1st Defendant charged in relation to the processing of the Plaintiff's funds were the same as those agreed in the Payment Processing Agreement that the Plaintiff entered into after negotiations with Mr Berger.

I address each of these pieces of evidence in turn.

176 As to the first piece of evidence relied upon, the Plaintiff referred to the following email sent by Ms Alfaro to Mr Berger:[118]

118 3PBOD at p 119.

Date:	Thu, 15 Aug 2019 10:47:58 PM (UTC)
Subject:	BOL API integration and live credentials
From:	Daphne Alfaro <d.alfaro@phoenixam.net>
To:	Daniel Berger <daniel.berger@mcccode.com>;
Attachments:	BOL_BOLTPAY_Merchant_Logins_.pdf

Hello Dan,

Please find attached the API integration instructions and live credentials.

In addition, **our cost** in MXC MID if you need it.

Rate: 5.50%
Transaction fee: $0.55
Refund fee: 0.50
Chargeback fee: 35.00
Setup fee per MID: 1,500
Reserve: 10%
Max transaction size: 1500
Monthly volume: 350,000
Days arrears 7

Let me know if you may need any further information.

Thanks,

Daphne A.

177 When she was asked about the contents of this email during her deposition in the United States of America, Ms Alfaro confirmed that she had written this email on behalf of the 1st Defendant.[119] She also clarified that the reference to "our cost" in the email was a reference to the 1st Defendant's cost. Subsequent to this email of 15 August 2019, Mr Berger sent the following email to the Plaintiff's representation Ms Meza on 16 August 2019:

[119] 6ABAEIC at p 178.

From: Daniel Berger <daniel.berger@mcccode.com>
Sent: Friday, August 16, 2019 6:15 AM
To: Sloane@seftops.net
Subject: Fwd: BOL API integration and live credentials

Hello Gal,

Please find attached the API integration instructions and live credentials.

Rate: 7.50%

Transaction fee: $0.75

Refund fee: 2.00

Chargeback fee: 35.00

Setup fee per MID: 1,500

2

Reserve: 10%

Max transaction size: 1500

Monthly volume: 350,000

Days arrears 7

178 In his email to Ms Meza, Mr Berger stated the various fees and parameters of the payment processing solution he was introducing. It was immediately clear that there were differences between the figures which he quoted to Ms Meza and the figures which Ms Alfaro had provided to him. For one, the rate which Ms Alfaro had quoted to Mr Berger was 5.5% – whereas Mr Berger had quoted a significantly higher rate of 7.5% to Ms Meza. Ms Alfaro

had also quoted a transaction fee of $0.55 and a refund fee of 0.5 – whereas Mr Berger quoted Ms Meza a much higher transaction fee of $0.75 and a much higher refund fee of 2.00. Despite these differences, the Plaintiff insisted that Ms Alfaro's email "establish[ed] that Mr Berger, in negotiating the terms of the Payment Processing Agreement with the [Plaintiff's] representatives" was taking reference from and conveying the payment processing costs imposed by the 1st Defendant and the parameters of the payment processing solution that the 1st Defendant would provide.[120]

179 I found the Plaintiff's argument to be without merit. In the first place, it was incorrect to say that in negotiating the terms of the Payment Processing Agreement with Ms Meza, Mr Berger was "taking reference from and conveying" the 1st Defendant's payment processing costs and the parameters of its payment processing solution. No mention at all was made of the 1st Defendant in Mr Berger's email to Ms Meza. Mr Berger's email did not even allude to his "taking reference from" or "conveying" another party's payment processing costs and/or the parameters of another party's payment processing solution. More importantly, if Mr Berger had indeed been acting as the 1st Defendant's agent in negotiating and entering into the Payment Processing Agreement with the Plaintiff, and if what he was doing in his email to Ms Meza was to "convey" the 1st Defendant's fees and charges, one would not have expected him to make upward adjustments to the figures provided to the Plaintiff.

180 The second piece of evidence which the Plaintiff relied on in arguing implied actual authority concerned the Draft Merchant Services Agreement which Mr Berger forwarded to the Plaintiff on 29 August 2019.[121] According to

120 Plaintiff's Closing Submission at para 86.

121 Defendants' Closing Submissions at paras 74 and 284; 2AEIC at p 103.

the Plaintiff, after Mr Berger had successfully negotiated the Payment Processing Agreement with the Plaintiff, the 2nd Defendant provided him with a Draft Merchant Services Agreement which he (Mr Berger) then forwarded to the Plaintiff. The Plaintiff found it "remarkable" that the Defendants had failed to reveal in these proceedings that the 2nd Defendant was the "source" of the draft agreement provided by Mr Berger to the Plaintiff.[122] The Plaintiff also argued that the 2nd Defendant's explanation – that he had sent the draft agreement to Mr Berger as a template – could not be believed for the following reasons:[123]

(a) The draft agreement that the 2nd Defendant sent Mr Berger was identical to the draft Merchant Services Agreement which Mr Berger forwarded to the Plaintiff. It was unbelievable that Mr Berger would adopt wholesale the terms of a template provided by Mr Carbonara and not even change the name of the contracting party which was still listed as Kings Road.[124]

(b) The document which the 2nd Defendant sent was named "*Merchant Intl Agreement_bol.docx*". The Plaintiff claimed that the letter "bol" actually represented a reference to the Plaintiff itself.[125]

(c) The document which the 2nd Defendant sent included the very fees and parameters which Mr Berger had agreed with Ms Meza during the Skype Teleconference on 15 August 2019. The Plaintiff argued that the 2nd Defendant must have inserted these figures into the contract, given

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122 Plaintiff's Closing Submissions at para 111.

123 Plaintiff's Closing Submissions at para 112.

124 Plaintiff's Closing Submissions at para 113.

125 Plaintiff's Closing Submission at para 115.

that he was able to point Mr Berger to where the "fees and schedule" could be found in the document.

(d) Mr Berger had also, in emails to the Plaintiff, made consistent references to "our" contract or a contract that "we" would prepare. According to the Plaintiff, the use of these collective nouns must have been in reference to the 1st Defendant.[126]

(e) Finally, Kings Road Capital, which was the entity named in the draft agreement sent by the 2nd Defendant to Mr Berger, was the same entity listed in the Due Diligence Form which had been sent to the Plaintiff earlier on 16 August 2019. This showed that the 2nd Defendant did not send Mr Berger a mere template. The Plaintiff also alleged that Kings Road Capital was directly related to either the 1st or the 2nd Defendants.[127]

181 Whether taken singly or as a whole, I did not think that the above points took the Plaintiff's case very far. At best, these points demonstrated that there was some kind of association or working relationship between the 2nd Defendant and Mr Berger, such that the 2nd Defendant was willing to share draft contracts for Mr Berger's use and possibly even provide input. However, these points – even if taken together – simply did not go so far as to imply that Mr Berger had actual authority to bind the 1st Defendant to the Payment Processing Agreement. As the CA highlighted in *Alphire* (at [7]), the cornerstone of actual authority, whether express or implied, is a consensual agreement between the principal and

126 Plaintiff's Closing Submissions at paras 117 – 118.

127 Plaintiff's Closing Submissions at paras 119 – 120.

the agent as to the existence of the latter's authority and the scope of that authority. This was simply not present on the evidence before me.

182 Further, I would add that the draft Payment Processing Agreement provides as follows:

Agreed and Accepted on behalf of: Kings Road Capital Corp. Private Limited

_____

Signature *Name*
Title: Date:

183 The Plaintiff claimed that there were "direct links" between Kings Road Capital Corp Pte Ltd and the 1st and/or 2nd Defendants. In its closing submissions, the Plaintiff alleged that the 2nd Defendant "admits to having substantial involvement" in "all" the companies listed in a "pending task report" apparently prepared by one Ms Vanessa Diaz (whom the 2nd Defendant agreed was an independent contractor who assisted with the 1st Defendant's accounting and other matters). However, an examination of the relevant portion of the trial transcript alluded to by the Plaintiff revealed that this allegation was incorrect – even misleading. In cross-examination, while the 2nd Defendant agreed that he was a director or sole shareholder of a number of the companies listed in the said report (*eg*, Republic Management Asia Pte Ltd), he asserted that he was *not* involved in some of the companies listed, except in a peripheral or an indirect manner. For example, in relation to Phoenix Connect Pte Ltd, the 2nd Defendant's evidence was that he had simply assisted the owner of the company

in getting the company licensed as an "financial institution";[128] that he had assisted by liaising with MAS, the law firm and other institutions; and that he had provided this assistance because at that time he had an employment contract with several of the other companies owned by the same owner.

184 In fact, the only evidence that the Plaintiff appeared to be able to identify in support of its submissions as to the Defendants' "substantial involvement" in Kings Road Capital consisted of two brief email references. First, the Plaintiff referred to an email from Ms Alfaro to the 2nd Defendant on 25 February 2020, where in one of several bullet-points, she had stated: "*Also Vanessa is still waiting Kings Road statements from MC*". The 2nd Defendant agreed that "Vanessa" was a reference to Ms Vanessa Diaz. However, even if one were to assume that the bullet-point in Ms Alfaro's email was a reference to Ms Diaz waiting for the 2nd Defendant to send her financial statements of bank statements of Kings Road Capital, this reference in itself did not prove – or even suggest – that the 2nd Defendant had "substantial involvement" in Kings Road Capital.

185 Second, the Plaintiff pointed to a notation in Ms Diaz's "pending task report" which appeared to show that the 2nd Defendant was expected to carry out "2019 categorisation" in relation to Kings Road Capital. Again, it was not possible to infer from this cryptic reference that the 2nd Defendant had "substantial involvement" in Kings Road Capital.

186 Indeed, even taking the above two scraps of evidence together, the most they hinted at was that the 2nd Defendant had some sort of connection to Kings Road Capital. They did not suggest that the 2nd Defendant had "substantial

[128] Transcript dated 27 April 2022 at p 24 ln 7 – 18.

involvement" in Kings Road Capital – much less that the company was somehow related to the 1st Defendant.

187 Moreover, assuming the 1st Defendant had indeed – through its conduct – granted Mr Berger authority to enter into the Payment Processing Agreement on its behalf, the relevant portion of the draft agreement would then logically have stated that it was agreed and accepted on behalf of the 1st Defendant – and not Kings Road Capital. The Plaintiff could not explain why, if the 1st Defendant had indeed authorised Mr Berger to contract on its behalf, Kings Road Capital should have been stipulated in the draft Merchant Services Agreement as the contracting party. After all, assuming that the draft agreement had been finalised, and Mr Berger had signed off on it *qua* agent, Kings Road Capital would have ended up as the contracting party and not the 1st Defendant (see *eg*, *Gregor Fisken Limited v Bernard Carl* [2021] EWCA Civ 792 at [54], see also *Hamid (t/a Hamid Properties) v Francis Bradshaw Partnership* [2013] EWCA Civ 470 ("*Hamid*"); *Internaut Shipping GmbH and another v Fercometal SARL* [2003] EWCA Civ 812). But this was not the case.

188 I turn next to the third piece of evidence which the Plaintiff cited, *ie*, that Mr Berger was being paid commissions by the 1st Defendant in relation to the processing of the Plaintiff's funds. Here, the Plaintiff pointed to the 1st Defendant's settlement reports and correspondence in which the 1st Defendant is stated as having "paid Mr Berger commissions, being a cut of the BHH funds that were being processed". The Plaintiff submitted that this was consistent with Mr Berger's description as an "agent" in Ms Alfaro's emails.[129] In addition, the Plaintiff claimed that while the Defendants initially asserted that Mr Berger unilaterally dictated the fees he earned on the processing of BHH's transactions,

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129 Plaintiff's Closing Submissions at para 27(c).

the 2nd Defendant had accepted that both Mr Berger and the 1st Defendant agreed to the allocation of Mr Berger's fees – and this was consistent with Mr Berger being an "agent".[130]

189 I was similarly unconvinced that the above points implied that Mr Berger had actual authority to bind the 1st Defendant to the Payment Processing Agreement. While it was indeed true that Ms Alfaro had described Mr Berger as an "agent", the mere use of such a label did not signify that there was implied actual authority. It was not disputed that Ms Alfaro was not a lawyer. While lawyers use terms such as "agents" in a technical, legal sense, it must be borne in mind that laypersons, such as the parties in this case, do not pay much heed to such legal technicalities especially in their communications with each other.

190 In this connection, the approach taken by the court in *Bunga Melati (CA)* is helpful. In that case, the plaintiff had relied on some bunker confirmations sent by MAL to the defendant which described MAL as a "broker" – a description which the defendant had not taken issue with. The CA noted that the defendant's employees had testified that they were unaware of the nuances and failed to appreciate the legal difference between referring to a party as a broker and as a trader, and also that these sums could have been used in error. The CA agreed with Prakash J that this evidence was not unbelievable, *inter alia*, given the previous work experience of the employees concerned, it was not inconceivable that they would be unfamiliar with the precise meaning of these terms, especially since other evidence showed that the terms could be used interchangeably.

191 I would add that, in my view, the fact that Mr Berger was paid a commission did not in any way imply that he had actual authority to contract on

130 Plaintiff's Closing Submissions at para 27(c).

the 1st Defendant's behalf. For ease of analysis, I reproduce what the 2nd Defendant had said in cross-examination:[131]

> Q: Now, I want to focus on the table at the bottom, that contains various references to commissions. Amongst other things there was a reference at line 20 to a Daniel commission. Do you see that?
>
> A: Yes I do.
>
> Q: Now, I believe your evidence is that Mr Berger had unilaterally determined the fee that was to be paid or allocated to MCDP in relation to the remittance services, as you call it; correct?
>
> A: I don't remember if it was he who decided the commissions MCDP would make. The way that **he would set it up is he would sell a rate to his customers and MCDP made a commission on its remittance services that was included in the mark-up that he had set, and then anything outside that, you know, that he was taking for his own commission, that was to be distributed by MCDP.**
>
> Q: Can I please refer you to 2AEIC 482, please. So for your context, Mr Carbonara, this is a page from the report of Mr Richard Hartung, so that's an industry expert that my client has called as a witness and he was cross-examined on this report last week. At paragraph 48, Mr Hartung was addressing the issue of the fees structure that was reflected in the settlement reports, an example of which we just saw. I want to start with paragraph 49, in which Mr Hartung quotes a statement from your eleventh affidavit in which you say: "The amount and type of fees that Berger allocated to MCDP for Berger's use of MCDP's software and remittance services were entirely within Berger's control and discretion." Okay? Now, can I ask, is that still your position today?
>
> A: My position hasn't changed, no.
>
> Q: So just pausing here, are you -- do you mean to say that Mr Berger unilaterally decided how much money or fees that MCDP was going to make from providing the remittance services?

[131] Transcript dated 27 April 2022 at p 76 ln 19 – p 78 ln 24.

> A: Again, it was -- he was marking up the fees to create a commission structure and he determined how much MCDP was going to make based on that mark-up, and that mark-up was for servicing the account through the remittance services as provided and –
>
> Q: And -- sorry. He determined how much MCDP was going to make. MCDP agreed to the fee structure he determined; correct?
>
> A: Yes.
>
> Q: So it was not a case where Berger unilaterally decided on a fee structure and forced MCDP to accept it. It was a case where Berger proposed it or determined it, but MCDP itself agreed to it; correct?
>
> A: Correct. He would determine the rates and as long as it was financially viable, MCDP would agree to it.
>
> Q: Yes…
>
> [emphasis added]

192 Based on the 2nd Defendant's evidence, it would appear that Mr Berger was not actually paid a commission by the 1st Defendant *per se*. Mr Berger was the one who had devised a fee structure: he marked up the fees to be charged to the Plaintiff so as to create a commission structure; and he determined what the 1st Defendant's cut of the fees would be, with the remainder being his own share. The 1st Defendant accepted his fee structure so long as it appeared financially viable. All this militated against the inference or the implication that Mr Berger had implied actual authority to contract on the 1st Defendant's behalf. Instead, it showed that Mr Berger was the one calling the shots. He decided how much to charge his client (the Plaintiff), and how much his service provider (the 1st Defendant) would receive.

193 I turn then to the Plaintiff's final piece of evidence in relation to its submission of actual authority: *ie*, the fact that the fees which the 1st Defendant charged in relation to the processing of the Plaintiff's funds were the same as those agreed in the Payment Processing Agreement negotiated and concluded

between Mr Berger and the Plaintiff's Ms Meza. Again, there appeared to be a simple explanation for this: as observed above (at [179]), Mr Berger was the one who set the rates which he charged his clients (*ie*, the Plaintiff); and it appeared that the arrangement was for the 1st Defendant to assist in collecting payment from the client before distributing to Mr Berger his share of the payment.

194 I add that the 2nd Defendant maintained this version of events under cross-examination; and the Plaintiff did not produce any evidence to refute it. Insofar as the Plaintiff tried to rely on Mr Hartung's opinion that it was "unusual" for Mr Berger to have exerted such control over the fees charged and the commissions payable, as I emphasised earlier, Mr Hartung was not a factual witness in these proceedings, and his opinion in this respect could not be accorded any weight.

195 In this connection, I also noted that during Mr Hartung's testimony in cross-examination, he did concede that as a matter of practice, "a processor [could] buy or lease a software solution from a third party" to assist them in processing payments and "use a remittance company to send remittances to the merchant"; and based on his experience, this arrangement could "get complicated" as it depended on the arrangements between the entities.[132] While Mr Hartung gave evidence that he could not conclude that Mr Berger was the payment processer in the Payment Processing Agreement, as I emphasised earlier, the question of whether Mr Berger or the 1st Defendant was the payment processer in the Payment Processing Agreement was one of fact which the trial

[132] Transcript of 21 April 2022 at p 155 ln 6 to ln 25.

court had to decide. Mr Hartung's opinion evidence on this matter was therefore irrelevant and could not be given any weight. In his own words:[133]

> What actually happened would be based on the evidence…I don't know from the evidence what authority he [Mr Berger] has… I don't know the legal authority of principal, but if he had authority to act as principal or another position, then he could act.

196 To sum up, therefore: on the evidence before me, I found that the Plaintiff was unable to show implied actual authority on Mr Berger's part.

Applying the law to the facts: The Plaintiff's case on apparent authority

197 As an alternative to actual authority, the Plaintiff pleaded that the 1st Defendant had "represented" that Mr Berger had "apparent authority" to "act as [the Plaintiff's] representative". The Plaintiff pleaded that this apparent authority arose from the 1st Defendant having "represented that Berger had such authority to act as its representative" – and that the 1st Defendant made this representation by "providing payment processing services to the Plaintiff in accordance with the terms agreed between Berger and Sloane [the Plaintiff's Ms Meza] and/or through its employee's administrative and/or authorised representative's (Alfaro's) conduct and participation in the group text-message discussions relating to the performance of the terms of the Payment Processing Agreement".

198 A closer look at the Plaintiff's pleaded case on apparent authority revealed a fundamental flaw. In gist, the "representation" from the 1st Defendant which the Plaintiff relied on for the purpose of establishing apparent authority was the 1st Defendant's alleged conduct *subsequent to* the conclusion of the Payment Processing Agreement. This could not satisfy the four factors set out

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133 Transcript dated 21 April 2022 at p 215 ln 24 to p 216 ln 22.

by Diplock LJ in *Freeman*. It will be recalled that the first three of these factors require that the claimant alleging apparent authority show that a representation that the agent has authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to him; that such a representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates; and that he (the claimant) was induced by such representation to enter into the contract. In the present case, the Plaintiff could not produce any evidence whatsoever of any *representation from the 1st Defendant* that Mr Berger had authority to conclude the Payment Processing Agreement on its behalf; much less that *the Plaintiff was induced by such a representation from the 1st Defendant to enter into the contract.*

199 Indeed, on the contrary, the evidence available suggested that such a representation was never made at all. The Plaintiff's witness, Ms Meza, stated that it was the Plaintiff's "usual practice to refer any potential new processing solutions" to Current Consulting Limited ("CCL"), a firm which the Plaintiff had engaged to provide due diligence and management consulting services in relation to the Plaintiff's payment management and collection business.[134] As part of their due diligence checks, CCL had conducted a background check on Mr Berger; and in their report of 13 September 2019, CCL had noted that he was connected to the 2nd Defendant via the "Pagoworld debt (PINK) from Sep 2018"; further, that the 2nd Defendant and his brother Joe were responsible along with one George Calderon, "for the old Kreysha/SecCom large old debt". CCL opined that there was a suspicion that the 2nd Defendant and his brother openly stole funds – but that Mr Berger was not involved.[135] Also included in the annex to the

134 Meza AEIC at para 6.

135 Meza AEIC at p 90.

due diligence report produced by CCL was an item of correspondence between Ms Meza and what appeared to be other employees of the Plaintiff:

> Hi Guys,
>
> Here are my notes from my call this morning with Daniel Berger, please let me know if you have any questions or feedback. If we're able to integrate without using the Boltpay gateway, I'm comfortable that we can continue to move this solution forward. Obviously, ***given the loose association with known fraudsters this early in the game, we'll want to be very watchful with this,*** but I am OK to proceed.
>
> [emphasis added]

200 I make two points about the above evidence. First, given that the Plaintiff had taken the precaution of requesting from CCL a due diligence report on Mr Berger, it would appear that logically, if there had been any representation from the 1st Defendant that Mr Berger was entering into the Payment Processing Agreement on its behalf, the Plaintiff would have requested a similar report on the 1st Defendant. It did not make sense that the Plaintiff would have wanted due diligence checks done on Mr Berger, but not on the entity that was supposedly representing Mr Berger's authority to contract on its behalf. Yet, there was no evidence of any due diligence checks conducted on the 1st Defendant.

201 Second, from the above evidence, it was clear that the Plaintiff was cognisant of the possibility of a "loose association" between Mr Berger and the 2nd Defendant (as well as the latter's brother). From Ms Meza's email (above), it was also clear that the Plaintiff viewed the 2nd Defendant with considerable disfavour and distrust. The 2nd Defendant has been, and continues to be, on record as one of the directors of the 1st Defendant, as well as its Chief Executive Officer and Managing Director. The Plaintiff has alleged in its pleadings that it was previously defrauded by the 2nd Defendant in a similar manner to that presently pleaded in this suit. Against this factual backdrop, the tenor of Ms

Meza's email – and in particular, her warning that they would "want to be very watchful" of Mr Berger's "loose association" with the 2nd Defendant – strongly suggested that while the Plaintiff might have been willing to deal with Mr Berger despite his suspected ties with the 2nd Defendant, they would not have entertained the prospect of contracting with an entity owned by the 2nd Defendant.

202 For the reasons stated above, I rejected the Plaintiff's case on apparent authority.

Applying the law to the facts: The Plaintiff's case on estoppel

203 Given the state of its own pleadings and the evidence (or lack thereof) on apparent authority, it was perhaps not surprising that in its closing submissions, the Plaintiff said nothing at all about apparent authority. Instead, as noted earlier, the Plaintiff submitted that even if Mr Berger did not have actual authority to conclude the Payment Processing Agreement on the 1st Defendant's behalf, the 1st Defendant had nonetheless provided payment processing services to the Plaintiff in accordance with the said agreement and should therefore be estopped from denying its liability under the agreement.

204 While the Plaintiff's closing submissions failed to make clear whether it was seeking to rely on agency by estoppel, this did not ultimately matter because – as the CA observed in *Bunga Melati (CA)* – unconscionability underlies equity's intervention to make a putative principal liable even in the absence of actual authority. In this connection:

> (U)nconscionability must comprehend not only the element of hardship on the part of the third party but also responsibility on the part of the putative principal. In other words, ***there must be some act or omission on the part of the principal that leads to the third party acting or continuing to act in a***

> ***particular way to his detriment or suffering hardship*** and it is this which gives rise to the requisite finding of unconscionability. This is why the inquiry is correctly to be undertaken within the traditional framework of estoppel that ***examines three elements which must be found to be satisfied, namely, (i) a representation by the person against whom the estoppel is sought to be raised; (ii) reliance on such representation by the person seeking to raise the estoppel; and (iii) detriment***…
>
> [emphasis added]

205 As I said earlier, it was regrettable that in this case, apart from repeating the allegation in its pleadings about the 1st Defendant's provision of payment processing services being a ratification or affirmation of the Payment Processing Agreement, the Plaintiff made no attempt to review the evidence adduced or to explain how the elements of estoppel were made out on such evidence.

206 Insofar as the Plaintiff relied on *Hong Leong* and *Wilson*, the facts before me were very far from the facts of these two cases. In *Hong Leong*, as seen from the summary above (at [168]), the evidence left no doubt that Chotek and Darimbi were aware at all material times of the negotiations with Hong Leong Group over the three agreements – and that they assented to these three agreements. *Inter alia*, OEH had – on behalf of Chotek and Darimbi – attended numerous meetings where discussions were held on Hong Leong Group's participation as a shareholder in accordance with the JVA and the liability of the old AHDL shareholders (Chotek, Darimbi and AEL) to reimburse Hong Leong Group in accordance with the compensation agreement. Chotek's and Darimbi's actions thereafter also left no doubt that they were taking steps to comply with the three agreements with Hong Leong Group (*eg*, their execution of deeds of assignment assigning to the first plaintiff HLIH their rights to subscribe for the AHDL shares).

207 As for *Wilson*, there was no doubt that the defendant company had knowingly let the plaintiff into possession of the land: his machinery had been brought onto the land in the company's own waggons; and the company's officers had carried out various acts in compliance with the terms of the contract concluded by Chester (*eg*, the laying down of a branch railway to the land). Turner LJ held that the equities of the case lay with the plaintiff who – having been given possession of the land on the faith of the contract – should not thereafter be "treated as a trespasser and turned out of possession on the ground that there was no agreement" (at p 466). Indeed, as seen from the above summary, Turner LJ viewed it as "a fraud for the defendant company to set up the absence of agreement when possession [had] been given upon the faith of it".

208 In short, in both *Hong Leong* and *Wilson*, the ***sole inference*** which could be drawn from the evidence was that the putative principal in each case was aware that the third party was operating on the misapprehension that the contract had been validly concluded with the principal; that the circumstances were such that the principal would have been reasonably expected to correct the misapprehension; and that far from having corrected the misapprehension, the principal had taken positive actions which appeared to demonstrate to the third party that it (the principal) considered itself bound by the contract. In this respect, it will be recalled that in *Bunga Melati (CA)*, counsel for the plaintiff bunker supplier had argued that it could be inferred from various pieces of evidence that the defendant shipowner knew MAL was conducting all its transactions with bunker suppliers on the basis that it was the defendant's agent. In declining to draw such an inference, the CA had this to say (at [38]):

> … it is well established that an inference may only be drawn if it is the *sole inference* that flows from the facts proved. The more serious the nature of the inference, the more careful the court

> must be to ensure that this is so. In our judgment, the various sets of facts that were advanced, whether taken individually or collectively, do not provide a sufficient basis to draw the inference that was urged upon us. It was simply not possible to conclude that [the plaintiff] knew that MAL was conducting *all* its transactions with *all* its bunker suppliers on the basis that it was [the defendant's] agent. Having failed to prove this, there was neither the need nor the basis for us to consider whether [the defendant] had a duty to communicate to [the plaintiff] that MAL was not its agent and [the plaintiff's] argument on agency by estoppel, even assuming this affords a separate basis of liability, fails.

209 In the present case, the Plaintiff's submissions did not explain how the *sole* inference to be drawn from the evidence was that the 1st Defendant was aware the Plaintiff was labouring under the misapprehension that the 1st Defendant was the contracting party under the Payment Processing Agreement, and that being so aware, it had failed to correct the misapprehension. The main argument which the Plaintiff advanced in its closing submissions was what it had said in its pleadings – *ie*, that the 1st Defendant had provided payment processing services. This was simply not enough for the Plaintiff's case on estoppel. The evidence of the services provided by the 1st Defendant was equally consistent with the 1st Defendant's case that it provided remittance services to Mr Berger, who needed to satisfy the contractual obligations he had undertaken to clients such as the Plaintiff, and who in turn provided for the 1st Defendant to get a cut of the rates he charged these clients.

210 The Plaintiffs also sought to rely on the presence of the 1st Defendant's sailboat emblem on the Merchant Control Panel and on the fact that it had received funds from WorldFirst Singapore Pte Ltd (WorldFirst) "for the account of [the 1st Defendant]". As to the presence of the sailboat emblem on the Merchant Control Panel, it was not disputed that the Merchant Control Panel was an information tool; it could not be used for payment processing functions such

as the approval or rejection of transactions.[136] The 2nd Defendant gave evidence that the 1st Defendant had acquired the Merchant Control Panel software from Coriunder and had placed its sailboat emblem on the said software as part of the "white-labelling arrangement between [the 1st Defendant] and Coriunder".[137] According to the 2nd Defendant, the 1st Defendant had allowed Mr Berger to use the Merchant Control Panel because he was the one who knew Coriunder and its founder; he had introduced Coriunder to the 1st Defendant as "a start-up that could provide software which could enable MCDP to manage its own customers better by hosting all the information in respect of its customers onto one platform (*ie*, the Merchant Control Panel software)"; and being much more tech-savvy than anyone from the 1st Defendant, he had also helped to set up the Merchant Control Panel software for the latter. The Plaintiff did not produce any evidence to refute the 2nd Defendant's account. In fact, its expert Mr. Hartung conceded in cross-examination that it was possible for a party to use another party's software and remittance solutions for payment processing, and that any such practice did not mean that the company providing the solutions was the payment processor. Mr. Hartung also agreed that whether this was the case would depend "on the contractual arrangements", and that it was "possible for a payment processor to use a remittance company to send remittances to the merchant".[138]

211 As for the receipt of funds from WorldFirst Singapore Pte Ltd (WorldFirst) "for the account of [the 1st Defendant]", I also did not find this point particularly helpful to the Plaintiff's case. The 2nd Defendant's evidence was that the 1st Defendant remitted monies through WorldFirst to Mr Berger's customers,

136 Transcript dated 19 April 2022 at p 47 ln 12 – p 48 ln 2.

137 Michael Carbonara AEIC at paras 28 – 30.

138 Transcript dated 21 April 2022 at p 155 ln 18 – 21.

such as the Plaintiff, pursuant to Mr Berger's instructions.[139] According to the 2nd Defendant, Mr Berger would instruct the payment processors whom he had engaged to process his customers' funds to transfer the processed funds to the 1st Defendant's bank account; and after the relevant payment processors had done so, Mr Berger would give the 1st Defendant instructions for the remittance of the funds, through the settlement reports generated from the Merchant Control Panel. The 2nd Defendant's evidence was that the settlement reports generated from the Merchant Control Panel would reflect the various "channels" (and thereby MIDs) which had been used to process payments. They would also reflect how much Berger was instructing MCDP to remit pursuant to each "channel". The fees allocated to all the relevant entities and/or individuals were based on what Berger had dictated and programmed into the Merchant Control Panel. Using its account with WorldFirst, the 1st Defendant would remit the appropriate amounts based on Mr Berger's instructions, after deducting appropriate fees and commissions.

212 Although the Plaintiff decried the 2nd Defendant's version of events as being unconvincing or even unbelievable, it should be highlighted that the Plaintiff's own witness Ms Meza herself accepted in cross-examination that it was possible for the company responsible for payment processing and the company responsible for remitting funds to be different.[140] The 2nd Defendant's version of events was also at least in part supported by the evidence of the parties' contemporaneous communications. For example, in an email sent by Ms

139 Michael Carbonara AEIC at para 38.

140 Transcript dated 19 April 2022 at p 116 ln 16 – p 117 ln 14.

Alfaro to Mr Berger on 27 January 2020, in which she had enclosed the "ConnectApp weekly settlement report", Ms Alfaro had expressly stated:[141]

> Hello Dan
>
> .....
>
> Week 01.06.20 to 01.12.20 will not be settled from MCDP Phoenix [the 1st Defendant] since funds were not received to any bank account under MCDP Phoenix as per your instructions……
>
> [emphasis added]

213 Ms Alfaro's email indicated that it was Mr Berger who decided whether processed funds should be sent to the 1st Defendant's account for remittance – or not, as the case might be. Other communications between Mr Berger and Ms Alfaro also indicated that it was Mr Berger who decided on the commission payable to the 1st Defendant for remitting the funds. Thus, for example, in a text message to Ms Alfaro on 24 December 2019, Mr Berger stated emphatically:[142]

> You don't decide on phoenix [the 1st defendant] commission.
>
> I…Do.

214 That Mr Berger appeared to be the person deciding how much funds would be forwarded to the 1st Defendant for remittance and how much commission the latter would receive was further emphasized in an email he sent on 25 December 2019. In that email, in response to an earlier email from Ms Alfaro enclosing the "ConnectApp Ledger Report", Mr Berger stated:[143]

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141 5ABOD at p 486.

142 5ABOD at p 593.

143 3PBOD at p 436.

> …Daphne I will calculate the ledger of commissions. It will not be the previous preset and phoenix [the 1st Defendant] participation will be reduced.

215 For the reasons set out above, therefore, I rejected the Plaintiff's argument that the 1st Defendant had taken positive actions post 15 August 2019 which demonstrated that it considered itself bound by the Payment Processing Report.

216 I add that in any event, on the evidence before me, I was not persuaded that the Plaintiff could have been labouring under the misapprehension that the 1st Defendant was the contracting party under the Payment Processing Agreement. The documented communications between Mr Berger and the Plaintiff throughout the course of their dealings showed that the former consistently represented himself to the Plaintiff as being the person with oversight of the payment processing services provided to the latter and the ability to make various decisions in relation to the provision of those services. These documented communications also showed that Mr Berger did not at any point allude to the 1st Defendant. I set out below a number of examples.

217 On 16 August 2019, for example (a day after the Skype call between Mr Berger and the Plaintiff's representative Ms Meza), Mr Berger provided Ms Meza with the fees, terms and other parameters of the payment processing services which he was providing to BHHI.[144] Some three days later, on 19 August 2019, Mr Berger informed Ms Meza that he needed to know where the Plaintiff wanted to receive the settlement funds so that he could allocate the dedicated structure for the same. He also informed the Plaintiff of the parameters which

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144 Defendants' Closing Submissions at para 76; 3PBOD at p 207.

they were required to follow in relation the transactions sent for processing. On 21 August 2019, Mr Berger sent the Plaintiff the credentials it needed to set up its systems. As the Defendants pointed out, for two weeks from the date when the Payment Processing Agreement was allegedly concluded on 15 August 2019 till 29 August 2019, Mr Berger was the only person whom the Plaintiff dealt with; and even when he subsequently added Ms. Alfaro to the Skype Groupchat on 29 August 2019. He introduced her as someone who would "back me [*ie*, Mr Berger] up".[145]

218 The communications exchanged in the months following the alleged conclusion of the Payment Processing Agreement on 15 August 2019 also showed that Mr Berger continued to represent himself to the Plaintiff as the person primarily in charge of ensuring the provision of the payment processing services. Indeed, as the Defendants submitted, some of Mr Berger's statements to the Plaintiff appeared to suggest that he had access to the acquiring bank and was monitoring the status of the transactions being processed. Thus, for example, on 31 August 2019 Berger informed the Plaintiff via their Skype Groupchat that he saw "a transaction went to the bank … So the Integration it's working". On that same day, when transactions were rejected, Mr Berger instructed Ms. Alfaro to "check the configuration is correct also on the mid at the bank". He also informed the Plaintiff that he was "looking at the connection" – and later, that the errors were "Solved".

219 As another example, on 7 September 2019, Mr Berger informed Ms Meza that he had noticed a huge disproportion between the transactions processed and advised her that this needed tweaking so that the account looked "healthy" and "organic". He also informed Ms. Meza that the "mids will have

145 Meza AEIC at p 39.

capacity growth of 1MM from next week" and purported to share with her the approval rates of other merchants. On 16 September 2019, Mr Berger directed Ms Alfaro to increase the capacity of the MIDs provided to BHHI. He also undertook to explain to Ms Meza that the global registration rules of the Credit Card Networks prevented him from increasing the capacity of the MIDs beyond a certain threshold. Subsequently, on 12 October 2019, he warned Ms. Meza to "slow down" on the transactions being processed because the amount was nearing the limit which he had told her about previously. Then, on 7 December 2019, when the acquiring bank blocked the MIDs, it was also Mr Berger who informed Ms Meza that he was working to solve the issue, that he had "[b]een at it with the guys in MX", and that she would know more as soon as *he* knew more.

220 As noted earlier, therefore, based on the evidence of the communications between the Plaintiff and Mr Berger, I did not find it could be said that the Plaintiff was operating on the misapprehension that the Payment Processing Agreement had been validly concluded with the 1st Defendant instead of with Mr Berger.

221 For the reasons set out above, I similarly rejected the Plaintiff's case on estoppel.

The Plaintiff's case on disclosed but unnamed principal

222 In addition to its pleaded reliance on actual authority, apparent authority, and/or estoppel, the Plaintiff put forward two other agency-related arguments in its closing submissions: one in relation to disclosed but unnamed principals; the other in relation to undisclosed principals.

223 In respect of the former, the Plaintiff argued that "(a)though Mr Berger did not name [the 1st Defendant] as the payment services provider that he was acting on behalf of when negotiating the Payment Processing Agreement, this does not prevent [the 1st Defendant] from being bound by it", as "(a)n agent can bind a principal to a contract even if the principal is not named". In advancing this argument, the Plaintiff cited a trio of authorities, but failed to analyse any of these authorities or to explain how they supported its case. This was unfortunate, as an examination of the facts and the *ratio* in each of these cases would have revealed that they provided no support at all for the Plaintiff's case.

224 In *N & J Vlassopulos Ltd v Ney Shipping Ltd* [1977] 1 Lloyd's Rep 478 ("*N & J Vlassopulos Ltd*"), the plaintiffs and the defendants were members of the Baltic Exchange but elected as brokers or agents only. One of the plaintiffs' functions was to arrange for the supply of bunkers to vessels at ports throughout the world. The dispute between the parties arose from the plaintiffs having supplied bunkers to a vessel at the defendants' request. The plaintiffs had forwarded their invoices to the defendants for payment, and having received no payment, had brought an action against the defendants to recover the invoice amount. The defendants refuted the claim on the ground that the request had been made on behalf of their principals, who were the time charterers of the vessel; and that although the plaintiffs did not know whom the principals were, they did know the defendant had acted as agents. At first instance, the plaintiffs obtained judgment, but the defendants were successful in their appeal. In allowing the appeal, the English Court of Appeal held that from the evidence, it was clear that the plaintiffs knew the defendants were ordering the fuel simply as agents; and it was therefore for the plaintiffs to establish those facts from which the court could infer (on the balance of probabilities) that the defendants were liable notwithstanding the plaintiffs' knowledge that they were acting as

agents. This, clearly, the plaintiffs were unable to establish. As Roskill LJ pointed out (at p 483):

> (T)he background, which I regard as all-important, is that one has two Baltic brokers each contracting as agents for principals. Each knew that the other was acting as an agent. It is true that the plaintiffs did not know for whom the defendants were acting as agents, but the whole background is of a contract entered into between two agents for their respective principals…
>
> Against the background which I have outlined, what were the plaintiffs entitled to conclude as to the attitude of the defendants? Were they entitled to conclude in these circumstances that the defendants were making themselves personally liable as the learned Judge held? I venture to think that they were not.

225 In *Marsh & McLennan Pty Ltd v Stanyers Transport Pty Ltd* [1994] 2 VR 232 ("*Marsh & McLennan*"), the respondent was the insured under an insurance policy arranged through the appellant who was an insurer's agent. The respondent sued the appellant for return of the premium after cancelling the policy. The appellant was found in the lower courts to be liable to the respondent for damages, but succeeded on appeal before the Appeal Division of the Supreme Court of Victoria. Marks J, who delivered the judgment of the Full Court, pointed out that this was not a "true undisclosed principal situation" (at p 242). Referring to commentary by Professor Reynolds ("Practical Problems of the Undisclosed Principal Doctrine" (1983) *Current Legal Problems* 119), Marks J noted that this was a case, rather, "where the principal is not undisclosed but rather unnamed or identified *ie*, his existence and connection with the transaction must be deemed to have been in some measure contemplated from the outset by the third party, though his name was not known"; and – citing *N & J Vlassopulos Ltd* – that for such a situation, the "*prima facie* rule is that the contract is between the third party and the principal". On the facts of *Marsh & McLennan*, it was held that the respondent's insurance broker – and therefore the respondent –

knew that the appellant was acting as agent for an overseas insurer: *inter alia*, the respondent's insurance broker had possession of the specimen policy which said so, and the appellant's brochures which implied it. Thus, the only parties to any contract were the respondent as the insured and the insurer, notwithstanding that acceptance of the premium was by an authorised agent of the insurer: the evidence showed that the appellant was in fact authorised by the overseas insurer.

226 Neither *N & J Vlassopulos Ltd* nor *Marsh & McLennan* furnished any support for the Plaintiff's case on agency. In each of these cases, the court was satisfied on the evidence that the two sides to the disputed contract knew from the outset that the agent was entering into the contract on behalf of a principal, even if the identity of the principal was not disclosed. In the present case, there was no evidence whatsoever of such awareness or knowledge. The Plaintiff has not been able to point to any evidence showing that it was aware of the *existence* of a principal – albeit an unnamed principal – on whose behalf Mr Berger was entering into the Payment Processing Agreement.

227 As for *Lundie & anor v Rowena Nominees Pty Ltd* [2006] WASCA 106 ("*Lundie*"), the background to the dispute in that case was a prospective issued by a company known as "Karri Oak" which offered to potential investors ("growers") the opportunity to participate in the establishment of a vineyard. Growers were offered the option of financing their investment by way of a loan facility; and the loan agreement was one of the agreements required to establish the project. The summary of the loan agreement in the prospectus stated that the parties to each loan agreement were "the registered broker Rowena Nominees Pty Ltd" ("Rowena") as "agent for various of its clients ("The Lenders") who may vary with each Loan Agreement, the grower and any guarantor of the grower". The applicants had applied for four leased areas; and four loan

agreements were executed in respect of the applicants. Each was executed by Rowena as attorney for and on behalf of "the Lender", and also executed by Karri Oak as attorney for and on behalf of the applicants. Rowena subsequently commenced proceedings against the applicants claiming repayment of the loan funds. The applicants, who denied that they had entered into loan agreements with Rowena and did not admit any loan agreement between themselves and a Lender, applied for summary judgment on the basis (*inter alia)* that Rowena's action was frivolous and vexatious. At first instance, the application was dismissed, whereupon the applicants appealed. In considering if there was a triable issue whether or not Rowena was entitled to sue on the loan agreements, the appellate court found that the loan agreements should be construed upon the basis that Rowena had contracted as agent and not as principal. This was a fact-specific finding: the court pointed to certain clauses in the loan agreements which appeared to show that Rowena was intended to be an agent. Notwithstanding this finding, the court noted that there appeared to be some authority for the proposition that where a person which entered into a contract professedly as an agent was in fact in the real principal, he could (perhaps) sue and be sued on the contract in certain circumstances. This proposition was irrelevant to the Plaintiff's case since the Plaintiff were not claiming that Mr Berger should be found personally liable on the Payment Processing Agreement.

228 In sum, therefore, the Plaintiff's submissions about the position of *unnamed* principals and its reliance on the above trio of cases did nothing to advance its case.

The Plaintiff's case on undisclosed principal: Applying the law to the facts

229 Finally, in relation to its case on agency, the Plaintiff submitted that even if the 1st Defendant were an "undisclosed principal (as opposed to a merely

unnamed one)", it "would still not preclude [the Plaintiff's claim against [the 1st Defendant" because "the law is clear that where an agent enters into a contract with a third party, intending to do so on behalf of the agent's principal, the principal may sue and be sued on the contract even though his existence was unknown to the third party".[146] Again, regrettably, although the Plaintiff cited a trio of authorities, no attempt was made to explain how they were of assistance to its case; and yet again, an examination of these authorities showed that they were of no assistance to the Plaintiff at all.

230 In *Siu Yin Kwan & anor v Eastern Insurance Co Ltd* [1994] 1 All ER 213 ("*Siu Yin Kwan*"), A Ltd was the owner of a vessel insured by the defendants. A Ltd had appointed R Ltd as its general agents worldwide and to effect the insurance for the vessel. The disputed contract was a contract for indemnity insurance which named R Ltd as the proposer and made no mention of the fact that A Ltd was the owners of the vessel and the employer of the crew on board. However, the defendants were aware from previous dealings that R Ltd were shipping agents and were not the owner of the vessel. When A Ltd later went into liquidation, the plaintiffs – who were the family members of two deceased crewmen – claimed that A Ltd's right as the employer to be indemnified by the defendant insurers under the policy had been transferred to and vested in the estates of the two deceased crewmen. The defendants argued that the policy did not effect a valid contract of indemnity against the employer's liability to the crew because the insured R Ltd was not the employer, and the employer A Ltd was not the insured. This argument was rejected by the Privy Council. Lord Lloyd, who delivered the judgment of the Privy Council, cited the following extract from the judgment of Diplock LJ (as he then was) in *Teheran Europe Co*

146 Plaintiff's Closing Submissions at para 288.

Ltd v ST Belton (Tractors) Ltd [1968] 2 All ER 886 at 890 ("*Teheran Europe*", at p 221):

> Where an agent has…actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all. If the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract. In the case of an ordinary commercial contract such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness or there are other circumstances which should lead the agent to realise that the other party was not so willing.

231 In *Siu Yin Kwan*, the contract in question being one for indemnity insurance, it was held to be "an ordinary commercial contract": A Ltd were entitled to sue as undisclosed principal unless R Ltd should have realised that the defendants were unwilling to contract with anyone other than themselves. In this connection, the Privy Council agreed (at p 223) with the finding of the court below that the actual identity of the employer was a matter of indifference to the defendant: it was not material to the risk; and the defendant would have been content to insure the employer of the crew, whoever it was, provided that it was satisfied with the answers given in the proposal form.

232 *Siu Yin Kwan* was applied by our CA in *Hongkong & Shanghai Banking Corp v San's Rent-A-Car Pte Ltd (t//a San's Tours & Car Rentals)* [1994] 3 SLR(R) 26 ("*HSBC*"). In that case, the appellant HSBC had granted credit facilities to a company which, as security, executed a debenture in favour of HSBC and assigned its interest in a leasehold property to HSBC. After the company defaulted, HSBC appointed receivers and managers under the debenture. The receivers negotiated with the respondent's representatives for the

purchase by the latter of HSBC's interest in the property. This led to the respondent signing a letter of offer agreeing to purchase the property and the receivers purporting to accept the offer. The respondent then refused to proceed with the sale, whereupon HSBC sued for wrongful recission and the respondent counterclaimed for recission. The trial judge rejected the respondent's defence that HSBC was not the party with whom the sale contract was made and/or that HSBC had no power to sell the property – but eventually found in favour of the respondent on the basis that there had been no consensus *ad idem* between the parties since the respondent's offer had been for purchase of legal title whereas the purported acceptance had related only to equitable title. HSBC's appeal was dismissed, as was the respondent's notice against the trial judge's rejection of the above defence. On the respondent's notice, the CA – citing *Siu Yin Kwan* and in particular the above passage from *Teheran Europe* – agreed with the trial judge that if a contract had arisen from the respondent's letter of offer and the purported acceptance, it would have been one between HSBC as vendor and the respondent as purchaser. This was because the letter of offer had stated that the vendor was selling as "first equitable mortgagee" – a description which could not have referred to the company. In any case, the receivers themselves confirmed they were acting for HSBC. In the circumstances, HSBC "as undisclosed principal were entitled to enter into the contract (if there was one)": the contract was "evidently not one where the identity of the parties was so material that [the respondent] would not have entered into if they had realised who the actual principal was " (*HSBC* at [23] – [24]).

233 Applying *Siu Yin Kwan* to the present case, the Plaintiff could not even cross the first hurdle: there was no evidence at all to show that Mr Berger had actual authority to contract on the 1st Defendant's behalf, and that he had entered in the alleged Payment Processing Agreement intending to contract on the 1st Defendant's behalf.

234 I add that insofar as the point on undisclosed principals was concerned, *Seah Boon Lock and anor v Family Food Court* [2007] 3 SLR(R) 362 appeared to be primarily concerned with the question of whether an agent for an undisclosed principal should be able to bring a suit in his capacity as agent without disclosing the identity of his principal. Nothing in the judgment appeared to me to assist the Plaintiff's case; and in any event, the Plaintiff failed to explain the relevance of this authority despite having cited it in closing submissions.

The Plaintiff's case on subsequent conduct: Whether Ms Alfaro dealt with the Plaintiff in the capacity of an employee or authorised representative of the 1st Defendant

235 To recapitulate: the Plaintiff's pleaded case was that on 15 August 2019, Mr Berger had concluded the Payment Processing Agreement with the Plaintiff on the 1st Defendant's behalf, as Mr Berger had "either actual or ostensible authority to act as [the 1st Defendant's] representative to offer or agree to provide payment processing services to the [Plaintiff]".[147] I found that the Plaintiff could not muster the evidence to prove what they had pleaded. The Plaintiff argued that I should nevertheless accept that there must have been a contract between the Plaintiff and the 1st Defendant for the 1st Defendant to provide payment processing services to the Plaintiff because Ms Alfaro was "involved in the performance" of such a contract as the 1st Defendant's alleged "employee, administrator and/or authorised representative".[148] It was submitted that in assisting the Plaintiff with payment processing matters post 15 August 2019, Ms

147 Reply (Amendment No 4) at para 5.

148 Reply (Amendment No 4) at para 5.3.

Alfaro did so in the capacity of an employee or authorised representative of the 1st Defendant.

236 I make four points about this submission. First, it was not clear what exactly the terms "administrator" and "authorised representative" meant – or whether they meant something different from "employee". From the Plaintiff's closing submissions, it appeared that these two terms were used interchangeably with the term "employee". It also appeared to be the Plaintiff's position that Ms Alfaro had in fact been employed by the 1st Defendant at the time she assisted the Plaintiff with their payment processing concerns.

237 Second, on the Plaintiff's own case, Ms Alfaro was introduced to its representatives by Mr Berger on 29 August 2019, *ie*, two weeks *after* Mr Berger had already negotiated and entered into the Payment Processing Agreement with the Plaintiff's representative. Insofar as proving the 1st Defendant's alleged breach of the Payment Processing Agreement was concerned, therefore, the argument about Ms Alfaro's "involvement" in the "performance" of the contract made sense only in the context of a case theory which posited Mr Berger's role as an agent of the 1st Defendant. According to this case theory, assuming Ms Alfaro was indeed the 1st Defendant's employee, her conduct in assisting with payment processing matters would constitute evidence of the 1st Defendant acting in conformity with the Payment Processing Agreement and provide support for the Plaintiff's estoppel-based arguments.

238 Third, on the evidence of the Plaintiff's own representative Ms Meza, when Mr Berger introduced Ms Alfaro to Ms Meza on 29 August 2019, he did so on the basis that Ms Alfaro was (in his own words) someone who would "*back*

me *up she is in that side of the pawn* [sic] *to finalise your launch*"[149] (emphasis in bold added). There was also, conspicuously, no mention of the 1st Defendant in this communication. In other words, Mr Berger expressly introduced Ms Alfaro to the Plaintiff as someone who would support *him* – not as an "employee, administrator and/or authorised representative" of the 1st Defendant.

239 Fourth, as I noted earlier, based on recent caselaw, there is no objection in principle to the court taking subsequent conduct into account when considering the question of the proper parties to a contract. In considering such evidence, it should be remembered that this was a case where even the Plaintiff was obliged to concede that there was no evidence of any express statements by its representatives and the 1st Defendant's that the latter was the contracting party to the Payment Processing Agreement. This being the case, the appropriate approach – as Coppel QC pointed out in *Lumley* (at [22]) – was to "construe or infer objectively what reasonable parties would have assumed would be the position based on what was said or done". Viewed objectively, the evidence of subsequent conduct relied on by the Plaintiff was either inconclusive or at best neutral: contrary to the Plaintiff's contention, it was far from clear from the evidence that Ms Alfaro had acted in the capacity of an employee or authorised representative of the 1st Defendant.

240 In the first place, while Ms Alfaro had an email address with the domain "phoenixam.net" – this did not necessarily mean that she was an employee, administrator or authorised representative of the 1st Defendant. To illustrate the point, the Plaintiff's own witness, Mr Wahlström, admitted in cross-examination that while he had an email address with the domain "@seftops.net", he was not

[149] Meza AEIC at p 39; 2 BAEIC at p 41.

an employee of Seftops[150]. In Ms Alfaro's case, the 2nd Defendant explained that the email domain "phoenixam.net" was issued to persons who carried out work for the 1st Defendant and worked on other projects: it was simply a means of consolidating communication, given that some of the independent contractors had their own companies.[151]

241 Next, the fact that Ms Alfaro had sent updates to the 2nd Defendant did not necessarily support the finding that she was employed by the 1st Defendant. The 2nd Defendant's evidence was that Ms Alfaro had sent those updates "based on services that she was doing, to manage as administrator for the different software platforms".[152] This appeared to me to be at the very least, a plausible explanation.

242 I note that in cross-examining the 2nd Defendant, counsel for the Plaintiff had pointed to an email sent by Ms Alfaro dated 25 September 2019 in which she had written "*Dan: BOL they want our corp docs as MCDP but we are going to give them kings road instead Also, they are pushing Dan to signed an agreement that isn't a benefit for us. This merchant is super high maintenance*".[153] It was put to the 2nd Defendant that the word "we" referred to the 1st Defendant. To this, the 1st Defendant had the following response:[154]

> A: No, because she is -- Ms Alfaro is not going to speak for me or MCDP. She isn't going to be informing me what my actions are going to be, she is informing what her and Daniel Berger were doing. That's how I took that.

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150 Transcript dated 19 April 2022, p 147 ln 23 – p 148 ln 1.

151 Transcript dated 25 April 2022, p 18, ln 2 to 6.

152 Transcript dated 25 April 2022 , p 21, ln 6 to 8.

153 1 PBOD at p 177.

154 Transcript dated 25 April 2022 p 26 ln 5 – 11.

> Otherwise she wouldn't be instructing me what MCDP is doing. That doesn't make sense to me.
>
> Q: Why do you say she was instructing you?
>
> A: No I'm saying she wouldn't. That wouldn't make sense for Ms Alfaro to instruct me what MCDP was going to do because that would be my decision what MCDP would do. So that's why I don't understand it the way you have explained it.
>
> [emphasis added]

243 In my view, it was at the very least unclear that in using the word "we", Ms Alfaro was referring to the 1st Defendant and/or that she was doing so from the perspective of an employee or authorised representative of the 1st Defendant. The 2nd Defendant's explanation – that it made no sense for Ms Alfaro to send him an email purportedly *telling* him what "MCDP" (the 1st Defendant) would be doing when he was the one who would make such decisions on MCDP's behalf – also appeared to me to be logical and tenable.

244 Fifth, while I have said that less weight should be given to evidence in Ms Alfaro's AEIC and her US deposition, it is useful to note that nothing emerged in either piece of evidence to support an inference that Ms Alfaro was an employee or authorised representative of the 1st Defendant *at the time she assisted the Plaintiff with payment processing matters*. In fact, Ms Alfaro's evidence in the AEIC she filed in this suit was that she had no formal employment relationship with the 1st Defendant. This was clarified in her US deposition, wherein she stated that she had been employed by the 1st Defendant for about a year between October 2017 and October 2018, and that thereafter she had worked for the 1st Defendant as an independent contractor.[155]

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155 Defendants' Closing Submissions at para 57.

245 The final point I make about the Plaintiff's reliance on the evidence of Ms Alfaro's conduct is one which I alluded to earlier (at [240] above). Even assuming for the sake of argument that Ms Alfaro *was* employed by the 1st Defendant at the time she was assisting the Plaintiff, the 1st Defendant's provision of payment processing services – and the fact that the provision of these services was in line with what the alleged Payment Processing Agreement stipulated – were equally consistent with the 1st Defendant's case that it provided the services to Mr Berger, who needed to satisfy the contractual obligations he had undertaken to clients such as the Plaintiff, and who in turn provided for the 1st Defendant to get a cut of the rates he charged these clients.

Summary of my decision on the Plaintiff's contractual claim

246 To sum up, then: insofar as the Plaintiff's contractual claim was concerned, applying an objective test to the evidence available, I found that the Plaintiff was unable to prove it had entered into the Payment Processing Agreement with the 1st Defendant as the other contracting party. To borrow the words of Coppel QC in *Lumley*, it might be said that if Mr Berger had taken reasonable steps to document and formalise the contract with the Plaintiff, it would have been made clear that the Payment Processing Agreement was with some corporate entity – and not himself. But he did not take any such steps. More importantly, even if he had done so, the evidence presented of the draft agreement indicated that had the contract been formalised, it would have been between the Plaintiff and *Kings Road Capital*.

247 I add that the manner in which Mr Berger operated in this case appeared to me to be similar to what was described as the "*modus operandi*" of the 2nd defendant Mr Foster in *Lumley*: as with Mr Foster in *Lumley*, Mr Berger was content, for reasons best known to himself, to leave opaque the network of

entities which actually did the work he brought in. Taken together, the evidence pointed towards the conclusion that it was Mr Berger, and not the 1st Defendant, who was the other contracting party to the Payment Processing Agreement. It was Mr Berger who appeared to be calling the shots at all material times. On the totality of the evidence, it would appear that Mr Berger had an agreement with the Plaintiff for the provision of payment processing services (the Payment Services Agreement); and Mr Berger then brought in the 1st Defendant as part of the network of entities which actually did the work he contracted to do.

248 As the Plaintiff was unable to prove the existence of a contractual relationship with the 1st Defendant, let alone the latter's breach of duties imposed by any such contractual relationship, the issue of whether the 2nd Defendant had knowingly induced or procured a breach of contract by the 1st Defendant did not arise.

Whether the 1st Defendant was in breach of its contractual and fiduciary duties to the Plaintiff and whether the 2nd Defendant had knowingly induced or procured the 1st Defendant's breach of contract

The Plaintiff's case on breach of fiduciary duties

249 I address next the Plaintiff's further and/or alternative claim that the 1st Defendant owed it fiduciary duties; that the 1st Defendant had breached its fiduciary duties by failing to account for the sum of US$2,680,535.21 (referred to in this context as "the Trust Monies") and/or to pay this sum to the Plaintiff; and that the 2nd Defendant had "knowingly assisted [the 1st Defendant]'s breach of its fiduciary duties".[156]

156 Statement of Claim (Amendment No 1) at para 23.

The law on fiduciary duties

250 The principles applicable in determining whether a party owes fiduciary duties to another have been articulated on several occasions by the CA: see *eg*, *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 ("*Turf Club Auto*", at [42] – [45]) and *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*", at [192] – [210]). Most recently, in *How Weng Fan v Sengkang Town Council* [2022] SGCA 72 ("*How Weng Fan*"), the CA summarised the principles as follows:

> 170 …The classic exposition of what a fiduciary is can be found in the judgment of Millett LJ (as he then was) in *Bristol and West Building Society v Mothew* [1998] Ch 1 ("*Mothew*") (at 18):
>
> > A fiduciary is someone who has **undertaken to act** for or on behalf of another in a **particular matter** in **circumstances which give rise to a relationship of trust and confidence**. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his *principal*. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p.2, *he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary*.
> >
> > [emphasis added in italics and bold italics]
>
> 171 There are a few important principles to be extracted from Millett LJ's classic judgment. First, as explained by Paul Finn in *Fiduciary Obligations* (The Law Book Company, 1977) and cited by Millett LJ in *Mothew*, a person is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary. In essence, "the label 'fiduciary' is

a conclusion which is reached only once it is determined that particular duties are owed" (see *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*") at [193], citing James Edelman, "*When do Fiduciary Duties Arise*?" (2010) 126 LQR 302 at 316) [emphasis added]. This was also the position taken by this court in *Tan Yok Koon* (at [205]), where we observed that the reason why express trustees owe fiduciary duties is not that the fiduciary duties arise from the trustee-beneficiary relationship per se. Instead, the fiduciary duties arise "from the voluntary undertaking to the settlor to manage the trust property not for the trustee's own benefit but for the benefit of the beneficiaries" [emphasis added].

172 Second, fiduciary duties are onerous, and the core duty of a fiduciary is to act with undivided loyalty to the principal or beneficiary (see our decision in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Ho Yew Kong*") at [135]). To put it another way, "the hallmark of a fiduciary obligation is that the fiduciary is to act in the interests of person" (*Tan Yok Koon* at [192]). The other facets of fiduciary duties listed by Millett LJ in *Mothew* flow from this fundamental duty of loyalty. These facets of fiduciary duties have now come to be known as the "no-profit rule", which proscribes the fiduciary from making a profit out of his fiduciary position, and the "no-conflict rule", which includes two different aspects that proscribes two different types of conflicts. The first proscribes the fiduciary from putting himself in a position where his own interests and his duty to his principal are in conflict (see, for instance, *Ho Yew Kong* at [135]; *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957 ("*Nordic International*") at [53]). The second prohibits the fiduciary from acting in a situation where there is a conflict between his duties owed to more than one principal.

173 Third, fiduciary duties are "voluntarily undertaken". This means that (*Tan Yok Koon* at [194]):

> … the fiduciary undertaking is voluntary in the sense that it arises as a consequence of the fiduciary's conduct, and is not imposed by law independently of the fiduciary's intentions. This is not to state that the fiduciary must be subjectively willing to undertake those obligations; the undertaking arises where the fiduciary voluntarily places himself in a position where the law can objectively impute an intention on his or her part to undertake those obligations.
>
> [emphasis in original in italics and bold italics]

174 Therefore, fiduciary duties should only be imposed if the characteristic expectation of undivided loyalty has been either

> explicitly or implicitly voluntarily undertaken by the fiduciary, and courts have to scrutinise the specific facts and context of each case to ascertain whether or not a fiduciary duty ought to be imposed on the trustee concerned (see *Tan Yok Koon* at [210]). This is well-established even in the commercial context. Thus, for instance, employees are not automatically fiduciaries to their employer, as care must be taken not to "equate the duty of good faith and loyalty owed by every employee with a fiduciary obligation" (*Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2007] 3 SLR(R) 265 at [28]).
>
> 175 There are certain established classes of relationships where there is a strong but rebuttable presumption that fiduciary duties are owed. These include the relationship of a trustee-beneficiary, director-company, solicitor-client, and between partners (see *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 ("*Turf Club*") at [43]). It is clear that the categories of fiduciary relationships are not closed, and fiduciary duties may be owed even if the relationship between the parties does not fall within one of the established categories, provided that the circumstances justify the imposition of such duties (see Turf Club at [43]). The critical point to note here is that all these established classes of fiduciaries share the commonality that the fiduciary has "undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence" (see *Turf Club* at [42]).

251 The inquiry into whether fiduciary duties have been undertaken is objective in nature (*Tan Yok Koon* at [199]). *Turf Club Auto* provides a helpful illustration of how the court undertakes such an inquiry. In *Turf Club Auto*, the Respondents had entered into a joint venture with another group ("the SAA Group") to develop a site in Bukit Timah. While the site was being developed, the two groups fell into dispute, and litigation ensued. A Consent Order was entered into between the parties, but further disputes erupted when the Respondents alleged that the SAA Group had breached the Consent Order. One of the contested issues which the CA had to consider was whether the SAA Group owed the Respondents fiduciary duties, and if so, whether the former had breached these fiduciary duties through its conduct in respect of the Consent Order. The CA noted (at [42]) that while there was no universal definition for

the term "fiduciary", there appeared to be "to be growing judicial support for the view that a fiduciary is "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence". On an examination of the evidence available, the CA held that the SAA Group did not owe the Respondents fiduciary duties. The court explained its reasoning as follows (at [43] – [45]):

> 43 While there are settled categories of fiduciary relationships – such as the relationship of a trustee-beneficiary, director-company, solicitor-client, between partners – it does not mean that all such relationships are invariably fiduciary relationships. In these relationships, there is a strong, but rebuttable, presumption that fiduciary duties are owed. Equally, the categories of fiduciary relationships are not closed or limited only to the settled categories. Fiduciary duties may be owed even if the relationship between the parties is not one of the settled categories, provided that the circumstances justify the imposition of such duties (see *Snell's Equity* at paras 7-004–7-005). For instance, parties in a joint venture may or may not share a fiduciary relationship, depending on the circumstances of their relationship (see John Glower, *Commercial Equity – Fiduciary Relationships* (Butterworths, 1995) at paras 3.90–3.96 and Snell's Equity at para 7-006). Therefore, contrary to the approaches adopted by the parties (in particular the Respondents), whether the parties are in a fiduciary relationship depends, ultimately, on the nature of their relationship and is not simply a question of whether their relationship can be shoe-horned into one of the settled categories (eg, a partnership) or into a non-settled category (eg, a joint venture or quasi-partnership).
>
> 44 Even leaving aside the issue that this is a departure from their pleaded case, the Respondents' submission that the SAA Group owed them fiduciary duties as parties in a joint venture which was a quasi-partnership has its problems. As pointed out by the Appellants, the parties' relationship was that of shareholders in joint venture companies. These were two groups of parties, who were at best acquaintances, who met each other by chance at the SLA's office and eventually entered into the joint venture to profit from the leasing of the site to subtenants through the JV Companies. Their relationship has always been formal and commercial, as evidenced by the entry into the MOU governing the joint venture and the eventual incorporation of the two JV Companies with a clear proportioning of shareholding

> between the parties. This was also not a case where the parties had run the two JV Companies as partners.
>
> 45 In short, the parties were not in a relationship of mutual trust and confidence that would give rise to a legitimate expectation on the Respondents' part that the SAA Group would not utilise their position to act in a way adverse to the Respondents' interests. It would also be inaccurate to say that the SAA Group had, by entering into the joint venture, assumed any responsibility in respect of the conduct of the Respondents' affairs (though there may arguably be such a responsibility vis-à-vis the JV Companies in so far as the member of the SAA Group is a director of the company). Courts will, and should, be slow in imposing fiduciary obligations on parties to a purely commercial relationship because it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party. Both the SAA Group and the Respondents were commercial parties capable of advancing and protecting their own interests. Further, even if the Respondents had indeed been victim of the SAA Group's poor or unfair management of the JV Companies, the correct forum is to bring a minority oppression suit, as they had sought to do in the Consolidated Suits, or through a derivative action as shareholders.

Applying the law to the facts

252 In the present case, the Plaintiff pointed to the following matters which, according to them, demonstrated that the 1st Defendant owed it fiduciary duties:[157]

(a) The 1st Defendant was the Plaintiff's payment processing agent;

(b) The 1st Defendant had oversight of, received, processed, and had custody over the Plaintiff's funds, and therefore had power and control over these funds;

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157 Plaintiff's Closing submissions at para 303.

(c) The 1st Defendant knew and/or ought to have known that the funds it received were meant to be allocated to and belonged beneficially to the Plaintiff. In particular, the settlement reports created by the 1st Defendant indicated that the payments processed under the Peak-Pay, House and House International 2 MIDs were meant for the Plaintiff;

(d) The Plaintiff had no oversight or control over its funds which were processed by the 1st Defendant through Feenicia and ConnectApp, and was therefore reliant on the 1st Defendant to properly account for such funds and to ensure that they were paid to the Plaintiff in full, subject only to the deduction of the agreed fees; and

(e) The 1st Defendant collected fees in relation to the payment processing services it was providing to the Plaintiff.

253 Following the approach articulated by the CA in *Turf Club Auto*, *Tan Yok Koon* and *How Weng Fun*, I found that it was simply not possible to infer from the above evidence that the 1st Defendant had "undertaken to act for or on behalf of" the Plaintiff in the processing of its funds "in circumstances which [gave] rise to a relationship of trust and confidence". In the first place, as seen from [246]–[247] above, the Plaintiff was unable to establish that the 1st Defendant was *its* payment processing agent: there was no evidence that the 1st Defendant was the contracting party to the Payment Processing Agreement.

254 Further, even assuming for the sake of argument it could be shown that the Plaintiff had contracted with the 1st Defendant for the provision of payment processing services, there was nothing in the evidence to suggest that such a relationship should have been anything more than a contract for the provision of services by one corporate entity to another – *ie*, a purely commercial relationship. Viewed objectively, the factors enumerated above by the Plaintiff

– *eg*, that the 1st Defendant collected fees for its payment processing services, that the 1st Defendant received and had oversight of funds sent for processing, *etc* – were simply indicative of a contract for the provision of services by one company to another: on the basis of these factors, it was not possible to impute to the 1st Defendant an intention to undertake the onerous obligations of a fiduciary. To use the language employed by the CA in *Turf Club Auto*, there was no evidence to show that the Plaintiff and the 1st Defendant were in a relationship of mutual trust and confidence that would give rise to a legitimate expectation on the Plaintiff's part that the 1st Defendant would not utilise its position to act in a way adverse to the Plaintiff's interests. Both were commercial parties capable of advancing and protecting their own interests. As the CA noted in *Turf Club Auto*, it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party.

255 The Plaintiff cited to me the case of *Apax Global Payment & Technologies Limited & Another v Morina & Others* [2011] EWHC 2983 (Ch) ("*Apax*") which they said was on all fours with the present case.[158] The first claimant in that case was Apax Global Payment and Technologies Limited ("Apax UK"), which was in liquidation at the time of the proceedings, but which had previously been part of a group of companies owned or controlled to a large extent by some of the defendants. The second claimant was Anfield Group Limited ("Anfield"). The claimants' case was that Apax UK had been contractually engaged by Anfield to act as their payment processing agent for the online betting business conducted by the Sportingbet group through Anfield in Turkey. The deal went south, and litigation ensued. The claimants alleged that the defendants had, pursuant to a collective conspiracy, misappropriated sums totalling about $7m received by Apax UK leaving them unable to account to

158 Plaintiff's Closing submissions at para 304.

Anfield for those sums. One of the questions which the court had to decide was whether the funds were received and held by Apax UK or any agent for it on trust for Anfield. Justice David held that they were.

256 However, Justice David's decision in *Apax* provided no support for the Plaintiff's case on fiduciary duties in the present case. It was not disputed in *Apax* that Apax UK and Anfield had contracted directly with each other – unlike in the present case. What Justice David did was to analyse various clauses in the agreements: as he explained, the important parts of the agreements for the purposes of the dispute before him were those terms which governed the receipt and holding of funds by Apax UK; it was those terms which would determine whether the funds were received and held by Apax UK or any agent for it on trust for Anfield or whether they created only a relationship of creditor and debtor. On an examination of the relevant contractual clauses, he was satisfied that they created the former type of relationship between the two entities. He pointed out, for example, that there were clauses which expressly provided for the segregation of Anfield's funds, and held that this contractual requirement for the segregation of funds was "the clearest evidence that the parties agreed that funds received by or to the order of Apax UK should be held on trust for Anfield". In short, therefore, the decision in *Apax* was based on the specific facts of that case – which were very far from the facts of the present case. In the present case, as highlighted earlier, the Plaintiff was unable to prove that it had contracted with the 1st Defendant for the provision of payment processing services; and there was no evidence of any agreement or arrangement whereby the funds allegedly due to the Plaintiff were to be specifically earmarked as such and segregated.

257 Having failed to make out its case on breach of fiduciary duties by the 1st Defendant, it followed that the Plaintiff was also unable to establish that the 2nd

Defendant had knowingly assisted the 1st Defendant in its breach of fiduciary duties.

The Plaintiff's pleaded allegations as to the 2nd Defendant's use of the 1st Defendant "as a vehicle to defraud"

258 It should be noted that vis-à-vis the 2nd Defendant, in addition to their claims against the 2nd Defendant for knowingly inducing or procuring the 1st Defendant's breach of contract and/or knowingly assisting the 1st Defendant's breach of fiduciary duties, the Plaintiff also pleaded that he was the "sole owner" of the 1st Defendant as well as being "one of its directors, its Chief Executive Officer, and its Managing Director"; and that he had "utilised the 1st Defendant as a vehicle to defraud and dishonestly misappropriate and/or divert away monies belonging to the Plaintiff".[159]

259 It was not clear from the above statements what exactly the Plaintiff were alleging as against the 2nd Defendant and what they were seeking to achieve in terms of advancing their case against either Defendant – or both. The language employed by the Plaintiff seemed to echo in some respects the language employed by the plaintiff in the case of *Mohamed Shiyam v Tuff Offshore Engineering Services Pte Ltd* [2021] 5 SLR 188 ("*Mohamed Shiyam*", at [77]–[80]). In that case, the plaintiff alleged (*inter alia*) that the defendant company had been used by individuals who were at various times directors and shareholders of the defendant, for the improper purpose of defrauding creditors – the fraud being that the proposed defendants interposed the defendant to incur liabilities yet with the intention that it would not be able to repay creditors, and instead the funds would be diverted to themselves. It should be pointed out, however, that in *Mohamed Shiyam*, this allegation was made in the context of an

159 Statement of Claim (Amendment No. 1) at paras 19 and 21.

application by the plaintiff to amend his statement of claim: the plaintiff wanted the defendant company's corporate veil to be pierced, so that the proposed defendants could be made jointly and severally liable with it for the plaintiff's claims. This did not appear to be the Plaintiff's objective in pleading the matters stated in [19] and [21] of its amended statement of claim. Regrettably, the Plaintiff's closing submissions shed no further light on this issue: not only did the Plaintiff fail to develop the argument in its submissions, it also failed in any event to identify the evidence which would support its allegation about the 2nd Defendant utilising the 1st Defendant as a vehicle for fraud.

260 For the reasons set out above, I did not find that the matters pleaded in [19] and [21] of the amended statement of claim added anything to the Plaintiff's case.

261 In the interests of completeness, I add that although the Plaintiff pleaded in its amended statement of claim that the 2nd Defendant "was the alter ego of the 1st Defendant", it did not elaborate in its closing submissions on how this allegation was made out. In particular, the Plaintiff failed to point to any evidence which showed that the 2nd Defendant was either carrying on the business of the 1st Defendant or that he made no distinction between himself and the 1st Defendant (*Mohamed Shiyam* at [76]; *Sun Electric Pte Ltd v Menvra Solutions Pte Ltd* [2018] SGHC 264 at [141]–[147], affirmed on appeal in *Sun Electric Pte Ltd and another v Menrva Solutions Pte Ltd and another* [2019] SGCA 51 at [9]).

The Plaintiff's other alternative claims

The Plaintiff's case on constructive trust

262 I next address the Plaintiff's other submissions, beginning with its alternative claim of a constructive trust. The Plaintiff claimed that the 1st Defendant had received the payments processed through the PeakPay MID, House MID and IPTV MID "with full knowledge that such payments were meant to be allocated to and/or belong beneficially to [the Plaintiff] (subject to the deduction of processing fees and charges), and that the Defendants having failed to account for or pay over these funds (collectively termed "the Trust Monies" in the amended statement of claim), the Plaintiff is entitled to a declaration that the Defendants held and continue to hold all such payments "on constructive trust" for the Plaintiff.

263 The Plaintiff advanced two arguments as to why a constructive trust should be imposed. First, it was argued that the Defendants had misappropriated and/or diverted funds which they knew rightfully belonged to the Plaintiff. Second, it was argued that in (allegedly) misapplying the funds, the 1st Defendant had breached fiduciary duties which it owed to the Plaintiff.

264 In respect of the second argument, while a constructive trust may be imposed over assets where there is a breach of fiduciary duties (see Alvin See, Yip Man and Goh Yihan, *Property and Trust Law in Singapore* (Wolters Kluwer, 2019) ("*Property and Trust Law in Singapore*") at p 400), I have found in this case (at [250] – [257]) that the Plaintiff was unable to prove the 1st Defendant owed it fiduciary duties. The Plaintiff's claim of a constructive trust on this basis must therefore fail.

The Plaintiff's submissions for a constructive trust on the basis that the Defendants had misappropriated and/or diverted funds

(1) The law

265 In respect of the first argument, the Plaintiff cited the CA's decision in *Yuanta Asset Management International Ltd and another v Telemedia Pacific Group Ltd and another and another appeal* [2018] 2 SLR 21 ("*Yuanta*"). In *Yuanta*, a company "TPG" and its director, Mr Hartanto, were the plaintiffs, while another company "Yuanta" and its sole director, Mr Yeh Mao-Yuan, were the defendants. TPG and Yuanta entered into a joint venture. "AEM" was incorporated as the joint venture company. The joint venture was structured to leverage on the plaintiffs' stock of shares in "NexGen" on the one hand, and the defendants' credit rating and reputation on the other hand, to obtain loan facilities for AEM. TPG agreed to transfer its NexGen shares to Yuanta as collateral for loans, and did in fact proceed to transferred 825 million NexGen shares to a designated account in Yuanta's name ("Yuanta Account"). Without the plaintiffs' knowledge, Mr Yeh procured the transfer of an additional 225 million NexGen shares ("October 225 million shares") from TPG's account to an account of Yuanta's subsidiary, "Fullerton". The October 225 million shares were sold by Fullerton ("225 million Sale"), with the sale proceeds being paid into Fullerton's account and thereafter transferred mostly to Mr Yeh and partially to one of his business associates. In the suit below, the plaintiffs sued the defendants for selling the NexGen shares without authority and secretly profiting from the sales. On appeal, the CA held (*inter alia*) that Mr Yeh had dishonestly misappropriated TPG's property when he transferred the October 225 million shares from TPG to Fullerton and retained the proceeds of their sale. The agreements between the joint venture parties did not authorise the transfer of shares into Fullerton's account or grant Fullerton authority to sell the shares. Since it would be unconscionable for Mr Yeh, having dishonestly taken and sold

the property and pocketed its proceeds of sale, to assert any beneficial interest in the shares or their proceeds of sale, a constructive trust arose by operation of law. In so holding, the CA referred to the following authorities:

> 113 …Lord Browne-Wilkinson observed in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716C:
>
> > I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity.
>
> On the authority of this case and several Australian cases, *Snell's Equity* (John McGhee QC ed) (Sweet & Maxwell, 33rd Ed, 2015) ("Snell's Equity") comments at para 26–012:
>
> > (b) Fraudulent taking. A distinction must be drawn between fraud consisting in the outright taking of a person's property, wholly without his consent, and a transaction induced by a fraudulent misrepresentation. In the first case, it has been said that a thief who steals the property of another holds it on constructive trust for the claimant. The thief's possessory title is subject to the claimant's equitable entitlement to have the property specifically restored to him so that he holds it as a constructive trustee. …
>
> 116 Thus we find that from the time of the dishonest taking of TPG's property, Mr Yeh (by his personal involvement from that time in transferring the shares to Fullerton, as well as through Fullerton's initial receipt and then through his own receipt of the sale proceeds) misapplied and/or held TPG's property on constructive trust for TPG. Mr Yeh is liable to account to TPG for its property. In lieu of restoring the shares in specie, Mr Yeh is to pay TPG substitutive equitable compensation quantified according to the value of the shares at the time they were removed from the TPG Account.
>
> [emphasis added]

266 In *Yuanta*, it was clear from the evidence that Mr Yeh had dishonestly misappropriated TPG's shares by transferring the shares to the Fullerton

Account, selling them and retaining the sale proceeds for his own benefit. In the present case, in contrast, the Plaintiff was unable to point to evidence capable of proving on a balance of probabilities that the Defendants had taken for themselves monies which were specifically owed and due to the Plaintiff.

(2) The evidence

267 In this respect, the Plaintiff's various arguments really boiled down to one key point – that the evidence showed a shortfall in the settlement proceeds which the Defendants could not account for. First, according to the Plaintiff, there was an aggregate sum of US$4,846,462.13 which represented the processing of transactions under the Peak-Pay, House and House International 2 MIDs between September 2019 to January 2020,[160] and which should have been remitted to the Plaintiff, but instead, the said sum was missing (the "First Shortfall"). These were funds allegedly received from Feenicia. The second shortfall which the Plaintiff claimed the Defendants were unable to account for was an aggregate sum of US$1,579,678.55, which represented the settlement proceeds from the processing of the Plaintiff's transactions under the IPTV/House International 2 (ConectApp) MID between December 2019 to February 2020 (the "Second Shortfall").[161] These were funds allegedly received from ConectApp.

268 As a preliminary point, I noted that at several points in its closing submissions, the Plaintiff appeared to suggest that the burden was on the 1st Defendant to "prove" that it had "remitted all the funds that it received which were meant for BHH [the Plaintiff]".[162] This was plainly wrong. That "he who

160 Plaintiff's Closing submissions at para 195.

161 Plaintiff's Closing submissions at para at para 261.

162 Plaintiff's Closing Submissions at para 211.

asserts must prove" is a "trite" common law rule which finds statutory expression in ss 103 and 105 of our Evidence Act: *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471 ("*SCT Technologies*") at [17]. As the claimant alleging misappropriation of its funds by the 1st Defendant, the Plaintiff bore the legal burden of proving its case, as well as the corresponding evidential burden of proof. The latter has been described as "the need of the party to adduce evidence to discharge his legal burden (or the need of the opposing party to adduce evidence to prevent the proving party from discharging his legal burden)": *SCT Technologies* at [18]. In *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("*Britestone*"), the CA explained (at [60]) how a plaintiff would go about discharging the legal and the evidential burden of proof:

> (A)t the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of adducing some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the plaintiff that the legal burden is also discharged and making a finding on the fact against the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of that relevant fact would have been discharged by the plaintiff. The legal burden of proof – a permanent and enduring burden – does not shift.

269 In the present case, therefore, it would be wrong to approach the Plaintiff's case on constructive trust by starting with a demand that the 1st Defendant "prove" its remittance of "all the funds that it received which were meant for [the Plaintiff]". The evidential burden on the Plaintiff required that it be able to adduce some (not inherently incredible) evidence that the 1st Defendant had received the First Shortfall amount of US$4,846,462.13 and the

Second Shortfall amount of US$ 1,579,678.55, and had misappropriated both amounts.

270 In respect of the First Shortfall, the Plaintiff relied heavily on the affidavit evidence of Mr Jose Omar Mosco Rojas ("Mr Rojas"), the CEO of Feenicia. In his affidavits, Mr Rojas purported to give his account of Feenicia's dealings with the 1st Defendant, and in particular, the amounts of the Plaintiff's funds allegedly remitted to the 1st Defendant. At the outset, however, it must be highlighted that Mr Rojas did not appear as a witness in these proceedings, and his affidavits were thus not tested in cross-examination. This was also true of Ms Alfaro – but as I have pointed out (at [122] above), Ms Alfaro's reasons for electing not to testify in the Singapore proceedings emerged clearly from her evidence in the US deposition: Ms Alfaro decided not to participate in the Singapore proceedings not because she was fearful of being cross-examined on her AEIC, but because she had been subjected to mental and financial strain and angst as a result of the subpoena and motions filed by the Plaintiff against her in the US, and had become resentful of the Defendants for their perceived failure to support her, especially in terms of the legal expenses she had been put to. In Mr Rojas' case, in contrast, the affidavit filed by the Plaintiff's US attorney revealed that after filing two affidavits in these proceedings at the Plaintiff's behest, Mr Rojas had suddenly and inexplicably become incommunicado: according to the US attorney, despite having been apparently cooperative during the filing of his two affidavits, Mr Rojas had subsequently failed to respond to all attempts to contact him for the purpose of procuring his attendance at trial.[163] This must naturally raise some doubt as to the reliability of Mr Rojas' affidavit evidence: if he had simply told the truth about his company's dealings with the 1st Defendant, what reason was there for him to avoid attending at trial to answer questions about his

163 Stanley Tan 8th Affidavit at pp 6 – 7.

evidence? Mr Rojas' unexplained and unexpected failure to attend at trial was all the more confounding given that there were some odd discrepancies between Mr Rojas' evidence and the existing documentary evidence. For example, Mr Rojas asserted in his affidavit of 22 February 2022 that on 18 October 2019, Feenicia had provided the 1st Defendant with MID 8214643for the latter's exclusive use – but this MID was not listed in the MCDP-Feenicia Agreement.

271 For the reasons stated above, I was of the view that very little weight if any should be accorded to Mr Rojas' affidavit evidence.

272 In any event, it appeared to me that the Plaintiff had either misquoted parts of Mr Rojas' affidavits or had made unwarranted assumptions (or both). It should be noted, in the first place, that the Defendants denied having received the amounts claimed by the Plaintiff; and as such, the onus was on the Plaintiff to prove receipt by the 1st Defendant of the disputed sum. The Plaintiff stated in its closing submissions that the 1st Defendant had "received an aggregate sum of US$18,423,937-01 from Feenicia, far in excess of the amount of US$4,846,462.13 owed by MCDP [the 1st Defendant] to BHH [the Plaintiff]"; and that Mr Rojas had "confirmed that Feenicia remitted *the full amount of settlements payable to MCDP [the 1st Defendant]* in respect of the three BHH MIDs".[164] However, an examination of Mr Rojas's affidavit of 22 February 2022 revealed that what he actually said was that he could "confirm that Feenicia has, in respect of the payments processed under MID 7996920, MID 7996997 and MID 8214643, transferred all *net settlement proceeds to MCDP"*: Mr Rojas did not use the words "*full amount of settlements payable to MCDP*", nor did he state that the amount transferred was US$4,846,462.13. In the absence of clarification from Mr Rojas, there was no basis for me to assume that the "net

164 Plaintiff's Closing Submissions at para 210.

settlement proceeds" he referred to comprised the US$4,846,462.13 that the Plaintiff was claiming.

273 Moreover, although the Plaintiff argued that the total sum of fund transfers from Feenicia exceeded the US$4,846,462.13 allegedly due to it from the 1st Defendant and that this must mean the latter had received "the full amount of settlements" due to the Plaintiff, this was pure supposition. In fact, as the Defendants pointed out, it was never disputed that the 1st Defendant processed transactions for other customers with Feenicia and that Feenicia would also have remitted funds for those other customers to the 1st Defendant.[165]

274 The Plaintiff relied on the rolling reserve report of 27 February 2020 in contending that the 1st Defendant "*ought to have*" remitted to it a rolling reserve of US$595,923.19 for the Peak Pay, House and House International MIDs from the period 27 February 2020 to 16 July 2020. In fact, there was actually nothing in the rolling reserve report *per se* which proved that this amount had been received by the 1st Defendant, in respect of the specified MIDs, for payment to the Plaintiff.

275 The Plaintiff also contended that the 1st Defendant and/or the 2nd Defendant had received three different amounts transferred by Feenicia on 13 April 2020, 11 June 2020 and 9 July 2020; and that these funds must have included the rolling reserve amount of US$595,923.19 allegedly due to the Plaintiff from the above-mentioned MIDs. This contention was based on Mr Rojas' statement in his affidavit of 22 February 2022 that the payments "substantially comprised the Rolling Reserves retained in respect of [the three

165 Defendants' Reply Submissions at para 101.

BHH MIDs]".[166] The three payments were made up of an amount of MXN 12,350,876.14 paid by Feenicia to an account held by the 1st Defendant with First Finance International Bank ("FFIB") on 13 April 2020; an amount of MXN 18,801,562.87 paid by Feenicia to a JP Morgan Chase London UK Bank account ending with "2077" on 11 June 2020; and an amount of MXN 9,599,218.57 paid by Feenicia to the same JP Morgan Chase London UK Bank account 9 July 2020. The Plaintiff claimed that the JP Morgan Chase London UK Bank account was the 2nd Defendant's "personal" bank account; the 2nd Defendant denied it.[167]

276 For the reasons stated in [270] above, I was disinclined to place any weight on Mr Rojas' untested affidavit evidence. There was no objective evidence to support Mr Rojas' allegation that the payments made by Feenicia to the 1st Defendant "substantially comprised" the rolling reserve of US$595,923.19 allegedly due to the Plaintiff for the Peak Pay, House and House International MIDs from the period 27 February 2020 to 16 July 2020. Moreover, the 2nd Defendant was able to provide in his AEIC an account of events which appeared to me to be reasonably cogent and which he maintained under cross-examination.

277 I have alluded to the 2nd Defendant's explanation earlier (at [39]–[40]). To recapitulate in greater detail: in respect of the funds transferred to the 1st Defendant's FFIB account on 13 April 2020 ("the FFIB Funds"), the 2nd Defendant stated that in April 2020, Feenicia had been obliged to release to the 1st Defendant the rolling reserves in respect of the transactions processed for the 1st Defendant's clients (*not* the Plaintiff). However, because the 1st Defendant was still required to remit processed funds to its customers in USD, this meant

166 Plaintiff's Closing Submissions at paras 222 – 223.

167 Plaintiff's Closing Submissions at para 222.

that it was at risk of incurring a significant currency exchange loss when remitting these funds to its customers in USD. Around the time the funds were to be transferred to the 1st Defendant for remittance to clients, there was a devaluation of MXN against USD. To mitigate against the currency exchange loss, the 1st Defendant considered various ways in which it could hedge against the devaluation of the MXN and avoid suffering an exchange loss. The best solution appeared to be for the 1st Defendant to take out a loan in USD to remit to its customers, using the MXN funds it had received from Feenicia as collateral, and to use the MXN funds to repay the USD loan once the MXN had regained in value. This led to the 1st Defendant looking for an institution which would be able to grant it a USD loan using the MXN funds as collateral. FFIB informed the 1st Defendant that it would be able to grant such a loan, but after the funds were transferred to the FFIB account, this failed to materialise. MCDP then looked for another solution. Morgan Stanley Smith Barney LLC (Morgan Stanley), with whom the 2nd Defendant had an account with at the time (Morgan Stanley Account), said that it would be able to provide the 1st Defendant such a loan. The 1st Defendant thus instructed FFIB to transfer the MXN funds to Morgan Stanley's omnibus account for MXN held with JP Morgan Chase London, UK. An omnibus account, according to the 2nd Defendant, is an account maintained by a bank at an authorised central counterparty for more than one client of the bank. The 2nd Defendant asserted that he did not own the JP Morgan Chase London, UK account, and that the beneficiary of the JP Morgan Account is Morgan Stanley.

278 Unfortunately for the Defendants, FFIB did not transfer the funds as instructed, and instead froze the 1st Defendant's FFIB Accounts and Funds, claiming that it had received information which required it to carry out an investigation. Since the 1st Defendant could no longer use FFIB to receive MXN, the 1st Defendant directed Feenicia to transfer the funds to be paid pursuant to a

document titled "Private Letter of Debt Cancellation" (which I deal with in the next paragraph) to Morgan Stanley.[168] This was to allow the 1st Defendant to obtain a USD loan using the MXN as collateral, thereby converting the MXN to USD and thereafter paying the clients for whom the funds had been earmarked. To this end, the transaction information provided to Feenicia was the same as that previously provided to FFIB: *ie*, that the funds were to be transferred to the JP Morgan Chase London UK account, which was Morgan Stanley's omnibus account for MXN.

279 In respect of the payments from Feenicia to the 1st Defendant of MXN 18,801,562.87 and MXN 9,599,218.57 on 11 June 2020 and 9 July 2020 respectively, the 2nd Defendant explained in his affidavit that these formed part of the total amount which Feenicia had agreed to pay the 1st Defendant pursuant to the "Private Letter of Debt Cancellation".[169] In gist, according to the 2nd Defendant, this "Private Letter of Debt Cancellation" was an agreement entered into between the 1st Defendant and Feenicia to settle a dispute between them over funds totalling MXN 60,994,338.80 which Feenicia had withheld from the 1st Defendant. Pursuant to the letter, Feenicia was to pay to the 1st Defendant a total sum of MXN 38,000,000 in full and final settlement of all debts owed to the latter; and it was in accordance with this agreement that Feenicia made the payments of MXN 18,801,562.87 and MXN 9,599,218.57 on 11 June 2020 and 9 July 2020 respectively. It should be pointed out that in his affidavit of 22 February 2022, Mr Rojas too stated that these two payments were made pursuant to the settlement agreement found in the "Private Letter of Debt Cancellation". Where the two men parted ways was on the issue of whether the amounts paid by Feenicia to the 1st Defendant pursuant to their settlement agreement included

168 Michael Carbonara AEIC at para 66, Exh MC-25.

169 Michael Carbonara AEIC at para 66, Exh MC-25.

amounts which were due to be paid to the Plaintiff. The 2nd Defendant's evidence was that the funds which Feenicia had withheld from the 1st Defendant – thereby leading to the dispute which was settled *via* the "Private Letter of Debt Cancellation" – were "amounts due and payable from Feenicia to MCDP pursuant to transactions which Feenicia had processed for MCDP's other customers (*for the avoidance of doubt, BHHI was not one of these customers)*".[170] Mr Rojas, on the other hand, alleged in his 22 February 2022 affidavit that "the MXN 60,994,338.60 of funds that were held back by Feenicia, of which MXN 28,400,781.44 has since been paid… included Rolling Reserves retained in respect of MID 7996920, MID 7996997 and MID 8214643".[171]

280 As I have noted, the 2nd Defendant's version of events appeared to me to be reasonably cogent. There was moreover some support for it in the documentary evidence. Thus, for example, in the letter from Feenicia dated 11 June 2020 to Accendo Banco S.A. IBM (11 June Letter) which reflected Feenicia's payment of MXN 18,801,562.37 to the JP Morgan Chase London UK account, the beneficiary's name was stated to be "Morgan Stanley Smith Barney LLC". This lent credence to the 2nd Defendant's evidence that the JP Morgan Chase London UK account was the omnibus account for MXN held by *Morgan Stanley* with JP Morgan Chase London UK – and not the 2nd Defendant's "personal" account as the Plaintiff claimed. If the account had in fact been the 2nd Defendant's "personal" account, it would not have made sense for the beneficiary's name to be reflected in Feenicia's letter as "Morgan Stanley Smith Barney LLC". As for the further notation "Bank to Bank Information: Further Credit: Michael A. Carbonara 896-010340-010", this has been explained by the 2nd Defendant: he stated that Morgan Stanley had told him to include this in the

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170 Michael Carbonara AEIC at para 65.

171 Jose Omar Mosco Rojas AEIC at para 17.

transfer description so that it would know the incoming transfer was intended for the purposes of obtaining the USD loan which he had requested.[172]

281 As I noted earlier, the 2nd Defendant's evidence was that the funds transferred by Feenicia did *not* include a rolling reserve amount of US$595,923.19 due to the Plaintiff for the three Feenicia-related MIDs from the period 27 February 2020 to 16 July 2020. The Plaintiff claimed that they included this amount – but the only evidence which the Plaintiff pointed to in support of its claim was the affidavit evidence of Mr Rojas; and as highlighted earlier, for the reasons stated at [270], I was not inclined to give any weight to the bare assertions made in Mr Rojas' affidavit.

282 In respect of the Second Shortfall, similarly, it appeared that the Plaintiff had no real evidence of the 1st Defendant having received the amount of US$1,579,678.55, from ConnectApp – much less, misappropriated this amount. For one, although the Plaintiff claimed that this amount had been received by the 1st Defendant from ConnectApp *between December 2019 to February 2020*, this was contradicted by the contemporaneous documentary evidence. As I noted earlier (at [212] above), in Ms Alfaro's email to Mr Berger on 27 January 2020 wherein she had enclosed the "ConnectApp weekly settlement report",[173] Ms Alfaro had expressly referred to "instructions" given by Mr Berger to the effect that the settlement funds for a particular week would not be remitted from the 1st Defendant's accounts as funds had not been received to any of the 1st Defendant's accounts. This email from Ms Alfaro followed a message via the Telegram app from Mr Berger to the Plaintiff's Ms Meza on 13 January 2020,[174]

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172 Michael Carbonara AEIC at para 67.

173 5ABOD p 486.

174 5ABOD p 436.

in which Mr Berger had informed Ms Meza that funds for transactions processed through the IPTV MID would be settled through another settlement facility. The Plaintiff's own evidence showed that by mid-January 2020, it was receiving funds from an entity named Pharos Payments SA DE CV. ("Pharos").[175] Both the Defendants denied any connection to Pharos; and no evidence has been produced by the Plaintiff to refute this.

283 The above evidence would appear to show, therefore, that since January 2020, the 1st Defendant had not been in receipt of funds from ConnectApp, pursuant to instructions given by Mr Berger for such funds to be settled through another settlement facility – apparently Pharos.

284 Insofar as ConnectApp was concerned, it should also be added that the 2nd Defendant gave evidence at trial that the 1st Defendant had not entered into any agreement with ConnectApp. The 2nd Defendant stated that his signature on the agreement allegedly executed between the 1st Defendant and ConnectApp on 4 November 2019 had been forged.[176] Not surprisingly, the Plaintiff disputed his evidence: the Plaintiff sought to show that the electronic signature on the ConnectApp agreement of 4 November 2019 was similar to the signature on another agreement referred to as the "Polasoft agreement signed for MC" and that an email from Ms Alfaro to the 2nd Defendant on 9 January 2020 suggested that she had been authorised by the latter to affix his electronic signature on the "Polasoft agreement".[177] Regrettably, however, Ms Alfaro's email of 9 January 2020 was never put to Mr Carbonara in cross-examination, which meant that he was deprived of the opportunity to provide any explanation that he might have

175 Meza AEIC at p 260.

176 Transcript dated 29 April 2022 at p 4 ln 1 – ln 15.

177 Plaintiff's Closing Submissions at para 244.

had for the email and to respond to the Plaintiff's interpretation of its implications. In the circumstances, I was disinclined to give any weight to the said email. In any event, I noted that in the course of her US deposition,[178] when asked if she had ever seen any contract "as between MCDP [the 1st Defendant] and ConnectApp", Ms Alfaro's answer was:[179]

> Not really. It wasn't, like, my job to do that.

285 In fact, the questions asked of Ms Alfaro and the responses she gave just prior to the above answer were even more telling:[180]

> Q: We spoke about last time the Conectapp MIDs. Does this refresh your recollection that the Conectapp MIDs was actually applied for and obtained by MCDP? And let me scroll --
>
> A: The Conectapp was -- I'm sorry?
>
> Q: Go ahead, please.
>
> A: So what I remember was, like, the Conectapp was for Daniel Berger.
>
> Q: And is that something you were told by Mr. Carbonara?
>
> A: By Daniel.
>
> Q: Okay. And did you ever see any documentation as it pertained to a agreement or a contract between Daniel Berger and Conectapp?
>
> A: So they -- they have Daniel as the main contact.
>
> Q: Okay. And as --
>
> A: They always, like -- it was always, like, for him to handle that.
>
> …….

178 Defendants' Reply Submissions at para 117.

179 6ABAEIC at p 744.

180 6ABAEIC at p 742 – 744.

> Q: As you sit here right now, can you recall ever seeing any sort of contract between Daniel Berger and Conectapp?
>
> A: No but he always, like -- he always, like, handled those contracts, so it wasn't, like, my place to ask.
>
> Q: Did you ever see any sort of contract as between MCC Code and Conectapp?
>
> A: No.
>
> Q: Did you ever see any contract as between MCDP and Conectapp?
>
> A: Not really. It wasn't, like, my job to do that.

286 As pointed out earlier, Mr Berger had – in his Telegram message to the Plaintiff's Ms Meza on 13 January 2020 – informed her that funds received by ConnectApp in respect of transactions processed through the IPTV MID would be settled through another settlement facility; and Ms Alfaro's subsequent email to Mr Berger on 27 January 2020 confirmed that he had given instructions that funds would not be "settled from MCDP Phoenix [the 1st Defendant] since funds were not received to any account under MCDP Phoenix". The evidence of these contemporaneous communications, taken together with the evidence given by Ms Alfaro in her US depositions, supported the Defendants' contention that it was Mr Berger – and not the 1st Defendant – who had engaged ConnectApp.[181]

(3) My findings

287 To sum up: the Plaintiff was unable to muster the evidence to prove that the Defendants had taken for themselves monies which were specifically owed and due to the Plaintiff. As such, it was unable to establish its claim for a declaration that the Defendants held the monies on a constructive trust.

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181 Defendants' Reply Submissions at paras 114 – 118.

The Plaintiff's case on unlawful means conspiracy

288 The second alternative claim advanced by the Plaintiff was that of unlaw means conspiracy: the Defendants were alleged to have "wrongfully, and with intent to injure the Plaintiff by unlawful means, conspired and combined together to misappropriate the Trust Monies and to defraud the Plaintiff and to conceal such fraud from the Plaintiff".[182]

289 As set out in the CA's judgment in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 (at [112]), the elements of a claim for conspiracy by unlawful means are as follows:

> (a) there was a combination of two or more persons to do certain acts;
>
> (b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;
>
> (c) the acts were unlawful;
>
> (d) the acts were performed in furtherance of the agreement; and
>
> (e) the plaintiff suffered loss as a result of the conspiracy (*Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 at [23]; *Tjong Very Sumito v Chan Sing En* [2012] SGHC 125 at [186]).

290 In the present case, the unlawful act which the Plaintiff relied on for its claim of unlawful means conspiracy in this case was the alleged misappropriation of its funds by the Defendants.[183] However, for the reasons set out above (at [267] – [287]), I found that the Plaintiff was unable to prove the misappropriation of their funds by the Defendants. The Plaintiff's claim of an

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182 Statement of Claim (Amendment No. 1) at para 24.

183 Plaintiff Closing submissions at para 320.

unlawful means conspiracy was therefore also fatally undermined by the same lack of evidence of the alleged unlawful act.

The Plaintiff's case on unlawful means conspiracy

291 The third alternative claim advanced by the Plaintiff was that of fraudulent misrepresentation: the Plaintiff claimed that the Defendants had defrauded it by falsely representing that the 1st Defendant would provide payment processing services to them in accordance with the Payment Processing Agreement.[184]

292 To establish fraudulent misrepresentation, the Plaintiff had to prove the following five elements (*Yong Khong Yoong Mark and others v Ting Choon Meng and another* [2021] SGHC 246 at [90] citing *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]):

(a) That a false representation of fact was made by words or conduct by the representor;

(b) That the representation was made with the intention that it should be acted upon by the representee (*ie*, the Plaintiff);

(c) That the Plaintiff acted upon the false statement;

(d) That the Plaintiff suffered damage by so doing; and

184 Statement of Claim (Amendment No. 1) at para 25.

(e) That the representation was made with the knowledge that it was false, that it was wilfully false, or at least made in the absence of any genuine belief that it was true.

293 Notwithstanding the fact that fraudulent misrepresentation was pleaded in the amended statement of claim, the Plaintiff appeared to abandon it as an alternative cause of action in its closing submissions: no attempt was made to elaborate on its pleaded claim of fraudulent misrepresentation in the closing submissions. In any event, for the reasons set out at [197] to [199], I found that there was no evidence of the 1st Defendant having represented to the Plaintiff that it would be the entity providing provide services in accordance with the Payment Processing Agreement.

The Plaintiff's case on unjust enrichment

294 Finally, in its amended reply, the Plaintiff also pleaded unjust enrichment. The Plaintiff pleaded that the Defendants had "benefited and/or been enriched as a result of the misappropriation and/or diversion of the Trust Monies and/or any benefits accruing thereon"; that the said "benefits and/or enrichment was at the expense of the Plaintiff"; and that the said "benefits and/or enrichment was unjust" because the "misappropriation and/or diversion of the Trust Monies were conducted without the consent of the Plaintiff, there has been a total failure of consideration by the Defendants in respect of the Trust Monies, and/or the 1st and/or 2nd Defendants knew that the Trust Monies rightfully belonged to the Plaintiff".[185]

295 In its recent decision in *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2021] 3 SLR 82 ("*Esben Finance*"), the CA decided (at [240] and [251(a)])

185 Reply (Amendment No. 4) at para 12AAAA.

that there was in principle no reason why lack of consent ought not to be recognised as an unjust factor because to hold otherwise would result in defendants who have received stolen property or value benefitting from a windfall". At the same time, the CA held that "the recognition of lack of consent as an unjust factor cannot be blanket and uncircumscribed because to do so would result in unacceptable encroachments on other areas of law, denuding them of their legal significance" (at [251(b)]). In particular, the court highlighted that there was a "need to prevent unjust enrichment from encroaching on or making otiose established areas of the law or denuding them of much of their legal significance" (at [251(c)]). The court held, accordingly, that "an unjust enrichment action on the basis of the unjust factor of lack of consent would generally not be available… where the claimant has any other available cause of action for recovery of the property or value in question under established areas of law" (at [251(c)]). Examples of the "established areas of law" which the court had in mind included "the law of agency, the law of property or the principles of equity" (at [242]).

296 As an illustration of how the restriction on the availability of unjust enrichment actions should work: in *Esben Finance*, the CA had to consider *inter alia* whether the appellants' claim of unjust enrichment vis-à-vis 14 payments made from their bank accounts to the respondent's personal bank account should be allowed. The CA agreed with the first-instance judge's finding that the 14 payments had been made without valid basis and could not have been actually authorized; nor was there any evidence of the appellants having made any representations to the effect that the payments were authorized (and thus the question of ostensible authority did not arise). In the circumstances, the CA concluded that the appellants retained property to the monies transferred by the 14 payments, and that there was nothing in the evidence to suggest that these monies could not be traced by the appellants directly into the respondent's bank

account. The CA found, accordingly, that the appellants had a *proprietary* claim against the respondent for the sums transferred by the 14 payments – *although this had not been pleaded.* In the CA's view, this was a case of "hard-nosed property rights" which "*should not be interfered with by recognising an unjust enrichment claim on the same facts*" (*Esben Finance* at [253], emphasis added). The appellants' appeal against the first-instance judge's decision to dismiss their claim in unjust enrichment for the 14 payments was therefore dismissed.

297 In light of the CA's decision in *Esben Finance*, I agreed with the Defendants that given the multiple causes of action pleaded and pursued by the Plaintiff in this case (breach of contract, breach of fiduciary duties, constructive trust, unlawful means conspiracy, etc.), an unjust enrichment action on the basis of the unjust factor of lack of consent should not be available to the Plaintiff.

298 Even assuming for the sake of argument that the Plaintiff should be able to avail itself of an unjust enrichment action on the basis of "total failure of consideration" (which it appeared to plead as a separate unjust factor), it failed to explain how the alleged "total failure of consideration" was made out on the facts of this case. As the Defendants pointed out, even assuming the Plaintiff could prove that the 1st Defendant was the party contracted to provide payment processing services under the Payment Processing Agreement, the evidence showed that the Plaintiff had received at least some of the settlement funds due to it in respect of the PeakPay, House and IPTV MIDs. It did not appear to be the case, in other words, that the Plaintiff had failed to receive any part at all of the benefit bargained for under the Payment Processing Agreement (see *eg*, the CA's judgment in *Ooi Ching Ling v Just Gems Inc* [2003] 1 SLR(R)14 at [44].

299 In any event, the Plaintiff's unjust enrichment claim was premised on the alleged misappropriation by the Defendants of the "Trust Monies" (as defined in

[17] of the amended statement of claim) – but for the reasons set out at [267] to [287] of these written grounds, I found that the Plaintiff was unable to prove the allegation of misappropriation by the Defendants.

300 In light of the above reasons, I also dismissed the Plaintiff's unjust enrichment claim.

Final observations on the Plaintiff's case

301 Lastly, in relation to the claim amount of US$2,680,535.21 pleaded by the Plaintiff,[186] I agreed with the Defendants that this pleaded amount appeared to be based on hearsay evidence, the accuracy and reliability of which none of the Plaintiff's witnesses could vouch for. In putting forward this figure, the Plaintiff had relied heavily on the affidavit evidence of Ms Ma Dan ("Ms Ma"), who was said to be a business intelligence analyst from Current Consulting Ltd. Ms Ma's affidavit stated that in arriving at her computations, she had relied on a number of documents (the "Merchant Control Panel Reports", the "Authorisation Logs", the "Feenicia Transaction List" etc).[187] In the cross-examination of the Plaintiff's representatives Mr Wahlström and Ms Meza, it emerged that they were not the ones who had prepared these documents, nor did they have personal knowledge of the contents of these documents. In fact, not a single witness was called by the Plaintiff who attested either to having prepared these documents or to having personal knowledge of their contents. When Ms Ma was cross-examined, she admitted that she had no personal knowledge as to who had prepared these documents: she thought it was a "Ms Tina", whom she had liaised with – but "Ms Tina" was not called as a witness. Ms Ma also

186 Statement of Claim (Amendment No. 1) at para 17.

187 Defendants' Closing Submissions at paras 98 – 103.

admitted that she had no personal knowledge as to the accuracy of the information in these documents. In her own words, she was merely "checking other people's homework".

302 The Plaintiff compounded matters further by shifting to the argument in closing submissions that the amount owed by the Defendants actually came to US$2,666,342.72 instead. This was not an amount which had been pleaded by the Plaintiff, even in the alternative; nor was it an amount which was put to the 2nd Defendant during cross-examination. In the circumstances, I did not think it was open to the Plaintiff to depart from their pleaded position and to claim instead the new figure of US$2,666,342.72. I would also add that the Plaintiff's belated argument in closing submissions that this new amount was based on 1st Defendant's "own documents" was not in any event borne out by the evidence.

Costs

303 As the Plaintiff did not succeed in making out any of its claims against the two Defendants, I awarded the Defendants the costs of the proceedings.

304 Having considered parties' submissions on costs, I fixed the Defendants' costs of this action at $200,000 (including disbursements which were agreed at $25,000). In fixing the quantum of costs, I took into account *inter alia* the fact that the Defendants had been obliged to deal with a broad range of legal and evidential issues because of the multiple causes of action pleaded by the Plaintiff. The Defendants' task was made the more difficult in some instances because of the lack of clarity in the Plaintiff's submissions (which I have alluded to in the course of these written grounds). At the same time, I also applied a discount to the costs awarded to the Defendants so as to reflect the fact that they had been unsuccessful in the fairly involved arguments they chose to put forward on the defence of illegality under RGA and on ss 5(2) and 5(6) of the CLA.

305 As for the various interlocutory applications for which costs had either been reserved or ordered to be in the cause, I dealt with them in the manner recorded in my notes of the hearing on 27 September 2022.

Mavis Chionh Sze Chyi
Judge of the High Court

Ong Tun Wei Danny, Yam Wern-Jhien, Teo Jason and Tan Li Jie Stanley (Rajah & Tann Singapore LLP) for the Plaintiff;
Kirpalani Rakesh Gopal and Oen Weng Yew Timothy (Drew & Napier LLC) for the 1st and 2nd Defendants.