IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 25

Suit No 6 of 2018

Between

(1) Esben Finance Limited
(2) Incredible Power Limited
(3) Rayley Co Limited
(4) Lismore Trading Company Ltd

… *Plaintiffs*

And

Wong Hou-Lianq Neil

… *Defendant*

JUDGMENT

[Trusts] — [Constructive trusts]
[Restitution] — [Unjust enrichment]
[Limitation of Actions] — [When time begins to run]
[Contract] — [Illegality and public policy]

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v
Wong Hou-Lianq Neil

[2020] SGHC(I) 25

Singapore International Commercial Court — Suit No 6 of 2018
Henry Bernard Eder IJ
13-17, 20-22 July, 20 August 2020

14 December 2020 Judgment reserved.

Henry Bernard Eder IJ:

Introduction

1 The trial of this action was conducted over some eight days using the Zoom platform followed by the exchange of the parties' detailed written submissions on a number of important discrete points. With a very large volume of documents (perhaps 40,000 or more in some 80 bundles) provided by the parties in both electronic and hard-copy form and oral testimony from numerous factual witnesses as well as experts on accountancy and foreign law, the conduct of this trial presented considerable logistical difficulties. I am grateful for the cooperation and assistance of counsel as well as the support from the Singapore International Commercial Court ("SICC") Registry which ensured the smooth running of the trial.

2 The present action concerns a family dispute on a grand scale. I was told that it forms only part of various proceedings in different jurisdictions including Malaysia and the British Virgin Islands ("BVI"). On the plaintiffs' side, the main driver of the present action appears to be an individual called Wong Kie Yik ("WKY"). The defendant, Neil Wong Hou-Lianq, is his nephew.

3 The first two plaintiffs, Esben Finance Limited ("Esben") and Incredible Power Limited ("Incredible Power") are companies incorporated in the BVI. The third and fourth plaintiffs, Rayley Co Limited ("Rayley") and Lismore Trading Company Ltd ("Lismore") are companies incorporated in Liberia. All four companies are (at least in a loose sense) part of what has been referred to in this action as the WTK Group of companies ("WTK Group") which was named after its founder, the late Datuk Wong Tuong Kwang ("WTK").

4 WTK was a successful Malaysian businessman whose empire spanned many businesses, including timber logging and harvesting. The flagship company of the WTK Group is WTK Realty Sdn Bhd ("WTK Realty") which was incorporated in Malaysia in the early 1980s. The WTK Group comprises over 50 companies, many of which were incorporated in Sarawak, Malaysia with the WTK Group's head office situated in the capital, Sibu, Sarawak. Some of the companies in the WTK Group or originally established by WTK were incorporated in Singapore, Papua New Guinea, the BVI and Liberia (together, the companies incorporated in Liberia and the BVI are referred to as the "Offshore Companies") including the plaintiffs.

5 An organogram submitted by the plaintiffs identifying in summary form the relevant parts of the corporate structure of these companies is attached as Annex A to this judgment although I should note that this organogram was disputed in part by the defendant, the main areas of contention being with regard

to (a) the directorship of Incredible Power and Rayley; and (b) whether one of the named companies *viz* Elite Honour Sdn Bhd ("Elite Honour") should be included as one of the "Logging Companies" (*ie*, the Malaysian companies that were in the logging business). So far as relevant, I deal with these points below.

6 Although the plaintiffs are, as I have said, part of the WTK Group at least in a loose sense, it is important to note that they were not included in the audited financial statements of WTK Realty. However, as appears from Annex A, there is no doubt that there were common shareholdings between the plaintiffs and other companies within the WTK Group strictly so-called. Further, the consolidated accounts of the WTK Group reflect the close interplay between the finances of the plaintiffs and that of the logging companies which were at the heart of the WTK Group. As submitted on behalf of the defendant, this is evident from the document titled "WTK Organisation – Consolidated Accounts", which shows that the WTK Group's intercompany account balances would not be complete without the inclusion of the plaintiffs' account balances, which are required to balance the debits and credits of the various companies within the WTK Group. Thus, it is the defendant's case that the Offshore Companies including the plaintiffs were, in effect, treated as a single economic entity.

7 Be all this as it may, it is common ground that the Offshore Companies including the plaintiffs were in the business of buying timber from the Malaysian companies in the WTK Group and selling the timber on to third parties including buyers in India, China, Japan and Taiwan. To that extent, the plaintiffs were, in effect, intermediaries. On any view, there was plainly a very close connection between the plaintiffs and the other companies within the WTK Group strictly so called.

8 WTK had three sons, WKY, Wong Kie Nai ("WKN") and Wong Kie Chie ("WKC"), (together the "Wong Brothers"). They joined WTK in his business in the late 1960s and 1970s. According to WKY, the three brothers were "close" and had a "very good relationship".

9 Following a stroke in 1993, WTK handed over responsibility for the overall management and control of the WTK Group as well as the plaintiffs to WKN, WKY and WKC, although I should emphasise that one of the important issues in this case concerns the precise part played by each of the individuals in that context.

10 For present purposes, it is sufficient to note that it is the plaintiffs' case that following WTK's stroke, it was WKN who handled the day-to-day management of a number of the Malaysian companies in the WTK Group, including Elite Honour, Ocarina Development Sdn Bhd ("Ocarina"), Sunrise Megaway Sdn Bhd ("Sunrise Megaway"), Harvard Rank Sdn Bhd ("Harvard Rank"), Faedah Mulia Sdn Bhd ("Faedah Mulia") and WTK Management Services Sdn Bhd ("WTK Management"). It is common ground that at all material times, WTK Management provided administrative services, including marketing and accounting to the Malaysian companies in the WTK Group. Two of the plaintiffs' witnesses, Ms Janice Ting Soon Eng ("Ms Ting") and Ms Helen Loh Leh Fong ("Ms Loh"), were (and are) employees of WTK Management. Ms Ting joined WTK Management in 1982 as the head of the accounts department. Today, she is its Chief Financial Officer. Ms Loh joined WTK Management in 1989 as an accountant. Today, she is its Financial Controller. Ms Loh also handled the accounts of Elite Honour, Ocarina and Sunrise Megaway.

11 The evidence of Ms Ting and Ms Loh is that they reported to and worked closely with WKN from the time they joined WTK Management until his death in March 2013. According to Ms Ting, WKN was "authoritative and domineering" and expected his employees to do as they were told. To similar effect, the evidence of Ms Loh was that WKN was a "strong character" who was "very quick but firm with his instructions" and expected his instructions to be carried out immediately.

12 In summary, it is the plaintiffs' case that WKN was also in charge of the day-to-day management, affairs and business of the Offshore Companies including the plaintiffs; that from 1993 until his own death in March 2013, it was WKN who directed the plaintiffs' affairs, made all the decisions affecting the plaintiffs and exercised complete control over the plaintiffs; that although WKY was the eldest of the three brothers, WKN became, in effect, the patriarch of the family; and that he had absolute control over and could do what he liked with the plaintiffs and would brook no interference.

13 At the material times, the plaintiffs each had US$ and/or S$ bank accounts with the Singapore branch of the Hongkong and Shanghai Banking Corporation ("HSBC"). Lismore, Rayley, and Incredible Power each had bank accounts in US$ and S$, while Esben had one bank account in US$ ("plaintiffs' accounts"). WKN, WKY and WKC were the authorised signatories of these accounts. Any one out of the three authorised signatories' signatures could authorise payments from the plaintiffs' accounts.

14 On 11 March 2013, WKN passed away after a period of illness leaving a widow, Kathryn Ma Wai Fong ("Mdm Ma") and two children, Neil Wong Hou Lianq (the defendant) and Mimi Wong. On the death of WKN, effective control of the WTK Group and the plaintiffs passed to WKY and WKC.

Summary of the plaintiffs' case

15 In summary, it is the plaintiffs' case that following WKN's death, WKY and WKC discovered that over a period of some 11 years between January 2001 and November 2012, some 50 separate payments had been made from the plaintiffs' various bank accounts on the instructions of WKN to the defendant amounting in total to US$20,278,565.41 and S$4,473,100.52 (the "50 Payments") in circumstances where (so say the plaintiffs) WKY and WKC were unaware of these payments to the defendant, the defendant did not provide any consideration to the plaintiffs for those payments, the plaintiffs did not receive any benefit from the defendant for those payments and those payments were made to the defendant even though they were not in the plaintiffs' interests.

16 A table setting out the date of each payment together with other relevant information is attached as Annex B to this judgment.

17 It is the plaintiffs' case that the 50 Payments to the defendant were discovered by WKY only *after* WKN's death in circumstances which are described in paras 119 to 139 of WKY's first affidavit of evidence in chief ("AEIC"). In summary:

(a) Shortly after WKN's death in March 2013, WKY looked into the accounts and financial affairs of the companies that WKN had managed.

(b) As part of that exercise, WKY told Ms Ting to ask Mr Richard Tiang ("Mr Tiang") (who was, according to WKY, the person responsible for carrying our administrative services for the plaintiffs including arranging payments to be made from the plaintiffs' HSBC bank accounts) what the balances in the HSBC's bank accounts were.

Mr Tiang then sent the bank statements to Ms Ting who then showed them to WKY.

(c) The bank statements showed that there was less than US$2.2m and S$1.3m in the plaintiffs' HSBC bank accounts. According to WKY, he was surprised at these balances because they were much lower than what he had thought they would be.

(d) WKY then asked Ms Ting to check with Mr Tiang why there was so little money left in the plaintiffs' bank accounts. According to WKY, Ms Ting was supposed to speak with Mr Tiang and get back to him but she did not do so.

(e) About a year later, in March 2014, WKY reminded Ms Ting to check with Mr Tiang, which Ms Ting said she would do.

(f) A few days later, Ms Ting told WKY that she had spoken to Mr Tiang and that he (Mr Tiang) had told her that the balances were low because (according to Mr Tiang) over many years, WKN had given instructions for large sums of monies to be remitted from the plaintiffs' accounts to the defendant by way of telegraphic transfers.

(g) Mr Tiang gave Ms Ting certain further documents (including telegraphic transfer forms ("TT forms")) from which she prepared a summary showing that between January 2001 and November 2012, the 50 Payments totalling US$20,278,565.41 and S$4,673,100.52 were remitted from the plaintiffs' accounts to the defendant's bank accounts with American Express Bank Ltd, Singapore and Standard Chartered Bank Singapore.

(h) Subsequently, Mr Tiang informed Ms Ting that he had on instructions given to him by WKN in April 2012, destroyed the documents of all the Offshore Companies, including the plaintiffs' documents but only much later, *ie*, in September 2014.

(i) After some further considerable delay, on 21 April 2016, Incredible Power, Rayley and Lismore demanded that the defendant repay the monies that had been remitted to him from their bank accounts. In those letters, Incredible Power, Rayley and Lismore identified the amounts and dates of the payments. At that time, Esben had been struck off the register.

18 It is an important part of the plaintiffs' case that they did not, at the time, receive any satisfactory response from the defendant (or Mdm Ma) to those demands nor any explanation that might justify the receipt by the defendant of the 50 Payments. Indeed, it is the plaintiffs' case that WKN and Mdm Ma had taken steps to ensure that WKY and WKC did not uncover the documents relating to the 50 Payments and that correspondence in May 2016 shows that Mdm Ma and the defendant were surprised that WKY and WKC had found out about them.

19 Thereafter, after some yet further delay, the plaintiffs commenced the present action by issuing a Writ of Summons dated 20 November 2017. The date is important because, as appears further below, it is the defendant's case that the plaintiffs' claims in respect of 49 of the 50 Payments are time-barred.

20 In this action, the plaintiffs seek recovery of the 50 Payments from the defendant together with interest and costs. As pleaded, that claim is advanced

on four main grounds *viz* (a) unjust enrichment; (b) dishonest assistance; (c) knowing receipt; and (d) unlawful means conspiracy.

21 In support of its claims, the plaintiffs also pursue tracing remedies against what they say are the defendant's assets. Pursuant to the court's order, the defendant has given substantial discovery of documents in relation to his assets and such tracing exercise; and the tracing claims have been the subject of detailed consideration by experts in accountancy as referred to below. Prior to the trial, the defendant made an application to adjourn the determination of these tracing claims until after determination of liability. This was strenuously opposed by the plaintiffs. In the event, following a contested hearing, I acceded to the defendant's application - but decided that, insofar as may be necessary, I would deal at this stage with any particular issues of principle with regard to methodology.

Summary of the defendant's case

22 The defendant admits that he received all the 50 Payments. However, he denies any wrongdoing either on his part or on the part of his father, WKN; and he denies any liability to the plaintiffs.

23 Moreover, it is the defendant's case that both WKY and WKC had actual knowledge or at least ought to have had knowledge of most if not all of the 50 Payments when they were made; and that, in that context, the defendant relies heavily upon the fact that a large number – some 25 – of the 50 TT forms authorising the 50 Payments made by the plaintiffs to the defendant bear WKY's initials or signature either on its own or together with WKN's signature.

24 In summary, it is the defendant's case that these claims are all time-barred by virtue of s 6 of the Limitation Act (Cap 163, 1996 Rev Ed)

("Limitation Act"); and/or are barred by the doctrine of laches and/or the doctrine of acquiescence. Alternatively, it is the defendant's case that the plaintiffs have failed to satisfy the legal burden of proof; and that the claims should be rejected for that reason. In particular, it was submitted on behalf of the defendant that, on the plaintiffs' own case, all of its witnesses had absolutely no involvement in the plaintiffs' business prior to March 2013; and that they therefore had no knowledge whatsoever as to the purpose of the 50 Payments.

25 In the further alternative, the defendant has raised a number of substantive positive defences. However, it is important to note that, as submitted on behalf of the plaintiffs, the defendant's case has changed more than once with regard to these positive defences.

26 Thus, as pleaded in the original Defence served on 26 March 2018, the defendant admitted at para 18 that he:

> …did not provide any consideration to the [p]laintiffs for the [50 Payments] and/or the [p]laintiffs did not receive any benefit from the [d]efendant for the [50 Payments]….The [d]efendant trusted WKN as his father and had no reason to believe or suspect that the [50 Payments] may have been made dishonestly (which, in any event, is not admitted). Whether the [50 Payments] were in the best interests of the [p]laintiffs and whether there were business or other reasons for the [50 Payments] are and/or ought to be within the knowledge of the [p]laintiffs and their directors.

Further, in para 19 of the original Defence, the defendant positively averred that he did "not know whether any consideration was provided to the [p]laintiffs for the [50 Payments] by any other persons including WKN and if the [p]laintiffs received any benefit from any other persons including WKN for the [50 Payments]."

27 Some nine months after service of the original Defence and after new lawyers (Rajah & Tann Singapore LLP) had been instructed, the defendant changed his position with extensive deletions and additions to his pleading. Thus, in Defence (Amendment No 1) dated 10 January 2019, paras 18 and 19 of the original Defence as referred to above were deleted; and the defendant set out in some detail and at considerable length a positive case with regard to the payments in question. In particular, it was pleaded at para 4(d) that:

> …The WTK Group was controlled by the Wong brothers. The Wong brothers treated the various companies within the WTK Group as a single economic entity. There was a general practice of offsetting the companies' balances against one another and utilising the funds of a company within the WTK Group which at the material time had sufficient funds to pay for the debts of another company within the WTK Group. As a result, inter-company debts developed between the companies within the WTK Group.

Further, at para 4(e), it was pleaded:

> The [50 Payments] were not wrongful as they were either: (i) transactions made in the course of the running of the various businesses of the WTK Group and/or in connection thereof; or (ii) gifts from WKN to the [d]efendant, his mother and/or his sister.

28 Paragraphs 37 to 63 of Defence (Amendment No 1) then set out what were, in effect, particulars of these alleged "transactions'' and "gifts". In broad summary, it was the defendant's case that the "transactions" consisted of various payments made by the plaintiffs to him "on behalf of" certain Malaysian companies pursuant to oral "agreements" involving him and his father to settle the "debts" that those Malaysian companies owed the defendant's companies and the defendant; and that the "gifts" were made in the context of a ''close and loving relationship" which, until WKN passed away in 2013, existed between WKN, Mdm Ma, the defendant and Mimi Wong. In particular, it was pleaded:

(a) 22 payments totalling US$11,078,618.84 and S$2,479,852.43 were made in the connection with "logging and transportation services provided by the defendant's company [*ie*, Golden Cash Harvest Sdn Bhd ("GCH")] to the WTK Group".

(b) 15 payments totalling US$3,772,912.83 and S$1,325,544.42 were made in connection with "management consultancy services provided by the defendant's company [*ie,* Demeter Resources Management Sdn Bhd, formerly known as Archer Oscar Sdn Bhd ("DRM")] to the WTK Group".

(c) Three payments totalling US$442,729.17 and S$867,703.67 were made in connection with "the provision of timber logs from the defendant's company [*ie*, WTK Reforestation Sdn Bhd ("WTK Reforestation")] to the WTK Group".

(d) Three payments of US$50,000, US$179,456 and US$263,852 were "directors' fees and/or shareholder dividends for the defendant's directorships and shareholding within the WTK Group".

(e) 11 payments totalling US$4,490,997 were gifts from WKN to the defendant, Mdm Ma and/or Mimi Wong.

As already stated, these payments are all listed in Appendix B to this judgment. By way of clarification, it is important to note that whereas, as I have said, there were 50 payments in total, it is the defendant's case that four of these payments were in, in effect, split into two parts. Hence the total number of the payments identified in sub-paragraphs (a)-(e) is 54.

29 As a result of the defendant's pleading concerning the alleged "transactions" in the Defence (Amendment No 1), the plaintiffs say that they had to undertake a massive and expensive inquiry into the Malaysian companies' documents. The plaintiffs say that that exercise showed no record of any such "debts" to the defendant's companies or the defendant. Thus, it was submitted on behalf of the plaintiffs that that meant that the plaintiffs could not have made the 39 payments to the defendant as pleaded in the amended Defence "on behalf of" the Malaysian companies; that that new defence had been "trumped up"; and that it was for this reason that having been caught out, and knowing that he would not be able to defend his lie, the defendant decided not to testify.

30 Thereafter, the plaintiffs say that the defendant changed his case again. As advanced in the AEICs of his witnesses, that case is that the Malaysian companies' services were split into "onshore" and "offshore" components and the payments to him were for the "offshore" payments that were not documented. The nub of that case appeared at paras 90 to 91 of the AEIC of Mdm Ma. That evidence was the focus of much attention during the trial and it is therefore convenient to quote it in full:

> 90. … From 2001, the structure of the contract fees changed from being paid entirely onshore to being partly paid onshore (directly from Elite Honour) and partly paid offshore (from the Offshore Companies). The arrangement from 2001 onwards was as follows:
>
> (a) The logs produced by Elite Honour and GCH were sold to Harvard Rank, one of the Logging Companies.
>
> (b) Harvard Rank sold timber logs to the Offshore Companies who would then sell them to end customers.
>
> (c) GCH would be partly paid for its service by way of onshore payments in Malaysia by Elite Honour and the remaining part of its dues will be paid by way of offshore payments from the Offshore Companies which

> would make the payments directly to [the defendant] (on Elite Honour's behalf).
>
> 91. The change in payment structure was not proposed by [the defendant] or [Mdm Ma]; it was suggested by someone on the WTK Group side. I do not exactly recall who it was but it is likely to have been WKN. I had no objections to the change in payment structure as a shareholder and director of GCH and agreed that the entire offshore amounts be paid to [the defendant]. It was the then practice of the Logging Companies to pay a portion of the logging expenses onshore through the Logging Companies themselves and the remainder offshore through the Offshore Companies. By routing the log sales of the Logging Companies through the Offshore Companies, the Offshore Companies ended up holding the revenue received from the end buyers. The Offshore Companies did not transmit the full sale price back to the Logging Companies; instead, they retained some revenue and paid part of the logging fees and expenses offshore; the remaining portion of such fees and expenses were paid onshore by the Logging Companies. From the perspective of a logging contractor such as GCH, the splitting of the logging fees and expenses into onshore and offshore components resulted in its income (and consequently taxes payable) being lowered….

31 It was the plaintiffs' case that none of this had been pleaded. This gave rise to considerable dispute between counsel; and a number of court hearings. It is unnecessary to set this out in detail. For present purposes, it is sufficient to note that the defendant applied to amend further his Defence on successive occasions in the lead-up to trial; and, with very considerable and increasing reluctance, I allowed three further amendments *viz* Defence (Amendment No 2) dated 25 April 2020; Defence (Amendment No 3) dated 10 June 2020 and Defence (Amendment No 4) dated 8 July 2020, the last being only a few days before the commencement of the trial.

32 For present purposes, the most important of these amendments was an amendment to para 4(d) and, in particular, the introduction of a new para 4(d)(iv) of the Defence and new particulars thereunder which were again

the focus of close attention at the trial and which (as they stood as at the beginning of the trial) were as follows:

> 4(d) The [p]laintiffs were part of the WTK Group which is headquartered in Sibu (defined in paragraph 7(a) below). The WTK Group was controlled by the Wong brothers. The Wong brothers treated the various companies within the WTK Group as a single economic entity. There was a general practice of offsetting the companies' balances against one another and utilising the funds of a company within the WTK Group which at the material time had sufficient funds to pay for the debts of another company within the WTK Group which affected the inter-company debt position as between the two affected companies. As a result, inter-company debts developed between the companies within the WTK Group.
>
> **Particulars**
>
> Pending discovery and/or interrogatories, the best particulars which the [d]efendant is presently able to provide are as follows:
>
> (i) The various companies within the WTK Group are set out at Annex B of this Defence (Amendment No 3).
>
> (ii) The Wong brothers treated these companies within the WTK Group as a single economic entity from or around the time of their respective incorporation, the dates of which are also set out in Annex B of this Defence (Amendment No 3).
>
> (iii) The Wong brothers treated the companies within the WTK Group as a single economic entity for cashflow purposes. As pleaded above, the debts of one group company were paid by another group company which had sufficient funds at the time. The payment by the latter company would be recorded as a debt in the books and/or records of both companies – in the latter's books and/or records as a debt owing by the former to it and in the former's books and/or records as a debt owing to the latter.
>
> (iv) The [p]laintiffs sold timber logs which originated from the Malaysian companies in the WTK Group which were in the logging business ("Logging Companies") to buyers overseas. The [p]laintiffs held a part of the proceeds from the timber sales and distributed such proceeds to

> the shareholders of the Logging Companies principally by way of cash dividends, from time to time.
>
> **Particulars**
>
> The best particulars which can presently be provided are as follows:
>
> (1) The Logging Companies included Sunrise Megaway…; Ocarina …; Faedah Mulia…; Jumbo Logging Sdn Bhd; Harvard Rank…; Harbour View Realty Sdn Bhd; Hung Ling Sawmill; Systematic Logging Sdn Bhd; Tekun Enterprises, Salwong Sdn Bhd and Syarikat Miri Sawmill.
>
> (2) From 2001 to 2012, cash totalling around US$67.35 million and S$2.76 million were withdrawn by way of house cheques from the [p]laintiffs' bank accounts.
>
> (3) From the mid-1980s up to 1988 and in one further instance in about 2000, the [d]efendant's mother distributed cash dividends to the shareholders of the Logging Companies. The [d]efendant's mother cannot recall the details of the cash dividends of the cash dividends distributed [*sic*].

33 In broad terms, the purpose of the new para 4(d)(iv) was to allow the defendant to advance a positive case (the "para 4(d)(iv) practice") as reflected in paras 90 to 91 of the AEIC of Mdm Ma quoted above.

34 In response, the plaintiffs served their Reply (Amendment No 2) which joined issue with this new case and, further, raised a new important plea of illegality. In summary, as set out in para 2B of the Reply (Amendment No 2) dated 3 July 2020, it was the plaintiffs' case that taking the defendant's case at its highest (which the plaintiffs denied) most of the payments (apart from those which are said to be gifts from WKN, directors' fees or shareholder dividends) would have been made pursuant to an arrangement between WKN and the defendant and/or the defendant's companies "that was illegal and/or involved illegal acts and/or a conspiracy to evade taxes under Malaysian law"; and that

the defendant "cannot and/or is precluded from and/or the [c]ourt will not recognise, or allow him to rely on, such arrangement as a defence to the [p]laintiffs' causes of action". I shall refer to the foregoing as the "illegality issue".

35 The plaintiffs also say that the defendant's narrative on the other payments has shifted. In his original Defence, the defendant did not specifically mention that any of the 50 Payments were "gifts". Then, in Defence (Amendment No 1) he claimed that he reasonably and honestly believed that some 11 payments were gifts from WKN and that they "formed part of WKN's entitlement of the assets held by the [p]laintiffs or were otherwise WKN's own funds which were routed through the [p]laintiffs" because WKN was a "beneficial owner" of the plaintiffs. It was the plaintiffs' case that there were "serious problems" with this new case; and that, as a result, the defendant advanced a new case *viz* that the plaintiffs held the timber sales proceeds for the shareholders of the Logging Companies; and that it was the "practice" of these companies to "route" the sale of their timber through the plaintiffs which then collected the sale proceeds and distributed them in cash to the shareholders of the Malaysian companies, including WKN. In summary, it was the plaintiffs' case that if the defendant's new case is to be believed, that would mean that this alleged "practice" involved black money; that, again taking the defendant's case at its highest, WKN had no right to the monies that he allegedly gifted his son; that he (*ie,* WKN) would be entitled to that money only if the Malaysian companies which were entitled to the sale proceeds declared dividends. The plaintiffs argued that until that happened, WKN had no business treating the monies as his own; and that, in any event, there is no evidence that the logging companies had made profits from which dividends could be declared. The plaintiffs say that, realising this, the defendant has once again tried to change

his narrative on the "gifts" (at least in part). The defendant now claims, in the last amendment application (which I again reluctantly allowed) that a further three payments, which he had previously described were directors' fees and/or shareholder dividends "could in fact be gifts which were made by WKN".

36 The plaintiffs say that the ease with which the defendant has changed his case, including at a very late hour shortly before the commencement of the trial, shows that he is just making things up as he goes along. In particular, it was submitted by the plaintiffs in their Opening Statement: "[the defendant] tries one fiction. When it falls flat on its face, [the defendant] changes his story to overcome the flaws. This is not a game. But the [d[efendant does not care."

37 I have set out the foregoing at some length because it provides an important overall view of the background to the trial and the issues which arise with regard to the positive substantive defences raised by the defendant.

38 The end result is that the defendant's case as advanced at trial was, in summary, as follows:

(a) The plaintiffs have failed to satisfy their own burden of proof to establish any of the causes of action advanced by them against the defendant.

(b) In any event, the defendant denies any wrongdoing by his father, WKN, or himself.

(c) The other directors of the plaintiffs, WKY and WKC, were or ought to have been aware of the payments – or at least most of them.

(d) The payments were all made for legitimate purposes. In particular:

(i) 36 of the payments were made on behalf of the WTK Group for goods and/or services which were provided by companies controlled by Mdm Ma and the defendant (the "36 payments"). These 36 payments may be grouped into the following categories of services *viz* (A) services provided by GCH; (B) services provided by DRM; (C) supply of timber logs from WTK Reforestation.

(ii) Three of the payments comprised the defendant's entitlement to directors' fees and/or shareholders dividends; alternatively were gifts made by WKN.

(iii) 11 of the payments comprise WKN's entitlement from the plaintiffs which he in turn gifted to the defendant/his mother and/or his sister.

The Evidence

39 The following individuals provided AEICs and were cross-examined in the course of the trial:

(a) On behalf of the plaintiffs:

(i) WKY: He was born in 1941. As he told the court at the beginning of his oral evidence, he had certain health issues. In giving evidence, he appeared to me somewhat frail and it was obvious that he had difficulty in remembering certain matters although that is perhaps unsurprising given that some of the relevant events stretch back almost 20 years.

(ii) Ms Ting: she joined WTK Management in 1982 as the head of the accounts department and is now the Chief Financial Officer (see [10] above).

(iii) Ms Loh: she joined WTK Management in 1989. In 2007, she was promoted to the position of Financial Controller of WTK Management, a position which she still holds today (see [10] above).

(b) On behalf of the defendant:

(i) Mdm Ma: as noted above, she is the widow of WKN and the mother of the defendant.

(ii) Chieng Muk Pang ("Mr Chieng"): from July 2000 to October 2015, he was employed as a Chief Surveyor by GCH whose directors and shareholders are Mdm Ma and the defendant.

(iii) Hii Siik Kiong ("Mr Hii"): he joined the WTK Group in 1990 as a logging camp manager in Papua New Guinea. In about 1999, he joined GCH as Operational General Manager reporting directly to the defendant. He continued in that role until 2010 when he was promoted to General Manager, his current position, again reporting directly to the defendant.

(iv) Ling Thien Kwong ("LTK"): he joined the WTK Group as a management trainee in March 1999. In October 2003, he left the WTK Group and joined GCH as an assistant accountant. In 2005, he was promoted to the role of Senior Accounts Supervisor for the GCH group of companies which comprised a number of businesses owned by the defendant and Mdm Ma including

GCH, DRM and WTK Reforestation. (Their shares in WTK Reforestation were sold to the WTK Group in 2007).

(v) Ling Heu Chong ("Mr Ling"). From 2001 to 2014, he was employed as a Log Pond Supervisor by Harvard Rank.

40 The plaintiffs also relied upon the evidence contained in two affidavits of Mr Tiang dated 28 August 2018 and 11 October 2018. He was previously employed by a company in Singapore, Double Ace Trading Co (Pte) Ltd ("Double Ace") which had offices at 3 Shenton Way # 20-08, Shenton House, Singapore 068805. The directors and shareholders of Double Ace included WKN, WKY and WKC. However, the precise organisational structure of Double Ace is unclear. According to WKY, an individual called Ong Kim Siong was the *"*resident director" but the plaintiffs' operations were run administratively by Mr Tiang: he was *"*working for looking, after [*sic*]" the four offshore companies, *ie*, the plaintiffs. According to WKY, Mr Tiang was first employed by WTK as a clerk; and "years later" was promoted by WKN to the position of "accounts clerk". He was, again according to WKY, responsible for carrying out administrative services for the plaintiffs including arranging for payments to be made from the plaintiffs' HSBC accounts on the instructions of WTK or WKN. It is not clear what other individuals (if any) were employed by Double Ace. There was a suggestion that Double Ace did not have any employees other than Mr Tiang. However, it is fair to say that WKY stated in para 65 of his AEIC that WTK and WKN "used to work closely with Double Ace's employees particularly Mr Tiang"; and, as already noted, in his oral evidence WKY referred to an individual called Ong Kim Siong as the *"*resident director*"*. Notwithstanding, the number of other individuals who may have been employed by Double Ace at any one time is unknown; and certainly no other

individuals were identified by name. Who these supposed employees were (if there were any) is unknown.

41 In my judgment, there is no doubt that Mr Tiang was, during the relevant period, a key individual acting directly on the instructions of WKN. In his own words, he was, the "[p]laintiffs' bookkeeper".

42 However, it is important to note that Mr Tiang is a convicted criminal and, as I understand, currently serving a substantial prison sentence. In February 2019, he pleaded guilty to and was convicted of some 15 criminal charges, with a further 54 charges taken into consideration for the purpose of sentencing, of, *inter alia*, dishonest misappropriation of some S$46.2 million of the plaintiffs' monies over an extended period of time. Thus, he is a convicted fraudster on a massive scale.

43 Mr Tiang was not called to give evidence. However, on the plaintiffs' application, I allowed these two affidavits to be adduced in evidence pursuant to s 32(1)(*j*)(i) of the Evidence Act (Cap 97, 1997 Rev Ed) on the basis that Mr Tiang was unfit to give evidence because of his physical and medical condition as a result of a stroke. My reasons for so doing are set out in a separate ruling dated 8 June 2020 which I do not propose to repeat. For present purposes, it is sufficient to note that (a) it was undisputed that Mr Tiang was unfit to give evidence at the date of the trial; (b) I considered the evidence in those affidavits potentially relevant; and (c) I rejected the defendant's submission that I should exclude such evidence as a matter of discretion under s 32(3) of the Evidence Act, in particular, on grounds of low probative value or unreliability. However, as recognised by s 32(5) of the Evidence Act and as I emphasised in my ruling at the time, it remains to consider what weight, if any, to give to such evidence. So far as relevant, I deal with this further below.

44 Both parties also served expert reports on certain accounting issues *viz* from Mr Andrew Heng ("Mr Heng"), a partner of Ferrier Hodgson MH Sdn Bhd (appointed on behalf of the plaintiffs) and Mr Michael Peer, Head of Disputes Advisory and a partner in PricewaterhouseCoopers South East Asia Consulting's Forensic Team (appointed on behalf of the defendant). Both these experts gave evidence during the trial.

45 In addition, both parties submitted reports in the form of written submissions or affidavits from experts on foreign law as follows:

(a) *Malaysian law*: On behalf of the plaintiffs, Mr Subbramaniam A/L Arjunan of Shanker & Arjunan & Chua, Kuala Lumpur, Malaysia. On behalf of the defendant, Mr Saravana Kumar Segaran of Rosli Dahlan Saravana Partnership, Kuala Lumpur, Malaysia. Both these experts gave oral evidence and were cross-examined during the trial. Their evidence was concerned with the illegality issue.

(b) *BVI law*: on behalf of the plaintiffs, Mr Kenneth MacLean QC of One Essex Court, London. On behalf of the defendant, Mr Shaun Raymond Folpp of Mourant Ozannes, BVI.

(c) *Liberian law*: On behalf of the plaintiffs, Mr T Negbalee Warner of Heritage Partners & Associates, Liberia. On behalf of the defendant, Benedict F Sannoh of Sannoh & Partners, Liberia.

46 In broad terms, the submissions of the experts on BVI law and Liberian law were concerned principally with the rights and duties of a director of a company incorporated in the respective jurisdictions with regard to the defendant's time-bar defence. With the consent of the parties, it was agreed that such submissions could be placed before the court in written form without the

makers themselves addressing the court orally and that counsel were at liberty to make such submissions in relation thereto as might be appropriate. So far as relevant, I deal with these submissions below – although I should mention that it was submitted on behalf of the plaintiffs that the time-bar defence raised by the defendant did not depend on either BVI law or Liberian law but ultimately depended on the law of Singapore and, in particular, the scope and effect of s 29 of the Limitation Act.

47 The evidence in this case has raised various difficult issues for a number of reasons which it is convenient to note and so far as necessary address at this stage. I deal with these difficulties under a number of heads as set out below.

(i) Oral Evidence; absence of critical witnesses.

48 I have already identified the three witnesses who provided AEICs and were called to give evidence on behalf of the plaintiffs *viz* WKY, Ms Ting and Ms Loh. So far as relevant, I deal with their evidence below. However, at this stage, it is important to note that, as I have said, WKY (who is a director of the plaintiffs and, as I have said, is obviously the main driver behind the present proceedings) is now almost 80 years old and suffering from health issues and a failing memory. Moreover, his own evidence was that prior to 2013, he had no involvement in the management of the plaintiffs or even the wider WTK Group; that he trusted WKN and did not press him for information (in particular, information with regard to the TT forms which he accepted he had signed) because he wanted "to maintain the good relationship with [WKN]". To that extent, his evidence was, in one sense, of limited assistance. Further, the evidence of the other witnesses called on behalf of the plaintiffs (Ms Ting and Ms Loh) was, in my view, equally of limited assistance in supporting the plaintiffs' case on the key issues.

49 Second, following the death of WTK, it was the plaintiffs' case (which I accept) that WKN effectively took control of the WTK Group and "ran the show". This continued to be the position until at least March 2011 when, due to illness, he went to Australia for medical treatment. It is obvious that until that time, he managed and controlled the plaintiffs and to some extent at least continued to do so until his death some two years later. No doubt, WKN's evidence would have been most valuable and provided answers to key questions. However, because of his death in March 2013, this was, of course, impossible. The result is that the present trial was, in a sense, *Hamlet* without the prince.

50 Unfortunately, the trial proceeded in the absence of at least three further potentially crucial witnesses *viz*:

(a) Mr Tiang: as stated above, he was, in his own words, the "[p]laintiffs' bookkeeper". As such, his evidence would have been very valuable indeed. However, as I have also already explained, he was unfit to give evidence because of a stroke last year.

(b) WKC: he went to live in Australia during the 1980s. He appears to have played little, if any part, in the plaintiffs' business operations. To that extent, his absence would seem of little, if any, relevance.

(c) The defendant himself.

51 The absence of the defendant was the subject of major attack by counsel on behalf of the plaintiffs given, in particular, that it was undisputed that he could, if he wished, have attended the trial and given evidence. Further, as submitted on behalf of the plaintiffs, it is noteworthy that the defendant has been intimately involved in this dispute and the conduct of the present proceedings

in the course of which he has filed no less than 30 affidavits including affidavits in support of his first and second applications to amend the Defence where he claimed to have personal knowledge of the (alleged) para 4(d)(iv) practice and the (alleged) agreements/arrangements. The defendant also continued to file affidavits after Mdm Ma said in her AEIC of 21 January 2020 that the defendant would not be coming to give evidence. In fact, he signed his latest affidavit even *after* the trial, *ie*, on 28 July 2020.

52 There is no suggestion that the defendant was unfit or otherwise unable to attend the trial and give evidence. On the contrary, it is undisputed that his non-attendance was the result of his own deliberate decision.

53 Various explanations have been offered for the defendant's absence. But I accept that, as submitted on behalf of the plaintiffs, none of them satisfactorily explains his absence.

54 First, Mdm Ma said in her AEIC that the defendant was not testifying because the present action was "frivolous and baseless". However, even if that is her belief, I do not consider that this is an acceptable reason for the defendant's absence. As submitted on behalf of the plaintiffs, a reason that relates to the merits of this action is not an acceptable explanation (see *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 ("*Sudha*") at [21]); and, in any case, as submitted on behalf of the plaintiffs, I accept that Mdm Ma's explanation makes little sense: if Mdm Ma or the defendant believed that this action was "frivolous and baseless", it seems difficult, if not impossible, to understand why there was reason to call any witnesses at all. But the defendant called six witnesses including, of course, Mdm Ma herself.

55 Second, it was submitted in the defendant's Opening Statement that his witnesses were able to give the "necessary evidence on the true nature and circumstances under which the [50] Payments were made". In my judgment, that submission overstates the position. I readily accept that the evidence of Mdm Ma was potentially of assistance. So too was the evidence of Mr Hii, LTK and Mr Ling, although, as submitted on behalf of the plaintiffs, these witnesses could say nothing about the alleged "gifts" and were not personally present when the alleged "agreement[s]" and "arrangement[s] and/or understanding[s]" relied upon by the defendant with regard to the other payments were entered into. In any event, there can be no doubt that the evidence of the defendant himself would have been very valuable with regard to the alleged "gifts" as well as the alleged agreements, arrangements or understandings which are the foundation of the defendant's positive case with regard to the other payments and also determining the true nature and circumstances under which the 50 Payments were made.

56 Third, Mdm Ma claimed during cross-examination that she had discussed the "frivolous and baseless" allegations with the defendant and told him that she would testify. On behalf of the plaintiffs, it was submitted that this makes no sense because Mdm Ma was not in any position to give evidence on the allegations against WKN and, as she herself admitted, she was not involved in the management of the plaintiffs. So far as relevant, I deal with Mdm Ma's evidence below. In any event, I accept that her desire and attempt to respond to allegations against WKN does not explain satisfactorily why the defendant did not testify.

57 Finally, Mdm Ma said that the defendant did not testify because this action is part of WKY's plan to harass the defendant and "all the case is about documentation [*sic*]". Mdm Ma may well be right in suggesting that the present

action is part of WKY's plan to harass the defendant, at least from her own perspective and that of the defendant. (Once again, it is noteworthy, that following the death of WKN, there have been numerous highly contentious and acrimonious legal proceedings - in particular, in Malaysia and the BVI - between or at least involving, on the one hand, WKY, and, on the other hand, Mdm Ma and the defendant in relation to allegations of fraudulent conduct by WKN during his lifetime.) However, be that as it may, the present case raises serious allegations against the defendant; and the fact that she and the defendant may perceive the present action to be part of WKY's plan to harass the defendant is, in my view, no or at least no proper justification for the defendant's decision not to give evidence. Further, the suggestion that the case is about *"*documentation*"* is inconsistent with Mdm Ma's own evidence that the payments to the defendant were deliberately kept off the books.

58 In light of the above, it was submitted on behalf of the plaintiffs that having regard to (a) the defendant's absence at trial in circumstances where (say the plaintiffs) he is the only person alive who knows why the payments were made to him; (b) the absence of any credible explanation for the defendant's deliberate decision not to testify; and (c) the many shifts in his defence, the court should draw a two-fold adverse inference against the defendant *viz*:

> (a) First, the court should infer that the defendant has been lying about the reasons why he says he received the payments. Where a party who personally knows the whole circumstances does not give evidence and submit to cross-examination, his non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case (citing SC Sarkar, *Sarkar Law of Evidence* vol 3 (LexisNexis, 2016 Ed) ("Sarkar") at p 2724; *Tan Eck Hong v Maxz Universal Development Group Pte Ltd* [2012] SGHC 240 at [37]).

(b) Second, the court should draw the inference that the 50 Payments were not made for the reasons advanced in any versions of the Defence. The effect of an adverse inference is to strengthen the evidence against the defendant, *ie*, to increase the weight of the evidence given on such issue by the plaintiffs and to show that the payments were not made in the course of plaintiffs' business or in its interests or for its benefit: see *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 ("*Wisniewski*") at 339.

59 In support of that submission, the plaintiffs further relied upon a number of authorities including *ARS v ART and another* [2015] SGHC 78 at [137]-[141], [147]; and *Red Star Marine Consultants Pte Ltd v Personal Representatives of the Estate of Satwant Kaur d/o Sardara Singh, deceased and another* [2019] SGHC 144 at [75].

60 On behalf of the defendant, it was accepted that under s 116(g) of the Evidence Act the court may in certain circumstances be entitled to draw adverse inferences from the absence of a witness. However, in summary, it was submitted on behalf of the defendant:

(a) Whether an adverse inference should be drawn will depend on all the evidence adduced, and the circumstances of each case: there is "no fixed and immutable rule of law" for the drawing of such an inference: *Sudha* ([54] *supra*) at [19]-[20]; *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 ("*Tribune*") at [50].

(b) The effect of an adverse inference is to "strengthen" the evidence adduced on that issue by the other party or to "weaken" the evidence, if

any, adduced by the party who might reasonably have been expected to call the witness: *Sudha* at [20(b)].

(c) However, an adverse inference is not invariably drawn whenever a party fails to give evidence. If the reason for the witness's absence or silence can be explained to the satisfaction of the court, then no adverse inference may be drawn: *Sudha* at [20(d)].

(d) Significantly, the defendant's absence does not in any way diminish the plaintiffs' burden to establish primary facts establishing a *prima facie* case on its claims: *Cheong Ghim Fah and another v Murugian so Rangasamy* [2004] 1 SLR(R) 628 (*"Cheong"*) at [38] . The drawing of an adverse inference cannot be used as a mechanism to shore up glaring deficiencies in the opposite party's case, which on its own is unable to meet up to the requisite burden of proof: *Tribune* at [50].

I accept these submissions. In particular, the exposition of relevant principles as set out in the judgment of VK Rajah JC (as he then was) in *Cheong* at [38]-[44] is, in my view, very helpful and one which I readily adopt.

61 Here, it was submitted on behalf of the defendant that no adverse inference should be drawn by reason of the absence of the defendant for the following reasons:

(a) The plaintiffs have failed to make out even a *prima facie* case of any of the four claims put forth by them. On this basis alone, the court should refuse to exercise its discretion to draw an adverse inference against the defendant: *Tribune* at [50]-[51].

(b) In any event, the adverse inferences suggested by the plaintiffs consists of vague allegations that the defendant is not testifying because his evidence would "be adverse to or undermine" various aspects of his defence. This is inadequate since the plaintiffs must identify with specificity what inference it invites the court to draw, and the precise manner and extent to which the evidence not given would have been unfavourable to the defendant. The court cannot simply speculate as to what the evidence may show: *Sudha* at [23]; *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2019] SGHC 68 ("*PNG*") at [83].

62 As to these submissions, my observations and conclusions are as follows:

(a) There is no obligation on a defendant to give evidence. As stated by VK Rajah JC in *Cheong* at [39], it is perfectly permissible for a party not to call witnesses or adduce evidence on any material point in issue.

(b) However, as I have already concluded, there is, in my view, no satisfactory explanation as to why the defendant has deliberately chosen not to give evidence. In such circumstances, it seems to me that it is certainly open for the court to draw adverse inferences against the defendant. Indeed, in the present circumstances as I have already described, it seems to me that this is a paradigm case for the court to draw appropriate adverse inferences against the defendant.

(c) The adverse inferences which the plaintiffs have invited the court to draw are not, in my view, "inadequate" or lacking in specificity.

(d) In deciding whether to draw an adverse inference, it is important to exercise caution so as, in effect, not to reverse the burden of proof. As appears from the citation by Rajah JC in *Cheong* at [42] to a passage in the decision of the English Court of Appeal in *Wisniewski* ([58(b)] *supra*) at 340 (see also *Sudha* at [20]):

> (3) There must, however, have been some evidence, however weak adduced by the [party inviting the court to make the adverse inference] on the matter in question before the court is entitled to draw the desired inference: in other words, *there must be a case to answer on that issue*. [emphasis added]

(e) In light of the above, I propose to deal with the question as to what, if any adverse inference(s) are to be drawn when considering the merits of the plaintiffs' various claims and, in particular, whether they have established a "case to answer" and, even in such case, what if any adverse inferences might properly be drawn.

(ii) Time of Relevant Events

63 Second, as already noted, the 50 Payments which are the subject of the present proceedings cover an extended period of some 11 years stretching back between 2001-2012 the earliest of which is almost 20 years ago. In these circumstances, it was submitted on behalf of the defendant that it is hardly surprising that it was difficult, if not impossible, for him to recollect at least initially when the plaintiffs' claims were first advanced, the exact true purpose of many of the payments which are the subject of these proceedings; and that this explains the various iterations of his pleaded Defence. I have some sympathy with that submission. Indeed, it is noteworthy that in the course of cross-examination, WKY was himself unable to explain the nature or purpose of a number of specific substantial payments that appear from bank statements to have been paid out of the plaintiffs' bank accounts to him.

(iii) Plaintiffs' documentary record

64 Third, I readily accept that the difficulties caused by the fact that proceedings may involve events many years ago are sometimes solved or at least alleviated by an examination of the relevant documentary record. Indeed, in such cases, the contemporaneous documents are very often the most important and most reliable source of evidence. However, there are, in the present case, significant gaps in the available documents. Indeed, that is, in my view, a gross understatement. That is so for two main reasons.

65 First, as I have said, the plaintiffs are offshore companies registered in either the BVI or Liberia. The companies did not have any employees of their own. They did not themselves keep or produce any financial documents or statements. The plaintiffs' position was that WTK Management did not provide any marketing or accounting services to the plaintiffs. Rather, *all* administrative services were provided by Double Ace. According to WKY, WTK originally had a room to himself at Double Ace's office where he would attend to the affairs and business of the Offshore Companies including the plaintiffs; and WKN also occupied a separate room in that office which WKC and WKY would use when they visited. According to WKY, the services provided by Double Ace included updating and maintaining the plaintiffs' financial records, liaising with the banks, and arranging for payments to be made from the plaintiffs' bank accounts in Singapore.

66 However, so far as Ms Ting was aware, the plaintiffs had no proper accounting system. Her unchallenged evidence was that apart from certain "intercompany ledgers" or "subledgers", no trial balances were ever prepared; as far as she was aware, there were no financial statements, no monthly management accounts, no year-end accounts. Certainly, apart from various

banks statements and a limited number of what have been referred to as the "CAD Documents" (as to which see further below), no proper financial statements or other records have been produced by the plaintiffs.

67 The absence of any such documents represents a major lacuna in the evidence before the court for which, it should be noted, the defendant is in no way to blame. The foregoing reinforces the reason why the evidence of Mr Tiang would certainly have been most valuable. However, as already noted above, he could not be called as a witness at trial; and what he said in the two affidavits which I did allow in evidence was of limited assistance with regard to the main issues in this case – and on one specific point (as to which see below) was highly controversial.

68 Second, it is undisputed that a very large number of the plaintiffs' documents were deliberately destroyed by Mr Tiang. As set out in paras 24 and 25 of Mr Tiang's affidavit dated 28 August 2018, his evidence is that WKN instructed him "in or around April 2012" to remove all the documents and records of the plaintiffs, including the documents and records relating to the 50 Payments from the plaintiffs' Singapore office; that subsequently "in or around May 2012", WKN instructed him to destroy those documents; and that, in accordance with those instructions, he (Mr Tiang) did indeed arrange for those documents to be removed from the plaintiffs' Singapore office in or around April 2012 and then arranged for those documents to be destroyed albeit only about some 29 months later "in or around September 2014". That evidence of Mr Tiang was supported in part by Ms Ting whose evidence was that Mr Tiang had informed her at the end of 2014 that he (Mr Tiang) had destroyed the documents on WKN's instructions – although the fact that Mr Tiang may well have told Ms Ting that he had destroyed the documents on WKN's

instructions does not, of course, necessarily mean that he did destroy the documents on WKN's instructions.

69 As to the foregoing, it is undisputed that Mr Tiang probably did destroy a very large number of the plaintiffs' documents – perhaps some 100 boxes. However, the account given by Mr Tiang as to the circumstances in which the documents were destroyed was hotly disputed. In particular, Mdm Ma's evidence was that any destruction of the documents by Mr Tiang was more likely to have been done at WKY's or WKC's behest; but this was entirely speculative and specifically denied by WKY.

70 In any event, it was strenuously denied by counsel on behalf of the defendant that WKN ever gave any instructions to carry out such removal and destruction of the plaintiffs' documents and records; and it was submitted on behalf of the defendant that Mr Tiang's evidence to that effect should be rejected. In support of that latter submission, counsel on behalf of the defendant made a number of points which I would summarise as follows:

(a) As already noted above, Mr Tiang is, on his own admission and plea of guilty, a convicted fraudster on a massive scale.

(b) Given the conduct of Mr Tiang in dishonestly misappropriating the plaintiffs' funds over an extended period, Mr Tiang had his own personal strong motive for destroying the documents and seeking to put the responsibility for so doing on WKN who had, of course, passed away by that time and could not challenge what Mr Tiang said.

(c) The evidence of Mr Tiang is both inherently unreliable and, on its face, untrue in certain respects. As stated above, Mr Tiang's evidence is that WKN instructed him to destroy all the plaintiffs' documents and

records in around May 2012; but that he did not do so immediately and only carried out such instructions over 2 years later, *ie*, around September 2014. However, as submitted on behalf of the defendant, there is no credible reason why Mr Tiang would wait for a substantial period of about some 30 months after WKN"s purported instructions to destroy the plaintiffs' documents and records to carry out those purported instructions; nor any credible reason as to why Mr Tiang would suddenly decide to follow those purported instructions and destroy the plaintiffs' documents and records in September 2014, some 18 months after WKN's death in March 2013.

(d) Mr Tiang's evidence is that he destroyed "*all* of the documents and records of the plaintiffs" [emphasis added]. That is demonstrably false: according to para 6(f) of the plaintiffs' Reply, Mr Tiang had apparently overlooked destroying "….a separate file containing copies of some of the [documents and records relating to the 50 Payments] which [Mr Tiang] had kept separately. That file … only came to the plaintiffs' attention after WKN passed away." Thus, on the plaintiffs' own case and contrary to what was stated by Mr Tiang in his affidavit, Mr Tiang did *not* destroy "all" of the plaintiffs' documents and records.

(e) Further, in the course of a discovery application by the defendant against the plaintiffs in these proceedings, it emerged that in August 2014 the Commercial Affairs Department ("CAD") had seized at least some of the plaintiffs' documents and records (*ie*, the "CAD Documents") in connection with the prosecution and subsequent conviction of Mr Tiang for dishonest misappropriation of the plaintiffs' monies; that Double Ace had requested the return of the CAD Documents in May 2016; and that the CAD Documents had, in fact,

been returned to Double Ace shortly thereafter in June 2016. The existence of these CAD documents is inconsistent with Mr Tiang's evidence that he destroyed "all" of the plaintiffs' documents and records.

71 I accept those submissions. In particular, although I accept that Mr Tiang probably did destroy a large number of the plaintiffs' documents, I am unable to conclude on the evidence whether this was done (a) on the instructions of WKN, (b) on his own initiative for his own personal reasons or (c) on the instructions of WKY or WKC. Be that as it may, it is, in my judgment, absolutely clear that the CAD Documents could and should have been disclosed by the plaintiffs in these proceedings as part of the ordinary disclosure process. The fact that they were not originally disclosed and only came to be disclosed following an application for specific disclosure by the defendant represents a serious failure by the plaintiffs to comply with their disclosure obligations. The explanation for this failure was given by WKY at para 12 in his 10th affidavit dated 5 November 2019 in response to the defendant's application for specific disclosure *viz* that "[WKY] had forgotten about the existence of the CAD [D]ocuments and was only reminded of their existence after the [d]efendant's application for disclosure was served." I regard that explanation as, at best, totally unsatisfactory if not disingenuous.

72 In passing, I should mention that it was an important part of the evidence of the plaintiffs' accountancy expert, Mr Heng, and indeed a major plank of the plaintiffs' case that the defendant's case should be rejected because it was largely unsupported by contemporaneous documents. I deal below with the substance of the defendant's case. However, at this stage, I would merely note that the apparent dearth of relevant documents would seem to be due, at least in part, to the matters stated above and, to that extent, not in any sense the fault of the defendant. Specifically, this seems to be a result of: (a) the fact that the

plaintiffs did not have a proper accounting system and (b) the destruction of a large number of the plaintiffs' documents and records by the plaintiffs' own bookkeeper, Mr Tiang.

73 For the sake of completeness, I should mention that I have not forgotten the fact that, as I have already stated, Mdm Ma arranged for the steel cabinets in WKN's room in WTK Management's offices to be removed, and that there is no longer any trace of these documents. What the documents were is unknown. But on the basis that the plaintiffs' business operations were administered not by WTK Management in Sibu but by Double Ace from their office in Singapore, it is perhaps doubtful that the steel cabinets removed by Mdm Ma from WKN's room in WTK Management's offices would necessarily be relevant to the plaintiffs' business operations, although I accept that that is somewhat speculative.

(iv) Status of the CAD Documents

74 Fourth, there was a major issue between the parties concerning the evidential status of most of the CAD Documents. The issue was important because the CAD Documents were heavily relied upon by the defendant. Indeed, as appears below, they constituted a crucial part of the defendant's case. The plaintiffs advanced forceful submissions why the CAD Documents were inadmissible in evidence as to the truth of their contents and could not be relied upon by the defendant.

75 Given the importance of this issue, I directed further written submissions following the trial. I deal below with these submissions. In so doing, I should make plain that a limited number of the CAD Documents were obviously admissible – for example, those signed or attested to in the course of the trial by

the plaintiffs' own witnesses including WKY and Ms Loh. However, there remained a hotly contested debate between the parties as to the admissibility of the remainder of the CAD Documents as to the truth of their contents.

76 As stated above, the CAD Documents were seized by the CAD from the offices of Double Ace, *ie*, the plaintiffs' agents in Singapore in August 2014 and returned to them in June 2016. It was common ground that these documents were "authentic". However, it was submitted on behalf of the plaintiffs that the contents of these documents were, in effect, hearsay statements (including manuscript writing) and thus inadmissible as to their truth unless the defendant could establish (the burden being on him) that what was stated in the documents was admissible as to the truth of their contents under one or more of the exceptions in s 32 of the Evidence Act.

77 In this context, it was accepted by the defendant that under s 5 of the Evidence Act, evidence may only be given of facts in issue or relevant facts; that hearsay evidence is *prima facie* inadmissible as it is perceived as irrelevant facts: *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [67]; that hearsay evidence will only be admitted where (a) it falls within one or more of the heads of exception in s 32(1) of the Evidence Act; and (b) the court determines that it should not exercise its discretion to exclude the evidence under s 32(3) of the Evidence Act in the interests of justice: see *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686 (*'Gimpex'*) at [95]; and that, even where hearsay evidence is admitted, the court retains the ultimate discretion under s 32(5) of the Evidence Act to assign the weight that it deems fit to all hearsay evidence that is admitted.

78 It was accepted on behalf of the defendant that (save to the extent that the statements contained in the documents were attested to by witnesses with

relevant knowledge as to the truth of their contents) the contents of the CAD Documents were hearsay statements and *prima facie* inadmissible as to the truth of their contents. However, on behalf of the defendant, it was submitted that these the CAD Documents were admissible as to the truth of their contents pursuant to s 32(1)(*b*) of the Evidence Act and/or s 32(1)(*j*) of the same Act:

> **32.**—(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> **…**
>
> (*b*) when the statement was made by a person in the ordinary course of a trade, business, profession or other occupation and in particular when it consists of —
>
> (i) any entry or memorandum in books kept in the ordinary course of a trade, business, profession or other occupation or in the discharge of professional duty;
>
> …
>
> (iv) a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by any person, body or organisation carrying out the trade, business, profession or other occupation,
>
> and includes a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary course of a trade, business, profession or other occupation based on information supplied by other persons;
>
> …
>
> (*j*) when the statement is made by a person in respect of whom it is shown —
>
> (i) is dead or unfit because of his bodily or mental function to attend as a witness…

In support of the foregoing and insofar as might be necessary, it was submitted on behalf of the defendant that Mr Tiang was the "maker, compiler and/or maintainer of the CAD Documents".

79 Further, with regard to the scope and effect of s 32(1)(*b*), the defendant relied upon a number of texts and authorities including *Gimpex* at [91]-[92] in particular where the Court of Appeal referred to the Consultation Paper issued by the Ministry of Law in 2011; the statement by the Minister for Law K Shanmugan where he explained that the parliamentary intent behind s 5 of the Evidence (Amendment) Act 2012 (Act 4 of 2012), which expanded the scope of the hearsay exceptions, was "to give the courts the discretion to sieve through the evidence to see which part should be allowed … [as] there is an interest of society in allowing relevant evidence, and that the judge is best placed to decide on what is relevant": *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 (K Shanmugam, Minister for Law) p 1141. Further, the defendant relied on a large number of other cases which, it was submitted, consistently reflect the parliamentary intent behind the 2012 amendments: that is, to "remove … technical limitations to the scope of the "business statement" exception, and to allow a court the discretion to admit *all business records* produced in the ordinary course of business which *appear prima facie authentic*" [emphasis added]: *Gimpex* at [92].

80 The defendant's reliance on s 32(1)(*b*) was disputed by plaintiffs on a number of grounds which I would summarise as follows:

(a) The defendant has the burden of showing that he is entitled to invoke one of the exceptions prescribed in s 32(1) of the Evidence Act.

(b) The rationale for the s 32(1)(*b*) exception is that statements contemporaneously made in the ordinary course of routine business may be presumed to have been made with a disinterested motive and may therefore be taken to be generally true. In other words, what lends business records their reliability is the element of regularity rather than

the profit motive or nature of the person carrying on the activity (relying on *Bumi Geo Engineering Pte Ltd v Civil Tech Pte Ltd* [2015] 5 SLR 1322 ("*Bumi*") at [104]; *Phipson on Evidence* (Hodge M Malek *et al* eds) (Sweet & Maxwell, 19th Ed, 2017) at para 29-13).

(c) The plain and ordinary meaning of the words "in the ordinary course" is matters that usually and regularly occur. Those words are then followed by the words "trade, business, profession or other occupation", which are of wide scope. What is important is that that activity is a known and recognised activity that is carried on regularly and in an organised fashion. According to the editors of the *Halsbury's Law of Singapore* vols 10 and 10(2) (LexisNexis Singapore, 2020)("*Halsbury's Law of Singapore*") at para 120.137:

> *Under [s 32(1)(b)], the ordinary course of business is intended. Therefore, if a company ordinarily carries on the business of a hotel, the statements made by the company in relation to a one-off sale of its used furniture would not be made in the ordinary course of business and would not be a statement within the section.* But statements made in its books of the identity of persons who had contracted *inter praesentes* for the occupation of a room and the location and description of the room to be occupied, and statements contained in a credit card voucher signed in respect of the occupation of the room, would be statements within the section [emphasis added]

(d) The plaintiffs identified two questions. First, what is the relevant party's business ? Second, were the documents made in the course of that business ?

(e) There is a fatal circularity which undermines the defendant's reliance on this exception. He is seeking to use the CAD Documents which he says were made in the ordinary course of the plaintiffs' business to prove that they were made in the course of that business.

(For convenience, I shall refer to this as the "bootstraps argument"). That is not permissible. There must first be proof, without reliance on the documents, of what the plaintiffs' business was. The defendant cannot use the inadmissible documents to show what the plaintiffs' practice and therefore business was so as to then admit the documents. In short, the documents are not relevant and admissible under this exception *for the purpose of showing what the business was.* The documents become relevant and admissible only once there is proof of the ordinary course of business. If the defendant is allowed to do what he is seeking to do, it will make a nonsense of this exception.

(f) There is no evidence of the (alleged) para 4(d)(iv) practice or the (alleged) agreements/arrangements. It thus cannot be said that the payments were made in the course of the plaintiffs' business, which in turn means that the documents could not have been made in the course of that business.

(g) The cases relied upon provide no support to the defendant. In particular, in none of them were the documents that were sought to be admitted used to prove what the business was. There had also been no dispute in those cases that the documents were admissible.

(h) Further, in order to bring s 32(1)(*b*) into play, the defendant must identify the person who made the statements in the CAD Documents because that section applies only "when the statement was made by a person in the ordinary course of a trade, business, profession or other occupation". If the person who made the statement is not identified, it cannot conceivably be said that he made the statement in the ordinary course of business. In each of illustrations (b) to (d) to s 32(1), which

list examples of admissible hearsay statements, the maker is identified. The identity of the maker of the statement and his motives are critical. If the person who made the statement is not identified, there is no way to know if he made the statement in the ordinary course of business and for what reason. To suggest otherwise is inconsistent with the wording of s 32(1)(*b*) and would undermine the *raison d'etre* for this exception.

(i) In support of the foregoing, the plaintiffs relied upon *Hope v Hope* [1893] WN 20 as well as certain other parts of the speech referred to above by the Minister of Law and the Consultation Paper.

(j) Here, there is simply no evidence to prove that Mr Tiang was the "maker, compiler and/or maintainer of the CAD Documents." Also, the premise of that contention is flawed as it assumes that the CAD Documents were created in the ordinary course of the plaintiffs' business and therefore Mr Tiang must have prepared them. It is also speculative as there is no evidence that Mr Tiang made the CAD Documents, *eg*, handwriting evidence.

(k) The defendant's reliance upon the evidence of WKY to suggest that the maker, compiler and/or maintainer of the CAD Documents could only have been Mr Tiang is misplaced and erroneous. Further, if the defendant wished to show that the plaintiffs "owned" the CAD documents, then the defendant should have called one of Double Ace's employees which has not happened.

(l) The foregoing is fatal to the defendant's applications under both s 32(1)(*b*) and s 32(1)(*j*).

(m) In any event, the CAD Documents should be excluded in the interests of justice under s 32(3) of the Evidence Act.

81 As for these submissions, my observations and conclusions are as follows.

82 I readily accept that the statements in the CAD Documents are *prima facie* inadmissible save to the extent that (a) the statements contained in the documents were attested to by witnesses with relevant knowledge as to the truth of their contents; and/or (b) they fall within one or both of the exceptions relied upon by the defendant; and that the burden of establishing the latter lies on the defendant.

83 The question as to whether the exception in s 32(1)(*b*) applies arises in the present case in rather unusual circumstances. Thus, this is not a case where (for example) a party (here, the defendant) is seeking to rely on that provision to admit in evidence documents produced by that party itself or by (say) an employee/agent of that party; or documents produced by some third party. Rather, in this case, on the basis that I am right in my conclusion that the CAD Documents are properly regarded as the plaintiffs' documents and records (as to which see below at [84]), it is the plaintiffs who are *themselves* seeking to exclude evidence contained in *their own* documents and records. Knowledge as to the actual "maker" of the statements lies entirely with the plaintiffs. In my view, the suggestion that the defendant might have called one of Double Ace's unidentified employees (whoever they may be) to give evidence with regard to the status of the CAD Documents (or specifically their "maker") is unrealistic if not disingenuous.

84 In considering whether the defendant can rely on the exception in s 32(1)(*b*) and at the risk of repetition, the starting point is to recognise that the CAD Documents were all seized by the CAD from the offices of Double Ace who were, in effect, the plaintiffs' agents. As stated above, the evidence is that the plaintiffs had no employees themselves; that all administrative services were provided by Double Ace including updating and maintaining the plaintiffs' financial records, liaising with the banks, and arranging for payments to be made from the plaintiffs' bank accounts in Singapore; and that it was Mr Tiang who was the plaintiffs' bookkeeper and who "looked after" the plaintiffs' business. WKY's evidence confirmed that the CAD Documents had been kept in the Singapore office of Double Ace and were all "owned" by the plaintiffs. It is fair to say (as counsel on behalf of the plaintiffs emphasised), that WKY's evidence was that he did not know exactly what documents had been seized by the CAD because he did not open the "box"; and, on this basis, it was submitted that, although WKY may have assumed or thought that the plaintiffs "owned" the documents, it is not fair for the defendant to rely on what WKY said because, on his own evidence, he did not look at them. I do not accept that submission. Even accepting the fact that WKY may not have opened the "box", in light of WKY's evidence and having regard to all the circumstances, I am satisfied that the CAD Documents are properly regarded as the plaintiffs' documents and records.

85 Even so, if, as submitted on behalf of the plaintiffs, s 32(1)(*b*) requires the maker of the statement(s) sought to be admitted to be specifically identified by name, I have considerable difficulty in accepting the submission made on behalf of the defendant that Mr Tiang satisfies that requirement. In that context, it was submitted on behalf of the defendant that WKY's evidence was that Mr Tiang was the only employee at Double Ace looking after the plaintiffs'

business, that therefore the "maker" of the CAD Documents can readily be identified; and that such "maker" must and can only have been Mr Tiang. I do not accept that submission. I have already touched on this topic above. Although WKY certainly gave evidence that Mr Tiang looked after the plaintiffs' operations, I did not understand his evidence to be that Mr Tiang was the *only* employee at Double Ace looking after the plaintiffs' business. Even on the basis of Mr Tiang's own evidence that he was the plaintiffs' bookkeeper, it does not necessarily follow that he was the "maker" of the statements contained in the CAD Documents; and even if he was (as submitted on behalf of the defendant) the "compiler" or "maintainer" of those documents, that does not mean that the statements in those documents were "made" by him.

86 I have wavered with regard to the submission made on behalf of the plaintiffs as to whether it is necessary for a party seeking to rely upon s 32(1)(*b*) to be able to identify the actual "maker" of the statement sought to be adduced in evidence. In truth, this raises an important question of law as to the scope and effect of that section as to which there appears to be no clear authority. I see force in the arguments in favour of a positive answer. However, it does not seem to me that the wording of the section necessarily compels that conclusion; and I note that, as submitted on behalf of the defendant, there are certainly some reported cases where it would seem that the precise identity of the maker of the statement was unknown – although it is fair to say that the point does not appear to have been specifically argued. In the absence of clear statutory wording to the contrary (as I consider the position to be here), my own view is that it is not a necessary requirement to identify the specific name of the maker – provided, of course, that the court is satisfied that the statement was made by "a" person "in the ordinary course of a trade, business, profession or other occupation". (The position is, of course, otherwise with regard to s 32(1)(*j*) because, for that

sub-section to apply, it is necessary, of course, to show that the "maker" of the statement is unfit etc.) That conclusion is, in my view, fortified by the dicta in the various cases relied upon by the defendant and the speech made by the Minister of Law with regard to the purpose of the legislation widening the scope of the hearsay exceptions. To my mind, this conclusion is also more conducive to the interests of justice: it avoids a situation where the court is forced to shut its eyes to what may be potentially important evidence.

87 For these reasons, it is my conclusion that it is not necessary to identify the particular individual who made the statements in the CAD Documents for the purposes of s 32(1)(*b*) provided that the court is, as I have said, satisfied that the statement was made by "a" person "in the ordinary course of a trade, business, profession or other occupation". Of course, if such evidence is admitted under s 32(1)(*b*), it does not necessarily follow that the court is bound to accept such evidence. On the contrary, as noted above, s 32(3) of the Evidence Act gives the court a discretion to exclude the evidence in the interests of justice; and, as recognised by s 32(5) of the Evidence Act, what weight (if any) to be given to such evidence is ultimately a matter for the court. Be all this as it may, it seems to me that even if the CAD Documents were not "made" by Mr Tiang, they are properly regarded as forming part of a record of documents which were "compiled" by him in his capacity as the plaintiffs' bookkeeper who looked after the plaintiffs' business.

88 That is still not the end of the road on this topic because it remains necessary to consider whether the defendant has established that the CAD Documents were made or "compiled" by "a" person " in the ordinary course of a trade, business" within the meaning of s 32(1)(*b*). In that context, it is necessary to consider the plaintiffs' submission that the defendant is, in effect, seeking to rely on a "bootstraps argument" which is impermissible. In principle,

I readily accept that a party would not be entitled to rely on documents which are otherwise inadmissible in order to prove the existence of an ordinary course of business for the purpose of satisfying the requirements of s 32(1)(*b*). However, having looked carefully at the CAD Documents, I am satisfied that they were made in the ordinary course of the plaintiffs' business. There is no doubt that the defendant seeks to rely on the CAD Documents to support his case as to the particular nature of the specific transactions carried out in the course of such business. Whether or not such documents (if admissible) establish or support *that* case remains to be considered in the light of the totality of the evidence. But, for present purposes and whether or not they serve ultimately to prove the defendant's case as to the nature of the specific transactions undertaken by the plaintiffs, it seems to me plain that the relevant requirement of s 32(1)(*b*) is satisfied, *ie*, these documents were made in the ordinary course of the plaintiffs' business. In my view, the cases cited by the plaintiffs (*ie*, *Management Corporation Strata Title Plan No 3556 (suing on behalf of itself and all subsidiary proprietors of Northstar @ AMK) v Orion-One Development Pte Ltd (in liquidation) and another* [2020] 3 SLR 373, *Bumi* ([80(a)] *supra*) and *Re K & R Fabrications (QLD) Pty Ltd (in liq)* (1980) 32 ALR 183) are distinguishable and of no assistance; and there is nothing in those cases nor in the passage from *Halsbury's Law of Singapore* which would justify any different conclusion to the one just stated on the facts in the present case.

89 Moreover, it is the plaintiffs' own case and own evidence that the plaintiffs are "in the business of" trading in timber logs and that the plaintiffs "would purchase timber from timber companies in the WTK Group in Malaysia" which they would then sell to buyers overseas. As submitted on behalf of the defendant, it is clear from the face of the CAD Documents that they relate to the plaintiffs' business of trading logs as they document the

plaintiffs' transactions with the Malaysian logging companies and other logging companies relating to the sale of logs.

90 I should also mention that, contrary to the plaintiffs' submissions, there is *other* evidence independent of the CAD Documents to support the specific case advanced by the defendants with regard to the nature of the transactions which lie at the heart of the defendant's case in relation to the 36 payments *viz* the evidence in Mdm Ma's statement – in particular at paras 91 and 92 as well as the evidence of the defendants' other witnesses – in particular, Mr Hii, LTK and Mr Ling, notwithstanding the fact that such evidence is (at least in part) highly controversial and heavily criticised by the plaintiffs.

91 For all these reasons, it is my conclusion that the CAD Documents are admissible in evidence under s 32(1)(*b*) of the Evidence Act as to the truth of their contents; but, with some reluctance, not otherwise under s 32(1)(*j*) of the Evidence Act.

92 Further, it is my conclusion that this is not a case where I should exercise my discretion to exclude the evidence contained in the CAD Documents under s 32(3) of the Evidence Act. On the contrary, in my view, there are compelling reasons why these documents should be admitted. In particular, as I have said, these documents are, in my view, properly regarded as the plaintiffs' own documents. Although it is uncertain who was the actual "maker" of these documents, there is no doubt that at the very least Mr Tiang, as the plaintiffs' bookkeeper, would have had responsibility for maintaining and retaining these documents as part of the plaintiffs' business records; and, at the very least, it is the defendant's case that they support an important part of his case. To exclude such documents from the evidence in the case would be to force the court to shut its eyes to potentially relevant evidence. Having said that, I readily accept

that the contents of the documents should be considered with a close eye; and it will, of course, be necessary to consider what weight should be given to such evidence.

Time-Bar/Laches

93 It was the defendant's case that the plaintiffs' claims were barred in whole or in part under s 6 of the Limitation Act and/or by the doctrine of laches and/or acquiescence. In particular, it was submitted on behalf of the defendant as follows:

(a) Under s 6 of the Limitation Act, the four causes of action relied on by the plaintiffs all have a limitation period of six years from the date of each payment. For dishonest assistance and knowing receipt, see *Panweld Trading Pte Ltd v Yong Kheng Leong and others (Loh Yong Lim, third party)* [2012] 2 SLR 672 ("*Panweld HC*") at [16], affirmed in *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [83]. For conspiracy, see *Dresdner Kleinwort Ltd v CIMB Bank Bhd* [2008] 3 SLR(R) 761 at [157]-[161]. For unjust enrichment, see *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chi* [2000] 3 SLR(R) 304 at [72]-[73].

(b) The plaintiffs bear the burden of proving on a balance of probabilities that their pleaded causes of action fall within the limitation period: *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat and another appeal* [2020] 2 SLR 272 at [37]-[41].

(c) Here, the plaintiffs' claims are all barred by virtue of s 6 of the Limitation Act.

(i) The Writ of Summons in the present action was filed on 20 November 2017.

(ii) 49 of the 50 Payments took place between January 2001 and October 2011, more than six years prior to the commencement of this action.

(iii) Accordingly, the plaintiffs' claim in respect of these 49 payments are barred under the Limitation Act.

94 In response, the plaintiffs submitted that the limitation period was postponed in the circumstances of the present case by virtue of s 29(1) of the Limitation Act which provides in relevant part as follows:

> **Postponement of limitation period in case of fraud or mistake**
>
> 29.—(1) Where, in the case of any action for which a period of limitation is prescribed by this Act —
>
> (*a*) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;
>
> (*b*) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (*c*) …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

95 Thus, it was submitted on behalf of the plaintiffs that where s 29(1) of the Limitation Act applies, the six-year limitation period in s 6(7) of the Limitation Act will run from the date on which the plaintiffs discovered or could with reasonable diligence have discovered the material facts: *Fan Juan Fen v Crocodile Holdings Pte Ltd* [2005] SGHC 152 at [79]; *Bank of America National Trust and Savings Association v Herman Iskandar and another* [1998]

1 SLR(R) 848 at [72]; that, in the circumstances of the present case, that date was no earlier than April 2013; that the Writ was issued within six years of that date; and that, accordingly, the plaintiffs' claims are not time-barred.

96 In support of the foregoing, it was submitted on behalf of the plaintiffs in summary as follows:

(a) Section 29(1)(*a*) applies where the action is "based upon the fraud" of the defendant or his agent *ie*, if their fraud is an element in that cause of action: *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 at [201(a)]. The words "fraud" and "agent" in s 29(1) of the Limitation Act are not used in the common law sense. They are used in the equitable sense to denote conduct by the defendant or his agent such that it would be against conscience for him to avail himself of the lapse of time: *King v Victor Parsons & Co (A Firm)* [1973] 1 WLR 29, cited in *Fan Juan Fen v Crocodile Holdings Pte Ltd and another and another suit* [2005] SGHC 152 at [81] and *Bank of America National Trust and Savings Association v Herman Iskandar and another* [1998] 1 SLR(R) 848 at [73]. Section 29(1)(*a*) of the Limitation Act applies in the present case because the plaintiffs' claims for unjust enrichment, dishonest assistance, knowing receipt and conspiracy are based on the fraud of the defendant and WKN who was the defendant's agent.

(b) Section 29(1)(*b*) of the Limitation Act applies where the defendant or his agent's fraud "concealed" the plaintiff's "right of action". The words "right of action" refer to the material facts which would form the basis of the claim. Where a company makes a claim for breaches of a director's duties to the company for making payments from the company's bank account for his own expenses, the fact that

payments were made is a material fact the concealment of which would postpone the running of time until the payments were discovered: see *DM Divers Technics Pte Ltd v Tee Chin Hock* [2004] 4 SLR(R) 424 ("*DM Divers*") at [83] and [89].

(c) It is not necessary to show that the defendant (or his agent) took active steps to conceal his wrongdoing or breach of contract. It is sufficient that the defendant knowingly committed the wrongdoing and did not tell the plaintiff anything about it. By saying nothing he keeps it secret and therefore conceals the right of action by "fraud" within the meaning of s 29(1)(*b*) of the Limitation Act.

(d) Section 29(1)(*b*) of the Limitation Act also applies because WKN and the defendant concealed the plaintiffs' right of actions "by fraud". The defendant received the payments knowing full well that he was not entitled to them and that his father had caused the plaintiffs to make the payments to the defendant in breach of his (WKN's) fiduciary duties to the plaintiffs.

(e) The period of limitation in this case did not start to run until April 2013 when the plaintiffs, through WKY, learnt of the low balances in the plaintiffs' accounts which ultimately led to the discovery of the payments to the defendant in around March 2014.

97 In further support of the foregoing, the plaintiffs relied on the evidence of WKY to the effect that he signed the TT forms because he trusted WKN and believed that the payments were in the plaintiffs' interests; that he did not see the defendant's name on any of the TT forms and that he signed a number of those TT forms in blank; that all the books and records documenting the payments, including the TT forms, HSBC bank statements and HSBC issuing

advices were to the best of his knowledge sent to and stored at the office of Double Ace; and that such records were never made available to WKY or WKC.

98 In any event, it was submitted on behalf of the plaintiffs that WKY and WKC could not with reasonable diligence have discovered the payments because they were not put on inquiry about the payments to the defendant. In that context, it was submitted on behalf of the plaintiffs that the concept of reasonable diligence involves two considerations *viz*:

(a) whether the plaintiff was put on inquiry or had reasonable cause to take the steps which would have led to the discovery of the relevant facts: *Davies v Sharples* [2006] EWHC 362 (Ch) ("*Davies*") at [59], where a plaintiff is put on inquiry only when he encounters facts which arouse suspicion: *DM Divers* at [89]; and

(b) whether having been put on inquiry the plaintiff acted sufficiently diligently in taking the necessary steps to ascertain the existence of the fraud or mistake: *Davies* at [59]. Here, the plaintiffs relied on the evidence of WKY to the effect that until his death in March 2013, WKN was solely in charge of the day-to-day management, affairs and business of the plaintiffs; that WKY and WKC trusted WKN to act in the plaintiffs' interests and did not know of the payments to the defendant, until after WKN's death.

99 In response, it was submitted on behalf of the defendant that s 29(1)(*a*) of the Limitation Act cannot apply because (a) the plaintiffs have not established any fraud on the part of the defendant or his agent and the 50 Payments were not procured by any fraud on the defendant's part; and/or (b) s 29(1)(*b*) of the

Limitation Act cannot apply because the plaintiffs' right of action was not concealed by fraud.

100 Here, it was the defendant's primary case that the plaintiffs were well aware of the nature of the 50 Payments all along. In any event, on the assumption that the plaintiffs could bring themselves within s 29(1)(*a*) or (*b*) of the Limitation Act, it was submitted on behalf of the defendant that the limitation period for the plaintiffs' four causes of action started to run once the alleged deception could have been discovered by the plaintiffs with the exercise of reasonable diligence: *Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 ("*Chua Teck Chew*") at [27]; and that the plaintiffs bear the burden of proving that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take: *Lim Siew Bee v Lim Boh Chuan and another* [2014] SGHC 41 ("*Lim Siew Bee*") at [131].

101 In support of the foregoing, it was further submitted on behalf of the defendant in summary as follows:

(a) In the first place, the plaintiffs had actual knowledge of the 50 Payments at or around the time they were made:

(i) WKY was a named director of Esben and Lismore, and a *de facto* and/or shadow director of Incredible Power and Rayley. In the course of his directorship of the plaintiffs, WKY had signed off on 25 out of 50 TT forms which were used to effect the 50 Payments to the defendant. WKY has also admitted to signing off on various documents which would and should have alerted him to the context and necessity of the 50 Payments.

(ii) As directors are agents of the company, information acquired by a director acting within the scope of his authority is attributable to the company under the doctrine of agency (*The "Dolphina"* [2012] 1 SLR 992 at [216]-[217]), WKY's knowledge of the 50 Payments should be attributed to the plaintiffs. The plaintiffs may thus be regarded as having had actual knowledge of the 50 Payments at or around the time they were made.

(iii) Mr Tiang also had actual knowledge of the 50 Payments. As the plaintiffs' accounts clerk who was responsible for arranging for the payments to be made from the plaintiffs' on WKY's or WKN's instructions, and being the donee of Powers of Attorney granted by Incredible Power and Rayley, Mr Tiang was also an agent of the plaintiffs. Hence, Mr Tiang's knowledge of the 50 Payments may also be attributed to the plaintiffs under the doctrine of agency.

(iv) WKY's claim that he did not know why these payments were made, and had authorised the 50 Payments in the mistaken belief that the payments would be made "in the interests of the [p]laintiffs", is a plain lie. WKY is a Chartered Certified Accountant by training, a former Senator of Malaysia who has been conferred with the title of "Permanca" and Chairman of the Sarawak Timber Association. His excuse – that he did not know what he was signing – is highly unbelievable and ought to be rejected in its entirety.

(v) More importantly, as directors and bank signatories of the plaintiffs, WKY and WKC owed fiduciary duties to the

plaintiffs, which would have required them to understand the nature of the 50 Payments made by the plaintiffs to the defendant. They were not entitled to turn a blind eye to the affairs of the plaintiffs by leaving these matters entirely in the hands of WKN as alleged, and thereafter seek to abrogate themselves from any responsibility on the basis that they had trusted WKN to act in the plaintiffs' best interests: citing *Secretary of State for Trade and Industry v Swan Overview* [2005] All ER(D) 102 (Apr) at [217]. A board of directors must not permit one individual to dominate them: see *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths and others* [1998] 2 All ER 124. Even if a director is not actively involved in the day to day management of a company he must nonetheless monitor those activities and have an understanding of what is going on, and has a continuing duty to acquire and maintain sufficient knowledge and understanding of the company's business: *Australian Securities and Investments Commission (ASIC) v Healey* (2011) 196 FCR 291 and *Re Barings plc and others (No 5), Secretary of State for Trade and Industry v Baker and others (No 5)* [1999] 1 BCLC 433 ("*Barings*").

(b) In the present case, the plaintiffs clearly could have discovered their alleged right of action in respect of the 50 Payments with reasonable diligence well before April 2013.

(c) What constitutes reasonable diligence will depend on all the circumstances of the case. The meaning of reasonable diligence is not the doing of everything possible, but the doing of that which, under

ordinary circumstances and with regard to expense and difficulty, could be reasonably required: *Chua Teck Chew* at [29].

(d) Under BVI and Liberian law, companies are required to maintain books and records of the company's transactions. This obligation to ensure that books and records are properly kept as well as the accuracy of the company's records and underlying documents falls on the directors of the company. To enable a director to be informed about the company's affairs, the director has the right to inspect and access the company's documents and records.

(e) More specifically, as directors of Esben and Incredible Power, WKY and WKC had continuing duties under BVI law to review and understand the substance of the documents which the company is obliged to maintain to enable them to properly discharge their duties as directors: *Barings* at 489. In addition to such continuing duty, WKY and WKC had a clear right to access and inspect the plaintiffs' documents and records relating to the 50 Payments, and to conduct the necessary enquiries to ascertain the context and necessity of these payments. These enquiries should have been regularly undertaken by WKY and WKC in the discharge of their fiduciary duties to the plaintiffs: *Bowview Overseas Limited and anor v Aleman, Cordero, Galindo & Lee Trust (BVI) Limited* BVIHCV2017/0156 ("*Bowview*") at [39].

(f) In addition, under Liberian law, as directors of Lismore and Rayley, WKY and WKC had a responsibility of managing the business affairs of those companies; and that, in so doing, they owed fiduciary duties to the respective companies which would require them to:

(i) Act honestly and in good faith in the company's best interests;

(ii) Exercise his powers for a proper purpose; and

(iii) Ensure that the affairs of the corporation are properly administered, which includes: (A) the duty to ensure that complete and correct accounts and financial statements are prepared and are accurate; (B) the duty to inspect the records and documents of the company, and to be keep informed as to the business and affairs of the company; and (C) the duty to inquire and ensure that accounts and financial statements are prepared and submitted to the board of directors where these documents have not been submitted.

(g) Here, it was common ground that WKY and WKC were directors of Esben and Lismore. Although they were not formally appointed directors of the other plaintiffs, nevertheless, they were, in effect, *de facto* directors or "shadow directors" of those companies.

(h) With regard to Incredible Power:

(i) WKY and WKC were at all material times the authorised bank account signatories to Incredible Power's HSBC bank accounts. In the Mandate for Accounts, WKY was stated to be a director of Incredible Power.

(ii) In their capacity as the authorised bank signatories to Incredible Power's HSBC bank accounts, WKY and WKC had actively participated in the management of Incredible Power and in the conduct of its business, by controlling and/or exercising

command over the funds held in Incredible Power's HSBC bank accounts. Specifically:

(A) WKY signed seven TT forms authorising payments from Incredible Power to the defendant, six jointly with WKN, and one TT form by himself.

(B) WKY endorsed the instruction dated 4 March 2014 to HSBC to close Incredible Power's HSBC bank account and to transfer the outstanding balances to Faedah Mulia, another company within the WTK Group.

(C) WKY was one of the two signatories who endorsed two TT forms dated 30 March 2009 and 22 April 2009 each for the payment of HK$5 million to Mdm Ma from Incredible Power.

(D) WKY was one of the signatories who endorsed Incredible Power's letter dated 1 April 2011 requesting the inclusion of the defendant as an authorised signatory for Incredible Power's HSBC bank accounts.

(E) WKY signed three of Incredible Power's journal slips dated 6 October 2011, 10 November 2011 and 14 December 2011, which were stated to be to the "debit" of a list of WTK Group Logging Companies and to the "credit" of Song Logging Sdn Bhd, another Logging Company within the WTK Group which WKY himself had admitted to managing from the 1970s. WKY signed off on these journal slips as "Manager".

(F) In 2012, WKY was the sole signatory of at least nine cheques, and WKC the sole signatory of at least one

cheque which were utilised by Mr Tiang to misappropriate funds amounting to US$1,656,732 from Incredible Power. The amounts under these cheques formed the subject of the 25th charge preferred against Mr Tiang.

(G) In 2013 and 2014, WKY was the sole signatory of at least 19 cheques, and WKC was the sole signatory of at least one cheque which was used by Mr Tiang to misappropriate funds amounting to a total of US$ 2,274,096.02 and S$1,007,397 from Incredible Power. The amounts under these cheques formed the subject of the 26th and 27th charges levied against Mr Tiang.

(H) WKY and WKC (together with WKN prior to March / April 2011) were for all intents and purposes the only individuals who were involved in running the affairs of Incredible Power. There were no other individuals who fulfilled the role of directors of Incredible Power. There is no evidence (and it is not the plaintiffs' case) that the *de jure* directors had any dealings or involvement at all in the affairs of Incredible Power. It is equally clear that Mr Tiang did not play the role of a director: he was only responsible for carrying out "administrative services" for Incredible Power on "instructions" which he received.

(I) Incredible Power was part of the WTK Group, which was run by the Wong Brothers as a single

economic entity for cashflow purposes. By virtue of WKY's and WKC's involvement in the management and affairs of companies within the WTK Group, they must also be regarded as individuals who were effectively in control of Incredible Power.

(J) It is clear from the above that WKY and WKC undertook and performed functions which could only be exercised by a director of Incredible Power, and/or had exercised real influence in the corporate governance of Incredible Power.

(K) Additionally, WKY and WKC were also the shareholders, and the ultimate beneficial owners of Incredible Power. Legal title to the 100 issued shares in Incredible Power was held by Swan Nominees Limited as nominee in equal proportion for the benefit of WKN, WKY and WKC.

(i) With regard to Rayley:

(i) WKY and WKC were at all material times the authorised bank account signatories to Rayley's HSBC bank accounts.

(ii) In their capacity as the authorised bank signatories to Rayley's HSBC bank accounts, WKY and WKC had actively participated in the management of Rayley and in the conduct of its business, by controlling and/or exercising command over the funds held in Rayley's bank accounts:

(A) WKY signed five TT forms jointly with WKN, authorising payments from Rayley to the defendant.

(B) WKY and WKC had endorsed the instruction dated 26 April 2013 to HSBC to close Rayley's HSBC bank accounts and to transfer the outstanding balances to Esben.

(C) WKY was one of the signatories who endorsed Rayley's letter dated 1 April 2011 requesting the inclusion of the defendant as an additional authorised signatory for Rayley's HSBC bank accounts.

(D) In 2009, WKY was one of the signatories who signed a TT form which was used by Mr Tiang to misappropriate funds amounting to US$113,882 from Rayley. The amount under this TT form formed the subject of the 31st charge levied against Mr Tiang.

(E) WKY and WKC (together with WKN before he left Sibu in March / April 2011 to seek medical treatment in Sydney) were for all intents and purposes the only individuals who were involved in running the affairs of Rayley. There are no other individuals who could be put forward as having fulfilled the role of directors of Rayley. There is no evidence (and it is not the plaintiffs' case) that the *de jure* directors had any dealings or involvement at all in the affairs of Rayley. It is equally clear that Mr Tiang did not play the role of a director: he was the plaintiffs' "bookkeeper" who was only responsible for carrying out "administrative services" for Rayley on "instructions" which he received.

(F) Rayley was part of the WTK Group, which was run by the Wong Brothers as a single economic entity for cashflow purposes. By virtue of WKY's and WKC's involvement in the management and affairs of companies within the WTK Group, they must also be regarded as individuals who were effectively in control of Rayley.

(j) For all these reasons, the plaintiffs clearly could with reasonable diligence have discovered their alleged right of action in relation to the 49 payments prior to April 2013, and there is no basis for them to postpone the limitation period.

102 Following the main hearing of the trial, the parties provided further written submissions on the defendant's time-bar defence including detailed submissions on matters concerning both BVI law and Liberian law with regard to the two main issues addressed by the foreign lawyers *viz*

(a) Whether a director of the plaintiffs (be it a named director, a *de facto* director and/or a shadow director (if found to fall within the definition of section 2 of the BVI Business Companies Act 2004)) is entitled and/or obligated under BVI and Liberian law respectively, to inspect and/or access the plaintiffs' respective records and underlying documentation (including the electronic records of the payments)?

(b) Whether a director of the Esben and Incredible Power, be it a named director, a *de facto* director and/or shadow director (if found to fall within the definition of section 2 of the BVI Companies Act 2004) is obliged to prepare and/or ensure the accuracy of those plaintiffs' accounts and financial statements?

103 I do not propose to set out the parties' respective submissions in detail with regard to BVI law and Liberian law. For present purposes, it is, I believe, sufficient to seek to summarise the plaintiffs' position:

(a) There is no pleaded case of limitation so far as the plaintiffs' case for unjust enrichment is concerned.

(b) It is not open to the defendant to run the arguments under BVI law and/or Liberian law summarised above because he has not pleaded these matters.

(c) Such arguments contradict the defendant's pleaded case.

(d) In any event, such arguments are incorrect as a matter of BVI law and Liberian law. In particular:

(i) Although WKY (and WKC) were directors of Esben and Lismore, they were *not* directors of Incredible Power or Rayley. Nor were they *de facto* or "shadow directors" because they did not undertake functions in relation to those companies which could be discharged only by a company or otherwise direct the *de facto* and/or *de jure* directors how to act in relation those companies. In summary, neither WKY nor WKC exercised any real influence on the corporate governance of those companies. To that extent, the submissions made by the defendant's foreign lawyers with regard to the rights or duties of WKY and WKC as a matter of BVI law and Liberian law in respect of Incredible Power and Rayley are inapplicable.

(ii) In any event, under ss 96 to 98 of the BVI Business Companies Act, the obligation to prepare and maintain a

company's documents, underlying documentation, financial statements and accounts is imposed on companies.

(iii) Although s 100 of the BVI Business Companies Act gives a director a right to inspect and access the company's documents and records, it does not impose on directors any general obligation to review or understand the company's documents.

(iv) Similarly, although the Liberian Business Corporation Act provides that a company must keep correct and complete books and records of accounts, there is no obligation on directors to ensure that this is done. Nor is there any duty on a director to inspect the company's books and records.

(v) Under BVI law and Liberian law, it is well-established that a director is entitled to entrust matters to another director of the company and is not under a duty to check performance of the functions delegated to another director. Further, it would be misleading to transpose statements of principles to the very different case of a closely-held family company. In this context, the authorities relied upon by the defendant are distinguishable on the facts: none of the cases concerned the management and operation of closely-held family companies.

(vi) The defendant's foreign law experts' arguments are based on the premise that the offshore payments were made in the ordinary course of the plaintiffs' business and so would have been reflected in the plaintiffs' books and records. But that premise is speculative and unproved.

(e) In any event, all these arguments are completely irrelevant to the issue of limitation under Singapore law. Taking the defendant's case at its highest (which is denied), WKY and WKC have breached their duties under BVI and Liberian law to allegedly maintain and inspect the plaintiffs' books and records, and to keep themselves informed about the company's affairs. But that does not assist the defendant. Whether the plaintiffs' claims are time-barred is a question of Singapore law (see *Dynasty Line Ltd (in liquidation) v Sukamto Sia and another and another appeal* [2014] 3 SLR 277 at [51]) that will turn on the meaning and effect of s 29(1) of the Limitation Act.

104 Here, it was submitted on behalf of the plaintiffs that they could not with reasonable diligence have discovered the fraud prior to April 2013 for reasons which I would summarise as follows:

(a) The defendant received the payments knowing that he was not entitled to them and that his father (WKN) had caused the plaintiffs to make the payments to the defendant in breach of his (WKN's) fiduciary duties to the plaintiffs. But neither the defendant nor his agent (WKN) told the plaintiffs about the 50 Payments. It was WKY's uncontradicted evidence that WKN never told WKY about the 50 Payments, and that WKN did not seek the approval of the plaintiffs' shareholders and directors before authorising the 50 Payments.

(b) WKN and Mdm Ma took steps to ensure that WKY and WKC did not uncover the documents relating to the payments, and as the 6 May 2016 letters show, they were surprised that WKY and WKC had found out.

(c) WKY testified that WKN told him expressly not to "interfere" with the plaintiffs' accounts and so WKY did as he was told because he did not want to upset WKN. It is completely understandable that WKY did as WKN, who was the patriarch of the Wong family, told him. It would have been unthinkable in a traditional Confucian Chinese family for WKY to ask questions when WKN was still alive, was still the patriarch, had the power as the leader of the family to marginalise people and was very much in touch with the business (relying on *Woon's Corporation Law* (Walter Woon gen ed) (LexisNexis, 2015) at para 103). It was Ms Ting's unchallenged evidence that WKN expected to be obeyed.

(d) Further, Mr Tiang destroyed the plaintiffs' documents on WKN's instructions. In June 2013, Mdm Ma removed the cabinets from WKN's office. There is no trace of those documents. So, plainly WKN and Mdm Ma took steps to ensure that WKY did not discover the Payments to the defendant which constitutes concealment by fraud within the meaning of s 29(1)(*b*).

(e) The defendant's case that the 50 Payments were never concealed from the plaintiffs because WKN asked WKY to sign some of the TT forms is flawed. The premise of that contention is that the defendant's name was on those TT forms. But there is no evidence of that. On the contrary, it was WKY's evidence that he did not know of the payments to the defendant and he signed the TT forms because he was told to and trusted WKN and believed that the 50 Payments were in the plaintiffs' interests. WKY did not ask WKN about the payments that the TT forms were used to make because he trusted WKN and did not want to upset WKN. He did not see the defendant's name on any of the TT forms and

had signed a number of those TT forms in blank. It was his practice to sign the TT forms in blank at WKN's request which he left with Mr Tiang. Ms Loh corroborated WKY's evidence. Ms Loh said that WKY did not usually sign approvals for payments and that on around 8 October 2011, she told WKY that WKN had asked her to hand a statement for his signature and WKY signed it.

(f) During cross-examination, the defendant's counsel, Mr Francis Xavier *SC* accepted that WKY signed some TT forms in blank. That was the premise of Mr Xavier's question to WKY, *ie*, whether WKY remembered which TT forms were blank and which were completed. WKY said that he could not remember. In fact, WKN himself signed in blank, as is evident from Mr Tiang's misappropriation charges.

(g) There is no evidence to contradict WKY's testimony. Mdm Ma does not know whether WKY and WKC were involved in the plaintiffs' affairs. Mr Hii conceded that he never told WKY or WKC about the "offshore" payments. Mr Ling's evidence is that he approached Ms Loh or WKN (and not WKY) to arrange for the payments to the defendant.

(h) The defendant cannot contend that Mr Tiang had actual knowledge of the 50 Payments to the defendant and so his knowledge may be attributed to the plaintiffs under the doctrine of agency. The defendant has not pleaded this point and so the plaintiffs have not had the opportunity to deal with it.

(i) There is no basis for the suggestion that WKY could with reasonable diligence have discovered the 50 Payments if he had inspected the records of the plaintiffs or Double Ace and that WKY had the opportunity to inspect the records because he regularly went to the

office; nor that that WKY could have asked Ms Ting, Ms Loh and Mr Tiang about the 50 Payments. This is another circularity. It assumes what needs to be proved. The premise of this contention is that the records showing the Payments would have been in Double Ace because they were made in the course of the plaintiffs' business. But that has not been proved.

(j) The defendant's contention is also incorrect for the simple reason that there is no evidence that WKY was put on inquiry about the 50 Payments to the defendant. In particular, it was WKY's evidence that he did not see the defendant's name on the TT forms that he signed and that if he had seen the defendant's name, he would have questioned the reason for the payment. There is also no evidence that there was any reason for WKY to suspect WKN, the patriarch of the Wong family. In any case, even if WKY had reason to suspect the payments to the defendant, there is no evidence that WKC knew anything. There is no suggestion anywhere that WKC knew anything of or was put on inquiry about the payments to the defendant or their reasons.

(k) In the circumstances, the period of limitation in this case did not start to run until April 2013 when the plaintiffs, through WKY, learnt of the low balances in the plaintiffs' accounts which ultimately led to the discovery of the payments to the defendant in around March 2014.

105 As for these respective submissions concerning the defendant's time-bar defence, my observations and conclusions are as follows.

106 First, it is important to note that the underlying premise of s 29 of the Limitation Act (*ie*, where s 29(1)(*a*) or (*b*) is satisfied, the commencement of

the limitation period will not be postponed in circumstances where the plaintiffs could with reasonable diligence have discovered the fraud) might be said to be somewhat anomalous – and perhaps even odd. After all, the object of any fraud is to seek to deceive the innocent party and prevent its discovery, and there is ample authority to the effect that if an innocent party is *in fact* deceived by fraud, it generally matters not that such party may have been a fool in trusting the knave. The underlying rationale in such circumstances is that the fraudster has successfully achieved his intended evil purpose and it is no defence that the innocent party could with reasonable diligence have discovered the fraud. Be that as it may, it is manifest that, so far as postponing the commencement of the limitation period, the purpose of s 29 is to strike a balance in favour of finality and drawing a line such that where s 29(1)(*a*) or (*b*) is satisfied, the commencement of the limitation period will only be postponed until the plaintiff has discovered or could with reasonable diligence have discovered the fraud.

107 Second, the plaintiffs' submission that the defendant's time-bar defence does not apply to the plaintiffs' claim for unjust enrichment does not appear to have been raised in the plaintiffs' written Opening Statement but was raised only at a late stage in the course of the trial. It rests on a close reading of, in particular, paras 5, 82, and 90-97 of the Defence (Amendment No 4). I accept that the manner of pleading in the Defence is open to criticism and is not entirely satisfactory. However, I am satisfied that on a fair reading, the plea of time-bar potentially applies to all of the plaintiffs' causes of action including unjust enrichment to the extent that the requirements of s 29(1)(a) and/or s 29(1)(b) are satisfied. Certainly, my understanding is that the parties proceeded on that basis until the pleading point was raised, as I have said, by the plaintiffs at a late stage of the trial.

108 Third, for the purpose of considering the defendant's time-bar defence, I proceed on an assumption in the plaintiffs' favour that the requirements of s 29(1)(*a*) and/or s 29(1)(*b*) are satisfied, *ie*, that the action "is based upon the fraud of the defendant or his agent…" and/or "the right of action is concealed by the fraud of [the defendant or his agent]". It is important to emphasise that I make this assumption solely for that stated purpose, and, in so doing, I recognise that, in one sense, I am putting the cart before the horse. Thus, there was a debate in the course of the parties' submissions as to whether the plaintiffs' claim for unjust enrichment was necessarily based upon the fraud of the defendant or his agent within the meaning of s 29(1)(*a*); and, of course, central to the other causes of action advanced by the plaintiffs is the question whether there was any fraud at all by the defendant let alone that the plaintiffs' right of action was concealed by the fraud of any such person within the meaning of s 29(1)(*b*). These are fundamental issues in the case. However, as I have already stated, for the purpose of considering the defendant's time-bar defence, I make the assumption stated above. To the extent that such assumption is wrong, it is plain that the plaintiffs cannot rely on any postponement of the limitation period under s 29 of the Limitation Act.

109 Fourth, on this basis, the central issues for the purpose of considering this time-bar defence are (a) whether (and when) the plaintiffs discovered the (alleged) fraud and (b) whether the plaintiffs could not with reasonable diligence have discovered the fraud prior to April 2013. I phrase the latter issue in this way because I accept that, in that context, the plaintiffs bear the burden of proving that they could not with reasonable diligence have discovered the fraud. As the authorities make plain, the question is not whether the plaintiffs *should* have discovered the fraud but whether the plaintiffs *could with reasonable diligence* have done so. In this regard, the burden of proof is on the plaintiffs,

who must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take: see *Lim Siew Bee* ([100] *supra*) at [131]. To this extent, the test is objective although, of course, what measures the plaintiffs would reasonably be expected to take are very much dependent on the facts of the case: *Lim Siew Bee* at [132].

110 Fifth, in considering whether the plaintiffs discovered the fraud or could not with reasonable diligence have discovered the fraud prior to April 2013, an important issue arises as to the identity of the individual(s) whose knowledge or reasonable diligence is relevant. That issue was not explored in any detail in the parties' respective submissions. Plainly, WKN's reasonable diligence and knowledge are irrelevant because (on the stated assumption), he was acting in fraud of the plaintiffs. So too, in my view, are Mr Tiang's knowledge and reasonable diligence irrelevant for that same reason. In addition, I can see no proper basis for attributing his knowledge to that of the plaintiffs. To that extent, I reject the defendant's submission that Mr Tiang's knowledge or reasonable diligence should be imputed to the plaintiffs. Both parties appear to have proceeded on the basis that, for the purposes of s 29 of the Limitation Act, the primary question was whether WKY could with reasonable diligence have discovered the fraud; and I also proceed on that basis. I put on one side WKC because, as I have stated, he moved to Australia at an early stage and appears to have played no part in the plaintiffs' business operations. Further, if WKY could not with reasonable diligence have discovered the fraud, then I see no reason to suppose that WKC would have been in any different position.

111 Sixth, I recognise some force in the plaintiffs' submission that it is not open to the defendant to run at least some of the arguments under BVI law and/or Liberian law summarised above because he has not pleaded such arguments; but the plaintiffs' objection is not straightforward. As submitted on

behalf of the defendant, there is no requirement to prove foreign law as a question of fact in Singapore International Commercial Court proceedings as would have to be done in proceedings before the Singapore High Court (see Report of the SICC Committee dated 29 November 2013; SICC Practice Directions at para 110(1)); and as stipulated in O 110 r 25 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), foreign law may be determined on the basis of submissions. Nevertheless, that does not obviate the necessity to plead points of foreign law at least succinctly. At the very least, such points of foreign law should be properly identified or agreed.

112 Here, I accept that the defendant's pleading was, at best confusing and, at worst, internally inconsistent. However, whilst refraining from engaging in a detailed analysis of the relevant procedural history, there is no doubt that the pleadings did raise certain limited issues of BVI law and Liberian law. Further, pursuant to O 110 r 25 of the Rules of Court (see also SICC Practice Directions at para 110), the plaintiffs themselves made an application (*viz* SIC/SUM 35/2020 ("SUM 35")) for certain questions of BVI and Liberian law to be determined by way of submissions instead of proof. By way of a letter dated 24 June 2020, the defendant's solicitors had written to the court Registry to indicate that the defendant had no objections to SUM 35, on the basis that, as agreed by the parties, counsel for the plaintiffs and the defendant might also deal with questions of foreign law in their Opening Statement and Closing Submissions.

113 The problem in the present case is that the defendant's foreign lawyers strayed beyond the limited issues originally identified in the pleadings. That was, to say the least, very unsatisfactory. In considering issues of foreign law, it is, in my view, particularly important that the issues are properly defined with specificity. However, I am satisfied that the plaintiffs' foreign lawyers were able to deal with the wider issues canvassed by the defendant's lawyers in their reply

submissions; and, in such circumstances, I see no prejudice to the plaintiffs in allowing submissions to be made on behalf of the defendant with regard to BVI law and/or Liberian law as summarised above based upon the opinions/submissions expressed by his foreign lawyers, Mr Folpp and Mr Sannoh.

114 Seventh, as to the rights and duties of WKY and WKC with regard to the plaintiffs' business under BVI law and Liberian law and without intending any discourtesy to the very detailed and helpful arguments on both sides, I would summarise briefly my broad conclusions as follows:

(a) It is common ground that WKY and WKC were directors of Esben and Lismore and, in that capacity, had a *right* to inspect and access the companies' documents and records as a matter of BVI law and Liberian law.

(b) The position is less clear as to whether as directors of Esben and Lismore, WKY and WKC had any personal *duty* to inspect and/or access those plaintiffs' respective records and underlying documentation (including the electronic records of the payments) and/or to prepare and/or ensure the accuracy of those plaintiffs' accounts and financial statements and/or any wider duty. On balance and borrowing the words of Jonathan Parker J in *Barings* ([101(a)(v)] *supra*) at 489, I am persuaded by the submissions of the plaintiffs' foreign lawyers that (whether under BVI law or Liberian law) there is no rule of universal application which can be formulated as to such duty or the entitlement of directors to delegate and to trust the delegates.

(c) On the evidence, I am not persuaded that WKY or WKC can properly be regarded as *de facto* or "shadow" directors of either

> Incredible Power or Rayley. As submitted on behalf of the defendant and summarised above, I readily accept that they performed some activities on behalf of those companies but there is little, if any, evidence to suggest that WKY or WKC undertook functions in relation to those companies which could only be discharged by a director or (more generally) exercised real influence in the governance of those companies.

115 Eighth, in any event, I do not consider that the position of directors (whether actual, *de facto* or shadow) under BVI law or Liberian law provides much, if any assistance, on the crucial issue under s 29(1) of the Limitation Act, *ie*, on the basis of the stated assumption that s 29(1)(*a*) and/or (*b*) are triggered, have the plaintiffs established that WKY could not with reasonable diligence have discovered the (alleged) fraud? In the circumstances of the present case, it seems to me wholly unrealistic to suppose that the answer to that question might depend on a detailed analysis of what rights or obligations WKY or WKC might have under BVI law or Liberian law. At the end of the day, it seems to me that, as submitted on behalf of the plaintiffs, that is ultimately a factual issue to be determined in the light of Singapore law and the principles stated above. As to that issue, I readily accept the defendant's submission that the meaning of reasonable diligence is not the doing of everything possible, but the doing of that which, under ordinary circumstances and with regard to expense and difficulty, could be reasonably required: *Chua Teck Chew* ([100] *supra*) at [29]; and that what constitutes reasonable diligence will depend on all the circumstances of the case.

116 Here, the main thrust of the plaintiffs' case was, as I have said, that WKN was, in effect, the patriarch of the family; that WKY did as WKN told him; that it would have been unthinkable in a traditional Chinese family for

WKY to ask questions; and that he (WKN) had absolute control over and could do what he liked with the plaintiffs and would brook no interference. The foregoing was certainly the submissions made on behalf of the plaintiffs but, in my view, such submissions overstate the evidence. In so saying, I bear well in mind the evidence of Ms Ting that WKN expected to be obeyed. That may well be right so far as the employees of the WTK Group are concerned but, at the very least, WKY was not an ordinary employee.

117 In my judgment, it is imperative to consider the *evidence* adduced by the plaintiffs in order to determine whether, on the stated assumption, the plaintiffs have discharged the burden on them that WKY could not with reasonable diligence have discovered the (alleged) fraud.

118 As to such evidence, it is undisputed that WKY signed 25 of the TT forms authorising the 50 Payments. As to these, WKY did not give any specific evidence concerning his signing of any particular TT forms. Rather his evidence was broad and very general. As appears from Annex B to this judgment, four of these TT forms were signed by WKY alone – *viz* No 22 dated 30 October 2006 and three more in 2011 and 2012, *ie*, Nos 48, 49 and 50. Of the other 21 TT forms, WKY's signature appears jointly with that of WKN.

119 In summary, WKY's evidence as contained in his AEIC dated 3rd February 2020 was that he "left the management and the business of the Offshore Companies including the [p]laintiffs, in WKN's hands*"*; that he "trusted WKN to act in the Offshore Companies' interests"; that "[o]n some occasions, WKN came to my office at the head office and asked me to sign TT [f]orms or cheques. I recall that those TT [f]orms or cheques….were blank [*ie*] they had not been completed and that WKN had signed on some of those TT [f]orms and cheques"; that he "did as WKN asked"; that, following WKN's

instructions, WKY also signed some TT forms placed before him by Mr Tiang when he visited the office of Double Ace in Singapore some of which had been *"*completed" and with the names of the beneficiaries filled in; that, in addition, he also signed and left with Mr Tiang "blank TT [f]orms and cheques"; that he had done as Mr Tiang asked, signing the "completed and bank TT [f]orms and cheques [as Mr Tiang asked]", believing these would be used to make payments in the plaintiffs' interests and to the plaintiffs' suppliers and service providers; that he could not "recall signing any cheques or TT [f]orms which bore [the defendant's] name".

120 Similarly, WKY's evidence in cross-examination was that if Mr Tiang or another member of staff showed him a TT form to sign and said that WKN wanted him (*ie*, WKY) to sign it, he would sign it; that in terms of the TT forms which he signed during the entire period between 2001 and 2012, he never asked about what the payments were for and had simply trusted WKN; that even when WKY was being asked to sign completed TT Forms, he would not read the contents "because [he] trusted [WKN]. … [Mr] Tiang asked [WKY] to sign. [He] just signed. That is all"; and that he never asked WKN if he could see the bank account statements or any of the plaintiffs' financial documents. He testified that he trusted his brother, WKN, throughout. Further, in cross-examination, Ms Ting also confirmed that WKY trusted WKN and would sign documents *"*blindly*"* once he saw the signature of the managing director of the relevant company's signature.

121 In cross-examination, WKY accepted that he could have asked Mr Tiang about the reason for the 50 Payments; and that if he had raised questions about the 50 Payments, Mr Tiang would have been obliged to "explain to [him] why" payment was being made to the defendant. Ms Ting also accepted that if WKY ever asked a question, the staff of WTK Management would explain. In the light

of that evidence, I am satisfied that if WKY had ever asked Mr Tiang why he was being asked to sign the TT forms and what any of the payments were for, he would have been told that they were payments being made to the defendant.

122 It is important to note that in the course of cross-examination, WKY also stated that he had not studied the plaintiffs' bank account statements because WKN did not allow him access to the financial records. He testified that "[WKN] said before, he said don't interfere with his - this offshore company bank balances and so on. That is why [WKY did not] ask". Further, he testified that he did not ask to see the financial documents of any of the plaintiffs; that he never inspected the books and records maintained by Mr Tiang in the Singapore office "because [WKN] specifically told us don't interfere with his management of the offshore company.."; and that he never asked WKN what the payments were for because he trusted WKN, and WKN would have been unhappy with him if he had asked. This line of evidence was the subject of re-examination when he repeated that "[WKN] doesn't want us to interfere with his day-to-day management. I don't know the agenda behind this. … I still don't know" and that "[a]t the time when [WKN] … he took over all the companies in WTK [in 1993], at that time he say, "Don't touch." Don't interfere with him you see? And he would tell us what to do". When WKY was asked further in re-examination why he had come to the view that if he had questions, WKN would not have been happy, his answer was "Usually he would – he will – … be angry. This is why I don't want to – I don't want to quarrel with him." When asked by the plaintiffs' counsel: "Angry with what?", his answer was "If I ask about the question."

123 As to this important evidence of WKY, my observations and conclusions are as follows:

(a) In considering generally the evidence of WKY, he was, as I have said, almost 80 years old and, in my view, somewhat frail. As referred to above, there is no doubt that the impression he sought to give was that he left everything to WKN because he trusted him and, according to his oral evidence, did not want to quarrel with him. However, WKY could not explain the basis of his (*ie*, WKN's) alleged concern or provide any reason as to why WKN would be unhappy if he asked WKN questions. Moreover, it would, in my view, be a mistake to think that WKY was, in any sense, an inexperienced or timid individual. On the contrary, he was a Chartered Certified Accountant, the former Senator of Malaysia who has been conferred the title "Permanca" and the Chairman of the Sarawak Timber Association (see [101(a)(iv)] above). Having seen and heard WKY give evidence, I am sure that he was very well able to make appropriate enquiries if he wanted to do so.

(b) As I have said, there is an important issue as to whether the TT forms signed by WKY were blank at the time when he signed them (either by himself or together with WKN); or whether, at that time, the TT forms were completed at least in part with defendant's name and perhaps other details. As stated above, it was WKY's evidence that although some of the TT forms which he signed were "completed" and already filled in with the names of the beneficiaries, some were not; and that he could not recall signing any TT forms with the defendant's name on the forms. It is fair to say that this supposed practice of WKY signing TT forms in blank was supported by the evidence of Ms Loh; and I readily accept (as the defendant's counsel also accepted) that this probably happened from time to time. In passing, it is perhaps worth noting one of the mysteries of this case *viz* if the payments to the defendant were all part of a fraudulent scheme by WKN secretly to

siphon funds out of the plaintiffs for the benefit of the defendant against the interests of his two brothers, WKY and WKC, it seems odd or at least curious that WKN should have decided that these 25 TT forms should be ones signed by WKY either alone or with WKN given, in particular, that WKN had authority to sign the TT forms himself without the need for anyone's else signature. On one view, this might be said to tell against any fraud on the part of WKN although I suppose that it could equally be suggested that this could have been part of WKN's attempt to cover his tracks.

(c) However, there is at least one document which indicates that, contrary to his evidence, WKY was well aware of at least some payment being made to the defendant personally. That document is a statement of account dated 31 August 2011 relating to Elite Honour, Ocarina and Sunrise Megaway showing a balance due of RM2,000,705.87. Although it is not easy to match the currencies, it seems likely that this payment constituted the two dollar payments Nos 48 and 49 totalling approximately US$680,000 dated 24 October 2011. The evidence of Ms Loh was that this was a document originally prepared by Mr Ling concerning payments that the defendant was requesting from the plaintiffs; that WKN (who was, of course, in Australia at this time undergoing medical treatment) had instructed her by telephone to obtain WKY's approval to this payment by getting him (WKY) to sign the document; and that the signed document should then be sent to Mr Tiang. Following those instructions, the evidence of Ms Loh was that she then wrote in manuscript at the bottom of the document "7/10/11 To Neil Wong's Accounts"; that she then took the document to WKY (in the Sibu Office) for his approval; that he (WKY) then signed the document himself without asking any questions; that she then

countersigned the document; and that Ms Loh's assistant then sent the completed document with WKY's signature and Ms Loh's signature to Mr Tiang. Ms Loh was unable to say whether this payment to the defendant's account was processed. When shown this document in cross-examination, WKY's initial response was that although he had seen the document at the time, he did not understand it; that he had simply signed the document when it was brought to him by Ms Loh without asking any questions because he trusted her; that he had not seen the words "To Neil Wong" when he signed it and that: *"*Maybe later on they put it on. I don't know." That suggestion that these words may have been added *after* WKY had signed the document was, of course, in conflict with the evidence of Ms Loh (which I accept) that she had already written those words, *ie*, "7/10/11 To Neil Wong's Accounts" on the document when she presented it to WKY for his approval and signature. I am ready to accept that WKY may well have trusted Ms Loh; but I do not accept that WKY did not understand the document nor that he had not seen the words "7/10/11 To Neil Wong's Accounts" which appear immediately below his signature. On the contrary, I am satisfied that by signing this document, he was well aware that he was giving his approval to the payment of a substantial sum of money to the defendant personally. I readily accept that the fact that WKY had approved and was aware of this particular payment to the defendant does not, of course, prove of itself that he was also aware of the other payments to the defendant. However, it is, in my view, important because, although only a snippet, it is, at the very least, incontrovertible contemporaneous documentary evidence which (together with the evidence of Ms Loh) undermines the main thrust of WKY's evidence that he was not aware of payments being made directly to the defendant;

and that if he had seen the defendant's name, he would have questioned the reason for the payment. At the very least, it shows that he was perfectly happy to sign off on at least one payment to the defendant without demur.

(d) In the event, I find it impossible to say, even on a balance of probabilities, whether the particular 25 TT forms which WKY did sign and which are the subject matter of the present action did or did not bear the defendant's name when they were signed by him; nor whether (apart from the particular payments referred to in the previous sub-paragraph) WKY was or was not actually aware of the payments to the defendant. I reach this somewhat unsatisfactory conclusion partly because (i) even on the assumption that WKY was not deliberately lying, it was quite obvious that his memory was failing; (ii) I am not satisfied that his evidence was reliable having regard to my conclusions as stated above and the further matters referred to below; and (iii) there is no other independent evidence to corroborate WKY's testimony.

(e) In evidence, WKY accepted that he was very interested - indeed keen - to know about the plaintiffs' business. He also accepted that he could have asked Mr Tiang about the reason for the 50 Payments, and that if he had raised questions about the 50 Payments, Mr Tiang would have been obliged to explain why payment was being made to the defendant. Ms Ting also accepted that if WKY had asked a question, the staff of WTK Management would have explained. In these circumstances, it is difficult, if not impossible, to understand why WKY did not ask any questions at all with regard to the TT forms which he signed even if, as he said, he trusted WKN and even if, again as he said,

they were blank when he signed them; or why he did not bother to look at any bank accounts or other records during the relevant period.

(f) As referenced above, I bear well in mind that in the course of cross-examination and then re-examination, the evidence of WKY was that WKN had positively told WKY not to interfere in the plaintiffs' business; that WKN did not allow him access to the plaintiffs' records; that if WKY asked WKN, WKN would "not be happy" with WKY; that WKN would "usually" (specifically when, or how often, was unstated) be angry with him (WKY) if he (WKY) asked a question; and that he (WKY) did not want to quarrel with WKN. However, I found this evidence most unsatisfactory and difficult to accept. Previously, the main reason given by WKY for simply doing what WKN told him to do was that he trusted WKN. If the position had, in truth, been as stated in WKY's cross-examination and re-examination, it is surprising that there is nothing to this effect in WKY's first AEIC. Such a scenario is also difficult, if not impossible to marry with the fact that, as WKY himself acknowledged, the three brothers shared a "very good relationship" and were "close".

(g) In summary, I am unable to say positively that WKY was aware of the 50 Payments to the defendant - other than Payment Nos 48 and 49 if and to the extent that such payments were (as they seem to be) the ones approved by WKY when he signed the statement of account dated 31 August 2011 as referred to above. However, in light of the above and on the stated assumption (*ie*, that the 50 Payments were made fraudulently), I am not persuaded that the plaintiffs have discharged the burden on them to show that WKY could not with reasonable diligence

have discovered such fraud prior to March 2011 when WKN fell seriously ill and travelled to Australia for medical treatment.

(h) In my judgment, that latter conclusion is even stronger when considering events after WKN went to Australia in March 2011. As already noted, WKY accepted in evidence that he was very interested - indeed keen - to know about the plaintiffs' business. On that basis and even accepting much of WKY's evidence, it beggars belief that WKY did not take up the reins or at least avail himself of the opportunity of looking at the plaintiffs' records (including bank statements) after WKN fell ill and went to Australia for medical treatment in 2011 and, perhaps even more so, after WKN subsequently died in 2013. However, WKY denied that he took over from WKN after he (WKN) left for Australia (with the exception of WTK Realty). On the contrary, his evidence was that even when WKN became terminally ill and went to Australia in March 2011, he did not even ask WKN about who was going to be looking after the plaintiffs' business; nor did he go and ask Mr Tiang. In my view, that is particularly remarkable and difficult, if not impossible, to accept given that WKN tendered his resignation as Chairman and Managing Director of WTK Realty on 16 May 2011 and as CEO of WTK Holdings on 15 June 2011. In any event, once WKN was in Australia, there could be no reason whatsoever for WKY not to access and inspect any bank statements or other records he may have wished to look at; and, given the absence of WKN and WKY's expressed keenness to know about the plaintiffs' business, every reason to do so.

(i) What is clear is that WKY signed various documents, including various Harvard Rank sales invoices from 2011 to 2012, back-to-back invoices which were issued from logging companies to the plaintiffs,

and from the plaintiffs to the overseas buyers from 2010 to 2014, payment vouchers of Elite Honour authorising payments to GCH, payment vouchers and cheques of Ocarina and Sunrise Megaway authorising payments to DRM, and financial statements for companies like Elite Honour, Ocarina, Faedah Mulia, WTK Management, Harvard Rank, Song Logging and Salwong throughout the relevant period up to 2012. The full details of these invoices, payment vouchers, cheques and financial statements were identified in a helpful "aide-memoire" provided by counsel on behalf of the defendant as part of his counsel's final oral submissions at the end of the trial. For the sake of brevity, I refrain from setting out the full list in detail. As submitted on behalf of the defendant, WKY was an experienced businessman and trained accountant. It would have been well within his expertise to understand these documents. As submitted on behalf of the plaintiffs, I accept that these documents do not refer to the 50 Payments to the defendant. However, they show, at the very least, that WKY was directly involved to some extent at least in the business operations of these relevant companies; and, in my view, they support the view that, at the very least, WKY could with reasonable diligence have accessed the plaintiffs' bank statements and other documents and, if had done so, discovered the 50 Payments to the defendant.

(j) The evidence of Mdm Ma is that WKN "would tell [his subordinates] to speak to WKY" on work matters from about late 2011. This is corroborated by Ms Ting, who explained that she was instructed to "report to and take instructions from WKY" in early 2011, when WKY was leaving Sibu for Sydney. When I asked WKY at the end of his evidence why, after WKN went to Australia in March 2011, he did not go to Mr Tiang and ask him what was going on, there was a long

pause before he eventually answered by saying that he was "…too busy in my Malaysia[n] business. That is why I didn't bother about Singapore. Singapore already stopped trading already in 2011 I think. The Hong Kong bank doesn't want to trade with us this unsuccessful logging operation. That is why he [presumably, Mr Tiang] want[ed] to close all the accounts." I am prepared to assume that WKY may well have been busy with his Malaysian business; and it may well be that "Singapore" (by which I understood him to mean the plaintiffs' business) stopped trading in 2011. However, we know that after WKN had travelled to Australia for medical treatment in 2011, two payments (*ie*, Nos 48 and 49 totalling approximately US$680,000) and a further payment (*ie*, No 50 totalling in two tranches a further sum of RM 2m equivalent to approximately US$673,000) were paid to the defendant pursuant to TT forms signed by WKY in October 2011 and about a year later in November 2012. When those TT forms were signed by WKY is unknown. However, as it seems to me, the important point is that borrowing WKY's words, he simply did not "bother" about Singapore (where, of course, Double Ace's office was situated) when, during WKN's absence in Australia, he could, if he had wanted, very easily have inspected the plaintiffs' bank accounts and other records. I also bear in mind that (i) he was certainly a director and shareholder of Esben, Lismore and Double Ace and (at least indirectly) a shareholder of Incredible Power and Rayley; and (ii) he was, as I have already stated, a signatory to the bank accounts and could, if had wished, obtained bank statements directly from HSBC bank at any stage.

(k) In my judgment, WKY's evidence becomes even more difficult to understand after WKN died in March 2013. In truth, the possible failure to exercise reasonable diligence after this date is not strictly

relevant to the time-bar defence because even if the limitation period commenced any time after WKN's death, the present action was commenced on 20 November 2017, *ie*, within six years of WKN's death. However, WKY's inaction after WKN's death is perhaps not entirely irrelevant because, in my view, it reflects a remarkable indifference to the plaintiffs' business operations which WKY cannot justify simply on the basis of his constant mantra that he left everything to WKN because he trusted WKN; or because he did not want to quarrel with WKN. Thus, when asked at the end of his evidence whether, after WKN's death, he requested Mr Tiang to give him the financial statements and documents, WKN's response was that he did not do so because Mr Tiang had already destroyed them. That was obviously incorrect because the evidence is that Mr Tiang did not destroy the documents until much later, *ie*, in September 2014, although in fairness to WKY, it may be that he misunderstood the question put to him. In any event, WKY confirmed in evidence that although he went to the Double Ace office in Singapore after WKN's death to see Mr Tiang, he did not ask Mr Tiang to produce the documents. According to WKY, Mr Tiang simply told him: "[t]here were not much left in the company. The money not much now [*sic*]". Of course, we know now that Mr Tiang had himself been stealing huge sums of money from the plaintiffs over a number of years; and it may well be that Mr Tiang's tactic was to seek to fob off any enquiries that WKY might make. But, in my view, WKY's inaction to exercise reasonable diligence with regard to the plaintiffs' business and to inspect relevant bank statements and other financial records following the death of WKN is a reflection of, and consistent with, his pattern of indifferent behaviour over many years.

124 In expressing my observations and conclusions above, I have glossed over one potentially important point raised by the plaintiffs which I should address briefly. In summary, it was the plaintiffs' submission that the concept of reasonable diligence involves two considerations. The first is whether the plaintiff was put on inquiry or had reasonable cause to take steps which would have led to the discovery of the relevant fact (*Davies* ([98(a)] *supra*) at [59]) where a plaintiff is put on inquiry only when he encounters facts which arouse suspicion: *DM Divers* ([96(b)] *supra*) at [89]. The second is whether having been put on inquiry the plaintiff acted sufficiently diligently in taking the necessary steps to ascertain the existence of the fraud or mistake: *Davies* at [59]. Here, it was submitted on behalf of the plaintiffs that there was no evidence to suggest that WKY was ever put on enquiry of any possible fraud prior to April 2013 with the result, if I understand the plaintiffs' case correctly, that the time-bar defence must necessarily fail.

125 This point raises an important question of law as to the proper scope of s 29 of the Limitation Act. However, it was not explored in any detail in the course of the parties' submissions; and, in my view, the authorities cited do not support the broad proposition inherent in what I understood to be the plaintiffs' submission *viz* that a plaintiff must be put on enquiry of a possible fraud before there can be any question of the exercise of reasonable diligence. As to that submission, I readily accept that, echoing the words of Patten J in *Davies* at [59], the first consideration may well be to ask whether the plaintiff was put on inquiry or had reasonable cause to take steps which would have led to the discovery of the relevant fact although the latter begs the question as to whether the words "reasonable cause" are intended to refer – and to refer solely - to a suspicion of fraud. My tentative view is that that cannot be so because any suspicion of fraud would necessarily fall within the phrase "put on inquiry". I

also readily accept that (a) a plaintiff is put on inquiry only when he encounters facts which arouse suspicion; and (b) if the plaintiff is put on inquiry, the second consideration will be whether the plaintiff has acted sufficiently diligently in relevant respect.

126 However, it is important to note that the wording of s 29 of the Limitation Act does not, on its face, seem to require a plaintiff to be "put on inquiry" or have his suspicions aroused. All it says is that, in the stated circumstances, "…the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it". In other words, it does not seem to be a precondition of the operation of s 29 that the plaintiff must be "put on inquiry" or have his suspicions aroused with regard to a possible fraud; and, although that may well be what happens in many cases, no case was cited to me to support any such precondition, and *Davies* does not quite go so far. For these brief reasons and in the absence of any clear authority to the contrary, I do not accept the plaintiffs' submission that the time-bar defence must necessarily fail if and to the extent that WKY was not put on inquiry of a possible fraud prior to April 2013.

127 However, if I am wrong as to the scope of s 29 of the Limitation Act, it seems to me that any precondition as urged by the plaintiffs would be satisfied on the basis of WKY's own evidence. As stated above, during cross-examination and re-examination, WKY asserted that WKN had positively told him not to interfere in the plaintiffs' business, that he did not allow him access to the plaintiffs' records and that WKN would "*usually*" be angry with him (WKY) if he (WKY) asked a question. Even accepting that WKN was regarded as the patriarch of the family, it is difficult to understand what possible legitimate explanation there may be for such conduct on the part of WKN given

that WKY was a major (33.3%) shareholder (directly or indirectly) of all the plaintiffs, a named director of Esben and Lismore and, again on the basis of WKY's own evidence, the three brothers had a "very good relationship" and were "close". In my judgment, such conduct on the part of WKN would have been sufficient to put WKY on inquiry and arouse at least some suspicion on the part of WKY to satisfy any precondition that might exist for the purposes s 29 of the Limitation Act; and in such circumstances, I am not satisfied that the assertion by WKY that he did not want to quarrel with WKN would constitute a good reason for failing to exercise reasonable diligence to discover the alleged fraud.

128 For all these reasons, it is my conclusion that all of the plaintiffs' claims are time-barred apart from the claim in respect of the last payment *ie*, No 50 which consisted of two tranches each of US$336,527 both dated 29 November 2012. In such circumstances, it is unnecessary to consider the further defences advanced on behalf of the defendant that the plaintiffs' claims are barred by the doctrine of laches and/or acquiescence.

129 However, in case I am wrong on the time-bar issue, I will now deal with the plaintiffs' claims on the assumption that they are not time-barred as well as the plaintiffs' claim in respect of Payment No 50.

The plaintiffs' claims against the defendant

130 It was the plaintiffs' case that they were entitled to succeed against the defendant on the basis of four main grounds *viz* unjust enrichment, dishonest assistance, knowing receipt and unlawful means conspiracy.

(A) Unjust Enrichment

131 It was common ground between the parties that the elements of a claim for unjust enrichment are (a) the defendant has benefited or been enriched; (b) the enrichment was at the expense of the plaintiff; and (c) the enrichment was unjust: *Koh Sin Chong Freddie v Singapore Swimming Club* [2015] 1 SLR 1240 at [208]; *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*") at [98].

132 Here, it is indisputable (and undisputed) that the defendant received all 50 Payments, *ie*, the defendant has benefited or been enriched, thus satisfying the first element.

133 The second and third elements are less straightforward. On behalf of the plaintiffs, it was submitted in summary as follows:

(a) The monies "belonged" to the plaintiffs.

(b) The defendant does not deny that the plaintiffs' monies were used to make 39 of the 50 Payments.

(c) For the other 11 payments (*ie*, the alleged gifts), the law is that companies cannot make gifts unless the directors can show that the gift was in the interests of the company: *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ("Woon") at para 8.20.

(d) In any event, (i) the suggestion that the remaining 11 payments were made to the defendant using WKN's monies has no evidentiary basis; and (ii) a benefit is at the plaintiff's expense if a defendant

receives that benefit immediately from the plaintiff or receives a benefit traceable from the plaintiff's assets: *Zhou Weidong v Liew Kai Lung and others* [2018] 3 SLR 1236 ("*Zhou Weidong*") at [52]; *Anna Wee* at [112], [115]-[116].

(e) The defendant' enrichment was unjust for the following reasons:

(i) A plaintiff company's lack of consent to the transfer of its money is a legally recognised unjust factor: *AAHG, LLC v Hong Hin Kay Albert* [2017] 3 SLR 636 at [74]; C*ompañia De Navegación Palomar, SA and others v Koutsos, Isabel Brenda* ("*Compañia")* [2020] SGHC 59 at [127]-[129].

(ii) The plaintiffs did not consent to the payments to the defendant because they were not authorised, *ie*, they were not in the plaintiffs' interests. WKN caused the plaintiffs to make the payments to the defendant which were not in their interests.

(iii) A director's duty to act in the interest of the company means that the director may only consider the interests of his company when making a decision. His overriding motive must be to advance the company's interests: *In re W & M Roith Ltd* [1967] 1 WLR 432. The test is both subjective and objective. The subjective element of the test relates to whether the director had exercised his discretion *bona fide* in what he considered was in the interests of the company: *Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] AC 821 at 832. But the subjective belief of the director cannot determine the issue: the court has to assess whether an honest and intelligent man in the position of the director, taking an objective view, could

reasonably have concluded that the transaction was in the interests of the company: *Charterbridge Corporation Ltd v Lloyds Bank Ltd and another* [1970] Ch 62 at 74-75. Thus, where the transaction is not objectively in the company's interests, the court may infer that the director was not acting honestly.

(iv) A company is taken not to have consented to a payment if that payment was made for a purpose other than which the company had authorised, and illegal payments and gifts which are not in the interests of the company cannot on any view be authorised: Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (London: Sweet & Maxwell, 9th Ed, 2016) ("Goff & Jones") at para 8-36; *Great Eastern Railway v Turner* (1872) LR 8 ChApp 149; Woon at para 8.20.

(v) The plaintiffs' innocent directors (WKY and WKC) did not know of those payments. A company is taken not to have consented to a payment if the company's innocent directors were not aware of that payment: *Compañia* [129]-[130]; *Aljunied-Hougang Town Council and another v Lim Swee Lian Sylvia and others and another suit* [2019] SGHC 241 ("*AHTC*") at [469].

(vi) WKY said that he did not consent or authorise the payments to the defendant and that WKN did not disclose the fact of the payments to WKY or seek the approval of the plaintiffs' shareholders and directors. Indeed, none of the defendant's witnesses suggested that WKN disclosed the fact of the payments to the plaintiffs or WKY or WKC.

(vii) It is not correct for the defendant to say that the payments were authorised by way of TT forms authorised by one or more of the plaintiffs' directors. WKN's authorisation is irrelevant. Where a company has been the victim of wrongdoing by its director, then the wrongdoing or knowledge of the director cannot be attributed to the company as a defence to a claim that the company brings against the director: *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2016] AC 1 at [7]; *Ong Bee Chew v Ong Shu Lin* [2019] 3 SLR 132 at [169].

(viii) WKY did not authorise the payments. WKY said that he signed the TT forms on WKN's and Mr Tiang's request believing that the TT forms would be used to make payments to its suppliers of timber logs, that he signed some TT forms in blank and he did not see the defendant's name on any of those TT forms. WKY discovered the payments to the defendant only after WKN passed away.

(ix) Where a director authorises a payment (for example by signing a cheque) in circumstances where the fraudulent nature of the transaction has been concealed from him, the knowledge of the purpose of that payment is not imputed to that director and the director is not taken to have participated in that payment: *Liquidator of the Caledonian Heritable Security Co (Limited) v Curror's Trustee* (1882) 9 R 1115 at 1131; *Land Credit Company of Ireland v Lord Fermoy* (1870) LR 5 Ch App 763.

(x) Further, if as the defendant now claims, the payments were made to the defendant consistently with the plaintiffs' (alleged) "practice" of making "onshore" and "offshore"

payments, then the payments would be payments of black money pursuant to an arrangement that involved illegal acts under Malaysian law. It has been long established that a court will not allow a party to base his defence upon wrongdoing.

(xi) Where a claim in unjust enrichment is established, the plaintiff is entitled to restitutionary recovery of the benefits conferred on the defendant (*Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid*") at [139]).

(xii) Thus, the defendant should be ordered to pay the plaintiffs the US$20,278,565.41 and S$4,673,100.52 that was paid to him.

134 As to these submissions, I readily accept the accuracy of the propositions of law advanced by the plaintiffs as summarised above. The main difficulty in the present case is how such propositions are to be applied in the circumstances of the present case. In that context, I bear well in mind that the plaintiff companies were not operated in the ordinary or usual way. In particular, as already noted above, it appears that there were no board meetings, no financial statements, no annual accounts and no declaration of profit or dividends properly so called. For whatever reason, I accept that the plaintiffs' operations were run throughout by WKN with both WKY and WKC leaving WKN to "run the show"; and that, in broad terms, WKY and WKC both did what WKN told them to do and, in so doing, trusted WKN to act properly in the interests of the plaintiff companies.

135 In that context, it is also important to note that it is admitted by the defendant on the pleadings that WKN owed the plaintiffs various duties under BVI and Liberian law *viz*:

(a) To act in the best interests of the plaintiffs;

(b) To exercise his powers for a proper purpose and in accordance with the BVI Business Companies Act 2004 (in respect of Esben and Incredible Power) and the Liberian Associations Law (in respect of Rayley and Lismore) and the plaintiffs' respective memoranda and articles of association;

(c) To act honestly to promote the interests and success of the plaintiffs for the benefit of the plaintiffs;

(d) To act *bona fide* and in good faith in the interests of the plaintiffs in the discharge of all his duties, powers, responsibilities, obligations and functions assigned to or vested in or attached to or assumed by him as a director (whether *de jure*, *de facto* and/or shadow) of the plaintiffs;

(e) To act for the proper purpose of the plaintiffs in relation to all of their affairs;

(f) When exercising powers or performing duties as a director, to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation, the nature of the company, the nature of the decision, and the position of the director and the nature of the responsibilities undertaken by him;

(g) To ensure that the affairs of the plaintiffs were properly administered and that their assets and property were properly accounted for and were not dissipated or exploited to the prejudice of the plaintiffs; and

(h) To disclose to the plaintiffs any of his breaches of any of the aforesaid or other duties owed to the plaintiffs.

In my judgment, the foregoing is important because it eliminates any suggestion that WKN had *carte blanche* to do whatever he liked with the plaintiffs or to utilise or distribute the plaintiffs' monies freely in such manner as he might in his absolute discretion think fit.

136 I have already addressed in broad terms the significant evidential difficulties in the present case as well as the important question as to what adverse inferences are to be drawn in light of the fact that the defendant has deliberately decided not to give evidence without any satisfactory reason for so doing. Bearing all those matters in mind as well as the propositions of law advanced by the plaintiffs which I have accepted, my observations and conclusions with regard to the plaintiffs' claims based on unjust enrichment are as follows.

137 The starting point is that it is undisputed that WKN caused the plaintiffs to make the 50 Payments to the defendant personally. The main questions which then arise are (a) whether the payments were *bona fide* in the plaintiffs' interests; and/or (b) whether the other directors/shareholders consented thereto.

138 In answering these questions in the rather unusual circumstances of the present case, it seems to me critical to consider where the legal and evidential

burdens lie. In that context, I was referred to a number of authorities including *Panweld HC* ([93(a)] *supra*) ; *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 ("*Ho Kang Peng*"); *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 ("*Goh Chan Peng*"). In their written submissions, the plaintiffs proffered a helpful analysis of these three cases which I gratefully adopt:

(a) In *Panweld HC*, the plaintiff company sued one of its directors, the defendant, for breaching his fiduciary duty to act in the interests of the company by causing the company to make payments to his wife for 17 years as "salary" when his wife was not an employee of the company. The defendant director did not dispute that he owed the plaintiff company a fiduciary duty to act in its interests and that he had caused the company to make the payments to his wife (at [36]). However, the defendant director claimed that, *inter alia*, the company had employed his wife as a marketing executive and she had rendered services (at [15]). The court said that if it found that the director's wife was not an employee of the company in any meaningful sense of the word, "it would follow" that the defendant had acted in breach of his fiduciary duties in causing the company to pay his wife's "salary" for 17 years (at [22]). On the facts, the court found that his wife was not an employee of the company and so the defendant director had breached his fiduciary duty to act in the interests of the company (at [37]).

(b) In *Ho Kang Peng*, the plaintiff company sued its director, the defendant, for, *inter alia*, breaching his fiduciary duty to act in the interests of the company by causing the company to make payments pursuant to a fictitious consulting agreement under which no services

were provided to the plaintiff company. The plaintiff company argued that once it showed that the defendant director had signed a sham agreement for non-existent services and made payments thereunder without formal board authorisation, the burden shifted to the defendant director to show that he acted in the interests of the company. The defendant claimed that the agreement and the payments made under the agreement were in the interests of the company because the purpose of that agreement and the payments was to procure business for the company (at [13] and [14]). The High Court found that the agreement was fictitious, and so it was "*incumbent*" on the defendant director to show that the payments were made for some alternative purpose which was in the company's interests. Since the defendant was unable to satisfy it of the factual basis of his defence, the plaintiff company had made out its claim that the defendant breached his duties to act in the company's interests (at [11] and [12]). The Court of Appeal dismissed the defendant director's appeal against the High Court's decision. The Court of Appeal found that the payments were actually bribes and that the defendant director had acted in breach of his duty to act in the company's interests (at [32]-[44]).

(c) In *Goh Chan Peng*, the plaintiff company sued the defendant director for breaching his fiduciary duty to act in the best interests of the company by causing the company to incur expenses which it argued were unjustified. The expenses were for wine purchases, medical equipment, course fees that his daughter attended, medical treatments for the defendant director, a camera lens and fountain pens (at [76]). The defendant director did not dispute the fact of the expenses or the sums. Instead, he argued, *inter alia*, that the expenses were justified as "general corporate business expenses that have been incurred in the course of

> Beyonics Group's usual operations", either as legitimate company expenses or as legitimate employee benefits. The High Court found that all these expenses were not relevant to the business of the company and were entered into for the defendant director's benefit and/or that of his family members (*Beyonics Technology Ltd and another v Goh Chan Peng and others* [2016] SGHC 120 at [165]-[175] ("*Beyonics Technology*")). The Court of Appeal affirmed the High Court's decision save for one point (*Goh Chan Peng* at [94]). In affirming the High Court's decision, the Court of Appeal rejected the defendant's director's contention that the High Court had erred in placing the onus on the defendant director to show that the expenses were legitimate. The Court of Appeal pointed out that the High Court considered the evidential burden had shifted to the defendant because the expenses were not directly relevant to the company's business and that the defendant director had not rebutted that evidence. He could not demonstrate how the expenses were reasonably incidental to the carrying on of the company's business and so the High Court was justified in arriving at its decision save for one point. The Court of Appeal accepted that the defendant director's explanation for why the fountain pens were purchased was reasonable, *ie*, they were for the benefit of the company to employees and a sign of appreciation for directors. So, the Court of Appeal reversed the High Court's decision to order him to repay the cost of the fountain pens (*Goh Chan Peng* at [80]-[84]).

139 In addition to these authorities, the plaintiffs' counsel also relied upon *Ong Teck Soon (executor of the estate of Ong Kim Nang, deceased) v Ong Teck Seng and another* [2017] 4 SLR 819 (*"Ong Teck Soon")* with specific reference to the 11 (or 14) payments which the defendant asserted were "gifts". One of

the questions before the High Court in that case was whether the legal burden was on the first defendant to prove that the testator gave the first defendant two watches as gifts, or on the plaintiff to prove otherwise (at [26]). There, the plaintiff had pleaded that the first defendant took and retained the watches "without legal basis". The first defendant in that case did not deny that he had the two watches and that they belonged to the testator before they came into his possession (at [33]). The High Court said that in determining where the legal burden lies, the pleadings are invariably the first port of call. It is from the pleadings that the court may glean the material facts that each party had asserted to establish its claim or defence. Sections 103 and 105 of the Evidence Act place the burden of proving a fact on the party who asserts the existence of any fact in issue or relevant fact, respectively (at [28]). The High Court concluded that in the circumstances, because the testator had passed on, the first defendant in that case was "better placed to lead evidence about the circumstances of the alleged gifts to him" and hence the legal burden was on the that defendant to prove his defence that the testator gave him the watches as gifts (at [33]).

140 On this basis, it was submitted on behalf of the plaintiffs that the *legal* burden fell on the defendant to prove his case that the 11 (or 14) payments were indeed gifts. As formulated, I do not accept that submission; or at least, it is my view that such submission is too simplistic. As stated by the learned Judge in *Ong Teck Soon*, I fully agree that in determining where the legal burden lies, the pleadings are invariably the first port of call. Here, it is a critical part of the plaintiffs' pleaded case that the making of these 50 Payments was "unjust". Consistent with all the authorities (including *Ong Teck Soon)* and applying relevant principles to the facts in the present case, it seems to me plain that in seeking to establish their case that the payments were "unjust", the *legal* burden rests firmly and throughout on the plaintiffs to show that the 50 Payments were

not *bona fide* in the interests of the plaintiffs. Further, it seems to me equally plain that the plaintiffs have *prima facie* satisfied that burden by showing that these payments were made to the defendant into his personal bank accounts in circumstances where it is undisputed that (a) the plaintiffs were in the business of buying timber from companies in Malaysia which they sold overseas to third party buyers and (b) the defendant did not personally himself supply timber or provide other services personally himself in relation thereto.

141 In these circumstances and again consistent with the authorities referred to above, it seems to me that the *evidential* burden shifts to the defendant to provide a satisfactory explanation supported by evidence as to why the 50 Payments were not "unjust" and, in particular, why it would be wrong to conclude that the Payments were not in the plaintiffs' interest or otherwise not illegitimate.

142 It is in this context that it becomes necessary to consider the positive substantive defences advanced by the defendant, bearing in mind, in particular, the provisions of ss 103 and 105 of the Evidence Act to the effect that he who asserts must prove as well as s 108 of the Evidence Act that "[w]hen any fact is especially within the knowledge of any person, the burden of proving that fact is upon him". To be clear, in expressing the foregoing, I bear well in mind the judgment of Rajah JC in *Cheong* ([60(d)] *supra*) and the importance of exercising caution so as, in effect, not to reverse the burden of proof. However, for the avoidance of doubt, I repeat that the *legal* burden of establishing that the 50 Payments were "unjust" and not in the plaintiffs' interest rests firmly and throughout on the plaintiffs notwithstanding that the *evidential* burden of providing a satisfactory explanation supported by evidence as to why the 50 Payments were not *"unjust"* and, in particular, why it would be wrong to

conclude that the 50 Payments were not in the plaintiffs' interest or otherwise not illegitimate has shifted to the defendant for the brief reasons stated above.

143 Against that background, I turn to consider the defendant's case. In summary, this was that all 50 payments were made for legitimate purposes *viz*

(a) 36 of the payments were made on behalf of the WTK Group for goods and/or services which were provided by companies controlled by the defendant and Mdm Ma. These 36 payments may be grouped into the following categories of services:

(i) Services provided by GCH to Elite Honour;

(ii) Services provided by DRM to Ocarina and Sunrise Megaway; and

(iii) Supply of timber logs from WTK Reforestation to Faedah Mulia;

(b) Three of the payments comprised the defendant's entitlement to directors' fees and/or shareholders dividends; alternatively were gifts to the defendant.

(c) 11 of the payments comprise WKN's entitlement from the plaintiffs which he in turn gifted to the defendant, Mdm Ma and/or his sister.

I consider each in turn although I propose to deal with them in reverse order.

The 11 alleged Gifts

144 The 11 payments which are said to be "gifts" are identified in Annex B and summarised in the Table below:

S/N	Date of payment	Paid by	Amount - RM[1]	Amount - US$	TT Form Signatory
1	23 Jan 2001	Lismore	N/A	75,000	WKN
2	26 Jan 2001	Lismore	N/A	75,000	WKN
6	11 Feb 2003	Rayley	N/A	110,026	WKN & WKY
7	29 Aug 2003	Incredible Power	N/A	263,852	WKN & WKY
8	13 Jan 2004	Esben	N/A	120,000	WKN & WKY
9	21 Jun 2004	Esben	1,000,000	263,852	WKN&WKY
10	2 Aug 2004	Esben	1,000,000	263,852	WKN & WKY
11	29 Oct 2004	Esben	2,800,000	736,997	WKN & WKY
12	5 Nov 2004	Incredible Power	5,000,000	1,319,260	WKN & WKY
13	13 Jan 2005	Rayley	2,100,000	552,631.57	WKN & WKY
18	23 Sept 2005	Incredible Power	2,700,000	710,526	WKN

145 In summary, it was submitted on behalf of the defendant that all these 11 payments were made from monies which belonged to WKN as directors' fees and/or a share of his shareholder dividends as a shareholder of the Logging Companies. In support of that submission, it was asserted on behalf of the defendant that the WTK Group had a practice of using the revenue collected by the Offshore Companies to pay off the costs, fees and expenses associated with the logging business, before distributing the balance to the shareholders of the Logging Companies by way of cash; and that WKN held a majority stake in a large number of the Logging Companies. Further, it was submitted on behalf of

[1] These amounts have been taken from the TT forms.

the defendant that WKY was fully aware of these gifts from WKN to his family and never raised any objections when WKN was alive; and as summarised above, according to the TT forms referred to above, eight of those TT forms were signed not only by WKN but also by WKY.

146 In theory, I readily accept that these 11 payments may well have been legitimate on the basis submitted on behalf of the defendant as summarised above. In principle, I see no difficulty with a director of a company gifting his directors' fees or a shareholder gifting his dividends to a third party; and I would also be prepared to accept that given the unorthodox way in which the plaintiff companies appear to be have been run without any financial statements or proper accounting, such gifting might have been conducted in a somewhat informal and haphazard fashion.

147 However, in order to get this defence off the ground, it seems to me that the evidential burden lies on the defendant to adduce at least some evidence to show that these were indeed legitimate gifts, and, in so doing, at least shift the evidential burden back to the plaintiffs. In that context, I fully recognise that these payments are all very old and that even in the ordinary course, and forgetting the particular evidential difficulties in the present case that I have already referred to earlier in this judgment, a court would perhaps look with some sympathy on the absence of documents which might prove, for example, that such payments were derived from fees or dividends to which WKN was entitled in his own right and constitute a written contemporaneous record of the making of the gift of such fees or dividends to the defendant or Mdm Ma or the defendant's sister. For these reasons, I would readily accept that the evidential burden on the defendant to show that these were indeed legitimate gifts or, at the very least, to shift the evidential burden back to the plaintiffs, might be satisfied without too much difficulty.

148 However, the difficulty here is that there is simply no, or no sufficient, evidence to support the defendant's case that these 11 payments were gifts by WKN derived from monies which WKN was entitled to receive as directors' fees or dividends. In particular, there is no information on the face of the TT forms relating to these 11 payments to indicate their nature or purpose. It is perhaps of interest to note that the last six payments show the equivalent amount of the relevant payment in RM currency; and that such equivalent amount in that currency is a round figure. However, it does not seem to me that this provides any indication one way or another as to the nature or purpose of the payment. Further, as submitted on behalf of the plaintiffs:

(a) It was Mr Heng's uncontradicted evidence that there was no evidence to show that the 11 payments were made using WKN's entitlement or funds.

(b) Mdm Ma also accepted that she did not know whether the plaintiffs declared dividends or paid dividends to WKN at any time. She claimed that the WTK Group companies paid WKN a dividend through the plaintiffs. However, Mdm Ma could not identify which company apparently declared dividends in favour of WKN. Mdm Ma also accepted that she did not know if the Logging Companies declared dividends or directors' fees to WKN.

(c) Mdm Ma claimed that Salwong had declared dividends to WKN based on the CAD Documents. But she had no personal knowledge of this. In any event, that was in 2009. The gifts were much earlier. Also, Salwong was not a Logging Company.

149 As I have already noted, the TT forms in respect of eight of the 50 Payments which are said to have been "gifts" were signed not only by WKN

but also by WKY. This was heavily relied upon by the defendant in support of the submission made on his behalf that WKY was aware that the payments were made to the defendant. I have already dealt generally with this point earlier. For reasons there stated and which I do not propose to repeat, I was unable to reach a conclusion as to whether, at the time WKY signed the TT forms, the forms were blank or not; or that WKY was in fact actually aware of the payments to the defendant. In such circumstances, it does not seem to me that the possibility that the defendant's name may have been on the TT forms when WKY signed them assists the defendant in discharging the evidential burden on him.

150 Needless to say, what would or at least might have been of assistance is the evidence of the defendant himself. However, as previously stated, he deliberately decided not to give evidence; and, for reasons which I do not propose to repeat, there is no satisfactory reason for the defendant so doing. Indeed, in this context, I accept the plaintiffs' submission that, insofar as may be necessary, it is appropriate to draw an adverse inference that, contrary to the defendant's case, these 11 payments were not made as gifts from monies which WKN entitled to receive by way of directors' fees or as shareholder dividends.

151 For all these reasons, it is my conclusion that the defendant has failed to discharge the evidential burden on him that these 11 payments were legitimate; and that, but for the time-bar, the plaintiffs would have been entitled to recover these payments from the defendant.

The three payments allegedly comprising the defendant's entitlement to directors' fees and/or shareholder dividends or constituting "gifts" by WKN to the defendant

152 These 3 payments are included in Annex B and (in chronological order) are summarised below:

S/N	Date	Paid by	Amount - RM[2]	Amount – US$	TT form Signatory	Other Information on the TT form
3	3 July 2002	Esben	N/A	50,000	WKN	*DR Directors' Fees Yearly 2001 US$50,000/2* (manuscript)
16	8 August 2005	Lismore	1,000,000	263,852	WKN & WKY	*(DR.JATI BAHAGIA SDN. BHD.)* (typed)
38	28 July 2008	Esben	N/A	179,456	WKN	*WTK TRADING (S$165,513.00)* *KAULULONG (S$ 70,000.00) S$241,369.00* *WTK SHARES ($ 5,856.00)* (typed)

153 As originally pleaded, it was the defendant's case that these three payments were made on behalf of certain Malaysian companies for directors' fees or in respect of shareholder dividends. However, shortly before trial, the defendant amended his Defence to plead in the alternative that these three payments were (or may have been) gifts. To the extent that these payments might have been gifts, my conclusion is the same as stated above with regard to the first category of 11 payments for similar reasons which I do not propose to repeat. It remains to consider the defendant's case that these three payments comprised the defendant's entitlement to directors' fees and/or shareholder dividends.

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[2] These amounts have been taken from the TT forms.

154 In support of that case, the defendant relied principally on the evidence of Mdm Ma which was, in broad terms, that the WTK Group had a practice of paying fees, costs and expenses associated with the logging business through the Offshore Companies including the plaintiffs. In particular, her evidence was that this included directors' fees and/or shareholder dividends; that the Offshore Companies, including the plaintiffs, were regarded as part of the WTK Group and the single economic entity; that the timber logs produced by the Logging Companies in Malaysia were sold to overseas buyers through the plaintiffs; that the plaintiffs would hold part of the proceeds received from the timber sales for the Logging Companies; that the plaintiffs would make payment of part of the fees and expenses associated with the logging business; and that thereafter, the plaintiffs would distribute the remaining portion of the sale proceeds held by them to the shareholders of the Logging Companies principally by way of cash dividends from time to time.

155 As to this, I note that the evidence of the plaintiffs' expert, Mr Heng, was that the plaintiffs were not treated as part of the WTK Group, because they were not included in the audited financial statements of WTK Realty. The latter is certainly correct; but I accept the submission on behalf of the defendant that the suggestion that the plaintiffs were not treated (at least in a loose sense) as part of the WTK Group is simplistic for the reasons stated earlier in this judgment.

(1) Payment of US$50,000

156 As to the first of these payments, it was the defendant's case that this sum of US$50,000 was paid to him "on behalf of" one or more Malaysian companies in the WTK Group being directors' fees for his directorships in those companies. As pleaded, the defendant claims that he was a director of

11 Malaysian companies in the WTK Group but owing to the lapse of time, he is unable to recall the company or companies whose directors' fees were paid to him. The evidence of the defendant's expert, Mr Peer, was that based on the "descriptions on the TT forms", the payment "could be related to directors' fees and/or shareholder dividends due to [the defendant] in the 11 companies". That comment is a reference to the manuscript notations on the face of the TT form which state "DR Directors['] Fees Yearly 2001 US$50,000/2".

157 On behalf of the plaintiffs, it was submitted that this handwritten notation was inadmissible for being hearsay. In particular, it was submitted on behalf of the plaintiffs that there is no evidence as to who entered those words, the reason they were entered and what they mean. As formulated, I do not accept that the notation is inadmissible. It appears to be initialled by WKN who is, of course, now dead. However, it is impossible to say and I do not know whether the entirety of the manuscript notation was added before or perhaps after WKN added his initials. Be all that as it may, I am prepared to assume in the defendant's favour that the notation is at least *prima facie* evidence that this payment of US$50,000 was indeed made to the defendant for directors' fees in his capacity of a director of one or more companies.

158 The plaintiffs accept that the defendant was indeed a director of the 11 Malaysian companies as pleaded between 2001 and 2003. However, it was submitted on behalf of the plaintiffs that Esben did not make, indeed could not have made, this payment "on behalf of" the WTK Group companies for directors' fees owed to the defendant. In support of that submission, the plaintiffs relied on the evidence of Mr Heng who examined the audited financial statements of two of those 11 companies and concluded that there is nothing in those documents which records the payment of any directors' fees in 2001 to 2003. In addition, they rely on Mr Heng's evidence to the effect that even though

the audited financial statements for the remaining nine companies record the payment of directors' fees in 2001 to 2003, the general ledgers of eight of those companies show that they paid their directors, including the defendant, those directors' fees in full. Mr Heng has not seen the ledgers of the last company, WTK Travel Service Sdn Bhd ("WTK Travel"), which have not been disclosed. The defendant and Ms Ma control WTK Travel. Notwithstanding the non-disclosure, the evidence of Mr Heng was that this payment dated 3 July 2002 payment could not have been for directors' fees that WTK Travel allegedly owed the defendant because the US$50,000 that Esben paid the defendant on 3 July 2002 amounted to RM 190,000 (based on the exchange rate applicable in July 2002 of RM3.80 to US$1) which exceeds the sum of directors' fees (RM 150,000) recorded in WTK Travel's audited financial statements for 2001 to 2003.

159 Mr Heng's testimony based on these documents is uncontradicted. It is also noteworthy that the defendant's witnesses have also avoided dealing with these documents in their AEICs. Further, in light of the failure of the defendant to give evidence himself, it is, in my view, appropriate to draw the adverse inference that any evidence he might give would not support the explanation advanced on his behalf in this respect.

160 For all these reasons, it is my conclusion that the case advanced on behalf of the defendant that this payment of US$50,000 was for legitimate directors' fees must be rejected; that the defendant has failed to satisfy the evidential burden on him to explain satisfactorily the legitimacy of this payment; and that, in the absence of the time-bar, the plaintiffs would be entitled to recover this payment of US$50,000.

(2) Payment of US$263,852

161 The TT form dated 8 August 2005 instructs HSBC to make a payment of US$263,852.00 from Lismore to the defendant. This TT form was signed by both WKN and WKY. It also bears a typewritten annotation: "(DR.JATI BAHAGIA SDN. BHD.)". In summary, it was submitted on behalf of the defendant that he was a shareholder of the company, Jati Bahagia Sdn Bhd ("Jati Bahagia") in August 2005; and that this payment would have been made by Lismore on behalf of Jati Bahagia as shareholder dividends due from that company to the defendant.

162 Once again, there are major difficulties with regard to the evidence concerning this payment. For the reasons stated above, the *evidential* burden is on the defendant to establish (at least *prima facie)* that this payment was made to him for the reasons stated in his Defence. I have already dealt generally with the point that some of the TT forms were signed by WKY. For reasons which I have already stated and which I do not repeat, I do not consider that this assists the defendant.

163 The plaintiffs say that the words "(DR.JATI BAHAGIA SDN. BHD.)" are inadmissible as hearsay in particular because there is no evidence as to who wrote those words. I do not accept that submission. However, even if that is wrong, there is no evidence as to when or why those words were entered or what they mean. Nor do they state the purpose for which the payment was made. In the absence of any other evidence, it does not seem to me appropriate to infer or to guess what that purpose was still less to conclude even on a *prima facie* basis that the payment was made by Lismore on behalf of Jati Bahagia as shareholder dividends due from that company to the defendant.

164 It is fair to say that Mdm Ma claimed that the WTK Group companies paid WKN a dividend through the plaintiffs but she could not identify which company apparently paid dividends in favour of WKN. In my view, such evidence fell far short of establishing the purpose of this payment even on a *prima facie* basis.

165 There is no other evidence, contemporary or otherwise, to support the defendant's pleaded case with regard to the purpose of this payment. In particular, the plaintiffs have been unable to obtain any documents relating to Jati Bahagia because it was struck off the Register of Companies on 8 November 2010. I am prepared to assume in the defendant's favour that even in the absence of such documents, he might have given evidence himself to substantiate his pleaded case. But, as stated above, he did not give evidence; and, in such circumstances, it is, in my view, appropriate to draw the adverse inference that any evidence he might have given would not support the explanation advanced on his behalf.

166 For all these reasons, it is my conclusion that the defendant has failed to satisfy the evidential burden on him to explain satisfactorily the legitimacy of this payment; that the case advanced on his behalf that this payment of US$263,852 was legitimate on the basis that it was or would have been made by Lismore on behalf of Jati Bahagia as shareholder dividends due from that company to the defendant must be rejected; and that, in the absence of the time-bar, the plaintiffs would be entitled to recover this payment.

(3) Payment of US$179,456

167 The TT form dated 28 July 2008 authorises a payment of US$179,456 from Esben to the defendant and was signed by WKN. It bears a typewritten annotation:

> WTK TRADING (S$165,513.00)
> KAULULONG (S$ 70,000.00) S$241,369.00
> WTK SHARES ($ 5,856.00)

168 As to this payment, it was the defendant's case that he was a director and shareholder of WTK Trading Sdn Bhd ("WTK Trading") and Syarikat Kalulong Sdn Bhd's ("Syarikat Kalulong") in July 2008; and that this payment of US$179,456 would have been made "on behalf of" those companies as directors' fees and/or shareholder dividends due to the defendant from those companies to him at the material time.

169 However, as with the previous payment of US$263,852, there is no or no sufficient evidence to support that case. Contrary to the plaintiffs' submission, I am prepared to assume in the defendant's favour that the typewritten notation is admissible; notwithstanding, the notation does not of itself prove even on a *prima facie* basis the defendant's case. There is no other evidence sufficient to support the defendant's case. Again, in the absence of evidence from the defendant it is, in my view, appropriate to draw the adverse inference that any evidence he might have given would not support the explanation advanced on his behalf.

170 Moreover, the evidence of the plaintiffs' expert, Mr Heng, was that the financial statements of WTK Trading show that it paid dividends in 2006 and 2007 (but not in 2008) and directors' fees in 2006 to 2008; that, according to WTK Trading's ledgers, it paid its shareholders and directors, including the

defendant, those fees and dividends in full. Further, Mr Heng's evidence was that Syarikat Kalulong did not pay any dividends in 2006 to 2008 and that while its audited financial statements show that it paid directors' fees in 2006 to 2008, its ledgers show that it paid its directors, including the defendant, those fees in full. I accept that evidence.

171 For all these reasons, it is my conclusion that: (a) the defendant has failed to satisfy the evidential burden on him to explain satisfactorily the legitimacy of this payment; (b) such evidence as there is to the contrary; (c) the case advanced on his behalf that this payment of US$179,456 was legitimate on the basis that it was or would have been made by WTK Trading and Syarikat Kalulong as directors' fees and/or shareholder dividends due to the defendant from those companies to him at the material time must be rejected; and (d) it follows that in the absence of the time-bar, the plaintiffs would be entitled to recover this payment.

The defendant's case with regard to the other 36 payments

172 It is the defendant's positive case that these 36 payments fall into three broad categories as indicated in Annex B to this judgment:

(a) Payments made for log production, log transportation and road construction services provided by GCH to Elite Honour, *ie*, Payment Nos 4, 5, 14, 15, 17, 19, 20, 21, 23, 24, 25, 26, 30, 35, 37, 39 (part), 40, 42, 45, 47 (part), 48, 50 (part);

(b) Payments comprising management consultancy services provided by DRM to Ocarina and Sunrise Megaway, *ie*, Payment Nos 22, 27, 28, 31, 34, 36, 37, 39 (part), 41, 43, 44, 46, 47 (part), 49, 50 (part); and

(c) Payments in respect of the supply of timber logs from WTK Reforestation to Faedah Mulia, *ie*, Payment Nos 29, 32, 33.

I propose to deal with each of these categories in turn.

(1) Payments made for log production, log transportation and road construction services provided by GCH to Elite Honour

173 On behalf of the defendant, it is said that 22 of the payments (including parts of three payments) fall within this category as identified in Annex B to this judgment. Of these, 12 of the TT forms authorising such payments were signed by both WKN and WKY; two were signed by WKY alone; and the remainder by WKN alone.

174 In summary, it is the defendant's case that all of these payments were made direct to him for log production, log transportation and road construction services provided by GCH to Elite Honour.

175 As to such payments, the defendant relied principally on the evidence of Mr Hii, LTK and Mdm Ma which was, as summarised on behalf of the defendant, as follows:

(a) GCH is engaged in the business of providing timber logging and ancillary services. The company was incorporated on 27 May 1999 for the purpose of carrying out logging operations for the Logging Companies within the WTK Group. Since its incorporation, the defendant and Mdm Ma have been the directors and ultimate beneficial owners of GCH.

(b) Elite Honour is a company which was incorporated in Malaysia on 15 December 1999. As part of the Logging Companies in the WTK

Group, Elite Honour was the main contractor involved in logging activities and transportation in Sarawak in the area covered under Forest Timber Licence No. T/3343 ("T/3343").

(c) By way of a written agreement dated 15 December 1999 ("Elite Honour Agreement"), Elite Honour engaged GCH to provide log production, log transportation and road construction services in T/3343. This agreement was part of a wider commercial arrangement for the production and transportation of logs in T/3343. T/3343 was held by a third party – Continuous Gain Sdn Bhd ("Continuous Gain"), which had engaged Elite Honour as the main contractor for the felling, extracting, harvesting and exhausting of all merchantable timber logs from T/3343.

(d) The logs extracted from T/3343 were sold by Continuous Gain to Harvard Rank.

(e) As the purchaser of the logs, Harvard Rank engaged Elite Honour to transport the logs from the transit camp to the log pond.

(f) By way of the Elite Honour Agreement, Elite Honour subcontracted its (i) log production and (ii) log transportation obligations owed to Continuous Gain and Harvard Rank respectively to GCH.

(g) Under the Elite Honour Agreement, the contract fees payable by Elite Honour to GCH for the work undertaken were pegged to the quantity of logs produced and transported in Hoppus Tons ("HT"), and the length of the roads constructed in miles. The contract prices were initially fixed as follows:

(i) Log production – RM 185/HT;

(ii) Log transportation – RM 125/HT; and

(iii) Road Construction – RM 100,000/Mile.

(h) In 2000, the full contract fees were paid entirely onshore in Malaysia by Elite Honour to GCH. This changed in 2001, when the parties agreed to vary the structure of the contract fees from being paid entirely onshore to one being partly paid onshore (from Elite Honour to GCH) and partly paid offshore (from the plaintiffs to GCH).

(i) However, from 2001 onwards, the arrangement between the parties was as follows:

(i) The logs which were extracted by GCH from T/3343 would be sold to Harvard Rank.

(ii) In accordance with the WTK Group's usual practice of routing the sale of timber logs through offshore companies, Harvard Rank sold the timber logs to the plaintiffs, who then on-sold them to overseas buyers.

(iii) GCH would be paid for its services partly by way of onshore payments made in Malaysia directly from Elite Honour. The remaining part of its dues would be paid by way of offshore payments from the Offshore Companies, which would make the payments directly to the defendant (on Elite Honour's behalf).

(j) This arrangement meant that there were two components to the contract price payable for GCH's services, namely: (i) the component paid by Elite Honour to GCH ("GCH Onshore Contract Price"); and (ii) the component paid by the Offshore Companies to Neil ("GCH Offshore Contract Price") (collectively, "GCH Total Contract Price").

(k) Following the change in the payment structure under the Elite Honour Agreement, there were also several periodic revisions to the contract price payable to GCH and the defendant in respect of the services which were rendered by GCH to Elite Honour agreed between the parties:

(i) In the period between 2000 to 2011, there were 12 revisions to the payment terms under the Elite Honour Agreement. The changes in the GCH Onshore Contract price would be confirmed in writing by Elite Honour in its letters which were issued to GCH. The revisions to the GCH Onshore Contract Price was on occasion matched by a corresponding and inverse revision to the GCH Offshore Contract Price. However, there were also other instances where Ms Loh had, on behalf of Elite Honour, specifically instructed LTK to revise one component of the GCH Total Contract Price without any corresponding change in the other component.

(ii) The revisions to the GCH Offshore Contract Price were generally not memorialised by Elite Honour in its letters to GCH. However, there were occasions where Elite Honour had itself acknowledged in writing that there was an offshore component which was payable in respect of GCH's services in T/3343 as appears, for example, from Elite Honour's letter to GCH dated 27 December 2002 recording the GCH Total Contract Price, which includes the GCH Offshore Contract Price).

(iii) In order to keep track of the offshore payments which were due to the defendant, the revisions to both components of the contract fees would be recorded in a spreadsheet, together

with the quantities of services rendered by GCH to Elite Honour. Using the information recorded in the spreadsheet, LTK would compute the fees which were payable to the defendant by the plaintiffs ("GCH Offshore Contract Fees"). LTK would then periodically request for payment of the outstanding offshore balance due to the defendant accordingly, by sending a summary of the outstanding GCH Offshore Contract Fees on to Ms Loh.

(iv) In requesting for payment of the outstanding GCH Offshore Contract Fees, LTK would factor in any advance onshore payment that may have been made by Elite Honour to GCH. This interplay between the onshore and offshore accounts is evidenced by the documents disclosed by the plaintiffs themselves, including the document titled "Elite Honour Sdn Bhd" which records the "total offshore owing" (outstanding GCH Offshore Contract Fees), and computes the net offshore fees owing to the defendant by deducting the onshore inter-company balance owed by Elite Honour to GCH from the outstanding GCH Offshore Contract Fees to arrive at the figure of RM 4,502,884.73. This sum was then confirmed to be "due to [GCH], being the contract fee outstanding from Elite Honour" in Elite Honour's Letter of Undertaking dated 13 June 2005.

(l) The 22 payments falling within this category were made in connection with the services rendered by GCH to Elite Honour under the Elite Honour Agreement. Of these, 18 payments were clearly recorded in the GCH Spreadsheet as payments made in satisfaction of the GCH Offshore Contract Fees and (as appears further below) were authorised by the plaintiffs. As regards the remaining four payments

which were not recorded in the GCH Spreadsheet (Payment Nos 4, 5, 26 and 30), it is also clear from the documents disclosed by the plaintiffs that these payments were made for the GCH Offshore Contract Fees owed to the defendant: see for instance the handwritten note on Rayley's letterhead exhibited at "LTK-1, Tab 73" which authorised payments of sums to the defendant which correspond exactly with the values of Payment Nos 4 and 5).

176 In support of the foregoing, the defendant's counsel also relied on numerous documents including many of those disclosed by the plaintiffs. For the sake of brevity, I do not propose to set out all these documents, except to note that they included a number of documents which were heavily relied upon by the defendant and which, it was submitted on behalf of the defendant, showed the following:

(a) A document setting out (i) a summary of annual contract fees payable to GCH; (ii) the onshore amounts paid; (iii) the offshore amounts paid; and (iv) outstanding GCH Offshore Contract Fees due to the defendant as of 30 May 2005 which was RM 4,502,884.73.

(b) A document titled "Elite Honour Sdn Bhd" which records that the outstanding Offshore Contract Fees due to the defendant as of 9 March 2006 was RM 5,350,068.61.

(c) A document titled "Golden Cash Harvest Sdn Bhd" which records that the outstanding GCH Offshore Contract Fees due to the defendant as of 23 August 2006 was RM 7,017,002.54. The document also contains a handwritten note by WKN authorising the sum of RM 3,500,000 to be paid to the defendant in satisfaction of these outstanding fees.

(d) A document titled "Reconciliation" which sets out a summary of the total outstanding sum of GCH Offshore Fees owed as at 1 September 2006 (*ie*, RM 5,517,00.22), as well as the sums which have been paid in respect of the GCH Offshore Fees up to that date. The document also contains a handwritten note by WKN indicating that the sum of RM 2,517,000.22 was to be paid to the defendant for the outstanding GCH Offshore Contract Fees.

(e) A document titled "Summary" by which LTK had submitted a request for offshore payment to Ms Loh. The document records, amongst other things, the outstanding sums owed in relation to the services provided by GCH under the Elite Honour Agreement. The document also contains handwritten notes setting out various sums which were to be paid in respect of the outstanding offshore fees.

(f) A handwritten note on Fax Transmission Form (Rayley Company Limited) which records that the plaintiffs had authorised the payment of US$1,000,000 from Rayley to the defendant for outstanding GCH Offshore Contract Fees.

(g) A memorandum from Ms Loh to WKN dated 23 June 2008 by which Ms Loh had relayed to WKN the defendant's request for, *inter alia*, payment of the outstanding GCH Offshore Contract Fees. On its face, the document appears to approve this request for payment by way of a handwritten note authorising payment of RM 2,728.549.22 to the defendant, comprising of RM 1,561,880.22 for the GCH Offshore Contract Fees, and RM 1,166,669 for the DRM Offshore Contract Fees (as to which see further below).

(h) A document titled "Demeter Resources Management Sdn Bhd" which contains handwritten instructions dated 27 October 2008, authorising, *inter alia*, the payment of RM 1,137,582.22 to the defendant for the GCH Offshore Contract Fees.

(i) A document titled "As At 31/03/2009" which sets out LTK's handwritten request to Ms Loh for offshore payment of, *inter alia*, the sum of RM 1,159,059.37 for the GCH Offshore Contract Fees. By way of a separate handwritten note which reads "Approved by: [signature] 23/5/2009", it appears that this request for offshore payment was approved.

(j) A document titled "As at 31 Dec 2009" which records, among other things, that the outstanding GCH Offshore Contract Fees due to the defendant as of 31 December 2009 was RM 1,593,441.92. By way of the handwritten note stating "CONTRACT Fees owing to Neil Wong", it appears that the payment of the outstanding offshore balances to the defendant was approved.

(k) A handwritten note to Mr Tiang which sets out LTK's request for payment of the offshore balances owed to the defendant, including the sum of RM 1,644,174.10 for the GCH Offshore Contract Fees.

(l) A document titled "As at 31 Aug 2011" which records the outstanding offshore fees due to the defendant as of 31 August 2011. This included the outstanding GCH Offshore Contract Fees of RM 1,000,703.87. The document also contains a handwritten note authorising payment of the outstanding offshore fees to the defendant.

(m) A document titled "As at 31.10.2012" which sets out LTK's request for, *inter alia*, the sum of RM 2,481,652.28 in respect of the outstanding GCH Offshore Contract Fees in or around November 2011 as at 31 October 2012. Ms Loh made a written note on the document on 14 November 2012 proposing the payment of RM 2,000,000. This was approved by WKN.

(n) A handwritten note on a Fax Transmission Form (Rayley Company Limited) which appears to authorise instructions for the payment of the outstanding GCH Offshore Contract Fees to the defendant.

(o) The TT form dated 22 May 2007 which bears the message "ELITE HONOUR SDN. BHD.". This would indicate that the payment was made in satisfaction of the GCH Offshore Contract Fees.

(p) The TT form dated on or around 18 June 2007 which bears the message "ELITE HONOUR". This would indicate that the payment was made in satisfaction of the GCH Offshore Contract Fees.

177 In light of the above, it was submitted on behalf of the defendant that if and to the extent that there was any evidential burden on him to explain the legitimacy of these payments, such evidential burden had been satisfied. On this basis, the defendant contends that the plaintiffs' claim for "unjust enrichment" must be rejected.

178 This was hotly disputed by the plaintiffs on various grounds as set out in their post-hearing written submissions. For the sake of brevity, I do not

propose to set out those detailed submissions. For present purposes and at the risk of repetition, I would summarise them as follows:

(a) This part of the defendant's case rests on the alleged "practice" referred to in para 91 of Mdm Ma's AEIC and the belated amendment to para 4(d)(iv) of the Defence. However, there is no or no sufficient evidence to support such alleged practice. Indeed, it is manifest that the alleged practice is a "work of fiction" which has been "trumped up" and that the defendant and Mdm Ma are "making things up as they go along". In support of the foregoing, the plaintiffs' counsel advanced a myriad of points including that: (i) neither the defendant nor Mdm Ma made any mention of such practice – nor indeed any practice - in their letters on 6 May 2016; (ii) the present alleged practice has only emerged belatedly after the abandonment of the defendant's original pleaded case and following various iterations forming part of an "evolutionary journey" leading to what is now said to have been the alleged practice; (iii) the defendant's case has constantly shifted and continued to shift (for example with regard to the definition of "Logging Companies" even during the trial); (iv) the attempt by Mdm Ma and counsel on behalf of the defendant to rely on what have been referred to as the Salwong documents is without merit because Salwong is not a Logging Company but an investment holding company; (v) the defendant knew or must have known that his earlier defence was false; and (vi) there is no credible explanation for why, if there was this alleged "practice", it was raised only in May 2020.

(b) The notion of the "practice" makes no sense. There is also no reason why the plaintiffs would do illegally what they could do perfectly

legally by distributing their profits (in low tax jurisdictions) to the Wong brothers as ultimate beneficial shareholders of the plaintiffs.

(c) The defendant is the only person who can explain the shifts in his defence and the court should draw the adverse inference that if he had given evidence it would have emerged that the "practice" was fictitious.

(d) More specifically, with regard to the allegation that the payments were made "on behalf of" Elite Honour for logging and transportation services rendered by GCH:

(i) There is no evidence – or at least no admissible or sufficient evidence – of any agreement, arrangement or understanding to such effect. In particular, there are no contemporaneous documents recording the alleged agreement between WKN and the defendant to vary the terms of the Elite Honour agreement; and the evidence of Mr Hii and Mdm Ma is of no assistance because they had no direct knowledge themselves of any such agreement and/or their evidence is of no probative value.

(ii) There is no evidence to show that GCH even did the work for the so-called "off-shore payments". The log production, log transportation and road construction reports that the defendant's witnesses referred to are not probative of whether GCH did the work under the Elite Honour agreement between 2001 and 2012. In particular, the relevant reports and dispatch notes that have been produced are inadmissible as to the truth of their contents (because Mr Lau was never called by the defendant) and/or are

> incomplete. Further, they are, in any event not probative of any work done: Mr Chieng accepted in evidence that the road construction reports that he had produced and referred to in his AEIC relate only to the "costings" for the proposed road construction and that those reports were prepared before the road construction was actually undertaken. Similarly, the spreadsheets and invoices relied upon by the defendant are either inadmissible (in particular, because LTK had no personal knowledge of the transactions behind the relevant entries), incomplete or unreliable and thus of no probative value.

179 As to these submissions, my observations and conclusions are, in summary, as follows:

(a) As submitted on behalf of the plaintiffs, it is right that there are no contemporaneous documents which record any "agreement" as alleged by the defendant between WKN and the defendant to vary the terms of the Elite Honour agreement; and that the documents said to support the alleged understanding or practice as alleged by the defendant are incomplete. However, given (i) the absence of proper financial documentation on the plaintiffs' side which I have already commented upon earlier in this judgment; and (ii) the fact that the matters in issue cover an extended period between some 8 and almost 20 years ago, I do not find this particularly surprising.

(b) At first blush, the failure of the defendant and Mdm Ma to respond openly and constructively to the questions posed by the plaintiffs' lawyers in the correspondence in 2016 and to explain at an early stage the nature of the alleged "practice" is, on one view,

surprising. However, by that time, it is obvious that there was already considerable suspicion and antagonism between, on the one hand, WKY and, on the other hand, the defendant and Mdm Ma. In that context, one can perhaps understand why the defendant and Mdm Ma were less than forthcoming.

(c) It is right to say that none of the defendant's witnesses could give direct evidence of the alleged agreement which it is asserted was made between WKN and the defendant. However, I found the evidence of, in particular, Mr Hii and LTK with regard to the "practice" compelling. In my view, they were plainly honest witnesses who were doing their best to explain the "practice". Their evidence was detailed and straightforward. It was consistent with and supported by the contemporaneous documents as referred to above, although the documentary record was incomplete and there existed, in certain respects, some discrepancies. In particular, the evidence contained in paras 74 to 184 of LTK's AEIC provided clear and compelling evidence confirming that these 22 payments were made direct to the defendant for outstanding GCH Offshore Contract Fees. I accept that evidence. Even disregarding entirely the evidence of Mdm Ma, I am satisfied that there was a "practice" as summarised above and that these 22 payments were made pursuant to such practice.

(d) I do not accept the plaintiffs' submission that the alleged practice necessarily makes no sense. At its simplest, the practice provided a means of channelling money directly to the defendant. Whether or not there may have been, as submitted on behalf of the plaintiffs, easier and better ways of achieving that aim is a matter of speculation. In the event,

it matters not. For whatever reason, that is the practice which, as I have concluded, was adopted.

(e) In reaching the foregoing conclusion, I have borne well in mind the fact that the defendant did not give evidence and that, as I have previously concluded, there is no satisfactory explanation for his failure to do so. I readily accept that the absence of the defendant in a case of this case is highly unusual – and indeed startling. In these circumstances, I have carefully considered whether, as the plaintiffs' counsel strongly urged, I should draw an appropriate adverse inference against the defendant in respect of these payments (as I have done in relation the allegation that certain of the other payments were "gifts") and, if so, what such adverse inference should be. In this context, it was the plaintiffs' submission that the appropriate adverse inference was that the alleged "practice" was "purely fictitious". I do not accept that submission. To do so would mean not only ignoring but rejecting much of the evidence of Mr Hii, Mr Ling and, in particular, LTK. In my view, there is no proper basis for so doing. On the contrary, as I have said, I regard all those witnesses as honest; and in the light of their evidence (in particular the evidence of LTK), I am satisfied that there was a "practice" as summarised above and that these 22 payments were made pursuant to such practice. For these reasons, it is my conclusion that this is perhaps a most unusual case where, whatever adverse inference might be drawn by reason of the fact that the defendant did not give evidence, any such adverse inference is outweighed by the evidence that was adduced by the other witnesses on behalf of the defendant in the course of the trial.

180 For all these reasons, it is my conclusion that, even in the absence of the time-bar, the plaintiffs would not be entitled to recover these 22 payments subject only to the issue of illegality which I consider below.

(2) Services provided by DRM to Ocarina and Sunrise Megaway

181 This category relates to some 15 payments made directly to the defendant comprising what were said on behalf of the defendant to be management consultancy services provided by DRM to Ocarina and Sunrise Megaway as listed in Annex B to this judgment. Of these, three of the TT forms authorising such payments were signed by WKY alone, two by WKN and WKY; and ten by WKN alone.

182 As to such payments, the defendant relied principally on the evidence of Mr Hii, LTK and Mdm Ma which was, as summarised on behalf of the defendant, as follows:

> (a) DRM (formerly known as Archer Oscar Sdn Bhd) was incorporated on 21 July 2005 to provide management consultancy services in relation to sustainable forest and logging operations to the WTK Group. The defendant and Mdm Ma are directors and ultimate beneficial owners of DRM.
>
> (b) Ocarina and Sunrise Megaway are WTK Group companies involved in logging operations in the areas designated under Forest Timber Licence No T/3218 ("T/3218") and Forest Timber Licence No T/3433 ("T/3433") respectively.
>
> (c) DRM entered into two agreements both dated 3 May 2007 ('"DRM Agreements") *viz* an agreement between Ocarina and DRM for

the provision of management consultancy services in T/3218 ("DRM-Ocarina Agreement"); and an agreement between Sunrise Megaway and DRM for the provision of management consultancy services in T/3433 ("DRM-Sunrise Agreement").

(d) Under the DRM Agreements, the scope of works to be provided by DRM included reviewing and identifying key business risks and opportunities in logging operations, advising and setting up sustainable forest management, and the appointment of personnel to carry out logging works in the concession area.

(e) It was agreed between the parties that the overall annual management fee for services to be provided by DRM would be paid by way of onshore and offshore payments as follows:

(i) In relation to the onshore fee: (1) Ocarina would pay DRM a monthly management fee of RM 50,000; and (2) Sunrise would pay DRM a monthly management fee of RM 130,000 ("DRM Onshore Contract Fees"). The onshore fees were recorded in the DRM Agreements.

(ii) In relation to the offshore fee, there would be a flat fee of RM 2,000,000 for DRM's management of T/3343 from July 2005 to June 2006 (prior to the DRM Agreements), as well as an additional annual payment of RM 2,000,000 ("DRM Offshore Contract Fees") for both the Ocarina and Sunrise Megaway projects.

(f) The DRM Agreements recorded only the agreement as to the onshore fee. The offshore fees were to be paid directly to the defendant and were not reflected in the DRM Agreements.

(g) There were two revisions to the total contract price payable in respect of the services which were rendered by DRM to Ocarina and Sunrise Megaway. LTK describes these revisions in detail in his AEIC *viz*:

(i) By way of letters dated 5 December 2008, Ocarina and Sunrise Megaway proposed to reduce the contract fees payable under the DRM Agreements by 10% with effect from 5 December 2008 as follows:

(A) DRM-Ocarina Agreement: Management fee from RM 50,000 to RM 45,000 per month;

(B) DRM-Sunrise Agreement: Management fee from RM 130,000 to RM 117,000 per month.

(ii) DRM accepted this proposal for reduced fees to be implemented from 1 January 2009, and for the 10% reduction to also be applied to the DRM Offshore Contract Fees, which would be reduced from RM 2,000,000 to RM 1,800,000 per annum. This was confirmed by Ms Loh on behalf of Ocarina and Sunrise Megaway.

(h) Subsequently, by way of two letters dated 1 October 2010, Ocarina and Sunrise Megaway proposed to reinstate the original contract fees payable under the DRM Agreements by 10% with effect from October 2010 as follows:

(i) DRM-Ocarina Agreement: Management fee from RM 45,000 to RM 50,000 per month; and

(ii) DRM Sunrise Agreement: Management fee from RM 117,000 to RM 130,000 per month.

(i) DRM accepted this proposal for the increase in fees to be implemented from October 2010, and for the increase to also be applied to the DRM Offshore Contract Fees, which would be increased from RM 1,800,000 to RM 2,000,000 per annum. Again, this was confirmed by Ms Loh on behalf of Ocarina and Sunrise Megaway.

(j) In order to compute and keep track of the outstanding offshore balance owed to the defendant, LTK recorded the applicable DRM Offshore Contract Prices in a spreadsheet ("DRM Spreadsheet") from September 2006 to June 2013, as well as the payments which were made to the defendant in satisfaction of the offshore fees ("DRM Offshore Contract Fees"). Based on the figures in the DRM Spreadsheet, LTK would then request that Ms Loh arrange for the outstanding balance of the DRM Offshore Contract Fees to be paid to the defendant.

(k) Of the 15 payments falling within this category, 12 were recorded in the DRM Spreadsheet as payments made in satisfaction of the DRM Offshore Contract Fees. Although the other three payments were not recorded in the DRM Spreadsheet (Payments Nos 27, 28 and 31), this was because Ms Loh had not updated Mr Ling. In any event, it is plainly apparent from the documents disclosed by the plaintiffs that these payments were also made for the outstanding DRM Offshore Contract Fees owed to the defendant.

(l) In further support of the foregoing, the defendant relied upon various contemporaneous documents including many disclosed by the plaintiffs themselves as referred to in para 12 of the aide-memoire served by the defendant's counsel at the end of the trial. For the sake of brevity, I again do not propose to set out all these documents but they included

a number of documents which were heavily relied upon by the defendant and which, it was submitted on behalf of the defendant, showed the following:

(i) The TT form dated 30 October 2006 which bears the message "DR. SUNRISE MEGAWAY" was said to be clear indication that the payment was made for the purpose of satisfying the DRM Offshore Contract Fees owed to the defendant.

(ii) The memorandum from Ms Loh to WKN dated 23 June 2008 (which contained the defendants' request for payment of the outstanding DRM Offshore Contract Fees of RM 1,166,669.00. This was approved by WKN by way of a handwritten note.

(iii) The document titled "Demeter Resources Management Sdn Bhd" which contained handwritten instructions dated 27 October 2008, authorising the payment of RM 833,335.00 to the defendant for the DRM Offshore Contract Fees.

(iv) The document titled "As At 31/03/2009" by which the plaintiffs had approved the payment of RM 950,001.00 to the defendant for the DRM Offshore Contract Fees.

(v) The document titled "As at 31 Dec 2009" by which the plaintiffs had approved the payment of DRM Offshore Contract Fees amounting to RM 810,000 for services provided under the DRM-Ocarina Agreement, and RM 540,000 for services provided under the DRM-Sunrise Agreement.

(vi) The email from LTK to Ms Loh dated 14 October 2010 by which LTK had forwarded the defendant's request for payment of the outstanding offshore fees to Ms Loh. By way of the handwritten notes on the printout of the email thread, the plaintiffs had authorised the payment of US$150,000 to the defendant in respect of the DRM Offshore Contract Fees.

(vii) The document titled "As at 31 Aug 2011" by which the plaintiffs had approved the payment of RM 1,000,002 to the defendant for the DRM Offshore Contract Fees.

(viii) The document titled "As at 31.10.2012" by which the plaintiffs had approved the payment of RM 2,000,000 in satisfaction of the outstanding offshore fees. Of this sum, US$336,526.65 was paid towards DRM Offshore Contract Fees.

(ix) The document titled "Demeter Resources Management Sdn Bhd" contained handwritten notes authorising payments to the defendant of (1) Ocarina: RM 533,336, (2) Sunrise Megaway: RM 1,993,336.00 or US$587,554.00; and (3) Encorp: RM 266,664.00. These payments correspond exactly with the value of Payment Nos 27, 28 and 31.

(x) The TT forms dated 22 May 2007 and 29 June 2007 relating to Payment Nos 27, 28 and 31.

183 As to the foregoing, it was submitted on behalf of the plaintiffs that, contrary to the defendant's pleaded case, there was no admissible evidence as to any "agreement" between the Wong brothers still less any evidence as to when and how any such agreement might have been reached; nor was there any admissible evidence that there was any agreement between WKN, the defendant

and/or Mr Hii that the plaintiffs would "on behalf of" Ocarina and Sunrise Megaway pay the defendant a "flat fee of RM2 million" and a "separate annual payment of RM2 million"; nor are there any contemporaneous documents which record the alleged "agreement(s)" between WKN and the defendant on the payment terms for DRM's services as pleaded in para 55 of the Defence (Amendment No 3) and the defendant's and/or Mr Hii's acceptance of Ocarina's and Sunrise Megaway's proposal for the variation of the payment terms for DRM's services. Further, the defendant chose not to testify, and Mr Hii's account of what the defendant may have told him does not assist the defendant.

184 As to these submissions, my observations and conclusions are as follows.

185 Once again, it is important to note that the defendant chose not to testify; and that there is therefore no evidence from him with regard to any "agreement(s)" as alleged in the Defence and summarised above.

186 I have already addressed the general question as to what, if any, adverse inferences should be drawn against the defendant by reason of his failure to give evidence; and I readily accept that there is a very strong argument that an appropriate adverse inference should be drawn against the defendant with regard to this present category of payments. However, whatever adverse inference might be drawn is not necessarily determinative and, as previously stated, has to be weighed against the rest of the evidence that was adduced in the course of the trial. Here, there is, in my view, ample cogent evidence in support of the defendant's case as summarised above – in particular, the evidence of Mr Hii at paras 83-118 of his AEIC and the evidence of LTK at paras 185-264 of his AEIC. Contrary to the plaintiffs' submission, I do not consider that such evidence is unhelpful – still less that it can properly be

ignored. As I have said, I regarded both these individuals as honest and straightforward; and their evidence is, in my view, compelling. In particular, LTK gave detailed evidence (largely unchallenged) concerning the evolution of the various agreements, the methodology concerning the payment of the DRM Onshore Contract Fees and the DRM Offshore Contract Fees by reference to the DRM Spreadsheet which he prepared as well as a detailed analysis of the 12 payments recorded in the DRM Spreadsheet and the three payments not recorded in the DRM Spreadsheet. I accept that evidence. In my view, whatever adverse inference might be drawn against the defendant is outweighed by this evidence of Mr Hii and LTK.

187 For all these reasons, it is my conclusion that, even in the absence of the time-bar, the plaintiffs would not be entitled to recover these 15 payments subject only to the issue of illegality which I consider below.

(3) Supply of timber logs by WTK Reforestation to Faedah Mulia

188 The third category of payments concerns three payments which the defendant's counsel submitted related to the provision of timber logs by WTK Reforestation to Faedah Mulia. As for these payments, the defendant relied principally on the evidence of LTK and Mdm Ma which was, as summarised by the defendant's counsel as follows:

> (a) WTK Reforestation is in the business of supplying timber logs. It was incorporated in the early 2000s and held the exclusive right for the felling and extraction of timber logs under Forest Timber Licence No T/4171 ("T/4171"). Up until about 2007 or 2008, the defendant and Mdm Ma were the only directors and shareholders of WTK Reforestation, after which the company was acquired by Faedah Mulia.

(b) Faedah Mulia is a WTK Group company which carries on the business of extracting and selling timber logs.

(c) In late 2005 or early 2006, WTK Reforestation entered into an arrangement with Faedah Mulia under which the latter was permitted to fell, extract and sell the timber logs in T/4171. As part of this arrangement, Faedah Mulia agreed to pay the defendant, through the plaintiffs, an offshore payment of RM 60/HT ("WTK Reforestation Offshore Fees") for the log production in T/4171.

(d) On the defendant's instructions, LTK computed the WTK Reforestation Offshore Fees due to the defendant and liaised with WKN to arrange for payment. The outstanding WTK Reforestation Offshore Fees, as well as the payments which had been made in satisfaction of such fees were recorded in spreadsheets ("WTK Reforestation Spreadsheets"), which were prepared and maintained by LTK for the purpose of keeping track of the WTK Reforestation Offshore Fees.

(e) Three of the 50 Payments constituted payments of the WTK Reforestation Offshore Fees, *ie*, Payment Nos 29, 32 and 33.

189 In further support of the foregoing, the defendant's counsel relied upon the following documents which were in the plaintiffs' possession, custody or power prior to the commencement of these proceedings and disclosed in the plaintiffs' very first List of Documents *viz*

(a) An email dated 22 October 2007 containing a handwritten note by WKN authorising the defendant's request for payment of the outstanding WTK Reforestation Offshore Fees.

(b) A spreadsheet which contains a handwritten note recording an outstanding balance of RM 1,502,0005 due to the defendant for the WTK Reforestation Offshore Fees, and that this figure was to be paid in two tranches of RM 500,000 and RM 1,002,005 in mid-June 2007.

(c) The TT forms dated 22 May 2007 and 22 June 2007 which bears the message "WTK REFORESTATION SDN. BHD."

190 On behalf of the plaintiffs, it was submitted that there was no admissible evidence in support of the defendant's pleaded case of any alleged "arrangement and/or understanding" between Faedah Mulia and the plaintiffs on the one hand and WTK Reforestation and the defendant on the other that the plaintiffs would pay the defendant RM 60/HT of WTK Reforestation's log production to the defendant, "in return for the provision of timber logs" to Faedah Mulia; nor that the payments that the plaintiffs made to the defendant were "on behalf of" Faedah Mulia's "debts" to WTK Reforestation.

191 Moreover, it was submitted on behalf of the plaintiffs that there were no contemporaneous documents which recorded any such agreement or understanding. In that context, the plaintiffs relied in particular on the evidence of their expert, Mr Heng, to the effect that having examined Faedah Mulia's and WTK Reforestation's audited financial statements and Faedah Mulia's accounting records including Faedah Mulia's general and creditors' ledgers, there is nothing in those documents to suggest that Faedah Mulia owed WTK Reforestation RM 60/HT of WTK Reforestation's log production; and that there is also nothing to show that WTK Reforestation ever asked Faedah Mulia to confirm the debt or the delivery of the quantities or services that support the payment of that sum.

192 As to these submissions, my observations and conclusions are similar to those which I have expressed in relation to the previous category of payments. In summary, I readily accept the plaintiffs' submission that in the absence of contemporaneous documents and since the defendant did not testify, there is no direct evidence of the "agreement(s)" between WKN and the defendant as alleged in the Defence and summarised above. At the risk of repetition, I also readily accept that there is a very strong argument that an appropriate adverse inference should be drawn against the defendant with regard to this present category of payments. However, whatever adverse inference might be drawn is not necessarily determinative and, as previously stated, has to be weighed against the rest of the evidence that was adduced in the course of the trial. Here, there is, in my view, ample cogent evidence in support of the defendant's case as to the practice adopted with regard to the supply of timber logs by WTK Reforestation to Faedah Mulia – in particular, the evidence of LTK at paras 265 to 286 of his AEIC. Again, contrary to the plaintiffs' submission, I do not consider that such evidence does not assist – still less that it can properly be ignored. As I have said, I regarded LTK as honest and straightforward; and his evidence is, in my view, compelling. I accept that evidence. In my view, whatever adverse inference might be drawn against the defendant is outweighed by this evidence of LTK.

193 For all these reasons, it is my conclusion that, even in the absence of the time-bar, the plaintiffs would not be entitled to recover these three payments subject only to the issue of illegality which I consider below.

194 So far, I have considered the plaintiffs claim as advanced on the basis of unjust enrichment. In summary, I have concluded that but for the time-bar defence, the plaintiff would be entitled to recover 14 out of the 50 Payments; but that in any event and even apart from the time-bar, the plaintiffs would not

be entitled to recover the other 36 payments on the basis of unjust enrichment. It remains to consider whether the plaintiffs are entitled to recover any of the 50 Payments from the defendant even in the absence of the time-bar defence on the basis of the other causes of action advanced by the plaintiffs.

(B) Dishonest Assistance

195 For a defendant to be liable for dishonest assistance, the plaintiffs submitted (and I accept) that the following four elements must be shown: *viz* (a) a person owed a fiduciary duty to the plaintiff; (b) that person breached his fiduciary duty; (c) the defendant rendered assistance towards the breach of that fiduciary duty; and (d) that assistance was rendered dishonestly: *Von Roll Asia Pte Ltd v Goh Boon Gay and others* [2018] 4 SLR 1053 at [105]; *AHTC* ([133(e)(v)] *supra*) at [450]-[451].

196 In my judgment, it is important to emphasise that the legal and evidential burden of proof in respect of this cause of action and, in particular, the four elements of such cause of action as referred to above, lies on the plaintiffs. In that regard, the plaintiffs submitted that all four elements have been satisfied.

197 As to that submission, I accept that WKN owed fiduciary duties to the plaintiffs and that therefore, the first element is satisfied. However, I do not accept that the plaintiffs have satisfied the legal and evidential burden on them with regard to the other elements. In particular, I am not satisfied on the evidence that the 50 Payments were not in the plaintiffs' interests or that the defendant assisted WKN's breach of his fiduciary duties, still less that he dishonestly assisted WKN in breaching WKN's fiduciary duties to the plaintiffs.

198 This conclusion may seem odd having regard to the fact that, but for the time-bar defence, I would have upheld the plaintiffs' claim in respect of at least

14 of the 50 Payments on the basis of unjust enrichment. However, that was because (a) the elements necessary to establish that cause of action are very different from the elements to establish a claim for dishonest assistance; and (b) it was my conclusion that the defendant had failed to satisfy the evidential burden on him which I considered arose in the context of a claim of unjust enrichment and the circumstances of the case.

199 In the present context, I bear well in mind the forceful submission made by the plaintiffs' counsel that this is to ignore the fact the defendant deliberately decided not to give evidence and that I should therefore draw an appropriate adverse inference against the defendant. However, as the authorities show and as I have emphasised, it is important not to reverse the burden of proof. Here, I am not satisfied that the plaintiffs have established even a *prima facie* case of dishonesty against the defendant with regard to the 14 payments. In those circumstances, it would, in my view, be wrong in principle to draw an adverse inference of dishonesty against the defendant because he decided deliberately not to give evidence.

200 The position with regard to the other 36 payments is *a fortiori*. As to these payments, I have positively held that the evidence adduced on the defendant's behalf is proof of a practice sufficient to defeat the claim for unjust enrichment which would, in effect, outweigh or override any adverse inference that I might draw against him. Such conclusion is inconsistent with any dishonesty on the part of the defendant (apart from the issue of illegality which I consider further below).

201 For these brief reasons and even in the absence of the time-bar, I would reject the claims advanced by the plaintiffs on the basis of dishonest assistance.

(C) Knowing Receipt

202 For a defendant to be liable for knowing receipt, the plaintiffs submitted (and I accept) that the following elements must be shown *viz* (a) a person has disposed of assets in breach of his fiduciary duty to the plaintiff; (b) the defendant has beneficially received assets which are traceable as representing the assets of the plaintiff; (c) the defendant knew that the assets he received were traceable to a breach of fiduciary duty; and (d) the defendant's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt: *Parakou Shipping Pte Ltd (in liquidation) v Liu Cheng Chan and others* [2017] SGHC 15 at [146] *("Parakou Shipping")*;

203 Again, the legal and evidential burden of proving these elements rests on the plaintiffs; and for reasons similar to those stated above with regard to the plaintiffs' claim for dishonest assistance, I do not accept that the plaintiffs have established even a *prima facie* case against the defendant for knowing receipt. It follows that even in the absence of the time-bar, I would reject the claims advanced by the plaintiffs on the basis of knowing receipt.

(D) Conspiracy to Injure by Unlawful Means

204 For a defendant to be liable for conspiracy by unlawful means, the plaintiffs submitted (and I accept) that the following elements must be shown *viz* (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 (although such intention need not be predominant); (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: *Parakou Shipping* at [161]; *Beyonics Technology (HC)* ([138(c)] *supra*) at [161].

205 Again, the legal and evidential burden of proving these elements rests on the plaintiffs; and for reasons similar to those stated above with regard to the plaintiffs' claim for dishonest assistance, I do not accept that the plaintiffs have established even a *prima facie* case against the defendant of any conspiracy to injure by unlawful means. It follows that even in the absence of the time-bar, I would reject the claims advanced by the plaintiffs on the basis of knowing receipt.

Illegality

206 It was the plaintiffs' case that with regard to the 36 payments, even if the defendant can make out his case that such payments were made to him for the reasons pleaded in the Defence, they do not afford him a defence because such defence is premised on an arrangement that involved illegal acts under Malaysian law which this court will not recognise (the "illegality issue"). This is disputed by the defendant on a number of grounds as referred to below.

207 However, before addressing the illegality issue, it is important to note how it fits in with the various claims advanced by the plaintiffs particularly in light of the conclusions which I have already reached earlier in this judgment. Thus:

(a) The illegality issue is not relevant to the 11 alleged "gifts" and the three other payments said to have been gifts or directors' fees or shareholder dividends. Subject to the time-bar, I have concluded that the plaintiffs would be entitled to recover such payments.

(b) Save for Payment No 50, the illegality issue does not arise for decision with regard to the other 35 payments because, as I have

concluded, the plaintiffs' claims in relation to these payments are time-barred.

(c) The result is that on the basis of my earlier conclusions, the illegality issue is only relevant to the plaintiffs' claims in respect of one single payment *ie,* Payment No 50; although, it would be relevant to all of the 36 payments if I were wrong on the time-bar issue.

208 The plaintiffs' case with regard to the illegality issue is as pleaded in para 2B of the Reply (Amendment No 2). In summary, it is the plaintiffs' case that if the court accepts that the 36 payments were made pursuant to an arrangement (the "split fee arrangement") between WKN and the defendant and/or the defendant's companies, namely GCH, DRM and WTK Reforestation, that was illegal and/or involved illegal acts and/or a conspiracy to evade taxes under Malaysian law; and that, for that reason "the [d]efendant cannot and/or is precluded from and/or the [c]ourt will not recognise, or allow him to rely on, such arrangement as a defence to the [p]laintiffs' causes of action".

209 As further pleaded by way of particulars, the plaintiffs' case is founded on the court accepting the evidence of Mr Hii, LTK and Mdm Ma that (contrary to the plaintiffs' primary case) the Logging Companies routed their sales of timber logs through the plaintiffs such that the plaintiffs ended up holding the revenue received from the end buyers of the timber logs. The plaintiffs pleaded that:

(a) instead of transmitting the full sale price back to the Logging Companies, the plaintiffs "retained some revenue" and "paid part" of the logging fees and expenses "offshore" and the Logging Companies paid the remaining portion of those logging fees and expenses "onshore";

(b) that they asserted that the "practice" of "splitting" of the logging fees and expense into "onshore" and "offshore" components resulted in lower income and consequently lower taxes payable "onshore";

(c) that WKN proposed the "onshore-offshore" payment structure for the services that the defendant's companies provided to the Malaysian companies in the WTK Group which Mdm Ma and the defendant agreed to and the "directors' fees and/or dividends" for the defendant's directorships and/or shareholdings in the companies in the WTK Group;

(d) that in furtherance of and/or pursuant to such arrangement, the plaintiffs made the payments in question to the defendant's bank account in Singapore, being "offshore" payments for the services that the defendant's companies provided to the Malaysian companies in the WTK Group and the defendant's "directors' fees and/or dividends"; and

(e) that the "offshore fees" were "deliberately kept off the books of the onshore companies".

In broad terms, I accept that the foregoing is a fair summary of the evidence of Mr Hii, LTK and Mdm Ma; and that, as I have concluded, the 36 payments in question were made pursuant to such an arrangement or practice.

210 It is on this basis that the plaintiffs submitted that such arrangement or practice was prohibited by and/or breached the laws in Malaysia in particular ss 3, 75A, 78 to 82, 113, 114, 119(A), and 140 of the Income Tax Act 1967 (No 47 of 1967) (M'sia) ("ITA"). In particular, the plaintiffs relied upon s 114(1) of the ITA which provides that it is an offence for a person to wilfully and with intent evade tax and to omit from a return any income which should

be included. The defendant's Malaysian law expert, Mr Saravana Kumar Segaran ("Mr Saravana"), also agreed that it is an offence under the ITA for a party to intentionally evade tax. It was the plaintiffs' Malaysian law expert, Dr Subbramaniam's unchallenged evidence that evasion of taxes occurs when the board is not informed of all the facts relevant to an assessment. Mr Saravana also accepted that the act of not declaring one's income, whether corporate or personal, is an infringement of Malaysian income tax law.

211 On behalf of the defendant, it was submitted that there was no illegality *per se*; that the plaintiffs must establish beyond reasonable doubt that the arrangement or practice was entered into for an illegal purpose; that, on the evidence, no such illegal purpose had been established; and that, on the contrary, the evidence was to the effect that the GCH Group entered into the split fee arrangements with the WTK Group not to evade tax but because the latter had proposed this in order to accommodate their existing practice.

212 It is right that the evidence of Mdm Ma was that it was likely to have been WKN on behalf of the WTK Group who initially proposed that part of the contract fees payable to GCH be paid offshore. I readily accept that this may well have been the case. However, whether or not that was so in fact, is, in my judgment, ultimately irrelevant to the question as to whether the arrangement was entered into for an illegal purpose.

213 Here, the evidence of, in particular, Mdm Ma and LTK was that the "offshore" component of the fees payable to the defendant was deliberately kept off the books. Despite Mdm Ma's protestations in evidence that she did not know what were the tax implications of such arrangement, it is noteworthy that she herself said in her AEIC that when GCH commenced an action against Elite Honour in 2014, GCH did not sue for the "offshore" component in that action

because the defendant had "concerns over the potential tax implications of the onshore-offshore payment structure". Moreover, Mdm Ma had no explanation for why the "offshore" component was deliberately kept off the books. As submitted by the plaintiffs' counsel, her silence betrays the fact that she well knew that the object of that arrangement was to evade the payment of taxes on the "offshore" component. If the "offshore" component was recorded in the books of their companies, then the defendant's and Mdm Ma's companies would have had to pay taxes on that income. That would have reduced the profits and therefore the dividends which those companies could have paid to the defendant and Mdm Ma. Mr Ling also accepted that if the "offshore" component had been declared to the Malaysian tax authorities, then the defendant's and Mdm Ma's companies would have had to pay taxes on that income. The defendant's and Mdm Ma's companies paid taxes only on the "onshore" component. Their companies did not declare the "offshore" component to the Malaysian tax authorities ("the Board"). Mr Ling said that the defendant's and Mdm Ma's companies' tax agent would determine the annual tax payable based on the companies' audited financial statements, which were in turn prepared by the companies' auditors based on the companies' books. So, the Board and the auditors did not know of the "offshore" payments if and when the companies' books were audited.

214 I do not accept the evidence of Mdm Ma that she did not know the tax implications of the split fee arrangement. On the contrary, I am sure that the defendant and Mdm Ma both fully understood all along the implications of what was being done, *ie*, that the deliberate and intended purpose of the arrangement was to evade tax in Malaysia. So far as may be relevant, it is also my conclusion that an adverse inference can and should be drawn against the defendant to that effect. (It is possible that his decision not to give evidence was driven by a

reluctance to being pressed with questions on this topic and to the risk of having to admit in open court that this was the case; but that is a matter of speculation.)

215 In support of the defendant's case that the split fee arrangement had not been entered into for an illegal purpose, the defendant's counsel sought to rely on the fact that he and his companies had made certain voluntary disclosures to the Board in 2015; that by letters dated 1 and 5 April 2019, the Board had accepted such disclosures and given notice that no audit or investigations would be made in the future in respect of the years of assessment for which disclosure was made; and that the defendant, Mdm Ma and their companies had paid the required settlement amounts to the Board.

216 However, I do not consider that the foregoing assists the defendant. As submitted by the plaintiffs' counsel, the evidence concerning such purported voluntary disclosure is, at best, most unsatisfactory and, in my judgment, falls far short of establishing that the defendant, Mdm Ma and their companies came clean to the Board on the "offshore" payments. (I put on one side the question whether the exercise of "coming clean" would negate any initial unlawful conduct for the purpose of the operation of the doctrine of illegality.) The evidence of LTK was that he sent to the defendant or Mdm Ma the spreadsheets which he claimed recorded the "offshore" component of the fees payable to the defendant for the purposes of the defendant's and Mdm Ma's "voluntary disclosure" to the Board. However, as submitted by the plaintiffs' counsel, the unredacted letters between the Board, Mdm Ma, the defendant and their companies show that the income declared to the Board for the purposes of the voluntary disclosure programme is significantly lower than the alleged "offshore" component recorded in those spreadsheets. This conclusion is reinforced by the withholding of documents that the court ordered that the defendant produce. The defendant has only disclosed the unredacted letters and

withheld other documents from the court. Notably, the defendant has not disclosed any documents relating to WTK Reforestation. There was no satisfactory explanation for this. In my judgment, this further reinforces the adverse inference to be drawn against the defendant with regard to this issue as stated above.

217 For all these reasons, I accept the plaintiffs' submission that the arrangement or practice which I have found was entered into and the 36 payments were made and performed with the deliberate intention by the defendant of evading taxes in Malaysia; and that such conduct was unlawful under the laws of Malaysia.

218 The question then arises as to whether such unlawful conduct has the effect contended by the plaintiffs, *ie*, that "the [d]efendant cannot and/or is precluded from and/or the [c]ourt will not recognise, or allow him to rely on, such arrangement as a defence to the [p]laintiffs' causes of action".

219 In support of that case, the plaintiffs' counsel relied upon what was described as three broad principles *viz* (a) the so-called *Foster v Driscoll* principle; (b) the so-called *Ralli Bros* principle; and (c) the principle that a man cannot rely on or profit from his own wrong. I deal with each of these so-called principles in turn.

The so-called Foster v Driscoll principle

220 The plaintiffs' counsel submitted that the principle to be derived from *Foster v Driscoll* [1929] 1 KB 470 is that where parties enter into an agreement with the object of breaking the laws of a friendly country or to procure someone else to break them or to assist in the doing of it, the court will regard that agreement to be a breach of international comity, and therefore, contrary to

public policy and void. However, I do not accept that the decision in *Foster v Driscoll* supports such a broad principle. At the very least, the principle as formulated by the plaintiffs' counsel needs some qualification and that careful consideration is required when seeking to apply any such principle to the very unusual facts of the present case.

221 In my view, the starting point is to recognise that the so-called *Foster v Driscoll* principle is founded on public policy which is or can be (as has often been stated) an "unruly horse". No doubt, this is so because views may differ as to what public policy should dictate as is apparent from the judgments in *Foster v Driscoll* itself.

222 I readily accept the general principle which is founded on public policy and international comity that the court will not enforce a contract if the real object and intention of the parties is to violate the laws of a friendly foreign state; and that such general principle was established in *Foster v Driscoll* itself and elaborated, confirmed or followed and applied in a number of cases including *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301("*Regazzoni*"); the Court of Appeal decision in *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 ("*Peh*") at [45] – [47]; and the SICC decision in *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] 4 SLR 1 ("*BCBC*") at [174] – [175].

223 However, it is important to note that these cases were generally concerned as to whether the court would enforce the contracts in question and award damages for their breach. The rationale for the principle is that if the court were to enforce such contracts it would, by lending such assistance, be helping the parties to breach the laws of a foreign country and this would be contrary to the comity between nations: see the exposition of the scope and rationale for the

principle in *Regazzoni v K C Sethia (1944) Ltd* [1956] 2 QB 490 ("*Regazzoni (EWCA)*") at pp 514 and 515 per Denning LJ (as he then was) (the decision was upheld on appeal to the House of Lords); *Peh* at [47]; *BCBC* at [175]; *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2016) ("*Dicey*") at para 32-191.

224 In contrast, the circumstances of the present case are quite different. The court here is not concerned with a claim by the plaintiffs to enforce a contract between the parties to the litigation. Rather, the plaintiffs seek to rely upon the so-called *Foster v Driscoll* principle to undermine the defence raised by the defendant against the plaintiffs' claims. In my view, that involves a considerable extension of the *Foster v Driscoll* principle; and whether or not such extension is justified raises an important and difficult question of law.

225 As to that question, the plaintiffs submitted that the issue of whether the *Foster v Driscoll* principle applies in non-contractual cases does not arise. In essence, they say that the illegality arises in the present case taking the defendant's case at its highest; and that therefore, the question of illegality arises only if the court finds that the payments to the defendant were made pursuant to agreements (or arrangements) between the defendant and WKN. In that case, the plaintiffs submitted that the payments would have been made to the defendant pursuant to agreements which were contractual in nature; and that even if the court finds that the payments were made to the defendant pursuant to an arrangement that was not contractual in nature, the *Foster v Driscoll* applies even where there is no contract but only a mere arrangement: citing *Brooks Exim Pte Ltd v Bhagwandas Naraindas* [1995] 1 SLR(R) 543 at [13]-[15].

226 In my view, that submission does not grapple with, still less meet satisfactorily, the main question which arises in this context, *ie*, whether the plaintiffs are entitled to rely on the *Foster v Driscoll* principle to undermine the defence raised by the defendant in the particular circumstances of the present case. For present purposes, I am prepared to assume in the plaintiffs' favour that it matters not whether the payments in question were made pursuant to some informal arrangement rather than a binding agreement. However, the fundamental question remains as to whether the *Foster v Driscoll* applies at all in the circumstances of the present case.

227 In my view, there are very strong arguments for the view that the plaintiffs cannot here rely on the *Foster v Driscoll* principle. These arguments were the focus of detailed written submissions served by the defendant's counsel after the trial which I would summarise as follows:

(a) It is clear from the origins of the illegality doctrine that it was formulated to prevent a party from founding a cause of action under a contract based on an illegal act and not to defeat a defence brought against a claim.

(b) As the Singapore Court of Appeal and learned academics have observed, the doctrine originates from Lord Mansfield CJ's decision in *Holman v Johnson* (1775) 1 Cowp 341 at 343 ("*Holman*") where his Lordship explained the doctrine as being:

> founded in general principle of policy …. The principle of public policy is this: *ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.* If, from the plaintiff's own stating or otherwise, *the cause of action* appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the

> court goes; not for the sake of the defendant, but because *they will not lend their aid to such a plaintiff* [emphasis added]

(*Ochroid* ([133(e)(xi)] *supra*) at [23]; Paul S Davies "The illegality defence - two steps forward, one step back?" (2009) 3 Conv 182 at p 182 – 183).

(c) The Singapore courts have applied this rule in numerous cases and in the context of considering whether to deny relief to a *plaintiff* that has claimed under or is purporting to enforce a contract that is illegal or tainted with illegality: see, for example, *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 *("Ting Siew May")* at [51] citing the English Court of Appeal decision in *Alexander v Rayson* [1936] 1 KB 169 at 182 that "where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose … any party to the agreement who had the unlawful intention is *precluded from suing upon it*" [emphasis added].

(d) Further, that the illegality doctrine applies to defeat claims and not defences is consistent with the fundamental rationale for the doctrine. In the landmark decision in English law (*Patel v Mirza* [2017] AC 467), the United Kingdom Supreme Court surveyed the development of the doctrine in English law and across the Commonwealth since *Holman* and distilled the "essential rationale of the illegality doctrine [to be] that it would be contrary to the public interest to *enforce a claim* if to do so would be harmful to the integrity of the legal system" [emphasis added] per Lord Toulson at [120].

(e) The argument from rationale applies with greater force where there is a foreign illegality which engages the public policy of the forum

court. It is clear from *Regazzoni* ([222] *supra*) and subsequent authorities that the rule in *Foster v Driscoll* relates to the forum court "*enforcing contracts or awarding damages for their breach*" contrary to the laws of a friendly foreign country as doing so would be to assist the breach of contract and offend international comity. As Denning LJ explained in *Regazzoni (EWCA)* ([223] *supra*) at p 515, the English courts will not enforce the laws of another friendly country but should take notice of such laws to the extent of *refusing enforcement of any agreement* which was intended to be carried out by breaking the laws of that country. Consistent with this principle, *all* the reported Singapore cases applied the principle in *Foster v Driscoll* where the foreign illegality was raised against *the plaintiff* in order to resist claims for damages for breach of contract: see for example *Peh* ([222] *supra*) and *BCBC*.

(f) Further, where the doctrine of illegality was considered in relation to a claim in unjust enrichment or in equity, the context was where the plaintiff had brought an *alternative claim* in restitution or equity, in order to obtain relief under a contract that was tainted by illegality. The issue was whether the illegality would also affect the alternative claim brought in unjust enrichment or equity: *Ochroid* at [42]–[51]. However, these principles do not assist the plaintiffs because the defendant is not seeking to enforce a contract or obtain any relief under a contract allegedly tainted by illegality by making an alternative claim in unjust enrichment or equity.

228 Against what the defendant submitted were these established principles, the plaintiffs relied in particular on the decision of the English High Court in *Barros Mattos Junior and others v MacDaniels Ltd and others* [2005] 1 WLR

247 ("*Barros")* where the plaintiff bank who was defrauded of monies sued the defendant, who had received the monies from the fraudster and changed most of it into Nigerian currency, in unjust enrichment. The defendant in that case alleged that it had changed its position because it had transferred the monies on the fraudster's instructions to the payee without knowledge of the fraud. The English High Court (Laddie J) held that the defendant was not entitled to rely on the change of position defence because this was based on an illegal act as the currency conversion was in breach of Nigerian foreign exchange laws.

229 So far as I am aware, *Barros* is the only decided case in which a plea of illegality has been upheld so as to defeat a defence raised by a defendant. Indeed, I am not aware of any case where such a plea has even been raised by a plaintiff against a defendant.

230 On behalf of the defendant, it was submitted that *Barros* is distinguishable on its facts and, in any event, should not be followed. In support of that latter submission, the defendant's counsel drew my attention to the fact that *Barros* has been widely criticised for its unprincipled extension of the illegality doctrine to defeat defences, citing the following:

(a) Professor Andrew Tettenborn, a leading academic in the law of obligations, has observed in Andrew Tettenborn, "Bank Fraud, Change of Position and Illegality: The Case of the Innocent Money Launderer" [2005] LMCLQ 6 (" LMCLQ Article") at p 8 that applying the illegality doctrine to defeat defences will give rise to artificiality, arbitrariness and injustice because it allows the plaintiff to establish his claim based on a false set of facts:

> … in *Barros* the *ex turpi causa* maxim was applied in a novel way, ie, to shut out a defence to an existing claim rather than to nullify a cause of action that would

> otherwise exist. … **the effect *of ex turpi causa* in the law of obligations ought to be limited to the creation, or rather non-creation, of rights to sue**. There is, it is suggested, **a substantial difference between taking away a cause of action** so as to give a defendant a possibly unjust escape from liability, and **artificially disabling a defence so as to allow a claim to succeed on what is effectively a false basis** (which was what Barros effectively did). The former can just be said to promote public policy, albeit in a rough and ready way. The **latter is apt to lead to such wildly arbitrary results** [emphasis added].

(b) The authoritative text on restitution, *Goff & Jones: The Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell & Stephen Watterson eds) (Sweet & Maxwell, 9th Ed, 2016) at para 27-53:

> … The maxim invoked by Laddie J to justify this harsh result encapsulates a rule that formerly debarred claims founded on evidence of illegality, and **there was no reason to think that it should have been extended to knock out *defences*** [emphasis from original in italics; emphasis added in bold]

(c) A key text on equity and trusts, David Hayton and Charles Mitchell, *Hayton and Marshall: Commentary and Cases on the Law of Trusts and Equitable Remedies* (Sweet & Maxwell, 12th Ed, 2005) was equally critical of *Barros* at para 11-32:

> On Laddie J's reasoning, the defendants would have escaped liability if they had paid the money away without converting it into naira first. Why should so much have turned on a breach of the Nigerian foreign exchange laws that was unconnected with the circumstances in which the claimant's money had been stolen and placed in the defendant's hands?... It is by no means obvious that the rule in [*Tinsley v Milligan* [1994] 1 AC 340 ("*Tinsley*")] debarring *Tinsley* founded on evidence of illegality should necessarily be extended to knock out *defences*, even assuming that the rule for claims works well, something which may be doubted [emphasis from original].

(d) The defendant argued that both Prof Tettenborn (see [230(a)] above) and Professor Andrew Burrows in Andrew Burrows, *The Law of Restitution*, (OUP, 3rd Ed, 2012) at pp 542 and 543 criticised *Barros* as misapplying the law. *Barros* relied on Lord Goff's comment in *Lipkin Gorman* [1991] 2 AC 548 at 580 that the "defence of change of position should not be open to a wrongdoer". However, *Barros* had misinterpreted this comment as Lord Goff meant that the defence of change of position did not apply when the claim was for a restitution for a wrong committed by the defendant against the plaintiff. This was not intended to impose a public policy rule to strike down defences involving an illegal act.

231 In my judgment, these criticisms of *Barros* ([228] *supra*) in applying the doctrine of illegality to defeat defences are cogent and compelling. The case appears to stand in splendid isolation. As submitted by the defendant's counsel, the decision in *Barros* represents an unprincipled extension to the *Foster v Driscoll* principle which will or may result in artificiality, arbitrariness and injustice. By applying the doctrine of illegality to shut out the defence of change of position in *Barros*, the plaintiff in that case was allowed to make out its claim on the basis of a false set of facts – that the defendant did not in fact change its position as a result of the enrichment. This led to an artificial, arbitrary and unjust result as the defendant was effectively treated as if it had been enriched by the funds received when that was in fact not the case, and had to pay the plaintiff out of its own pocket. Likewise, extending the doctrine of illegality to defeat the defendant's defence in this case will, in my view, result in artificiality, arbitrariness and injustice.

232 Further, it was submitted by the defendant's counsel that the doctrine of illegality as applied in *Barros* is no longer consistent with English law and, in

any event, does not represent Singapore law. In that case, Laddie J held at [27] and [28] that the doctrine of illegality is "indiscriminate" in requiring that the court to take no notice of any illegal activity and "allows no room for the exercise of any discretion by the court". However, as submitted by the defendants' counsel, such approach is no longer English law: see *Patel v Mirza* ([227(d)] *supra*) [120]. It is also inconsistent with Singapore law to the extent that for contracts that are entered into with the object of committing an illegal act, the courts will apply the principle of proportionality to decide whether to allow recovery under the contract: *Ochroid* ([133(e)(xi)] *supra*) at [38]–[40]. In particular, in applying the principle of proportionality, the court will consider a number of non-exhaustive factors in the analysis, including (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and conduct of the parties, and (e) the consequences of denying the claim: *Ochroid* at [38]; *Ting Siew May* ([227(c)] *supra*) at [70]. As Professor Tettenborn noted in the LMCLQ Article at pp 8 and 9, the illegality doctrine should not be applied in a rigid fashion and to disproportionate effect. It should instead be applied flexibility by taking into consideration the degree of illegality and its interaction with the transaction concerned.

233 For all these reasons, it is my conclusion that the so-called *Foster v Driscoll* principle does not assist the plaintiffs in the circumstances of the present case.

The so-called Ralli Bros principle

234 In summary, it was submitted on behalf of the plaintiffs that they can rely on the principle in *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920]

2 KB 287 (*"Ralli Bros")* to defeat the defence raised by the defendant with regard to the 36 payments, the relevant principle being "…that a contract is invalid where according to the terms of the contract the performance of the contract would necessarily involve an act which would be illegal in the place of performance, regardless of when the foreign law rendered that act illegal…". In particular, it was submitted on behalf of the plaintiffs that the *Ralli Bros* principle is not an application of the doctrine of frustration but rather an independent conflicts of law principle; and that it applies in this case because the arrangement and/or agreements relied upon by the defendant required the performance of acts that would be illegal in Malaysia.

235 In my judgment, this part of the plaintiffs' case fails for a number of reasons which I can summarise quite shortly. First, under Singapore law, the *Ralli Bros* principle is regarded as one pertaining to the frustration of a contract arising from some supervening illegality in the place of contractual performance: see *Ralli Bros* itself in particular at 292; *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis Singapore, 2019) at 75.366; *Peh* ([222] *supra*) at [44]; and cf: *Ryder Industries Ltd (formerly Saitek Ltd) v Timely Electronics Co Ltd* [2015] HKCU 3109 per Lord Collins at [43] and *Dicey* at para 32-100. Here, there was no "supervening" illegality and no frustration. Second, the uncontested evidence of the defendant's Malaysian law expert, Mr Saravana, is that the act of receiving offshore payments, or the entry into a contract which provides for such payments is by itself not illegal. Rather, the only potential illegal act is the wilful non-declaration of tax to the Malaysian tax authorities with the intent to evade tax. Even on the assumption that an arrangement which has the object of evading tax is illegal, the *Ralli Bros* principle is not engaged and has no application in the circumstances of the present case. Third, the effect of the *Ralli Bros* principle is to render the relevant contract "invalid and

unenforceable". However, the defendant is not seeking to enforce any contract nor (if there is any difference) any arrangement.

236 For these brief reasons, I would reject the plaintiffs' attempted reliance on the *Ralli Bros* principle.

The principle that a man cannot rely on or profit from his own wrong

237 In summary, it was submitted on behalf of the plaintiffs that it has long been established that a court will not allow a party to rely on wrongdoing in his defence; that this a principle of public policy encapsulated in the Latin phrase: *ex dolo malo non oritur* action; and that no court will lend its aid to a man who founds his cause of action or defence upon an immoral or illegal act. On this basis, it was submitted on behalf of the plaintiffs that allowing the defendant to justify the retention of monies by reference to the split fee arrangement would allow the defendant to profit from his own illegal acts which is impermissible.

238 In broad terms, I readily accept the existence of the general principle relied upon by the plaintiffs. However, in my view, it has no application in the circumstances of the present case and cannot assist the plaintiffs. In one sense, this part of the plaintiffs' case is no more than a rehash of their submissions based upon the *Foster v Driscoll* principle and, so far as relevant, I would simply refer to my conclusions with regard thereto. Further, in applying this principle, it is always important to identify the relevant act or conduct which is said to constitute the relevant "wrong". As I have accepted, the relevant act or conduct was illegal under Malaysian law but it was not a relevant "wrong" as between the plaintiffs and the defendant.

239 For these brief reasons, I reject the plaintiffs' attempted reliance on this principle.

Conclusion

240 For all these reasons, I would summarise my conclusions as follows:

(a) All of the plaintiffs' claims are time-barred apart from the claim in respect of Payment No 50 identified in Annex B.

(b) Esben's claim in respect of Payment No 50 identified in Annex B fails.

(c) If I am wrong on the time-bar point, I would hold that the plaintiffs' claims succeed in respect of the following 14 payments identified in Annex B to this judgment *viz* Nos 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 16, 18 and 38.

(d) However, even if I am wrong on the time-bar point, I would hold that the plaintiffs' further claims in relation to the other 36 payments identified in Annex B fail and must be rejected in any event.

241 In light of these conclusions, no question of tracing arises. It is therefore unnecessary to address the parties' submissions with regard to a number of discrete issues of principle relating to the proper methodology of any tracing exercise.

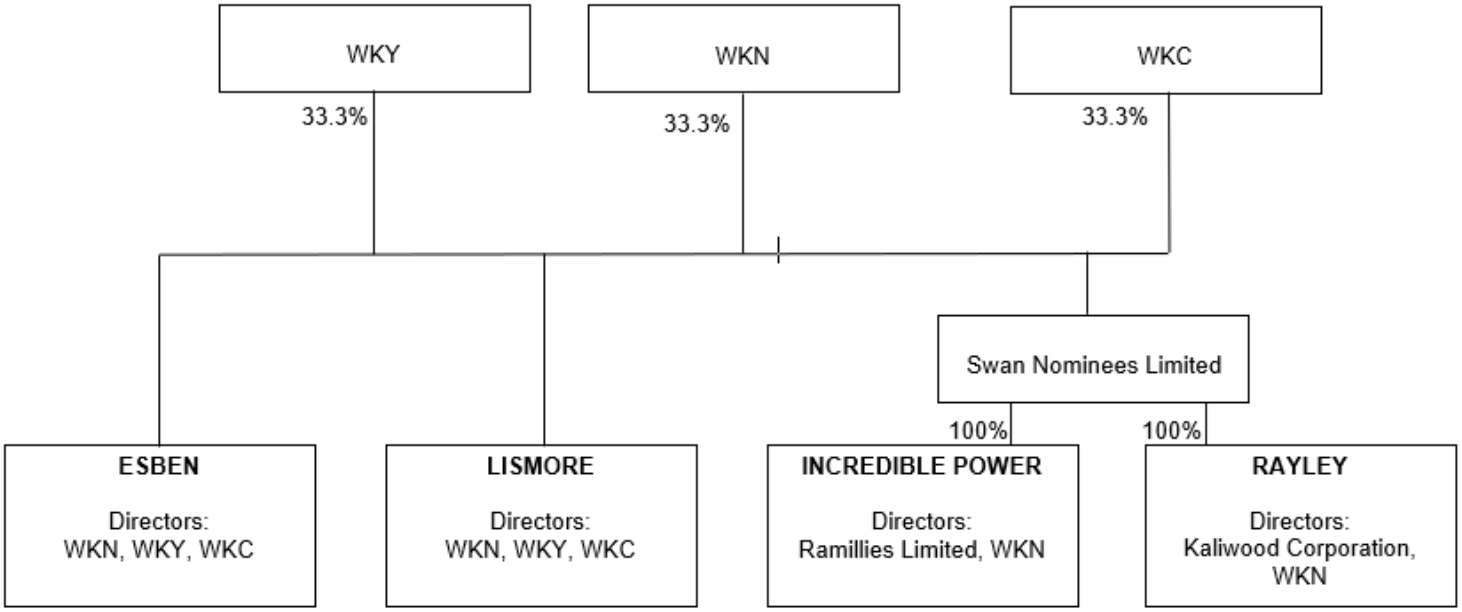
242 I reserve all questions of costs.

Henry Bernard Eder
International Judge

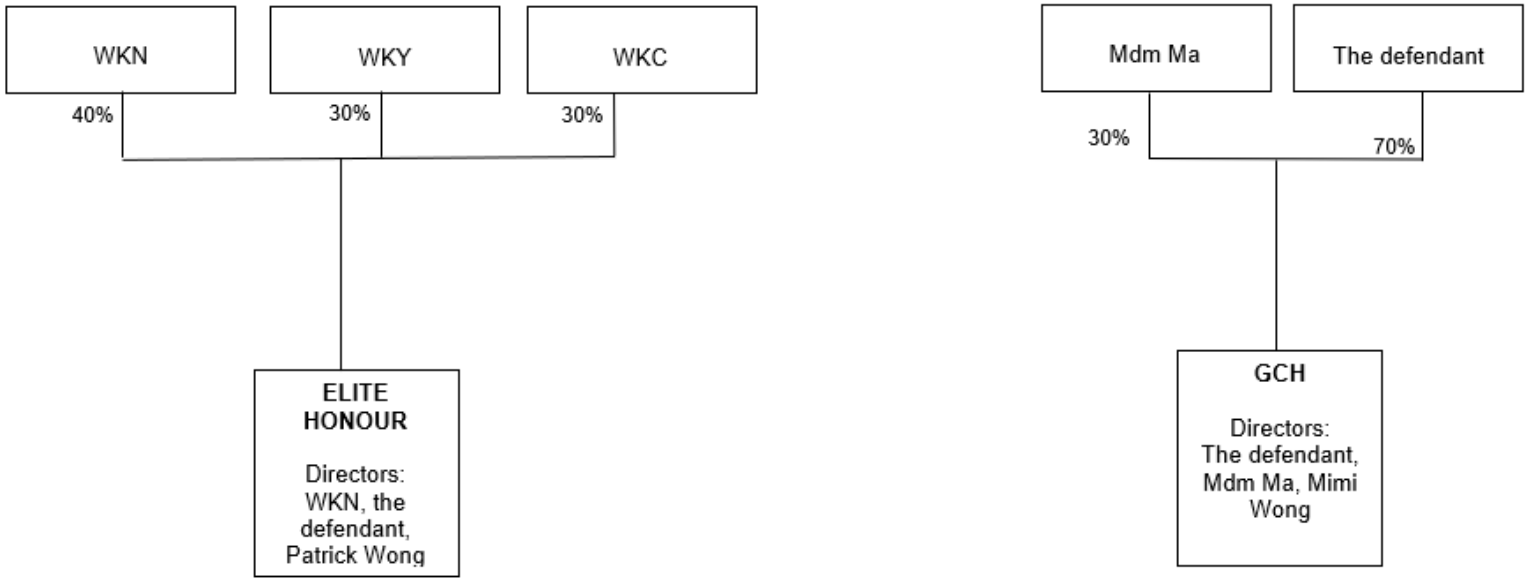
Davinder Singh s/o Amar Singh *SC*, Pardeep Singh Khosa, Rajvinder Singh Chahal, Avinash Iswar Selvarajah, Sumedha Madhusudhanan (Davinder Singh Chambers LLC) for the plaintiffs;
Francis Xavier s/o Subramaniam Xavier Augustine *SC*, Jainil Bhandari, Chia Xin Ran Alina, Chiang Yuan Bo, Kristin Ng Wei Ting and Riko Isaac (Rajah & Tann Singapore LLP) for the defendant.

Annex A

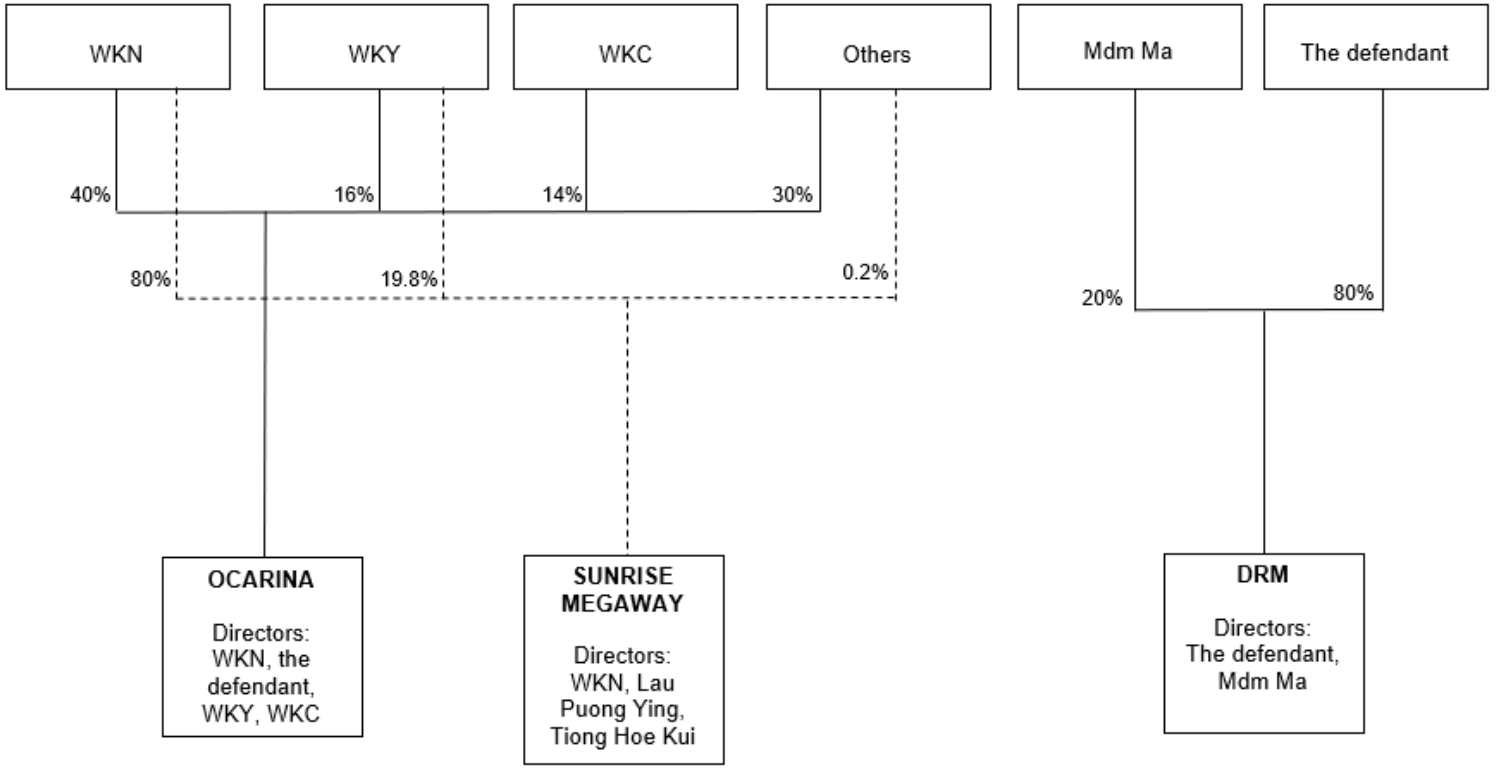
CORPORATE STRUCTURE OF THE PLAINTIFFS FROM JANUARY 2001 TO MARCH 2013



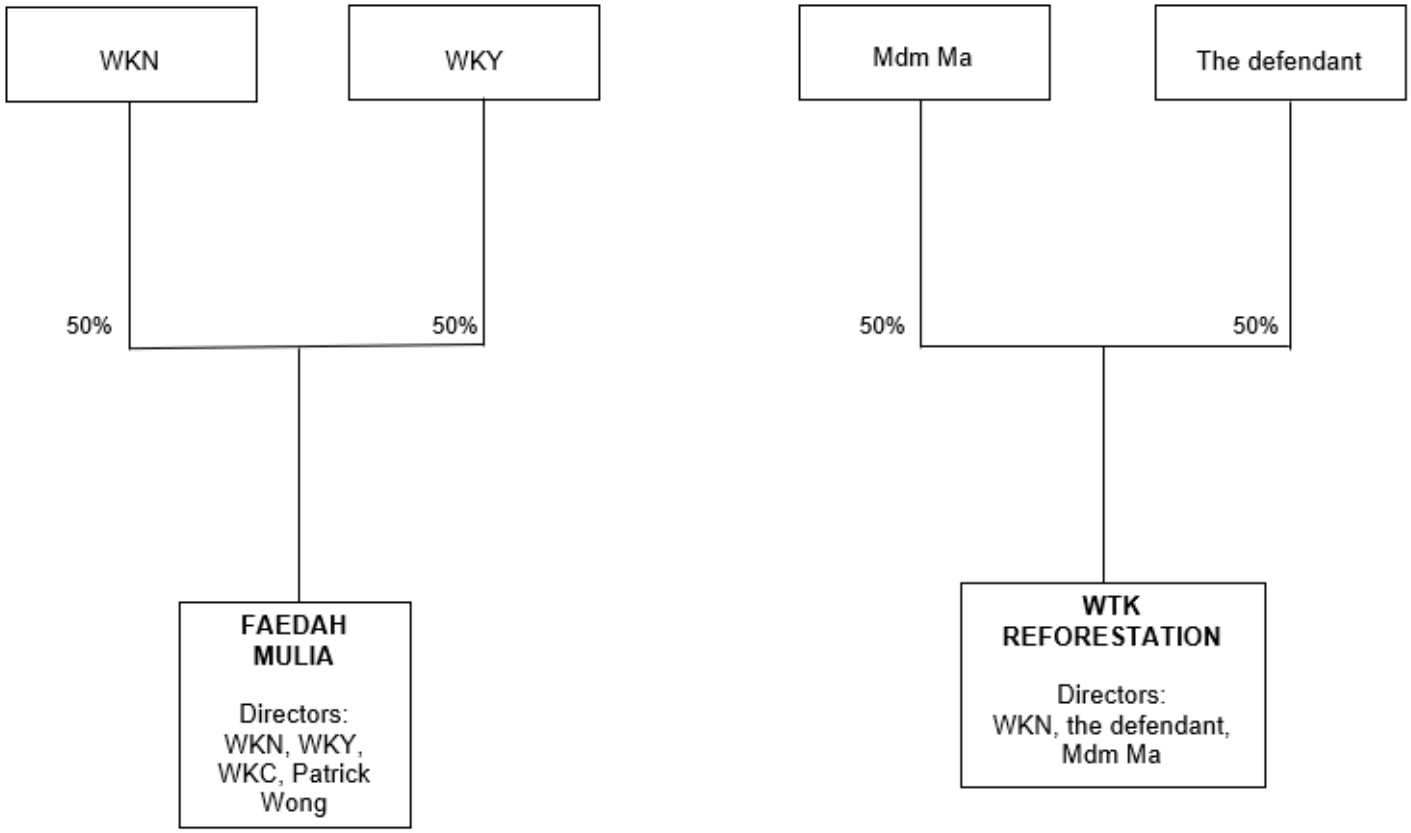
CORPORATE STRUCTURE OF THE RELEVANT MALAYSIAN COMPANIES (PART 1 OF 3)



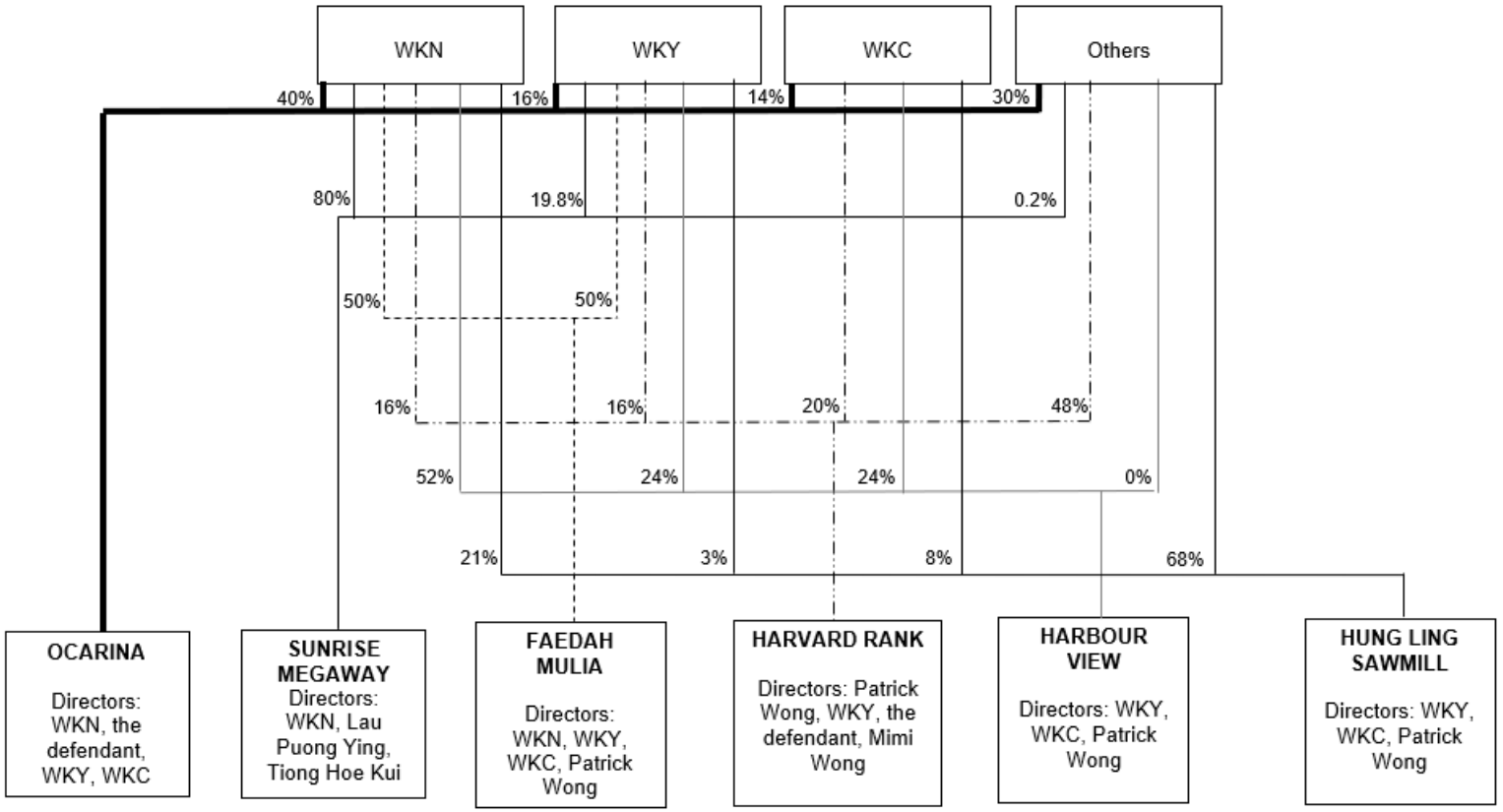
CORPORATE STRUCTURE OF THE RELEVANT MALAYSIAN COMPANIES (PART 2 OF 3)



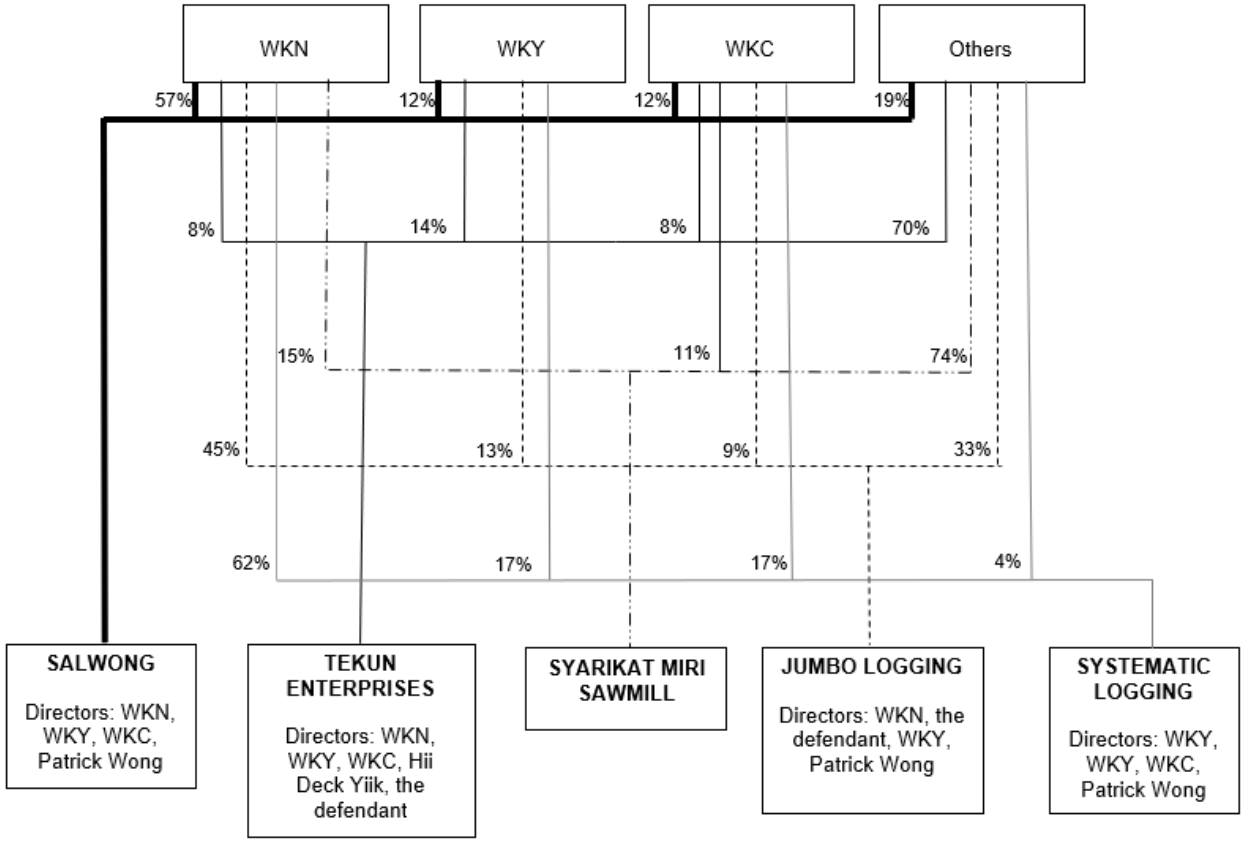
CORPORATE STRUCTURE OF THE RELEVANT MALAYSIAN COMPANIES (PART 3 OF 3)



CORPORATE STRUCTURE OF THE LOGGING COMPANIES (PART 1 OF 2)



CORPORATE STRUCTURE OF THE LOGGING COMPANIES (PART 2 OF 2)



Annex B

S/n	Date of Transfer	Paid by	Amount in RM[3]	Amount – US$/S$[4]	TT Form Signatory	Defendant's Case
1	23 Jan 2001	Lismore	N/A	US$ 75,000	WKN	Gifts from WKN
2	26 Jan 2001	Lismore	N/A	US$ 75,000	WKN	Gifts from WKN
3	03 Jul 2002	Esben	N/A	US$ 50,000	WKN	Directors fee/dividends/gifts
4	23 Oct 2002	Incredible Power	N/A	US$ 350,000	WKN and WKY	Logging & transportation services
5	23 Oct 2002	Rayley	N/A	US$ 350,000	WKN and WKY	Logging & transportation services
6	11 Feb 2003	Rayley	N/A	US$ 110,026	WKN and WKY	Gifts from WKN

[3] Rounded to the nearest RM.

[4] Rounded to the nearest dollar.

S/n	Date of Transfer	Paid by	Amount in RM[3]	Amount – US$/S$[4]	TT Form Signatory	Defendant's Case
7	29 Aug 2003	Incredible Power	N/A	US$ 263,852	WKN and WKY	Gifts from WKN
8	13 Jan 2004	Esben	N/A	US$ 120,000	WKN and WKY	Gifts from WKN
9	21 Jun 2004	Esben	1,000,000	US$ 263,852	WKN and WKY	Gifts from WKN
10	02 Aug 2004	Esben	1,000,000	US$ 263,852	WKN and WKY	Gifts from WKN
11	29 Oct 2004	Esben	2,800,000	US$ 736,997	WKN and WKY	Gifts from WKN
12	05 Nov 2004	Incredible Power	5,000,000	US$ 1,319,260	WKN and WKY	Gifts from WKN
13	13 Jan 2005	Rayley	2,100,000	US$ 552,632	WKN and WKY	Gifts from WKN
14	28 Apr 2005	Incredible Power	N/A	US$ 1,000,000	WKN and WKY	Logging & transportation services

S/n	Date of Transfer	Paid by	Amount in RM[3]	Amount – US$/S$[4]	TT Form Signatory	Defendant's Case
15	22 Jul 2005	Incredible Power	2,000,000	US$ 527,705	WKN and WKY	Logging & transportation services
16	08 Aug 2005	Lismore	1,000,000	US$ 263,852	WKN and WKY	Directors fee/dividends/gifts
17	29 Aug 2005	Incredible Power	2,502,885	US$ 660,392	WKN and WKY	Logging & transportation services
18	23 Sep 2005	Incredible Power	2,700,000	US$ 710,526	WKN	Gifts from WKN
19	16 Mar 2006	Esben	5,350,069	US$ 1,443,390	WKN and WKY	Logging & transportation services
20	31 Aug 2006	Esben	3,500,000	US$ 951,225	WKN and WKY	Logging & transportation services
21	05 Sep 2006	Esben	2,517,000	US$ 684,153	WKN and WKY	Logging & transportation services
22	30 Oct 2006	Esben	N/A	US$ 150,000	WKY	Management consultancy services

S/n	Date of Transfer	Paid by	Amount in RM[3]	Amount – US$/S$[4]	TT Form Signatory	Defendant's Case
23	29 Jan 2007	Esben	N/A	US$ 493,193	WKN and WKY	Logging & transportation services
24	29 Jan 2007	Esben	N/A	US$ 76,169	WKN and WKY	Logging & transportation services
25	29 Jan 2007	Rayley	N/A	US$ 1,000,000	WKN and WKY	Logging & transportation services
26	22 May 2007	Esben	3,000,000	US$ 884,277	WKN	Logging & transportation services
27	22 May 2007	Esben	1,993,336	US$ 587,554	WKN	Management consultancy services
28	22 May 2007	Esben	533,336	US$ 157,205	WKN	Management consultancy services
29	29 May 2007	Incredible Power	500,000	US$ 147,379	WKN	Provision of timber logs
30	20 Jun 2007	Esben	375,382	US$ 110,648	WKN	Logging & transportation services
31	20 Jun 2007	Esben	266,664	US$ 78,601	WKN	Management consultancy services

S/n	Date of Transfer	Paid by	Amount in RM[3]	Amount – US$/S$[4]	TT Form Signatory	Defendant's Case
32	20 Jun 2007	Incredible Power	1,002,005	US$ 295,350	WKN	Provision of timber logs
33	30 Oct 2007	Lismore	1,996,557	SG$ 867,704	WKN	Provision of timber logs
34	14 Nov 2007	Esben	N/A	US$ 500,000	WKN	Management consultancy services
35	26 Nov 2007	Incredible Power	4,243,070	SG$ 1,825,581	WKN	Logging & transportation services
36	26 Nov 2007	Incredible Power	1,944,978	SG$ 836,827	WKN	Management consultancy services
37	27 Jun 2008	Rayley	N/A	SG$ 654,272	WKN and WKY	Logging & transportation services
37	27 Jun 2008	Rayley	N/A	SG$ 488,718	WKN and WKY	Management consultancy services
38	28 Jul 2008	Esben	N/A	US$ 179,456	WKN	Directors fee/dividends/gifts

S/n	Date of Transfer	Paid by	Amount in RM[3]	Amount – US$/S$[4]	TT Form Signatory	Defendant's Case
39	30 Oct 2008	Lismore	1,970,917.22	US$ 316,326	WKN	Logging & transportation services
39	30 Oct 2008	Lismore		US$ 231,724	WKN	Management consultancy services
40	26 May 2009	Esben	1,159,059	US$ 341,609	WKN	Logging & transportation services
41	27 May 2009	Esben	950,001	US$ 279,993	WKN	Management consultancy services
42	10 Feb 2010	Esben	1,593,442	US$ 465,646	WKN	Logging & transportation services
43	10 Feb 2010	Esben	540,000	US$ 157,802	WKN	Management consultancy services
44	10 Feb 2010	Lismore	810,000	US$ 236,704	WKN	Management consultancy services
45	26 Jul 2010	Esben	N/A	US$ 200,000	WKN	Logging & transportation services
46	15 Oct 2010	Esben	N/A	US$ 150,000	WKN and WKY	Management consultancy services

S/n	Date of Transfer	Paid by	Amount in RM[3]	Amount – US$/S$[4]	TT Form Signatory	Defendant's Case
47	14 Apr 2011	Esben	N/A	US$ 546,984	WKN	Logging & transportation services
47	14 Apr 2011	Esben	N/A	US$ 566,666	WKN	Management consultancy services
48	24 Oct 2011	Esben	1,000,704	US$ 340,375	WKY	Logging & transportation services
49	24 Oct 2011	Incredible Power	1,000,002	US$ 340,137	WKY	Management consultancy services
50	29 Nov 2012	Esben	2,000,000	US$ 336,527	WKY	Logging & transportation services
50	29 Nov 2012	Esben		US$ 336,527	WKY	Management consultancy services