Panweld Trading Pte Ltd *v* Yong Kheng Leong and others (Loh Yong Lim, third party) [2012] SGHC 57

Case Number : Suit No 107of 2010

Decision Date : 19 March 2012

Tribunal/Court : High Court

Coram : Steven Chong J

Counsel Name(s) : Foo Maw Shen, Daryl Ong and Wong Ping Siang (Rodyk & Davidson LLP) for the plaintiff; Singa Retnam (Kertar & Co) and Nirmala Ravindran (Low Yeap Toh & Goon) for the first to third defendants; Siva Krishnasamy and James Selvaraj (Tan Lee & Partners) for the fourth defendant; Burton Chen and Winston Yien (Tan Rajah & Cheah) for the third party.

Parties : Panweld Trading Pte Ltd — Yong Kheng Leong and others (Loh Yong Lim, third party)

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 34 of 2012 was dismissed by the Court of Appeal on 22 October 2012. See [2012] SGCA 59.]

Companies – directors – breach of fiduciary duties

Limitation of actions – trust property – accessory liability – knowing receipt

19 March 2012 Judgment reserved.

Steven Chong J:

Introduction

1 This case arose from the alleged mismanagement of a company by a director who was also its 20 percent shareholder. There were only two directors at the material times, and the other director owns the balance 80 percent shareholding. This case gives new meaning to the phrase "family-run business". It is alleged by both directors that each had placed their wives, daughter and son and even a mistress on the company's payroll even though none of them were ever truthfully employees in the strict sense of the word.

2 So what brought about the disharmony which led to this action? In or around March 2009, the minority shareholder informed the majority shareholder that the company needed a bank loan to secure a performance bond for a potential project as the funds of the company were running low and that the company's expenses had increased. This prompted the majority shareholder to look into the company's finances as he had always been under the distinct impression that the company's finances were healthy. Certified public accountants, BDO LLP ("BDO") were engaged to conduct a forensic examination of the accounts. The investigations eventually exposed many alleged financial misdeeds by the minority shareholder, including the fact that his wife was paid salaries for 17 years, even though she had never reported for work. When the minority shareholder was confronted that his wife was a "*phantom*" employee who has been receiving salaries from the company without any proper basis, he retorted by alleging that the majority shareholder had likewise placed his wife and even his mistress on the payroll albeit over a shorter period.

3 As the salary payments were made over 17 years, not unexpectedly, limitation of action

became a key *legal* issue in this dispute. In this regard, it is common ground between the parties that if the minority shareholder/director is found to be in breach of his fiduciary duties in causing the company to pay salaries to the "*phantom*" employee, the claim against him would not be statute barred. However, it is contended by the minority shareholder's wife who received the salary payments that she would nonetheless be entitled to invoke the limitation defence, notwithstanding that limitation may not be available to her husband. This raises an interesting question of whether there is any rational basis to justify the availability of the limitation defence to an accessory in circumstances when the principal wrongdoer is unable to rely on it.

The Parties

4 The plaintiff, Panweld Trading Pte Ltd ("Panweld"), is a local private company and is in the business of manufacturing spray painting booths as well as other repair and engineering works.

5 The 1st defendant, Yong Kheng Leong ("Mr Yong"), was appointed as a director of Panweld on or around 15 May 1985 and remained so until his resignation on 21 May 2009. There is some dispute as to whether he was Panweld's Managing Director, which he denies [note: 1], but nothing really turns on his disputed status as Managing Director. However, it is not disputed that Mr Yong was at least its General Manager. [note: 2]

6 The 2nd defendant, Lim Ai Cheng ("Mdm Lim"), and the 3rd defendant, Yong June Meng Gary, are the wife and son of Mr Yong respectively, while the 4th defendant, Sanware Engineering Services ("Sanware"), was one of Panweld's suppliers of spare parts and machinery. All dealings between Sanware and Panweld were conducted through Mr Yong.

7 The third party, Mr Loh Yong Lim ("Mr Loh"), was and still is a director of Panweld and the majority shareholder, who owned 80 percent of the shares in Panweld until December 2001, when he transferred 20 percent of his shareholding to his son, Mr Loh Chiang Tien. Mr Loh's son was also appointed a director of Panweld in April 2002. The balance 20 percent was and still remains held by Mr Yong. The Third Party claim was brought by Mr Yong against Mr Loh on the basis that if he is found to be liable to Panweld for the salary payments to Mdm Lim, he should be entitled to an indemnity/contribution from Mr Loh because the payments were made with his knowledge and approval. [note: 3] The Third Party action would logically be a non-starter if I find that Mr Loh was not aware and/or did not approve the salary payments to Mdm Lim. In my view, the Third Party action was ill-advised because if Mr Loh had approved the payments, Mr Yong would not be liable. On the other hand, if there was no approval, there can be no recourse against Mr Loh for any indemnity. In either event, there is no merit in the Third Party action.

8 In the course of the trial, the claim against the 3rd defendant for the wrongful payment of a month's salary was sensibly dropped as it only involves a very small sum of money.

9 At the conclusion of the trial, the claim against Sanware was amicably settled in circumstances which I will elaborate upon below.

The claims

10 When the trial started, Panweld pursued five independent heads of claim against the various defendants. All heads of claim arose from the alleged mismanagement of Panweld by Mr Yong. The largest claim relates to salaries paid to Mdm Lim from 1992 to 2009 amounting to the total sum of

$873,959.20. Panweld claims that Mdm Lim was a "*phantom*" employee and was therefore wrongfully paid.

11 The other four claims comprise:

(a) the sum of $226,636 being rental paid by Panweld's tenant, Sun Power Engineering, which were wrongly credited to Mr Yong's director's account with Panweld;

(b) the sum of $178,810.01 being unauthorised expenses claimed and paid to Mr Yong;

(c) the sum of $35,238.68 being secret commissions purportedly paid by Mr Yong to Panweld's customers; and

(d) the sum of $95,261 being the amount which was refunded and received by Mr Yong in respect of inflated invoices raised by Sanware on the instructions of Mr Yong.

12 At the close of the trial on 9 February 2012, the parties reached a settlement on the above four claims, without admission of liability, on the following terms:

(a) Panweld shall retain the sum of $265,000 which was paid by Mr Yong to Panweld *prior* to the commencement of the action;

(b) Mr Yong withdraws his counterclaim in this action;

(c) Mr Yong relinquishes all his rights in respect of the balance sum standing in his director's account with Panweld;

(d) as a consequence of the above settlement, Sanware is released from all further liabilities with no order as to costs against Sanware; and

(e) the costs in respect of the four claims shall follow the event of the remaining claim for the salaries paid to Mdm Lim.

Salaries paid to Mdm Lim

13 This decision will therefore only deal with the remaining claim of the salaries which were paid and received by Mdm Lim. It is not in dispute that for 17 years, from 1992 to 2009, Mdm Lim was paid a total sum of $873,959.20 as a "marketing executive" of Panweld. [note: 4] Mdm Lim's salary payments were duly recorded in Panweld's monthly payroll records. In addition, payments for Mdm Lim's Central Provident Fund ("CPF") contributions were regularly made by Panweld. Further, income tax returns ("IR8A") were also prepared by Panweld's accountants, Mr Quek Siew Ping ("Mr Quek") and his predecessor, the late Mr Michael Loh, on behalf of Mdm Lim in respect of her salaries.

14 Panweld claims that Mdm Lim was a "*phantom worker*" in the sense that she was not an employee of Panweld as she had never reported for work at the office, nor rendered any service to Panweld. [note: 5] Panweld claims that Mr Yong had acted in breach of his fiduciary duty as a director of Panweld in channelling funds belonging to Panweld in the guise of the salary payments to Mdm Lim. [note: 6] Panweld also claims that, by reason of Mdm Lim's knowing receipt of the wrongful salary payments and/or dishonest assistance in Mr Yong's breach, she holds those sums on constructive

trust for and on behalf of Panweld. [note: 7]

15 Both Mr Yong and Mdm Lim deny liability on several grounds:

(a) Mdm Lim was employed as a marketing executive of Panweld with the knowledge and approval of Mr Loh [note: 8];

(b) Mdm Lim had in fact rendered services to Panweld as a marketing executive [note: 9]; and

(c) the bulk of Mdm Lim's salary was in fact paid from Mr Yong's salary increments, car allowance and bonuses. [note: 10]

16 At the close of the trial on 9 February 2012, Counsel for Mr Yong and Mdm Lim, Mr Singa Retnam ("Mr Retnam") accepted that, in the event that the salary payments are found to have been paid in breach of Mr Yong's fiduciary duties, the claims against Mr Yong would not be barred by the Limitation Act (Cap 163, 1996 Rev Ed) ("the Limitation Act"). This is certainly the correct position to take, as will be elaborated upon later. However, Mr Retnam argued that even if Mr Yong is found to have acted in breach of his fiduciary duties, Mdm Lim is nonetheless entitled to avail herself of the defence of limitation under s 6 of the Limitation Act, *ie*, even if Mdm Lim is found to be liable to account as a constructive trustee, time had begun to run against Panweld from the dates of each payment and, consequently, the bulk of the claim against her is time barred, except for the last six years preceding the commencement of this action from 2004 to 2009. In this connection, it is agreed by both parties that if Mdm Lim is found not to fall within s 22(1) of the Limitation Act, the recoverable amount would be restricted to $338,410 instead of $873,959.20.

The evolving defences raised by Mr Yong and Mdm Lim

17 It is perhaps apposite to commence this inquiry by first examining the pleaded defence of Mr Yong and Mdm Lim and to see how it has evolved over time. It is pertinent to highlight that the defence, which was jointly filed by Mr Yong and Mdm Lim, underwent several changes. When the defence was first filed on 11 March 2010, Mr Yong claimed that Mr Loh had placed his wife ("Mrs Loh") and mistress ("Sook Min") on the payroll in March 1995, even though neither of them were employees of Panweld in any meaningful way. [note: 11] When Mr Yong expressed concern over the employment of Mrs Loh and Sook Min, Mr Loh suggested that Mdm Lim be included in the payroll as well in 1995. [note: 12] Therefore the essence of the original defence was that Mdm Lim was included in Panweld's payroll *at the suggestion* of Mr Loh, in reaction to Mr Yong's concern over the employment status of Mrs Loh and Sook Min. I shall refer to this as the "reaction theory". For ease of reference, I shall refer to Mdm Lim, Mrs Loh and Sook Min as "the three wives" collectively. Implicit in this defence is that all three wives were placed on the payroll even though they were not required to render any service to Panweld.

18 However, this defence morphed when it was amended on 13 April 2011. Mr Yong claimed that Mdm Lim was *genuinely* employed on a temporary basis to assist him in Panweld from 1992 to 1994, and thereafter, from 1995 on a full-time basis. [note: 13] It is apparent that by this amendment, Mr Yong had effectively abandoned the original "reaction theory" given that he accepts that Mdm Lim was placed on the payroll albeit on a "temporary basis" from 1992, well *before* Mrs Loh and Sook Min in 1995. It did not escape my attention that the defence was amended some time *after* Panweld's Reply denying the alleged agreement and highlighting the fact that Mrs Loh and Sook Min were only placed on the payroll long *after* Mdm Lim had started receiving salary payments. [note: 14]

19 The defence underwent a further change on 26 May 2011. For the first time, Mr Yong alleged that the employment of Mrs Loh and Sook Min was to reduce taxes payable by Panweld. [note: 15] Mr Yong now claims that Mdm Lim's part-time salary from 1992 to 1994 was paid from Mr Yong's bonuses and unused annual leave pay and that her full-time salary comprised of three components, one being her fixed salary of $1,125, the second being the transfer of Mr Yong's car allowance of $1,000 and the balance from Mr Yong's annual increments and/or bonuses. [note: 16] Mr Yong alleged that Mdm Lim's fixed salary component of $1,125 was derived from 25 percent of the collective salaries of Mrs Loh and Sook Min. The underlying rationale for the fixed component of $1,125 was that based on Mr Yong's 20 percent shareholding in Panweld, Mdm Lim should therefore be paid 20 percent of the salaries paid to Mr Loh's wife and mistress (20 percent of Mr Loh's 80 percent).

20 It is therefore apparent that Mr Yong's and Mdm Lim's defence to a rather straightforward claim had undergone several inexplicable amendments. The pleaded defence, even in its final form, is confusing and bizarre:

(a) It claims that Mdm Lim was employed on a *part-time* basis from 1992 to 1994 with the approval of Mr Loh but her salary was in fact paid from Mr Yong's bonuses. In other words, she worked for *free* as far as Panweld was concerned in that the financial burden of Mdm Lim's salary was borne by Mr Yong and not by Panweld.

(b) More than a year later, the defence was amended to claim that Mdm Lim's salary was made up of three components, a point which was not previously raised. Apart from the fixed component of $1,125, the balance was in fact paid from Mr Yong's car allowance and bonuses. In other words, he continued to bear the bulk of the financial burden in employing Mdm Lim *full-time* for Panweld.

(c) The convoluted components to make up Mdm Lim's elaborate salary structure do not lend credence to her employment status as an ordinary "marketing executive".

21 In all the different versions of the defence, the common denominator is that the employment of Mdm Lim was with the express approval of Mr Loh. This is the principal *factual* issue before me. This was flatly denied by Mr Loh. [note: 17] Before examining the evidence as to whether Mr Loh had in fact approved Mdm Lim's employment, it is important to explain the relevance of Mr Loh's approval in the context of Mdm Lim's employment. It is necessary to first state at the outset that there is no requirement in law that the employment of an employee such as a marketing executive must be approved by the board of directors or by all the shareholders. This is a matter typically decided by the person or persons vested with the management of the company, such as a managing director or general manager. It was admitted by Mr Loh in his Affidavit of Evidence in Chief ("AEIC") that Mr Yong was "in charge of and made all key decisions and exercised full authority and control over the hiring of [Panweld's] employees". [note: 18]

22 Whether Mr Yong had acted in breach of his fiduciary duties would depend on the court's determination of whether Mdm Lim was paid a salary, even though she neither reported for work nor performed any service for Panweld over the extended period when she was on the payroll. If I find that Mdm Lim was not an employee of Panweld in any meaningful sense of the word, it would follow that Mr Yong would have acted in breach of his fiduciary duties in causing Panweld to pay Mdm Lim's salary for 17 years. On the other hand, if I find that Mdm Lim had in fact provided services to Panweld as a "marketing executive", the absence of Mr Loh's approval, even if proved, becomes moot. However, if I find otherwise, then Mr Loh's approval would be relevant to establish that the salary payments to Mdm Lim were regularly made by Panweld with the approval of all shareholders

(comprising Mr Yong and Mr Loh), even though she may not in truth be an employee, or that the breach by Mr Yong had been waived or "barred by acquiescence" as pleaded. [note: 19]

Was Mdm Lim really an employee

23 It must be borne in mind that it is the current pleaded defence that Mdm Lim had *in fact* performed services as a "marketing executive" to Panweld. It has not been suggested that she was entitled to receive the remuneration *solely* because she was listed as an employee on Panweld's payroll. This defence in itself contradicts the original defence that all three wives were to be paid even though they were not really employees.

24 In her AEIC, Mdm Lim describes her work in Panweld as conducting surveys and market research of the prices of goods sold by competitors, sourcing for new products and performing duties as Mr Yong's personal assistant including typing and filing. [note: 20] Mdm Lim also claims that she had accompanied Mr Yong to meet Panweld's customers both during and after office hours. [note: 21] Her evidence as to the nature and scope of her work in Panweld was very general and when probed for supporting documents such as survey reports, brochures and catalogues for the new products to establish her alleged nature of work, she was unable to produce any. [note: 22] When asked what new products she had introduced to Panweld, Mdm Lim initially referred to spray painting equipment. [note: 23] However, when she was reminded that spray painting equipment was already an *existing* business, she had to concede that she did not introduce any *new* product to Panweld. [note: 24]

25 Two employees of Panweld, Mr Quek and Ms Choong Shu Fong ("Ms Choong"), testified that they had never seen Mdm Lim in Panweld's office. [note: 25] Given that Mr Quek and Ms Choong had been working in Panweld since the early 1990s, the likelihood of them not seeing her working in the office throughout her alleged 17 years of service in Panweld was highly improbable if she had in fact worked in the office. When Mdm Lim was cross-examined on whether anyone in Panweld had ever seen her doing typing and filing work, she accepted that no one had seen her in Panweld's office as she was always "*locked in [Mr Yong's] office*". [note: 26] Mdm Lim added that she had regularly visited Panweld's office on Saturdays, Sundays and public holidays and she further claimed rather incredulously that when she visited the office during working days, none of the staff ever saw her in the office for 17 years although she claimed to have seen the staff members from inside the locked office of Mr Yong. [note: 27] In re-examination, when Mdm Lim was asked to identify a staff of Panweld whom she had met on Panweld premises, she could only name one Mr Sunny Ong of Sun Power Engineering who happened to be a tenant and not an employee of Panweld. [note: 28] He apparently met Mdm Lim at Panweld's premises on a weekend in the context of inviting Mdm Lim to his daughter's wedding. [note: 29] This could hardly constitute evidence that she was "working" in Panweld's office on weekends, as she alleged. It was only when she was reminded that Mr Sunny Ong was not a staff of Panweld when she said she also recalled meeting Ms Choong, Mr Loh and one Alice in the office. [note: 30] Mdm Lim was unable to call any *independent* witness to corroborate her employment status in Panweld even though she claims to have worked in Panweld for 17 years.

26 When she was asked in re-examination to name some of Panweld's competitors in relation to her evidence that her job scope involved market research of the prices of goods sold by Panweld's competitors, she rattled off a few names without explaining their relevance. [note: 31] Astonishingly, she identified Singapore Airlines as one of Panweld's competitors. [note: 32] It seems to me that she was merely repeating names, which she had memorised without understanding their significance. I

found her testimony about her alleged employment status and the nature of her alleged work to be entirely unsatisfactory and wholly unreliable. It should not be overlooked that Mr Yong claims that his wife was hired in 1992 because he had difficulty finding suitable secretarial assistance. [note: 33] If this was so, then there can be no conceivable or acceptable explanation for such a peculiar working arrangement.

Mdm Lim's salary structure

27 The fact that Mdm Lim could not have been a legitimate employee becomes even clearer when Mr Yong's and Mdm Lim's evidence on the determination of her salary is carefully scrutinised.

28 Mdm Lim claims to have commenced her part-time work in 1992. [note: 34] It is perhaps helpful to begin this analysis by reviewing the circumstances of Mdm Lim's first "*pay cheque*". Her salary payment for 1992 can be traced to a handwritten document dated 13 May 1992 wherein Mr Yong gratuitously declared for himself leave pay of $20,000, of which $15,000 was to be paid to Mdm Lim for her monthly salary of $3,000 from April to June, and sales commission ranging from $1,000 to $2,000 for the same period. [note: 35] This payment of $15,000 to Mdm Lim was in fact reflected in the May 1992 payroll record. Given that Mr Yong's monthly salary at that time was only $4,500, leave pay of $20,000 would have been equivalent to about 4.5 months of leave. There is no evidence before the court that he had accumulated or was entitled to such a generous leave when he declared the leave pay for himself. It is also extremely odd for a part-time employee to be paid in a lump sum for three months' work in arrears. Further, there is no material to suggest that Mdm Lim had done any sales to justify any commission payments. Such an unusual pay arrangement leads me to the irresistible conclusion that she could not have been a *bona fide* employee of Panweld.

29 As stated earlier in [20] above, Mdm Lim claims that her part-time salary was in fact paid by Mr Yong from his unused leave and bonuses. From 1995 to 2009, she was paid on a full-time basis and her salary curiously changed to incorporate three components, one being the fixed component of $1,125 and the balance being transferred from Mr Yong's bonuses and his alleged car allowance of $1,000. [note: 36] I shall refer to this as the "transfer salary" theory. The immediate observation I make about this rather bizarre salary arrangement is that if Mdm Lim was in fact performing proper services as an employee of Panweld, there could be no legitimate reason why part or all of her part-time salary should be funded by her husband, Mr Yong, instead of Panweld. In addition, it would be a misnomer to describe her "employment history" as *part-time* from 1992 to 1995 and thereafter *full-time* from 1995 to 2009, given that she was never seen in the office by any staff member of Panweld throughout the 17 years. In my view, this is a wholly contrived explanation in a hopeless attempt to disguise the fact that Mdm Lim was never truthfully an employee of Panweld. In her AEIC, Mdm Lim made her case even more unconvincing by alleging that her "salary was being paid from [Mr Yong's] salary and there was no loss to [Panweld]" [note: 37]. In cross-examination, she clarified that she meant to say that her entire salary over the years was paid from Mr Yong's bonuses and unused leave. [note: 38] She was in effect saying that she was employed by Mr Yong at his own expense. Such an arrangement runs entirely contrary to her alleged *bona fide* employment by Panweld.

30 One of the building blocks of the "transfer salary" theory is that Mr Yong was entitled to a monthly car allowance of $1,000 which he had unselfishly transferred to Mdm Lim to make up for her "*low pay*". [note: 39] However, in his own AEIC, he claimed, in the context of justifying his car related expenses, that he did not receive any car allowance. [note: 40] Mr Yong's alleged car allowance was also never stated in any of the payroll records of Panweld. Further, the "transfer salary" theory is at best a *zero sum game*. If it was transferred from Mr Yong to Mdm Lim, such transfer should be

evidenced by a corresponding decrease in his remuneration. According to Mr Yong, this "transfer salary" started in 1995. However, both the payroll and CPF contributions records for Mr Yong's 1995 income do not show any corresponding decrease of $1,000 from his monthly salary. [note: 41]

31 Mr Yong had to concede that the payroll records of Panweld also do not reflect his car allowance entitlement. [note: 42] When challenged in cross-examination, Mr Yong changed his evidence and claimed that the $1,000 was paid for his "productivity bonus" instead of car allowance. [note: 43]

32 As explained in [19] above, the fixed component of $1,125 was allegedly based on 25 percent of the combined salaries of Mrs Loh and Sook Min. Mrs Loh was paid $2,500 while Sook Min was paid $2,000. If this was the arrangement, it would have been implemented from day one, and not three years after the commencement of Mdm Lim's alleged part-time employment. This could not have been the arrangement from inception simply because the commencement dates for their respective employment were different. That was precisely the reason why Mr Yong and/or Mdm Lim had to concoct this fallacious wage computation (introduced by way of a further amendment to the defence) to fit in with Mdm Lim's actual salary payments over the years. Further, as rightly pointed out by Counsel for Panweld, Mr Foo Maw Shen ("Mr Foo"), the conduct of Mr Yong and Mdm Lim belies any such agreement because Mdm Lim continued to receive this fixed component up to the time she stopped receiving salary in 2009, even though Sook Min and Mrs Loh had ceased receiving salaries from Panweld since 1999 and 2003 respectively. [note: 44] If there was indeed such an agreement to benchmark Mdm Lim's salary, the fixed component, being 25 percent of the combined salaries of Mrs Loh and Sook Min, would have commensurately decreased. But this did not happen. There is some dispute over whether Mrs Loh continued to receive her salary after 2003. [note: 45] This will be dealt with below, but even if this is correct, it still does not add up because there is no dispute that Sook Min had ceased receiving any salary after 1999.

33 Mr Foo further submitted that there is no truth that Mdm Lim's balance salary was funded from Mr Yong's bonuses. He drew the court's attention to the fact that according to the IR8A forms submitted by Mr Yong and Mdm Lim, both of them were paid not insignificant bonuses for the years 1995, 1996, 1997, 2000, 2001, 2006 and 2008. [note: 46] Specifically, Mr Foo cross-examined Mr Yong on the minutes of the Annual General Meeting ("AGM") of Panweld for 2007 and 2008 in which the total remuneration of Mr Yong was declared. [note: 47] Mr Yong could not provide any reasonable explanation as to why his declared incomes for income tax purposes for 2007 and 2008 were higher than the amounts approved at the AGM other than to allege that the AGM minutes were not accurate. [note: 48] He, however, conceded that he could not produce any evidence to show that he was in fact entitled to receive more remuneration than that stipulated in the AGM minutes. [note: 49] If so, how could there have been any transfer? He was already paid more than his entitlement.

34 In his AEIC, Mr Loh stated that in contrast to his constant base salary of $2,000 from 1996 to 2009, Mr Yong's salary increased from $6,700 (as of 1998) to $9,500 (as of 2008). [note: 50] Mr Retnam relied on Mr Loh's AEIC to support the transfer salary theory since Mr Yong only received $7,000 in 2009. Consequently, he argued, the difference of $2,500 must have been transferred to Mdm Lim as part of her salary. [note: 51] It was not clear to me how Mr Loh derived Mr Yong's 2008 monthly salary as $9,500. It was unfortunate that it was not put to Mr Loh that the balance $2,500 would therefore have been transferred to Mdm Lim. In any event, Mr Yong's salary at $9,500 does not gel with the 2007 and 2008 AGM minutes, which approved Mr Yong's annual salary as $82,816 and $89,074 respectively. If, in fact, Mr Yong's monthly salary was $9,500 as at 2008, his annual salary

would be at least $114,000. The evidence does not support such a sum.

35 In the premises, I find that there is no truth whatsoever in any transfer of Mr Yong's bonuses, salary increments or car allowance to make up Mdm Lim's monthly salary payments. In fact, the evidence is to the contrary. This finding is in addition to the inherent absurdity of the transfer salary theory.

Breach of fiduciary duties, knowing receipt and dishonest assistance

36 It was accepted that Mr Yong owed, *inter alia*, the following duties to Panweld:

(a) a duty to act in the best interest of the company; and

(b) a duty to use his powers for a proper purpose.

37 Given my finding that Mdm Lim was paid salaries over 17 years even though she was never *in truth* an employee of Panweld, it cannot seriously be disputed that Mr Yong, in causing the salaries to be paid to her under these circumstances, had acted in breach of his fiduciary duties to Panweld.

38 It follows from my primary finding that Mdm Lim could not have had any expectation to receive the monthly salaries from Panweld over the 17 years. The payments were made to her bank account. She would have known that she was not a legitimate employee of Panweld and that the only reason she has been receiving the salaries was because her husband, Mr Yong, had wrongfully caused Panweld to make the payments to her without any proper basis. On this basis, I find that liability based on knowing receipt has been made out, since there was (a) a disposal of Panweld's assets in breach of Mr Yong's fiduciary duty; (b) beneficial receipt by Mdm Lim of assets which are traceable as representing Panweld's assets; and (c) knowledge on Mdm Lim's part that the assets she received are traceable to a breach of fiduciary duty. See *George Raymond Zage III and anor v Ho Chi Kwong and anor* [2010] SGCA 4; [2010] 2 SLR 589 ("*George Raymond Zage III*") at [23].

39 Panweld also argued that Mdm Lim facilitated Mr Yong's breach of duty by acting as a convenient conduit through which Mr Yong could siphon money out of Panweld with impunity. [note: 52] Based on my findings, the claim based on dishonest assistance has also been made out given that (a) Mr Yong, as Panweld's director, was trustee *vis-a-vis* Panweld's assets; (b) Mr Yong breached such trust when he misapplied monies belonging to Panweld; (c) Mdm Lim facilitated Mr Yong's breach by allowing her bank account to be used for such purposes; and (d) dishonesty on Mdm Lim's part in that she knew full well that she was not entitled to the salaries paid to her over 17 years. See *Halsbury's Laws of Singapore*, Vol *9(2)* (LexisNexis, 2003) ("*Halsbury's Vol 9(2)*") at [110.588] and *George Raymond Zage III* at [20].

Approval by Mr Loh

40 As I have explained in [22] above, the question of Mr Loh's approval becomes relevant for consideration if I find, as I have, that Mr Yong had breached his fiduciary duties in causing Mdm Lim to be paid salaries over 17 years, even though she did not perform any meaningful service as an employee of Panweld. At the material time (the relevant date being 1992 or 1995 when the alleged agreement was reached), there were only two shareholders and two directors of Panweld, *ie*, Mr Loh (80 percent) and Mr Yong (20 percent). Mr Loh's approval *in his capacity as shareholder* of Panweld is

relevant on two fronts:

(a) shareholders may by resolution *prospectively* release Mr Yong from his fiduciary duty; and/or

(b) shareholders may by resolution *retrospectively exonerate* Mr Yong from the consequences of his breach of duty.

(a) See *Halsbury's Singapore*,*Vol 6 (2010 Reissue) ("Halsbury's Vol 6")* at [70.275].

41 In this regard, it is not disputed that no shareholders' resolution was ever passed to approve the salary payments to Mdm Lim. However, the lack of such a resolution would not be fatal if all the shareholders, *ie*, Mr Yong and Mr Loh, had in fact assented to a particular course of action which a general meeting of Panweld could have carried into effect. In such a case, the assent is as binding as a resolution of the shareholders would be. See *Halsbury's Vol 6* at [70.203], *Jimat bin Awang and ors v Lai Wee Ngen* [1995] 3 SLR(R) 496; [1995] SGCA 77 at [30] and *In re Duomatic Ltd* [1969] 2 Ch 365 ("*Duomatic*"). This principle applies even if assent was given by different parties at different times. See *Tayplan Limited (in Administration) v Alan Smith and Lee Smith (also known as Lee Stow Smith)* [2011] CSIH 8 ("*Tayplan*") at [28].

42 The *Duomatic* principle was recently applied in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and ors* [2010] SGHC 163 ("*RTC*") in connection with the approval of the company in respect of personal expenses of the directors' relatives. Chan J made certain salient observations (*RTC* at [182]–[187]):

> To the extent that these expenses are not reasonably incidental to the business of RTC, the [directors] can be said to have acted in breach of their duty...However, I find that the [directors], acting in their capacity as shareholders of the company and collectively embodying the interests of the company, had authorised and ratified the charging of these expenses to the company via the private accounts. Even if there was no proper written shareholders' resolution on the ratification or authorisation of such expenses, if all the shareholders with the right to attend and vote at a general meeting had assented to this matter which a general meeting of the company could carry into effect, the assent was as binding as a resolution in a general meeting: see *Re Duomatic Ltd*...
>
> As I have found that all the [directors] had agreed to the system of private accounts with full knowledge of how it was supposed to work, I find that the charging of the impugned expenses to their private accounts for squaring off later was conduct which they had, as shareholders, viewed as "fair game and acceptable"...As the [directors] were the only shareholders of RTC, they collectively represented the interests of the...As RTC was solvent at all times when the [directors] charged expenses to their private accounts, the [directors] were "in substance the company" and in adopting the acts of charging expenses to their private accounts in agreement with one another as shareholders, they had made those acts the Plaintiff's acts. Thus, the Plaintiff cannot now complain that the expenses charged were charged in breach of their duties to RTC. As a result, the Plaintiff's claim in respect of the directors' remuneration and expenses must fail.

43 Both counsel were *ad idem* that the *Duomatic* principle would apply if Mr Loh had in fact approved the salary payments to Mdm Lim. However during oral closing submissions, Mr Retnam further submitted that the *Duomatic* principle would also apply even if Mr Loh was not aware of the

salary payments since Panweld's accountant, Mr Quek, was fully aware at all material times. I disagree. First, as a matter of pleadings, Mr Yong's original defence was that the payments were approved by Mr Loh. It was subsequently amended on 13 May 2011 to state that the payments were *also* approved by Mr Quek. There is, however, no alternative case that the payments were proper *even if* Mr Loh had not approved them on the premise that Mr Quek was aware of the same. Secondly, as a matter of law, the *Duomatic* principle is intended to regularise acts or payments on the basis that a shareholders' resolution would have been passed to approve the acts or payments in question had it been tabled. It therefore has no application if Mr Loh, as the majority shareholder, was unaware and would not have approved the payments. For this reason, the fact that Mr Quek had all along prepared the IR8A forms for Mdm Lim and had arranged for the payment of her CPF contributions based on Mdm Lim's salaries does not change the position in law. The income tax declarations and CPF contributions were merely acts carried out *in furtherance of* the salary payments to Mdm Lim. Such acts do not translate into consent or approval by Mr Loh if none otherwise existed. That is a separate and independent inquiry that I will address below. If Mr Retnam is right in his alternative submission, it would follow that a breach of fiduciary duty by a director can be "cured" because another employee of the company was aware of it. That cannot be right.

44 I should add that the mere fact that Panweld might have been managed like a family-run business, in the usual sense of the phrase, should not make a difference. As was observed in *Tayplan* at [24]:

> This therefore was a family enterprise from which, had it remained solvent, the family, and only the family, would have been likely to benefit, the benefit being distributed in such way as the individual family members wished. However, the vehicle through which this family chose to conduct its business was a registered company. That brought with it certain advantages, most notably the incorporation of a company with a personality distinct from its members and consequently limited liability, but also the requirement to observe certain disciplines designed to protect not only the members but also those who dealt with the company. The Lord Ordinary found that the defenders, as directors and company secretary, and therefore the persons responsible, did not observe these disciplines. In contravention of section 221 of the Companies Act 1985 [similar to s 199 of the Singapore Companies Act (Cap. 50, 2006 Rev Ed)], they failed to keep sufficient accounting records.

45 In any event, there is no dispute that the burden to establish Mr Loh's knowledge and approval rests with Mr Yong and/or Mdm Lim. I begin by examining the pleaded defence as regards this alleged approval. When the defence was first pleaded, Mr Yong claimed that Mr Loh agreed to place Mdm Lim on the payroll in *reaction* to Mr Yong's concern over Mrs Loh's and Sook Min's employment in Panweld. Although this has since been amended, I have noted that there is no truth whatsoever in the "reaction theory" because Mdm Lim was placed on the payroll in 1992, long before Mrs Loh and Sook Min in 1995. If such an agreement had been reached, they would all have been placed on the payroll *together* in 1992. This point was alluded to by Panweld in its Reply filed on 25 March 2010, which led to the amendment to the defence *a year later*.

46 During the investigations by BDO in October 2009, prior to the commencement of the action, Mr Yong had provided his own handwritten note to BDO stating that "Mr Loh [had] employed his wife and his girlfriend in 1995 without [his] knowledge". [note: 53] Clearly, the essence of any agreement must necessarily entail both Mr Yong's and Mr Loh's knowledge of the salary arrangements of the three wives. In cross-examination, Mr Yong could not provide any explanation for his contradictory stance other than to say that he might have written it down wrongly on the handwritten note. [note: 54]

47 In his amended defence, Mr Yong claims that the payment of the three wives' salaries was to reduce the tax burden of Panweld. However, in cross-examination, he again shifted his position, saying that it was instead to lighten his *own* tax liability. [note: 55]

48 Finally, when Mr Yong was first confronted by Mr Loh on or about 25 June 2009 about Mdm Lim's salary payments, the transcript of the taped recorded conversation appears to suggest that Mr Yong was informing Mr Loh for the first time. In response, Mr Loh told Mr Yong "[t]hat I don't know *lah*". Conspicuously, Mr Yong did not claim that Mr Loh was aware of the payments all along and had in fact approved them. This is in fact consistent with Mr Yong's own position that he was not aware of the salary payments to Mrs Loh and Sook Min. For the above reasons, I find that Mr Yong has failed to discharge the onus of proving that Mr Loh was aware and had approved the salary payments to Mdm Lim.

49 It leaves me now to consider the points raised by Mr Yong and Mdm Lim that the salary payments were properly approved by Mr Loh. As a starting point, Mr Yong relied on the salary payments to Mrs Loh and Sook Min. [note: 56] However, it is essential to bear in mind that the reliance on the salary payments to Mrs Loh and Sook Min is to support the alleged agreement. It is not their defence that Mdm Lim was entitled to be paid merely because Mrs Loh and Sook Min were likewise receiving salaries. For the reasons set out in [45] to [48] above, I have determined that Mr Yong has failed to prove the alleged agreement. Further, the comparison of the flexible working arrangements of Mrs Loh and Sook Min with that of Mdm Lim is not particularly helpful because that does not address the issue of whether such an agreement existed or whether Mdm Lim was in truth an employee. In the course of the proceedings, I had observed, on a number of occasions, to both counsel that "two wrongs do not make a right". It may well be that the payments to Mrs Loh and Sook Min were not proper either. Although that issue is strictly not before me, Mr Foo had informed the court that Mr Loh is prepared to refund the salaries paid to Mrs Loh and Sook Min if ordered to do so by the court. I do not believe this is the correct forum for me to make such an order of refund, particularly since neither Mr Yong nor Mdm Lim had made any such submission on the matter. They could not make such a submission before me since it would undermine their defence based on the alleged agreement. That is a separate matter for Mr Yong, as 20 percent shareholder of Panweld, to take up if he is so advised. However, for completeness, I should add that evidence was adduced in court that, unlike Mdm Lim, staff members of Panweld had seen Mrs Loh and Sook Min on Panweld's office premises. [note: 57] Further, both Mrs Loh and Sook Min testified that they did some administrative and secretarial work in the office and translation work for Mr Loh during meetings with Panweld's customers. [note: 58] I do not accept that the three wives were employees of Panweld in any meaningful sense of the word. The distinctions highlighted by Mr Foo as regards the nature of the work performed by Mrs Loh and Sook Min are not significant enough for me to arrive at a different conclusion from that reached with regard to Mdm Lim.

50 Mr Retnam relied on various documents to establish that Mr Loh was aware of the salary payments to Mdm Lim. First, Mr Retnam referred to Panweld's monthly payroll records. However, there is no evidence that Mr Loh had ever examined the payroll records of Panweld. In fact, according to the evidence of Mr Yong, he too claimed that he had never reviewed the payroll records. [note: 59] Obviously, if Mr Yong, who was managing Panweld, whether as Managing Director or General Manager, had never seen the payroll records, it is not at all surprising for Mr Loh as the inactive director not to have read them. As regards the monthly management accounts, although Mr Loh would have been provided with copies, it does not advance the defence since the accounts on their face do not disclose the names of the employees on the payroll.

51 The only document which Mr Yong was able to identify, which could *possibly* point to Mr Loh's knowledge of the salary payments, was a handwritten monthly account dated 12 March 1998 ("the account") prepared by Mr Quek. Mr Retnam cited Mr Quek's testimony during cross-examination to suggest that the account was provided to the "directors", *ie*, both Mr Yong and Mr Loh. The account stated, *inter alia*, "[directors'] wives salaries (3 persons)". In order to fully understand the evidence of Mr Quek in its proper context, it is necessary to set out his testimony on this point in its entirety [note: 60] :

> Q: This was a document you prepared to show the monthly operating expenses of the plaintiff, wasn't it?
>
> A: *It's for Mr Yong*. Mr Yong request what is the money as –
>
> Q: Please, Mr Quek. You seem to prefix all your answers as "according to Mr Yong", "Mr Yong". Here, did you prepare this to show to the *directors* what the monthly operating expenses are?
>
> A: Yes.
>
> Q: There you have recorded what the directors' salaries are and the wives' salaries, three persons, 6225, so the *directors* would have been aware of this, wouldn't they?
>
> A: Yes.
>
> [emphasis added]

52 From the above transcript, it is clear to me that the account was prepared at the behest of Mr Yong. When Mr Quek agreed with Mr Retnam that the account was provided to the *directors* (in plural), it appeared to me that Mr Quek did not appreciate that the question was expressed in plural. In any event, Mr Retnam did not clarify with Mr Quek that he was also referring to Mr Loh when he agreed that the account was provided to the "*directors"*, given his earlier answer that it was prepared for Mr Yong. This was, however, clarified by Mr Quek in re-examination when he confirmed that the account was *only* provided to Mr Yong. [note: 61] I accept Mr Quek's evidence that the account was not provided to Mr Loh. I should add that it is odd that Mr Yong, having trawled through the voluminous documents disclosed in this action, was only able to identify one solitary document, the account, in his somewhat desperate attempt to pin knowledge and approval on Mr Loh. I say this is odd because the salary payments to Mdm Lim were made over 17 years and yet he was only at best able to point to one document.

53 Next, although Mr Loh claimed that Mrs Loh had stopped receiving salary from Panweld since 2003, Mr Retnam explained that this was contradicted by Panweld's balance sheet from 1 July 2007 to 31 October 2007 ("2007 balance sheet") which showed that Mrs Loh continued to receive salary of $2,500 as at October 2007. [note: 62] Her salary was credited to Mr Loh's director's account with Panweld. The fact that Mr Loh's director's account was credited with a monthly sum of $2,500 was not disputed. In fact, it was accepted by Mr Foo that the $2,500 monthly credits to Mr Loh's director's account were made from at least January 2005.

54 Mr Quek, in explaining the status of the directors' accounts in response to Mr Yong's queries, had provided some handwritten remarks on the 2007 balance sheet that $2,500 was credited into Mr Loh's director's account representing Mrs Loh's salary. Mr Quek admitted that the handwritten

remarks were indeed his but claimed that he was forced by Mr Yong to deliberately falsify the entry as representing Mrs Loh's salary when it was actually reimbursement for Mr Loh's China expenses. [note: 63] I did not believe his explanation. There was no reason in *2007* for Mr Yong to "force" Mr Quek to falsify the nature of the payment given that the investigations against Mr Yong were only initiated in or around April *2009*.

55 Mr Loh also sought to explain in cross-examination that the description by Mr Quek in the 2007 balance sheet was erroneous in that the payments were in fact reimbursement of his monthly expenses incurred for his China trips on behalf of Panweld. [note: 64] Likewise, I did not accept Mr Loh's explanation. There is no documentary evidence to support Mr Loh's alleged monthly China expenses. Further, it is odd that the expenses were fixed at $2,500 every month for reimbursement purposes even though Mr Loh admittedly did not travel to China every month. Mr Loh's explanation that this was rounded up for convenience does not address the complete absence of documentary evidence to support the reimbursement expenses.

56 Although I did not accept both Mr Quek's and Mr Loh's testimony on this point, ultimately, this finding offers no assistance to Mr Yong's or Mdm Lim's defence. For the reasons set out in [49] above, the fact of the salary payments by Panweld to Mrs Loh and Sook Min in itself does not bear out the defence of an alleged agreement between Mr Yong and Mr Loh to place the three wives on Panweld's payroll. All that it establishes is that Mr Yong was not alone in arranging unauthorised salary payments to his wife.

Can Mr Yong and/or Mdm Lim invoke the limitation defence

57 As mentioned at [16], Mr Retnam rightly accepts that, in the event that the salary payments are found to have been paid in breach of Mr Yong's fiduciary duties, the claims against Mr Yong would not be barred by the Limitation Act (which will be referred to as "the Act", or "our Act" when discussed together with the English equivalents). Why Mr Retnam's concession is correct will be explained below.

58 With regard to the claim against Mdm Lim, Mr Retnam argues that, given that Mr Loh had consented to Mdm Lim's employment, Panweld is barred by acquiescence from maintaining their claims against Mdm Lim. [note: 65] In light of my finding that Mr Loh did not know of Mdm Lim's "employment", the argument based on acquiescence becomes moot. Mr Retnam also submitted that even if liability is made out, part of the claim against Mdm Lim would be time barred pursuant to ss 6(1)(a), 6(1)(d) and 6(2) of the Act [note: 66]. Section 6 of the Act provides that:

> **Limitation of actions of contract and tort and certain other actions**
>
> 6.—(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:
>
> (a) actions founded on a contract or on tort;
>
> ...
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or sum by way of penalty or forfeiture.
>
> (2) An action for an account shall not be brought in respect of any matter which arose more

than 6 years before the commencement of the action.

...

(7) Subject to sections 22 and 32, this section shall apply to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

59 In response, Mr Foo argues that no time bar applies because the claim against Mdm Lim falls within s 22(1) of the Act. [note: 67] Section 22 of the Act provides that:

Limitations of actions in respect of trust property

22.—(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

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

60 I should state at the outset that Mdm Lim's reliance on ss 6(1)(a) and 6(1)(d) of the Act appears misplaced since those provisions relate to claims based on contract, tort or "an action to recover any sum recoverable by virtue of any written law." Her reliance on s 6(2) of the Act is also inappropriate, since an "action for an account" can only be maintained where there is a fiduciary relationship between the parties as to raise an obligation to account, and where the amount due is uncertain and unliquidated (*Black's Law Dictionary*, 9thEd, 2009 and *Attorney General v Cocke* [1988] Ch 414, 420), *eg*, s 6(2) of the Act was applied to an action for an order for account and inquiry into a partnership's finances in *Toh Kim Chan v Toh Kim Tian* [2003] 1 SLR(R) 839 at [36]–[37]. The claim for the return of salaries paid and received by Mdm Lim is not an "action for an account".

61 As will be discussed (at [65] to [74] below), there are, for purposes of limitation, two classes of constructive trusteeships. Class 1 constructive trusteeships fall within s 22(1) of the Act and are never time barred. Class 2 constructive trusteeships, on the other hand, are subject to the limitation defence. In a number of decisions such as *Peconic Industrial Development Ltd v Lau Kwok Fai and ors* [2009] HKCFA 16; [2009] 2 HKLRD 537 ("*Peconic*"), *Dubai Aluminium Co Ltd v Salaam and ors* [2002] UKHL 48; [2003] 2 AC 366 ("*Dubai Aluminium*") and *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 ("*Paragon Finance*"), where the courts have ruled that the claims against Class 2 constructive trustees, *eg*, dishonest assistants and knowing recipients, fall outside the equivalent of s 22(1) of the Act, they did not go on to identify the applicable limitation provision which operated to bar the claims.

62 In my view, claims based on dishonest assistance and knowing receipt are claims for equitable relief (see *Paragon Finance* at p 413 and *Selangor United Rubber Estates Ltd v Cradock and ors (No*

3) [1968] 1 WLR 1555 ("*Cradock*") at p 1582), and are governed by s 6(7) of the Act: Report of the Law Reform Committee on the Review of the Limitation Act (Cap 163) (February 2007) ("*LRC Report 2007*") at p 8. Why such claims do not fall under s 22(2) will be explained later (at [94] to [95]). As s 6(7) of the Act is expressly subject to s 22, the question that must ultimately be answered is whether s 22(1) of the Act applies, as Mr Foo argues, such that the whole of Panweld's claim against Mdm Lim remains alive notwithstanding the lapse of six years. Although s 6(7) of the Act was not specifically pleaded by Mr Yong and/or Mdm Lim, in my view, there is no prejudice to Panweld since it was fully aware of the limitation defence and, more significantly, the focus on the limitation contest was on the applicability of s 22(1) of the Act, to which both parties have made substantial submissions.

63 Pursuant to s 2(1) of the Act, "trust" and "trustee" have the same meanings as under the Trustees Act (Cap 337, 2005 Rev Ed), which include "implied and constructive trusts". See s 3 of the Trustees Act (Cap 337, 2005 Rev Ed). Was Mdm Lim a "constructive trustee" within the meaning of s 22(1) of the Act?

"Constructive trusts" under the English equivalent of s 22

64 What constitutes "constructive trust" for the purpose of limitation has been the subject of much jurisprudential discussion. As s 22 of our Act was modelled on s 19 of the Limitation Act 1939 (UK) ("the 1939 UK Act") (see Sing *Parliamentary Debates*, Vol 11, col 587 (2 September 1959) (Mr K M Byrne, Minister for Labour and Law) and *LRC Report 2007* at p 4), English authorities on this point are highly relevant and will be discussed in some detail.

65 The English authorities distinguish between two broad classes of "constructive trusts" for limitation purposes. The line is drawn based on whether the trust in question arose *before* the occurrence of the transaction impeached, or whether it arose *by reason of* that transaction. See *Soar v Ashwell* [1893] 2 QB 390 ("*Soar*"), *Isabella Taylor v Davies and ors* [1920] AC 636 (Privy Council) ("*Taylor*"), *Paragon Finance* at pp 408–409, *Cradock* at p 1579, JJ. *Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467 ("*JJ Harrison*") at [25]–[30], *Dubai Aluminium* at [139], *Gwembe Valley Development Co Ltd and anor v Thomas Koshy and ors* [2003] EWCA Civ 1048 ("*Gwembe Valley*") at [86]–[88], *Halton International Inc and anor v Guernroy Ltd* [2006] EWCA Civ 801 ("*Halton International*") at [10] and *Statek Corporation v Alford* [2008] EWHC 32 (Ch) ("*Statek*") at [106]. The distinction was neatly stated by Ungoed-Thomas J in the following terms (*Cradock* at p 1579):

> It is essential at the outset to distinguish two very different kinds of so-called constructive trustees: (1) Those who, though not appointed trustees, take upon themselves to act as such and to possess and administer trust property for the beneficiaries, such as trustees de son tort. Distinguishing features for present purposes are (a) they do not claim to act in their own right but for the beneficiaries, and (b) their assumption to act is not of itself a ground of liability (save in the sense of course of liability to account and for any failure in the duty so assumed), and so *their status as trustees precedes the occurrence which may be the subject of claim against them*. (2) *Those whom a court of equity will treat as trustees by reason of their action, of which complaint is made.* Distinguishing features are (a) that such trustees claim to act in their own right and not for beneficiaries, and (b) no trusteeship arises before, but only by reason of, the action complained of.
>
> [emphasis added]

66 While trusts falling under the former category ("Class 1") come within "trust" in s 22(1) of the Act, those falling under the latter category ("Class 2") do not, and thus, could be time barred. See JJ.

Harrison at [37], *Gwembe Valley* at [111], *Dubai Aluminium* at [141] and *Halton International* at [10], [26].

67 The distinction between Class 1 and Class 2 constructive trusteeships was illustrated in the recent decision of *Halton International* (at [13]–[15]) by juxtaposing two cases involving breach of directors' duties:

> In [*JJ Harrison (Properties) Ltd v. Harrison* [2002] 1 BCLC 162], the claimant was a family property company, of which the defendant was a director. In 1985 a property owned by the company was valued at £8,400, but in a side letter the valuer said that it "may have some development potential" and that the valuation did not take this into account. The side letter was not disclosed to the company, but the director was aware of it. In 1986 he bought the property from the company without disclosing the side letter. He later sold it for a very substantial profit. More than six years later the company sued him for an account of the proceeds of sale of the land. His limitation defence failed in the Court of Appeal on the ground that the claim was within class 1.
>
> In [*Gwembe Valley Development Co. Ltd v Koshy* [2004] 1 BCLC 131], the defendant was managing director of the claimant company, GVDC, and a shareholder in it. He also owned a majority of the shares in and controlled another company, Lasco, which lent money to GVDC. He arranged the loans...The case against the defendant was that he did not disclose to the board of GVDC his interest in Lasco, or the profit that Lasco made on the loans to GVDC. It was held that, apart from fraud, the claim would have been time-barred, because his liability to account for the secret profit was not within class 1, and therefore the exception provided by section 21(1)(b) did not apply. (The claim ultimately succeeded, on the basis that the defendant had fraudulently concealed from GVDC his interest in Lasco and the true cost of the kwacha lent to GVDC.)

While the director in JJ. *Harrison* had a pre-existing "trustee-like" responsibility *vis-a-vis* the property which was the subject of the action, the liability of the director in *Gwembe Valley* to account for undisclosed profits did *not* depend on any such pre-existing responsibility, and thus, could not be brought within the English equivalent of s 22(1)(b) of our Act. See *Gwembe Valley* at [119] and *Halton International* at [16]). Therefore, but for the fact that the fraudulent nature of the non-disclosure brought the director's breach in *Gwembe Valley* within the English equivalent of s 22(1)(a) of our Act, the director would have been able to plead limitation in defence. See *Gwembe Valley* at [120], [136]–[138]).

68 Indeed, Mr Foo relied on JJ. *Harrison* to bring the claim against Mr Yong within s 22(1) of the Act. [note: 68] Mr Retnam accepts this position, and I find, rightly so. Although there was no express trust, Mr Yong was a fiduciary of Panweld, and as director, stood in a trustee-like position *vis-a-vis* Panweld's assets (see *Cradock* and *Halsbury's Vol 9(2)* at [110.588], fn 2), *ie*, he was a trustee of the monies before he wrongfully paid them to Mdm Lim. This brought his breach within Class 1 constructive trusteeship and thus disentitled him from raising the limitation defence. It follows that it is no longer necessary for me to deal with Mr Foo's alternative submissions that the limitation period for the claim against Mr Yong had been extended pursuant to s 26(2) of the Act, due to Mr Yong's acknowledgment of Panweld's claim in May 2009 [note: 69], and/or ss 29(1)(a) and 29(1)(b) of the Act, due to the concealed nature of Mr Yong's wrongdoing. [note: 70]

Background to the distinction between the two classes of "constructive trusts"

69 The genesis of s 19 of the 1939 UK Act, on which s 22 of our Act was modelled, may be traced

back to developments in England prior to the 1890s. Before 1890, when the Trustee Act 1888 (UK) ("the 1888 UK Act") came into operation in England, the Court of Equity developed the general rule that, in the absence of laches or acquiescence, a claim against an express trustee shall be perpetual. See *Soar* at p 395. The rationale was not based on culpability, but *deemed possession*; the legal fiction adopted was that the possession of an express trustee was never by virtue of any right of his own, but was deemed, from the outset, to be taken for and on behalf of his beneficiary, and thus, time did not run in his favour against the beneficiary. See *Taylor* at pp 650–651, *Cradock* at 1579, *Paragon Finance* at pp 408–409 and *Halton International* at [22].

70 To ameliorate the harshness visited on trustees who could remain liable indefinitely for innocent breaches of trust, when even common law actions for fraud were subject to a six-year time bar, s 8 of the 1888 UK Act (which scheme was adopted by s 19 of the 1939 UK Act, and consequently, s 22 of our Act) introduced a six-year limitation period for claims for breach of trust. Two situations were, however, excepted from s 8 of the 1888 UK Act, *viz*, (a) where the claim was founded on fraud; and (b) where the proceeds were still retained by the trustee or had previously been received by the trustee and converted to his use. See *Paragon Finance* at p 410.

71 Before this statutory scheme came into place, however, courts developing the general rule that claims against express trustees were perpetual, extended the meaning of "express trustee" to include persons who were, technically, implied or constructive trustees. Those who fell within this expanded meaning of "express trustee" were not allowed to raise the limitation defence. See Michael Franks, MA, *Limitation of Actions* (Sweet & Maxwell, 1995) at p 64. In *Soar*, trustees entrusted the trust fund to their solicitor, Ashwell, to be invested in an equitable mortgage by deposit of title deeds. Instead of accounting to the trustees for the sums received upon the mortgage being paid off, Ashwell retained a portion of the monies for himself. The English Court of Appeal held that Ashwell was an "express trustee" to whom no limitation period applied because he was trustee of the funds *before* he committed the alleged wrong (*ie*, Class 1 constructive trusteeship). In other words, the classification of "express trustee" in *Soar* also included certain types of constructive trusts, specifically, those falling within Class 1. Lord Esher MR held (at pp 393–395) that:

> Was Ashwell...such a trustee as a Court of Equity will not allow to rely on the Statutes of Limitation? *If there is created in express terms, whether written or verbal, a trust, and a person is in terms nominated to be trustee of that trust, a Court of Equity, upon proof of such facts, will not allow him to vouch a Statute of Limitation against a breach of that trust. Such a trust is in equity called an express trust*...If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a Court of Equity, the defendant a trustee for the plaintiff, the Court of Equity treats the defendant as a trustee become so by construction, and *the trust is called a constructive trust; and against the breach which by construction creates the trust the Court of Equity allows Statutes of Limitation to be vouched*...There are cases not falling strictly within either of those thus enunciated, some of which have been treated by the Courts of Equity as within the class in respect of which a Statute of Limitations will not be allowed to be vouched, and some within the class in respect of which such a statute may be vouched...
>
> *[T]he questions in this case are whether Ashwell was not, in view of a Court of Equity, a trustee of the money before the alleged breach by misappropriation, and, if he was, under which class of trust he was with regard to limitations. The moment the money was in his hands, he was in a fiduciary relation to the nominated trustees...he held the money in trust to deal with it for them as directed by them; he was a trustee for them. He was therefore a trustee of the money before he committed, if he did commit, the alleged breach of trust…*

> [W]here a person has assumed, either with or without consent, to act as a trustee of money or other property, i.e. to act in a fiduciary relation with regard to it, and has in consequences been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee...and will call him an express trustee...*I am of the opinion that the present case is within the description of that which is treated as and is called in equity an express trust, and that the inquiry as to the alleged breach cannot be stopped by the Statute of Limitations.*
>
> [emphasis added]

72 There is sound policy underlying the distinction made between express trusts (in the expanded sense, which includes Class 1 constructive trusts) and Class 2 constructive trusts for the purposes of limitation. Class 2 constructive trusteeships are contingent on proof of the defendant's contemporaneous acts by reason of which the constructive trust arose. Such evidence may be more prone to conflicts and destruction over time, as compared to proof of the existence of an express trust or pre-existing fiduciary relationship. As such, considerations of fairness require that time should run in favour of such defendants. See *Soar* at p 396 per Bowen LJ, and p 400 per Kay LJ.

73 Following the enactment of the 1888 UK Act, which by s 1(3) extended the definition of "trustee" to constructive and implied trustees, the judicial exercise of distinguishing between the two categories of constructive trusts persisted. See *Taylor* at pp 651–653. However, the label "express trust" need no longer be stretched to include Class 1 constructive trusts as both express trustees and Class 1 constructive trustees could be precluded from relying on the limitation defence where the requirements of s 8 of the 1888 Act are met. See JJ. *Harrison* at [34]. Indeed, the distinction also survived the subsequent enactment of the 1939 UK Act, upon which our Act was modelled. In connection with this, Millett LJ (as he then was) listed ten reasons justifying the distinction, *inter alia* (*Paragon Finance* at pp 412–413):

> (1) If [the 1939 UK Act] was intended to abrogate the former distinction between the two kinds of constructive trust...It can hardly have done so merely by adopting the definitions of "trust" and trustee in the Trustee Act 1925, since these are not materially different from those in [the 1888 UK Act]. *If anything, the use of the definitions in [the Trustee Act 1925] points in the opposite direction, for that Act is concerned exclusively with the powers and duties of trustees properly so called. It is not concerned with persons whose trusteeship is merely a formula for giving restitutionary relief.*
>
> ...(4) As a matter of statutory construction the question turns on the meaning of the opening words of [s 22(1) of our Act]...these are not apt to cover constructive trusts of the second kind...because they refer to "...an action by a beneficiary under a trust...to which the trustee"...*these words would appear to be prima facie applicable only to those whose trusteeship precedes the occurrence which is the subject of the claim against them* and not those whose trusteeship arises only by reason of that occurrence. (5) ...[T]he distinction between the two kinds of constructive trusts...*was the distinction between an institutional trust and a remedial formula – between a trust and a catch phrase*.
>
> ...(8) Although at first sight the distinction...appears to be merely chronological, *it marks a real difference between trustees (whether or not expressly appointed as such) who commit a breach of trust (however created) and persons who are not trustees at all but who are described as trustees for the purposes of enabling equitable relief to be granted against them*. Actions founded on tort are barred after six years, and there is no exception for actions founded on fraud, though the start of the limitation period may be deferred in such cases. There is no logical

basis for distinguishing between an action for damages for fraud at common law and the corresponding claim in equity for "an account as constructive trustee" founded on the same fraud.

[emphasis added]

74 It must be recognised that Class 2 "constructive trusts" are not, in fact, "trusts" in the true sense of the word. It is nothing more than a formula for equitable relief; a court applying equitable principles finds that the defendant ought to be made liable in equity, and thus, imposes a constructive trust for this purpose. See *Cradock* at p 1582. In the words of Millett LJ in *Paragon Finance* at p 409 (which were echoed in *Dubai Aluminium* at [141]–[142] and *Cradock* at p 1575):

> In the first class of case, however, the constructive trustee really is a trustee...the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.
>
> The second class of case is different...In such a case *[the defendant] is traditionally though I think unfortunately described as a constructive trustee and said to be "liable to account as constructive trustee." Such a person is not in fact a trustee at all, even though he may be liable to account as if he were*. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions "constructive trust" and "constructive trustee" are misleading, for *there is no trust and usually no possibility of a proprietary remedy;* they are "nothing more than a formula for equitable relief": *Selangor United Rubber Estates Ltd. V Cradock* [1968] 1 WLR 1555 at p 1582 *per* Ungoed-Thomas J...*They were not in reality trusts at all, but merely a remedial mechanism by which equity gave relief for fraud*.
>
> [emphasis added]

This use of "remedial" in relation to Class 2 "constructive trusts", which restricts the plaintiff to a *personal* remedy must, of course, be distinguished from "remedial" in the sense which is used in the United States and Canada, where a "remedial constructive trust" may be imposed as a *discretionary proprietary remedy*. Under English law, constructive trusts arise based on legal rules, and the court's role in this connection is purely declaratory. See Hayton & Mitchell, *The Law of Trusts and Equitable Remedies*, 12th Ed (Sweet & Maxwell, 2005) ("*Hayton & Mitchell*") at [6–03].

The position in Singapore

75 The recent High Court decision of *Wong Chong Yue v Wong Chong Thai* [2011] 2 SLR 804 ("*Wong Chong Yue*") concerned a claim that certain shares were held by the defendant on an *express trust* for the plaintiff. Philip Pillai J, in determining the preliminary issue of whether the claim for breach of trust and for account had been time barred, held (at [9]) that:

> The meaning and scope of s 22(1)(*b*) was examined in *Soar v Ashwell* [1893] 2 QB 390. Lord Esher MR said (at 393):
>
> > If there is created in expressed terms, whether written or verbal, a trust, and a person is in terms nominated to be the trustee of that trust, a Court of Equity, upon proof of such facts, will not allow him to vouch a Statute of Limitations against a breach of that trust. Such a trust is in equity called an express trust...If the breach of the legal relation relied on,

> whether such breach be by way of tort or contract, makes, in the view of a Court of Equity, the defendant a trustee for the plaintiff, the Court of Equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the Court of Equity allows Statutes of Limitation to be vouched.

In the same judgment, Bowen LJ stated that (at 395-396):

> ...That time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust, is a doctrine which has been clearly and long established...A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour...although but for such conduct and behaviour he would be a stranger to the trust...[T]he liability of a stranger to the trust *arises from his conduct and depends on the proof of his contemporary acts...*

The above passages have been cited with approval more recently by the English High Court in *Cattley v Pollard* [2007] Ch 353 at [43]-[47]. A claim for accounting under an express trust would accordingly not be subject to any time bar, whether under s 6(2) or anywhere else in the Limitation Act. Section 22(2) of the Limitation Act is subject to s 22(1) of the Limitation Act, and therefore does not apply.

[emphasis added]

76 Mr Foo correctly pointed out that *Wong Chong Yue* is not directly applicable to the present case since Pillai J was there concerned with the issue of limitation *vis-a-vis* an express trust [note: 71] , and that contrary to Mr Retnam's submission [note: 72] , *Wong Chong Yue* did not suggest that a six-year time bar applied to *all* constructive trust claims. [note: 73] The term "express trust", as discussed, bore an expanded meaning in the pre-1890 era during which *Soar* was decided. Furthermore, while Bowen LJ referred to a time bar in relation to constructive trusts, his description of constructive trustees, being strangers to the trust, but for certain conduct giving rise to liability, was in effect a description of Class 2 constructive trustees.

77 With the benefit of hindsight, drawn from the *Paragon Finance* and *Dubai Aluminium* line of cases, it would certainly seem regressive for our courts to retreat to the pre-20th century English position of denying reliance on the limitation defence only in cases of express trusts. Indeed, the Court of Appeal had the opportunity to deal with a related point in *QBE Insurance Ltd v Sim Lim Finance Ltd* [1987] SLR(R) 23 ("*QBE Insurance*") which was decided before *Paragon Finance.* The respondent, Sim Lim Finance, entered into a hire-purchase agreement with Highlight Industry whereby the latter acquired on hire purchase 74 sets of industrial sewing machines and agreed to pay Sim Lim Finance monthly instalments totalling $105,000. Highlight also took out a fire policy with the appellant, QBE Insurance, in relation to the machines. Following the destruction of the machines in a subsequent fire, Sim Lim Finance wrote a letter to Highlight, carbon-copied to QBE, claiming an interest in the machines, and requesting Highlight to instruct QBE to pay the insurance proceeds to Sim Lim Finance. When QBE did not acknowledge or reply to the letter, Sim Lim Finance sued Highlight, its directors, and QBE for compensation and damages arising from conspiracy, breach of trust and negligence. After QBE filed its defence, the action went to sleep for approximately four years before Sim Lim Finance gave notice of its intention to proceed with its claim. QBE then applied to dismiss the action for want of prosecution.

78 QBE's application was dismissed in the High Court which held, *inter alia*, that Sim Lim Finance's claim based on fraudulent breach of trust against QBE as constructive trustees had not been time barred. On appeal, QBE argued that Highlight insured the machinery on their own account, and not as trustees for Sim Lim Finance, and that even if there was a claim based on constructive trust, such action did not fall within s 22(1) of the Act. In dismissing QBE's appeal, the Court of Appeal held (at [28] and [32]) that:

> 28 The next submission of counsel for the appellants was that any claim based on constructive trust would have been barred after six years on the ground that s 22(1) of the Limitation Act (Cap 10) had no application to constructive trusts: he cited *Soar v Ashwell*...and *In re Robinson*...*We do not think that this contention is supported by these authorities...*[I]n support of his contention, [counsel] relied on a passage in the judgment of Bowen LJ (at 395–396) where his Lordship drew a distinction between an express trust (*ie* one which arises between the *cestui que trust* and his trustee) and a constructive trust (*ie* one which arises when a stranger to a trust already constituted is held by the court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour) and that "time is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust...". *In our view, counsel's argument was based on a partial reading of Bowen LJ's judgment.* His Lordship (at 396) recognised and drew attention to the "variety and inconsistency both in the language used about constructive trusts and in the line of demarcation that has been drawn between the cases of express and constructive trusts"...
>
> 32 ...[C]ounsel's contention that statutory limitation applies to all constructive trusts was again too wide. In the present action...*[w]hether or not [the claim based on constructive trust], if well-founded, would be barred after six years cannot therefore be decided until the nature of the constructive trust, if any, has been determined by the trial judge.*
>
> [emphasis added]

79 Thus, it would appear from the observations by the Court of Appeal in *QBE Insurance* that not *all* "constructive trusts" fall within s 22(1) of the Act. Consistently with the subsequent line of English cases including *Paragon Finance* and *Dubai Aluminium*, the Court of Appeal recognised that whether a claim is subject to a time bar depends on the *nature* of the constructive trust in question.

Strangers to the Trust

80 I have held (at [68]) that Mr Yong is a constructive trustee falling within s 22(1) of the Act as he is a Class 1 constructive trustee. The same may not be said of Mdm Lim. Given the foregoing, it seems quite clear that dishonest assistants and knowing recipients, as strangers to the trust, are Class 2 constructive trustees who are not "trustees" within s 22(1) of the Act. As was observed in Charles Mitchell, "Dishonest assistance, knowing receipt, and the law of limitation" (2008) 3 Conv 226 ("*Charles Mitchell*") at pp 230–231:

> Claimants have [argued]...that [s 22(1) of the Act] applies to actions for dishonest assistance and knowing receipt. The [argument] turns on the fact that dishonest assistants and knowing recipients are "personally liable to account as constructive trustees"...One might have thought that knowing recipients would find it harder to defeat this argument than dishonest assistants because the former always receive property which can be impressed with a trust and the latter do not. Paradoxically, however, *knowing recipients have been held to fall outside the subsection...for a long time, whereas dishonest assistants have only been found to fall outside the subsection very recently*.

[emphasis added]

81 Even though knowing recipients and dishonest assistants are not "trustees" within the meaning of s 22(1) of the Act, is there any statutory basis to deny such Class 2 constructive trustees from pleading limitation? This issue shall be analysed with reference to dishonest assistants and knowing recipients separately to determine whether they should be treated in the same vein or differently.

Dishonest assistants

82 When courts hold that a dishonest assistant to a breach of trust is "liable to account as a constructive trustee", they do not actually mean that he must account for property in his hands, which he holds on trust. Liability based on dishonest assistance is a *personal* liability, and the defendant can be liable whether or not he had received and/or retained trust property; there is no real trust to speak of. See *Hayton & Mitchell* at [11–06], AJ Oakley, *Constructive Trusts*, 3rd Ed (Sweet & Maxwell, 1997) at pp 188–190, Hanbury & Martin, *Modern Equity*, 18th Ed (Sweet & Maxwell, 2009) at [12–010]–[12–011] and *Charles Mitchell* at p 229.

83 Mr Foo argued that s 22(1) of the Act should apply to dishonest assistants because liability of the dishonest accessory should be of the same measure as the wrongdoing principal. [note: 74] This argument touches on a dilemma which has been discussed in the English cases in relation to whether claims based on dishonest assistance may be brought under s 22(1)(a) of the Act by construing dishonest assistants as having been "a party or privy" to the fraudulent breach of trust. The dilemma, as stated in *Charles Mitchell* at p 235, is that between two anomalies: either dishonest assistants are never subject to the same rule as fraudulent trustees, even when the trustee and the accessory are fraudulent co-conspirators, or dishonest assistants are sometimes entitled to invoke the limitation defence where the breach of trust was committed innocently, but not where the breach was committed fraudulently, even though in both cases, they may have behaved equally badly. In holding that dishonest assistants were Class 2 constructive trustees who may rely on the six-year limitation defence, Deputy High Court Judge Richard Sheldon QC held in *Cattley and anor v Pollard and anor* [2007] 3 WLR 317 ("*Cattley*") at p 334 that:

> Mr Godsmark also relied on the following passage in the judgment of Millett LJ in the Paragon case [1999] 1 All ER 400, 414:
>
> > "(10) A principled system of limitation would also treat a claim against an accessory as barred when the claim against the principal was barred and not before. There is, therefore, a case for treating a claim against a person who has assisted a trustee in committing a breach of trust as subject to the same limitation regime as the claim against the trustee: see J *W Brunyate, Limitation of Actions in Equity* (1932). But the borrowers, who obtained the money by deceit and were the principal wrongdoers, were neither trustees nor fiduciaries. If guilty of fraud, they can plead the statute. It would be extraordinary if the defendants were liable in equity as accessories or co-conspirators without limit of time when the claim against the principal wrongdoers was barred."
>
> Whilst this passage does provide some support for Mr Godsmark's argument, it is to be noted that Millett LJ is only postulating an argument ("There is … a case") which he then proceeds to answer on the facts before him. *I do not read this passage as indicating that Millett LJ is accepting that the same period of limitation should necessarily be applicable to a claim against the trustee and a claim against the accessory. It seems to me that there is an illogicality in making a dishonest assistance claim subject to the same period of limitation as a claim against the trustee*. In the light of *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (which was decided after the

Paragon case), a person dishonestly assisting in a breach of trust is liable whether or not the trustee has been fraudulent. Where the trustee's breach is not fraudulent a claim against him would be subject to a six-year limitation period and, if fraudulent, there would be no applicable period of limitation. *It would appear illogical for a dishonest assistance claim against the accessory to be subject to a six-year limitation period if the trustee's breach of trust is not fraudulent but subject to no period of limitation if the trustee's breach were fraudulent: the accessory, to be made liable, has to have been guilty of dishonesty in both cases and there is no readily apparent rationale as to why a different period of limitation should apply*.

[emphasis added]

84 To avoid the anomalous distinction between actions for dishonest assistance and knowing receipt, where the breach of trust has been committed fraudulently, and actions where it has not, even where the accessory has behaved equally badly in both cases, the better view is that accessorial liability, in both instances, falls outside s 22(1)(a) of the Act, whether or not the breach of trust by the principal is dishonest. See *Charles Mitchell* at p 235.

85 Mr Foo sought to rely on *Statek* to argue that *Cattley* did not represent the correct legal position in England. [note: 75] *Statek* involved misappropriation of company monies by its directors. The plaintiff company (Statek) was purchased by another company (TCI II) in 1984. One Johnston and one Spillane became directors of Statek. TCI II was the holding company, and all its revenue came from the highly profitable trading activities of Statek. From February 1984 to January 1996, Johnston and Spillane systematically looted Statek and TCI II, misappropriating more than $19.8 million from Statek and more than $10.5 million from TCI II. Between April 1988 and December 1995, a series of payments were made into the personal bank account of one Alford (the defendant), a businessman and longtime business associate of Johnston and Spillane. Statek alleged that, in dishonest breach of his duties to Statek, Alford facilitated the misapplication of Statek's monies so received by him for which Statek claims, *inter alia*, that he is bound to account as constructive trustee. Evans-Lombe J found that Alford was a *de facto* director and hence breached his fiduciary duties to Statek *ie*, Class 1 constructive trustee (*Statek* at [107]). In *obiter dicta*, he added (at [120]–[124]) that:

> In arriving at his conclusion Mr Sheldon [in *Cattley*] placed principal reliance on the judgment of Lord Millett as he had then become in *Dubai Aluminium Company Limited v Salaam* [2003] 2 AC 366...[T]he House of Lords concluded that Mr Amhurst was constituted a category 2 trustee having assisted in a fraud. At paragraph 141 in the speech of Lord Millett he is recorded as saying this:-
>
> > "Unlike HB in *Mara v Browne* [1896]1Ch199, Mr Amhurst did not assume the position of a trustee on behalf of others. He never had title to the trust funds or claimed the right to deal with them on behalf of those properly entitled to them. He acted throughout on his own or his confederate's behalf. The claim against him is simply that he participated in a fraud. Equity gives relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally (and I have suggested unfortunately) described as a "constructive trustee" and is said to be "liable to account as a constructive trustee". But he is not in fact a trustee at all, even though he may be liable to account as if he were...and he could plead the Limitation Acts as a defence in the claim."
>
> ...Mr Sheldon describes Lord Millett in this passage as "dealing with a claim for dishonest assistance in a fraudulent breach of trust"…and found that the Limitation Act could be pleaded as a defence to the claim.

> With respect to Mr Sheldon, nowhere in his judgment does Lord Millett describe the assistance given by Mr Amhurst to the fraud as being assistance to a fraudulent breach of trust. He does not do so in the passage cited...[T]he case does not seem to proceed on the basis that he or any of the other defendants were trustees or fiduciaries of the assets of the claimant whose fraud, in dealing with those assets, had been assisted by the actions of Mr Amhurst.

86 Evans-Lombe J thus observed in *obiter dicta* that s 21(1)(a) of the 1980 UK Act (*in pari materia* with s 22(1)(a) of our Act) applied to accessories to fraudulent breaches of trust (*Statek* at [114]–[125]). This observation in effect subjects a dishonest assistant in an innocent breach of trust to a different limitation regime from that which applies where the breach of trust is fraudulent, *ie*, the very anomaly identified in *Charles Mitchell*. Evans-Lombe J's criticism of *Cattley* was however difficult to follow since the claim in *Dubai Aluminium* clearly related to dishonest assistance to a fraudulent misappropriation of company funds, which was subject to the limitation defence (see *Dubai Aluminium* at [85], [87], [141] and [143]), *ie*, falling outside the ambit of s 21(1)(a) of the 1980 UK Act.

8 7 *Statek* must now be viewed in light of *Peconic*, where the Hong Kong Court of Final Appeal firmly held that dishonest assistants are allowed to plead the limitation defence. See *Peconic* at [24]. The bank in *Peconic* was fraudulently induced by one Chio to invest in a land speculation deal through a joint venture company (Peconic), of which Chio became a director and 25 percent shareholder in 1991. The land was purchased at HK$515 million, although the immediate vendor, which Chio beneficially owned, only bought it for HK$151 million. Chio made a fortune of HK$350 million in the meantime. In 2002, the bank sued a solicitor (Lau) who had allegedly assisted Chio in the fraudulent breach of his fiduciary duties to Peconic. The Hong Kong Court of Final Appeal had to deal with the issue of whether dishonest assistants fell within s 20 of the Hong Kong Limitation Ordinance, which is *in pari materia* with s 22 of our Act, such that Lau was precluded from raising the limitation defence. Referring to Class 1 constructive trustees as "fiduciaries", to whom the limitation defence is denied, and Class 2 constructive trustees as "non-fiduciaries", including dishonest assistants who may plead the limitation defence, Lord Hoffmann, sitting in the Hong Kong Court of Final Appeal, held that (*Peconic* at [23]–[24]):

> [N]on-fiduciaries do not come within the definition of trustees in [s 22 of the Act]. It is necessary however to deal with a different submission, which is that...one category of non-fiduciaries, namely, persons who dishonestly assist a trustee in a fraudulent breach of trust, should be treated in the same way as the trustee and not allowed a limitation defence.
>
> This argument has the high authority of some dicta...in *Soar v Ashwell* [1893] 2 QB 390. These remarks have been subjected to minute analysis in the cases and academic writings but I am willing to accept that they support the proposition that dishonest assisters cannot rely on a limitation defence. Nevertheless, I think that they are wrong in principle and unsupported by authority. *The principle is not that the limitation defence is denied to people who were dishonest...The principle is that the limitation period is denied to fiduciaries. But dishonest assisters are not fiduciaries. It might be surprising, as Millett LJ said in the Paragon Finance case (at p.414), if a person primarily liable was entitled to plead the Limitation Act when someone who assisted him could not. But there seems no reason in fairness or logic why the reverse should not be true. And in any case, Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378 shows that the liability of a dishonest assister is independent of the dishonesty of the trustee or other fiduciary.* [Counsel for the bank] placed some reliance upon Millett LJ's observation that "a principled system of limitation would also treat a claim against an accessory as barred when the claim against the principal was barred and not before"...That showed, he said, that if the fraudulent trustee is never entitled to plead limitation, the dishonest assister should not be entitled to do so. *But I do not think Millett LJ could have meant this, which would be contrary to*

most of his reasoning and to his subsequent clear statement in Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366, 404 that a dishonest assister is not a fiduciary and can plead the Limitation Act.

[emphasis added]

Knowing Recipient

88 The fact that a "constructive trust" imposed on the knowing recipient arises by virtue of the relevant wrong also situates such claims within Class 2. Notwithstanding the weight of authority to the contrary, Mr Foo argued that Mdm Lim's liability falls squarely within s 22(1)(b) of the Act because she currently holds the misappropriated monies in her possession. [note: 76] This argument may however be said to have been foreclosed following *Taylor* (at p 653), which clearly determined that "trust property" in the Ontario equivalent to s 22(1)(b) of our Act refers "not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others".

89 While it is clear that knowing receipt claims do not fall within s 22(1)(b) of the Act, can it nevertheless be brought within s 22(1)(a)? In *G L Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216 ("*Baker*"), Danckwerts J, whose judgment was discharged by the Court of Appeal on a separate ground, observed, albeit tentatively, that s 19(1)(a) of the 1939 UK Act (*in pari materia* with s 22(1)(a) of our Act) applied to third parties who innocently received monies traceable to fraudulent breach of trust, such that there was no time bar. *Baker* involved a claim by a company (Baker) to recover money entrusted to its auditor (Titley) who fraudulently paid some of it to a company of which he was a director (Medway). When judgment against Titley remained unsatisfied, Baker claimed from Medway repayment of the said sum. Danckwerts J held (at p 1221–1222) that:

> This Act is one which I understand was drafted by a very eminent Chancery lawyer, but none the less it is one which gives considerable difficulties of interpretation whenever the court is concerned with its application...[*s 22(1)(a) of the Act] does not in terms refer to actions against trustees, but the words used are "in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy." It seems to me that the words "in respect of any fraud or fraudulent breach of trust" may be capable of referring to a case where the action of the plaintiffs is based upon the fact that their moneys were fraudulently paid away and have reached the hands of an innocent party. That is a possible construction, but whether or not it is the right one is not at all clear*...I am bound to say that I think that the words "in respect of any fraud or fraudulent breach of trust" are wide enough to cover the present case...It is because they received that payment by virtue of Titley's fraudulent breach of trust that the plaintiff company is able to bring this action against them. Consequently, so far as those words are concerned, the provision seems to me wide enough.
>
> [emphasis added]

90 Like Mr Foo's argument in relation to s 22(1)(b) of the Act (at [88]), any argument in reliance on Danckwerts J's tentative suggestion, which was unsupported by authority and which ran counter to the *Paragon Finance* and *Dubai Aluminium* line of cases (*Cattley* at p 338), is now foreclosed, following *Peconic*, where Lord Hoffmann NPJ held (at [25]) that:

> It is true that in certain contexts the words "in respect of" may have a very wide meaning and *the possibility of such a meaning being given to the words in s.20 was tentatively considered by*

Danckwerts J in G L Baker Ltd v. Medway Building and Supplies Ltd [1958] 1 WLR 1216, 1222. But I think that in the context of s.20 of the Ordinance it simply means that the beneficiary must be claiming against the trustee on the ground that he has committed a fraudulent breach of trust. *If it had been intended to include claims against dishonest assisters or other non-fiduciaries on the ground that they were accessories to the breach of trust, the language would have been a good deal clearer*.

[emphasis added]

91 In oral closing submissions, Mr Foo also relied on certain remarks made by Millett J (as he then was) in *Agip (Africa) Ltd v Jackson and ors* [1989] 3 WLR 1367 (Ch) ("*Agip*") as being suggestive of the fact that there are different categories of knowing recipients, some of whom should be disentitled from relying on the limitation defence. Millett J held (*Agip* at pp 1387–1388) that:

Knowing receipt

In *Baden, Delvaux and Lecuit v. Société General pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1983] BCLC 325, 403, Peter Gibson J. said:

> "It is clear that a stranger to a trust may make himself accountable to the beneficiaries under the trust in certain circumstances. The two main categories of circumstances have been given the convenient labels...'knowing receipt or dealing' and 'knowing assistance'. The first category of 'knowing receipt or dealing' is described in Snell...as follows: 'A person receiving property which is subject to a trust...becomes a constructive trustee if he falls within either of two heads, namely: (i) that he received trust property with actual or constructive notice that it was trust property and that the transfer to him was a breach of trust; or (ii) that although he received it without notice of the trust, he was not a bona fide purchaser for value without notice of the trust, and yet, after he had subsequently acquired notice of the trust, he dealt with the property in a manner inconsistent with the trust.' *I admit to doubt as to whether the bounds of this category might not be drawn too narrowly in Snell. For example, why should a person who, having received trust property knowing it to be such but without notice of a breach of trust because there was none, subsequently deals with the property in a manner inconsistent with the trust not be a constructive trustee within the 'knowing receipt or dealing' category?*"

I respectfully agree...*Without attempting an exhaustive classification, it is necessary to distinguish between two main classes of case under this heading*. *The first is concerned with the person who receives for his own benefit trust property transferred to him in breach of trust.* He is liable as a constructive trustee if he received it with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust; or if he received it without such notice but subsequently discovered the facts. In either case he is liable to account for the property, in the first case as from the time he received the property, and in the second as from the time he acquired notice.

The second and, in my judgment, distinct class of case is that of the person, usually an agent of the trustees, who receives the trust property lawfully and not for his own benefit but who then either misappropriates it or otherwise deals with it in a manner which is inconsistent with the trust. He is liable to account as a constructive trustee if he received the property knowing it to be such, though he will not necessarily be required in all circumstances to have known the exact terms of the trust...The essential feature of the first class is that the recipient must have received the property for his own use and benefit. This is why neither the paying nor the

collecting bank can normally be brought within it. In paying or collecting money for a customer the bank acts only as his agent. It is otherwise, however, if the collecting bank uses the money to reduce or discharge the customer's overdraft. In doing so it receives the money for its own benefit...

[emphasis added]

92 Although Gibson J, in the passage endorsed by Millett J, does seem to suggest that there could be several classes of knowing receipt, depending on the quality of knowledge/notice on the part of the recipient, the distinction Millett J drew "between two classes of case under this heading" seems to mirror the distinction between the two *general* classes of constructive trusts, which he later set out more clearly in *Paragon Finance.* In any case, this passage from *Agip*, which Mr Foo relied on, did not concern the defence of limitation, and it is unclear on its face, how the sub-categories of knowing recipients should differ in respect of the availability of the limitation defence. No other authority was cited to me to this effect.

93 Given the persuasive authority in favour of the position that knowing recipients, like dishonest assistants, are Class 2 constructive trustees, I am of the view that Panweld's claim against Mdm Lim falls outside s 22(1) of the Act, and is consequently partially time barred.

Section 22(2) of the Act

94 It remains to be considered whether the limitation defence in relation to dishonest assistance and knowing receipt claims is rooted in s 22(2) of the Act. Although Sheldon QC in *Cattley* (at [92]) seemed to accept that claims against dishonest assistants were governed by s 21(3) of the 1980 UK Act, which is similar to s 22(2) of our Act, his reliance on *Gwembe Valley* on this point might not be entirely accurate as the relevant discussion in *Gwembe Valley* concerned claims against *fiduciaries* (*Gwembe Valley* at [111]):

Fiduciary duties and limitation – summary

111. In the light of those cases, in our view, *it is possible to simplify the court's task when considering the application of the 1980 Act to claims against fiduciaries.* The starting assumption should be that a six year limitation period will apply – under one or other provision of the Act, applied directly or by analogy – unless it is specifically excluded by the Act or established case-law. Personal claims against fiduciaries will normally be subject to limits by analogy with claims in tort or contract (1980 Act s 2, 5; see Seguros). *By contrast, claims for breach of fiduciary duty, in the special sense explained in Mothew, will normally be covered by section 21. The six-year time-limit under section 21(3), will apply, directly or by analogy, unless excluded by subsection 21(1)(a) (fraud) or (b) (Class 1 trust)* [.]

[emphasis added]

95 For consistency, "trust" under s 22(1) must mean the same thing under s 22(2). Consequently, while s 22(2) of the Act applies to trustees who parted with trust property negligently or innocently (see Oughton, Lowry & Merkin, *Limitation of Actions* (LLP, 1998) at p 375 and Choong Yeow Choy, *Law of Limitation* (Butterworths Asia, 1995) at [2.13.3]) it does *not* apply to strangers to the trust such as Class 2 constructive trustees. Support for this may be drawn from JJ. *Harrison* at pp 754 – 755, where it was observed that:

The answer to the question whether s. 21(3) of the 1980 Act has any application to the present

case...is provided by Millett LJ's historical analysis in *Paragon Finance plc v Thakerar & Co* [1999] 1 All ER 400...:

> '...It was evidently considered unduly harsh that trustees should remain liable indefinitely for innocent breaches of trust when even common law actions for fraud were barred after six years and s. 8 of the 1888 Act introduced a period of limitation (effectively six years) for such claims. Its purpose was to provide protection for trustees who would otherwise be liable without limitation of time (laches and acquiescence apart) where the breach of trust was committed innocently; see *Re Richardson, Pole v Pattenden* [1920] 1 Ch 423 at p. 440...'

The position, therefore is that, *since the coming into operation of s. 8 of the Trustees Act 1888, express trustees and constructive trustees within Millett LJ's first category have been able to rely upon the limitation period now prescribed by s. 21(3) of the 1980 Act*, subject to the saving provisions now contained in s. 21(1) of that Act.

[emphasis added]

Conclusion

96 As the claim against Mr Yong falls within s 22(1) of the Act, no limitation period applies. Mr Yong is therefore a constructive trustee of the full measure of the monies misapplied. As Mdm Lim is entitled to raise the six-year limitation defence under s 6(7) of the Act, the amount recoverable against her would be capped at $338,410 instead of $873,959.20. The result may appear anomalous in that the principal wrongdoer, Mr Yong, is not able to plead limitation while his accessory, Mdm Lim, is able to do so. However, it has also been said that it would be anomalous for an accessory (who is not a trustee) not to be entitled to plead limitation when a non-trustee who has committed a fraud is entitled to do so. Ultimately, the outcome is merely a function of the court's interpretation of whether Class 2 constructive trustees, either as knowing recipients or dishonest assistants, fall within the definition of "trustees" in s 22(1) of the Act. Sound judicial reasoning from established case law dictates that they do not because they are, in truth, not really trustees. There is no reason why knowing recipients and dishonest assistants should be treated differently. In the words of Lord Millet in *Paragon Finance* at p 409, they are "*unfortunately described*" as constructive trustees. In truth, they are "*constructively treated, by a legal fiction*" as though they are trustees by their participation in the breach of trust by the principal wrongdoer. See *Charles Mitchell* at p 229.

97 Mr Yong is therefore liable to Panweld for the full salary claim of $873,959.20, while Mdm Lim is only jointly liable to the extent of $338,410 together with interest at 5.33 percent per annum on the respective judgment sums from 12 February 2010 till the date of judgment. As agreed, costs of the four settled claims shall follow the event of the salary claim. However as Mdm Lim has succeeded on the limitation defence, I shall order one set of costs at 80 percent of the entire action to be paid by Mr Yong to Panweld to be taxed if not agreed and that Mdm Lim is jointly liable to the extent of 30 percent for such costs. As I have noted at [7] that the third party action is without merit, it is dismissed with costs to be taxed if not agreed.

[note: 1] AEIC of 1st Defendant (15 September 2011) at [113], NE, 8 November 2011, at p 14 lines 8 – 11 (Cross Examination of 1st Defendant, Yong Kheng Leong)

[note: 2] AEIC of 1st Defendant (15 September 2011) at [3(a)], [113].

[note: 3] Defendant's Closing Submissions (20 December 2011) at p 159.

[note: 4] Plaintiff's Statement of Claim (12 February 2010) at [24], Plaintiff's Closing Submissions (20 December 2011) at [38], Defendant's Closing Submissions (20 December 2011) at [8].

[note: 5] Plaintiff's Closing Submissions (20 December 2011) at [39] – [42].

[note: 6] Plaintiff's Closing Submissions (20 December 2011) at [34], [107].

[note: 7] Plaintiff's Closing Submissions (20 December 2011) at [34] – [35].

[note: 8] Defence (Am.No.4) (21 December 2011) at [21], Defendant's Closing Submissions (20 December 2011) at pp 82 – 85, AEIC of 2nd Defendant (23 August 2011) at [13] – [15].

[note: 9] Defendant's Closing Submissions (20 December 2011) at pp 7, 82 – 85, AEIC of 2nd Defendant (23 August 2011) at [2] – [4].

[note: 10] AEIC of 2nd Defendant (23 August 2011) at [5].

[note: 11] Defence (11 March 2010) at [21(a)].

[note: 12] Defence (11 March 2010) at [21(b)].

[note: 13] Defence (Am.No.2) (13 April 2011) at [21(b)].

[note: 14] Plaintiff's Reply (25 May 2010) at [15].

[note: 15] Defence (Am.No.3) (26 May 2011) at [21(a)].

[note: 16] Defence (Am.No.3) (26 May 2011) at [21(b)].

[note: 17] AEIC of Loh Yong Lim (16 September 2011) at [87] – [89].

[note: 18] AEIC of Loh Yong Lim (16 September 2011) at [13].

[note: 19] Defendant's Closing Submissions (20 December 2011) at pp 147 – 151.

[note: 20] AEIC of 2nd Defendant (23 August 2011) at [2] – [3].

[note: 21] AEIC of 2nd Defendant (23 August 2011) at [4].

[note: 22] NE, 4 November 2011, at pp 45 – 47 (Cross Examination of 2nd Defendant, Lim Ai Cheng).

[note: 23] NE, 4 November 2011, at p 48 lines 10 – 18 (Cross Examination of 2nd Defendant, Lim Ai Cheng).

[note: 24] NE, 4 November 2011, at p 48 line 19 – p 49 line 25 (Cross Examination of 2nd Defendant, Lim Ai Cheng).

[note: 25] AEIC of Quek Siew Ping (16 September 2011) at [15] – [16], NE, 31 October 2011 at p 23 (Cross Examination of Quek Siew Ping), AEIC of Choong Shu Fong (16 September 2011) at [49].

[note: 26] NE, 4 November 2011, at p 51 line 4 – p 53 line 23 (Cross Examination of 2nd Defendant, Lim Ai Cheng).

[note: 27] NE, 4 November 2011, at p 54 (Cross Examination of 2nd Defendant, Lim Ai Cheng).

[note: 28] NE, 4 November 2011, at p 70 lines 5 – 21 (Re-Examination of 2nd Defendant, Lim Ai Cheng).

[note: 29] NE, 2 November 2011, at p 22 line 12 to p 23 line 8 (Cross-Examination of Sunny Ong).

[note: 30] NE, 4 November 2011, at p 71 lines 1 – 8 (Re-Examination of 2nd Defendant, Lim Ai Cheng).

[note: 31] NE, 4 November 2011, at pp 68 – 70 (Re-Examination of 2nd Defendant, Lim Ai Cheng).

[note: 32] NE, 4 November 2011, at p 69 line 18 (Re-Examination of 2nd Defendant, Lim Ai Cheng).

[note: 33] NE, 8 November 2011, at p 73 line 22 – p 74 line 3 (Cross Examination of 1st Defendant, Yong Kheng Leong).

[note: 34] AEIC of 2nd Defendant (23rd August 2011) at [2].

[note: 35] Plaintiff's Closing Submissions (20 December 2011) at [45].

[note: 36] AEIC of 1st Defendant (15 September 2011) at [59] – [62].

[note: 37] AEIC of 2nd Defendant (23 August 2011) at [7].

[note: 38] NE, 4 November 2011, at pp 60 – 61 (Cross Examination of 2nd Defendant, Lim Ai Cheng).

[note: 39] NE, 8 November 2011, at pp 98 – 99 (Cross Examination of 1st Defendant, Yong Kheng Leong).

[note: 40] AEIC of 1st Defendant (15 September 2011) at [39].

[note: 41] NE, 8 November 2011, at p 101 line 4 – p 103 line 5 (Cross Examination of 1st Defendant, Yong Kheng Leong).

[note: 42] NE, 8 November 2011, at p 100 line 17 – p 101 line 3 (Cross Examination of 1st Defendant, Yong Kheng Leong).

[note: 43] NE, 8 November 2011, at p 103 lines 6 – 20 (Cross Examination of 1st Defendant, Yong Kheng Leong).

[note: 44] Plaintiff's Closing Submissions (20 December 2011) at [58] – [61].

[note: 45] Defendant's Closing Submissions (20 December 2011) at pp 83 – 85.

[note: 46] Plaintiff's Closing Submissions (20 December 2011) at [66].

[note: 47] NE, 9 November 2011, at pp 1 – 15 (Cross Examination of 1st Defendant, Yong Kheng Leong).

[note: 48] NE, 9 November 2011, at p 15 lines 4 – 7 (Cross Examination of 1st Defendant, Yong Kheng Leong).

[note: 49] NE, 9 November 2011, at p 15 lines 8 – 19 (Cross Examination of 1st Defendant, Yong Kheng Leong).

[note: 50] AEIC of Loh Yong Lim (16 September 2011) at [20].

[note: 51] Defendant's Closing Submissions (20 December 2011) at p 79.

[note: 52] Plaintiff's Closing Submissions (20 December 2011) at [35], [37], [51], [73] – [77], [206] – [207].

[note: 53] NE, 8 November 2011, at p 87 line 17 – p 88 line 12 (Cross Examination of 1st Defendant, Yong Kheng Leong).

[note: 54] NE, 8 November 2011, at p 89 lines 8 – 24 (Cross Examination of 1st Defendant, Yong Kheng Leong).

[note: 55] NE, 8 November 2011, at p 76 line 19 – p 81 line 14 (Cross Examination of 1st Defendant, Yong Kheng Leong)

[note: 56] Defendant's Closing Submissions (20 December 2011) at pp 47 – 82.

[note: 57] NE, 28 October 2011, at p 56 lines 5 – 25 (Cross-examination of Choong Shu Fong), AEIC of Quek Siew Ping (16 September 2011) at [20].

[note: 58] AEIC of Loh Sook Min (16 September 2011) at [5] – [7], AEIC of Lim Siew Juat (16 September 2011) at [5] – [6].

[note: 59] NE, 8 November 2011, at p 58 lines 5 – 25 (Cross-examination of 1st Defendant, Yong Kheng Leong).

[note: 60] NE, 31 October 2011, at p 30 lines 7 – 22 (Cross-examination of Quek Siew Ping).

[note: 61] NE, 1 November 2011, at p 74 line 6 – p 75 line 24 (Re-examination of Quek Siew Ping).

[note: 62] Defendant's Closing Submissions (20 December 2011) at p 83.

[note: 63] AEIC of Quek Siew Ping (16 September 2011) at [54].

[note: 64] NE, 27 October 2011, at p 59 line 15 (Cross-examination of Loh Yong Lim).

[note: 65] Defence's Closing Submissions (20 December 2011) at p 147.

[note: 66] Defence & Counterclaim (Am.No.4) (21 December 2011) at [22].

[note: 67] Plaintiff's Closing Submissions (20 December 2011) at [249].

[note: 68] Plaintiff's Closing Submissions (20 December 2011) at [236(a)], [244] – [246].

[note: 69] Plaintiff's Closing Submissions (20 December 2011) at [279] – [283].

[note: 70] Plaintiff's Closing Submissions (20 December 2011) at [284] – [290].

[note: 71] Plaintiff's Closing Submissions (20 December 2011) at [276].

[note: 72] Defendant's Closing Submissions (20 December 2011) at pp 133, 135.

[note: 73] Plaintiff's Closing Submissions (20 December 2011) at [277].

[note: 74] Plaintiff's Closing Submissions (20 December 2011) at [267].

[note: 75] Plaintiff's Closing Submissions (20 December 2011) at [266] – [267].

[note: 76] Plaintiff's Closing Submissions (20 December 2011) at [262].