IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(I) 10

Suit No 4 of 2020

Between

(1) Tamar Perry
(2) Solid Fund Private Foundation

… *Plaintiffs*

And

(1) Bonnet Esculier Servane Michele Thais
(2) Jacques Henri Georges Esculier

… *Defendants*

Counterclaim

Between

(1) Bonnet Esculier Servane Michele Thais
(2) Jacques Henri Georges Esculier

… *Plaintiffs in Counterclaim*

And

(1) Tamar Perry
(2) Solid Fund Private Foundation

… *Defendants in Counterclaim*

JUDGMENT

[Conflict of Laws — Choice of law — Equity]
[Conflict of Laws — Choice of law — Property]
[Trusts — Constructive trusts]
[Trusts — Recipient liability — Proprietary liability]
[Trusts — Resulting Trusts]

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Perry, Tamar and another
v
Esculier, Bonnet Servane Michele Thais and another

[2022] SGHC(I) 10

Singapore International Commercial Court — Suit No 4 of 2020
Simon Thorley IJ
14, 16–18, 21, 22 March, 21, 22 April 2022

15 July 2022 Judgment reserved.

Simon Thorley IJ:

Introduction and background

1 Both the Plaintiffs and Defendants were investors in funds administered by a group of companies trading under various names, each comprising as its principal denominator the word "Lexinta". The activities of each of these companies were directed by a Spanish citizen resident in Switzerland, Bismark Badilla ("Badilla"). Whilst it will be necessary to consider the roles played by a number of these companies individually, where it is not necessary to draw any distinction between the individual Lexinta companies I shall refer to them compendiously as "Lexinta".

2 The Defendants were relatively early investors, their initial investment being made in April 2014. In late 2015, they expressed a desire to realise the reported accumulated assets of their investment and it was agreed that this would

be done in April 2016. Payment was not then forthcoming, but, following demands made on the Defendants' behalf – over a period of months between August 2016 and February 2017 – sums amounting to around US$10 million were credited to the Defendants' bank account with DBS Bank Ltd ("DBS") in Singapore (the "Disputed Monies").

3 Between April 2016 and August 2017, the Plaintiffs, or persons from whom the Plaintiffs claim to derive title, deposited in excess of US$24 million with Lexinta (the "Plaintiffs' Fund") and contend that instead of investing that fund as agreed, Lexinta dissipated it directly to earlier investors including the Defendants as part of a Ponzi scheme.

4 In March 2018, the first Plaintiff, Ms Tamar Perry ("TP"), and another person, Mr Yachel Baker ("YB"), obtained *ex parte* discovery orders from the Hong Kong courts against DBS for the banking records of the Lexinta group claiming to have been victims of a fraudulent Ponzi scheme. This order resulted in TP becoming aware that the Disputed Monies had been transferred into the Defendants' DBS bank account.

5 The Plaintiffs assert that those transfers were the result of back-to-back transfers of some of the Plaintiffs' Fund such that, in law, those sums belong to the Plaintiffs and not the Defendants. Accordingly, in May 2018, TP's lawyers in Hong Kong demanded that DBS transfer the Disputed Monies to her. As a result, at some date thereafter, DBS froze the Defendants' bank account.

6 It was not, however, until March 2019 that the Defendants became aware that the funds in their DBS account had been frozen and that TP had demanded that the sums involved be transferred to her. Discussions between the parties then

ensued which failed to result in agreement as to the ownership of the Disputed Monies.

7 Faced with the conflicting claims, DBS availed itself of the Interpleader proceedings provided for by Order 17 of the Rules of Court (Cap 332, R 5, 2014 Rev Ed).

8 Interpleader proceedings have to be commenced by an Originating Summons and DBS did this in the Singapore High Court on 8 August 2020. This was HC/OS 1016/2019 ("OS 1016") and it named the first Defendant in this suit, Mrs Bonnet Esculier Servane Michele Thais ("BE"), TP and YB as the first, second and third defendants respectively.

9 OS 1016 first came on for hearing before Dedar Singh Gill JC (as he then was) on 10 January 2020. YB renounced any claim to the Disputed Monies and therefore played no further part in the proceedings. Paragraph 2 of Gill JC's order (HC/ORC 1066/2020, the "Order") made pursuant to O 17 r 5(1)(*b*) provided:

> 2. [BE] and the [TP] shall proceed to have their respective claims to the Disputed Monies determined with the [TP] to be the plaintiff in such further proceedings (the "Further Proceedings") and [BE], the defendant. The [YB] shall not be a party to the Further Proceedings.

10 Paragraph 3 of the Order directed that TP should file a Statement of Claim in the Further Proceedings. Orders were made for a cross-undertaking in damages from TP and for security for costs. Paragraph 7 dispensed with DBS's attendance at any further hearings of the Further Proceedings. Finally, paragraph 8 reserved the costs of OS 1016, and paragraph 9 gave all parties liberty to apply.

11 Following certain procedural complications, at a further hearing on 17 March 2020 leave was given for the second Defendant in this suit, Mr Jacques Esculier ("JE"), to be joined as the fourth defendant in OS 1016 and for the second Plaintiff in this suit, Solid Fund Private Foundation ("SFPF"), to be joined as the fifth defendant in OS 1016.

12 The "Further Proceedings" were therefore commenced in the High Court on 19 March 2020 (HC/S 259/2020) naming TP as Plaintiff and BE and JE as Defendants. On 20 March 2020, the Writ of Summons and Statement of Claim were amended to include SFPF as the second Plaintiff.

13 On 9 June 2020, the High Court proceedings were transferred to the Singapore International Commercial Court and the suit was re-designated SIC/S 4/2020.

14 Once the claims in this action are resolved, OS 1016 will be restored under the liberty to apply provision so that DBS can be directed to pay the Disputed Monies to the successful party and any consequential orders can be made.

The Lexinta companies

15 In the Statement of Claim, five Lexinta Companies are identified:

(a) Lexinta AG ("LAG"), a Swiss company formerly registered in Zug but re-registered in Zurich on 15 September 2015;

(b) Lexinta Group Limited ("LGL"), a company registered in Hong Kong;

(c) Lexinta Limited ("LL"), a company registered in Hong Kong;

(d) Lexinta Management Limited ("LML"), a company registered in Hong Kong; and

(e) Lexinta Inc ("L Inc"), a company registered in the Seychelles.

16 Particular attention needs to be paid to LGL as the expression "Lexinta Group" is also used in the contemporaneous documents and by witnesses as well as counsel during the trial to refer to the group of companies as a whole (which, as stated at [1] above, I have designated "Lexinta"). The distinction between the two raises important issues in the case and it is therefore necessary to ensure that confusion between LGL, the Hong Kong company, and Lexinta, the group of companies, is avoided.

The Defendants and their dealings with Lexinta

The Defendants' backgrounds

17 BE is a French national currently living in Switzerland. She qualified as a lawyer in the early 1990s. During her career she worked for the New York international law firm, Coudert Brothers LLP, and was a partner for some eight years acting on mergers and acquisitions. She then became general counsel to the Murex group, a leading global fintech company, where her main focus was on intellectual property. She retired four or five years ago.

18 JE is also a French national currently living in Switzerland. He has enjoyed a successful career in business. Between 2007 and 2020 he was the Chief Executive Officer ("CEO") of WABCO Holdings Inc ("WABCO"), a US company, which is a market leader in advanced technologies for commercial vehicles. In addition, he was Chairman of the Board from 2009 until 2020. WABCO was, until it was taken over in 2020, listed on the New York Stock Exchange.

19 In the late 1990s, the Esculiers were based in Singapore and therefore opened bank accounts with DBS. Three are relevant to these proceedings:

(a) A multicurrency savings account in BE's name;

(b) A foreign currency account in their joint names; and

(c) A foreign currency deposit account in their joint names.

20 In 2014, the Esculiers were both approaching retirement. They considered that they had not been enjoying sufficiently significant financial returns on their savings and decided to pursue more active options to grow them. In consequence, BE was introduced to Badilla in early 2014. Since her husband was fully occupied in his job, the primary dealings were between Badilla and BE.

Assessment of the Defendants' oral evidence

21 Both the Defendants came to Singapore to give evidence in person, having complied with the necessary COVID protocols. Unfortunately, the night before the trial was due to start BE tested positive for COVID and was therefore unable to attend court in person, but was able to join via a video-link from her hotel whilst in isolation. Since it made no sense for JE to give evidence before BE as she was the principal witness and since, entirely understandably, both parties wished that her evidence should be given in person and not by video-link, some adjournments were necessary to make this possible. By the time that she was able to give oral evidence, JE had himself contracted the virus and the parties agreed that he should give his evidence by video-link from his hotel room, which he did.

22 The cross-examination of BE by Mr Chaisty QC ("Mr Chaisty") was lengthy, robust but fair, very detailed and focused closely on the minutiae of the text of various documents which I shall have to consider in more detail below. During the course of this process, BE was courteous, patient, measured and precise. She had a good recollection of events and was clear in rejecting certain propositions put to her by Mr Chaisty. It is not surprising – both due to the nature of the cross-examination and to the fact that she was still recovering from her illness – that on occasions BE became somewhat emotional. Overall, I consider her to have been a good witness and that significant weight should be attached to her evidence.

23 The cross-examination of JE was shorter but of a similar nature. JE came over as a man of presence with a dominant personality. He had a less good recollection of contemporaneous events as he was not involved on a day-to-day basis and therefore relied, to a great extent, on the documents as being a record of those events. He demonstrated a clear, logical and measured business-like approach to the giving of evidence. Overall, he was an impressive witness and weight can therefore be attached to his evidence.

24 In the Plaintiffs' written closing submissions, it is submitted that neither witness "approached the giving of evidence in a simple and straightforward manner which was open and clear and designed to assist the court. Each in their own way gave answers clearly designed to advance their own agenda of ensuring that no concessions were made however reasonable it would have been to do so".[1]

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1 Plaintiffs' Closing Submissions (12 Apr 2022) ("PCS") at para 37(8).

25 As a matter of generality, I have no hesitation in rejecting this submission. I shall deal with specific criticisms of their evidence in the appropriate place.

Introduction to Badilla and Lexinta, and the Defendants' signing of the Asset Management Agreement

26 This matter is dealt with in paragraphs 22–33 of BE's affidavit of evidence-in-chief ("AEIC")[2] and in paragraphs 14–16 of JE's AEIC.[3] It was amplified upon in cross-examination.[4] In early 2014, BE was introduced to Badilla by two acquaintances, Mrs Lindsatom and Mr Benhamoud, both of whom were investors with Lexinta. Both expressed satisfaction with the service they had been given particularly with regard to the care and attention that they had received personally from Badilla. The Esculiers therefore met with Badilla in Spain where he explained his investment strategy. Paragraph 25 of BE's AEIC reads as follows:[5]

> Badilla introduced himself as the principal of the Lexinta Group, which he said specialised in investing in initial public offerings ("IPOs") of listed securities. He presented himself as well-connected with financial institutions that gave him access to opportunities like IPOs, notably in Asia, a region that we were interested in due to its significant growth potential. Badilla said that the Lexinta Group operated out of Switzerland and Hong Kong, and that he had longstanding clients who had confidence in him as he was committed to them and would never let them down. I was reassured by the fact that Lexinta AG, which appeared to be the flagship company of the Lexinta Group, was based in Switzerland where we had our home and our roots; it is also a reputable regulated financial centre. I also checked the website of the Lexinta Group (http://www.lexinta.ch) and felt assured by the information I found there on the Lexinta Group.

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2 Defendants' Bundle of Witness Statements (22 Feb 2022) ("DBWS") at pp 150–153.

3 DBWS at p 199.

4 Transcript (21 Mar 2022) at p 10 line 9 to p 37 line 17.

5 DBWS at p 151.

[footnote explaining the inaccessibility of the website omitted]

27 The Lexinta initial public offering ("IPO") strategy, as explained both to the Esculiers[6] and to TP, involved Badilla taking advantage of his contacts with financial institutions who had confidence in him so that he could support those institutions by undertaking to invest in "IPOs" at the outset. He did this when he considered that there would be an initial demand for the stock in question so that the price would rise immediately after launch. Lexinta would take advantage of this early rise by selling the holding in the open market for a profit.

28 As a result of viewing the webpage, BE understood that Lexinta (referred to by her as the Lexinta Group) was regulated by the Swiss Financial Market Supervisory Authority ("FINMA"). Badilla also supplied her with peripherals which described the services offered by Lexinta as well as a pricing strategy so that they could familiarise themselves with Lexinta and the nature of its business.[7] Badilla then supplied BE with a draft Asset Management Agreement which she considered and proposed certain amendments.[8]

29 Following further discussions between BE and Badilla, the final Asset Management Agreement (the "Esculier AMA") was signed between the parties on 15 April 2014.[9] Since a good deal turns on the form of this agreement a copy is attached as Annex 1 to this Judgment. As will be seen, it is headed "Lexinta Group" but then goes on to define Lexinta Group as "Lexinta Ltd, Lexinta Management Ltd and Lexinta Inc" when identifying the Asset Manager. Express mention is therefore made of LL, LML and L Inc but not of LAG or LGL (see

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6 Transcript (21 Mar 2022) at p 14 lines 2–10.

7 Defendants' Bundle of Documents (8 Nov 2021) ("DBOD") (Vol 1), Tabs 2–4.

8 DBOD (Vol 1), Tab 5.

9 DBOD (Vol 1), Tab 10.

[15] above). On the signature page, however, following Badilla's signature on behalf of the "Asset Manager-Trader",[10] is the corporate stamp of LAG.

30 In relation to the identification of the various companies in Lexinta referred to in the Esculier AMA, BE said this in paragraph 33 of her AEIC:[11]

> At the time we entered into the Asset Management Agreement, Jacques and I believed that we were entering into a relationship with Badilla as the person managing our investments and the "Lexinta" name. We took Lexinta AG to be headquarters of the Lexinta Group and did not specifically inquire into how many other companies or entities Badilla operated as part of the Lexinta Group for the purposes of carrying out his asset management activities. Nor did we pay specific attention to the precise names of the other "Lexinta" entities through which Badilla or the Lexinta Group operated. We believed that the Asset Management Agreement (which listed a number of such companies and entities) covered or would cover all relevant entities.

31 BE was cross-examined on this paragraph[12] on the basis that, as a lawyer, she would have focussed on the precise companies identified as being the parties to the agreement and, thus, would have been alert to the fact that LAG was not a party and, further, that any other company within Lexinta – of which the Esculiers subsequently became aware – would likewise not be a party to the agreement. When asked whether she took a "relaxed" position as to which of the Lexinta companies she and JE thought were their counterparties under the Esculier AMA, BE answered:[13]

> I'm trying to say, maybe I didn't express clearly, that I thought I was dealing with the group, Lexinta Group represent -- you know, represented by the parent or the holding which was the

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10 DBOD (Vol 1) at p 59.

11 DBWS at p 153.

12 Transcript (21 Mar 2022) at p 27 line 24 to p 30 line 24, p 44 line 13 to p 15 line 23, p 48 line 14 to p 49 line 19, and p 54 line 17 to p 59 line 3.

13 Transcript (21 Mar 2022) at p 30 lines 13–19.

> Swiss company. And it -- it made sense because it had the headquarters in Switzerland, so it made sense. I didn't go further. If it's you're asking me, I didn't go further.

32 I accept this evidence. It was not suggested to BE that Badilla drew her attention to the activities which were to be undertaken by each individual Lexinta company, nor that there were other companies in the Lexinta group that had not been identified but which might be involved in the overall management of the Esculiers' affairs. More specifically, there was no suggestion – nor any reason to believe – that BE's attention had been drawn, at any time before the Esculiers asked to have the proceeds of their investment returned to them, to the fact that, although each page of the agreement carried the heading in bold capitals "LEXINTA GROUP", there was a company within Lexinta called "Lexinta Group Limited" (*ie*, LGL) which was not a party to the Esculier AMA.

33 Section 8 of the Esculier AMA records that:[14]

> The ASSETS are deposited in an ACCOUNT at the BANK in the name of the CLIENT. The ownership of the ASSETS fully remains with the CLIENT, and the ASSET MANAGER is only providing SERVICES as provided in this AGREEMENT. …

The term "BANK" is defined in Section 4 as "the bank where the ASSETS are or may be held", over which the "ASSET MANAGER" is authorised "[g]ive all necessary or useful instructions".[15] Taken literally, this would appear to suggest that there would be a bank account opened at a third-party bank, such as the Hang Seng Bank (see [37] below), and that sums would be withdrawn from that account for investment purposes. It also follows that any proceeds earned would then be deposited back into that account. BE however gave evidence that this

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14 DBOD (Vol 1) at p 57.

15 DBOD (Vol 1) at p 56.

was not the parties' understanding. When cross-examined on Section 8,[16] BE said this:[17]

> Mr Chaisty: Section 8 says [the section as reproduced above is read out]. Did you regard that section as a matter of importance to you, those words at the beginning of section 8?
>
> BE: Yes, this, and we -- we discussed -- I asked Benhamoud about this, how -- how it would be, you know, done, and he explained to me that, about the transfer, he would create a sub-account or sub-accounts in our names. And actually when I was receiving -- I was receiving from him, at my request three times, I think, information, I would receive portfolio valuation, trading reports and trades, and I think it's on the portfolio valuation, each time I would see the main account and then the sub-account. And eventually, we had three sub-accounts, so we had three sub-account number.
>
> Mr Chaisty: But --
>
> BE: And it took -- yeah, and he explained to me that at the time.
>
> Mr Chaisty: We'll look at those documents. What you mean is you saw some numbers. You saw some numbers that were said to represent an account. That's what you're talking about, isn't it? We'll look at them in due course. There are about 10 or 15 digits out there that --
>
> BE: I saw a number -- no, it's not exactly that.
>
> Mr Chaisty: Well --
>
> BE: When I asked him we had to -- excuse me, sir.
>
> Mr Chaisty: I was going to let's leave that for a moment because we'll come to the detail on it.
>
> BE: Yes, I just want to say that he explained to me how it would work, that's what I want to say before I signed the contract.
>
> Mr Chaisty: Sure, but that's not what section 8 says, is it? When you read section 8, before he's talked about sub-accounts, was it not your understanding that it was going to be more straightforward than that, that the assets would be deposited in an account at the bank which was in your name?
>
> BE: No, no, I understand what you said, because I was -- I had question there. I asked him if it was going to be me opening a

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16 Transcript (21 Mar 2022) at p 33 line 1 to p 39 line 17.

17 Transcript (21 Mar 2022) at p 33 line 1 to p 35 line 1.

> specific account, I asked him that, and he said "no". Because, he said, for IPOs, he needed to have access to -- quickly to the sub-account because there would be many transactions, so it would be impossible for him each time to -- to call me, to contact me to be able to access to the funds. So it's why it would need to be those sub-accounts where he could have access. So this he explained at the time.

34 BE thus understood that their investments were not to be ring-fenced in the sense of being held in a separate bank account but that they would be held in a Lexinta bank account with Lexinta itself creating individual sub-accounts for each client being, in effect, a record of each transaction effected on that client's behalf.

35 Section 9 of the Esculier AMA[18] provides that the agreement is valid for 12 months but neither party suggested that it was not extended by consent after the end of the first year until terminated by the Esculiers as of December 2015 (see [47] below). Section 10 contains the cancellation provisions and Section 11 designates Swiss law as the proper law of the agreement.[19]

The investments

36 BE had been provided on 11 April 2014 with the necessary details for transferring money to Lexinta as follows:[20]

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18 DBOD (Vol 1) at p 57.

19 DBOD (Vol 1) at p 57.

20 DBOD (Vol 1) at p 53.

LEXINTA GROUP

Bahnhofstrasse 23
CH-6300 Zug, Switzerland

PHONE +41 41 544 8324
FAX +41 41 544 8861

EMAIL info@lexintagroup.com
WEB lexinta.net

WIRE TRANSFER INSTRUCTIONS

Transfer Funds To:	Hang Seng Bank Ltd
Bank Address:	Jonsim Place 228 Queen's Road East Wanchai, Hong Kong
Account Number:	390431633883
For Credit To:	Lexinta Ltd
SWIFT Code:	HASE HKHH
Bank Code:	024

37 It will be seen that this document contains the same heading, address and contact details as was on the Esculier AMA (compare Annex 1 below) with LL being identified as the account holder at Hang Seng Bank in Hong Kong. BE then gave instructions to Credit Suisse in Switzerland to transfer US$1,000,000 from hers and JE's joint account to Hang Seng Bank to be invested in IPO securities.[21] This was done on 16 April 2014. The transfer was acknowledged by a letter dated 8 May 2014 which forms Annex 2 to this Judgment.[22] As can be seen from the letter, notwithstanding the fact that the payment had been made to LL, the subject title reads "Lexinta Group Ltd – 1 million USD transfer acc Bonnet Esculier". It confirms that the transfer is "in accordance with our agreement", is signed by Badilla and LAG's name and address are in the letter's footer, not that of LL.

38 BE gave evidence in relation to this receipt in her AEIC, where she stated that whilst she could not recall whether she noticed at the time the reference to LGL, had she done so she would have simply treated it "as another one of the

21 DBOD (Vol 1), Tab 9.

22 DBOD (Vol 1), Tab 17.

"Lexinta" named entities used by Badilla/the Lexinta Group in its dealings with us".[23] Again, for the reasons already given, I accept this evidence.

39 A further investment of €2,000,000 from the Credit Suisse account was made to the LL account at Hang Seng Bank on 4 June 2014 and was acknowledged with a letter in similar form on 1 July 2014.[24] On this occasion, the heading read "Lexinta Group Ltd - 2 Million EURO transfer acc 1738-697553 Bonnet Esculier". Again, this was to be invested in IPO securities.

40 On 9 February 2015, BE ordered a transfer of €1,000,000 from her DBS account in Singapore to LL's Hang Seng account.[25] The acknowledgment letter dated 2 March 2015 was again in similar form but the heading read "Lexinta Group Ltd – 1 Million EURO transfer acc 1738-379855 Bonnet Esculier".[26] This was also to be invested in IPO securities.

41 The final investment was made on 26 February 2015 when BE transferred €1,000,000 from her DBS account in Singapore to LL's Hang Seng account.[27] This investment was to be invested in the "Lexinta Single Opportunity Fund". The acknowledgment letter dated 2 March 2015 was in similar form and the heading again read "Lexinta Group Ltd – 1 Million EURO transfer acc 1738-379855 Bonnet Esculier".[28]

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23 DBWS at p 156.

24 DBOD (Vol 1), Tabs 20 and 39.

25 DBOD (Vol 2), Tab 122.

26 DBOD (Vol 2), Tab 118.

27 DBOD (Vol 2), Tab 132.

28 DBOD (Vol 2), Tab 136.

42 The Lexinta Single Opportunity Fund was, according to a press release on a website TraderL.com,[29] launched on 25 January 2015 and was designed to capitalise on the volatility in oil stocks.

The Esculiers' knowledge of Lexinta's trading activity

43 BE provides details of the manner in which their investments were managed by Lexinta in paragraphs 50–55 of her AEIC, which I reproduce below, without the footnote references to the individual documents:[30]

> 50. Over the course of our professional relationship with Badilla / the Lexinta Group, Badilla regularly sent us numerous emails informing us about IPO opportunities, often accompanied by reports from financial analysts, Bloomberg printouts (indicating share price or exchange rate movements), and spreadsheet compilations of impending IPOs. Through these email exchanges, Badilla also updated us on the Lexinta Group's business development plans and the securities which would be subscribed for our account.
>
> 51. Badilla would also meet with us to explain why, in his analysis, certain IPOs were good opportunities to invest in and others, too risky and hence to be avoided. Badilla would make the final decisions on all investments.
>
> 52. As regards Badilla's updates to us on the Lexinta Group's expansion plans, I highlight the following:
>
> > (a) An email dated 10 August 2014 stating that the Lexinta Group had acquired "Eternitrade AG", which according to the email was an independent Swiss asset management company with an online trading platform that supported securities trading in over 80 markets internationally.
> >
> > (b) A Bloomberg article dated 22 August 2014 (i) stating that the Lexinta Group had opened a fund to outside investors which was targeting to raise $250 million by the end of the year; and (ii) quoting Badilla as saying that there had already been a firm commitment of $100 million worth of assets under management (The Bloomberg article dated 22 August 2014 is enclosed

29 DBOD (Vol 2), Tab 116.

30 DBWS at pp 159–164.

within the brochure advertising the "Lexinta Single Opportunity Fund", which Badilla had given to me).

(c) An email dated 12 February 2015 attaching an extract from a commercial register maintained by the Liechtenstein Ministry of Justice, showing that the Lexinta Single Opportunity Fund had been established in Liechtenstein and was being administered by "Valartis Fund Management (Liechtenstein) AG".

(d) An email dated 14 August 2015 attaching an analysis entitled "Lexinta Research Monthly Energy Market Review", on the state of the energy market and the Lexinta Group's investment strategy.

These various updates given by Badilla gave us assurance and confidence that the Lexinta Group was going from strength to strength. The Lexinta Group's positive performance and our growing trust in Badilla led us to gradually increase our investments with Badilla / the Lexinta Group.

53. We also received from Badilla:

(a) periodic Bloomberg trading terminal printouts of trades which reflected the trades that had been carried out on our behalf (ESCULIER / BERVANE BONNET) by Lexinta AG, dated 17 April 2014, 23 April 2014, 12 June 2014, 13 June 2014, 18 July 2014, 25 July 2014, 31 July 2014, 5 August 2014, 25 January 2015, 26 January 2015, 6 February 2015, 11 February 2015, 25 February 2015, 1 April 2015, 16 April 2015, 24 April 2015, 7 May 2015, 15 May 2015, 20 May 2015, 21 May 2015, 3 June 2015, 18 June 2015, 16 July 2015, 17 July 2015, 22 July 2015, 8 October 2015, 16 October 2015, 22 October 2015, 3 November 2015, 4 November 2015, 10 November 2015, 19 November 2015, 16 December 2015, 2 February 2016, 17 February 2016, 30 March 2016, and 15 April 2016; and

(b) periodic portfolio valuations and trading reports showing the growth in our investments, dated 30 September 2014, 1 January 2015, 15 February 2015, 1 March 2015, 13 May 2015, 1 August 2015, 1 December 2015, 31 December 2015 and for the periods April 2014 to April 2015, January to July 2015, and March to April 2016.

54. These reports assured Jacques and me that the IPOs invested on our behalf were making good gains and assured us that Badilla was able to astutely invest our funds, thereby reaping positive returns.

> 55. The portfolio valuations that Badilla provided to us showed that by 31 December 2015:
>
> (a) the USD 1 million we had invested on 16 April 2014 and EUR 2 million we had invested on 4 June 2014 in the Joint Trading Account had grown in value to USD 8,068,333.00;
>
> (b) the EUR 1 million we had invested on 9 February 2015 in my Trading Account had increased in value to EUR 1,578,514.00; and
>
> (c) the EUR 1 million we had invested on 26 February 2015 in my Fund Account had increased in value to USD 1,300,125.00.

44 In cross-examination, BE gave evidence that she met with Badilla every couple of weeks or so when he would give her the receipts for the trades that had been carried out.[31] She also amplified on the information that was provided to her prior to making the investment in the Single Opportunity Fund.[32] There was no specific challenge to the accuracy of the trading receipts in the sense that publicly available documents would demonstrate that, on the dates in question, the market in a given share did not move as indicated in the trading receipts. The trading reports referred to in paragraph 52 of BE's AEIC (as reproduced above) are thus consistent with a thriving business.

45 I therefore accept BE's evidence at paragraph 54 of her AEIC[33] that she and her husband were satisfied that Badilla was able "to astutely invest our funds, thereby reaping positive returns".

46 It should be noted that it was not suggested in this case that, whilst they were investors in Lexinta, the Esculiers knew or had any reason to suspect that

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31 Transcript (21 Mar 2022) at p 43 line 3 to 44 line 12 and p 56 lines 5–7.

32 Transcript (21 Mar 2022) at p 56 line 8 to p 59 line 3.

33 DBWS at p 163.

Badilla was operating anything other than a wholly legitimate and successful business. Such an allegation was made in the Hong Kong proceedings which led to OS 1016 and this suit as is explained in paragraphs 139–146 of BE's AEIC.[34] It was withdrawn following evidence filed by BE on OS 1016.

Withdrawal of the Esculiers' investments

47 In the autumn of 2015, it was anticipated by the Esculiers that WABCO would be sold and JE was planning to stop work. So they decided that the time was right to invest their funds more conservatively and to terminate the Esculier AMA. It bears noting that the sale ultimately fell through at the last moment and JE continued work as the CEO of WABCO. However, before then, the Esculiers had already given Badilla notice that they intended to terminate the Esculier AMA at the end of December 2015,[35] but subsequently agreed with Badilla that termination would occur at the end of the second year of investment, April 2016.

48 The portfolio valuations are those referred to in paragraph 53(b) of BE's AEIC (see [43] above). The last of these valuations, as at 31 December 2015, were as follows:[36]

(a) As regards the IPO investments made in respect of BE and JE jointly ("Joint IPO Investments"), US$8,068,333;

(b) As regards the IPO investments made in respect only of BE, €1,578,514 ("BE's IPO Investments"); and

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34 DBWS at pp 189–192.

35 DBWS at pp 164–165, paras 56–57 (SE's AEIC).

36 DBOD (Vol 3) at pp 84, 82 and 86 respectively.

(c) As regards BE's investment in the Lexinta Single Opportunity Fund ("BE's Single Opportunity Fund Investment"), US$1,300,125.

However, these sums did not take into account commission due to Lexinta.

49 The Esculiers experienced difficulties in obtaining repayment of their funds, the details of which I shall have to consider below. For present purposes, it is sufficient to record that they were repaid in three tranches:

(a) In respect of the Joint IPO Investments, US$7,439,004.77 on 5 August 2016;[37]

(b) In respect of BE's IPO Investments, US$1,499,488 on 12 September 2016 and €164,841.26 on 28 September 2016 (the first payment was paid in US dollars rather than in Euros and the second represented the shortfall);[38] and

(c) In respect of BE's Single Opportunity Fund Investment, US$1,302,250.92 on 1 February 2017 (this sum included US$2,125.94 owing to a miscalculation of the prior payments above).[39]

50 These sums were, however, not paid out of LL's account at Hang Seng Bank, but from LGL's account at DBS in Hong Kong. They were credited to BE's DBS account in Singapore and were subsequently placed on a time deposit maturing on 31 August 2017 which was then rolled over until the account was frozen by DBS in March 2019.[40]

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37 DBWS at p 174, para 83(b) (BE's AEIC).

38 DBWS at pp 177–178, paras 92–95 (BE's AEIC).

39 DBWS at pp 178–180, paras 96–107 (BE's AEIC).

40 DBWS at pp 181–183, paras 108–114 (BE's AEIC).

The Plaintiffs and their dealings with Lexinta

The first Plaintiff's background and the Plaintiffs' witnesses

51 TP is a dual citizen, holding both Israeli and Polish passports. She is resident in both London and Tel Aviv. She is a qualified, non-practicing, lawyer who is a businesswoman focusing on the real estate and technology sectors and a private investor. She is the sole shareholder and director of an Israeli company, Solid Real Estate and Development (1993) Limited ("SRE").

52 Evidence was given on behalf of the Plaintiffs both by TP and by Marc Van Campen ("Van Campen"), a Dutch citizen, who is a partner in the law firm Van Campen Liem which acts for SFPF, the second Plaintiff, a company registered in Curacao. Van Campen has been involved in the affairs of TP's family since 2006. He gave evidence directed to the relationship between SFPF and British Guarantee National Investment Company ("BGNIC"), an investment vehicle of TP's family.

Assessment of the first Plaintiff's oral evidence

53 TP was cross-examined on her written evidence by Ms Aurill Kam ("Ms Kam"). In the Defendants' written closing submissions, criticism was made of the manner in which TP gave her evidence saying that she was "an uncooperative witness, refusing to answer simple questions which went to the heart of her case when she sensed that she was on dangerous territory".[41] I consider this an over-exaggeration. In most respects I consider that TP was seeking to assist the Court so far as she was able. However, she has been involved in this and other litigation in relation to the investments made by her and her family's investment vehicles for a number of years, and her recollection of events was not wholly clear. In

[41] Defendant's Closing Submissions (12 Apr 2022) ("DCS") at para 42.

these circumstances, the contemporaneous documents provide the best record of events and I accept that where there are no contemporaneous documents, the Court should proceed with caution when assessing the weight to be attached to her evidence. I shall deal with specific areas of criticism as they arise.

Introduction to and agreements with Badilla and Lexinta

54 The manner in which TP came to be involved with Badilla and Lexinta is explained by TP in paragraphs 7–29 of her AEIC. It is convenient to set this passage out in full:[42]

> 7. This case concerns a business or supposed business sometimes trading as "Lexinta Group". Lexinta Group purportedly operated as an asset investment and management business from Switzerland and Hong Kong. When I refer to "Lexinta" below I refer to the business trading as Lexinta Group, as it was represented to me.
>
> 8. Bismark Antonio Badilla Rivera ("Badilla") presented himself as the President and Founder of Lexinta Group and as principal or sole owner of that business. To the best of my knowledge Badilla is a Spanish national who was resident in Switzerland at the times material to this suit and is currently awaiting trial in Switzerland on fraud charges relating to Lexinta Group. Badilla was my main contact with Lexinta.
>
> 9. I first became aware of Lexinta through a friend of mine, Mr. Gil Neuhaus ("Mr. Neuhaus"), who is a jeweller based in Marbella and Israel. In or around early March 2016 Mr. Neuhaus and I were discussing investment opportunities. He mentioned that he had invested with Lexinta Group and that he had been very pleased with the investment's performance. He suggested that I meet Badilla, who Mr Neuhaus understood to be Lexinta's principal and who was in Israel at the time.
>
> 10. I agreed to meet Badilla and Mr. Neuhaus introduced us via "WhatsApp" and arranged for us to meet. Badilla came to my office in Israel in or around the end of March 2016. At this meeting Badilla explained to me that:

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42 Plaintiffs' Bundle of AEICs (22 Feb 2022) ("PBAEIC") (Vol 1) at pp 7–14.

a. Lexinta was an asset management business which he ran and controlled and which had offices in Switzerland and Hong Kong;

b. He was in a position to obtain allocations of pre-listing shares for Initial Public Offerings (IPOs) for Lexinta's clients through his contacts in the industry;

c. Lexinta would purchase these shares on its clients' behalf and sell them almost immediately following the IPO launch (i.e. within approximately twenty minutes of the stock being first listed on the relevant exchange). The process would then be repeated with subsequent IPOs (the "IPO Program").

d. Each purchase and sale of IPO shares was likely to produce a substantial profit, so that over a year a very substantial return was likely to be earned on funds invested via Lexinta.

11. At this meeting Badilla produced promotional material appearing to support his claims by reference to Lexinta's alleged performance over previous years.

12. I was impressed by Badilla's presentation. My advisors, Professor Omri Yadlin and Israel Wolnerman, also participated in the meeting and they confirmed to me that, as Badilla had claimed, past experience suggested that stock performance on the first day of an IPO is on average positive, and therefore investment in pre-IPO share allocations, if such allocation can be secured, would be a good investment strategy.

13. Therefore, on the basis of my meeting with Badilla, I decided on 16th April 2016 to make an initial limited investment of USD1,000,000 in the IPO Program, to see how it went.

14. In my dealings with Badilla up to this point I had understood that his business traded as "Lexinta Group" and had offices in Switzerland and Hong Kong. When, in an email of 16th April 2016 (copied to me), Mr. Wolnerman asked Badilla how his business worked, he replied in an email dated 17th April 2016 as follows:

"*For the IPO subscription Lexinta Group is the entity making the subscription on behalf of our clients. We are the financial intermediary between the Under Writer, book runners or trader of the IPO subscription, the sale of the transaction is individual. Lexinta Group at all times and amongst all the Trades remain the financial intermediary on the transaction. Your client in this case will have an account with our company, and we (on your behalf) will*

> *have accounts open at all the Banks and traders that provide the access to the trade.*
>
> *... I suggested a 3 months contract in order for you and your associates to become aquatinted to the trade and transaction, if there would be anything that you do not agree or not like about the trade, you are free to stop the contract at any time.*"

15. Beyond this, I did not know anything specific about Lexinta Group's internal structure, or the legal entities involved.

16. I understood from Badilla that Lexinta would invest my money in his IPO program, which would be held in a separate client (sub-)account in my name (initially in SRE's name) with the respective banks and used to purchase shares for me in a series of IPOs for which Lexinta had secured, or would secure, a pre-IPO allocation. I expected Lexinta to sell the shares bought for me immediately after the IPO listing and then to hold the proceeds of sale for me in the same separate client (sub-)account in my name (or initially in SRE's or my name).

17. From April 2016 onwards Badilla or Lexinta provided me with a high volume of informal updates through WhatsApp and email (including calculations and screenshots of Bloomberg data for the IPO stock)6 and occasional formal "portfolio valuation statements", indicating that assets which I believed were held for me by the Asset Manager in segregated personal sub-accounts were generating substantial profits.

18. At Badilla's request, the funds transferred to Lexinta by me and on my behalf referred to below were on each occasion transferred to a single account bank account, no. 30011925288, held by LGL with DBS Bank Ltd, Hong Kong Branch ("the LGL Account").

19. Badilla presented to me shortly after my first investment that the invested sums were used to purchase and sell stock in three companies at a substantial profit, in accordance with what I understood to be the IPO Program:

> a. on or around 20 April 2016 MGM Growth Properties LLC (stock code MGP:US);
>
> b. on 21 April 2016 American Renal Associates Holdings Inc (stock code ARA:US);
>
> c. on or about 22 April 2016 Secureworks Corp. (stock code SCWX:US).

20. A few days before the launch of each IPO in which my assets were to be "invested", Badilla would send me brief details of the supposed trade. For example, Badilla sent me details of

the MGM Growth Properties IPO by email on 16th April 2016, an IPO in respect of Samsung Biologics in South Korea by email on 29th September 2016, and an IPO for Kyushu Railway Company by email on 6th October 2016.

21. Although, in his supposed role as Asset Manager for me (acting through Lexinta), Badilla would select the IPOs in which to "invest" on my behalf, he gave me to understand that, had I objected to participating in a particular IPO, then Lexinta would not have booked any part of it to my account; but I never objected.

22. Badilla would often send me, via WhatsApp, what appeared to be 'real-time' updates on the IPOs, including screenshots of Bloomberg data showing the date of the IPO and where it was taking place. After the launch of the IPO I would receive a further update from Badilla on the gain from the IPO, often including the sale price of the IPO shares and/or a screen shot of the Bloomberg entry for the IPO stock showing the IPO placement price and the movement in the stock price for that company.

23. I and my advisor, Mr Wolnerman, would review these reports from time to time, and the reports from Badilla always matched the publicly available online information regarding changes in share price following the relevant IPOs.

24. This stream of information from Badilla made me feel engaged and involved with his supposed investments on my behalf, and of course supported the idea that he and Lexinta Group were wholly genuine and expert in the field of IPO investment.

25. I regularly visit Zurich for business purposes, and on one trip I visited Lexinta's offices at Talstrasse 61, 8001 Zurich (where it carried on business before its subsequent re-registration as a Zurich company domiciled at that address). On my visit, I found the offices to be (as I had expected) well-presented and I saw numerous members of staff in the office. Everything I saw on this visit supported my belief that Lexinta offered a legitimate investment opportunity and was a respectable and trustworthy investment management firm (which publicly at the time, was indeed its reputation).

26. By July 2016 I was convinced that Badilla and Lexinta were trustworthy and able to deliver on their promises.

27. At this point (June/July 2016) I also introduced Britannia Guarantee National Insurance Company Limited ("BGNIC") to Lexinta and asked Badilla to become trustee of a family trust, the Catolac Family Trust (the "Trust").

> 28. As I said above, I had stayed in regular contact with Badilla since our initial meeting. Our later conversations had originally been mostly in relation to his purported investments on my behalf, but I later explained to him some of the complex and difficult circumstances in which I was then involved (and continue to be involved) following my father's death and the subsequent disputes that had arisen between me and parties which included Mr Dieter Neupert.
>
> 29. Badilla presented himself as being very wealthy in his own right and very astute in financial matters. I quickly came to regard him as a good friend and by the summer of 2016 I had begun a personal relationship with him. Badilla is a very persuasive and charismatic individual who finds it easy to win (and to abuse) the trust of others. In short he is a classic con-man and he conned me financially and in our personal relationship.
>
> [footnotes omitted]

55 As with BE, it can be seen that TP exercised due diligence before investing in Lexinta and was given equivalent information in early 2016 to that which was given to BE in early 2014.

56 When TP first decided to invest through Lexinta, she signed an Asset Management Agreement between SRE and "Lexinta Group" dated 18 April 2016 (the "SRE AMA").[43] This forms Annex 3 to this judgment. As can be seen, it is in similar form to the Esculier AMA with the "Lexinta Group" defined as including LL, LML and L Inc, but not LGL or LAG. In Section 9, the SRE AMA is expressed to be valid for 90 days rather than a full year in the case of the Esculier AMA. BGNIC also entered a similar AMA on 7 July 2016 (the "BGNIC AMA").[44]

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43 Agreed Bundle of Documents (Agreed on Authenticity) ("ABOD") (14 Feb 2022) (Vol 1), S/No 8.

44 PBAEIC (Vol 3) at pp 164–171 (Van Campen's AEIC).

57 TP did subsequently enter a further AMA with Lexinta, but this was not until 30 June 2017, which was after the events which gave rise to this action and both parties agreed that it was of no relevance. The only extant agreements were the SRE AMA and the BGNIC AMA referred to above.

58 As appears from paragraph 13 of TP's AEIC, she states that she made an initial investment of US$1,000,000 in the IPO program in April 2016, transferring the funds not to LL at the Hang Seng Bank, as had been the case with the Esculiers, but to the account held by LGL with DBS in Hong Kong.[45] It is this distinction that underlies the basis of the Plaintiffs' claim in this suit.

59 In paragraph 42 of her AEIC, TP then states that the following sums were transferred by her or for her benefit to the LGL account:[46]

> The personal investments I made with Lexinta to which I have referred in this Affidavit (made on each occasion by transfer to the LGL Account for my benefit) were to the value of just over USD7,000,000 made up as follows:
>
> | | | |
> |---|---|---|
> | a. | 19th April 2016 | USD1,000,000 |
> | b. | 12th May 2016 | USD1,000,000 |
> | c. | 7th July 2016 | USD900,000 |
> | d. | 6th September 2016 | USD3,620,750 |
> | e. | 23rd August 2017 | USD500,000 |
> | Total | | USD7,020,750 |

60 The date of 6 September 2016 for the transfer of US$3,620,750 appears to be incorrect and should read 9 September 2016.[47] Paragraph 34 of TP's AEIC

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45 PBAEIC (Vol 1) at p 11, para 18.

46 PBAEIC (Vol 1) at pp 18–19.

47 PBAEIC (Vol 1) at p 51 (TP's AEIC): US$3,620,750 comprises the transfers for US$700,000, US$122,000, US$895,000 and US$1,903,150.

indicates that these sums in this transfer were remitted by JL Securities ("JL") "for [her] personal benefit and for the credit of my personal account … with Lexinta".[48] It is this particular transfer that forms the basis of TP's claim in this action (the "JL Transfer"). There is a dispute between the parties as to whether these sums were remitted for her personal benefit and, hence, whether she had standing to act as a plaintiff in this regard. This is an issue which I shall return to at [186] below.

61 In paragraphs 7, 8 and 10 of his AEIC, Van Campen states that BGNIC remitted the following sums to the LGL account:[49]

(a) 11 July 2016: US$3 million;

(b) 5 August 2016: US$7 million; and

(c) 1 February 2017: US$8 million.

62 Van Campen goes on in paragraphs 13–21 of his AEIC[50] to explain his understanding that certain assets of BGNIC, including its right and interest in the sums transferred to the LGL account referred to above, were acquired by SFPF by virtue of a sale and purchase agreement dated 25 September 2017 (the "BGNIC SPA").[51] Whilst a number of uncertainties surrounding this transaction were raised during the cross-examination of Van Campen, the Defendants do not dispute[52] that the BGNIC SPA was executed and that, subsequently, on 17 November 2017, the sum of US$23,207,566 was paid by SFPF to BGNIC. This

48 PBAEIC (Vol 1) at p 15.

49 PBAEIC (Vol 3) at pp 117–118.

50 PBAEIC (Vol 3) at pp 119–122.

51 PBAEIC (Vol 3) at pp 177–182 (Van Campen's AEIC).

52 DCS para 127.

was the sum referred to in clause 2.1 of the BGNIC SPA.[53] There is thus no need to consider this transaction any further.

63 During her oral evidence TP laid great emphasis on the fact that all the above sums were transferred to LGL and was careful to use the expression "Lexinta Group Limited"[54] as is illustrated from the following extract :[55]

> Ms Kam: When you were dealing with Badilla and Lexinta, would it be correct to say that as far as you were concerned, you were dealing with him and the group and not any specific entity under the Lexinta Group?
>
> TP: I dealt with this LGL. That's the company that I know, Lexinta Group Ltd. I know Mr Badilla, and I know the Lexinta Group Ltd. That's the – that's the person and the entity that I dealt with.
>
> Ms Kam: Are you saying you dealt specifically with Lexinta Group Ltd or that you dealt with the Lexinta Group as a whole?
>
> TP: I dealt with Lexinta Group Ltd.
>
> Ms Kam: Lexinta Group Ltd is a company in Hong Kong, is that correct?
>
> TP: It's a company that -- that has a bank account in Hong Kong, yes.
>
> Ms Kam: So when you say you dealt with Lexinta Group Ltd, who did you think you were dealing with? A Zurich entity or a Hong Kong entity?
>
> TP: I -- Lexinta -- Lexinta Group. What I know about Lexinta Group Ltd is that it has an office in Switzerland and in Hong Kong.
>
> …
>
> Ms Kam: Just one other point. In the same bundle at page 9, volume 1,[56] starting with paragraph 14, you say: "In my dealings with Badilla up to this point I had understood that his business

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53 PBAEIC (Vol 3) at pp 184–185 and 187 (Van Campen's AEIC).

54 Transcript (14 Mar 2022) at p 132 line 21 to p 136 line 24.

55 Transcript (14 Mar 2022) at p 132 line 21 to p 133 line 17 and p 136 lines 4–24.

56 Here, Ms Kam is referring to PBAEIC (Vol 1) at p 9, para 14 (TP's AEIC).

> traded as 'Lexinta Group' and had offices in Switzerland and Hong Kong." Yes?
>
> TP: Yes.
>
> Ms Kam: Over the page, at page 10, at paragraph 15, you say: "Beyond this, I didn't know anything specific about Lexinta Group's internal structure, or the legal entities involved."
>
> TP: Yes, I just know Lexinta Group Ltd, that's all.
>
> Ms Kam: Yes. Well, you know Lexinta Group based on paragraph 14, yes? Not Lexinta Group Ltd, a specific entity?
>
> TP: You are trying to put it to me like that, but I'm saying that I dealt with Lexinta Group Ltd. That's in all the documents, that's where I transferred the money, and that's where I got my money. So, sorry, that's my answer.
>
> Ms Kam: Your Honour, I'll leave it to submissions.
>
> [footnote added for cross-referencing]

64 As indicated by Ms Kam, the emphatic reference to LGL was not made in TP's AEIC, where she was content to refer to Lexinta, which she defined as being "the business trading as Lexinta Group, as it was represented to me".[57] Indeed, TP further stated in paragraph 15 (see [54] above), that she did not know anything specific about Lexinta Group's internal structure, or the legal entities involved.

65 In giving her oral evidence in the way she did, I consider that TP was overemphasising the importance of the corporate identity of LGL, well knowing by the time she went into the witness box of the importance to her case of the fact that LGL was not a company referred to as being one of the companies defined as being part of the Lexinta Group in the SRE or BGNIC AMAs. TP does not suggest that this distinction was drawn to her attention by Badilla or by the advisors she consulted when entering the SRE AMA or at any time during

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[57] PBAEIC at p 7, para 7 (TP's AEIC).

the course of her relationship with Lexinta. She also does not suggest that she herself was aware of the distinction at the relevant time.

66 I prefer her evidence given in paragraph 15 of her AEIC that "she did not know anything specific about Lexinta Group's internal structure, or the legal entities involved" (see [54] above). Like the Esculiers, TP proceeded, in my judgment, on the basis that LGL was just another company within the Lexinta group of companies, all of which were acting pursuant to and subject to the terms of the asset management agreement which she had signed to regulate her dealings with that group of companies.

67 In paragraph 41 of her AEIC, TP draws attention to the fact that when the JL Transfer was made (and indeed, when all the other transfers referred to in [58]–[60] above were made) there was no AMA in existence between her (TP, as an individual) and Lexinta. In her AEIC, TP does not refer to the SRE AMA, but in cross-examination, she accepted that she had signed the SRE AMA and that her understanding was that all these payments were paid pursuant to the SRE AMA.[58] On the facts, this is, I believe, an inevitable conclusion. People do not transfer money to investment houses for investment purposes without some form of asset management agreement being signed to regulate their relationship. In my judgment, TP was working on the basis that the SRE AMA was regulating her relationship with Lexinta notwithstanding the fact that the transfers were actually being made either by her personally or by JL to LGL. She did not contend that either Badilla or Lexinta did anything to suggest the contrary.

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[58] Transcript (14 Mar 2022) at p 62 line 10 to p 65 line 11 and p 70 line 9 to p 75 line 7.

Withdrawal of the Plaintiffs' investments

68 TP explained in cross-examination that the initial arrangement she had with Badilla was that she should have a distribution of initial profits straightaway and that she received some US$3 million between October 2016 and March 2017. This, she said, gave her comfort that the investment was a real investment.[59]

69 In October 2017, TP sought to realise a further US$5 million and completed a "Transfer of Funds Request Form" on 20 October 2017[60] which was acknowledged by letter dated 20 November 2017 from LGL indicating that payment would be made on or before 21 December 2017.[61] No such payment was made.[62]

70 In December 2017, TP learned that an action had been commenced in Hong Kong on 10 November 2017 by 14 investors and that they had obtained a freezing order against Badilla and Lexinta over some US$24 million. TP then instructed lawyers in Hong Kong to make enquiries on her behalf, which revealed that the LGL trading account with DBS had a zero cash balance and zero assets.[63]

71 Subsequently, by way of a third-party discovery order made in TP's favour against DBS, TP became aware of the transfers to BE's DBS account in Singapore from LGL's DBS account in Hong Kong (as set out in [47]–[50]

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59 Transcript (14 Mar 2022) at p 127 line 19 to p 129 line 22.

60 PBAEIC at p 218.

61 PBAEIC at p 220.

62 PBAEIC at pp 19–20, paras 44–47 (TP's AEIC).

63 PBAEIC at pp 20–22, paras 48–51 (TP's AEIC).

above).[64] These can be contrasted with the payments in to the LGL DBS account by the Plaintiffs (contrast [47]–[50] with [58]–[62] above):

(a) Payment ***in*** by BGNIC: US$7,000,000 on 5 August 2016;

(b) Payment ***out*** to BE: US$7,439,004.77 also on 5 August 2016;

(c) Payment ***in*** by JL: US$3,620,750 on 9 September 2016;

(d) Payment ***out*** to BE: US$1,499,488.00 on 12 September 2016 plus €164,841.26 on 28 September 2016;

(e) Payment ***in*** by BGNIC: US$8 million on 1 February 2017; and

(f) Payment ***out*** to BE: US$1,302,250.92 also on 1 February 2017.

72 It is these back-to-back transfers, "robbing Peter to pay Paul", as Mr Chaisty put it[65] – which form the foundation of the Plaintiffs' claim in this action.

The pleadings

73 The pleadings are extensive. The following is a summary of the parties' cases necessary to identify the issues which now remain to be adjudicated upon.

The Statement of Claim

74 The Statement of Claim ("SOC") has been amended three times, the last amendment being directed during the trial, on 17 March 2022. I should also

64 PAEIC tab 62 at pages 100, 105-107 and 122-123

65 Transcript (14 Mar 2022) at p 19 lines 4–17.

highlight that several references are made in the SOC[66] to a personal asset management agreement between TP and Lexinta, coined the "TP AMA" and dated 30 June 2017.[67] However, the Plaintiffs have since accepted that the TP AMA is of no relevance to the events and transfers (see [71] above) with which this suit is concerned.[68] Thus, those references may be ignored, and focus may be applied to the following assertions, on which the Plaintiffs' case is built:

(a) That at all material times Badilla was operating a Ponzi scheme.[69]

(b) That the Defendants' investments were not genuine and that any returns on their alleged investments were fake.[70]

(c) That the Disputed Monies did not represent assets held pursuant to the Esculier AMA by Lexinta companies other than LGL, but rather, were assets transferred to LGL by the Plaintiffs.[71]

(d) That the payments out to the Defendants by LGL did not discharge any obligation of those Lexinta companies to return assets pursuant to the Esculier AMA since LGL had no contract with the Esculiers and had received no assets from them.[72]

(e) That the monies transferred to LGL by the Plaintiffs which were paid out to the Defendants were to be held by LGL as custodian or

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66 Statement of Claim (Amendment No 3) (23 Mar 2022) ("SOC") at paras 6, 10, 10A, 16–18, 20, 23 and 37.

67 PBAEIC (Vol 1) at p 18, paras 40–41 (TP's AEIC).

68 Transcript (16 Mar 2022) at p 6 lines 1–24 (Court's question and Mr Chaisty's reply).

69 SOC at para 36(a).

70 SOC at para 36(b).

71 SOC at para 36(c).

72 SOC at para 36(d).

nominee to be transferred to the Asset Manager to be held under the terms of the relevant AMA.[73]

(f) That LGL's obligations to the Plaintiffs were governed by Hong Kong law and not by Swiss Law.[74]

(g) That the fact that any obligations arising under the SRE or BGNIC AMAs are governed by Swiss law is irrelevant as no funds were ever transferred from LGL to the Asset Managers.[75]

(h) That, accordingly, those monies were held by LGL on trust for the Plaintiffs.[76]

(i) That LGL had therefore acted in breach of its fiduciary duty and/or in breach of trust by making the transfers to the Defendants as part of the Ponzi scheme.[77]

(j) That, in consequence, the Plaintiffs as beneficial owners were entitled to trace the monies (or alternatively, the alleged profits made) as the Defendants had given no relevant consideration for receipt thereof regardless of whether the Defendants had knowledge sufficient to put them on notice of the Plaintiffs claim to the monies.[78]

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73 SOC at paras 6, 14A and 37(a).

74 SOC at para 37(b).

75 SOC at para 37(c).

76 SOC at para 37(d).

77 SOC at para 38.

78 SOC at para 38A.

The Defence and Counterclaim

75 By their Re-Amended Defence dated 23 March 2022,[79] the Defendants pleaded as follows:

(a) The Plaintiffs are put to proof of the contention that there was a Ponzi scheme.[80]

(b) Paragraphs 36(b), (c) and (d) of the SOC are denied (see [74(b)], [74(c)] and [74(d)] above).[81]

(c) That LGL formed part of Lexinta and, together with the other members of the group, served the needs of the investors. Further, to the extent that LGL received funds, such receipt was "for and on behalf of (or reasonably regarded as being for and on behalf of) Lexinta Group".[82]

(d) That the payment of the Disputed Monies from the LGL account to the Esculiers was in discharge of the obligations of Lexinta under the Esculier AMA.[83]

(e) Paragraph 37(a) of the SOC is denied (see [74(e)] above).[84]

(f) That the JL Transfer was not made for the benefit of the Plaintiffs.[85]

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79 Defence and Counterclaim (Amendment No 2) (23 Mar 2022) ("D&CC").

80 D&CC at para 17.

81 D&CC at para 18.

82 D&CC at paras 18(a) and (b).

83 D&CC at para 18(c).

84 D&CC at para 29A.

85 D&CC at para 29A(b).

(g) That all obligations between Lexinta and the Plaintiffs; between Lexinta and the Defendants; and between the Plaintiffs and the Defendants, are governed by Swiss law.[86]

(h) Paragraphs 37(b), (c) and (d) of the SOC (set out [74(f)], [74(g)] and [74(h)] above) are denied, and it is asserted that Swiss law does not recognise "the institution of a common law trust or equitable proprietary rights over bank account balances".[87]

(i) That all the Plaintiffs' assets held by Lexinta were held pursuant to the AMAs and not on a common law trust.[88]

(j) It is denied that under Swiss law the Plaintiffs could assert any claim for breach of trust or fiduciary duty or are entitled to the relief sought.[89]

(k) If the substantive law is Hong Kong law, the Defendants assert that they had no notice or knowledge of the existence of a trust, or of any breach of trust or fiduciary duty and deny the existence of the same or the right to trace.[90]

(l) If the substantive law is Hong Kong law and there has been a breach of trust/fiduciary duty, the Defendants received payment of the Disputed Monies for valuable consideration and without notice.[91]

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86 D&CC at para 29B.

87 D&CC at para 29D.

88 D&CC at para 29D(b).

89 D&CC at paras 29E and 29F.

90 D&CC at para 30.

91 D&CC at para 31.

(m) By the Counterclaim the Defendants seek an award of damages under the cross-undertakings given by the Plaintiffs in orders made in OS 1016 on 10 January 2020 and 17 March 2020, HC/ORC 1066/2020 (the Order referenced at [9] above) and HC/ORC 1975/2020.

The Reply and Defence to Counterclaim

76 The Reply and Defence to Counterclaim, the second amendment to which is dated 29 March 2022,[92] was also the subject of a further substantial amendment during the trial. It is a lengthy document which repeats and amplifies upon pleas made in the SOC. The following matters should be noted:

(a) That, even if LL, LML, L Inc or LAG acted as asset managers under the Esculier AMA, they were not entitled to act by and did not purport to act by LGL.[93]

(b) That, all transfers of the Disputed Monies to BE were from the LGL account not from LL or other Lexinta entities.[94] These did not represent funds held for the Defendants.[95]

(c) That the Disputed Monies represented sums due to TP from the Catolac Trust and were, on her instructions, transferred directly to LGL by JL acting in its capacity as asset manager for the Catolac Trust.[96]

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92 Reply and Defence to Counterclaim (Amendment No 2) (29 Mar 2022) ("R&DC").

93 R&DC at paras 4(d) and 8(a).

94 R&DC at paras 6(h)–(k).

95 R&DC at paras 8(b)–(c).

96 R&DC at para 7.

(d) The Defendants are put to proof that they believed in good faith that the returns allegedly received had been achieved as a result of the operation of the Esqulier AMA and that it is improbable that the assets were genuinely and profitably invested.[97]

(e) The contention that Hong Kong law governs the relationship between the Plaintiffs and LGL is repeated on the basis that since LGL was not a party to the SRE or BGNIC AMAs, Swiss law was nor expressly applicable and was not the law having the closest connection to the dispute between the parties.[98]

(f) The Defendants are put to proof of the contentions as to matters of Swiss law. No positive case to the contrary is pleaded.[99]

(g) The contention that the Defendants received payment of the Disputed Monies for valuable consideration is denied save that no admission is made as to whether the Defendants acted in good faith or without notice.[100]

(h) The Plaintiffs accept that the Defendants were not an accomplice of Badilla and Lexinta and that they were defrauded by them.[101]

(i) It is denied that the Defendants are entitled to relief under the Counterclaim.[102]

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97 R&DC at paras 6(k)(ii0, 11(b) and 13.

98 R&DC at para 18B.

99 R&DC at para 18C.

100 R&DC at para 19.

101 R&DC at para 20.

102 R&DC at paras 21–24.

77 It is necessary to amplify a little on [76(g)] above. It appears from the pleadings that a distinction is being drawn between consideration on the one hand and notice on the other. As to the latter, the pleading merely puts the Defendants to proof, it raises no positive case that they had either actual or constructive notice or that they lacked good faith. The AEIC's sworn by BE and JE therefore dealt with the allegation on this basis. They did not deal in detail with any specific matters raised by the Plaintiffs because there were none.

78 During the oral opening by Mr Chaisty, it became apparent that his clients accepted that prior to the Esculiers' request for the return of their investment, they had no reason to believe that the investments made on their behalf by Lexinta were anything other than genuine and successful investments. Their case was that the dealings the Esculiers had with Badilla between October 2015 (when the return of the proceeds of the investment was first requested) and February 2017 (when the final sums due were transferred) were such as to furnish them with actual notice or, alternatively, were such that a reasonable person in the position of the Esculiers would have had concerns sufficient to make inquiries such as to constitute constructive notice.

79 Ms Kam contended that such an approach amounted to the raising of a positive case which should have been pleaded and that a mere non-admission did not entitle Mr Chaisty to cross-examine the Esculiers on that positive case.[103] Following submissions,[104] amendments were proposed both to the Statement of Claim and the Reply raising a substantive positive case of actual or constructive

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103 Transcript (14 Mar 2022) at p 41 line 15 to p 51 line 22.

104 Transcript (14 Mar 2022) at p 138 line 21 to p 146 line 12.

notice (the amendments appear chiefly in the Reply),[105] for which leave was given by consent.[106]

The issues

80 The issues that arise for decision can best be considered in the following order:

(a) Was Badilla operating a Ponzi scheme when the Esculiers were repaid? If so, when did the scheme commence?

(b) What is the status of LGL:

(i) With regard to the Esculiers' dealings under the Esculier AMA?

(ii) With regard to the Plaintiffs' dealings under the SRE AMA or the BGNIC AMA?

(c) What law governs the relationships between the parties and Lexinta and between each other. Swiss law or Hong Kong law?

(d) If Swiss law applies, can a relationship of trust exist between LGL and the Plaintiffs and, if so, what are the consequences?

(e) If Hong Kong law applies, does a relationship of trust exist between LGL and the Plaintiffs and, if so, what are the consequences?

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105 R&DC at paras 19A, 19B and 19C.

106 Transcript (17 Mar 2022) at p 4 line 9 to p 5 line 21.

(f) Was the JL Transfer was made for the benefit of TP?

(g) If the Plaintiffs' action fails, what damages are the Defendants entitled to under the cross-undertakings (see [75(m)] above).

Issue 1: The Ponzi Scheme

81 The Plaintiffs' claim is that a Ponzi scheme was being conducted by Badilla from before the time when the Esculiers first invested in April 2014 and that, accordingly, none of the money transferred to Lexinta by the Esculiers was ever invested notwithstanding the documentation that was provided by Badilla purporting to demonstrate that individual investments that were made.

82 I am satisfied that such as scheme was in operation by 2016 as it is clear that the sums paid by the Plaintiffs to LGL were never invested but were paid directly out, *inter alia*, to the Esculiers. However, I have greater difficulty in reaching a conclusion as to when this activity started. It is accepted that the onus of proving a starting date lies on the Plaintiffs.

83 It was not until November 2017 that it was first publicly suggested that Badilla might be running a Ponzi scheme, when two articles appeared in Swiss publications. Investigations had, however, first been commenced by the Swiss Public Prosecutor's Office following a complaint made by a Mordechai Fishman on 31 August 2017. Details of the investigations are contained in a "Petition for an Investigation Order" dated 25 April 2018[107] which records that Badilla had been arrested by the Swiss police on 23 April 2018.[108] This document states that:

> At the latest from the year 2015, the accused is surmised, from the outset of the contractual relationship (with the victims) to

[107] PBAEIC (Vol 1) at pp 466–479 (TP's AEIC).

[108] PBAEIC (Vol 1) at pp 27–28, para 59 (TP's AEIC).

> have switched the use of the moneys entrusted to him to the extent that the accused is supposed to have untruthfully stated that the money was invested in IPOs, even though he knew that the money would be used for the remittance of repayment and profits to [previously] existing investors.

84 On 26 April 2018, an order[109] was made in the Zurich District Court that Badilla should be taken into investigative custody pending trial. Paragraph 3.2 of the order records that the period of custody should not last longer than the expected penal loss of freedom had he been tried and convicted. He apparently remained in detention without trial until recently. It was suggested that his release was due to the fact that although no trial had taken place, the time he had served in detention was equivalent to that which he would have been sentenced to had he been tried and convicted. I have, however, no evidence to support this suggestion and nothing turns on it.

85 Paragraph 4.3 of the order records that Badilla had admitted that "he had deceived these investors from the year 2015 on the use of monies".[110]

86 It thus appears that the Swiss authorities had uncovered no information which supported a conclusion that Badilla had been conducting a Ponzi scheme earlier than 2015 and the Plaintiffs have adduced no evidence in support of such a conclusion. Mr Chaisty submitted that there was nothing to suggest that the scheme was ever genuine as there was no independent evidence of any investment and that the supporting documents supplied to BE were internally created fictitious documents. Against this, however, I have to take into account the fact that Badilla had been running the Lexinta investment business for a number of years and had received favourable press coverage, that the

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109 PBAEIC (Vol 1) at pp 488–493 (TP's AEIC).

110 PBAEIC (Vol 1) at p 491 (TP's AEIC).

investigations that BE made prior to investing satisfied her that Lexinta was regulated by the Swiss financial authorities and that the supporting documents did reflect what had indeed occurred in the financial markets on the dates in question.

87 Taking all these matters into account I am unable to conclude that the Lexinta business was a sham from the outset and am unable to place any date on when the Ponzi scheme began, earlier than the conclusion reached by the Swiss authorities as being "at the latest from the year 2015".[111] The important point to my mind is that it is not suggested that the Esculiers had any reason to believe that their money had not been invested and the recorded profits made until sometime after they sought return of those sums.

Issue 2: The status of LGL

88 Resolution of this question lies at the heart of this dispute. The Plaintiffs' case is encapsulated in paragraphs 19 and 20 of their written closing:[112]

> 19. The Ps' position is that the sums advanced by [JL] in Septembers 2016 were advanced to [LGL] on the terms that it would hold such money for transfer to the Asset Manager as defined in the AMA entered into by SRE to be used for IPOs. [LGL] did not so transfer such money but instead handed over part of it to the Ds. Such terms are not admitted by the Ds. It is the Ps' position that the sums advanced by BGNIC (the subject of the assignment under the agreement with [SFPF]) were advanced to [LGL] on the terms that it would hold such money for transfer to the Asset Manager as defined in the AMA entered into by BGNIC. Such terms are not admitted. There is no scope, on the evidence, to seriously doubt that [TP] and BGNIC advanced money in the mistaken belief, induced by Badilla, that such would be invested. Money was never paid over to be paid to the Ds.

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111 PBAEIC (Vol 1) at p 475 (TP's AEIC).

112 PCS at paras 19–20.

> 20. In neither scenario did [LGL] become entitled in its own right to the sums so advanced. The money continued to belong to [TP], the payments by [JL] having been made on her behalf, and by BGNIC until the assignment to [SFPF] of all relevant rights.

89 Underlying this submission is the contention that, since LGL was not a party to any of the AMAs, it did not hold the sums transferred to it under the terms of those AMAs but was an independent third party to whom the sums had been transferred to hold the same on trust for transfer to one of the parties to the AMAs.

90 The Defendants' position was succinctly summarised by Ms Kam when, in her closing oral submissions, she said:[113]

> Ms Kam: So the point I want to make from all of this, Your Honour, is that it is clear from this course of dealing that LGL was employed by Badilla as one of the Lexinta companies to carry out Lexinta obligations under the Esculier AMA. And the defendants accepted that. That's how both parties dealt with each other.
>
> …
>
> Now, my submission is this, Your Honour: My friend takes issue with our position that the defendants dealt with Lexinta as a group. But, Your Honour, the documents that we have just examined show that Badilla himself held his asset management business out as Lexinta Group and not by the name of any particular Lexinta entity. He capitalised on the Zurich presence of the Lexinta Group. And that's something which both the plaintiffs and the defendants relied on. And because of their relationship with Badilla, both the plaintiffs and the defendants did not draw distinctions between the different Lexinta entities. Both parties dealt with LGL, not as a separate standalone entity independent of the group of companies, but rather as an integral part of the Lexinta Group of companies. And that's why, Your Honour, both the plaintiffs and the defendants regarded LGL as synonymous with Lexinta or Lexinta Group.
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> We say, Your Honour, that the notion that LGL is an entity that stands apart from the rest of the Lexinta companies, through

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113 Transcript (21 Apr 2022) at p 111 lines 23–27 and p 115 lines 7–27.

> with Badilla carried out the asset management business, is a contrived legal construct and it's not supported by how the witnesses saw the relationship. It is not supported by the documentary evidence.

91 I have considered the references to LGL in the course of the parties' dealings with Lexinta in paragraphs [26]–[35] (in respect of the Defendants) and [54]–[67] (in respect of the Plaintiffs) above. So far as concerns the Defendants, reference to LGL first occurred somewhat tangentially in the receipt for the first payment to LL. Thereafter, the name occurred from time to time but without comment from Badilla. When it came to the payments out, BE gave evidence in paragraph 86 of her AEIC as follows:[114]

> As I recall, Badilla had around this time orally informed me that the funds would be remitted from a DBS bank account, to expedite the transfer. I cannot now recall if I noticed at the time that the funds were in fact transferred from the Lexinta Account. However, I would not have attached much significance to it even if I had. As far as we were concerned, the transfer of USD 7,439,004.77 represented a return by Badilla and the Lexinta Group of our invested funds pursuant to our instructions, in accordance with the Asset Management Agreement.

92 She was cross-examined on this at length, but the substance of her evidence was not shaken.[115] She was aware that the money was coming from a DBS account, not from the Hang Seng Bank account, but her attention was not drawn by Badilla to the fact that this account was in the name of LGL rather than LL nor to the fact that LGL was not a party to the AMA and she did not spot the distinction.

93 Her answers in cross-examination can be summed up in the following extract:[116]

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114 DBWS at pp 175–176.

115 Transcript (21 Mar 2022) at p 183 line 23 to p 192 line 17.

116 Transcript (21 Mar 2022) at p 189 line 25 to p 192 line 17.

Mr Chaisty: At page 167, on 10 August, Benson writes and says: "The transfer was done from DBS Hong Kong by Lexinta Group Limited." Then you write back and say: "Thank you ... This is the brokerage firm where we invested the funds." You knew that that was untrue, didn't you?

BE: No, sir. I may have missed -- I responded quickly, but in my mind, I think it is important we understand my mind. My mind was Lexinta. When he -- when I asked for the request at DBS, I said: "... please confirm transfer attached from LEXINTA ..." So for me, it's the Lexinta name, you see. So maybe I read too quickly, but when I put on the 10th, this is the brokerage firm I invest the fund, I meant "Lexinta", Lexinta Group.

Mr Chaisty: Well, it's not a long letter, it's not a long email from Benson. The transfer was done from DBS Hong Kong to Lexinta Group Ltd. If we just remind ourselves, only a few days earlier, at page 162, your lawyers were disputing that the asset management agreement was concluded with Lexinta Group Ltd. They specifically wrote in those terms at 162. I put to you, Mrs Esculier, that when you wrote and said that Lexinta Group Ltd was the brokerage firm where you invested the funds, you knew that that was not correct.

BE: No. No, sir. I-- I meant Lexinta. I meant Lexinta. I tell you, I tell you deep, deep in my heart.

Mr Chaisty: And if you had meant that, you would have said it, wouldn't you?

BE: Excuse me?

Mr Chaisty: If you had meant that, then you would have said it, because he's quite specific. It tends to suggest –

BE: I was referring to Lexinta, to the -- I was referring to Lexinta, really. You see, before I put "Lexinta", cap. I was referring to Lexinta. I was. I was referring to the group.

Mr Chaisty: But you were very relieved, weren't you, when those payments -- that payment for 7.43 hit your account. Weren't you?

BE: Wouldn't you be, sir –

Mr Chaisty: Of course.

BE: -- if you had been in my situation?

Mr Chaisty: Of course I would.

BE; Thank you.

> Mr Chaisty: And you were so relieved that you, as I have said before, were content not to ask any further questions about where the money might have come from or got into DBS in the first place.
>
> Court: I don't think that's a fair analogy of what the witness answered to that question.
>
> Mr Chaisty: Well, then I will put it separately and distinctly.
>
> Court: I think you had better because it's always difficult going back up to what the answers were.
>
> Mr Chaisty: You were so relieved that the money had hit your account that you were quite content not to ask any questions about how it got in DBS in the first place, weren't you?
>
> BE: As I said earlier, it didn't ring a bell when I would receive from DBS. It did not.
>
> Mr Chaisty: It didn't ring a bell. Despite the fact that you had dealt with the transfers to Lexinta Ltd --
>
> Court: I think we are going over the same ground again and again.
>
> Mr Chaisty: Certainly.

94 So far as the Defendants are concerned, I am satisfied that at all times both the Esculiers and Badilla were working on the basis that, notwithstanding the express definition in the Esculier AMA of the Lexinta Group as being LL, LML and L Inc, the agreement covered all their dealings with Lexinta no matter which company within Lexinta actually performed any given act. This properly reflects the course of dealings between them and is a necessary implication to give business efficacy to their dealings.

95 In the case of the Plaintiffs, the SRE AMA signed on 18 April 2016 again defined LL, LML and L Inc as being the "Lexinta Group" but on the next day the first transfer of US$1,000,000 was made on Badilla's instructions to LGL, without any indication by Badilla that this transfer was outwith the terms of the AMA. It was not something that TP noticed or was alerted to by her advisers either at this time or later. As indicated in [66] above I prefer her evidence given

in paragraph 15 of her AEIC that "she did not know anything specific about Lexinta Group's internal structure, or the legal entities involved".

96 Van Campen gave similar evidence. In paragraph 6 of his AEIC he deposes to the fact that BGNIC entered the BGNIC AMA on 7 July 2016 and states, "I note that LGL is not on the face of it a company within the definition of Asset Manager in the BGNIC AMA".[117]

97 He does not state in his AEIC that he noted this at the time because he was not involved then, but he accepted in cross-examination that at all times since he became involved, he assumed that all sums that were remitted were to be managed under the BGNIC AMA.[118] The last part of that cross-examination reads as follows:[119]

> Ms Kam: At paragraph 6, you made that point there that LGL is not, on the face of the agreement, a company within the definition of "asset manager" in the BGNIC AMA, but you also say that the three payments were made to LGL. Why do you think BGNIC sent these monies to LGL?
>
> Van Campen: To have the Lexinta Group, LGL, manage these funds, invest these funds for BGNIC so that BGNIC could make a very nice return.
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> Ms Kam: When you say for the Lexinta Group to manage, you would be saying to manage under the BGNIC AMA?
>
> Van Campen: Yes.
>
> Ms Kam: Thank you.

98 My conclusion, therefore, in relation to the Plaintiffs' dealings with Lexinta are the same. TP, SRE and BGNIC on the one hand and Lexinta, through Badilla, on the other were working on the basis that, notwithstanding the express

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117 PBAEIC at p 117.

118 Transcript (17 Mar 2022) at p 21 line 7 to p 25 line 22.

119 Transcript (17 Mar 2022) p 25 lines 11–22.

definition in the AMAs of the Lexinta Group as being LL, LML and L Inc, the agreement covered all their dealings with Lexinta no matter which company within Lexinta actually performed any given act. This properly reflects the course of dealings in relation to the Plaintiffs' investments and is a necessary implication to give business efficacy to their dealings.

99 Accordingly, at all material times the three AMAs extended by implication to include LGL as a party thereto. The Plaintiffs' case is founded upon the assertion that LGL was not a party to the AMAs and, therefore, there was no contractual relationship between the parties and LGL. It was entrusted the sums on terms that it would transfer them to the relevant Asset Manager and obtained no entitlement to the sums so received. Hence, it held the sums on either or both of a resulting or constructive trust for the benefit of the beneficial owners – the Plaintiffs. It formed no part of their case that, if there was a contractual relationship, any separate obligation of trust arose.

100 In my judgment the sums transferred to LGL were held by them pursuant the terms of the AMAs and were not held by them on trust for TP or BGNIC. The Plaintiffs' action therefore must fail. However, since this matter may go on appeal, I shall deal with the other issues on the basis that the parties' dealing with LGL were not governed by the AMAs.

Issue 3: Swiss law or Hong Kong law?

101 There is no dispute that so far as the Esculier, SRE and BGNIC AMAs are concerned, there is an express choice of Swiss law. The question to be decided is which law applies to determine whether or not the pleaded cause of action for breach of trust is a viable plea. I shall refer to it as the "putative trust".

102 The parties were agreed that the starting point was that Singapore law applied to determine what the proper law was. The principles are well established. In the absence of any binding or express choice of law clause, the applicable law falls to be assessed by reference to the three-stage process set out by the Court of Appeal in *The Republic of Philippines v Mahler Foundation* [2014] 1 SLR 1389 at [81]:

> The broad common law methodology for resolving a legal question with a foreign law element involves a three-stage process: (i) the characterisation of the relevant issue; (ii) the selection of the appropriate choice of law rule in the context of the relevant connecting factors; (iii) the identification of a system of law by the application of those connecting factors.
>
> [citations omitted]

103 On the assumption that there was no contractual relationship between the parties and LGL, there was no express choice of law to govern the relationship between them, so the three-stage test must be applied. As to the first, the parties are agreed that the characterisation of the relevant issue is that this is a proprietary claim to the Disputed Monies. This broad characterisation follows from the Court of Appeal's earlier decision in *Perry, Tamar and another v Esculier, Jacques Henri Georges and another and another matter* [2022] 1 SLR 107, where the Plaintiffs were denied leave to amend their SOC to include alternative claims which were not proprietary. Simply put, personal actions do not fall within interpleader proceedings authorised in OS 1016. That said, regarding the issue simply as a proprietary claim to the Disputed Monies in this way is a somewhat reductive characterisation of the relevant issue, as I shall explain. Indeed, such over reduction is what led, in my view, Mr Chaisty to take the position he did at the second stage of the three-stage analysis.

104 In approaching the second stage in his oral closing submissions, Mr Chaisty, somewhat surprisingly, submitted that since this was a proprietary

claim, the relevant connecting factor was that the property in question (*ie*, the Disputed Monies) was located in Singapore so that Singapore law should apply. In essence, he was asking for the *lex situs* to be applied. This was neither pleaded nor raised in opening, and I reject it on that basis. However, even if I were to consider it substantively, this submission, in my judgment, represents a too narrow and mechanistic approach to the second stage of the three-stage analysis.

105 Mr Chaisty relies heavily on *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387 ("*Macmillan*"), where Staughton LJ suggested that as a "general rule, which is subject to exceptions", issues as to rights of property are to be determined by the law of the place where the property is (at 399F). Where land is concerned, this is sound. In respect of chattels, the learned Lord Justice offers this reasoning (400A):

> There is in my opinion good reason for the rule as to chattels. A purchaser ought to satisfy himself that he obtains a good title by the law prevailing where the chattel is, for example in Petticoat Lane, but should not be required to do more than that. And an owner, if he does not wish to be deprived of his property by some eccentric rule of foreign law, can at least do his best to ensure that it does not leave the safety of his own country.

106 Here we are not concerned with chattels. The Disputed Monies constitute intangible property. The distinction between chattels and intangible property is not one which can be glossed over: see *Dicey, Morris and Collins on the Conflict of Laws* (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey*") at para 22–010. I therefore cannot take *Macmillan* as authority for the proposition Mr Chaisty advances, much less one carrying the force he suggested it should.

107 Second, as stated at [74(h)] above, the "proprietary right" which the Plaintiffs assert over the Disputed Monies is by way of a trust which was created when such monies were transferred to the bank account of LGL. This proprietary

right is alleged to flow into the Defendants' DBS account because they received the money without giving valuable consideration and with notice (see [74(j)]). Hence the Defendants were not *bona fide* purchasers for value without notice, and as such, cannot assert better title.[120] This being the case, the proprietary right on which the Plaintiffs rely is equitable, not legal, and one which their written submissions suggest may be asserted either by virtue of a resulting or constructive trust.[121]

108 *Dicey* states that there "seems to be no clear English or Commonwealth authority on the choice of law rules relating to constructive and resulting trusts" (at para 29–076). The learned authors recognise that there is both judicial and academic support for the application of the *lex situs*, "on the basis that rights in property are ultimately at stake" (at para 29–081) (also see Adeline Chong, "The Common Law Choice of Law Rules for Resulting and Constructive Trusts" (2005) 54(4) ICLQ 855 at 871–883, which is cited by *Dicey*), yet also highlight that the *lex situs* need not apply, as was the case in *Lightning v Lightning Electrical Contractors Ltd* (23 April 1998, Court of Appeal) (England and Wales). Indeed, here, Millett LJ criticised the blanket application of such a rule. He observed:

> … It would be absurd if they were governed by the law of the place where the property in question happened to be located.
>
> Such a rule would lead to bizarre results if, for example, A's instructions were to buy properties in more than one jurisdiction, for the consequences of the same arrangement might then be different in relation to the different properties acquired. It would also lead to bizarre results if A left it to B's discretion to choose the property to be acquired, since that would give B the unilateral power to decide on the legal consequences of the transaction which he had entered into with A. …

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120 PWS at para 17.

121 PWS at paras 25–26.

109 In any event, it is clear from the Court of Appeal's decision in *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [74]–[81], which generally affirmed the seminal work of Yeo Tiong Min, *Choice of Law for Equitable Doctrines* (OUP, 2004), that characterising claims in equity is not always wholly straightforward. Instead, it is necessary for the court to examine closely the nature and origins of the equitable obligation concerned in the context of its factual matrix (at [76]).

110 This leads to the final point on the second stage of the three-stage analysis. Even if I assume, as I have for the purposes of Issue 3 and onwards (see [100] above), that the parties' dealings with LGL were not governed by the AMAs, the Plaintiffs' transfers of the Disputed Monies still need to be understood in its proper context. There is no dispute that the monies are located in Singapore, but the relevant connecting factor is not merely that. It is also the underlying relationship and transfers of funds which led to the putative resulting or constructive trust, as well as the allegation of breach of that trust by LGL which placed the Disputed Monies in the Defendants' DBS account (see [74(i)] above). I therefore consider that the correct law to be applied is that which is most closely connected to the putative trust (see *Dicey* at 29R–001 and 29–075).

111 The Plaintiffs assert that it has no meaningful connection with Switzerland. LGL was a Hong Kong Company, the sums involved were paid into Hong Kong bank accounts for investment in IPOs predominantly in Asia and the sums paid out were from a Hong Kong bank account to a Singapore bank account. The Plaintiffs comprise TP, a dual Israeli and Polish citizen resident in London and Tel Aviv, and SFPF, a Curacao company. The Defendants are French citizens at the outset resident in Belgium and subsequently in Switzerland.

112 The Defendants placed heavy reliance on the decision of the Court of Appeal in *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 ("*Rappo*") in support of the proposition that when seeking to determine the applicable law to claims in equity regard should be had to the foundational sources from which the equitable right had arisen – in this case the AMAs. It was also contended that there were countervailing factors which pointed to Switzerland rather than Hong Kong. In *Rappo*, the claim was for breach of fiduciary duties, fraudulent misrepresentation and deceit arising out of some dealings in artworks. The dispute related in particular to some artwork in Singapore and there was a dispute as to whether the applicable law was the law of Switzerland or Singapore.

113 When considering the appropriate *fora*, the court said this:

> 69 In the present appeals, at the first stage of the *Spiliada* analysis, the legal burden lies on the Appellants to demonstrate that Switzerland and/or Monaco are "clearly or distinctly more appropriate" fora than Singapore for the trial of the substantive dispute between the parties (see *Spiliada* at 477). Whether this is indeed the case turns on a consideration of the factors that connect the dispute with the competing jurisdictions.
>
> 70 We think it is appropriate here to emphasise that it is the quality of the connecting factors that is crucial in this analysis, rather than the quantity of factors on each side of the scale. Parties in modern commercial litigation are often well connected, with relational and business ties to many different jurisdictions. The task of the court in this context is not to draw up a balance sheet of tenuous or insubstantial points of contact with different fora in the expectation that the jurisdiction with the largest number on its side prevails at the close of the analysis. Rather, the search is for those incidences (or connections) that have the most relevant and substantial associations with the dispute.

114 In [76] the Court went on to say:

> 76 In *Rickshaw Investments* [cited at [109] above], we agreed (at [80]) with the view of Prof Yeo Tiong Min in *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004) that in determining the applicable law to claims in equity, it is

> important to ascertain the foundational sources from which the relevant equitable rights and remedies arise. These would include, amongst others, established categories of law such as contract and tort. While we decided that we would not go so far as to endorse the proposition that equitable concepts and doctrines would always be dependent on other established categories of law, we accepted a more limited proposition which we stated as follows (at [81]):
>
> > … [W]here equitable duties (here, in relation to both breach of fiduciary duty and breach of confidence) arise from a factual matrix where the legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned. …

115 In this case, the Defendants say that the putative trust arises out of the contractual arrangements between the Plaintiffs and Lexinta and the part played by LGL in furtherance of those arrangements which is alleged to give rise to the existence and breach of trust. The purpose for which the sums were transferred to LGL was so that Lexinta could carry out its obligations under the AMA. It would be unreal, they submit, to divorce the putative trust from the underlying contracts so that Swiss law should apply.

116 In addition, they point to the fact that all the Plaintiffs' dealings were with Badilla who was based in Switzerland, that the holding company, LAG, was based in Switzerland, that TP visited Lexinta's offices in Switzerland and that their understanding was that their dealings with Lexinta would be subject to Swiss law.

117 In their written closing the Plaintiffs contended that *Rappo* was not on point and of no relevance.[122] I do not agree. I consider that there is a close analogy between the underlying matrix of facts in this case and those in *Rappo* and that

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122 PWS at para 8.

the observations of the Court of Appeal set out above are directly applicable to this case. I do not say that the fact that the putative trust arises out of the contractual arrangements between the Plaintiffs and Lexinta is decisive of the matter, but it is a significant factor. Further, I consider that the quality of the other factors relied upon by the Defendants outweighs those relied upon by the Plaintiffs.

118 Accordingly, had it been necessary for me to decide what was the applicable law of the putative trust, I would have held that it was the law of Switzerland.

Issue 4: The Position under Swiss law

119 For this court, Swiss law is a question of fact. The Defendants pleaded their position on Swiss law in their Defence (see [75(g)]–[75(j)] above). In the Reply, the Plaintiffs put them to proof but did not raise a substantive case to the contrary.

120 The Defendants adduced an expert report dated 8 November 2021 (the "First Report") from Dr Felix Joseph Dasser ("Dr Dasser"). Dr Dasser is qualified to practice law before the Swiss Bar and is a partner at Homburger AG, a law firm based in Zurich. He is also an adjunct Professor of Law at the University of Zurich for private law, private international law including international procedural law, and comparative private law.

121 The Plaintiffs did not adduce any evidence on Swiss law. When the matter was discussed at a CMC on 8 December 2021, counsel for the Plaintiffs confirmed that his clients did not propose to adduce evidence on Swiss law but nonetheless expressed a desire to cross-examine Dr Dasser on the basis that his report had been founded on some assumptions of fact which the Plaintiffs did

not accept. The Plaintiffs were therefore directed to draft questions to be considered by Dr Dasser, with a view to being able to dispense with such cross-examination as is allowable in circumstances where the opposing party is not raising a positive case (the "Questions").

122 The Questions[123] were filed on 22 December 2021 and resulted in a second expert report from Dr Dasser dated 27 January 2022 (the "Additional Report") in which he responded to each question in turn.[124] Having considered the Additional Report, the Plaintiffs maintained their desire to cross-examine Dr Dasser. This was done, with the approval of the Swiss authorities, by video-link on 18 March 2022.

123 Dr Dasser gave his evidence with authority and with clarity. He was a good witness in that he opined on matters that were within his areas of expertise, but declined to answer questions which fell outside those areas. More specifically, he had had significant past experience in Swiss law relating to Ponzi schemes, having been involved in the Bernie Madoff litigation for some ten years.

124 Rather than include long extracts from the First Report in this judgment, the whole report forms Annex 4 hereto. As can be seen he was asked to address four questions:

> (1) Whether, under Swiss law, the Esculier AMA is a valid and binding contract.
>
> (2) Whether, under Swiss law, the payments made by Lexinta Group Ltd ("LGL") to the Esculiers from an account in the name of LGL discharged the obligations of the Lexinta Group entities under the Esculier AMA, particularly in light of the fact that they were accepted as such by the Esculiers.

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123 DBWS at pp 218–222 (Dr Dasser's 2nd AEIC).

124 DBWS at pp 208–217 (Dr Dasser's 2nd AEIC).

> (3) Whether the Plaintiffs' claim and the remedies sought thereon (as framed in [37]-[38A] of the SOC), i.e., the vindication of their alleged equitable property rights to the Disputed Monies, are recognized by or otherwise tenable under Swiss law.
>
> o If the answer is yes, why; and
>
> o If the answer is no, why not.
>
> (4) Whether, under Swiss law, the Esculiers would be entitled to retain the Disputed Monies on the basis of the Plaintiffs' pleaded case.
>
> o If the answer is yes, why; and
>
> o If the answer is no, why not.

125 Dr Dasser then set out his understanding of the facts in paragraph 8 which appears to me to be an accurate précis of the facts as pleaded, and which was not the subject of any direct challenge in the course of cross-examination. Much of the focus of the cross-examination was on Item (13) of paragraph 8, which reads: "According to the Defendants, they neither knew about nor had reason to know about nor were accomplices of the Lexinta Ponzi Scheme". I shall return to the *factual* aspect of this dispute when I consider the position under Hong Kong law from [136] below.

126 The other important points of Dr Dasser's First Report are:

(a) In paragraphs 9 to 16 of the First Report, Dr Dasser makes some preliminary comments on Swiss law. He draws attention to the fact that none of the causes of action under the Swiss Code of Obligations form the basis of the Plaintiffs' claim (see paragraph 12). In paragraph 16, he deals with the high standard of proof required, which is well above the common law basis of balance of probabilities.

(b) In paragraphs 17 to 22, he gives reasons for concluding that the validity of the Esculier AMA cannot be questioned and that, under Swiss

law, an investor in a Ponzi scheme cannot question the validity of the payment to another investor unless there is proven bad faith on the part of the other investor.

(c) In paragraphs 23 to 29, he considers the impact under Swiss law of the fact that the payments to the Esculiers came from the LGL bank account and concludes that even if LGL was not bound by the Esculier AMA, payment by LGL would "liberate the debtor of his obligation". In paragraphs 30 to 40 he explains that the concept of beneficial ownership is not acknowledged under Swiss law.

(d) Finally, in paragraph 41, he answers the questions reproduced in [124] above, as follows:

> (1) The Defendants had a valid and binding contract with the Lexinta Group (the Esculier AMA).
>
> (2) The payments made by Lexinta Group Ltd ("LGL") to the Defendants from an account in the name of LGL discharged the obligations of the Lexinta Group entities under the Esculier AMA.
>
> (3) The Plaintiffs' claim and the remedies sought thereon (as framed in [37]-[38A] of the SOC), i.e., the vindication of their alleged equitable property rights to the Disputed Monies, are not recognized by or otherwise tenable under Swiss law.
>
> (4) Under Swiss law, on the basis of the Plaintiffs' case as pleaded, the Defendants are entitled to retain the Disputed Monies, which they received as lawful performance under a valid and binding contract (the Esculier AMA) even under the Plaintiffs' pleaded case.

127 I turn then to Dr Dasser's Additional Report (which is included as Annex 5). Here he deals with the eight questions posed by the Plaintiffs, but the substance of the questions as well as his responses can be identified from paragraph 4 of the report, which reads:

> Generally, I noted that the questions mainly focus on my understanding of certain facts. As will be explained in detail below, my conclusions in the [First] Report do not depend upon facts that appear to be disputed (as I understand the Parties' respective cases). In particular:
>
> - Whether there is a Ponzi scheme or not is not relevant. In either case, the payments to the Defendants who are not accused of any connivance were valid performance of a contract.
> - Whether LGL is part of the Lexinta Group or not is not relevant. In either case, payment by LGL of the monies requested by the Defendants as a consequence of their termination of the Esculier AMA was valid performance on behalf of the Lexinta Group.
> - Whether the companies of Mr Bismark Badilla properly administered the investments by the Plaintiffs or the Defendants or not is not relevant. The validity of the payments to the Defendants is not dependent on the relationship between the Plaintiffs and the Lexinta Group.

128 In paragraphs 19 and 20, Dr Dasser reiterates his opinion that Swiss law does not recognise property rights in amounts in bank accounts because Swiss substantive law does not recognise the concept of a trust.[125] The only rights are contractual rights.

129 Dr Dasser was cross-examined on both his reports on two aspects in particular. First, Mr Chaisty sought to distinguish the *Oschward* case (see paragraph 19 of the First Report) on the basis that there was a difference in law between a loan agreement as in *Oschward* and an investment agreement as in this case. The Plaintiffs had led no evidence to suggest that this was the case and Dr Dasser opined that any distinction did not matter for the purposes of his report.[126] I accept that evidence.

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125 DBWS at pp 216–217.

126 Transcript (18 Mar 2022) at p 12 line 18 to p 13 line 8.

130 Secondly, Mr Chaisty sought to investigate the degree of knowledge of or involvement in a Ponzi scheme that a third party would have to have in order to prove the requisite bad faith or connivance (see paragraph 21 of the First Report and paragraph 4 of the Additional Report).

131 When dealing with the *Oschward* judgment, the following exchanges occurred:[127]

> Mr Chaisty: "The plaintiff would have had to explain which signs should have served as a warning to a man of the defendant's experience." What is the relevance of that sentence as a matter of Swiss law?
>
> Dr Dasser: Well, the relevance is what you quoted earlier, that the crucial sentence in this paragraph 3 is the one that starts with: "The defendant's liability for damages in tort could only be considered if the defendant had intentionally or negligently demanded the fraud committed by Ms Oschwald against the plaintiff, be it as instigator, accomplice or accessory." You must understand that this is a tort claim, and tort requires a breach of the law.
>
> Mr Chaisty: Yes.
>
> Dr Dasser: The law that is addressed here is the criminal statute on fraud. So only to the extent that the defendant was an accomplice in a criminal sense can there be liability in tort. What the court then says is, well, there is not even an assertion that there had been any indications that the defendant could have known about this. Meaning, let alone he could not possibly have been an accomplice, an instigator or an accessory. So the test is a very high one. Here, what come on top is what I mentioned in my report, that the measure of proof required by Swiss law is a very high one. So the claim here failed by a large measure.
>
> Mr Chaisty: Just to be clear, I think you've just confirmed what I'd understood from this report, that this issue that's being addressed at page 62 is, essentially, the defence to a tort claim, and the absence of bad faith, or the presence of good faith, was a defence to that tort claim.
>
> Dr Dasser: That's right.

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127 Transcript (18 Mar 2022) at p 18 line 19 to p 22 line 13.

Mr Chaisty: If we go back then to your page 15, you used the phrase "good faith", I think, on at least two occasions, and "bad faith" on one. For example, at paragraph 18, you say: "The mere fact that Mr Badilla might have operated a Ponzi scheme through the Lexinta Group does not render an agreement between a good faith investor and the Lexinta Group invalid under Swiss law." As a matter of Swiss law, then, would it follow or could it follow, depending on the facts, that an absence of good faith could affect the outcome as regards the validity of a person's position?

Dr Dasser: Well, the absence of good faith alone is not what is relevant here. The question really is, is the investor also an instigator or an accomplice? This is not the same as simply not being careful enough. I mean, I based my report on the assertions as I understood them at the time when I wrote the report, and I understood there were no allegations that the defendants were not in good faith, so that's what I based my report on. If the issue now is that there might be assertions that were not in good faith, I would need to slightly rephrase my report and be more specific what the relevant test is under Swiss law. Here, in this paragraph 18, I addressed the validity of the contract. The contract that is for the furtherance of a fraud is against the law and, therefore, invalid under Swiss law. But that requires that the parties were aware, positively aware, of the fact that they executed this agreement to commit the fraud.

Mr Chaisty: Under paragraph 21, I think you make a slightly different point, but tell me if I've misunderstood. You say: "Thus, under Swiss law, an investor in a Ponzi scheme cannot question the validity of the payment to another investor (at least not in the absence of proven bad faith of the other investor)." At paragraph 21, I think you're talking there about the time of payment or the receipt of funds from the fraudster to a victim. Is that correct?

Dr Dasser: Correct.

Mr Chaisty: When you say "at least not in the absence of proven bad faith", if, as a matter of Swiss law, a person, when at the time that they received the money from the fraudster, which, as a Ponzi, had belonged to another investor -- if, at the time they received the money, it had been established as a matter of fact that they were acting in bad faith, would that, as a matter of Swiss law, impact on their entitlement to retain the monies?

Dr Dasser: Yes, there would be an impact. I have not addressed this in detail in my report because I had no reason to address this. But if the investor knows that the money he is about to receive has been illegally taken from a third person by means of a fraud, then that investor would be implicated in the fraud, and there are criminal provisions that render that behaviour illegal.

> Mr Chaisty: Can I just --
>
> Dr Dasser: But it requires evidence of actual knowledge.

132 The cross-examination then turned to the question of constructive knowledge as opposed to actual knowledge and Dr Dasser explained that he was not an expert in Swiss criminal law and that, having not had any notice of this question, he was not in a position to answer it.[128]

133 Ms Kam objected to this line of questioning on the basis that bad faith as that term was understood under Swiss law had not been pleaded but I allowed the cross-examination to proceed *de bene esse* with the matter to be discussed in closing submissions.

134 In the Plaintiffs' written closing submissions Dr Dasser is criticised for his inability to say how far constructive as opposed to actual knowledge might affect the position.[129] I do not accept that this is a valid criticism. If the Plaintiffs wished to raise a positive case that as a matter of Swiss law, constructive knowledge rather than actual complicity in a Ponzi scheme affected the Esculiers' liability in this case, this should have been pleaded and supported by evidence from a Swiss lawyer. If they wished to assert that under Swiss law the Esculiers had either sufficient actual knowledge or that the facts supported a conclusion of constructive knowledge again this should have been pleaded. The onus on this aspect would have been on the Plaintiffs. No challenge was made to Dr Dasser's evidence on the high burden of proof in Swiss proceedings (see paragraph 16 of his First Report at Annex 4) and the Plaintiffs have made no attempt to discharge this burden. The furthest they go is to place the burden on the Defendants to demonstrate good faith for the purposes of the defence of *bona*

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128 Transcript (18 Mar 2022) at pp 14–25 and p 38 line 21 to p 41 line 4.

129 PWS at para 48.

fide receipt for value without notice under Hong Kong law (which I consider from [136]–[185] below) which is very far from the same thing. The onus is different as is the burden of proof.

135 Taking all these matters into account, Dr Dasser's evidence satisfies me that had LGL not been bound by the terms of the AMAs and had merely been entrusted with the sums invested by the Plaintiffs, the Plaintiffs would have had no cause of action under Swiss law against the Esculiers.

Issue 5: The Position under Hong Kong law

136 In order to approach this issue, it is necessary to assume, first, that the relationship between the Plaintiffs and LGL was not governed by the AMAs and, secondly, that the law governing that relationship was the law of Hong Kong. The parties accepted that the law of Hong Kong was the same as Singapore.

137 In these circumstances, there is scope for the existence of a relationship of trust. The Plaintiffs contended that since the sums of money had been paid to LGL for one purpose and one purpose alone – to hold them for onward transmission to one of the parties to the AMA's for investment under the terms of the AMAs – then the Plaintiffs retained a proprietary interest unless and until that transfer took place. LGL had misappropriated the sums by transferring them (*inter alia*) to the Esculiers. In these circumstances an obligation of trust arose and LGL acted in breach of trust. The Plaintiffs therefore remained beneficial owners and were entitled to trace part of the money paid into the hands of the Esculiers. Their case was that the trust was either a constructive trust or a resulting trust, or, possibly, a *Quistclose* trust (as founded in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567).

138 The Defendants' response to this was, understandably, somewhat circular as they contended that since the Plaintiffs expected LGL to facilitate the investment of the Fund pursuant to the AMAs, it must follow that any relationship between them would be governed by Swiss law. They did not contend, as I understood it, that if this was not the case, the circumstances were such that no obligation of trust would exist under Hong Kong law.

139 To my mind, therefore, on the assumption that Hong Kong law applies and there was no contractual relationship between LGL and the Plaintiffs, it follows that the relationship between them was one of trust and it matters not what its precise nature was.

140 On the basis that there was such a trust the Defendants raise the defence that, since they had no knowledge or notice of the trust arrangement, they received payment "in good faith, for valuable consideration and without notice of any purported claim (s) of the Plaintiffs".[130] It is common ground that the onus of proof on this defence lies on the Defendants.

141 There are four aspects of this defence are set out in *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* ("*MKC*") [2017] SGHC 317 at [294]:

> To successfully establish the bona fide purchaser defence, the defendant must establish the following elements: (a) that he acted in good faith; (b) that he had paid valuable consideration; and (c) that he obtained the legal interest in the property; and (d) that he had no notice of the plaintiff's equitable interest in the property: [*Snell's Equity* (John McGhee, ed) (Sweet & Maxwell, 33rd Ed, 2015)] at paras 4-021–4-035.

130 D&CC at para 31.

142 Point (c) does not arise in this case as it is not disputed that the Esculiers have obtained the legal interest in the Disputed Monies. The other three do need to be considered.

Good Faith

143 The requirement of good faith and its relationship to the aspect of notice was considered in *Midland Bank Trust Co v Green* [1981] AC 513 at 528 where Lord Wilberforce said this:

> My Lords, the character in the law known as the *bona fide* (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened upon his conscience and the composite expression was used to epitomise the circumstances in which equity would or rather would not do so. I think that it would generally be true to say that the words "in good faith" related to the existence of notice. Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice which assumed a statutory form in the Conveyancing Act 1882, section 3. But, and so far I would be willing to accompany the respondents, it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or that when notice came to be regulated by statute, the requirement of good faith became obsolete. Equity still retained its interest in and power over the purchaser's conscience. The classic judgment of James L.J. in *Pilcher v. Rawlins* (1872) L.R. 7 Ch. App. 259, 269 is clear authority that it did: good faith there is stated as a separate test which may have to be passed even though absence of notice is proved. And there are references in cases subsequent to 1882 which confirm the proposition that honesty or bona fides remained something which might be inquired into (see *Berwick & Co. v. Price* [1905] 1 Ch. 632, 639; *Taylor v. London and County Banking Co.* [1901] 2 Ch. 231, 256; *Oliver v. Hinton* [1899] 2 Ch. 264, 273).

144 Whilst the requirement of good faith is closely related to the question of notice, it remains a separate consideration based on the equitable regard to conscience. However, in many cases (see, for example, *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156 at [121] and *MKC* at [296]), the same

considerations will apply to reaching a conclusion on good faith and notice. In this case, the Plaintiffs did not assert that if the Defendants discharged the burden with regard to notice, both actual and constructive, any separate factors arose for consideration on good faith. The two stand or fall together. I will therefore consider them together from [153]–[184] below.

Consideration

145 The Defendants' assertion is that the payments were received in mutual discharge of the parties' respective obligations under the Esculier AMA. Even if the relationship between the Plaintiffs and LGL was governed by Hong Kong law, it was not disputed that the relationship between the Esculiers and Lexinta was governed by Swiss law and, thus, regard had to be had to Swiss law to determine whether, if LGL was not a party to the contract, nonetheless the payment by it of the sums due under the AMA was a valid discharge of any obligations whether real or fictitious of those companies within Lexinta which were parties to the AMA.

146 On the assumptions that are being made, I cannot accept this. If Hong Kong law applies and an obligation of trust arises to which the Defendants pleads a defence of bona fide purchaser, it must be Hong Kong law that is applied to determine whether or not this defence succeeds.

147 The Plaintiffs contend that Hong Kong law should be applied to assess the question of consideration and raise two points. First, they contend that there were no obligations under the AMA because it was a sham. Secondly, they say that since LGL was not a party to the contract, it owed no obligations to the Esculiers and therefore acted as an unauthorised intervenor. I was referred to a passage in Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff &*

Jones: The Law of Unjust Enrichment (Sweet & Maxwell, 9th Ed, 2016) at para 5–73:

> … a defendant's obligation to a creditor is not discharged if the creditor is paid by an unauthorised intervenor acting voluntarily—i.e. by an intervenor whose intention to pay is not vitiated in any way, and who does not pay pursuant to a legal liability.

148 In response, as to the first point, the Defendants assert that even under Hong Kong law, an investor who successfully exits a Ponzi scheme with apparent profits is a purchaser for value. They rely on the observations of Lord Sumption in *Fairfield Sentry Ltd (in Liquidation) v Migany and others and other cases* [2014] UKPC 9 at [3]:

> It is inherent in a Ponzi scheme that those who withdraw their funds before the scheme collapses escape without loss, and quite possibly with substantial fictitious profits. The loss falls entirely on those investors whose funds are still invested when the money runs out and the scheme fails. Members of the Fund who redeemed their shares before 18 December 2008 recovered the NAV which the Directors determined to be attributable to their shares on the basis of fictitious reports from BLMIS. The loss will in principle be borne entirely by those who were still Members of the Fund at that date.

149 They also rely on the statement by Lord Briggs in *In the Matter of Stanford International Bank Ltd (in liquidation)* [2019] UKPC 45 at [69]:

> The Board's unanimous view is that, even if in principle the court had jurisdiction to do so, it would not be a proper exercise of discretion to grant relief from oppression, both for the reasons given by Wallbank J and for this additional reason. Relief from oppression under section 204 is, as the judge acknowledged, essentially equitable in origin. Depositors who were paid by SIB prior to its ceasing to trade received the money as bona fide purchasers for value without notice. They were bona fide because no suggestion was made that they were aware either of the bank's insolvency or of the underlying Ponzi scheme. They were purchasers for value because they were paid pursuant to a contractual entitlement: see *Snell's Equity* (33rd ed) para 4-022; *Thorndike v Hunt* (1859) 3 De G & J 563 and *Taylor v Blacklock* (1886) 32 Ch D 560 at 568, 570. They were purchasers without

> notice because it is not suggested that any of them knew or ought to have known the facts giving rise to a claim based on section 204.

150 On the second point, they contend that LGL was not an unauthorised intervenor acting voluntarily. It was acting under the direction of Badilla for Lexinta. They invited me to test the matter by asking the question: if Lexinta had remained in funds, could the Esculiers, having been paid by LGL, have demanded payment again from one of the actual contracting parties?

151 I accept the submissions of the Defendants. It is an unfortunate fact of a Ponzi scheme that there are many innocent parties some of whom will have "escaped" with their investments and notional profits because they exited before the scheme was exposed. Others will be unlucky because they were still invested when the scheme collapsed.

152 However, the fact that an investment agreement may turn out to be a sham and the profits fictitious does not, in law, mean that there is no consideration for the payment out of monies apparently owing. Further, on the facts of this case, I am satisfied, that even if LGL was not a party to the AMA, it was not acting as an unauthorised intervenor.

Notice

153 The applicable principles are succinctly stated in *MKC* at [285]:

> In relation to the third element, the defendant's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt: [*George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*GRZ III*")] at [23], citing *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437. The degree of knowledge required to impose liability will necessarily vary from transaction to transaction; in cases where there is no settled practice of making routine enquiries and prompt resolution of the transaction is required, clear evidence of the degree of

> knowledge and fault must be adduced: *GRZ III* at [32]. Actual knowledge of a breach of trust or fiduciary duty is not invariably necessary, particularly when there are circumstances in a particular transaction that are so unusual, or so contrary to accepted commercial practice, that it would be unconscionable to allow a defendant to retain the benefit of the receipt: *GRZ III* at [32].

154 Actual notice is a straight question of fact. Constructive notice is a value judgment based on the available facts and guidance was given in the judgment of Lord Clarke in *Papadimitriou v Credit Agricole Corporation and Investment Bank* ("*Credit Agricole*") [2015] 1 WLR 4265 at [12]–[20]:

> 12 Both in the courts below and before the Board the parties accepted that the relevant test was that stated by Lord Neuberger of Abbotsbury MR in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453, para 100, which must of course be considered in its context. That context includes paras 97–100 of his judgment as follows:
>
> > 97. the issue is simply whether on the facts known to the banks at the time at which they received the payments in question they had notice of TPL's proprietary right to the money so paid.
> >
> > 98. In *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 195–196 Lord Browne-Wilkinson explained: "The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it."
> >
> > 99. In *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978, 1014, Millett J, albeit in an addendum to his judgment, touched on the question of the nature of constructive notice in these terms: "[the plaintiff] attempted to establish constructive notice on the part of each of the defendants by a meticulous and detailed examination of every document, letter, record or

> minute to see whether it threw any light on the true ownership of the [relevant] shares which a careful reader—with instant recall of the whole of the contents of his files—ought to have detected. That is not the proper approach. Account officers are not detectives. Unless and until they are alerted to the possibility of wrongdoing, they proceed, and are entitled to proceed, on the assumption that they are dealing with honest men. In order to establish constructive notice it is necessary to prove that the facts known to the defendant made it imperative for him to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper."
>
> 100. In the present case, as at the three dates identified in para 95 above, TPL's case is that the banks ought to have appreciated that the transfers of money effected on, or as at, those dates was 'probably improper' on the ground that the money was beneficially owned by TPL, or at least that the banks ought to have made inquiries before accepting the money. It is accepted by both TPL and the defendants that the issue is to be determined by asking what the banks actually knew, and what further inquiries, if any, a reasonable person, with the knowledge and experience of the banks, would have made, and, in the light of that, whether it was, or should have been, obvious to the banks that the transaction was probably improper.

13 In para 109 Lord Neuberger MR summarised his conclusion as to how the question should be put. He said that the question was whether, on the facts known to the banks on the three dates,

> a reasonable person with their attributes (ie those of a responsible large bank with the benefit of highly experienced insolvency practitioners as their appointed administrative receivers) should either have appreciated that a proprietary claim probably existed or should have made inquiries or sought advice, which would have revealed the probable existence of such a claim.

14 The approaches of Lord Browne-Wilkinson and Millett J do not seem to the Board to be entirely consistent. The position has however been resolved in Lord Neuberger MR's para 109. As he indicates, it is important for these purposes to distinguish between three different circumstances. The first is where the bank in fact appreciates that a proprietary right in the property probably exists, so that the bank has actual notice of the right. That is not this case. The second is where a reasonable person with the attributes of the bank should have appreciated based

on facts already available to it that the right probably existed, in which case the bank has constructive notice of the existence of the right.

15 The third is where the bank should have made inquiries or sought advice which would have revealed the probable existence of such a right. Here too, the bank would have constructive notice of the right. The question is in what circumstances and to what extent it can properly be said that the bank should have made inquiries or sought advice. The cases suggest various possible approaches. So, for example, Lord Browne-Wilkinson said in the passage in *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 195–196, quoted in para 12 above:

> In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it.

The suggestion there is that the bank must make inquiries if the bank is on notice as to the possible existence of such a right.

16 What then is meant by possible? The Board does not think that Lord Browne-Wilkinson can have intended to refer to the mere possibility of the existence of a proprietary right. Although Lord Browne-Wilkinson referred more than once to possibility, he also referred in a similar context, at p 196E, to there being "a substantial risk". As the quotation at para 12 above shows, Millett J in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978, 1014 also referred to "the possibility of wrongdoing". After correctly referring to the fact that a bank's account officers are not detectives, he said that, unless and until they

> are alerted to the possibility of wrongdoing, they proceed, and are entitled to proceed, on the assumption that they are dealing with honest men. In order to establish constructive notice it is necessary to prove that the facts known to the defendant made it imperative for him to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper.

17 With respect to Millett J, it is not absolutely clear what he meant. He was correct to say that the starting point is the assumption that the bank is dealing with honest men but it

appears to the Board that there is some confusion between the first stage, at which the bank is alerted to "the possibility of wrongdoing" which it appears prompts an inquiry, and the second stage after the inquiries have taken place. If he intended to say that it was only necessary to carry out inquiries if it was obvious that, absent inquiries, the transaction was probably improper, the Board regards that as too high a test. The purpose of any such inquiries is to ascertain whether the transaction was improper. If the facts already known to the bank show that the transaction was probably improper without further inquiries, it appears to the Board that the bank would have had constructive knowledge of that impropriety without further inquiry.

18 As the Board sees it, the problem is largely resolved by Lord Neuberger MR's approach in the *Sinclair case* [2012] Ch 453, para 109. He identifies the relevant persons at the bank and says that the bank will have constructive notice where they should either have appreciated that a proprietary claim probably existed or have made inquiries or sought advice, which would have revealed the probable existence of such a claim. However, the Board thinks that by "proprietary claim" Lord Neuberger MR must have meant "proprietary right". In the context of knowing receipt, in *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, 290 Danckwerts LJ said:

> In my view, knowledge of a claim being made against the solicitor's client by the other party is not sufficient to amount to notice of a trust or notice of misapplication of the moneys. In the present case, which involves unsolved questions of fact, and difficult questions of German and English law, I have no doubt that knowledge of the plaintiffs' claim is not notice of the trusts alleged by the plaintiffs.

In the *Sinclair case* [2012] Ch 453, para 108, Lord Neuberger MR said that he agreed with the judge in that case that the reasoning in the *Carl Zeiss case* supported the proposition that notice of a claim was not the same as notice of a right. In these circumstances the Board considers that in his next paragraph (para 109) Lord Neuberger MR must have intended to refer to the existence of a proprietary right and not a claim.

19 In para 109, Lord Neuberger MR identifies two alternative cases in which the bank would have constructive notice of a propriety right. The first is where the bank should have appreciated that a propriety right probably existed. Lord Neuberger MR does not suggest that further inquiries or advice would be needed in that event, because the bank would have constructive notice of the right. The second is where the bank should have made inquiries or sought advice which would have revealed the probable existence of such a right. He does not

> identify the state of mind which should have led the bank to make such inquires or sought such advice. It appears to the Board that Lord Neuberger MR did not intend to contradict Lord Browne-Wilkinson's approach at the earlier stage.
>
> 20 Thus, on the one hand, the bank's knowledge of facts indicating the mere possibility of a third party having a proprietary right would not be enough to put the bank on inquiry but, on the other hand, it is not necessary for the bank to conclude that it probably had such a right. The test is somewhere in between. It may be formulated in this way. The bank must make inquiries if there is a serious possibility of a third party having such a right or, put in another way, if the facts known to the bank would give a reasonable banker in the position of the particular banker serious cause to question the propriety of the transaction. This approach seems to the Board to be consistent with that expressed in *Lewin on Trusts*, 19th ed (2014), para 41-134 in connection with commercial transactions. They say that in some commercial contexts a purchaser may be fixed with notice in the absence of actual knowledge, but
>
> > only where in the particular commercial contract involved he has failed to draw inferences which ought reasonably have been drawn in that context or has been put upon inquiry by knowledge of suspicious circumstances indicative of wrongdoing on the part of the transferor, but has failed to make inquiries that are reasonable in the circumstances.

155 In the present case, therefore, three questions arise:

(a) Was it probable that either of the Esculiers had actual knowledge that Badilla was operating a Ponzi scheme?

(b) Was it probable that a reasonable person with the attributes of the Esculiers would have appreciated on the facts available to them that Badilla was operating a Ponzi scheme?

(c) Were the facts known to the Esculiers such as would give a reasonable person in the position of the Esculiers serious cause to question the propriety of the repayments to be made and then to make proper inquiries?

156 In answering those questions, it should be borne in mind that, since the onus is on the Defendants, it is for them to prove the negative, so that if there is doubt whether they have done this, the benefit of that doubt must be given to the Plaintiffs.

157 The starting point is to have regard to the relationship between Badilla and the Esculiers when they first asked for the return of the proceeds of their investment in October 2015. The evidence of both the Esculiers[131] and TP[132] demonstrates that Badilla was able to easily generate confidence in his ability as an investment manager and to create and maintain an atmosphere of trust. He did this both by his personality and by the detail which he supplied to his investors to support the investments which he asserted had been made on his clients' behalf, regardless of whether this was true or false. Both parties had taken steps to satisfy themselves that Badilla was the right man to be entrusted with their investments before signing the AMAs and depositing funds with Lexinta. The Plaintiffs do not suggest that the Esculiers had any reason to be dissatisfied with Lexinta's conduct prior to seeking the release of their funds in October 2015, nor had they any reason to suspect that the profits that it was said that they had made were anything other than genuinely generated.

158 When the Esculiers met with Badilla to tell him that they wished to terminate the AMA at the end of the financial year (December 2015), which they were entitled to do under Section 9 of the Esculier AMA (see Annex 1), Badilla requested that termination should be in April 2016 at the end of the second year of the agreement so that he could obtain all the commission due to him. Whilst

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131 Transcript (22 Mar 2022) at p 47 lines 16–19.

132 PBAEIC (Vol 1) at p 14, para 29 (TP's AEIC).

that was not in fact a requirement of the agreement, the Esculiers claim that they agreed out of fairness to Badilla.[133]

159 Their relationship is summed up in the following passage of Mr Chaisty's cross-examination of BE:[134]

> Mr Chaisty: Did you go back to him and say, "Well, look at section 9. Section 9 makes provision for cancellation on 60 days' notice"? Did you go back to him and say --
>
> BE: Sir, at the time, it's not the relationship -- kind of relationship. If I put this, how it was at the time, the context. We had a very good relationship. I had the impression he had worked extremely hard, extremely hard for us, very long hours, so when he told me that, I believed him. And I also think that, actually, even before that, he had described to me that the cut-off date for his commission was the date of signing of our contract. I'm pretty sure he told me that, before that actual meeting. So I -- I know we are in this courtroom and discussing legal document, but I was -- yeah. There, it was not -- I don't -- I don't think that made sense for me to just go back to the agreement. It was not the type of -- of relationship we had built and trust we had built over the last two years, the last year and a half.

160 The parties then met on 4 January and sometime in early February 2016 and, possibly, once more before April. However, it was not suggested to BE in cross-examination that prior to April there was any indication by Badilla that there might be problems or delays in making payment in April.[135] However, on 16 April 2016 payment was not made. The starting point for considering whether or not the requisite knowledge can be ascribed to the Esculiers is therefore 16 April 2016.

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133 DBWS at p 165, paras 57–58 (BE's AEIC); and Transcript (21 Mar 2022) at p 71 line 4 to p 74 line 10.

134 Transcript (21 Mar 2022) at p 71 line 16 to p 72 line 10.

135 Transcript (21 Mar 2022) at p 78 line 9 to p 83 line 5.

161 The first period of delay was from 16 April until 5 August 2016 when US$7,439,004.77 in respect of the Joint IPO Investments was repaid. Both the Esculiers were cross-examined at length on the various documents that passed between the parties in this period.

162 Mr Chaisty made two preliminary observations in relation to this evidence. First, he contended that the detail in the correspondence and the nature of the meetings and phone calls between BE and Badilla had not been properly addressed in her AEIC, and that this was an attempt on her part to conceal the "high degree of concern and anxiety" she had at the time.[136] It is correct to say that her AEIC did not go into the detail that was subsequently the subject of the cross-examination, but it has to be remembered that at the time she swore her AEIC, the case that the Defendants had to meet was not the detailed positive case that arose out of the amendments to the pleadings during the course of trial. At the time of the AEIC, the Defendants had merely been put to proof of the absence of notice. I consider that the level of detail contained in the AEIC was adequate to address this burden and that no criticism can be made for not going into further detail.

163 Secondly, Mr Chaisty drew my attention to some observations of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15]–[22] which conclude at [22] as follows:

> In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the

136 'PCS at para 37(9).

> opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

164 This is a helpful analysis of the manner in which a judge should assess oral evidence based upon contemporaneous documents, especially in seeking to gauge the personality, motivations and working practices of a witness. This is particularly so when the issue resides in determining the state of mind of the witness at a given time as opposed to their recollection of events.

165 However, it is essential to bear in mind that one should resist the temptation to focus too much on the precise wording of a document – particularly e-mails but equally, to a lesser extent, on more formal correspondence – in seeking to determine what the purpose underlying the communication was and, thus, what the thinking was of the writer or the influence that the writer was seeking to have on the recipient. This approach may be appropriate when considering the wording of a contract or a deed but is less helpful when dealing with everyday communications.

166 In this case, the cross-examination of the Esculiers did focus to a significant extent on certain words and phrases in each piece of correspondence in seeking to ascertain the Esculiers' state of mind when either writing or receiving it. I did not find this to be a realistic exercise best calculated to assist me in forming a view as to what the real state of mind was of the Esculiers at any given time.

167 The interchanges between the Esculiers and Badilla in the period up to 5 August 2016 in summary were as follows:

(a) To begin with, BE contacted Badilla to be told that an audit was taking place and he was unable to say how long this would take.[137] This passage of cross-examination concluded:[138]

> BE: What -- sorry, sir, I would like to finish. What I was trying to explain, sir, is that probably at the beginning when I didn't see the transfer coming, I called him maybe twice a week. Then when he told me about the audit, then I called him less because I thought the audit was going on. And then when I was expecting the funds and I didn't see it coming, it's probably when I asked my husband to step in to see, you know, what was going on.
>
> Mr Chaisty: Why did you ask your husband to step in?
>
> BE: Because I sensed that Mr Badilla respected my husband.
>
> Mr Chaisty: What? He would say something to your husband different to you, or he would react differently if your husband phoned him, would he?
>
> BE: I'm a woman. My husband is a very respected man. It can sound subjective, but he is.
>
> Mr Chaisty: Would it be fair to say that you and your husband felt that it was important that your husband should speak to Badilla because Badilla was just making excuses and that your husband would be able to get to the bottom of it more effectively?
>
> BE: No, not necessarily excuses. We're trying to understand. We're trying to understand what was -- what were the audits, what was the purpose, the complexity of the audit. So I asked my husband to try to understand more from Mr Badilla.

(b) JE then e-mailed Badilla on 16 May 2016 asking for a clear schedule for the return of the funds and received a reply on the same day. There then followed an exchange of e-mails until 30 May 2016 in which Badilla explains the requirements of the audits and the Esculiers express

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137 Transcript (21 Mar 2022) at p 85 line 10 to p 92 line 18.

138 Transcript (21 Mar 2022) at p 91 line 18 to p 92 line 18.

their increasing frustration.[139] The last e-mail from Badilla on 30 May reads as follows:[140]

> Dear [BE],
>
> I hope that my note finds you well, ahead of my call today, I will give you a quick up-date, I spoke to the compliance department and they are almost finished with the Audit, I am fully aware that you have some pressing needs and that you need the transfer done asap, I can assure you that I have been doing my best to get it moving quickly, please keep in mind that your accounts traded a large number of IPO's and some very significant amounts, over 50% of our allocation were allocated to your accounts from our trading books, of course this was great, but it also trigger a more intense audit, our intention is not to delay or retain your funds and profits, I made your account a priority for the past 24 months, I truly hope that you and Jacques are able to understand it. and I hope that the optic of this transfer does not mare the good work that we have done for you in past 24 months.
>
> Best wishes from me [BE], and we speak later this afternoon.
>
> BIZ
>
> [quoted as written]

(c) Nothing happened, so on 23 June 2016 BE informed Badilla that lawyers were being instructed. This was not done immediately and on 11 July 2016 Badilla e-mailed BE with what appeared to be a remittance advice to BE in the sum of US$7,439,000.77 but no proceeds were received by BE's bank.[141]

(d) On 21 July 2016, Swiss lawyers, Bar and Karrer ("B&K"), instructed by the Esculiers wrote to LAG demanding either payment of all sums due or a detailed written explanation together with all supporting

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139 DBOD (Vol 3), Tabs 196–199.

140 DBOD (Vol 3) at p 134.

141 DBOD (Vol 3), Tabs 203–205.

documents including bank statements. It reserved the right to bring proceedings against LAG.[142]

(e) Although the letter was written to LAG, Badilla replied on LGL's notepaper (but with the same Lexinta Group heading as before).[143] The letter reads as follows:

> **Asset Management agreement with [BE] and [JE]**
>
> Dear Sirs,
>
> Please be advised that I am in receipt of your letter dated 21st July 2016, delivered by registered mail to the offices of Lexinta AG located at [address], of which the contents have been duly noted.
>
> Before moving on to answer your requests, I would like to point out that our mutual clients, [JE] & [BE] Asset Management Agreement is with Lexinta Group Ltd, a Hong Kong domiciled corporation and therefore all future correspondence should be addressed to that entity, as detailed in the letterhead above.
>
> I can confirm that a notice of termination has been received for the joint account identified as A20-1738-379855 / acct. id: SE-A1-U and that the sum of USD 7,439,004,77 is being processed for reimbursement in accordance with the notice of termination.
>
> At this juncture I would like to convey my sincerest apologies for any inconvenience caused by the unforeseen administrative delays in the processing of our mutual client's notice of termination in respect to the fore-mentioned account.
>
> Due the technicalities of the investments that the funds were invested in, I can confirm the funds will be transferred to the nominated bank with a value date no later than Monday, 15th August 2016. In light of the delays faced by [JE] & [BE], I will endeavour to reimburse the funds prior to the nominated dated.
>
> As for the other two investment sums of EUR 1,578,514 and USD 1,300,125 respectively identified as A20-1738-

142 DBOD (Vol 3), Tab 206.

143 DBOD (Vol 3), Tab 208.

> 379855 / acct. id: SE-A2-E and A20-1738-37985655 / acct. id: SE-A3-S, please be advised that according to our records we have not received a notice of termination. Therefore I will personally visit [JE] & [BE], within the next 10 working days, to obtain their consent to terminate.
>
> On receipt of the notice(s) of termination immediate processing for reimbursement will begin in accordance with the Asset Management Agreement.
>
> If you require any further assistance please do not hesitate to contact me.
>
> Yours truly,
>
> [signed]
>
> Bismark Badilla
>
> President & CEO

(f) It can be seen that Badilla asserted (wrongly) for the first time that LGL was a party to the AMA and, also for the first time, sought to draw a distinction between the sums owing to the Esculiers under the three investments made by them (see [43] above). He indicated that the sum due in relation to the first investment, US$7,439,000.77, would be paid by 15 August 2016.

(g) Around this time, B&K did some searches into Badilla and Lexinta. They did not find anything of concern, particularly, there were no debt issues. BE also found out that Badilla was doing a road show with clients and contacted other investors for reassurance that they had been repaid when requested. BE's evidence is that she understood that these other investors had been repaid, and that she found this reassuring.[144]

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144 Transcript (21 Mar 2022) at p 149 line 22 to p 150 line 12, p 164 line 7 to p 165 line 17, and p 175 line 20 to p 176 line 20; Transcript (22 Mar 2022) at p 3 line 18 to p 17 line 19.

(h) B&K responded on 29 July 2016 repeating and amplifying upon its demand for a written detailed account by 3 August 2016, drawing attention to the fact that the AMA was signed by LAG with an address in Zug and contesting the contention that notice of termination had not been given for the latter two investments. For the avoidance of doubt, notice of termination was confirmed.[145]

(i) On 3 August 2016 Badilla responded, again from LGL, indicating that US$7,439,000.77 would be remitted on 5 August and that the termination process would be initiated for the other two accounts.[146]

(j) US$7,439,000.77 was then transferred on 5 August 2016.[147]

168 It is appropriate to take stock of the position at this point when the bulk of the sums due were paid. Both BE and JE were cross-examined on all that occurred during this period. In closing submissions, Mr Chaisty submitted that by the time they gave evidence, they were well aware of the issues in the case and fully grasped the points raise on their defence. "They were resolute in their determination to keep to the script of denying at any stage despite the delays, excuses and correspondence, even the smallest hint of any suspicion at any time".[148] In consequence, I was invited to conclude that neither Defendant had approached the giving of evidence in a simple and straightforward manner which was open, clear and designed to assist the court and, further, that recourse to the documents demonstrated that they had real concerns and doubts as to where their money was.

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145 DBOD (Vol 3), Tab 209.

146 DBOD (Vol 3), Tab 210.

147 DBOD (Vol 3), Tabs 211–212.

148 PCS at para 37.

169 It is important to bear in mind that the relevant question to be posed in relation to notice is whether one person had notice (be it actual or constructive) that another has a claim, *specifically,* to beneficial ownership of the sums in question. Any suspicion or concerns that the Esculiers had must have been such as to cause them to question the propriety of the repayments on the basis that the money *might belong to someone else*. It is insufficient if they had different concerns. It is thus necessary to be clear, where the witness is being asked about suspicions and concerns, precisely what it was that those suspicions and concerns were directed to.

170 Dealing first with JE's evidence. In the main, he left matters to his wife but acted directly with Badilla when requested. He said that in the course of his business he had a standard process with regard to debt collection. First, he would try to find out the reason why the sums were not paid, then, second, build up pressure on the appropriate person to bring them up to speed on the urgency of doing whatever was necessary and, third, if necessary, he would instruct a lawyer.[149] We can see that this was the process adopted here.

171 So far as concerns Badilla's comments about the necessity of an audit, JE said that there was substance and a certain credibility to this claim, having regard to his experience in dealing with banks. Further, JE also testified that his experience had shown him that matters such as audits pan out "more in terms of weeks and months rather than days",[150] explaining the Esculiers' tolerance of Badilla's delays.

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149 Transcript (22 Mar 2022) at p 74 line 9 to p 77 line 14, p 83 lines 3–13, p 91 line 18 to p 92 line 24, p 97 line 2 to p 98 line 5, and p 100 lines 6–24.

150 Transcript (22 Mar 2022) at p 81 line 25 to p 83 line 2.

172 He also gave evidence of his experience that people who owe money always find tactics to postpone things and that this was what he considered Badilla was doing.[151]

173 It was not directly suggested to JE that as at 5 August 2016 he had serious cause for concern as to the origin of the money being remitted to them, but I consider it is clear from his evidence that he did not. To him, as a businessman, whilst Badilla's conduct was regrettable and frustrating, it was nothing out of the ordinary.

174 BE was aware of her husband's approach to solving issues by applying pressure and understood that this was what he was seeking to do once she had asked him to become involved.[152] She also had had experience with the delays inherent in dealing with banks.[153] She plainly found Badilla's conduct frustrating, even childish, but did not consider that he was lying about the need for an audit which made sense to her.[154]

175 BE was cross-examined at length over the various words and phrases in each of the documents to seek to identify the degree of concern which she had prior to the payment on 5 August 2016. The following is an example:[155]

> Mr Chaisty: So three months of recurring promises that have been broken, yes? By this stage, by 11 July, were you now

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151 Transcript (22 Mar 2022) at p 110 line 23 to p 111 line 16 and p 112 line 16 to p 114 line 11.

152 Transcript (21 Mar 2022) at p 96 lines 13–20 and p 120 lines 5–21.

153 Transcript (21 Mar 2022) at p 96 line 21 to p 97 line 12.

154 Transcript (21 Mar 2022) at p 94 line 23 to p 95 line 3, p 101 line 9 to p 102 line 8, and p 117 line 23 to p 118 line 20.

155 Transcript (21 Mar 2022) p 145 lines 3–13. See also Transcript (21 Mar 2022) at p 155 line 23 to p 156 line 14, p 159 line 21 to p 160 line 9, and p 173 lines 6–18; Transcript (22 Mar 2022) at p 32 line 13 to p 33 line 13.

> starting to have concerns about what was going on and where your money was?
>
> BE: Not where my money was, no.
>
> Mr Chaisty: I see.
>
> BE: Not where my money was.
>
> Mr Chaisty: Where did you think it was?
>
> BE: But concerns, yes, and it's why – it's why -- and it's why, even earlier, I think towards the end of June, we informed him that we had to hire a lawyer.

176 It is clear from this interchange that BE's concerns did not relate to where her money was coming from but to the fact that there were unacceptable delays in having her money remitted to her. It was not put to her that she had concerns at this time that she was going to be paid with someone else's money. It was at this time that she checked that there were no debt issues, which is consistent with a concern about the viability of the business and its ability to pay not about the source of the funds.

177 She was then cross-examined on the fact that the funds were to be remitted from the DBS account in Hong Kong rather than the Hang Seng Bank account.[156] Although this is a long passage, the kernel of her evidence can be seen from the following extract:[157]

> BE: What do you mean by "taking money"?
>
> Mr Chaisty: Well, receiving money for investment in the same way that you thought you were receiving payment.
>
> BE: Yes.
>
> Mr Chaisty: You knew that?
>
> BE: Yes.

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156 Transcript (21 Mar 2022) p 181 line 8 to p 192 line 16.

157 Transcript (21 Mar 2022) p 187 line 5 to p 188 line 17.

> Mr Chaisty: So you must have at least suspected that the money sitting in the DBS account that was going to be paid to you, might have belonged, might have represented money that other third party parties had given it.
>
> BE: No. This, no.
>
> Mr Chaisty: Right, so what did you think the DBS account was all about? Where did that suddenly spring from.
>
> Mr Chaisty: From my perspective, what matters is it was Lexinta. Really, if I go to the bottom of it, for me, what was important it was coming from Lexinta.
>
> Mr Chaisty: So anything that bears the name Lexinta as far as you're concerned --
>
> BE: So we had -- excuse me.
>
> Mr Chaisty: Anything that bears the name Lexinta as far as you're concerned is okay, is it?
>
> Court: Again, I think you have to be more accurate than that.
>
> Mr Chaisty: So by 5 August 2016, any payment from any bank
>
> account which bears the name Lexinta, wherever it might be, is okay, is it? Nothing to worry about.
>
> BE: I wouldn't say wherever it might be. It was coming from Hong Kong, I had transferred in Hong Kong. So I was comfortable with that. If it had come from the Cayman, Curacao, then perhaps I would have wondered. But it came from Hong Kong, where -- and from Lexinta, so I was -- it was fine. I was fine with that.
>
> Mr Chaisty: Mrs Esculier, I have to put this to you, and I do it quite squarely, that by 5 August, you didn't care where the money came from, you were quite happy to take money wherever it was coming from, whichever bank account it might be?
>
> BE: I disagree, sir, with all respect.

178 Both BE and JE's evidence was the subject of the criticisms outlined above. Having seen and heard both of them in the witness box and considered the contemporaneous documents, I am unable to accept the validity of those criticisms. I accept the logic of the approach adopted by the Esculiers as a means to put pressure on Badilla and a review of the documents in this context supports the evidence given. I accept that the Esculiers were frustrated and towards the

end somewhat concerned as to what was going on. However, I also accept that they took appropriate steps, both through B&K and by the searches done by BE, to satisfy themselves that there was no underlying problem with Badilla's business. Their conclusion that his reluctance to pay was in part due to audit difficulties and in part due to the fact that Badilla was focusing on other matters is not unreasonable.

179 I can now return to the three questions set out in [155] above. It follows from my findings that the answer to both questions 1 and 2 is "No". The Defendants did not have actual knowledge by 5 August 2016 that Badilla was operating a Ponzi scheme and I do not consider that a reasonable person in the position of the Esculiers would have appreciated on the facts available to them that Badilla was operating a Ponzi scheme. There was nothing other than the delay in making the repayment to alert them to that possibility. The length of that delay coupled with the reasons given for it would not, in my judgment, have alerted the notional reasonable person to have any greater concerns than did the Esculiers.

180 Question 3 requires me to ask whether the facts known to the Esculiers were such as would give a reasonable person in the position of the Esculiers serious cause to question the propriety of the repayments to be made and then to make proper inquiries.

181 There must be serious concerns not about the ability to pay but about the proprietary of the monies being repaid. The Esculiers did not have such concerns and I do not believe that the notional reasonable person would have has any greater concerns on the facts of this case. Like the Esculiers, the facts might have caused them to make enquiries similar to those made by the Esculiers but this would not have revealed the existence of the Ponzi scheme. The Plaintiffs did

not identify any other enquiries which the reasonable person should have made which would have revealed the true position. This is not surprising as no such information came to light until over a year later. The answer to question 3 is therefore, also "no".

182 As at 5 August 2016, therefore, the Defendants would have made out the defence of lack of notice.

183 I can deal with the other two repayments briefly. The second repayment was made just over a month later on 13 September 2016 (see [71(d)] above), and it also comprised the payment of €164,841.26 on 28 September 2016 to make up the exchange rate deficit. The third was made on 1 February 2017. Throughout this period, the Esculiers maintained pressure on Badilla and Badilla continued to prevaricate. BE gave evidence, which I accept, that once they had been repaid the majority of their investments in August 2016, they were reassured that the other outstanding payments would be made.[158] I also accept her evidence that by December 2016, she was tired of the whole situation.[159]

184 The position as I see it is that once the first substantial payment had been made, the Esculiers were satisfied that as long as they maintained pressure on Badilla he would pay up in due course. The Plaintiffs do not suggest that anything else occurred in this period that should have alerted the Esculiers or the notional reasonable person that Badilla was operating a Ponzi scheme or given them serious cause for concern that this might be the case. Their mind-set and hence the mind-set of the notional reasonable person would thus not have changed.

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158 Transcript (21 Mar 2022) at p 195 line 22 to p 196 line 6; Transcript (22 Mar 2022) at p 123 lines 10–15.

159 Transcript (22 Mar 2022) at p 37 lines 1–14 and p 45 lines 17–24.

Conclusion on Issue 5

185 I therefore conclude that had it been necessary for the Defendants to establish the defence of "*bona fide* purchaser for value without notice", they would have done so.

Issue 6: The JL Transfer

186 By June 2016, the relationship between TP and Badilla was such that she asked him to become a trustee of a family trust, the Catolac Family Trust (the "Catolac Trust"). She recounts the history of the Catolac Trust and the manner in which it had dealings through JL in paragraphs 30 to 35 of her AEIC:

> 30. On 23rd January 2012 my late father, Mr Israel Perry, had declared the Trust as a discretionary trust primarily for the benefit of his immediate family (my mother Mrs. Lea Lilly Perry, my sister Yael Perry, me and my children).
>
> 31. [JL] acted as asset manager for Catola International Inc ("Catola"), a Panamanian company wholly owned by the [Catolac] Trust, under an asset management agreement dated 26th January 2012 between [JL] and Mr Mordechai Rozanes, the original trustee of the [Catolac] Trust.
>
> 32. Mr Rozanes was later replaced as trustee of the [Catolac] Trust by Mr Neupert. On 10th April 2015 Mr Neupert exercised his powers as trustee to resolve to make a distribution in accordance with the Second Schedule of the [Catolac] Trust Deed, which sets out default trusts which would take effect in any event at the end of the trust period. This distribution would have exhausted the [Catolac] Trust assets. This distribution was not however implemented by Mr Neupert.
>
> 33. On 12th July 2016, Badilla was appointed sole trustee of the [Catolac] Trust in succession to Mr Neupert, and as such also became sole signatory for Catola. The appointment of Badilla as sole trustee was made by Ballestier Finance Corp as Protector of the [Catolac] Trust. This appointment illustrates the trust I had come to repose in Badilla by this time.
>
> 34. On or around 9th September 2016 assets to the value of USD3,620,750 were remitted by [JL] to the LGL Account, for my personal benefit and for the credit of my client account (or supposed client account) with Lexinta. Four payments were made by [JL]: EUR1,700,000 (credited to the LGL Account as

> USD1,903,150), EUR800,000 (credited to the LGL Account as USD895,600), USD700,000 and USD122,000.
>
> 35. Badilla, acting in his capacity as trustee of the [Catolac] Trust and signatory for Catola, did the following:
>
> a. With respect to distributions made by Badilla from the Trust to me, he gave instructions to [JL] to transfer sums from Catola to the LGL Account for my benefit, which I confirmed in writing to [JL].
>
> b. With respect to distributions made from the [Catolac] Trust to my mother, he caused funds to be transferred to an account she held at [JL], for which I held power of attorney. On 6th September 2016 I instructed [JL] to make transfers from my mother's account to the LGL Account for my benefit.
>
> c. The instruction I gave to [JL] with respect to my mother's account, was pursuant to the terms of a written agreement between my mother and myself dated 6th September 201617, which provided (so far as is relevant) that any balance of this account exceeding USD800,000 was to be made available to me for my benefit, so that when the payment from my mother's account to the LGL Account was made on my instructions, it was for my benefit.

187 The Defendants contend that this evidence is insufficient to demonstrate that the JL payments were made for the benefit of TP rather than the Catolac Trust. In their closing submissions[160] the Defendants give five reasons why I should not accept TP's evidence, which mainly revolve around the fact that there is no corroborating evidence, as well as the fact that some possibly inconsistent statements were made in earlier proceedings in Hong Kong.

188 In cross-examination which runs from pages 77 to 127 of the transcript for 14 March 2022, TP was repeatedly presented with documents which it was contended brought into question her evidence that the distribution from the Catolac Trust via JL was for her benefit. It does appear that from time to time

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160 DCS at paras 275–290.

there was a measure of confusion as to whether the investments were made for the benefit of the Catolac Trust, a still subsisting trust, or whether they represented distributions on sums due to TP from the Catolac Trust following which the Catolac Trust ceased to exist.

189 I do not propose to extend this already overlong judgment by considering the whole of that cross-examination. It is sufficient to cite the end of it:[161]

> TP: And I would say -- and I would just repeat it, because it's very important for me, when -- when we did a distribution, my -- my sister got her part, it was considered to be her personal money, and the same -- the same supposed to be -- sorry, the same distribution for me supposed to be for my personal use. Like my sister. So I don't know -- so, yeah, I had here a mistake, but there is no Catolac Trust. There is no trustee. There is no trust. At the day of the distribution, this trust ceased to exist.

190 This passage is indeed a repetition of the position she maintained throughout the cross-examination. True it is that TP did not produce any documents to support the assertion that the Catolac Trust had been wound up but neither did the Defendants. Equally, it is true that the Plaintiffs did not adduce evidence from anyone else in support, but it appears that the best person to assist in this would have been Badilla.

191 Overall, the totality of the evidence does satisfy me, on the balance of probabilities, that the sums transferred by JL to the LGL account in Hong Kong did represent moneys in the Catolac Trust which were due to TP.

Issue 7: The counterclaim

192 By their counterclaim the Defendants seek, if successful in the action, an award of damages under the cross-undertaking given by the Plaintiffs to BE by

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[161] Transcript (14 Mar 2022) at p 126 line 24 to p 127 line 8.

virtue of the Orders made in OS 1016 in paragraph 4 of the Order dated 10 January 2020 and to JE in paragraph 3(a) of the Order dated 17 March 2020.[162]

193 Strictly speaking, since the Orders were made in OS 1016, any award under the cross-undertakings should be a matter for the judge in that summons when it is restored following judgment in this action. However, both parties invited me to decide it in this action as that would avoid the necessity for the judge in OS 1016 to be re-acquainted with the details of the litigation and for a further hearing to be appointed to resolve the matter.

194 This is a sensible pragmatic course and, in the circumstances, I am prepared to accede to their invitation.

195 The Esculiers were denied access to the Disputed Monies held in the Esculiers' DBS account in Singapore when it was frozen on 15 March 2019. The Defendants thus seek an award for losses caused since that date. The Plaintiffs dispute this contending that any award should only relate to losses, if any, arising after the dates of the Orders, a year later. The plain wording of the undertaking favours the Defendants. The material portion provides that should the Court "find that the denial of access to the [Defendants of the Disputed Monies] has caused loss …". The relevant date is thus the date from which access is denied, not the dates of the Orders.

196 Kitchin LJ (as he then was) gave guidance as to the principles and approach applicable in assessing damages under a cross-undertaking in *AstraZeneca AB v KRKA dd Novo Mesto* [2015] EWCA Civ 484 at [12]–[15].

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162 D&CC at paras 40 and 41.

They can be summarised as follows in so far as applicable to the facts of this case:

(a) The approach is compensatory not punitive but the principle of "liberal assessment" should apply.

(b) The fact that certainty or precision is not possible does not mean that a principled approach cannot be attempted.

(c) If the assessment involves estimating what might have happened in the future the court must make an estimate of the chances of that thing happening and adjust the award by reference to those chances.

(d) The court should not be over eager in scrutinising the evidence or too ready to subject any proposed methodology to minute criticism.

197 BE gave evidence that had the Disputed Monies not been frozen they would have been invested in a Swiss retirement fund and have achieved a significantly higher rate of interest than was achieved by the rates that have been applied during this period by DBS. In this connection, the Defendants tendered information regarding such a fund which generated 6.26% over the three years to September 2021 against a benchmark of 6.96%.[163] Adopting a pragmatic approach, it is suggested that it that it would be fair for an award to be made at the pre-judgment interest rate of 5.33%.

198 In cross-examination BE accepted that from the time the Disputed Monies were received in the DBS account they were put on a time deposit. She said that at that time she was busy and could not attend to reinvestment, particularly as interest rates were pretty high, but that she intended to do so,

[163] DBOD (Vol 3), Tab 286.

conservatively, when the opportunity arose. She considered that she would have done this when the market conditions changed and interest rates dropped.[164]

199 I accept that the Esculiers would not have left the money on deposit for an extended period particularly when interest rates were dropping and the suggestion of investing in a conservative retirement fund is plausible. The return suggested rate of return of around 6.0% seems reasonable although there should be a discount to cater for the chance that they would not have made such an investment or that they would have made it at a date somewhat later then the date on which they lost control of the Disputed Monies.

200 There are some similarities between the fact that the monies were unavailable to them and the position which would have applied had the money been owed to them by the Plaintiffs and only been paid after judgment in their favour when the 5.33% rate might have been applied.

201 Taking all these factors into account, I have concluded that the Plaintiffs should pay the Defendants damages at the rate of 4% on the disputed sums from 15 March 2019, but with credit being given for all sums actually accrued by way of interest on the account in the meantime.

Conclusion

202 The action fails. Whilst one has sympathy for any party who loses money as a result of a Ponzi scheme, in the circumstances of this case the law does not entitle the Plaintiffs to recover from the Defendants, earlier investors, who had the good fortune to be repaid before the scheme collapsed.

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164 Transcript (22 Mar 2022) at p 51 line 7 to p 53 line 19.

203 OS 1016 should therefore be restored for an appropriate order to be made giving effect to this judgment so that the Defendants are no longer denied access to the Disputed Monies.

204 The parties did not address me on costs. The normal order would be that the Plaintiffs should pay the Defendants' costs. If Plaintiffs wish to contest this, they should so indicate, giving reasons, within seven days from the date of this Judgment. If not, the parties should seek to agree costs and, if this is not possible, they should, within 21 days, file written submissions, no more than eight pages long, and should indicate whether they are content to dispense with a hearing and have the matter decided on paper.

Simon Thorley
International Judge

Paul Chaisty QC (instructed counsel), Yee Mun Howe Gerald and Koh Kuan Hong John Paul (Premier Law LLC) for the plaintiffs/defendants in the counterclaim;
Kam Su Cheun Aurill and Lim Rui Hsien Esther (Legal Clinic LLC), Colin Liew (Colin Liew LLC) (instructed co-counsel) for the defendants/plaintiffs in the counterclaim.

Annexures

Annex 1: The Esculier AMA

205 This document may be accessed as an attachment to the PDF copy of this judgment, labelled "Annex 1—The Esculier AMA".

Annex 2: 8 May 2014 Letter from Badilla

206 This document may be accessed as an attachment to the PDF copy of this judgment, labelled "Annex 2—8 May 2014 Letter from Badilla to SE".

Annex 3: The SRE AMA

207 This document may be accessed as an attachment to the PDF copy of this judgment, labelled "Annex 3—The SRE AMA".

Annex 4: The First Report of Dr Dasser

208 This document may be accessed as an attachment to the PDF copy of this judgment, labelled "Annex 4—The First Report of Dr Dasser".

Annex 5: The Additional Report of Dr Dasser

209 This document may be accessed as an attachment to the PDF copy of this judgment, labelled "Annex 5—The Additional Report of Dr Dasser".