IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 62

Civil Appeal No 1 of 2022

Between

Tan Teck Kee

… *Appellant*

And

Ratan Kumar Rai

… *Respondent*

In the matter of Suit No 160 of 2019 and Summons No 2708 of 2021

Between

Ratan Kumar Rai

… *Plaintiff*

And

(1) Seah Hock Thiam
(2) Tan Teck Kee
(3) Worldbridgeland (Cambodia) Co Ltd

… *Defendants*

JUDGMENT

[Civil Procedure — Service]
[Contempt of Court — Civil contempt]
[Equity — Fiduciary relationships — Duties]
[Equity — Fiduciary relationships — When arising]
[Equity — Remedies — Account — Wilful default]

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Tan Teck Kee
v
Ratan Kumar Rai

[2022] SGCA 62

Court of Appeal — Civil Appeal No 1 of 2022
Judith Prakash JCA, Tay Yong Kwang JCA and Steven Chong JCA
4 July 2022

28 September 2022 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 This appeal, which arises from the decision of the High Court Judge ("the Judge") in *Ratan Kumar Rai v Seah Hock Thiam and others* [2021] SGHC 276 (the "Judgment"), raises an interesting question as to whether and when a director may owe concurrent fiduciary duties both to a third party *and* his principal company. Through the factual lens of this dispute, this judgment will examine a situation in which such duties may legally co-exist and how they may be reconciled.

2 This question of interest arises from the main matter which forms the subject of this appeal, that is, HC/S 160/2019 ("Suit 160"). In the court below, the Judge found, largely, in favour of the plaintiff, and this judgment deals with the appeal of the second defendant against that decision. There is a separate but

connected application which this appeal also concerns, HC/SUM 2708/2021 ("SUM 2708"). We will first address the appeal in respect of the decision in Suit 160 before turning to deal with the appeal in relation to SUM 2708 at [105] below.

The appeal in respect of Suit 160

The parties' dispute

3 The thrust of the plaintiff's case below was relatively straightforward; to the extent there were complexities, they arose chiefly from the need for careful characterisation of the roles played by the various actors involved in the case. Essentially, the plaintiff claimed to have participated in an investment venture over which the first and second defendants had oversight and control; the third defendant was said to be the corporate vehicle of the venture. The nature of the first and second defendant's oversight and control was argued to have given rise to fiduciary obligations, which the plaintiff sought to enforce by orders to account. The plaintiff also made allegations of wilful default with a view to obtaining more onerous orders to account on the basis of wilful default. The third defendant was absent from the trial, and the first and second defendants denied the truth of the underlying averments which formed the foundation of the plaintiff's claim that fiduciary obligations arose.

4 The Judgment comprehensively set out the cases advanced by the parties below, and ably addressed the many factual issues to which those conflicting cases gave rise. As such, it is not in our view necessary to repeat them. Instead, we will provide an abridged overview of the dispute with a view to focussing on the most crucial disputes of fact which need to be resolved in this appeal. This overview will progress in four parts, chronologically.

Part 1: The basic relationship between the parties

5 Our starting point is the basic narrative advanced by the plaintiff, Ratan Kumar Rai ("Mr Rai"). The Judgment sets out Mr Rai's case in detail at [30]–[42]. Mr Rai claimed that around 2010 or 2011, he, the first defendant, Seah Hock Thiam ("Mr Seah") and one Seah Chong Hwee ("Mr SCH") began discussing the possibility of jointly investing in Cambodian real property following several trips there to examine potential sites (see the Judgment at [70]). The second defendant, Tan Teck Kee ("Mr Tan"), who was based in Cambodia in connection with various businesses owned by Mr Seah (see the Judgment at [69]), was also a party to these discussions. It needs to be noted that these four men were close friends (see the Judgment at [2] and [68]), and according to Mr Rai, it was in the context of their close friendship that they started discussing this potential joint investment (see the Judgment at [30]).

6 These discussions, according to Mr Rai, culminated in a meeting (the "First Meeting") at which he, Mr Seah and Mr SCH orally agreed to pursue the joint investment to purchase some plots of Cambodian land (the "Venture"). At this juncture, the plan underlying the Venture was simply to purchase land in Cambodia and flip it for a profit when it appreciated in value. Mr Tan was also present at the First Meeting, though he did not agree to participate in the Venture as an investor as he lacked capital. However, it was not the case that he had no role in the Venture, as we will explain below.

7 In his pleadings, Mr Rai labelled the oral agreement reached at the First Meeting in respect of the Venture as the "Oral Understanding" (see the Judgment at [32]). The existence and content of this Oral Understanding lay at the heart of the dispute in the court below. On Mr Rai's case, the parties to the Oral Understanding – namely, Mr Rai, Mr Seah and Mr SCH – agreed that

Mr Seah would act as the "custodian" of the investment funds for the Venture (see the Judgment at [33]). As "custodian", he was said to have undertaken *directly to the other investors in the Venture*, the obligation to oversee the funds, monitor expenses, sales receipts, and distribute profits made from the Venture, amongst other things (the list of obligations pleaded by Mr Rai is set out in the Judgment at [86] and [88]). Mr Seah, however, did not have to perform these tasks alone. On Mr Rai's case, he and Mr SCH agreed that Mr Seah could engage Mr Tan to "assist" him in the performance of such duties. In exchange, Mr Seah and Mr Tan would be entitled to share in 10% of the profits as their management fee.

8 However, regardless of what these four men allegedly agreed on, it was not in dispute that they could only give effect to this Oral Understanding *via* a Cambodian company. This was because Cambodian law precluded foreigners from owning land in Cambodia. Only citizens or companies incorporated in Cambodia with at least 51% of their shares held by a Cambodian national were allowed to do so. "Everyone" was aware of this restriction, even before the First Meeting (see the Judgment at [71]). Therefore, to get around this restriction, Mr Rai claimed that, shortly after the First Meeting, he, Mr Seah and Mr SCH met with one Oknha Rithy Sear ("Mr Rithy") (the "Second Meeting") to discuss his potential involvement. Mr Rithy was a Cambodian businessman whom they had met through a mutual friend during their visits to Cambodia to view the plots of land, the purchase of which they were considering.

9 At the Second Meeting, they discussed the Venture, and, on Mr Rai's case, Mr Rithy agreed to join them not only as an investor, but also as one of the individuals (alongside Mr Seah and Mr Tan) liable to render "true and full" accounts to the other investors, and who was also entitled to share in the 10% management fee mentioned above. Their plan, Mr Rai claimed, was to make the

acquisitions using a Cambodian company in which Mr Rithy was to hold the bare majority of shares (*ie*, 51%), and Mr Tan was to hold the balance. The Cambodian company ultimately used for this plan was the third defendant in Suit 160, Worldbridgeland (Cambodia) Co Ltd ("WBL"). Upon incorporation, Mr Rithy and Mr Tan were WBL's only two directors, and they remained so throughout the period with which Suit 160 was concerned. Mr Rithy and Mr Tan held, respectively, 51% and 49% of WBL's shares, and these represented around US$5,000 in capitalisation.

10 Whilst we are on WBL, it is useful to highlight that a point of some inferential significance is its incorporation date of 25 May 2011, prior to the First Meeting. Since the company existed at this time, an important question which arises in connection with the First Meeting – given that its participants were aware of the land-ownership restrictions imposed by Cambodian law – is whether WBL was *specifically* identified as the corporate vehicle for the Venture at that meeting. Mr Rai's evidence was that WBL did not come into the picture until *after* the Oral Understanding was concluded. He claimed that no company in particular had been identified at the time of the Oral Understanding, and that it was only thereafter that Mr Tan said that WBL would be the company used to make the land purchases. If true, this might lend support to Mr Rai's claim that the Venture was informally driven by the close relationship between the participants; indeed, to the extent that they were not even concerned about the particular vehicle to be used. However, there is no written evidence of the fact of the First Meeting, much less its contents. So, the answer to this question remains, ultimately, an inferential one to which we will return at [50] below.

11 There was no dispute that the plots of Cambodian land ultimately purchased were acquired in the name of WBL with the funds of Mr Rai and other investors. However, Mr Seah and Mr Tan wholly denied the existence of

the Oral Understanding or anything equivalent to such an oral agreement. They asserted, to the contrary, that the Oral Understanding – as well as the First and Second Meetings – were complete fabrications by Mr Rai. They instead relied on the fact that WBL was incorporated on 25 May 2011 and averred that it had been established by Mr Tan and Mr Rithy as a real estate investment company. In this connection, in fulfilment of its commercial purpose, they claimed that WBL was the actual entity which identified the opportunities to invest in Plots A and B, and had solicited the investors' contributions to finance these acquisitions (see the Judgment at [31]). Therefore, Mr Seah and Mr Tan pleaded that all investors (including Mr Rai) only had a contractual relationship with WBL, against which their causes of action lay. No cause of action, they claimed, could lie against them personally because there was simply no Oral Understanding.

12 It is evident from the above that the case put forth by Mr Seah and Mr Tan was fundamentally opposed to that of Mr Rai. Therefore, the primary issue which needed to be decided in order to resolve the dispute, was *whose* account ought to be believed. That is, was the investment initiated pursuant to the Oral Understanding which placed Mr Seah and Mr Tan personally at the helm of the Venture; or, was it initiated by WBL? The answer would ultimately depend on the assessment of the undisputed and objective facts. It is to these undisputed and objective facts which we now turn as we describe how the Venture panned out.

Part 2: How the Venture panned out

13 Shortly after the Second Meeting, on 10 October 2011, WBL entered into a sale and purchase agreement to purchase a 7,000m^2 plot in Phnom Penh for US$11,854,100 ("Plot A"). The particulars of this purchase are set out in the

Judgment at [7]–[10] and we need not restate them here. We will only highlight four salient points. First, in addition to the persons present at the First and Second Meetings, there were three others who contributed to the purchase of Plot A: Lee Eng Ngee ("Mr LEN"), Tan Loo Lee ("Mr TLL") and Lee Teck Leng ("Mr LTL"). Mr Seah admits that these three men were his "business partners", but the evidence of Mr TLL and Mr LTL (Mr LEN did not give evidence) suggests that their relationship with Mr Seah (and that of Mr LEN) was more akin to that of close friends. That said, it is not unequivocally clear that Mr Seah was the one who invited them to invest in the Venture. Mr TLL gave evidence that he heard about the opportunity from Mr LEN, who could have been told of the opportunity by Mr Seah. Mr LTL's evidence was that he came to know about the Venture from Mr Seah. The latter's evidence clearly supports Mr Rai's claim, but what is more pertinent to highlight is that neither Mr TLL nor Mr LTL gave evidence that they had learnt of the Venture from WBL directly. The importance of this point should be clear in light of the fundamentally opposing cases of the parties.

14 Returning then to the remaining three salient points in respect of the purchase of Plot A: the second is that Mr Rai's contribution was a significant sum of US$1,904,000. The third is that, part of this sum, amounting to US$974,000 was transferred by Mr Rai to Esun International Pte Ltd ("Esun"), a company controlled by Mr Seah (see the Judgment at [10]) rather than to WBL directly. Esun sent the money to Mr Tan's personal bank account, and it was then used to complete the purchase. The last is that, not long after the purchase of Plot A, Mr Tan issued a document to the contributing investors on 1 December 2011. This document was not issued on WBL's letterhead and was simply titled "Cambodian Investment Funds". It recorded the contributions of each investor, and, more importantly, included the following two terms (the full document is set out in the Judgment at [11]):

> 2. The decision on investment opportunities and the amount of investments for each projects [*sic*] ***will be solely decided by [Mr Tan]*** … director of [WBL], the company handling these funds.
>
> 3. To protect the interests of all subscribers, these funds will be logged in for a minimum period of two years. At the maturity of the investment funds, ***10% of the net profit*** (after deducting all cost and tax) ***will be paid to the director***, ***[Mr Tan]*** as the director fees.
>
> [emphasis added]

15 The next milestone in the Venture took place on 29 March 2012. On this date, WBL entered into another sale and purchase agreement to purchase a further 3,000m^2 plot adjacent to Plot A ("Plot B"). The price of Plot B was US$5,424,700 and although the group of investors who contributed to the purchase of Plot B differed from that in respect of Plot A (see the Judgment at [12]–[15]), Mr Rai remained a substantial contributor. He paid US$3,490,252 towards the purchase price of Plot B, all of which was transferred to Mr Tan's personal bank account instead of to WBL's bank account. Nothing equivalent to the "Cambodian Investment Funds" document was issued to the contributors following this second acquisition.

16 The final milestone of the Venture took place sometime between late 2012 and early 2013. By this time, Plots A and B had appreciated substantially in value. The investors determined that it would be more profitable for them to develop rather than to sell the land. After meetings with potential land developers and subsequent negotiations, a joint venture agreement ("JVA") was entered between WBL and Oxley Holdings Limited ("Oxley Holdings") – a company listed on the Mainboard of the Singapore Exchange – to construct a 45-storey twin tower, mixed-use development called "The Bridge" on Plots A and B. The JVA was signed on 15 July 2013.

17 Mr Seah and Mr Tan did not adduce any objective evidence of communications from WBL seeking the investors' consent to enter into the JVA (see the Judgment at [80]). Instead, Mr TLL testified to the effect that it was Mr Tan, acting in his capacity as a director of WBL, who had sought his consent. Mr LTL testified that Mr Seah was the one who *likely* informed him about the JVA and conveyed the opportunity to exit the Venture, though he was unable to recall this as a fact. Although neither account was supported by contemporaneous or objective evidence, one would expect Mr TLL's account, if correct, to be supported by objective, written correspondence emanating from WBL. On the other hand, given that Mr LTL's account was premised on informality, the absence of written documentation was not unexpected.

18 In any event, whatever the circumstances under which it came to be drafted and executed, the JVA provided that the vehicle of the joint venture was another Cambodian company called Oxley Diamond (Cambodia) Co Ltd ("Oxley Diamond"). WBL and Oxley Holdings each held 50% of the shares in Oxley Diamond; Mr Tan and Mr Rithy were appointed to Oxley Diamond's board as WBL's nominees, and the Chief Executive Officer of Oxley Holdings, Ching Chiat Kwong ("Mr Ching") was its nominee on Oxley Diamond's board (see the Judgment at [16]–[17]). The JVA provided that WBL and Oxley Holdings would each contribute an initial sum of US$35 million to the development of The Bridge, this sum being the valuation of Plots A and B agreed upon by the parties. Therefore, to put the JVA simply, WBL was to contribute US$35 million in land, and Oxley Holdings was to pay for the development costs up to the same value.

19 After the JVA was signed, nothing of particular significance took place until 31 December 2013. On or around this date, Mr Tan sent a document bearing WBL's letterhead to the investors who remained invested in the Venture

after the JVA was signed. This document, titled "Investment Agreement for 'The Bridge'" (the "Investment Agreement"), recorded each investor's contribution to the Venture (*ie*, the sums they each contributed to the purchase of Plots A and B) and, thus, their share of the profits which WBL stood to earn from the JVA. Mr Rai's total contribution was recorded as US$5,394,252 and this entitled him to a share of 31.2% of the profits (see the Judgment at [99]). Three further points about this document, are also worth noting.

20 First, the Investment Agreement states that WBL entered into the JVA "with the consent of all the subscribers to this fund" (see the Judgment at [19]). This statement pulls into even sharper focus the curious *total* absence of objective evidence demonstrating that formal requests for investors' consent had in fact emanated from WBL (see [17] above). Second, the Investment Agreement also provided that 10% of the net profit would be paid to *WBL* as management fees, "after deducting all costs and tax" (see the Judgment at [19] and [97]). This contradicts the terms of the "Cambodian Investment Funds" document which provided that *Mr Tan* was the one entitled to 10% of the profits as his "director fees" (see [14] above). Third, after 15 July but before 31 December 2013, the investors in the Venture were not issued any formal written document recording their interest in the profits which WBL stood to earn from the JVA. On Mr Rai's case, he was the one who asked for this document because he was critically ill at that time and he wanted to ensure that his wife would be able to handle his affairs should something untoward happen to him. Mr Tan's version of events is that he procured the Investment Agreement to ensure that, should anything happen to him (*ie*, Mr Tan), the investors would be able to prove the extent of their investments (see the Judgment at [80]). It is pertinent to note that, on either account, the Investment Agreement was not a document created contemporaneously to capture ongoing changes in the investors' position *vis-à-vis* the Venture. Instead, it was a

retrospective document aimed at formalising the informal understanding of the Venture among the parties. Therefore, even if Mr Tan's account is preferred, it is not entirely clear how it supports his and Mr Seah's claim that the Venture was WBL-led.

21 The foregoing paragraphs adequately capture how the Venture broadly panned out. Thus, we turn next to the third segment of the parties' dispute. This concerns the period after the Venture had become profitable and when profit distributions started to be made to (or withheld from) the investors. In particular, we are concerned with: (a) four payments made to Mr Rai, the first of which he received in 2015 and the balance three in 2018 (see the Judgment at [24]); and (b) US$35 million which WBL received from Oxley Diamond as dividends under the JVA, in respect of which no distribution has, to-date, been made to the investors. In respect of (a), Mr Rai also alleged that Mr Tan had made wrongful deductions prior to issuing the distributions.

Part 3: Distributions made and withheld by WBL; deductions

22 In July 2015, WBL and Oxley Holdings agreed to amend the JVA to account for the latter's reduced contribution from US$35 million to US$20 million as the land development costs were lower than initially estimated. As a consequence, WBL's contribution to the joint venture outvalued that of Oxley Holdings by US$15 million. Accordingly, it was agreed that Oxley Holdings would reimburse WBL to the tune of US$15 million, which it did on 17 July 2015. WBL, in turn, apportioned this US$15 million amongst the remaining investors in the Venture on or around 11 August 2015. For his 31.2% share in the Venture, Mr Rai received the sum of US$4,672,009 (the "First Payout") (see the Judgment at [22] and [24(a)]). With respect to the First Payout, no wrongful deduction has been alleged by Mr Rai (see the Judgment at [115]).

23 From the date of the First Payout until January 2018, nothing of interest occurred in relation to dividends from Oxley Diamond and payment to the investors. On 17 January 2018, Mr Tan informed Mr Rai that WBL would be receiving dividends from Oxley Diamond pursuant to the JVA, and that these funds would be distributed to the investors once received. On 27 March 2018, Mr Tan confirmed that US$10 million had been received from Oxley Diamond, and that Mr Rai would receive $2,840,892 (converted from US to Singapore dollars at the rate of US$1 is to S$1.30) for his 31.2% share, *after* deductions. On 2 April 2018, two cheques amounting to $2,840,000 were issued to Mr Rai by Mr Seah (see the Judgment at [24(b)]) (the "Second Payout").

24 Before turning to the next payout, we should state that it was Mr Rai's case that two improper deductions were made by Mr Tan from the dividends before the Second Payout. The first was the deduction of 20% allegedly made on account of capital gains tax. Mr Rai contends no capital gains tax was payable at the time. The second was a deduction of 15% for withholding tax when the correct deduction would have been of 14%. At the trial, Mr Rai called Vanessa Sok ("Ms Sok"), a Cambodian lawyer, as his expert witness. She confirmed that WBL did not need to pay capital gains tax at the material time, and that the applicable withholding tax rate was 14% (see the Judgment at [116]–[117] and [119]–[120]). Mr Seah and Mr Tan's Cambodian law expert was not asked to provide his opinion on these issues (see the Judgment at [115]). There was thus no serious dispute that Ms Sok's opinion was accurate.

25 Following communications between Mr Tan and Mr Rai in June 2018, Mr Rai was informed that WBL would be receiving further dividends of US$10 million from Oxley Diamond. For his 31.2% interest in the Venture, Mr Rai received a cheque for the sum of S$2,539,555 on 12 June 2018 (the "Third Payout"). The cheque for this sum was, again, issued by Mr Seah and

not by WBL. In respect of the Third Payout, like the Second Payout, Mr Rai claimed that Mr Tan had wrongfully deducted capital gains tax and excessive withholding tax (see the Judgment at [116] and [119]). Further, even though the dividends received from Oxley Diamond in respect of the Second and Third Payouts were the same (*ie*, US$10 million), we note that the sums actually paid to Mr Rai on the two occasions were curiously different.

26 Finally, on 17 October 2018, Mr Tan informed Mr Rai that there would be a further distribution of US$10 million. On 15 November 2018, Mr Tan sent a further message to inform Mr Rai that the total amount, after deductions, would be US$7,650,000, and that Mr Rai would be receiving US$2,368,800 for his 31.2% share. Four days later, Mr Rai received a cheque for this sum and again, the payment was from Mr Seah (the "Fourth Payout"). In respect of the Fourth Payout, Mr Rai only claimed that Mr Tan had wrongfully deducted excessive withholding tax; unlike the Second and Third Payouts, he did not allege that there was wrongful deduction for capital gains tax (see the Judgment at [116] and [119]).

27 At the trial, Mr Tan explained that the calculations for the deductions were carried out by the staff of WBL, and not by him personally, though he did not adduce any written documentation to evidence such calculations. Under cross-examination, he accounted for the lack of written evidence with the explanation that the calculations were conveyed to him verbally at a meeting. However, Mr Tan subsequently changed his evidence under cross-examination and claimed that the staff of WBL had given him a thumb drive containing the calculations, which he had subsequently lost. Mr Tan did not, however, attempt to obtain a duplicate copy of these calculations. He claimed that there was simply no reason for him to doubt the correctness of the calculations prepared by WBL's staff (see the Judgment at [122]–[123]). Of course, whether it was

reasonable for Mr Tan to have taken this course depends on a variety of considerations. Even so, however, it should be noted that a specific discovery order compelling him to disclose his correspondence with WBL's finance staff was made on 5 July 2021, three weeks before the start of the trial. By this stage of the proceedings, it was clear that Mr Rai had made allegations of wrongful deductions against Mr Tan. Yet, no explanation was proffered by Mr Tan as to why he did not take basic steps to answer these allegations.

28 Finally, we turn to the last important facet of the case in relation to the payouts. There is no dispute that, between April 2018 and August 2019, WBL received a further sum of US$35 million from Oxley Diamond which was retained without consulting the investors, including Mr Rai (see the Judgment at [125] and [129]). In fact, Mr Rai and the other investors were not even informed that this large sum had been received by WBL. It was only by way of a subpoena for documents served on Mr Ching that this came to be discovered by Mr Rai on the second day of the trial (see the Judgment at [125]).

29 When questioned about WBL's receipt of these dividends from Oxley Diamond, Mr Tan asserted that WBL – and, by extension, he (as a director of WBL at the time) – did not owe any duty of disclosure to the investors (see the Judgment at [127]). Further, such money had to be retained by WBL because it *may* be required for a "guaranteed rental scheme" ("GRR Scheme") promised by Oxley Diamond to purchasers of units in The Bridge. By this scheme, potential purchasers were allegedly incentivised to buy units in The Bridge because they were guaranteed rental earnings for a specified duration (see the Judgment at [130]). In due course, we will turn to the appropriate inferences to be drawn from these explanations. Nevertheless, it bears highlighting at this point: (a) that the latter explanation was maintained despite Mr Tan conceding that Oxley Diamond did not actually impose any conditions on the use of the

US$35 million which was distributed to WBL (see the Judgment at [131]); and (b) the assertion that such funds needed to be retained for the GRR Scheme was not pleaded.

Part 4: Commencement of Suit 160

30 Whatever one makes of the foregoing events, what is plainly evident is that the Venture was successful. Indeed, on 29 April 2018, Oxley Holdings issued a press release which reported that sales from The Bridge had garnered a "gross profit of S$140.8 million with a gross profit margin of 38%". This came to the attention of Mr Rai, who claimed that he turned to Mr Seah and Mr Tan for more information. No record of these requests exists and Mr Rai's explanation for this was that they were made orally, in person. In any case, Mr Rai claimed that the information was not forthcoming from them, and so, on 4 February 2019, he commenced Suit 160 against them for an account. WBL was added as a third defendant on 4 December 2019, but, as stated at [3] above, it did not participate in the trial.

The decision below

31 Drawing together all of the facts, circumstances and explanations put forth by the parties (as summarised above), the Judge found that Mr Seah and Mr Tan were fiduciaries to Mr Rai. In respect of Mr Seah, she found that his role was more limited and, accordingly, ordered that a relatively narrow common account be taken (see the Judgment at [133]–[134]) in relation to his involvement. As Mr Seah did not appeal against the Judgment, we need not concern ourselves further with this decision. As regards Mr Tan, in addition to finding that he was a fiduciary to Mr Rai with broad managerial oversight over the Venture (see the Judgment at [103]), the Judge was also satisfied that multiple instances of wilful default had been established against him. She

therefore ordered that the account he provide to Mr Rai be rendered on the basis of wilful default (see the Judgment at [132]).

32 In finding that Mr Tan was a fiduciary to Mr Rai, the Judge essentially preferred Mr Rai's account as to the genesis of the Venture. In her view, the investors had entered into an oral understanding "of some sort" (though, she did not find that every facet of the Oral Understanding pleaded by Mr Rai had been proven: see the Judgment at [81]), and that it was Mr Seah and Mr Tan who undertook to manage the Venture for the investors. This was in contradistinction to Mr Seah and Mr Tan's account, which placed WBL at the front and centre of not just the Venture generally, but *specifically*, as the initiating entity for the Venture. Many factors persuaded her to prefer Mr Rai's account, but the crucial ones may be summarised as follows.

(a) First, the extremely informal dealings of the parties supported the finding that they were dealing as close friends. Indeed, the earliest document – *ie*, the "Cambodian Investment Funds" document – recording the investors' contributions was only issued some months *after* they had transferred millions of dollars towards the purchase of Plot A (see the Judgment at [67]–[69] and [81]–[83]).

(b) Second, by contrast, the stark absence of *any* communications between WBL in its own capacity as a supposed real estate investment company and the investors prior to the purchase of Plot A cut against the allegation that WBL was the entity leading and initiating the Venture (see the Judgment at [65]–[66] and [75]).

(c) Third, the fact that WBL was a new company with only nominal capitalisation and no track record of projects before the Venture made it even less plausible that the investors would be willing to deal with it as

informally as they did, particularly, given the large sums of money involved (see the Judgment at [66], [72]–[73]).

(d) Fourth, the fact that Cambodian law restricted land ownership of foreigners provided a coherent and reasonable explanation for WBL's involvement in the Venture (see the Judgment at [71]).

(e) Fifth, the "Cambodian Investment Funds" document provided that it was Mr Tan alone who held the discretion over the use of the funds for the Venture (see the Judgment at [74]).

(f) Sixth, Mr Rai and his brother carried out legal work for the JVA between WBL and Oxley Holdings despite not being officers or even shareholders of WBL. If the Venture – and thus, the JVA – was being led by WBL, one would expect that it would have sought the advice of its own lawyers. The fact of Mr Rai and his brother's involvement therefore stood in support of the view that the Oral Understanding was probably a more accurate account of the case (see the Judgment at [76]–[79]).

(g) Finally, although the terms of the Investment Agreement seemed to suggest that WBL was behind the JVA, the fact that it was produced retrospectively undercut the weight which this document could lend to Mr Seah and Mr Tan's case (see the Judgment at [80]).

33 Apart from detailing the factors which stood in support of Mr Rai's case that it was the Oral Understanding which governed the investors' participation in the Venture – and not any alleged contractual relationship they each had with WBL – the Judge also explained her views on other factors which seemed to work against Mr Rai's case.

34 The first concerned Mr Rithy's role as a director of WBL. Contrary to Mr Rai's claim that he was a "mere front" for the purchase of Plots A and B, given the Cambodian land-ownership restrictions, the Judge held that Mr Rithy played some role in the Venture; for example, he took the lead in negotiating the JVA with Oxley Holdings. Notwithstanding, the Judge ultimately preferred the view that the fact that Mr Rithy had a role in the Venture did not detract from the substantial role played by Mr Tan (see the Judgment at [91]–[96] and [99]–[102]).

35 The second concerned inconsistencies in Mr Rai's case and the evidence in respect of the Oral Understanding, particularly, as they related to the exact timing of its formation, and certain aspects of its formulation. For example, Mr Rai pleaded that the Oral Understanding was formed at a meeting in September or October 2011. However, Mr Rai then stated in his affidavit of evidence-in-chief that it was formed over two meetings, the first taking place earlier than pleaded, between June and September 2011. Another inconsistency arose from Mr Rai's original pleaded case, which averred that the Oral Understanding related to the *development* of Cambodian land, not its acquisition, as his evidence would later suggest. The Judge regarded these inconsistencies as "relatively minor". In her view, they did not alter the *essence* of Mr Rai's case, which was founded on the basic claim that the investors agreed to participate in the Venture with Mr Seah and Mr Tan at the helm (see the Judgment at [84]–[90]).

36 In the round, the Judge was persuaded that the vital factual components of Mr Rai's case were established, and that these facts supported the finding that fiduciary relationships arose as a legal basis for the orders sought.

The grounds of appeal

37 Before us, Mr Tan raises two broad grounds of appeal.

(a) The Judge erred in finding that he was a fiduciary to Mr Rai and hence liable to account. Several arguments of fact and law are advanced in this connection.

(b) The Judge erred in determining that he was liable to account on the basis of wilful default. Instead, the Judge should have ordered an account on a common basis.

38 We should highlight that some of the arguments pursued on appeal were not canvassed before the Judge. Thus, for good order, instructed counsel for Mr Tan, Mr Davinder Singh SC ("Mr Singh"), sought leave under O 57 r 9A(4)(*b*) of the Rules of Court (2014 Rev Ed) (the "ROC 2014") to raise these new points before us on the basis that they are points of law which arise squarely from the evidence on record. No additional evidence needs to be relied on. The lawyers for Mr Rai, Drew & Napier LLC, led by Mr Jimmy Yim SC ("Mr Yim"), did not object to these arguments. We were satisfied, upon application of the relevant principles (see *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [38]), that leave may be granted. The new arguments will be highlighted in the course of our decision below.

Our decision

39 Mr Tan's two grounds of appeal will be dealt with in turn.

Whether Mr Tan was a fiduciary liable to account

40 We will address this issue from the ground up. That is, we will examine the underlying factual disputes and the findings made below before turning to determine their legal effect.

(1) The principal factual disputes

41 There are, in our view, two crucial questions of fact which were before the court below.

> (a) The first question, to which we alluded at [12] above, is whose broad account of the facts is to be preferred as regards the genesis of the Venture. Thus, was the Venture, as Mr Rai suggested, initiated pursuant to the Oral Understanding (or at least an oral understanding of "some sort") which placed Mr Seah and Mr Tan at the helm; or, was it, as Mr Seah and Mr Tan claimed, initiated by WBL in connection with its own business as a real estate investment company?
>
> (b) The second question only arises if the first question is resolved in Mr Rai's favour. If so, what then – as a matter of fact – were the roles played by Mr Seah, Mr Tan, Mr Rithy and WBL *vis-à-vis* the investors? This question needs to be addressed both in relation to their roles at the outset of the Venture, and as the Venture progressed.

(A) WHOSE BROAD ACCOUNT IS TO BE PREFERRED

42 In our judgment, the facts and circumstances of this case, as well as the explanations provided by the parties at the trial (as we have restated at [5]–[30] above) lend far stronger support to Mr Rai's case. The Judge was thus correct to find that the Venture was initiated pursuant to "some sort" of oral

understanding (see the Judgment at [65]–[90]). Or, as the Judge aptly put it, the Venture was being "driven from the bottom up by the [investors], rather than from the top down by WBL" (see the Judgment at [80]).

43 As stated earlier, the Judge did not determine that the Oral Understanding, on the exact terms pleaded by Mr Rai, existed. Instead, she found that there was "some sort" of oral understanding (see the Judgment at [81]), and this, Mr Singh argues, was not a decision she was entitled to reach. For this, he cites *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and others* [1992] 2 SLR(R) 382 ("*Multi-Pak*") at [24(c)]:

> A court may not make a finding or give a decision based on facts not pleaded and a finding or decision so made will be set aside (see *Esso Petroleum Co Ltd v Southport Corporation* [[1956] AC 218], *Panding v London Brick Co Ltd* [1971] 10 KIR 207 and *Lloyde v West Midlands Gas Board* [1971] 1 WLR 749).

44 In our view, *Multi-Pak* does not support the strict and inflexible position which Mr Singh advances in the present case. To be clear, we are not departing from the law and principles of pleadings as previously laid down by this court (see, *eg*, *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [34]–[41]; *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] 2 SLR 1256 at [125]; and *Fan Ren Ray and others v Toh Fong Peng and others* [2020] SGCA 117 at [12]). On the contrary, in *V Nithia*, this court observed that the court is *only* precluded from deciding a matter *which the parties have not put into issue* (at [38]).

45 Mr Rai's claim was premised on the assertion that Mr Seah and Mr Tan, by their participation in the Oral Understanding, owed him fiduciary obligations. However, it is crucial to bear in mind that he did not rely on the Oral Understanding *itself* as the source of Mr Seah and Mr Tan's obligations.

Put simply, his claim was not in contract, and the Judge, by deciding that "some sort" of oral understanding existed, was not going beyond the remit of the case before her. She was, as she was entitled to do, determining the *extent* to which Mr Rai had proven the individual aspects of his asserted relationship with Mr Seah and Mr Tan *vis-à-vis* the Venture. These constituent aspects of the Oral Understanding were – apart from the Oral Understanding itself – in issue. This was because, as the Judge rightly observed at [61]–[64] of the Judgment (and, as we will elaborate below from [50]–[66] and [68]–[78] below), the question of whether an *ad hoc* fiduciary relationship arises in any given case is evaluative and dependent on the actual roles played by the putative fiduciary. Such a relationship may have arisen irrespective of whether Mr Rai had proven *all* of the pleaded terms of the Oral Understanding or only *some* of those terms. It may have arisen even if the terms had not been proven as precisely pleaded; and, equally, it may not have arisen even if all of the terms had been proven as pleaded. Where the identification of fiduciary relationships is concerned, greater emphasis lies with the *substance* of the relationship rather than the terms governing that relationship. We therefore do not accept that the Judge was not entitled to reach the factual conclusion she did.

46 Mr Singh also submitted that Mr Rai's case was "riddled with inconsistencies", and that his explanations for such inconsistencies were unconvincing. In fact, Mr Singh argues that the pleaded Oral Understanding was not only inconsistent, it was so unclear that it was difficult for Mr Tan to even know the case he had to meet. To this end, Mr Singh points, in particular, to the inconsistent dates and number of the meetings which Mr Rai claimed gave rise to the Oral Understanding (see [35] above). In the face of these issues, he argues that the Judge should have found that Mr Rai's case was not credible.

47 We disagree for two reasons. The first is that the inconsistencies raised (which are the same as those set out in the Judgment at [84]–[87]) do not disprove Mr Rai's basic claim that some sort of oral understanding existed. The most that can be said is that they cast some doubt on the veracity of his recollection. Although the Judge did not accept Mr Rai's account as presented, the inconsistencies did not undermine the impact of the objective evidence and context as found by her. The second reason is that nothing more, in our view, was *required* for Mr Seah and Mr Tan to know the case which they had to meet. Their position was not just that the Oral Understanding was fabricated. They also claimed that, on the contrary, the Venture was initiated and managed by WBL as a real estate investment company carrying on its own business. This was Mr Tan's positive case and positive cases demand positive proof. Mr Rai's primary task was to prove *his* case, while Mr Seah and Mr Tan's was to prove theirs and by doing so show that his case could not stand. There can be no dispute that the parties did participate in the Venture. What was in dispute was which of the parties' conflicting and competing case theories truly accounted for the investors' participation in the Venture. In that sense, proof of Mr Rai's case would necessarily disprove Mr Tan's case and vice versa. In such a situation, in deciding which account is to be preferred, the court is not restricted to examining the positive case put forward by the plaintiff. Rather, the court is required to evaluate both case theories in order to arrive at a view as to which account is to be preferred.

48 Looking at the objective evidence before us, we are, like the Judge, satisfied that there *must* have been some sort of prior oral understanding which underpinned the conduct of Mr Rai, Mr Seah, Mr SCH, Mr Tan, Mr Rithy and even the other contributing investors like Mr LEN, Mr TLL and Mr LTL.

49 In our view, the factors which the Judge took into consideration (see [32] above) did indeed point towards the existence of such an oral understanding. However, to draw the correctness of the Judge's conclusion into even sharper focus, we highlight *the factor* in particular which persuaded us. This was the fact that *millions* of dollars were transferred by the investors into the control of Mr Seah, Mr Tan, Mr Rithy and/or WBL without any security, guarantee or any other form of written documentation to record the purpose of the transfers. We will return to the issue of who was actually in control of the monies transferred shortly. For now, our focus is on the fact that such substantial sums of money were being handled in such an informal manner. We accept, of course, that this does not *ipso facto* preclude a finding that WBL initiated the Venture as part of its ordinary business as a real estate investment company. However, before arriving at such a conclusion, the objective evidence must be carefully scrutinised to determine whether this was more likely than Mr Rai's case. Our first observation against such a view is the fact that there were *no* communications whatsoever between WBL and the investors *before* the purchase of Plot A (see [32(b)] above). We can well understand a group of friends being willing to deal with each other in this manner, even if the degree of trust between each pair of individuals may not rise to a level where they would have been comfortable dealing with each other, individually, in this informal way. In larger groups, the web of relationships strengthens the trust one member of the group may place in another, not by virtue of that member's own experience dealing with the other, but the trust that he has in the judgment of another member who, in turn, trusts that individual. By contrast, it is doubtful that a group of investors, most of whom were resident in Singapore, would have dealt so informally with a Cambodian company which had no track record of success and only nominal capitalisation. Ultimately, for such an arrangement to make any sense, the investors must have *some* trust in the arrangements for their

investments. WBL could not have been *itself* the source of that trust. This reinforces our view that the trust must therefore have stemmed from the investors' knowledge of the people involved: in particular, the people who would have control over their investments in the Venture. There were only three potential candidates in this regard: Mr Seah, Mr Tan and Mr Rithy.

(B) ROLES PLAYED BY MR SEAH, MR TAN, MR RITHY AND WBL

50 The Judge found that Mr Seah's role was generally limited to collecting and relaying money to WBL or Mr Tan's bank accounts through Esun (see [14]–[15] above). He was not involved in the day-to-day control or management of the Venture or WBL (see the Judgment at [10] and [105]–[110]) once the Venture took off, and this was not a finding which has been challenged on appeal.

51 Mr Seah seemed, however, to have a more prominent role in the procurement of the investors' participation in the Venture. As we noted at [13] above, Mr LEN, Mr TLL and Mr LTL were *Mr Seah's* business associates and friends; Mr LTL gave evidence that it was Mr Seah who informed him about the Venture. This does not necessarily mean that Mr Seah alone was enough to convince each and every investor to participate in the Venture, but, as we observed at [49] above, the web of relationships created an environment which seemed to bolster Mr Seah's initiation of the Venture. Mr LTL gave evidence that he was initially hesitant about the Venture despite Mr Seah's optimism. He therefore turned to Mr LEN whom he knew to be "balanced in his assessments". Mr LEN, who had successfully invested in property during the 1990s in China with Mr Seah, suggested to Mr LTL that the Venture mirrored their earlier investment in China. This in turn persuaded Mr LTL to invest.

52 To us, the salient point which arises from this is the key role Mr Seah played in persuading the investors to join the Venture. His success may not have been due to his efforts alone, but it seems to us that he was at the forefront. This role, in turn, sheds light on how the investors agreed to participate in the Venture. At a very basic level, it lends support to our view (and that of the Judge) that the Venture was not initiated by WBL. After all, Mr Seah was not a director or shareholder of WBL and his involvement in inviting investors to consider the opportunity clearly contradicts the case that WBL was the initiator of the Venture. More importantly, however, Mr Seah's role was probably the reason why the investors had agreed to participate in the Venture without *any* legal safeguard such as even a simple written contract.

53 The evidence given by Mr TLL and Mr LTL is useful in assessing this probability. Mr TLL's evidence was that he became interested in the Venture because Mr LEN had informed him that he (Mr LEN) and Mr Seah were investing. He claimed that he was "subsequently given an investment agreement" which was with WBL. However, the documents reflecting the investors' participation in the Venture were not created contemporaneously; both the "Cambodian Investment Funds" document and the Investment Agreement were prepared retrospectively. Mr LTL's evidence is also revealing. He testified that, as a lawyer, he was cautious of the fact that the Venture would be carried out through WBL in which Mr Rithy – with whom he had no prior relationship – had a controlling interest as well as a directorship. He therefore "made an effort to speak" to Mr Rithy. The answers which Mr Rithy gave in these conversations and his "behaviour in general" satisfied Mr TLL that Mr Rithy was trustworthy.

54 Neither of these fairly inadequate accounts can reasonably offer an explanation why no effort was made to secure at least a basic written agreement

with WBL if that was indeed the party with whom the investors thought they were dealing. Indeed, even if Mr LTL considered Mr Rithy to be trustworthy, that was still the first time he had met Mr Rithy, and as a lawyer cautious in the first place about the structure of the Venture, it was inexplicable that he did not even ask for the arrangement to be captured in writing. In our view, such lack of effort to safeguard themselves can only be reasonably explained by the fact that there must have been someone involved closely in the Venture who the investors saw as guarding their interests. The evidence of Mr Seah's active involvement in the initiation of the Venture and Mr Tan's known appointment as the other shareholder and director of WBL point towards the investors trusting *them* as the persons who would protect their interest in the Venture. In fact, we consider that Mr Rai's specific case that Mr Seah had undertaken to manage the Venture with Mr Tan as his "assistant" is the more probable explanation for their investments. We prefer this view because of the far stronger prior connections between Mr Seah and the investors like Mr TLL and Mr LTL. That said, while this is, in our view, the more likely reason why the investors' participation in the Venture took such an informal shape, Mr Seah's role once the Venture commenced and progressed, as the Judge determined, was not actually that of a manager. Instead, Mr Seah had effectively delegated that responsibility to Mr Tan.

55 As the Judge explained at [110] of the Judgment, Mr Seah and Mr Tan had engaged in a variety of business ventures before this. Mr Seah's *modus operandi*, the Judge noted, was that he would "contribute capital while Mr Tan would perform the work of managing the business or investment on the ground". This working arrangement was accepted by Mr Tan in cross-examination.

56 In the circumstances, we are satisfied that, though Mr Seah did not play an active day-to-day role in the Venture, his position in relation to the investors

was not insignificant. He was a crucial source of trust which gave the investors the confidence to participate in the Venture on the informal and, more importantly, unprotected basis.

57 This brings us next to the position of Mr Tan as Mr Seah's "assistant". Having established Mr Seah's role in the Venture, the further question which we need to address is the specific capacity in which Mr Tan undertook to act as Mr Seah's assistant. There are two possible answers. The first is that he did so in his personal capacity whilst concurrently being a director of WBL. The second is that he did so in his capacity as a director of WBL, thereby placing the investors in a direct legal relationship *only* with WBL such that should they need to enforce their interests in the Venture, such enforcement would properly lie *only* against WBL. To the extent that Mr Tan then needed to safeguard the interests of the investors, it was only because WBL, as a contractual party to the JVA, was obliged to safeguard the interests of the investors and he did so in his capacity as a director of WBL. It is in this context that the interesting question which we had alluded to at the outset of this judgment (see [1] above) takes centre stage. That is, whether it is permissible for a director to undertake to act in the interests of third parties in his own capacity when he, as a director, already has to act in the interest of his company. However, it would only be necessary to resolve this question if we uphold the Judge's finding that Mr Tan had acted in his personal capacity whilst concurrently being a director of WBL.

58 We first examine whether WBL was even contemplated as the body corporate through which the Venture would be carried out at the time when the oral understanding was reached. As mentioned at [10] above, Mr Rai claims that WBL was not brought up *specifically* until after the Oral Understanding had been formed following the Second Meeting. However, we note that WBL was incorporated on 25 May 2011 and the First and Second Meetings, according to

Mr Rai, took place in the latter half of 2011, *ie*, after the incorporation of WBL. Mr Rai claims that it was at the Second Meeting that the attendees – including himself, Mr Seah, Mr Tan and Mr Rithy – planned to use a Cambodian company 51% owned by Mr Rithy and 49% owned by Mr Tan to carry out the Venture. Given the specific shareholding split, it is not unlikely that Mr Rithy and/or Mr Tan might have raised the fact that WBL fitted the bill. This is especially so, given that "everyone" was aware of the restrictions imposed on land ownership under Cambodian law at the time when the Venture was discussed (see the Judgment at [71]).

59 However, the fact that WBL might have been mentioned as the specific company through which Plots A and B would be acquired for the purposes of carrying out the Venture is not necessarily dispositive of the issue. In our view, the more significant premise underlying the nature and extent of Mr Tan's role *vis-à-vis* the investors and, therefore, whether a personal relationship can be said to have been formed between himself and the investors is the fact that the investors transferred substantial amounts of money towards the Venture with nothing in writing to even record their contributions – much less anything which suggested *specifically* that they had entered into an enforceable contract with WBL. This is further compounded by the fact that, as stated at [14]–[15] above, portions of such transfers were not even paid into WBL's bank account, but rather into Mr Tan's own account.

60 These objective facts strongly support the inference that Mr Tan had not undertaken to "assist" Mr Seah in his capacity as a director of WBL, but rather, in his personal capacity. It bears emphasising that this role was conceived at the commencement of the Venture, *ie*, around the time when the investors made their substantial contributions towards the purchase of Plot A.

61 After the acquisition of Plot A, but before the acquisition of Plot B, Mr Tan issued the "Cambodian Investment Funds" document to the investors. Although this document recorded WBL as the company "handling" the investors' funds, it was also stated that Mr Tan would, *personally*, have sole decision-making powers in respect of those funds, and would alone be entitled to 10% of the net profits of the Venture as *his* "director fees" (see [14] above). Before us, Mr Singh referred to Mr Tan's oral testimony that these terms were incorrectly recorded, and they should instead refer to WBL and not to Mr Tan personally. However, that was a bare assertion that was not substantiated by any objective evidence. We must therefore construe the "Cambodian Investment Funds" document on the terms as recorded therein. Those terms, in particular, cll 2 and 3, therefore make it abundantly clear that Mr Tan undertook to act in his *personal* capacity as Mr Seah's assistant in the management of the investors' funds and not in his capacity as a director of WBL.

62 Some five months after the execution of the JVA, Mr Tan arranged for the issuance of the Investment Agreement which recorded that *WBL*, rather than Mr Tan, was the entity entitled to receive 10% of the profits as management fees. This document contained no references to Mr Tan, *only WBL*, suggesting that no legal relationship existed with Mr Tan personally. Yet, when the time came for distributions to be made to the investors from the dividends received from Oxley Diamond under the JVA, conspicuously, *WBL* played no role. The evidence revealed that Mr Tan was effectively handling the payouts in his own capacity, with Mr Seah, a non-member and non-director of WBL, taking on the task of relaying the payments to fellow investors (see [22]–[26] above). We also noted that Mr Rithy, the other director of WBL, played no role in handling and authorising these payouts.

63 We therefore agree with the Judge that Mr Tan did not undertake to "assist" Mr Seah in his capacity as a director of WBL. Instead, he did so in his personal capacity. There was, therefore, as a matter of fact (we will turn to the issues of law shortly at [67] below), a relationship between the investors and Mr Tan *directly*, without the interposition of WBL.

64 This brings us, finally, to the position which Mr Rithy held in relation to the investors and how, if at all, such relationship affected Mr Tan's relationship with the investors by virtue of his role as described above. As stated at [9], Mr Rithy was the majority shareholder and a director of WBL, and, as the Judge found, he was not a "mere front" (see [34] above). As a director, he had the power to affect the investors' commercial interest in the Venture since such interest necessarily depended on WBL. The question, therefore, is whether the fact that Mr Rithy held such power in WBL by itself undermined Mr Tan's role in relation to the investors. Put simply, the question is how Mr Tan could have safeguarded the investors' interests when Mr Rithy had the power at law to stop Mr Tan from acting in the interests of the investors.

65 In this respect, we agree with the Judge's view that Mr Tan's role in the Venture was not diminished by the fact that Mr Rithy was not a mere front. We do not think that, in order to be in a legally significant relationship with the investors – particularly, one which could carry fiduciary obligations – Mr Tan needed to possess the strict legal right to exercise unilateral control over WBL. The extent of control Mr Tan could exercise in WBL, notwithstanding the co-ownership and co-directorship of Mr Rithy, was a question of fact. Consider for example, the "Cambodian Investment Funds" document and the Investment Agreement. These documents were drafted, signed and issued by Mr Tan without reference to Mr Rithy. Equally, there is nothing to suggest that the payouts issued by Mr Tan in 2015 and 2018 were co-handled or even approved

by Mr Rithy. Indeed, Mr Rithy was not copied in emails sent by Mr Tan setting out his calculations of the deductions and the payouts, which suggests that Mr Tan had determined and authorised those payouts without reference to Mr Rithy.

66 In the round, although Mr Rithy could *in theory* exercise his powers as a co-owner and director of WBL to affect Mr Tan's exercise of control over WBL, Mr Singh was not able to refer us to any occasion where Mr Rithy in fact exercised such powers. In our judgment, Mr Rithy's position in WBL did not in any meaningful way affect Mr Tan's ability to carry out his role (in his *personal* capacity) of assisting Mr Seah in the latter's management of the Venture in the interest of the investors. This leads us to the pivotal questions of whether the role which Mr Tan undertook placed him in a fiduciary relationship *vis-à-vis* the investors, and, if so, whether there was any legal impediment preventing Mr Tan from assuming fiduciary obligations to the investors given that he already owed fiduciary obligations to WBL as its director.

(2) The legal questions raised on appeal

67 Mr Singh advances two principal legal arguments in this appeal:

(a) The Judge failed to appreciate that the unique and distinguishing obligation owed by fiduciaries to their principals is that of single-minded loyalty. Thus, he argues, to identify whether a putative fiduciary was in fact in an *ad hoc* fiduciary relationship with a supposed principal, the court needs to ask whether that putative fiduciary undertook to act exclusively in the interests of the supposed principal.

(b) Mr Rai's claim to be in a fiduciary relationship with Mr Tan would fall foul of the principle in *Said v Butt* [1920] 3 KB 497, most

recently clarified in *PT Sandipala Arthaputra and others v STMicroelrectronics Asia Pacific Pte Ltd and others* [2018] 1 SLR 818 ("*Sandipala*"). Mr Singh argues that the principle in *Said v Butt* applies here because Mr Rai's real legal relationship arose from a contract with WBL and there was no legal relationship with Mr Tan who was merely a director of WBL.

(A) THE "TEST" FOR IDENTIFYING A FIDUCIARY RELATIONSHIP

68 We now turn to consider whether the Judge was correct to find that Mr Tan was a fiduciary to Mr Rai and hence liable to account.

69 In *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*") this court stated that the relevant inquiry is whether the putative fiduciary had "voluntarily place[d] himself in a position where the law can objectively impute an intention on his … part to undertake [fiduciary duties]" [emphasis omitted] (at [194]). This question is notoriously open-ended and, thus, in determining whether such an intention ought to be imputed, the court can rarely be more precise – without being unduly dogmatic – than broadly examining and evaluating the specific nature of the role played by the putative fiduciary (see, *eg*, the characteristics suggested in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 at [41] citing *Frame v Smith* [1987] 2 SCR 99; *Commodities Intelligence Centre Pte Ltd v Mako International Trd Pte Ltd and others* [2022] SGHC 131 ("*Mako*") at [53]–[55] citing *Burdett v Miller*, 957 F.2d 1375 (7th Cir 1992)). These include the extent to which the putative fiduciary may exercise discretion which affects the position of the supposed principal and the degree of vulnerability to which the supposed principal is subject. This was the approach adopted by the Judge (see the Judgment at [60]–[64]).

70 Mr Singh however argues that the Judge erred because she failed to direct her mind to the question as to whether the putative fiduciary, Mr Tan, had undertaken to act exclusively in the interest of the supposed principal, Mr Rai. This is one of the new arguments raised by Mr Singh. In support of this, he cites several key authorities that single-minded loyalty is the unique and distinguishing obligation owed by fiduciaries (see, *eg*, *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18, *Tan Yok Koon* at [192], *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 at [247] and [253]).

71 In particular, Mr Singh relies on a passage in the decision of the Federal Court of Australia, *Grimaldi v Chameleon Mining NL (No 2) and another* [2012] FCAFC 6 ("*Grimaldi*"). At [177], the court stated:

> As to who is a "fiduciary", while there is no generally agreed and unexceptionable definition, the following description suffices for present purposes: a person will be in a fiduciary relationship with another when and in so far as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another *as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest* ...
>
> [emphasis added; citations omitted]

72 Relying on this authority at the hearing, Mr Singh submitted that Mr Tan could not have undertaken any duty of single-minded loyalty to Mr Rai because he was already a director of WBL and, thus, *would not* have undertaken to act loyally to anyone else. Mr Singh argued that, without this undertaking to Mr Rai to act with single-minded loyalty, no fiduciary relationship could have arisen between Mr Tan and Mr Rai. It appears to us that Mr Singh's argument is predicated on a wholly subjective inquiry *from the perspective of the putative fiduciary*, *ie*, whether Mr Tan *would* have undertaken to act exclusively in the interests of Mr Rai. We do not think that such an approach is supported by the

authorities: see Weiming Tan, "Negotiating New Curves Alone Chancery Lane: Four More Questions on Fiduciaries" (2021) 35(4) *Trust Law International* 197 ("*Tan*") at pp 198–201. Here, the author usefully sets out the modern approach in identifying *ad hoc* fiduciaries in Australia (as stated in *Grimaldi*), as well as other leading common law jurisdictions such as Canada (as stated in *Waxman v Waxman* [2002] OTC 443 at [1225]), New Zealand (as stated in *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 at 598) and the UK. The former three have, for some years, applied a test based on an inquiry into the "reasonable" or "legitimate" expectations of the supposed *principal* (as can be gleaned from the passage quoted from *Grimaldi* above). This approach, *Tan* explains, has recently been applied by the UK Supreme Court in *Children's Investment Fund Foundation (UK) v Attorney General and others (sub nom Lehtimäki v Cooper)* [2022] AC 155 ("*Lehtimäki v Cooper*") in respect of charitable companies (at [42]–[51] and [78], *per* Lady Arden).

73 To be clear, we are not saying that a test premised on the "reasonable" or "legitimate" expectations of the supposed principal should be preferred over the broader approach espoused in *Tan Yok Koon*, *ie*, whether the putative fiduciary had "voluntarily place[d] himself in a position where the law can objectively impute an intention on his … part to undertake [fiduciary duties]". Indeed, in *Lehtimäki v Cooper*, Lady Arden herself recognised that an inquiry into the "reasonable expectation" of a supposed principal "may not be appropriate in every case" (at [48]), though she did not elaborate when it might be appropriate or otherwise. The point we make is simply that the notions of "reasonableness" and "legitimacy" applied in other jurisdictions quite plainly do not support an approach focused entirely from the subjective perspective of a putative fiduciary as to whether he would have undertaken to act exclusively in the interest of the supposed principal.

74 However, we should state that we are mindful that there is some academic criticism against the broad, open-textured approaches adopted in cases like *Tan Yok Koon*. In a recent article by Professor Sarah Worthington, "Fiduciaries Then and Now" (2021) 80(S1) *Cambridge Law Journal* s154 ("*Worthington*"), support was expressed for the view of Professor Len Sealy (see "Fiduciary Relationships" (1962) 20(1) *Cambridge Law Journal* 69), who had suggested that the identification of fiduciary relationships should be more specific to cases where the putative fiduciary "has control of another's property or has undertaken to act on another's behalf and for the other's benefit and not the fiduciary's own benefit" (*Worthington* at p s163). These narrower circumstances – called "legally significant facts" by the learned professors – are suggested to be a desirable circumscription of the potential situations capable of giving rise to fiduciary relationships and the corresponding onerous obligations and remedies which follow therefrom.

75 As Professor Worthington went on to observe (at pp s165 and s167):

> (p s165) What Sealy's analysis does is provide for us, in remarkably clear and incisive form, the legally significant facts within any relationship which determine whether fiduciary obligations will be imposed.
>
> So the real innovation in this early work done by Sealy lies in addressing the lawyer's need to know which facts are legally relevant, and precisely which obligations are then imposed, and, finally, what legal consequences will then follow if these obligations are breached by the individuals we call "fiduciaries". Sealy provided exceptionally precise and practically useful answers to each of these questions.
>
> …
>
> (p s167) … We have paid far less attention to defining the legally material facts that give rise to these tightly defined duties and their unusual defendant-focused remedies. This matters. Indeed, it matters a great deal. If we have not clearly settled on the legally significant facts, then we may be under- or over-inclusive in identifying the situations where the law imposes fiduciary obligations and affords disgorgement remedies. We do

> not make this mistake in other areas of the law: consider the consequences if we adopted rather loose and flexible rules around when a contract had been made, or when a trust arises, or when a duty of care is owed. Sealy's tightly circumscribed legally material facts capture only individuals who have control of another's property or have undertaken a role to act on another's behalf and for that other's benefit *and not the fiduciary's own benefit.*
>
> [emphasis in original]

76 We accept that, in a paradigm case, a fiduciary would have undertaken in clear, express terms, to act only for the benefit of his principal to the exclusion of all others, including the fiduciary himself. However, even taking the academic preference for greater precision in articulating "legally significant facts" at its highest, we do not understand the academics to be making an argument for dogmatic adherence to this paradigm case. After all, as *Tan* rightly observes, rarely will there be a case in which a person expressly undertakes to act selflessly (*Tan* at p 201). Indeed, as Professor Worthington goes on to observe in her article, a distinction which Professor Sealy drew between fiduciaries on one hand, and, on the other, persons not typically considered fiduciaries but possessing some discretion which needs to be exercised in good faith and for proper purposes (*eg*, holders of contractual discretions, mortgagees with a power of sale), is that Professor Sealy required a fiduciary, "if he acts at all, to act in accordance with the undertaking *he is seen to have given* not to act in his own interests. This is the legal constraint which addresses the moral hazard of having … fiduciaries in control of the principal's property or in control of acting for and on behalf of the principal" [emphasis added; emphasis in original omitted] (*Worthington* at p s170). If it is sufficient that the putative fiduciary is *seen* to have given such an undertaking, that necessarily requires some degree of *objectivity* in the analysis.

77 This brings us back to the present appeal. For the purposes of the present appeal, we do not see any reason to depart from the open-ended approach preferred in *Tan Yok Koon*. Even if this approach may engender some uncertainty in its application, it is unclear whether there is, at present, an obviously better and clearer path. As was observed in *Mako*, "the best which can be done, until an effective theory of fiduciaries is formulated and accepted, is to take into account the relevant considerations" [emphasis omitted] (at [55]). Such a task is not one which we are being asked to undertake in the present case; indeed, neither Mr Singh nor Mr Yim has mounted arguments with a view to resolving this long-standing challenge in the law of fiduciaries, and, without the benefit of full arguments, we leave the matter for another case. On this note, we turn to the appeal before us.

78 In our view, Mr Tan should be *imputed* with the intention to undertake fiduciary obligations to the investors (see the test set out in *Tan Yok Koon* at [69] above). The position which he voluntarily undertook possessed a high degree of control in the handling of the investors' interest in the Venture. Mr Rithy's position as a director of WBL did not, in any meaningful way, limit Mr Tan's exercise of such control and, more pertinently, there was little which the investors could do to protect their interest in the Venture. In other words, they were particularly vulnerable to Mr Tan's exercise of power. This is most evident from the fact that Mr Tan could unilaterally decide to retain in WBL's possession the US$35 million received by WBL from Oxley Diamond, a sum which Mr Tan candidly admitted the investors had an interest in (see the Judgment at [131]). In fact, Mr Rai did not even know that such sum had been paid to WBL until Mr Ching was subpoenaed to produce the relevant documents in the course of the trial (see [28] above).

79 We therefore agree with the Judge's conclusion that Mr Tan owed Mr Rai fiduciary obligations on the facts as an *ad hoc* fiduciary. There is, however, a further argument raised by Mr Singh. He submits that even if Mr Tan is held to owe fiduciary obligations to Mr Rai, he would nonetheless not be liable to account (which is the order sought by Mr Rai: see [30] above) because only *custodial* fiduciaries are liable to account. In support of this, Mr Singh relies on the decision in *Tongbao (Singapore) Shipping Pte Ltd and another v Woon Swee Huat and others* [2019] 5 SLR 56, where Audrey Lim JC (as she then was) stated that where a fiduciary does not breach a custodial duty, "the accounting rules are inapplicable" (at [128]). We highlight that this was one of the new arguments raised by Mr Singh on appeal.

80 The factual basis of this argument is that any control Mr Tan had over the money contributed by the investors to the Venture was derived solely from his office as a director of WBL. Furthermore, even as a director he did not have unilateral control over such money since Mr Rithy was also a director of WBL and thus could veto his decisions. We have dealt with the second of these two points at [64]–[66] above and our answer does not need to be repeated. As to the former, we reject Mr Singh's contention. While we have found that Mr Tan undertook fiduciary obligations in his personal capacity, he was also a director of WBL with – as we have shown – the ability to exercise unilateral custodial powers over the assets of WBL in which the investors had an interest. The relevant question for determination is whether Mr Tan can owe concurrent fiduciary duties both to Mr Rai, a third party *and* WBL.

81 We turn to this at [84] below after disposing of Mr Singh's argument on the application of the principle in *Said v Butt*.

(B) APPLICABILITY OF THE PRINCIPLE IN *SAID V BUTT*

82 The principle in *Said v Butt* provides that the law will "exempt directors from personal liability for the contractual breaches of their company (whether through the tort of inducement of breach of contract or unlawful means conspiracy) if their acts, in their capacity as directors, are not themselves in breach of any fiduciary or other personal legal duties owed to the company" (*Sandipala* at [62]).

83 The detailed factual analysis above makes it plain that this is not a case which involves a company's breach of contract, in respect of which a claim has been brought to hold a director personally liable. Mr Rai's claim against Mr Tan is not premised on a contract breached by WBL but, rather, against Mr Tan as a fiduciary in his own right. The principle in *Said v Butt*, in short, is not engaged and we do not need to spend any time further on this issue.

84 Mr Singh argues that a director may not, outside his capacity as a director of a company to which he owes fiduciary obligations, voluntarily undertake a role *vis-à-vis* a third party to give rise to fiduciary obligations. Mr Singh argues that such a situation is not possible because a director owes a duty of single-minded loyalty to his principal company, and thus, to place the interests of the company above all others including his own. To allow a fiduciary relationship to arise between the director and a third party at the same time would, as Mr Singh says, require the director to do the "very opposite" of what he should do *vis-à-vis* his principal company.

85 With respect, we do not agree with Mr Singh's proposition. In our view, there is nothing – as a matter of general principle – which prevents a director from voluntarily placing himself in a position which gives rise to a second fiduciary relationship to a third party. We can accept that a director who owes

fiduciary duties to his company *should not* voluntarily place himself in a position to give rise to fiduciary duties to a third party as it may potentially create a conflict of interest. Where he has voluntarily done so, the company would be entitled to take action against the director for acting in a situation of actual conflict or placing himself in a position in which there is a "real sensible possibility" that a conflict of interest would arise (*Boardman v Phipps* at [1967] 2 AC 46 at 124 *per* Lord Upjohn). The solution is not, in our view, for the court to lay down a rule that no fiduciary duties to third parties can ever arise in the latter situation. In our judgment, the relevant inquiry is whether the director had voluntarily placed himself in a position which gives rise to fiduciary duties to a third party. If the answer to this *factual* inquiry is in the affirmative, then to hold that such a person (who is concurrently a director), cannot, as a matter of law, owe fiduciary duties to the third party would in effect immunise the errant director from the consequences of his actions which had in turn created real or potential conflicts between his position as a director and that of his role to the third party.

86 We therefore do not accept the broad argument that fiduciary duties may not arise in cases like the present. In fact, we would highlight that Mr Singh does not appear to be arguing that there was any real conflict which arose in this case. Indeed, based on the objective evidence before us, it does not seem that there was any *real* conflict between Mr Tan's performance of his duties as a director of WBL and his performance as a fiduciary to the investors (including Mr Rai). On Mr Tan's case, WBL's business was in real estate investment, and, if so, we struggle to see why it would be disloyal for Mr Tan to properly perform and account for what Mr Tan himself seeks to characterise as a subscription agreement between the investors and WBL. Such tasks are those which WBL would *itself* – on Mr Tan's case – have to carry out for its investors, and, in doing so, it would be acting both in its own interests and those of its investors.

There is, in this scenario, little room for actual conflict between the interests of WBL and its investors as they are substantially aligned. It thus seems to us that Mr Tan's argument is somewhat self-serving in that *he* is seeking to rely on an alleged prohibition in order to avoid performing the very obligations which he had voluntarily undertaken *vis-à-vis* the investors.

87 As a closing note, we are mindful that Mr Rai's action was brought against *both* Mr Tan *and* WBL. Furthermore, Mr Rai has since obtained an order against WBL to account. Mr Singh argues that this creates an incompatible state of affairs. While this might have given rise to some inconsistency in the cases mounted against WBL and Mr Tan, we do not agree such inconsistency justifies reversing the Judgment especially since the order against WBL was a default order obtained when it elected not to participate in the trial. In short, the mere fact that Mr Rai, for whatever reason, had chosen to mount an inconsistent claim against WBL does not mean that the Judge had erred in arriving at her decision against Mr Tan. In any event, we note that Mr Tan's compliance with the order would effectively relieve WBL from having to *separately* provide an account to Mr Rai.

88 In summary, we therefore affirm the Judge's holding that Mr Tan was a fiduciary to Mr Rai.

Whether Mr Tan should account on the basis of wilful default

89 Having determined that Mr Tan was a fiduciary to Mr Rai, it follows that he is liable to account (see *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2019] 4 SLR 714 at [72]–[77], *UVJ and others v UVH and others and another appeal* [2020] 2 SLR 336 ("*UVJ v UVH*") at [24]–[27], and *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [166]–[172] (*per*

Lord Millett NPJ). The remaining question is whether he should be ordered to render a common account or an account on the basis of wilful default.

(1) The applicable law

90 A prayer for an account to be taken on the basis of wilful default requires proof of *at least* one instance of such default (see *Ong Jane Rebecca v Lim Lie Hoa and others* [2005] SGCA 4 ("*Rebecca Ong*") at [61]), though, if only one instance is established, that would likely have to be a significant instance of default (see John McGhee and Steven Elliott gen eds) (Sweet & Maxwell, 34th Ed, 2020) ("*Snell*") at para 20-026, citing *Coultard v Disco Mix Club Ltd* [2000] 1 WLR 707 at 733). That single instance of default would need to be significant because, in examining the fiduciary's misconduct, what the court is looking to establish specifically, is whether that default allows a *prima facie* inference to be drawn that there may be other instances of wilful default which have yet to be uncovered (see *Snell* at para 20-026, citing *Re Tebbs* [1976] 1 WLR 924 ("*Re Tebbs*") at 930 and *Re Stevens* [1898] 1 Ch 162 at 170). Naturally, the greater the number of *proven* instances of default, the stronger the inference that there may be others. If no such inference arises, irrespective of the number of instances proven, a common account would be sufficient.

91 These principles are broadly consistent with those applied by the Judge (see the Judgment at [113]), though, we have restated them by placing emphasis on the need for particularity in drawing the specific inference of wilful default. In our view, this particularity is necessary given that, as Slade J observed in *Re Tebbs*, an order for an account to be taken on the basis of wilful default can be quite "drastic" because it entails an unbounded search for potential wrongdoing (at 930–931). Accordingly, if there is no suggestion that such a search would be productive, the court will generally hesitate to grant such an order. That said,

we are of the view that the Judge applied her mind to the correct principles and, indeed, Mr Singh has not argued otherwise. Thus, we will focus our attention, in the main, on the facts.

(2) The allegations of wilful default

92 As stated at [22]–[29] above, three acts of wilful default were alleged against Mr Tan at the trial. The first concerned various deductions he made from the payouts to the investors, including Mr Rai. The second and third concerned, respectively, Mr Tan's failure to inform the investors that WBL had received US$35 million in dividends from Oxley Diamond under the JVA, and his alleged unilateral decision to retain this sum in the accounts of WBL rather than issuing further payouts. The Judge found that each of these allegations of wilful default were made out against Mr Tan.

93 With respect to the first allegation, Mr Singh makes three arguments. First, that the four payouts made by Mr Tan were of money which belonged to WBL. As such, if there was any impropriety in Mr Tan's handling of the payouts, it is *WBL* which has a cause of action against him for breach of his duties as a director. Second, that Mr Tan's "uncontradicted" evidence is that he did not carry out the calculations personally, nor did he have the expertise to carry out such calculations. Lastly, that, even if Mr Tan had been involved in calculating the deductions, he was acting *qua* director. Thus, Mr Rai's claim lies properly against WBL and not against Mr Tan personally.

94 Given our decision that Mr Tan did owe fiduciary duties to Mr Rai, the first and third of these arguments can be dismissed without more. As regards the second, we reject the bare assertion that Mr Tan was not involved in calculating and making the deductions which were in excess of those imposed by Cambodian tax law. The Judge noted serious evidential difficulties with

Mr Tan's account (see the Judgment at [122]–[123]) and, in this appeal, Mr Singh does nothing to allay her specific concerns; concerns which we share upon our review of the evidence on record. We are, therefore, unpersuaded that her decision in respect of the first allegation of wilful default should be disturbed.

95 We turn next to the third allegation, but, before doing so, it bears highlighting that Mr Singh says nothing about the second allegation or Mr Tan's concession at the trial that it was "fair" for him to have informed the investors that US$35 million had been received by WBL (see the Judgment at [131]). There is thus no basis to disturb the Judge's finding that Mr Rai's second allegation was made out. As to the third allegation, Mr Singh makes four arguments. First, the Judge erred in rejecting Mr Tan's explanation that the US$35 million received by WBL had been retained for the GRR Scheme (this scheme is explained at [29] above). Second, the Judge was wrong to attribute weight to the lack of consultation with the investors prior to the decision to retain the US$35 million (see the Judgment at [131]). Mr Singh submits that the investors were not directors or shareholders, nor did they have any contractual right to participate in such a decision. Third, this money belonged to WBL and not to the investors, who only had a contractual right to be paid a certain percentage of the profits after deductions. Accordingly, the retention could not have been wrongful. Lastly, in any event, even if the retention is found to be wrongful, it was a wrongful act of *WBL*, not of Mr Tan, who had acted *qua* director.

96 We are not persuaded by these arguments. The last argument falls away in light of our finding that Mr Tan did owe fiduciary duties to Mr Rai. The other three arguments are equally devoid of merit. In our judgment, Mr Tan's explanation that the US$35 million needed to be retained for the GRR Scheme

was not pleaded and was wholly contrived. None of Mr Singh's submissions compel us to resist this finding because they do not: (a) proffer an explanation for the fact that the payment from Oxley Diamond was made without any condition; or (b) point us to any contemporaneous correspondence between any officeholders of WBL, Oxley Holdings or Oxley Diamond which even remotely suggested that the GRR Scheme was the reason contemplated for the retention of the US$35 million. Thus, irrespective of whether the investors had a right to participate in the decision to retain the US$35 million, or an immediate right to receive any payout, we do not accept that the money was retained for any legitimate reason.

97 We accordingly agree with the Judge that all three allegations of wilful default have been made out against Mr Tan.

(3) The appropriate order to account

98 The three instances of wilful default on the part of Mr Tan are, in our view, sufficient to justify an order for him to account on the basis of wilful default. Two reasons, in particular, persuaded us to reach this conclusion. The first concerns the fact that Mr Tan not only concocted reasons to justify the withholding of payouts from the substantial sum of US$35 million received from Oxley Diamond, he failed to even inform Mr Rai or the other investors that such funds had been received. This raises a strong suspicion as to *what else* Mr Tan has failed to disclose. In addition, at a very basic level, it is not even clear how much *more* is due to WBL in respect of profits from the JVA. If we were to substitute the Judge's order with an order for Mr Tan to render a mere common account, he would only need to provide Mr Rai with information on the sums *actually* received, disbursed and distributed in connection with the Venture (see *Rebecca Ong* at [55]). In our judgment, this would be wholly inadequate. Given the amount of money involved in this case, the stark lack of

detailed information available, and the evasive manner in which Mr Tan has explained the instances of wilful default, we agree with the Judge's conclusion that a more robust account is necessary.

99 We therefore uphold the Judge's order that Mr Tan shall account to Mr Rai on the basis of wilful default.

Our decision in respect of the appeal in Suit 160

100 Leaving aside the specific factual and legal arguments raised in support of Mr Tan's position – which we have already addressed above – we are, more fundamentally, unpersuaded by the narrative put forth by Mr Seah and Mr Tan to contradict that advanced by Mr Rai. As stated at [11] above, they did not merely deny that the Oral Understanding existed. They averred, on the contrary, that the investors had directly contracted with WBL as the true initiator and manager of the Venture.

101 In this appeal, *all* of the factual arguments advanced by Mr Singh were directed at scrutinising Mr Rai's case. While that approach is, strictly, not incorrect, it is insufficient because it does not remove the need for this court to examine the probative weight of WBL's positive defence. As explained earlier, the fact of the matter is that the court is confronted with two competing narratives as to who the investors contracted with. The court's task is to decide which is *more* probable, always bearing in mind that there is no dispute that the investors did participate in and did contribute large sums to the Venture.

102 After all, it was incontrovertible that the investors transferred *millions* of dollars without any agreement in writing, much less a written agreement with WBL. This was particularly striking given that the investors held no stake in, much less control of WBL, and indeed, the full extent of their very substantial

contributions to both Plots A and B was not even captured in writing until 31 December 2013 when the Investment Agreement was issued. There was nothing which showed that WBL had, in its own capacity, communicated with Mr Rai and the other investors prior to the payment of their contributions. Furthermore, substantial portions of the investors' contributions were paid into Mr Tan's personal bank account for the acquisition of Plots A and B, not WBL's, notwithstanding that WBL's bank account was operational at the time of these transfers (some payments into it had been made). These critical factors pointed sharply away from the claim that the investors dealt directly with WBL in contract.

103 By contrast, although Mr Rai's case contained some inconsistencies and could not account for every objective or undisputed fact, in the final analysis, it provided a clear and coherent explanation for the *critical* foundational facts which Mr Seah and Mr Tan's case evidently could not.

104 In the premises and for all the above reasons, we dismiss Mr Tan's appeal in respect of Suit 160 in its entirety.

The appeal in respect of SUM 2708

105 We now turn to the appeal against the decision in SUM 2708.

Background

106 In the lead up to the trial, Mr Rai applied for and was granted an order for specific discovery against WBL (the "Order"). The Order was served on WBL, which did not comply. In search of a way to secure its compliance, the Order (alongside a penal notice) was then served on Mr Tan, who – despite retaining his 49% stake in the company – had by then resigned as a director of

WBL. Given his resignation, Mr Tan took the position that he was not in a position to influence WBL to comply with the Order. He therefore filed SUM 2708 seeking two declarations to such effect, as well as a third declaration that, in any event, the Order and penal notice had not been properly served on him. Shortly thereafter, an application for leave to commence committal proceedings was taken out against Mr Tan in respect of his alleged failure to ensure WBL's compliance in HC/SUM 2849/2021 ("SUM 2849").

107 The sequence of events relating to SUM 2708 is important. On 7 and 8 February 2019, Mr Rai's Writ of Summons and Statement of Claim were served on Mr Seah and Mr Tan. At this point, WBL was not a defendant to Suit 160; it was only on 4 December 2019 that the Statement of Claim was amended to include WBL as the third defendant. On 19 August 2020, Mr Tan tendered his resignation as a director of WBL with a three-month notice period. His resignation was thus effective on 19 November 2020.

108 On 16 February 2021, Mr Rai filed an application for specific discovery against WBL. On 25 March 2021, before this application was heard, then-counsel for WBL informed the court that WBL would no longer take part in Suit 160 and that they would be taking steps to discharge themselves from acting for WBL. On 16 April 2021, the specific discovery application was heard and the Order was granted. The same day, Mr Rai's lawyers were informed by Mr Tan's lawyers that Mr Tan had earlier resigned as a director of WBL. On 21 April 2021, the Order was served on WBL; it prescribed two deadlines: (a) by 23 April 2021, WBL was to file and serve its list of documents as well as the relevant affidavits; and (b) by 30 April 2021, WBL was to produce those documents for inspection.

109 These deadlines passed without WBL's compliance. Accordingly, on 26 May 2021, Mr Rai's lawyers served the Order and a penal notice on Mr Tan. Two points, in this connection, must be emphasised. First, by a letter sent on the same day, Mr Rai's lawyers informed Mr Tan's lawyers – "as a matter of professional courtesy" – that the Order and penal notice had been served on Mr Tan "in accordance with" O 45 r 7(2) of the ROC 2014. Second, the penal notice stated:

> ***If*** [WBL] neglects to obey this order by the time therein limited, you, [Mr Tan (NRIC)], a member of [WBL] whose affairs are managed by its members and/or an individual who is involved in the management of [WBL] and is in a position to influence its conduct in relation to the commission of the contempt of court, will be liable to process of execution and/or contempt of Court for the purpose of compelling the said [WBL] to obey the same.
>
> [emphasis added]

110 Mr Tan's lawyers responded on the same day but that response does not bear on this appeal. Mr Rai's lawyers replied on 28 May 2021 stating that the service of the Order and penal notice on Mr Tan was effected in compliance with O 45 r 7 of the old ROC. They also purported to extend the deadlines prescribed by the Order. After asserting the view that Mr Tan was "in a position to influence" WBL under s 6(2) of the Administration of Justice (Protection) Act 2016 ("AJPA"), the letter stated: "In light of the above … Please have [Mr Tan] procure [WBL's] full compliance with [the Order] by 2 June 2021 (*ie*, being 7 days from the date of service)". The "date of service" being 26 May 2021.

111 Mr Tan maintained his position that he was not obliged to comply with the Order and, thus, on 10 June 2021, he took out SUM 2708 for the following declarations. First, that the Order did not require him, a minority shareholder of WBL, to influence WBL to comply with it. Second, that the Order could not be

enforced by an order of committal against him. Third, that the service of the Order and penal notice on him was out of time and thus improper. On 17 June 2021, Mr Rai responded by taking out SUM 2849. The Judge directed both applications to be heard with the trial.

The decision below

112 In respect of the first and second declarations sought by SUM 2708, the Judge undertook an analysis of s 6(2) of the AJPA:

> **Contempt by corporations**
>
> **6.**—(2) Where a corporation commits contempt of court under this Act, a person —
>
> (*a*) who is —
>
> (i) an officer of the corporation, or a member of a corporation whose affairs are managed by its members; or
>
> (ii) an individual who is involved in the management of the corporation and is in a position to influence the conduct of the corporation in relation to the commission of the contempt of court; and
>
> (*b*) who —
>
> (i) consented or connived, or conspired with others, to effect the commission of the contempt of court;
>
> (ii) is in any other way, whether by act or omission, knowingly concerned in, or is party to, the commission of the contempt of court by the corporation; or
>
> (iii) knew or ought reasonably to have known that the contempt of court by the corporation (or contempt of court of the same type) would be or is being committed, and failed to take all reasonable steps to prevent or stop the commission of that contempt of court,
>
> shall be guilty of the same contempt of court as is the corporation, and shall be liable on being found guilty of contempt of court to be punished accordingly.

113 Upon her analysis of this provision, the Judge determined that a *prima facie* case of contempt had been made out against Mr Tan. For reasons which we shall not repeat (see the Judgment at [145]–[154]), she made two crucial findings in arriving at this view. First, s 6(2)(*a*) was satisfied on either limb (i) or (ii); that is, WBL was either a "corporation whose affairs are managed by its members", or, in any case, that Mr Tan was "involved in the management" of WBL and was "in a position" to influence its conduct. Second, she was satisfied that limb (iii) of s 6(2)(*b*) was made out because the facts showed that Mr Tan knew about the contempt by WBL and yet he did not take any steps to prevent or stop such contempt (see the Judgment at [155]–[156]). In light of her decision, she declined to grant either the first or second declarations sought by SUM 2708.

114 As regards the third declaration, the Judge was invited to consider the operation of O 45 r 5(1)(ii) and r 7(3) of the old ROC:

> ORDER 45
>
> ENFORCEMENT OF JUDGMENTS AND ORDERS
>
> **Enforcement of judgment to do or abstain from doing an act (O. 45, r. 5)**
>
> (1) Where —
>
> (*a*) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, Rule 4; or
>
> (*b*) a person disobeys a judgment or order requiring him to abstain from doing an act,
>
> then, subject to these Rules, the judgment or order may be enforced by one or more of the following means:
>
> (i) with the leave of the Court, an order of committal;
>
> (ii) ***where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body***;

> (iii) subject to the provisions of the Debtors Act (Cap. 73), an order of committal against that person or, where that person is a body corporate, against any such officer.
>
> **Service of copy of judgment, etc., prerequisite to enforcement under Rule 5 (O. 45, r. 7)**
>
> **7.**—(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in Rule 5(1)(ii) or (iii) unless —
>
> (*a*) a copy of the order has also been served personally on the officer against whom an order of committal is sought; and
>
> (*b*) ***in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act***.
>
> [emphasis in bold italics added]

115 The Judge began by stating that the Order was issued against WBL, not against Mr Tan personally, and, therefore, the above provisions were applicable (see the Judgment at [162]–[163]). On the basis of these provisions, particularly O 45 r 7(3)(*b*), she then found that the Order and penal notice were served out of time. Indeed, as stated above, Mr Tan was only served these documents on 26 May 2021, several weeks *after* the deadline for WBL's compliance with the Order (see [108]–[109] above).

116 Nevertheless, the Judge went on to hold that this defect in service did not preclude Mr Rai from commencing committal proceedings against Mr Tan. She reasoned at [165] of the Judgment:

> ***The consequence of this non-compliance with O 45 r 7(3) is that [the Order] cannot be enforced by an order of committal against "any director or other officer" of WBL, under O 45 r 5(1)(ii)***, and the service of [the Order] and [Penal Notice] on Mr Tan on 26 May 2021 was improper to that extent. ***However, service on Mr Tan was not improper for the purposes of any committal proceedings against Mr Tan himself*** under O 52. What must be personally served on the person sought to be committed under O 52 is the *ex parte* originating summons or summons for an order of committal,

> the statement and supporting affidavit under O 52 r 2(2), the order granting leave to commence committal proceedings and the application for the order of committal: O 52 r 3(4). The ROC does not expressly require an O 52 r 2(2) statement to set out whether and how the relevant order of court was served on the person against whom an order of committal is sought for breach of that order: *BMP v BMQ and another appeal* [2014] 1 SLR 1140 ("*BMP*") at [28]. While the court at the leave stage must be satisfied *prima facie* that the court order which is the subject of the committal proceedings has been duly served on the respondent or that the respondent has received notice of the court order, and evidence of service must be included in the affidavit supporting the leave application (see *BMP* at [31]), ***there is no requirement that the order must have been served on an "officer" of the body corporate concerned, or that service must have been effected before the expiration of the time within which WBL was required to comply with [the Order]*** (as is required under O 45 r 7(3)).
>
> [emphasis added]

117 It seems to us, from the emphasised text, that the Judge drew a distinction between two situations. The first situation contemplates committal proceedings commenced against Mr Tan in his capacity as a director or officer of WBL, for the purpose of enforcing the Order. In this situation, strict compliance with the timelines for service prescribed by O 45 r 7(3)(*b*) is necessary, and, if service is defective in this regard, O 45 r 5(1)(ii) precludes the Order from being enforced by an order of committal. The second situation contemplates committal proceedings commenced against Mr Tan "himself", which suggests to us that the Judge had in mind an order of committal which did not depend on Mr Tan being a director or officer of WBL. Indeed, this reading of the Judgment is supported by the Judge's decision that a *prima facie* case of contempt was made out against Mr Tan on the basis that he – despite having vacated his office as a director of WBL at the time of the Order – nevertheless fell within the other limbs of s 6(2)(*a*) of the AJPA (see [113] above). Given that the Judge declined to grant the third declaration sought by

SUM 2708, it is evident that she took the view that Mr Tan fell within the second situation.

The grounds of appeal

118 Mr Tan challenges the Judge's decision in respect of SUM 2708 in its entirety. Therefore, the issues before us are the same two which the Judge had to determine, although we will address them in reverse order. We will first consider the consequence of the defective service of the Order on Mr Tan, and, thereafter, we will address whether s 6(2) of the AJPA has been made out.

Our decision

Consequences of the defective service of the Order

119 In summary, we do not agree with the Judge's reasoning in respect of this issue. Our approach to this issue follows three steps. First, we will explain the relationship between the AJPA and the old ROC. No observations will be made on how this explanation translates to the new Rules of Court 2021. Second, we then explain which provisions of the ROC 2014 apply to an individual in Mr Tan's position; that is, a person whose liability for contempt stems from any limb of s 6(2)(*a*) of the AJPA *other than* by virtue of him being an "officer of the [relevant] corporation". Lastly, we will resolve how these explanations apply to the facts in this case.

120 The AJPA chiefly sets out the substantive law on contempt. Part 6 pertains to certain matters of procedure, but those are irrelevant for present purposes. Before us, the procedural matter in issue concerns the *initiation* of contempt proceedings, *ie*, the prerequisites which must be met in order to obtain an order of committal. The provisions relevant to this are found only in O 45 rr 5–7 and O 52 of the ROC 2014. Thus, one should not determine the

validity of the initiated contempt proceedings with reference to the AJPA; this issue is to be determined by the application of the ROC 2014. Indeed, s 26(1) of the AJPA expressly provides that contempt proceedings as well as the court's power to punish contempt "must be exercised in accordance with the procedure set out in the Rules of Court".

121 Second, it is clear that O 45 r 5(1)(ii) does not apply to Mr Tan. He was not a director or officer of WBL, and, indeed, Mr Rai's own case was that: (a) Mr Tan was a member of WBL, which was a corporation managed by its members; or (b) Mr Tan was an individual in a position to influence the conduct of WBL. There was no claim that Mr Tan was somehow still a "director". Thus, if O 45 r 5(1)(ii) is not engaged, it follows that O 45 r 7(3) also does not apply. Before we explain which provisions of the ROC 2014 should then apply, it bears highlighting that we are aware that O 45 r 5(1)(ii) may *seem* as though it has been engaged in this case because the Order was issued against WBL, a company. However, there are two parts to O 45 r 5(1)(ii). First of all, a "body corporate" must have disobeyed the order in question, and, *secondly*, in such case, an order of committal may be obtained specifically against that body corporate's directors or officers. In cases, like the present, where the Order is issued against a body corporate (*ie*, WBL) but the individual against whom enforcement by an order of committal is sought is *not* a director or officer, O 45 r 5(1)(ii) plainly does not apply.

122 The question then is whether *any other provision* applies. Mr Yim argues that none applies because, even though s 6(2)(*a*) of the AJPA expands the categories of persons who may be held in contempt for a body corporate's non-compliance with a court order – that is, beyond "directors and officers" – O 45 r 5(1)(ii) was not amended to provide for a service requirement on such persons other than "directors and officers". In essence, Mr Yim attributes the

apparent lack of a service requirement to "legislative oversight". Such oversight, he says, obviates the need for personal service on Mr Tan "whether before or after the expiration of time within which [WBL] was required to do the act ordered".

123 We reject this argument. Order 45 r 5(1)(i) of the ROC 2014 (see [114] above) clearly applies generally to *all* cases in which a party seeks to enforce a court order by an order of committal. This is broad enough to catch the present case, and, consequently, O 45 r 7(2)(*b*) – which refers to enforcement of "Rule 5" as a whole, not any particular sub-paragraph of Rule 5 – would require that Mr Tan be served a copy of the Order *before* the expiration of the time within which he was required to compel WBL's compliance. In our view, such a construction of the provisions of the ROC 2014 is not only textually permissible, it is sensible and necessary. Service in the context of contempt proceedings is not a mere formality. Indeed, it can scarcely be said that a person has failed to comply with an order of court if he does not even know about the order until *after* the date by which his compliance was required. To suggest that a person could still be held in contempt in such case, as Mr Yim does, would not only be prejudicial to such persons against whom committal proceedings are initiated, but also simply contradict good order and common sense.

124 This, finally, brings us back to the facts of the present case. There are, in our view, two important points to be borne in mind. The first is that Mr Rai's lawyers *themselves* took the position that the Order and penal notice had been served on Mr Tan pursuant to O 45 r 7(2) of the ROC 2014 (see [109]–[110] above). Having done so, they should have taken steps to ensure that the requirement of service under O 45 r 7(2)(*b*) was fulfilled. Second, however, Mr Rai's lawyers failed to do so because they did not apply under O 45 r 6 to modify the period of compliance prescribed by the Order. Instead, by their letter

dated 28 May 2021, they purported to *unilaterally* extend Mr Tan's period for compliance by seven days from 26 May 2021 (see [110] above). Such unilateral extension was not permissible under the ROC 2014 and, as such, given that service of the Order was effected well past 23 and 30 April 2021, the deadlines for compliance, such service failed to comply with O 45 r 7(2)(*b*).

125 The effect of this, pursuant to the words of O 45 r 7(2)(*b*), is that the Order "shall not be enforced under Rule 5" by way of an order of committal, and Mr Rai is precluded from commencing committal proceedings against Mr Tan on the premise of such service. We accordingly allow Mr Tan's appeal and declare that the service of the Order on him was defective; the leave granted by the Judge for Mr Rai to commence committal proceedings is, consequently, also set aside.

Whether s 6(2) of the AJPA has been made out

126 In light of our decision that the Order and penal notice were not properly served on Mr Tan, there is no need for this court to decide whether the Judge was correct in holding that s 6(2) of the AJPA was made out.

Conclusion and costs

127 For the reasons given, we dismiss the appeal against the Judge's decision in Suit 160. The order that Mr Tan render an account to Mr Rai on the basis of wilful default thus stands. As regards Mr Tan's appeal against the decision in SUM 2708, we allow his appeal only on the basis that the service of the Order and the penal notice was improper. We therefore set aside the leave granted to Mr Rai to commence committal proceedings against Mr Tan.

128 For the appeal against the decision in Suit 160, we award Mr Rai costs of $75,000 (all-in); in respect of appeal against the decision in SUM 2708, we award Mr Tan $15,000 (all-in). The net order is therefore $60,000 (all-in) in favour of Mr Rai. The usual consequential orders are to apply.

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Davinder Singh SC, Pardeep Singh Khosa, Gerald Paul Seah and Stanley Tan Jun Hao (Davinder Singh Chambers) (instructed), Sharon Chong Chin Yee, Nandakumar Renganathan, Nandhu and Lim Shu Yi (RHTLaw Asia LLP) for the appellant;
Jimmy Yim Wing Kuen SC, Chen Jie'an Jared, Lee Soong Yan Kevin, Dierdre Grace Morgan, Chloe Shobhana Ajit and Eunice Lau Guan Ting (Drew & Napier LLC) for the respondent.