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

[2022] SGHC 131

Suit No 924 of 2019

Between

Commodities Intelligence
Centre Pte Ltd

… *Plaintiff*

And

(1) Mako International Trd Pte Ltd
(2) Zhuang Sheng
(3) Chua Yi Yang

… *Defendants*

Counterclaim of the First Defendant

Between

Mako International Trd Pte Ltd

… *Plaintiff in Counterclaim*

And

Commodities Intelligence
Centre Pte Ltd

… *Defendant in Counterclaim*

JUDGMENT

[Agency — Duties of agent]
[Agency — Evidence of agency]
[Companies — Incorporation of companies — Lifting corporate veil]
[Contract — Contractual terms — Implied terms]
[Contract — Misrepresentation]
[Equity — Dishonest assistance]
[Equity — Fiduciary relationships — When arising]
[Equity — Fiduciary relationships — Duties]
[Tort — Conspiracy]

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Commodities Intelligence Centre Pte Ltd
v
Mako International Trd Pte Ltd and others

[2022] SGHC 131

General Division of the High Court — Suit No 924 of 2019
Lee Seiu Kin J
22–25, 29–31 March, 1, 7, 8 April, 3, 6–8, 10, 13, 15, 17, 21, 27, 28 September, 1 December 2021

31 May 2022 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 The plaintiff's central case is that the defendants were its agents, and, on this basis, they owed fiduciary and other duties. These duties, the plaintiff says, were breached in many different ways, causing it to suffer more than US$1.7m in losses. The plaintiff also brings other connected claims for misrepresentation, conspiracy, and dishonest assistance.

The parties

2 The plaintiff is Commodities Intelligence Centre Pte Ltd ("CIC"). CIC is a Singapore-incorporated company in the business of developing e-commerce applications. It owns and operates a commodities-trading platform which offers, amongst other things, trade-matching (the "Platform"). CIC was incorporated in

May 2018, as a joint venture between three parties, including Zall Smartcomm ("Zall"). Zall operates a leading business-to-business platform in China and has launched other online transaction and service platforms around the world.[1] Two of CIC's officers gave evidence at trial: Yu Wei (referred to as "Peter"), its chief executive officer, and Li Xiaolin (referred to as "Richard"), who held the title of "Deputy Director".

3 The three defendants are, respectively, Mako International Trd Pte Ltd ("Mako"), Zhuang Sheng (referred to as "Jonathan") and Chua Yi Yang (referred to as "Wayne"). Mako was incorporated in Singapore on 6 September 2018 by Jonathan and his business partner, Eddy Chandra ("Eddy"). Jonathan and Eddy are each 50% shareholders of Mako, which is in the business of commodities trading, importing and exporting. It participates in such trades both in its own capacity, as well as a procurer of trades for other parties. At the material time, Jonathan, Eddy and Wayne were the directors of Mako.[2] However, only Jonathan and Wayne gave evidence, both for themselves and on behalf of Mako. Eddy was not called to give evidence, and, as far as the parties were concerned, he did not play any role in the events leading up to this suit.

Background to the dispute

4 Jonathan and Wayne were introduced to CIC in early September 2018 by a mutual business acquaintance from a company called China Petroleum and Gas (S) Pte Ltd ("CPAG"). At this time, Mako had either been incorporated or was in the midst of being incorporated.[3] Thereafter, between September and

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1 Yu Wei's Affidavit of Evidence-in-Chief (8 Mar 2021) ("Peter's AEIC") at paras 7–9.

2 Zhuang Sheng's AEIC (9 Mar 2021) ("Jonathan's AEIC") at paras 12, 27–29.

3 Li Xiaolin's AEIC (9 Mar 2021) ("Richard's AEIC") at paras 11–15; Jonathan's AEIC at paras 18(a) and 53.

October 2018, Richard met with Jonathan and Wayne to discuss a potential business relationship between CIC and Mako. The parties broadly agree that the purpose of such relationship was for Mako to assist CIC in developing its business in the Indonesian market. However, on CIC's case, the defendants were the ones who pitched the idea of assisting CIC with developing its presence in the Indonesian commodities market;[4] on the defendants' account, it was CIC who sought assistance with the development of its business.[5]

5 Whichever the case, in the midst of these meetings, on 12 October 2018, the Platform was officially launched in Singapore. It is Peter's evidence that, though the technology for the Platform was provided by Zall, CIC did not receive other forms of operational support.[6] It therefore needed to find ways to promote usage of the Platform on its own. The key strategy it intended to employ to achieve this was, first, to network with players in the commodities trading industry. CIC would then to use this network to encourage usage of its Platform. To this end, CIC was keen on participating in physical, back-to-back trades between suppliers in the region, particularly in Indonesia, and end-buyers in China. It was of the view that such physical trades would increase its exposure in the commodities trading industry, and, accordingly, help it to market the Platform.[7]

6 However, CIC claims that it had no experience in the area of conducting physical trades, which is where Mako, Jonathan and Wayne were supposed to

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4 Statement of Claim (Amendment No 3) (24 Mar 2021) ("SOC") at para 6; Richard's AEIC at para 15.

5 Defence and Counterclaim (Amendment No 2) (5 Feb 2021) ("D&CC") at para 12; Jonathan's AEIC at para 56(a).

6 Peter's AEIC at para 7.

7 Peter's AEIC at para 11; Richard's AEIC at para 29.

come in. On CIC's case, Jonathan and Wayne held themselves out as seasoned commodities traders with reliable contacts in Indonesia. In particular, it is Richard's evidence that Jonathan and Wayne provided two set of documents to convince CIC that they had the necessary experience.[8] The first was a deck of PowerPoint slides (the "Slides"), which set out the experience they (and thus, Mako) allegedly had in the Indonesian commodities market. The second was what CIC calls the "Indicative List of Deals". On its face, this "List" contains the details of past commodities trade deals. On Richard's evidence, Jonathan and Wayne provided them to CIC as a résumé of sorts,[9] that is, as a list of trade deals which they claimed to have procured and carried out in the past. The purpose of the "List" is the subject of dispute, and bears substantially on the parties' cases. I will return to it at [60]–[63] below.

7 CIC avers that these representations and documents induced it to appoint Mako as its "agent" to "source for business in Indonesia, market CIC to local Indonesian traders and customers, and develop CIC's presence in the Indonesian commodities trading market for bauxite, nickel ore and coal".[10] This appointment was effected in mid-November 2018 by way of a written agreement entered into between CIC and Mako.[11] This agreement was recorded in Chinese and it is titled "服务协议书" (fú wù xié yì shū). The parties agree that this should be read as the "Service Agreement", but dispute the translation of the substantive terms which inform their rights and obligations. CIC's preferred translation of

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8 Richard's AEIC at paras 19–29.

9 Richard's AEIC at para 27(g) and pp 1062–1082.

10 SOC at para 7.

11 Richard's AEIC at para 32; Jonathan's AEIC at para 101, read with Defendants' Closing Submissions (12 November 2021) ("DCS") at para 2.

the agreement, put forward by its translator, Tan Sin Ger ("Mr Tan"), is as follows:[12]

Service Agreement

Principal: [CIC]

Trustee: [Mako]

Mako is entrusted by CIC for the commercial development project. After friendly negotiation between the Principal and Trustee, this service agreement is hereby endorsed for joint compliance and performance.

1. Project Plan

Detailed collaboration: CIC and MAKO shall cooperate. MAKO shall be the ***agent*** for CIC, ***responsible for developing the Indonesian market*** to meet the pre-determined objectives, ***such as*** to register customers online, complete online trade matching transaction amount ***and self-operating deals*** and so on. CIC shall pay the corresponding marketing expenses in accordance with the performance. ***Details of operations: MAKO will be responsible for providing the seller resources while CIC provides buyer resources***.

Commencement: At the early stage of the project, it is temporarily fixed for 6 months (after 3 months, there will be a review and strategic adjustment). CIC shall subsidise MAKO's project expenditures by way of service fees.

2. Project requirements and resources

i. Capital: The fee payable each month during the early stage of the project is S$18,000. The financial services are provided based on the business requirements (mainly back-to-back LC deals: 10 million in cash and 30 million in back-to-back LCs; trade matching does not require financial service).

…

4. Revenue forecast for the project

Short-term objectives:

i. MAKO shall provide 10 business partners for online registration and make announcement. Minimum of 20 messages are required every week;

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12 Richard's AEIC at pp 1188–1189.

> ii. Complete 100 customer registrations within 3 months. Achieve trade matching of USD 2 billion for the online CIC platform. Complete USD200 million for the self-operating deals. Both parties shall negotiate on the gross profit margin of the self-operating deals based on the actual situation.
>
> iii. Complete 300 customer registration within 6 months. Achieve USD 6 billion for trade matching on CIC online platform. Complete USD600 million for the self-operating deals. Both parties shall negotiate on the gross profit margin of the self-operating deals based on the actual situation.
>
> Long term objective: To be determined based on the actual performance of the short-term objectives.
>
> [emphasis in bold italics added]

8 The defendants' qualified translator, Wang Rihui's ("Mr Wang"), offered the following translation in opposition:[13]

> **Service Agreement**
>
> ***Client***: [CIC]
>
> ***Service Provider***: [Mako]
>
> Whereas the Client ("CIC") agrees to engage the Service Provider ("Mako") to develop a business expansion project, CIC and Mako, after friendly negotiations, hereby sign this Service Agreement for joint compliance and performance.
>
> 1. Project Plan
>
> Specific Method of Cooperation: CIC and MAKO shall collaborate, with MAKO acting as CIC's ***broker*** to be ***responsible for opening up an Indonesian market***, meeting pre-determined objectives for online registration of customers, online matched trading volumes ***and actual trades involving CIC***, and so on. CIC shall pay for the corresponding marketing expenses according to performance. ***Specific operation: MAKO shall be responsible for the provision of sellers whereas CIC shall be responsible for the provision of buyers.***
>
> Present Commencement: Prior to the commencement of the project, CIC shall pay MAKO a service fee as subsidy for project expenses for an interim period of 6 months (which shall be reviewed for strategic adjustments after 3 months into completion).

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13 Jonathan's AEIC (Vol 6) at pp 5086–5088.

> 2. Required Project Resources
>
> (1) Capital: During the early stage of the project, there will be fees to be paid. The amount of fees to be paid is SGD 18,000 per month. Financial services shall be provided subject to business requirements (mainly back-to-back LCs: cash 10 million, back-to-back LC 30 million; no financial services are required for matched trades);
>
> …
>
> 4. Project Revenue Forecast
>
> Short-term objectives:
>
> (1) MAKO is to provide 10 business partners for online registration, as well as post messages at the rate of at least 20 messages per week;
>
> (2) Within 3 months, to meet the target of having 100 registered customers, matching USD2 billion worth of online trades on CIC's platform; and achieving USD200 million worth of trades involving CIC; the gross profit margin of the trades involving CIC shall be negotiated by the Parties based on the actual situation.
>
> (3) Within 6 months, to meet the target of having 300 registered customers, matching USD6 billion worth of online trades on CIC's platform; and achieving USD600 million worth of trades involving CIC, the gross profit margin of the trades involving CIC shall be negotiated by the Parties based on the actual situation.
>
> Long-term objectives: To be determined subject to actual performance of the short-term objectives.
>
> [emphasis in bold italics added]

9 The parties' dispute over the proper translation of the Service Agreement, however, is just an aspect of their more fundamental dispute over the nature of the relationship it created between CIC and Mako. On CIC's case, the agreement was entered into hurriedly,[14] and does not "exhaustively spell out all of [Mako's] duties"[15] which should be understood as being more fully informed by three crucial facts surrounding the formation and performance of the Service

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14 Plaintiff's Closing Submissions (12 Nov 2021) ("PCS") at para 97(b)(iii), referencing Jonathan's AEIC (Vol 2) at pp 1331–1332.

15 Reply and Defence to Counterclaim (22 Feb 2021) ("R&DC") at para 4D(a)(i).

Agreement.[16] First, the fact that Jonathan and Wayne "operated with autonomy, and were given the responsibility and discretion to source for, negotiate and procure" trade deals in Indonesia. Second, the fact that CIC "did not have any employees with experience with local Indonesian traders and customers". Finally, the fact that CIC "relied on and reposed trust and confidence in Jonathan and Wayne and trusted their expertise to procure and carry out Indonesian commodities deals".

10 I should add that, beyond Mako, it is CIC's case that Jonathan and Wayne were also its agents in their *personal* capacities.[17] To this end, CIC cites the same three facts above, but in lieu of the Service Agreement – to which Jonathan and Wayne were not parties – CIC relies on the fact that in November 2018, Wayne asked for name cards to be issued to him and Jonathan. More specifically, he requested that CIC print his and Jonathan's personal email addresses on these name cards, as opposed to email addresses tied to Mako. CIC did ultimately issue such name cards, identifying Jonathan and Wayne as a "Director" and "Deputy Director" of CIC, respectively.[18] CIC submits that this should be construed as an indication that Jonathan and Wayne agreed to act as its agents personally, beyond their less direct roles as directors of Mako.[19]

11 In any event, whatever the nature of the legal relationship between CIC and each of the three defendants, sometime in mid-to-late November 2018, Mako procured a back-to-back trade for CIC to participate in as a middleman pursuant to the Service Agreement (the "Transaction"). It bears noting that Mako did not enter into the Transaction for and on behalf of CIC. CIC admits that Mako did

16 SOC at paras 8(b), 8(c) and 9.

17 SOC at para 8.

18 Peter's AEIC at para 25 and pp 89–90.

19 SOC at paras 8(a1) and 8(a); PCS at paras 16 and 106–109.

not have "any authority to enter into or execute any agreement on [its] behalf".[20] Thus, although the trade was sourced by Mako, the contracts in the Transaction were signed *by employees of CIC*.

12 In the first leg of the Transaction, CIC contracted to purchase, on an FOB basis, 55,000 wet metric tonnes ("WMT") of nickel ore containing at least 1.65% nickel. After some back-and-forth, the supplier of the nickel ore ended up being an Indonesian company called PT Toshida Indonesia ("Toshida") (I will refer to the contract between them as the "CIC-Toshida Contract"). I pause to highlight that the parties dispute the circumstances leading up to the formation of the CIC-Toshida Contract. I will address the necessary aspects of their dispute in due course. For now, I note that prior to the formation of the CIC-Toshida Contract, the supplier that Mako recommended was one PT Integra Mining Nusantara ("Integra"). A contract between CIC and Integra was executed for the supply of the nickel ore (the "CIC-Integra Contract"), but this was later replaced with the CIC-Toshida Contract when it came to light that Integra's export licence would expire before the date on which the cargo could likely be shipped out of Indonesia. In the second leg of the Transaction, CIC contracted on a CIF basis to sell the cargo to CPAG for a profit (the "CIC-CPAG Contract"). CPAG was also a middleman; so, in the third leg of the Transaction, CPAG was contracted to sell the cargo to the ultimate buyer, a Chinese company called Guangdong Guangqing Metal Technology Co Ltd ("GGMT").

13 The Transaction, unfortunately, ran into difficulties. There were delays in the loading and shipping of the cargo, which contained an insufficient quantity of ore and failed to meet specifications. The shipped cargo only contained 37,408 WMT of ore and it was certified to contain just 1.43% nickel. These

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[20] D&CC at para 16(c)(i); R&DC at para 4D(a).

problems caused CIC to suffer the following losses: (a) the wasted part-payment it made to Toshida for cargo which failed to meet specifications; (b) the cost of freight it incurred to deliver the ore to CPAG in China; (c) the dead freight it incurred as a result of unutilised freight space; (d) demurrage from delays in the loading and shipping; and (e) payment it had to make to CPAG to satisfy an arbitral award made in CPAG's favour as a result of CIC's failure to provide cargo which met the specifications of the CIC-CPAG Contract.[21]

14 CIC seeks, by the causes of action it brings in this suit (see [1] above), to pin the responsibility for such losses on the defendants. Naturally, this begs the question as to why CIC has not taken the commercially simpler course, and sued Toshida. Indeed, most of the above losses flow directly from the failure of the cargo to meet specifications. By contrast, to hold the defendants liable for the same losses, CIC needs to rely on causes of action which are obviously more challenging to establish. On this, I should highlight that CIC did, on 15 October 2019, file a notice of arbitration against Toshida.[22] However, CIC has concerns that any award it might be able to obtain would be unenforceable. This risk of unenforceability, CIC pleads, is also attributable to the defendants – specifically, their failure to ensure that: (a) the CIC-Toshida Contract was recorded in Bahasa Indonesia; and (b) the arbitration clause in this contract was valid.[23] The first failing allegedly renders the contract null and void as a matter of Indonesian law. So, even if it is able to successfully obtain an arbitral award against Toshida, this would not be enforceable in Indonesia. The defendants'

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21 SOC at paras 69 and 75.

22 Agreed Bundle of Documents (Vol 6) (20 Mar 2021) at p 133.

23 SOC at para 79(f).

second failing is also said to have a bearing on the enforceability of any arbitral award CIC might be able to obtain against Toshida.[24]

15 The present suit against the defendants is, therefore, an alternative means to reach the same end. Furthermore, I should also note that the arbitration with Toshida has yet to conclude. As such, if I find the defendants liable to CIC and make an order for the payment of damages, my decision would not be rendered otiose by the rule against double recovery.[25] I can therefore proceed to consider CIC's case without concern for these parallel proceedings.

Outline of the parties' dispute

16 As mentioned at the outset, CIC's primary case rests on the premise that the defendants were its agents, *and therefore*, fiduciaries.[26] In the first alternative, it avers that the defendants were *ad hoc* fiduciaries.[27] In the second alternative, CIC argues that the duties which a fiduciary would owe should, nevertheless, be implied into the Service Agreement.[28]

17 On whichever basis, CIC pleads that the defendants were obliged: (a) to serve CIC with good faith and loyalty; (b) not to mislead CIC or misrepresent to it matters relating to the Transaction, as well as other potential transactions; (c) to use care and skill in the performance of their duties in relation to CIC; (d) not to act in the interest of others or pursue the interests of another to the prejudice of or contrary to or in conflict with the interests of CIC; (e) not to place

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24 PCS at paras 147 and 148.

25 Plaintiff's Reply Submissions (30 Nov 2021) ("PRS") at para 25.

26 SOC paras 7–10.

27 PCS at paras 69–71.

28 SOC at para 9 read with Plaintiff's Further and Better Particulars (3 Feb 2021) ("CIC's F&BP (3 Feb 2021)") at answer 5(a); PCS at paras 129 and 130.

or allow themselves to be placed in a situation or position where their duties to CIC will or may conflict with their personal interests; (f) to disclose potential conflicts of interests in the Transaction or other transactions which they were procuring for CIC or representing CIC in; (g) to account, and to pay CIC all monies, property or other proceeds received on behalf of CIC; and (h) not to make secret profits.[29] I emphasise that these are *all* the duties which CIC pleads.

18 These duties, CIC claims, were breached by the defendants in many ways. First, by causing it to enter the CIC-Integra and CIC-Toshida Contracts, which were allegedly illegal. Second, by failing to ensure that the source as well as supplier of the nickel ore were reliable. Third, by failing to ensure that the CIC-Toshida contract complied with Indonesian law. Fourth, by inducing CIC not to purchase cargo insurance. Fifth, by concealing facts about the Transaction from CIC. Lastly, by interposing CIC into the Transaction negligently and/or against its interests.[30]

19 Apart from its primary case that the defendants owed and breached many duties as agents and fiduciaries, CIC also brings alternative causes of action for: (a) negligence;[31] (b) fraudulent or negligent misrepresentation;[32] (c) lawful or unlawful means conspiracy;[33] and (d) dishonest assistance (against Jonathan and Wayne).[34] Further, in the event a cause of action is made out against Mako but

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29 SOC at paras 9 and 10.

30 SOC at para 79, consolidated in PCS at paras 132–218.

31 SOC at para 10A read with paras 74, 79 and 80; PCS at para 234.

32 SOC at paras 70–78.

33 SOC at paras 81–83.

34 SOC at para 84.

not Jonathan and Wayne, CIC submits that the Mako's corporate veil should be pierced to hold the two directors personally liable.[35]

20 The defendants dispute that they were CIC's agents and fiduciaries. The essence of their defence is that Mako acted as a mere broker of deals.[36] That is, Mako's role was simply to introduce commodities suppliers in Indonesia to CIC, which was to decide for itself whether to participate in back-to-back trades with end-buyers it found. It was not Mako's responsibility to procure and enter whole deals for CIC, much less to do so assiduously and loyally. As to Jonathan and Wayne, the defendants' case is that they acted only as directors of Mako, and did not consent to being appointed as CIC's agents personally.[37] Therefore, the defendants deny owing any of the above duties to CIC, whether as agents, *ad hoc* fiduciaries, or impliedly in contract. In the alternative, on the basis that such duties are found to have been owed, the defendants say they were not breached.[38] The defendants' case in respect of CIC's claim in negligence is the same. They deny owing a duty of care and skill,[39] and, in the alternative, they submit that the duty had not been breached.[40] They also deny liability for misrepresentation, conspiracy and dishonest assistance,[41] and argue that there is no basis for the corporate veil of Mako to be pierced.[42]

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35 SOC at para 83A.

36 D&CC at paras 16 and 21.

37 D&CC at para 23(a).

38 D&CC at para 104.

39 D&CC at para 23A.

40 Defendants' Reply Submissions (1 Dec 2021) ("DRS") at paras 287–300.

41 D&CC at paras 100–103; 105; and 105C and 106.

42 D&CC at paras 105A.

21 Finally, Mako brings a counterclaim for unpaid fees under the Service Agreement, and this claim comprises two parts. First, Mako avers that CIC owes four months of its monthly fee of S$18,000, *ie*, S$72,000 (see cl 2 of the Service Agreement set out at [7]–[8] above).[43] Second, apart from the Transaction, Mako alleges that, it procured two other trades for CIC under the Service Agreement. It claims that the fee for one of these two trades, amounting to US$10,281.43, remains outstanding.[44] CIC denies liability for the first claim on various grounds, and admits liability to the second.[45] In respect of both claims, CIC also invokes the right to set-off liability against its own claim for damages.[46]

The issues before me

22 Based on the parties' cases, the substantive issues before me are:

(a) First, what was the nature of CIC's relationship with each of the three defendants: whether the defendants were agents and thus, fiduciaries; or whether they were fiduciaries on the facts.

(b) Second, taking into account my findings on the above issue, what duties did the defendants owe CIC: whether in equity as fiduciaries, in contract under the Service Agreement, or in tort?

(c) Third, having regard to the duties which I find were owed, did the defendants breach any of those duties, and, if so, what losses did CIC suffer as a result?

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43 D&CC at paras 108 and 109.

44 D&CC at paras 110 and 111.

45 R&DC at paras 28–29A; PRS at paras 181(a)(i)–(iii) and (b)–(d).

46 R&DC at paras 29 and 30; PRS at paras 181(a)(iv), (e) and 182.

(d) Fourth, did the defendants make any false representations to CIC, and, if so, was CIC induced by any of those representations to act in a manner which caused it to suffer loss?

(e) Fifth, did the defendants conspire, whether by lawful or unlawful means, to cause CIC injury? If so, what losses did CIC suffer as a result of such conspiracy?

(f) Sixth, on the basis that Mako is found to have been a fiduciary – but not Jonathan and Wayne personally – did the latter two dishonestly assist Mako in breaching its fiduciary duties to CIC?

(g) Seventh, on the basis that Mako is found liable to CIC – but not Jonathan and Wayne personally – should its corporate veil be pierced to hold the latter two personally liable?

(h) Lastly, whether Mako's counterclaims for unpaid fees are made out, and if so, whether any of the defences raised are also made out so as to allow CIC to avoid liability.

23 Beyond these, however, CIC raises three preliminary issues in its closing submissions which ought to be disposed of before I turn to the substantive issues before me, proper. They are:

(a) Whether the defence should be struck out on the basis that the defendants have failed to comply with their discovery obligations, and have withheld documents likely to be detrimental to their case.[47]

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47 PCS at para 36.

(b) Whether Mr Wang committed perjury at trial in relation to the preparation of his translations, and, as such, whether I should disregard all of his translations and oral testimony on that basis.[48]

(c) Whether I should disregard all of Wayne's evidence on the basis that it was not his own, but rather contrived to support Jonathan's account of the facts.[49]

Preliminary issues

Striking out the defence in toto

24 The legal basis on which CIC seeks to strike out the defence is the court's broad power under O 24 r 16(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Its essential complaint is that Jonathan and Wayne supressed the disclosure of their correspondence with various third parties as well as between themselves. Further, to explain their non-disclosure, they allegedly concocted unbelievable stories about how these correspondences have become irretrievable because their mobile phones have malfunctioned, were lost or damaged.[50]

25 Putting aside the issue of whether the evidence bears out CIC's claim, I decline even to consider this argument, raised *only* after the end of trial, for two reasons. First of all, I accept that it is possible for O 24 r 16(1) to be invoked at this stage of the proceedings (see *Btech Engineering Pte Ltd v Novellers Pte Ltd* [2019] SGHC 171 ("*Btech*") at [93]–[103]). However, given that striking out a defence (or a claim) is obviously significant, it is a point which should be pleaded – as a matter of fair notice – so as to put it into issue. This, in my view, is clear

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48 PCS at paras 99 and 100.

49 PCS at para 54.

50 PCS at paras 42–53.

from Loh J's decision in *Btech* (see [97]). No such issue was placed before me, notwithstanding that CIC's Statement of Claim was amended for a third time on 24 March 2021, after the start of trial, long after discovery.

26 My second reason for declining to consider CIC's argument is its overly general character. On the basis that Jonathan and Wayne have refused to disclose their correspondence with third parties and between themselves, CIC submits that the *whole* defence should be struck out. Even if I accept its characterisation of the facts, this conclusion does not follow. CIC makes no argument as to how the lack of these correspondence bears on any of its many causes of action, and the importance of such precision can be seen from *Btech*. After determining that the plaintiff in *Btech* had deliberately suppressed certain documentary records, Loh J concluded: "Seeing as the documentary records would be relevant to [the defendant's] counterclaim for the equipment and tools specifically, and not its other counterclaims, I do not think it would be fair to strike out [the plaintiff's] defence to counterclaim *in toto*" (at [102]).

27 I am mindful from *Alliance Management SA v Pendleton Lane P and another and another suit* [2008] 4 SLR(R) 1 (at [6]) that the principle underlying the power in O 24 r 16(1) is the public interest in the administration of justice, specifically, ensuring that court orders are duly obeyed. This, however, needs to be weighed against the principle that a litigant should not ordinarily be denied the opportunity for his defence (or claim) to be considered on its merits. CIC's broad argument that the entire defence should be struck out patently fails to strike this balance. I therefore dismiss its argument.

Whether Mr Wang is guilty of perjury

28 I turn to the second issue. Essentially, CIC submits that I should disregard all the translations Mr Wang provided as well as his oral testimony on the basis

that he has perjured himself. CIC makes four allegations in this regard. First, that Mr Wang lied in his affidavit of evidence-in-chief ("AEIC"), where he claimed to have *personally* translated all relevant documents. Second, that he continued to lie about this during cross-examination. Third, that he falsely testified that no translations had been provided to him together with the original documents. Lastly, that he also falsely testified that the defendants did not return any of the draft translations which he had prepared with amendments.

29 When Mr Wang took the stand for less than half a day, he was questioned only on the interpretations he put forth, and how he arrived at them.[51] At no point did CIC's counsel even hint at the four allegations above, much less put them to Mr Wang directly for his response. I note that the defendants argue in their reply submissions that there are no inconsistencies in Mr Wang's evidence from which it can be concluded that he lied.[52] This is, however, insufficient to ameliorate the concern I have with the manner in which CIC has levelled allegations. Counsel for the defendants do not represent his interests, and it is simply Mr Wang who needs, and should have a chance to respond. Since CIC failed to accord him this opportunity, I cannot even begin to assess whether he is, as CIC boldly claims, "*guilty of perjury*". I therefore wholly reject CIC's argument.

Weight to be given to Wayne's evidence

30 I turn to the final preliminary issue. In short, CIC submits that *no* weight can be given to Wayne's evidence because it is contrived to support Jonathan's position. This submission rests on the "fundamental principle that [a] witness's evidence must remain his own and cannot be supplanted by [that] of another" (citing the Court of Appeal's decision in *Ernest Ferdinand Perez De La Sala v*

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51 NEs 25 Mar 2021 at pp 29–48.

52 DRS at paras 61–78.

Compañia De Navegación Palomar, SA [2018] 1 SLR 894 at [136] and [138]), and, to show that this principle has been breached, CIC makes three allegations.[53]

31 First, CIC submits that much of Wayne's evidence relates to matters *only* included in Jonathan's AEIC, and that there is "no reason" for Wayne to have done this given that his *own* involvement was not identical to Jonathan's. On this basis, CIC argues that no weight should be attributed to his evidence.[54] In support of this, CIC relies on *Jasviderbir Sing Sethi and another v Sandeep Singh Bhatia and another* [2021] SGHC 14 ("*Jasviderbir Sing*"). In this case, Coomaraswamy J declined to accord any corroborative weight to the evidence of three plaintiff witnesses on the grounds that their accounts were "too clear, too categorical and too consistent" (at [56]). Many passages had been replicated verbatim or almost so (at [57]). In this light, the first defendant argued that there had been collusion in the preparation of the AEICs (at [58]). However, the judge observed that this submission went much further than necessary. Instead, it appeared to him that what happened was that the first plaintiff's AEIC was drafted on his instructions, "in the usual way". This draft was then used as a template for the AEICs of the three witnesses (at [59]–[60]).

32 CIC submits that the impropriety which taints the preparation of Wayne's AEIC is "far more egregious" than in *Jasviderbir Sing* because it does not merely replicate parts of Jonathan's AEIC. Instead, it "purports to adopt and incorporate all matters in Jonathan's AEIC". He is, as such, not giving his own evidence, but rather parroting Jonathan's evidence.[55] I do not accept the parallel CIC seeks to draw with *Jasviderbir Sing*. There, the three witnesses adduced AEICs which

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53 PCS at paras 57–59.

54 PCS at para 60.

55 PCS at para 60(e).

appeared to have been prepared by each of them independently. The discovery of their replication of many passages therefore cast doubt on the implied premise that the evidence affirmed was their own. By contrast, here, right at the outset of Wayne's AEIC, he states as follows:

> I wish to inform the Honourable Court that I have reviewed and studied the AEIC of [Jonathan] affirmed on 9 March 2021 ("ZS AEIC"). Insofar as the matters deposed to in the ZS AEIC relate to me alone, or to both Jonathan and me collectively, they are true and accurate. This includes all the matters in respect of the [Transaction] …[56]

33 By this, Wayne very candidly admits that he did not, without knowledge of Jonathan's version of the facts, produce his own independent account. He had the benefit of reading Jonathan's AEIC and recalling events through such lens. This certainly reduces the probative value which can be given to his evidence. However, the fact that Wayne prepared his AEIC in this way does not, contrary to CIC's submission, deprive it of all evidential weight. It is wholly permissible for Wayne to have the same recollection of events as Jonathan, and the fact that his AEIC was prepared in this way does not *ipso facto* render it unbelievable.

34 CIC's second point is that the circumstances surrounding the preparation of Wayne's AEIC "cast serious doubt" as to the independence of his evidence. In essence, CIC relies on:[57] (a) the fact that he and Jonathan prepared their AEICs together with their counsel; and (b) Wayne's lack of familiarity, at trial, with the contents of his and Jonathan's AEICs. I reject these submissions. One, while it is not ideal, it is not uncommon for AEICs to be prepared with some degree of proximity in time and space. As I explained above, this reduces the probative value of the evidence given, but it is not a fact which, alone, necessarily strips the evidence of any weight. Two, I accept that witnesses should be familiar with

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56 Wayne's AEIC at para 4.

57 PCS at para 61.

their evidence, but Jonathan and Wayne's AEICs totalled almost 6,000 pages. I do not commend their hyper-cautious, over-inclusion of any and all documents, but I equally cannot expect Wayne to maintain a high degree of familiarity in the face of such voluminous records. This is especially so, given that the AEICs were affirmed in March 2021, and Wayne only gave evidence before me in September 2021, six months later.

35 CIC's last point is that Wayne is heavily if not wholly reliant on Jonathan for the conduct and especially funding of his defence in this litigation. On this, Wayne's evidence is that he has *not yet* paid anything in costs, but that there was "nothing agreed" as regards the bearing of costs or any potential judgment debt.[58] This is not enough to support the bold assertion that Wayne is "entirely beholden to Jonathan" and would consequently not give independent evidence.[59]

36 Finally, and most importantly, CIC had clear notice of the way in which Wayne's AEIC was prepared, and did in fact cross-examine him on the issue. I therefore reject CIC's argument that *no* corroborative weight should be given to Wayne's evidence when assessing Jonathan's evidence. The weight to be given to his evidence turns on the extent to which CIC's counsel was able to affect his credibility in cross-examination. In my judgment, this effect was minimal, and, in the premises, I will give Wayne's evidence the appropriate weight in light of my observations at [33] above.

The substantive issues

37 I now turn to the eight substantive issues set out at [22] above.

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58 NEs 21 Sep 2021 at p 60 lines 4–14.

59 PCS at para 62(c).

Issue 1: Nature of the parties' relationship

38 In summary, having considered the evidence and submissions before me, I find that Mako was not, in any legally meaningful sense, an "agent" for CIC. As such, their relationship was not one which fell within the settled categories giving rise to fiduciary obligations. Further, I also find that Mako was not CIC's fiduciary on the facts of the case. I now explain my decision.

CIC's relationship with Mako

39 The evidence shows that the Service Agreement was probably not meant to be a comprehensive reflection of CIC and Mako's agreement.[60] I accept this. However, in assessing the nature of CIC and Mako's relationship, their written agreement is still necessarily the starting point. The terms of the agreement have been set out at [7]–[8] above. In its preamble, CIC is described as "委托方" (wěi tuō fāng), and Mako is described as "受托方" (shòu tuō fāng). In Mr Tan's view, these should be read as "principal" and "trustee" respectively. In the first clause, Mako is described as "代理商" (dài lǐ shāng), which Mr Tan suggests should be translated as "agent". Mr Wang proposes more neutral translations of "client", "service provider" and "broker", respectively.

40 The parties' reliance on these terms, however, is misplaced. It is trite that labels neither conclusively indicate nor preclude the existence of particular legal relationships, and this lack of certainty is exacerbated by the fact of the parties' translation dispute. In fact, even if the dispute is set aside and I take CIC's case at its highest, the labels which it prefers are still unhelpful. First, given Mr Tan's translation of "受托方" as "trustee" as opposed to "fiduciary", CIC only submits

60 Jonathan's AEIC (Vol 2) at pp 1331–1332.

that it "entrusted" Mako under the Service Agreement.[61] CIC does not claim that in entering the agreement, it and Mako specifically applied their minds to the question of whether Mako would be a fiduciary under the agreement. This being the case, the translation of "受托方" is largely unhelpful since whether or not CIC "entrusted" Mako, and the degree to which it did so, still needs to be proven by reference to the substantive terms of the Service Agreement and the full context of their relationship. Second, even if I accept that "代理商" means "agent", the term is still notoriously broad and, as I will explain shortly, does not alone inform the actual obligations which the "agent" in question should be said to have owed. Therefore, it is not a question of whether I prefer Mr Tan or Mr Wang's translations. Mako's alleged status as a fiduciary is still an evaluative question.

41 To answer this evaluative question, I begin with the aspects of the Service Agreement which are clear, regardless of whether I adopt Mr Tan or Mr Wang's translation. These aspects will shed a clearer light on the substantive nature of CIC's relationship with Mako.

(a) First, it is clear that the objective of the Service Agreement was for Mako to develop CIC's presence in the Indonesian commodities market. This is obvious from the first portion of cl 1, and the milestones of this general objective are also clearly set out in cl 4.

(b) Second, the methods by which Mako was to achieve this objective are also clear. As cll 1 and 4 of the Service Agreement shows, Mako was obliged to secure a certain number of customer registrations and matched trades on the Platform. Mako was also obliged to bring to CIC what Mr Tan calls "self-operating deals". Mr Wang prefers the translation "actual trades involving CIC", but the difference is not material. On

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61 PCS at para 101(a).

either, it can be seen that the intention was to involve *CIC itself* in trade deals.

(c) Third, it is also clear from the final sentence of cl 1 of the Service Agreement that Mako bore the responsibility for bringing *suppliers* into the picture, whilst CIC was responsible for finding *buyers*. Therefore, in carrying out a "self-operating deal" or a trade involving CIC, Mako's job was to recommend a supplier from Indonesia, and CIC's job was to find an end-buyer.

42 This third point contradicts CIC's case that Mako's function under the Service Agreement was, generally, to procure trades. Thus, CIC disputes that the last sentence of cl 1 has any significance. During the cross-examination of Richard, it was put to him that Mako was just a broker obliged to introduce *sellers* to CIC. Richard disagreed and it is useful to quote his response in full:[62]

> Richard: Disagree. Detail of operation, I think that's -- that's only part of the -- I would say a part of the strategy we want to address with them, because they claim that they have a better, you know, seller -- seller network or seller resources. That -- that's why we want to emphasise in the project plan. But that -- but that doesn't mean that their responsibility is only limit to that.
>
> [The defendants' counsel puts the position again.]
>
> Richard: No, I think -- I -- okay, I repeat again. This line is only to highlight, to emphasise, you know, part of the strategy, because they -- they claimed that they're more familiar with Indonesia. That is why we only address here. But prior to this line, right, you can see that we also, you know, in -- the – more importantly -- I mean, as it address: "… MAKO shall be the agent for CIC, responsible for developing the Indonesian market to meet the pre-determined objectives, such as …" Blah, blah, blah.
>
> I mean, that is -- that is the main body of -- of the project plan, right? So the detail of operation is just to, you know -- as I say, it's to highlight or to emphasise on this area.

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62 NEs 1 Apr 2021 at p 43 line 18 to p 44 line 10.

43 This response is barely comprehensible, much less a meaningful answer to *why* the Service Agreement stipulated at all that CIC was to provide "buyer resources". If CIC's intention was only to emphasise that Mako was to provide "seller resources", this could have been said without the stipulation that CIC was responsible for the provision of "buyer resources". These responsibilities are plainly separable. In any event, Richard's answer is also inconsistent with the contemporaneous messages he and Wayne exchanged. These messages show that CIC had indeed been procuring buyers with a view to matching them with suppliers identified by Mako.[63]

44 CIC does not address this glaring issue in its submissions, and this, in my view, is quite detrimental to its case that Mako was its agent, and thus, fiduciary. CIC's obligation to procure buyers substantially minimises the scope of work which Mako was contracting to take on under the Service Agreement, and, when coupled with CIC's admission that Mako was not granted "any authority to enter into or execute any agreement on [its] behalf",[64] there is very little to suggest that Mako owed fiduciary duties just by virtue of its status as an "agent".

45 I am mindful that agents come in all shapes and sizes. A narrow scope of work, coupled with a lack of power to bind one's principal to contracts does not necessarily mean that a person cannot be labelled an "agent". However, as stated at [40] above, the label "agent" itself is unilluminating. CIC's case is not that Mako was a purely ministerial agent, acting strictly on definitive instructions. Its case is that Mako was a *fiduciary* agent, and, given this, Mako's lack of a power to unilaterally affect CIC's position is salient.

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63 Jonathan's AEIC (Vol 2) at pp 1343–1345.

64 D&CC at para 16(c)(i); R&DC at para 4D(a).

46 This is because the absence of such power takes Mako's position outside the paradigmatic definition of the term "agency", which is best used "to connote an authority or capacity in one person *to create legal relations* between a person occupying the position of principal and third parties" [emphasis added] (*Scott v Davis* (2000) 204 CLR 333 at [227] (*per* Gummow J), which referenced the High Court of Australia's earlier decision in *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652 (*per* Dixon J)). Both these cases are cited by Professor Tan Cheng Han SC in his work *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) ("*Tan*") (at para 1.008), as a useful working definition of "agency" because, in his view, "a person who acts on behalf of another without the ability to affect the latter's legal position may, in relation to the latter, have contractual rights and obligations, be capable of incurring tortious liability, and may also owe fiduciary obligations[,] but these fall within the usual scope of the law of contract, tort and equity respectively[,] to which the law of agency adds little if anything" (at para 1.007).

47 This definition also mirrors article 1(1) of the leading work in this area, Peter Watts and FMB Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 22nd Ed, 2021) ("*Bowstead and Reynolds*") (at para 1-001) (cited with approval in *Mayor and Burgesses of the London Borough of Haringey v Ahmed and another* [2017] EWCA Civ 1861 ("*Haringey v Ahmed*") at [27]–[28] and also see *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567 ("*UBS v Kommunale*") at [91]):

> Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf ***so as to affect his legal relations with third parties***, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.

[emphasis added]

48 Although this definition does not reflect the full range of persons which can fairly be described as "agents", what it does describe is the *paradigm agent*, which can be presumed to owe fiduciary obligations, unless such presumption is rebutted. These are the duties of loyalty and to act *bona fide* in the best interests of the principal (I will simply refer to this as the "duty of good faith") (see *Snell's Equity* (John McGhee and Steven Elliott gen eds) (Sweet & Maxwell, 34th Ed, 2020) ("*Snell*") at paras 7-008–7-010; *Bristol and West Building Society v Mothew* [1998] Ch 1 ("*Mothew*") at 18A–18C; *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 at [253]).

49 On this, I note that the imposition of fiduciary duties on "agents" tends to be the source of some confusion. It is often assumed that "agency", however broadly defined, is a settled category of fiduciary relationships. However, as Marcus Smith J aptly observed in *Pengelly v Business Mortgage Finance 4 plc* [2021] 1 All ER (Comm) 1191, "if the concept of agency is a wide-ranging and indeterminate one, then to say that all agents are fiduciaries is likely to be wrong" (at [34]). Non-paradigm agents *may* well be fiduciaries, but, as *Tan*, *Bowstead and Reynolds*, *Haringey v Ahmed* and *UBS v Kommunale* show, our intuitive sense that "agency" presumptively entails the imposition of fiduciary obligations relates specifically to agents with the power to change their principals' legal position. That is, to bind the principal to contracts; to dispose of the principal's property; and generally, to expose the principal to liability. This is not the only characteristic of a fiduciary, or even necessarily a definitive one, but it is a strong *indicium* because it places the party liable to have his legal position changed in a uniquely vulnerable position.

50 A party to a typical contractual relationship has to bear the risk that his counterparty might act in breach of contract and cause him loss. He also has to

bear the risk that external forces outside his control may render his contractual bargain unperformable, otiose or otherwise unprofitable. These are *external risks* which the contracting party may ameliorate, whether by the contractual bargain itself, insurance, or simply by taking practical steps to ensure his counterparty performs. By contrast, a party who grants discretionary power to another person to legally act on his behalf has to bear an *internal risk* that his representative may exercise such power to bind him to a detrimental position. This risk is inherent to the very conferral of discretionary powers, and it is not easily mitigated. In fact, even if the representative exercises his powers illegitimately, doctrines such as the defence of *bona fide* purchaser for value without notice and ostensible authority exist specifically to secure commercial certainty and protect third parties in dealings with such representatives. And, in respect of the latter, cases like *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 show how far the law can go to prefer the interests of the third parties over those of the grantor of the power.

51 In the face of this, the imposition of onerous fiduciary obligations over the exercise of powers is justified and necessary to mitigate at least some of the internal risks the grantor faces, by deterring the grantee from abusing his powers (deterrence is a well-established purpose for imposition of fiduciary duties: see, *eg*, the discussion in Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010) ("*Fiduciary Loyalty*") at pp 61–76). Conversely, absent such an internal risk (and the powers which create such risk in the first place), the impetus for the imposition of such onerous obligations is rather substantially minimised, at least in the context of representative relationships. Therefore, to use the words of the Court of Appeal in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [43], I do not think there is a "strong, but rebuttable, presumption" that an "agent"

who lacks the power to alter his principal's legal position owes fiduciary duties as one of the relationships within the "settled categories".

52 Returning to the present case, it is a clear conclusion that Mako was *not* a paradigm agent with the power to affect CIC's legal relations with third parties. As such, I will not presume that Mako was a fiduciary. That said, this does not entirely preclude such a conclusion. As the authors of *Bowstead and Reynolds* state in their article 1(4) (at para 1-001):

> A person may have the same fiduciary relationship with a principal where that person acts on behalf of that principal but has no authority to affect the principal's relations with third parties. ***Because of the fiduciary relationship such a person may also be called an agent***.
>
> [emphasis added]

The authors call these "canvassing" or "introducing" agents and suggest that such agents *may* also owe fiduciary duties (at para 1-020). However, the last sentence of article 1(4) suggests clearly that it is not *because of* their "agency" that they owe fiduciary duties. But, rather, *it is because they owe fiduciary duties* that they are regarded as "agents" in a legally meaningful sense. For these types of "agents", as can be gathered from *Tan's* suggestion (see [46] above), we ought to turn to the applicable principles in equity directly because the law of agency adds little, if anything, to the analysis.

53 This being the case, the inquiry should be focused on whether the person is an *ad hoc* fiduciary on the usual metrics. The starting point for this inquiry is *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*"), where the court stated that a fiduciary relationship can be said to arise if the putative fiduciary "voluntarily places himself in a position where the law can subjectively impute an intention on his … part to undertake [the fiduciary duties]" (at [194]). To lend this statement more particularity,

reference can be made to *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 ("*Susilawati*"). Here, the court regarded three factors set out by the Supreme Court of Canada in *Frame v Smith* [1987] 2 SCR 99 as "helpful" in determining whether the imputation of such an intention is appropriate (at [41]):

> Relationships in which fiduciary obligations have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

54 Useful and additional guidance can be found south of *Frame v Smith*. In *Burdett v Miller*, 957 F.2d 1375 (7th Cir 1992), the US Court of Appeals for the Seventh Circuit was tasked with analysing the nature of the relationship between a retail investor, one Ms Burdett, and Mr Miller, the owner and operator of an accounting firm who was also a professor of accounting. Delivering the opinion of the court, the eminent Judge Richard Posner said: "where a person solicits another to trust him in matters in which he represents himself to be expert as well as trustworthy[,] and the other is not expert and accepts the offer and reposes complete trust in him, a fiduciary relation is established" (at 1381). He then goes on to qualify this view: "We have emphasized knowledge and expertise but we do not mean to suggest that every expert is automatically a fiduciary. *A fiduciary relation arises only if 'one person has reposed trust and confidence in another who thereby gains influence and superiority over the other'*" [emphasis added]. Applying this view, the judge went on to conclude that Mr Miller *was* a fiduciary because he "cultivated a relation of trust with Burdett over a period of years, holding himself out as an expert in a field (investments) in which she was inexperienced and unsophisticated". Mr Miller was also aware that Ms Burdett

"took his advice uncritically and unquestioningly and that she sought no 'second opinion'… [she did not even ask for] any documentary confirmation of the investments to which he steered her".

55 I should state that Judge Posner's approach towards identifying *ad hoc* fiduciary relationships is far from definitive. Like *Susilawati* and *Frame v Smith*, it only calls to attention certain characteristics which *might* affect the conclusion. As Professor Conaglen observes in his chapter on fiduciaries in *Snell*, the courts have generally avoided pinning down the facts which justify the imposition of fiduciary duties, preferring instead to preserve some flexibility in the approach to this inquiry (see *Snell* at para 7-005; *Tan Yok Koon* at [192]). Many scholars, including Conaglen himself (see *Fiduciary Loyalty*, ch 9), have offered suggestions on how to assess the existence of fiduciary relationships, but none, as he admits in *Snell*, "[have] garnered universal support". Therefore, the best which can be done, until an effective theory of fiduciaries is formulated *and accepted*, is to take into account the relevant considerations.

56 This brings me back to the present case. CIC submits that, despite Mako's lack of authority to execute contracts on its behalf, it still had a "wide scope of authority (actual or implied) in relation to procuring, structuring and execution of the [Transaction]". So much so that CIC relied wholly on Mako to:[65] (a) source for, negotiate and procure the Transaction, in particular, to identify reliable upstream suppliers and downstream buyers; (b) communicate with third parties, and provide updates from those third parties; and (c) prepare and review the draft contractual documents relating to the Transaction. Further, CIC also submits that it acted entirely in accordance with Mako's recommendations and instructions

65 PCS at paras 110(a)–(c).

in relation to the operation and execution of the Transaction.[66] Having examined the evidence and taken into account the considerations set out at [53]–[54] above, I find that Mako was not CIC's *ad hoc* fiduciary.

57 First, the evidence does not bear out CIC's claim that it relied entirely on Mako to source for, negotiate, and procure the Transaction. As stated at [41(c)]–[43] above, CIC has not shown that cl 1 of the Service Agreement ought not be read as an error or otherwise non-binding. By the contract CIC *itself* drafted, it was responsible for finding buyers for its back-to-back trades. It therefore cannot even be said that CIC relied on Mako to identify buyers, much less that it reposed trust in Mako in this exercise. Indeed, the correspondence between Richard and Wayne shows that CIC did look for buyers.[67] Further, although it is agreed that Mako was the one who identified CPAG as the buyer in the Transaction,[68] the evidence – in my judgment – shows that Mako did so because CIC was persistent in asking to be interposed in back-to-back trades,[69] not because doing so was a task which CIC had "relied entirely" on Mako to carry out.

58 This just leaves Mako's obligation to identify suppliers. I accept that CIC relied on Mako to source for reliable suppliers; however, this does very little to support the existence of a fiduciary relationship between the two. CIC's reliance on Mako to do a good job in this regard is wholly protected by the imposition of an ordinary duty of care and skill. As stated at [5] above, the purpose of Service Agreement was to increase CIC's exposure in the commodities trading industry so as to enable it to better market the Platform. There is nothing about this

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66 PCS at para 110(d).

67 Jonathan's AEIC (Vol 2) at pp 1343–1345.

68 SOC at paras 11 and 12; D&CC at para 30.

69 Jonathan's AEIC (Vol 2) at pp 1343–1353, 1380–1381.

purpose that logically requires Mako to perform its functions under the Service Agreement with undivided loyalty and in good faith, beyond care and skill.

59 Further, the character of CIC's reliance on Mako was also not indicative of any imbalance in expertise (see *Burdett v Miller* at [54] above) or vulnerability (see *Susilawati* at [53] above) which supports the imposition of fiduciary duties. CIC's lack of expertise was not so great as to prevent it from exercising its own judgment over the suppliers recommended by Mako. I accept that CIC's officers were not experienced with commodities trading in Indonesia. However, Richard, who was Mako's main contact with CIC, had more than four years of experience as a "Senior Executive, Trader" in Sumitomo Corporation in Asia & Oceania, a trading and investment company, before he joined CIC. In this capacity, Richard "manage[d] existing clients' account[s] and expand[ed] operations and sales of inorganic [and] functional chemicals (electronic chemicals) to the market".[70] In my view, this was sufficient experience to ask Mako the right questions, hold it to conduct the necessary checks, and to understand the nature of the Transaction. Indeed, even if not Richard personally, CIC's chief operating officer, Li Xuhui (also known as "Mark") (to whom Richard answered for matters relating to the Service Agreement and the Transaction)[71] is described by CIC on its website as having "many years of experience in commodity spot market, cross-border E-commerce, strategic business planning, marketing, trading and operation".[72] Therefore, to the extent that CIC relied on Mako, such reliance does not disclose any vulnerability on CIC's part, nor an inability to exercise oversight. Instead, it was a commercial risk it chose to take.

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70 Jonathan's AEIC (Vol 1) at pp 410–416; NEs 29 Mar 2021 at p 170 lines 8–15.

71 Richard's AEIC at para 9.

72 Jonathan's AEIC (Vol 1) at pp 19–20.

60 On this, I should add that misplacing trust in a contractual counterparty to guard one's interests does not elevate that counterparty's status to that of a fiduciary. There is a clear difference between *choosing to trust*, and *having to rely* on another party. On my analysis above, CIC did not need to rely on Mako, and the evidence also shows that CIC eagerly chose to trust Mako of its own informed volition, not in circumstances akin to *Burdett v Miller*. This then brings me back to the Slides and Indicative List of Deals.

61 As mentioned at [6] above, it is CIC's case that Mako put forward these two documents to persuade CIC of its expertise in the Indonesian commodities market. On Richard's evidence, Jonathan and Wayne (and by extension, Mako) overstated their experience in these documents, in particular, the Indicative List of Deals which he testifies contained trades with which the defendants had never been involved. The defendants do not dispute that they prepared the Slides,[73] but they say that Richard misrepresents the "Indicative List of Deals". Their case is that the documents constituting the Indicative List of Deals were produced on Richard's request after CIC had already decided to engage Mako to provide brokering services.[74] The purpose of this was to provide CIC with information relating to historical commodities trades, so that CIC could populate the Platform with false but believable trade deals ahead of the platform's launch in Shanghai on 5 November 2018. Therefore, the defendants point out, a total of 19 templates were sent to Richard between 30 October and 21 November 2018, which went past the date on which the Service Agreement was executed by the parties (either 13 or 16 November 2018).

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73 Jonathan's AEIC at paras 57–59.

74 Jonathan's AEIC at paras 77 and 96; Wayne's Supplemental AEIC (20 Mar 2021) at para 7–10.

62 On balance, I find that the defendants' account is to be preferred for two key reasons. First, the documents continued to be provided by Wayne after the Service Agreement had been signed and entered. If the Indicative List of Deals had been prepared by Jonathan and Wayne for the purpose of persuading CIC to enter into the Service Agreement, there is no reason for this. When Richard was questioned about this during cross-examination, his explanation was that even though the Service Agreement had been signed, CIC was still "assess[ing] their ability".[75] I find this difficult to accept on the logic of CIC's own case. CIC was either satisfied with Mako's credentials or it was not. If CIC was as cautious as it claims, it would have carried out all credential reviews before signing the Service Agreement. In any case, the objective evidence – in the form of the messages exchanged between Richard and Wayne – shows clearly that the information was being put up on the Platform to boost its apparent utilisation.[76]

63 Second, Richard was not – in my judgment – a credible witness. Whilst on the stand, he was evasive, often resorting to the unbelievable claim that he "did not know" when confronted with the objective evidence. For example, when it was put to him that he had sought trade information from Jonathan and Wayne to "beef up" the numbers on the Platform ahead of its launch in Shanghai, his response was: "Beef up. I -- I can't remember, but -- but anyway, this request is from Zhang Jun [the CIC employee in-charge of the Platform] I really -- I don't really take -- paying too much attention to it. Anyway, this -- that was not my scope".[77] The incoherence of this answer to a relatively simple question, in the face of the objective evidence placed before me, casts considerable doubt in my mind as to the veracity of Richard's evidence.

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75 NEs 1 Apr 2021 at p 90, line 20 to p 92, line 24; also see PRS at para 30(a).

76 Jonathan's AEIC (Vol 1) at pp 482–488, 500–508, (Vol 6) at pp 5018–5033.

77 NEs 30 Mar 2021 at p 149, lines 10–18.

64 The analytical consequence of this finding is significant. First and most importantly, it substantially minimises the factual premises supporting the claim that Mako falsely induced CIC to enter the Service Agreement and place trust in it. Second, when coupled with the experience that Richard and Mark had (at [59] above), it becomes clear that CIC was not the babe in the woods it claims to be. It knew how to maximise its relationship with Mako to create the impression that the Platform was more actively used than it was, so as to launch the product more effectively in Shanghai. Lastly, these points suggest that CIC and Mako were on a relatively equal footing, supporting my conclusion that there was no great imbalance in expertise or any vulnerability indicative of a fiduciary relationship (see [59] above). In fact, at one point in his correspondence with Wayne, Richard describes their relationship as a "collaboration",[78] as does the Service Agreement on Mr Tan's translation (see [7] above). Mr Wang's translation similarly refers to their relationship as reflecting "cooperation" (at [8] above).

65 This analysis applies equally to the third and fourth points at [56] above.

(a) In respect of the third point, CIC was not wholly reliant on Mako to prepare contractual documents as it claims. There is evidence to show that CIC did (and therefore knew how to) review its own contracts.[79] Further, if there were were legal issues which CIC could not handle internally, the general experience of CIC's team – as attested to by Peter[80] – suggests that they would have had enough business acumen to know to seek legal advice as necessary. On this, I must emphasise that even if Jonathan and Wayne had experience with the Indonesian commodities

78 Jonathan's AEIC (Vol 1) at pp 486.

79 In particular Jonathan's AEIC (Vol 1) at p 620 read with (Vol 6) at pp 5130–5136; also, Jonathan's AEIC (Vol 7) at pp 5233–5234.

80 Peter's AEIC at para 8.

trade, they were not legally trained, nor is it CIC's case that they had made representations to such effect.

(b) As regards the fourth point, even if CIC acted unquestioningly in accordance with Mako's recommendations, I do not accept that this as an *indicium* which supports the existence of a fiduciary relationship. It first needs to be asked *why* CIC acted in this way, and, in view of my findings above, the answer to this question seems to be that CIC failed to exercise sufficient oversight of its own commercial affairs. As I suggested at [59] above, CIC was not so ill-informed of the industry such that it could not even have exercised oversight. The dynamic in this case should thus be sharply distinguished from *Burdett v Miller*.

66 As to the second factor at [56] above, it is clear that Mako (via Jonathan and Wayne) communicated with third parties in connection with the Transaction. The defendants do not dispute this. This fact, however, is neither here nor there in so far as it relates to Mako's status as an *ad hoc* fiduciary. First, there is no evidence to show that Mako had the authority on CIC's behalf to make binding representations, compromise matters, negotiate terms, or otherwise affect CIC's position by its communications. And, when coupled with the fact that Mako had no authority to enter into contracts, Mako's role seems more to be in the spirit of a messenger or coordinator than a representative of *CIC*. Second, it is not tenable to infer from the fact of Mako's communications with third parties that it was in a position which justified the imposition of fiduciary duties (*per* the threshold in *Tan Yok Koon* set out at [53] above). It is not in my view uncommon for commercial parties to communicate with a new business contact through the party connecting them. Unless there is something about such intermediating that discloses any of the factors in *Susilawati*, this fact does not take CIC far.

67 In the round, the relationship between CIC and Mako seems to me to be one exclusively grounded in contract. While it is not impossible for a commercial counterparty to also be a fiduciary, the nature of the parties' relationship in this case does not support that conclusion. In fact, beyond the deficiencies in CIC's positive case, there is also strong negative argument against it. If Mako was a fiduciary pursuant to the Service Agreement, the foremost consequence is that Mako would owe a duty of undivided loyalty to CIC in connection with its job to recommend reliable buyers and sellers. It would then have been obliged to bring *all* available deals to CIC for it to have the opportunity to reject taking up such a deal (see, *eg*, *Bhullar v Bhullar* [2003] EWCA Civ 424). Mako would not even have been able to enter physical trades on its own part without obtaining CIC's informed consent. This plainly goes far beyond what parties intended by their self-described "collaboration" (see [64] above), and thus also cuts against the imputation of a subjective intention on the part of Mako to assume fiduciary obligations (see *Tan Yok Koon* at [53] above).

CIC's relationship with Jonathan and Wayne

68 I turn next to consider CIC's relationship with Jonathan and Wayne. As stated at [10] above, CIC's case is that Jonathan and Wayne were also its agents in their own capacities, and thus, owed it the same fiduciary and other obligations it claims Mako owed. Having found that Mako was not CIC's agent or fiduciary, this aspect of CIC's case essentially falls away. However, I will briefly discuss the key factual basis on which CIC avers that Jonathan and Wayne became its agents in their personal capacity.

69 CIC's case is basically that Jonathan and Wayne asked for, and were given CIC name cards on or around 29 November 2018. On Richard's evidence, they requested the name cards so as to be able to represent CIC and negotiate

contracts with prospective trading counterparties on CIC's behalf.[81] Thus, on 2 December 2018, Wayne sent the following message to a chat group which included Richard and Mark: "能帮我们印名片吗？需要用到[.] 因为是用cic去签合同".[82] The translation of this message, on Mr Tan's evidence, is "Can help us print the name cards? Need to use[.] Because *we're* using [CIC] to sign the contract" [emphasis added].[83] Mark responded to oblige. On this basis, CIC submits that "Wayne was stating in no uncertain terms that Jonathan and Wayne needed to identify themselves as being from CIC and *therefore having the authority to enter into or commit to deals on CIC's behalf*" [emphasis added].[84]

70 I reject this submission. First of all, Mr Tan interpolates the word "we're" into the message and this is, in my view, incorrect and unnecessary. I find Mr Wang's translation of that series of messages as "Can you help us print the name card? We need to use it[.] Because it is [CIC] that is signing the contract",[85] to be both more literally and contextually accurate. On this interpretation, there is no basis for CIC to submit that Jonathan and Wayne had the "authority to enter into or commit to deals on CIC's behalf".

71 The question this leaves is why then Jonathan and Wayne required such name cards. CIC submits that this fact is sufficient to indicate that Jonathan and Wayne wished to identify themselves as agents of CIC.[86] This, however, seems to stretch a minor fact into a major conclusion. During cross-examination, Jonathan explained that he had asked for CIC name cards so as to be able to

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81 Richard's AEIC at para 55.

82 Jonathan's AEIC (Vol 2) at p 1433.

83 Richard's AEIC at p 1370.

84 PCS at para 107(b)

85 Jonathan's AEIC (Vol 2) at p 1433.

86 PCS at para 109(a).

distribute them to customers whom they were persuading to register with CIC Platform.[87] I accept this explanation. As I will discuss from [145]–[146] below, Mako had business beyond CIC, and it is reasonable that Jonathan and Wayne would have wanted to bring their relevant customers' attention specifically and separately to CIC's business as distinct from Mako's. After all, this was the very purpose of the Service Agreement, even on CIC's case (see [5] above).

72 Second, and in any event, CIC's submission that Jonathan and Wayne were empowered to enter into contracts on behalf of CIC stands in stark contrast with CIC's admission that Mako was not empowered to contract on its behalf.[88] CIC's formal agreement was with Mako, yet even then, it accepts that Mako did not have any contracting powers. It is wholly unexplained why CIC would then empower Jonathan and Wayne to enter and execute contracts on its behalf, in their personal capacities without a formal agreement. Further, it is unclear how CIC intended to distinguish between Jonathan and Wayne acting as directors of Mako without the power to bind CIC, and in their personal capacities with such power. In my view, it is unlikely that CIC had such intention, and this peculiarity only arises because CIC seeks to imbue Jonathan and Wayne's rather innocuous act of requesting for name cards with too much significance.

73 I therefore reject CIC's claim that Jonathan and Wayne, in their personal capacities, were its "agents". Instead, they were acting in their capacities as directors of Mako, and it therefore follows that they did not personally owe CIC duties. In this regard, I should also point out that from [139]–[152] below, I will address CIC's submission that Mako's corporate veil should be pierced to hold Jonathan and Wayne personally liable. My rejection of the factors on which CIC

87 NEs 7 Sep 2021 at p 55 lines 2–14.

88 R&DC at para 4D(a).

relies in making this submission further shows that its attempt to characterise Jonathan and Wayne as acting in their personal capacities is bereft of any factual basis. I will therefore only consider CIC's case in so far as it pertains to the duties *Mako* owed CIC.

Issue 2: Obligation(s) owed by Mako to CIC

74 With the above findings in mind, I turn to the duties owed by Mako.

Duties of good faith and loyalty

75 I have found that Mako was not a fiduciary to CIC, whether by virtue of being an "agent" or on the facts. Accordingly, Mako does not owe CIC duties of good faith and loyalty *in equity*. However, CIC alternatively argues that such duties were implied into the Service Agreement, and therefore, owed *at law*.[89] In essence, CIC submits that even if Mako is found not to have been a fiduciary, it nevertheless owed such duties because, otherwise, Mako would have been able to conduct itself as CIC's agent without being held to any standard. This, they submit, "cannot be the case".[90] I do not accept this.

76 First, the Court of Appeal in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 2 SLR(R) 518 has rejected the existence of an implied term of good faith at law (at [41]–[60]). Although this is distinct from a duty of loyalty, my view is that the court's reasoning applies with equal force to this duty as well. Accordingly, CIC may only argue that these duties are implied into the Service Agreement as a matter of *fact*. To do so, CIC would need to demonstrate that the test in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") is satisfied. It has wholly failed

89 PCS at paras 128 and 129.

90 PCS at para 131(b)(iv) and (c).

to do so. In its closing submissions, CIC simply asserts that the test is satisfied,[91] and in reply, its approach is to attack the defendants' arguments that the test has not been made out.[92] Because of this, there is simply no cogent justification for me to imply these duties into the Service Agreement.

77 Further, there is a second, more conceptually potent reason for rejecting CIC's argument. The final step of the test in *Sembcorp Marine* requires the court to consider whether an officious bystander would say, "oh, of course!", if asked whether the proposed implied terms ought to constitute a part of the contract in question. In my view, however, the hypothetical bystander could only respond in this way – in so far as the duties of good faith and loyalty are concerned – if the contract, first and foremost, obviously creates one of the "settled" categories of relationships giving rise to fiduciary obligations. For example, the relationship between a solicitor and his client, a paradigm agent and his principal, or a trustee and his beneficiary. Accepting any view less strict than this will have the effect of expanding the existence of fiduciary relationships.

78 Professor Paul Desmond Finn, in his seminal work *Fiduciary Obligations* (The Law Book Company, 1977), famously remarked that the conclusion that an individual is a "fiduciary" is "unimportant". He explained, "[i]t is not because a person is a 'fiduciary' or a 'confidant' that a rule applies to him. It is because a particular rule applies to him that he is a fiduciary or confidant for its purposes" (at p 2) (an observation which the Court of Appeal approved in *Tan Yok Koon* at [193]). Accordingly, if – in the face of my conclusion that Mako was not a fiduciary to CIC – I nevertheless find that duties of good faith and loyalty should

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91 PCS at paras 124–131.

92 PRS at paras 48 and 49.

be implied into the Service Agreement, that would be to contradictorily conclude that Mako was *in truth* a fiduciary.

79 I am mindful that it is not necessarily impermissible for such duties to exist, in parallel, both or either in contract or equity. However, CIC's basic case is that Mako was its *fiduciary*, and, as I mentioned at [55] above that there is no universally accepted approach, or list of considerations, for determining whether fiduciary duties exist. Given the obvious difficulty surrounding this area of law, it would be slightly foolhardy to think that the persistent challenge of identifying the existence of fiduciary relationships may be resolved simply by applying a test designed to ascertain implied terms. I therefore find that Mako did not owe CIC duties of good faith and loyalty.

Duty to advise and provide information

80 In closing submissions, CIC argues that Mako had a duty "not to mislead CIC or misrepresent to CIC any matter in relation to the Transaction and *to advise* and *provide timely and accurate information* relating to all aspects of the Transaction to CIC" [emphasis added].[93] The emphasised text does not form part of CIC's pleaded case, whether on the basis of Mako's alleged status as a fiduciary,[94] or by way of implied contractual terms.[95] CIC only pleads that Mako was obliged "not to mislead CIC or misrepresent to CIC any matter in relation to the [Transaction] or potential transactions". It does aver that Mako "advised" it on matters relating to the Transaction,[96] and that Mako also kept it apprised of

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93 PCS at para 120(b).

94 SOC at paras 9(b) and 10(b)

95 CIC's F&BP (3 Feb 2021) at answer 5(a).

96 SOC at paras 26, 59(c)(iii), 59(f1) and 59(g1); R&DC at paras 25(f)(ii) and 25(f)(iii).

developments in the Transaction.[97] However, it is one thing to say that a counterparty provided advice and information. It is entirely another to allege that it was *obliged* to do the same. Further, it also cannot be suggested that that these two duties are an extension of the asserted "duty not to mislead or misrepresent". The latter is proscriptive, and the former two are prescriptive.

81 Counsel for CIC will be aware of the importance of pleadings from cases such as *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [36]. CIC has already put forth an extensive and lengthy case, and, in the face of this, it is not in my view appropriate to allow at the end of trial, points which were not put before me. Therefore, on the basis that CIC failed to plead these distinct duties, I decline to consider its claims for Mako's alleged breaches thereof.

Duty not to mislead or misrepresent

82 As stated at [80] above, CIC avers that Mako was obliged not to mislead it or make misrepresentations as regards the Transaction. On its case, this duty was owed by virtue of: (a) Mako's status as a fiduciary; (b) its appointment as an "agent"; or (c) a term implied in fact into the Service Agreement.[98] As I have found that Mako was not a fiduciary, I need not consider this ground. As regards the latter two grounds, CIC's case is confused and unnecessary.

83 I begin with the second ground, which I am prepared to consider on the basis that Mako was an "agent", for whatever this is worth in terms of imposing consequential legal obligations. Even on this basis, however, if one consults the standard texts on agency, it will be seen that no author speaks of an agent owing

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97 SOC at paras 18, 21(b), 22(a), 27, 46, 47, 59(f), and 62.

98 SOC at paras 6, 8 and 9(b); CIC's F&BP (3 Feb 2021) at answer 5(a).

– by virtue of their "status" as "agent" – a "duty not to mislead or misrepresent": see *Tan*, ch 7; *Bowstead and Reynolds*, ch 6; Roderick Munday, *Agency: Law and Principles* (OUP, 4th Ed, 2022), ch 8. The reason for this is quite simple and connected to why CIC's third ground also fails. The law of torts already offers recourse in respect of losses suffered as a result of actionable misrepresentations. This cuts across all representors, irrespective of whether they are "agents", and so, there is no need for a "duty not to mislead or misrepresent" to be additionally imposed on "agents", whether as a freestanding duty or by implication. Indeed, if *Sembcorp Marine* is applied, it is hard to see what "gap" would be filled by the implication of such a duty. Accordingly, I will only consider CIC's case in misrepresentation on the tortious basis which it has pleaded as a separate cause of action (see [123]–[131] below).[99]

Duty to account

84 CIC pleads that Mako was under a duty to account.[100] However, it makes no connected allegation that Mako received money or property on its behalf. As such, even if I find that Mako was under such a duty, this would be wholly superfluous. I therefore do not consider the point.

Duty of care and skill

85 As stated at [16], [17] and [19] above, it is CIC's case that Mako owed it a duty of care and skill as a fiduciary, in contract, and in tort. Given my finding that Mako was not a fiduciary, I need not consider whether this duty is owed in equity. In any event, it is not even clear whether treating such a duty as existing "in equity" engenders any meaningful distinction from treating it as a duty owed

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99 SOC at paras 70–78.

100 SOC at para 9(g).

in contract or tort (see *Mothew* at 17G–H; although, for a recent survey of the authorities and authors favouring the opposite view, see Weiming Tan, "Peering through equity's prism: A fiduciary's duty of care or a fiduciary duty of care?" (2021) 15 Journal of Equity 181–202).

86 In respect of the other bases, it seems a trite conclusion that Mako owed CIC a duty of care and skill in performing the Service Agreement. As a matter of contract, Mako's obligation to recommend suppliers was undertaken with the objective of developing CIC's presence in the Indonesian commodities market. In carrying out this obligation, it is obvious that Mako was required to do so with due care and skill. In tort, CIC and Mako were clearly in sufficient proximity to give rise to a duty of care and skill as well; and I see no policy objections to the conclusion that Mako owed such a duty to CIC.

87 I note that the respective scopes of Mako's contractual and tortious duty could differ. However, CIC unfortunately does not make clear whether I should assess the facets of its claim in contract or tort. As such, this is not an issue I will address. Instead, from [88] below, I will simply consider CIC's case by answering two basic factual questions which feature in all cases involving an alleged breach of a duty of care and skill. First, whether the scope of the duty owed extends to the relevant functions advanced by CIC. If Mako's duty was not wide enough to cover those functions, it simply will not be liable for CIC's losses. If Mako's duty *was* wide enough, then, the next question is whether its conduct met the requisite standard of care.

Issue 3: Whether Mako breached its duty of care and skill

88 Having found that CIC did not have a personal relationship with Jonathan and Wayne, and that the only duty Mako owed CIC was a duty of care and skill,

I now turn to consider Issue 3: the scope of such duty; whether Mako breached this duty; and if so, the extent to which it is liable for CIC's losses.

89 Before doing so, however, it is important to state again that each facet of CIC's case is premised on the breach of a host of distinct duties (see [17]–[18] above).[101] For example, in respect of the first facet I will consider at [93] below, it is CIC's submission that Mako breached its "duties of (i) loyalty; (ii) not to misrepresent; and (iii) care and skill".[102] I call attention to this because it is clear that these are distinct allegations which entail different inquiries. Whether Mako acted disloyally is an entirely different question from whether it failed to meet a particular standard of care. Yet, because of the over-inclusive approach CIC has taken, its submissions fail to address clearly how its account of the facts establish Mako's breach of *each* duty. In fact, CIC's submissions are not even consistent; in the concluding paragraph of its submissions on the first facet, CIC states that there was a clear breach of the "fiduciary duty to act honestly and in the best interests of CIC".[103] Even if I had accepted that Mako owed fiduciary obligations, this duty is patently distinct from the three duties listed above.

90 The upshot of this is that CIC's case is extremely imprecise and more than slightly unclear. The following demonstrates this. Under the heading "The Defendants' breaches of fiduciary duties owed to the Plaintiff", CIC states in its closing submissions that there are six acts and omissions of the defendants which may be impugned as breaches of their duties of "loyalty", "not to misrepresent", "care and skill" and "duty of no conflict", or some combination thereof.[104] In respect of *all six* acts and omissions, CIC submits that the defendants breached

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101 PCS at para 132.

102 PCS at para 132(a).

103 PCS at para 137.

104 PCS at para 132.

their duty of care and skill.[105] However, in 86 paragraphs of submissions on the issue,[106] CIC makes few arguments about how the defendants *exactly* failed to meet the standard of care expected of them. Instead, it makes these arguments in a different section of its submissions relating to its claim in negligence, which I have stated at [19] above it brings as an alternative cause of action.[107] Even so, in this section – which spans a comparatively brief 11 paragraphs – CIC only raises four of the six acts and omissions it submits amounted to breaches of the defendants' alleged "fiduciary duties".[108]

91 This is confusing. Even if I give allowance to CIC for its counsel's error in thinking that the "duty of care and skill" is a fiduciary duty, rather than a duty which fiduciaries *also happen to owe* (see [85] above), that does not then clarify what I am supposed to consider as part of their case that the defendants acted in breach of their duty of care and skill. Does it include the other two of six aspects it raises in connection with the defendants' alleged "fiduciary duties", or does it only include the four aspects it raises in connection with its action in negligence? If it does include those two aspects, what arguments should I then consider in determining whether the defendants met the standard of care expected of them? To this, I must express some disappointment at the convolution and duplicity of the case advanced by CIC. Far more thought could and should have gone into the *precise* basis CIC considered the defendants' conduct wrongful. Rarely will it be effective to simply toss up a series of duties and leave the court to determine which (if any) has been breached.

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105 PCS at paras 132(a)(iii), (b)(iii), (c)(ii), (d)(iii), (e)(iii) and (f)(iii).

106 PCS at paras 133–218.

107 PCS at paras 242–252.

108 PCS at paras 242(b), (c), (d) and (e).

92 While it is not my position to iron out these issues on CIC's behalf, I am mindful not to allow CIC's position to be too substantially affected by the curious manner in which its counsel decided to advance its case. Accordingly, with the above difficulties in mind, I will proceed to consider all six acts and/or omissions raised by CIC to determine: (a) whether the alleged acts or omissions related to matters which fell within the scope the Mako's duty of care and skill; (b) if so, whether CIC has adequately proven the alleged acts or omissions, and, thus, whether such acts or omissions fell short of the standard of care expected of Mako; and/or (c) if so, whether Mako's failures to meet the requisite standard of care is causally linked to CIC's losses.

By causing CIC to enter into illegal contracts

93 CIC avers that Mako caused it to enter the CIC-Integra and CIC-Toshida Contracts which were illegal. CIC's basic case is that these contracts were illegal because neither Integra (initially) nor Toshida (subsequently) were the suppliers of the nickel ore cargo sold under the Transaction. Instead, Mako arranged for another Indonesian company to be the true supplier – either PT Sambas Minerals Mining ("PT Sambas") or CV Sambas Alam Prima ("CV Sambas")[109] – to utilise the export quotas of Integra or Toshida. The utilisation of another's export quota is a violation of Indonesian law.[110]

94 For context, PT Sambas was controlled by a man named Simon Tarigan ("Simon"), with whom Jonathan and Wayne were familiar from their previous business transactions. Simon was also the owner of CV Sambas.[111] On the basis of this familiarity, Jonathan's evidence is that PT Sambas was Mako's preferred

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109 PCS at para 137.

110 PCS at paras 133 and 137.

111 Jonathan's AEIC at para 35(c).

supplier for the Transaction.[112] Jonathan also gives evidence that it was only after it became clear that PT Sambas would not be able to renew its export quota to meet the timelines of the Transaction, that Integra and later, Toshida, came into the picture.[113] The defendants deny that PT Sambas or CV Sambas' nickel ore was being exported illegally using either Integra or Toshida's export quotas. Further, the defendants also take issue with an apparent inconsistency in CIC's case. In its statement of claim, CIC pleads that the nickel ore *did not* originate from either PT Sambas or CV Sambas, but rather "local Indonesian miners".[114] Pointing to this pleading, the defendants submit that CIC has departed from its case,[115] and CIC naturally denies this in reply.[116] The essence of CIC's reply is that its basic case – that the nickel ore *was not sourced* from Integra or Toshida – has remained consistent. I accept this. This lies at the heart of its case that the CIC-Integra and CIC-Toshida Contracts were illegal, and even though there are some inconsistencies between CIC's statement of claim and its closing submissions, they are not of any real significance given that the defendant's case is that the nickel ore cargo ultimately delivered *originated from Toshida*.[117] Even so, I do not accept CIC's claim that the nickel ore cargo delivered did not originate from Toshida.

95 As a starting point, I accept that the defendants' Indonesian law expert, Mr Ibrahim Senen ("Mr Senen"), does not dispute that it is illegal for a supplier to utilise the export quota of a third party.[118] As such, if it is true that the nickel

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112 Jonathan's AEIC at para 138.

113 Jonathan's AEIC at paras 139–152, 157–165 and 185–199.

114 SOC at paras 70 and 71.

115 DCS at paras 441–445.

116 PRS at paras 58–61.

117 D&CC at para 102.

118 Ibrahim Senen's AEIC (9 Mar 2021) ("Mr Senen's AEIC") at paras 60 and 78(f).

ore cargo was in fact supplied by PT Sambas, CV Sambas, or even unnamed local Indonesian miners, the contracts would have been illegal under Indonesian law. However, I reject CIC's averment that the CIC-Integra and CIC-Toshida Contracts were illegal.

96 In support of its case, CIC relies on the fact that the Indonesian authorities detained the nickel ore cargo. It is not in dispute that this was to facilitate investigations into the origins of the cargo.[119] However, the cargo was eventually allowed to leave Indonesia, and in response to this, CIC calls to attention communications between Wayne and Simon which suggest that US$25,000 was paid to Simon to facilitate the release of the cargo from the load port.[120] CIC does *not* however, come out and make the clear allegation that the Indonesian authorities accepted a bribe for the release of the cargo. Instead, it submits that, given the evidence pertaining to the US$25,000, "no meaningful conclusion can be drawn from the fact that the vessel was allowed to leave the load port by the authorities".[121]

97 I do not accept this submission. As far as the Indonesian authorities are concerned, the nickel ore could either leave the port legally because it belonged to Toshida (as opposed to PT Sambas, CV Sambas or local Indonesian miners), or it could not. If I were to conclude that the CIC-Toshida Contract was illegal despite fact that the vessel was eventually allowed to leave the port, I would – at the very least – be making the suggestion that the Indonesian authorities erroneously allowed the cargo out of the country. However, when coupled with the basis on which CIC expects me to make this finding – that some US$25,000

119 SOC at para 47; D&CC at para 79.

120 PRS at para 63(d).

121 PRS at para 63(e).

had been paid to the Indonesian authorities so as to facilitate this – the suggestion is unavoidably that the authorities were bribed, and had illegally allowed the nickel ore cargo to leave Indonesia on that basis. I *firmly* reject this both as an allegation of fact, as well as a matter of international comity. If CIC had wished for me to make such a finding, this should have been made its *positive* case, and strong evidence should have been tendered to prove it true. The soft, non-committal basis on which CIC suggests I should reach the same effective conclusion is wholly inadequate. I therefore dismiss CIC's claim that Mako caused it to enter illegal contracts.

By failing to ensure reliability of source and supplier

98 The essence of CIC's case insofar as Mako's duty of care is concerned, is that Mako failed to carry out adequate checks to ascertain that the source of the nickel ore cargo and the suppliers thereof, were reliable. The primary basis on which it makes this submission is that the cargo originated from PT Sambas, and that Mako "blind[ly] reli[ed]" on Simon's word to ascertain that the cargo and PT Sambas were reliable.[122] This, CIC submits, does not satisfy the standard of care expected of a reasonable man. Given my finding at [97] above, this aspect of CIC's case naturally falls away as it has failed to demonstrate – in my view – that the supplier of the cargo was *not* Toshida.

99 As such, I will only consider its alternative case that, even if PT Sambas was not the source of the cargo, that Mako nevertheless failed to carry out checks on Toshida to ascertain that it was a reliable supplier. Instead, it relied solely on the alleged recommendation of Simon that Toshida was reliable.[123] To bolster its case, CIC submits, with the benefit of hindsight, that the cargo and its supplier

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122 PCS at para 138(b), 245 and 246.

123 PCS at para 138(c).

were evidently unreliable because the cargo failed to meet the specifications set out in the CIC-Toshida and CIC-CPAG Contracts. I do not accept this argument. Whether Mako should be held liable for its alleged failure to exercise due care in respect of its obligation to recommend suppliers to CIC turns on whether Mako fell short of the standard of care a reasonable man would exercise in performing this function. Inferring that Toshida was unreliable using hindsight in the matter submitted by CIC would be to unjustifiably make Mako the insurers of CIC's venture.[124]

100 Accordingly, whether Mako should be held liable for Toshida's apparent lack of reliability turns simply on whether they exercised the care a reasonable man would have in their position. In determining this, three subsidiary questions are relevant. First, what did Mako actually know about Toshida as a supplier and what should it reasonably have known. Second, with the knowledge Mako had or ought to have had about Toshida as a supplier, what steps would a reasonable person take in carrying out its function under the Service Agreement. Third, if the steps taken by Mako were not those which a reasonable person would have taken, whether CIC would have entered into the CIC-Toshida Contract in any event, that is, irrespective of anything done or not done by Mako. I point to the CIC-Toshida Contract specifically because it was ultimately the supplier of the nickel ore cargo. Even if, hypothetically, Mako had negligently recommended Integra to CIC as a supplier, determining that issue would be of no significance since the CIC-Integra Contract was not performed, and CIC did not suffer losses from its entry thereinto.

101 Turning then to the first question, Jonathan's evidence is that neither he nor Wayne directly communicated with Toshida. Instead, such communications

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124 DRS at para 160(a).

were effected through Simon.[125] Indeed, it appears that Jonathan and Wayne did not know much, if anything, about Toshida as a nickel ore supplier. Their own position is that Toshida only came into the picture when it came to light that Integra's export quota would expire at a date before the likely completion of loading of the nickel ore cargo onto the chartered ship. In this regard, there were issues surrounding the chartering of the ship which caused certain delays in the vessel's arrival at the relevant port in Indonesia. On this ground, the defendants' position is that Simon recommended that the supplier be changed from Integra to Toshida, which had an export quota expiring slightly later.[126] Immediately following Simon's suggestion, contemporaneous messages were exchanged which evidenced a discussion between Mako and CPAG and, separately, Mako and CIC relating to the substitution of Integra.[127] It is therefore unlikely that Mako conducted due diligence between the time of Simon's recommendation and the time which Mako itself raised the issue of the change in supplier with CIC. Whatever due diligence it conducted, if any, could only have been done beforehand.

102 This brings me, then, to the second question. In my judgment, a reasonable person in the position of Mako would have done either one of two things. First, he would have taken some steps to ascertain whether Simon's recommendation was reliable. Second, alternatively, given that CIC had already committed to the supply of nickel ore to CPAG and chartered a vessel, and the fact that there was some urgency to the identification of a suitable supplier to be able to meet the timeline for delivery under the CIC-CPAG Contract, a reasonable person would have called to CIC's attention the fact that he had no

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125 Jonathan's AEIC at para 35, last unnumbered section.

126 Jonathan's AEIC at para 185.

127 Jonathan's AEIC (Vol 5) at pp 3768–3769, (Vol 3) at pp 2164–2165.

personal experience with Toshida, but queried whether, in the circumstances, CIC was nonetheless willing to take the risk of entering the CIC-Toshida Contract, *or*, whether it would prefer to risk a delay while Toshida's reliability was being assessed. Having considered the evidence, I find Mako did the former.

103 I accept Jonathan's evidence that prior to CIC's execution of the CIC-Toshida Contract, he and Jonathan met with the "boss" of a surveying company in Indonesia with the objective of establishing a connection and building their network of contacts. In this meeting, they queried about the suppliers with whom they should avoid, specifically raising both Integra and Toshida. They were told that these companies had "sufficient quota and cargo" and also, that "there was no adverse news in the market about them".[128] I further accept Jonathan and Wayne's evidence that they informed CIC that they had never dealt personally with Toshida, though it had been recommended as a supplier by Simon.[129] This was conveyed to Richard and Mark at a meeting prior to CIC's execution of the CIC-Toshida Contract.[130] Richard naturally gave contrary evidence,[131] but given my reservations about his credibility (see [63] above) and the fact that Mark was not called as a witness to corroborate his account, I do not accept his version of events.

104 Put together, the acts of Jonathan and Wayne were – in my judgment – sufficient to discharge Mako's duty of care and skill in performing its role of recommending suppliers to CIC under the Service Agreement. There is therefore no need for me to turn to the third question, and I accordingly dismiss CIC's

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128 Jonathan's AEIC at paras 229–230.

129 Jonathan's AEIC at paras 185 and 198.

130 Jonathan's AEIC at para 197.

131 Richard's AEIC at para 121.

claim that Mako breached its duty of care and skill in respect of the reliability of the source and supplier of the nickel ore cargo.

By failing to ensure contract complied with Indonesian law

105 As stated at [14] above, CIC's case is that it faces the risk that it will not be able to enforce any arbitral award it may obtain against Toshida because: (a) the CIC-Toshida Contract was not properly translated to Bahasa Indonesia as is required by Indonesian law; and (b) the arbitration clause in this contract[132] was also invalid because it stipulates a non-existent arbitral tribunal, the "Singapore International Economic and Trade Arbitration Commission Singapore Commission".[133] CIC attributes these legal problems with the CIC-Toshida Contract to Mako on the basis that it failed to advise CIC on such legal requirements despite (*via* Jonathan and Wayne) holding itself out as possessing the requisite expertise in procuring and performing Indonesian commodities deals. Legally, CIC suggests that Mako's failing was a breach of its duties of loyalty, as well as care and skill,[134] but, as I have found the duty of loyalty not to have been owed, I will only consider this claim on the basis that it amounts to a breach of Mako's duty of care and skill – more specifically, Mako's *tortious* duty of care and skill. On my reading, the imprecisely worded terms of the Service Agreement (see [7]–[8] above) do not accommodate such a narrow and specific duty, and, for substantially the same reasons as those stated at [76], I find that there is no basis for me to imply such a duty.

106 I turn then to the law of negligence to determine whether Mako owed a duty to exercise care and skill to ensure that CIC's contracts were compliant with

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132 Jonathan's AEIC (Vol 7) at p 5220, cl 9 ("Dispute Settlement").

133 SOC at para 79(f).

134 PCS at para 132(c).

Indonesian law. In this regard, CIC accepts that Jonathan and Wayne were not legally trained. Instead, it relies on the fact that the two directors held themselves out as having "the requisite experience in the Indonesian commodities market and ought to have known that there were commercial risks" which would arise from these failures.[135] After due consideration, I find that this is not a sufficient basis to impose on non-legally trained persons a duty of care which effectively requires them to: (a) have knowledge of specific laws, here particularly, foreign laws; (b) to then be able to identify legal issues and risk; and (c) to render advice on legal issues. In my judgment, public policy considerations at the second stage of the test in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 cut against the conclusion that a layperson can owe such a duty of care and skill.

107 The key policy considerations informing my decision is this. Almost all areas of modern commerce involve some issues of law or potential legal risks. It goes much too far to suggest that, if a person represents that he has commercial expertise in a particular industry, it necessarily follows that he is aware of attendant legal issues and risks, and further, that he appreciates that he should take reasonable care to ensure that those legal issues and risks are properly covered. To find that Mako owed such a duty on the mere basis of its representation of commercial expertise alone would, in my judgment, be to impose an equivalent duty on a substantial class of businessmen, against the reality of how the world of commerce operates. I am mindful, however, that this general view cannot be stated with too much force. It is certainly not wholly impermissible for a layperson to make clear and specific representations such that it would not be contrary to policy to impose on him a narrow duty of care to take reasonable measures to ensure that specific legal issues and risks do not

135 PCS at para 248.

surface. However, such a duty should only arise in cases where the obligor has done something to justify the imposition of such a duty. General representations as to commercial expertise are insufficient, and I accordingly find that Mako was not under a duty, as CIC asserts, to "ensure that the CIC-Toshida Contract [was] in [Bahasa Indonesia] and that the arbitral body under the dispute resolution clause exists and [was] valid".[136]

108 Before I leave this issue, however, two further points need to be made for completeness. First, in closing, CIC submits that a "reasonable person exercising ordinary care and skill in the position of the Defendants would have engaged an Indonesian legal practitioner to ensure that the CIC-Toshida Contract was valid … under Indonesian law before committing CIC to [the Transaction]".[137] I reject this submission on four bases. One, as stated several times from [39]–[67] above, CIC admits that Mako did not have the authority to enter into contracts on behalf of CIC. It follows from this that Mako could not have "committed" CIC to the Transaction. Two, I stated at [59] above that Richard and Mark had sufficient experience and should have had enough business acumen to determine for themselves whether to take legal advice, particularly foreign legal advice. Three, CIC's watered-down claim that Mako should have engaged an Indonesian legal practitioner to ensure that the CIC-Toshida Contract was in order does not form a part of CIC's pleaded case. Lastly, even if I were to consider CIC's claim on the basis of this less onerous duty to seek legal advice, I found at [41(c)]–[44] that Mako's function under the Service Agreement was, narrowly, to recommend suppliers to CIC. This being the case, the imposition of a duty of care and skill on Mako to ensure legal advice was sought would go against the grain of their Service Agreement.

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136 SOC at para 79(f).

137 PCS at para 248.

109 Second, even if I were to assume that Mako owed a duty of care exactly as framed by CIC, there is at present no loss to which CIC can point to as being *caused* by Mako's breach of the duty. CIC's expert on Indonesian law, Professor Hikamahanto Juwana ("Prof Juwana"), testifies that the consequence of failing to translate a contract to Bahasa Indonesia has the effect of rendering the contract invalid and unenforceable. For this, he refers to a 2015 decision of the Indonesian Supreme Court (*Nine AM v PT Bangun*, 1572 K/PDT/2015).[138] Mr Senen disputes this conclusion on several bases, the most pertinent being that the rule of law requiring contracts to be recorded in Bahasa Indonesia has "little application" to the enforcement of a foreign arbitral award because, once the award has been rendered, enforcement is carried out by reference to the award, not the underlying agreement.[139] Neither expert has fully convinced me of their position, and it is this uncertainty which explains why CIC cannot prove its loss. As CIC's arbitration with Toshida has yet to conclude, it cannot be shown that CIC's losses are causally connected to Mako's assumed failure to ensure the CIC-Toshida Contract complied with Indonesian law. If, for example, CIC succeeds in that arbitration and is able to enforce its award against Toshida, there is no loss which can be tied to the breach of this *particular* duty.

By causing CIC not to purchase cargo insurance

110 On CIC's case,[140] Mako represented that CIC need not purchase insurance for the nickel ore cargo *because* CPAG would purchase the cargo insurance policy on its behalf. The evidence supports this. On 4 December 2018, the following messages were exchanged between Jonathan and Richard:[141]

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138 Hikamahanto Juwana's AEIC at paras 28–34.

139 Mr Senen's AEIC at paras 28–30.

140 SOC at para 13(e).

141 Jonathan's AEIC (Vol 3) at pp 2115–2116.

Jonathan:	You don't need to buy the insurance. The buyer will buy.
	Will buy it in advance for you@ Li Xiaolin-Richard
Richard:	So, I sell to CPAG FOB?
Jonathan:	No. The buyer will help you buy.
	Will claim from you.
Richard:	Oh, I said wrongly.
Jonathan:	It is not in the letter of credit, so it's ok.
Richard:	Ok.

111 On this basis, CIC did not purchase any cargo insurance, despite it being contrary to CIC's obligations under the CIC-CPAG Contract (which was a CIF contract: see [12] above).[142] However, such cargo insurance was not ultimately purchased by CPAG, instead, it was purchased by GGMT for its own benefit, *not* for CIC's.[143] I therefore find that Mako did cause CIC not to purchase cargo insurance, and for this reason, I hold that it was within the scope of Mako's duty of care to *ensure* that CPAG did in fact purchase the insurance Mako suggested that it would. To be clear, my view is that this duty arises specifically as a result of Mako making the representation it did to CIC. Had it not done so, CIC would and could have purchased insurance on proper terms to satisfy its contractual obligations under the CIC-CPAG Contract. Having caused CIC to do otherwise, Mako owed a duty of care to ensure CIC's act would not compromise its legal position. The fact that insurance on proper terms was *not* purchased shows that Mako acted in breach of this duty of care.

112 However, CIC has not shown that it suffered any losses as a consequence of Mako's breach of duty. I have examined the arbitral award made against CIC

142 Richard's AEIC at pp 1659, 1661, 1687, 1689, 1708 and 1709.

143 Richard's AEIC at para 211 and p 2151.

in favour of CPAG,[144] and it does not appear to me that CIC was made to pay damages *in relation to* the breach of its obligation under the CIC-CPAG Contract to purchase insurance. In the premises, I find that CIC suffered no losses, and I dismiss its claim accordingly.

By concealing facts about the Transaction from CIC

113 In respect of this aspect of its case, CIC submits that Mako intentionally concealed eight facts about the Transaction from CIC.[145] Such facts range from information relating to reasons for a price reduction effected in the CIC-Toshida and CIC-CPAG Contracts, to the status and progress of the loading of the nickel ore cargo. Indeed, CIC makes rather extensive submissions on how Mako concealed information about the loading process.[146] This, however, differs from its pleaded case. In its statement of claim, CIC's case in respect of Mako's alleged concealment of information focused only on two facts: (a) that the nickel ore cargo was off-specification;[147] and (b) that samples of the cargo had not been taken which would show CIC that the cargo was off-specification.[148] Neither of these facts form any of the eight facts about the Transaction which CIC takes up in closing submissions.

114 I accordingly decline to consider CIC's submissions on these points. It bears emphasising the importance of complete pleadings in commercial cases. As is, such cases – and the present one is no exception – tend to be driven by the strategy of, 'less is not more, *more* is more'. Parties are free to construct their

144 Peter's AEIC at pp 131–177.

145 PCS at para 155(a)–(h).

146 PCS at paras 156 and 158 and pp 241–248.

147 SOC at paras 79(i) and 81(f).

148 SOC at paras 51, 60, 63, 65 and 81(i)–(k).

cases as extensively or concisely as they wish. However, if a party chooses to advance an extensive case, spread across as many alternative causes of action as the facts may conceptually bear, the court may equally treat his pleadings as a *strictly* complete representation of *every* aspect of his case. Any deviation from the pleadings would then not be entertained.

By interposing CIC in the Transaction

115 CIC avers that Mako acted in breach of its duty of care and skill by failing to "structure CIC's participation in the [Transaction] in a manner which upheld and protected CIC's interests".[149] Particularly, it points to five acts and omissions of Mako.[150]

(a) First, that Mako failed to take steps to ensure that CPAG's letter of credit was issued in accordance with the terms of the CIC-CPAGContract.

(b) Second, that Mako caused the bill of lading ("BL") for the nickel cargo to be consigned "to order" with a blank endorsement instead to order of CIC's issuing bank, thereby placing CIC's legal ownership of the cargo at risk.

(c) Third, that Mako failed to ensure that CIC had the complete set of documents needed for presentation to CPAG's issuing bank to obtain payment under CPAG's letter of credit.

149 PCS at paras 206(b)–(f), 207, 209, 215, 218 and 251.

150 PCS at para 251(g), (h), (i) and (j).

(d) Fourth, that Mako caused CIC to provide a letter of indemnity on back-to-back terms with CPAG, authorising the discharge of the nickel ore cargo to the ultimate-buyer, GGMT without the original BL.

(e) Lastly, that Mako frustrated CIC's attempts to establish contact with CPAG, GGMT and Shanghai Orient Intertek Testing Services Company Ltd ("Intertek"), the independent surveyor which CPAG was supposed to engage to analyse and certify the nickel ore at the discharging port.

I will take each of these allegations in turn.

116 First, under the Service Agreement, Mako's narrow function was to refer reliable Indonesian suppliers to CIC to assist in the development of its market presence (see [41(a)] above). Given this, I find that – on the basic structure of their formal relationship – Mako did not owe CIC a duty of care and skill to ensure that CPAG's letter of credit was issued on terms compliant with the CIC-CPAG Contract. To impose a duty of care on Mako in respect of this specific task, there must have been something more to create the necessary proximity between the two parties in relation to this task. Otherwise, as a default, CIC was responsible for engaging CPAG on matters relating to the CIC-CPAG Contract.

117 In opposition to this, Richard's evidence is that Jonathan and Wayne gave assurances "that they would be sorting out the amendments to the CPAG [letter of credit]".[151] I observed at [63] above that Richard was not, in my judgment, a particularly credible witness, and I decline to accept his evidence without at least some objective supporting evidence. Despite the majority of the trio's exchanges being on WeChat, CIC did not refer me to any messages which showed such

[151] Richard's AEIC at para 93.

assurances. On a balance of probabilities, I therefore find that no such assurances were made, and, for this reason, I find that there is no basis to impose on Mako an obligation to take care to ensure that the CPAG reissued a compliant letter of credit.

118 As this issue is of some importance, I call to attention a crucial exchange between Richard, Jonathan and Wayne, and between Jonathan and Wayne and the officers of CPAG. Early on 11 December 2018, Richard sent to Jonathan and Wayne proposed amendments to CPAG's issued letter of credit. These proposed amendments were then forwarded by Wayne to CPAG, whereupon CPAG took the view that, because the letter of credit was issued on a back-to-back basis, its terms could not be changed (presumably to be on the same terms as the letter of credit issued by CIC to the supplier, Toshida). After arriving at this conclusion, Wayne states that he would explain the matter to CIC.[152] In subsequent WeChat messages exchanged between Richard, Jonathan and Wayne, the latter two state that they are unsure whether the proposed amendments are possible,[153] but they do not ask CIC to take the issue up with CPAG directly. CIC relies on this in its submissions to make the point that it is "disingenuous" for Mako to attempt to shift the responsibility for communicating with CPAG because "the fundamental premise [is] that CIC reposed trust and confidence in [Mako] … and relied on them to procure, structure and execute the [Transaction]".[154]

119 It can be seen from this that CIC's case that Mako owed a duty to ensure that CPAG's letter of credit was compliant with the terms of the CIC-CPAG Contract rests, ultimately, on the premise that Mako was CIC's fiduciary. As I

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152 Jonathan's AEIC (Vol 5) pp 3710–3716.

153 Richard's AEIC at pp 1764–1767.

154 PCS at para 208(h)(ii).

have found at [67] above, Mako was not CIC's fiduciary, and I do not think it appropriate to say that CIC *reposed* trust in Mako so much as it *misplaced* trust in it. This misplaced trust is insufficient, in my view, to create proximity between Mako and CIC in respect of this function. Therefore, to reiterate, I find that Mako did not owe CIC a duty to take reasonable care to ensure that CPAG's letter of credit was issued in accordance with the terms of the CIC-CPAG Contract. In fact, for the same reasons, I find that Mako did not owe CIC a duty to ensure that it had a complete set of documents needed for presentation to CPAG's issuing bank to obtain payment under CPAG's letter of credit (CIC's third allegation as set out at [115] above).

120 I turn next to the second, fourth and fifth allegations made by CIC against Mako (again, at [115] above), which may be dealt with more briefly.

(a) As to CIC's second allegation, I find that irrespective of whether Mako in fact caused the BL to be consigned "to order" instead of to the order of CIC's issuing bank, CIC has failed to show how this caused the losses it suffered. The proprietary risks which this alleged breach would have created are not connected to any of the losses CIC pleads (see [13] above). Indeed, in written closing submissions, CIC submits that it was "significantly riskier" for the BL to made out "to order" with a blank endorsement. CIC does not then point to the manifestation of that risk.[155]

(b) The same can be said of CIC's fourth allegation. On the basis that Mako did in fact procure CIC to provide a letter of indemnity on back-to-back terms with CPAG to authorise the discharge of the cargo to the ultimate-buyer GGMT, and that this was done in breach of Mako's duty of care and skill, it is wholly unclear what losses CIC suffered as a result

155 PCS at para 214.

of such act. To the contrary, from the arbitral award made in favour of CPAG against CIC, it appears that the release of the cargo facilitated the mitigation of losses on the part of CPAG, which was accounted for in the award against CIC. Such mitigation was possible because CPAG could, at least, modify its contract with GGMT to on-sell the off-specification nickel ore for a lower price.[156] Further, there is also no suggestion, much less evidence, that issues of title to the cargo arose which required CPAG to enforce the letter of indemnity to CIC's detriment.

(c) Finally, in respect of CIC's fifth allegation, I observe that CIC has not adduced any clear evidence demonstrating that Mako took steps to frustrate its attempts to communicate with CPAG, GGMT and Intertek. To the contrary, Richard's own evidence clearly demonstrates that CIC was in contract with CPAG and Intertek.[157] In any event, as with the second and fourth allegations above, it is unclear – even if Mako did in fact obstruct CIC's communications with CPAG, GGMT and Intertek – what losses CIC suffered as a consequence.

121 In sum, I dismiss CIC's claim in respect of each of these five allegations and find, on the first and third allegation that Mako did not owe a duty of care to ensure that CPAG's letter of credit was in compliance with the terms of the CIC-CPAG Contract. On the second and fourth allegations, I find that even if Mako had breached its duty of care, CIC has not proven the relevant losses it suffered as a result of such breaches. As to the final allegation, I find primarily that CIC has failed to establish as a matter of fact that they were obstructed from establishing contract with CPAG, GGMT or Intertek. In any event, it is also not

156 Peter's AEIC at pp 166 and 172.

157 Richard's AEIC at paras 272–287.

clear to me which of CIC's losses would have flowed from such obstruction had CIC been able to prove it on a balance of probabilities.

By delegating its responsibilities to Simon

122 In closing, CIC submits that Mako wholly delegated their responsibilities under the Service Agreement to Simon, and that they did so negligently without exercising reasonable oversight or supervision.[158] This was not a fact which CIC pleaded. Indeed, its pleadings do not even mention Simon or his alleged role in the Transaction, much less allude to negligent delegation. I accordingly decline to consider the point (also see [81] and [114] above).

Issue 4: Mako's liability for misrepresentation

123 I now turn to CIC's claim for misrepresentation, either on a fraudulent or negligent basis, the latter with reference to s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed).[159] I should restate that CIC's case is framed against all three defendants, not just Mako.[160] However, as I have found at [73] above, Jonathan and Wayne were not acting in their own capacities in the course of their dealings with CIC. Indeed, it is Richard's own evidence that when he *first* met the pair, they specifically mentioned to him that they were "in the process of establishing their new company, [Mako]".[161] Thus, as with Issue 3 above, I will only consider CIC's case as it relates to Mako.

124 To begin, I set out the elements of the torts:

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158 PCS at paras 243–244.

159 SOC at paras 70–78.

160 SOC at paras 73 and 77.

161 Richard's AEIC at paras 11–15.

(a) The elements for fraudulent misrepresentation are as follows (see *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [26]): (i) there must be a representation of fact by words or conduct; (ii) the representation must be made with the intention that it should be acted on by the plaintiff; (iii) the plaintiff had acted upon the false statement; (iv) the plaintiff suffered damage by so doing; and (v) the representation must be made with the knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

(b) The elements for negligent misrepresentation are as follows (see *Ma Hongjin v Sim Eng Tong* [2021] SGHC 84 at [20]): (i) the defendant must have made a false representation to the plaintiff; (ii) the representation must have induced the plaintiff's actual reliance; (iii) the defendant must have owed a duty of care not to make that representation; (iv) the defendant must have breached his duty of care in making that representation; and (v) the breach must have caused the plaintiff damage.

To induce CIC to enter the Transaction

125 CIC avers that Jonathan and Wayne (on behalf of CIC), at a meeting in late November 2018, made five misrepresentations to induce it to enter into the contracts with Integra, Toshida and CPAG pursuant to the Transaction:[162]

(a) First, they were experienced with the sale and purchase of nickel ore for exportation out of Indonesia.

[162] SOC at paras 13, 27, 28, 70 and 71; consolidated in PCS at paras 273 and 274.

(b) Second, the supplier of the nickel ore would be PT Sambas, which was an established mining supplier.

(c) Third, they had worked with PT Sambas previously, and from this experience, they knew it be a reliable supplier.

(d) Lastly, PT Sambas was to be the supplier, but, because it did not have a valid export licence at the time, arrangements would be made for its nickel ore to be exported through another Indonesian supplier, this being either CV Sambas or some other reliable supplier to be identified by Mako.

126 The evidence does not show that the first representation was false. The two key bases on which CIC alleges that Jonathan, Wayne and therefore Mako are: (a) that they did not have the experience they claimed to have had by their Indicative List of Deals; and (b) that they only had one contact in Indonesia for the supply of commodities, Simon.[163] As to (a), I have dealt with the Indicative List of Deals at [60]–[63] above. As regards (b), Jonathan gives evidence that Simon was not their *sole* contact in Indonesia for commodities generally, but rather, their main contact for nickel ore transactions.[164] I accept his evidence as credible, and CIC has accorded me no reason to doubt it.

127 CIC submits that the second and third representations were false on the sole basis that the nickel ore cargo ultimately delivered was off-specification.[165] I reject this contention. As I found at [97] above, CIC has not established that the cargo ultimately shipped did not belong to Toshida. The fact that the cargo

163 PCS at para 275(a).

164 Jonathan's AEIC at para 35(c).

165 PCS at paras 138, 139 and 275(b).

was off-specification therefore has nothing to do with the reliability of PT Sambas as a supplier. The fourth representation, in my view, can also be dismissed for the reason that CIC has not satisfied me that the cargo shipped did not belong to Toshida. Implicit in the representation framed by CIC is the suggestion that the true supplier would be PT Sambas, which I have not accepted.

128 I therefore dismiss CIC's claim for misrepresentation in respect of these four representations on the basis that they were not false. It also bears reiterating, however, my finding at [57] above that CIC was the one who insisted on being interposed in back-to-back trades, which is what led Mako to recommend that it should consider participating in the Transaction. This, in my view, separately shows that even if the above four misrepresentations had been made, CIC – on balance – likely did not rely on them in deciding to enter into the contracts with Integra, Toshida and CPAG. CIC was extremely keen to participate in a back-to-back trade, and I find that it would have entered the Transaction once presented with the opportunity, irrespective of these four representations.

To induce CIC to replace the CIC-Integra Contract

129 In respect of this cause of action, CIC claims that Jonathan and Wayne made five representations to induce it to enter into CIC-Toshida Contract and, consequently, replace the CIC-Integra Contract.[166] First, that Integra would not be able to export the nickel ore cargo as its export quota was expiring. Second, that, in order to meet the timelines for shipment, the CIC-Integra Contract had to be replaced with the CIC-Toshida Contract. This was because Toshida's export quota was expiring at a later date and, as such, its export quota could be used to export the nickel ore originating from CV Sambas (or PT Sambas). Third, that Jonathan and Wayne had previously worked with Toshida. Fourth, that CIC

166 PCS at para 276.

did not have to be concerned about the counterparty to the supply contract because the cargo was the same (*ie*, in truth, supplied by CV Sambas to PT Sambas) and the terms of the CIC-Toshida Contract were the same as the terms of the CIC-Integra Contract. Finally, that due diligence had been done on Toshida as well as the cargo.

130 The only evidence CIC adduces in support of its claim that Jonathan and Wayne made these representations is Richard's testimony.[167] The evidence given by Jonathan and Wayne naturally opposes this account. Given my doubts about the credibility of Richard's evidence, I am not satisfied that such representations were made. I therefore dismiss CIC's misrepresentation claim as premised on these five representations. It is also worth highlighting that these representations are alleged to have been made at the meeting between Richard, Mark, Jonathan and Wayne mentioned at [103] above, and my findings on these two claims are therefore connected.

To induce CIC to accept the terms of the CIC-Toshida Contract

131 CIC's third claim in misrepresentation is duplicative. It is premised on the fourth alleged representation set out at [129] above. For the same reason, I dismiss this claim.

Issue 5: Defendants' alleged conspiracy with CPAG

132 CIC alleges that the defendants entered into a conspiracy with each other as well as CPAG and/or its agents, two individuals named Lei Jun and Chen Ye (the "conspirators"). CIC's case is that this conspiracy was either committed by unlawful or lawful means,[168] and its particulars can be summarised as follows.

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167 Richard's AEIC at para 121.

168 SOC at paras 81–83.

First, before CIC's involvement in the Transaction, the conspirators reasonably suspected that the Indonesian nickel ore supplier to CPAG would likely supply off-specification ore.[169] Second, the conspirators concealed their suspicion so as to induce CIC to enter into the Transaction.[170] Third, the conspirators procured changes in CIC's contracts with Toshida and CPAG so as to reduce the degree of protection accorded to CIC as the middleman in the Transaction.[171] Finally, the conspirators sought to interpose CIC so as to cause it to bear the risks inherent in the transaction.[172]

133 Having dismissed all of CIC's other primary causes of action, there is simply no factual basis which can ground its conspiracy claims. First, as regards its claim for *lawful* means conspiracy,[173] a crucial element which CIC must prove is that the conspirators acted with the "predominant purpose of causing damage" (see *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 ("*Nagase Singapore*") at [23]). As I found above, the defendants did not breach any aspect of their duty of care and skill. Thus, it can scarcely be maintained that they acted in a manner with such predominant purpose. Similarly, in relation to conspiracies carried out by *unlawful* means, the conspirators must have had the intention to cause damage or injury (see *Nagase Singapore* at [23]; *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112]). Again, in light of the findings made, it cannot be sustained that the defendants possessed such intention.

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169 SOC at para 81(e).

170 SOC at para 81(f).

171 SOC at para 81(g).

172 SOC at para 81(h).

173 SOC at para 83.

134 Beyond the lack of evidence supporting CIC's allegations, there seems to me to be three points which further undermine its case.

(a) First, as mentioned at [132] above, the crux of CIC's case is that the conspirators sought to interpose CIC to pass onto it the risks inherent in the Transaction. However, as I have found at [57], Mako did not seek to interpose CIC in the transaction. It was CIC who was eager to participate as an intermediary. This finding deprives CIC's claim of a much-needed logical starting point.

(b) Second, it betrays common sense for Mako to have conspired with CPAG, Lei Jun and/or Chen Ye to harm CIC in this way. Mako was being paid to assist CIC, and as it submits, it stood to earn a commission from a successful trade.[174] Similarly, although CPAG succeeded in its arbitration against CIC (see [13] above), it was itself an intermediary in the Transaction. GGMT was the end buyer and, as such, CPAG stood in a similar position of risk *vis-à-vis* GGMT in respect of the nickel ore cargo which failed to meet specifications.[175]

(c) Finally, CPAG's involvement is a crucial component of CIC's conspiracy claims. It is forensically unsatisfactory that CIC did not call either Lei Jun or Chen Ye as witnesses. Even if the other issues with these conspiracy claims are put aside, without their evidence, it is not likely that I would have concluded that the combination CIC pleaded[176] – which involved CPAG, Lei Jun and/or Chen Ye – existed.

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174 DCS at para 694.

175 DCS at para 695.

176 SOC at para 81.

135 For these reasons, I dismiss CIC's conspiracy claims.

Issue 6: Liability for dishonest assistance

136 CIC's claim for dishonest assistance is advanced on the basis that Mako is established to be a fiduciary (whether by virtue of its status as an "agent" or on the facts), but Jonathan and Wayne are not.[177] Having failed to establish that Mako was a fiduciary, this claim necessarily fails. I therefore dismiss this action on the grounds that no fiduciary relationship exists between CIC and Mako.

137 However, even if I assume that: (a) Mako was a fiduciary; *and* (b) that it acted in breach of its fiduciary duties, CIC has not referred me to any evidence which meaningfully supports the conclusion that Jonathan and Wayne acted in a dishonest manner (as defined in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] AC 378 ("*Royal Brunei*") at 389; also see *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589 at [20]–[22]). Given CIC's approach, I should emphasise that it is not axiomatic that all breaches of fiduciary duty are dishonest. Such breaches can be committed quite honestly. In the *locus classicus* case of *Regal (Hastings) Ltd v Gulliver and others* [1967] 2 AC 134 at 144–145 (also see *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [13]–[15], in which the Court of Appeal cited this passage with approval), commenting on an error of law committed by the trial judge, Lord Russell said:

> My Lords, with all respect I think there is a misapprehension here. ***The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides***; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by

[177] SOC at para 84.

> his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. ***The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account***.
>
> [emphasis added]

138 Thus, without serious arguments applying the threshold in *Royal Brunei*, CIC's claim for *dishonest* assistance would have failed even if I erred on the primary basis that Mako was not a fiduciary.

Issue 7: Whether Mako's corporate veil should be pierced

139 Having dismissed various causes of action brought by CIC against Mako, it is not necessary for me to consider whether Mako's corporate veil ought to be pierced to hold Jonathan and Wayne personally liable. Nevertheless, on the basis that I have erred dismissing all of CIC's claims against Mako, I will address the key aspects of CIC's case on this point.

140 To pierce the corporate veil of Mako, CIC states that it relies solely on the "alter ego" ground (see *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 ("*Alwie Handoyo*") at [96]),[178] and raises four factors in support.[179] First, Richard's evidence that Jonathan represented to him that Mako would be the business vehicle through which both he and Wayne rendered their services to CIC.[180] Second, although Eddy was also a director of Mako, there is no evidence that he was involved in its management. Third, Mako – a company which was incorporated only on 6 September 2018 – was advertised as having experience which reflected that of Jonathan and Wayne personally,

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178 PCS at para 288.

179 PCS at paras 289–295.

180 Richard's AEIC at paras 15 and 17.

rather than deals which Mako had procured since its incorporation.[181] Last, the facts suggest that no distinct lines were drawn between Mako's finances on the one hand, and Jonathan or Wayne's on the other.

141 Before I turn to consider these factors, I think it is meaningful to observe that there is, in general, a paucity of cases where the courts have "pierced the corporate veil". There are a few usual examples, but it is not clear whether each and every one of these cases should be construed as an instance of the court's necessary exercise of its specific power to "pierce the corporate veil". This is as opposed to analysing them as decisions which show that the courts were, in fact, applying some other legal principle to the same end. Consider, for example, the well-known decisions of *Gilford Motor Co v Horne* [1933] Ch 935 ("*Gilford*") and *Jones v Lipman* [1962] 1 WLR 832 ("*Jones*"). In the seminal decision, *Prest v Petrodel Resources Ltd and others* [2013] 2 AC 415 ("*Prest*"), Lord Sumption preferred to leave *Gilford* and *Jones* as cases in which the court actually decided to pierce the veil upon an application of his "evasion principle" (at [28]–[30]) (a summary of the approach espoused by Lord Sumption may be found in *Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd and others* [2016] 1 SLR 1129 at [198]–[202]). Lord Neuberger, by contrast, took the view that these cases could have been resolved without such reference. He suggested that the injunction ordered against the company in *Gilford* could have been justified on the basis that it was Horne's agent (at [71]–[72]). As regards the decision in *Jones*, Lord Neuberger thought that an order for specific performance against Lipman would have had the effect of compelling him to, in turn, compel the company to convey the property to the plaintiffs (at [73]). In this vein, his Lordship concluded with the view that there have been no cases which *needed* to rely on the doctrine that the court may pierce the corporate veil. He was not, however, prepared to declare

[181] Richard's AEIC at p 1011.

that no such doctrine existed (at [79]–[80]). Lord Walker went even further and came quite close to denying the existence of the doctrine entirely. In his view, all cases – with the possible exception of the difficult decision of *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 – could be explained by the application of other legal principles (at [106]).

142 I am aware that the views expressed in *Prest* have yet to be considered, much less accepted here. The law stands as stated in *Alwie Handoyo*. There, the apex court *expressly* upheld the judge's decision to "pierce the corporate veil" on the "alter ego" ground (at [100]), and it is certainly not my place to rationalise decisions of a superior court. By this, I mean that it is not for me to query whether the breadth of the "alter ego" ground for piercing the corporate veil is framed by the "evasion principle" espoused by Lord Sumption, or whether its application is guided by some other narrower, wider or alternative legal principle the Court of Appeal may or may not have had in mind. Therefore, the most precise analysis which can be rendered is to examine closely the factual *indicia* which suggests that Mako was the "alter ego" of Jonathan and Wayne. That being said, I also observe that, though the precise principle guiding the application of the piercing doctrine in Singapore is not yet settled – indeed, even in *Prest*, it was a source of some strife between the judges – the overall weight of the jurisprudence and literature nevertheless tends towards the consistent view that the doctrine should only be applied in *limited* circumstances.

143 On this note, I return to the four factors raised by CIC. In my view, even if CIC established any one of its causes of action against Mako, these factors do not justify piercing its corporate veil.

144 As CIC emphasises in its own submissions, where the alter ego ground is relied on, "the key question that must be asked whenever an argument of alter

ego is raised is whether the company is carrying on the business of its controller" (*Alwie Handoyo* at [96]).[182] In answering this *key* question, and deciding that the corporate veil ought to be pierced in that case, the Court of Appeal found relevant several factual *indicia*. First, the fact that the appellant incorporated the company for the sole purpose of receiving payment under the relevant agreement in that case. Second, the fact that the appellant was the only shareholder and director of the company, and admitted that the relevant company was under his control. Third, the fact that the appellant operated the company's bank account as if it was his own, and admitted that this was the case (at [97]–[100]).

145 Similarly probative *indicia* are not present in this case. First of all, Mako was not incorporated solely to deal with CIC under the Service Agreement. The defendants point me to business and transactions which Mako undertook outside of the Service Agreement with CIC.[183] CIC attempts to undermine this, in reply, by advancing the submission that one of the two other companies with which Mako did business, Yiwan Resources Limited ("Yiwan"), was "essentially … under [Jonathan's] influence and control".[184] In respect of the other company, Dalphy International Limited ("Dalphy"), CIC submits that the defendants have merely put forward contractual agreements between Mako and that company, without anything more to establish that these contracts represent real transactions conducted therewith. On this basis, CIC suggests that *no* weight should be given to the defendants' evidence.[185]

146 I do not accept either contention. In respect of Yiwan, CIC relies on an "admission" by Jonathan, but there was in my view, no such admission. I accept

182 PCS at para 285.

183 DCS at para 706.

184 PRS at para 166.

185 PRS at para 168.

that Jonathan does appear to refer to Yiwan as "our" company in his AEIC, however, when CIC's counsel asked him in cross-examination, "Yiwan is not your company, is it?", Jonathan responded, "That is so, but it was *our friend's company*" [emphasis added].[186] This line of questioning was not pursued further, and as such, I cannot understand the basis on which CIC expects me to conclude that Jonathan and Wayne were the "directing minds and wills of *these* corporate entities",[187] *ie*, Mako and Yiwan. I turn next to Dalphy. I also do not accept that the contractual documents tendered by the defendants should be accorded no weight. The import of doing so would be to find, implicitly, that these documents are false, and that the defendants have entered into evidence forged documents which do not actually reflect Mako's business. This is not a conclusion which I can reach lightly, and if it is CIC's position that the documents do not reflect the true state of affairs they purport to, that should have been tested during cross-examination of either Jonathan or Wayne. I therefore find that CIC has failed to prove that Mako's business with Dalphy was not genuine.

147 CIC also submits that whether or not Mako carried on business with other parties "is not determinative of the issue of alter ego".[188] This is, strictly speaking, correct. However, the fact that Mako *did* carry on business with other parties is quite deleterious to CIC's case. Where the court is asked to look at a defendant company with *no business* other than with the plaintiff, it is considerably easier to conclude that the defendant company was only carrying on the business of its controller. With each additional business counterparty thrown into this mix, the conclusion becomes more difficult to reach. This is because it would require the plaintiff to *specifically distinguish* one contract or

186 NEs 7 Sep 2021 at p 116, line 14 to p 117, line 2.

187 PRS at para 167.

188 PRS at para 165.

counterparty from the others, a task which requires very particular evidence which CIC does not have.

148 This segues to my second point. Unlike the company in *Alwie Handoyo*, Jonathan and Wayne are not the only directors of Mako. To address this obvious flaw in their case to pierce Mako's corporate veil, CIC submits that there is no evidence to demonstrate that the other director of Mako was involved in decision-making and management. CIC makes the allegation, and its submission thus fails to appreciate that the burden of proof lies on it to satisfy the court that the other director sat on the board of Mako in name only and no more.

149 Third, I turn to CIC's argument that the trading experience which Mako advertised it had, was that of Jonathan and Wayne *personally*, not transactions which it had entered into or procured on its own part. This argument is weak at best. I accept that the marketing was not strictly accurate, but this does little to show that Mako was only carrying on Jonathan and Wayne's personal business. It is quite typical for a company in the business of providing a service, especially newly formed companies, to advertise the experience of the *individuals* in its employ, or on its board of directors. Those individuals can fairly and legitimately lend such experience in their capacity as employees or directors of the company. Indeed, CIC was doing exactly the same thing with regard to the Platform. To suggest otherwise would be contrary not only to common sense, but also the basic structure of such corporations.

150 My fourth and final point concerns the weight the court in *Alwie Handoyo* gave to the fact that the appellant operated the company's bank account as his own, and conversely, treated its dues as his own. Most pertinently, the court observed that the appellant procured payments that were due to the company, and directed that the payment of such dues be made to his personal account (at

[99]). In what seems to be a similar vein, CIC submits that Jonathan and Wayne had "no qualms about assuming what [were] rightfully the financial obligations of Mako".[189] In support of this claim, it points to an instance in which Jonathan appears to have made an US$80,000 payment *for* Mako in connection with the Nickel Transaction.[190]

151 In my judgment, the evidence on which CIC relies simply does not carry the same weight as the situation in *Alwie Handoyo*. There is little which can be inferred from the fact of payment alone. It may well be that, after such payment was made for Mako, a liability of US$80,000 was recorded in Mako's accounts in Jonathan's favour. That would clearly suggest that there was a distinction between *Jonathan* and *Mako's* money. Conversely, if the payment had not been recorded, or had been written off, that could support CIC's case. The evidence before me does not address this gap, and I accordingly cannot draw the inference which CIC urges upon me in respect of this payment.

152 To conclude, having considered CIC's case in the round, it is not at all clear to me that Mako was doing no more than carrying on the personal business of Jonathan and Wayne. Therefore, even if CIC had successfully established any of its causes of action against Mako, I would not have thought it appropriate to pierce its corporate veil on the "alter ego" ground so as to hold either Jonathan or Wayne personally liable for CIC's losses.

Issue 8: Mako's counterclaim for unpaid fees

153 As noted at [21] above, Mako brings a counterclaim for unpaid fees. This comprises two parts which I will address in turn.

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189 PCS at paras 294(c) and (d).

190 PCS at para 294 and PRS at para 170.

154 First, Mako claims that the duration of the Service Agreement was six months starting November 2018, and that it was entitled to a fee of S$18,000 per month for its services (see cll 1 and 2 of the agreement set out at [7]–[8] above). CIC only made two months' payment, and Mako claims the balance four months, *ie*, S$72,000.[191] CIC advances four defences,[192] but I will only discuss the one I find effective. This being CIC's claim that it was not obliged to make payment for the remaining four months because Mako did not provide any services under in and after January 2019.[193] I accept this.

155 The fees potentially payable by CIC under the Service Agreement would only have accrued to Mako in three circumstances. One, if Mako had performed the services it contracted to perform under the agreement and, therefore, earned its fees for the months from January to April 2019. This would have conferred on Mako a claim in ***debt***. Two, if the payment clause in the Service Agreement was effected as a retainer, in which case, Mako's claim would also be in ***debt***. Three, if CIC had committed a repudiatory breach of the Service Agreement which, in turn, permitted Mako to terminate the contract and sue for ***damages***. Mako's damages would then be calculated on the basis that it was precluded from performing the services it had been contracted to perform, and as a result, it was prevented from earning the monthly fees it would have been able to earn, had it been able to so perform.

156 Mako's claim does not satisfy any of these three circumstances. One, CIC submits,[194] and I accept, there is no evidence to suggest that after the Transaction, Mako did anything in continued performance its functions under the Service

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191 D&CC at paras 108 and 109.

192 R&DC at paras 28–29A; PRS at paras 181(a)(i)–(iv) and (b)–(d).

193 R&DC at para 29; PRS at paras 181(a)(i) and (b).

194 PRS at para 181(b)(ii).

Agreement. Two, it is not Mako's case that the Service Agreement was entered into as a retainer. Three, there is no indication that CIC repudiated the contract, or committed any repudiatory breach which could ground Mako's claim on the basis of damages rather than debt. It is not even clear how the agreement ended. It seemed simply to have tapered off, without a formal conclusion. Accordingly, I dismiss Mako's claim for S$72,000.

157 Mako's second counterclaim is that sometime early in November 2018, it brokered two other trades for CIC prior to the Transaction, one for zinc ingots and another for copper cathodes.[195] CIC admits that it paid US$9,682.41 for the zinc transaction, and that it owes Mako US$10,281.43 for procuring the copper transaction. In its defence, CIC only invokes the right to set-off liability against its claim for damages.[196] Since I have dismissed all of CIC's claims for damages, its defence of set-off fails, and, accordingly, I find that CIC is liable to pay Mako the sum of US$10,281.43.

Conclusion

158 For the reasons given above, I dismiss all the causes of action of CIC in this suit, and allow Mako's counterclaim for US$10,281.43. CIC may satisfy the payment of this sum in US dollars but, if enforcement is required, the sum shall only be converted to Singapore dollars on the date which execution is authorised by the court (see *Miliangos v George Frank (Textiles)* [1976] AC 443). The parties have tendered costs schedules, and the defendants submit that they should be awarded costs on an indemnity basis fixed at S$1,165,531.[197] In my judgment,

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195 D&CC at paras 110 and 111.

196 R&DC at para 30; PRS at para 182.

197 DRS at paras 394–405; Defendants' Costs Schedule (1 Dec 2021) at p 13.

indemnity costs are not justified, and I fix costs at S$693,526 (all-in) on a standard basis as put forth by CIC in its cost schedule.[198]

159 It remains for me to thank counsel for their assistance in this matter. I am grateful for their detailed submissions and thorough work, though I will suggest that tendering a total of 1,500 pages of closing and reply submissions was on the far end of excessive. Not every argument needs to be laden with an inordinate amount of context, and rarely are subsidiary comments or hyperbolic statements helpful in achieving the goal of persuasion. More often than not, they do the exact opposite and create difficulty where none exists. So, while I am grateful to counsel for their industry, this is an opportune moment to remind counsel that concise and focused submissions are almost always more effective.

Lee Seiu Kin
Judge of the High Court

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198 Plaintiff's Cost Schedule (Revised) (30 Nov 2021) at p 9.