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

[2022] SGHC(A) 2

Civil Appeal No 26 of 2021

Between

POA Recovery Pte Ltd

… *Appellant*

And

(1) Yau Kwok Seng
(2) Capital Asia Group Pte Ltd
(3) Capital Asia Group Oil Management Pte Ltd

… *Respondents*

Civil Appeal No 34 of 2021

Between

(1) Joseph Jeremy Kachu Li
(2) Thomas C C Luong

… *Appellants*

And

(1) Yau Kwok Seng
(2) Capital Asia Group Pte Ltd
(3) Capital Asia Group Oil Management Pte Ltd

… *Respondents*

In the matter of Suit No 578 of 2018

Between

POA Recovery Pte Ltd

… Plaintiff

And

(1) Yau Kwok Seng
(2) Capital Asia Group Pte Ltd
(3) Capital Asia Group Oil Management Pte Ltd

… Defendants

And

(1) Joseph Jeremy Kachu Li
(2) Thomas C C Luong
(3) Lee Hwee Zie Candice
(4) Ngo Chung Hoon
(5) Low Choon Seng
(6) Gunasekaran Santhosh
(7) Yap Kian Ooi Kelvin
(8) Poon Chwin Keng
(9) Gurpreet Kaur
(10) Chan Tai Suan
(11) Lim Chui Teng
(12) Tan Ley Hoon
(13) Choong Su Lin
(14) Tham Yew Cheong
(15) Wong Puie Kuan
(16) Yan Ying Chieh
(17) Loke Yiing Tsen
(18) Heng Yang Teck
(19) Lim Wei Bee
(20) Tan Chee Huat
(21) Jenny Chan May Fong
(22) Foo Peck Lee
(23) Lim Kar Choon
(24) Wong Kok Seng
(25) Kamalavathani a/p Nadarajah

(26) Teoh Su Lim
(27) Lee Pei Yee
(28) Teoh Yeong Sheng
(29) Gai Sik Mei
(30) Thor Mei Ling
(31) Goh Saw Lan
(32) Onn Chok Chiang
(33) Chew Tee Mun
(34) Lim Kai Ying
(35) Ho Swee Yenn
(36) Hoi Yoke Ping
(37) Ong Yuan Siew
(38) Lee Wan Tze
(39) Liew Jer Wey
(40) Gemma Thadeus
(41) Lee Yee Min
(42) Boon Doon Eng
(43) Ding Sing Leong
(44) Ding Sue Yue
(45) Ooi Sau Mei
(46) Ling Peng Min
(47) Jonathan Quek Chin Wei
(48) Tan Siew Lee
(49) Tan Soh Peng
(50) Tan Kien Chee
(51) Ho Jong Yoong
(52) Yeoh Phing Teck
(53) Lee Teng Hau
(54) Yeo Kok Yee
(55) Ng Kai Yun
(56) Chong Yik Ling
(57) Tan Soo Siong
(58) Steve Kwon
(59) Ho Mei Ngor Sandy
(60) Lau Hoi Po
(61) Ng Wai Kwan
(62) Wong Shu Fat
(63) Tsang Chi Chiu
(64) Keiko Suzuki
(65) Siow Chun Weng
(66) Cheang Choon Thoe

(67) Joyce Cheng Ee Teng
(68) How Hock Ann

…Third Parties

JUDGMENT

[Contract] — [Illegality and public policy]— [Maintenance and champerty]
[Tort] — [Misrepresentation] — [Fraud and deceit]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

POA Recovery Pte Ltd
v
Yau Kwok Seng and others and another appeal

[2022] SGHC(A) 2

Appellate Division of the High Court — Civil Appeals Nos 26 and 34 of 2021
Belinda Ang Saw Ean JAD, Woo Bih Li JAD and Quentin Loh JAD
12 July; 27 August 2021

3 February 2022 Judgment reserved.

Belinda Ang Saw Ean JAD (delivering the judgment of the court):

Introduction

1 Some 4,000 investors participated in investments relating to crude oil produced in Alberta, Canada from September 2012 until the ventures ended in October 2015. 1,102 of those investors ("the Investors") claimed to be victims of an investment fraud that was perpetrated by the respondents and their counterparts in Canada. Their accusation was that the scheme of the investments was nothing more than an illusion, as it turned out to be a Ponzi scheme. The Investors, who claimed to have been defrauded of around CAD130m, collectively sought recourse through the appellant, POA Recovery Pte Ltd ("POA Recovery"), a special purpose corporate entity. The respondents deny making any fraudulent misrepresentation and further deny complicity with any Canadian party in the alleged fraudulent investment.

2 The trial Judge ("the Judge") dismissed the action on a standalone ground, namely, the use of a special purpose vehicle to bring a collective action as assignee of the Investors' claims was impermissible procedurally and in law. The Judge went on to consider POA Recovery's pleaded case based on fraud and fraudulent misrepresentation, which was the main case pursued during the trial. The Judge concluded, amongst other things, that there was no investment fraud and that the Investors' losses were the result of a failed investment.

3 This court will consider whether POA Recovery's challenges to the Judge's factual findings satisfy the standard of review to warrant appellate interference, namely, whether the findings of fact were plainly wrong or against the weight of the evidence. Whilst POA Recovery's allegations of investment fraud have to be tested against all the available evidence adduced at trial, as the Judge noted, the body of available evidence adduced at trial was perceptively disadvantaged by (a) the non-attendance of material witnesses from both sides, and (b) incomplete documentary evidence. The undisputed evidential shortcomings on the legal and factual merits of the dispute will guide this court's understanding of the arguments, evidence, and materials in the appeals.

4 In reviewing POA Recovery's slew of allegations, including the assertions that the Judge did not address in his judgment the various points raised by POA Recovery, the court is guided by the following principles: (a) a judge is only required to deal with what is essential to dispose of the dispute before him; and (b) where fraud is alleged, cogent evidence is required to discharge an appellant's legal and evidential burden to the requisite standard of proof. With these two points in mind, the focus will be on material aspects of the dispute that are necessary to determine the two appeals. One other feature in the main appeal is the use of a special purpose vehicle to sue. This approach raises issues on the permissibility of collective actions structured in such a

manner, and whether the rules on maintenance and champerty were transgressed.

***Dramatis personae* and background to appeals**

5 There are two appeals before us: AD/CA 26/2021 ("AD 26") and AD/CA 34/2021 ("AD 34"). Numerous individuals and entities are involved in the present appeals. For clarity, we set out a table listing and abbreviating the key individuals and entities, before elaborating below on their roles and relationships in the alleged fraud:

s/n	Name	Place of origin, incorporation or passport	Remarks
Litigants			
1	POA Recovery	Singapore	Appellant, AD 26
2	Yau Kwok Seng ("Yau")	Singapore	First respondent, AD 26 and AD 34
3	Capital Asia Group Pte Ltd ("CAG")	Singapore	Second respondent, AD 26 and AD 34
4	Capital Asia Group Oil Management Pte Ltd ("CAGOM")	Singapore	Third respondent, AD 26 and AD 34
5	Joseph Jeremy Kachu Li ("Li")	United Kingdom	First appellant, AD 34
6	Thomas C C Luong ("Luong")	Canada	Second appellant, AD 34

Companies *(alphabetical order)*			
7	Capital Asia Group Oil Management Ltd ("CAGOM Canada")	Canada	-
8	Capital Asia Group (Hong Kong) Limited ("CAG HK")	Hong Kong	-
9	Capital Asia Group (M) Sdn Bhd ("CAG MY")	Malaysia	-
10	Conserve Oil Group Inc ("COGI")	Canada	-
11	Proven Oil Asia Berhad ("POA MY")	Malaysia	-
12	Proven Oil Asia Hong Kong Ltd ("POA HK")	Hong Kong	-
13	Proven Oil Asia Ltd ("POA")	Canada	-
14	Proven Oil Asia Pte Ltd ("POA SG")	Singapore	-
Personnel *(alphabetical order)*			
15	Alex Gramatzki ("Gramatzki")	Canada	-
16	Audrey Tan ("Audrey")	Singapore	-
17	Candice Lee ("Candice")	Malaysia	-
18	David Crombie ("Crombie")	Canada	-
19	Gary Tan	Singapore	-
20	Greg Busby ("Busby")	Canada	-
21	Jonathan Quek ("Jonathan")	Malaysia	-

22	Juergen Hainzl ("Hainzl")	Canada	-
23	Karen Dowling	Canada	-
24	Phyllis Fong ("Phyllis")	Singapore	-
25	Richard Orman ("Rick Orman")	Canada	-
26	Robin Chan ("Chan")	Singapore	-
27	Tan Choon Hua ("Paul Tan")	Singapore	-

POA Recovery & COGI

6 The appellant in AD 26, POA Recovery, is a Singapore-incorporated private limited company with an issued share capital of S$1, and it is the entity to which the claims of the Investors were assigned. It is undisputed that the *sole purpose* of POA Recovery's incorporation was to pursue the Investors' claims. The individual Investors' claims were said to be assigned to POA Recovery by way of formal agreements ("the Assignment Agreements"). Under each agreement, the 1,102 Investors irrevocably assigned to POA Recovery all "rights, title, benefit and interest" in "appropriate legal action against relevant persons and or entities … who have caused or contributed to [their] loss or damage, including the loss of the Crude Oil Investments".

7 According to POA Recovery, the crude oil investment ("the Scheme") involved the Investors purchasing physical barrels of crude oil that would be resold for profit on their behalf by an entity known as POA. POA was a subsidiary of COGI, which operated the oil and gas properties from which the crude oil would be purchased by the Investors. The Investors were promised returns after POA resold the crude oil at a profit.

8 POA Recovery submitted that the investments under the Scheme were marketed (*ie*, represented to the Investors) as bearing three key features.

(a) **Purchase of oil:** Each investment was a purchase of crude oil.

(b) **Profits for Investors:** The oil would be resold by POA on behalf of investors at a profit, which would be paid to the Investors quarterly at 3% of the purchase price until the end of the investment term. This 3% profit was derived from the onward sale of the crude oil (which the Investors purchased) by POA to oil giants. The aggregate annual return would be 12%, and at the end of the investment period, the full purchase price would be returned to the Investors.

(c) **Security:** As security for their investment capital, the Investors would receive a first charge over the oil fields in the projects in which they had invested.

According to POA Recovery, the investments did not in fact bear any of these features.

9 The duration of the Scheme lasted from September 2012 to October 2015. We will elaborate on the events that unfolded shortly.

Yau, CAG and CAGOM, Li and Luong

10 Yau is the first respondent in AD 26. He is the sole shareholder and director of the second and third respondents, CAG and CAGOM. Yau, CAG and CAGOM are also the respondents in AD 34. It is not disputed that CAG and CAGOM acted primarily through Yau. Where appropriate, we refer to them collectively as “the respondents”.

11 Yau was nominated by POA as the "key employee" involved in the marketing of the investments. CAG was appointed by POA as the exclusive marketing agent of the investments. The agreement between them is referred to by parties as the "Collaboration Agreement". CAG earned commission of between 18–20% of the capital raised via the investments. The investments were demarcated by projects, named according to the oil fields from which the oil had allegedly been obtained. There was a total of 17 projects between 2012 and 2015 (which we detail in our analysis at [117] below).

12 CAG conducted the marketing of the investments in Asia with the assistance of agents and sub-agents. CAG appointed two entities, CAG MY and CAG HK, as sales agents in Malaysia and Hong Kong respectively. These entities, in turn, appointed marketing companies within their respective regions, known as Associate Marketing Companies ("AMCs"). CAG also enlisted sub-agents from the AMCs to assist in marketing of the investments. Li and Luong, the appellants in AD 34, were two such sub-agents. These sub-agents were investors who also played a role in marketing so that they too could earn a portion of the commissions that POA paid. Some of these investors, including Li and Luong, were invited to POA and COGI installations in Alberta, Canada to see the rigs and production lines. They returned satisfied with what they had seen.

13 A prospective investor who wished to invest would be asked to sign a Buyer's Purchase Order ("BPO"). CAG earned a commission from POA for each BPO procured. The sub-agents who played a role in marketing would also earn a portion of the commissions that POA paid.

14 CAGOM was incorporated in 2012. It was set up to hold the leasehold security that was provided by POA in respect of the crude oil investments.

CAGOM owned 100% of the shares in CAGOM Canada, a Canadian company that was initially used to hold the security provided by POA in respect of the investments. From 20 November 2015 onwards, CAGOM Canada became POA's 99% shareholder; we will elaborate below at [23] on the significance of this arrangement.

15 POA Recovery refers to POA, COGI and the CAG entities collectively as the "Conserve Group". This description can be misleading as CAG is a separate entity that is not part of COGI and POA. We will nevertheless use the same terminology in so far as it forms part of POA Recovery's arguments.

Other key personnel and entities

16 Other key personnel and entities (as tabulated and abbreviated at [5] above), and their roles, include the following:

(a) **Payment subsidiaries:** POA SG, POA MY and POA HK, collectively the "POA subsidiaries". These were the subsidiaries through which POA made profit/capital repayments to investors in Singapore, Malaysia, and Hong Kong respectively.

(b) **CAG personnel:**

(i) Phyllis, Yau's business partner and legal advisor to CAG.

(ii) Audrey, CAG's vice-president of marketing.

(iii) Paul Tan, the Chief Operating Officer of CAG. He trained CAG's sales agents. He was also a director of POA from early 2016 onwards (see [22] below).

(iv) Gary Tan, who trained CAG's sales agents.

(c) **POA and COGI personnel:**

(i) Hainzl, COGI's principal representative during the conception of the Scheme.

(ii) Crombie, the president of COGI and president of POA from 2011 until his resignation in March 2016.

(iii) Gramatzki, the vice-president of POA and Vice President of CAGOM Canada.

(iv) Karen Dowling, COGI's vice president of Land, *ie*, COGI's officer overseeing the leases held over oil fields.

(v) Rick Orman, a director of POA from early 2016 onwards. He was a former Minister of Energy in Alberta, and chairman of WesCan Energy Corp, a listed oil exploration company.

(vi) Busby, part of POA's new management from early 2016 onwards with Paul Tan and Rick Orman (see [22] below).

(vii) Chan, who was appointed as POA's accountant after its financial collapse.

(d) **CAG MY personnel:** Candice and Jonathan, owners of CAG MY and officers who operated POA MY. They were two Investors who were also sub-marketers.

Events leading up to the commencement of the action in Singapore

17 For some of the 17 projects (see [11] above), the Investors had been paid the agreed 3% returns quarterly and obtained full capital refunds after the expiration of each project term. By October 2015, three projects had successfully exited, *ie*, the investors had received both their capital refunds and

their investment returns. Five projects had partially exited, *ie*, the majority of investors in those projects had been paid their 3% returns and exit payments.

18 For the remaining projects, POA was unable to pay the 3% returns as well as return the investment capital to the Investors. This was due to POA and COGI getting into financial difficulties in 2015 because of the drastic fall in the price of oil world-wide. As the Judge observed, while there was no direct evidence on the fall in oil prices, the parties did not seem to challenge such a fall. However, POA Recovery challenges the Judge's finding that the collapse of the Scheme was *attributable* to the fall in oil prices in 2015.

19 Oil prices fell below US$40 per barrel at the end of October 2015. On 26 October 2015, COGI was forced into receivership when its bank creditor called on a loan. A Canadian court appointed MNP Ltd as the receiver and manager of COGI. COGI was thus unable to transfer any money to POA. POA was itself enjoined, by an order of a Canadian court on 27 November 2015, from disposing of its oil and gas leases and assets. Crombie notified CAG of COGI's receivership three days later. According to the respondents, CAG stopped marketing POA projects immediately.

20 In November 2015, officers from POA including Crombie travelled to Singapore to brief the investors on the situation in Canada. They assured the investors that the contracts would be performed.

21 In early 2016, the receivers of COGI applied to put POA under receivership, but this was successfully resisted by Phyllis and Paul Tan. By this time, there were "alarms and frantic action in Canada as well as in Singapore, Malaysia, and Hong Kong among the Investors and the AMCs in the respective countries": Judgment at [13].

22 In the light of the financial turmoil, POA appointed a new management team. CAGOM Canada successfully took over 99% of the shares in POA and COGI was left with 1%. In January 2016, Rick Orman and Paul Tan were appointed directors of POA, and they formed the new management team that included Busby.

The June Agreement

23 Sometime in June 2016, the new POA management team met the Investors in Kuala Lumpur to discuss how the Investors could recover their investments. This led to the formation of an agreement ("the June Agreement"). Under the June Agreement, the Investors were given shares in CAGOM Canada in proportion to the outstanding money due to them under the crude oil investments. The investors who signed the agreement agreed to forgo their rights under the original contracts governing their purchase of crude oil from POA. They accepted that their recourse would lie in their rights as shareholders of CAGOM Canada instead. In return, the Investors would receive dividends from POA, which was by then 99% owned by CAGOM Canada. Since CAGOM Canada was the 99% shareholder of POA, profits from POA's restructuring, if successful, would be distributed as dividends to the signatories on a *pro rata* basis. 85% of the Investors signed the June Agreement. The remaining 15% had their rights held on trust for them. Any disposal of POA's assets required the approval of 60% of its shareholders.

24 The full extent of the June Agreement was disputed. The parties disagree over whether the newly implemented shareholding structure in CAGOM Canada had the effect of extinguishing the Investors' original rights as against POA (under the BPOs) and separately as against the respondents. We will address this below in the course of our analysis.

The Interim Advisory Board

25 In April 2017, the management and control of CAGOM Canada was under a new management committee known as the "Interim Advisory Board". The new committee included Yau, Luong, Li, and four other Investors. Li was the chairman. In November 2017, the members of the Interim Advisory Board were appointed as full directors of CAGOM Canada and formed CAGOM Canada's "Executive Board".

26 After gaining control of CAGOM Canada, Li, Luong and several other members of the Interim Advisory Board sold off a valuable POA asset known as the "Joffre" asset without the requisite 60% shareholders' approval, and in spite of express objections by certain Investors to the sale. Li and Luong only reported, after the fact, that the sale was completed. They then proceeded to inform the CAGOM Canada shareholders that they were getting a final distribution of 1% of the sale proceeds. Li and Luong have not provided proof of the sale: the buyer was not named, and the sale price was not disclosed. Li and Luong were thereafter also involved in two further transactions that were found by the Judge to be against the interests of the Investors.

Procedural history

27 Chiefly, POA Recovery's pleaded case is that the respondents were complicit in POA and COGI's fraud against the Investors under the Scheme, and that the investments were not genuine investments in crude oil. Fraudulent misrepresentations were made to Investors to induce investments. The case pursued below largely mirrors POA Recovery's primary case on appeal.

28 The respondents challenged the action in law and in fact, and their case on appeal is largely identical. The primary defence in law was that

POA Recovery had no legal standing to bring an action because its attempt to sue on behalf of the Investors amounted to the illegal practice of maintenance, *ie*, an unconnected person lending assistance (*eg*, financial support) to the real aggrieved parties or encouraging them to sue. Their factual case was that the investments were genuine commercial transactions and not a Ponzi scheme as alleged. If fraud had been perpetrated, it would have occurred much later after the sharp drop in oil prices that led to COGI's receivership. At some point thereafter, POA and COGI or some of their officers took steps that might be viewed as fraud committed against the Investors. Such fraud (if any) was perpetrated against not only the Investors but also the respondents. The respondents were not parties to any fraud.

29 The respondents brought a third-party action that joined 68 individuals as third parties. 66 third parties were joined in the suit on the ground that they were sales agents appointed by AMCs who over-promised or misrepresented the investments to the other Investors. These 66 third parties, like Yau, marketed the Scheme and also invested their own money in the projects. The respondents claimed, *inter alia*, for a return of the "Secret Commissions" received by the third parties.

30 The respondents had a separate case against Li and Luong. Luong is a Hong Kong businessman who was an Investor. Luong introduced the investments to Li, a trained accountant and authorised representative of Luck Hock Watch Company Ltd ("Luck Hock") and Enoch International Company Ltd ("Enoch"). Li invested in the Scheme and got Luck Hock and Enoch to invest as well.

31 The respondents' additional claim against Li and Luong was that when the investments failed, Li and Luong financially mismanaged CAGOM Canada

and POA, and depleted the underlying assets of the crude oil investments, leaving the Investors with less than 1% of the principal investment amounts from the crude oil investments. To mask their own wrongdoing, Li and Luong galvanised the Investors to take remedial action, both in Canada as well as in Singapore. In the proceedings below, the respondents sought contribution and/or indemnity from Li and Luong towards any damages that the respondents might have been ordered to pay, and further and in the alternative, for Li and Luong to indemnify and/or contribute to the respondents in respect of commissions that Li and Luong had received.

The decision below

32 The Judge dismissed POA Recovery's claim on the basis of its lack of standing, specifically that the assignments of the Investors' claims to POA Recovery were void for being contrary to the doctrine of maintenance: see *POA Recovery Pte Ltd v Yau Kwok Seng and others (Joseph Jeremy Kachu Li and others, third parties)* [2021] SGHC 41 (the "Judgment") at [42]–[47]. As the action was dismissed, no orders, apart from costs orders, were made against Li and Luong. We briefly set out the Judge's reasoning.

POA Recovery's standing to bring the suit

33 The Judge agreed with the respondents' characterisation of POA Recovery, *ie*, that it was a "shell company" incorporated only for the purposes of commencing the suit. The Judge found the Assignment Agreements void for being contrary to the doctrine of maintenance with the effect that POA Recovery had no standing to bring the present action.

34 The Judge applied the test set out by the High Court in Re *Vanguard Energy Pte Ltd* [2015] 4 SLR 597 ("Re *Vanguard*") at [43]–[44], namely, that

it is contrary to the doctrine of maintenance for individual plaintiffs to assign their bare rights to litigate unless one of three exceptions could be proven.

35 The Judge concluded that the three exceptions in Re *Vanguard* did not apply. As the assignment was not associated with the transfer of property, the first exception did not apply. On the second exception, the Judge disagreed that POA Recovery had a legitimate interest in the assignment. POA Recovery had no separate purpose apart from pursuing the Investors' claims. The present case could be distinguished from a situation whereby a company assigns a bare cause of action to its shareholders. Such shareholders can be said to have a legitimate interest in the assignment since they would have benefitted from the fruits of a successful litigation in any event (see Re *Vanguard* at [48]). Finally, the Judge also found the third exception in Re *Vanguard* to be inapplicable. Structuring the action in this manner was contrary to public policy in that the respondents would have no one to look to for costs except the solitary shareholder of a S$1 shell company. Beyond the security for costs paid up to the filing of affidavits, the respondents would be "chasing shadows across Hong Kong, Malaysia, and Singapore": Judgment at [44].

36 The Judge said that the use of a special purpose vehicle to sue was procedurally impermissible. The Investors had to "comply with the law" if they wished to pursue their rights in court. That meant that the Investors had to (a) sue individually, and agree to proceed with one suit with the others stayed (since the issues and witnesses involved are common to all), (b) file a representative action under O 15 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), or (c) join the parties and consolidate their actions under O 15 r 4 and O 4 r 1 respectively.

The merits of POA Recovery's claims

37 After concluding that POA Recovery did not have *locus standi* to sue, the Judge went on to examine the purported causes of action. The Judge concluded, on the facts, that POA Recovery's claims lacked merit. The Judge identified the "only clear causes of action" as fraud in tandem with POA and COGI, and fraudulent misrepresentation. These were therefore the subjects of the Judge's focus in the Judgment. The rest of POA Recovery's claims were not adequately pleaded, namely the causes of action in breach of contract, breach of fiduciary duties and/or trust, negligence, and unlawful means conspiracy. The elements of these causes of action were not elaborated upon – the Judge's observations in this regard are found at [18]–[20] of the Judgment.

Fraud

38 The Judge's discussion on POA Recovery's claim in fraud comprises four main parts. First, the alleged misuse of Investors' moneys, *ie*, the allegation that the respondents had permitted or procured the Investors' moneys to be applied for purposes other than the purchase of crude oil. Second, the wrongful discharge of security, *ie*, the allegation that the respondents had permitted or procured the discharge of the security that CAGOM and CAGOM Canada held over the oil fields on behalf of the Investors. Third, the allegation of secret commissions being collected by CAG. Fourth, the evidential gaps which led the Judge to conclude that there was no fraud, but merely a failed investment.

39 The Judge was not convinced that POA could only use the Investors' money to buy crude oil and not for any other purposes. The BPOs signed by the Investors with POA were, by their express wording, contracts for the sale and purchase of crude oil. Clause 7 of each BPO, however, explicitly provided that POA could allocate the Investors' monies "for development and purchase of oil

and gas leases/assets": Judgment at [24]. Thus, even if the Investors' moneys had been used to purchase oil and gas assets instead of crude oil, this was a legitimate means of raising money to fulfil POA's contractual obligations.

40 Based on the above, the Judge opined that "[t]he scheme was unlike a Ponzi scheme in which the fraudster uses the investment monies to pay other investors": Judgment at [24]. The Judge added, in this regard, that there could be no dispute that POA and COGI were genuinely in the oil-producing business. The respondents asserted that COGI was the largest oil producing company in Alberta prior to it being placed under receivership. This was not disputed by POA Recovery. It therefore appeared "quite clear" to the Judge that COGI was a legitimate oil producing company in Canada: Judgment at [25].

41 Next, the Judge found that the respondents had nothing to do with the discharge of the security that CAGOM and CAGOM Canada held over the oil fields for the benefit of the Investors. The Judge noted that while there was "some unchallenged evidence that in the chaos that followed COGI's receivership, the securities were discharged", there was "nothing to show that the authorisation for the discharge had anything to do with the [respondents]": Judgment at [26]. There was evidence that there might even have been a forgery of the signature authorising the discharge, but that evidence pointed to Karen Dowling, POA's and COGI's officer overseeing the leases that they held over the relevant oil fields (*ie*, "landman", as referred to by the Judge and the parties).

42 The Judge rejected the allegation that CAG fraudulently received secret commissions from POA. POA Recovery's witnesses complained that they had not been apprised of the fact that CAG's commissions were deducted upfront from the capital raised from the Investors (*ie*, 18–20%; see [11] above). As a result, only about 80% of the Investors' capital went upstream to POA. In the

Judge's view, these allegations were without merit. It is both legally and commercially acceptable for sales agents to operate on a commission basis. Some of the Investors, who were also the AMCs and sales agents, also received commissions for their sales of the crude oil investments. In so far as POA Recovery took issue with CAG's non-disclosure of the quantum of its commissions and the mode of their distribution, these were both matters that were strictly between POA and CAG. CAG did not have a legal obligation to report either of these matters to the Investors. The Judge noted the existence of stark evidential gaps that had to be construed against POA Recovery. No one from POA or COGI testified to explain how "[the] BPOs really worked": Judgment at [27]. The lawyers involved in structuring and executing the documents were not called. No one asked for the audited accounts of POA and COGI to see how these contracts appeared, nor to see what COGI's normal business practices were.

43 Also, key personnel were not called as witnesses. Karen Dowling and Crombie were not called even though they could have been material witnesses as regards the respondents' allegation that documents had been forged leading to the discharge of the Investors' security in Canada. Rick Orman, who was a former Minister of Energy, was a material witness given that he had come to meet the respondents and some of the Investors, but he, too, was not called to testify. Chan, who was appointed POA's accountant after its collapse, was also not called to testify even though POA Recovery had initially listed him as one of its witnesses. Chan could have shown that the wrongdoings, if any, lay with POA's old management and not with the respondents. The Judge observed that the absent witnesses were not called for strategic purposes or for practical reasons (*eg*, the Canadian witnesses may have been unwilling to testify), and not as a result of neglect by counsel: Judgment at [28]. The Judge decided that

the evidence that *was* in the available record supported the finding that there was no fraud; the collapse of the Scheme was an investment failure. That was what the Judge felt that he could reasonably and fairly conclude in the light of evidential gaps.

Fraudulent misrepresentation

44 POA Recovery claimed that the Investors were misled by the respondents into signing the contracts to purchase crude oil from POA. The two primary alleged misrepresentations identified by the Judge were, first, the giving of a guarantee that the Investors would receive their annualised returns for the duration of the contract with eventual repayment of the full amount of their investment capital; and second, the representation that the Investors were buying crude oil.

45 The Judge was satisfied that CAG, which was responsible for training the sales agents in Singapore, Malaysia and Hong Kong, had clearly and unambiguously informed the sales agents that they could *not* inform potential buyers that the capital returns for the investments were *guaranteed*. Other than the assertions by some of the witnesses that Yau had guaranteed the capital refunds, the evidence showed that at most, Yau had only assured some of the early Investors that the investments were reliable. Assurances of this sort are not a guarantee in law that can found a cause of action. In any event, by the time those Investors visited the COGI oil fields, they had convinced themselves that they were in a good deal, and themselves became "evangelists of the same cause": Judgment at [30]. Thus, if individual Investors had been misled by what they claimed to be the promises of capital protection, the promises were made by the sales agents and not by the respondents. In this regard, the Judge appeared to accept the respondents' evidence that they had "used whatever information

they had been given by POA and COGI without embellishment", and "represented accurately what they were told". Much of the information could be found in a bound document called the "Crude Oil Bible". The Investors who were authorised to sell the crude oil investments could also access, and in fact used, the same Crude Oil Bible.

46 Even if the respondents had falsely represented that the Investors' moneys would only be allocated towards the purchase of actual crude oil, there was no evidence that the Investors had relied on this representation in entering the BPOs. The BPOs specified that if the Investors wanted delivery of crude oil, that could be done on the terms set out in the contracts. Those terms were not put to the test because none of the Investors had opted to take delivery of the crude oil, and indeed none appeared interested in this option. That showed that "so far as the Investors are concerned, they were only interested in getting their capital refund and 12% profit": Judgment at [33]. Accordingly, it appeared unobjectionable that the BPOs were in fact "a little more sophisticated", *ie*, contracts that were more like investments in the "commercial ventures of POA" in which investors were promised a return of 12% per annum.

47 Finally, the Judge noted that the BPOs were not all executed at once but over the years, and the early BPOs had shown promise because they were being performed, and the promises kept. Evidence was also led showing that numerous Investors had visited the COGI oil fields and returned fully satisfied with what CAG was offering them (see [12] above). They had passed on their experience to other interested buyers who relied on their recommendations and purchased the investments with or through them accordingly.

48 As for the remaining representations set out in the Statement of Claim, the Judge observed briefly that many of the alleged misrepresentations sounded

like "promotion puffs": Judgment at [22]. Some representations may have been serious representations of fact but have not been proven to be false, such as the claim that COGI "manages over 70,000,000 barrels of oil equivalent and has oil reserves and resources in excess of CAD7 billion".

49 Based on the above, the Judge concluded that "[t]he ideas of fraud and fraudulent misrepresentation only came to mind much later, by which time, the story had become more complicated and messier, by reason of the activities of Li and Luong": Judgment at [36]. Until that point (when the investments failed), the Investors had been working with Yau in trying to recover their investments. Yau was taking the lead not only because he was the person who had introduced the investment to the early investors, but also because he was himself an investor in the scheme. There was also evidence from the email of Gramatzki that showed that the Canadians were trying to control the damage without alarming the investors, but eventually, the loss was way too large, and nothing could be done "but for everyone to roll over and give up".

Li, Luong and the third parties

50 The only order the Judge made in respect of the third-party action was an order for costs. The Judge nevertheless pointed out that "not all third parties are the same. Li and Luong may have more to answer for than the others, but that is an internal matter among the third parties": Judgment at [48].

51 The first of three wrongdoings by Li and Luong were their sale of the "Joffre" asset without requisite shareholder approval (the "Joffre Asset Purchase"; see [26] above). The Judge also accepted two further allegations against Li and Luong, which concerned what was known as the "Spurs Investment" and the purchase of an asset known as "Provost" (the "Provost

Purchase"). In short, the Judge was persuaded that Li and Luong had belatedly disclosed information to the investors, taken up a further investment on the investors' behalf in highly questionable circumstances, and facilitated a surreptitious purchase of an asset by another entity, to the investors' detriment.

52 The Judge surmised that it was "obvious" that any action which Li and Luong had carried out to recover POA's assets had been undertaken purely for their own benefit, because they, as well as their principals, were major investors in the Scheme. The Judge concluded by observing that he had "accepted the [respondents'] claim that Luong and Li financially mismanaged CAGOM Canada in the aftermath of the 2015 oil crisis and that the Investors could have recovered more than 1% of their investment capital if not for Luong's and Li's questionable dealings": Judgment at [48].

53 In relation to the third-party action against the other sales agents, the Judge found that on balance, Yau had been careful to avoid the promise of a guaranteed return: see [45] above. Therefore, if individual Investors had been misled by what they claimed to be the promises of capital protection, the promises were made by the sales agents and not by the respondents.

The parties' cases on appeal

54 The Appellant's case and the Respondent's case copiously set out *general narratives* that, for the most part, left this court with no clear indication of the critical issues in the appeals. We accept that presentation of narratives in written submissions is not always objectionable, but here, some 34 out of the 77-paged Appellant's Case comprised a dense coagulation of facts. Some portions were chronological, while others were thematic. The respondents were

no better in that some 22 out of 75 pages in the Respondents' Case comprised their propounded narrative of events.

55 The skeletal arguments were more helpful, but the issues only crystallised and narrowed in the course of oral arguments before us. Suffice it to say, it remains counsel's duty to assist the court in arriving at a clear and considered decision on the merits *at all stages of proceedings*; in this case, the structure of both parties' written cases served to obfuscate rather than aid. Every appeal court desires a succinct and clear covering of only the critical issues in the appeals, such as what questions of law must be reviewed and what findings of fact are in error and reviewable under the well-established standard of review.

56 At this part of the judgment, we deal only with AD 26. We will address AD 34 separately at the end of this section of the judgment (see [203] below onwards). We do not propose to set out the parties' cases in detail as the salient arguments will be discussed in the judgment. For now, a brief synopsis of the respective cases suffices.

57 Essentially, POA Recovery disputes that the investments bore the three key features mentioned at [8] above. It alleges that the respondents were complicit in the fraud perpetrated by COGI and POA, by marketing the investments as bearing the three key features, when in fact the respondents knew that the investments were fictitious. POA Recovery alleges, to this end, that the respondents crafted a web of lies and had repeatedly suppressed information from the Investors to their detriment.

58 The respondents maintain their case below, that is, the investments were not fictitious, and that if there had been any fraud, such fraud was on the part of POA, COGI and their officers. The respondents, as *marketing agents*, were not

privy to any fraud, and always acted in what they believed to be the best interests of the investors.

59 In this appeal, POA Recovery also complained that the Judge was wrong in ruling that the other causes of action were not adequately pleaded. We see this as a half-hearted complaint because POA Recovery did not seriously deal in detail with where, how and why the other causes of action were sustainable. The appeal was primarily based on fraud and fraudulent misrepresentation which was the main case pursued during the trial. We will discuss the pleadings point below.

Issues on appeal in AD 26

60 As regards AD 26, we will address the following issues in turn:

(a) First, whether POA Recovery has sufficiently pleaded its other causes of action besides fraud and fraudulent misrepresentation. These include the actions in negligence, breach of trust and fiduciary duty, conspiracy, and dishonest assistance.

(b) Second, whether POA Recovery has *locus standi* as assignee to sue the respondents.

(c) Third, whether POA Recovery's claim in fraud and/or in fraudulent misrepresentation should be allowed.

61 For the reasons explained below, we reverse the Judge's decision on the second issue, on *locus standi*, but dismiss POA Recovery's contentions on the first and third issues. As a result, AD 26 is dismissed.

POA Recovery's pleadings

62 POA Recovery brought causes of action in negligence, breach of fiduciary duty and/or trust, dishonest assistance and the tort of unlawful means conspiracy. All references hereinafter to "Statement of Claim" are references to Statement of Claim (Amendment No 2) filed by POA Recovery.

63 Paragraphs 17 (breach of fiduciary duty and trust) and 18 (negligence) of the Statement of Claim averred to these causes of action. The Judge's concern, with which we agree, was that the *factual substratum* of the negligence and breach of duty claims appeared to be mixed with the fraud claim (at paras 15–18 of the Statement of Claim).

64 There were other concerns. POA Recovery had amalgamated the factual bases of its various claims. That approach may not be objectionable if done properly. But here, facts that constituted the specific elements to make up the individual causes of action (or if the causes of action overlapped, clear explanations as to the degree of overlap) were not particularised at all.

65 On negligence, we agree with the respondents' contention that nothing in the Statement of Claim pointed clearly to the existence of a duty of care or established with specificity the standard of care that the respondents ought to have been held to. There was not even a tangential reference to meeting the *threshold requirement* of negligence: that of factual foreseeability (see *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") at [75] and [76]). Even after close perusal of the Statement of Claim, the facts pertaining to factual foreseeability were not discernible. This lack of factual averment is fatal to POA Recovery's claim in negligence; factual foreseeability "is a threshold question which the court must

be satisfied is fulfilled, failing which *the claim does not even take off*' [emphasis added]: *Spandeck* at [76]. A failure to clearly plead the facts that would demonstrate such factual foreseeability would consequently result in a claim in negligence failing *in limine*.

66 The same observations may be made as regards POA Recovery's pleadings on breach of trust and fiduciary duty against the respondents in their role as agent. We agree with the observations of the High Court in *Tonny Permana v One Tree Capital Management Pte Ltd and another* [2021] 5 SLR 477 ("*Tonny Permana*") that specificity in arguments (including the pleaded case) is of *paramount* importance in claims against agents for breach of trust and/or fiduciary duty. This is due to the inherently fact-sensitive nature of such duties, and how different circumstances will often shape the contours of the precise duties in question. In *Tonny Permana* at [99]–[101], Chan Seng Onn J noted as follows:

> 99 … Where an agent is able to unilaterally and significantly influence his/her principal's position or interests and has been conferred such powers in trust and confidence, extensive fiduciary duties may arise. On the other hand, where the agent has limited authority and discretion, the agent will owe few, if any, fiduciary duties.
>
> 100 In particular, case law has clarified that just because an agent may be considered a fiduciary in a limited manner (specifically, for matters in which he or she is allowed to exercise judgment or discretion to affect certain interests of the principal), this does not mean that *every* duty the agent owes to the principal is a fiduciary duty. This is clear from the seminal decision of *Bristol and West Building Society v Mothew* [1998] 1 Ch 1 at p 16. Therein, Millett LJ stated:
>
>> Despite the warning given by Fletcher Moulton L.J. in *In re Coomber; Coomber v Coomber* [1911] 1 Ch 723, 728, this branch of the law has been bedevilled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one's terms. The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts

> legal consequences differing from those (*sic*) consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that ***not every breach of duty by a fiduciary is a breach of fiduciary duty***. …
>
> [emphasis added in bold italics]
>
> …
>
> 101 The same observation has been made locally. Judith Prakash J (as she then was) observed in *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2007] 3 SLR(R) 265 at [28] that "care had to be taken not to equate the duty of good faith and loyalty owed by every employee with a fiduciary obligation" (citing *Nottingham University v Fishel* [2000] IRLR 471 with approval). The same logic extends to contractual agents, who may not be "employees" in the strict sense, but are nonetheless employed by their principals to engage in a certain course of action.
>
> [emphasis in original]

67 Chan J's observation at [100] of *Tonny Permana* is particularly apposite: that "…just because an agent may be considered a fiduciary in a limited manner … this does not mean that *every* duty the agent owes to the principal is a fiduciary duty" [emphasis in original]. The onus is on a plaintiff (here, POA Recovery) to aver *with specificity* the precise duty owed, the scope of such duty, and the context in which it would apply. POA Recovery has mentioned none of these in the Statement of Claim, which leads to many questions: in what specific sense were the respondents alleged to be fiduciaries *vis-à-vis* the Investors? Were the fiduciary relationships limited to only a particular aspect of the respondents' dealings with the Investors, many of whom they had never even met personally? Were the fiduciary relationships with *all* Investors homogenous? Would the different fiduciary relationships, if they existed, not call for varying degrees of scrutiny, given that there were varying layers of sub-agents and sub-marketers sandwiched between the respondents and each individual Investor? These are questions to which POA Recovery has proffered no clear answers, and the source of the difficulty is its inadequate pleadings.

68 We turn to consider the pleadings on dishonest assistance and conspiracy together because the Appellant's Case discussed both causes of action in one section. As we have commented, different legal claims should be separated as each cause of action possesses different legal elements, which must be independently satisfied on the facts. Regrettably, this unhelpful approach of "lumping" various causes of action together is symptomatic of the lack of clarity that pervades POA Recovery's case not only on appeal, but also at trial.

69 We agree with the Judge that dishonest assistance and conspiracy were not adequately pleaded. First, dishonest assistance is mentioned at paras 33.2 and 38 of the Statement of Claim: "the Defendants are liable to account to the Plaintiff … on the ground of dishonest assistance". While the cause of action was expressly spelled out, nothing in the Statement of Claim alluded clearly to the facts in support of the elements of dishonest assistance. At best, it may be said that POA Recovery was *impliedly* imploring the High Court to discern, from the narrative presented, *dishonesty* on the part of the respondents. But that is a very general averment. The specifics of the relationship between each of the three respondents in the context of the investments were not spelled out. One would expect to see, in this respect, facts clearly demonstrating the attribution of knowledge between the respondents *inter se*, and how liability on the part of one necessarily meant liability on the part of the others. A plaintiff must also include how, in the context of the specific transactions in question, there could have been "assistance" that was "dishonest". These were never explained or elaborated upon in the Statement of Claim, with the result that the court had no reference point for determining whether the elements of dishonest assistance, as a *distinct* source of *secondary* liability, could be made out over and above any primary liability on the part of Yau: see also *Tonny Permana* at [246]. Consequently, the respondents did not know the case that they had to meet.

70 Next, at para 33.3 of the Statement of Claim, the averment on conspiracy is that "the Defendants and others yet unknown … wrongfully … by unlawful means, conspired and combined together to defraud the Scheme Participants". The Statement of Claim does not aver to the acts of conspiracy, the nature of the agreement and who precisely were the co-conspirators. The elements of unlawful means conspiracy are *fivefold* and *distinct*, and they were stated by the Court of Appeal in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 as follows (at [112]):

> … To succeed in a claim for conspiracy by unlawful means … the appellants must show that:
>
> > (a) there was a combination of two or more persons to do certain acts;
> >
> > (b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;
> >
> > (c) the acts were unlawful;
> >
> > (d) the acts were performed in furtherance of the agreement; and
> >
> > (e) the plaintiff suffered loss as a result of the conspiracy … .

71 Immediately, the inadequacy of POA Recovery's pleadings on conspiracy becomes apparent. It is not adequate where a plaintiff avers that a defendant had conspired with "others yet unknown". In pleading a *combination* that forms part of a conspiracy, the co-conspirators must be identified. The alleged combination must also be specified. Having failed to do so, the state of POA Recovery's pleadings was self-evidently prejudicial to the respondents.

72 For these reasons, we affirm the Judge's decision that POA Recovery had not adequately pleaded its causes of action (apart from fraud and fraudulent misrepresentation).

POA Recovery's legal standing to bring the claims

Validity and extent of deeds of assignment

73 POA Recovery commenced proceedings as assignee. 1,102 Investors were alleged to have irrevocably assigned their "rights, title, benefit and interest" to POA Recovery by way of the Assignment Agreements. The court's *basic* expectation is to see proof of such assignment starting with the disclosure of documentary evidence in support. It is surprising that little attention was paid to make good POA Recovery's status as assignee. Counsel for the appellants, Mr Danny Ong ("Mr Ong"), acknowledged the deficiencies in the documentary evidence when he was queried about the Assignment Agreements. The appellants only adduced a *single template* of the deed of assignments. Crucial details such as the dates of the deeds, the parties involved, and whether the deeds had been duly executed were not available in the record of appeal. Accompanying this was also a template of the *notice* of assignment, with all details absent again, save for the signature and details of Luong (as assignee) and one Wong Puie Kuan (as witness). The only other evidence available on appeal that was remotely related was found in the *index* to the agreed bundles for the proceedings before the Judge. The index then referred to a *series of letters* from Rajah & Tann Singapore LLP to various parties, that *in turn* purported to enclose the notices of assignment issued by the relevant Investors. Post-hearing of the appeals, POA Recovery filed and served a supplementary affidavit exhibiting all 1,102 deeds of assignment. On 8 September 2021, POA Recovery filed a List of Documents ("LOD") setting out the 1,102 deeds, given that such LOD had not been filed in the court below.

74 The oral arguments had proceeded upon oral confirmation by Mr Ong that there had been at least 143 Assignment Agreements that were properly executed (see [76(a)] below). Counsel for the respondents, Ms Melanie Ho

("Ms Ho") objected as she could not verify Mr Ong's figure of 143 Assignment Agreements. We were not impressed with her belated objection as none was taken below. As we explained during the hearing, counsel ought to have raised an objection (at the earliest possible instance) as to the absence of the Assignment Agreements.

75 We also note that the deeds were executed without the legal requirement for sealing. As a matter of Singapore law, the requirement for a deed executed by individuals is that the deed has to be "SIGNED, SEALED and DELIVERED" (see *Lim Zhiping v Seow Suat Thin* and another ([2020] SGCA 89). It would appear that the deeds in question were not examined for the specific requirements under Singapore law for a deed executed by individuals. Other than making this observation, we say no more on the matter since it was not an issue in the appeal.

76 We now turn to the question whether POA Recovery could pursue claims against the respondents on the basis of accrued rights arising before the assignments. The Writ of Summons (the "Writ") for the present action was filed on 1 June 2018. The relevant deeds were then annexed to "Schedule 1" of the Statement of Claim accompanying the Writ at varying points in time, as follows:

> (a) The first 143 deeds, found in Annex A to the Statement of Claim. were executed at various dates *before* 1 June 2018 and were included in Schedule 1 on 1 June 2018. We refer to these as the "Annex A" deeds.
>
> (b) The next 74 deeds, found in Annex B to the Statement of Claim, were executed at various dates *before* 1 June 2018, but were only included in Schedule 1 on 4 April 2019. We refer to these as the "Annex B" deeds

(c) The remaining 885 deeds, found in Annex C, were executed as various times *after* 1 June 2018, and were included in Schedule 1 on 4 April 2019. We refer to these as the "Annex C" deeds.

77 It appears that after POA Recovery had filed its Writ on 1 June 2018, 886 Investors then formalised the assignment of the causes of action to POA Recovery, by way of the Annex C deeds and one assignment by Mr Kenneth Lim Cher Kiong ("Mr Lim"). There were also 74 deeds that had been formalised (*ie*, signed) by the date of Writ, namely the Annex B deeds, but were not included in the Statement of Claim. POA Recovery sought to introduce these 960 (*ie*, 886+74) assignments by amending its Writ on 4 April 2019. As Mr Lim's claim was withdrawn from the suit, a second amendment to the Writ was made on 16 June 2020.

78 The respondents take no objection in relation to the Annex A deeds, and any reliance on them by POA Recovery. However, they object to the reliance on the Annex B and Annex C deeds, on the basis that these assignments occurred *post* the issuance of the Writ and therefore did not vest in POA Recovery when the action was commenced. In riposte, POA Recovery relies on *The "Jarguh Sawit"* [1997] 3 SLR(R) 829 ("*Jarguh Sawit (CA)*") for the proposition that a plaintiff may properly pursue a claim assigned to it post-filing of a writ of summons, where such claim had already accrued as at the date of the filing of the writ.

79 Where an amendment to a writ has been duly made, the amendment dates back to the date of the original issue of the writ. As a result, the action continues as though the amendment had been inserted from the beginning: *Singapore Civil Procedure 2021, vol 1* (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2021) at para 20/8/3, citing *Sneade v Wortherton Barytes and Lead*

Mining Co Ltd [1904] 1 KB 295 at 297 amongst others. In *Jarguh Sawit*, the appellants contended that by a deed of assignment dated 5 August 1996, they had acquired all of the relevant rights belonging to Oxford Jay International Pte Ltd ("OJI"), pursuant to a memorandum of agreement dated 7 May 1992 (the "MOA") that OJI had entered into with Navigation Maritime Bulgare ("NMB"). This deed of assignment was executed after the writ was served, and after the original defence and counterclaim was filed. Following this assignment, the appellants sought to amend their counterclaim to include the damages suffered by OJI because of NMB's breach of the MOA. The court below refused to grant leave to amend the counterclaim.

80 The Court of Appeal in *Jarguh Sawit (CA)* allowed the amendment because OJI's claim for damages against NMB was already *in existence* as at the date of the writ, and that it did not matter that this cause of action only vested in the appellants after that date (at [62]). As stated in *Jarguh Sawit (CA)* at [63]:

> However, as the appellants pointed out, this vesting has retrospective effect: see *Read v Brown* (1888) 22 QBD 128. Thus, the 1997 White Book [*The Supreme Court Practice*] states, at para 20/5–8/16 that:
>
>> An assignment whether legal or equitable, of a subsisting and viable claim against the defendant or what is sometimes called 'a right of subrogation' is not in itself, and does not create a cause of action against the debtor and therefore the plaintiffs would be allowed to reamend their writ and statement of claim so as to include a claim by them as legal or equitable assignees of the various rights of cargo owners in respect of lost cargo and to join the assignors if necessary, since such a claim did not assert retrospectively a new or different cause of action, although such amendments are made after the expiry of the current period of limitation, since the action was brought within such period (*Central Insurance Co Ltd v Seacalf Shipping Corp* [1983] 2 Lloyd's Rep 25, CA).
>
> In our view, this applies equally to counterclaims (the defendant's "writ") as it does to writs of summonses.

81 That same issue arose again recently before the Court of Appeal in *BXH v BXI* [2020] 1 SLR 1043 ("*BXH*"). Having referred to the relevant portions of *Jarguh Sawit (CA)* as above, the court made several pertinent observations (at [117]–[124]) on the two decisions relied upon by the court in *Jarguh Sawit* (*CA)* – namely, *Central Insurance Co Ltd v Seacalf Shipping Corporation (The Aiolos)* [1983] 2 Lloyd's Rep 25, CA ("*Central Insurance*") and *Read v Brown* (1888) 22 QBD 128 ("*Read v Brown*"). In short, the court in *BXH* noted that those cases do *not* in fact establish that an assignment can retrospectively vest rights in an assignee. The Court of Appeal reasoned, amongst other things, that *Central Insurance* and *Read v Brown* did not concern retrospective vesting. Instead, *Central Insurance* concerned subrogation (see *BXH* at [117]), while *Read v Brown* concerned the significance of an assignment in determining a plaintiff's cause of action (see *BXH* at [122]).

82 The court's observations in *BXH* are indeed apposite. Neither *Central Insurance* nor *Read v Brown* appear to support the existence of a standalone rule on retrospective assignment of causes of action. Instead, and as correctly discerned in *BXH*, these cases seem to have been decided on their respective unique factual matrices (the former concerning subrogation of rights in the context of an insurer, and the latter concerning whether an assignment could cure what appeared to be a jurisdictional defect in a plaintiff's cause of action). It would consequently appear that in so far as the court in *Jarguh Sawit (CA)* relied on *Central Insurance* and *Read v Brown* for the proposition that there may be retrospective vesting of causes of action, this would appear doubtful as a matter of reasoning.

83 That said, while we find the reasoning in *BXH* compelling, these observations were made in *obiter*; the court eventually held that these principles did not, in any case, concern arbitration proceedings (*BXH* at [125]), which was

the relevant issue there. Also, while *BXH* cast doubt on the reasoning in *Jarguh Sawit (CA)*, it did not conclude in clear terms whether and why standalone retrospective assignments of causes of action after the date of commencement of a suit are untenable in principle. As a result, we find ourselves bound by the *ratio decidendi* in *Jarguh Sawit (CA)*, such that all three categories of deeds should be allowed into evidence in this case, notwithstanding that the Annex C deeds were executed after the date of commencement of the suit. The issue that arises for consideration is whether these assignments are affected by maintenance or champerty and are therefore void as contrary to public policy or otherwise illegal (see s 5A(2) of the Civil Law Act (Cap 43, 1999 Rev Ed)).

Champerty and maintenance

84 The parties have accepted that the relevant exceptions to the rule against maintenance and champerty are set out in Re *Vanguard*, as follows:

> 43 … an assignment of a bare cause of action (or the fruits of such actions) will not be struck down if:
>
> (a) it is incidental to a transfer of property; or
>
> (b) the assignee has a legitimate interest in the outcome of the litigation; or
>
> (c) there is no realistic possibility that the administration of justice may suffer as a result of the assignment. In this regard, the following should be considered:
>
> (i) whether the assignment conflicts with existing public policy that is directed to protecting the purity of justice or the due administration of justice, and the interests of vulnerable litigants; and
>
> (ii) the policy in favour of ensuring access to justice.
>
> 44 With respect to [43(b)], the cases have used different terms to describe the interest that would invoke the exception to the rule against maintenance and champerty. In *Trendtex* ([33] *supra*), Lord Wilberforce used the term “a genuine and

> substantial interest" whereas Lord Roskill referred to "a genuine commercial interest". Both terms were used in *Brownton* ([33] *supra*), since it referred to *Trendtex* quite extensively. Lord Mustill spoke of "legitimate interest" in *Giles* ([33] *supra*). In *Martell v Consett Iron Co Ltd* [1955] Ch 363, Dankwerts J referred to "a common interest". In *Lim Lie Hoa* ([33], *supra*), the Court of Appeal used the terms "a pre-existing interest" and "a genuine interest", and in *Unruh* ([42] *supra*), the Hong Kong Court of Final Appeal used the terms "legitimate common interest" and "common interest". I do not think much turns on the actual term used since the question in each case is the same, *ie*, whether the maintainer's interest in the litigation justifies his intervention.

85 The exceptions in Re *Vanguard* arise for deliberation where there is a *prima facie* violation of the rules on maintenance and champerty. There would be no need to consider whether the *exceptions* are engaged in the present case if the doctrines of champerty or maintenance were not transgressed in the first place. The Judge agreed with Ms Ho that the assignments to a shell company like POA Recovery contravened the doctrine of maintenance. Two points were patent in the Judge's decision: first, the assignee was a shell company "incorporated only for the purposes of commencing this suit": Judgment at [42]. Second, assignments to such a shell company were unlike a situation where a bare cause of action is assigned to shareholders of a company, because such shareholders possess a "legitimate interest … since they would have benefitted from the spoils of a successful litigation in any event": Judgment at [44]. The assignments consequently were affected by maintenance or champerty, and were void being contrary to public policy. And since the assignments were void, POA Recovery had no standing to sue as assignee.

86 Maintenance proceedings are defined as the giving of assistance or encouragement to one of the parties to a litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference: Re *Vanguard* at [33]; *Lim Lie Hoa v Ong Jane*

Rebecca [1997] 1 SLR(R) 775 ("*Lim Lie Hoa*") at [23]; *Hill v Archbold* [1968] 1 QB 686 at 693; *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju* [2013] 4 SLR 91 at [40].

87 Maintenance is generally distinguished from its subset, champerty, that consists of maintaining a civil action in consideration of a promise of a share in the proceeds if successful: *Choo Cheng Tong Wilfred v Phua Swee Khiang and another* [2021] SGHC 154 at [267]–[269]; *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR(R) 989 at [32]; *Singapore Parliamentary Debates, Civil Law (Amendment) Bill* (10 January 2017) vol 94 (Indranee Rajah, Senior Minister of State for Law); UK, Law Commission, *Proposals for Reform of the Law Relating to Maintenance and Champerty* (London: Her Majesty's Stationery Office, 1966) at para 9; *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia, 2nd Singapore and Malaysian Ed, 1998) at p 639.

88 As stated in *Giles v Thompson* [1994] 1 AC 142, the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interest of vulnerable litigants. These fundamental considerations are not *per se* violated by the Investors' use of a SPV structure, without more. There must be an accompanying element of impropriety (*eg*, with a surreptitious third-party funder controlling proceedings, or such third-party wagering on the litigation).

89 Upon close scrutiny of the facts, the litigation brought by POA Recovery did not fall into either prohibited category. For all intents and purposes, the Investors made use of POA Recovery for access to the courts. All the claims of transnational Investors were assigned to POA Recovery so that the assigned claims were "consolidated" and brought to court as a single high-value claim. As it transpired, POA Recovery was always controlled by the Investors. Mr Ong

confirmed that the litigation was funded by the Investors: the Investors had contributed their pro-rata share of the proceeds of sale of some assets into the litigation pool, and additional funding was from some Investors like Enoch, Li's employer, and a related company, Luck Hock (see [30] above). Above all, POA Recovery, as the assignee and a separate legal entity, would have no share in the proceeds of the litigation. Fruits of the litigation would be paid out to the Investors according to the terms of the Assignment Agreements. There is also no evidence that points to the existence of third-party financing and a third-party funder controlling the litigation.

90 The arrangement to use a special purpose vehicle with these attendant features, *absent of any element of impropriety*, would not necessarily offend the doctrine of maintenance nor impermissibly sidestep O 15 r 12 of ROC. With respect, we disagree with the Judge that if the Investors wished to sue collectively, the only procedurally permissible way would be to, *inter alia*, file a representative action under O 15 r 12 or join the parties and consolidate their actions under O 15 r 4 and O 4 r 1. In our view, the use of an entity to "consolidate" all claims to efficiently bring a single high-value claim to court may be viewed as a modern-day alternative to a representative action because it is much more than a representative action. What matters is that the assignments must not be, and are not, affected by any element of impropriety; POA Recovery as assignee does not sue in a representative capacity at all. Lastly, we add that such an assignment structure may (where appropriately used) also promote efficiency in the administration of justice; it obviates the need for the cumbersome task of filing hundreds, if not thousands of *separate writs* pending consolidation, thereby easing the strain on both litigants and the courts.

91 The other concern was that POA Recovery, as a shell company with a minimum paid up capital, could easily cost-proof itself. While the Judge

considered this issue as part of the question whether the *exceptions* to the rule prohibiting maintenance and champerty were satisfied, the concern of cost-proofing remains equally pertinent in the anterior inquiry. That is, even if an assignment arrangement is not champertous, the court must still be satisfied, as a matter of fairness in the administration of justice, that the structure adopted by the Investors is not abused in an attempt to insulate themselves from potential liability.

92 This was an issue that no doubt weighed on the Judge's mind: see Judgment at [44]. However, in our view, that concern is more apparent than real. POA Recovery has pointed to Orders of Court evincing that it has put up some S$430,000 as security for costs of the trial, up to the stage of exchange of AEICs. This is not an insignificant sum. In addition, on 26 February 2021, POA Recovery furnished S$20,000 as security for AD 26. Mr Ong suggested, during the hearing of the appeals, that the Judge omitted to consider the sheer extent of security furnished.

93 We note that the respondents have sought costs to the tune of over S$1m for the trial. Any shortfall between their cost estimate for the trial and the S$430,000 security provided ought to have been anticipated since the security for costs was provided up to the stage of the exchange of AEICs only. However, the respondents did not file an application for further security for costs. The prudent course, if costs had been a genuine concern from the outset, would have been to seek an order against POA Recovery for further security for costs.

94 Having concluded as we have, there is strictly no need to consider the exceptions in Re *Vanguard*. However, as the facts relevant to the anterior inquiry overlap with the factual consideration of whether the *exceptions* to the

rule prohibiting maintenance and champerty are satisfied, we find it appropriate to make brief remarks on certain observations made by the Judge.

95 With respect, we express our doubts as to the Judge's conclusion that POA Recovery did not satisfy the second exception in Re *Vanguard* – that of a genuine commercial interest. In this inquiry, the court must look broadly at the totality of the transaction to determine whether there was genuine commercial interest: Re *Vanguard* at [35]; *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 ("*Trendtex*") at 603; *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499 (CA) at p 510. A close examination of the relevant jurisprudence reveals that the Judge might have erred in concluding as he did.

96 In Re *Vanguard* itself, the company there was placed under compulsory liquidation. Three of the company's shareholders were willing to fund the litigation of three potential claims in return for assignment of part of the fruits of the action. Under the proposed agreement to assign, the company would fund 50% of the solicitor-and-client costs upfront and any security for costs to be provided up to a cap of $300,000 ("the Co-Funding"), with the funders to pay the remainder. The funders would also fund party-and-party costs and other legal costs. Any proceeds from the claims would be paid out under a payment waterfall structure, first to the company up to the amount of the Co-Funding, secondly, to the funders up to the amount funded by them, and thirdly to the company. The funders would also indemnify the company against any shortfall between the amount recovered and the amount of the Co-Funding as well as sums which the company was ordered to pay in relation to the claims. Chua Lee Ming JC (as he then was) held that the assignees in that case did possess a genuine commercial interest. This was because (at [48]):

> … the [assignees] have a legitimate interest in the litigation of the [claims]. The [assignees] are shareholders of the [company].

> They are also either current or former directors of the [company], and one of them is also a creditor of the [company]. As shareholders, they will benefit from the spoils of successful litigation and thus have financial interests in the litigation. Clearly, they are not uninterested strangers. As the cases have shown, courts have taken a flexible approach in determining whether a legitimate interest exists.

97 Similarly, in *Lim Lie Hoa*, the Court of Appeal held that there was a genuine interest on the part of parties, stating at [34] as follows:

> Before the execution of the assignment and the P/A, the second appellant had an interest in the estate: he was one of the beneficiaries. He therefore had a pre-existing interest. The respondent and her children were dependent on the second appellant for support, and the respondent's interest was the maintenance which was to come from the second appellant's entitlement to the estate. In that sense she also had a pre-existing interest in the second appellant's entitlement. The learned judge held thus … :
>
>> … when the [assignment] was executed the plaintiff clearly had a pre-existing interest in the second defendant's entitlement to the estate. It cannot seriously be contended that the plaintiff is a total stranger and has no interest in the second defendant's entitlement when she was and still is [dependent] upon the second defendant for maintenance due to her under the court order and there was then outstanding maintenance.
>
> We agree entirely with the learned judge.

98 The cases in the past required a *pre-existing* genuine commercial interest *only* because the entity/person taking the assignment existed independent of the underlying claim. The situation at hand is *sui generis* in nature, simply because POA Recovery has no distinct purpose from the Investors. It was indeed incorporated solely for the purpose of access to the court in respect of a single claim. A similar situation arose in *JEB Recoveries LLP v Binstock* [2015] EWHC 1063 (Ch). In that case, three individuals, Mr Wilson, Mr Hardy and Mr Stannard, set up JEB Recoveries LLP ("JEB Recoveries") and assigned to it their debts and causes of action *vis-à-vis* the defendant Mr Binstock. The debt

included a liquidated debt that Mr Binstock owed to Mr Wilson under a service contract, and this was the liquidated debt for which JEB Recoveries commenced the action against the defendant. In rejecting the arguments on champerty, the court specifically observed as follows:

> 54 … The correct analysis is that (1) JEB is a special purpose vehicle having as its commercial objective recovery of debts and claims of its partners and their families against Mr Binstock and his family; (2) in relation to JEB, its principals have agreed to share the profits derived from the fruits of any litigation or other recovery (including payment of debts); (3) all such fruits have been assigned to JEB; and, (4) in consequence, Mr Wilson is entitled to a one third share of such profits, if any.
>
> 55 Further, I regard the position of Mr Wilson and JEB in relation to the Claim as very different from that of the assignor and Mrs Simpson in *Simpson*. In this case, JEB has no separate purpose unconnected with Mr Wilson's claim against Mr Binstock; the claim for damages is not incidental or collateral to another objective, it is central to the Claim. The purpose of the Claim is to establish a disputed debt. By contrast, the purpose of Mrs Simpson's claim was to use the assigned cause of action as a platform from which to carry on a campaign aimed at changing the hospital's operational practices.

99 We agree with Mr Ong that on the evidence, POA Recovery's entire purpose (and indeed existence) was as a convenient tool to prosecute the Investors' claims – this manifested the genuine commercial interest. We therefore respectfully disagree with the Judge's view on this issue, as found at [44] of the Judgment. Thus, even if the present assignment structure were to be deemed champertous, POA Recovery would be able to avail itself of the second Re *Vanguard* exception.

100 Based on the foregoing, we conclude that contrary to the Judge's view, POA Recovery does have *locus standi* to bring the present claim.

POA Recovery's claim

101 As noted at [59] above, in the present appeal POA Recovery has advanced, as its primary case, claims in fraud and fraudulent misrepresentation. These were the same two claims that were advanced at trial: Judgment at [18]. As we explain below with reference to the applicable principles, it is appropriate in the appeal to consider first and foremost whether the respondents were dishonest in the ways alleged, bearing in mind that *dishonesty* must be established in both causes of action that undergird POA Recovery's case.

Applicable principles

102 The elements for fraudulent misrepresentation are well-settled. The most recent restatement of the law is in *Liberty Sky Investments Ltd v Goh Seng Heng and another* [2020] 3 SLR 335 ("*Liberty Sky*"), which was affirmed by the Court of Appeal in *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd and other appeals and another matter* [2020] 1 SLR 606. Audrey Lim JC (as she then was) observed in *Liberty Sky* at [31] the existence of the following four elements:

> (a) There must be a representation of fact.
>
> (b) Such representation must have been made with the intention that it should be acted upon by the plaintiff.
>
> (c) The plaintiff must have acted upon the false statement and suffered damage by so doing.
>
> (d) The representation must be made "with 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".

103 The first element is what is commonly referred to as the "actionable representation" requirement: see *Tonny Permana* at [182], citing *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 ("*RTC*"). Not all statements can form the subject matter of a claim in misrepresentation. Actionable misrepresentations must imply "a *factum*, not a *faciendum*", that is, a statement of present fact and not one with any element of futurity: *RTC* at [21]. Also, statements of *opinion* do not constitute actionable misrepresentations: *Zuraimi bin Mohamed Dahlan and another v Zulkarnine B Hafiz and another* [2020] SGHC 219 ("*Zuraimi*") at [30], citing *Goldrich Venture Pte Ltd and another v Halcyon Offshore Pte Ltd* [2015] 3 SLR 990.

104 The second element expressed by Lim JC is a factual one that coalesces two overlapping ideas arising from case law. The first idea is that a representation must be addressed to or targeted at the representee. This is the rule in the seminal decision of *Peek v Gurney* (1873) LR 6 HL 377. Relatedly, the second idea is that the representation must have been intended to be "acted upon" – that is, the trite notion that mere puff cannot form the subject matter of a claim in misrepresentation: see *Zuraimi* at [29]. Mere puff "is reserved for a particular type of *self-evidently hyperbolic* representation … [i]t refers to the classic 'hard sell' made off-the-cuff by a salesman": *Zuraimi* at [29]. The nexus between the two aforementioned ideas is self-evident – the intention of the representor, and who his intended addressee is, are relevant in the inquiry.

105 The third element is the well-established requirement of inducement, sometimes referred to as the requirement of reliance: see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [44]; *Ong Keh Choo v Paul Huntington Bernardo* [2020] SGCA 69 at [80]–[91]. A plaintiff would not ordinarily be held to be induced by a misrepresentation if the express contractual terms, read and

signed, contradict or correct the representor's misrepresentation: see *Tonny Permana* at [70] and [194], citing the Court of Appeal's decision in *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 ("*Broadley*"). In other words, a plaintiff must prove that he did rely on the misrepresentation, and that he had no opportunity, with due diligence, to rectify any misimpression that had purportedly been conveyed. Separately, where the representation is fraudulent, a rebuttable presumption arises that the representee was in fact induced to enter into the agreement by virtue of the representations made. The burden of proof shifts to the representor who must establish, on the balance of probabilities, that the fraudulent misrepresentation did not play a real and substantial part in causing the representee to enter into the agreement, albeit he does not have to go so far as to show that the misrepresentation played no part at all. In other words, proof that the misrepresentation was not a material cause of the decision to enter the contract would suffice.

106 The fourth element is falsity or dishonesty, and this includes recklessness, *ie*, where a representation is "made in the *absence of any genuine belief* that it is true" [emphasis added]: *Liberty Sky* at [31]. In a claim for fraudulent misrepresentation, it must be proven that the representor acted dishonestly by making a representation that he knew was or must have been false. Falsity, in this sense, would include statements of half-truth, and is to be construed objectively from the perspective of the addressee: see *MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] 2 All ER (Comm) 833; *IFE Fund SA v Goldman Sachs International* [2006] 2 CLC 1043; *Dimmock v Hallett* (1866) 2 Ch App 21.

107 On *fraud*, POA Recovery has in mind the tort of deceit. The tort of deceit essentially comprises the same legal elements as fraudulent misrepresentation: see *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd and others*

[2021] 5 SLR 738 at [56], citing *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]. POA Recovery has not alleged otherwise, nor has it canvassed in its Appellant's Case separate legal elements which would distinguish fraud from fraudulent misrepresentation. It also bears mention that during the hearing of the appeals, Mr Ong focused on fraudulent misrepresentation.

108 In the light of the above, it is clear that the principles undergirding a cause of action in fraud, and those relevant to a claim in fraudulent misrepresentation, are closely intertwined. In the context of the present case, the crux of the matter is whether the respondents were involved in a dishonest and fraudulent scheme with POA and COGI, in marketing the investments to the Investors. As mentioned earlier, we accordingly consider both causes of action at the same time, with reference to the elements of fraudulent misrepresentation as canvassed above. If POA Recovery succeeds in proving fraudulent misrepresentation, it will likewise prevail in its fraud claim.

Clarifying POA Recovery's claim in fraudulent misrepresentation

109 In the context of the legal test set out above, it is important to first distil the specific representations that POA Recovery alleges were made by the respondents. Two different categories of representations may be gleaned from POA Recovery's case.

110 The first is what we describe as the "main representations". POA Recovery has repeatedly alleged that the respondents falsely conveyed that the alleged Scheme and the investments bore the *three key features* mentioned at [8] above (oil, profits, security). POA Recovery argues that the main representations were fraudulent (see [102(d)] above). We will therefore

consider whether the investments truly bore the three features. Also critical is whether, if the investments did *not* bear the three features, the respondents were privy to this, *ie*, whether the respondents were complicit in any fraud perpetrated by POA and COGI.

111 The second category of representations will be referred to as the "remaining representations". This category comprises two other discrete representations that POA Recovery alleges were made by the respondents: (a) on there being *guaranteed* returns on the investments; and (b) on the *risk profile* of the investments. It suffices to say for now that we have our doubts as to whether some of the representations had even been made by the respondents.

112 Before turning to the two categories of representations in turn, beginning with the main representations, we propose to first address the respondents' two "freestanding" defences raised on appeal. In the context of the present claim for fraudulent misrepresentation, the respondents' freestanding defences are plainly misconceived.

The respondents' "freestanding" defences

113 The respondents' first "freestanding" defence is that the June Agreement (see [23] above) precludes the respondents' liability to the Investors. This defence is doubtful as it conflates any liability that *POA* might have with any liability that may exist against the *respondents* as exclusive marketing agents.

114 It is undisputed that, through the June Agreement, the investors relinquished their rights and potential claims as against POA, for the (at that point) failing investments in COGI's oilfields. In exchange, the investors became shareholders of CAGOM. The June Agreement certainly did not recognise the respondents as parties to the investment agreements, which were

between individual investors and POA. It is not surprising that the June Agreement did not extend to the respondents. Any potential liability on the part of the respondents is separate and distinct from this June Agreement.

115 The respondents' second freestanding defence is that CAG's liability for misrepresentation is excluded under the reservation form which investors would make use of in order to place crude oil orders with POA (through CAG). The exclusion clause in the reservation form, the respondents contend, meets the requirements of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed). This contention is a non-starter. First, the respondents have not explained how, as a non-contracting party to the contracts for purchase of crude oil (*ie*, the BPOs between investors and POA), they are entitled to rely on the terms of the reservation form. In addition, there are other unanswered questions such as whether the reservation form creates a separate collateral contract, or how such a contract would interact with the BPOs. Second, the respondents' reliance on exclusion clauses as a defence to *fraud* is misconceived in law. It is trite that exclusion clauses cannot exclude liability for fraud assuming fraud is established.

The main representations

116 POA Recovery submits that the Scheme was misrepresented to the Investors as a scheme to purchase barrels of crude oil for resale every quarter. It argues that this misrepresentation is a self-contained wrong that is not undermined by the Judge's findings that COGI was genuinely involved in the oil producing business, that some investors had visited Conserve Group's oil fields, and that oil prices fell in 2015. We disagree that the alleged misrepresentation can be so neatly compartmentalised. The Judge's findings are relevant to the overall analysis of the issue. The discussions here are divided in

two parts: first, whether COGI and POA were conducting a fraudulent business, with the effect that the investments did not in fact bear the three key features; and second, if COGI and POA were engaged in fraud, whether the respondents were complicit in such fraud. POA Recovery accepts that these are the two essential components in its case.

Whether there was fraud on the part of COGI and POA

117 It is critical to first set out the context to the allegations of fraud. As mentioned at [11] above, POA and COGI spearheaded 17 projects between 2012 and 2015. The investments totalled about CAD175m in value. While POA Recovery's witnesses have advanced inconsistent figures, POA Recovery seems to stand by the CAD175m figure on appeal. The evidence in this regard emanates from one Chan Tai Suan, who is a director of POA Recovery, an Investor, and a sub-marketer. He gave evidence for POA Recovery. We set out his evidence on the projects in the table below:

No	Project name	Launch date	Contract period (months)	Sales to investors (CAD)	Remaining amounts owed to investors (CAD)
1	Twining	12/9/2012	36	3,099,643.03	43,950.78
2	Twining	20/11/2012	36	3,118,701.64	1,613,232.71
3	Provost	31/12/2012	12	5,724,410.00	0
3A	Taber	14/1/2012	12	4,274,632.99	0
4	Claresholm	11/3/2013	36	1,957,819.93	1,957,819.93
5	Saddle Hills	16/4/2013	24	17,969,215.28	193,880.90
6	Leo	12/11/2013	24	7,540,001.26	2,417,003.40

7	Wolf Island	14/1/2014	24	13,911,392.16	13,911,392.16
8	Nevis	26/3/2014	18	4,649,317.49	17,292.55
9	Barons	26/3/2014	24	34,113,279.11	34,113,279.11
10	Provost	21/8/2014	6	5,180,460.27	0
11	Edson	20/10/2014	24	3,474,974.73	3,474,974.73
12	Bigstone	14/11/2014	24	8,807,845.05	8,807,845.05
13	Three Hills	26/1/2015	24	1,884,213.02	1,884,213.02
14	Weyburn	6/2/2015	24	3,084,667.21	3,084,667.21
15	Joffre 1	4/3/2015	24	19,999,250.37	19,999,250.37
16	Joffre 2	8/6/2015	24	17,292,949.63	17,292,949.63
17	Clearview	19/8/2015	24	19,788,476.01	19,788,476.01
Total:				175,871,249.18	128,600,227.57

118 To clarify, the column "Sales to investors" represents the total value of crude oil purchased by investors for the particular project. The next column, "Remaining amounts", represent the outstanding capital amounts that have yet to be repaid to the investors. Each project is due for exit after the expiration of the contract period. Using "Clearview" as an example, the project commenced on 19 August 2015, and it was due for exit 24 months later, on 19 August 2017. The name of the project matches the name of the property securing that project.

119 The 17 projects are the subject matter of the main representations, as alleged by POA Recovery. Specifically, POA Recovery alleges that these projects did not bear the three key features promised to investors – oil, profits, and security – and that the projects were fraudulently marketed to investors.

120 In our view, there is insufficient cogent evidence to conclude that COGI and POA were involved in a fraudulent scheme from the outset, albeit, as regards the third key feature of the investments (security), COGI, POA and their officers may have been dishonest in discharging the securities, but that came about after or during the collapse of the venture.

(1) Investors' purchases of crude oil

121 The first key feature of the investments is whether the investments involved genuine purchases of barrels of crude oil. Contrary to POA Recovery's contention, the existence of a genuine business is important as it has a bearing on the contention that the Scheme was fraudulently misrepresented to the Investors as a scheme to purchase barrels of crude oil for resale every quarter. In this regard, there is evidence that COGI was a legitimate oil producing company that operated oil and gas assets in Alberta, Canada. The respondents cite key documents in support, which include COGI's company profile, contracts with oil giants, and third-party valuations and audits from entities such as the Government of Alberta, renowned oil experts (McDaniel & Associates Consultants Ltd, Sproule Associates Ltd ("Sproule") and Schlumberger Canada Ltd), and reputable accounting firms (Deloitte LLP and KPMG). These documents were provided to investors via the Crude Oil Bible, and corroborated by piecemeal correspondence between investors and lawyers who conducted verification of COGI's notarised oil contracts. The respondents also point, correctly, to the oil field visits by investors, during which investors satisfied themselves of the legitimacy of the oil business.

122 Significantly, the oil allocation documents show that COGI/POA did in fact allocate crude oil to investors upon purchase. These have been referred to by the respondents and Ms Ho took pains to take this court through the available

evidence. The oil allocation sheets listed the amounts invested by each investor and corresponding volumes of crude oil. For each sale, POA submitted Drop Shipment Certificates to Alberta tax authorities. As Ms Ho explained, the aforesaid certificates are important for payment of taxes imposed by the Alberta government on oil and other resources. In other words, this record keeping is a "necessary part" of POA's tax reporting requirements.

123 POA Recovery does not address the allocation documents at all in the Appellant's Case. Mr Ong also did not muster any satisfactory response to the allocation documents in oral arguments. We are persuaded that the allocation documents, Certificates and other verification documents provide strong proof of the existence of actual sale transactions of crude oil between COGI/POA and the Investors. An examination of the aforementioned documents reveals that they are detailed, verified, and that there is consequently no reason to doubt their veracity. For example:

(a) The company profile of the Conserve Group, which was provided to investors, details the origins of the group, the key personnel's profiles, and the group's reputed oil trading partners.

(b) The crude oil contracts with oil giants are detailed, signed and bear the relevant company letterheads. No allegation of inauthenticity has been made. The same may be said of the *certification* of the barrels of oil managed by the Conserve Group, which was provided by entities such as Sproule.

(c) The KPMG audit details the value and quantity (in cubic meters) of crude oil transacted by POA. Similarly, no allegation of inauthenticity has been made.

(d) As mentioned, the allocation documents are highly detailed and stipulate not only the value of each investor's investment and the volume of crude oil allocated, but also details such as the date of investment, allocated project, *etc*.

124 The total amount (in barrels) of crude oil purchased, allocated to investors, and held by COGI is unclear. On this basis, POA Recovery raises a rhetorical question: "Where is the CAD128.6m worth of oil which should have been purchased with investors' funds?" This rhetoric adds nothing to POA Recovery's contention. The primary documents mentioned above show that at the genesis of the investments, COGI in fact had possession of substantial amounts of crude oil. The documentary trail is patchy because COGI's receiver accidentally deleted a significant portion of POA's records. The parties do not dispute the accidental deletion of POA's records. Also, the party that would have had the best evidence on the amount of crude oil barrels held in 2015, when the Scheme imploded, would be COGI/POA and its officers. But POA Recovery did not call them as witnesses. We note that POA Recovery in the present appeal did not criticise the Judge's observation that the absence of material witnesses at the trial was due to litigation strategy of both parties. Thus, on the evidence that *is* available in court, it is clear that POA and COGI had a legitimate business that subsequently fell into hard times, and that COGI was thereafter put into receivership by its creditor-bank (see [19] above).

125 POA Recovery further asserts that there was no actual purchasing of crude oil, because COGI was "in reality in the business of acquiring and operating oil and gas properties, and … these acquisitions were financed by investors' monies collected by CAG". POA Recovery's argument conflates two distinct issues. Crombie gave evidence that investors' moneys may have been applied to acquire/improve COGI's oil and gas assets. However, this does not

inevitably lead to the conclusion that there were no purchases of crude oil by investors. In fact, the BOP by its terms provided for physical delivery of crude oil purchased by the investor and physical delivery could be demanded at the investor's option. We will elaborate on this option below.

126 The "watch shop" analogy provided by the respondents in the Respondents' Case is illustrative. The respondents explain that a shop selling watches will use the purchase money for various purposes including asset acquisition and upgrading. This does not mean that watches were not in fact sold. The same may be said here. The respondents rely on the allocation documents which POA Recovery did not adequately address, much less refute. The allocation documents show that barrels of crude oil were allocated to investors. The *use* of the proceeds of sale thereafter, for various purposes, does not change the fact that barrels of crude oil were indeed sold.

127 It is hence incorrect for POA Recovery to assert that the true investment sold to investors was not crude oil. The more pertinent question that arises from Crombie's evidence is how the purchase moneys were used by COGI/POA post-purchase, and whether this was permissible under the investments.

(2) How investors' funds were used and whether this was permissible

128 POA Recovery submits that COGI's/POA's use of investors' moneys for purposes other than the "purchase of oil" was a breach of the BPOs. It objects to the use of investors' funds for (a) oil and gas asset acquisition/development, and (b) payment of other investors' profits. It alleges that the use of funds for these purposes was contrary to the nature of the investments as represented. POA Recovery's argument is linked to the second feature of the investments: that investors would receive *profits* generated from the resale of oil.

129 COGI operated oil fields, extracted/produced oil, and sold oil to oil giants. It could do, and had done, all of this even prior to any investors' coming on board. The commercial rationale behind getting the investors involved thus becomes apparent: their investments provided additional working capital for COGI, so that COGI could continue operating and improving its assets and business, and thereby its profitability. That was why in exchange for such capital, COGI offered investors a return on investments.

130 Further, the Crude Oil Bible, provided to all investors, is transparent about the fact that COGI and the Conserve Group expend resources in sourcing for valuable and high-yielding oil and gas assets. This buttresses the point made above: the investors were informed and would have known that to some degree, the moneys they provided to COGI/POA could be used for such sourcing.

131 Importantly, the respondents point to the contractual structure of the BPOs which does not prohibit the use of investors' funds in this manner. Clause 7 reads as follows:

> SALE OF BARRELS OF CRUDE OIL AND OPERATIONS & SERVICES CONTRACT. The Buyer agrees to appoint POA and Conserve Oil Corporation, Canada "COC" as its Operator and Service provider for the warehousing and storage of the barrels of crude oil as purchased, to Re-Sell for Buyer on a Quarterly Basis and to allocate monies for development and purchase of oil and gas leases / assets.

POA Recovery disagrees not only with the respondents' interpretation of cl 7, but also asserts that cl 7 is not found in all BPOs. Clause 7 is found in 804 of the BPOs, and absent in 298 of the BPOs (out of a total of 1,102 Investors). The BPOs with cl 7 absent was not an issue at trial – the Judge interpreted and dealt with cl 7 as if the clause was present in *all* BPOs. Also, by POA Recovery's own admission, the "aggregate claims" of the investors whose BPOs lacked cl 7 was *not* before the Judge. We are not inclined to allow a different case to be

advanced in the appeal. As an aside, we note that even on the documents available on appeal, it is not possible to verify and link the 298 BPOs to specific deeds of assignment. The individual deeds do not stipulate the date of the underlying BPO and unique reference number. The individual deeds also do not state the projects. Hence, it is not possible to link specific projects with the BPO as a means to ascertain whether which BPOs are later projects (without cl 7) and earlier projects (with cl 7). All that has been provided are three sample *redacted* BPOs that lack cl 7; such a state of evidence is self-evidently inadequate to make out POA Recovery's case.

132 In any event, POA Recovery's interpretation of cl 7 is doubtful. It argues that cl 7 was ultimately and fully "aligned with the idea that investors' monies would be used to purchase crude oil", as reflected in the language in the "rest of [the] clause" (conceivably, including the header of the clause, "SALE OF BARRELS OF CRUDE OIL AND OPERATIONS AND SERVICE CONTRACT"). As such, the small print in the last line of cl 7, *ie*, "allocate monies for the development and purchase of oil and gas leases/assets", could not be relied on at all. The purported authorisation (for POA to spend investment funds on developing its leases and assets) would turn a *purchase* order for a physical commodity into a *bond*. But this argument fails to advance POA Recovery's case, as it presupposes that there was no allocation of crude oil to begin with; we have earlier explained that there was allocation of crude oil to the investors. POA Recovery has not provided countervailing evidence or otherwise shown to be dealing with the matter. We add that we agree with the respondents that any lack of clarity on how cl 7 is to operate is for POA Recovery to explain but it did not do so. There were no witnesses from COGI/POA to explain how the mechanics of the BPOs and cl 7 interacted and operated in practice.

133 We now turn to POA Recovery's second point which is the use of investors' moneys to *repay other investors*. Such a *modus operandi* allegedly showed that the investments from the get-go were unsustainable and that each investment was "a little more than a bond masquerading as a physical commodity product". POA Recovery submits that POA's internal accounting records (known as POA's Quickbooks accounting records between 2012 and 2015) showed that the Scheme was always cashflow negative. POA's records reflected oil and gas revenues of only CAD6.5m between 2012 and 2015, a stark contrast to the revenues of CAD73.5m in 2013, CAD 241.3m in 2014 and CAD464.9m in 2015 that would have been necessary to sustain the quarterly on-selling and repurchase cycle that was marketed. POA Recovery relies on its expert, Cosimo Borelli ("Borelli"), who had analysed the POA's Quickbooks accounting records and opined as follows:

> "…for each year between 2013 to (sic) 2015, POA relied upon new Investments raised to fund the shortfall of principal repayments and in interest payments on existing Investments – the Scheme was not cashflow positive or self-sustaining during the Review Period, and required ongoing new Investments for POA to continue the Scheme."

134 The overall evidence, while unclear, suggests that profits for investors were paid out partly from the resale of oil, and partly using new investors' moneys. Even so, however, this was in our view permissible and not fraudulent.

135 Based on Chan Tai Suan's AEIC, CAD101,538,873.16 of investments were sold to investors for the first ten projects, and about CAD47m worth of payments to investors remained outstanding. This means that some CAD54m of profits/capital returns had been paid as regards these ten projects, which were due for exit on or before late-2015. The quantum of the paid-out sum is not disputed by POA Recovery and is in part corroborated by other documents. These ten projects (exits from 2012 to late-2015) are the relevant projects for

examining where the funds paid to investors came from. Borrelli accepted this methodology. The remaining seven projects were due for exit in 2016 onwards. No payments were made at all for the seven projects, conceivably due to COGI's receivership and the consequential freezing of POA's assets in October 2015.

136 We deal first with Yau's actions in late-2015. There is evidence that in late-2015, when COGI was in financial difficulties, POA and Yau reserved funds received from new investors for potential payment to old investors. It was not clear from the evidence but POA Recovery submits that investors were actually paid using new investors' funds. This contention is not borne out in the email exchange identified by POA Recovery. Yau stated that they should keep 20% of the POA subsidiaries' earnings in Asia "just in case needed". Gramatzki then agreed, and said that he will be "sending the funds for July exit and interest next week". After this exchange, there is nothing else to show that the 20% reserve was even used, and whether the funds sent by Gramatzki were derived from oil resales or from new investors' funds being held by POA/COGI. In any event, even if the funds had been used for project exits, we explain below that this was not objectionable (see [193] below).

137 As for the period before late-2015, there is no direct evidence of new investors' moneys being used in this manner. POA Recovery's argument on the period from 2012 to early 2015 is premised on entirely Borrelli's opinion evidence. Borrelli opined that the revenue from oil and gas resale was insufficient to make the requisite pay outs to investors. POA thus argues that in the light of POA's/COGI's dismal financial figures for 2012–2015, it *must be that* throughout the entire duration of the alleged Scheme, profits to old investors were paid *solely* using new investors' moneys.

138 We are not persuaded by POA Recovery's contention. There is clear evidence of oil sales contracts with oil giants, and the allocation documents showing that oil was purchased and allocated to investors (see [121] above). Moreover, even by POA Recovery's own evidence, some revenue was in fact generated from oil and gas sales. Borrelli's retort was that the revenue generated was insufficient. However, three points show that Borrelli's evidence does not in fact sustain POA Recovery's case. His views in fact appear to support the respondents' position.

139 First, Borrelli's evidence painted an incomplete picture of the oil and gas revenue. Borrelli's table at para 36 of his report states that there was no oil and gas revenue for 2013 and 2014. Oil and gas revenue for 2012 was indicated as CAD1,052,825.05, and CAD5,453,528.61 for 2015. However, in cross-examination, Borrelli was referred to a lawyers' letter to COGI/POA dated 11 April 2014; this letter indicated a *monthly* oil and gas revenue of CAD8m for February 2014. Borrelli and POA Recovery did not challenge the veracity or authenticity of the letter. That being the case, this single *month* of revenue exceeded the combined *annual* revenues for 2012 and 2015, demonstrating the lack of accuracy in Borrelli's evidence.

140 Second, Borrelli miscalculated the amounts repaid to investors. His report at para 36 (the section labelled "Investments – Principal Repayments") shows total repayments of approximately CAD10m between 2012 and 2015. However, it was highlighted to Borrelli that by *POA Recovery's own evidence* (the evidence of Chan Tai Suan), the total amounts repaid to investors by 2015 was about CAD54m. Borrelli's figures were inaccurate with a difference of *CAD44m*. Borrelli attempted to defend himself by questioning the credibility of the base figures he had been shown. But these figures emanated from Chan Tai

Suan, POA Recovery's director and witness. Borrelli subsequently admitted that he did not know "why the numbers are different".

141 Third, even taking Borrelli's incomplete evidence at face value, there was some CAD5m in oil and gas revenue in 2015. This shows that oil sales were in fact being conducted, thus proving the legitimacy of COGI's oil resale business.

142 Based on the above, at the bare minimum, there was (a) about CAD1m of revenue from oil and gas resale in 2012; (b) CAD8m in February 2014; and (c) about CAD5m in 2015, totalling CAD14m. This amount is not insubstantial. Flowing from this, it is highly unlikely that if COGI made CAD8m in revenue in one month alone in February 2014, it made no other sales at all in 2013 and 2014. The true extent of the sales is unfortunately unclear. Nevertheless, a minimum of CAD14m worth of oil resale revenue would have been added to a pool of revenue. This pool of revenue conceivably comprised moneys from various sources including oil resales *and* investors' moneys. From this pool, COGI dispensed profits to investors.

143 POA Recovery has not alleged that COGI could not mix its revenue streams in this manner. This much is also clear from Borrelli's evidence, where he pooled together different revenue inlets and outlets in forming a view on COGI's finances. Borrelli did not opine that COGI/POA could not regard its revenues from various sources as a collective whole, and thereafter make payments out of this pool. Indeed, it would be commercially insensible to assert as such, absent any contractual restrictions (of which POA Recovery has pointed to none).

144 In this respect, we also agree with the respondents' contention that "how the Principal and the POA Subsidiaries chose to make payment of the exit amounts was an internal accounting arrangement". We echo our observations at [129]–[130] above – in so far as POA/COGI fulfilled its end of the bargain and provided the Investors with profits, and in so far as there were genuine sales of crude oil, it does not matter that the revenue from investors was utilised as working capital. Also, the above fell under the remit of *POA and COGI's internal accounting arrangement*, and the respondents would not have been responsible for this as *marketing agents* – we elaborate on this point at [157] below.

145 Using new investors' funds to pay old investors would be a problem if an entire "business" scheme was built on *solely* or *predominantly* on such circular fund movements. But that was not the case here, as explained above: there were genuine and significant crude oil transactions. In this case, we agree with the Judge's finding that the underlying business was genuine, not fictitious.

146 For completeness, we address a final standalone argument made by POA Recovery on this issue. This concerns the "Loyalty Customer Bonus", *ie*, the reinvestment of successful investors' funds. This point, raised by POA Recovery, is a non-starter. Successful investors were procured to re-invest in the alleged Scheme. But that was a commercial decision taken by the investors who wished to earn more after exiting on existing projects. Whilst reinvestment is a "typical characteristic" of a Ponzi scheme, to infer fraud from encouraging reinvestment without more is a leap of logic. Also, in the respondents' view, there would have been nothing wrong with encouraging further reinvestment – that was the entire purport of their job scope, to encourage investments. POA Recovery has not proven that the respondents had reason to believe that COGI's

business was *untenable* when the Loyalty Customer Bonus scheme was introduced in August 2015. There is no evidence to this effect.

147 Cumulatively, the salient factors militate against the conclusion that the Scheme was a Ponzi scheme. There was a genuine underlying business for the investments; the payments to old investors were made up of a mix of funds from various sources; and the partial rechannelling of funds was an attempt to keep the business afloat when POA and COGI faced troubled waters from late-2015 onwards (see [19]–[22] above). With the accidental deletion of POA's documents by the receiver, the true state of the accounts is unknown. Whether COGI and POA's management knew that their revenue streams were insufficient to make the requisite payments to investors (*ie*, there might have been dishonesty) is at best speculative. Plainly the picture remains unclear. The upshot of this is that POA Recovery has not proved on the balance of probabilities that the Scheme was a Ponzi scheme.

148 Consequently, POA Recovery's allegation of the respondents' complicity in POA/COGI's fraud does not arise for determination at all. Put differently, there can be no complicity in a fraudulent scheme if the Scheme was not proven to be fraudulent to begin with.

149 For the sake of argument, even assuming that COGI and POA were fraudulent throughout the duration of the alleged Scheme, we will explain below that Yau and the respondents were not complicit in this (see [157]–[177] below).

(3) The investors' security

150 The investors' security forms the third key feature of the investments, as represented by the respondents. POA Recovery contends primarily that there had in fact been insufficient security for the Investors. Its other contentions on

this issue are better dealt with in the next section on the respondents' complicity. We will now discuss the allegation of the insufficient security.

151 Prior to the discharges of security, all 17 projects had secured properties. To Yau's understanding, the "right" practice was for the security to be maintained until and "unless the batch is exiting", that is, a property may be sold and the proceeds used to fulfil outstanding investor payments when a project is exiting. This was permissible, as will be explained at [193] below.

152 However, by early-February 2016, there was insufficient security. It appears, from an email from Karen Dowling dated 4 February 2016, that only five securities (securing six projects) remained as at 2 February 2016. The rest had been discharged. To clarify, the properties pertaining to projects 3, 3A and 10 (Provost and Taber) had exited fully, so these are not in issue. What remained were 15 projects that required security, of which four shared two properties (Twining 1, Twining 2, Joffre 1 and Joffre 2). That meant that 13 properties were required. As a result, there were *eight discharges* that are the subject of dispute (*ie*, 13 - 5 = 8).

153 Critically, the remaining eight properties were discharged by *Karen Dowling* and/or COGI, not the respondents. Karen Dowling's email to Crombie dated 4 February 2016 states that "[a]s ***Conserve/COGI*** started running into some issues with its debt repayment to [Alberta Treasury Branches ("ATB")], ***they had committed to selling properties*** to hold off ATB placing Conserve/COGI into bankruptcy. In order to hold off … Bankruptcy certain assets had to be sold" [emphasis added in bold italics]. Karen Dowling then referred to the list of discharged properties.

154 Consequently, in 2016, there was insufficient security for the projects. This was of Karen Dowling's and COGI's doing. Their conduct appears *prima facie* dishonest because COGI, POA and their officers knew that the investments were meant to be secured for the investors' benefit. Their discharge of the security, for the purpose of staving off COGI's insolvency, was surreptitious. It left the Investors in an unenviable state where they had no assurances that COGI/POA could fulfil investor payments. If not fraudulent, their conduct appears to be a breach of the BPOs, under which the investors were promised security. However, and critically, while Karen Dowling and COGI were responsible for the unauthorised discharges of properties, the evidence shows, quite unequivocally, that Yau was innocent. We will address this aspect of the appeal at an appropriate juncture (see [178] below onwards).

Whether the respondents were complicit in any fraud perpetrated by COGI and POA

155 As mentioned, the respondents did not market to the Investors a Ponzi scheme. Yau was described as POA's "key employee". Nothing turned on that label. In our view, the respondents are far from the crooks that POA Recovery portrays them to be. Yau always acted pursuant to instructions from his principals, COGI and POA, and in what he believed to be the best interests of the investors. He mainly took the cue from his principals but did not blindly follow instructions and did raise concerns when he had misgivings.

156 Our discussion herein is divided into three parts. In the first part, we will explain, with reference to the respondents' conduct *during* the Scheme (*ie*, before COGI's receivership in October 2015), why they had no reason to suspect that POA and COGI were engaged in fraud (assuming the Scheme was fraudulent). In the second, we discuss the respondents' roles *after* COGI's receivership, when they were involved in efforts to keep the investments viable.

Finally, we will discuss the discharges of the securities which took place in 2016.

(1) The respondents' roles during the Scheme

157 As mentioned, this section deals with the respondents' conduct between 2012 and 2015, before COGI entered into receivership (see [19] above). We stress at the outset that the respondents were POA's *marketing agents.* This is critical. The respondents did not participate in the crude oil production and resale business – that was entirely POA's and COGI's domain. The respondents merely marketed the investments for a commission. The same may be said as regards POA and COGI's allegedly wrongful use of investors' moneys – it was not the respondents' responsibility as marketing agents to oversee how POA and COGI utilised the funds they received. The respondents' role was to market the investments, and nothing suggests to us that they would have been privy to matters that were essentially in the remit of COGI's higher management.

158 To support the allegation that Yau was fraudulent, POA Recovery accuses the respondents of misrepresenting the nature of the investments (*ie*, the three key features) and suppressing COGI's/POA's financial woes. There is the additional complaint that Yau did not disclose to the Investors that the respondents' commissions were deducted from the capital invested. For the reasons we will come to, POA Recovery's arguments are unsustainable on the evidence.

159 The correspondence shows that Yau and the respondents constantly sought to verify the legitimacy of the *oil purchases (ie*, the first key feature of the alleged Scheme), and offered this verified information to investors via POA's marketing materials. There is evidence that Phyllis, CAG's legal advisor,

clarified and asked for proof of oil barrel allocations (with Yau copied). In response, Gramatzki represented that "every barrel is physically traceable to each individual". In other words, the respondents sought and obtained POA's confirmation of the accuracy of the statements on the nature of the investments as contained in the marketing materials. Yau also had the benefit of other verifications such as KPMG's audit. These verification documents were provided to investors via the Crude Oil Bible (see [121] above).

160 With these documents in mind, POA Recovery's argument that Yau always knew that the alleged Scheme was "just a structure" to avoid regulatory restrictions (*ie*, an absence of genuine investment) is untenable. Yau had used the phrase "just a structure" in his email dated 5 February 2016, as follows:

> Karen explanation is not right, all the 1st charge that belong to Asia is not allow to sell unless the batch is exiting. We don't care who is going to be bankruptcy or owning money, the assets are not allow to sell.
>
> Regards to selling barrels is just a structure for allowing Asia to market so that it won't fall under the security Act in Asia. This mean that our Asia is in directly buying the producing oil fields ?with 1st charge holding by CAGOM.

POA Recovery capitalises on that phrase to advance the argument that the entire Scheme was hollow and a mere façade for a fraud. This argument however presents an incomplete and misleading snapshot of the fuller picture. Yau's use of the phrase is not indicative of fraud – it was a reference to the investments being structured as sales of barrels of crude oil in order to *comply with securities regulations*, and it does *not* indicate that there were in fact no such sales of crude oil. Also, POA Recovery omitted the other aspects of the same email, namely the first paragraph of the email reproduced above (which we elaborate on at [192] below), which shows that Yau was not complicit in any fraud.

Importantly, we have also concluded earlier that crude oil was in fact allocated to Investors, and crude oil was sold to oil giants (see [121]–[127] above).

161 In this connection, POA Recovery also highlights the dearth of evidence as to "logistics" arrangements, *etc*, during the genesis of the alleged Scheme, and argues that the alleged Scheme was developed and implemented with alarming haste. We make two points. First, this evidential gap, if any, could have been filled if POA Recovery had called COGI/POA's officers as witnesses (but it did not). Secondly, we also do not see the significance of this argument when none of the Investors had ever demanded physical delivery of crude oil and none appeared interested in this option. As mentioned earlier, the BPOs specified that if the Investors wanted delivery of crude oil, that could be done on the terms set out in the contracts. However, this option was not exercised by the Investors.

162 Next, while POA Recovery asserts that the respondents obscured the true figures of POA's revenue, this assumes that the respondents knew of these figures. But as alluded to, such information would reside with COGI and POA, who are the sellers of the crude oil. POA Recovery has not shown that the respondents, as marketing agents, would have known the true figures. It also chose not to call witnesses from COGI/POA who could have shed light on the matter.

163 As for how *profits* (the second feature of the Scheme) were dispensed, the evidence does not show that Yau was privy to how these were paid out, and from what fund sources (apart from oil resales) the profits were derived. Yau averred in his AEIC that payments were made by COGI and POA through POA subsidiaries. He also testified that the respondents did not exert control over the POA subsidiaries, and that these were controlled by Gary Tan (POA SG and

POA HK) and Jonathan and Candice (POA MY). POA Recovery has not pointed to any countervailing evidence to challenge Yau's testimony. Yau's explanation makes sense and is plausible since the respondents were the Asian exclusive *marketing agents* of POA/COGI. There was no reason for them to be involved in the profit distribution; that was the remit of POA, COGI, and the payment subsidiaries over which Yau had no control.

164 POA Recovery further alleges that information on the "misuse" of investors' funds was also withheld. It asserts that in February 2015, Yau edited a letter drafted by Gramatzki, in which the latter sought to explain how COGI and POA were using funding from investors to acquire assets. Yau allegedly removed all references to acquisition of property using investor-capital. This is inaccurate. In the first place, as explained, it was permissible to use investors' funds to acquire/develop COGI and POA's oil and gas assets in order to *improve revenue generating capacity*. In any event, the documents cited by POA Recovery do not show that Yau edited the draft. All drafts emanated from *Gramatzki*, not Yau. While the letter to investors had CAG copied, it was signed off by POA. More to the point, this was a letter to *exiting* investors. It is unclear how any redaction on COGI's/POA's use of funds would have been material. Our observations above apply with equal force to POA Recovery's allegation that the respondents failed to disclose the use of investors' moneys to pay returns. There was no obligation to disclose this. It was not objectionable for COGI and POA to use a mix of different fund sources to pay investors. POA Recovery has also not shown that Yau was privy to the extent of this practice by POA and COGI.

165 Finally, POA Recovery also takes issue with the respondents' non-disclosure of the commissions they received during the Scheme. However, POA Recovery wrongly asserts that the commissions retained by the respondents

were 18–20% of the sums received from investors. The respondents aver that the actual quantum they retained was 6–7%, and that 13–14% had been distributed to AMCs and sales agents. While the precise percentages are unclear, the respondents are broadly correct, based on the available evidence. POA Recovery's argument is also dubious. The sub-marketers admitted to retaining commissions and saw this as acceptable, but they could not explain why it would be objectionable for the respondents to similarly retain commissions. Finally, perhaps the most fundamental point is that there is no legal basis for an obligation of disclosure of the sort alleged. The commission structure was POA's own internal arrangement with the respondents. This was similarly the Judge's observation: Judgment at [17].

166 While Yau and CAG did redact references to commissions from KPMG's reports, this redaction was not for a sinister reason. The respondents had no obligation to disclose such information. POA Recovery further argues that KPMG eventually resigned from producing further reports upon discovery of unauthorised redactions to its report. This assertion is not borne out on the evidence. In the emails that POA Recovery cites, it is unclear why KPMG resigned, and whether this had anything to do with Yau and CAG unilaterally redacting references to commissions.

(2) The respondents' conduct after COGI's receivership

167 When things took a turn for the worse in October 2015, and COGI was put under receivership, the respondents' roles shifted from being marketers of the investments, to being involved in viably resuscitating the investments. Indeed, marketing of the investments was restricted at that juncture due to COGI's and POA's financial woes: see Judgment at [11] and [12]. POA Recovery characterises the respondents' conduct at this precipice (from October

2015 onwards) as attempts to conceal the collapsing fraudulent scheme and to drain the investors of every last cent. POA Recovery raises about five overlapping allegations, which we address in turn.

168 The first broad allegation is that Yau took control of POA after COGI's receivership to prevent the unravelling of the fraud. This however assumes there was a fraud in the first place. More critically, POA's "new management" that was constituted in early 2016 comprised Paul Tan, Gramatzki and Rick Orman, but *not* Yau (see [22] above). Yau only joined the Interim Advisory Board from April 2017 onwards (see [25] above). While POA Recovery has asserted that "Yau had Paul and Mr Rick Orman … *installed* to run POA" [emphasis added] (thereby insinuating that Paul Tan was in effect a puppet for Yau), this allegation has not been proven. POA Recovery led no evidence (oral or documentary) that would implicate Yau as having instructed and controlled Paul Tan as regards critical decisions made in respect of POA.

169 That brings us to the respondents' non-disclosure of William Bailey's ("Bailey's") initial valuation of POA in 2016 (which revealed alleged deficiencies in the security being held). In April 2016, the new POA management (Paul Tan under instructions from Gramatzki and Rick Orman) engaged Bailey to carry out a fresh valuation of POA's assets. Bailey's first valuation revealed that POA's properties allegedly had a value of only CAD11m. A second valuation was then requested, which was updated and valued POA at CAD44m. This second valuation was disclosed to investors. POA Recovery takes issue with the respondents' failure to disclose Bailey's *initial* valuation to investors, and construes this as dishonesty on Yau's part.

170 POA Recovery's contention is misconceived on numerous counts. First, we note that the Appellant's Case does not even mention Bailey's second

valuation, thereby obfuscating the reason for complaining about the non-disclosure of Bailey's initial valuation report. In this light, the only question of relevance is whether the procurement of a subsequent (*ie*, the second) valuation was dishonest *on the respondents' part*. In our view, it could not have been. It is undisputed that the updated valuation was requested not by the respondents, but by POA's new management, *ie*, Paul Tan, Gramatzki and Rick Orman. Bailey confirmed during cross-examination that "[i]t was a combination of Paul and Rick and [Gramatzki] that [he] was taking instructions from", and that he did *not* correspond with Yau. POA Recovery has also not proven that when Paul Tan corresponded with Bailey, he had done so under Yau's direction. The respondents thus had no role in the procurement of Bailey's updated valuation; this is a point that is critical as we elaborate below.

171 In this respect, POA Recovery makes much of Bailey's description of his updated report as "mechanical". POA Recovery equates "mechanical" to "misleading" and as involving an "inappropriate evaluation methodology". Such an assertion is not entirely substantiated. Bailey himself has clarified, in his updated report, that "mechanical" was a reference to technicalities and parameters that had been amended in his updated valuation methodology. Bailey also impressed upon the court, during cross-examination, that he took pains to "explain exactly what a mechanical update is" in his updated report, in order to "[take] care of [his] responsibilities to the investors to explain exactly what it is". In other words, there was nothing on the face of Bailey's updated valuation that would have suggested that it was improper or deceitful.

172 Based on the above, the respondents would have had no reason to doubt Bailey's updated valuation. We recognise that Bailey suggested, in his AEIC, that his updated valuation was in some sense *misleadingly* procured by Paul Tan and Gramatzki. However, nothing suggests that *the respondents* would have

been privy to this because it was not Yau who procured the updated report in the first place. The respondents were accordingly well-entitled to release the *updated*, and not outdated, report in order to provide information and updates to the investors well after the Scheme collapsed with the appointment of receivers in 2015 (see [19] above).

173 The second allegation (raised by Mr Ong during the oral hearing) is that the attempts by POA to restructure the investments were unviable and insincere. The argument is speculative, because the issue of the sincerity of the attempted restructuring was not thoroughly explored at trial, due to the absence of key witnesses. Specifically, any allegation that the restructuring was a farce would require implicating personnel who headed the restructuring attempts, such as Rick Orman and Gramatzki; these personnel have not given evidence on the issue. At least from Yau's perspective, there would have been no reason to doubt the sincerity of the restructuring attempts; this much is disclosed by his honest disposition in the correspondence that we discuss shortly (see [177], [191] and [192] below).

174 Relatedly, the third allegation is that the June Agreement (see [23] above) was intended to be a cover-up for the fraud. Aside from Yau's lack of proven complicity in any fraud, two other points put paid to this argument. First, there is no evidence that that was the purpose of the June Agreement. In fact, in the light of Yau's *bona fide* disposition (which may be gleaned from the discussion above at [159]–[160], as well as our observations at [177] and [191]–[192] below), the compelling inference is that the June Agreement was *not* a cover-up as alleged, but a genuine attempt to make good the bad situation that precipitated from COGI's receivership. Second, and critically, Yau appointed personnel, such as Li, to the Interim Advisory Board to *investigate* POA's and COGI's parlous financial predicament and to seek solutions (see [25] above).

Li and several other members of the Board were themselves investors with skin in the game, and who wished to save their investments. It is speculative to suggest that Yau in such an arrangement was simply seeking to *conceal* the alleged fraud and his complicity.

175 The fourth allegation is that the respondents did not disclose POA's difficulties meeting payment obligations to the investors. POA Recovery however does not point to an obligation on the part of the respondents as marketing agent of POA to disclose such information. POA either pays or fails to pay investors. The investors will take issue if they do not receive payment from POA. Moreover, the payment vehicles (*ie*, the POA subsidiaries; see [163] above) were not under the control of the respondents. In any event, POA Recovery has not even proven that the respondents knew of the full extent of COGI's/POA's financial difficulties (see [162] above).

176 The fifth and final allegation is that CAG itself gave POA a loan of S$3m on 8 October 2015 to tide POA over a shortfall of S$4.1m for October payments, and this kept the Scheme afloat for the respondents' gain. POA Recovery's argument again *assumes* that the respondents were in on the fraud. What the respondents did – injecting their own funds to assist their principals – actually strengthens their case that they were innocent. They genuinely believed that COGI's business could be revived with time, and did their best to contribute.

177 Indeed, the Appellant's Case omits to mention crucial evidence which corroborates the picture of Yau being honest when COGI faced troubled waters. In Yau's email to Hainzl dated 30 October 2015, he insisted on conducting dealings with investors properly even in the face of COGI's receivership:

> Yesterday was the first conference regards to the receivership and you have come out a solution plan that ***protecting the clients***.
>
> We need to ***notify all the clients asap*** and assure them we are working with the lawyers to resolve the issue.
>
> …
>
> The unlucky side is we CAG trying our best to sell the product in Asia and now this have happen to our poor clients in Asia for their hard earn money.
>
> I believed this also happen to your German side too.
>
> ***I am not comfortable to hold those clients money that suppose to purchase the project 18 and 19.***
>
> ***I like to return all the money to those clients and tell them the problems that COC, POA had courses the issue.***
>
> I know once is break this news to all clients, the road ahead will be a difficult. ***But we have to be strong to walk through this and put all the clients properties in save position.***
>
> Let ***work with the lawyers*** asap!
>
> [emphasis added in bold italics]

The correspondence speaks for itself, and it is, in our view, highly probative of Yau's honest attitude towards the investors even in the face of troubled waters.

(3) The investors' security

178 POA Recovery has placed much emphasis on what it alleges to be the respondents' dishonest portrayal of the investors' security as a "first charge", and Yau's involvement in the wrongful discharges of eight properties securing the projects (see [152] above). POA Recovery points to these as evidence of the respondents' complicity in the alleged fraud. The accusations, however, are misplaced in the light of the contemporaneous documentary evidence (even assuming POA's/COGI's fraud from the get-go).

179 We begin with what had been told to investors *vis-à-vis* the security. It is critical to understand the roles that POA/COGI, Karen Dowling, Yau and the respondents played in the security arrangement. Yau and the respondents, as POA's and COGI's *marketing agents*, were told to market the investments as being secured by a "first charge", and they did market the investments on that basis. There was nothing objectionable about that since the security provided was in fact a "first charge". An investor had written to the Alberta Energy Regulator ("AER") seeking clarification on the nature of the security; AER's response was that the relevant "security notice … [had been] registered as a *first charge* against Petroleum and Natural Gas agreements" [emphasis added].

180 POA Recovery argues in this respect that the respondents misrepresented the *priority* of the Investors' security when the respondents referred to it as a "first charge". This was because under the terms of a debenture, the charge thereunder was subordinated to certain liabilities in connection with the acquisition of businesses or assets which were referred to as Senior Indebtedness. Therefore, the argument by POA Recovery was that the reference to a "first" charge had misled the Investors into thinking that that charge would have priority over all other debts when in fact that was not the case. However, since POA Recovery is relying on fraudulent misrepresentation, it has to establish fraud and not just negligence on the part of the respondents.

181 We are unable to agree with POA Recovery. First, the term "first charge" was not coined by the respondents. It was a term used by POA Recovery and also by the AER as elaborated above (see [179] above). Secondly, there was no evidence before us of the existence of any Senior Indebtedness at the material time, *ie*, when the investments were marketed, and Mr Ong conceded that there was no higher priority encumbrance in fact.

182 Thirdly and importantly, Yau himself believed that the first charge provided priority to investors. In January 2013, some investors raised a query about the reference in a letter of undertaking to a "subordinated fixed and floating debenture". Gramatzki's response of 11 January 2013 was that the debenture was subordinated to a bank, "if Bank financing is ever used". Gramatzki elaborated that if assets of $10m were used to obtain a loan of $4m to acquire a new property, POA would hold assets with a combined value of $14m but the bank would take a charge on all assets of POA and therefore "the Asian charge is subordinated to the Bank".

183 Yau's response (which may be erroneously dated 10 January 2013) was that that was not what they had discussed earlier. He asked, "how can the clients become subordinate charge". He said that this was "unacceptable". POA would be allowed to use mortgaged property to pay off Asian investors but not to use it to finance the purchase of new property. Therefore, it is clear that Yau and the respondents believed that the investors did have valid and useful security. Yau was in fact *insistent* that this ought to be the case.

184 In the circumstances, the allegation about the respondents' reference to the "first charge" was a red herring. It is a separate question whether the discharge of securities was wrongly done and whether the respondents were privy to or complicit in the discharge. It is to this point that we now turn.

185 As a starting point, CAGOM *held* the security provided by POA in respect of the investments (see [14] above). POA provided CAGOM *guarantees* up to a certain value, and these guarantees were registered as encumbrances (*ie*, first charges) over the leases that POA had over various oil fields.

186 But it was not Yau's responsibility to *register* the security; that responsibility fell on Karen Dowling. She was authorised by Yau by letter (dated 27 September 2012) to register security for the investments (in favour of CAGOM, as explained). Based on the security documents provided in the evidence, the security provided to CAGOM had been duly registered (prior to their unauthorised discharge). On this premise, POA Recovery cannot show that Yau was complicit in any fraud relating to security unless it can prove that Yau was complicit in the eventual discharge of the securities.

187 We affirm the Judge's finding that the respondents had nothing to do with any unauthorised discharge of the securities. It is undisputed that all discharges of security were executed by Karen Dowling and/or Crombie. For at least one of the projects, Twining, Karen Dowling discharged the security using a forged letter of authorisation. As mentioned, she had only been authorised, by letter, to *register*, not discharge, security for the investments.

188 POA Recovery asserts that there was no forgery of the authorisation documents, that Gramatzki informed Yau of the discharge, and that Yau did not object when he saw the discharge form signed by Karen Dowling. However, the respondents point to discrepancies in the authorisation documents, which indicate forgery of Yau's signature. The discrepancies highlighted include different fonts and date formats, and a "cut and paste" version of Yau's signature. POA Recovery has neither addressed these discrepancies, nor rebutted the report adduced by the respondents which strongly points to forgery. POA Recovery also was silent on the forged letter's origins. In cross-examination, its witnesses conceded that "the [respondents] had no knowledge of [the forgery]", and accepted that the forged letter did contain a "cut-and-paste" of Yau's specimen signature.

189 That Yau was in the dark is corroborated by the suspicious circumstances under which he was informed of the discharge. By the time Yau was informed by Gramatzki, the discharge of the security for Twining was a *fait accompli*. POA Recovery omitted this fact in the Appellant's Case. The Notice of Discharge was executed on 20 December 2013 and registered by Alberta's Minister of Energy on 30 December 2013. Gramatzki then requested an *unsigned* discharge form from Karen Dowling on 15 January 2014 and sent the same to Yau on 23 January 2014. In that email to Yau, Gramatzki stated "I attach the discharge document … please have that signed and sent back". The impression conveyed to Yau was therefore a false one, *ie*, that Twining had not yet been discharged.

190 In fact, the private correspondence between Gramatzki and Karen Dowling suggests that they intended to make Yau a scapegoat, or at least co-implicate him behind his back. In his email to Karen Dowling on 15 January 2014, Gramatzki stated "*I also want to get a signature from Asia. I know that we have you as agent but it is just for my additional comfort so that they never come and tell us that they did not know it was discharged*". Gramatzki admitted that Twining was already "discharged", yet in his email to Yau eight days later on 23 January 2014, he gave the false impression that the discharge had not been executed.

191 POA Recovery construes the above email as Gramatzki not wanting to be implicated by the "main perpetrator", Yau. We hesitate to accept POA Recovery's interpretation, which is quite clearly an argument of convenience. Its interpretation is improbable when one considers the timing of the email. Crucially, Yau's response, sent later that same day, was consistent with someone who was concerned for the interests of the Investors. His priority when he was informed by Gramatzki of the discharge was to ensure that there was

alternative and adequate security, and accountability to investors. He said "POA need[s] to explain why they need [Twining] and in exchange to another piece of land with higher value".

192 Yau's stance was consistent in this regard. Following the events just discussed, which occurred in 2014, he protested vehemently in 2016 when the numerous unauthorised discharges of security came to light and were brought to his attention (see [152] above). Yau's email to Crombie dated 5 February 2016 reads as follows:

> Karen explanation is not right, all the 1st charge that belong to Asia is not allow to sell unless the batch is exiting. We don't care who is going to be bankruptcy or owning money, the assets are not allow to sell.

The Appellant's Case does *not* mention, let alone discuss, the relevant portions of this email chain. Nor has POA Recovery raised cogent evidence that contradicts the portrayal of Yau therein. Yau's insistence that Investors' security be preserved is inconsistent with someone who is defrauding investors. We add that POA Recovery did not call Karen Dowling to give evidence, even though she clearly could have clarified the issue. The Judge made essentially the same observation.

193 The picture for the security for a different project, Saddle Hills, is less clear, but the issue nevertheless resolves in favour of the respondents. It is unclear when Yau became aware of the discharge. However, in any event, POA Recovery has not proved that Yau was prepared to discharge the security *before* the exit of the Saddle Hills project. The evidence shows that when the Saddle Hills security was being discharged, the corresponding project was *clearly headed for exit*. In Gramatzki's email on 24 June 2015, it was made clear that the Saddle Hill project had partially exited in April, and two further payments

were required soon for full exit (in July and October). If so, there was no reason for the underlying property to remain secured. That is precisely the sentiment expressed by Yau in his email on 5 February 2016 to Crombie: that "all the 1st charge that belong to Asia is not allow[ed] to sell *unless the batch is exiting*" [emphasis added]. This is also consistent with Yau's understanding of when the security could be discharged, as may be gleaned from his early correspondence with Gramatzki in January 2013. This email chain shows that Yau constantly clarified the legitimacy and mechanics of the security so that he could provide accurate explanations to queries from investors.

194 As it turned out, from Paul Tan's email dated 22 September 2015, the Saddle Hills property appeared to be of sufficient value to cover the exit payments. POA Recovery has not shown why Yau would not have had a reason to accept the figures presented by Paul Tan. Thus, even if Yau was aware of the discharge when it happened, his conduct cannot be considered dishonest. Yau's priority was ensuring investors would receive the exit payments, and that appeared to have been achieved.

195 The six other discharged properties were Claresholm, Nevis, Barons, Edson, Weyburn and Clearview. There is simply no specificity in the Appellant's Case in this regard. POA Recovery seems to be insinuating that because Yau was (allegedly) complicit in the "wrongful" discharges of Twining and Saddle Hills, he likewise must have been complicit in the discharges of the other properties by Karen Dowling. But there is no evidence to this effect. The evidence that *is available*, as canvassed above, shows quite the contrary – that Yau indeed maintained an honest and transparent attitude throughout his dealings with the Investors.

196 We add, on a final note, that Yau, his family, and other CAG officers and their families (Paul Tan and Audrey) were themselves investors in the Scheme. Yau himself had invested in the Scheme *right from the outset*. POA Recovery does not dispute this, nor did Mr Ong offer any meaningful retort when Ms Ho raised the point during oral submissions. It is hard to believe that Yau and CAG's officers would have invested in the Scheme if the Scheme was fraudulent, and if they were part of the alleged fraud.

Conclusion on the main representations

197 Based on our conclusions above, POA Recovery's case on the main representations must be rejected. The respondents did not misrepresent the three features of the alleged Scheme, because the investments did bear, to their knowledge, those characteristics. They did not dishonestly obscure anything from the investors, many of whom did their own checks and clarifications. We accordingly dismiss this aspect of POA Recovery's appeal. We turn then to the remaining representations.

The remaining representations

198 As mentioned, this category of representations comprises two alleged misrepresentations: one on profits being *guaranteed*, and another on the *risk profile* of the investments. The first may be given short shrift: while POA Recovery fiercely pursued the guarantee representation at trial, the Appellant's Case did not pursue it. For completeness, we note briefly that Audrey (CAG's vice-president of marketing) gave evidence that the *sub-marketers* had, *without CAG's authority*, guaranteed to several investors the success of the investments, and that none of the "guarantee" marketing materials originated from the respondents. POA Recovery has not refuted Audrey's evidence; it does not even mention Audrey's evidence in the Appellant's Case. Audrey's evidence is

corroborated by contemporaneous evidence in the form of email exchanges with sub-marketers, the Crude Oil Bible, and approved presentation slides (which underwent rounds of vetting between COGI, POA and CAG).

199 POA Recovery's argument on the "risk profile" misrepresentation, in short, is that the investments were not in fact in barrels of crude oil, but in COGI's business. An investment of the latter sort (POA Recovery alleges) is riskier than an investment in the former. We disagree. First and foremost, there was no misrepresentation because the respondents had represented, correctly, that COGI's business did comprise sales of oil and gas. We have explained this point in the previous section. The fact that investors' moneys were used to improve COGI's oil and gas assets does not mean that the investment was not one in crude oil.

200 More fundamentally, the factual premise of POA Recovery's argument is lacking. POA Recovery's argument assumes that the investments *as promised*, *ie*, resales of barrels of crude oil, were *risk free*. This is incorrect. The investments in oil barrels, as represented, also bore risk and were subject to market fluctuations in oil barrel prices. POA Recovery contends that with the security of the physical oil barrels, investors would have been insulated. It also contends that there was insulation from price fluctuations because "the lower the price, the more physical barrels of oil one would be able to purchase". These arguments are illogical and presumptuous. Price fluctuations mean that for every barrel of oil bought at price $X, it might be sold at price $Y subsequently, which could be lower. Thus, the revenue generated might be lower. Consequently, COGI would struggle to pay investors during a price crash. In that sense, there is no insulation. One might be able to buy more barrels of oil if prices drop. But there would be no change in the demand for oil unless consumer patterns change (something which has not been explored in the trial

below). Consequently, and all things being equal, if one purchases more barrels of oil, these will not suffice if the price does not improve.

201 It therefore cannot be said that the respondents made any representation on risk profile that deviated from the actual risk profile of the investments.

Conclusion on AD 26

202 Based on the foregoing, we dismiss POA Recovery's appeal in AD 26. While POA Recovery did have standing to bring the claims on behalf of the Investors, these claims are untenable on the facts of the present case. We will deal with the issue of costs shortly.

Li and Luong's appeal in AD 34

203 Li and Luong challenge the Judge's factual findings that they had mismanaged CAGOM Canada in the wake of COGI's receivership, and that such mismanagement led to lower recovery for the Investors in the wake of the collapse of the investments (see [50]–[53] above). On the other hand, the respondents seek to affirm the Judge's findings on Li and Luong's financial mismanagement of CAGOM Canada when COGI was in financial trouble. They seek contribution from Li and Luong in the event they are found liable for fraud.

204 We repeat here the point this court alluded to during the hearing of the appeals, namely that there was no need to turn to the merits of AD 34. The Judge made *no orders* in AD 34 apart from costs orders, in the light of his dismissal of the suit. AD 34 is entirely parasitic on AD 26; AD 34 was contingent on AD 26 being brought in the first place. Li and Luong acknowledge that AD 34 only falls to be considered if AD 26 is *successful*. That is, because AD 26 had been filed, there existed a risk that the respondents would be found liable for

fraud on appeal. If found liable, the respondents might have re-opened their case against Li and Luong to seek contribution. Li and Luong thus, conceivably, pre-emptively filed AD 34 in order to challenge the Judge's factual findings, so that in the event the respondents were found liable on appeal, they (Li and Luong) would not subsequently be found liable for contribution.

205 Two logical conclusions follow. First, if AD 26 had not been brought, AD 34 could not have been filed. It is trite that no right of appeal lies against a non-decision: see *Ong Jane Rebecca v Lim Lie Hoa and other appeals and other matters* [2021] 2 SLR 584 at [178]–[179]. Indeed, under the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), standalone factual findings are not indicated as capable of forming the subject matter of appeal. Second, if AD 26 is *dismissed* (as we have concluded), the *status quo* remains, and the respondents bear no liability. Consequently, the question of Li and Luong's contribution does not even arise. Li and Luong's counsel acknowledged this point during the course of oral submissions, and did not belabour the court with unnecessary submissions.

206 For these reasons, we dismiss AD 34. The only point of concern that remains is the implication of the Judge's adverse factual findings against Li and Luong. Li and Luong have raised the concern of *res judicata*, *ie*, if other Investors or the respondents pursue them in a separate suit for their mismanagement of CAGOM Canada, the Judge's decision would foreclose the possibility of Li and Luong resisting such a suit.

207 We clarify that there is no *res judicata* over the issues involving Li and Luong. In dismissing the suit, the Judge made *no orders* against Li and Luong apart from costs orders. That is, the Judge did not, and did not have to, adjudicate on the merits of the respondents' contribution claim. Viewed this

way, the Judge's observations on Li and Luong's culpability (as regards their mismanagement of CAGOM Canada's assets) are mere *obiter*. It remains open to Li and Luong to challenge the Judge's observations if a subsequent suit is brought against them.

Costs of the appeals

208 For the reasons provided above, we dismiss both AD 26 and AD 34.

209 POA Recovery is to bear the costs of AD 26, fixed at S$85,000 (all-in). Li and Luong are to, jointly and severally as co-appellants, bear the costs of AD 34, fixed at S$35,000 (all-in). The usual consequential orders for payment out of the security will apply to both sets of costs awarded to the respondents.

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

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