

Loh Sze Ti Terence Peter v Gay Choon Ing  
[2008] SGHC 31

**Case Number** : Suit 341/2005  
**Decision Date** : 28 February 2008  
**Tribunal/Court** : High Court  
**Coram** : Belinda Ang Saw Ean J  
**Counsel Name(s)** : Manjit Singh and Sree Govind Menon (Manjit Govind & Partners) for the plaintiff;  
Tan Teng Muan (Counsel) (Mallal & Namazie) and Sarbjit Singh (Lim & Lim) for  
the defendant  
**Parties** : Loh Sze Ti Terence Peter — Gay Choon Ing

*Trusts*

28 February 2008

Belinda Ang Saw Ean J:

1 The dispute with which this litigation is concerned is over the beneficial ownership of 1.55m ordinary shares of \$1 each in the capital of a company called Gay Lip Seng & Sons (Pte) Ltd ("the Company"). The Company owns and operates a hotel known as Tai Hoe Hotel ("the hotel").

2 According to the plaintiff, Terence Loh Sze Ti ("Loh"), he invested money in the Company for the redevelopment of the hotel, and the Company in turn issued 1.55m ordinary shares ("the Shares") which the defendant, Gay Choon Ing ("Gay"), held on trust for Loh's benefit pursuant to a Trust Deed dated 3 January 1994. In his defence, Gay adopted a very different stance. He denies any beneficial ownership arrangement and maintains that the Shares were acquired by him with money loaned to him by Loh. Sadly, the bitterness which has arisen between two erstwhile trusted friends is reflected not only in the events leading to execution of the Points of Agreement on 27 October 2004 ("the POA"), but also in this litigation where serious allegations have been made by Loh against Gay, including allegations of fraud. That latter complaint was prompted by what was perceived by Loh as a breach or breaches of trust by Gay in relation to the Shares. In the present proceedings, Loh seeks, *inter alia*, an order to rescind the POA on grounds of fraud or misrepresentation. It was argued that the POA should be rescinded for breach of fiduciary duty by reason of non-disclosure of material information (which I shall refer to below), and also by virtue of the fact that the POA was a transaction entered into between a trustee and a beneficiary. Alternatively, or in any event, there is, *inter alia*, a claim for an account of the profits and gains received by Gay from the Shares during his trusteeship.

### **The History of Events leading to the present proceedings**

#### ***The relationship between the parties***

3 I start with a brief outline of the relationship between the parties. It was because of this relationship that Loh became involved in the Company. Loh is a businessman. At all material times, Loh was the managing director and a shareholder of a Kenyan company called ASP Company Limited ("ASP"). Loh and Gay met in the early 1970's when they both served in the Singapore Armed Forces. Subsequently, Gay went to work in ASP. In 1981, Gay was stationed in Nairobi and he worked there until he resigned from ASP in 2004. By all counts, Gay has done well for himself with his limited formal

education - he stopped schooling after obtaining his O-level certificate. Gay joined ASP as general manager and was later made a director.

4 Loh was Gay's immediate boss. The two men got on well and developed a close and friendly relationship. A level of trust also developed between the two. Counsel for Gay, Mr T M Tan, described Gay as "dependable, stoic and loyal". Loh, on the other hand was described as "a brilliant entrepreneur". Mr Tan also described them as a "formidable" team in East Africa. Loh, who has a law degree and is also a qualified chartered accountant, was looked upon by Gay and his family members with a high level of respect. He was their confidant and a role model to Gay's children. Gay acknowledged his gratitude to Loh for his generosity in financing his children's education in Australia. The friendly personal relationship between Loh and Gay had spanned decades. Those close ties have now been broken. They have been replaced by the bitter dispute between the parties which has resulted in the present litigation where Gay stands accused of cheating Loh of his alleged investment in the Company.

### ***The Shares and the POA***

5 The central issues in this case arise in this way. Gay is a shareholder of the Company. Before 1993, Gay held one of ten ordinary shares of \$1 each in the equity of the Company. The hotel was a family business started by Gay's father. At that time, the other shareholders of the Company were Gay's father and brothers. Gay's father died in 1989 and his shareholding was subsequently transferred by his estate to Gay's mother in 1995.

6 In 1993, there were plans to redevelop the hotel. It was then a 2-storey pre-war hotel with 12 rooms. The redevelopment costs were estimated at \$5.5m. As part of the redevelopment plans, the Company increased its authorised capital to \$5.5m in 1993. There was also a revaluation of the hotel's property to \$3m to more accurately reflect the equity of the existing ten shareholders. The difference between the authorised share capital and the revaluation (the surplus arising from revaluation was to be capitalised through the issuance of bonus shares) came from new equity of \$2.5m which Gay had undertaken to raise. The redevelopment was also financed by a bank loan as in fact happened. The redeveloped hotel with six storeys and 70 rooms was reopened in November 1995.

7 Specifically, pursuant to an Extraordinary General Meeting ("EGM") held on 13 December 1993 ("the 1993 EGM"), the members approved the revaluation of the hotel's property at \$3m. The revaluation surplus of \$2,999,990 was credited to the Company's capital reserve account. In same EGM, it was resolved to capitalise the revaluation surplus of \$2,999,990 to satisfy an allotment of 2,999,990 ordinary shares of \$1 each in value ("the bonus shares"). The bonus shares were to be distributed "amongst the persons who were registered as holders of the issued share capital of the Company at the closing of the Register on 13 December 1993". [\[note: 1\]](#) The cut off date was part of the plan to more accurately reflect the equity of the existing ten shareholders. Plainly, the intention was to exclude the holder of the new 2.5m shares from the bonus issue. The Company agreed to issue 2.5m partly paid ordinary shares of \$1 each upon receipt of \$600,000 from Gay who had undertaken to raise and inject \$2.5m for the redevelopment. As for the Shares in question, two share certificates nos. 11 and 12 were duly issued in Gay's name on 28 December 1993. Each certificate was for 775,000 shares and it stated that \$0.24 was paid for each share. As in fact happened, the bonus issue was delayed until 1995.

8 It is common ground that the money for the Shares came from Loh. In dispute was the amount of money Gay had actually received for the Shares. The purpose of the payment was also in dispute. According to Gay, he only received \$1.4m and not \$1.55m as claimed by Loh. Furthermore, Loh claims that this money was his investment in the Company and that Gay held the Shares on trust for him. In

contrast, Gay maintains that the money was a loan made to him in order for him to redevelop the hotel owned by the family company. Whatever the purpose may have been (and this bears upon the central dispute of the case) both Loh and Gay entered into a Trust Deed on 3 January 1994. Suffice it to say that it is Gay's defence that security for the loan was achieved by the declaration of trust contained in the Trust Deed. Gay said he left for Kenya soon after signing the Trust Deed, and he was not given a copy of it until sometime in November 2004. Apart from his annual home leave, Gay was away from Singapore for most of the time until 2004. Seemingly, the Trust Deed was retained by Peter Chua, a solicitor, who prepared the documentation.

9 Some ten years later, Gay informed Loh in August 2003 or thereabouts that he wished to retire from his employment with ASP; this intention was repeated in August 2004. From email correspondence between Loh and Gay, at least in August 2004, Loh knew of Gay's intention to retire but he saw it as abandonment. The parties disagreed on the severance payments allegedly due to Gay which culminated in a letter of demand sent by Gay's Nairobi lawyers to ASP on 25 October 2004.

10 The next day, on 26 October 2004, Loh in his capacity as managing director of ASP wrote to Gay as follows:[\[note: 2\]](#)

Further to our meeting today, we thank you for accepting that it was your decision to leave and bearing in mind the financial position of the company, you have accepted to leave on 31 October 2004 after your notice period without claims on the company whatsoever.

In turn, the company acknowledges that it has no claims against you whatsoever.

...

Please sign a copy of this letter as your acknowledgement and acceptance.

11 On 27 October 2004, Gay signed the letter as directed to signify his acceptance of the terms. The very same day, Loh and Gay signed the POA, which is set out in full:[\[note: 3\]](#)

#### Points of Agreement

Mr Gay Choon Ing is holding in trust 27.5% (equivalent to SGD1,400,000/-) of the share capital in Gay Lip Seng & Sons (Pte) Ltd, in trust for Mr Terence Loh Sze Ti, representing the actual payment made by Mr Terence Loh for this investment. The Trust Document is held by Mr Peter Chua of Peter Chua & Partners.

Mr Gay Choon Ing and Mr Terence Loh Sze Ti have agreed that Mr Terence Loh will sell to Mr Gay Choon Ing the entire 27.5% held in trust for SGD1,500,000/-, made up of SGD1,400,000/- original investment plus SGGD100,000/- dividends not received. This amount is payable, SGD500,000/- on 15 November 2004, SGD500,000/- on 15 November 2005 and SGD500,000/- on 15 November 2006

On completion of payment of the purchase price, the Trust Document will be surrendered to Mr Gay Choon Ing by Mr Peter Chua as stakeholder.

While payment is being made, Mr Peter Chua will hold the Trust Document on behalf of both parties as stakeholder and Mr Gay Choon Ing will be entitled to vote the entire 27.5% share as he wishes at any AGM or EGM or shareholders' meeting as long as it is not adverse to Mr Terence Loh's interest.

If payment is not received within fourteen days of due date, interest will accrue at 3% above the Citibank base rate until such time as payment is received and Mr Terence Loh will be entitled to vote the 27.5% share interest at any AGM, EGM or shareholders' meeting.

12 It is common ground that the total sum of \$1.5m under the POA was paid in full by February 2005. Gay and his wife became shareholders of 99% of the Company after buying out two of Gay's brothers in 2005. Gay said that this buyout was not contemplated at the time of the POA and was the result of the decision of his two brothers to cash out, one to be a pastor, and the other for health reasons after being diagnosed with cancer. In 2005, the Company declared a large dividend to which Loh took issue with in this action. Gay explained that the large dividend declared in 2005 was to meet the needs of his cancer-stricken brother and his family.

13 In Nairobi, Gay's lawyers on 24 January 2005 wrote to Loh resurrecting Gay's demand for severance payments against ASP. ASP replied to this demand on 31 January 2005, enclosing the waiver letter of 26 October 2004 which was rejected by Gay's lawyers in reply on 4 February 2005. The contents of the waiver letter were "vehemently denied" and the lawyers warned that Gay would sue for his dues without further notice. In February 2005, Loh accused Gay of criminal intimidation and criminal breach of trust. On 16 May 2005, Loh commenced this action against Gay.

14 I now turn to the issues central to this action in relation to the Trust Deed and POA. I hasten to mention that I have confined this judgment to the salient points raised in arguments about breaches of trust. As for the other several subsidiary points ventilated, and the authorities cited, I have not found it necessary to deal with them in this judgment. Furthermore, having regard to the conclusions reached in this judgment, it was also unnecessary to consider the alternative defence of estoppel, waiver and limitation.

## **Issue 1- The Trust Deed**

### ***The competing views***

15 The legal interest in the Shares was and is vested in Gay. At issue is the ownership of the beneficial interest. As such, the burden of proof is on Loh to prove that he is the beneficial owner of the Shares.

16 Loh's case is that Gay is bound by the clear declaration of trust in the Trust Deed and relies on the Trust Deed for its full terms and effect. In broad terms, it is not disputed that the money for the Shares came from Loh. The authenticity of the Trust Deed was also not in issue for Gay admitted to signing it. The Trust Deed provides as follows:[\[note: 4\]](#)

THIS TRUST DEED is made the 3<sup>rd</sup> day of January, 1994 Between GAY CHOON ING ... (hereinafter referred to as "the Trustee") of the one part And LOH SZE TI TERENCE PETER ... (hereinafter referred to as "the Beneficiary" which expression shall where the context so admits include his successors-in-title) of the other part.

WHEREAS:-

1) Gay Lip Seng & Sons (Pte) Ltd (hereafter referred to as "the Company") is a company incorporated in the Republic of Singapore, having its registered office at 30 Verdun Road, Singapore 0820 and an authorised share capital of Singapore Dollars Five Million and Five Hundred Thousand (S\$5,500,000.00) only.

2) 10 ordinary shares of the Company at S\$1.00 each have been issued and fully paid up. 2,500,000 ordinary shares of the Company at \$1.00 each have been issued and paid up for \$0.24 each.

3) The Beneficiary had caused to be transferred to the name of the Trustee the following shares in the Company (hereinafter referred to as "the said shares"), particulars of which are as follows:-

<u>Certificate No.</u>	<u>Paid up Capital</u>	<u>No. of Shares</u>
11	\$0.24	775,000
12	\$0.24	775,000

NOW THIS DEED is made in consideration of the premises WITNESSETH as follows:-

1. The Trustee declares that he shall hold the said shares in the Company and the dividends thereon upon Trust for the Beneficiary absolutely and will sell transfer or otherwise deal with such shares and such dividends and interests payable in respect of the same in such manner as the Beneficiary shall from time to time direct.

2. The Trustee shall at the request of the Beneficiary or his successors-in-title attend all meetings of the shareholders of the Company, which the Beneficiary is entitled to attend by virtue of being the registered proprietor of the said shares, and shall vote at every such meeting in such manner as the Beneficiary or his successors-in-title shall have previously directed in writing and in default thereof and subject to any such direction at the discretion of the Trustee and further shall if so required by the Beneficiary or his successors-in-title execute all proxies or other documents which shall be necessary and proper to enable the Beneficiary his personal representatives or assigns or his or their nominees to vote at any such meeting in the place of the Trustee.

3. The Beneficiary shall at all times hereafter indemnify and keep indemnified the Trustee his personal representatives or assigns against all liabilities which the Trustee his personal representatives or assigns or his or their nominees may incur by reason of the said shares being registered in the name of the Trustee as aforesaid.

4. The power to appoint a new Trustee hereof is vested in the Beneficiary during his life.

17 It is Gay's case that the matters pleaded in the Defence (Amendment No 4) make up the background facts and explain the agreement between the parties to constitute the Trust Deed as a security for the advance from Loh. Paragraphs 4 to 11 of the Defence (Amendment No 4) read as follows:

4. Sometime in late 1993, there was a need for the Defendant to invest in the Company and the Defendant approached the Plaintiff for assistance. The Plaintiff agreed to extend the Defendant a loan of \$1.55 million to invest.

5. The Plaintiff agreed to advance this money interest free in recognition of the Defendant's service to ASP in Kenya. The Defendant suggested that as security 1.55 million shares were to be "pledged" to the Plaintiff in the event of the Defendant's demise prior to repayment, the Plaintiff would be secured. The Plaintiff agreed. It was agreed that arrangements to pay off the advance

would be made at the time the Defendant left ASP's employment.

6. Pursuant to the above, the Plaintiff engaged a lawyer to draw up the security document which was framed as a trust document and this document was executed on or about 3 January 1994 ("the Trust Document").

7. The Trust Document reflected a total of 1.55 million shares ("the Shares") as being held on trust by the Defendant for the Plaintiff.

8. The Plaintiff however advanced a sum of \$1.4 million only and not \$1.55 million as had been agreed ("the Advance").

9. The Trust Deed was not rectified by reason of the fact that there was at the time a very close personal relationship between the Plaintiff and his family on the one hand and the Defendant on the other and by reason of the fact that this relationship as between the Plaintiff and the Defendant extended to the close working relationship as employer employee that the Plaintiff had with the Defendant. It was also the case that a copy of the Trust Document was never extended to the Defendant who only came into possession of it sometime in November 2004.

10. The Plaintiff was at all material times treated as being entitled in fact to 1.4 million shares, being the extent of his advance.

11. The Plaintiff and the Defendant agreed that the security which took the form of the Trust Document was to be held by the Plaintiff until such time that the \$1.4 million was repaid to the Plaintiff.

### ***Construction of the Trust Deed***

18 An important issue between the parties is how the trust document in question should be construed. There are also further issues between the parties as to whether extrinsic or parol evidence can be admitted in evidence as an aid to construction of the Trust Deed, and as to whether Gay is estopped from denying the trust and Loh's beneficial ownership of the Shares.

19 The approach to adopt towards the whole issue, as I see it, is to first construe the Trust Deed in its entirety to determine whether or not the declaration of trust was to create a trust of the Shares with Loh as the beneficial owner. This to begin with is derived from its nature and the text itself. Where the allegation of a loan is sustainable from the text itself, it will then not be necessary to consider extrinsic evidence. On the other hand, if it cannot be arrived at upon a proper construction of the Trust Deed without resort to extrinsic evidence, it will then become necessary to determine whether extrinsic evidence is admissible in the circumstances of the present case. A distinction is drawn here between extrinsic evidence that is admissible for it establishes the factual matrix to aid the Court in construing the language of the contract in the context in which the contract was entered into and, on the other hand, extrinsic evidence that is considered inadmissible. In particular, where the parties have recorded terms of their agreement in a document, the parol evidence rule generally excludes the use of evidence of terms which subtract from, add to, vary or contradict the language of the written document (see ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed). There are exceptions to this rule which I do not have to go into in this case. Finally, if the position contended for by Mr Tan has not been made out adopting the two avenues mentioned, the focus will then be on the estoppel plea. As it turned out, in the final analysis of this case, it was not necessary to resort to this third approach, and I say no more about it.

20 I now turn first to the deed and the declaration of trust. At this stage, I have to consider the nature and the contents of the document which the parties executed. In this regard, the court is concerned with the substance of the transaction rather than the title or label the parties give to the document (see *MCST Plan No 1933 v Liang Huat Aluminium Ltd* [2001] 3 SLR 253 at [6]). The trust document does not express itself to be an agreement to buy shares in the Company using Gay as a bare trustee. On the face of it, the document describes itself as a "Trust Deed", and I do not think it is simply a label because in use is the phrase such as "upon trust for" a named beneficiary. The language of the Trust Deed is that which is ordinarily used to describe a trustee-beneficiary relationship and bears the hallmarks of an express trust. In particular, there is a declaration of trust and the subject matter of the trust is the Shares and dividends. There are provisions for the appointment of a new trustee (and impliedly, the power to appoint an additional trustee if the original trustee is not to be replaced); obligations of the trustee and other usual standard clauses one expects to find in a trust document and which are fundamental to the concept of a trust.

21 At the conclusion of the first stage, I agree with counsel for Loh, Mr Manjit Singh, that on its true construction, the declaration of trust in the Trust Deed meant that the Shares were beneficially owned by Loh. It must be remembered that Gay had not disavowed the trust document which, on the face of it, is inconsistent with his loan argument. Notably, the question whether the Trust Deed was meant to operate as security for the loan is first and foremost not supported by the text of the document. The beneficiary's promise in cl 3 to indemnify Gay for obligations arising by reason of the Shares being registered in his name is certainly inconsistent with the loan argument. If Loh was a creditor as argued for by Gay, there would be no need for cl 3 because Gay, as the registered and beneficial owner of the Shares, would be responsible to meet calls on the Shares which at the time were partially paid for. If the parties had wanted to give security which was to be achieved by a declaration of trust created over Gay's (as opposed to Loh's) interest in the Shares, one would have expected them to have used appropriate language to describe it in the instrument itself or by a side agreement. Moreover, the Trust Deed was to take effect upon execution. What is missing from the case as presented is the arrangement governing its operation, and in particular the conditions for its operation if it was not intended to take effect immediately upon execution, but in the event of Gays' untimely demise before the loan was repaid in full.

22 It is difficult to appreciate Mr Tan's contention that Recital 3 of the Trust Deed does not bear out Loh's claim to beneficial ownership of the Shares. Recital 3 states that it was Loh who caused the Shares to be transferred to Gay whereas Loh's pleaded case is that Gay caused the Shares to be issued to himself. This apparent discrepancy does not take the matter any further for Gay. I do not see how the wording of Recital 3 of the Trust Deed (or the use of the words "caused to be transferred to the name of the Trustee") displaces the ordinary effect of what is, on the face of it, an express trust. Moreover, it is common in trust documents to recite that the settlor has transferred the trust property to the trustees. In any case, even as an aid to construction, Recital 3 cannot prevail over the main terms of the Trust Deed. As L P Thean JA rightly observed in *MCST Plan No 1933 v Liang Huat Aluminium Ltd* ([20] *supra*) at [7]:

[A] recital in an instrument can only assist in the construction of the substantive terms thereof; it cannot override or control the operation of the substantive terms, where such terms are clear and unambiguous.

23 For completeness, I have to mention that Mr Manjit's reliance on s 95 of the Evidence Act is misplaced for that provision only applies to patent ambiguity in a document as the Court of Appeal so held in *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759 at [58] to [59]. The bank's case was based on a latent ambiguity in the letter of agreement and the Court of Appeal went on to consider s 94(f) of Evidence Act. Equally, the *contra proferentum* rule raised by Mr Tan has no

application here. The rule only operates where there is truly an ambiguity and there is none here.

24 Plainly and in summary, the loan position argued for by Mr Tan cannot be achieved upon a proper construction of the Trust Deed without resort to extrinsic evidence. Gay's fallback argument as presented by Mr Tan is that extrinsic evidence is admissible to show the circumstances in which the Trust Deed came to be executed with a view to arriving at the true effect of the transaction to which the Trust Deed relates. It is therefore necessary to consider whether extrinsic evidence is admissible in the circumstances of the present case and, if so, to make certain findings based on an objective assessment of what a reasonable person armed with the knowledge the parties actually had would have understood the words in the Trust Deed to mean in the context in which the declaration of trust was created. This approach has been endorsed in numerous Court of Appeal decisions, and more recently in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891. Justice Andrew Phang JA (delivering the judgment of the Court of Appeal) at [29] said:

No contract exists in a vacuum and, consequently, its language must be construed in the context in which the contract has been made. We would go as far as to state that even if the plain language of the contract appears otherwise clear, the construction consequently placed on such language should not be inconsistent with the context in which the contract was entered into if this context is clear or even obvious, since the context and circumstances in which the contract was made would reflect the intention of the parties when they entered into the contract and utilised the (contractual) language they did. It might well be the case that if a particular construction placed on the language in a given contract is inconsistent with what is the obvious context in which the contract was made, then *that* construction might *not* be as clear as was initially thought and might, on the contrary, be evidence of an ambiguity.

[Emphasis in original text]

25 Objective evidence of the aim of the transaction which goes to establishing the factual matrix is also relevant. A question which a reasonable man is bound to ask himself is this: What was a declaration of trust needed for? Was the Trust Deed meant to operate as security for the loan? For answers, the court will have to examine the relevant background in this case. In the final analysis, there are only two feasible explanations, either Gay held the Shares on trust over Gay's (as opposed to Loh's) interest in the Shares, or *vice versa*. In this examination, I have to take into account the surrounding factual matrix to decide whether the trustee's obligation is that of a debtor to a creditor or that of a trustee to a beneficiary.

### ***Was it a loan or an investment in the Company?***

26 I now turn to the question of whether the assertion of a loan by Gay is supported by the evidence. Apart from the Trust Deed, the two share certificates dated 28 December 1993 for 775,000 ordinary shares each and Gay's letter of 30 December 1993 to M/s Peter Chua & Partners enclosing the two share certificates, there are no contemporaneous documentary evidence of the transaction at all. In fact, the only formal documentation was the Trust Deed. In this regard, I had the benefit of evidence from Gay and Loh. The only omission is evidence from Peter Chua, the solicitor who prepared the Trust Deed. The witnesses called by Gay were not privy to the arrangement between Gay and Loh. I am also mindful that the first tranche of the trial took place nearly thirteen years ago after the events in question. It is plain that it is for Gay, or those acting on his behalf, to satisfy me that the transaction was a loan.

27 As stated, Gay's case is that the money from Loh for the Shares was a loan to him repayable in the event he leaves ASP. Loh was willing to lend money to Gay as Loh wanted to him to stay back in



Kenya. As the loan was interest free, Gay agreed to give dividends declared and paid on the Shares to Loh. Security for the loan was to be achieved by a declaration of trust. It was Gay's concern that Loh would be left exposed in the event of the borrower's untimely death. The Trust Deed was duly prepared and executed by the parties. Gay was under an obligation not to deal with the Shares save to the extent spelled out in the Trust Deed. Gay's obligation to repay the loan was not documented. What was also not clear was whether in the event of a default by Gay, Loh's only recourse was the Trust Deed. It bears mentioning that when the trust is used as a means to hold security over the property of the debtor for the benefit of the lender, the trust property is usually vested in an independent trustee or the lender (see Underhill and Hayton on *Law Relating to Trusts and Trustees*, 17<sup>th</sup> Ed (Butterworths 2006) at para 1.100). In contrast, a curious feature here (if Gay's version is to be believed) is that the debtor is the trustee of his own asset, *i.e.* the trust property.

28 According to Loh, there was no loan in the first place. The money he gave to Gay was an investment in the Company. Gay had invited him to invest in the Company having explained the family's plans to redevelop the hotel and money was needed for the project. He was told that the Company "welcomes an investment of about \$1.55m". [\[note: 5\]](#) Loh explained that he chose to invest in the Company over a decision to buy a bungalow for his own family. He trusted Gay who had convinced him that it would be a good investment and that Loh need not have to worry about Gay's siblings as Gay would, with the new shares, be able to take control of the Company. Gaining control of the Company was something Gay desired and as both were close at that time, Loh agreed to invest in the Company.

29 Mr Tan challenges the notion of an investment made by Loh pointing out that the Company was at the material time a family-owned company. The siblings were a fractious lot and nobody would want to "invest" in such a company to be mired in the quarrels and feuds of the Gay family. He maintains that no reasonable person, particularly an astute businessman, like Loh, would choose to invest in the business of a fractious family over buying a bungalow in a very good area for his family. Mr Tan was sceptical and denounced Loh's explanation as "false and preposterous". Furthermore, Loh was said to have made a Freudian slip when asked whether he knew what the paid up capital of the Company was, and what the eventual capital would be. Loh's answer was: "No. I just lent him the money at his request. We were close." [\[note: 6\]](#) That answer, Mr Tan submits, invariably exposes the lie in Loh's version.

30 Mr Tan gave three other reasons why Loh's version of an investment should not be believed. First, the absence of any due diligence on Loh's part before investing into the Company was conduct consistent with a loan transaction rather than of someone who was thinking of investing in the Company. Second, Loh openly talked about his beneficial ownership only after he fell out with Gay. Gay's dream of owning the hotel, a fact which Loh acknowledges, point to the veracity of his testimony that Loh loaned him the money to invest in his father's company. Third, the trust is not recognised by the Company. Article 9 of the Articles of Association of the Company states:

Except as required by law, no person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future, or partial interest in any share or unit of a share or (except only as by these articles or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder.

31 I am not moved by any of Mr Tan's arguments. The sum effect of the combination of the several factors he raised does not necessarily support the existence of a loan. On the contrary, the probabilities point strongly to an investment by Loh. Whilst there is a dispute as to the exact amount

remitted to Gay, be it \$1.4m or \$1.55m, the fact remains that a substantial sum was involved. Whilst it was not denied that at that time both shared a close relationship, apart from that bond, the circumstances were not such that the common sense of the situation bore out a loan even out of kindness.

32 I accept as plausible Loh's explanation that he chose to invest in the Company over an earlier decision to buy a bungalow for his family. From the standpoint of a businessman, he made a decision to switch investments, preferring the one with a potential for a greater return on investment. The investment was to be in a company that was going to redevelop its existing hotel on the same plot of land it owned to a new six-storey modern hotel with some 70 bedrooms. Moreover, there could, as Loh explained, be an enhancement in the hotel's earnings and profits for the Company.

33 In addition, the new shares totalling 2.55m represented a substantial block of shares which enabled Gay to take control of the Company, and this fact was admitted by Gay and his daughter, Rosemary Gay ("Rosemary"). Gay was appointed managing director of the Company in 1994, and he held that position all these years. In fact, at the 1993 EGM, a resolution was passed to put Gay in charge of the redevelopment of the hotel, and in this regard, his appointment as stated in the resolution was "irrevocable". He was also authorised and empowered to bind the Company on all matters to, *inter alia*, "ensure the successful running of the hotel to enable the company to repay all the bank borrowing". [\[note: 7\]](#) Thus, the existence of quarrelsome siblings would not detract from Gay being a trustee of the Shares. Besides, Loh had Gay's word that he would handle his brothers and hold the Shares on trust for Loh. In any event, the purpose of examining the factual matrix is not to question the wisdom of a party entering into a transaction, but to determine if the objective facts and circumstances point to a different interpretation of the transaction.

34 There is nothing to the claim that Loh made a Freudian slip during cross-examination. Loh clarified that he made a mistake, and went on to reaffirm his position that he invested in the Company. As for the other factors raised by Mr Tan, they are at best neutral points. For instance, I do not agree with Mr Tan that the emails in 2001 to which he referred to in his closing submissions are necessarily inconsistent with an investment. By the same token, neither is each email, by itself evidence of a loan. There is no other written communication until 2004. In his email dated 11 August 2004, Gay did not refer to the money as a loan, but the meaning of the words used was referable to an investment, and was further confirmation of it. Moreover, the terms of the POA contradicted Gay's story of a loan and his claim as the legal and beneficial owner of the Shares. The POA described the money from Loh as an investment in the Company, and the subject matter of the POA was the sale of the Shares to Gay. It was agreed in the POA that until full payment of the purchase price, Loh was to retain his interest in the Shares and that Gay was not to vote in any AGM or EGM, or shareholders meeting in a manner that conflicted with Loh's interests. Mr Manjit also points to the absence of any mention of a loan in the past until M/s Lim & Lim's letter dated 30 March 2005 as further telling evidence against Gay's case.

35 Furthermore, Mr Manjit submits that Gay should not be believed as he is not a credible witness. A number of criticisms were advanced against Gay for the inconsistent accounts of important events he gave in pleadings, and on the genesis of the Trust Deed, which he did not deny signing but the effect of which he has challenged. As an illustration of Gay's readiness to lie if it suited his case, Mr Manjit referred me to Gay's testimony where he initially confirmed that he did not notify Peter Chua of the interest free loan. Later, he said that Peter Chua was told about such a loan, and that it was linked to Gay's employment in Kenya. Upon further cross-examination, Gay admitted that he did not inform Peter Chua of the loan or that it was linked to ASP. [\[note: 8\]](#) Furthermore, during cross-examination, Gay testified that the loan was repayable on demand contrary to the pleaded position that the loan was repayable when Gay leaves ASP. Even if the different versions of his testimony in

cross-examination only showed up his poor recollection of events, the fact remains that his testimony is unreliable.

36 Mr Manjit also objected to Mr Tan's reliance on Article 9 of the Articles of Association of the Company as it was not Gay's pleaded case. I do not propose to dwell on the arguments on Article 9 save to say that Article 9 has no relevance here. Whilst the objective of Article 9 is to keep trusts off the register, the existence of a trust is not prevented. More importantly, such equitable interests in shares are not invalid (see *Walter Woon on Company Law*, 3<sup>rd</sup> Ed (Sweet & Maxwell Asia 2005) at para 11.89).

37 Moving on to the amount received by Gay, was it \$1.4m or \$1.55m? I refer to this as a sub-issue as it is not determinative of the action before me for the reasons I will come to.

38 Gay said that he received \$1.4m. Loh asserts that a total of \$1.55m was given to Gay. As for the disputed sum of \$150,000, the evidence on this is not all that clear. A sum of \$150,000 was apparently remitted by Loh's wife in November 1993 to Rosemary's bank account. Rosemary confirmed that Loh did not owe her money but could not recall receiving the \$150,000. In response, Mr Tan said that this assertion at the trial contradicts Loh's pleaded case and testimony on two counts. First, the pleaded case is that \$150,000 was an outright cash payment as opposed to a remittance from Loh's wife to Rosemary. Second, this sum was said to have been paid in Africa over a period of years in small amounts and in different currencies. Whilst accepting the force of Mr Tan's submissions on the apparent discrepancies, I am, nonetheless, not persuaded by Rosemary's explanation that \$150,000 came from her mother who had provided funds to defray expenses of the Company. Above all, it bears noting that the subject matter of the Trust Deed is 1.55m shares with a par value of \$1.00 each. The intention from the outset was that the investor would become a shareholder in proportion to his investment. Significantly, in this action Gay is not asking for rectification of the Trust Deed to correct the number of shares from 1.55m to 1.4m shares. In addition, at least so far as it concerns this aspect of their relationship that has been formally documented, Gay cannot deny the existence of the facts and matters upon which they have agreed, *i.e.* that the number of shares held on trust was 1.55m. Consequently, a finding on the exact amount Gay received from Loh is not necessary for a ruling on the declaratory order sought in this action.

39 In my judgment, Loh's evidence of an investment is preferred since Gay's testimony is by comparison tissue paper thin. I therefore reject the submissions that the Trust Deed should not be construed as creating a trust whereby 1.55m shares in the capital of the Company was held on trust by Gay for Loh. Accordingly, I declare that Gay held the Shares on trust for the benefit of Loh.

## **Issue 2- Fiduciary Duty in relation to the Shares and the POA**

40 Loh's complaints broadly relate to: (i) breaches during the period of the trusteeship before the POA ("First Complaint"), and (ii) the POA for the sale of the beneficial interest in the Shares was induced by misrepresentation or breach of trust ("Second Complaint").

### ***Summary of Loh's case***

41 The First Complaint is about the trustee (i) misappropriating Loh's share of profits and dividends; (ii) dealing with the Shares without informing Loh or obtaining his prior consent thereby resulting in the misappropriation of bonus shares issued to shareholders; (iii) holding himself out as the beneficial owner of the Shares and; (iv) withholding material information of the Company from Loh and failing to render true and complete accounts of the Company to Loh. In the course of the trial, Loh made further allegations relating to Gay misusing the cash reserves of the Company in the purchase

of an apartment in the development known as The Icon ("the Icon apartment") instead of declaring bigger dividends.

42 The Second Complaint is that Gay had fraudulently or negligently misrepresented to Loh that the dividends due to him amounted to \$100,000 and that the fair value of the Shares was \$1.4 million. Consequently, the POA should be rescinded on grounds of fraud or misrepresentation. It was hence argued that the POA was entered into in breach of trust. In particular, Gay had not discharged the onus of proving that he made full and frank disclosure of all material facts bearing on the trust property that was being purchased and that he had given fair value to Loh.

43 Consequently, the relief as appears in the Statement of Claim is as follows: (i) damages to be assessed; (ii) an account of all sums due from Gay to Loh; (iii) payment by Gay to Loh on the taking of the account; (iv) all further necessary or appropriate accounts, inquiries and directions; (v) rescission of the POA with damages to be assessed and consequently the recovery of Loh's shares in the Company; and (vi) interest at a rate of 6% per annum on all sums found due and payable.

### **Summary of the defence**

44 Gay denies any breach of trust. Mr Tan maintains that there is no actionable breach of trust. The Trust Deed was never relied upon, referred to or invoked by either party until differences between them emerged. Insofar as the dividends due to Loh are concerned, Rosemary in an email dated 16 February 2003 had advised Loh of the quantum of the dividend declared and paid out. As for the bonus shares, Loh knew all along about the bonus issue which was for the Gay family members. He knew about the bonus issue as he had assisted Gay in the run up to the 1993 EGM. Finally, the purchase of the Icon apartment was known to Loh. Not only did the idea of investing in the Icon apartment come from Loh, the purchase, which was a management decision, was disclosed in Company's audited accounts for the financial year ending 31 August 2003. In any case, the POA was entered into in full and final settlement of Loh's claims against Gay and *vice versa*. The POA was entered into at the time Gay signed the letter of 26 October 2004 to waive his rights to severance payments. In the circumstances, the POA must be interpreted in light of this waiver on Gay's part.

### **Scope of duty and accountability**

45 Now that the trustee-beneficiary relationship is established in relation to the Shares, it is necessary to examine what were the trustee's duties under the Trust Deed. This question is relevant particularly where the court is concerned with allegations that the trustee has failed to perform his fiduciary obligations to the beneficiary in a situation of conflict with his personal interests. The measure of the alleged conflict and possibly its very existence will depend on the scope of the fiduciary duty in question. In the case of an express trust, the duties are prescribed by the trust instrument. In addition to the clauses in the trust instrument, there are, as Millet LJ in *Armitage v Nurse and others* [1998] Ch 241 at 253 said, certain irreducible core obligations fundamental to the concept of a trust - the duty to perform the trust honestly and in good faith for the benefit of the beneficiary. However, as Millet LJ pointed out, the fiduciary obligations do not include the duties of skill and care, prudence and diligence. Once the scope of the duties under the trust instrument is defined, the next question is whether the trustee has committed some breach by placing himself in a position where his duty and interest may possibly conflict. It is at this stage that any question of accountability arises. Once established, the trustee is accountable for the profits made within the scope and ambit of his duty (see Lord Upjohn's analysis in *Boardman v Phipps* [1967] 2 AC 46 at 127).

46 It is not disputed that Gay as trustee of the Shares was also a director of the Company. He

was already a director since 14 September 1993 before his appointment as trustee.[\[note: 9\]](#) It was held in *Butt v Kelson and others* [1952] 1 Ch 197 that beneficiaries cannot call on trustee directors to use their powers as directors as though such powers were held on trust for the beneficiaries. On the facts, *Butt v Kelson* is not an analogous case but a parallel can be drawn from this principle which is of general application and of relevance to this case. This principle is especially pertinent here where a number of the complaints in reality concern a director's duty to the Company. As such, a claim brought by a beneficiary against a trustee for breach of fiduciary duty may well be barred by the rule against reflective loss as *Shaker v Al-Bedrawi & others* [2003] 2 WLR 922 appears to have determined. The English Court's decision on this point was followed in *Gardner v Parker* [2004] 2 BCLC 554. The latter decision was referred to by the Singapore Court of Appeal in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR 597 who accepted the principle of reflective loss as good law in Singapore. Chan Sek Keong CJ (delivering the judgment of the court) at [70] reaffirming the scope of the principle said:

[T]his principle extends beyond a shareholder's claim that his shares have been devalued, and includes "all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds.

### ***First Complaint: Breaches during the period of trusteeship before the POA***

47 With the principles mentioned above in mind, I now turn to the Trust Deed for the scope of the trustee's duties. Clause 1 is aimed at ensuring that the trustee as registered holder of the Shares does not sell, mortgage or otherwise deal with the Shares without the consent of beneficiary. The purpose of cl 2 is to ensure that communications which are sent to the registered holder are conveyed to the beneficiary.

48 I pause to make some general comments before considering the First Complaint in detail. Accusations of breaches of trust have been somewhat freely bandied around. Whilst that is understandable following a falling out between two erstwhile close friends, a cautious balance must be struck for once suspicion takes root as was the case here, it is possible that past events take on a different colour and are easily seen as wrongdoings in a different light. Needless to say, it is necessary for Loh to establish that his claim for breach of trust is available on the facts and in law.

49 Loh maintains that the Shares held on trust represented 61.9% of the issued capital of the Company and that share percentage of 61.9% was an agreed term in the Trust Deed. This percentage is calculated based on Loh having 1.55m shares out of 2,500,010 shares in 1994. He relied on Recital 2 of the Trust Deed which stated that in 1994 the issued share capital of the Company was 2,500,010 ordinary shares of \$1.00 each. The audited accounts for 1994 and 1995 showed the issued share capital as 2,500,010 shares. I am not persuaded that there was such an agreement that fixed in percentage terms the shareholding at 61.9% for purposes of future dividends or for that matter, all other rights as shareholder. The intention of the Company from the time of the issue of the new 2.5m shares was to raise the paid up capital to \$5.5m which it did by the financial year ending 31 August 1996. By the time the Company declared dividends for the first time in 1999, the Shares held on trust in percentage terms was 28.18% of the issued share capital of the Company.

50 Moving on, Loh's allegations may be distilled into four broad areas of complaints:

- (i) Acquisition of additional shares in the Company;
- (ii) Misappropriation of bonus shares;

- (iii) Misappropriation of dividends; and
- (iv) Misuse of the Company's cash reserves.

I will deal with each of these in turn.

*(i) Acquisition of additional shares*

51 It is not disputed that Gay had from time to time bought over his siblings' shares in the Company. Gay is said to have breached his duty as trustee in not affording Loh a reasonable opportunity to buy the shares on offer. All shares offered for sale by the existing members should have been extended to him in the proportion of the shares held on trust. As such, he is therefore entitled to a proportion of the shares now that Gay has already acquired them. His claim is premised on the alleged pre-emption right of a shareholder. In the course of cross-examination, Loh identified Article 43 of the Company's Articles of Association as conferring the pre-emption right that he was relying on. [\[note: 10\]](#)

52 In my judgment, there is no basis for Loh's claim. I agree with Mr Tan that there are no pre-emption provisions in the Articles of Association restricting the transfer of shares by a member to an existing member or stranger. There is nothing in the Articles of Association that bound a member desiring to sell his shares to first offer them for sale to all the existing members of the Company, and not just to Gay. There are also no restrictions on the registration of a transfer of shares from a member to any other person as long as the shares are fully paid up and the Company does not have a lien on those shares. This is borne out by Article 24 read with Article 22. Article 24 provides as follows:

The directors may decline to register any transfer of shares not being fully paid shares to a person of whom they do not approve and may also decline to register any transfer of shares on which the company has a lien.

53 The relevant part of Article 22 states:

Subject to these articles any member may transfer all or any of his shares by instrument in writing in any usual or common form or in any other form which the directors may approve.

54 Article 43 cited by Loh is completely irrelevant. It is headed "Alteration of Capital" and it applies to the offer of new shares to existing members before their issue which is distinct from the issued shares already owned by Gay's siblings.

55 Mr Manjit relies on *Teck Jin (Pte) Ltd v Tan Kim Seng* [2007] SGHC 151 ("*Teck Jin*") to support his argument that Gay as trustee has to account to Loh for all the benefit accruing to him as a result of the shareholding held on trust for Loh. In other words, whatever shares were offered for sale by existing shareholders, 61.9% of the shares on sale should have been offered to Loh. In my judgment, *Teck Jin* is distinguishable on the facts. It does not provide Loh with the support he needs. That case concerned a resulting trust arising from the plaintiff's payment of shares acquired by the defendant. The benefits that accrued to the defendant were the result of the shareholding held on trust for the plaintiff which is unlike the factual matrix before me. Apart from the Shares held on trust, Gay himself owned shares in the Company. Of the 2.5m new shares issued in December 1993, Gay subscribed for 950,000 new shares. Loh knew when entering into the Trust Deed that Gay was already a shareholder in his own right in the Company and the Company was a family company run by Gay's family. He is unable to say that the opportunity to purchase was unquestionably his even on a balance of

probabilities and, in the absence of a pre-emption right, Loh has not shown on the facts that in acquiring the additional shares Gay offended the no-profit rule and no-conflict rule. Briefly, the no-profit rule is based on an unauthorised profit which is the fruit of the trust property and the no-conflict rule is that the trustee, being in a fiduciary position, has entered into a transaction inconsistent with his fiduciary duty of loyalty to the beneficiaries of the trust, thereby abusing his position to gain an advantage for himself.

56 Clause 1 of the Trust Deed obliges Gay to hold 1.55m shares and the dividends thereon upon trust for Loh. As Millet LJ pointed out in *Armitage v Nurse* (see [45] above), Gay has no duty to exercise skill, prudence and diligence to increase Loh's percentage shareholding in the Company. By acquiring additional shares in the Company for himself, Gay enlarged his own shareholding in the Company and increased his voting power in the Company. But this does not *ipso facto* amount to placing himself in a position of conflict within the scope and ambit of his duties under the Trust Deed and the interest of the beneficiary.

57 For all these reasons, Loh's claim that Gay was in breach of trust in acquiring additional shares in the Company from his siblings fails.

*(ii) Misappropriation of Bonus shares*

58 Loh claims that Gay should have informed him that the Company was going to issue bonus shares so that he could have given instructions on how to vote on his behalf. In the absence of such information, on the authority of *Teck Jin*, Loh claims 61.9% of the bonus shares issued by the Company on the basis that they were benefits accruing to him as a result of his shareholding held on trust for his benefit. Gay as trustee of the Shares is *prima facie* obliged to account to the beneficiary for the bonus shares.

59 In response, Mr Tan contends that Loh at the outset was aware of the bonus issue from his substantial involvement in the finalisation of the documentation for the hotel's redevelopment plans called "Project Brief"[\[note: 11\]](#) as well as from his contributions in putting together the "Points to include in the EGM Dec '93".[\[note: 12\]](#) The Project Brief touched on the rejection of a proposal to capitalise the value of the land at \$1.8m and to distribute shares on that basis. The second document, "Points to include in the EGM Dec '93", contained the following statement: "Shareholders acceptance that the company be valued for S\$3 million which form (*sic*) the basis for the calling in of new capital [of \$2.5m] to finance the project to enable it to proceed". Accordingly, Mr Tan argues that Loh was aware that under the capital restructuring scheme, the new 2.5m shares were not entitled to any bonus shares from the capitalisation of the revaluation surplus of \$2,999,990.

60 It was pointed out that Loh also knew that the bonus shares were subsequently issued but had never complained that his Shares were entitled to bonus shares until this present action. Loh confirmed that he knew that Gay Yun Lin, one of the plaintiffs in the 1999 oppression proceedings, had a 5.5% shareholding in the Company. The printout of the Registry of Company Computer Information (Business Profile) search on the Company undertaken on 25 November 1999 showed that Gay Yun Lin had at the time 300,000 shares in the Company.[\[note: 13\]](#)

61 The minutes of the 1993 EGM and those of the Extraordinary General meeting held on 2 November 1995 ("the 1995 EGM") were part of the documentation produced for the oppression proceedings.[\[note: 14\]](#) The 1993 EGM minutes were referred to in Loh's handwritten notes in the following manner:[\[note: 15\]](#)

(e) EGM 13/12/93 – SJ + YL proxy (wife) present – all resolutions passed w/out any votes

against. Must know all 17 resolutions and understand.

62 Whilst accepting the writing on the notes as his, Loh denied that he went through in detail the documents for the oppression proceedings. He acted as an intermediary between the lawyers and Gay's wife. I am not at all convinced by Loh's testimony. I do not accept Loh's explanation that he merely wrote down what he heard from discussions with the lawyers without being aware of the substance and significance of what he was writing. As an investor with a substantial investment in a company that was facing a possibility of a winding up order (this was the alternative relief sought in the oppression action), he must have taken more interest in the oppression proceedings than he wanted this court to believe. His involvement in the Company was to protect his beneficial interest inasmuch as to lend assistance to Gay's wife.

63 For these reasons, I reject Loh's denial that he was never aware of the bonus issue. I find that Loh was, on a balance of probabilities, aware that the Company's bonus shares were for the original ten shares as the bonus issue was a result of a capitalisation of the revaluation of the Company's property *prior* to the issuance of the new shares. This must be so for it does not make business and commercial sense for the existing shareholders with their ten shares to allow the new shares to participate in the bonus issue which, on the one hand, would have the effect of diluting the value of the existing shareholding and, on the other hand, allow the investor to take over the Company with a surplus capital reserve of \$2,999,990 without paying a premium for the new shares. In my judgment, the pricing of the 2.5m new shares was on the basis that the revaluation surplus of \$2,999,990 would accrue to the existing ten shares. Therefore, the 2.5m new shares were not entitled to any bonus shares.

64 As it happened, the bonus shares were not issued after the 1993 resolution. They were deferred, according to Gay and Rosemary, until the finalisation of the transfer of Gay's deceased father's one share in the Company to his mother. This was not done until 1995. Thereafter, the Company Secretary advised that it would be neater if a fresh resolution was passed to deal with the bonus issue. The Company convened the 1995 EGM where the resolution of 1993 on the bonus issue was "rescinded" and a fresh resolution passed in substantially the same terms save that Gay's mother now replaced Gay's father as a shareholder. Gay himself had two original shares instead of the previous one. Just like the 1993 resolution, the new 2.5m shares issued in 1994 were excluded from the bonus issue. One of the resolutions passed in the 1995 EGM accepted a deed of waiver from Gay to the Company waiving entitlement to bonus shares for the 2.5m shares allotted on 28 December 1993. This deed of waiver reflected the actual position from the outset. In my judgment, the resolutions in 1995 were confirmatory in effect in that the new 2.5m shares were not entitled to the bonus issue. As stated, this is because the pricing of the 2.5m new shares at \$1 per share was on the basis that the revaluation surplus of \$2,999,990 was to accrue to the existing ten shares. Consequently, Loh is not entitled to any bonus shares. Although the Company at the 1995 EGM described the 1993 resolution as "rescinded" before passing a new resolution in 1995, this was a housekeeping exercise which did not detract from the original basis for the issuance of the new shares as new capital.

65 The audited accounts for the financial year ending 31 August 1996 made reference to the bonus shares being issued to the shareholders who were registered as members as at 2 November 1995, and not 13 December 1993 which was the cut off date stipulated in the 1993 resolution. I make three points. First, this new cut off date did not change what was agreed in the 1993 resolution as confirmed by the deed of waiver. In my judgment, Gay as trustee of the Shares was not wrong in giving the deed of waiver. Second, Loh as a person holding a beneficial as opposed to a legal interest is not a "member" by the terms of Article 107 of the Company's Articles of Association which is set out below. This reading arises from the proscription of a notice of any trust being entered on the



register in the case of a company limited by shares (see [36] on Article 9). Loh's claim that as at 2 November 1995, he was a shareholder through Gay, and as such was entitled to bonus shares, ignores the fact that the Shares under the Trust Deed were part of the 2.5m new shares and that pricing of the Shares at \$1 per share was on the basis that the bonus shares would accrue to the original ten shares. In my judgment, the cut off date of 2 November 1995 did not affect the entitlement of the ten original shares to the bonus issue. Third, even if Gay, for the sake of argument, had on Loh's instructions refused to give the deed of waiver, the matter would have ended with the shareholders of the ten shares insisting that the Company gave effect to the 1993 resolution.

66 Articles 107 and 108 of the Company's Articles of Association cited by Mr Manjit (which is on capitalisation of profits) as supporting Loh's case read as follows:

#### CAPITALIZATION OF PROFITS

107. The company in general meeting may upon the recommendation of the directors resolve that it is desirable to capitalize any part of the amount for the time being standing to the credit of any of the company's reserve accounts ... and accordingly that such sum be set free for distribution amongst the members who would have been entitled thereto if distributed by way of dividend and in the same proportions on condition that the same be not paid in cash but be applied either in or towards paying up any amounts for the time being unpaid on any shares held by such members respectively or paying up in full unissued shares or debentures of the company to be allotted and distributed credited as fully paid up, to and amongst such members in the proportion aforesaid ... and the directors shall give effect to such resolution. A share premium account and a capital redemption reserve may, for the purposes of this article, be applied only in the paying up of unissued shares to be issued to members of the company as fully paid bonus shares.

108. Whenever such a resolution as aforesaid shall have been passed the directors shall make all appropriations and applications of the undivided profits resolved to be capitalized thereby, and all allotments and issues of fully paid shares or debentures, if any, and generally shall do all acts and things required to give effect thereto ...

67 These articles do not assist Loh's case. They have to be construed in the commercial context in which the resolution in 1993 was passed. This commercially sensible approach gives effect to the expectations of the ten existing shareholders as described (see [63] above).

68 In light of the conclusions I have reached, *Teck Jin* is distinguishable from the present case. It is clear, and I so find, that the bonus shares did not accrue to Gay as a result of Loh's shareholding. I have already ruled that the Shares were issued without the right to participate in the bonus issue.

#### *(iv) Misappropriation of dividends and the failure to declare dividends*

69 It is not disputed that the total dividends declared by the Company between 1999 and 2003 was \$395,588; that Loh did not receive any dividends declared as they were taken by Gay; and that under the POA, Loh received as dividends the sum of \$100,000.

70 Loh now claims an entitlement to dividends totalling \$244,868 on the basis of holding 61.9% of the issued share capital of the Company. This percentage, as stated, was calculated based on Loh having 1.55m shares out of 2,500,010 shares in 1994 (see [49] above). Loh's calculations are ill-founded. There is no reason for Loh's entitlement to be calculated on the basis of his shareholding as at 1994. Loh is only entitled to demand under the Trust Deed the dividends declared on the 1.55m shares. The dividends declared on the Shares between 1999 and 2003 based on the issued capital of

the Company of 5.5m is \$111,568.44 ( $1,550,000 \div 5,500,000$ ) x \$395,888). Since he has already been paid \$100,000, Gay has to account for the remaining \$11,568.44.

71 If the POA is rescinded, Gay is to account to Loh for dividends declared on his 1.55m shares after 27 October 2004. This would include the dividends declared in 2005 based on his shareholding of approximately 28.18%. It is not known if there were dividends declared in 2006 and 2007. If there were, Loh would also be entitled to a share of that. Of the known dividends declared, Gay must account to Loh and pay over the sum after accounting for the same.

72 In relation to the argument that without informing Loh, Gay used the Shares to vote in his own way on the profits to be declared, the dividends to be paid as well as the cash to be placed in reserves, it was contended that had Gay consulted Loh, he would have voted in his own interest in respect of the aforesaid matters. This assertion has not merit whatsoever. Article 99 of the Company's Articles of Association makes it clear that the Company in general meeting may declare dividends, but no dividend is to exceed the amount recommended by the directors. Before recommending any dividend, the directors have the power under Article 102 to set aside out of the profits of the Company any sum the directors think proper as reserves and at the discretion of the directors applied, *inter alia*, for the business of the company or invested. It follows that the member is in no position to demand that more profits beyond the figure recommended by the directors be set aside for dividends. Moreover, the beneficiary cannot get the trustee director to exercise his power to increase the dividends declared (see [46] above).

73 Notably, where directors act in bad faith and for purposes of their own refuse to make proper distribution of earnings, the injury is primarily to the shareholders collectively, and must be redressed through the company to compel proper action. A shareholder cannot maintain a personal action for a wrong to the company merely because the indirect result is a diminution in the value of his shares. I have set out the legal position on reflective loss in [46] and have applied this principle to this case in [74] below.

#### *(4) Misuse of Company's assets*

74 Loh accuses Gay of misusing the cash reserves of the Company in relation to the purchase of the Icon apartment and argues that this was part of "a clear pattern of financial manipulations that intentionally enriche[d] the Defendant whilst dispossessing the Plaintiff of his true entitlement". [\[note: 16\]](#) Gay admitted that in May 2003 he had authorised the purchase of the Icon apartment using the Company's surplus funds and registered the property in his wife's name. Mr Manjit characterised this as fraud on the part of the trustee. There is no merit in this complaint from the standpoint of a beneficiary. First, Gay's role as trustee director and as trustee of the Shares must not be conflated. I have already mentioned the principle in *Butt v Kelson* (see [46] above). Second, as a matter of law, the fact that a company's assets are depleted does not amount to an injury to the member even if it was by way of diminution in the dividends declared and all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds (per Millet LJ in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 66). Third, the rule against reflective loss can apply in circumstances such as the present case where a beneficiary with an equitable interest in a company's shares sues his trustee for an account of the profit taken by the trustee and against whom the company in respect of the same profit has a prior claim against the trustee in his capacity as a director of the company for breach of fiduciary duty (see *Shaker v Al- Bedrawi; Gardner v Parker* at [46] above).

75 These authorities assist me in the approach I must take in this case. For the foregoing reasons, there is in my judgment no breach of trust in relation to the purchase of the Icon apartment.

**Second Complaint: Was the POA induced by misrepresentations or entered into in breach of trust?**

76 Loh has asked the court to set aside or rescind the POA for the sale of Loh's equitable interest in the Shares. Loh claims to be entitled to have the transaction set aside on two distinct grounds. First, Loh was induced to enter into the transaction by reason of fraudulent misrepresentation made by Gay to him as to the value of his shareholding and dividends declared. If the misrepresentation was not fraudulent, Loh claims to be entitled to set aside the POA under the Misrepresentation Act (Cap 390, 1994 Rev Ed). Second and in the alternative, Gay breached fiduciary duties by reason of his failure to give full disclosure of material information such as the value of his shareholding in a sale and purchase transaction between a fiduciary and a beneficiary, and also by virtue of the fact that the beneficiary did not receive a fair value for the trustee's purchase. I will deal with each distinct ground in turn.

*(1) Misrepresentation*

77 Under this head of claim, Loh must establish the making of the misrepresentation by Gay, the inducement thereby of Loh and reliance thereon by Loh to his detriment. Briggs J in *Ross River Ltd & Another v Cambridge City Football Club Ltd* [2007] EWHC 2115 at [193] and [194] helpfully summarises the legal position on the law of rescission for misrepresentation which I accept and apply to this case:

The making by one contracting party to another of a material misrepresentation of fact which induces that other to make the contract gives that other the right to rescind the contract, qualified in cases of innocent or negligent misrepresentation by the court's statutory discretion to award damages in lieu, but not so qualified where, as here, the misrepresentation is fraudulent.

Although silence as to the material facts is not in general capable of constituting a misrepresentation, it may do so where the defendant is under a positive duty of disclosure, for example when negotiating a species of contracts regarded as *uberrimae fidei*, or where an existing relationship between the parties, such as a fiduciary relationship, imposes an obligation of disclosure.

78 The starting point for a claim for misrepresentation is to determine whether the defendant did in fact make the statement on which the claimant relies. Here, the complaint in misrepresentation concerns the statements allegedly made, and their truth. Gay is said to have represented that (i) the dividends due and payable to Loh were \$100,000, and (ii) the fair value for 1.55m shares was \$1.4m. The alleged misstatements were made orally to Loh in Nairobi on 26 October 2004. [\[note: 17\]](#) In his affidavit of evidence-in-chief, Loh testified that Gay said on the 26 October 2004 that he would buy his shares based on current value and would pay up all dividends due to Loh. A figure of \$100,000 was stipulated as the dividends due to Loh and the fair value of the Shares was said to be \$1.4m. [\[note: 18\]](#)

79 Gay denies making the alleged oral representations. Mr Tan submits that Gay could not have said all that was attributed to him as he was only making a repayment of a loan. Indeed, as was pointed out, neither a figure for the price or the number of the Shares was mentioned in any of the email exchanges on or before 26 October 2004. Loh's pleaded representation floundered after Loh admitted in cross-examination that he could not remember the particular date the representations were made to him. The upshot of that testimony is that the pleaded case is not supported by Loh's inconsistent evidence. It follows that the elements of inducement and reliance fail *in limine*.

80 Appreciating the evidential difficulties, Mr Manjit in his closing submissions advanced and addressed a case of non-disclosure as opposed to active misrepresentation of the fair value of the Shares. The non-disclosure was premised squarely on Gay's positive duty to disclose material information given the fiduciary relationship of the parties and Gay's admission that he did not inform Loh of the value of the Shares before the POA was signed. I shall be discussing this aspect of non-disclosure below under the heading "Fair dealing rule". Suffice it to say that in the context of Loh's pleaded case, the analysis of misrepresentation is about comparing the statement allegedly made with its truth, rather than between the alleged statement and what was not said. In reaching the conclusion that Loh did not prove that Gay did in fact make the statements on which Loh allegedly relied upon, the claim in misrepresentation must fail.

## (2) Fair dealing rule

81 Having failed on misrepresentation, the next question is whether there is a separate viable complaint to rescind the POA founded on non-disclosure of material facts and the absence of informed consent. This is essentially the fair dealing rule which stipulates that a trustee may purchase the beneficial interest from his beneficiary, but the latter may have the sale set aside or rescinded unless the trustee can establish the propriety of the transaction by showing that he had not taken advantage of his position and had made full disclosure of material facts to the beneficiary so that the beneficiary was fully informed, and that the transaction was fair and honest (see *Tito and others v Waddell and others (No 2)* [1977] 1 Ch 106 at 241). As to what are material facts, they comprise information which the trustee has acquired, or of which he has been in possession, in the course of his trusteeship. This includes knowledge of the overall value of the trust and valuations specially obtained by the trustee (see *The Law relating to Actionable Non-Disclosure*, 2<sup>nd</sup> Ed (Butterworths 1990) at para 17.13). So to summarise, when the fair dealing rule applies, the trustee is (i) bound to disclose to his beneficiary material facts before the transaction is entered into, and (ii) must prove that the transaction is a fair one having regard to all the circumstances.

82 Mr Tan submits that it was not Loh's pleaded case that Gay had breached the fair dealing rule and that he is now barred from advancing and addressing the point. It can be gleaned from the pleadings that Gay stood in a fiduciary relationship to Loh. In pleadings, Loh had complained that Gay, in breach of trust withheld from him material information that he would have required to make informed decisions on his investment in the Company. [\[note: 19\]](#) However, in the Further & Better Particulars filed on 26 August 2005 on behalf of Loh, the POA was not on the list of matters identified as requiring disclosure for the beneficiary to make informed decisions.

83 At the forefront of Mr Manjit's submissions is that the breach of fiduciary duty was the equivalent of fraud. The purchase of trust property at \$1.4m was not a fair value and this grossly undervalued transaction goes to the heart of Gay's breach of his duties as a trustee. There was, he said, no full and frank disclosure of all relevant matters bearing on the transaction. Notably fraud here is not to be understood to mean common law deceit. Liability for breach of fiduciary duty is not dependent on proof of deceit or negligence (see *Swindle & others v Harrison and another* [1997] 4 All ER 705 at 732). Once breach of fiduciary duty is established, there is discretion in the court to grant equitable relief. It may set aside or rescind the transaction. Accounts and restitution may be ordered.

84 At the end of the day, the pleading point taken by Mr Tan may not matter much, except possibly as a matter of accurate pleading, since the pleadings on the whole do allow for the argument that Gay, in his capacity as trustee, is as much liable for the consequences of either the failure to disclose or the breach of duty of honesty (or the duty to act in good faith) as well as falling foul of the no conflict rule. This is significant because the fair dealing rule is after all an application of a wider principle that a trustee may not put himself in a position in which his personal interests and his duty

to his beneficiary conflict. In short, on the pleadings as they stand, it is at the very least open to argument that Gay is liable in his capacity as trustee if in that capacity he had procured the POA in circumstances that as a consequence he would not be allowed to benefit from the improper transaction and equity can require him to rescind the transaction and make restitution. The court would want to be, and must be, objectively satisfied that no advantage was taken of the beneficiary, that the trustee made disclosure to him of all material facts (including value) which he needed to know, and that the transaction was a fair one.

85 It is often said that the various obligations of a fiduciary merely reflect different aspects of his core duty of loyalty and fidelity. They are the duty of good faith; an obligation not to make a profit out of his trust, and not to place himself in a position where his duty and his interest may conflict. He must also not act for his own benefit or the benefit of a third person without the informed consent of his principal (see *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18). The rule that a fiduciary is not allowed to enter into transactions in which he had, or could have a personal interest conflicting, or which may possibly conflict with the interests of his principal or beneficiary is universal and inflexible (per Lord Cranworth LC in *Aberdeen Rail Co v Blaikie Brothers* [1843-60] All ER Rep 249 at 252; per Lord Herschell in *Bray v Ford* [1896] AC 44 at 51). As to whether there is a conflict, the test is whether "the reasonable man looking at the facts and circumstances of the particular case would think there was a real sensible possibility of conflict" (per Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46 at 124). So, if a fiduciary puts himself in a position of conflict of interest, the general rule is that he is obliged by his trust to prefer the interest of his beneficiary. It follows that a fiduciary that permits his loyalty to his beneficiary to be fettered by considerations of personal interest arising from the transaction is in breach of duty. Put simply, since the beneficiary is entitled to the single minded loyalty of his fiduciary, a fiduciary cannot act for his own benefit without the informed consent of his beneficiary (see Millet LJ in *Bristol and West Building Society v Mothew* at 18). Consent that is needed to uphold the transaction is predicated upon full and frank disclosure of all material facts in relation to the transaction. In this way, the beneficiary's consent that is required to negate the protection which the no conflict rule provides him is obtained. From an evidential point of view, the fairness of the transaction is objective evidence to assist the court in determining whether informed consent was in fact obtained (see *Snell's Equity*, 31<sup>st</sup> Ed (Sweet & Maxwell, 2005) at paras 7-32 & 7-44). The onus is on the fiduciary to prove affirmatively that he has obtained the beneficiary's consent after making full disclosure of all material facts, and in my view, it is no answer to a charge of non-disclosure that the information affecting the beneficiary's consent was known to him as he had the means to acquire the information and, hence, could have been acquired by the beneficiary. I shall elaborate on this last point later on.

86 This is a case where there was a clear conflict of interest between Gay's personal interests and his duty to Loh in that a reasonable man looking at the facts would think that there was a real sensible possibility of conflict. It is worthwhile reproducing below the relevant extracts of the emails covering this aspect of the evidence.

87 In his email of 11 August 2004, Gay made known to Loh that he could not afford to pay for the Shares based on valuation. Gay was not making a statement that the value of the Shares was par value. He simply said he could not be buying at value. He wrote:

*You asked me about what is the fair value of your shares. I think the answer does not lie entirely in that [...] [It] lies in how much blessing and goodwill you would give me when I leave you today and start on my own alone. I am not really concerned about how much you paid-in when you decided to help me out in 1993 and the value the shares were transacted just a few months ago. What I cannot afford is the value derives (sic) from the valuation of the property such as when my brother Gary did it to me.*

(Emphasis added)

88 In an email dated 12 August 2004, Loh asked:

*It would also be nice if you tell me exactly what I can expect from my investment and your promise of making it a good investment for me and when you will repay the dividends and when I will see some benefits so that I can decide what to do.*

[Emphasis added]

89 Gay had also written that accrued dividends based on Rosemary's record were as follows:[\[note: 20\]](#)

[F]rom Rose's record you have invested x amount and the dividend accrued to date is 100k and the total is y amount.

90 On 15 October 2004, Loh reminded Gay in the following terms:

I think as a shareholder I am entitled to know about my interest and when u said in your email do not try and do what my brother did to me- its is ironical because your brother tried to say [Tai Hoe] was worth less than it was and in fact are u not doing the same to me? After 10 years investing without seeing a cent?

91 The POA was signed on 27 October 2004. I have already set out the text of the POA in [11] above. Under the POA, Gay paid a total sum of \$1.5m to Loh.

92 In my judgment, there is plainly a conflict of interest. Gay did not disclose the value of the Shares by the date of execution of the POA. He admitted to this omission in cross-examination. He took the misguided view that because he could not afford to pay for the Shares based on valuation he was entitled to have a single-minded preference for his own interests over duty and to proceed with the purchase on that footing. I find that Gay intentionally refrained from acquiring and providing material information as to the value of the Shares, and his conduct was such as to attract the application of the fair dealing rule. The application of the rule, as I have stated earlier, does not depend on any finding of dishonesty. Gay's non-disclosure involved a conscious act of disloyalty to make his conduct a breach of fiduciary duty in the sense explained by Millet LJ in *Bristol & West Building Society v Mothew* ([85] *supra*) at 19:

Conduct which is in breach of this duty need not be dishonest but it must be intentional.

Clearly, Gay took over Loh's beneficial interest in circumstances in which there was, in my judgment, no informed consent. Gay did not establish that the purchase was based on the informed consent of Loh.

93 Mr Manjit submits that \$1.4m was not a fair price for the Shares. Gay knew at this time (and I so find) that the Icon apartment was worth \$1m, and it was an asset of the Company which was held on trust by his wife for the benefit of the Company. The Company had nil debts and relatively large cash reserves. Rosemary confirmed that the cash reserves in 2003 were \$843,599. By 2004, the cash reserves were reduced to \$587,941 because of the movement of \$447,722 to Gay's wife for the Icon apartment. Gay was also aware that the hotel was worth \$9.5m in 1999. In 2005, OCBC loaned \$2m to the Company on security of the hotel and the Company's assets. For the purposes of this \$2m

loan, Knight Frank valued the property on 20 April 2005 at \$7.2m. The inference to be drawn from these factors is that in October 2004 before the POA was signed, the Shares were likely to be worth much more than \$1.4m. In cross-examination, Gay conceded that he, personally, did not inform Loh about any of these matters which I find are facts material for Loh to have known before the execution of the transaction, and Gay as trustee was under a positive duty to disclose them to Loh as he wanted to take over the Shares. As stated, the question here is whether Gay made full disclosure to Loh of all the facts known to him to enable Loh to decide whether it was in his interest to sell his beneficial interest to Gay at \$1.4m. The answer must be negative. I also find that the purchase was not at a fair value.

94 Mr Tan's fallback argument is that Gay said that the POA was a compromise settlement between Loh and Gay having regard to the contemporaneous waiver letter that Gay signed to give up all claims against ASP for any severance payments. Gay explained that both the POA and the waiver letter were prepared by Loh and Gay was required to sign the waiver letter before the POA was executed. Loh disputes this.

95 Unfortunately for Gay, the waiver letter is irrelevant to whether he had complied with the fair-dealing rule. First, the waiver letter was *vis-à-vis* Loh in his capacity as representative of ASP and not in his personal capacity. Thus, it could not properly be linked to the sale of Loh's beneficial interest. Gay also failed to establish that Loh was the alter ego of ASP. There is no evidence that Loh was the majority shareholder in ASP much less the controlling figure in ASP. Loh had explained that he is one of six shareholders of ASP. His shareholding, he said was less than 1% of ASP's share capital. Gay himself in an email dated 16 October 2004 recognised that ASP was not owned by Loh alone. He mentioned there were others like "the Wongs" and "Edesa". Second, notwithstanding the parties to the waiver letter and the POA being different, Gay failed to show how signing the waiver letter satisfied the fair dealing rule. It is not enough for Gay to argue that the contemporaneous waiver letter showed that the POA was a compromise on the part of Loh. Gay had to show that Loh was fully aware that this was the case. Finally, and in any event, Gay's own denial of the contents of the waiver letter coupled with his fresh assertion through his Kenyan lawyers for severance pay even after the POA was signed completely undermines his position that the POA and waiver letter were a compromise.

96 A point that was taken in submissions is that Loh knew as he had the means to ascertain the fair value of the Shares from his past involvement in the hotel and the audited accounts of the Company, he was therefore bound by the terms of the POA. [\[note: 21\]](#) Furthermore, Loh himself did not inquire into the value of the Shares before signing the POA. [\[note: 22\]](#) In fact, it was Loh who stipulated it when he drew up the POA and presented it to Gay for signing.

97 The evidence Gay adduces to support his case on Loh's knowledge is as follows. First, Loh made handwritten notes on the proposals regarding redevelopment of the hotel signifying his detailed involvement in the Company. Second, Loh had full access to the Company's accounts and records when he assisted Gay's family in the oppression proceedings involving shareholders of the Company in 1999-2000. Furthermore, Loh had an idea of the value of the Shares as Loh was emailed Rosemary's computation of the net tangible asset ("NTA") and earnings per share ("EPS") of the shares. The NTA of \$1.56 per share was based on the audited accounts for the financial year ending 31 August 1999. There was also a valuation report on the Company prepared by M/s Teo Foong & Wong dated 6 December 2000 which gave the NTA as \$1.41 per share. Third, Gay personally gave the Company's accounts from 1999-2001 to Loh some time in early 2003; and sometime in 2004, he left a copy of the accounts for the years 2002 and 2003 on Loh's table in ASP's Nairobi office. This is borne out by the fact that even as late as August 2004 and October 2004, Loh knew that the hotel was without debt and profitable. He made this remark in his email of 12 August 2004 and 15 October 2004.



Rosemary's testimony is that the hotel was only without debt in 2003. The Company was profitable from 1996. The profits after tax for 1996, 1997, 1998, 1999, 2000, 2001, 2002 and 2003 as stated in Gay's Answers to Interrogatories dated 28 July 2005 were \$5,417, \$130,352, \$132,846, \$173,006, \$205,853, \$374,769, \$439,711 and \$170,675 respectively. The net profit for the financial year ending 31 August 2004 was \$264,617. [note: 23] Therefore, Loh must have seen the accounts of the Company in the light of his two emails in 2004 remarking on Tai Hoe Hotel as "without debt" and "profitable". Finally, both Rosemary and Chong Yuh Ching were instructed to be cooperative, and if needed, to give Loh access to information. Chong Yuh Ching confirmed this in her affidavit of evidence-in-chief, and also in cross-examination. Rosemary in her written testimony also deposed that Loh from time to time asked her about accounting matters relating to the Company.

98 Mr Manjit submits that on the facts the alleged knowledge of Loh is irrelevant to Gay's duty of loyalty which consists of the duty to disclose material facts relating to the transaction. I agree. The purpose of the fair dealing rule is to prevent a fiduciary from abusing his relationship of trust so as to procure an advantageous transaction at the expense of the beneficiary. Consequently, the law imposes on the trustee the onus of affirmatively establishing the propriety and fairness of the transaction. The trustee has to demonstrate that he had fully informed the beneficiary of the material facts bearing on the transaction and the beneficiary thereafter consented to the transaction. It is no answer to say that the beneficiary would have acted in the same way even if the information had been disclosed (see *Swindle v Harrison* ([83] *supra*) at 733; *Johnson v EBS Pensioner Trustees Ltd* [2002] Lloyd's Rep P.N. 309 at [72]). Likewise, the positive duty to disclose is not negated simply because the beneficiary could have made inquiries, or had the means to acquire relevant information. The fact of the matter is that in this case the beneficiary was asking for information on what his investment was worth.

99 As for the dividends declared over the years, Loh's entitlement was calculated by Rosemary based on 1.4m shares and not 1.55m shares as recorded in the Trust Deed. Taking Loh's beneficial interest as amounting to 1.55m shares, his percentage entitlement ought to be 28.18% instead of 27.5% as stated in the POA. Based on 28.18%, the total amount of dividends due to Loh as at the date of the POA was \$111,568.44 and not \$100,000 as stated in the POA. Accordingly, Loh's true entitlement to dividends was not disclosed to him and Gay concedes as much.

100 There is no evidence that the factual "errors" in the POA undervaluing Loh's entitlement were fully intended by the beneficiary, save that Gay insists that Loh was the one who drafted the POA. Even then, that was countered by Loh in cross-examination that the figures were supplied by Gay and it was Gay who pressured Loh to sign the POA. In any case, it was more probable than not that the figure of \$100,000 in the POA was taken from the email stating what was on the records of Rosemary. In the final analysis, even a finding that it was Loh who had drafted the POA would not be determinative of the fair dealing rule.

101 Accepting as I do that Gay breached the fair dealing rule, the proper remedy in equity is to order the POA to be set aside. Gay therefore continues to be the trustee for Loh of the Shares in the Company. I disagree with Mr Tan that *restitutio in integrum* is not possible despite performance of the POA by payment. Moreover, Millet LJ said in *Dunbar Bank plc v Nadeem and another* [1998] 3 All ER 876 at 884:

The remedy of rescission is an equitable remedy. It is well established that it is a condition of relief that the party obtaining rescission should make *restitutio in integrum* or, in modern terminology, counter restitution to the other party. If counter restitution cannot be made the claim to rescission fails: see *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218.



In the circumstances, as a condition of rescission Loh is to hand over the sum of \$1.5m to Gay. However, since he has already been paid \$100,000 as dividends, Gay has to account for the remaining \$11,568.44 (or such sum as may be determined as due to Loh after taking of an account) and this amount may be set off against the \$1.5m paid to Loh.

102 Moreover, as a consequence of the rescission and my earlier finding that Gay had not accounted for the dividends declared in respect of the Shares (see [69] to [73] above), I also order an account of all the dividends received by Gay from the time dividends in respect of the Shares were first declared by the Company in 1999 right up to recent times, and upon taking of an account, Gay is to pay over the dividends due to Loh after deducting all sums received by Loh as dividends.

## **Result**

103 For the reasons stated, I grant the following orders:

- (i) An order declaring that Gay held the Shares on trust for the benefit of Loh;
- (ii) The POA is rescinded. As a condition of rescission, Loh is to return the sum of \$1.5m to Gay. However, Loh is permitted to set off from this money dividends payable to Loh under paragraph (iii) hereof;
- (iii) An account of all the dividends received by Gay from the time dividends in respect of the Shares were first declared by the Company in 1999 right up to recent times and upon taking of an account to pay within 14 days the dividends due to Loh. Credit is to be given for all sums received by Loh as dividends;
- (iv) Interest at the rate of 5.33% per annum on dividends that remain outstanding after expiry of the 14 days stipulated in paragraph (iii) hereof until the date of payment.
- (v) Gay is to pay the costs of this action to be taxed.

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[\[note: 1\]](#)2DB 43

[\[note: 2\]](#)2AB 164

[\[note: 3\]](#)1AB 13

[\[note: 4\]](#)1AB 4

[\[note: 5\]](#)Para 6 of Loh's affidavit of evidence-in-chief

[\[note: 6\]](#)Transcript of Evidence, 24 November 2006 at p7 at line 20 to p 8 line 11.

[\[note: 7\]](#)2DB 46

[\[note: 8\]](#)Transcript of Evidence 8 May 2007 pp 61 to 63

[\[note: 9\]](#)3 AB 186

[\[note: 10\]](#)Transcript of Evidence, 4 May 2007 at 82

[\[note: 11\]](#)2AB 178 & 179

[\[note: 12\]](#)2AB 180

[\[note: 13\]](#)2DB 298.

[\[note: 14\]](#)2AB 41-46 & 58-60

[\[note: 15\]](#)Affidavit evidence-in-chief of Chong Yuh Ching at p31

[\[note: 16\]](#)Plaintiff's Closing Submissions at [18]

[\[note: 17\]](#)Statement of Claim paras 12 & 13; F&BP dated 26 August 2005 at p11 in answer to para 13 of the Statement of Claim

[\[note: 18\]](#)Loh's affidavit of evidence-in-chief paras 20 & 21

[\[note: 19\]](#)Para 10(iv) of Statement of Claim

[\[note: 20\]](#)2AB 149

[\[note: 21\]](#)Defence (Amendment No 4 ) para 29

[\[note: 22\]](#)Defence (Amendment No 4) para 38

[\[note: 23\]](#)3AB 344