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

[2024] SGHC(A) 27

Appellate Division / Civil Appeal No 88 of 2023

Between

(1) Darsan Jitendra Jhaveri
(2) Singapore Star Holdings Pte Ltd
(3) Great Newton Properties Pte Ltd
(4) Capital Glory Investments Pte Ltd
(5) Newton Noble Properties Pte Ltd
(6) Sino Noble Asset Management Pte Ltd
(7) Singapore Star Investments Pte Ltd
(8) Singapore Star Shipping Pte Ltd
(9) Singapore Star Properties Pte Ltd
(10) Sino Ling Tao Resources Pte Ltd
(11) Millers Capital Investments Pte Ltd
(12) Nova Raffles Holdings Pte Ltd

… *Appellants*

And

(1) Lakshmi Anil Salgaocar suing as the Administratrix of the Estate of Anil Vassudeva Salgaocar
(2) Winter Meadow Capital Inc

… *Respondents*

In the matter of Suit No 821 of 2015

Between

(1) Lakshmi Anil Salgaocar suing as the Administratrix of the Estate of Anil Vassudeva Salgaocar

(2) Winter Meadow Capital Inc

… *Plaintiffs*

And

(1) Darsan Jitendra Jhaveri
(2) Jhaveri Jashma Darsan
(3) Pooja Darsan Jhaveri
(4) Singapore Star Holdings Pte Ltd
(5) Great Newton Properties Pte Ltd
(6) Capital Glory Investments Pte Ltd
(7) Newton Noble Properties Pte Ltd
(8) Sino Noble Asset Management Pte Ltd
(9) Singapore Star Investments Pte Ltd
(10) Singapore Star Shipping Pte Ltd
(11) Singapore Star Properties Pte Ltd
(12) Sino Ling Tao Resources Pte Ltd
(13) Millers Capital Investments Pte Ltd
(14) Nova Raffles Holdings Pte Ltd

… *Defendants*

And

Kwan Ka Yu Terence

… *Third Party*

GROUNDS OF DECISION

[Contract — Illegality and public policy — Illegality under international and foreign law]
[Trusts — Breach of trust]
[Trusts — Express trusts]

TABLE OF CONTENTS

Darsan Jitendra Jhaveri and others
v
Lakshmi Anil Salgaocar (suing as the Administratrix of the Estate of Anil Vassudeva Salgaocar) and another

[2024] SGHC(A) 27

Appellate Division of the High Court — Civil Appeal No 88 of 2023
Woo Bih Li JAD, Debbie Ong Siew Ling JAD and See Kee Oon JAD
3, 17 April 2024

16 September 2024

See Kee Oon JAD (delivering the grounds of decision of the court):

Introduction

1 This appeal, AD/CA 88/2023 ("**AD 88**"), was the culmination of a protracted dispute which had not only persisted for over a decade but had also spawned a plethora of related proceedings before the Singapore courts as well as courts elsewhere. The dispute centred on a claim by Mr Anil Vassudeva Salgaocar ("**Mr Salgaocar**") against Mr Darsan Jitendra Jhaveri ("**Mr Darsan**") for breaches of trust. In the court below, the trial judge ("**the Judge**") found in favour of Mr Salgaocar (or, more precisely, Mr Salgaocar's estate, as he passed away not long after the suit below was commenced). Dissatisfied with the Judge's decision, Mr Darsan appealed.

2 We heard AD 88 on 3 April 2024 and dismissed it on 17 April 2024 after considering the parties' submissions. We delivered a brief oral judgment. We now provide the full written grounds of our decision.

Facts

The parties here and below

3 The first plaintiff in HC/S 821/2015 ("**Suit 821**") was Mr Salgaocar. Mr Salgaocar was a highly successful Indian businessman. He was primarily involved in the business of selling and exporting iron ore from the iron mines which he and his family owned in India.[1] This business was conducted principally through Mr Salgaocar's main operating company, Salgaocar Mining Industries Pvt Ltd ("**SMI**").[2]

4 The first defendant in Suit 821 was Mr Darsan. He is an Indian businessman based in Hong Kong.[3] He hailed from a family of gemstone traders and was in the business of dealing in gemstones and polymers.[4] He decided to relocate to Hong Kong in 2000 to expand his business into the Chinese market.[5]

5 Mr Salgaocar commenced his claim in Suit 821 on 11 August 2015 against Mr Darsan on the basis that Mr Darsan was in breach of trust by, among other things, misappropriating the trust assets for his own benefit.[6] According

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1 Joint Record of Appeal ("JRA") Vol III(1) 8.

2 *Lakshmi Anil Salgaocar (suing as the administratrix of the estate of Anil Vassudeva Salgaocar) and another v Darsan Jitendra Jhaveri and others (Kwan Ka Yu Terence, third party)* [2023] SGHC 47 ("HC Judgment") at [6].

3 JRA Vol III(38) 175.

4 JRA Vol III(38) 170, 173.

5 JRA Vol III(38) 175.

6 JRA Vol II(1) 32.

to Mr Salgaocar, this trust ("**the 2003 Trust**") had been created pursuant to an oral agreement which was allegedly entered into in December 2003 between the two men ("**December 2003 Agreement**").[7] The agreement stipulated that Mr Salgaocar would set up special purpose vehicles ("**SPVs**") for the conduct of the iron ore business. These SPVs would be funded by Mr Salgaocar, who would be the sole beneficial owner of all the shares issued in the SPVs and all monies, investments and other assets held by the SPVs. Mr Darsan would be a shareholder and/or director of the SPVs and would hold the shares in the SPVs and any interest in the SPVs' assets on trust for Mr Salgaocar. Mr Darsan would also act in accordance with all instructions from Mr Salgaocar on matters concerning the SPVs. As consideration for this, Mr Salgaocar would pay Mr Darsan US$0.50 for each wet metric ton ("**WMT**") of cargo sold by SPVs incorporated in the British Virgin Islands ("**BVI**").[8]

6 Following the alleged December 2003 Agreement, six SPVs were incorporated in the BVI between 2004 and 2011:[9]

(a) Ling Tao Trading Ltd ("**Ling Tao**");

(b) Sino Ling Tao Resources Ltd ("**Sino Ling Tao (BVI)**");

(c) GBA Minmetals Trading Ltd ("**GBA Minmetals**");

(d) Cheermark Global Ltd ("**Cheermark**");

(e) Joyking Global Ltd ("**Joyking**"); and

(f) Eltina Ltd ("**Eltina**").

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7 JRA Vol II(1) 28.

8 JRA Vol II(2) 7.

9 JRA Vol II(2) 107; HC Judgment at [1], [14].

These BVI-incorporated SPVs ("**BVI SPVs**") were funded by Mr Salgaocar and used to trade in iron ore.[10] Mr Darsan was the sole shareholder, director and bank signatory of Sino Ling Tao (BVI) and GBA Minmetals and was a nominee shareholder, director and bank signatory of Joyking and Cheermark. He was also a bank signatory for Ling Tao.[11] Save for Eltina, however, these SPVs have since been struck off.

7 Another 21 SPVs were incorporated in Singapore from 2005 to 2012.[12] These included the following 12 Singapore-incorporated SPVs ("**Singapore SPVs**"):[13]

(a) Singapore Star Holdings Pte Ltd ("**Singapore Star Holdings**") (formerly known as Sino Noble Holdings Pte Ltd ("**Sino Noble Holdings**"));

(b) Great Newton Properties Pte Ltd ("**Great Newton Properties**");

(c) Capital Glory Investments Pte Ltd ("**Capital Glory**");

(d) Newton Noble Properties Pte Ltd ("**Newton Noble**");

(e) Sino Noble Asset Management Pte Ltd ("**Sino Noble**");

(f) Singapore Star Investments Pte Ltd ("**Singapore Star Investments**");

(g) Singapore Star Shipping Pte Ltd ("**Singapore Star Shipping**");

(h) Singapore Star Properties Pte Ltd;

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10 HC Judgment at [1].

11 JRA Vol II(2) 113–116.

12 JRA Vol II(1) 54.

13 JRA Vol II(2) 100–101.

(i) Sino Ling Tao Resources Pte Ltd ("**Sino Ling Tao (SG)**");

(j) Millers Capital Investments Pte Ltd;

(k) Nova Raffles Holdings Pte Ltd; and

(l) Trustworth Shipping Pte Ltd ("**Trustworth Shipping**").

8 When Mr Salgaocar passed away on 1 January 2016, Suit 821 was continued by his widow, Mdm Lakshmi Anil Salgaocar ("**Mdm Lakshmi**"), in her capacity as the sole administratrix of his estate.

9 On 4 May 2018, Mr Darsan's wife, Mdm Jhaveri Jashma Darsan ("**Mdm Jashma**"), and daughter, Ms Pooja Darsan Jhaveri ("**Ms Pooja**"), as well as 11 of the Singapore SPVs listed above (at [7(a)] to [7(k)]) were joined as defendants in Suit 821 to facilitate the claims which Mr Salgaocar's estate was pursuing against them. Winter Meadow Capital Inc ("**Winter Meadow**"), a BVI-incorporated company, was also joined as the second plaintiff alongside Mdm Lakshmi to allow Winter Meadow to pursue causes of action against Mr Darsan, specifically for an account from Mr Darsan of Winter Meadow's assets and for an order for the delivery up or transfer of the books and records of Winter Meadow.[14] However, the plaintiffs discontinued their claim against Mdm Jashma on 4 March 2019 and did not effect service of process on Ms Pooja.[15]

10 On appeal, Mr Darsan was the first appellant whilst 11 of the Singapore SPVs, in the order listed at [7(a)] to [7(k)] above, were the second to twelfth

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14 See HC/SUM 1400/2018; JRA Vol II(2) 163.

15 HC Judgment at [9].

appellants. Mdm Lakshmi and Winter Meadow were the first and second respondents, respectively.

Background to the dispute

11 Given the fact-centric nature of this appeal, we think it appropriate to set out in some detail the facts leading up to and following the alleged December 2003 Agreement and the parties' dispute. The background facts are largely undisputed.

12 The dispute was closely intertwined with Mr Salgaocar's iron ore business. While Mr Salgaocar's family had sold and exported iron ore primarily to buyers in Japan following the closure of the Suez Canal in 1967, Chinese demand for iron ore started to grow as a result of the large-scale construction of steel plants in China.[16] As such, Mr Salgaocar started marketing iron ore into China in 2000.[17]

13 Following the incorporation of the BVI SPVs pursuant to the alleged December 2003 Agreement, the trade of iron ore into the Chinese market was structured as follows. SMI would sell the iron ore exclusively to five of the BVI SPVs above – *ie*, Ling Tao, Sino Ling Tao (BVI), GBA Minmetals, Cheermark and Joyking – on a "free on board" ("**FOB**") basis.[18] Following this purchase, the relevant BVI SPV would, through Trustworth Shipping, charter or arrange for a vessel to load the iron ore for shipment to China.[19] These SPVs would then on-sell the iron ore on a spot basis to the Chinese market on a "cost and freight"

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16 JRA Vol II(2) 104.

17 JRA Vol II(2) 107.

18 JRA Vol II(2) 108.

19 JRA Vol II(2) 111.

("**CFR**") basis while the vessel was *en route* to China.[20] The last BVI-incorporated SPV, Eltina, purchased iron ore not from SMI but from one of Mr Salgaocar's other companies in Swaziland for further sale to the Chinese market.[21] These transactions were known as the "two-legged contracts". These contracts proved to be hugely profitable and the BVI SPVs obtained large amounts of profits from them.[22] These profits were allegedly used to fund the Singapore SPVs and enabled them to acquire vessels, shipping assets and real estate.[23]

14 According to Mr Salgaocar, Mr Darsan acted as Mr Salgaocar's nominee shareholder and/or director and trustee in respect of the BVI and Singapore SPVs and their assets but was not involved in their day-to-day trading operations.[24] Instead, Mr Salgaocar hired Mr Terence Kwan ("**Mr Kwan**") and Ms Yuk Fang Chiang Mirrica ("**Ms Chiang**") to do work relating to the BVI SPVs' business and oversaw matters relating to the BVI SPVs himself.[25] Mr Darsan, however, alleged that he was the one who had employed Mr Kwan, Ms Chiang and Ms Esther Tam ("**Ms Tam**"), a clerical assistant, to manage the operations of his iron ore trading business.[26]

15 As for the Singapore SPVs, Mr Salgaocar's position was that he had caused various individuals (including Mr Darsan) to hold their shareholding and/or positions in the Singapore SPVs for the benefit of and on trust for

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20 JRA Vol II(2) 112.

21 JRA Vol II(2) 125.

22 JRA Vol II(2) 108.

23 HC Judgment at [19].

24 JRA Vol II(2) 109, 130.

25 JRA Vol II(2) 109–110.

26 JRA Vol III(38) 190.

himself. These individuals included Mr N G Prabhu and Mr Rohit Ramesh Mathrani ("**Mr Rohit**"). Mr Salgaocar claimed that all major decisions regarding the investments and/or asset purchases made by the Singapore SPVs were made by him.[27]

16 In 2007, Mr Salgaocar arranged for Mr Darsan to become a director of and obtain a majority shareholding in Singapore Star Holdings. In 2009, the Singapore SPVs were restructured such that Singapore Star Holdings served as a main holding company.[28] This rendered Mr Darsan the sole or majority shareholder of the Singapore SPVs in name.[29]

17 The Singapore SPVs made several notable investments:

(a) Around 2006 to 2007, Mr Salgaocar decided to develop a block of condominium apartments named "Newton Imperial". He designated Great Newton Properties to be the developer of Newton Imperial. This project took place from January 2007 to April 2011.[30]

(b) Around June 2008, Mr Salgaocar decided to purchase 60 office units in WCEGA Tower. He designated Sino Noble to be the asset holding company.

(c) In January 2007, Mr Salgaocar decided to purchase 24 apartment units in a condominium development called "The Waterford Residence". Capital Glory and Newton Noble were designated as the

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27 JRA Vol II(2) 130.

28 JRA Vol II(1) 65–66.

29 JRA Vol III(38) 208–209.

30 JRA Vol II(2) 131.

asset holding companies that acted as the registered owners of these apartments.

(d) Around the same time, Mr Salgaocar decided to purchase four apartment units in a condominium development, Residences@Evelyn. He used four Singapore SPVs as the asset holdings companies for these apartments: Albana Investments Pte Ltd, Cargills Investments Pte Ltd, Singapore Star Investments and Sino Noble.

(e) From 2006 to June 2012, Sino Ling Tao (SG) purchased various vessels and machinery. Mr Salgaocar was allegedly personally involved in the decision-making regarding these transactions.

18 Mr Salgaocar claimed that between 2011 and 2014, Mr Darsan had, among other things:

(a) arranged for the BVI SPVs to pay US$270,372,938 to himself or entities controlled by or connected to him;[31]

(b) prevented Mr Salgaocar from dealing with the trust assets, which included the trading profits of the SPVs;[32]

(c) failed to comply with Mr Salgaocar's instructions in relation to the trust assets and refused to transfer them to Mr Salgaocar or to provide him with a full and complete account of the assets;[33]

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31 HC Judgment at [19].

32 JRA Vol II(2) 140.

33 JRA Vol II(2) 141.

(d) made unauthorised transfers of units in Newton Imperial, Residences@Evelyn, WCEGA Tower and The Waterford Residence to various BVI-incorporated companies including Million Dragon Wealth Ltd ("**Million Dragon**"), whose sole shareholder was Ms Pooja;

(e) procured the transfer of one Mr Madanmohan Rajendrarao Narsapur's ("**Mr Narsapur**") shareholding in GBA Minmetals and Eltina to himself without the knowledge, approval or consent of Mr Salgaocar;[34] and

(f) altered the accounting records of Singapore Star Holdings and its subsidiaries to reflect that US$350m was owed by Singapore Star Holdings and its subsidiaries to Ultra Best Limited ("**Ultra Best**"), a company owned and controlled by Mr Darsan.[35]

19 Mr Salgaocar began demanding the transfer of at least some of the trust assets back to him in August 2012.[36] One such asset was the shares in Trustworth Shipping. Mr Salgaocar demanded, around late 2012 and/or early 2013, that Mr Darsan arrange for the transfer of all the shares in Trustworth Shipping to Mr Salgaocar so that he could properly oversee the settlement of two ongoing disputes involving the company.[37] Mr Darsan agreed. On 19 March 2013, Singapore Star Shipping transferred all of its shareholding in Trustworth Shipping to Mr Salgaocar for a nominal consideration of US$1. Trustworth Shipping settled one of the two claims in May 2013; the other claim was, apparently, still being contested in arbitration.

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34 JRA Vol II(2) 143.

35 JRA Vol II(2) 143.

36 JRA Vol II(1) 74.

37 SOC at para 148.

20 Following the transfer of the shares in Trustworth Shipping, Mr Darsan refused to transfer the remaining trust assets to Mr Salgaocar. As such, in April 2014, Mr Salgaocar instructed Haridass Ho & Partners ("**Haridass Ho**"), his Singapore lawyers at the time, to act for him in relation to the recovery of the trust assets. Haridass Ho then instructed Holman Fenwick Willan Hong Kong ("**HFW**") to issue a letter of demand to Mr Darsan. This letter was sent on 14 May 2014 ("**HFW Letter**") and stated that:

(a) Mr Darsan held the BVI SPVs, Mr Salgaocar's trading profits and the investments and assets held by the Singapore SPVs on trust for Mr Salgaocar;

(b) Mr Darsan had caused various units in Newton Imperial to be transferred to his wife and himself; and

(c) Mr Darsan had failed to prudently manage the assets owned by the Singapore SPVs.

The HFW Letter also required Mr Darsan to confirm that he would transfer the trust assets back to Mr Salgaocar and give a full account of the trading profits received by him by 28 May 2014, failing which Mr Salgaocar would commence proceedings against Mr Darsan.[38]

21 In response to the HFW Letter, Mr Darsan had, according to Mr Salgaocar, caused the transfer of the shares in Winter Meadow to Mr Salgaocar for the nominal consideration of US$2 on 8 July 2014.[39] On the same day, Ms Pooja transferred her shareholding in Million Dragon to

[38] Joint Appellants' Core Bundle ("JACB") Vol II dated 3 November 2023 at p 26.

[39] JRA Vol II(1) 78.

Mr Salgaocar for a nominal consideration of US$1.[40] Mr Darsan had also signed agreements on behalf of Sino Ling Tao (SG) to assign to Winter Meadow payments made by Sino Ling Tao (SG) to third parties[41] and allegedly arranged for various documents and/or records of Trustworth Shipping to be delivered to the offices of Haridass Ho in 2014.[42]

22 On a separate but pertinent note (see also [27] below), Mr Salgaocar lodged caveats over units in Newton Imperial, WCEGA Tower and The Waterford Residence in July 2015.[43] Mr Darsan applied for these caveats to be removed in Originating Summonses Nos 727 and 945 of 2015 ("**OS 727 and OS 945**") in August and October 2015, respectively.

23 As Mr Darsan had allegedly failed to account for the trust assets and to return these assets to Mr Salgaocar, Mr Salgaocar commenced Suit 821.

Procedural history leading up to the decision below

24 After the suit was commenced on 11 August 2015, Mr Darsan filed his defence on 6 October 2015 and applied in Summons No 6205 of 2015 ("**SUM 6205**") on 28 December 2015 to strike out the Statement of Claim ("**SOC**") and for the suit to be dismissed on the basis that the SOC revealed that Mr Salgaocar's export arrangements to China through the BVI SPVs breached Indian law.[44]

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40 JRA Vol II(1) 80.

41 JRA Vol II(1) 78.

42 JRA Vol II(1) 80.

43 HC Judgment at [25].

44 HC Judgment at [22].

25 As mentioned earlier at [8], Mr Salgaocar passed away on 1 January 2016. Following his passing, a dispute arose in the Family Justice Courts between Mdm Lakshmi and Ms Chandana Anil Salgaocar, Mr Salgaocar's daughter, over the appointment of the administratrix of his estate. Mdm Lakshmi's solicitors subsequently notified the court, on 15 May 2017, that a settlement of the issue on appointment was expected and that a single administratrix would administer the estate's affairs, including the conduct of the suit below.

26 On 16 May 2017, Mr Darsan commenced proceedings against Mr Salgaocar's estate and Million Dragon in the BVI ("**BVI 83**"). Mr Darsan claimed that he was the beneficial owner of the sole share in Million Dragon, which was transferred by Ms Pooja to Mr Salgaocar in July 2014 (see [21] above). Mr Darsan alleged that the transfer was made in return for Mr Salgaocar agreeing to transfer to Mr Darsan monies that were paid for the purchase of units in Newton Imperial by Million Dragon. As Mr Salgaocar failed to transfer the monies, Mr Darsan asserted that he was the beneficial owner of the share. About three weeks later, on 7 June 2017, Mdm Lakshmi, in her capacity as a beneficiary of the estate, filed Originating Summons No 627 of 2017 ("**OS 627**") in the High Court for an anti-suit injunction to restrain Mr Darsan from proceeding in BVI 83. The application was not granted by the High Court in April 2018 but was later allowed by the Court of Appeal in July 2019. Mdm Lakshmi obtained the issue of the letters of administration (granted on 8 August 2017) of Mr Salgaocar's estate on 25 September 2017.[45]

27 On 16 October 2017, the applications by Mr Darsan for the removal of the caveats – OS 727 and OS 945 – were allowed by the High Court on the basis

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45 HC Judgment at [24].

that the 2003 Trust related to the shares in the BVI SPVs and so Mr Salgaocar was not entitled to pierce their corporate veils and reach into the assets held by these SPVs.[46] The appeal by Mr Salgaocar's estate was subsequently dismissed by the Court of Appeal. It was for this reason that Mdm Lakshmi and Winter Meadow did not make any claim to the assets of the SPVs in Suit 821 but instead limited their claim to the *shares* of the subsisting BVI SPVs and Singapore SPVs subject to the 2003 Trust.[47]

28 On 15 November 2017, Mr Darsan applied in Originating Summons No 1293 of 2017 ("**OS 1293**") for a declaration that the suit below had been automatically discontinued pursuant to O 21 r 2(6) of the Rules of Court (2014 Rev Ed) on the basis that no party to the action had taken a step as reflected in the court records for over a year. This was resisted by Mdm Lakshmi, who applied in Summons 5581 of 2017 in OS 1293 for a declaration that the suit below was not deemed discontinued or alternatively that the suit be reinstated. On 22 February 2018, the High Court determined that the suit had not been automatically discontinued. Separately, Mr Darsan was granted permission to withdraw SUM 6205 (the striking out application) on 25 May 2018.

29 On 2 October 2020, a third-party notice was issued to Mr Kwan by the defendants in Suit 821 (*ie*, Mr Darsan, Mdm Jashma, Ms Pooja and the Singapore SPVs listed at [7(a)] to [7(k)] above).[48] In essence, the defendants were claiming against Mr Kwan for an indemnity or a contribution in the event that Mr Darsan was found liable to Mr Salgaocar's estate in respect of the misappropriation claim in relation to Eltina ("**the Third Party Action**").

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46 HC Judgment at [25].

47 HC Judgment at [30].

48 JRA Vol II(4) 255.

30 Suit 821 proceeded to trial before the Judge on 20 April 2021. On 28 February 2023, the Judge delivered his judgment. He found in favour of Mdm Lakshmi in *Lakshmi Anil Salgaocar (suing as the administratrix of the estate of Anil Vassudeva Salgaocar) and another v Darsan Jitendra Jhaveri and others (Kwan Ka Yu Terence, third party)* [2023] SGHC 47 ("**the Judgment**"). The Judge dismissed the Third Party Action as he found that the plaintiffs in Suit 821 had no claim against Mr Darsan for the sums that were the subject of indemnity and contribution sought by Mr Darsan in the Third Party Action.[49] Winter Meadow's claim was also dismissed as it was unclear what cause of action it was relying on for the reliefs it sought.[50] We elaborate on the key points of the Judgment below (at [47]–[50]). On 18 July 2023, the Judge delivered another judgment in relation to costs ("**the Costs Judgment**"), where he ordered, among other things, costs to be awarded on an indemnity basis and for Mr Darsan to be personally liable for the estate and Winter Meadow's costs and disbursements.[51]

Procedural history following the decision below

31 On 5 June 2023, the respondents filed HC/SUM 1654/2023 ("**SUM 1654**"), an application for the following orders:

(a) Mr Darsan shall, within seven days, execute all documents necessary for the purposes of transferring the shares in the SPVs pursuant to and in compliance with the Judge's judgment; and

(b) in default of Mr Darsan doing so, the Registrar of the Supreme Court shall be empowered to do so on behalf of Mr Darsan.

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49 HC Judgment at [4].

50 HC Judgment at [257].

51 JRA Vol I 233–235 (Costs Judgment at [9]–[13]).

32 The appellants, on the other hand, filed HC/SUM 1897/2023 ("**SUM 1897**") on 26 June 2023, which was an application for a stay of execution of the Judge's orders in Suit 821.

33 They then proceeded to file two appeals against the Judgment on 14 August 2023. The first appeal was AD 88 which pertained to the Judge's decision on the claims of Mr Salgaocar's estate against Mr Darsan and the other defendants in Suit 821, whilst the second – AD/CA 89/2023 ("**AD 89**") – pertained to the Judge's decision on the Third Party Action between Mr Darsan and Mr Kwan. AD 89 was subsequently withdrawn by Mr Darsan on 23 February 2024.

34 On 13 September 2023, Hoo Sheau Peng J dismissed SUM 1897 and allowed SUM 1654. She permitted Mr Darsan 21 days instead of seven days to comply with the Judge's orders.

35 In spite of Hoo J's decision on SUM 1897, the appellants filed AD/SUM 41/2023 ("**SUM 41**"), an application for a stay of the Judge's orders on 5 October 2023. SUM 41 was dismissed by a two-member *coram* of the Appellate Division of the High Court, comprising Debbie Ong Siew Ling JAD and See Kee Oon JAD, on 17 January 2024 as they did not agree that complying with the order would render Mr Darsan in breach of certain tax notices issued to him from the Indian authorities.

36 On 30 October 2023, the appellants filed AD/SUM 46/2023 ("**SUM 46**"), an application for permission for the appellants to adduce fresh evidence in AD 88. This evidence included tax notices and a seizure order which had been issued by the Indian tax authorities against the beneficiaries of Mr Salgaocar's estate. SUM 46 was dismissed by Ong JAD and See JAD on

17 January 2024 on the basis that the fresh evidence did not meet the requirement for relevance under the modified *Ladd v Marshall* [1954] 1 WLR 1489 test. On 24 January 2024, the appellants requested for SUM 46 to be reheard by the full *coram* of the Appellate Division pursuant to s 41(8) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed).

37 On 4 November 2023, Mr Darsan filed Writ Petition (Civil) No. 14567 of 2023 ("**Writ 14567**") in the High Court of Delhi against (a) the Union of India, through the Ministry of Finance, (b) the Central Board of Direct Taxes, through its Chairman, (c) the Commissioner of Income Tax, through the Assistant Director of Income Tax, (d) Mr Salgaocar's estate, and (e) the Union of India, through the Ministry of External Affairs. In Writ 14567, Mr Darsan sought the following prayers:

> (a) that the court pass appropriate directions *qua* the subject monies/shares mentioned in the Garnishee Notice till there is final adjudication of the dispute between Mr Darsan and Mr Salgaocar's estate.
>
> (b) that the court direct the relevant authorities to intervene in the proceedings pending before the Singapore High Court between Mr Darsan and Mr Salgaocar's estate;
>
> (c) that the court direct Mr Salgaocar's estate not to proceed with the execution proceedings before the Singapore Court in view of the present proceedings ("**Prayer (iii)**");
>
> (d) that the court declare Section 32(17)(a) of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015 (India) ("**the BMA**") to be arbitrary and unconstitutional; and

(e) that the court pass any other orders or such further orders as the court may deem fit and proper in the facts and circumstances.

38 In response, Mr Salgaocar's estate filed HC/OA 1197/2023 ("**OA 1197**") in Singapore on 28 November 2023. This was an application for an order that Mr Darsan be permanently restrained from taking any steps in pursuit of Prayer (iii) and any other variation of it or any reliefs which have a similar or like effect. The estate also filed HC/SUM 3643/2023 ("**SUM 3643**"), an application for an order that, pending the final disposal of OA 1197, including any appeals, Mr Darsan be restrained from taking any steps in the pursuit of Prayer (iii).

39 SUM 3643 was heard on 28 November 2023 by Goh Yihan J. Goh J allowed SUM 3643 and ordered that pending the final disposal of OA 1197, including any appeals, Mr Darsan be restrained from pursuing or taking any steps in the pursuit of Prayer (iii) and any other variation of it or any reliefs which have similar or like effect. He also found that Mr Darsan's commencement of Writ 14567 was an attempt to circumvent the Singapore court's ruling in SUM 1897 and SUM 41.

40 On the same day (*ie*, 28 November 2023), a hearing in relation to Writ 14567 was conducted in the Delhi High Court. On 30 November 2023, the Delhi High Court's orders were made available on its website in the form of a document. According to this document, the Delhi High Court had ordered that "status quo qua subject monies/shares be maintained by the parties" pending a hearing in January 2024 where issues of the Delhi High Court's jurisdiction will be argued. In addition, para 10 of the document stated: "It is further submitted an anti suit injunction has been filed at the Singapore High Court, hearing of which is to take place today at about 1:00 PM. The learned counsel for

respondent no. 4 [*ie*, Mr Salgaocar's estate] is directed not to proceed with such matter till further orders".

41 Following Goh J's decision in SUM 3643, Mr Darsan applied to amend Prayer (iii) to state the following: "Direct [Mr Salgaocar's estate] to hand over immediately to [the Commissioner of Income Tax] any assets (in any form whatsoever) obtained by her pursuant to the execution proceedings before the Singapore Court in view of the present proceedings."

42 On 5 January 2024, the respondents filed AD/SUM 2/2024 ("**SUM 2**"), an application for permission to adduce further evidence in this appeal. As counsel for the respondents clarified at a case management conference on 31 January 2024, the relevance of the further evidence was solely with respect to the application of the *Hadkinson* principle (which originates from the case of *Hadkinson v Hadkinson* [1952] P. 285) and *not* with respect to the merits of the appeal. As such, any overlap between the evidence sought to be adduced by way of SUM 2 and SUM 46 was inconsequential.

43 This was quickly followed by the filing of AD/SUM 5/2024 ("**SUM 5**") by the appellants on 2 February 2024. This application sought to amend SUM 46 to seek the court's permission to adduce another piece of evidence, namely an affidavit filed by the Indian tax authorities in Writ 14567, in the present appeal. As mentioned at [36] above, this application was made in conjunction with the appellants' request for SUM 46 to be reheard by the full *coram* of the AD.

44 On 21 February 2024, the respondents filed AD/SUM 12/2024 ("**SUM 12**") for an extension of time to be granted for the filing of SUM 12 and for the appellants' notice of appeal to be struck out. The respondents then filed

AD/SUM 16/2024 ("**SUM 16**") on 20 March 2024 for permission to adduce further evidence for the purpose of SUM 12 and the application of the *Hadkinson* principle.

45 On 3 April 2024, we made no order on SUMs 2 and 16 and dismissed SUM 12. We issued the grounds of our decision in *Darsan Jitendra Jhaveri and others v Lakshmi Anil Salgaocar (suing as the administratrix of the estate of Anil Vassudeva Salgaocar) and another* [2024] SGHC(A) 20 on 25 June 2024. Our decision was made on the basis that (a) no permission was required to adduce further evidence for the purpose of persuading the court that an appeal should not be heard and (b) there were no good reasons to grant an extension of time for the filing of SUM 12. In any event, we were not persuaded that Mr Darsan's conduct justified a striking out of the appeal or a refusal of the court to hear the appeal based on the *Hadkinson* principle. We also denied the appellants' request for SUM 46 to be reheard, with SUM 5 dismissed accordingly. We issued the grounds of our decision on 25 June 2024 in *Darsan Jitendra Jhaveri and others v Lakshmi Anil Salgaocar (suing as the administratrix of the estate of Anil Vassudeva Salgaocar) and another* [2024] SGHC(A) 19.

46 Besides giving our decision on the numerous interlocutory applications above on 3 April 2024, we also heard parties in relation to AD 88. We dismissed the appeal two weeks later on 17 April 2024 by way of an oral judgment.

Decision below

47 For context, we briefly summarise the key points of the Judgment.

48 First, the Judge found that the December 2003 Agreement must have existed for the following three reasons:

(a) Mr Salgaocar's management of the BVI and Singapore SPVs suggested that he regarded the SPVs as his own, in contrast to Mr Darsan's lack of involvement with their operations and affairs;

(b) Mr Darsan's defence was implausible; and

(c) the events from around 2014, when Mr Salgaocar formally commenced claims for the trust assets, were indicative of the existence of the December 2003 Agreement.

This agreement then gave rise to the 2003 Trust, which extended to the shares in the BVI and Singapore SPVs.

49 Second, the Judge held that Mr Darsan had breached the 2003 Trust by (a) misappropriating the monies held on trust, (b) refusing to take instructions from Mr Salgaocar and preventing him from dealing with the trust assets, (c) misappropriating units in Newton Imperial, (d) wrongfully disposing of other properties, (e) procuring the transfer of shares in GBA Minmetals and Eltina to himself, (f) wrongfully altering the accounting records of Singapore Star Holdings, and (g) misappropriating assets held by Sino Ling Tao (SG). As such, the Judge granted, among other things, a declaration that Mr Darsan and the Singapore SPVs held the trust assets on trust for Mr Salgaocar and that they were to transfer ownership of the trust assets to Mr Salgaocar's estate.[52]

50 Third, the Judge also found that the December 2003 Agreement was not illegal under Indian law, specifically under the Prohibition of Benami Property Transactions Act 1988 (India) ("**the Benami Act**"), the BMA, the Prevention of Money Laundering Act 2002 (India) ("**the PMLA**"), the Income Tax Act

[52] HC Judgment at [224].

1961 (India) ("**the Income Tax Act**"), the Customs Act 1962 (India) ("**the Customs Act**") and the Foreign Exchange Management Act 1999 (India) ("**the FEMA**"). This finding rendered the question of whether the 2003 Trust was rendered unenforceable by reason of foreign illegality moot.

Parties' cases on appeal

51 The appellants appealed against the whole of the Judge's decision save for the Judge's dismissal of Winter Meadow's claim against Mr Darsan and the Judge's finding that certain communications between Mr Darsan, Mr Ajaib Haridass ("**Mr Haridass**") (Mr Salgaocar's lawyer from Haridass Ho), Mr Salgaocar and other individuals in June and July 2014 were conducted on a "without prejudice" basis.

Appellants' case

52 The following points were raised by the appellants.

53 First, the Judge erred in finding that the respondents had proven the existence of the December 2003 Agreement. To this end, the appellants submitted that the Judge had approached the matter as a "binary question",[53] and found that the respondents had proven their case in Suit 821 simply because he had rejected Mr Darsan's defence and counterclaim. Such an approach was wrong in law.[54] The Judge had also failed to consider the evidence which contradicted the existence of this agreement, such as Mr Salgaocar's conduct

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53 Appellants' Case at para 53.

54 Appellants' Case at para 56.

after the alleged breaches of trust,[55] the management and funding of the SPVs by Mr Darsan,[56] and the contemporaneous documentary evidence.[57]

54 Second, the alleged December 2003 Agreement was void/unenforceable for illegality. This agreement, if it existed, violated the Customs Act, the BMA, the PMLA, the Benami Act, the Income Tax Act and the FEMA.[58] This meant that the agreement was unenforceable pursuant to the principles set out in *Foster v Driscoll and others* [1929] 1 KB 470 ("***Foster v Driscoll***") and *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287 ("***Ralli Brothers***").[59]

55 Third, the 2003 Trust failed for lack of certainty.[60]

56 Fourth, the Judge erred in finding that Mr Darsan had breached the alleged December 2003 Agreement.[61] The Judge's finding was against the weight of the evidence. The Judge also failed to consider that Mr Salgaocar might have acquiesced to those breaches of trust.[62]

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55 Appellants' Case at paras 63–75.

56 Appellants' Case at paras 76–99.

57 Appellants' Case at paras 103–112.

58 Appellants' Case at para 113.

59 Appellants' Case at para 144.

60 Appellants' Case at para 156.

61 Appellants' Case at para 162.

62 Appellants' Case at paras 168–176.

57 Fifth, there was no basis for an account on a wilful default basis. There was nothing to suggest that Mr Darsan had committed other breaches of trust which were not yet known to the respondents or to the court.[63]

58 Sixth, the Judge erred in awarding costs on an indemnity basis. There was no improper purpose behind the assertions in Mr Darsan's defence or counterclaim.[64]

Respondents' case

59 In response, the respondents took the following positions.

60 First, the Judge correctly found that the December 2003 Agreement existed and that the 2003 Trust arose pursuant to this agreement. The respondents argued that the Judge did not err in finding for the respondents as the pleadings made it clear that the Judge could only make his finding based on one of two possible versions of facts.[65] In any case, the Judge arrived at his findings after a "very careful and detailed analysis of the facts and evidence".[66]

61 Second, the 2003 Trust was enforceable. There was no basis for the appellants to criticise the Judge's finding that the December 2003 Agreement did not breach the relevant Indian laws. In any event, the principles in *Foster v Driscoll* and *Ralli Brothers* did not render the 2003 Trust unenforceable as they extend only to claims for breach of contract.[67]

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63 Appellants' Case at paras 179–180.

64 Appellants' Case at para 184.

65 Respondents' Case at para 23.

66 Respondents' Case at para 28.

67 Respondents' Case at para 153.

62 Third, the 2003 Trust was valid. The appellants' arguments that the 2003 Trust was void for uncertainty were baseless and unsupported by the evidence.[68]

63 Fourth, the Judge was correct in finding that Mr Darsan had breached the December 2003 Agreement. Not only did Mr Darsan admit to arranging payments from the BVI SPVs to be made to bank accounts belonging to him or persons or entities controlled by or connected to him,[69] the fact that he had transferred six Newton Imperial units to himself and disposed of various properties was undisputed.[70] The appellants' claim that Mr Salgaocar had "acquiesced" to the breaches of trust was also not pleaded by the appellants and was not based on any evidence.[71]

64 Fifth, the Judge correctly ordered an account on a wilful default basis.[72]

65 Sixth, the Judge correctly awarded costs on an indemnity basis. Indemnity costs are justified as long as a party's conduct was, among other things, clearly without basis. The Judge was correct in finding that many aspects of Mr Darsan's defence were entirely unsustainable[73] and that Mr Darsan had set out to undermine the court's processes.[74]

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68 Respondents' Case at paras 97, 100.

69 Respondents' Case at para 169.

70 Respondents' Case at para 171.

71 Respondents' Case at para 175.

72 Respondents' Case at para 178.

73 Respondents' Case at para 180(a).

74 Respondents' Case at para 180(b).

Issues to be determined

66 Having regard to the parties' submissions above, the following issues arose for our determination:

(a) whether the parties entered into the December 2003 Agreement giving rise to the 2003 Trust;

(b) whether the 2003 Agreement was in breach of Indian laws and whether the 2003 Trust was thus void or unenforceable;

(c) whether the 2003 Trust failed for lack of certainty;

(d) whether Mr Darsan breached the 2003 Trust;

(e) whether an account should have been granted on a wilful default basis; and

(f) whether the costs of the suit below should have been awarded on an indemnity basis.

Issue 1: Whether Mr Darsan and Mr Salgaocar entered into the December 2003 Agreement which gave rise to the 2003 Trust

67 The issue of whether Mr Darsan and Mr Salgaocar had in fact entered into the alleged December 2003 Agreement was a key plank of the appellants' arguments on appeal. If we agreed with the appellants that the Judge had erred in finding that the December 2003 Agreement existed, it would follow that there was no trust in favour of Mr Salgaocar and all of the Judge's other findings against the appellants in relation to the breaches of the 2003 Trust could not stand. Upon careful consideration of the parties' submissions and the evidence before us, however, we were not satisfied that the Judge's findings were plainly wrong or against the weight of the evidence. We now deal with each of the appellants' main contentions in turn.

Whether the Judge had wrongly applied a "binary approach" or otherwise wrongly applied the applicable standard of proof

68 The appellants argued that the Judge had wrongly applied a "binary approach" in finding for the respondents. In other words, the Judge had concluded that the respondents' case had been made out simply because he had rejected Mr Darsan's defence and counterclaim.[75] Such an approach was clearly wrong in law: *Suying Design v Ng Kian Huan Edmund and other appeals* [2020] 2 SLR 221 at [94]. The burden on the respondents to prove their claim on a balance of probabilities could not have been met simply because the respondents showed that their case was a "better explanation" than that put forth by Mr Darsan.[76]

69 The appellants then pointed out that the Judge had failed to (a) consider Mr Darsan's explanations as to why Mr Salgaocar wanted to involve him in the iron ore business, and (b) take into account the lack of evidence behind the respondents' claim that Mr Salgaocar had wholly funded the SPVs. This indicated that the requisite burden of proof was *not* met on the evidence. Accordingly, the logical inference to be drawn was that the Judge had indeed engaged in the flawed "binary approach".

70 The respondents argued that the court is not bound to choose between the parties' competing version of events and is free to find that neither version has been proved.[77] However, they also argued that a court had to come to a view on the pleadings and the facts. The respondents argued that the pleadings only allowed for two possible versions of facts – either Mr Darsan or Mr Salgaocar

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75 Appellants' Case at para 53.

76 Appellants' Case at para 57.

77 Respondents' Case at para 25.

owned the SPVs and assets as pleaded in the SOC. Furthermore, the Court of Appeal had recognised the binary nature of the present dispute in *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [68], which was the Court of Appeal's decision allowing Mdm Lakshmi's application for an anti-suit injunction to restrain Mr Darsan from proceeding with BVI 83 (see [26] above). On the facts, the Judge was fully cognisant of and applied the applicable standard of proof, arriving at his findings only after a careful and detailed analysis of the facts and evidence.

71 We did not find the respondents' argument on the binary nature of the dispute persuasive. The view expressed in the decision they relied on was in respect of only one particular factual dispute and not the entire dispute between the parties. As a general rule, even where the pleadings mention only two opposing narratives, this does not mean that the court must inexorably find that either narrative has been proved: see *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [35] and *Suying Design Pte Ltd v Ng Kian Huan Edmund and other appeals* [2020] 2 SLR 221 at [94]. A claimant only discharges his burden of proof if the court believes his case to be proved and not simply because the court disbelieves the other side's version of events unless clearly there is no other possible version.

72 In any event, it was clear to us that the Judge did not find that the December 2003 Agreement existed *simply because* he had rejected Mr Darsan's defence and counterclaim. Quite apart from disbelieving Mr Darsan's defence and finding it implausible,[78] the Judge had carefully considered the evidence for the respondents pertaining to the management and operations of the BVI SPVs

[78] HC Judgment at [84]–[129].

as well as the Singapore SPVs. For example, he found that the documentary evidence as well as the evidence of Mr Kwan, Mr Cheong Hock Wee ("**Mr Cheong**"), who was the general manager of Sino Ling Tao (SG) and Singapore Star Shipping from 2007 to 2010, and Ms Tan Ai Kheng ("**Ms Tan**"), a real estate agent, supported the respondents' position that all significant decisions concerning the trading of iron ore by the BVI SPVs were made by Mr Salgaocar or were at least made with his approval.[79]

73 The Judge also examined the evidence pertaining to the management of three of the Singapore SPVs – Trustworth Shipping, Sino Ling Tao (SG) and Singapore Star Shipping – and found that they were under Mr Salgaocar's control.[80] At the same time, the Judge observed that Mr Darsan had adduced "no evidence" that he was involved in the operations of Sino Ling Tao (SG) and Singapore Star Shipping. The Judge (at [40] and [70] of the Judgment) had also expressly considered and rejected Mr Darsan's "cogent explanation" as to why Mr Salgaocar had allegedly wanted to involve him in the iron ore business.

74 Importantly, it was Mr Darsan's position that Mr Salgaocar required his assistance in the trading of iron ore with the Chinese market but the Judge found that there was no evidence that, prior to 2004, Mr Darsan had any iron ore trading experience, let alone in relation to the Chinese market (see [95] of the Judgment).

75 Finally, the Judge *had*, contrary to the appellants' contentions, considered the issue of funding in the Judgment. For example, he found that Mr Darsan was unable to provide any evidence showing that he had provided

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79 HC Judgment at [50].

80 HC Judgment at [63]–[71].

the capital for Trustworth Shipping when it was first incorporated.[81] We add that it is inconsequential that the Judge made no reference to the evidence of the respondents' accounting expert, Mr Sim Guan Seng ("**Mr Sim**"), in this regard. This is because Mr Sim's evidence would not, in any event, have assisted the appellants as he stated that the SPVs were owned and controlled by Mr Salgaocar through trustees and nominees and that the profits were transferred to at least some of the Singapore SPVs.[82]

76 It was therefore clear to us that the Judge had properly weighed the two accounts of events which were put forth by the parties at trial and carefully explained why he accepted the respondents' version as being the more credible version on the totality of the evidence before him. There was accordingly no merit to the contention that the Judge had engaged in a "binary approach" or had otherwise wrongly applied the burden of proof.

Whether Mr Salgaocar's conduct following the alleged breaches of trust showed that the 2003 Trust did not exist

77 The appellants argued that the Judge failed to consider Mr Salgaocar's "complete inaction" following the alleged breaches of trust from 2011 to 2012.[83] According to the respondents' pleaded case, Mr Darsan had misappropriated monies from the BVI SPVs since 2011 and Mr Salgaocar had been demanding for the return of the SPVs and the trust assets from Mr Darsan since August 2012.[84] However, not only was there no documentary evidence of any such demand by Mr Salgaocar, Mr Salgaocar did "absolutely nothing" to obtain the

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81 HC Judgment at [107].

82 JRA Vol III(17) 185, 194.

83 Appellants' Case at para 73.

84 Appellants' Case at para 64.

return of the SPVs and assets which were allegedly stolen from him.[85] For example, he did not take steps to remove Mr Darsan as bank signatory of the SPVs or to prevent Mr Darsan from accessing the SPVs' offices or documents.[86] He remained inactive in July 2012 (when Mr Darsan's misconduct allegedly began)[87] and even in August 2013 (when Mr Kwan allegedly told Mr Salgaocar of Mr Darsan's misconduct).[88]

78 According to the appellants, Mr Salgaocar's inaction was inexplicable in the light of the fact that Mr Salgaocar would have been aware of Mr Darsan's misconduct from an early stage. Mr Salgaocar was described as a micro-manager who was involved in the day-to-day running of the SPVs and was regularly updated on the detailed financials of the SPVs. Each alleged misappropriation also involved substantial sums of money. It was inconceivable that Mr Kwan and Ms Chiang only discovered the alleged misappropriations more than two years after they occurred, given that Mr Kwan was reporting the cash flow positions of the BVI SPVs to Mr Salgaocar on a daily basis and Mr Salgaocar regularly obtained updated ledgers – which were primarily in relation to the BVI SPVs ("**the Ledgers**") – from Ms Chiang.[89]

79 On the contrary, Mr Haridass and Mr Kwan testified that Mr Darsan and Mr Salgaocar remained on good terms in 2012 and 2013.[90] It also could not be said that Mr Salgaocar was prevented from dealing with the SPVs as Mr Vivek Khabya ("**Mr Vivek**"), who shared a "very close professional and personal

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85 Appellants' Case at para 65.

86 Appellants' Case at para 65.

87 Appellants' Case at para 64.

88 Appellants' Case at para 71; Appellants' Reply at paras 19–20.

89 Appellants' Case at para 71.

90 Appellants' Case at para 66(a).

relationship" with Mr Salgaocar, was appointed as the director of several Singapore SPVs in July 2012. Salgaocar Asia Pte Ltd ("**SAPL**"), which was a company operated by Mr Salgaocar, also entered into tenancy agreements with Mr Darsan and Mdm Jashma in November 2012 and paid rent in relation to six units in Newton Imperial. These units were alleged to have been misappropriated by Mr Darsan. In these circumstances, it could not be said that Mr Salgaocar did not know that Mr Darsan had bought over those units in Newton Imperial.[91]

80 The respondents argued that any "inaction" on the part of Mr Salgaocar was due to the fact that he only discovered Mr Darsan's breaches of trust in August 2013.[92] He then promptly engaged Mr Haridass to act for him in relation to the return of the trust assets. In addition, there were good reasons as to why Mr Kwan and Ms Chiang only discovered the misappropriations in August 2013. These transactions were not included in the BVI Spreadsheets which were sent to Mr Salgaocar. Mr Kwan's evidence was also that he did not act on transfers of funds to Ultra Best in 2012 because he knew that GBA Minmetals was transferring sums of money to Ultra Best which would in turn transfer monies to companies in Mr Salgaocar's name.[93]

81 We did not agree with the appellants that Mr Salgaocar had taken "complete inaction" following the alleged misappropriations by Mr Darsan in 2011 and 2012. This was because, as the respondents pointed out, Mr Salgaocar only began to uncover the breaches of trust in August 2013, when he was

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91 Appellants' Case at para 66(d).

92 Respondents' Case at para 33.

93 Respondents' Case at para 34.

informed of these remittances by Mr Kwan.[94] It was in our view not surprising that Ms Chiang and Mr Kwan only found out about the unauthorised remittances in August 2013 even though they occurred in 2011 and 2012. As Mr Kwan testified, he, Ms Tam and Ms Chiang were of the view that Mr Salgaocar and Mr Darsan maintained "a very good relationship" and that they were "very good friends" and Mr Salgaocar trusted Mr Darsan.[95] As such, *even if* they had seen transfers from the SPVs to companies belonging to Mr Darsan, such as Ultra Best, they would have been under the impression that these transfers were authorised by Mr Salgaocar.

82 Moreover, given that these were allegedly unauthorised transfers, it was unlikely that they would have been recorded in the Ledgers which were sent to Mr Salgaocar by Mr Kwan or Ms Chiang. Mr Kwan was clearly not in possession of the supporting documents pertaining to these transfers.[96] Ms Chiang's role was limited to the input of data and other administrative tasks,[97] and would not have included recording such transfers on her own accord. This provided a credible explanation in our view as to why these transfers were not brought to Mr Salgaocar's attention by Ms Chiang and Mr Kwan before August 2013.

83 Given that Mr Salgaocar engaged Mr Haridass to act for him in February 2014, shortly after Mr Kwan informed him of Mr Darsan's acts of misappropriation, it could not be said that there had been "complete inaction" on Mr Salgaocar's part. The conduct of Mr Salgaocar must also be viewed in

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94 JRA Vol III(8) 27.

95 JRA Vol III(51) 272.

96 JRA Vol III(8) 18.

97 JRA Vol III(51) 273.

the light of the fact that he was not the *legal* owner of the shares in the relevant SPVs. As we pointed out to counsel for the appellants at the hearing on 3 April 2024,[98] Mr Salgaocar would therefore have faced significant difficulty in removing Mr Darsan as a director or a signatory of the SPVs.

84 There was also no inconsistency in the fact that the respondents had, in their pleadings, indicated that Mr Salgaocar had demanded that Mr Darsan return the shares in the SPVs and the other trust assets since August 2012 even though he only found out about Mr Darsan's acts of misappropriation in August 2013. As stated in the SOC at paras 147–148, the demands made by Mr Salgaocar in 2012 and 2013 for the transfer of the shares in Trustworth Shipping to Mr Salgaocar were made to ensure that Mr Salgaocar could oversee the resolution and settlement of two disputes involving Trustworth Shipping.[99] Mr Salgaocar's official demand for the return of the shares in the other SPVs was brought later on 14 May 2014 through the HFW Letter.

85 We were not persuaded by the appellants' arguments pertaining to the appointment of Mr Vivek as a director of some of the Singapore SPVs as well as the tenancy agreements pertaining to the six units in Newton Imperial for the same reasons set out at [154] and [157] below respectively as they did not outweigh the overwhelming evidence in favour of the respondents.

86 Accordingly, Mr Salgaocar's conduct following the alleged breaches of trust did not show that the 2003 Trust did not exist.

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98 Transcript (3 April 2024) at p 45.

99 JRA Vol II(1) 146.

Whether the SPVs were controlled by Mr Darsan or Mr Salgaocar

87 The appellants argued that the Judge failed to consider that it was Mr Salgaocar's own position in the HFW Letter that the BVI SPVs were at the relevant times controlled and managed by Mr Darsan, that Mr Darsan was involved in the investment of the proceeds of the sale of iron ore and that Mr Darsan was in charge of managing the assets.[100] Mr Haridass also testified that Mr Salgaocar had told him that the BVI SPVs were controlled and managed by Mr Darsan.[101] In addition, Mr Darsan was involved in the operations of the BVI SPVs since he worked at the Hong Kong Gateway Office of the SPVs and was copied on Mr Kwan's daily reports on the BVI SPVs to Mr Salgaocar.[102] Mr Darsan also had demonstrable knowledge and understanding of the iron ore trade and the relevant employees, such as Mr Kwan, Ms Chiang and Ms Tam, took instructions from him.[103]

88 These arguments were not persuasive. While the HFW Letter did state that the BVI SPVs were "at the relevant times controlled and managed" by Mr Darsan and this contradicted Mr Salgaocar's version that he retained sole control and management of the SPVs,[104] the HFW Letter also contained numerous other references to Mr Darsan holding companies and assets on trust for Mr Salgaocar.[105] Furthermore, while the HFW Letter was not entirely consistent with Mr Salgaocar's position for the action, it was only one piece of evidence to be considered.

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100 Appellants' Case at para 77(a).

101 Appellants' Case at para 77(b).

102 Appellants' Case at para 77(c).

103 Appellants' Case at paras 77(d)–77(e).

104 JRA Vol II(1) 111, 177, 129.

105 JRA Vol III(15) 193.

89 The appellants' argument that Mr Haridass testified that Mr Salgaocar had told him that the BVI SPVs were controlled and managed by Mr Darsan was unconvincing. Although Mr Haridass admitted that Mr Darsan played *some* role in the sale of iron ore into China, he quickly clarified that he would not "go so far as to say that [Mr Darsan] had a say in how the business was to be run" and that he did not "know the extent to which [Mr Darsan] was involved".[106] He also expressly rejected the suggestion that it was Mr Darsan who was trading iron ore through GBA Minmetals, Joyking and Cheermark. The evidence of Mr Haridass, taken as a whole, did not show that the BVI SPVs were controlled and/or managed by Mr Darsan.

90 Also, Mr Darsan did not possess demonstrable knowledge and understanding of the iron ore trade as we mentioned at [74] above. There was also no evidence that the relevant employees, namely Mr Kwan, Ms Chiang and Ms Tam, took instructions from Mr Darsan. On the contrary, the Judge pointed to several pieces of evidence (*eg*, at [51] and [211] of the Judgment) which showed that Mr Salgaocar was the person giving instructions in relation to matters involving the SPVs. We saw no reason to disagree with the Judge's reasoning on this point.

91 Finally, nothing turned on the mere fact that Mr Darsan was copied on the daily reports which Mr Kwan sent to Mr Salgaocar. As the Judge found at [60] of the Judgment, Mr Kwan clarified that he had only done so at Mr Darsan's request and because he did not see any reason to refuse. The Judge also observed that Mr Darsan was unable to produce "old emails" showing any instructions from him to Mr Kwan that Mr Darsan was to be given daily reports in the same manner as was given to Mr Salgaocar.

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106 JRA Vol III(51) 96.

Whether the SPVs were wholly funded by Mr Darsan or Mr Salgaocar

92 The appellants submitted that there was no evidence that Mr Salgaocar had wholly funded the SPVs or that the Singapore SPVs were wholly funded by the BVI SPVs' trading profits.[107] Instead, the evidence supported Mr Darsan's account that he provided funding to the SPVs. The appellants pointed to, among other things, the HFW Letter, bank account statements for the SPVs, Ultra Best's provision of unconditional financial support to Singapore Star Holdings and its subsidiaries, and the cash flow statement of Singapore Star Holdings. The Ledgers only showed that funds were transferred between the SPVs but not that it was Mr Salgaocar who funded the SPVs or that the Singapore SPVs were wholly funded by the trading profits of the BVI SPVs.[108]

93 The respondents argued that there was no evidence that Mr Darsan had funded the SPVs. Not only did Mr Darsan accept that Mr Salgaocar owned and funded Ling Tao (one of the BVI SPVs), but it was also clear from the evidence of Mr Cheong and Mr Kwan that Mr Salgaocar owned and funded Sino Ling Tao (BVI). In relation to the cash flow statement of Singapore Star Holdings, the auditors stated that they were unable to ascertain the financial capability of Ultra Best due to a lack of sufficient audit evidence.[109]

94 In our view, it was not clear on the evidence that the SPVs were entirely funded by Mr Salgaocar. We saw no reason, however, to disagree with the Judge's view that there was no evidence that it was Mr Darsan who had personally funded the relevant SPVs (see [107] and [127] of the Judgment). Also, nothing in the HFW Letter suggested that Mr Darsan had funded the

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107 Appellants' Case at para 79.

108 Appellants' Case at paras 84–85.

109 Respondents' Case at para 59.

SPVs.[110] On the contrary, the HFW Letter painted Mr Darsan as a trustee who was simply in charge of holding the relevant assets and companies *on behalf of* Mr Salgaocar.

95 The bank account statements which the appellants referred to belonged to Singapore Star Holdings and Sino Ling Tao (SG) and reflected inflows of monies into these accounts labelled with Mr Darsan's name in the corresponding descriptions.[111] These statements were, to our mind, inconclusive. This was because they did not show the source of the monies and thus could not show that Mr Darsan had personally funded the SPVs.

96 With respect to Ultra Best's alleged provision of unconditional financial support to Singapore Star Holdings and its subsidiaries, we agreed with the respondents that the independent auditors' report to the members of Sino Noble Holdings (which was later renamed to Singapore Star Holdings) showed that the financial capability of Ultra Best could not be ascertained.[112] This was therefore insufficient evidence to show that Ultra Best had funded Singapore Star Holdings and/or its subsidiaries. As for the cash flow statement of Singapore Star Holdings, which was simply titled "Group Cash Flow Statement",[113] it was on the face of the document neither clear which companies made up this "group" nor apparent that the statement had been audited.

97 On the other hand, there was *some* evidence that Mr Salgaocar had provided funding for the SPVs. Mr Salgaocar was the guarantor and obligor in

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110 JRA Vol III(15) 194.

111 JRA Vol III(41) 238–242.

112 JRA Vol IV(8) 177.

113 JRA Vol V(81) 48.

respect of loan facilities taken out by Great Newton Properties and HSBC.[114] An extension of the loan facility again required a personal guarantee from Mr Salgaocar. In addition, Mr Cheong testified that, in his view, Mr Salgaocar was the person who had arranged and provided the funding for the operations of Singapore Star Holdings and its subsidiaries.[115] This was consistent with the notes to Singapore Star Holdings' Audited Financial Statement for the year ended 30 June 2008 which stated that Mr Salgaocar would continue to provide "unconditional financial support to the group and company".[116]

98 The appellants' arguments on the Ledgers were also unpersuasive. They first argued that the Ledgers had not been shown to be authentic and admissible evidence. They then argued, presumably in the alternative, that the Ledgers demonstrated that Mr Darsan had deposited monies inside some of the SPVs. In relation to the appellants' argument on the authenticity and admissibility of the Ledgers, we saw no reason to depart from the Judge's finding that the respondents had adduced sufficient evidence to rely on the Ledgers as secondary evidence (see Judgment at [202]). Although Mr Kwan was unable to confirm where precisely the Ledgers had originated from, it was his testimony that he did obtain copies of the Ledgers. This was because he had been forwarded e-mails that Ms Chiang had sent to Mr Salgaocar which in turn enclosed the Ledgers and he could recall having seen some of the items listed in the said Ledgers.[117] As for the appellants' contention that the Ledgers showed Mr Darsan depositing monies inside some of the SPVs, this did not assist Mr Darsan as there was no evidence indicating the true source of such funds.

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114 HC Judgment at [128].

115 JRA Vol III(52) 95–96.

116 JRA Vol III(14) 18.

117 JRA Vol III(52) 15, 24.

99 On this basis, we agreed that the Judge did not err in finding that Mr Salgaocar had wholly funded the SPVs.

Whether there were "plausible reasons" for the existence of the December 2003 Agreement

100 The appellants argued that there was no plausible reason for the alleged December 2003 Agreement to exist from Mr Salgaocar's perspective.[118] This was because Mr Salgaocar had already been exporting iron ore directly into China since 2000 and there was no explanation why he would enter into the December 2003 Agreement to interpose Mr Darsan to do the same thing. There was also no reason for Mr Salgaocar to interpose Mr Darsan as a nominee shareholder when he could hold those shares himself.[119] Mr Salgaocar had been exporting iron ore directly into China through two companies – Sino Source Industries Ltd ("**Sino Source**"), a company incorporated in Hong Kong, and GBA Products Ltd ("**GBA Products**"), a company incorporated in Dubai. Although the sole benefit to Mr Darsan was allegedly the US$0.50 for each WMT of cargo sold by the SPVs, there was no evidence of Mr Darsan ever receiving such payments.

101 The respondents argued that the entire purpose of the December 2003 Agreement was for Mr Salgaocar to earn higher margins on the second leg of the two-legged contracts.[120] The respondents pointed out that Mr Darsan's own evidence was that GBA Products and Sino Source were independent companies and not Mr Salgaocar's companies. The profits earned were therefore not enjoyed directly by Mr Salgaocar and he wanted to enter into the December

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118 Appellants' Case at para 102.

119 Appellants' Reply at para 46.

120 Respondents' Case at para 64.

2003 Agreement to earn more on the second leg. It was also perfectly legitimate, as a commercial arrangement, for Mr Salgaocar to interpose Mr Darsan as a nominee shareholder in the SPVs.[121]

102 We took the view that there were plausible reasons for the parties to have entered into the December 2003 Agreement. For one, it was undisputed that Mr Salgaocar and Mr Darsan shared a very close relationship and mutual trust, to the extent that they were, in Mr Darsan's own words, like "father and son" (Judgment at [17]). It was therefore not unusual for Mr Salgaocar to have requested Mr Darsan, a man he trusted at the time, to serve as his nominee shareholder in exchange for some consideration. We also accepted that there could have been plausible commercial reasons as to why the parties entered into the December 2003 Agreement, such as maintaining the privacy of Mr Salgaocar as the actual beneficial owner of the share(s). For these reasons, we disagreed with the appellants that there was no plausible reason for the parties to have entered into the December 2003 Agreement. This was in spite of our observation that the ownership of GBA Products and Sino Source could not be determined on the basis of the evidence before us, which rendered the benefits that Mr Salgaocar purportedly enjoyed from the second leg somewhat speculative.

Whether the contemporaneous documents supported the existence of the December 2003 Agreement

103 As a final point, the appellants argued that despite voluminous documents in the trial bundles and the lengthy 12-year period between the December 2003 Agreement and the commencement of Suit 821, there was not a single document suggesting, let alone recording, the alleged December 2003

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121 Respondents' Case at para 65.

Agreement.[122] The first time the December 2003 Agreement was mentioned was in the SOC dated 4 September 2015 and the HFW Letter was the first time Mr Salgaocar asserted *some* beneficial interest over the SPVs.[123] The agreement was also not declared in Mr Salgaocar's income tax returns. The appellants also submitted that the Judge failed to take into account documents which recorded Mr Darsan as the beneficial owner of the SPVs, such as an HSBC "Declaration of Beneficial Ownership Form" ("**the HSBC Form**").[124]

104 It was true that the December 2003 Agreement did not appear to have been recorded in contemporaneous written documents. This did not, however, prove that the oral agreement did not exist. At the time of the December 2003 Agreement, Mr Darsan and Mr Salgaocar shared a good relationship, one which Mr Darsan even described as akin to that between "father and son". This would have explained the absence of documentary evidence in relation to the December 2003 Agreement. As for the fact that Mr Salgaocar's tax returns did not disclose any interest in the SPVs, this was inconclusive. Lastly, with regard to the HSBC Form, there was no evidence as to who had prepared it, whether Mr Darsan had discussed it with Mr Salgaocar before signing it and, pertinently, whether the form was eventually submitted to and/or processed by HSBC. Besides, as mentioned, there was other evidence supporting Mr Salgaocar's position.

Summary

105 For the reasons above, we affirmed the Judge's finding that the December 2003 Agreement existed and gave rise to the 2003 Trust.

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122 Appellants' Case at para 104.

123 Appellants' Case at para 106.

124 JACB Vol II at p 62; Appellants' Case at para 112.

Issue 2: Whether the December 2003 Agreement was in breach of Indian laws and whether the 2003 Trust was thus void or unenforceable

106 This issue comprised the following two sub-issues:

(a) whether the December 2003 Agreement was in breach of any of the relevant Indian laws; and

(b) if the answer to (a) was in the affirmative, whether the 2003 Trust was unenforceable by reason of foreign illegality.

Whether the December 2003 Agreement was in breach of any of the relevant Indian laws

107 The appellants submitted that the December 2003 Agreement, assuming it existed, violated the FEMA, the BMA, the PMLA, the Benami Act, the Income Tax Act and the Customs Act.[125] These arguments were similarly canvassed before the Judge, who rejected them and found that the December 2003 Agreement was not in breach of these laws. For the reasons below, we were not convinced that the Judge had erred in his finding.

FEMA

108 The relevant section of the FEMA (s 4) prohibits an Indian resident from holding, owning, possessing or transferring any foreign exchange, foreign security or any immovable property situated outside India. At the trial below, the Judge accepted the evidence of the respondents' expert, Justice Ramasubramanian Venkat Easwar ("**Justice Easwar**"), that the December 2003 Agreement was a rectifiable breach under the FEMA: Judgment at [185]–[186]. The case of *Vijay Karia v Prysmian Cavi E Sistemi S.R.L and*

125 Appellants' Case at para 113.

others [2020] SCC Online SC 177 ("***Vijay Karia***") was cited for the proposition that any infringement of the FEMA would amount to a rectifiable breach.

109 On appeal, the appellants argued that *Vijay Karia* did not stand for the proposition that *all* violations of the FEMA were rectifiable. That case involved the specific issue of whether an arbitration award should be enforced. The Indian Supreme Court was therefore making the point that the violation of a FEMA provision did not constitute an illegal activity so as to justify the non-enforcement of an arbitration award, not that any violation of the FEMA will not be deemed illegal.[126] The appellants also submitted that a breach could not be rectified if it involved the serious contravention of money laundering.[127] They also pointed to a seizure order issued by the Directorate of Enforcement in India ("**DE**") to Mdm Lakshmi and her children as well as a press release by the DE as "clear evidence" that the December 2003 Agreement contravened the FEMA.

110 The respondents, on the other hand, pointed out that nothing in the FEMA prohibited the setting up of a foreign trust and *Vijay Karia* made it clear that the policy underpinning the FEMA was that breaches of its provisions could not be said to be an illegality.[128] The appellants' claim that a breach of the FEMA could not be rectified if it involved money laundering was made pursuant to Regulation 8(2) of the Foreign Exchange Rules 2000,[129] but this was not pleaded by the appellants and in any case this provision only came into force on 20 February 2017 and was not addressed by the parties' experts.[130] The

126 Appellants' Case at para 119.

127 Appellants' Case at para 120.

128 Respondents' Case at paras 109–111.

129 See JRA Vol IV(16) 130.

130 Respondents' Case at para 116.

respondents also argued that there was no evidence that Mr Salgaocar was a person resident in India under the definition found in the FEMA. This precluded any breach of the FEMA by Mr Salgaocar.

111 In our view, even if the December 2003 Agreement had contravened the FEMA, the appellants did not adduce any evidence to show that (a) any breach of the FEMA which concerned money laundering would *necessarily* amount to a non-rectifiable breach or that (b) the alleged breach in question properly engaged concerns about money laundering and was therefore non-rectifiable. As for the respondents' argument that Mr Salgaocar was not a "person resident in India" at the relevant time in 2003, this echoed the finding of the Judge at [175] of the Judgment that there was no evidence to show that Mr Salgaocar had been an Indian tax resident since 2003. We saw no reason to disagree with the Judge's finding on this point. Finally, in SUM 46, the appellants attempted to adduce the seizure order and the press release of the DE as further evidence on appeal. These were at best only statements of opinion by a foreign authority as to whether there was any breach. They were no substitute for expert evidence which the parties had put forward before the Judge for consideration.

112 Accordingly, we were not persuaded to disturb the Judge's finding that there was no breach of the FEMA.

BMA

113 We turn to the BMA, which seeks to tackle the problem of "black money" in India, *ie*, undisclosed foreign income and assets by an Indian resident.[131] The Judge held that the December 2003 Agreement did not violate (and was not intended to violate) the BMA since it only came into force on

[131] Appellants' Case at para 124.

1 April 2016. As such, the question whether the BMA was breached did not arise (Judgment at [172]). This much was conceded by the appellants' expert witness, Justice Ajit Prakash Shah ("**Justice Shah**").[132]

114 On appeal, the appellants raised the Indian Supreme Court decision in *Union of India v Gautam Khaitan* (2019) 10 SCC 108 ("***Gautam***") which allegedly stated that the BMA is applicable even in respect of offences committed prior to the enactment of the BMA. To this end, Mdm Lakshmi and the other beneficiaries of Mr Salgaocar's estate were served notices by the Indian authorities under the BMA for the estate's failure to disclose foreign assets claimed to belong to Mr Salgaocar in Suit 821 below. Moreover, the Judge erred in assuming that the performance of the December 2003 Agreement had been completed as the very purpose of the respondents' claim in the suit below was to enforce the alleged December 2003 Agreement.[133] Finally, the appellants submitted that s 51(1) of the BMA applied. This provision is stated as follows:[134]

> **51.** Punishment for wilful attempt to evade tax.
>
> (1) If a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of Section 6 of the Income Tax Act, wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and with fine.

Here, Mr Salgaocar had intentionally failed to disclose his interests in the SPVs which resulted in a breach of s 51(1).[135]

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132 JRA Vol III(31) 130.

133 Appellants' Case at para 129.

134 ROA Vol III(34) 95.

135 Appellants' Case at para 130.

115 We agreed with the respondents that *Gautam* did not stand for the proposition that the BMA was applicable even in respect of acts committed prior to the enactment of the BMA.[136] This was not the position put forth by the appellants' expert witness, Justice Shah. More precisely, all that Justice Shah admitted was that the court in *Gautam* held that tax would be charged on an undisclosed foreign asset acquired prior to 1 July 2015 in the year in which a notice for assessment was issued.[137] In other words, any potential offence under the BMA would only be committed in the year in which a notice for assessment was issued.

116 On the facts, there was no evidence to show that Mr Salgaocar had "wilfully" committed any offence under s 51 of the BMA in 2003 or that he had failed to disclose his assets in breach of the BMA. In SUM 46, the appellants sought to adduce the notices issued against Mdm Lakshmi and the other beneficiaries of Mr Salgaocar's estate in AD 88.[138] These notices were again at best only statements of opinion by the Indian authorities as to whether there was a breach of the BMA, and the parties had already adduced expert evidence before the Judge.

117 In any case, even if these notices were taken to show that Mr Salgaocar had committed an offence under the BMA in 2021, *ie*, the year in which the tax notices were issued against his estate, such illegality would have stemmed from his failure to disclose his interests in the SPVs and in engaging in a wilful attempt to evade tax. This illegal act would however be wholly distinct and subsequent to the December 2003 Agreement. In other words, there was nothing

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136 Respondents' Case at para 124.

137 ROA Vol III(34) 111.

138 See Minute Sheet for AD/SUM 46/2023 dated 17 January 2024.

to suggest that the December 2003 Agreement *itself* was void for illegality. As the Judge observed at [172] of the Judgment: "… the purpose of the December 2003 Agreement could not have been to circumvent an Act that did not exist when it was entered into". Any illegality arising in 2021 would thus be wholly irrelevant given that the relevant obligations under the December 2003 Agreement pertaining to the beneficial ownership of the shares in the SPVs had, in our view, been performed before the BMA came into force.

PMLA

118 The Judge found that there were no breaches of the PMLA. This was because the parties agreed that the BMA was a predicate offence for the PMLA. As such, it could only have been a predicate for the PMLA on and after 1 April 2016, when the BMA came into force (Judgment at [173]). As there was no relevant offence under the BMA at the time of the agreement, the transactions in the SOC would not attract any of the provisions of the PMLA. In any event, the Judge found that Mr Easwar's unchallenged evidence was that the PMLA did not have any extra-territorial application and so did not apply to the December 2003 Agreement.

119 The appellants argued that there was a breach of ss 41 and 51 of the BMA. As the parties' experts agreed that an offence under s 51 of the BMA would automatically lead to an offence under ss 3 and 2(*u*) of the PMLA, the PMLA was breached.[139] The respondents argued that there was no breach of s 51 of the BMA and the PMLA does not have any extra-territorial application.

120 Given our finding above at [116] that there was no breach of the BMA, the appellants' case on the PMLA failed accordingly. The appellants also failed

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139 Appellants' Case at para 132.

to offer any response in the Appellants' Reply to the respondents' argument that the PMLA did not possess any extra-territorial application.

Benami Act

121 The Judge found that the appellants had abandoned their arguments in relation to the Benami Act at trial.[140] Justice Shah conceded that the Benami Act did not apply to the December 2003 Agreement as it was "not extra-territorial in operation" and was not engaged given that all the transactions and assets were outside India. This view was echoed by Justice Easwar (Judgment at [171]). There was thus no breach of the Benami Act as it did not apply to the December 2003 Agreement at all.

122 On appeal, the appellants submitted that there *were* in fact transactions in respect of assets within India that the Benami Act applied to.[141] Specifically, Sino Ling Tao (BVI), GBA Minmetals, Cheermark and Joyking bought iron ore from SMI in India and on-sold it to buyers in China. The respondents had also in their SOC admitted that some of the trading profits had been invested in assets in India.[142]

123 In response, the respondents argued that this was a point which was neither pleaded nor argued below and, in any case, was contradicted by Justice Shah's evidence. This allegation was also not put to Justice Easwar, which deprived him of the opportunity of assisting the court.[143]

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140 HC Judgment at [171].

141 Appellants' Case at para 143.

142 See JRA Vol II(2) 127, 136.

143 Respondents' Case at para 136.

124 We were of the view that the December 2003 Agreement did not breach the Benami Act. To begin with, these arguments pertaining to the Benami Act were neither pleaded nor argued by the appellants in Suit 821 before the Judge. The appellants' arguments on this point also ran counter to the evidence of their expert witness, Justice Shah, who conceded that the Benami Act did not apply to the transactions in Suit 821. This was because, according to him, the shares, assets and trading profits of the SPVs were all situated outside India.[144] It was not insignificant that Justice Shah maintained this conclusion even *after* he was pointed to paragraphs within the SOC which indicated that some of the Singapore SPVs had invested in assets in India.[145] Therefore, it was not for the appellants to make an argument which was contrary to the evidence of their own expert. As for the appellants' submission that the BVI SPVs conducted some parts of their operations in India, there was no indication that these "transactions" pertained to the subject matter of the December 2003 Agreement, which primarily involved the shares of the SPVs. To this end, it was clear to us that the transfer of the shares in the Singapore and BVI SPVs to Mr Darsan must have taken place outside of India as Mr Darsan was based in Hong Kong. There was thus no breach of the Benami Act.

Income Tax Act

125 The Judge found that there were no breaches of the Income Tax Act as there was no evidence that Mr Salgaocar had been a tax resident in India since 2003 (Judgment at [175]). There was also no evidence that Mr Salgaocar had controlled and managed the BVI and Singapore SPVs from India or that these companies had failed to declare income tax in India (Judgment at [176]). In any

144 JRA Vol III(54) 185.

145 JRA Vol III(54) 186.

event, the Judge accepted Mr Easwar's evidence that s 276C of the Income Tax Act only provided for the prosecution of a wilful attempt to evade tax, which necessitated a "deliberate" omission. As there was no evidence that Mr Salgaocar possessed the necessary *mens rea*, the Judge was unable to conclude that there was a breach of the Income Tax Act.

126 The appellants argued that Mr Salgaocar *was* a tax resident of India. This was demonstrated by his income tax returns and the fact that he has been assessed to have breached the BMA and the FEMA. Moreover, if Mr Salgaocar had failed to disclose his alleged ownership of the SPVs in his tax returns, it could reasonably be inferred that his failure to do so was intentional to evade tax.[146]

127 The respondents submitted that there was no evidence that Mr Salgaocar was an Indian tax resident since 2003 and that Mr Salgaocar's tax returns from 2011 to 2015 was not evidence that he was an Indian tax resident since *2003*.[147] Even if Mr Salgaocar had failed to declare income tax in India, there was no evidence that he possessed the necessary *mens rea*. This point was not put to any of the respondents' witnesses. Finally, it was undisputed that the Income Tax Act only required Indian tax residents to disclose their foreign assets and income from the financial year beginning in 2011. Justice Easwar's unchallenged evidence was that the December 2003 Agreement, which was entered into seven years earlier, could therefore not have been entered into with the object of violating the Income Tax Act.[148]

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146 Appellants' Case at para 135.

147 Respondents' Case at para 139.

148 Respondents' Case at para 141.

128 In our view, there was insufficient evidence to show that the December 2003 Agreement breached the Income Tax Act.

129 First, we agreed with the respondents that Mr Salgaocar's tax returns pertained only to the period from 2011 to 2015.[149] They were therefore insufficient to show that Mr Salgaocar was an Indian tax resident since 2003.

130 Second, the appellants did not substantiate their claim that Mr Salgaocar's failure to disclose his ownership in the SPVs in his tax returns demonstrated that he had *intended* to evade tax. Instead, they relied solely on the bare assertion that there was "no other credible reason for [Mr Salgaocar's] deliberate omission".[150]

131 Finally, and pertinently, we found that the appellants had conflated the argument in respect of Mr Salgaocar's alleged breaches of the Income Tax Act with the question of the alleged illegality of the December 2003 Agreement. As such, even if Mr Salgaocar had indeed made a deliberate omission in his bid to evade tax, such illegality was separate and distinct from the issue of whether the December 2003 Agreement was itself illegal. We were fortified in this conclusion by the fact that the Income Tax Act only required Indian tax residents to disclose their foreign assets and income from 2011. This meant that the parties could not have entered into the December 2003 Agreement for the purpose of circumventing the Income Tax Act.

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149 JRA Vol V(8) 18, 21, 24, 26.

150 Appellants' Case at para 135.

Customs Act

132 In relation to the appellants' arguments on the Customs Act, the Judge found that the December 2003 Agreement did not result in the evasion of customs duty for the sale of iron ore pursuant to ss 135 and 140 of the Customs Act. As s 14 of the Customs Act was amended with effect from 10 October 2007 to include the Customs Valuation (Determination of Export Goods) Rules 2007 (India) ("**the Export Valuation Rules**"), there were two time periods which were relevant in determining if the Customs Act was breached by the December 2003 Agreement.[151]

133 On the first period from April 2004 to 9 October 2007, an exporter was not required to declare the true value of iron ore for the purpose of the Customs Act and there was no evidence that SMI underdeclared the export value of the iron ore sold to the BVI SPVs. As such, there is no basis to accept that the performance of the December 2003 Agreement breached the Customs Act in the first period.

134 On the second period from 10 October 2007 to July 2012, Justice Easwar's unchallenged evidence was that there was nothing in the Export Valuation Rules that required an exporter to declare the downstream price of the exported goods.[152] There was also no evidence as to what SMI actually declared to the customs authorities. There was thus no basis to conclude that the Customs Act was breached in the second period. Declaration of the CFR price when SMI shipped iron ore to China was also not possible as Mr Salgaocar would not have agreed on the CFR price with the Chinese buyers at the point of

151 HC Judgment at [180].

152 JRA Vol III(20) 81; HC Judgment at [182].

export. Instead, it was only when the vessel was *en route* to China that Mr Salgaocar would sell the shipment.

135 The appellants raised the following arguments on appeal. First, Justice Shah gave clear evidence that there was a requirement to declare the downstream price of the exported goods where the buyer was a related buyer and it could not be shown that the buyer had not influenced the price.[153] Second, there was a breach of this requirement. Although the Judge accepted that the buyer and seller were related, he did not consider that the burden was on Mr Salgaocar (the exporter) to show that the price was not influenced. Moreover, if the respondents' assertion was that the December 2003 Agreement was entered into for Mr Salgaocar to earn higher margins on the second leg of the two-legged contracts, then Mr Salgaocar would have logically tried to depress (*ie*, influence) the FOB price in order to make profits.[154] Third, a show-cause notice issued by the Directorate of Revenue Intelligence ("**Show Cause cum Demand Notice**") evidenced a breach of the Customs Act.

136 The respondents on the other hand submitted that the Judge correctly found that Justice Easwar gave unchallenged evidence that there was no requirement in the Export Valuation Rules to declare the downstream price of exported goods. Justice Shah did not give any evidence that there was a requirement in the Export Valuation Rules to declare the downstream price of exported goods.[155] In any case, the burden was on the Customs Department and not Mr Salgaocar to show that the relationship between the buyer and seller

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153 Appellants' Case at para 138; JRA Vol III(31) 120; JRA Vol III(42) 43.

154 Respondents' Case at para 139.

155 Respondents' Case at para 145.

influenced the price.[156] There was also no evidence that Mr Salgaocar had depressed the FOB price.

137 We saw no merit in the appellants' arguments on this issue. In our view, the Judge was justified in accepting Justice Easwar's evidence that (a) r 3(2) of the Export Valuation Rules provided that the "transaction value shall be accepted" even where the buyer and the seller were related, provided that the relationship had not influenced the price,[157] and (b) the Customs Department bore the burden of showing that the relationship between the buyer and the seller did influence the price.[158] In any event, the fact remained that, aside from speculation by the appellants, there was no evidence as to what SMI *actually* declared to the authorities or how such a declaration itself may have suggested that there was any influence on the price. It therefore could not be said that the Customs Act had been breached.

138 As a final point, we were not convinced that the Show Cause cum Demand Notice, which the appellants relied on to show that a breach of the Customs Act had occurred, assisted the appellants. This was because while the notice did indicate that the authorities believed that there might have been a contravention,[159] it was not a final determination that there was a breach of the Customs Act. No further evidence was also led on this point by the appellants.

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156 Respondents' Case at para 147.

157 JRA Vol III(20) 89–90.

158 JRA Vol III(20) 79.

159 JRA Vol III(54) 155.

Whether the 2003 Trust was unenforceable for illegality

139 For the reasons set out in the previous section, we found that the December 2003 Agreement did not breach the relevant Indian laws. At this point, we observe that the appellants appeared to have mischaracterised their submissions as concerning whether the December 2003 Agreement was void and unenforceable on the basis of illegality.[160] That was, however, not the issue in question. After all, a valid and enforceable contract does not constitute a pre-requisite for the creation of a trust. The real point in contention was thus whether the respondents' *claims for breaches of the 2003 Trust* were unenforceable by reason of foreign illegality.

140 The Judge found that the December 2003 Agreement was not illegal under Indian law and therefore did not proceed to address the appellants' arguments below in relation to whether the principles in *Foster v Driscoll* and *Ralli Brothers* extended to non-contractual claims. The principle laid down in *Foster v Driscoll* is that, where the real object and intention of an agreement is to perform in a foreign and friendly country some act which is illegal by the law of such country, the court should not enforce such an agreement by awarding damages for its breach. The rule in *Ralli Brothers*, on the other hand, is that a contract is invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed: *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] 1 SLR 136 ("***Esben Finance***") at [163]. Given that we had arrived at the same conclusion as the Judge in relation to the legality of the December 2003 Agreement under Indian law, there was no reason for us to depart from the Judge's conclusion as to whether the respondents' claims were unenforceable by reason of foreign illegality.

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160 Appellants' Case at para 144.

141 In any event, the current position under Singapore law is that the principles in *Foster v Driscoll* and *Ralli Brothers* are restricted in their application to claims in contract: *Ang Jian Sheng Jonathan and another v Lyu Yan* [2021] 1 SLR 1091 at [26]; *Esben Finance* at [166]. While the Court of Appeal in *Esben Finance* expressed the provisional view (at [172]) that *Foster v Driscoll* and *Ralli Brothers* could potentially apply to claims for unjust enrichment, this was not an expression of their opinion that these principles could be extended to *all* non-contractual claims. Indeed, the appellants raised no further points, whether in their written submissions or in the course of their oral arguments, to convince us that the principles in *Foster v Driscoll* and *Ralli Brothers* should be extended to cover claims for breaches of trust and/or fiduciary duties. On this basis, the respondents' claims for breaches of the 2003 Trust would not be barred by any foreign illegality pertaining to the December 2003 Agreement.

Issue 3: Whether the 2003 Trust failed for lack of certainty

142 We turn now to the issue of whether the 2003 Trust failed for lack of certainty. The Judge found that the 2003 Trust was a valid express trust because the three certainties, *ie*, certainty of intention, certainty of subject matter and certainty of the objects of the trusts, were fulfilled on the evidence (Judgment at [159]).

143 The appellants contended on appeal that the Judge had erred. They raised two arguments in this regard. First, a trust cannot be created over property that does not exist (*ie*, future property). In such circumstances, the trust may only be validly constituted where the settlor subsequently "re-declares" the

trust.[161] Second, there was no certainty of intention to create the trust as there was ample evidence of Mr Salgaocar conducting himself in a manner inconsistent with the 2003 Trust. Specifically, Mr Salgaocar had allowed Mr Darsan to control and manage the SPVs and to deal with the SPVs' assets as he saw fit until the HFW Letter was issued in 2014.

144 The respondents argued that certainty of intention existed on the facts as both Mr Salgaocar and Mr Darsan conducted themselves consistently with the terms of the 2003 Trust. This was evident from the fact that Mr Salgaocar owned, incorporated and funded all the SPVs and had complete control over their operations. In contrast, Mr Darsan was not involved in the trade of iron ore at all. This was also reinforced by Mr Darsan's conduct in transferring assets to Mr Salgaocar pursuant to the HFW Letter.[162]

145 There was no reason for us to depart from the Judge's finding that the three certainties had been fulfilled on the evidence.

146 We begin with the appellants' argument regarding certainty of subject matter. This very argument – that a trust could not be created over future property – was raised in Suit 821 before the Judge.[163] We agreed with the Judge's analysis, citing *Pearson and others v Lehman Brothers Finance SA and other companies* [2010] EWHC 2914 (Ch) at [225], that a trust "will not fail for want of certainty merely because its subject matter is at present uncertain, if its terms are sufficient to identify its subject matter in the future" (Judgment at [157]). There was therefore sufficient certainty of subject matter as the 2003

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161 Appellants' Case at para 156(a).

162 Respondents' Case at para 99.

163 JRA Vol IV(16) 120.

Trust encompassed the equity in all the SPVs and the profits and the assets and investments purchased using the SPVs.

147 In relation to certainty of intention, we were unconvinced by the appellants' argument that there was evidence that Mr Salgaocar had allowed Mr Darsan to control and manage the SPVs and to deal with their assets as he saw fit until the HFW Letter was issued. As we observed at [88]–[91] above, the evidence supported the Judge's finding that the BVI SPVs were controlled and managed by Mr Salgaocar.

148 In addition, we agreed with the respondents that Mr Darsan's actions following the issuance of the HFW Letter were consistent with Mr Darsan holding the shares of the SPVs on trust for Mr Salgaocar. For example, shortly after the HFW Letter was issued, Mr Darsan caused the entire equity in Winter Meadow to be transferred from him and his wife to Mr Salgaocar for US$2. Mr Darsan did not claim that the transfer of assets such as these was made pursuant to any settlement which he had entered into with the respondents. In these circumstances, the transfers of assets by Mr Darsan (or persons related to him) to Mr Salgaocar for nominal consideration were highly indicative that they belonged to Mr Salgaocar. This demonstrated that there was indeed certainty of intention on the part of Mr Darsan and Mr Salgaocar for the relevant assets to be held on trust for Mr Salgaocar.

149 For the reasons above, we rejected the appellants' contentions that the 2003 Trust failed on the basis of lack of certainty. As we agreed with the Judge's finding that a valid express trust was in place, we did not need to address the appellants' arguments regarding the respondents' alternative claim that Mr Darsan held the trust assets on resulting trust for Mr Salgaocar's benefit.

Issue 4: Whether Mr Darsan breached the 2003 Trust

150 The Judge found that Mr Darsan had breached the 2003 Trust in the following ways:

(a) misappropriating monies;[164]

(b) refusing to take instructions from Mr Salgaocar or preventing him from dealing with the trust assets;[165]

(c) misappropriating units in Newton Imperial and wrongfully disposing of units in Residences@Evelyn, The Waterford Residence and WCEGA Tower;[166]

(d) procuring the transfer of shares in GBA Minmetals and Eltina to himself;[167]

(e) wrongfully altering the accounting records of Singapore Star Holdings;[168] and

(f) misappropriating assets held by Sino Ling Tao (SG) to Winter Meadow and P.D. Holdings Limited ("**P.D. Holdings**").[169]

151 The appellants argued that the Judge had erred in arriving at each of his findings above. In our view, the Judge's findings did not appear to be plainly wrong or against the weight of the evidence before us and therefore should not be disturbed. We state our reasons below.

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164 HC Judgment at [208].

165 HC Judgment at [209].

166 HC Judgment at [214].

167 HC Judgment at [217].

168 HC Judgment at [219].

169 HC Judgment at [222].

152 First, in relation to the misappropriation of monies, the appellants argued that the Judge's finding was based entirely on the Ledgers, which the Judge erred in admitting into evidence and giving weight to.[170] However, as we observed at [98] above, the Judge was justified in concluding that the Ledgers were authentic and admissible and in giving full weight to them.

153 Second, the Judge found that Mr Darsan had prevented Mr Salgaocar from dealing with the trust assets by (a) refusing to comply with Mr Salgaocar's instructions in relation to the trust assets, (b) reorganising the structure of the Singapore SPVs without authorisation from Mr Salgaocar, and (c) instructing the staff of the Singapore SPVs that they were to report to him.[171] The appellants argued that the Judge had failed to consider evidence which showed that Mr Salgaocar continued to deal with the business of the SPVs from July 2012. There was also no evidence that Mr Salgaocar was prevented from doing so by Mr Darsan.[172]

154 We could not agree with this argument. There was no evidence to show that Mr Salgaocar continued to deal with the business of the SPVs from July 2012. The fact that Mr Vivek had been appointed as the director of Singapore SPVs in July 2012[173] was neither here nor there as the appellants did not point us to any evidence which showed that this was done on the instructions of Mr Salgaocar. On the contrary, Mr Darsan's evidence at the trial below was that from 2011, it was he (and not Mr Salgaocar) who ran the BVI and Singapore

170 Appellants' Case at para 163.

171 HC Judgment at [213].

172 Appellants' Case at para 164.

173 Appellants' Case at para 66(c).

SPVs.[174] Mr Darsan's position was therefore not that he did not prevent Mr Salgaocar from dealing with the trust assets, but that it was his "prerogative" to do so.[175] He should not be allowed to resile from that position now.

155 Third, in relation to the contention that Mr Darsan had misappropriated units in Newton Imperial and wrongfully disposed of units in Residences@Evelyn, The Waterford Residence and WCEGA Tower, the appellants argued that the Judge erred in failing to consider the evidence which showed either that Mr Darsan was entitled to do so or that Mr Salgaocar acquiesced.[176] The defence of acquiescence arises when a claimant had refrained from seeking redress when a violation of his rights was brought to his notice and he had instead stood by watching the defendant deal with property in a manner inconsistent with his rights: *Eller, Urs v Cheong Kiat Wah* [2020] SGHC 106 at [103].

156 The defence of acquiescence was, in our view, not made out on the facts. As observed above at [81]–[84], Mr Salgaocar did not take "complete inaction" upon discovering Mr Darsan's breaches of the 2003 Trust. Instead, he took active steps to seek legal advice, which culminated in the issuance of the HFW Letter. On this basis, it could not be said that Mr Salgaocar had "acquiesced" to Mr Darsan's acts of misappropriation and wrongful disposal pertaining to the properties or, indeed, his other breaches of the 2003 Trust.

157 We were also cautious not to place excessive weight on the fact that rent had ostensibly been paid by SAPL, a company allegedly operated by

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174 JRA Vol III(53) 65.

175 JRA Vol III(53) 64.

176 Appellants' Case at para 165.

Mr Salgaocar, to Mr Darsan and Mdm Jashma for the six units in Newton Imperial which Mr Darsan was said to have misappropriated. We accepted that this fact, by itself, suggested that the units belonged to Mr Darsan. However, there were several evidentiary gaps in relation to the issue of rent. For one, the rental agreement which was adduced in evidence was undated.[177] Counsel for the appellants also admitted at the hearing on 3 April 2024 that they did not cross-examine Ms Tan on the rent which was purportedly paid for the six units in Newton Imperial.[178] This was despite the fact that Ms Tan worked closely with Mr Salgaocar in relation to the development of Newton Imperial.[179] We stress that it was her unchallenged evidence that she dealt with Mr Salgaocar regarding Newton Imperial and that he was the owner thereof. Accordingly, we took the view that even taking into account that rent had been paid, there was insufficient evidence to conclude that the Judge had erred in finding that Mr Darsan had misappropriated the units in Newton Imperial.

158 Fourth, in relation to the contention that Mr Darsan had procured the transfer of shares in GBA Minmetals and Eltina to himself, the appellants argued that the Judge erred in failing to consider the implausibility of the contention that Mr Darsan could cause Mr Narsapur, who was described by the respondents as a long-standing member of Mr Salgaocar's staff, to hand over the shares in GBA Minmetals and Eltina to Mr Darsan.[180] This was in light of the fact that Mr Narsapur had been Mr Salgaocar's sole nominee shareholder and director in respect of Eltina from around July 2011.[181] This argument was,

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177 JRA Vol V(31) 232.

178 Transcript (3 April 2024) at p 49.

179 JRA Vol III(6) 184.

180 Appellants' Case at para 166.

181 HC Judgment at [217].

in our view, entirely speculative. Mr Narsapur did not give evidence in Suit 821, and it was unclear what he was told about the transfer of the shares.

159 Fifth, the appellants raised no specific arguments in relation to the Judge's finding that the altering of the accounting records of Singapore Star Holdings by Mr Darsan was a breach of trust. They relied instead on the defence of acquiescence only, which we dismissed at [156] above.

160 Sixth, the appellants argued that the Judge erred in failing to consider that the letter from Rajah & Tann Singapore LLP to Mr Darsan dated 24 June 2015 stated that the transfer of assets from Sino Ling Tao (SG) to Winter Meadow was undertaken pursuant to Mr Salgaocar's instructions.[182] However, even if this letter evidenced Mr Salgaocar instructing Mr Darsan to transfer the relevant assets to Winter Meadow, this did not explain Mr Darsan's actions in causing Sino Ling Tao (SG) to transfer title to the other assets to P.D. Holdings, a company owned and/or controlled by Mr Darsan.[183]

161 For the reasons above, we found no reason to disturb the Judge's findings on the breaches of the 2003 Trust which were committed by Mr Darsan.

Issue 5: Whether an account should have been granted on a wilful default basis

162 We now turn to the issue of the ordering of an account and inquiry on a wilful default basis. At the trial below, the Judge was satisfied that such an order was justified (Judgment at [254]).

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182 Appellants' Case at para 167.

183 HC Judgment at [22].

163 On appeal, the appellants contended that the Judge had misconstrued the law. A threshold requirement for an order of an account on a wilful default basis is that the beneficiary must prove at least one instance of wilful default. Even after this requirement is met, the court must still exercise its discretion on whether to order such an account. The relevant test for when the court will do so is whether the past conduct of the trustee is such that it gives rise to a reasonable *prima facie* inference that other breaches of trust not yet known to the claimant or the court have occurred. The appellants stated that an order of an account on a wilful default basis was not appropriate as Mr Darsan had acted consistently with his ownership of the assets, Mr Salgaocar had acquiesced in such conduct and there was nothing to suggest that Mr Darsan has concealed other conduct which might give rise to an allegation of a breach of trust. The appellants also submitted that the Judge erred in ordering that the appellants deliver up books of the BVI SPVs as Mr Kwan's evidence was that he had already handed these documents to Mr Salgaocar.[184]

164 The respondents, on the other hand, argued that the court correctly ordered an account on a wilful default basis as Mr Darsan's acts constituted a breach of trust and Mr Salgaocar did not acquiesce in such acts.[185] Moreover, Mr Kwan did not expressly state that he took all of the BVI SPVs' books or that he gave them to Mr Salgaocar. The respondents also confirmed on affidavit that they did not have possession, custody or power of the various documents referred to in Mr Kwan's affidavit of evidence-in-chief.

165 In our view, there was nothing to indicate that the Judge had exercised his discretion wrongly as he had found that Mr Darsan had breached *both* his

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184 Appellants' Case at paras 177–181.

185 Respondents' Case at para 178.

custodial and management stewardship duties. It therefore could not be said that there was no reasonable *prima facie* inference that other breaches of trust not yet known to the respondents or the court had occurred. Our findings above (see [156]) also put to rest the appellants' contentions that Mr Salgaocar had acquiesced to Mr Darsan's misconduct.

166 That said, we sought clarification from both counsel during the hearing of AD 88 on 3 April 2024 as to whether the Judge was justified in ordering Mr Darsan to deliver up the "books and records of the BVI SPVs, the Singapore SPVs and their subsidiaries". This concern stemmed from our view that it was not clear which books, records and documents had already been handed over to Mr Salgaocar. In this regard, Mr Kwan stated in his affidavit of evidence-in-chief that he had delivered books and records which were kept at the Hong Kong Gateway office (in the form of hard disks and documents) to Mr Salgaocar in 2014 without specifying *which* SPVs these books and records pertained to. Neither counsel provided any satisfactory elaboration at the hearing. The matter was further obscured by a submission for the estate which drew a distinction between the Ledgers and other accounting records of the companies (a distinction which in our view was not borne out by the evidence). Accordingly, it was unclear whether the Judge's order for Mr Darsan to deliver up the relevant books and records was even capable of being complied with or enforced. We therefore set aside the order for the appellants to deliver up the "books and records of the BVI SPVs, the Singapore SPVs and their subsidiaries" when we dismissed AD 88 on 17 April 2024.

167 Following our dismissal of AD 88, the estate filed AD/SUM 23/2024 ("**SUM 23**") on 2 May 2024. SUM 23 sought a correction of our decision to set aside the Judge's order on the basis that the appeal of Mr Darsan in AD 88 was confined to the order that he deliver up the books and records of the BVI SPVs

and their subsidiaries. In other words, Mr Darsan's appeal did not extend to his obligation under the Judge's order to deliver up the books and records of the Singapore SPVs and their subsidiaries. Hence, the court could not have intended to relieve him of this obligation. According to the estate, this was a non-substantive and inadvertent error that could have been corrected by the court as it did not correctly reflect the court's intention. In response, Mr Darsan's main submission was that the error was substantive in nature and was therefore one which the court could not correct.

168 We allowed SUM 23 on 30 July 2024 with no order as to costs. To begin with, we were satisfied that the Appellate Division has the jurisdiction and power to clarify or correct the terms of its orders on the basis of O 3 r 2(2) of the Rules of Court 2021 and its inherent jurisdiction and power. Drawing from case law in Australia and the United Kingdom, we held that the applicable test in respect of the court's exercise of such jurisdiction and power was whether the judgment or order (as corrected) gives effect to the intention of the court at the time when it was made. The relevant question was therefore what the court had intended to do at the time and what the court would have done if the issue had arisen at the time its orders were made. This test was, in our judgment, of greater utility than an inquiry into whether a proposed amendment was of a "substantive" nature or not.

169 In the present case, our intention in setting aside the Judge's order was to circumscribe his order in respect of the books and records of the BVI SPVs and their subsidiaries *only*. This was evident from the fact that the focus of the appellants in AD 88 had been solely on the books and records of the BVI SPVs. Their arguments in the Appellants' Case and the Appellants' Reply bear this out. The correctness of the Judge's order with respect to the books and records of the Singapore SPVs and their subsidiaries was thus *never in issue*.

170 In this regard, we were not persuaded by Mr Darsan's argument that the books and records of the Singapore SPVs and their subsidiaries *were* in issue in AD 88 because the notice of appeal was widely worded as an appeal against the entire decision of the Judge (save for two specific aspects). According to Mr Darsan, this meant that the court did expressly consider and hear arguments on the matter.[186] We found this to be a disingenuous argument made only in response to SUM 23. While a notice of appeal may be framed widely, an Appellant's Case elaborates on that part of the decision which is in issue. A notice of appeal therefore needs to be read together with the Appellant's Case to delineate the specific issues in contention. On this basis, the mere fact that the notice of appeal was worded widely was insufficient to place the books and records of the Singapore SPVs and their subsidiaries in issue.

171 We add that SUM 23 could have been averted had counsel for either side drawn the distinction between the books and records of the Singapore SPVs and their subsidiaries (which were not in issue) and those of the BVI SPVs and their subsidiaries (which were in issue) to our attention. Unfortunately, counsel for both sides omitted to do so – first at the hearing on 3 April 2024 and again when we delivered our decision on AD 88 on 17 April 2024. On the latter occasion, counsel for both sides had confirmed that they had no further queries or comments. Yet, SUM 23 was subsequently filed on 2 May 2024.

172 For the reasons above, we were satisfied that the court's intention was to circumscribe the Judge's order in respect of the books and records of the BVI SPVs and their subsidiaries *only*. The error in this case arose from an accidental slip and would have been corrected at once had it been flagged by any party at the time the order was made. We therefore amended our order and set aside the

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186 Appellants' Written Submissions for AD/SUM 23/2024 dated 31 May 2024 at para 16.

Judge's order only with respect to the delivery up/transfer of possession or title or ownership of the books and records of the BVI SPVs and their subsidiaries (if any).

Issue 6: Whether the costs of Suit 821 should have been awarded on an indemnity basis

173 The Judge took the view that the manner in which Mr Darsan ran his defence and brought his counterclaim was unreasonable and resulted in wasteful litigation.[187] He cited Mr Darsan's amendment of his defence to include new allegations, which unnecessarily increased the complexity of the trial and were plainly unmeritorious. The timing of the commencement of the Third Party Action also strongly suggested that it was brought with the intention of intimidating Mr Kwan from giving evidence against Mr Darsan in Suit 821.[188] Taken as a whole, Mr Darsan's conduct reflected a high degree of unreasonableness which warranted the imposition of costs on an indemnity basis. The Judge applied an uplift of 33 per cent accordingly.[189]

174 On appeal, the appellants argued that the Judge had erred in awarding costs on an indemnity basis and in applying the "significant uplift".[190] They contended that it was not sufficient for Mr Darsan's claims to have been unmeritorious in hindsight. Instead, it had to be shown that his allegations were put forward in bad faith or for an improper purpose. No such finding could be sustained on the facts. Mr Darsan's claim in the Third Party Action also could not have been said to be unreasonable as it was commenced to seek an indemnity

187 Costs Judgment at [11].

188 Costs Judgment at [12].

189 Costs Judgment at [17].

190 Appellants' Case at para 182.

from Mr Kwan for the respondents' claim against Mr Darsan for the relevant sums.

175 We did not think that the Judge had erred in exercising his discretion to award costs on an indemnity basis against Mr Darsan. As the Judge rightly observed, a high degree of unreasonableness could justify an award of indemnity costs (Costs Judgment at [10]). This was observed by the High Court in *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 at [49]. In other words, it is not a *requirement* for the action to have been brought in bad faith or for an improper purpose before indemnity costs may be ordered. Such a situation merely forms a category of cases which demonstrate that a party has acted so unreasonably that costs on an indemnity basis are justifiably awarded against him. It remains the fundamental principle that the question of costs is always a matter for the discretion of the court, which must be exercised judicially based on the facts of each case.

176 There was also no reason for us to disturb the Judge's findings regarding the unreasonableness of Mr Darsan's conduct.

177 First, it was Mr Darsan's evidence at the trial that he had given instructions to Mr Kwan to destroy the relevant documents. This followed from his assertion that Mr Kwan "would not do anything like destroying documents without my permission".[191] This was altogether inconsistent with Mr Darsan's alleged earlier position (in his affidavit dated 8 July 2019) that Mr Kwan had destroyed the documents on Mr Salgaocar's instructions (and not his own).[192] To this end, the explanation put forth by Mr Darsan in this affidavit was also

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191 JRA Vol III(52) 235.

192 JRA Vol III(3) 207, 230–232.

rejected by the Judge at [204] of the Judgment. The Judge therefore did not err in relying on Mr Darsan's evidence that he had instructed Mr Kwan to destroy the relevant documents.

178 Second, there was no basis to disagree with the Judge's finding that the timing of the commencement of the Third Party Action strongly suggested that it was brought with the intention of intimidating Mr Kwan from giving evidence against Mr Darsan. Mr Kwan's evidence was that days after Mr Darsan issued the demand letter to him, he was invited to lunch by Mr Bhasin Rajeev Kumar (an old acquaintance of Mr Kwan and Mr Darsan)[193] who told him that he would not have to worry about the demand letter if he agreed not to give evidence for the estate. This was supported by the WhatsApp conversation between the two men.[194] On the basis of this evidence, the Judge was justified in finding that Mr Darsan's conduct was questionable.

179 The Judge's findings therefore fully supported the discretionary exercise of his power to order costs on an indemnity basis and to adopt a 33 per cent uplift from the quantum assessed on the standard basis.

Conclusion

180 For the reasons above, we dismissed AD 88 in its entirety, save for the setting aside of the Judge's order for the appellants to deliver up the "books and records of the BVI SPVs and their subsidiaries". Accordingly, we ordered Mr

193 JRA Vol III(8) 8; JRA Vol III(47) 10.

194 JRA Vol III(47) 20–21.

Darsan to bear the respondents' costs of the appeal, which we fixed at $100,000, inclusive of disbursements.

Woo Bih Li
Judge of the Appellate Division

Debbie Ong Siew Ling
Judge of the Appellate Division

See Kee Oon
Judge of the Appellate Division

Tan Chee Meng SC, Lim Wei Lee, Daryl Wong, Victoria Yu, Chin Ming Fwu and Wee Min (WongPartnership LLP) (instructed), Narayanan Sreenivasan SC, Palaniappan Sundararaj, Rajaram Muralli Raja, Eva Teh Jing Hui and Tan Si Xin Adorabelle (K&L Gates Straits Law LLC) for the appellants;
Davinder Singh SC, Jaikanth Shankar, Jaspreet Singh Sachdev and Ng Shu Wen (Davinder Singh Chambers LLC) (instructed), Kanapathi Pillai Nirumalan, Liew Teck Huat, Ritesh Vaman and Phang Cunkuang (Niru & Co LLC) for the respondents.