IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 35

Civil Appeal No 218 of 2018

Between

Sim Poh Ping

… *Appellant*

And

(1) Winsta Holding Pte Ltd
(2) M Development Limited

… *Respondents*

Civil Appeal No 219 of 2018

Between

(1) Sim Pei Yee
(2) Sim Pei San
(3) Overseas Students Placement Centre Pte Ltd
(4) Jiu Mao Jiu Hotpot Pte Ltd

… *Appellants*

And

(1) Winsta Holding Pte Ltd
(2) M Development Limited

… *Respondents*

Civil Appeal No 220 of 2018

Between

(1) Winsta Holding Pte Ltd
(2) M Development Limited

… *Appellants*

And

(1) Sim Poh Ping
(2) Sim Pei Yee
(3) Sim Pei San
(4) Overseas Students Placement Centre Pte Ltd
(5) Jiu Mao Jiu Hotpot Pte Ltd
(6) Kong Weijia

… *Respondents*

In the matter of Suit No 491 of 2015

Between

(1) Winsta Holding Pte Ltd
(2) M Development Limited

… *Plaintiffs*

And

(1) Sim Poh Ping
(2) Sim Pei Yee
(3) Sim Pei San
(4) Overseas Students Placement Centre Pte Ltd
(5) ATAS Residence Pte Ltd
(6) Uni-House Pte Ltd
(7) Unihouse @ Evans Pte Ltd
(8) Jiu Mao Jiu Hotpot Pte Ltd
(9) ICS Catering Pte Ltd
(10) I-Masters Air-Conditional Pte Ltd

(11) Kong Weijia
(12) Ng Connie (Connie Huang)
(13) Tan Choon Leong (Chen Junliang)

… *Defendants*

JUDGMENT

[Equity] — [Fiduciary relationships] — [Duties] — [Breach]
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v
Winsta Holding Pte Ltd and another and other appeals

[2020] SGCA 35

Court of Appeal — Civil Appeals Nos 218, 219 and 220 of 2018
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA and Steven Chong JA
21 October 2019

9 April 2020 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction and overview

1 These are three related appeals arising out of the decision of the High Court judge ("the Judge") in *Winsta Holding Pte Ltd and another v Sim Poh Ping and others* [2018] SGHC 239 ("the Judgment"). In essence, they relate to two main areas. The first concerns the ***liability*** of the relevant defendants for alleged breaches of fiduciary duties. The second is closely related to the first inasmuch as if any breaches of fiduciary duties are in fact established, the question arises as to what ***remedies*** are available to the plaintiff concerned.

2 We commence by observing that the *former* relates, in the main, to ***factual*** *findings* in relation to *liability* by the Judge in the court below, whilst the *latter* raises, *inter alia*, difficult ***legal*** *issues* which have hitherto not been decided definitively by this court.

3 Not surprisingly, in so far as the ***former*** (*ie*, the issue of ***liability*** for alleged breaches of fiduciary duties) is concerned, the inquiry is a ***fact-centric*** one that, in turn, engages (in a holistic fashion) all the relevant facts and circumstances of the case. This will, indeed, be evident in the analysis that follows.

4 In so far as the ***latter*** (*ie*, ***remedial*** aspect) is concerned, the difficult legal issue that must be decided by this court relates to the role (if any) of ***causation*** when a breach of fiduciary duty has been established. We will explore this – as well as other related issues – later in this judgment. Let us turn now to the factual background to the present appeals.

Facts

5 Winsta Holding Pte Ltd ("Winsta Holding") is the holding company, and beneath it were seven subsidiaries (singly, a "Winsta Subsidiary" and collectively, "the Winsta Subsidiaries"). Six of these subsidiaries were primarily in the hostel business, and the last ran a serviced apartments business. Winsta Holding and its 51% shareholder, M Development Ltd ("M Development"), were the plaintiffs in the action below. Because cross-appeals have been brought against the Judge's decision, we refer to Winsta Holding and M Development collectively as "the Winsta Companies" for convenience. We will also refer hereafter to Winsta Holding as well as the Winsta Subsidiaries as "the Winsta Group".

6 The chief antagonists in the action were Mr Sim Poh Ping ("Mr Sim"), Ms Sim Pei Yee ("Ms Lynn Sim") and Ms Sim Pei San ("Ms Joyce Sim") (collectively, "the Sims" or the "Sim family"). Mr Sim is the father of Ms Lynn Sim and Ms Joyce Sim. Each of them was a director of Winsta Holding and of

all of the Winsta Subsidiaries. The allegations were that they had breached their fiduciary duties by diverting opportunities away from the Winsta Group to their own corporate vehicles or by entering into interested party transactions between the Winsta Group and these corporate vehicles. These are the seven named corporate defendants in the suit below (which are separate and distinct from the Winsta Subsidiaries, and are therefore not to be confused with the latter; see also [17] below); we will refer to them as "the Corporate Defendants". In addition, the Winsta Companies pursued claims against three other individuals, Mr Kong Weijia ("Mr Dave Kong"), Ms Ng Connie ("Ms Connie Ng"), and Mr Tan Choon Leong ("Mr Shawn Tan"). These individuals allegedly dishonestly assisted the Sims in breaching their fiduciary duties to the Winsta Group. The total value of the claims pursued was in the range of $16.3m to $39.8m, as quantified by the Winsta Companies' expert. The thirteen defendants are collectively referred to as "the Defendants".

7 The Judge explained his holdings in the Judgment. The Judge found that the Sims had committed a large number of breaches of fiduciary duty against the Winsta Group. Some of these included the diversion of corporate opportunities from a Winsta Subsidiary to their own vehicles, but most of them concerned interested party transactions where the Sim sisters (Ms Lynn Sim and Ms Joyce Sim) stood on both sides of the transaction. Although liability for breach of fiduciary duty was established, the Judge determined that the burden fell on the Winsta Companies to establish but-for causation, rejecting the rule in the Privy Council decision (on appeal from the Supreme Court of Canada) of *Brickenden v London Loan & Savings Co et al* [1934] 3 DLR 465 ("*Brickenden*", and therefore commonly referred to as "the *Brickenden* rule") that had been *interpreted* (in the Singapore context (though *cf* the strict reading of the *Brickenden* rule, as to which see [89] below)) to entail the burden being

placed on the wrongdoing fiduciaries instead to prove that their principals would have suffered the loss in any event. The Winsta Companies faced significant difficulties in proving but-for causation, and ultimately only two of their claims, concerning the diversion of two opportunities, succeeded. Mr Dave Kong, Ms Connie Ng and Mr Shawn Tan were also found to have assisted the Sims in carrying out the breaches of fiduciary duty.

8 The Winsta Companies and some of the Defendants filed appeals against the Judge's decision. We summarise the thrust of these three appeals briefly. Civil Appeal No 218 of 2018 ("CA 218") is Mr Sim's appeal against the Judge's decision finding him liable for breaching his fiduciary duties towards the Winsta Group. The Judge accepted that the evidence did not show that Mr Sim had an interest or control in any of the corporate defendants which had benefited from the various breaches of fiduciary duty, apart from Overseas Students Placement Centre Pte Ltd ("OSPC"), but nevertheless found Mr Sim to have breached the no-conflict and no-profit rules. Mr Sim alleges that this is a "quantum leap" in reasoning and must be overturned on appeal.

9 Civil Appeal No 219 of 2018 ("CA 219") is the appeal brought by the Sim sisters and their corporate vehicles OSPC and Jiu Mao Jiu Hotpot Pte Ltd ("JMJ Hotpot"). By this appeal, the Sim sisters seek to reduce the amount of equitable compensation and costs ordered to be paid to the Winsta Companies.

10 Civil Appeal No 220 of 2018 ("CA 220") is the most legally complex of the three appeals. In this appeal, the Winsta Companies appeal against the Judge's decision to reject *Brickenden* and require them to prove but-for causation. They say that *Brickenden* is justified on the basis of authority, principle, and policy, and is particularly apt for this case where they, as

principals, face difficulty in establishing but-for causation given that the Sims as directors had such pervasive control over the Winsta Subsidiaries.

11 We now go into the facts in greater detail.

The parties

The Plaintiffs

12 Winsta Holding, the first respondent in CA 218 and CA 219 and the first appellant in CA 220, was the first plaintiff in the High Court. It is the holding company in a group of companies (*viz*, the Winsta Group) which are in the hostel and serviced apartments business. The Winsta Group comprises Winsta Holding and the following wholly owned subsidiaries of Winsta Holding (*viz*, the Winsta Subsidiaries):

(a) Evan Hostel Pte Ltd ("Evan Hostel");

(b) Carlisle Hostel Management Pte Ltd ("Carlisle Hostel");

(c) Katong Hostel Pte Ltd ("Katong Hostel");

(d) Pearl Hill Hostel Pte Ltd ("Pearl Hill Hostel");

(e) Queensway Student Hostel Pte Ltd ("Queensway Hostel");

(f) The Hill Lodge @ Mount Vernon Pte Ltd ("Hill Lodge"); and

(g) Global Residence Pte Ltd ("Global Residence").

13 On 20 May 2015, Winsta Holding and the Winsta Subsidiaries commenced Suit No 491 of 2015 ("the Suit") in the High Court claiming breach of fiduciary and other duties, knowing receipt, dishonest assistance, conspiracy

to injure and/or deceit. The Winsta Subsidiaries were placed under creditors' voluntary liquidation between 3 August 2015 and 4 August 2015.

14 M Development, the second respondent in CA 218 and CA 219 and the second appellant in CA 220, was the second plaintiff in the Suit. M Development holds 51% of the issued share capital of Winsta Holding and is a public company listed on the Singapore Exchange. M Development was assigned the claims by the Winsta Subsidiaries in the Suit on 29 October 2015.

The Defendants

15 Mr Sim, the appellant in CA 218 and the first respondent in CA 220, was the first defendant in the Suit. His daughters, Ms Lynn Sim and Ms Joyce Sim, are the appellants in CA 219 and two of the respondents in CA 220. Mr Sim and Ms Joyce Sim, together with two related companies, held 34% of the shares in Winsta Holding. The remaining 15% of the shareholding was owned by various unrelated third parties.

16 The directorships of the Sims in the Winsta Group at all material times were as follows:

(a) Mr Sim: managing director of Winsta Holding (July 2014 to 22 May 2015), director of Winsta Holding, and director of each of the Winsta Subsidiaries;

(b) Ms Lynn Sim: director of M Development (until 28 April 2015), director of Winsta Holding, and director of each of the Winsta Subsidiaries;

(c) Ms Joyce Sim: director of Winsta Holding and each of the Winsta Subsidiaries.

17 Seven companies were made defendants to the action below (*viz*, the Corporate Defendants). The Corporate Defendants were alleged to have been the vehicles of the Sim family which were used to facilitate the Sims' wrongdoing, and are as follows:

(a) OSPC (*ie*, Overseas Students Placement Centre Pte Ltd);

(b) ATAS Residence Pte Ltd ("ATAS");

(c) Uni-House Pte Ltd ("Uni-House");

(d) Unihouse @ Evans Pte Ltd ("Unihouse@Evans");

(e) JMJ Hotpot (*ie*, Jiu Mao Jiu Hotpot Pte Ltd);

(f) ICS Catering Pte Ltd ("ICS Catering"); and

(g) I-Masters Air-Conditional Pte Ltd ("I-Masters").

18 In addition (and as alluded to above), claims were brought against three other individuals who were alleged to have dishonestly assisted the Sims in their breaches of fiduciary duty:

(a) Mr Dave Kong, the director of ATAS (see the Judgment at [11]), an employee of OSPC (see the Judgment at [40]) and a shareholder in JMJ Hotpot (see the Judgment at [98]);

(b) Ms Connie Ng, an employee of Katong Hostel seconded to Winsta Holding (see the Judgment at [12]); and

(c) Mr Shawn Tan, Operation Manager of Winsta Holding and director of I-Masters (see the Judgment at [13]).

Background to the dispute

19 The Judge has comprehensively set out the facts in the Judgment at [17]–[36] and in his discussion of each of the claims. Here, we offer only a brief summary of the most pertinent facts that are germane to the present appeals.

20 The Sims, in particular Mr Sim, were the original driving force behind the Winsta Subsidiaries and the creation of the Winsta Group. Mr Sim entered the property leasing business and hostel business in 2002–2003. In 2003, Katong Hostel was incorporated and it started its first student hostel. The business was profitable and Mr Sim expanded it by opening more hostels. For each new hostel opened, a new company would also be incorporated to manage it. Pearl Hill Hostel was incorporated on 25 May 2004 and Hill Lodge on 9 January 2006. Mr Sim then decided to strike out into the business of managing serviced residences in 2007, and incorporated Global Residence that year to manage rented serviced apartments.

21 Winsta Holding was incorporated on 27 February 2008 and became the holding company of the various individual hostel and serviced apartment companies. Expansion of the hostel business also continued at a steady pace. On 13 March 2008, Queensway Hostel was incorporated as another subsidiary of Winsta Holding. In 2009, Winsta Holding acquired Carlisle Hostel. Evan Hostel was later incorporated in 2012.

22 M Development entered the picture in January 2010. It bought 51% of the shares of Winsta Holding. Mr Sim was invited but declined to join the board of M Development. Ms Lynn Sim was appointed to the board of M Development by September 2010. As stipulated under the terms of M Development's purchase of the shares in Winsta Holding, the Sims continued

to manage Winsta Holding and its subsidiaries. Mr Sim was in charge of charting the overall direction of the Winsta Group and handling key contracts with governmental authorities whilst the Sim sisters were the directors in charge of the day-to-day operations. In 2011, Mr Huang Wen-Lai, a nominee of M Development, was appointed to the board of Winsta Holding.

23 The profits of the Winsta Subsidiaries declined between 2010 and 2012. In 2013, the Winsta Group registered a loss of $8.5m. Further losses were projected for 2014. In July 2014, M Development appointed additional directors, Ms Huang Tzu Ting ("Ms Huang"), Mr David Chin and Mr Yap Kian Peng, to the board of Winsta Holding. At the same time, Mr Sim was appointed as managing director of Winsta Holding.

24 Winsta Holding and M Development began to suspect very significant interested party transactions in the Winsta Group after the additional directors were appointed to the board of Winsta Holding. Ms Huang was given the authority to take necessary steps to protect, secure and preserve the company's records and financial information. She engaged KordaMentha Pte Ltd ("KordaMentha"), a company specialising in forensic accounting, review and investigation services. In April 2015, KordaMentha produced its draft Preliminary Findings. On 7 May 2015, the Preliminary Findings were discussed by the Winsta Holding board. Two weeks later, the Suit was commenced. The dispute concerns alleged breaches of fiduciary duty in respect of duties owed to the Winsta Subsidiaries.

25 On 22 May 2015, the Sims' employment with Winsta Holding was terminated. Ms Lynn Sim's directorship in M Development was also terminated. But the Sims remained directors of Winsta Holding. In June 2015, Winsta Holding appointed The Uncharted Co ("TUC") to provide management

services to its businesses, primarily in relation to Katong Hostel, Evan Hostel, Hill Lodge and Global Residence. In July 2015, the TUC produced its report on its observations and suggested steps to turn around the business units. It stated that Katong Hostel's losses for the first half of 2015 were about $0.5m and its losses might be about $1.8m by December 2015, and that it did not have enough cash to meet all its obligations. It also stated that the Winsta Group was expected to face a shortfall of about $11.2m in December 2015.

26 The Winsta Subsidiaries were placed under creditors' voluntary liquidation between 3 August 2015 and 4 August 2015. The decisions were made by the directors nominated by M Development. Winsta Holding and M Development alleged that the liquidations were due to the subsidiaries having been run to the ground by the Sims' fraudulent and/or wrongful conduct. This is a matter of contention in these appeals as well.

27 Katong Hostel and Evan Hostel had leases with the Singapore Land Authority ("SLA"). The latter called on the insurance bonds issued as security in connection with the leases after Katong Hostel and Evan Hostel were placed under liquidation. The bonds amounted to $2.1m, and were guaranteed by Winsta Holding, the Sims and the four directors of Winsta Holding nominated by M Development. Mr Sim paid $276,666.67 in this regard. In addition, ORIX Leasing Singapore Limited ("ORIX") called on the guarantees provided by Mr Sim, Ms Lynn Sim, Winsta Holding and Global Residence for a $2.5m loan facility to renovate a hostel leased to Evan Hostel. Mr Sim paid ORIX $681,542.20.

Claims pursued below

28 The Winsta Companies pursued eight discrete categories of claims against the Defendants in the High Court. We briefly summarise each of these as follows.

29 First, the Winsta Companies claimed that the Sims had breached their fiduciary duties to Global Residence by diverting an opportunity to operate serviced apartments at a property called Illuminaire to their own vehicle, OSPC. The Illuminaire opportunity arose in 2012 (see the Judgment at [43] and [54]).

30 Second, the Winsta Companies claimed that the Sims had breached their fiduciary duties by diverting an opportunity to provide serviced apartments at Scotts Square to their own vehicle ATAS, which competed with the business of a Winsta Subsidiary, Global Residence. This opportunity arose in May 2014 (see the Judgment at [58]).

31 Third, the Winsta Companies claimed that the Sims had breached their fiduciary duties towards Hill Lodge and Evan Hostel by subletting blocks of buildings at these two properties under the Winsta Group to their own vehicles Uni-House and Unihouse@Evans respectively. The Winsta Companies claimed that the homestay business run by Uni-House and Unihouse@Evans was in competition with the hostel business of Hill Lodge and Evan Hostel (see the Judgment at [80]). Uni-House was incorporated in February 2012 (see the Judgment at [81]). Unihouse@Evans was wholly owned by Uni-House (see the Judgment at [92]).

32 Fourth, the Winsta Companies claimed against the Sims for allegedly misusing Winsta Group's resources to run JMJ Hotpot, and for using JMJ Hotpot as a conduit to divert revenue arising from Mongolian students

attending a summer camp to their own benefit (see the Judgment at [100]). The Winsta Group had been contracting with Help International LLC to provide accommodation for a group of Mongolian students visiting Singapore in the summers of 2011 to 2013. In 2014, however, the students were housed at Devonshire, a property owned by Ms Joyce Sim's husband, and the monies were paid to JMJ Hotpot instead of to the Winsta Group (see the Judgment at [104]).

33 Fifth, the Winsta Companies claimed against the Sims for the provision of catering services by their vehicle, ICS Catering, to the Winsta Group. The allegation was that the Sim sisters had received personal benefits in the form of monthly fees from ICS Catering, and no disclosure of their interests had been made to Winsta Holding (see the Judgment at [115]). ICS Catering was incorporated on 1 November 2012, and was a vendor to the Winsta Group in 2013 and 2014 (see the Judgment at [114]). ICS Catering also took over the running of the cafeteria at Hill Lodge.

34 Sixth, the Winsta Companies claimed against the Sims for holding an interest, through OSPC, in I-Masters, which provided air-conditioning and general contracting and maintenance ("ACM") work to the Winsta Group. The allegation was that OSPC's divestment of its shareholding to one Zhao Feng for no consideration was a sham, and that the Sims acted in conflict of interest in awarding the ACM work to I-Masters (see the Judgment at [133]). I-Masters was incorporated on 23 April 2013, and received payments from various Winsta Subsidiaries from 2013 to 2015.

35 Seventh, the Winsta Companies pursued claims against Mr Dave Kong, Mr Shawn Tan and Ms Connie Ng in dishonest assistance. Mr Dave Kong was alleged to have dishonestly assisted the Sims by diverting the Illuminaire and

Scotts Square opportunities to the Sims' vehicles, OSPC and ATAS, and by managing the Illuminaire and Scotts Square properties, all while knowing of the Sims' interests in OSPC and ATAS (see the Judgment at [151]). Mr Shawn Tan was alleged to have dishonestly assisted the Sim sisters by fronting the management and operations of I-Masters for the Sim sisters, who were its real owners and controllers (see the Judgment at [164]). Ms Connie Ng, a senior employee of Winsta Holding, was alleged to have dishonestly assisted the Sim sisters by assisting with the accounting work for various Sim family vehicles, even though she knew they were not part of the Winsta Group (see the Judgment at [170]).

36 Eighth, claims were also pursued against OSPC and JMJ Hotpot. OSPC was alleged to have dishonestly assisted in the diversion of the Illuminaire opportunity. JMJ Hotpot's account was allegedly used to receive payment from Help International LLC for housing the Mongolian students when they visited the in summer of 2014 (see the Judgment at [173]–[174]).

The decision below

37 The Judge dealt with each of the categories of claims largely in the sequence in which we have set them out at [29]–[36] above, except that where the Sims were concerned, he considered the liability of the Sim sisters separately from the liability of Mr Sim.

38 First, the Judge found that the Sim sisters had breached the no-conflict rule and the no-profit rule when they directed the Illuminaire opportunity to OSPC and procured OSPC to compete with Global Residence (see the Judgment at [54]). The Judge rejected the explanations provided by the Sim sisters in relation to the Illuminaire project (see the Judgment at [50]). He considered that

there was no reason why it could not have been directed to Global Residence. Mr Dave Kong confirmed on the stand it was entirely possible for the project to have been a Global Residence project. It was also clear that the serviced apartment business at Illuminaire competed with Global Residence's business (see the Judgment at [53]). The evidence showed that the Sim sisters received the opportunity in their capacities as directors of Winsta Holding or Global Residence. The Sim sisters' interest in OSPC placed them in a position of conflict in respect of their duties to Winsta Holding and Global Residence. This conflict of interests was compounded by the fact that the Sim sisters received profits earned by OSPC (see the Judgment at [54]). The Sims' interest in OSPC was disclosed to the board of Winsta Holding in 2010 but no disclosure was made regarding OSPC's subsequent involvement in the Illuminaire project; thus, the disclosure was wholly insufficient for purposes of the conflict of interests arising from the fact that OSPC was in a business in competition with Global Residence (see the Judgment at [56]). Thus, the Sim sisters had breached the no-conflict and no-profit rules.

39 Second, the Judge also found that the Sim sisters had breached their fiduciary duties towards Global Residence when they diverted an opportunity to lease apartment units at Scotts Square to their own vehicle, ATAS. Contrary to the sisters' arguments, the Judge found that both of them had interests in ATAS: they were the sole directors and shareholders of ATAS when it was incorporated, and although the shares were transferred away to Ms Lynn Sim's mother-in-law (see the Judgment at [60]), they continued to be heavily involved in ATAS so much so that they were considered by Mr Dave Kong to be the *de facto* controllers of ATAS (see the Judgment at [66]). The Judge found that there had been a breach of fiduciary duty because Global Residence could have taken up the opportunity as it was involved in the serviced apartment business as well,

but that the Sim sisters had directed the Scotts Square opportunity to ATAS instead and had procured ATAS to compete with Global Residence (see the Judgment at [72]), without disclosing this and obtaining the informed consent of Winsta Holding. This was a breach of both the no-conflict and no-profit rules (see the Judgment at [72]–[73]).

40 Third, the Judge considered the claims brought for alleged breach of fiduciary duties by the Sim sisters in having Hill Lodge lease out two blocks of buildings to Uni-House and in having Evans Hostel lease out one block of buildings to Unihouse@Evans. The Sim sisters argued that they had no personal interests in either Uni-House or Unihouse@Evans. The Judge disagreed. It was significant to him, amongst several other reasons, that the Sim sisters were appointed as bank signatories of Uni-House even before the tenancy agreement for Uni-House was signed (see the Judgment at [84]); the person whom the Sim sisters claimed was running the homestay business at Uni-House had no experience in running such a business, and instead gave evidence that Ms Joyce Sim made the key decisions (see the Judgment at [85]); Ms Joyce Sim had substantial involvement in the operations of Uni-House (see the Judgment at [86]); and they had effectively treated Uni-House as if it was their own company, for example, where Ms Joyce Sim used a personal bank account to collect rentals from Uni-House customers in China (see the Judgment at [89]). The Judge found a breach of fiduciary duty not in the fact that the opportunity to run a homestay business was diverted from the Winsta Group – he considered that this was quite a different kind of business from the hostel business the Winsta Group was in – but, instead, found the breach in the interested party transactions that took place between Uni-House and Hill Lodge, as well as between Unihouse@Evans and Evan Hostel, because the Sim sisters stood on

both sides of the transactions in violation of the no-conflict rule (see the Judgment at [95]).

41 Fourth, the Judge found, contrary to the Sim sisters' arguments, that they were the beneficial owners of JMJ Hotpot. Although the shares in JMJ Hotpot had been transferred to Mr Dave Kong, this was done only to enable JMJ Hotpot to apply for work permits, as Ms Joyce Sim had been blacklisted by the Ministry of Manpower (see the Judgment at [98]–[99]). Ms Lynn Sim admitted that Winsta Group personnel provided support and administrative services to JMJ Hotpot without any disclosure to or approval of the board of Winsta Holding, and without any payment to the Winsta Group for such services (see the Judgment at [101]). By misusing Winsta Group's resources, the Sim sisters had breached their fiduciary duties to act in the best interests of Winsta Holding and not to place themselves in a position of conflict (see the Judgment at [103]).

42 In so far as the accommodation of Mongolian students was concerned, Ms Joyce Sim said that payment was made to JMJ Hotpot's account because Help International LLC needed a company's bank account to make payment to and so she gave them JMJ Hotpot's account. However, she admitted that she had received $31,250 which was deposited into her joint account with her husband. None of this was disclosed to the board of Winsta Holding (see the Judgment at [105]). The Judge accepted Ms Joyce Sim's evidence that when she offered Devonshire to Help International LLC, the intention was to surrender the lease of Katong Hostel. Thus, the Winsta Group could not have taken advantage of the 2014 summer camp opportunity (see the Judgment at [110]). Nevertheless, the 2014 summer camp opportunity came to the Sim sisters because of their position as directors of Winsta Holding and Katong Hostel. Clearly, Ms Joyce Sim had a personal interest in Devonshire and in fact profited personally from the opportunity. By reason of their relationship,

Ms Lynn Sim was also an interested party. Thus, the Sim sisters had breached the no-profit rule (see the Judgment at [111]).

43 Fifth, in so far as the claims pursued in respect of ICS Catering were concerned, the Judge concluded that the Sim sisters had committed breaches of fiduciary duty. ICS Catering was in fact owned and controlled by the Sim family: the Sim sisters were the only directors of ICS Catering at its incorporation and were heavily involved in running it, and although Winsta Holding was given a 70% shareholding in ICS Catering, Winsta Holding itself was never told of this, and its 70% shareholding was later transferred away without consideration (see the Judgment at [120]–[121]). The breaches lay in the Sim sisters' standing on both sides of the transactions, with ICS Catering on the one hand, and various Winsta Subsidiaries on the other, which amounted to breaches of the no-conflict and no-profit rules (see the Judgment at [128]–[129]).

44 Sixth, in so far as I-Master's provision of ACM work to the Winsta Group was concerned, the Judge found that the Sim sisters had an interest in I-Masters, but did not control it (see the Judgment at [137]). OSPC had a shareholding in I-Masters when the latter was incorporated, and the divestment of that shareholding to one Zhao Feng for no consideration was considered by the Judge to be a sham. OSPC was the Sims' vehicle, so the Sim sisters retained an interest in I-Masters. They had breached the no-conflict rule when they procured the Winsta Group to enter into transactions with I-Masters, since they stood on both sides of the transactions and had not disclosed this (see the Judgment at [144]).

45 Having considered the liability of the Sim sisters in respect of the six claims for breach of fiduciary duty above, and having found that all the claims

succeeded, the Judge turned to consider Mr Sim's liability. It was not disputed that he had an interest in OSPC. The Judge accepted, however, that there was no evidence that Mr Sim had an interest in and/or controlled any of the remaining corporate defendants, *ie*, ATAS, Uni-House, Unihouse@Evans, JMJ Hotpot, ICS Catering and I-Masters (see the Judgment at [145]). He stated that the mere fact that Mr Sim was the patriarch of the Sims was insufficient to support such an inference. The question therefore was whether Mr Sim knew of his daughters' interests in the Corporate Defendants and/or of their wrongdoings. The Judge found that Mr Sim must have known that the Sim sisters had interests in the Corporate Defendants and of Ms Joyce Sim's interest in Devonshire. In view of their relationship, Mr Sim would also be regarded as having personal interests in the Corporate Defendants and in Devonshire. Mr Sim must have agreed to the actions taken by the Sim sisters (see the Judgment at [148]). Thus, the Judge found that Mr Sim had breached his fiduciary duties in the same way as the Sim sisters had. If Mr Sim had not agreed with the actions taken by the Sim sisters, he ought to have taken steps to protect the Winsta Group's interests once he had learned of what the Sim sisters had wanted to do. By taking no action, he had breached his fiduciary duty to act in the best interests of Winsta Holding (see the Judgment at [149] and [150]).

46 The seventh category of claims concerned claims in dishonest assistance brought against Mr Dave Kong, Mr Shawn Tan and Ms Connie Ng. The Judge found Mr Dave Kong liable in dishonest assistance with regard to the Illuminaire and Scotts Square properties. He considered that Mr Dave Kong did not actively assist in the decision to divert the Illuminaire opportunity to OSPC (see the Judgment at [158]) but that he did bring the Scotts Square opportunity to Ms Lynn Sim's attention, which amounted to active assistance. He further actively assisted by managing OSPC's business at Illuminaire and ATAS's

business at Scotts Square in competition with Global Residence (see the Judgment at [161]). This assistance was dishonest, because he knew that the shareholders of Winsta Group and OSPC were different, and that ATAS was not a Winsta Group company (see the Judgment at [162]). Mr Dave Kong himself was placed in a position of conflict of interest because he was managing the serviced apartment business at Illuminaire and Scotts Square in competition with Global Residence's business (see the Judgment at [163]). Global Residence was also managed by him through OSPC, which had acted as the marketing and sales agent for Global Residence (see the Judgment at [41]).

47 The Judge also found Mr Shawn Tan liable in dishonest assistance for actively assisting the Sim sisters by awarding the ACM works to I-Masters (see the Judgment at [168]). Mr Shawn Tan represented Winsta Group in awarding these works, while knowing of the Sim sisters' interests in I-Masters (through OSPC) (see the Judgment at [165]). This was active involvement amounting to a breach of the standards of honest conduct.

48 Finally, the Judge found Ms Connie Ng liable in dishonest assistance for assisting the Sim sisters' breaches with respect to OSPC, ATAS and JMJ Hotpot (see the Judgment at [171]). Ms Connie Ng was a senior employee of Winsta Holding, and yet she had helped with the accounting functions for OSPC and ATAS and had helped set up the accounting system for JMJ Hotpot (see the Judgment at [171]). She had to have known of the Sim sisters' interests in OSPC, ATAS and JMJ Hotpot (see the Judgment at [172]).

49 On the eighth category of claims, brought against OSPC and JMJ Hotpot for dishonest assistance, the Judge found that the claims had been made out. The Judge considered it clear that OSPC had dishonestly assisted in the Sim sisters' breaches of the no-conflict rule in respect of the diversion of the Illuminaire

opportunity and with regard to OSPC competing with Global Residence. He also noted that JMJ Hotpot's account had been used to receive payment from Help International LLC for the 2014 summer camp, which amounted to dishonest assistance of the Sim sisters' breach of the no-profit rule in respect of that opportunity (see the Judgment at [173]–[174]).

50 The Judge then turned to the issue of remedies. The Winsta Companies had sought compensation to place each of the Winsta Subsidiaries in the position they would have been had the Defendants not breached their duties and the Winsta Subsidiaries not been liquidated, as well as various expenses incurred in reviewing the Winsta Group's records (see the Judgment at [183]). The Judge considered that there were two possible approaches to be taken in ascertaining whether the Defendants' breaches had caused the Winsta Companies' loss.

51 On the one hand, there was the approach taken in *Brickenden* ([7] *supra*), which the Judge considered stood for the proposition that but-for causation was not essential for breach of fiduciary duty; as the Judge put it, it was "not necessary to show a causal link between the breach and the loss claimed" (see the Judgment at [185]). The Judge acknowledged, however, that this strict interpretation of *Brickenden* had been superseded in Singapore, where *Brickenden* was now limited to cases involving fiduciaries in one of the well-established categories of fiduciaries who had committed culpable breaches of core duties of honesty and fidelity (see the Judgment at [190]). Further, a wrongdoing fiduciary in Singapore could seek to limit the amount of equitable compensation payable by showing that the principal would have suffered the loss even if he had not breached his fiduciary duties (see the Judgment at [192]).

52 On the other hand, there was the approach that *did* require the plaintiff to prove but-for causation of his loss, as represented by the cases of *Target Holdings Ltd v Redferns (a firm) and another* [1996] 1 AC 421 ("*Target Holdings*") and *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 ("*AIB*"), which were decisions of the House of Lords and the UK Supreme Court, respectively.

53 The Judge preferred the approach taken in *Target Holdings* and *AIB*. In his view, principle demanded that where there was a breach of fiduciary duty, the principal "should be compensated for loss suffered as a result of that breach and no more". Justice, too, demanded that "the law … not punish the wrongdoer by making him liable for loss not causally linked to his breach" (the Judgment at [193]). In the Judge's view, the middle path of employing a burden-shifting device which had been taken in some of the cases was unsatisfactory. He considered that there was no reason in principle why the evidential burden of proving causation should shift to the fiduciary once the principal had proved that the breach was "in some way connected" to the loss; instead, the principal squarely bore the legal burden of proof to show that his loss was causally linked to the fiduciary's breach of duty, and the evidential burden was similarly placed on the principal to adduce evidence of loss that was causally linked to the breach (see the Judgment at [194]).

54 The Judge turned to apply his holdings on the law to the facts of the case. He first examined the claim for equitable compensation for *post-liquidation* loss of profits. The Winsta Companies' arguments were essentially that because of the Sims' breaches of fiduciary duty, there was no choice other than to liquidate the Winsta Subsidiaries (see the Judgment at [205]).

55 The Judge disagreed with this contention. The Judge found that "it [was] abundantly clear from the evidence that the reason for the decision to liquidate the Winsta Subsidiaries was the projected shortfall" of funds if the businesses of Katong Hostel, Evan Hostel, Hill Lodge and Global Residence were to continue, when M Development was unwilling to provide further funding (see the Judgment at [210]). The question, then, was whether that shortfall was causally linked to the Defendants' wrongdoings. The Judge considered that it was not. Examining the evidence, the Judge found that the reasons for the projected shortfall with regard to Katong Hostel, Evan Hostel and Global Residence were all commercial (see the Judgment at [216] and [218]). In short, the expected shortfall of $11.2m and the Winsta Subsidiaries' general financial predicament had "nothing to do with [the Defendants'] wrongdoings" (see the Judgment at [220]). The Judge therefore held that the Winsta Companies had failed to establish causation in respect of the post-liquidation losses.

56 The Judge then turned to consider the claims made for pre-liquidation losses. A number of discrete claims were made. The Judge considered that the Winsta Companies had only succeeded in establishing but-for causation in respect of two of the losses, namely, those concerning the diversion of the Illuminaire and Scotts Square opportunities (see the Judgment at [222]). But for the breaches of fiduciary duty, these two opportunities would have been directed to Global Residence instead of OSPC and ATAS. The Sim family, Mr Dave Kong and OSPC were liable to M Development in respect of the Illuminaire opportunity, and the Sim family, Mr Dave Kong and ATAS were liable to M Development in respect of the Scotts Square opportunity. Winsta Holding could not claim the losses suffered by the Winsta Subsidiaries (see the Judgment at [227]). As for the other breaches of fiduciary duty, the Judge considered that the Winsta Companies had not proved that they had suffered any loss (see the

Judgment at [229] and [230]). Only a nominal amount of equitable compensation would therefore be awarded for these breaches (see the Judgment at [233]).

Issues before this court

57 We will describe the parties' cases in detail when we address each of the appeals below. For present purposes, the essential thrust of each appeal has already been adequately set out at [8]–[10] above. The appeals raise the following issues for our determination:

(a) **CA 218**:

(i) Whether Mr Sim breached his fiduciary duties to the Winsta Group;

(ii) If his breaches are established, what losses can the Winsta Companies establish and what is the quantification of compensation?

(b) **CA 220**:

(i) What are the appropriate causation principles governing the determination of compensable loss for breaches of fiduciary duties?

(ii) Applying the principles derived from (i) above, what is the equitable compensation established?

(c) **CA 219:**

(i) Should the amount of equitable compensation and costs awarded by the Judge to the Winsta Companies be reduced?

58 We have decided to discuss the appeals in the order set out above as CA 219 is only concerned with the limited issue of quantum of equitable compensation and costs to be paid, whereas CA 218 and CA 220 go towards the liability of the relevant Defendants for breach of fiduciary duty and therefore precede, conceptually, a discussion with regard to the quantum of compensation and costs.

Our decision

CA 218

59 In CA 218, Mr Sim appeals against liability for breach of fiduciary duty and, should that fail, Mr Sim alternatively appeals against the quantum of equitable compensation and costs he should pay. Mr Sim challenges liability on the basis that he had no interest in any of the Corporate Defendants, except OSPC, to which opportunities that should have gone to the Winsta Group were diverted. Mr Sim argues that this is what the Judge himself had found, and thus it cannot be said that he had preferred his own interests. Mr Sim also challenges the Judge's findings that he knew that his daughters were engaged in breaches of *their* fiduciary duties by diverting opportunities away from the Winsta Group to the Corporate Defendants. Mr Sim argues that he was neither involved nor consulted by the Sim sisters; he had delegated the day-to-day management of the Winsta Group to his daughters, as he was entitled to do, and they had engaged in the breaches of fiduciary duty without informing him. In so far as the quantum of equitable compensation and costs is concerned, Mr Sim attacks the basis of the calculations used by the Winsta Companies' expert, Mr John Temple-Cole ("Mr Temple-Cole"), and also argues that costs payable to the Winsta Companies ought to be reduced owing to their "unreasonable" and "reprehensible" conduct in the Suit.

60 We will first examine the issue of Mr Sim's liability for breach of fiduciary duty before considering the issue of equitable compensation and costs.

Mr Sim's liability for breach of fiduciary duty

Mr Sim's knowledge of the Sim sisters' breaches of fiduciary duty

61 We begin first with the Judge's findings as regards Mr Sim's knowledge of the Sim sisters' breaches of fiduciary duty. The Judge made several findings in the Judgment (at [147]) to support his conclusion that Mr Sim must have known of the Sim sisters' actions. We think it is fair to say that the Judge comprehensively examined the way Mr Sim interacted with his daughters, and how they worked with each other to run the Winsta Group, in coming to the conclusion that Mr Sim *must have known* of his daughters' actions, and *must have agreed* to them (see the Judgment at [148]).

62 Mr Christopher Daniel ("Mr Daniel"), counsel for Mr Sim, argued that the Judge had erred in drawing the inference as to Mr Sim's knowledge. We cannot accept Mr Sim's arguments. As we pointed out to Mr Daniel at the hearing, it is not the role of an appellate court to delve into the minutiae of the factual findings made by the trial judge and make findings of our own, *unless* the findings were plainly inconsistent with the evidence which had been given. This would also be true of the *inferences* drawn by the Judge, which ought to stand unless they were plainly against the weight of the evidence. The trial judge had the benefit of hearing and observing the witnesses over the course of a lengthy trial, and carefully considered the evidence in coming to his findings and set out his reasons for those findings in a comprehensive judgment.

63 The hurdle that Mr Sim had to surmount was therefore to show that the Judge's findings and inferences were against the weight of the evidence. To this

end, Mr Daniel relied primarily on the evidence that the Sims gave at trial to support the arguments as to Mr Sim's limited scope of knowledge.

64 In our judgment, the Judge was entitled to draw the inferences that he did. The Judge had considered Mr Sim's evidence, and weighed this evidence against all the other evidence before him. We consider that nothing in Mr Daniel's arguments seriously challenged the correctness of the Judge's findings and the findings therefore ought to stand.

Mr Sim's interests in the Corporate Defendants

65 Mr Sim's other main challenge against the Judge's decision is to point to the fact that there was no evidence indicating that he personally had any interests in the Corporate Defendants to which opportunities had been diverted, except OSPC, and thus could not be said to have breached the no-conflict rule in that he had not favoured his own interests over the Winsta Group's interests. To this end, Mr Daniel placed special emphasis on the Judge's findings in the Judgment at [145] where the Judge observed that there was "no direct evidence that [Mr Sim] [had] an interest in and/or controlled any of the remaining corporate defendants, *ie*, ATAS, Uni-House, [Unihouse@Evans], JMJ Hotpot, ICS Catering, and I-Masters". The Judge also elaborated that there was "also no evidence upon which [he could] infer any such interest or control", with the mere fact that Mr Sim was "the patriarch of the Sim Family" being "insufficient to support such an inference". Mr Daniel pointed out that the Judge himself was acknowledging the absence of evidence to support an inference as to Mr Sim's personal interests in the Corporate Defendants, but the Judge then appeared to have contradicted himself in the Judgment at [148], when he found that in view of the relationship between Mr Sim and his daughters, Mr Sim "would be

regarded as having personal interests in the [Corporate Defendants] and in Devonshire as well".

66 There is an apparent tension between the Judge's findings at [145] and [148], where the Judge observed on the one hand that there was no evidence to support a finding that Mr Sim had personal interests in the Corporate Defendants, but then gravitated to the opposite view and concluded that "in view of their relationships", *ie*, Mr Sim's relationship with his daughters, Mr Sim would be *deemed* to have such a personal interest. We consider, however, that this tension is more apparent than real. The key to resolving this tension is to consider the Judge's findings in sequence, *especially* after due consideration of his findings at [147] of the Judgment which we have referred to at [61] above.

67 In our view, the Judge's findings at [147] of the Judgment demonstrate how the Sims operated as a tight-knit family unit in their business dealings. The Sim sisters would inform their father about their business dealings and consult him on them, or seek his advice. On occasion, they would also seek his approval for important decisions. Indeed, that the Sim sisters should operate in this way, giving deference to their father and requiring his approval to take important decisions, reflects how Mr Sim essentially founded the Winsta Group and was the prime actor in its expansion. Although the Sim sisters eventually came to take on greater and more involved roles in disparate parts of the business, it is evident that they respected Mr Sim's business acumen and did not forget that it was Mr Sim who had placed them in the positions of power and authority in these businesses. This led the Judge to infer – rightly, in our view – that the Sim sisters would not have acted to the detriment of their father without his knowledge. More importantly, they led the Judge to correctly infer that Mr Sim had, on a balance of probabilities, personal interests in the Corporate Defendants to which business opportunities that rightly belonged to the Winsta Group had

been diverted. Mr Sim was a shareholder in Winsta Holding and its managing director; it was natural to infer that he would not have wanted or allowed the benefits he derived from that interest to be damaged, unless he was obtaining a benefit or advantage from having the opportunities diverted elsewhere instead. Given the close-knit relations between Mr Sim and his daughters, and his daughters' interests in and control of the Corporate Defendants, it was open to the Judge to infer that Mr Sim was probably benefiting in some way from the Corporate Defendants taking advantage of the business activities instead of leaving these opportunities to the Winsta Group instead. Thus, the Judge was right to infer that Mr Sim likely had personal interests in the Corporate Defendants, which entailed that he had preferred those interests over his fiduciary duty to the Winsta Group when he knew of the business opportunities being diverted away from the Winsta Group but did nothing to stop that.

68 If it were necessary, we would also observe that the Judge's finding that Mr Sim had breached his fiduciary duty to the Winsta Group could also be justified on the alternative basis that he had breached the no-conflict rule in preferring the interests of a *third party* when he had come to know of his daughters' actions but took no action to stop them. The no-conflict rule is typically framed in terms of the fiduciary preferring his personal interests over those of his principals (see, for example, the High Court decision of *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957 at [53]), which might suggest a binary opposition of interests between the fiduciary's *own* interests, and his principal's interests. But this is usually because the cases in which this particular formulation of the rule is applied involve allegations of the fiduciary in question preferring his own interests, as opposed to some other interests.

69 The true statement of principle, however, is not so narrow. In other cases, the High Court has contemplated the possibility of breach of the no-

conflict rule where the errant fiduciary prefers not his own interests, but rather the interests of a third party, over the interests of his principal. For example, in the High Court decision of *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1, Andrew Ang J observed (at [32]) that "the 'no conflict' rule is a prophylactic principle aimed at avoiding the risk that the director might prefer his personal or a *third party's* interests over those of the company" [emphasis added]. Similarly, the statement of general principle given by Millett LJ in the English Court of Appeal decision of *Bristol and West Building Society v Mothew* [1998] Ch 1 ("*Mothew*") at 18A–18C describes one of the core duties of a fiduciary as not acting for his benefit or the benefit of a *third party* without informed consent:

> … This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or *the benefit of a third person* without the informed consent of his principal. … [emphasis added]

70 The academic commentaries, too, suggest that a breach of fiduciary duty can occur where the fiduciary prefers a third party's interests over those of the principal. The authors of *Walter Woon on Company Law* (Tan Cheng Han SC, gen ed) (Sweet & Maxwell, 3rd Rev Ed, 2009) observe at paras 8.40 and 8.43, in relation to the duty to avoid conflicts of interest, as follows:

> **8.40** The duty to avoid conflicts of interest is not confined to instances where a director obtains a profit. A director is under an obligation not to place himself in a position where the interests of the company whom he is bound to protect comes into conflict with either his personal interest *or the interest of a third party for whom he acts*. …
>
> …
>
> **8.43** The duty to avoid conflicts of interest extends beyond attaching liability to blameworthy disloyalty; it also serves as a prophylaxis against the risk that the director might prefer his

> personal or a *third party's interests* over that of the company.
> …
> [emphasis added]

71 It is inherent in the nature of this core fiduciary duty that the fiduciary places the interest of the beneficiary above all other interests. The no-conflict rule is *fundamentally* concerned with securing the ***utmost protection of the beneficiary***. Hence, it is wholly unsurprising that the rule does not depend on whether the preferred interests are those of the fiduciary or those of a third party. The prevention of any personal gain by the fiduciary himself is only a corollary of the fundamental concern.

72 Here, even if the Judge was wrong to infer that Mr Sim had personal interests in the Corporate Defendants or Devonshire, we think that he was nevertheless right to infer that Mr Sim, in essentially turning a blind eye to his daughters' breaches of fiduciary duty and failing to disclose the same to the Winsta Group or to take any action to stop his daughters, had preferred the interests of third parties, namely, the Corporate Defendants and his daughters. This would have been sufficient, in and of itself, to justify the finding that Mr Sim had breached the no-conflict rule.

73 Because there is no reason nor basis for us to interfere with the Judge's factual findings as regards Mr Sim's liability for breach of fiduciary duty, we agree with the Judge on this point and Mr Sim's appeal fails.

The quantum of equitable compensation and costs payable by Mr Sim

74 The Judge found Mr Sim jointly and severally liable to M Development for the diversion of the Illuminaire and Scotts Square opportunities (see the Judgment at [250]–[251]).

75 Mr Sim takes issue with the amount of equitable compensation quantified by the Winsta Companies' expert, Mr Temple-Cole. He specifically objects to Mr Temple-Cole's use of a 15% profit margin with regard to the incomes from the Illuminaire and Scotts Square properties, which he says fails to take into consideration factors such as inflation and rising costs and expenses. Mr Sim also objects to the quantum of expenses which Mr Temple-Cole calculated Global Residence would have had to spend to earn the diverted income. Mr Sim further says that it was unreasonable for Mr Temple-Cole to have assumed that Global Residence would have continued its operations in perpetuity.

76 These objections can be dealt with summarily. Our first observation is that none of the Defendants below had engaged an expert to value the compensation payable. This represents a significant impediment to Mr Sim's case, because we observed, in *Saeng-Un Udom v Public Prosecutor* [2001] 2 SLR(R) 1 at [26], that a "court should not, when confronted with expert evidence which is unopposed and appears not to be obviously lacking in defensibility, reject it nevertheless and prefer to draw its own inferences".

77 We do not consider the expert evidence given by Mr Temple-Cole to have been obviously lacking in defensibility. In so far as Mr Sim's objection to the 15% profit margin used is concerned, we note that no evidence has been presented showing that inflation, rising costs and other expenses would affect the reasonableness of the percentage used. As regards the expenses attributed to Global Residence, Mr Temple-Cole gave a reasonable explanation that Global Residence would have made the same profit before tax margin on the diverted incomes as it was making prior to the diversion of income, *ie*, 15%. And in so far as the assumption that Global Residence would have continued operations in perpetuity is concerned, this assumption was not even applied in respect of

computing the loss of profit from the diversion of the Illuminaire and Scotts Square opportunities from Global Residence, but rather concerned the quite separate question of what Global Residence's profits would have been had it not been liquidated, which was, in turn, part of the larger question of post-liquidation loss (which the Judge ultimately did not award the Winsta Companies).

78 In summary, we see no reason to interfere with the Judge's findings on the amount of equitable compensation payable in relation to the diversion of the Illuminaire and Scotts Square opportunities.

79 Turning then to the issue of costs, Mr Sim contends that the Winsta Companies should be ordered to pay indemnity costs for their "unreasonable" and "reprehensible" conduct in the Suit. Mr Sim argues that the suit was a "fishing expedition", given the "complete lack of evidence adduced over the course of proceedings against [him]". Mr Sim is also aggrieved by the failure of the Winsta Companies' solicitors to prepare the trial bundles in accordance with the Supreme Court Practice Directions.

80 Mr Sim's submission that indemnity costs should be ordered against the Winsta Companies is simply hopeless in the light of our affirmation of the decision in the court below that Mr Sim is liable for breaches of fiduciary duty. Mr Sim's contention that the action was a mere fishing expedition against him cannot stand. The Winsta Companies were justified in believing that Mr Sim had interests in or control of any of the Corporate Defendants that would support a determination of breach of fiduciary duty. The Winsta Companies were therefore within their rights to pursue claims against him, and to cross-examine him to ascertain whether he did truly hold an interest in the Corporate Defendants.

81 The alleged non-compliance with the Supreme Court Practice Directions, concerning the late service of trial bundles and inconvenience caused by apparently less than ideal presentation of documents, was really only minor in nature and does not justify the sanction of indemnity costs. Indeed, the Judge himself took no note of these non-compliances, so they do not appear to have been so severe an inconvenience to the trial.

82 Finally, as regards the argument that Mr Temple-Cole's report ("the KordaMentha Valuation Report") was of limited assistance to the court, we observe that the Judge had already accounted for this lack of assistance in ordering that costs payable for the report be assessed at 60% of the cost incurred in obtaining the report. There is no reason to account for this again by the draconian measure of indemnity costs.

83 In short, none of Mr Sim's arguments in the appeal succeeds. CA 218 is therefore dismissed in its entirety.

CA 220

84 CA 220 is the appeal by Winsta Holding and M Development against the Judge's finding that, despite the many breaches of fiduciary duty by the Sims, causation was only established in respect of the diversion of the Illuminaire and Scotts Square opportunities to OSPC and ATAS. The Judge had rejected the application of the rule in *Brickenden* ([7] *supra*), and had considered that the onus lay on the Winsta Companies to prove but-for causation of loss. In CA 220, the Winsta Companies vigorously contend that the Judge was wrong to reject *Brickenden*. Their case is that fiduciaries, such as the Sims in their capacity of company directors of Winsta Holding and the various Winsta Subsidiaries, should be deterred from breaching their fiduciary duties. A strict

application of *Brickenden* achieves this by recognising that if the breach is material to the event that led to the loss, the defaulting fiduciary should not be allowed to argue that even if he had not breached his duty, some other factor would have caused the same loss. *Brickenden* reminds the court not to speculate as to what the many possible causes of the loss might have been in coming to a view as to what might have been "but for" causes; instead, so long as the fiduciary's breach of duty was material to the loss, that is sufficient to establish causation.

85 As the short summary in the preceding paragraph illustrates, the central issue in CA 220 concerns the appropriate principles of causation (if any) to be adopted in the remedy of equitable compensation for breaches of fiduciary duty. The law in this area is unsettled and difficult. We will therefore examine the appropriate legal principles to be adopted in this area of the law, before turning to consider how those principles are to be applied to the facts of this case.

Preliminary observations and relevant concepts in the field

(A) Introduction

86 It might, however, be useful at this juncture to make some preliminary observations which will not only unpack the possible pitfalls that ought to be avoided in analysing this particular issue but will hopefully also point the way towards the resolution of legal conundrums that have resulted in the spilling of much academic ink. However, before proceeding to do so, it would be apposite to outline – in its bare essence – the difficult legal issue itself.

87 From a *remedial* perspective, the three categories of breach enunciated by Tipping J in the New Zealand Court of Appeal decision of *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 ("*Bank of*

New Zealand") at 687 (and approved of by Ribeiro PJ in the Hong Kong Court of Final Appeal decision of *Thomas Alexej Hall v Libertarian Investments Ltd* (2013) 16 HKCFAR 681 ("*Libertarian Investments*") at [75]) are illuminating:

> Breaches of duty by trustees and other fiduciaries may broadly be of three different kinds. First, there are breaches leading directly to damage to or loss of the trust property; second, there are breaches involving an element of infidelity or disloyalty which engage the conscience of the fiduciary; third, there are breaches involving a lack of appropriate skill or care. It is implicit in this analysis that breaches of the second kind do not involve loss or damage to the trust property, and breaches of the third kind involve neither loss to the trust property, nor infidelity or disloyalty.

The present case concerns a breach of the second kind of duty in the trichotomy of breaches presented by Tipping J. The issue that arises is the role (if any) that ***causation*** plays in the granting of the appropriate remedy in the case of a breach of the second kind of duty *not* involving any damage to or loss of property in the custody of the fiduciary (*ie*, a ***non***-custodial breach of fiduciary duty).

*(B) An overview of the various approaches towards the role of causation adopted by Singapore High Court decisions where there is a **non**-custodial breach of fiduciary duty*

88 The common issue that arises with regard to a breach of fiduciary duty, whether custodial or non-custodial, is whether *causation* is required to be proved and, if so, *how* it is to be proved. In so far as ***non***-custodial breaches of fiduciary duty are concerned, *different approaches* have been adopted by various local *High Court* decisions. It will suffice for the purposes of the present overview to note that there are at least three possible approaches to the role of causation in ascertaining whether or not a remedy ought to be awarded to the plaintiff.

89 The *first* (which we refer to hereafter as "***Approach 1***") – which is frequently attributed to a strict reading of the Privy Council decision of *Brickenden* ([7] *supra*) – is that causation is ***not*** relevant once a *breach* of fiduciary duty has been established. In particular, a defendant would not be permitted to argue that it is not responsible for the damage which the plaintiff has suffered as that damage would have occurred in any event and that the defendant had therefore not caused the damage in question. The underlying rationale for such a strict (indeed, prophylactic) approach centres on the need to deter breaches of fiduciary duty.

90 By way of a brief aside, judges and academics have interpreted *Brickenden* differently: some have read it as a principle relating solely to rescission and not compensatory awards (see Hobhouse LJ (as he then was) in the English Court of Appeal decision of *Swindle and others v Harrison and another* [1997] 4 All ER 705 ("*Swindle*"), at [190] below), some have taken it to be a principle relating only to the breach of fiduciary duty (see Mummery LJ in *Swindle* at [188] below), some have stated that the rule is an application of a "material" causation test approaching strict liability (see Joshua Getzler, "Equitable Compensation and the Regulation of Fiduciary Relationships" in *Restitution and Equity Volume One, Resulting Trusts and Equitable Compensation* (Peter Birks & Francis Rose eds) (Mansfield Press, 2000) ch 13 ("*Getzler*") at p 239), and some have opined that the rule was mainly about excluding ready resort to contributory negligence as a defence (see *Getzler* at p 240, citing PD Finn, "Good Faith and Non-Disclosure" in *Essays on Torts* (PD Finn ed) (Lawbook Co, 1989) at pp 166–170). Although Approach 1 could be justified by way of the doctrine of *rescission*, as a learned writer has, in our view, quite correctly pointed out, this would be "a very strained interpretation of what Lord Thankerton said in *Brickenden*" (see Matthew Conaglen,

"*Brickenden*" in *Equitable Compensation and Disgorgement of Profit* (Simone Degeling & Jason NE Varuhas eds) (Hart Publishing, 2017) ch 6 ("*Conaglen on Brickenden*") at p 119). The other suggested readings are likewise strained.

91 The *second* (which we refer to hereafter as "***Approach 2***") – which is in *complete contrast* to the first, and which is attributed to the House of Lords decision in *Target Holdings* ([52] *supra*) and (more recently) the UK Supreme Court decision of *AIB* ([52] *supra*) – is that the plaintiff must ***always*** establish "but for" causation.

92 The *third* (which we refer to hereafter as "***Approach 3***") is a kind of *hybrid* approach which, whilst not eschewing the requirement of causation (which is *wholly* endorsed under Approach 2), nevertheless attempts to give effect to the underlying rationale under Approach 1 by *reversing the burden of proof* inasmuch as the *defendant* will have to prove that the damage suffered by the plaintiff would have occurred in any event.

93 We will assess each of these approaches in due course before arriving at a decision as to which approach ought to be adopted in the Singapore context. We should also add that the actual legal issues are – as we shall see below – obviously far more complex than the mere sketch or outline which we have just presented. For example, under Approach 3, the court has to decide whether the reversal is of the legal burden or the evidential burden.

94 We should mention that the concept of causation is itself a logical construct. By this, we mean that, as a matter of pure *logic*, *every* effect *must* have *a cause or a series of causes*. Put another way, the concept of causation is a *universal* one that is simultaneously an integral part of the fabric of the law. Viewed in this light (and in so far as ***non***-custodial breaches of fiduciary duty

are concerned), Approach 1 becomes immediately *less persuasive*. *However*, it does *not necessarily* follow, then, that Approach 2 *must* apply – at least not in an *unmodified* form. Nevertheless, Approach 2 does remain preferable to Approach 1 inasmuch as it embodies the concept of causation. In this regard, Approach 3 attempts to achieve a ***balance*** between Approach 1 on the one hand and Approach 2 on the other.

95 We would also venture to suggest that underlying the approaches may – in some instances at least – be what is emblematic of a particular approach towards the common law on the one hand and equity on the other (or, more to the point, as embodying a *clear preference* for one over the other). As we shall attempt to demonstrate, the best approach is – as far as it is possible – to ***integrate*** both these seminal branches of the law as opposed to preferring one over the other. Rendering explicit subjective (and often, it should be said, subconscious) bias towards one approach rather than the other is also helpful in dissolving any possible bias as this is, in our view, a first step as well as a prerequisite to developing the aforementioned *integrated* approach. And it is to the issues just mentioned that our attention now turns.

(C) Common law and (not versus) equity

96 The common law of England (including the principles and rules of equity) constitutes part of Singapore law (see also s 3 of the Application of English Law Act (Cap 7A, 1994 Rev Ed)). Indeed, the reception of both common law and equity dates back to the Second Charter of Justice of 1826. The relationship between common law and equity was not, however, always an easy one. However, by the time the Judicature Acts of 1873 and 1875 in England were promulgated, the *administration* of both branches of the law had been fused. The question that remained was whether the ***substantive principles*** had

been fused *as well*. There is, surprisingly, no clear answer to this particular question, especially amongst legal scholars. Some are in favour of fusion, whereas others are not (see *Equity and Law: Fusion and Fission* (John Goldberg, Henry Smith & PG Turner, eds) (Cambridge University Press, 2019) and the legal scholarship referred to therein). It is beyond the ambit of this judgment to provide a definitive view on this thorny issue. However, the debate is instructive inasmuch as at least part of why one lies on one side of the divide or the other has to do, it is suggested, with whether one considers oneself more of an equity lawyer or more of a common lawyer. Perhaps unsurprisingly, this is especially the case where legal scholars are concerned. However, as already alluded to above, the best approach is one of ***balance*** – in particular, the courts do best when they endeavour to embrace, as far as is possible, all the relevant rules and principles of common law and equity, allocating the appropriate "legal space" to each and utilising them as and when appropriate in order to achieve a just and fair result in the case at hand. One doctrine ought not to be subsumed in the other unless to do so is principled; in particular, mere theoretical elegance alone is an insufficient ground for doing so (see, for example, in the context of the doctrines of unconscionability, economic duress and undue influence, this court's decision in *BOM v BOK and another appeal* [2019] 1 SLR 349 at [175]–[180], especially at [176]). Much will depend, in the final analysis, on the precise area of law concerned as well as its content and potential interaction (or otherwise) with other area(s) of law.

97 In the context of the present appeals, it would appear that, having regard to the fact that breaches of fiduciary duty lie in the sphere of *equity*, *equitable* remedies ought – as a matter of first impression at least – to take precedence. And if this is the case, then if the (equitable) remedy is thought to lie in the sphere of trust accounting principles (*and* having regard to the underlying

rationale that a prophylactic approach is required in order to deter breaches of fiduciary duty), it might be argued that the extremely strict approach (centring on *Brickenden* ([7] *supra*)) in Approach *1* (briefly referred to above at [89]) ought to apply – in which case causation would appear to be irrelevant. There are, however, at least two difficulties with such an approach. The first (which we have already referred to above) is that the concept of causation is a logical construct that, *ex hypothesi*, is of *general or universal* application and which therefore *transcends*, *inter alia*, the divide between equity on the one hand and the common law on the other. The second finds its source in the point made in the preceding paragraph, and relates to the need to allocate or accord the appropriate "legal space" (in this instance) to common law doctrines as well. In this regard, quite apart from its logical nature, the concept of causation is simultaneously also an integral part of the common law approach in the context of the award of compensatory damages. At this juncture, though, it might be thought that we are faced with a binary situation which requires either the endorsement of the equitable approach or the common law approach. *However*, as we shall demonstrate below, there is a *yet further* approach that ***balances*** the apparent tension between equity and the common law. Indeed, we would suggest that our proposed approach actually *integrates* the approaches at equity and at common law into a *hybrid* doctrine of sorts (as we shall see, this is in fact Approach ***3***, which we had briefly referred to at [92] above).

98 Indeed, an integrated as well as holistic approach is also reflected in the following observations in a very perceptive article by Prof Charles Mitchell, whose observations also impact (as we shall see) on other issues (Charles Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 Current Legal Problems 307 ("*Mitchell*") at pp 326–327):

> The Australian courts have tried to paper over the cracks in their theory by appealing to a grand but vague idea that equity does things differently from the common law, and that 'common law concepts' of causation and remoteness are irrelevant to claims for equitable compensation. Lionel Smith has observed that this reasoning will not do, either, not because it asserts that equity and the common law can do things differently, but because it ignores the differences between distinct types of equitable claim. More specifically, it entails [citing Lionel Smith, "The Measurement of Compensation Claims against Trustees and Fiduciaries" in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) at p 369]
>
> > a failure to recognise that not every claim for money is a claim for loss. The judges [know] that some money claims in equity [are] subject to a different manner of quantification that [does] not look to remoteness or foreseeability or even causation; they [assume] that this [means] that claims for compensation are handled differently in equity. The truth is that those claims that are assessed without regard to remoteness, foreseeability or causation are not claims for loss.
>
> The courts of every Commonwealth jurisdiction would do much better to recognize that the rules governing claims to reconstitute trust funds do not apply to claims for equitable compensation for breach of fiduciary duty. Even where the parties are trustee and beneficiary, 'that relationship does not in and of itself dictate how the law should determine issues of causation and remoteness,' as Tipping J observed in the New Zealand Court of Appeal [in *Bank of New Zealand* ([87] *supra*)]. He went on to stress that 'breaches of duty by trustees and other fiduciaries may … be of … different kinds', including 'breaches leading directly to damage to or loss to trust property' and 'breaches involving an element of … disloyalty', and he rightly said that it is an error to suppose that 'the existence of the same relationship between the parties ie trustee and beneficiary' mandates 'that the same approach to causation and remoteness should be taken in all cases irrespective of the nature of the breach'. …

(D) Breach of trust distinguished from breach of fiduciary duty

99 We begin first by considering the position of a trustee, and the important distinction that exists between his or her *stewardship duty* and his or her *fiduciary duty*. Although this case is *not* concerned with a breach of trust, an

understanding of this distinction is relevant to understanding the distinction between a ***custodial*** breach and a ***non****-custodial breach of fiduciary duty*, which we will elaborate in the next section.

100 It is fundamental to the law of trusts that ***trustees*** owe a duty to their beneficiaries to administer trust property *in accordance with the terms of the trust*. Trustees owe a ***custodial stewardship duty*** and a ***management stewardship duty***. Breach of the former duty occurs where the trustee *misapplies trust assets*. The trustee commits a different breach when he breaches his management stewardship duty; it occurs where he *fails to administer the trust fund in accordance with his equitable duties*, such as when he administers the trust negligently, in breach of his equitable duty of care. Using the trichotomy of breaches Tipping J elucidated (see [87] above), a breach of the custodial stewardship duty is the first kind of breach (*ie*, a breach leading directly to damage to or loss of the trust property), and a breach of the management stewardship duty is likely to be the third kind of breach (*ie*, a breach involving a lack of appropriate skill or care).

101 A trustee, being the quintessential ***fiduciary***, also owes a *duty of loyalty* towards his principal. A fiduciary can breach this duty of loyalty, which finds particular expression in the form of the no-conflict and no-profit rules, even where he does not take any action affecting his principal's assets or property. We have highlighted these fiduciary duties of a trustee in our earlier decision in *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*"). At [205] of *Tan Yok Koon*, we observed that:

> … Third, there is no doubt that express trustees owe fiduciary duties. The duty to perform the trust honestly and to act in good faith for the benefit of the beneficiaries is at the same time an irreducible core duty of the trust and a duty that is fiduciary in nature. In this context, the fiduciary duty arises not from the

> trustee-beneficiary relationship *per se*, but from the voluntary undertaking to the settlor to manage the trust property not for the trustee's own benefit but for the benefit of the beneficiaries. … [emphasis in original omitted; emphasis added in underlining]

Using the trichotomy of breaches presented by Tipping J again, such a breach of fiduciary duty is the second kind of breach (*ie*, breaches involving an element of infidelity or disloyalty which engage the conscience of the fiduciary).

102 It is clear that a breach of trust is *not the same (or coterminous or coincident)* with a breach of fiduciary duty (and see *Mitchell* ([98] above) at pp 320–321). For example, whilst it is a breach of fiduciary duty for the fiduciary to have acted despite having a conflict between duty and interest (or between interests) (commonly referred to as a breach of the duty of undivided loyalty) or to have taken an unauthorised profit (though *cf* Matthew Conaglen, *Fiduciary Loyalty – Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2011), who argues persuasively that there is *only one* fiduciary duty of loyalty which constitutes the source of all fiduciary duties generally), it does *not* ***necessarily*** follow (at least from a *theoretical or conceptual* perspective) that such actions would *simultaneously* constitute a breach of *trust*. As Prof Mitchell observes by way of an illustration (*Mitchell* at p 321):

> … [A] trustee might invest all the trust money in an authorized investment chosen with a view to favouring a life tenant at the expense of a remainderman by generating income at the expense of capital growth. Here the investment is authorized, but the trustee has breached his duty not to favour the interests of one beneficiary over the interests of another.

And the same author illustrates the *converse* situation (*ie*, a situation where there is a breach of trust, albeit no breach of fiduciary duty) as follows (*Mitchell* at p 321):

> … For example, [a trustee] may use trust money to acquire an unauthorized investment because he considers this to be in the beneficiaries' best interests. Even where such a 'judicious breach of trust' turns out well, a 'carping beneficiary could insist that the unauthorised investment be sold and the proceeds invested in authorised investments'. The reason is that the trustee has failed to comply with the terms of the trust, although his loyalty to the beneficiaries is unimpeached. …

103 It is trite that there are fiduciaries who are not trustees, such as company directors. For these non-trustee fiduciaries, they can commit breaches of fiduciary duty, but not breaches of trust, although *custodial* breaches of fiduciary duty have been treated by some cases as akin to breaches of the custodial stewardship duty of a trustee. *Custodial* breaches of fiduciary duty are to be contrasted with *non*-custodial breaches of fiduciary duty, and it is this distinction to which we now turn.

(E) Non-custodial breach of fiduciary duty distinguished from custodial breach of fiduciary duty

104 Breach of fiduciary duty itself can be further divided into two main categories for conceptual clarity: (a) *custodial* breach of fiduciary duty, and (b) *non*-custodial breach of fiduciary duty. As we had noted earlier in this judgment, the present case relates to alleged ***non***-custodial breaches of fiduciary duty. As also alluded to above, such a situation is *different* from situations concerning *custodial* breaches of fiduciary duty. This difference does indeed have significant theoretical as well as practical implications. Let us elaborate.

105 The main difference lies in the very terminology itself. The former (*viz*, *non*-custodial breach of fiduciary duty) does *not* involve the *stewardship* of assets as such. It occurs where the fiduciary breaches his fiduciary duties, *ie*, the no-conflict and no-profit rules, but this breach does not involve any of the assets *already entrusted to him*. Hence, the usual remedy would lie in the sphere of

compensatory monetary awards (to be more precise, *equitable compensation*). Where the fiduciary earned profits from the breach, the principal can seek, alternatively, *an account of profits*. Both equitable compensation and account of profits have a common thread in so far as they are both monetary in nature and their elements as well as relationship have been set out in a comprehensive and learned joint article: see Yip Man & Goh Yihan, "Navigating the Maze – Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 ("*Yip & Goh on Equitable Compensation*").

106 However (and in contrast), the latter (*viz*, *custodial* breach of fiduciary duty) *does*, in fact, involve the *stewardship* of assets. It is *a breach of fiduciary duty resulting in the misapplication of the principal's funds or trust funds*. For example, a director of a company, a well-established class of fiduciary, has control over the disposal of the company's assets. In this sense, he or she has stewardship of the assets. A misapplication of the company's funds – for example, where they were dissipated for the director's own benefit in breach of the no-conflict rule and the no-profit rule – would give rise to a *custodial* breach of his or her fiduciary duty.

107 A question at this point arises as to whether or not there is, in fact, a distinction between such a custodial breach of fiduciary duty on the one hand and a breach of the duty of custodial stewardship of a trustee on the other. This may in turn affect whether or not the remedial response to a breach of the custodial stewardship duty of a trustee (such as substitutive compensation) would be applicable to a custodial breach of fiduciary duty. In the case of a trustee, a custodial breach of fiduciary duty is presumably treated as a breach of the custodial stewardship duty of the trustee. However, it may not be so clear in a case of a non-trustee fiduciary misapplying his or her principal's assets.

108 A related question that arises is whether a *custodial* breach of fiduciary duty should attract the remedial principles targeting the breach of the no-conflict rule or no-profit rule *or* the remedial principles targeting the misapplication of funds (see *Yip & Goh on Equitable Compensation* ([105] above) at para 47 and *Mitchell* ([98] above) at p 324). There is good reason for the remedial principles targeting the misapplication of funds to apply to a *custodial* breach, for the wrong is done to the principal's funds placed under the custody of the fiduciary (see *Agricultural Land Management* at [363]).

109 Cases have often treated instances of breaches by fiduciaries, such as company directors, in wrongfully disposing of assets to which they have been given custody or power, as essentially being ***akin to breaches of the custodial stewardship duty of a trustee***, and ordered remedies that would typically be granted in the like situation of a breach of the custodial stewardship duty of a trustee. These cases explain that although company directors are not strictly trustees because title to the company's assets is not vested in them, they are nevertheless in ***a closely analogous position*** to a trustee because of the fiduciary duties they owe to the company, and are often treated like trustees in relation to the company assets under their control. As such, awards of substitutive compensation can be awarded against company directors for wrongful disposal of assets (see, for example, the English Court of Appeal decisions of *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership) and others* [2011] 3 WLR 1153 at [34] and *Bairstow and others v Queens Moat Houses plc* [2001] 2 BCLC 531 at [50]; the UK Supreme Court decision of *Revenue and Customs Commissioners v Holland and another* [2010] 1 WLR 2793 ("*Holland*") at [46] and [49]); the English Court of Appeal decision of *Auden McKenzie (Pharma Division) Ltd v Amit Patel* [2019] EWCA Civ 2291 ("*Auden McKenzie*") at [57]–[58]; as well as the Supreme Court of

Western Australia decision of *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1 ("*Agricultural Land Management*") at [363]). Given that this particular legal issue does not arise on the facts of the present case (which relates to alleged *non*-custodial breaches of fiduciary duty), we say no more about it. The resolution of the question may, however, be a matter of choice for the principal, *ie*, it is dependent on which set of remedial principles he seeks. What *is* clear is that a ***non****-custodial breach of fiduciary duty* ***is clearly different from both*** a *custodial breach* of fiduciary duty and a *breach of the custodial stewardship duty of a trustee*.

110 We next touch on one further (residuary) issue, which is the role of *causation* in the context of *breaches of* ***the custodial stewardship duty of a trustee*** in particular. It is in fact very important but, because it does not arise on the facts of the present case, we will only touch on it in the briefest of fashions and will rule definitively on it when it next comes directly for decision before this court.

(F) The role of causation (if any) in so far as breaches of ***trust*** *are concerned (and possibly)* ***custodial*** *breaches of fiduciary duty*

111 One approach that has been adopted in case law is the analogue of *Approach 1* – that causation is ***not*** relevant once a breach of the *custodial stewardship duty* of a trustee has been established. Under this approach, the remedy is an order of ***falsification*** available to a principal following a process of accounting on the basis of a *common account* (see *Agricultural Land Management* at [335]; see also the Singapore High Court decision of *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2019] 4 SLR 714 ("*Cheong Soh Chin*") at [71]–[78]). This remedial response to a breach of the custodial stewardship duty of a trustee may also be applicable to a *custodial*

breach of fiduciary duty, an issue highlighted earlier at [107] that remains to be determined conclusively in an appropriate future case.

112 Where it is established through the process of accounting that the trustee had disposed of a trust asset without authority, the principal could ask the court to disallow (*ie*, falsify) the unauthorised disposal. The court would do so, and order the trustee to either reconstitute the trust fund *in specie* or reconstitute the trust fund in monetary terms in lieu of reconstitution *in specie* (see *Libertarian Investments* ([87] *supra*) at [87] and [168]; see also *Mitchell* at pp 321–322). We refer to this approach as the "orthodox approach", for ease of reference.

113 The process of falsification involves no inquiry into loss; it does not matter whether the dissipation of the asset would have occurred even without the unauthorised act (see *Agricultural Land Management* at [336]–[338]). Such a remedy is ***substitutive*** in nature (see *Agricultural Land Management* at [349], citing Dr Steven Elliott's views in *Compensation Claims Against Trustees* (2002) (unpublished DPhil thesis, University of Oxford, archived at the Bodleian Law Library); see also *Mitchell* at p 322). It presupposes the existence of "a primary duty to hold and deal with the trust property in accordance with the trust terms, and to produce it when called upon to do so" (*Mitchell* at p 322). It has also been described as "restitutionary" or "restorative" (*Libertarian Investments* at [168] *per* Lord Millett NPJ).

114 In our respectful view, perhaps a more accurate way of describing the legal position is that the concept of causation should *not* be viewed as being wholly irrelevant or immaterial even where a common account is sought in the context of a breach of the custodial stewardship duty of a trustee. Causation *is* still relevant – except that the role it plays is *different from* the situation where compensation is sought. Put simply, the ***causal link*** is between the trustee's

breach of duty and the subject matter of the trust that is now sought to be *restored* (see the English Court of Appeal decision of *Magnus v Queensland National Bank* (1888) 37 Ch D 466 at 479–480; see also the English Court of Appeal decision of *Target Holdings Ltd v Redferns and another* [1994] 1 WLR 1089 ("*Target Holdings (CA)*") at 1102H). To put it yet another way, the subject matter of the trust would not have departed from the custody of the trustee to whom it was entrusted ***but for*** the trustee's breach of his custodial stewardship duty (*Agricultural Land Management Ltd* at [368] *per* Edelman J; *Bank of New Zealand* ([87] *supra*) at 687 *per* Tipping J; *Libertarian Investments* at [76] *per* Ribeiro PJ). Looked at in this light, the concept of causation is ***inextricably integrated*** as part of the overall process whereby the subject matter of the trust had (unjustifiably) departed from the trustee's custody.

115 We recognise that the sense in which causation appears in the situation of falsification is a ***limited*** one, meaning that the court does ***not*** go *further* to determine whether the loss would still have occurred in the absence of the trustee's breach of duty.

116 If the orthodox approach is accepted, then the decisions in *Target Holdings* and *AIB* ([52] *supra*) may need to be reconsidered (at least in the context of breaches of *trust* and perhaps *custodial* breaches of fiduciary duty) – at least in so far as both cases treated a breach of the custodial stewardship duty of a trustee as a *reparative (or compensatory)* claim instead (see, for example, *Mitchell*, especially at pp 323–324; see also Lusina Ho, "Causation in the Restoration of a Misapplied Trust Fund: Fundamental Norm or Red Herring?" in *Equitable Compensation and Disgorgement of Profit* (Simone Degeling & Jason NE Varuhas eds) (Hart Publishing, 2017) ch 8 ("*Fundamental Norm or Red Herring?*") at p 166).

117 Both *Target Holdings* and *AIB* involved funds being paid to and held by solicitors for the purpose of making secured loans to third-party borrowers. The solicitors were to release the loan monies to the borrowers after obtaining the stipulated security. In both cases, the solicitors released the monies before obtaining security. In *Target Holdings*, the requisite security was obtained shortly after the release of monies. In *AIB*, the requisite security, which was a first charge on a property, was never obtained; only a second charge was obtained on the property. In both cases, the House of Lords and the UK Supreme Court agreed with the trustee-solicitors that their clients *would have suffered loss in any event* due to other reasons, so the trustee-solicitors were not liable to restore to their clients the full amount of monies wrongfully disbursed.

118 Delivering the leading judgment in *Target Holdings*, Lord Browne-Wilkinson observed that "the beneficiary is entitled to be compensated for any loss he would not have suffered *but for* the breach" [emphasis added] (at 436C). Subsequent cases and academic commentary have latched on, in particular, to the two words "but for", as signalling the acceptance of the relevance of *"but for" causation of loss*. The notion that the remedy of equitable compensation would involve considerations of *causation of loss* was placed on an even firmer footing in the subsequent UK Supreme Court decision in *AIB*. The result of Lord Toulson and Lord Reed's judgments in *AIB* is that the element of causation (in its ***full*** *sense*, inclusive of the inquiry as to whether the loss would still have occurred in the absence of a breach of duty) *is* now *relevant* to claims for breach of trust, at least for trusts arising in the commercial context. We will refer to the approach taken in *Target Holdings* and *AIB* as "the causation approach" for easy reference. We discuss these two cases in further detail below at [198]–[219], given that the Judge below had relied on these two cases in the Judgment.

119 *Not* following *Target Holdings* and *AIB* would *preserve* the equitable remedy of *falsification*. We note that some commentators have explained that the application of the orthodox approach to the facts of *Target Holdings* and *AIB* would have led the court to the ***same*** outcome based on the concepts of adoption or acquiescence (see Prof Lusina Ho's analysis in *Fundamental Norm or Red Herring?*, especially at pp 171–173; and Prof James Penner's analysis in "Falsifying the Trust Account and Compensatory Equitable Compensation" in *Equitable Compensation and Disgorgement of Profit* (Simone Degeling & Jason NE Varuhas eds) (Hart Publishing, 2017) ch 7 ("*Penner on Falsification*"), especially at pp 147–148).

120 Besides the process of a common account, an account can also be taken on a ***wilful default basis***, in response to a breach of the trustee's ***management stewardship duty*** (see [100] above). The specific remedy is that of *surcharging*, through the process of accounting on the basis of wilful default (see also *Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2014) ("*Snell's Equity*") at para 30-012). An account on the wilful default basis, *unlike* the common account, depends upon trustee misconduct, as we made clear in our decision in *Ong Jane Rebecca v Lim Lie Hoa and Others* [2005] SGCA 4 at [61]. An account on a wilful default basis is sought by the principal where the account is shown to be defective because it does not include assets which the trustee in breach of his duty failed to obtain for the benefit of the trust. In this case, the account will be surcharged – that is to say, the asset will be treated as if the trustee had performed his duty and obtained it for the benefit of the trust. The trustee will be ordered to make good the deficiency in the trust by payment of a monetary award.

121 The focus, in ordering the monetary payment in the case of an account taken on a wilful default basis, is on the *loss* caused to the trust fund (see the

Singapore High Court decision of *Tongbao (Singapore) Shipping Pte Ltd and another v Woon Swee Huat and others* [2019] 5 SLR 56 ("*Tongbao Shipping*") at [127]; *Cheong Soh Chin* ([111] *supra*) at [87], citing *Snell's Equity* at para 20-027; and *Agricultural Land Management* ([108] *supra*) at [347]–[348]). This payment of equitable compensation is akin to the payment of damages as compensation for loss (see *Libertarian Investments* ([87] *supra*) at [170] *per* Lord Millett NPJ; see also P J Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at pp 225–226). Prof Conaglen has instructively explained (see Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" (2016) 40 Melbourne University Law Review 126 at p 146) that surcharges on the wilful default basis "necessarily [require] a hypothetical assessment of what a prudent investor would have done, in order to establish the manner in which the trustee should have acted"; this hypothetical assessment entails a causal inquiry to identify what the trustee would have received had he properly discharged his duties. Unlike falsification, *causation* in the full sense between the breach of duty and the loss sustained by the trust is therefore *relevant*.

122 As we have already noted, the issues concerning custodial breaches in the context of trust or fiduciary duty have ***not*** arisen in the context of the present case (which relates, instead, to an alleged *non*-custodial breach of fiduciary duty) and we will therefore arrive at a definitive view when the relevant issues arise directly for consideration by this court.

(G) A note on the use of the term "equitable compensation"

123 The term "equitable compensation" is widely known to be attributable to the House of Lords decision of *Nocton v Lord Ashburton* [1914] AC 932 ("*Nocton*"), and is of relatively recent vintage compared to the orthodox

remedies of falsification and surcharging for custodial breaches. *Nocton* was a case involving a ***non***-custodial breach of fiduciary duty. Since then, however, the term has been pervasively used by academics and courts alike to refer to other kinds of monetary awards for breaches of trust and breaches of fiduciary duty. It has now seemingly evolved to become a catch-all remedy counsel seek for any breach of trust or fiduciary duty. Such loose usage of the term must be guarded against. It has not only hindered readers from accurately understanding the kind of monetary award ordered but may also have caused academics and courts to confuse and conflate the *reparative* and *substitutive* characteristics of different kinds of monetary awards.

124 Specifically, the term "equitable compensation" has been used to refer to three different kinds of monetary awards. First, as in *Nocton*, it has been used to refer to ***compensation for loss for a non-custodial breach of a fiduciary duty***. Second, it has been used to refer to the monetary award ordered in cases of ***custodial breaches*** (see, for example, *Target Holdings* ([52] *supra*) at 439B; *AIB* ([52] *supra*) at [76] and [78]; *Auden McKenzie* ([108] *supra*) at [35]; and *Libertarian Investments* at [87] and [168]). Third, it has been used to refer to the monetary award in the case of ***surcharging*** the account for a breach of the management stewardship duty of a trustee (see, for example, *Libertarian Investments* at [170]).

125 In the first and third situations, the monetary awards are ***reparative***. They seek to "repair" the loss that has been caused to the principal or the trust fund. In *contrast*, in the *second* situation involving custodial breaches, the monetary award is ***substitutive*** – it seeks to restore the trust fund or the fund of the principal either *in specie* or by a monetary sum in lieu. The usage of the term "equitable compensation", with its reparative origins, in cases of custodial breaches may have well led academics and courts to view the monetary awards

ordered for custodial breaches similarly – and in our view, wrongly – in a reparative light.

126 For clarity of thought, the term "equitable compensation" herein used refers ***only*** to *compensation for loss* in the case of a ***non***-custodial breach of a fiduciary duty. We would also urge future counsel, academics and courts to use the term only in this sense, to refer only to the *reparative* remedy sought for ***non***-custodial breaches of fiduciary duty, in order to eradicate any confusion in this area of law.

(H) Other limiting doctrines in the remedial inquiry – remoteness, foreseeability, intervening cause, contributory responsibility and mitigation

127 The better part of the discussion thus far has been devoted to the matter of causation – whether or not a causal inquiry is required at all when a claim for equitable compensation is advanced; and facets of causation – such as the standard upon which it ought to be proved, and who bears the onus of proving causation (or lack thereof) of loss (as the respective equitable remedy in question demands). Causation, however, is only *one* component of the remedial inquiry. There are also *other limiting doctrines*, such as remoteness, foreseeability, intervening causes, contributory responsibility, and mitigation. However, given that the applicability of these doctrines to a claim for equitable compensation has not been argued by the parties in this case, we will reserve our determinations to an appropriate case in the future. It suffices to say at this juncture that the case law does not speak with a unified voice on whether these limitations on common law compensatory damages are applicable to equitable compensation.

The role of causation in non-custodial breaches of fiduciary duty

128 Having engaged in a fairly comprehensive discussion of the relevant concepts in the field of equity, we now turn to discuss the essential legal question that lies at the heart of this dispute – the role of causation for non-custodial breaches of fiduciary duty.

(A) Introduction

129 The present case concerns breaches involving an element of infidelity or disloyalty. In such cases, perhaps the only uncontroversial starting point is that the court has jurisdiction to make an award of equitable compensation for a breach of fiduciary duty (see the Singapore High Court decision of *Then Khek Khoon and another v Arjun Permanand Samtani and another* [2012] 2 SLR 451 ("*Then Khek Khoon (2012)*") at [55]). This can be traced back to the case of *Nocton* ([123] *supra*), where Viscount Haldane LC held that "[o]perating in personam as a Court of conscience [the Court of Chancery] could order the defendant ... to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury" (at 952).

130 However, it is far from clear from the case law as to what the applicable test of causation is. It is not an exaggeration to speak of this difficult area of law as being clouded by confusion. We hope this judgment will throw some light on this muddled area of law and bring about some much-needed clarity.

131 There are three approaches that emerge from case law as explained above at [89]–[92]: Approach 1, where causation is ***not*** relevant once a *breach* of fiduciary duty has been established; Approach 2, where the plaintiff must ***always*** establish "but for" causation; and Approach 3, a hybrid approach, where causation is relevant but *the burden of proof is reversed* inasmuch as the

defendant will have to prove that the damage suffered by the plaintiff would have occurred in any event. The most appropriate approach has to be determined by a consideration of both the relevant *case law* and *general principles* and *policy*. We first examine the case law, before turning to the arguments from principle and policy.

(B) Case law and commentary

132 Approach 1 is widely regarded as having originated in the case of *Brickenden* ([7] *supra*), a decision of the Judicial Committee of the Privy Council on appeal from the Supreme Court of Canada. *Brickenden* concerned the defendant solicitor's failure to disclose his own conflicting interest in a transaction. The defendant solicitor had acted for the claimant finance company in lending money to a couple, the Biggs, but had failed to disclose that the Biggs owed him debts which they would be able to repay with the monies from the claimant finance company. It was therefore a case of *non*-custodial breach of fiduciary duty. Lord Thankerton's famous dictum, which has since engendered a great amount of case law and academic commentary in different jurisdictions, is as follows (at 469):

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.

It must be said that the cases which have interpreted this vexed *dictum* have not always taken a consistent view as to what it actually means. But some of them have coalesced around a *strict* interpretation of this *dictum*, which perceives the

rule as stating that a causal link between a fiduciary's breach and a principal's loss is irrelevant as long as the fiduciary's breach is established – in other words, the errant fiduciary cannot argue that the events that ultimately transpired would have occurred even without his breach. Many jurisdictions, including Canada, where *Brickenden* was decided, have since eschewed the perceived rigidity of the *Brickenden* rule (see *Then Khek Khoon (2012)* at [60]; *Conaglen on Brickenden* ([90] above) at p 134), of which we speak more below. It also bears noting at this juncture that, the case of *Brickenden* remained dormant in the Singapore context until the High Court decisions of *Then Khek Khoon (2012)* (where it was discussed in *obiter dicta*) and *Quality Assurance Management Asia Pte Ltd v Zhang Qing and others* [2013] 3 SLR 631 ("*QAM*"). The latter case revived the *Brickenden* rule in Singapore, but confined its applicability to certain classes of fiduciaries committing certain defined categories of breach.

133 Broadly speaking, the Canadian, New Zealand, Hong Kong, English and Australian courts have adopted the position that causation is relevant in a claim for compensation for breach of fiduciary duty. This inquiry is broadly aligned with that for compensation for loss at common law, in that the fiduciary is liable to compensate the principal only for the loss that he has caused, as assessed on a "but for" test; in other words, the principal cannot claim compensation in respect of those "losses" which would he would have suffered even if the fiduciary had not breached his duties. Some jurisdictions, however, have made *adjustments* to the general approach to account for the fact that it is a fiduciary who has breached his duties and has caused his principal loss. In Canada, New Zealand and Hong Kong, the onus of proving that the loss would not have accrued is placed on the defendant-fiduciary. In contrast, the position taken in England is to place the burden of proving "but for" causation on the claimant-principal. The position in Australia is unclear, but the Australian courts seem to

be moving away from a strict application of the *Brickenden* rule. In Singapore, there are two competing approaches that are presently adopted in the courts: (a) the first approach adopts the strict *Brickenden* rule, but limits its application to a certain category of breaches; whereas (b) the second approach follows the UK position in demanding that the claimant-principal prove "but for" causation of the loss. The Singapore cases will first be outlined, followed by the case law in Canada, New Zealand and Hong Kong, before turning to the positions in England and Australia.

134 In discussing the cases we focus primarily on the approach they have taken to the specific issue of causation, including the particular question of the burden for proving or disproving it, because that is the issue that lies at the heart of the dispute in the present case.

Singapore case law

135 We begin first with a decision of this court, *Ohm Pacific Sdn Bhd v Ng Hwee Cheng Doreen* [1994] 2 SLR(R) 633 ("*Ohm Pacific*"), a case concerning a *non*-custodial breach of fiduciary duty. This court held that "it is ***necessary*** for the [principals] to ***prove a causal connection*** between the breach of duty and the alleged loss" [emphasis added] (at [27]). This court further held that "[n]o principle could be extracted from the cases that once a breach of duty was shown the burden fell on the ... defaulting fiduciary to show that the loss did not result from her breach". This court did not grant the remedy sought, because the loss claimed "***did not flow*** from [the breach of fiduciary duty] and there was in this case ***no causal link*** between the breach of duty … and the loss alleged to have been suffered" [emphasis added] (at [23]). This case, it seems to us, stands for the position that it was necessary for a causal link to be established between the fiduciary's breach and the loss.

136 On the contrary, the High Court in *Kumagai-Zenecon Construction Pte Ltd and another v Low Hua Kin* [1999] 3 SLR(R) 1049 ("*Kumagai-Zenecon (HC)*") seems to have taken an approach similar to that in *Brickenden*, albeit without expressly citing *Brickenden* itself. In that case, the director-defendant was found to have breached his fiduciary duty to the company when he used his position as director to authorise the purchase of shares in another company for his own advantage (at [16]). This was in fact a ***custodial*** breach of fiduciary duty, given that the director had misapplied the funds of the company, but this aspect was *not* pointed out by the High Court. G P Selvam J, sitting in the High Court, relied heavily on the Australian case of *Re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 ("*Re Dawson*") in holding, *inter alia*, that the breaching fiduciary "is liable to make restitution – that is restore the wronged person in the same position as he would have been if no breach had been committed"; that considerations of causation, foreseeability and remoteness "do not readily enter into the matter"; and that the test of liability is whether the loss would have happened if there had been no breach (at [35]). *Re Dawson* was similarly a case concerning *a breach of* ***trust*** (at 212), for which the remedy ordered was to require the defaulting trustee to restore to the trust estate the assets disbursed without authority (at 216). Selvam J's reliance on *Re Dawson* is explicable on the basis that *Kumagai-Zenecon (HC)* also concerned a breach of trust, but we say nothing about the correct principles applicable to custodial breaches.

137 The burden-shifting approach was first canvassed in the case of *John While Springs (S) Pte Ltd and another v Goh Sai Chuah Justin and others* [2004] 3 SLR(R) 596 ("*John While Springs*"), in which Choo Han Teck J sought to reconcile the principles in *Ohm Pacific* and *Kumagai-Zenecon (HC)*. He held that the ***burden of proof lay with the plaintiff*** (drawing on *Ohm*

Pacific), "but equity may accept a lower standard of proof sufficient to require a ***shifting of the evidential burden*** to the defendant" [emphasis added] (at [6]). In interpreting *Kumagai-Zenecon (HC)*, Choo J held that the plaintiffs had to prove that their losses and/or damages suffered "were ***caused by or linked to*** the defendants' breaches of fiduciary duties"; and thereafter, "***the burden shifted to the defendants*** *to show that the plaintiffs* ***would have incurred those losses even if there had been no breach*** *by the defendants*" [emphasis added] (at [5]). He considered that this was "nothing more than the plain application of the court's discretion as to when it thinks that sufficient evidence had been led so as to require a rebuttal or reply" (at [6]). *John While Springs* was a case concerning a *non*-custodial breach of fiduciary duty, where the fiduciaries incorporated a company with the purpose of carrying on business in competition with their principal.

138 The dictum in *Brickenden* was referred to by Vinodh Coomaraswamy JC (as he then was) in his judgment in *QAM* ([132] *supra*), where he undertook a detailed analysis of the applicable test for causation of loss arising out of breaches of fiduciary duties. In that case, the claimant claimed for breaches of the no-conflict and no-profit rules in the context of ***non-custodial*** breaches of fiduciary duty (see *QAM* at [13]–[15]).

139 Coomaraswamy JC considered that the strict approach of equity was exemplified by the *Brickenden* rule (at [43]). However, he recognised that it was not readily apparent that equity should be as stringent with all fiduciaries as it was with the trustee fiduciary or where the breach of fiduciary duty arose independently of any fault or culpability in any moral sense on the part of the fiduciary (at [52]). Drawing inspiration from the Australian decision of *Maguire and another v Makaronis and another* (1997) 188 CLR 449 ("*Maguire*"), he held that the *Brickenden* rule applied with full stringency, at the very least, to

"(a) a fiduciary who is in one of the *well-established categories* of fiduciary relationships; (b) who commits a *culpable breach*; [and] (c) who breaches an obligation which stands at the very *core of the fiduciary relationship*" [emphasis added] (at [56]). He considered these three requirements to be cumulative. Justifying the application of the *Brickenden* rule to this class of cases, which we will hereinafter refer to as "the *QAM-Brickenden* class of cases", Coomaraswamy JC provided two rationales: (a) it made sense from a conceptual perspective for equity to tilt the balance in favour of the innocent party and against the wrongdoer in cases at the core of the *Brickenden* principle; and (b) it also made sense from a pragmatic perspective, because the natural information asymmetry between the fiduciary and the principal made the breach of fiduciary duty harder to detect and to prove (at [59]).

140 In addition, the learned judge further mitigated the apparent harshness of the *Brickenden* rule by modifying it with regard to the burdens of proof that would be placed on the wronged principal and the wrongdoing fiduciary. Citing Choo J's decision in *John While Springs*, he held that the legal burden of proving "but for" causation of the loss always remained with the principal, but once the plaintiff adduces some evidence to connect the breach to the loss, equity will readily shift the *evidential* burden to the wrongdoing fiduciary to show that the principal would have suffered the loss in any event (at [60]–[61]).

141 This was clarified in the subsequent High Court decision of *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 ("*Then Khek Koon (2014)*") by the same judge. Coomaraswamy J held that in the *QAM-Brickenden* class of cases, equity would hold a breaching fiduciary liable without regard to the principles of causation, foreseeability and remoteness, including even the need for "but for" causation, following *Brickenden* (at [106(b)]). As for cases falling outside the *QAM-*

Brickenden class of cases, equity would hold a breaching fiduciary liable only if the but-for test of causation was satisfied (relying on *Target Holdings* ([52] *supra*)), with the burden of proving "but for" causation lying with the plaintiff (citing *Ohm Pacific* ([135] *supra*)) (at [106(c)], [106(e)]).

142 On the facts of *Then Khek Koon (2014)*, Coomaraswamy J found that the case fell outside the *QAM-Brickenden* class of cases, because the fiduciary relationship between a sale committee in charge of the collective sale of a condominium and the body of subsidiary proprietors of flats in the condominium was a novel one and the breach of the duty of fidelity by the defendants was an innocent breach. Therefore, the subsidiary proprietors had to establish a causal link between the sale committee's breach of the fiduciary duty and their loss (at [117]).

143 The High Court next had the occasion to consider the causation test for non-custodial breaches of fiduciary duty in *Beyonics Technology Ltd and another v Goh Chan Peng and others* [2016] 4 SLR 472 ("*Beyonics Technology (HC)*"). Hoo Sheau Peng JC (as she then was) followed the approach taken by Coomaraswamy J in *Then Khek Koon (2014)*, but she preferred Coomaraswamy J's original holding in *QAM*, that even in the *QAM-Brickenden* class of cases, the need for "but for" causation was not dispensed with altogether; it was merely a shift in the burden of proof (at [136]). She noted that these propositions aligned with *John While Springs* and *Kumagai-Zenecon (HC)* ([136] *supra*) (at [137]).

144 In the past two years, cases attracting arguments on *Brickenden* have begun to appear with increased frequency. The attenuated *Brickenden* test formulated by Coomaraswamy J involving a shift in the evidential burden was recently applied in the High Court decision of *Tongbao Shipping* ([121] *supra*).

In contrast, as set out above at [53], the High Court in the present case took the position that the "but for" test as set out in *Target Holdings* and *AIB* ([52] *supra*) should apply to ***all*** kinds of breaches of equitable compensation, eradicating the two classes of cases delineated by Coomaraswamy J.

145 Analysing the decisions of *QAM*, *Then Khek Koon (2014)*, *Beyonics Technology (HC)*, *Tongbao Shipping*, and the Judgment in the present case, Valerie Thean J concluded in the High Court decision of *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other suits* [2019] SGHC 43 ("*MCH International*") that there were two approaches to causation in the case law. Under the first approach, where a fiduciary had breached his duty of honesty and fidelity, a plaintiff need only prove that the breach was in some way connected to the loss, and the evidential burden thereafter shifted to the fiduciary to prove that the principal would have suffered the loss regardless of the fiduciary's breach (this describes the *QAM*, *Then Khek Koon (2014)*, *Beyonics Technology (HC)*, and *Tongbao Shipping* line of cases). The second approach was to use a "but for" test across all cases of breach of fiduciary duties (see *MCH International* at [206]).

146 Thean J leaned in favour of applying the second approach. She considered that on the facts of *MCH International*, the difference between the two approaches was immaterial because the higher threshold of "but for" causation was clearly satisfied for the losses, except for one instance of loss where its existence was not proved so the causation issue did not arise (at [207]). In *obiter dicta*, in relation to a head of claim for which no loss was established, Thean J opined that it would have been appropriate to apply the ***"but for" causation test*** to the defendant-director's breach in not acting *bona fide* in the best interests of the company (at [230] and [234]). In coming to her view, she placed emphasis on the fact that this particular head of loss arose from a

contractual document governing the directors' responsibilities. In such circumstances, where a claim for damages for breach of contract would fail the "but for" test, it would be just to apply the same test for equitable compensation (at [234]). In this regard, Thean J relied on the distinction drawn in *Target Holdings* and *AIB* between traditional trusts and trusts commercial in nature which have parameters marked by contract (at [233]–[234]). On appeal, this court did not deal with the issue of causation (see *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837).

The Canadian position

147 The distinction between a custodial breach of fiduciary duty in the form of a breach of trust, and a non-custodial breach of fiduciary duty, is recognised by the Canadian courts (see, for example, *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 ("*Canson Enterprises*") at [72] and [76]).

148 We begin with the Supreme Court of Canada's decision in *Canson Enterprises*. This was a case involving the liability of a solicitor as fiduciary to his clients for failure to disclose to them a secret profit made by the third party in respect of the clients' purchase of a property. The question was whether the solicitor was liable only for losses directly flowing from that breach of duty, or whether the solicitor was also liable for loss caused by the subsidence of the building which had not been detected owing to the negligence of the builders and engineers. The court unanimously held that the solicitor was not liable for the losses caused by the intervening acts.

149 The majority, comprising La Forest, Sopinka, Gonthier and Cory JJ, drew a distinction between the remedial consequences for custodial breach of

fiduciary duty and for non-custodial breach of fiduciary duty. The majority explained that in the former situation, "the trustee's obligation is to hold the *res* or object of the trust for his *cestui que trust*, and on breach the concern of equity is that it be restored to the *cestui que trust* or if that cannot be done to afford compensation for what the object would be worth" (at [72]). In the latter situation, "the concern of equity is to ascertain the loss resulting from the breach of the particular duty". The majority expressed the view that the principles applicable to a custodial breach should *not* be transposed to a non-custodial breach, because that transposition would cause harsh and inequitable results. Instead, the principles governing compensation in equity should draw on the principles governing compensation at common law where the same policy objective was sought, given that the two streams of common law and equity were now intermingled (at [83]–[87]). Causation therefore remained relevant in a claim for compensation for breach of fiduciary duty.

150 McLachlin J delivered a concurring judgment, but the chief distinguishing factor was that her approach entailed keeping the principles of equity separate from those of the common law. Similar to Coomaraswamy JC's explanation in *QAM* (see [138]–[139] above), McLachlin J noted that a fiduciary stood in a different position from ordinary actors who were subject to actions in tort and contract, which warranted fiduciaries receiving separate treatment from those actors by the law; as the learned judge pertinently observed (at [3] and [6]):

> … In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when

> breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken – an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest" … In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.
>
> …
>
> … [B]ecause the fiduciary has superior information concerning his or her acts, it will be difficult to detect and prove breach of these wide obligations; and because the fiduciary has control based on the notion of implicit trust, there is a substantial potential for gain through such wrongdoing. This may justify more stringent remedies than for negligence or breach of contract. …

However, it is notable that McLachlin J, like the majority, also took the view that where the same policy goals are shared by tort and breach of fiduciary duty, the remedies may coincide. She also accepted that insights offered by the law of tort might prove useful.

151 McLachlin J summarised her views as to equitable compensation as follows (at [27]):

> In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By *analogy with restitution*, it attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, *on a common sense view of causation, were caused by the breach*. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach. Where the trustee's breach permits the wrongful or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss will be recoverable. Where there is no such link, the loss must be recovered from the third parties. [emphasis added]

152 The above passage carries hints of a restitutionary approach to equitable compensation, in referencing an analogy with restitution. But, equally, portions of the passage suggest, instead, an approach more analogous to that for compensation for loss at common law, especially where McLachlin J described how "the losses made good are only those which, on a common sense view of causation, were caused by the breach" (at [27]). Indeed, this passage was famously cited with approval by Lord Browne-Wilkinson in *Target Holdings* ([52] *supra*) (at 439A), a case concerning breach of trust, where he gave particular emphasis to the words "common sense view of causation", although *Canson Enterprises* was not a case of custodial breach. The passage thus appears to have been more prominently cited in the case law in support of the causation approach to cases of breach of *trust*. This, too, is how some academic commentators understand the purport of this important passage. The authors of James Edelman & Steven Elliott, "Money remedies against trustees" (2004) 18 Trust Law International 116, for example, observe that the passage appears to run "reparative and substitutive thinking together" (at pp 123–124):

> … In effect, McLachlin J wished to distinguish equitable compensation from common law damages on the basis that it is substitutive rather than reparative, but she was unable to make the analogy with restitution of trust property work because she could not convincingly describe the model of the substitution. Her Ladyship inevitably ended with a reparative model confusingly clothed in substitutive language.

153 On the facts, McLachlin J considered the question to be whether "applying a common sense view of causation, the further losses sustained in the course of construction can be said to have resulted or flowed from the breach of fiduciary duty" (at [28]). She answered that question in the negative. In her view, the construction loss was caused by third parties, and there was no link between the breach of fiduciary duty and this loss.

154 The test of causation for a non-custodial breach of fiduciary duty was further developed in Canada in the decision of *Hodgkinson v Simms* [1994] 3 SCR 377 ("*Hodgkinson v Simms*"). In this case, the defendant accountant advised the claimant, his client, to put money into certain property investments. Unbeknownst to the claimant, the defendant-fiduciary was in a financial relationship with certain property developers, and he therefore profited from the claimant's purchase of the investments. The trial judge awarded the claimant the entire amount of his lost investment. The Supreme Court of Canada upheld this decision. Before the Supreme Court, the defendant argued that *Canson Enterprises* prevented the court from awarding the claimant the full measure of his lost investment, because his non-disclosure was not the proximate cause of the claimant's loss; instead, it was the general economic recession of the 1980s that had caused the properties to depreciate in value (at [77]). The defendant also argued that even if he had disclosed his conflict, the claimant would still have invested in the properties anyway (at [75]).

155 The Supreme Court of Canada split four to three. The majority, led by La Forest J, stated that the trial judge had resolved the issue of non-disclosure in the claimant's favour; in other words, disclosure *would* have led to the claimant not investing (at [75]). But, in any event, the majority also held that based on *Brickenden* ([7] *supra*), ***the onus was on the defendant*** to prove that the innocent victim would have suffered the same loss regardless of the breach (at [76]). The defendant had failed to establish that the claimant would have suffered the wrong even if there was no breach of fiduciary duty. The majority then addressed the argument that the economic recession was the proximate cause of the loss. The majority disagreed, finding that the loss was caused by the defendant's breach of duty: the defendant had been retained specifically to make independent recommendations of suitable investments for the client,

which gave the defendant influence and discretion over the client such that he effectively chose the risks to which the client would be exposed. Those risks manifested, so it was right that the defendant ought to be held liable (at [82]). It was the defendant's breach that initiated the chain of events leading to the client's loss (at [79]).

156 The majority further opined that *Canson Enterprises* "held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result" (at [80]). According to the majority, the applicability of these principles depends on the form of breach of fiduciary duty, which may be tantamount to deceit or theft, or may be no more than an innocent and honest bit of bad advice or a failure to give a timely warning. *Canson Enterprises* was an example of the latter form of breach, and stood for the proposition that courts should strive to treat similar wrongs similarly, and that equity was flexible enough to borrow from the common law (at [81]).

157 Sopinka and McLachlin JJ, in the minority, did not find a fiduciary relationship on the facts (at [143]). On the claim for contractual damages, the minority was persuaded that the loss in value was caused by an economic downturn and did not arise naturally from the breach of contract (at [154]). By way of *obiter dicta*, the minority noted that the Supreme Court of Canada in *Canson Enterprises* recognised that "the results of supervening events beyond the control of the defendant are not justly visited upon him/her in assessing damages, even in the context of the breach of an equitable duty" (at [148]).

158 A recent summary of the state of the Canadian law as regards *Brickenden* can be found in the Federal Court decision of *Southwind v Canada* [2017] FC 906. In that case, Zinn J explained that although the *Brickenden* rule

was originally interpreted in Canada to operate as an irrebuttable presumption that the claimant-principal would have not proceeded with the impugned transaction had there been no breach, it was now understood as "a presumption that shifts the onus upon the defendant to prove the [claimant-principal] would have proceeded with the transaction despite the non-disclosure [constituting the breach]" (at [248]).

The New Zealand position

159 The New Zealand courts have steered away from adopting the strict *Brickenden* rule. Instead, they have interpreted *Brickenden* to entail *a shifting of the burden* to the wrongdoing fiduciary to disprove causation.

160 The seeds of this approach were first sown in the New Zealand Court of Appeal decision in *Bank of New Zealand* ([87] *supra*). The defendant, the New Zealand Guardian Trust Co Ltd, was a trustee under a debenture deed securing advances to a property investment company by various banks, including the plaintiff bank. The defendant failed in its duty under the deed to use reasonable diligence to detect breaches of the deed by the company inasmuch as it failed to detect that the company had made advances to its subsidiaries. The company later went into receivership and the banks only recovered a small percentage of their advances. A suit for breach of fiduciary duty was brought, but was dismissed both at first instance and by the New Zealand Court of Appeal. In essence, it was held that the defendant fiduciary's breach of duty was a breach of its duty to exercise reasonable care, which was not a fiduciary duty.

161 Although the resolution of *Bank of New Zealand* in the manner just noted, *ie*, as *not* involving a breach of fiduciary duty, would seem to make that case markedly less relevant to ours, Tipping J's judgment marking out three

categories of breaches by a fiduciary has proven highly influential. We have already referenced this trichotomy of breaches above at [87]. The second category of breach, *ie*, a breach of duty involving an element of infidelity or disloyalty engaging the fiduciary's conscience, is most relevant to our case. Commenting on this category of breach, which Tipping J suggested "might be called a true breach of fiduciary duty", he observed that ***a burden-shifting approach*** would be appropriate (at 687):

> In the second kind of case, the trustee or other fiduciary has committed a breach of duty which involves an element of infidelity or disloyalty engaging the fiduciary's conscience – what might be called a true breach of fiduciary duty … [I]n such a case once the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover unless the defendant fiduciary, upon whom is the onus, shows that the loss or damage would have occurred in any event, ie without any breach on the fiduciary's part. Questions of foreseeability and remoteness do not arise in this kind of case either. Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach.

162 Tipping J's approach received endorsement by the Supreme Court of New Zealand in two subsequent decisions, *viz*, *Amaltal Corporation Ltd v Maruha Corporation* [2007] 3 NZLR 192 ("*Amaltal Corporation*") at [30] and *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384 ("*Stevens*") (at [34]–[36]).

163 In *Amaltal Corporation*, the fiduciary breached its duty of loyalty, but alleged that a countervailing benefit had been conferred on the company to which fiduciary duty was owed, which it argued meant that the amount it was liable to pay was correspondingly reduced. Citing part of the passage from Tipping J's judgment in *Bank of New Zealand* that we have just excerpted above (at [161]), the Supreme Court held that it was for the defaulting fiduciary to

establish the benefit gained by the person to whom the fiduciary duty was owed (see *Amaltal Corporation* at [29] and [30]).

164 In *Stevens*, the defendant estate agent failed to inform its clients, the claimants, that a prospective purchaser of their house often bought residential properties and resold them at a profit, because it had hoped to be instructed by the purchaser on any resale that might eventuate. The claimants sold their house to the purchaser for about $2.6m. Later, the purchaser sold the house for $3.6m. The market value at the time of the first sale was $3.25m but there was some evidence that the claimants were willing to sell it at $2.8m. All the judges concurred that there had been a breach of fiduciary duty, but they differed as to the quantum of equitable compensation payable by the wrongdoing fiduciary.

165 For our purposes it is instructive that all five judges concurred in the approach to be taken as regards causation. Blanchard J, with whom McGrath and Gault JJ agreed, delivered the majority judgment. His summary of the relevant principles is found at [85], and essentially affirms the approach taken by Tipping J in *Bank of New Zealand* and confirmed in *Amaltal Corporation*. He described the shift in New Zealand law in the following terms (at [85]):

> It was once the strict rule that when a fiduciary committed a breach of duty by non-disclosure of material facts which the party to whom the duty was owed was entitled to know in connection with the transaction, the fiduciary could not be heard to maintain that the disclosure would not have altered the decision to proceed with the transaction; once the court had determined that the undisclosed facts were material, speculation as to what course the beneficiary, on disclosure, would have taken was not regarded as relevant. *The strict rule could sometimes lead to unfair results and has been modified in this country by an approach which affords the fiduciary a limited opportunity of showing that all or some of the loss would have occurred even if disclosure had been made.* The matter was put in the following way in [*Bank of New Zealand*] in a passage approved by this Court in [*Amaltal Corporation*]:

> "… [O]nce the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover unless the defendant fiduciary, upon whom is the onus, shows that the loss or damage would have occurred in any event, ie without any breach on the fiduciary's part … Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach."

[emphasis added]

166 Elias CJ, in her judgment, placed significant emphasis on the notion that causation *was* relevant in an inquiry into equitable compensation for breach of fiduciary duty. She noted that the "necessity of demonstrating that a loss was caused by the claimed breach of fiduciary duty follows from the compensatory justification for the remedy", and "since the loss is the basis of the claim, it is generally for the plaintiff to show such loss as part of his case" (at [34]). She also made observations reminiscent of the majority's decision in *Canson Enterprises* ([147] *supra*) in adverting to the fact that the "purpose of compensation is the same in law and equity", with the defendant "only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong", citing *Target Holdings* ([52] *supra*) (at [37]). She accepted, however, that the New Zealand courts had adopted the application of a reverse onus of proof which allowed a defendant fiduciary to assert that the loss shown by the plaintiff would have occurred in any event, observing that although the strict interpretation of *Brickenden* ([7] *supra*) was that it created an "irrebuttable presumption" that loss was caused by the fiduciary's breach, that interpretation had been "modified by New Zealand case law to a shift in the onus of proof" (at [38]). Elias CJ characterised the reverse onus of proof as an "evidential rule which arises when the plaintiff has demonstrated loss caused by the breach but the defendant seeks to attribute the loss in whole or in part to another cause in circumstances where proof is difficult

and shifting the onus meets the justice of the case". This evidential shift "responds to difficulties in proof where loss entails the hypothetical of what a principal would have done if properly informed" (at [39]). Elias CJ also identified one possible instance when such burden shifting might occur (at [38]):

> *Brickenden*, and the cases which have developed from it, identify one such occasion for shifting the onus as the effect of non-disclosure by a fiduciary of information material to a transaction undertaken by the principal. Once materiality is shown, it is for the defendant to show that the transaction would nevertheless have been entered into by the principal for another reason.

167 Unlike the majority, Elias CJ was wary of describing the shifting of the burden as being a "narrow escape route" to be "policed with 'rigour'" (at [39]). In her view, the fiduciary was to be subject to ordinary civil standard of proof, namely, the balance of probabilities. Like the majority, however, Elias CJ was also satisfied that fiduciary in this case failed to show that the sellers would have gone ahead with the transaction even had they known that the buyer was a property speculator (at [40]).

168 The majority and minority parted ways as to the measure of loss sustained by the sellers in *Stevens*. The majority awarded the difference between the price paid and the market price. The majority held that the "same general approach [to causation] should be taken [with regard to] the quantum of the loss" (at [85]). Where there was a normal or *prima facie* measure of loss, it was for the fiduciary to show that that measure was not the appropriate measure. In the majority's view, the normal measure of loss where a fiduciary breach had affected the price at which a property was sold was the difference between the sale price and the market value. Thus the fiduciary was obliged to show that the plaintiff's loss was less, or non-existent. Any doubts ought to be resolved against the fiduciary. The majority justified this approach to identifying the

measure of loss on policy grounds that the policy underlying *Brickenden* was to "deter fiduciary breaches by limiting the circumstances in which fiduciaries in breach can escape or reduce their liability for the consequences of the breach" (at [85]).

169 Elias CJ's minority view, however, was that the plaintiff-friendly rule in *Brickenden* ought not to be extended to the issue of quantification of loss. She considered that there was no place for presumptive measures of loss for the defendant fiduciary to disprove (at [41]). Instead, it was for the plaintiff to prove his loss, and the court in examining the issue of the measure of loss could consider the price at which the vendors were otherwise prepared to sell. Elias CJ considered that the evidence in the case showed that the vendors would have been prepared to sell at $2.8m if there had been no breach. Thus this figure, and not the market value of $3.25m adopted by the majority, represented the "outer extent of the loss attributable to the breach of duty" (at [49]).

170 As Prof Jamie Glister rightly notes in his case note, "Breach of fiduciary duty: *Brickenden* lives on (*Premium Real Estates v Stevens*)" (2011) 5 Journal of Equity 59, *Stevens* represents an emphatic endorsement of *the modern approach* to *Brickenden* that contemplates *a shifting of the evidential burden to the fiduciary* to prove that his principal would have suffered the claimed loss even if it were not for his breach of duty. He points out, however, that the division of opinion as to the measure of loss was a point of difficulty in the case.

The Hong Kong position

171 The principles applicable to claims for compensation for breach of fiduciary duty were authoritatively laid down by the Hong Kong Court of Final Appeal in *Libertarian Investments* ([87] *supra*). *Libertarian Investments* itself

was a case concerning both a *custodial* breach of trust and a breach of fiduciary duty. That factual substratum gave rise to important statements of law, particularly by Lord Millett NPJ as to the proper approach to remedies for breach of trust, *ie*, custodial breach.

172 Ribeiro PJ also delivered a powerful judgment in *Libertarian Investments*. For present purposes, Ribeiro PJ's schematic categorisation of the different types of breach is important. Ribeiro PJ adopted the three categories of breach set out by Tipping J in *Bank of New Zealand* ([87] *supra*): (a) the first category being breaches "leading directly to damage to or loss of the trust property"; (b) the second category being breaches "involving an element of infidelity or disloyalty which engage the conscience of the fiduciary"; and (c) the third category being breaches "involving a lack of appropriate skill or care" (at [75]). Ribeiro PJ's view was that some element of causation was required for all three categories of breach (at [76]): "[i]t is of course true that in every case, there must be shown to be 'some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz the fact that the loss would not have occurred but for the breach…'". However, the learned judge took the view that the rules of causation would apply with "varying strictness depending on the type of duty and breach in question".

173 Ribeiro PJ considered that in the third category of breaches, involving a lack of appropriate skill or care, the fiduciary relationship merely provided the setting for a duty which was indistinguishable from a common law duty of care. Thus, the common law rules as to causation, foreseeability and remoteness would apply to these claims (*Libertarian Investments* at [77]).

174 Turning then to the first category of breaches, Ribeiro PJ noted that "strict rules on causation apply", with these rules "borrowed from those developed in relation to traditional trusts, requiring the trustee to restore to the trust fund what he has caused it to lose as a result of his breach of trust" (*Libertarian Investments* at [78]). Although this appears to be an endorsement of the orthodox approach to equitable compensation, we note that Ribeiro PJ immediately proceeded in the same paragraph to cite the famous passage from Lord Browne-Wilkinson's opinion in *Target Holdings* ([52] *supra*) that in such cases that "the trustee is liable to make good [the] loss to the trust estate if, but for the breach, such loss would not have occurred". And in the next paragraph Ribeiro PJ explained that "[c]ausation is established on a 'but for' basis without the constraints of the common law causation rules on remoteness and foreseeability". It seems that Ribeiro PJ was attempting to reconcile the orthodox approach and the causation approach.

175 It is the second category of breaches which most directly concerns us. Ribeiro PJ cited Tipping J's analysis in *Bank of New Zealand* with apparent endorsement for the proposition that the plaintiff principal or beneficiary would have to show a material loss arising out of the breach, upon which the onus or burden would shift to the defendant fiduciary to disprove causation (*Libertarian Investments* at [82]), quoting the passage we have already excerpted above at [161].

176 Subsequently in his judgment, Ribeiro PJ confirmed that the test of causation for equitable compensation entailed that "[w]here *the plaintiff provides evidence of loss flowing from the relevant breach of duty*, the ***onus lies on a defaulting fiduciary to disprove the apparent causal connection*** between the breach of duty and the loss (or particular aspects of the loss) apparently flowing therefrom" [emphasis added] (*Libertarian Investments* at [93]). It is

unclear whether this statement was made in relation to both the first *and* second categories of breaches, or only the second category.

177 The facts of *Libertarian Investments* concerned both a breach of trust and a breach of fiduciary duty. In so far as the breach of trust was concerned, the defendant fraudulently extracted a sum of money from the trust fund, dishonestly claiming that it was used to purchase certain shares on behalf of the plaintiff. Given that these shares were never in fact purchased, the defendant wilfully defaulted in the performance of his fiduciary obligation to purchase these shares on behalf of the plaintiff (at [113] and [120]). Ribeiro PJ held that ordering the defendant to restore to the trust fund the sum extracted would not adequately reflect the loss suffered by the trust estate; instead, the appropriate order was for the defendant to pay equitable compensation on a wilful default basis with a view to placing the trust estate in the position which it would have occupied if he had duly performed his duty of acquiring the shares (at [122]). As there was a breach of fiduciary duty causing loss, Ribeiro PJ applied the test he had set out in *Libertarian Investments* at [93] that placed the burden on the wrongdoing fiduciary to prove that such loss would have occurred in any event even if no breach had occurred (at [116]). The defendant was unable to do so, and equitable compensation was ordered against him.

178 The other judges in *Libertarian Investments* concurred in the result reached by Ribeiro PJ, although their views on causation appear to have differed slightly. Lord Millett NPJ in his statement of principle (not surprisingly, perhaps) approved of the orthodox approach to remedies at least where breaches of trust were concerned (at [168]). The learned judge further explained that where the plaintiff sought to surcharge the account by asking for it to be taken on the basis of wilful default, the defendant would be ordered to make good the deficiency by payment of money and, in this case, the payment of equitable

compensation was akin to the payment of damages as compensation for loss (at [170]). Litton NPJ characterised the essence of the remedy for breach of a fiduciary obligation as "restitution: [t]o put the trust estate back as far as possible *as if* the breach had not occurred" [emphasis in original] (at [154]).

179 More recently, the Hong Kong Court of Final Appeal has, once again, had the opportunity to consider the question of equitable compensation for breaches of fiduciary duty, in the case of *IQ EQ (NTC) Trustees Asia (Jersey) Ltd and another v Bruno Arboit and Roderick John Sutton and another* [2019] HKCFA 45 (also known as "*Zhang Hong Li v DBS Bank (Hong Kong) Ltd*"). The Court of Final Appeal followed the three categories of breach and the appropriate remedial response in each category set out by Ribeiro PJ in *Libertarian Investments*: see *Zhang Hong Li v DBS Bank (Hong Kong) Ltd* at [115]. In particular, the court reaffirmed the burden-shifting approach in relation to the second category of breaches (at [118]):

> Similarly, for second category cases, involving an element of infidelity or disloyalty which engage the conscience of the fiduciary, the rules on foreseeability and remoteness do not apply. Once the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover unless the defendant fiduciary, on whom the onus lies, shows that the loss or damage would have occurred in any event without any breach on his part.

The English position

180 The position under English law is somewhat unclear. There is at least one authority which has endorsed the application of *Brickenden* ([7] *supra*), albeit limiting the circumstances in which it might apply. Otherwise, the trend of the English cases is towards a position where an inquiry into causation is *always* relevant in cases of breaches of fiduciary duty, with the burden lying on the plaintiff-principal to prove causation. This is perhaps best illustrated by the

decisions in *Target Holdings* and *AIB* ([52] *supra*), following which it would appear that the English courts adopt the "but for" test for *all kinds* of equitable breach. It must not be forgotten, however, that *Target Holdings* and *AIB* were cases concerning ***custodial*** breaches of fiduciary duty. *Target Holdings* and *AIB* do create ramifications for non-custodial breaches of fiduciary duty, but for conceptual clarity the two types of breaches must be kept separate and distinct, and any cross-pollination between the tests for the two types of breaches be made clear, as we have already discussed above. We will therefore address these cases after analysing cases squarely concerning non-custodial breaches in England.

181 One case to have considered the *Brickenden* rule was the English High Court decision of *Bristol and West Building Society v May May & Merrimans (a firm) and others* [1996] 2 All ER 801 ("*Merrimans*"). One of the situations considered by the court was where the defendant-solicitors were alleged to have committed a breach of fiduciary duty by giving a warranty which they knew or must be taken to have known to be false. The question was whether or not the lenders, who were the clients, had to establish that they would not have acted in reliance on the warranty if they had been told the true facts (at 825j). Chadwick J began by observing that it would be a "strange principle of equity" if such a burden was placed on the lenders, because a common reason for giving a warranty was the fear that, without the false warranty, the lenders would refuse to proceed. Chadwick J then recited the famous passage from *Brickenden*, which he summarised thus: "where a fiduciary has failed to disclose material facts, he cannot be heard to say, in answer to a claim for equitable compensation, that disclosure would not have altered the decision to proceed with the transaction" (at 826h). He treated the *Brickenden* principle as good law even after *Target Holdings*, and considered that he was bound to apply this principle.

He reasoned that *Target Holdings* did not cite *Brickenden*, and there was good reason for this – the *Brickenden* principle was of no direct relevance to the questions considered by the House of Lords in *Target Holdings* (at 826j). Where the breach of fiduciary duty lay in the giving of a false warranty or representation for the purpose of obtaining an advance cheque, the *Brickenden* principle applied, and it was *not* relevant to ask what the lenders would have done if they had been told the true facts (at 827f). In contrast, in cases of breach of trust, *Target Holdings* would apply to the exclusion of the *Brickenden* principle (at 823b).

182 Two later cases, however, seem to have rejected the principle in *Brickenden.* These are *Swindle* ([90] *supra*) and *Gwembe Valley Development Co Ltd (in receivership) and another v Koshy and others (No 3)* [2004] 1 BCLC 132 ("*Gwembe Valley*").

183 *Swindle* concerned a firm of solicitors which had extended a loan to its client, without disclosing two material facts, one of which was that it would profit from the loan transaction. The client used this loan towards the purchase of a hotel. She also mortgaged her own house to a bank for the purchase of the hotel. The business was unsuccessful and the client defaulted on the mortgage. The bank took possession of her house. The client claimed against the solicitors for breach of fiduciary duty, seeking equitable compensation in the value of the equity she formerly had in her house.

184 The client's claim was dismissed at first instance. The recorder held that although the solicitors had breached their fiduciary duty to the client in failing to disclose the profit they had earned from the loan, this breach had not caused the client's loss. It was established that the client would have taken the loan anyway even if full disclosure had been made.

185 The client's appeal to the Court of Appeal was unanimously dismissed. The judges concurred that there had been a breach of fiduciary duty by the solicitors. However, they considered that that breach had not caused the client's loss. Each of the Lords Justices delivered an opinion, and although it can be discerned that each of them held the view that causation was relevant in claims for equitable compensation arising out of breaches of fiduciary duty, they differed widely as to what this causal inquiry would entail.

186 Evans LJ considered that an analogy could be drawn between damages for fraud at common law on the one hand, and equitable compensation for inequitable conduct which equity regards as fraud on the other. In both these categories of case, the remedial approach was restitutionary in nature: the defendant would be liable to restore the plaintiff to the position he had been in when the defendant did him wrong (at 715d–715j). He noted that the same "stringent" approach was said to apply when the defendant was in breach of fiduciary duty, citing *Brickenden* ([7] *supra*) as a case in point. He considered, however, that the nature of the breach of fiduciary duty in *Swindle* did not entail this stringent causation approach being taken against the fiduciary. In Evans LJ's view, the authorities showed that "the stringent rule of causation or measure or damages does not apply as regards breaches of equitable duties unless the breach can properly be regarded as the equivalent of fraud" (at 717a). Instead, in those cases, the "plaintiff is entitled to be placed in the same position financially as he would have been in if the breach of duty had not occurred – *not necessarily the same as he was in before it occurred*" [emphasis added] (at 717b). This entailed an inquiry into causation, and this test of causation "remain[ed] one of common sense", with the possibility that the chain of causation might be broken by "some independent and untoward event", citing *Canson Enterprises* ([147] *supra*) as authority (at 718b–c).

187 In Evans LJ's view, the facts of *Swindle* did not disclose a breach of fiduciary duty which might be regarded as the equitable equivalent of fraud; thus, the "prima facie measure of … loss [was] the amount by which [the client was] worse off now than she would have been if those breaches had not occurred" (at 718g). The solicitors' failure to disclose could not be said to have led to the making of the loan – which had then enabled the restaurant to be purchased – even on a "but for" basis, because it had been found by the recorder below that disclosure of the true facts would not have affected her decision to accept the loan. Thus the client would have lost the equity in her home in any event (at 718g–h).

188 Mummery LJ also relied on *Brickenden* in his judgment, but considered that *Brickenden* went towards *the issue of breach*, citing *Brickenden* as authority that the motivations of a fiduciary were irrelevant as a defence to breach of fiduciary duty (at 733c). On *causation of loss*, Mummery LJ held that it was necessary for the principal "to show that the loss suffered ha[d] been caused by the relevant breach of fiduciary duty"; that "liability [was] not unlimited"; and that there was "no equitable by-pass of the need to establish causation" (at 733h). The exercise was one of "restoration to the plaintiff of the value of what has been lost 'through the breach' or 'as a result of the breach'" (at 734b) and the "causal link had to be established between the defendant's wrongdoing and the loss suffered by the plaintiff" (at 732f). In this regard, Mummery LJ cited *Target Holdings* ([52] *supra*) for the proposition that equitable compensation for breach of trust was designed to "make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach" (at 733j). Mummery LJ recognised that *Target Holdings* was a case concerning breach of trust, but he considered that the same

considerations applied to a claim for breach of fiduciary duty as "fiduciary duties are equitable extensions of trustee duties" (at 734a).

189 On the facts, Mummery LJ considered that the client's loss did not flow from the solicitor's breach of duty in failing to disclose material facts; rather, it flowed from her own decision to take the risk involved in mortgaging her own house to finance her son's restaurant business at the hotel (at 735b–e).

190 Hobhouse LJ agreed with both Evans LJ and Mummery LJ, and set out his reasons in a concurring judgment. First, the learned judge held, interpreting *Nocton* ([123] *supra*), that the remedy for a breach of fiduciary duty is "essentially restitutionary in its character" – the fiduciary may be restrained from enforcing the transaction, it may be rescinded, or accounts and restitution may be ordered (at 726c). This was different from common law damages. Second, the learned judge considered that the rule in *Brickenden* was *not* a "principle relating to the recovery of damages nor does it give rise to common law rights"; rather, it was "essentially a principle which precludes the fiduciary from enforcing his common law rights" (at 726e–f). Thus, the rule in *Brickenden* could not be used to enable a plaintiff to recover common law damages without establishing a causal connection between the loss and the relevant wrong.

191 Turning to the case itself, Hobhouse LJ observed that the loss claimed by the client resulting from the hotel purchase did not relate to the breach of fiduciary duty complained of, which related to the loan transaction. This, he held, was not permitted. He buttressed this conclusion by relying on the cases of *Target Holdings* and *Canson Enterprises* ([147] *supra*). He held that they stood for the proposition that "the causative relevance of the breach to the loss had to be shown" (at 728f). He recognised that *Target Holdings* was a case on

breach of trust, but the proposition was nevertheless applicable, given that an honest breach of fiduciary duty was certainly not to be viewed any more seriously than an honest breach of trust (at 728a–b). On the facts, the client would have borrowed money from the solicitors even if the solicitor liaising with her had fully discharged his duty of disclosure to her. Thus, no remedy was available. If this were the whole of Hobhouse LJ's reasoning, it would have been clear in so far as he found the causation principles in *Target Holdings* to be applicable. However, the learned judge also relied on the case of *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 ("*Smith New Court*"), finding that the test therein on the tort of deceit was not satisfied on the facts (at 727b–d). His application of the test in *Smith New Court* suggests that he viewed the claim to be one for common law damages, in line with his earlier comment that the plaintiff could not combine a breach of fiduciary duty with a claim to common law damages (at 726g). This, with respect, has led to an ambiguity in the resultant reasoning in the judgment itself.

192 The diversity of views expressed by the judges has led at least one commentator to observe that the Court of Appeal's decision in *Swindle* was "regrettably opaque" (*Conaglen on Brickenden* ([90] above) at p 140). Prof Conaglen noted that "Hobhouse LJ treated *Brickenden* as relevant solely to rescission, and not to damages"; "Mummery LJ held that *Brickenden* related solely to the question of breach" and "Evans LJ considered that *Brickenden* created a 'stringent rule of causation' to be applied where the 'equitable equivalent of fraud' is proven" (at pp 139–140). In Prof Conaglen's view, perhaps the only thing upon which all three judges agreed was that "the plaintiff must establish causation in order to succeed with a claim for equitable compensation" (at p 140).

193 In the subsequent decision of *Nationwide Building Society v Balmer Radmore* [1999] All ER (D) 95 ("*Nationwide Building Society*"), Blackburne J adopted the approach set out by Evans LJ in *Swindle*. The learned judge first explained the position in common law: a negligence or compensatory measure involves considering what would have happened if the defendant had not breached his duty (which Blackburne J termed the "what if approach"), whereas the fraud or restitutionary measure involves determining what his position would have been but for the breach (the "but for approach"). Under both measures, it must be shown that there is a causal link between the wrong and the damage. He understood Evans LJ's approach in *Swindle* to turn on the distinction between fraudulent and non-fraudulent breaches of fiduciary duty: where the breach is non-fraudulent, the "what if" approach applies. Applying this approach, where a misrepresentation or non-disclosure made by the fiduciary had caused the beneficiary to authorise the application of his monies in a particular way, "the only sensible approach to the question of compensation for the consequences of the misrepresentation or non-disclosure is to consider what would have happened if there had been no misrepresentation or the appropriate disclosure had been made". The applicable test would be different if the fiduciary had induced the giving of authority by a statement he knew to be untrue. In the latter circumstance, compensation was to be assessed on the "but for" basis, the same as compensation for cases of common law deceit. Blackburne J recognised that it was only Evans LJ who drew a distinction between dishonest breach and innocent breach in *Swindle*.

194 *Gwembe Valley* ([182] *supra*) concerned a defendant-director who was found to have breached his fiduciary duties to the claimant-company because of the deliberate non-disclosure of his personal interest in certain transactions entered into by the company and the unauthorised profit made by him through

those transactions. Mummery LJ delivered the judgment on behalf of the English Court of Appeal. He held that where there was deliberate and dishonest concealment by a fiduciary of his personal interest, equitable compensation was available as a remedy (at [143]). The question which followed concerned the role causation played in such a claim. He held that causation had "no part to play in determining whether there [had] been non-compliance by the director with the fiduciary-dealing rules": "[n]on-disclosure [was] non-compliance" (at [144]). Thus, in order to establish *breach* it was unnecessary for the company to prove that it would not have entered into the transaction, if there had been compliance by the director with the fiduciary-dealing rules and he had made disclosure of his interest in the transaction. Mummery LJ cited the dictum from *Brickenden* as support for this proposition.

195 Causation *was* relevant, however, in determining what ought to be paid as compensation by the wrongdoing fiduciary. In this regard, the court could ask, in quantifying the loss, what would have happened if the material facts had been disclosed. Mummery LJ elaborated as follows (at [147]):

> If the commission of the wrong has not caused loss to the company, why should the company be entitled to elect to recover compensation, as distinct from rescinding the transaction and stripping the director of the unauthorised profits made by him? There is ***no sufficient causal link*** between the non-disclosure of an interest by [the director] and the loss suffered by [the company], *if it is probable that, even if he had made the required disclosure of his interest in the transaction, [the company] would nevertheless have entered into it*. In our judgment, a director is not legally responsible for loss, which the company would probably have suffered, even if the director had complied with the fiduciary-dealing rules on disclosure of interests. [emphasis added in italics and bold italics]

The evidence before the Court of Appeal was that the disclosure by the director would have made no difference to what the company would have done (at

[159]); thus, no loss was occasioned and no compensation was awarded. This was sufficient to dispose of the case.

196 The court did make a note of an argument raised in the course of submissions by the company that the burden of proof should be on the wrongdoing fiduciary to prove that the impugned transactions would still be entered into even if there was no breach of fiduciary duty (at [152]). But the Court did not decide on this argument. One commentator has therefore suggested that this silence could be understood as tacit approval by the court that the onus of proof remained on the principal (see Sirko Harder, "Equitable compensation for a fiduciary's non-disclosure and hypothetical courses of events" (2011) 5 Journal of Equity 22 ("*Harder on Equitable Compensation*") at p 29).

197 A survey of the English case law would not be complete without *Target Holdings* and *AIB* ([52] *supra*), which have been cited extensively in our courts, including the Judgment in the court below. We have already explained that these cases concerned ***custodial*** breaches of fiduciary duty, and as such their holdings are not directly applicable to the present case. Nevertheless, we examine the cases for *dicta* that might have *ramifications* even for ***non****-custodial* breaches of fiduciary duty.

198 *Target Holdings* was a case concerning funds held by a firm of solicitors, Redferns, on trust for a mortgagee lender. The solicitors were authorised to release the funds only upon completion of the property transfer and execution of charges over the property. The solicitors committed a breach of trust when they disbursed the funds without obtaining the necessary charges. However, the requisite charges were eventually obtained. Thereafter, when the property was sold, the amount recovered from the sale was far below the value of the

mortgage. The lender sued the solicitors for breach of trust and claimed restitution of the entire sum wrongfully disbursed.

199 Lord Browne-Wilkinson delivered the only reasoned judgment. He began with a recitation of the relevant principles. He recognised that the processes of equity operated somewhat differently from those at common law. He described essentially the ***orthodox*** approach of falsification for breach of trust, which he stated was developed in relation to "traditional trusts" (*Target Holdings* at 434C). He also observed, in relation to such "traditional trusts", that the "common law rules of remoteness of damage and causation do not apply" (at 434F), which further coheres with the orthodox approach. Nevertheless, he noted that "[u]nder both [equity and common law] liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong" (at 432G).

200 Lord Browne-Wilkinson's judgment then proceeds to observe that there would still have to be "some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz. the fact that the loss would not have occurred *but for* the breach" (at 434F). This particular statement has sparked considerable controversy in the cases and the commentaries, by introducing a causal analysis into the remedial inquiry.

201 The judgment does not dwell for long, however, on this causal requirement. Instead, Lord Browne-Wilkinson went on to draw a distinction between "traditional trusts" on the one hand and trusts used in a commercial setting on the other. He considered that it was "wrong to lift wholesale the detailed rules developed in the context of traditional trusts and then seek to apply them to trusts of quite a different kind", because the trust had become a "valuable device in commercial and financial dealings" in the modern world (at

435G). The trust in *Target Holdings* was an example of the modern commercial trust situated in a larger scheme of *contractual* arrangements: the monies had been paid to the solicitors as part of a conveyancing transaction, the purpose of that transaction being to achieve the commercial objective of the client, with the depositing of money with the solicitors "but one aspect of the arrangements between the parties, such arrangements being for the most part contractual" (at 436B). It was true that the solicitors nevertheless held the money on trust, but this was subject to the "basic equitable principle … that the beneficiary is entitled to be compensated for any loss he would not have suffered *but for the breach*" [emphasis added] (at 436C). Thus, if the underlying commercial transaction had not been completed, there could be no doubt that the solicitor could be required to restore to the client account money that had been wrongly paid away. But if the transaction had been completed then requiring the solicitor to restore the trust fund would be "entirely artificial" (at 436D).

202 Lord Browne-Wilkinson further developed the distinction between traditional trusts and the modern commercial trust by observing that the rationale behind the obligation to reconstitute the trust fund in cases concerning traditional trusts "reflects the fact that no one beneficiary is entitled to the trust property and the need to compensate all beneficiaries for the breach" (at 436D). But the same could not be said of a modern commercial trust. Instead, if the same principles were transposed to the modern commercial trust, the beneficiary would be allowed to recover from the solicitor more than what he had in fact lost, which "flies in the face of common sense and is in direct conflict with the basic principles of equitable compensation" (at 436E). In *Target Holdings*, the property transaction *had been completed*. Thus, the claimants had no right to have the solicitors' client account reconstituted as a "trust fund" (at 436F).

203 Lord Browne-Wilkinson also considered an alternative argument put forward by the claimant lender as to why the solicitors ought to reconstitute the trust. This argument was developed in the reasoning of the Court of Appeal, which had taken the position that where "moneys are paid away to a stranger in breach of trust, an immediate loss is suffered by the trust estate: as a result, subsequent events reducing that loss are irrelevant" (at 436G). He considered that this argument conflicted with the existing authorities. Citing *Re Dawson* ([136] *supra*) and McLachlin J's minority judgment in *Canson Enterprises* ([147] *supra*), Lord Browne-Wilkinson noted that the authorities had held that losses were in fact to be assessed at the time of trial, using the full benefit of hindsight (at 437H and 439B). Lord Browne-Wilkinson considered that this accorded with principle: "[e]quitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach" (at 439A–B). On the facts of *Target Holdings*, it was clear to the House of Lords that the lender had, by the time the suit commenced, in fact "obtained exactly what it would have obtained had no breach occurred, i.e. a valid security for the sum advanced" (at 440G). Thus, the lender had suffered no compensable loss.

204 Following *Target Holdings*, a number of authorities sought to read down the holding in that decision or otherwise distinguish it from the case at hand. Indeed, some retained the orthodox approach towards equitable compensation (see, for example, the English High Court decision of *Ultraframe (UK) Ltd v Fielding & Ors* [2005] EWHC 1638 (Ch) at [1513]–[1514] and *Holland* ([108] *supra*) at [48] and [49]).

205 The apparent controversy in the cases, however, has been authoritatively silenced, so far as English law is concerned, by the UK Supreme Court's

seminal decision in *AIB* ([52] *supra*). We have already explored the core statements of principle laid down in *AIB* in our discussion at [118] above. Here, we set out a more detailed exposition of the case.

206 The facts of *AIB* are broadly similar to those of *Target Holdings*, with one important distinction. In *AIB*, the requisite security was *never* obtained. £3.3m was advanced by a lender to a firm of solicitors for the purposes of a property transaction. Those monies were only to be released to the borrowers upon the solicitors obtaining a first-ranking charge over the property in question, which required that prior charges be redeemed. Another lender, Barclays, had a prior-ranking charge over the property in the value of about £1.5m, but the solicitors mistakenly paid only £1.2m to Barclays. The solicitors disbursed the remaining sum of approximately £309,000 to the borrower together with the balance of the loan funds instead. The first-ranking charge as originally intended and required was never obtained by the solicitors. Instead, the lender and Barclays entered into negotiations by which it was agreed that Barclays' charge could remain, but it would only secure the sum of £273,777.42 still owed to Barclays by that point. As in *Target Holdings*, when the property was sold, the sum recovered was not sufficient to satisfy the loan; the lender only received about £870,000, leaving a shortfall of about £2.5m. The lender sued the solicitors for breach of trust, arguing that the entire £3.3m had been disbursed without authority and ought therefore to be restored to the trust.

207 Two judgments were delivered, one by Lord Toulson, and the other by Lord Reed. Both judgments concurred that the trustee-solicitors would only be liable to compensate the client for the amount the client would have stood to recover if there had been no breach of trust, not the whole amount or value of the sum wrongly paid out.

208 Lord Toulson did *not* agree with the approach towards breaches of trust involving the unauthorised dissipation of assets taken in cases such as *Agricultural Land Management* ([108] *supra*) (*per* Edelman J) and *Libertarian Investments* ([87] *supra*) (*per* Lord Millet NPJ), which was to award the objective value of the property lost determined at the date when the account is taken with the benefit of hindsight. Under this approach, it was *not* relevant to consider what the trustee ought to have done (at [57]). Instead, in Lord Toulson's view, "absent fraud, which might give rise to other public policy considerations … it would not … be right to impose or maintain a rule that gives redress to a beneficiary for loss which would have been suffered if the trustee had properly performed its duties" (at [62]). Returning to the orthodox approach would be a "backward step" from Lord Browne-Wilkinson's fundamental analysis in *Target Holdings* (at [63]).

209 Lord Toulson developed his reasoning as follows. He considered that there was no doubt that the basic right of a beneficiary was to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and with the general law. Where there had been a breach of that duty, the basic purpose of the remedy would be either to "put the beneficiary in the same position as if the breach had not occurred or to vest in the fiduciary any profit which the trustee may have made by reason of the breach" (at [64]). As to the former, however, a causal analysis was relevant, in that the purpose of the remedy was to "plac[e] the beneficiary in the same position as he would have been in but for the breach". He considered that this could be practically achieved by restoring the value of something lost by the breach, or making good financial damage caused by the breach; but "a monetary award which reflected neither *loss caused* nor profit gained by the wrongdoer would be *penal*" [emphasis added]. On the facts of *AIB*, Lord Toulson considered it "artificial and

unrealistic" to say that there had been a loss to the trust fund of about £2.5m by reason of the solicitors' conduct, when "most of that sum would have been lost if the solicitors had applied the trust fund in the way that the bank had instructed them to" (at [65]).

210 In this regard, Lord Toulson was explicitly clear that he viewed "but for" causation as a necessary inquiry for custodial breaches. Further, at [71], he endorsed the views of Prof David Hayton, in his chapter "Unique Rules for the Unique Institution, The Trust", in *Equity In Commercial Law* (Simone Degeling & James Edelman) (Lawbook Co, 2005) ch 11 that "in circumstances such as those in *Target Holdings* the extent of equitable compensation *should be the same as if damages for breach of contract were sought at common law*" [emphasis added]. While Lord Toulson recognised that Lord Browne-Wilkinson's approach towards compensation has typically been labelled "reparative", in contrast to "substitutive", he was of the view that "substitutive" compensation was also, "in a practical sense", reparative in nature (at [54]). He made a statement of basic principle (at [73]), as follows:

> … Monetary compensation, whether classified as restitutive or reparative, is intended to make good a loss. The basic equitable principle applicable to breach of trust, as Lord Browne-Wilkinson stated, is that the beneficiary is entitled to be compensated for any loss he would not have suffered *but for* the breach. … [emphasis added]

211 Lord Toulson accepted the distinction drawn by Lord Browne-Wilkinson in *Target Holdings* between a traditional trust and a commercial trust; in his view, "it is a fact that a commercial trust differs from a typical traditional trust in that it arises out of a contract rather than the transfer of property by way of gift" (at [70]). Thus, the "contract defines the parameters of the trust", with such trusts now "commonly part of the machinery used in many commercial transactions". The trustees of such trusts were likely to have their

duties "closely defined", and be of "limited duration". Lord Toulson then endorsed the following statement of principle (at [71]):

> … [T]he fact that the trust was part of the machinery for the performance of a contract is relevant as a fact in looking at what loss the bank suffered by reason of the breach of trust, because it would be artificial and unreal to look at the trust in isolation from the obligations for which it was brought into being. …

212 On the facts, Lord Toulson considered that the commercial transaction had been completed "as a commercial matter" when the loan moneys were released to the borrowers (at [74]). Thus, the solicitors would only be liable to restore to the lender what had been lost as a result of their breach of contract and negligence, and no further (at [76]).

213 Lord Reed's approach was similar to Lord Toulson's. Lord Reed held that compensation for a breach of an obligation generally seeks to place the claimant in the position he would have been in if the obligation had been performed, and equitable compensation for breach of trust was, in principle, no different (at [93]).

214 In a case where trust property has been misapplied, Lord Reed held that equitable compensation would be assessed on the same basis as the requirement to restore the trust fund (at [134]). Lord Reed explained that Lord Browne-Wilkinson in *Target Holdings* did not intend to depart from the orthodox approach that the equitable obligation arising from a breach of trust affecting the trust fund was *to restore the fund to the position it would have been in but for the breach* (at [116]). Lord Reed added that the assessment of compensation should clearly reflect an analysis of the characteristics of the particular obligation breached (at [138]). Although Lord Reed seemed to endorse the orthodox approach, he nevertheless approved of the use of "but for" causation.

215 Lord Reed's departure from the orthodox approach is made clear in his identification of the *purpose* of equitable compensation (used in a case of breach of trust) (at [136]):

> … Of course, the aim of equitable compensation is to compensate: that is to say, to provide a monetary equivalent of what has been lost as a result of a breach of duty. At that level of generality, it has the same aim as most awards of damages for tort or breach of contract. *Equally, since the concept of loss necessarily involves the concept of causation, and that concept in turn inevitably involves a consideration of the necessary connection between the breach of duty and a postulated consequence* (and therefore of such questions as whether a consequence flows "directly" from the breach of duty, and whether loss should be attributed to the conduct of third parties, or to the conduct of the person to whom the duty was owed), there are some structural similarities between the assessment of equitable compensation and the assessment of common law damages. [emphasis added]

216 Lord Reed similarly alluded to the distinction between a commercial trust and a traditional trust: where the trust is "part of the machinery for the performance of a contract, that fact will be relevant in considering what loss has been suffered by reason of a breach of the trust" (at [137]). However, Lord Reed added that that "the liability of a trustee for breach of trust, even where the trust arises in the context of a commercial transaction which is otherwise regulated by contract, is not generally the same as a liability in damages for tort or breach of contract" (at [136]).

217 It is in the *application* of the principles to the facts of *AIB* ([52] *supra*) that Lord Reed's endorsement of a "but for" standard is best illustrated. Lord Reed considered the lender's argument that the solicitors ought to be liable to restore the full sum wrongfully disbursed to be infected by a logical fallacy, in that the argument "assumes that liability does not depend on a causal link between the breach of trust and the loss" (at [140]). It was significant to Lord Reed that the solicitors were being made liable for the "consequences of

the hopeless inadequacy of the security accepted by [the lender] before [the solicitors'] involvement, despite the fact that [the solicitors'] breach of trust did not affect the security except to the extent, initially, of £309,000, and finally of £273,777.42". This, he said, was a proposition rejected in *Target Holdings* and in the Commonwealth cases (at [140]).

218 In our view, it is apparent in the same result that both Lord Toulson and Lord Reed arrived at that a causal inquiry *was* being applied. Thus, some commentators understandably consider the UK Supreme Court to have rejected the view that the orthodox trust accounting principles can operate separately and differently from equitable compensation for loss (see Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 4th Ed, 2019) ("*Burrows on Remedies*") at p 515; see also *Penner on Falsification* ([119] above) at p 151).

219 We reiterate once again that *Target Holdings* and *AIB* were cases concerning ***custodial*** breaches. That said, the emphatic affirmation in *AIB* of Lord Browne-Wilkinson's approach in *Target Holdings* appears to us to confirm that "but for" causation is now an intrinsic part of the remedial inquiry for breach of trust under English law, which approach might well naturally extend also to breaches of fiduciary duty, especially since Lord Browne-Wilkinson in *Target Holdings* did *not* limit himself to speaking only in terms of breach of trust, but also relied on cases concerning breach of fiduciary duty in his analysis: see *Target Holdings* at 438A–B. In fact, Hobhouse LJ expressly extended the reasoning in *Target Holdings* to a case of ***non***-custodial breach of fiduciary duty in *Swindle* (see [191] above).

The Australian position

220 As already alluded to above, the Australian case of *Maguire* ([139] *supra*) provided the inspiration for the adoption of the two classes of tests as established in *QAM* ([132] *supra*). *Maguire* discussed the *Brickenden* rule in *obiter dicta*. This case concerned a breach of fiduciary duty of solicitors to their clients in the execution of a mortgage. The solicitors had failed to draw their clients' attention to the fact that the solicitors would be the mortgagees and were therefore personally interested in the transaction. The clients defaulted on the loan and the solicitors enforced the mortgage. The clients succeeded in having the mortgage set aside. The solicitors appealed and the High Court of Australia unanimously dismissed the appeal. The judges, however, differed in their reasons for doing so.

221 A four-judge majority, comprising Brennan CJ, Gaudron, McHugh and Gummow JJ ruled that this was a case about rescission. Thus, *Brickenden* ([7] *supra*) did not apply because it was not a case concerning equitable compensation for loss (at 472). The majority went on, however, to make several observations about equitable compensation for breach of fiduciary duty. It observed that in actions against a fiduciary arising other than out of breach of trust, "the criteria which supply an *adequate or sufficient connection* between the equitable compensation claimed and the breach of fiduciary duty" would be taken into account [emphasis added] (at 473). The majority also made some observations on the *Brickenden* rule. It was the majority's view that the apparent rigour of the *Brickenden* rule might be due to a tendency too readily to classify as fiduciary in nature relationships which might better be seen as purely contractual or as giving rise to tortious liability. However, the majority considered that it was "*not self-evident* that the response should rest *in a general denial of the applicability of the reasoning in* Brickenden *to delinquent*

fiduciaries, particularly solicitors and other professional advisers" [emphasis added] (at 474). This *obiter dictum* has been widely read as endorsing the full strictures of *Brickenden* in Australia, and indeed, Singapore: see *QAM* at [53].

222 Kirby J, in the minority, preferred to endorse *Brickenden wholeheartedly*. Kirby J began by acknowledging the criticisms that *Brickenden* was too strict and unjust in that it might burden a fiduciary with consequences that had been caused by other considerations (at 489). He noted how the Commonwealth courts had developed three approaches to mollify the absoluteness of the *Brickenden* rule (at 490–492), as follows:

> (a) To construe the rule as no more than an evidentiary principle. Where a breach of fiduciary duty is proved, the consequence is that a court of equity will presume that all adverse events which follow are the result of the fiduciary's breach. Courts will not "speculate" about other possible causes or what might have been. But the rule can be displaced by evidence to the contrary. In such circumstances a heavy onus lies on the fiduciary to prove that events which followed the breach were causally unrelated to it such that they should be fairly and justly be laid at the door of others than the defaulting fiduciary.
>
> (b) To draw a distinction between a case of a breach of a true fiduciary obligation and one which lacks dishonesty and merely constitutes honest but careless dealings.
>
> (c) To apply the "but for" causation test.

223 Kirby J's own preference, however, was for the strictness of *Brickenden* to remain. This was because an approach premised on the principal establishing "but for" causation would "involve the courts in the embarrassing and difficult

task of untangling the multiple causes of losses which have followed an undoubted breach", whereas the *Brickenden* rule had the "advantage of simplicity and the prophylactic consequence of discouraging fiduciary default" (at 492). In addition, the rule helped to fulfil the purposes of equity, which were different from those of the common law, including "ensuring ... strict loyalty and good faith to beneficiaries, the dutiful enforcement of obligations; the deterrence of breaches by fiduciaries of their powers, and, where such occurs, the ready restitution and reinstatement of the beneficiary to the fullest extent possible". He considered that the rigour of *Brickenden* in so far as causation was concerned could be appropriately ameliorated by the court exercising its discretion when ordering relief (at 494).

224 At about the same time, in the decision of *Beach Petroleum NL v Kennedy and others* (1999) 48 NSWLR 1 ("*Beach Petroleum*"), the New South Wales Court of Appeal read down the *Brickenden* rule. The court held that "*Brickenden* is not, in our opinion, authority for the general proposition that, in no case involving breach of fiduciary duty, may the Court consider what would have happened if the duty had been performed" (at [444]).

225 The *Beach Petroleum* case was cited with approval in *obiter dicta* in the subsequent decision of *Australian Securities and Investments Commission v Citigroup Global Markets Pty Ltd (No 4)* (2007) 160 FCR 35. Jacobson J sitting alone in the Federal Court noted that *Brickenden* had been followed in *Beach Petroleum* (at [366]), but he observed that the *Beach Petroleum* court had relaxed the erstwhile strict approach to *Brickenden* because of *Target Holdings* ([52] *supra*), which required causation "to be determined using commonsense and hindsight". Jacobson J agreed with the interpretation of *Brickenden* adopted in *Beach Petroleum*.

226 This more generous reading of *Brickenden* was echoed in *Watson and Others v Ebsworth & Ebsworth (A Firm) and Another* (2010) 31 VR 123. There, the Victoria Court of Appeal said (at [165]) that:

> … [T]he statement [in *Brickenden*] about impermissible speculation related to the question of the likely conduct of the person to whom the duty was owed had proper disclosure been made. The case does not negative the requirement for some proof of causation and does not, as the appellants verged on contending, reverse the onus of proof in relation to causation. …

227 Similarly, in *Agricultural Land Management* ([108] *supra*), Edelman J, sitting in the Supreme Court of Western Australia, opined that "[w]here a claim is brought to recover loss caused by the act of the defendant fiduciary putting himself in a position of conflict then it is very difficult to see why the negative 'but for' criterion should not apply" (at [395]). By the negative "but for" criterion, Edelman J meant that it is generally necessary but not always sufficient for the plaintiff to prove that his loss would not have been suffered but for the defendant's breach of duty (at [394]). Edelman J explained his holding on the basis that the defendant fiduciary should not be required to pay compensation for losses which would have been suffered even if the conflict had not occurred (at [395]).

228 In summary, the strict view of *Brickenden* appears to have won some measure of approval at the highest level of the Australian judiciary, given that the majority in *Maguire* ([139] *supra*) did not consider *Brickenden* to apply with any less stringency in the case of delinquent fiduciaries, and Kirby J in the minority had wholeheartedly embraced *Brickenden*. That said, the recent Australian decisions seem to have moved away from a strict application of the *Brickenden* rule in permitting consideration of what would have happened if the duty had been performed, at least for non-custodial breaches of fiduciary duty.

Academic commentators

229 The views existing in academic commentaries are as varied as the positions taken in case law across the different jurisdictions, or even (and perhaps, in the nature of academic scholarship, not surprisingly) more so. These views may reflect possible subjective subconscious bias towards an approach based on the area of law the commentators specialise in (especially in the areas of contract and restitution). There is simply too much ink spilt on the subject and it is imprudent, if not impossible, to survey the commentaries comprehensively on this subject. We can only offer a sample of the positions taken in the academic scholarship.

230 One of the first and more prominent articles to have discussed the *Brickenden* rule is an article written by Heydon J before his elevation to the bench: see J D Heydon, "Causal Relationships between a Fiduciary's Default and the Principal's Loss" (1994) 110 LQR 328. This was in fact a case note discussing the English Court of Appeal's decision in *Target Holdings (CA)* ([114] *supra*), which had then just been issued. The majority of the English Court of Appeal took the view that this was a case involving the unauthorised disbursement of trust monies, and that it was thus incumbent on the solicitors as trustees to restore to the trust fund the entire sum wrongfully disbursed. Heydon wrote that this approach foreclosed any inquiry into causal links between breach and damage, and was "harsh", "chancy" and "difficult to formulate" (at p 329). He considered that this strict approach, however, found its parallels in *Brickenden* rule in its strictest form. Citing the famous passage from *Brickenden* (see [132] above), the learned author observed that the principle expressed in the passage "cover[ed] circumstances much wider than the misapplication of trust property", and that if the principle existed, "its operation without reference to issues of causation supports by analogy the recoverability of damages against

trustees independently of a causal link between breach and loss" (at p 331). Heydon considered, however, that the *dictum* in *Brickenden* was framed in curious terms (at p 332):

> … The test is propounded in curious terms—in the first sentence using the language of estoppel ("he cannot be heard to maintain"), which will prevent the calling of evidence, while in the second sentence warning against speculation, a danger which would be averted if evidence were called. Another danger capable of being averted by evidence is the danger of injustice in extreme cases. … No authority was cited for the test, and no argument offered in its support; in particular no explanation was given of why the plaintiff should recover in respect of loss which was not caused by the defendant. …

These sharp criticisms of the strict approach to *Brickenden* reveal Heydon's strong discomfort with that interpretation of the *Brickenden* rule. We observe, by way of aside, that most of the cases share in these concerns and have relaxed the rule by permitting burden-shifting, as we have described above in our survey of the case law.

231 Another article offering a useful discussion of *Brickenden* is Prof Conaglen's chapter, *Conaglen on Brickenden* ([90] above). Two valuable insights may be drawn from this article. The first concerns the inaptness of drawing on trust accounting principles for non-custodial breaches. The second concerns Prof Conaglen's observation that Lord Thankerton's *dictum* is best understood as a statement of the relevant counterfactual that falls for consideration when the court attempts to quantify the loss that a breach of fiduciary duty has caused (at p 119).

232 On the first point, Prof Conaglen notes that Lord Thankerton's *dictum* can be understood as going towards rescission or liability, but that the effect of the *dictum* bears its strongest analogy with the trust accounting principles available against a fiduciary steward of assets. The notion that causation

principles do not apply is very similar to a beneficiary falsifying the account in respect of a defaulting trustee's breach of trust (at pp 123–124). Prof Conaglen questions, however, whether exporting the trust accounting principles in this way is appropriate in principle. The trust accounting principles were developed in the context of trustees who had stewardship over trust assets, and it is therefore *inappropriate* that trust accounting principles be exported to "non-stewardship fiduciary relationships like the one in *Brickenden*" (at p 126). It is right that causation principles do not feature where the trustee defaults in making an unauthorised disbursement of trust property, because the trustee has a fundamental obligation to hold on to the trust assets unless they are properly disposed of (at p 127). However, these principles do not apply in non-stewardship fiduciary cases. "[N]on-stewardship fiduciaries do not hold assets in their fiduciary capacity, and so there is no justification for requiring them to account for those assets 'just as if the money was still in their hands'" (at p 128).

233 Turning to second point concerning the counterfactual analysis necessarily employed by the court in quantifying loss, Prof Conaglen considers that two possibilities are available to the court: (1) assume that the principal would not have proceeded at all, and ignore what would have happened if full disclosure had been made; or (2) take the position the principal would have been in if the fiduciary had made full disclosure and obtained the consent of the principal (at p 130). Prof Conaglen makes the point that it seems more in keeping with "fiduciary doctrine's general policy of deterring fiduciaries from acting in breach of fiduciary duty to refuse to permit the fiduciary to rely on the second counterfactual, and to insist instead on the first counterfactual being used" (see *Conaglen on Brickenden* at p 132). On the other hand, he also sees the merits of permitting the fiduciary to rely on the second counterfactual. He makes the point that it may seem more penal than compensatory to make a

fiduciary liable to compensate his principal for a loss making transaction "where it is shown that the principal would have acted in exactly the same way even if the fiduciary had acted perfectly properly by making full disclosure" (see *Conaglen on Brickenden* at p 131). Ultimately, the choice between the two counterfactuals is one upon which "sensible minds may reasonably differ" (see *Conaglen on Brickenden* at p 133).

234 In another article, "Remedial Ramifications of Conflicts between a Fiduciary's Duties" (2010) 126 LQR 72, Prof Conaglen took the position that notwithstanding the famous *Brickenden* dictum, causation *is* relevant and something that the claimant must establish in cases of conflicts between a fiduciary's duties (at p 100).

235 Prof Sirko Harder takes the position that the approach adopted by the Canadian and New Zealand courts as to breaches of fiduciary duty involving a failure to disclose relevant facts should be preferred. That approach contemplates a *rebuttable presumption* that disclosure would have made a difference. Under this approach, Lord Thankerton's passage in the *Brickenden* should therefore understood merely as an evidential rule, *excluding "speculation" but allowing the fiduciary to prove with conclusive evidence* that his breach would have made no difference, in that the principal would still have entered into the impugned transaction (*Harder on Equitable Compensation* at pp 26–27). This is in contrast to reading the *Brickenden* rule as an irrebuttable presumption that the principal would not have entered into the impugned transaction had the fiduciary disclosed the relevant facts. Prof Harder argues that the rebuttable presumption approach strikes the correct balance between enforcing strict standards for fiduciaries, by requiring them to provide a proper evidentiary foundation for a contrary conclusion which should be cogent, and imposing punitive awards on fiduciaries in the case where they are made liable

for loss not caused by their breach (*Harder on Equitable Compensation* at pp 29–30). Any factual uncertainty as to what the principal would have done upon disclosure ought to be resolved against the fiduciary because his or her breach caused the uncertainty in the first place.

236 Prof Charles Rickett argues that compensation is only considered for loss suffered that is relevantly connected to the duty breached, approving of the approach adopted in *Bank of New Zealand* ([87] *supra*), where the court determined carefully that the breach in question was a breach of a duty to exercise reasonable care before deciding the applicable compensatory principles (see Charles Rickett, "Compensating for Loss in Equity – Choosing the Right Horse for Each Course" in *Restitution and Equity Volume One, Resulting Trusts and Equitable Compensation* (Peter Birks & Francis Rose eds) (Mansfield Press, 2000) ch 10 ("*Rickett*") at pp 175 and 190). The first point is to examine the type and content of the equitable duty allegedly breached, and from that examination should flow the answer as to how equity will compensate in any case (at p 191).

237 Prof Burrows supports the position taken in *Target Holdings* and *AIB* ([52] *supra*), *viz*, that the burden of showing "but for" causation between the fiduciary's breach and the principal's loss is placed squarely on the principal. The learned author is of the view that there is "no good reason for equitable compensation going its own separate way from compensatory damages", because "compensatory damages and equitable compensation should be regarded as identical in function—compensation" (see *Burrows on Remedies* ([218] above) at p 514). Any difference, he argues, should "rationally turn on the different duties in question and not on the fact that the remedy is equitable compensation rather than common law damages". In all cases of breach, whether custodial or non-custodial, equitable compensation is to "put the

claimant into as good a position as if no wrong had occurred"; therefore, it has "exactly the same function as compensatory damages" (see *Burrows on Remedies* at p 512). Where the fiduciary has earned unauthorised profits, restitution in the form of an account of profits may be alternatively claimed (see *Burrows on Remedies* at p 526).

(C) Our decision on the correct approach to causation

(1) Approach 3 should be adopted

238 In our judgment, Approach 1, *ie*, that causation is *not* relevant once a *breach* of fiduciary duty has been established (the strict view of the *Brickenden* rule), ought to be ***rejected***. This is because it denudes the requirement of causation of any real substance, and exposes the wrongdoing fiduciary to too great a degree of liability to compensate the principal. It is overly generous to the principal and (potentially at least) overly punishes the wrongdoing fiduciary. We agree with the statement of principle set out by Mummery LJ in *Swindle* ([90] *supra*) that "[t]here is no equitable by-pass of the need to establish causation" (at 733h). Endorsing the strict view of the *Brickenden* rule, *viz*, Approach 1, would create exactly that by-pass.

239 Approach 2 ought also to be ***rejected***. Approach 2 places the legal burden of proving "but for" causation firmly on the principal. The principal bears the onus of proving that it would have made a difference had the fiduciary not breached his duty. However, this fails to give sufficient regard to the unique position occupied by fiduciaries and the need to ensure that fiduciaries conduct themselves "at a level higher than that trodden by the crowd" (see the High Court of Australia decision of *Warman International Ltd and another v Dwyer and others* (1995) 182 CLR 544 at 557).

240 In our view, ***Approach 3*** (see [92] above) should be adopted in Singapore. This approach does not eschew the need for a causation test, and at the same time, such an approach gives legal effect to the stringent duties placed on fiduciaries and the corresponding need to deter fiduciaries from breaching their duties. Under this approach to causation, the principal bears the legal burden of establishing its claim, but the ***legal burden of proof*** *of showing that the loss would have been sustained by the principal even if the fiduciary had not breached his or her fiduciary duty falls on the* ***fiduciary***. Consistent with s 103(2) of the Evidence Act (Cap 97, 1997 Rev Ed), given that under Approach 3 the fiduciary is bound to prove the existence of facts showing that the losses would have been sustained even without his or her breach, the legal burden of proof lies on him or her. In other words, the burden lies on the fiduciary to rebut the ***rebuttable presumption*** that the loss would *not* have been sustained by the principal had the fiduciary not breached his or her fiduciary duty. This rebuttable presumption arises once the principal is able to prove on a balance of probabilities that the fiduciary has breached his or her fiduciary duty, and that loss has been sustained.

241 The burden-shifting approach finds support in the ***authorities***. It is a common theme of the cases that where equitable compensation is claimed for breach of fiduciary duty, it can only be claimed for loss that has been *caused* by the breach (see, for example, the Singapore decisions of *Ohm Pacific* ([135] *supra*), *John While Springs* ([137] *supra*), *QAM* ([132] *supra*), and *Beyonics Technology (HC)* ([143] *supra*)). The *burden-shifting* approach *retains this fundamental requirement of causation*, and has been adopted in the Singapore High Court decisions of *John While Springs*, *QAM*, *Beyonics Technology (HC)* and *Tongbao Shipping* ([121] *supra*).

242 However, we *depart from* the Singapore High Court cases with regard to their holding that the burden that shifts to the fiduciary to show that the principal would have suffered the loss even if there had been no breach is only an *evidential* one. Consonant with the need for strong deterrence against fiduciaries breaching their fiduciary duties, it is necessary to place the legal burden on the fiduciary fully and squarely. As Prof Harder has explained, any uncertainty as to what would have happened had there been no breach should be resolved against the fiduciary, given that his breach caused the uncertainty (see *Harder on Equitable Compensation* at p 30). We also do not, with respect, agree with the cases of *John While Springs*, *QAM* and *Beyonics Technology (HC)* in so far as they establish that the principal has to adduce *some evidence* to connect the breach to the loss before the evidential burden shifts to the fiduciary. This prior evidential burden placed on the principal to adduce "some evidence" of the connection between the breach and the loss made sense in those cases because the burden to be shifted to the fiduciary from the principal was an evidential one. However, once it is made clear that the burden placed on the fiduciary to rebut the presumption of causative link between the breach and the losses is a *legal* one, there is no need – and in fact, would be inconsistent – to retain the requirement for this prior evidential burden. In any case, this prior evidential burden is too vague to be a satisfactory legal test as it can shift between the parties throughout the course of the proceedings themselves (see also [243] below). Once the principal is able to show breach and loss, there arises a rebuttable presumption that the breach is a "but for" cause of the loss. The burden is then on the fiduciary to rebut this presumption.

243 In a case where there is patently no linkage between the fiduciary's breach and the losses sustained, it may, understandably, be of concern to some that the legal burden to rebut the presumed causation is placed on the *fiduciary*.

Such concern, if it so arises, is laid to rest by the fact that the discharge of the legal burden would not be an onerous one where there is clearly no causative link. As we have explained in *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 at [14], although the legal burden lies on one party – in this case, the fiduciary – the evidential burden may shift as between the parties, depending on the precise evidence adduced before the court. After the fiduciary shows evidence pointing to the lack of linkage between the breach and the loss, the evidential burden may shift to the principal to adduce evidence to show otherwise. The precise manner in which the evidence is adduced will of course depend on the precise facts and circumstances of each case. Courts should not belabour themselves unnecessarily with exceptional cases and throw the baby out together with the bathwater in attempting to craft legal propositions for these extreme outlying situations. In any case, even where there is patently no causative link, we are of the view that the *practical application* of the rebuttable presumption does *not* pose a problem.

244 ***Policy*** considerations also militate in favour of adopting Approach 3. ***Approach 3*** strikes the appropriate ***balance*** between the interests of the principal and the interests of the fiduciary. In so far as the former is concerned, the principal only bears the burden of showing the existence of a breach and loss for a rebuttable presumption of causation to arise – he or she does not need to show that if the fiduciary had not breached his or her duty, he or she would not have suffered the loss. In so far as the latter is concerned, the fiduciary is given a "narrow escape route", to use the words of Tipping J (see [161] above), because the fiduciary is at least given the opportunity to prove that his or her principal would have suffered the loss *in any event*, even without his or her breach of fiduciary duty.

245 There are good reasons why fiduciaries ought to be treated differently from other actors, and therefore why deterrence and prophylaxis are more pressing concerns when dealing with breaches of fiduciary duties. As has been referred to in several of the judgments we have examined above, and compellingly summarised by McLachlin J in the extract from *Canson Enterprises* ([147] *supra*) excerpted above at [150], the fiduciary's relationship with his principal is quite unlike the relationship of commercial parties trading with each other at arms' length. The core differences are these. At common law, the starting point is that the innocent party and the wrongdoing party are independent actors, standing on equal ground, capable of taking care of their respective positions. Consistently with the notion of equal actors, the common law in awarding damages to compensate the innocent party will have regard to the interests of the wrongdoing party, despite his or her wrongdoing, by keeping his or her liability within reasonable limits. The remedial response of the common law is therefore to compensate the innocent party only for his loss, with punitive damages to be awarded in rare cases. There is no element of deterrence manifest in the remedies provided in common law (see, for example, *QAM* at [37] and [40] and *Canson Enterprises* at [3] *per* McLachlin J).

246 In contrast, the starting point in equity is the trust and confidence reposed in the wrongdoing fiduciary by the innocent principal. The relationship between the wrongdoing fiduciary and the innocent principal is not one where both occupy equal footing, but rather one of ***dependence*** by the principal on the fiduciary. The principal relies on the fiduciary to act in his or her best interests, and is especially vulnerable to the fiduciary's breach of duty. Indeed, the High Court in *Kumagai-Zenecon (HC)* ([136] *supra*) has observed that a fiduciary owes his or her principal "the highest standard [of duty] known to the law" (at [13]).

247 In attempting to ensure that fiduciaries do not abuse the power given to them, and also to ensure that fiduciaries are not tempted or distracted from acting in the best interests of their principals, fiduciary law has always embodied elements of deterrence and prophylaxis (see *QAM* at [38] and [41]; *Hodgkinson v Simms* ([154] *supra*) at [93] *per* La Forest J). Equity intervenes not so much to recoup a loss suffered by the plaintiff as to hold the fiduciary to and vindicate the high duty owed to the plaintiff. Hoo JC recognised this in *Beyonics Technology (HC)* ([143] *supra*), when she observed that the high standards demanded of a fiduciary justified a strict approach to be taken against wrongdoing fiduciaries: "where the fiduciary acts in derogation from his core obligation of single-minded loyalty to his principal and prefers his own interest, the principal should not have to bear the heavy burden of proving strict 'but for' causation" (at [137]).

248 Finally, as a matter of ***practicality***, burden-shifting is to be preferred because it will often be the case that the fiduciary is in a better position to know how the loss was caused (or not caused) (see *QAM* at [139] above, *per* Coomaraswamy JC; *Canson Enterprises* at [6] *per* McLachlin J). It is usually the case that a fiduciary is given a wide discretion to make decisions and enter into transactions on behalf of the principal. Whereas a principal may face difficulty in establishing "but for" causation, the wrongdoing fiduciary will likely be in a better position to show how the loss was occasioned, as well as to meet the necessary threshold of proving that the loss would have arisen even without his breach of duty.

(2) Categories of breach to which Approach 3 applies

249 Next, we consider the types of fiduciary breaches for which Approach 3 is applicable. As set out above at [139], Coomaraswamy JC held in *QAM* that

the *Brickenden* rule (understood to encompass a burden-shifting approach) applies, *at the very least*, to "(a) a fiduciary who is in one of the *well-established categories* of fiduciary relationships; (b) who commits a *culpable breach*; [and] (c) who breaches an obligation which stands at the very *core of the fiduciary relationship*" [emphasis added]. This demarcation of the cases has attracted some criticism (see Tan Ruo Yu, "Causation in Equitable Compensation: The *Brickenden* Rule in Singapore" (2014) 26 SAcLJ 724). While we acknowledge that in *QAM* Coomaraswamy JC did not lay down these three requirements as the definitive threshold for the application of the burden-shifting approach, they have come to be seen as such (see the cases cited at [141]–[144] above) – not least of all in Coomaraswamy J's subsequent decision in *Then Khek Koon (2014)* ([141] *supra*) at [108]. We will examine the appropriateness of the three requirements in turn.

250 The first requirement is that the fiduciary falls into one of the *well-established categories of fiduciary relationships*. While we recognise that this requirement may help to prevent those in "novel" categories of fiduciary relationships from being unfairly saddled with onerous causation principles, this marker of well-established categories of fiduciary does not cohere with the legal principle that fiduciary obligations are voluntarily undertaken (*Tan Yok Koon* ([101] *supra*) at [194]). Once a person undertakes to act in a way that is fiduciary in nature, he or she cannot claim to be surprised that his or her failure to live up to those obligations entails *the burden-shifting rule* being applied against him or her. He or she ought not to be allowed to shelter behind his or her status as a "non-established" category of fiduciary. As this court has explained in *Tan Yok Koon*, it is not the mere existence of a fiduciary relationship that gives rise to fiduciary duties (at [207]); rather, the label "fiduciary" is a conclusion which is reached only once it is determined that particular duties are owed (at [193]).

Hence, whether someone owes fiduciary obligations does not follow from him or her falling into one of those well-established categories of relationships of, for example, director—company, solicitor—client, doctor—patient, *etc*. In summary, focusing on well-established categories of fiduciary relationship for the purposes of the burden-shifting approach runs contrary to the principles set out in *Tan Yok Koon*.

251 The second limiting factor is that there be a "culpable" breach, as compared to a mere innocent breach of a fiduciary duty. A culpable breach seems to refer to a breach that is deliberate and conscious. However, drawing such a distinction contradicts the established law in respect of *breach* of fiduciary duty that the no-profit and no-conflict rules are strict in that they do not depend on fraud or absence of *bona fides* (see, for example, the oft-cited House of Lords decision of *Regal (Hastings) Ltd v Gulliver and Others* [1967] 2 AC 134 ("*Regal (Hastings)*") at 137). This strict approach carries over into other aspects of fiduciary law: in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Ng Eng Ghee*"), for example, this court expressed the tentative view that breach of the no-conflict rule would be established once there is a "mere possibility" of conflict, instead of the higher threshold of "real sensible possibility" of conflict (at [140]–[142]). One of the reasons given for this was "the need to extinguish all possibility of temptation and to deter fiduciaries who may be tempted to abuse their positions" (at [143]). It would be more in keeping with the tenor of these pronouncements that *all* breaches of fiduciary duties engage the burden-shifting approach.

252 We recognise that it might seem unduly harsh to apply the strictures of the *Brickenden* rule – even on the relatively more fiduciary-friendly approach which we have endorsed – to a fiduciary who was not aware of his or her breach

of the no-profit rule or the no-conflict rule and had acted *bona fide*, in his or her belief that the transaction was in the interests of his or her principal. However, as explained at [71] above, the fundamental concern of the no-profit rule and the no-conflict rule is the utmost protection of the principal. Just as a strict approach is taken with regard to the test for breach of duty as established in *Regal (Hastings)* and *Ng Eng Ghee*, a strict approach must similarly be taken with regard to the test for causation. The fiduciary should and could have obtained the consent of his or her principal to enter into the impugned transaction which breaches the no-conflict rule or the no-profit rule. In any case, the fiduciary has an escape route – he or she would not be liable to pay equitable compensation if he or she can show that the loss to the principal would have been sustained even without his or her breach.

253 The third limiting factor is the requirement that there be a breach of a "core" fiduciary duty. We agree with this requirement. Coomaraswamy JC correctly included ***the no-profit and no-conflict rules*** as core fiduciary duties (see *QAM* at [57]). This accords with what we recently said in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 at [135], that "[f]iduciary duties in the classic sense encompass the two distinct rules proscribing a fiduciary from making a profit out of his fiduciary position (namely, the no-profit rule) and putting himself in a position where his own interests and his duty to his principal are in conflict (namely, the no-conflict rule)". Besides these two duties, the duty of the fiduciary to ***act in good faith*** is also a core fiduciary duty. In this regard, Millet LJ's illuminating *dicta* in *Mothew* at 18A–C on fiduciary duties (cited above at [69]) deserves to be spelt out in full:

> … A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The

> distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This *core liability* has several facets. A fiduciary *must act in good faith*; he *must not make a profit out of his trust*; he *must not place himself in a position where his duty and his interest may conflict*; he *may not act for his own benefit or the benefit of a third person without the informed consent of his principal*. … [emphasis added]

In our view, it is only breaches of these rules that should engage *Brickenden*, because these go directly to the foundation of the fiduciary relationship – the duty of loyalty owed by the fiduciary to his principal.

(3) Summary of the law on causation

254 To summarise briefly, the approach to causation is as follows:

(a) In a claim for a ***non****-custodial* breach of the duty of *no-conflict* or *no-profit* or the duty to act in *good faith*, the plaintiff-principal must establish that the fiduciary breached the duty and establish the loss sustained.

(b) If the plaintiff-principal is able to meet the requirements of (a), a *rebuttable* ***presumption*** that the fiduciary's breach caused the loss arises. The ***legal burden*** is on the wrongdoing ***fiduciary*** to rebut the presumption, to prove that the principal would have suffered the loss in spite of the breach.

(c) Where the fiduciary is *able* to show that the loss would be sustained in spite of the breach, no equitable compensation can be claimed in respect of that loss.

(d) Where the fiduciary is *unable* to show that the loss would be sustained in spite of the breach, the upper limit of equitable

compensation is to be assessed by reference to the position the principal would have been in had there been no breach.

Application to the facts

255 We now turn to apply the principles which we have distilled to the facts at hand.

256 There are two broad categories of loss claimed by the Winsta Group: (a) post-liquidation losses; and (b) pre-liquidation losses, respectively.

(A) Post-liquidation losses

257 The post-liquidation losses are the losses suffered by the Winsta Group from the Winsta Subsidiaries entering creditors' voluntary liquidation in August 2015 (see the Judgment at [203]). The thrust of the Winsta Companies' submissions is that the Judge was wrong to have ruled that the liquidations arose out of "commercial" reasons. The Winsta Companies contend that the Judge ought to have assessed the position "holistically", given that the respondents' misdeeds had spanned "almost four years", such that the "chain of causation stretched from late 2011 and 2015". In this situation, the Winsta Companies say that it could not have been possible to decide between causes attributable to the respondents and causes not so attributable. Instead, it is sufficient, given the pervasiveness of the Sims' wrongdoing, that their wrongful conduct be considered a material cause of the liquidations; the Judge should not have engaged in examining the relative importance of contributory causes, or looked at them through the lens of assessing comparative fault. Mr Lee Eng Beng SC ("Mr Lee"), counsel for the Winsta Companies, urged us to hold that it ought to be the respondents, as fiduciaries, who bore the evidential burden of showing that the loss was *not* caused by their breaches. He argued that simply accepting

the Judge's findings at face value ignored the shifting of the evidential burden to the fiduciary, and also ignored the principle that intervening causes ought not to enter the analysis.

258 The respondents, on their part, argue that the Winsta Companies have to prove that the decision to liquidate each of the Winsta Subsidiaries was causally linked to the respondents' wrongdoing. They argue that the Winsta Companies have entirely failed to particularise this connection.

259 Applying our approach to causation as set out above at [254], given that the Winsta Companies were able to show breaches of the core fiduciary duties of no-conflict and no-profit on the part of the respondents and were able to show that post-liquidation losses were sustained, the *burden of proof lies on the respondents* to show that the losses would have been sustained even if they had not breached their core fiduciary duties. Nevertheless, the Winsta Companies are unable to succeed in their appeal, because the Judge's findings afford a more than ample basis to discharge the respondents' obligation to show that the losses would have been suffered in any event. The Judge has *found* that the Winsta Group would have been in its financial predicament *even if* the Sims had not breached their duties, because of the *commercial* reasons he had identified. Nothing in the Winsta Companies' arguments provides an adequate response to these findings of fact the Judge had made. As we pointed out to Mr Lee at the hearing, the Judge had made a positive finding of fact that the Winsta Subsidiaries had to be liquidated because of *commercial reasons*. We elaborate.

260 The Judge found that the businesses of Carlisle Hostel, Pearl Hill Hostel and Queensway Hostel had ceased by 10 July 2015, when the Board was considering what steps it should take having discovered the interested party transactions by the Sims, and having commenced this action. This was because

the leases granted by the SLA for Carlisle Hostel and Pearl Hill Hostel had ended in October 2014 and 2015 respectively, and the SLA did not offer any renewals (see the Judgment at [208]). Similarly, the commercial basis for Queensway Hostel to continue operating had been undermined by February 2014. Queensway Hostel catered to students attending the Management Development Institute of Singapore ("MDIS"), but MDIS set up its own hostel in 2012 and 2013 and required its students to stay at its hostel (see the Judgment at [208]).

261 The Judge also considered that it was "abundantly clear" that the reason why the Winsta Subsidiaries had to be liquidated "was the projected shortfall of $11.2m by December 2015" if the businesses of the other Winsta Subsidiaries, namely, Katong Hostel, Evan Hostel, Hill Lodge and Global Residence, were to continue, especially given that M Development was unwilling to provide further funding (the Judgment at [211]). This finding was based on the meeting of Winsta Holding's board on 10 July 2015, which showed that (a) the rental of over $400,000 per month payable by Katong Hostel was the main reason for its expected shortfall of $4.7m; (b) the rental payable by Evan Hostel was also the main reason for its expected shortfall of $2.8m; and (c) Global Residence's rental rates had decreased significantly since June 2015 (see the Judgment at [213]). Although the minutes did not reveal the reasons for Hill Lodge's commercial difficulties, the Judge noted that the expected shortfall for Hill Lodge's business was small, at $865,000, and not significant in the wider context of a total shortfall of $11.2m (see the Judgment at [216]).

262 The Judge further buttressed this finding by referring to the expert report prepared by Mr Temple-Cole, which he considered "confirm[ed] that the financial situation of the Winsta Subsidiaries in 2015 was due to commercial

reasons" (see the Judgment at [217], where the Judge comprehensively sets out the key points of the expert's analysis).

263 The question of what caused the liquidations (and thus the post-liquidation losses) *is entirely answered* by the Judge's finding that the Winsta Subsidiaries had to be liquidated because of *commercial reasons*. There is thus *ample ground* for the respondents *to rebut the presumption* of a causative link between the breaches and the post-liquidation losses.

264 Mr Lee also sought to persuade us that the consequences of the breaches of fiduciary duty had not been fully explored below, and argued that if these breaches had come to light earlier, his clients, the Winsta Companies, would likely have removed the Sims from any positions of power or authority in Winsta Group, and introduced new management. The new management, in turn, might well have been able to turn the businesses around, especially since they would not have been interested, unlike the Sims, from wrongfully profiting from their directorships.

265 We also reject this argument. Although this argument was presented in the guise of a counterfactual as to what the Winsta Companies would have done had they discovered the breaches of fiduciary duty, in truth, this argument was premised on the Sims' failures to discharge their duty of care, skill and diligence. The core contention, as it were, is that the Sims had not done as much as they should have done to look after the Winsta Group's commercial interests. So described, this is nothing more than a breach of a director's duty of care skill and diligence. This duty, however, is *not* a fiduciary duty. Thus, the *Brickenden* rule would not have been engaged at all, and the Winsta Companies would have to establish but-for causation. We consider, however, that the Winsta Companies would be unable to do so. This is the case for two reasons. First, the

Winsta Companies will once again confront the insuperable obstacle of the Judge's finding: the post-liquidation losses were caused by *commercial reasons*. Second, as Mr Lee himself candidly informed us, his clients did not give evidence as to what they would have done had they discovered the breaches of fiduciary duty. Thus it was merely speculation that new management would have been brought in and that they could have turned around the business.

266 For the above reasons, we dismiss the Winsta Companies' appeal in respect of the post-liquidation losses, which we consider were not caused by the respondents' breaches of fiduciary duty.

(B) Pre-liquidation losses

267 In addition to their claim for post-liquidation losses generally, the Winsta Companies also mount discrete claims for pre-liquidation losses. These claims were rejected by the Judge either because the alleged claim did not disclose a breach of fiduciary duty, or, if breach was disclosed, "but for" causation of the losses had not been established. We will consider them in turn.

(A) Uni-House

268 The first claim is for loss caused by Ms Lynn Sim and Ms Joyce Sim's breaches of fiduciary duties in respect of the student hostel at Mount Vernon Road. The lease over the land at 27 Mount Vernon Road was taken out by one Winsta Subsidiary, Katong Hostel; but the hostel itself was managed by another Winsta Subsidiary, Hill Lodge. The alleged breach was in Ms Lynn Sim and Ms Joyce Sim procuring Hill Lodge to enter into a tenancy agreement to lease two blocks (out of six) to Uni-House without making proper disclosure of their interests in Uni-House. The sub-lease was made at a monthly rate of $60,000 and a 30% share of Uni-House's net profits for the period from 1 March 2012

to 27 December 2014; thereafter, the sub-lease was extended for 12 months at a monthly rental of $54,000, with no profit sharing (see the Judgment at [76]–[77]).

269 The Judge accepted that the Sim sisters had breached the no-conflict rule in failing to disclose their personal interests as owners and controllers of Uni-House to Winsta Group (see the Judgment at [95]–[97]). That said, the Judge refused the claim for equitable compensation because he found that the rentals paid by Uni-House to Hill Lodge were no less than what Hill Lodge could have earned from letting out the tenanted premises themselves. In other words, no loss was caused (see the Judgment at [231]). Further, he did not consider that there was a diversion of opportunity in leasing out the blocks to Uni-House because Uni-House ran a home-stay business, which the Judge considered to be different from the hostel business run by the Winsta Group (see the Judgment at [94]).

270 The Winsta Companies contend that the Judge was wrong to make this finding. They make several points. First, the Judge was wrong to have considered Uni-House's homestay business not to have been in competition with the Winsta Group's hostel business. Thus, the Judge wrongly disregarded the profits earned by Uni-House as loss suffered by Hill Lodge. Instead, the businesses were very similar – both shared the "basic feature" of providing student accommodation. And even if they were not, the Winsta Group itself was planning to move into the home-stay business, so leasing the two blocks to Uni-House to let it run a homestay business *was* a diversion of opportunity away from Hill Lodge. The respondents argue that the Judge's finding ought to be upheld.

271 We agree with the Winsta Companies that the home-stay business run by Uni-House was very similar to the hostel business run by Hill Lodge, and the Judge ought not to have found that these two businesses were so different that Hill Lodge could not have taken up this opportunity itself. As the Winsta Companies note, a homestay business is essentially the hostel business supplemented by the further provision of guardianship services. The core of both types of business is the provision of accommodation, as Ms Lynn Sim conceded on the stand. There were other ancillary services which were also common to both types of business, such as the catering of food, housekeeping, and the provision of internet services, which Ms Joyce Sim also fairly accepted on the stand. Winsta Group was well able to provide all of these services, as it was already providing these for its hostel business.

272 The key distinction was therefore the provision of additional care by a guardian in the homestay business. Ms Joyce Sim described the provision of this service as the "most important". There is probably some truth to this statement, but the more important question is whether Winsta Group could have entered this business itself. The evidence shows that the Winsta Group *was* exploring entering into the *homestay* business *at that time*, as an email written in 9 March 2012 by Ms Lynn Sim herself to the directors from M Development indicates: "there are plans for us to expand in this [homestay] market". And it appears to us that it was quite feasible for the Winsta Group to consider doing so, because Ms Joyce Sim also testified that with sufficient time for preparation, "Winsta [could] go in".

273 Looked at in this light, given the similarities between the hostel business and the homestay business, and given that the Winsta Group was contemplating entering the homestay business at the time the two blocks were sublet to Uni-House, we consider that the transaction in respect of Uni-House *was* a diversion

of opportunity away from the Winsta Group. We therefore consider that a breach of the *no-profit rule* has been established in respect of this particular breach.

274 The question that follows concerns equitable compensation. The Winsta Companies ask for equitable compensation in the sum of the net rental income Uni-House received from 2012 to July 2015, which they say was directly attributable to the homestay business opportunity diverted from the Winsta Group. This amounted to $881,916. Applying the principles we have set out above, we consider that the burden of proof shifts to the Sim sisters to disprove causation of loss. In our judgment, the Sim sisters are unable to do so. Nothing in their submissions addresses this point, because their submissions were focused on supporting the Judge's finding that a homestay business was quite different from the hostel business. That, however, goes to the question of breach, which we have already addressed.

275 In the circumstances we are satisfied that the Sim sisters' breaches of fiduciary duty in respect of Uni-House did cause the Winsta Companies loss, and the Winsta Companies are therefore entitled to equitable compensation of $881,916 in respect of this claim.

(B) Unihouse@Evans

276 The next discrete claim pursued is for the interested party transactions that occurred in respect of Unihouse@Evans. The arguments made here are essentially the same as those in respect of Uni-House and Hill Lodge. First, it is argued that the Winsta Companies argue that the Judge erred in finding that the home-stay business was different from a hostel business. Second, it is argued

that the Judge erred in accepting that the rentals paid by Unihouse@Evans were the no more than what Evan Hostel could have earned by itself.

277 We allow this claim for the same reasons we have given above in respect of Uni-House. In short, the homestay business was not so different from the hostel business that the Winsta Group was already familiar with, and the Winsta Group itself was looking to expand into the homestay business and had the means to do so. Thus, this transaction did represent a breach of the no-conflict rule and the no-profit rule on the part of the Sim sisters, who, as the owners and controllers of Unihouse@Evans (see the Judgment at [92]) had profited from the diversion of this opportunity away from the Winsta Group.

278 As to the equitable compensation, the analysis is the same as that for Uni-House above. The Winsta Companies ask for equitable compensation in the sum of the net rental income Unihouse@Evans received, amounting to $80,283. The burden lies on the Sim sisters to show that the loss would have been sustained even if they had not breached their fiduciary duties. We consider that they are unable to do so; as with Uni-House, nothing in their submissions addresses causation.

279 The Winsta Companies therefore succeed on this claim and are entitled to equitable compensation in the amount of the net rental income earned by Unihouse@Evans in the sum of $80,283.

(C) Interested Party Transactions between ICS Catering and the Winsta Group

280 The next claim is brought in respect of the Sim sisters' breaches of fiduciary duty in failing to disclose their interests in ICS Catering, which they hired to provide catering services to the Winsta Subsidiaries (see the Judgment

at [114]). The Judge found that by entering into these interested party transactions, Ms Lynn Sim and Ms Joyce Sim had breached both the no-conflict rule and the no-profit rule (see the Judgment at [129]). It is important to note, however, that the finding in respect of the no-profit rule was only for "receiving the monthly fees for assisting with ICS Catering's accounting and administrative affairs" (the Judgment at [129]). The Judge did *not* make a finding that an opportunity had been diverted away from the Winsta Group.

281 The crux of the Winsta Companies' arguments, however, is essentially that the Sim sisters diverted this opportunity from the Hill Lodge cafeteria to ICS Catering, which they had set up for that purpose. The Winsta Companies point out that Hill Lodge ran a cafeteria on its premises, so the Winsta Group had the resources and expertise to provide in-house catering services to their hostels. It is suspicious that this cafeteria closed just nine months after its opening, with ICS Catering taking over the premises instead.

282 The respondents, for their part, contend that the Winsta Companies have failed to adduce evidence to show that the Winsta Group had the capabilities to provide in-house catering services to their hostels.

283 In our judgment, there *is* evidence given by Ms Lynn Sim herself that the Winsta Group was in a position to provide catering services, as the following testimony shows:

> Q And provision of food and beverage? That is something which is well within the expertise of Winsta, isn't it?
>
> A Winsta do not do F&B.
>
> Q There was a café at Hill Lodge.
>
> A Yes.
>
> Q That's providing food and beverage to the customers there? Isn't that correct?

A Yes.

Q So why do you say Winsta is not in the business – it's true that Winsta was into that business for about nine months before the café was taken over by ICS correct?

A Yes.

Q So that's why you're saying that Winsta is not in the business, because it was only nine months that they had the café running? Is that why?

A Yes.

Q If ICS had not taken over the café and Hill Lodge had continued running the café, would you agree with me that Winsta is well positioned to provide food and drinks to its customers?

A Winsta's main business is not in F&B, it is actually in terms of hostel accommodations.

Q I'm not asking you about whether the main business is in F&B, I'm asking you whether Winsta was in a position to provide F&B to the persons occupying the hostels or the boarding house.

A Yes.

Q You agree with me it was in a position?

A Yes.

Q Provision of food and drinks is not something outside the expertise of Winsta, would you agree?

A Yes.

284 In our view, this evidence provides ample support for the Winsta Companies' contention that there had been a diversion of opportunity from the Winsta Group to ICS Catering. The Winsta Companies' claim for loss comprises the amount charged by ICS Catering above costs which would not have been a necessary expense had the Winsta Group relied on its own in-house catering; in other words, the claim is for ICS Catering's profit margin, which the Winsta Companies' expert has calculated at $298,235. The Winsta Companies further claim for loss suffered by Hill Lodge in sum of $227,320, as

a result of the diversion of the cafeteria business from Hill Lodge to ICS Catering.

285 The burden shifts to the respondents to prove that the Winsta Companies would have suffered the loss anyway – in this case, that the Winsta Group could not have taken up the opportunity to operate the catering business anyway. The respondents rely on two pieces of evidence. The first was that the Winsta Group found the running of the Hill Lodge cafeteria to be too challenging and decided to concentrate on running its core business of running student hostels. The second was that after ICS Catering's contract was terminated, the Winsta Group did not rely on an in-house team to provide catering but instead turned to an external vendor, Revada. In our view, neither of these really establishes that the Winsta Group could not or would not have pursued the opportunity to provide catering services. Ms Lynn Sim's own evidence was that the Winsta Group was in a position to provide such catering services, as set out in the transcript extracted above at [283]. Instead, given that the Sim sisters were directors of Hill Lodge, and at the same time, beneficial owners and controllers of ICS Catering (see the Judgment at [120]), it is more likely than not that the Sim sisters shut Hill Lodge out from pursuing this business further, in the interest of growing their own personal concern, ICS Catering. As for the hiring of Revada, we consider that the shuttering of the Hill Lodge cafeteria meant that there was no alternative for the Winsta Group but to turn to an external vendor. It did not mean that the Hill Lodge cafeteria would have found itself in such a situation even if the Sim sisters had not breached their duties and diverted business away to ICS Catering in the first place. Thus this, too, does not assist the respondents.

286 In the circumstances, we consider that the Winsta Companies succeed on this aspect of their appeal, and find that they are entitled to equitable compensation for the value of this lost business opportunity.

(D) Diversion of Summer Camp Opportunity to Devonshire

287 This is a claim for about $15,000 in profit that would have been made from housing a group of 200 Mongolian students at properties of the Winsta Group, either Katong Hostel and/or Queensway Hostel, which the Winsta Companies contend was wrongly diverted away when arrangements were made for the students to be housed at Devonshire, a property owned by Ms Joyce Sim's husband, instead.

288 The Judge's finding was that the Winsta Group could not have taken advantage of the 2014 summer camp opportunity. He accepted Ms Joyce Sim's explanations that neither Queensway Hostel nor Katong Hostel were available for the summer camp in 2014 (see the Judgment at [106]–[110]). He also found, however, that Ms Lynn Sim and Ms Joyce Sim had both breached the no-profit rule (see the Judgment at [111]).

289 The Winsta Companies appear to accept the Judge's finding that the Winsta Group could not have taken advantage of this opportunity through its various subsidiaries. Their argument, however, is that the Winsta Group could have rented separate accommodation to house the visiting Mongolian students, and the Winsta Group could then have reaped the profit from that, instead of JMJ Hotpot.

290 In our judgment, this submission is too speculative. No evidence has been cited by the Winsta Companies to show what alternative accommodation would have been rented, and the price at which it would have been rented, so as to establish the loss that the Winsta Group has suffered. It may simply have been the case that no accommodation could have been rented at reasonable rates, so no loss was occasioned at all.

291 We note that the Winsta Companies rely on Mr Temple-Cole's forensic report, where he gives a figure of $15,073 as the alleged loss, on the basis that the opportunity to provide housing ought to have gone to Global Residence, and Global Residence would have made a profit of 15% before tax on the $107,523 that was actually received by the respondents' vehicle, JMJ Hotpot. But this is inconsistent with the argument that the opportunities should have gone to Katong Hostel or Queensway Hostel.

292 In our judgment, the Winsta Companies have not established the loss claimed. We therefore reject the appeal in respect of this claim.

(E) Interested Party Transactions between I-Masters and the Winsta Group

293 The final claim under the heading of pre-liquidation losses is for the alleged loss the Winsta Group suffered from having I-Masters provide ACM services to the Winsta Group.

294 The Judge did *not* make a finding that this constituted a diversion of opportunities away from the Winsta Group to I-Masters. Instead, the breaches of fiduciary duties he found were in Ms Lynn Sim and Ms Joyce Sim failing to disclose their personal interests in I-Masters (see the Judgment at [144]). This was a breach of the no-conflict rule.

295 The thrust of the Winsta Companies' submissions on appeal, however, is that the interested party transactions amounted to a diversion of opportunity to I-Masters, because the Winsta Group was "fully capable of providing similar services at costs [*sic*]". The evidence the Winsta Companies rely on is the fact that Mr Shawn Tan, who later worked for I-Masters, was previously in charge of the in-house air-conditioning division operating under Katong Hostel.

296 In our judgment, the Winsta Companies' argument cannot be accepted. The Judge accepted the evidence of Mr Shawn Tan that he constantly faced manpower shortages while with Winsta Holding (see the Judgment at [143]). These findings suggest that the Winsta Group was never in a position to take up the opportunity to provide ACM services as the Winsta Companies allege. The Winsta Companies have not cited evidence on appeal that would contest the Judge's finding and thus establish a sufficient connection between breach and loss. That being the case, the Winsta Group cannot be said to have suffered a loss. The appeal in respect of this claim is therefore dismissed.

CA 219

297 CA 219 is the Sim sisters' appeal against the amount of equitable compensation they have been ordered to pay, and against the quantum of costs they are liable to pay.

The issue of the amount of equitable compensation payable

298 The Judge held that the Sims, together with Mr Dave Kong and OSPC, were jointly and severally liable to pay M Development the sum of $930,872.55 for the diversion of the Illuminaire opportunity to OSPC, and $463,460.40 for the diversion of the Scotts Square opportunity to ATAS (see the Judgment at [226]). The opportunities ought to have been directed to Global Residence instead.

299 Mr Temple-Cole assumed that Global Residence's profit margin before tax would have been 15%, based on Global Residence's actual profit margin before tax for 2011. This profit margin was also comparable to the average profit margin before tax earned by Global Residence before M Development invested in Winsta Holding. The Judge accepted this assumption to be reasonable (see

the Judgment at [224]). The sums above were therefore derived by taking 15% of the actual income earned by Illuminaire ($6,205,817) and Scotts Square ($3,089,736).

300 The Sim sisters contend on appeal that the Judge had erred in failing to take into account taxes in assessing the amount of equitable compensation. The proper approach would have been to take into account profits *after* tax. Global Residence would have incurred tax liability on any profits earned from Illuminaire or Scotts Square, so the amount of equitable compensation to be paid ought to be the amount of profits *after* tax. Global Residence's actual profit margin after tax for 2011 was 12% (rounded down from 12.5%). This, they argued, was the appropriate margin to be used. The equitable compensation to be paid therefore ought to have been $744,698.04 for Illuminaire ($6,205,817 × 12%) and $370,768.32 for Scotts Square ($3,089,736 × 12%).

301 The respondents, the Winsta Companies, contend that the Judge was entirely correct to use Global Residence's profit margin *before* tax in calculating equitable compensation. The Winsta Companies object to the Sim sisters raising this new argument: the Sim sisters ought to have obtained leave to do so but they did not, and have thus failed to comply with O 57 r 9A(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). But even if the court allows the Sim sisters to take the point on appeal, however, the Winsta Companies argue that an appellate court has to be very cautious in deciding to overturn the trial court's assessment of the expert evidence, and that we ought not to do so here. In any event, the Winsta Companies argue that Mr Temple-Cole was justified in calculating Global Residence's profits on a pre-tax basis.

302 We deal first with the objection based on O 57 r 9A(4) that leave of court was not obtained, and ought not be granted, to permit the Sim sisters to introduce

a new point in the appeal, in this case, the arguments about tax ("the Tax Argument"). The Winsta Companies argue that not all the facts bearing on the Tax Argument are before the court because the only evidence as to the appropriateness of using pre-tax profits is in Mr Temple-Cole's own report. If the Sim sisters wished to contend that post-tax profits were appropriate, they should, as the Winsta Companies correctly argue, have called their own expert to deal with the complexities of "how much tax would in fact have been payable", taking into account "the relevant years in which the profit would have accrue, whether there were any tax losses that could have been utilised to offset the profit, whether and to what extent there would be any permissible deductions available, and finally, any tax implications from the fact that [M Development] is bringing the action as assignee of the Winsta Subsidiaries' causes of action". The Sim sisters, however, have failed to call an expert to support their contentions in the appeal.

303 As already mentioned, we agree with the Winsta Companies' arguments. In our recent decision in *Li Shengwu v Attorney-General* [2019] 1 SLR 1081, we indicated that whether a party would be granted leave to pursue a new point on appeal would involve consideration of various factors, including whether further submissions, evidence or findings would have been necessitated had the new point been raised below (at [39]). This does seem to be a case where expert evidence as to the post-tax profit margin would have been necessary. The Sim sisters' broad-brush approach of simply taking the 12% profit margin figure based on historical averages seems a little too simplistic, and more importantly, is unsupported by any expert evidence. This point is sufficient to dispose of the Tax Argument.

304 In any event, we would also observe that there are no grounds for appellate intervention in this case. In our view, Mr Temple-Cole was justified

in using pre-tax figures in calculating Global Residence's profit margins. It was not lost upon Mr Temple-Cole that he could choose between pre-tax and post-tax profits. He explained that if he had chosen post-tax profits, he would have had to consider (a) tax that would have been payable annually on lost cash flows (*ie*, company tax on annual profits) and (b) tax which may be payable by the Winsta Companies on the receipt of an award of damages. He explained that he chose to use pre-tax profits because:

> In this case, in consideration of the available financial information and related uncertainties, I have opted to assess damages on a pre-tax basis. This means that I have not deducted company tax on estimated annual lost profits (i.e. the Lost Cash Flows), but equally have not 'grossed-up' my lump sum estimate of damages for any tax which might be payable by [the Winsta Companies] if they were awarded that amount. …

305 Mr Temple-Cole's explanation is essentially that he struck a fair balance by not deducting tax that would have been payable on the profits, but also by not using a higher figure that would have been taxed down upon the Winsta Companies receiving the compensation as an award of damages. We are of the view that this is a reasonable explanation.

The issue of costs

306 The Judge's decision on costs is not found in his judgment. Instead, the Judge gave his decision on costs by way of letter dated 27 November 2018. The Judge assessed full professional costs at $350,000, and awarded the Winsta Companies 60% of those costs, in other words, $210,000. He also ruled that KordaMentha's forensic fees, including the preparation of the forensic report, were payable in full, but that the Winsta Companies could only recover 60% of the fees for the KordaMentha Valuation Report. In addition, he ruled that the Winsta Companies were not entitled to recover any professional fees paid in

connection with the attendance of Mr Matthew Fleming and Mr Tay Tat Hwa in court. Mr Fleming and Mr Tay had been called by the Winsta Companies as experts.

307 The Sim sisters make arguments with regard to four components of costs in this appeal: (1) the Winsta Companies' professional costs; (2) KordaMentha's forensic fees; (3) KordaMentha Valuation Report fees; and (4) costs of Mr Temple-Cole's attendance. We consider these in turn. We deal with item (1) on its own, and items (2) to (4) together as they all have to do with KordaMentha.

(1) The Winsta Companies' professional costs

308 The Sim sisters contend that the sum of $210,000 awarded by the Judge ought to be reduced on two main bases. The first is that the total amount of full professional costs ought not to have been $350,000 in the first place. The Sim sisters propose four reasons why this sum should be lowered:

(a) First, the daily tariff applied in this case ought to have been $16,000, as this case straddled the divide between "simple tort, contract, corporate/company law disputes" (Appendix G guideline of $15,000 per day) and "complex tort or contract" matters (Appendix G guideline of $17,000 per day).

(b) Second, costs should be discounted to take into account the unnecessary time spent in cross-examining the witnesses on the KordaMentha Valuation Report, which the Judge himself ultimately found to be deeply flawed.

(c) Third, not only should a discount be given for Mr Fleming and Mr Tay's attendance, *credit* should be given to the Sim sisters for thoroughly debunking their credibility.

(d) Fourth, time spent on cross-examining Mr Temple-Cole ought to have been assessed as wasted costs, given the gross unreliability of the KordaMentha Valuation Report he prepared.

309 The second main basis the Sim sisters rely on is that the percentage of professional costs awarded should be lower than the 60% measure adopted by the Judge. This is because the Winsta Companies' action had failed in so many aspects, and the amount recovered in the claim so small in relative terms, that the Winsta Companies ought to be considered as having mounted an "exaggerated claim", and costs ought not to be awarded for "matters that bore no fruit". The Sim sisters substantiate this argument by relying on the following:

(a) the Winsta Companies' abandonment of many of their allegations at trial;

(b) the Winsta Companies' failure to substantiate their claims, notably their failure to adequately plead their claim in conspiracy;

(c) the Winsta Companies having succeeded only in two specific claims for the diversion of the Illuminaire and Scotts Square opportunities;

(d) the aggregate sum awarded by the Judge, of $1,404,332.95, being less than 10% of the total amount pursued, which was in the range of $16.3m to $39.8m;

(e) the Winsta Companies' failure to appreciate they would be unable to prove damages; and

(f) the Winsta Companies failing to properly prepare the bundles for trial.

310 The Sim sisters contend that the Winsta Companies had unnecessarily protracted the proceedings, and wasted the court's and parties' time, so that the appropriate percentage of costs to be recovered should be 30%, not 60%.

311 We will deal with the Sim sisters' arguments in turn. We state at the outset that we think that there is no reason to disturb the Judge's decision on costs, bearing in mind that costs are in the discretion of the trial judge and an appellate court will rarely intervene.

312 As regards the four arguments described at [308] above, we think there is no reason to reduce the absolute amount of professional costs. First, the Winsta Companies are correct that this dispute falls within the category of "Equity & trust", for which the Appendix G recommended daily tariff is $20,000–$30,000. The dispute was factually intense, and also legally complex, involving as it did the vexing controversy concerning *Brickenden* ([7] *supra*). Both sides saw fit to engage Senior Counsel. Second, we do not think that costs should be further discounted for the time spent cross-examining witnesses as to the KordaMentha Valuation Report. It is true the Judge made several criticisms of the report (see the Judgment at [236]), but he evidently thought it useful enough because he nevertheless awarded costs for it (albeit at 60% of the Winsta Companies' proposed figure). Third, we do not think that costs should be *credited* in the Sim sisters' favour simply because they succeeded in showing that Mr Fleming and Mr Tay's evidence was unhelpful. No authority has been

cited for this. Fourth, Mr Temple-Cole's evidence does not warrant a ruling of wasted costs; as the Judge himself noted (see the Judgment at [236]), it was because of his decisions on liability and causation that he did not have to come to the question of quantifying loss, for which Mr Temple-Cole's evidence likely would have been of assistance.

313 We think that there is also no reason to disturb the Judge's ruling that 60% of the total costs ought to be recoverable. Although the Winsta Companies have recovered far less than what they had originally set out to recover, the amount ultimately ordered exceeds $1m and is well above the threshold for a suit to be commenced in the High Court. The Winsta Companies appear to have proceeded on a much more generous view of *Brickenden* than what the present authorities hold, but the arguments were not made frivolously, nor was the interpretation offered patently unarguable or wrong. The Winsta Companies have already been visited with the consequences of failing in the legal arguments with regard to the lower amounts recovered; it is unnecessary to also reduce costs awarded in their favour. In addition, the Winsta Companies are also entirely correct to point out that the Judge found a litany of breaches of fiduciary duty by the Sim sisters. Although not all of these breaches ultimately translated into recoverable loss, the award of costs should stand as a signal of our disapproval of the Sim sisters' conduct.

(2) KordaMentha fees and Mr Temple-Cole's costs of attendance

314 The Sim sisters also contend that costs awarded for KordaMentha's fees ought to be reduced. These comprise the KordaMentha forensic fees ($445,641.70, awarded in full) and the KordaMentha Valuation Report fees (an award of $186,419.58, being 60% of $310,699.30). The Sim sisters contend that the fees had initially been pursued by the Winsta Companies as part of damages

or equitable compensation, and not as costs, so the Winsta Companies ought not to have a second bite at the cherry. The Sim sisters further claim that because the KordaMentha Valuation Report was unreliable and not useful, the Winsta Companies should not be allowed to claim for it at all. Similarly, they claim that because Mr Temple-Cole did not provide assistance in court, only 10% of the costs of his attendance in Court should be awarded.

315 What the Sim sisters now say is a complete reversal from their position below, where it was *they* who contended that the KordaMentha forensic fees and the KordaMentha Valuation Report fees could only be recovered as costs and not as equitable compensation (see the Judgment at [238]). The Judge's order on costs is, in fact, exactly the result that the Sim sisters were contending for. Hence, they should not be complaining that the Judge characterised the fees as costs. We also do not agree with the Sim sisters' contention that no costs should be awarded for the KordaMentha Valuation Report and that the costs for Mr Temple-Cole's attendance in court should be reduced, for the same reasons provided in [312] above. In the circumstances, Judge's costs orders for the KordaMentha items and Mr Temple-Cole's attendance in court will stand.

Conclusion

316 In conclusion, both CA 218 and CA 219 are dismissed in their entirety. The appeal in CA 220 is allowed only in part: only the claims for pre-liquidation losses in respect of Uni-House, Unihouse@Evans, and ICS Catering are allowed. The Sims, Mr Kong and OSPC are liable to M Development in the sum of $930,872.55 in respect of the Illuminaire opportunity. The Sims, Mr Kong and ATAS are liable to M Development in the sum of $463,460.40 in respect of the Scotts Square opportunity. The Sims are liable to M Development in the sum of $881,916 for the diversion of business from Hill Lodge to Uni-House,

the sum of $80,283 for the diversion of business from Evans Lodge to Unihouse@Evans, and the sums of $298,235 and $227.320 for the diversion of business from the Winsta Group to ICS Catering.

317 Unless the parties are able to come to an agreement on costs, they are to furnish, within 10 days from the date of this judgment, written submissions limited to 10 pages each, setting out their respective positions on the appropriate costs orders for the appeals in the light of the present judgment.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

Christopher Anand s/o Daniel, Harjean Kaur, Keith Valentine Lee Jia Jin and T Varshini (Advocatus Law LLP) for the appellant in Civil Appeal No 218 of 2018 and the first respondent in Civil Appeal No 220 of 2018;
Lee Eng Beng SC, Cheng Wai Yuen, Mark, Chew Xiang, Ho Zi Wei, Lim Wee Teck, Darren (Rajah & Tann Singapore LLP) for the respondents in Civil Appeals Nos 218 and 219 of 2018 and the appellants in Civil Appeal No 220 of 2018;

Narayanan Sreenivasan SC, Ang Mei-Ling Valerie Freda and Hiren George Jonas (K&L Gates Straits Law LLC) for the appellants in Civil Appeal No 219 of 2018 and the second to fifth respondents in Civil Appeal No 220 of 2018;
The sixth respondent in Civil Appeal No 220 of 2018 in person.