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

[2022] SGHC 233

Suit No 410 of 2016 (Taking of Accounts or Inquiries No 2 of 2021)

Between

Innovative Corporation Pte Ltd

… *Plaintiff*

And

(1) Ow Chun Ming
(2) Clydesbuilt (Holland Link) Pte Ltd

... *Defendants*

JUDGMENT

[Equity — Remedies — Account — Difference between taking of account and account of profits]
[Equity — Remedies — Account — Account of profits — Whether fiduciary liable to account for profits paid to related parties]
[Equity — Remedies — Account — Whether fiduciary entitled to equitable allowance]

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v
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23 September 2022 Judgment reserved.

Ang Cheng Hock J:

Introduction

1 In my judgment dated 13 May 2019 in HC/S 410/2016, I found that the first defendant, Mr Ow Chun Ming, had breached his fiduciary duties to the plaintiff, Innovative Corporation Pte Ltd; and that the second defendant, Clydesbuilt (Holland Link) Pte Ltd, had dishonestly assisted the first defendant in his breach of his fiduciary duties. That was a case which involved the first defendant having appropriated for himself a business opportunity that rightly belonged to the plaintiff, which then allowed the defendants to be involved as owners and builders of a project for the development of 82 units of semi-detached houses known as "Eleven@Holland" and a Hakka Memorial Museum and Cultural Centre ("HMMCC") (collectively, the "Project"). The full facts and my findings can be found in the reported judgment in *Innovative Corp Pte*

Ltd v Ow Chun Ming and another [2020] 3 SLR 943 ("*Innovative Corp*"). I briefly set out the key factual findings made in *Innovative Corp*:

(a) From its inception, one Ms Annie Chen Liping ("Ms Chen") was the plaintiff's director, major shareholder and main decision-maker (*Innovative Corp* at [2]). The first defendant, an experienced real estate developer, was the chairman and CEO of the Clydesbuilt group of companies (the "Clydesbuilt Group"), which included the second defendant (*Innovative Corp* at [4]).

(b) The Fong Yun Thai Association ("FYTA") owned the land at 33 Holland Link in Singapore (*Innovative Corp* at [5]). In late 2007, FYTA decided to embark on the Project (*Innovative Corp* at [6]). In late 2008 or early 2009, Tianjin Heping Construction Group Co Ltd ("THC"), a Chinese company associated with Ms Chen, and FYTA commenced negotiations over the Project (*Innovative Corp* at [9]). These negotiations culminated in an agreement signed on 9 July 2009 (*Innovative Corp* at [10]). THC subsequently authorised FYTA to deal with the plaintiff and Ms Chen in its place (*Innovative Corp* at [14]).

(c) The plaintiff subsequently accepted the first defendant's proposal to collaborate with the plaintiff as a joint venture partner and the first defendant was appointed as a director of the plaintiff in December 2009 (*Innovative Corp* at [20]–[23]).

(d) Ms Chen introduced the first defendant to FYTA's representatives on 24 February 2010 (*Innovative Corp* at [30]). On or around April 2010, the first defendant received an official invitation to tender for the Project. The first defendant submitted his bid on 19 April 2010, which was accepted by the board of FYTA on 4 May 2010. The

second defendant was incorporated on 17 May 2010 as the vehicle to carry out the Project (*Innovative Corp* at [36]). The first defendant resigned as a director of the plaintiff in August 2010 (*Innovative Corp* at [64]).

(e) On 7 October 2010, the defendants, Clydesbuilt Investment Pte Ltd ("CBI") (in which the first defendant owned 95% of the shares), FYTA, and the trustees through which FYTA originally owned the land ("FYTA's trustees") entered into a joint venture agreement (the "JVA") (*Innovative Corporation* at [38]). In summary, the JVA contemplated that:

(i) The second defendant was to issue 1m preference shares at a par value of $0.01 each, totalling $10,000, to representatives of FYTA.

(ii) The first defendant, his brother, his sister, and three representatives from FYTA were to be appointed to the board of directors of the second defendant.

(iii) FYTA would be entitled to 25 of the 82 residential units that would be built, while CBI would be entitled to 57 units.

(iv) Pursuant to a sale and purchase agreement, the second defendant would acquire the land on which the residential units would be built for $70m, which was to be paid by setting it off against FYTA's share of the development costs for the Project.

(f) The project was completed sometime in 2014 (*Innovative Corp* at [39]). On 31 July 2018, 21 of the 25 units (as four units had been sold earlier on) earmarked for FYTA were transferred to them. Thereafter,

the 1m preference shares held by FYTA were cancelled, and FYTA's representatives resigned as directors of the second defendant (*Innovative Corp* at [40]). At the time of the trial, the second defendant held 48 of its 57 earmarked residential units as nine units had previously been sold (*Innovative Corp* at [41]).

2 Consequent to my findings on the defendants' liability, I ordered the defendants to account to the plaintiff for all the profits they made in relation to the Project. The defendants' appeal to the Court of Appeal was unsuccessful.[1] The present proceedings before me concern the determination of the profits made by the defendants from the Project. For convenience, I shall refer to the present proceedings as the "assessment proceedings", to distinguish it from the earlier proceedings that culminated in the judgment I delivered in *Innovative Corp*, which I shall refer to as the "liability proceedings". As parties remained at loggerheads on most issues in the assessment proceedings, the hearing before me was a complex and involved process, which required the assistance of numerous expert witnesses. Experts on, *inter alia*, accounting, property valuation, and construction costs were called to give evidence. Before I delve into the issues in dispute and my findings, let me set out the relevant procedural history of the assessment proceedings that led to the hearing before me. This will be relevant to the question of whether the defendants have properly complied with their discovery obligations, and also shows the attitude and approach that they have taken to the assessment proceedings.

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[1] Minute Sheet for CA/CA 124/2019, 26 February 2020.

Procedural history

3 After the Court of Appeal dismissed the defendants' appeal on 26 February 2020, the plaintiff initiated the present assessment proceedings. Pursuant to that, the first defendant filed an affidavit on 21 August 2020,[2] which parties have referred to as his "accounts affidavit". In one short portion of his accounts affidavit, the first defendant affirmed that he and the second defendant had made no profits at all from the Project. According to the first defendant, this was based on the financial statements of the second defendant. These financial statements showed that the second defendant had incurred accumulated losses of $3,343,956, from the time of incorporation up to 31 October 2018.[3] For the rest of the lengthy accounts affidavit, the first defendant mostly regurgitated what he had already stated in his affidavit of evidence-in-chief filed in the liability proceedings, even though large portions of this evidence had not been accepted by the court.

4 As the accounts affidavit did not disclose any documents of relevance to the profits made by the defendants, other than the financial statements of the second defendant, the plaintiff requested for more information and documents relating to the Project from the defendants. The defendants declined to provide any of the information or documents requested. They also did not even comply with a direction made by an Assistant Registrar ("AR") that they were to file a supplementary affidavit, after having considered the requests of the plaintiff for more information and documents.[4]

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2 Affidavit of Ow Chun Ming @ Victor Ow sworn on 21 August 2020 ("First defendant's accounts affidavit").

3 First defendant's accounts affidavit at para 17.

4 Minute Sheet for HC/S 410/2016 (PTC) dated 28 August 2020 at page 2, lines 21–24.

5 The court thus directed the plaintiff to file an application for discovery against the defendants,[5] and this was done on 27 November 2020 (HC/SUM 5229/2020).[6] It was only after the discovery application was filed that the defendants agreed to provide the plaintiff with most of the documents requested. These documents were provided to the plaintiff in various stages from January to March 2021. As there were still some categories of documents that were contested, HC/SUM 5229/2020 eventually proceeded for hearing before an AR on 14 May 2021. After hearing arguments, the AR granted all of the plaintiff's requests for documents.[7] The defendants were ordered to produce the documents by 28 May 2021.[8] This was less than three months before the start of the hearing before me. Even then, the defendants only provided the documents that they were ordered to disclose to the plaintiff in a staggered manner, right up to 29 July 2021.

6 Parties exchanged the first round of their affidavits of evidence-in-chief on 30 June 2021 and 5 July 2021. In the first defendant's affidavit of evidence-in-chief, he again repeated large portions of his accounts affidavit, and his affidavit of evidence-on-chief in the liability proceedings. These portions were to the effect that the plaintiff's Ms Chen would have consented to the first defendant's breach of fiduciary duties, if he had informed her of what he intended to do.[9] The defendants also wanted to issue a subpoena to call

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5 Minute Sheet for HC/S 410/2016 (HC/SUM 2126/2020), 13 November 2020, at page 3, lines 1–2.

6 HC/SUM 5529/2020 (Summons for Discovery) filed on 27 November 2020.

7 Minute Sheet for HC/S 410/2016 (HC/SUM 5229/2020), 14 May 2021 at Annex A, para 15.

8 Minute Sheet for HC/S 410/2016 (HC/SUM 5229/2020), 14 May 2021 at page 28, line 19.

9 Affidavit of Evidence-in-Chief of Ow Chun Ming @ Victor Ow sworn on 30 June 2021 at paras 122–138.

Ms Chen as a witness in the assessment proceedings to establish that she would have agreed to the first defendant's conduct in pursuing the opportunity to develop the Project on his own, *if* she had been apprised of what he was doing.

7 However, this issue had been specifically decided in the liability proceedings. At [94] to [99] of *Innovative Corp*, I found that Ms Chen had not consented to the first defendant's actions in bidding for the Project, and would not have consented even if she had known what he was actually doing. As such, pursuant to an application taken out by the plaintiff, which I heard a few days before the start of the hearing in the assessment proceedings, I struck out the portions of the first defendant's affidavit of evidence-in-chief which dealt with this point.[10]

The issues before the court

8 The principal task for the court in these assessment proceedings is, of course, to determine the profits that the defendants have made from the Project, and what are the sums they should be made to account to the plaintiff. From the evidence led at the hearing and the parties' post-hearing submissions, a number of legal and factual issues have been raised. I set out the key issues as follows:

(a) First, is the plaintiff correct in asserting that the defendants have to make an account of their profits to the plaintiff on a "wilful default" basis?

(b) Second, how are the second defendant's profits from the project to be determined? Can the court venture beyond the financial statements

[10] HC/SUM 3291/2021 (Summons for Striking Out Affidavit) filed on 12 July 2021; Minute Sheet for HC/S 410/2016 (HC/SUM 3291/2021 and HC/SUM 3225/2021), 6 August 2021, at page 3.

of the second defendant, and look into the reasonableness of the construction costs charged by the main contractor for the Project, *ie*, Clydesbuilt Pte Ltd ("CBPL"), a company that is 95% owned by the first defendant? If so, which of the two competing approaches to assessing a fair construction cost advocated by the parties' respective expert quantity surveyors is to be preferred?

(c) Third, which of the valuations of the remaining unsold units by the plaintiff's or the defendants' real estate valuation experts should be accepted? In this regard, there is also the connected issue of what is the relevant date for the valuation of these properties.

(d) Fourth, what are the first defendant's profits from the Project? Should an assessment of the first defendant's profits include all the directors' fees, salaries and remuneration he has received from the various companies in the Clydesbuilt Group that he has involved in the Project? Should it also include the directors' fees, salaries and remuneration received by his relatives who are directors and/or shareholders in these companies?

(e) Fifth, is the first defendant entitled to an equitable allowance for his contributions to the generation of profits from the Project? More specifically, is the first defendant entitled to his claims for costs of equity capital, costs of provision of a financial guarantee, and costs of his time, skill and effort?

(f) Sixth, what are the sums that the first and second defendants must account to the plaintiff in respect of the profits from the Project?

9 There are, of course, numerous other less major but interrelated issues that parties have raised in the course of their submissions, and these will be dealt with if and when it becomes necessary for me to do so.

Whether the defendants have to account to the plaintiff on a "wilful default' basis

10 The plaintiff submits that the defendants must account for their profits on a "wilful default" basis rather than on a "common account" basis because the defendants have been found by the court to have been guilty of misconduct. The distinction between these two bases of accounting has been explained by the Court of Appeal in *UVJ and others v UVH and others and another appeal* [2020] 2 SLR 336 ("*UVJ*") at [23]–[27]:

> (a) A common account and an account on a wilful default basis are both procedures for the accounting of funds. However, the former does not depend on wrongdoing and a beneficiary is thus entitled "as of right" to be given an account in common form of the trustee's stewardship of trust assets (*ie*, an account of what was actually received and the trustee's disbursement and distribution of it) without having to show that the trustee has committed a breach of trust. Conversely, an account on a wilful default basis is premised on misconduct by the trustee and is not available to a beneficiary as of right. Therefore, a beneficiary must prove at least one act of wilful neglect or default to be entitled to an account on a wilful default basis.
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> (b) Moreover, the scope of an account on a wilful default basis is wider than that of a common account, as the trustee is not only required to account for what he has received, but also for what he *might* have received had it not been for the default. The judge or registrar taking an

> account on a wilful default basis is also entitled to look into all aspects of the trustee's management of the trust property and require the trustee to explain any suspect transaction, even if that particular transaction has not been complained of by the beneficiary.

11 In essence, a trustee may be ordered to provide an account of the trust property and his dealings with it, either on a "common basis" or "wilful default basis". The accounting procedure serves two purposes: (i) the informative purpose of allowing the beneficiaries to know the status of the fund and what transformations it has undergone; and (ii) a substantive purpose of ensuring that any personal liability a custodial fiduciary may have arising out of maladministration is ascertained and determined (*Lalwani Shalini Gobind and another v Lalwani Ashok Bherumal* [2017] SGHC 90 ("*Lalwani*") at [16]; *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2019] 4 SLR 714 ("*Cheong Soh Chin*") at [73]). This is a procedure that has to be carried out by the trustee, and the court will examine the account that is provided.

12 Whether the trustee provides an account on a "common" or "wilful default" basis has to be decided by the court before the account is ordered to be given, and that in turn depends on whether the trustee has been found to have acted in breach of his duties in a manner that shows dishonesty or some active misconduct. As noted in *UVJ* at [25], it must be proved that the trustee has committed at least one act of wilful neglect or default for an account on a "wilful default" basis to be granted. Following the taking of an account, the beneficiary is entitled to ask for an inquiry to discover what the trustee did with any money that was misappropriated; the taking of an account is merely a step in the process (*UVJ* at [27]). In particular, upon the taking of an account, discrepancies may be discovered and consequential orders made, including the falsification of

wrongful expenses or losses charged to the account or the surcharging of the account (*UVJ* at [28]; *Cheong Soh Chin* at [77]).

13 Falsification of a wrongful expense or loss charged to the account, in simple terms, means that the beneficiary may require that the entry in the account be deleted or disallowed so that the expense or loss is no longer charged to the account. The trustee then has to reconstitute the trust fund *in specie* or in monetary terms (*Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 ("*Sim Poh Ping*") at [112]; *Cheong Soh Chin* at [78]).

14 Alternatively, the account may be surcharged. Where a beneficiary seeks to surcharge a common account, the beneficiary essentially asserts that the trustee *has received* more than the account records (*eg*, where the trustee has received income from the trust property that was not recorded in the trust account), and the beneficiary is then entitled to surcharge the account to include that income (*Cheong Soh Chin* at [79]). Also, where an account is taken on a wilful default basis and the account is surcharged, assets which the trustee failed to obtain for the benefit of the trust in breach of his duties will be treated as having been obtained, and the trustee will be ordered to make good the deficiency in the trust by payment of a monetary award (*UVJ* at [28]; *Sim Poh Ping* at [120]). While a surcharge would ordinarily be the remedy sought following the taking of an account on a "wilful default" basis, it is not the *only* remedy that can be ordered (*UVJ* at [28]). Nevertheless, none of these specific remedies are available in the present case when an *account of profits* has been ordered, rather than the *taking of an account and consequential orders*.

15 As pointed out by the defendants,[11] it appears that the plaintiff has misunderstood the difference between an order directing a defaulting trustee to account for trust property which is a *process*, and an order granting an account of profits against a fiduciary which is a *remedy*. The conceptual difference between the two was explained by the High Court in *Lalwani* at [26] (and endorsed by the Court of Appeal in *UVJ* at [29]) as such:

> … the taking of accounts on either [a common or wilful default] basis above should not be conflated with an account of profits. While there is a common aspect between the taking of accounts and the accounting of profits in that they both attempt to quantify the deficit, if any, in the trust fund that must be made good by the defendant to the claimant, the taking of accounts is a process, while accounting of profit is a remedy. Thus, an account of profits is usually the very relief sought by claimants, whereas the taking of accounts may only be the first step, to be followed by the beneficiary's objections to the accounts presented and his claim for specific reliefs (*Snell's Equity* at para 20-017; Lord Millett NPJ, *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [168]). There are other nuanced differences. For instance, the taking of accounts arises generally in custodial fiduciary relationships, such as *vis-à-vis* trustees, executors, or custodial agents. An account for profits, however, may be relevant as a remedy for the breach of any form of fiduciary duty, regardless of whether the relationship is predicated on the custody of assets. Indeed, an account of profits may exceptionally be invoked even in cases beyond the fiduciary context (*Ng Bok Eng Holdings Pte Ltd and another v Wong Ser Wan* [2005] 4 SLR(R) 561 at [54]). Further, the taking of accounts on a common basis, unlike an account of profits, is also not predicated on the allegation or establishment of a breach (see, in the context of partnerships, *Ang Tin Gee v Pang Teck Guan* [2011] SGHC 259 at [86]).

16 What the plaintiff prayed for in this case,[12] and what I ordered in the liability proceedings (*Innovative Corp* at [141]), is for the defendants to provide

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11 1st and 2nd Defendants' Closing Submissions ("DCS") at paras 16–28.

12 Statement of Claim (Amendment No 1) ("SOC") at claims (b) and (c) against the first defendant and Claim (b) against the second defendant (Setting Down Bundle ("SDB") at page 26).

an account of profits which arise from the first defendant's breach of fiduciary duties and the second defendant's dishonest assistance of that breach. This translates to an order that the defendants are to each account for the profits that they made from the Project, and for such sums to be paid over to the plaintiff. That is the typical remedy awarded for breaches of fiduciary duties by errant directors and for dishonest assistance of such breaches by third parties.

17 It is important to bear in mind that an account of profits is a remedy granted by the court, very much like an order for damages. It is directed at addressing a specific breach of trust or breach of fiduciary duties, and will only be granted if the court has found that there has been such a breach. In this case, I granted the remedy of an account of profits to address the finding I made in the liability proceedings that the first defendant had appropriated a business opportunity belonging to the plaintiff, in breach of his fiduciary duties as a director of the plaintiff, and that the second defendant had dishonestly assisted the first defendant in exploiting that business opportunity. In that sense, these proceedings for an assessment of the defendants' profits from the Project are somewhat similar to proceedings for the assessment of damages. The end goal is for the court to determine figures which represent the profits made by each of the defendants, and to order these sums to be paid over to the plaintiff.

18 Another conceptual difference that is of significance in this case is that an order for an account of profits focuses on the gain that was made by the fiduciary, and not on the loss to the trust fund (*UVJ* at [28]). That flows from the principle that the purpose of a disgorgement of profits is not to compensate the beneficiary but to ensure that the fiduciary does not profit from his breach of duty (*United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461 at [46] and [47]). That is why an order for an account of profits may sometimes result in a "windfall" for the successful claimant. It is

precisely because an account of profits is premised on the gains of the errant fiduciary that it is possible that the beneficiary will gain a "windfall" (*ie*, benefits the beneficiary might not otherwise have earned on its own) (*Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 ("*Mona Computer*") at [16]). The rationale is the policy consideration that a fiduciary should not be permitted to enjoy any of its profits derived from its breaches of duties (*Mona Computer* at [17]), and such a strict approach will hopefully deter would-be errant fiduciaries. Unlike a surcharge following the taking of an account on a wilful default basis (which is focused on the loss to the trust fund), the remedy of an account of profits is focused on the gain that has been made by the defaulting fiduciary (*UVJ* at [28]; *Sim Poh Ping* at [121]). This has some implications, as I will explain below at [80]–[84], on the plaintiff's argument that the court should order the defendants to account to the plaintiff the value of the units in the Project on the basis of their highest value, from the time that a sale licence was granted to the second defendant to sell the units on 3 June 2011 to the date of the assessment proceedings.[13]

The second defendant's profits from the Project

19 I now examine the evidence as to the second defendant's profits from the Project.

20 It will be recalled that the first defendant had caused the second defendant to be incorporated on 17 May 2010 in order to undertake the development of the Project (see [1(d)] above). The second defendant was wholly owned by CBI, which was 95% owned by the first defendant, and 5%

[13] PCS at paras 77–83.

owned by the first defendant's brother, Mr Aldrin Ow Hing Choy ("Aldrin Ow").[14]

21 To recapitulate, the land on which the Project was developed was originally owned by FYTA's trustees. On 7 October 2019, the JVA in relation to the Project was entered into between the defendants, CBI, FYTA and FYTA's trustees. Amongst other terms, the second defendant acquired the land from FYTA's trustees for a purchase price of $70m. The purchase price would be paid by setting it off against the deemed value of 25 out of the 82 residential units in the Project to be built which FYTA was entitled to (at a price per unit of $2.8m). CBI would be entitled to the other 57 units (see [1(e)] above).

22 In carrying out the Project, the second defendant then appointed CBPL as the main contractor for the Project at a contract price of $70m. CBPL is a related company of the second defendant. The first defendant is CBPL's controlling mind and shareholder. A chart which sets out the shareholdings and relationships between the first defendant and his companies that were involved in the Project is set out in Figure 1 as follows:[15]

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14 Agreed Bundle of Documents Volume 5 ("5AB") at page 11748.

15 5AB at pages 11746–11761.

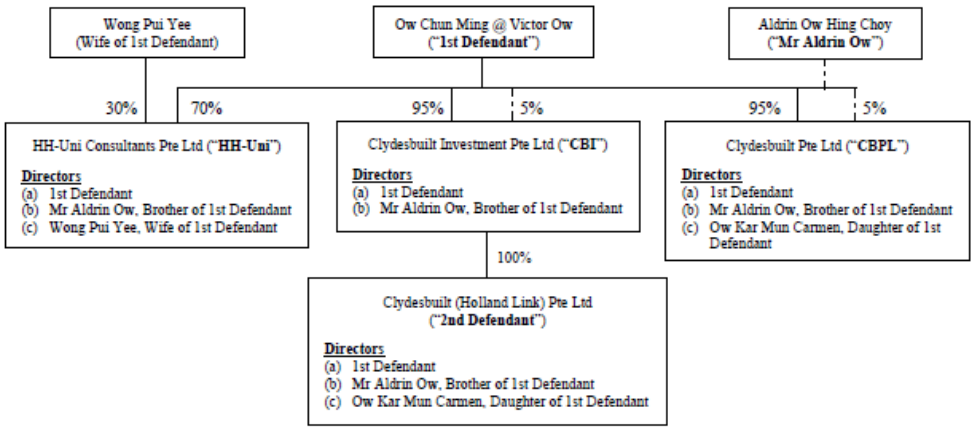

Figure 1: Chart of shareholding and relationship between first defendant and related companies

23 The plaintiff called a quantity surveyor as an expert witness, Mr Lee Choong Hiong ("LCH"), who expressed the view that, based on the documents that had been disclosed by the defendants and that he had reviewed, the contract sum of $70m awarded to CBPL was not a fair and reasonable one.[16] Using the Tender Price Index ("TPI") published by the Singapore Institute of Surveyors and Valuers ("SISV") to benchmark the contract sum of $70m against the award price for a similar project for which an open tender was called, LCH opined that a fair and reasonable award price for the Project would be $42,437,000.[17] In other words, LCH's view was that the second defendant overpaid CBPL by almost $28m.

24 On the other hand, the defendants contend that the court should not look behind the agreed contract sum between the second defendant and CBPL. This

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16 Plaintiff's Quantity Surveyor Expert's Report by Lee Choong Hiong dated 5 July 2021 ("LCH's 5 July 2021 Report") at para 6.5 (Plaintiff's Bundle of Affidavits of Evidence-in-Chief Volume 4 ("4PBAEIC") at Tab 2, page 33).

17 Plaintiff's Quantity Surveyor Expert's Report by Lee Choong Hiong dated 21 August 2021 ("LCH's 21 August 2021 Report") at para 10 (Supplementary Bundle of Plaintiff's Expert Reports ("PSB") at Tab 3A, page 76).

was a fixed sum contract, which had already been pre-determined by the terms of the JVA.[18] According to the defendants, there has never been any suggestion that the construction costs had been inflated by the defendants with a view to depressing the profits that the second defendant would make from the Project.[19] Also, these construction costs of the second defendant have been recorded in its books and accounts, as well as its audited financial statements.[20] Additionally, the defendants have called a quantity surveyor as an expert witness, Mr Chin Pay Fah @ Chin Bay Fah ("CBF"), who expressed the view that the construction costs paid by the second defendant to CBPL for the Project were fair and reasonable.[21]

25 Given the parties' positions, there are two issues to consider:

(a) whether the court should look behind the sum contractually agreed upon between the second defendant and CBPL; and

(b) if so, whether the plaintiff's or defendants' quantity surveyor's methodology should be preferred.

Whether the court should look behind the agreed contract sum between the second defendant and CBPL

26 As would be apparent from the chart set out above (at [22]), the main contractor, CBPL, is part of the Clydesbuilt Group. The first defendant readily admitted in his oral evidence that he is the controlling mind and shareholder of

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18 DCS at para 245.

19 DCS at para 246.

20 DCS at para 244.

21 Defendants Quantity Surveyor's Expert Report by Chin Bay Fah dated 5 July 2021 ("CBF's 5 July 2021 Report") at para 5.1 (Defendant's Bundle of Affidavits of Evidence-in-Chief Volume 3 ("3DBAEIC") at Tab 6, page 24).

the group.[22] The other named directors and shareholders of the companies in the group are all his close relatives. I have already mentioned that Aldrin Ow, one of the directors of CBPL, is the first defendant's brother (see [20] above). The remaining director of CBPL, Carmen Ow Kar Mun ("Carmen Ow"), is the first defendant's daughter. For completeness, I should mention that the second defendant appointed HH-Uni Consultants Pte Ltd ("HH-Uni") to provide consultancy services for the Project. The first defendant holds 70% of the shares in HH-Uni, while one Wong Pui Yee ("Wong"), the first defendant's wife, holds the remaining 30% of the shares. The directors of HH-Uni are the first defendant (who is also the Chief Executive Officer), Wong, and Aldrin Ow.[23]

27 I agree with the plaintiff's submission the court would be ignoring the commercial reality if it were to simply accept that the contract sum of $70m agreed between the second defendant and CBPL (which were both controlled by the first defendant) could be relied on as the costs of the second defendant in determining its profits, without any further inquiry into whether that contract sum represented a fair and reasonable amount for construction costs, plus a reasonable margin for profit.[24] This is for two main reasons.

28 First of all, given that the second defendant and CBPL are both controlled by the first defendant, there is a distinct possibility that the contract price of $70m does not reflect the fair and reasonable construction costs for the Project. Put another way, the court cannot accept, at face value, that figure as being fair and reasonable because it was not a commercial, arm's-length

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22 Notes of Evidence ("NE"), 25 August 2021, page 82 lines 11–24 and page 83 lines 5–17.

23 5AB at page 11755.

24 Plaintiff's Closing Submissions ("PCS") at paras 91–102.

transaction between the two companies. There was no open tender called before the construction contract for this Project was awarded to CBPL. The defendants point out that the price of $70m had already been agreed in the JVA with FYTA, and that the reason the first defendant had been chosen by FYTA as the partner for this Project was precisely because of his experience and expertise as a developer of residential developments.[25] That might well all be true, but it does not change the fact that this arrangement with FYTA allowed the defendants to use CBPL as the main contractor for the Project, which in turn created another avenue through which the first defendant could derive his profits from the Project. Specifically, the first defendant could derive his profits from the Project not only as an owner and developer, but also through the use of CBPL, as the main contractor appointed for the construction of the Project. It would not matter then how much the second defendant paid CBPL for the construction costs since the first defendant and Aldrin Ow, who together own 100% of the shares in CBPL (see [20] above), would be the ultimate beneficiaries of any overpayment.

29 Second, it is erroneous for the defendants to argue that the court should accept the sums paid to CBPL and HH-Uni as the fair construction and consultancy costs respectively for the Project simply because these figures had been recorded in the accounts of the second defendant and also appear in its audited financial statements.[26] The purpose of a statutory audit is not to ensure that *all* entries and documents in a particular set of accounts are correct; rather, it is a sampling exercise and merely involves the checking of *selected* entries and documents within a set of accounts (*PlanAssure PAC (formerly known as*

[25] DCS at paras 245 and 257–261.

[26] DCS at paras 244 and 251–253.

Patrick Lee PAC) v Gaelic Inns Pte Ltd [2007] 4 SLR(R) 513 at [34]; *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655 at [147]).

30 The fact that the figures in relation to the construction and consultancy costs were recorded in the books and accounts of the second defendant does not answer the question of whether such costs were fair and reasonable. The defendants submit that the second defendant's audited financial statements "present compelling and reliable evidence as contemporaneous records" of its costs.[27] However, the defendants have not cited any authority stating that the court is *bound to* take the books and accounts of a company as *conclusive* evidence of its costs, and to accept on the basis of those books and accounts that a company's costs were *fair and reasonable*. They cite the Court of Appeal's observations in *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 ("*Jet Holding*") at [49], where the Court of Appeal cautioned that parties should not be "put through an unnecessary procedural treadmill", especially when they have to rely on thousands of documents to establish their case.[28] The defendants' reliance on *Jet Holding* is misplaced. The Court of Appeal in *Jet Holding* was expressing the view that the court should not adopt "an overly punctilious insistence on compliance with the provisions in the Evidence Act [(Cap 97, 1997 Rev Ed)] for its own sake" in admitting documents into evidence, especially when large volumes of documents are being relied upon (at [50]). The Court of Appeal did not decide that a party is somehow relieved of its onus to *adduce* documents to substantiate its claims simply because the documents are voluminous.

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27 DCS at paras 45.

28 DCS at paras 53–55.

31 Significantly, under cross-examination, the first defendant accepted that of the approximately $53.3m recorded in the accounts of CBPL as the direct costs incurred for the Project, the documents disclosed by the defendants showed that only approximately $27.1m was accounted for in terms of invoices issued by sub-contractors, suppliers, *etc*, to CBPL.[29] In other words, a large amount of the sum which the second defendant paid to CBPL has not been accounted for by CBPL. This strongly suggests that the first defendant was "moving" part of the monetary benefits gained from the Project from the second defendant to CBPL. In other words, it is highly likely that the first defendant was partly deriving his profits from the Project through CBPL, which he substantially owned and controlled. This also allows an inference to be drawn that the contract sum between the second defendant and CBPL did not represent the fair and reasonable construction costs for the Project.

32 I should add that, after the first defendant was cross-examined, and in the period between the first and second tranches of the hearing before me, the defendants belatedly disclosed on 5 October 2021 more than 48,000 documents, which they claimed showed how CBPL had used the entirety of the amounts received from the second defendant for the construction of the Project.[30] In other words, the defendants claimed that these newly discovered documents would show that no sum paid over by the second defendant to CBPL for the Project was unaccounted for. Counsel for the plaintiff objected to these documents on the basis that these documents had come too late in the day. Given the lateness of the disclosure, it was not possible for the plaintiff to go

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29 NE, 24 August 2021, page 131 line 25 to page 137 line 10.

30 See 1st and 2nd Defendants' 7th Supplementary List of Documents dated 5 October 2021; NE, 16 November 2021, page 8 line 10 to page 10 line 6.

through all these documents and match them to the entries in the sub-ledgers in CBPL's books.[31]

33 I find the defendants' conduct of disclosing these over 48,000 documents at such a late stage of the proceedings to be quite unacceptable. The issue of there being no documents disclosed, to show how a substantial portion of the $53.3m paid by the second defendant to CBPL had been incurred by the latter for the Project, had been raised in the first expert report of LCH which was adduced as early as 5 July 2021.[32] Despite that, it was only three months later, after the first tranche of the hearing during which the first defendant was cross-examined, that these additional over 48,000 document were disclosed. Not only that; there was no attempt by the defendants to even correlate these newly discovered documents to the hitherto unaccounted amount of approximately $26.2m (being $53.3m less $27.1m) received by CBPL. That would at least have been a step towards assisting the court or the plaintiff in making some sense of this heap of documents.

34 On 16 November 2021, when the defendants' counsel attempted to admit these documents as part of the agreed documentary evidence, and the plaintiff's counsel objected, there was no attempt by the former to then try to admit these documents as part of the defendants' documents, since they would not be agreed documents. Neither was there any attempt by the defendants' counsel to adduce any further evidence from the first defendant or any other witness in relation to these over 48,000 documents. It is well-established law that documents do not speak for themselves. As stated by the Court of Appeal

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31 NE, 16 November 2021, page 13 line 4 to page 17 line 6.

32 LCH's 5 July 2021 Report at paras 6.3 and 7.17–7.18 (4PBAEIC at Tab 2, pages 32 and 39–40).

in *Jet Holding* at [36], whether documents may be admitted into evidence depends on whether they satisfy the relevant criteria contained in the Evidence Act 1893 (2020 Rev Ed) (the "EA") or fall within the relevant exceptions contained therein. In particular, s 66 of the EA provides that documents must be proved by primary evidence except in the cases mentioned in s 67 of the EA, whereby "primary evidence" is defined under s 64 of the EA as the document itself produced for the inspection of the court. Although the Court of Appeal's observations in *Jet Holding* were made in relation to provisions of the Evidence Act (Cap 97, 1997 Rev Ed) then in force, there are no substantive differences between the relevant provisions in that version and those in the EA presently in force.

35 Even if the authenticity of the documents sought to be admitted is established, if the documents are being admitted to prove the truth of their contents and the maker of the document is not present in court to be cross-examined to test the veracity of the documents, the documents would constitute hearsay evidence (*Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430 at [27]; Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 4.001). Such documents would be inadmissible unless it is shown that they fall within one of the exceptions to hearsay under s 32 of the EA (*Jet Holding* at [75]). If there is any objection to the admission of documents as part of the documentary evidence, then the onus is on the party seeking to rely on these documents to satisfy not only the evidential requirements of formal proof, but also to procure the attendance of the maker of the documents to lead evidence as to what these documents actually show in terms of the facts. In this case, the defendants made no attempt to cross any of these hurdles. As such, I do not think that the defendants are entitled to rely on these over 48,000

documents to purportedly show that all the amounts received by CBPL from the second defendant was properly utilised for the purposes of the Project.

36 In the situation here, where the plaintiff has shown that there is a real possibility that the second defendant might have channelled part of the monetary benefits from the Project to CBPL, it is necessary to inquire into the quantum of such benefits that have been passed over to these related entities. The same analysis and approach must also apply to HH-Uni, another related company controlled by the first defendant, and which was appointed by the second defendant as the consultant for the Project.

37 As a matter of principle, the profits which an errant fiduciary must account for should include any profits which the fiduciary has diverted to third parties, especially where these third parties are substantially connected with the fiduciary. As the Court of Appeal observed in *Parakou Investment Holdings Pte Ltd and another v Parakou Shipping Pte Ltd (in liquidation) and other appeals* [2018] 1 SLR 271 ("*Parakou*") at [129]–[130]:

> 129 … an account of profits is available against a fiduciary who procures an unlawful benefit for a corporate vehicle in which he has a substantial interest, particularly where the corporate vehicle is but a 'mere cloak' for his unlawful conduct. *A fiduciary 'cannot avoid the rules concerning accountability for profits by arranging for the profit to be taken by his company (or a company in which he has a substantial interest) which is a mere cloak for the [fiduciary]'* (see Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 19th Ed, 2015) at para 20-085). …
>
> 130 The Defendants attempt to distinguish *CMS Dolphin* on the sole ground that it involved a 'corporate vehicle formed by [the wrongdoing directors] to take unlawful advantage of the business opportunities'. They argued that, in contrast, and '[c]ritically, there is no element of diversion of business in any of the transactions for which the [D]irectors were found to have breached their fiduciary duties'. We are unable to agree. The nature of the wrongdoing by the director in *CMS Dolphin* is not materially different from the wrongdoing of the Directors. *If*

> *anything, the wrongdoing of the Directors is more egregious: instead of an inchoate business opportunity, what they diverted out of Parakou were the moneys of Parakou. The recipients of these diversions were, besides the Directors themselves, companies that they wholly owned and controlled (ie, PIH and PSMPL).* In the words of the court in *CMS Dolphin* at [97], each of the Directors 'should be accountable for the profits properly attributable to [his or her] breach of fiduciary duty'.
>
> [emphasis added]

38 It is clear from the observations in *Parakou* that where a fiduciary is liable to account for profits he has obtained in breach of his fiduciary duties, he cannot escape that liability by diverting those profits to third parties, not least where those third parties are companies which the fiduciary owns.

39 In my view, that principle applies equally to a dishonest assistant such as the second defendant, which has assisted in the breach of the first defendant's fiduciary duties, and has therefore been ordered to personally account for its profits. The second defendant cannot escape its liability to make an account of its profits derived from the Project by diverting such profits to CBPL and/or HH-Uni, given that both the second defendant, CBPL and HH-Uni are part of the Clydesbuilt Group of which the first defendant is the controlling mind and shareholder (see [22] above). Specifically, the second defendant may have diverted its profits to CBPL and/or HH-Uni by artificially inflating the price of the contracts between itself and these related parties, so as to give the appearance of having incurred higher development costs and making lower profits as a result. Therefore, a determination of the actual profits earned by the defendants, must include any profits which the second defendant may have diverted to CBPL and/or HH-Uni. This cannot be done without an inquiry into what would have been the fair and reasonable costs of the construction and consultancy services provided by CBPL and HH-Uni for the Project, which would then allow the court to determine if the second defendant overpaid CBPL

and/or HH-Uni. I therefore find that there is a proper basis for the court to look beyond the contract sums between the second defendant and HH-Uni in order to determine what would be a fair and reasonable amount to be paid for the construction and consultancy work in respect of the Project, including a reasonable margin for profit.

The different approaches taken by LCH and CBF: which is to be preferred?

40 Both LCH and CBF are quantity surveyors. Both of them are in agreement that, to properly assess the value of construction works, they must be given access to a complete set of the construction drawings, and also information about the specifications and finishes of the materials used for the Project.[33] All these information would have been prepared by the engineers and consultants for the Project.

41 In this case, the defendants did not give discovery of the construction drawings. Their counsel's explanation is that they did not do so because the plaintiff did not apply for discovery of these documents.[34] What had happened was that the plaintiff had applied for discovery of all the tender documents for the Project in HC/SUM 5229/2020, and such tender documents would normally include the construction drawings and specifications of the intended works.[35] This discovery application was resisted by the defendant on the grounds that such documents were irrelevant and unnecessary.[36] After the AR ordered the disclosure of the documents, the defendants then took the position that such

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33 NE, 11 August 2021, page 191 line 19 to page 193 line 1; NE, 30 November 2022, page 89 lines 6–22.

34 NE, 12 August 2021, page 33 line 6 to page 36 line 16.

35 Summons for HC/SUM 5229/2020 (Schedule); Minute Sheet for HC/SUM 5229/2020, 14 May 2021, page 19 line 22 to page 20 line 2.

36 Minute Sheet for HC/SUM 5229/2020, 14 May 2021, page 21, lines 5–12.

documents never existed because there had been no tender in the first place.[37] The plaintiff persisted and asked the defendants to disclose the documents that CBF would be relying on for his expert report,[38] but the defendants demurred.[39] It was only *after* CBF filed his first expert report that the defendants then disclosed about 194 pages of previously undisclosed technical drawings which CBF had relied upon in preparing his first report.[40]

42 The first defendant himself gave oral evidence that his own quantity surveyor, CBF, asked for the architectural and structural drawings and that he passed them to CBF for CBF to prepare his expert report.[41] The first defendant also testified that he knew that a quantity surveyor would need the architectural drawings and the schedule of finishes and specifications for the Project, in order to assess the value of the work done.[42] This was hardly surprising since the first defendant is an experienced property developer. But, incredibly, the first defendant also testified that he did not know that the plaintiff also needed the architectural and structural drawings for its quantity surveyor to prepare his expert report.[43]

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37 Plaintiff's Bundle of Documents for Closing Submissions Volume 1 ("1PCSBOD") at page 237.

38 1PCSBOD at page 243.

39 1PCSBOD at pages 247–248.

40 PCS at para 88; CBF's 5 July 2021 Report (3DBAEIC at Tab 6); see Plaintiff's Quantity Surveyor Reply Expert's Report by Lee Choong Hiong dated 5 November 2021 ("LCH's 5 November 2021 Report") at Appendix 1 for the list of undisclosed documents (PSB at Tab 3B, pages 94–97)

41 NE, 24 August 2021, page 72, lines 16–21.

42 NE, 24 August 2021, page 74 line 25 to page 75 line 8; page 77 lines 6–19.

43 NE, 24 August 2021, page 73 line 13 to page 74 line 4.

43 I find that the approach taken by the defendants and their counsel in relation to the discovery of the construction drawings and specifications to be completely at odds with the duty of a party and their counsel to ensure that prompt discovery is given of all relevant documents. In this case, the defendants cannot even say that they were unaware of the relevance of the drawings because CBF had asked for these documents for the purpose of preparing his expert report. It appears quite clear to me that the defendants and their counsel had deliberately withheld the disclosure of relevant documents until as late as possible in some misguided attempt to achieve some kind of tactical advantage in the assessment proceedings. Such conduct is entirely inimical to the proper conduct of litigation and is worthy of condemnation.

Construction costs of the Project

44 As a result of this selective approach to disclosure, the plaintiff's quantity surveyor, LCH, could not determine with any real accuracy the value of the construction works carried out by CBPL for the Project. LCH testified that he had to take a different approach to try to estimate the cost of the construction works.[44] This was by assessing what would have been the awarded tender sum for the Project if it had undergone a tender process.[45] LCH described this as the "TPI method" (TPI being short for the Tender Price Index).

45 The Project proceeded in two phases. For Phase 1 of the Project, which was construction of the 82 semi-detached houses, LCH's approach was as follows. He used the TPI, which is compiled by the SISV. The TPI reflects the tender prices received for building projects in Singapore. The TPI shows "the

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[44] NE, 12 August 2021, page 14 line 13 to page 19 line 23.

[45] LCH's 5 July 2021 Report at para 8.13 (4PBAEIC at Tab 2, page 45).

tender price movements of specific sub-sectors of the construction industry" and "is compiled from prices or unit areas of tenders awarded during the reference period".[46]

46 In assessing the reasonable tender sum of Phase 1 of the Project, LCH chose another residential project, Parkwood Collection ("Parkwood"), to be used for cost benchmarking against Phase 1 of the Project in view of the many similar characteristics shared between Parkwood and Phase 1 of the Project.[47]

47 LCH then assumed that, if a tender had been carried out for the Project, it would have been done in the last quarter of 2010. This is given that the JVA was signed on 7 October 2010, and the contract between the second defendant and CBPL was dated 21 February 2011.[48]

48 Parkwood's successful tender sum was $44,197,548 for a Gross Floor Area ("GFA") of 20,330.55m^2, or $2,174 per square metre. That was in the year 2018.[49] On the assumption that a tender had been carried out in October 2010, the TPI would require an adjustment of (-1.26%). That would result in a cost per GFA for the project to be $2,147 per square metre.[50] As the GFA for Phase 1 of the Project was 17,583.04m^2, that would mean a figure of $37,751,000 as the reasonable costs of construction.[51]

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46 LCH's 5 July 2021 Report at para 8.14 (4PBAEIC at Tab 2, page 45).

47 LCH's 5 July 2021 Report at paras 8.18–8.24 (4PBAEIC at Tab 2, pages 46–48).

48 LCH's 5 July 2021 Report at para 8.27 (4PBAEIC at Tab 2, page 49).

49 LCH's 5 July 2021 Report at para 8.25–8.26 (4PBAEIC at Tab 2, page 48).

50 LCH's 5 July 2021 Report at para 8.32 (4PBAEIC at Tab 2, page 50).

51 LCH's 5 July 2021 Report at para 8.37 (4PBAEIC at Tab 2, page 51).

49 As for Phase 2 of the Project, which was the building of the HMMCC, LCH's approach is as follows. He could not identify any project comparable to HMMCC,[52] so he considered a table of construction prices in a construction market quarterly update issued in June 2010 published by Rider Levett Bucknall LLP ("RLB"), a construction and property consultancy firm.[53] From the table, LCH then noted that the costs of construction of institutes of higher learning was approximately 10% lower than that for semi-detached houses.[54] His view was that the costs of construction of an institute of higher learning would be the best proxy for a building such as the HMMCC. LCH then adjusted the construction costs per square metre of Parkwood, which was a semi-detached cluster housing development, to a figure that reflected just the costs per square metre for building the semi-detached houses in Parkwood, arriving at a figure of $1,626.35 per square metre.[55] He then applied the TPI adjustment of (-1.26%) because of the difference in the years when Parkwood and the HMMCC were built.[56] He then further adjusted the figure downwards by 10%, because of the difference in costs of construction of semi-detached houses and institutes of higher learning, to arrive at a reasonable construction cost of HMMCC of $1,445.27 per square metre.[57] By multiplying this figure by the area of 3,242.26m^2, LCH arrived at a figure of $4,686,000 as the estimated reasonable construction costs of Phase 2 of the Project.[58] However, the area of 3,242.26m^2

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52 LCH's 5 November 2021 Report at para 4.2 (PSB at Tab 3B, pages 87–88).

53 LCH's 5 July 2021 Report at paras 8.33–8.35 (4PBAEIC at Tab 2, pages 50–51).

54 LCH's 5 July 2021 Report at paras 8.36 (4PBAEIC at Tab 2, page 51).

55 LCH's 21 August 2021 Report at paras 2–6 (PSB at Tab 3A, page 75).

56 LCH's 21 August 2021 Report at para 7 (PSB at Tab 3A, page 75).

57 LCH's 21 August 2021 Report at para 8 (PSB at Tab 3A, page 75).

58 LCH's 21 August 2021 Report at para 9 (PSB at Tab 3A, page 76); LCH's 5 November 2021 Report at paras 4.2(c)–4.2(f) (PSB at Tab 3B, page 88).

used by LCH in his calculations for Phase 2 of the Project (in his reports of 21 August 2021 and 5 November 2021)[59] appears to be the construction floor area ("CFA") which LCH had calculated himself in his report of 19 July 2021.[60] I note that LCH had expressly stated in his reports of 21 August 2021 and 5 November 2021 that he had relied on the *CFA* calculated by CBF in his report of 5 July 2021[61] – yet, in CBF's report of 5 July 2021, CBF had assessed the GFA for Phase 2 of the Project to be 2,471.77m^2, and the CFA for Phase 2 of the Project to be 3,521.13m^2.[62] I also note that LCH had accepted in his report of 19 July 2021 that the *GFA* for Phase 2 of the Project was 2,471.77m^2.[63]

50 It is unclear to me why LCH had, in his final round of calculations, used the CFA instead of the GFA to determine the reasonable construction costs for Phase 2 of the Project, when LCH himself had accepted (in his reports of 5 July 2021 and 19 July 2021) that it is the GFA which should be relied upon to calculate the reasonable construction costs.[64] In the circumstances, I am of the view that as a matter of consistency with the computation of the reasonable construction costs for Phase 1 of the Project, the reasonable construction costs for Phase 2 of the Project should be assessed using the GFA rather than the CFA, *ie*, 2,471.77m^2. Therefore, the estimated reasonable construction costs

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59 See LCH's 21 August 2021 Report at paras 9–10 (PSB at Tab 3A, page 76); LCH's 5 November 2021 Report at para 4.2(f) (PSB at Tab 3B, page 88).

60 Plaintiff's Quantity Surveyor's Reply Expert Report by Lee Choong Hiong's dated 19 July 2021 ("LCH's 19 July Report") at para 6.15 (Plaintiff's Bundle of Affidavits of Evidence-in-Chief Volume 8 ("8PBAEIC") at Tab 5, page 20).

61 See LCH's 21 August 2021 Report at para 9 and footnote 5 (PSB at Tab 3A, page 76); LCH's 5 November 2021 Report at para 4.2(f) (PSB at Tab 3B, page 88).

62 CBF's 5 July 2021 Report at para 4.2.4 (3DBAEIC at Tab 6, page 23).

63 LCH's 19 July Report at para 6.16–6.18 (8PBAEIC at Tab 5, pages 20–21).

64 LCH's 5 July 2021 Report at paras 8.36–8.37 (4PBAEIC at Tab 2, page 51); LCH's 19 July 2021 Report at para 6.18 (8PBAEIC at Tab 5, page 20).

for Phase 2 of the Project should be 2,471.77m^2 multiplied by the reasonable construction cost of HMMCC of $1,445.27 per square metre, which would amount to $3,572,375.03.

51 I turn to consider the approach taken by the defendants' expert quantity surveyor, CBF. The financial statements of the second defendant recorded the construction costs paid to CBPL as $67,563,062.13.[65] CBF attempted to justify this figure as being fair and reasonable. As already mentioned at [42] above, CBF approached the issue of assessment of construction costs purportedly on the basis of reviewing the construction drawings and specifications, and then applying his judgment as to the value of such works carried out. Ordinarily, CBF's methodology would have been the preferred approach to assessing the value of construction works (as opposed to LCH's approach, which involved a significant amount of estimation and assumptions due to the lack of construction drawings). However, upon scrutinising the analysis adopted by CBF, and as shown when he was cross-examined, there are numerous flaws and gaps in his computations.

52 CBF's first expert report included a bill of quantities ("BQ") that he prepared, which set out the quantities of each element and item of the Project and the corresponding rates.[66] CBF's evidence is that he prepared the BQ based on the construction drawings and specifications he was given.[67] However,

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65 Plaintiff's Accounting Expert's Report by Leow Quek Shiong dated 5 July 2021 ("LQS's 5 July 2021 Report") at para 10.7.13 (Plaintiff's Bundle of Affidavits of Evidence-in-Chief Volume 1 (1PBAEIC at Tab 1, page 76).

66 CBF's 5 July 2021 Report at pages 788–817 (Defendant's Bundle of Affidavits of Evidence-in-Chief ("4DBAEIC") at Tab 7, pages 788–817).

67 NE, 30 November 2021, page 89 line 14 to page 91 line 3.

under cross-examination, it soon became apparent that many of the figures that CBF assessed had no proper basis at all.

53 CBF admitted that the construction drawings that the defendants provided him with were not complete, *eg*, he had not seen any drawings for the metal work,[68] temporary earth retaining structures,[69] home lift installation,[70] signage works,[71] vehicular access control,[72] and landscaping works,[73] just to name a few of the many items for which there were missing drawings. As for the roof, CBF conceded that he either could not find the drawings for the roof in Phase 1 of the Project,[74] or that despite referring to drawings, he had utilised rates for the roof in Phase 2 of the Project based on his own estimation and experience.[75] CBF also admitted that he was not provided with the specifications for many of the works carried out, and hence, he made his own assumptions regarding the quantities used and the quality of the finishings. I will illustrate this by providing some examples from his evidence. CBF admitted that he did not know the type of glass that was used for building the shower screens in the units, and he simply assumed that the screens would have been built using tempered glass.[76] He also admitted that he was not shown or

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68 NE, 1 December 2021, page 70 line 7 to page 72 line 7.

69 NE, 30 November 2021, page 120 lines 11–14; 1 December 2021, page 59 line 21 to page 61 line 3.

70 NE, 30 November 2021, page 112 lines 2–5.

71 NE, 1 December 2021, page 58, lines 1–3.

72 NE, 30 November 2021, page 112 lines 6–8; 1 December 2021, page 53 line 23 to page 55 line 22.

73 NE, 30 November 2021, page 100 line 23 to page 102 line 22.

74 NE, 30 November 2021, page 127 line 18 to page 128 line 11.

75 NE, 1 December 2021, page 66 line 13 to page 70 line 6.

76 NE, 30 November 2021, page 97 line 18 to page 98 line 7; page 100 lines 16–22.

told what was demolished,[77] but simply assumed a figure of $224,800 (for Phase 1) and $58,400 (for Phase 2) for the costs of demolition works based on his own experience.[78] He took the same approach for the ironmongery works,[79] the temporary earth retaining structures,[80] and incoming cable.[81] Another example is the waterproofing system for the Project, where CBF was not provided with any schedule of finishes or specifications. His evidence is that he assumed the type of waterproofing used, without knowing what was actually used, and assessed the costs based on the industry rate.[82] For many other items, such as the wall tiles finish,[83] CBF also admitted that he simply applied his own assumptions to determine the rates, but did not explain this in his expert report, nor did he set out the basis of his assumptions.

54 The cost of the items which CBF determined based on his own assumptions, without having regard to any drawings or specifications, were not insubstantial. Using this approach, CBF indicated in Annex C of his report of 5 July 2021 the costs of the following works in Phase 1 of the Project as follows:[84]

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77 NE, 30 November 2021, page 120 line 24 to page 121 line 20.

78 CBF's 5 July 2021 Report at pages 793 and 808 (4DBAEIC at Tab 7, pages 793 and 808).

79 NE, 30 November 2021, page 113 lines 24 to page 116 line 3.

80 NE, 30 November 2021, page 120 line 11 to page 121 line 2; page 121 line 3 to page 123 line 22.

81 NE, 1 December 2021, page 81 line 22 to 25; page 86 line 7 to page 87 line 25.

82 NE, 1 December 2021, page 25, line 25 to page 28 line 15; page 32 line 9 to page 35 line 13; page 88 lines 4–8.

83 NE, 1 December 2022, page 40 line 20 to page 42 line 9; page 46 line 11 to page 47 line 23.

84 CBF's 5 July 2021 Report at pages 789–803 (4DBAEIC at Tab 7, pages 789–803).

Type of Work	Cost ($)
Metal work	944,227.82
Roof	599,114.16
Temporary earth retaining structures	60,000
Home lift installation	3,320,000
Signage works	24,600
Vehicular access control	50,000
Landscaping works	493,864
Shower screen	212,400
Ironmongery	177,216
Incoming cable	165,000
Waterproofing system	338,681.89
Wall tiles finish	1,060,112.32
Demolition and site preparation works in Phase 1 of the Project	224,800

55 I note in particular that CBF had assessed the costs of the wall tiles finish for Phase 1 of the Project as $1,060,112.32. His evidence on the stand was that he had arrived at this value through his own computations, without having regard to any specification or drawing that was provided under the contract, nor to any schedule of finishes.[85] Not only that, although the revised contract amount stipulated for the wall tiles finish was $800,000, CBF had assessed the

[85] NE, 1 December 2022, page 9 line 19 to page 10 line 8; page 46 line 11 to page 47 line 23.

cost of that item to be some $260,000 higher.[86] Similarly, the revised contract sum stipulated for the floor finishing was $2.84m, but CBF conceded on the stand that he had assessed the costs of the floor finishing to be $3.75m, which is some $900,000 higher than the revised contract sum.[87] Yet, CBF provided no explanation as to how his own computations could have led to cost assessments which exceeded even the stipulated contract sum.

56 The difficulties with the approach taken by CBF are perhaps best illustrated by the plaster work for Phase 1 of the Project, for which there was a contract with a sub-contractor at a price of $1.7m, after revision. CBF assessed the plaster works as having a value of some $3.193m, but he provided no explanation in his report as to how he worked out this figure.[88] Under cross-examination, CBF admitted that he did not see any schedule of finishes and he also assumed the thickness of the plaster works based on the "[i]ndustry practice".[89] I am unable to understand how the court can be expected to rely on the assessments provided by CBF when there is no explanation in his expert report as to how these figures were arrived at.

57 The purpose of engaging an expert quantity surveyor is to obtain a reasoned opinion as to the value of works, having regard to what work was actually carried out, the materials used, the costs of materials, the method of construction, the specifications, *etc*. However, it is patently clear that in

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86 NE, 1 December 2022, page 47 lines 18–23; CBF's 5 July 2021 Report at page 785 (4DBAEIC at Tab 6, page 785)

87 NE, 1 December 2022, page 46 lines 15–25; CBF's 5 July 2021 Report at pages 785 (4DBAEIC at Tab 7, page 785).

88 CBF's 5 July 2021 Report at pages 785 and 797 (4DBAEIC at Tab 7, pages 785 and 797).

89 NE, 30 November 2021, page 123 line 23 to page 127 line 17.

providing his expert opinion, CBF had not considered many of these matters in numerous instances. I find it quite difficult to accept CBF's assessments as to the value of the works, especially those which are not supported by any basis or evidence other than his own subjective computations and assumptions.

58 For some of these items, given the absence of information, CBF claimed that he went down to the site of the Project and carried out his own measurements. For example, for the landscaping works, as there were no landscaping drawings, CBF claimed that his team went to the site to look at the number of trees, and they reported to him that they had counted 400 trees.[90] However, when questioned, he appeared to be unsure as to the accuracy of this figure. When questioned as to the basis of assuming a unit rate of $1,000 per tree, such as whether it was based on the type of tree, CBF could not satisfactorily explain why he had chosen that figure, other than saying that the trees were "big".[91] He also agreed that his report had provided no details as to the size or type of the trees, and how big or mature the trees were when they were planted.[92]

59 As an expert witness, CBF should not have descended to giving factual evidence as to his own measurements and observations at the Project site. However, what is worse is that CBF did not make it clear which parts of his assessment were based partly on his own measurements and observations. He also did not set out in his expert reports his own measurements and observations

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90 NE, 30 November 2021, page 100 line 23 to page 102 line 22; 1 December 2021, page 89 line 16 to page 91 line 3.

91 NE, 1 December 2021, page 91 lines 4–18.

92 NE, 1 December 2021, page 93 lines 4–9.

taken at the site, nor did he state how such measurements were made and how the construction costs were computed based on those measurements.

60 To compound the problem even further, CBF did not even explain in his expert reports how he came up with many of the figures in the BQ. Under cross-examination, CBF admitted that he had used BCA rates for only about 25% and 28% for his total cost estimates for Phase 1 and Phase 2 of the Project respectively.[93] However, this is hardly apparent from his expert reports, as he did not explain the bases for the computation of the rest of his costs estimates. This presents a serious difficulty, for if CBF had used rates which are not substantiated and made no reference as to their source(s), it is then impossible for any person reading his reports to assess whether his calculations are correct.

61 All these deficiencies are serious flaws in CBF's expert evidence. Order 40A rule 3(2)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC 2014") requires that an expert's report must (i) give details of any literature or other material which the expert witness has relied on in making the report, while O 40A r 3(2)(*c*) of the ROC 2014 provides that an expert's report must contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given. In failing to set out and explain: (i) the assumptions he made in determining the construction costs of the Project; (ii) the alleged measurements and observations he made at the Project site; and (iii) how he made his computations based on those assumptions, measurements and/or observations, CBF's expert report falls well short of the standard imposed by O 40A rr 3(2)(*b*) and 3(2)(*c*) of the ROC 2014.

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93 NE, 1 December 2021, page 95 lines 6 to page 97 line 11.

62 In a sense, the difficulties that CBF faced were caused by the defendants. CBF himself explained that the developer (the second defendant) and main contractor (CBPL) would have had all the necessary information as to the construction drawings, and information as to the specifications, finishes and materials used. If all these had been provided to him, CBF testified that he would have been able to opine on the costs of construction, without having to make numerous assumptions and guesses, or attend at the site to make his own measurements and observations.[94] Be that as it may, it still remains the case that CBF's expert opinion cannot be properly relied upon by the court to determine if the contract price paid by the second defendant to CBPL was reasonable. Put simply, it is completely unreliable.

63 Given the circumstances, I reject the costs estimates computed by CBF. While the approach advocated by LCH is certainly not ideal for the reasons I have already explained (see [44] above), I find that LCH's figures present the best available evidence of what would be the fair and reasonable costs of construction for the Project. The defendants are in no position to complain about LCH's methodology because they are to blame for not producing the necessary drawings and specifications for the construction of the Project despite having been ordered by the court to provide an account of their profits, and to provide discovery of the necessary documents for that purpose.

64 In summary, the construction costs of each phase of the Project, as recorded in the second defendant's accounts, and the reasonable construction costs of the Project are as follows:

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94 NE, 1 December 2021, page 113 line 7 to page 115 line 3; 30 November 2021, page 110, lines 12–15.

	Construction costs recorded in the second defendant's accounts ($)	**Reasonable construction costs assessed by LCH ($)**	**Net difference ($)**
Phase 1	55,096,440	37,751,000	17,345,440
Phase 2	12,466,622.13	3,572,375.03	8,894,247.10
Total	67,563,062.13	41,323,375.03	26,239,687.10

65 As such, I find that the construction costs of the Project have been seriously inflated by the defendants. The figure of $67,563,062.13, recorded in the accounts of the second defendant as the construction costs for both phases of the Project,[95] is not an accurate indication of how much it would have cost for the second defendant to construct the Project. There is a net difference of $26,239,687.10 between what the second defendant recorded as the construction costs of the Project, and what would be a reasonable estimate of the construction costs of the Project. In the circumstances, it appears clear that the defendants' costs of the Project have been grossly inflated, which correspondingly means that the defendants' profits from the Project have been artificially depressed. In my view, the inflation of the defendants' costs, and the corresponding depression of its profits, was a means by which the second defendant had diverted economic benefits worth over $26m from the Project to CBPL. As explained at [39] above, the second defendant, having dishonestly assisted in the first defendant's breach of fiduciary duties, cannot be allowed to escape its liability to account of its profits to the plaintiff by diverting such profits to CBPL. As such, in my judgment, the second defendant must be made to account for its profits on the notional basis that the economic benefit

[95] LQS's 5 July 2021 Report at para 10.7.13 (1PBAEIC at Tab 1, page 76).

transferred to CBPL worth over $26m had not been transferred away, *ie*, on the basis that the second defendant had only incurred reasonable construction costs of $41,323,375.03.

Consultancy costs charged by HH-Uni

66 I now consider the fairness of the consultancy costs charged by HH-Uni to the second defendant. HH-Uni is a company that is 70% owned by the first defendant, and 30% by his wife (see above at [22]). The first defendant accepts that he is the controlling mind and shareholder of the Clydesbuilt Group, which HH-Uni is a part of (see above at [26]). Therefore, for the same reasons that the court cannot simply accept the amount paid by the second defendant to CBPL as necessarily representing a fair and reasonable estimate of the construction costs for the Project, the same can be said of the consultancy costs paid by the second defendant to HH-Uni. Any suggestion that the consultancy costs should be accepted as $5m according to the terms of the JVA would thus be unsustainable.[96]

67 The financial statements of the second defendant record that the consultancy costs charged by HH-Uni was the amount of $3,514,741.86.[97] The documents disclosed by the defendants, however, show that HH-Uni rendered three invoices to the second defendant in relation to consultancy agreements for a total of $3,424,000 (including 7% GST).[98] In other words, there is a difference of $90,741.86 between the consultancy costs recorded in the second defendant's

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96 DCS at para 286.

97 LQS's 5 July 2021 Report at para 10.7.22 (1PBAEIC at Tab 1, page 80) and Appendix 32 (Plaintiff's Bundle of Affidavits of Evidence-in-Chief Volume 2 ("2PBAEIC") at Tab 1, page 838).

98 LQS's 5 July 2021 Report at paras 10.7.28 and 12.44 (1PBAEIC at Tab 1, pages 81 and 162) and Appendix 33 (2PBAEIC at Tab 1, pages 841–843).

accounts and the invoices issued by HH-Uni to the second defendant for the Project. In his examination of the second defendant's accounting documents, the plaintiff's accounting expert, Leow Quek Shiong ("LQS"), expressed the view that the actual consultancy costs paid by the second defendant to HH-Uni was the lower figure of $3,424,000. He noted that the second defendant had recorded the amount of $90,741.86 as income being "understated gain on disposal of properties in previous year", and explained that this income was recorded "as a result of cost savings from the consultancy fees charged by HH-Uni for the Project".[99] In other words, HH-Uni had given the second defendant a discount of $90,741.86 in relation to the consultancy costs.

68 LCH's view is that the prevailing market rate of consultancy costs charged in 2010 ranged from 5% to 8% of what would be the reasonable tender price for the main construction contract, *ie*, the contract between the second defendant and CBPL.[100] Therefore, based on his assessment of the reasonable costs of construction of the Project as $42,437,000, if one was to apply the rate of 5%, the consultancy costs would be the sum of $2,121,850.[101] I am not persuaded by LCH's reasoning in this regard. It is entirely unclear to me why a figure of 5% is being used to demonstrate that the consultancy costs charged by HH-Uni are inflated when LCH had himself testified that the acceptable range is from 5% to 8%. If 8% is applied, then the figure would be $3,394,960, which is fairly close to the amount charged by HH-Uni, which was $3,424,000. At the same time, LCH also gave evidence that he did not examine the consultancy agreement between the second defendant and HH-Uni, and in any

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99 LQS's 5 July 2021 Report at paras 10.6.11–10.6.12 (1PBAEIC at Tab 1, pages 67–68).

100 LCH's 5 July 2021 Report at paras 9.6–9.11 (4PBAEIC at Tab 2, pages 53–54).

101 Recalculation of Reasonable Tender Sum for Phase 2 by Lee Choong Hiong ("LCH's 21 August Report") at para 11(a) (1PCSBOD at page 167)

event,[102] he admitted that he did not have the expertise to assess the fairness or reasonableness of what was charged by HH-Uni based on its scope of work in the agreement.[103] Given this, I am unable to agree with LCH's evidence that the figure of $3,424,000 paid by the second defendant as consultancy fees for the Project is not a fair or reasonable figure, or has been inflated. I therefore accept that the defendants have properly incurred $3,424,000, paid to HH-Uni, as consultancy costs for the Project.

What is the value of the unsold residential units in the Project?

69 A total of 82 semi-detached units had been constructed at Eleven@Holland. As already explained at [1(e)] above, the agreement with FYTA was that they would be entitled to ownership of 25 units, while CBI, the 100% owner of the second defendant, would be entitled to ownership of the remaining 57 units. The second defendant obtained the developer's sale license on 3 June 2011,[104] and the number of units (inclusive of those where ownership had been allocated to FYTA) sold over the course of the next few years is as follows:[105]

Year	Number of units sold (Number of FYTA units sold)
2011	11(4)
2012	1

102 NE, 12 August 2021, page 125 line 24 to page 126 line 9.

103 NE, 12 August 2021, page 129 line 25 to page 132 line 8; page 168 lines 12–16.

104 Supplementary Expert Report by Low Kin Hon dated 19 July 2021 ("LKH's 19 July 2021 Report") at Appendix 5 (Defendant's Bundle of Affidavits of Evidence-in-Chief Volume 4 ("4DBAEIC") at Tab 8, page 17).

105 See Plaintiff's Valuation Expert's Amended Report by Tan Keng Chiam dated 16 August 2021 ("TKC's 16 August 2021 Report") at para 69 (PSB at Tab 1, pages 26–27).

2013	1
2017	7(7)
2018	1(1)
2021	11(11)
Total	**32(23)**

70 At the time the court issued the judgment on liability on 13 May 2019, the defendant held 48 units. These were all units that CBI was entitled to ownership of. As for the 21 unsold units that FYTA was entitled to ownership of, they were transferred to FYTA on 31 July 2018 (see [1(f)] above).

71 The plaintiff's position in these assessment proceedings is that the profits that would have been made if these unsold units had been sold by the second defendant must be taken into consideration in determining the profits that the second defendant must account for.[106] As such, the plaintiff called as an expert witness a property valuer, Mr Tan Keng Chiam ("TKC") from Colliers International Consultancy & Valuation (Singapore) Pte Ltd, to give evidence as to how much the unsold units could have been sold for in the market.

72 On the other hand, the defendants' initial position was that there would be no profits from these units since they remain unsold. Instead, it was contended that the second defendant continued to incur costs for the maintenance of these unsold units. This position was reflected in the first defendant's accounts affidavit.[107] However, it appears that the defendants then took a different position when the first defendant's affidavit of evidence-in-

106 PCS at paras 56–83.

107 First defendant's accounts affidavit at paras 10–18 and 120–121.

chief was later filed, and now accept that the second defendant would have to account for its profits on the basis that these units were sold.[108] As such, the defendants called their own property valuer, Ms Low Kin Hon ("LKH") of Knight Frank Pte Ltd ("Knight Frank"), to give evidence as to the market value to be attributed to these unsold units.

73 The issue that the court has to decide is which of the two competing valuations given by the property valuers is to be preferred. In a tabular format, the two property valuers' figures are set out below:[109]

Date of valuation	**Valuation by TKC ($)**	**Valuation by LKH ($)**
June 2011	183,440,000	180,759,000
31 October 2018	179,560,000	150,035,000
13 May 2019	177,110,000	152,677,000
26 February 2020	175,620,000	153,557,000
30 June 2021	180,500,000	143,453,000

74 As can be seen, the parties had instructed their respective property valuers to value the 48 unsold units as at five separate dates. This is because the parties could not agree on the appropriate date for valuing the unsold units for the purpose of assessing the profits that the second defendant must account for. I turn first to this preliminary issue before considering the two experts' valuation evidence.

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108 DCS at paras 142–242.

109 PCS at para 56; DCS at para 164.

The appropriate date for valuing the unsold units

75 The reasons given by either or both of the parties for having chosen these five dates for valuing the 48 unsold units are as follows:[110]

(a) June 2011 (proposed by the plaintiff) – being the date on which the units in the Project were first sold;

(b) 31 October 2018 (proposed by the plaintiff) – being the end of the second defendant's Financial Year ("FY") 2018;

(c) 13 May 2019 (proposed by the plaintiff and defendants) – being the date of the liability judgment in HC/S 410/2016;

(d) 26 February 2020 (proposed by the defendants) – being the date when the Court of Appeal dismissed the defendants' appeal; and

(e) 30 June 2021 (proposed by the defendants) – being the date on which the court had directed the parties to exchange their expert reports.

76 The defendants argue that "logic and fairness" dictate that the date of valuation of the unsold units ought to be as close as possible to the final order made by the court for the defendants to pay over to the plaintiff the sum determined as the profits derived from the Project. As such, the defendants submit that the appropriate date of valuation should be 30 June 2021.[111]

77 On the other hand, the plaintiff submits that it should be entitled to profits based on the value of the unsold units at the "highest intermediate value",

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110 DCS at para 162.

111 DCS at para 161.

and this was during the time when the Project was launched and its first units were sold, *ie*, June 2011, if one looks at the valuation figures presented by both the expert valuers (see [73] above).[112]

78 The plaintiff also argues that the defendants would have been able to sell all the units in or around June 2011 because "most developers would proceed to sell the units after they have obtained the housing developers' licence".[113] I note that, in TKC's expert report dated 16 August 2021, it is reflected that in 2011, 11 units in the development were sold, seven of which were units that the defendants were entitled to ownership of (see [69] above). The defendants in turn submit that they had expended their best efforts to market the units in the development, but were only able to sell 13 units (nine of which were units that they were entitled to ownership of).[114]

79 As a preliminary matter, I am of the view that the defendants cannot be said to be under any obligation to account for the profits from the Project until they were ordered by the court to do so on 13 May 2019. As such, as a matter of principle, I cannot agree with the plaintiff that either June 2011 or 31 October 2018 would be appropriate dates to value the unsold units on the basis that the second defendant could have sold the units on those dates. The fact remains that, on those dates, the defendants had not yet been ordered to account for the profits from the Project. It was only after 13 May 2019 that the defendants came under an obligation to account for profits from the Project, and would thus know that they ought to take steps to sell the unsold units because the profits to be derived from the Project belong to the plaintiff.

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112 PCS at paras 77–83.

113 PCS at para 58.

114 DCS at para 149.

80 I also do not agree with the plaintiff's argument that a defaulting fiduciary, who is in wrongful possession of property and has the power to deal with the property, is required to account for the highest value of the property in the period while the property was in the defaulting fiduciary's possession. The plaintiff relies on the English cases of *Nant-Y-Glo and Blaina Ironworks Company v Grave* [1878] 12 Ch D 738 ("*Nant-Y-Glo*") and *Eden v Ridsdales Railway Lamp and Lighting Company, Limited* (1889) 23 QBD 368 ("*Eden*"). However, the cases relied on by the plaintiff involved situations where it may perhaps be explained that the fiduciary's breaches of duty had caused an identifiable loss to his principal, and the court was thus focused on making orders that made good the loss suffered by the principal.

(a) In *Nant-Y-Glo*, the defendant director received 50 shares of the claimant company from promoters (then quoted at £80 a share), in breach of his fiduciary duties to the company. The company elected to take the value of the shares received by the director. It was in this context that the court observed that the mere restitution of the shares (quoted at only £1 a share when the action was commenced and 20s at the time of the decision) would not do full justice, and thus ordered the director to pay to the company the value of the 50 shares at £80 a share (at 748 and 750).

(b) Similarly, in *Eden*, the plaintiff director received 200 shares from promoters in breach of his fiduciary duties to the defendant company. The court observed (at 371) that had the director disclosed his breach of duty, and the company claimed the shares, the company would have had the opportunity of selling them at the "highest value reached". Thus, the company was entitled to payment of the highest value of the shares reached of £200.

81 I would describe *Nant-Y-Glo* and *Eden* as decisions where the remedies granted were designed to compensate the *losses* of the principals in those cases, and that loss is often the opportunity to sell the appropriated property at its highest price in the intermediate period when the property was in the possession of the fiduciary. As is evident from the observations in *Eden*, the remedy in that case compensated the principal for his loss by considering the value that the principal could have obtained from the shares had the fiduciary not breached his duties, and accounted the shares to the principal. In *Ding Auto Pte Ltd v Yip Kin Lung and others* [2019] SGHC 243 ("*Ding Auto*"), the court cited *Nant-Y-Glo* at [227] in the context of equitable compensation. Notably, the court highlighted at [226] that equitable compensation is "restorative" in the sense of restoring the parties to the position they occupied before the breach of fiduciary duties. This was not challenged on appeal, which in any event was dismissed. The key distinction between an account of profits and equitable compensation is that the former is measured by what the errant fiduciary has gained whereas the latter is usually measured by what the beneficiary has lost (Malcolm Cope, *Equitable Obligations: Duties, Defences and Remedies* (Lawbook Co, 2007) at para 8.240). In other words, the amount recoverable in an action claiming an account of profits is dependent upon the profits obtained by the fiduciary and not the loss suffered by the beneficiary.

82 On the facts of our case, the first defendant had breached his fiduciary duties by appropriating a business opportunity belonging to the plaintiff, and the second defendant had dishonestly assisted the first defendant in that breach. The court has ordered the defendants to account for the profits that they obtained from their exploitation of that business opportunity. Here, the court is concerned with ensuring that the defendants disgorge the profits that they have made, and that they do not retain any of the benefits of their misconduct (see

[18] above). As such, the proper focus here should be on what profits the defendants have made or can make, and not what loss the plaintiff has suffered. In this regard, it must be emphasised that the loss of a beneficiary is not necessarily the same as the profit which the fiduciary has made; the fiduciary may have to account for a profit even if the beneficiary has suffered no loss (*UVJ* at [83]; *Murad and another v Al-Saraj and another* [2005] EWCA Civ 959 ("*Murad*") at [58]).

83 Moreover, I am mindful that the profits earned by an errant fiduciary may fluctuate before he is found liable for breaches of fiduciary duties and made to account for his profits. In such situations, it would be consistent with the focus of an account of profits being on the errant fiduciary's gains for the fiduciary's profits to be determined at the time that the fiduciary is held liable to account for his profits to the beneficiary. As observed in Graham Virgo, *The Principles of Equity & Trusts* (Oxford University Press, 3rd Ed, 2018) ("*Graham Virgo*") at para 18.5.1:

> … The remedy of an account of profits seeks to prevent the defendant from profiting from the wrong. To the extent that the value of any benefit has fallen by the time of judgment, the defendant's profit will have reduced as well. Consequently, the better view is that the profit should be determined at the time of the judgment. …

84 Therefore, where the value of a fiduciary's gain has fluctuated, I am of the view that the most principled and accurate measure of the benefit that the fiduciary has obtained would be the value of the fiduciary's gain at the time he is found to be in breach of his duties, and is ordered to make an account of his profits to the beneficiary. Accordingly, the most appropriate date at which the 48 unsold units should be valued is 13 May 2019, when the judgment on liability was issued.

The plaintiff's objections to LKH's independence as an expert

85 In her evidence, LKH provided certain disclosures that she believed might be perceived as having some impact on her independence as an expert witness. First, in her first affidavit of evidence-in-chief exhibiting her first expert report, she disclosed that Knight Frank, and in particular herself, had previously been appointed by FYTA to advise on the fair differential premium to be paid to the state for the Project site as at 17 March 2010 for the lifting of the title restriction from "Place of Worship" to "Residential (Landed)" development and the upgrading of the unexpired term of the lease to a fresh 99-year lease.[115] Second, at the start of her cross-examination, she disclosed that Knight Frank had been involved in marketing the sale of the residential units at Eleven@Holland for the period from April to December 2011.[116] She explained that she herself was not involved in those marketing efforts, and that she thinks that Knight Frank did not successfully manage to assist the second defendant in selling any units.[117]

86 However, it soon became clear in the course of LKH's cross-examination that her disclosures were inaccurate and incomplete. She was confronted with a tax invoice from Knight Frank dated 22 September 2011 for $178,633.40, which was for commissions for the sale of four units at Eleven@Holland.[118] This showed that she was wrong when she claimed that Knight Frank did not successfully manage to sell any of the units for the second

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115 Affidavit of Evidence-in-Chief of Low Kin Hon affirmed on 5 July 2021 ("LKH's 1st AEIC") at para 4 (3DBAEIC at Tab 3, page 2); NE, 18 November 2021, page 35 line 4 to page 37 line 2.

116 NE, 18 November 2021, page 37 lines 3–12.

117 NE, 18 November 2021, page 37 line 14 to page 40 line 2.

118 NE, 18 November 2021, page 40 line 3 to page 41 line 23.

defendant. In any event, her evidence was that Knight Frank's involvement occurred such a long time ago that it would not affect her independence as a valuer for the Project in 2021.[119]

87 Then, after LKH did some further checks, she also said that she had discovered another Knight Frank invoice in June 2011 for $191,000 which was the amount of commissions for the successful sale of four units at Eleven@Holland,[120] and numerous other invoices issued by Knight Frank to the second defendant, from 2015 to 2021, for commissions involving the leasing of units at Eleven@Holland.[121] She also informed the court that there were other Knight Frank invoices issued to other entities in the Clydesbuilt Group in relation to other developments of the Clydesbuilt Group.[122]

88 LKH then revealed that the Clydesbuilt Group was an existing "corporate client" of Knight Frank.[123] She candidly admitted that this was a fact that she should have disclosed in her expert report, but could not give any real explanation as to why she did not do so in the first place.[124] She could only testify that she had "missed out" on checking whether there were transactions between Knight Frank and its existing client, the Clydesbuilt Group.[125]

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119 NE, 18 November 2021, page 41 line 24 to page 42 line 9.

120 NE, 23 November 2021, page 20 lines 5–10; page 24 lines 15–22.

121 NE, 23 November 2021, page 24 line 24 to page 25 line 24.

122 NE, 23 November 2021, page 20 line 11 to page 21 line 2; page 25 lines 2–24.

123 NE, 23 November 2021, page 30 line 12 to page 31 line 25; page 33 line 12 to page 37 line 10.

124 NE, 23 November 2021, page 34 line 11 to page 37 line 10.

125 NE, 23 November 2021, page 37 line 17 to page 42 line 20.

89 To compound matters, it also emerged that in January 2011, on the instructions of the second defendant, LKH had prepared a valuation report on the gross development value of the Project (assuming that construction was completed), for which Knight Frank charged $10,700. This valuation had been prepared to assist the second defendant in obtaining secured financing for the development of the Project.[126]

90 The plaintiff submits that LKH had failed to discharge her duties as an expert witness by failing to give full and frank disclosure of her and Knight Frank's existing business relationship with the defendants.[127] In particular, the plaintiff points to what it describes as three material non-disclosures by LKH: (i) her failure to disclose the valuation report of 27 January 2011 for Eleven@Holland that she prepared for the second defendant;[128] (ii) her failure to disclose that Knight Frank was involved as a marketing agent of Eleven@Holland from April to December 2011, and that it had earned a substantial amount of commissions from this role;[129] and (iii) her failure to disclose that Knight Frank had earned substantial commissions from their dealings with the Clydesbuilt Group involving other projects, such as Lornie 18 and Clydes Residences, that had been developed by the Clydesbuilt Group.[130]

91 The defendants, on the other hand, describe these objections as "nothing more than an attempt to obfuscate and shift the focus away from the numerous

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126 NE, 18 November 2021, page 43 line 5 to page 44 line 7; 23 November 2021, page 20 line 14 to page 21 line 2.

127 PCS at para 156.

128 PCS at paras 160–162.

129 PCS at paras 163–166.

130 PCS at paras 166–169.

shortcomings in [TKC's] valuation approach".[131] They point to LKH's evidence that she did not disclose the valuation report she had prepared for the second defendant in January 2011 only due to "inadvertence", in particular, because Knight Frank's conflict searches had apparently not flagged this previous assignment.[132] The defendants also suggest that it was "understandable" that LKH could not remember preparing this valuation report approximately ten years ago in 2011, in light of her evidence that she had undertaken approximately 1300 valuation reports in that year.[133] The defendants argue that LKH "is and remains an independent expert".[134]

92 An expert's duty to the court is enshrined in O 40A r 2 of the ROC 2014: O 40A r 2(1) provides that it is the duty of an expert to assist the court on the matters within his expertise, while O 40A r 2(2) provides that this duty overrides any obligation to the person from whom he has received instructions or by whom he is paid. This duty is of such central importance that O 40A r 3(2)(*h*) of the ROC 2014 requires the expert's report to "contain a statement that the expert understands that in giving his report, his duty is to the Court and that he complies with that duty" (*Pacific Recreation Pte Ltd v S Y Technology and another appeal* [2008] 2 SLR(R) 491 at [69]). In discharging this duty, experts must not only be impartial, but must also *appear to be so* (*Gunapathy Muniandy v Khoo James and others* [2001] SGHC 165 at [12.16]). For this reason, experts should disclose "without any prompting" any existing or recent relationship with any of the parties; a failure to make proper disclosure in a timely manner may cause "serious concerns about apparent or actual bias on the part of the

131 DCS at para 143.

132 DCS at para 147; NE, 23 November 2021, page 48 lines 9–13.

133 DCS at para 143; NE, 24 November 2021, page 90 line 8 to page 91 line 24.

134 DCS at para 144.

expert" and could lead to the expert's evidence being discounted (*HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [71]; *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2011) at para 40A/2/1).

93 Where an expert is found not to be independent, the court may accord less weight to the expert's evidence, or even exclude it entirely.

(a) In *Technomed Limited and another v Bluecrest Health Screening Limited and another* [2017] EWHC 2142 (Ch), an expert witness engaged by the defendants, one Professor Harry Mond ("Professor Mond"), failed to disclose that he was the medical director of a company which was in commercial discussions with the second defendant in that case – that relationship only emerged during cross examination. The court observed at [14] that although "Professor Mond was doing his best to give honest and frank evidence, having not disclosed the fact of his company's involvement with [the second defendant], it cannot be said that he can be seen to be independent of the parties". Consequently, the court attached "no weight" to Professor Mond's evidence (at [22]).

(b) In *EXP v Barker* [2017] EWCA Civ 63, the appellant, a consultant neuroradiologist, was sued by the respondent for negligently failing to identify and report a cerebral artery aneurysm when reviewing an MRI brain scan carried out on the respondent. An expert witness engaged by the appellant, one Dr Andrew Molyneux ("Dr Molyneux"), failed to disclose that he had a lengthy and extensive relationship with the appellant. Among other things, Dr Molyneux had trained the appellant for seven years. They also worked together closely for a

> substantial period, whereby they co-operated on papers and Dr Molyneux helped the appellant to obtain foreign placements (at [27]). In the circumstances, the court observed at [51] that the judge below was fully entitled to find that the weight to be accorded to Dr Molyneux's views must be considerably diminished; it would even have been appropriate for the judge to exclude Dr Molyneux's views entirely.

94 Applying these principles, I find that LKH has indeed breached her duties as an expert by failing to give disclosure of facts that might have an impact on her impartiality and independence as an expert. I am prepared to accept her evidence that her failure to disclose her previous assignment by the second defendant to carry out a valuation of the Project was due to an innocent mistake on her part, or because of some inadequacies in the conflict checks she had carried out. I accept that she had genuinely forgotten about her previous valuation carried out in January 2011.

95 However, the same cannot be said about her failure to disclose the existing commercial relationship between Knight Frank and the Clydesbuilt Group. As I pointed out earlier at [88], LKH was aware that the Clydesbuilt Group was an existing client of Knight Frank, and that there had been ongoing business dealings between them. She herself admitted that she should have disclosed this fact in her expert report. That she then made a deliberate choice not to do so, for whatever reason, suggests that there was an attempt to conceal the existing relationship between Knight Frank and the Clydesbuilt Group.

96 An expert must only accept an appointment in cases where she is able to discharge her duties to the court independently, and is free of any constraints arising from an existing business relationship. In my view, the commercial

relationship between Knight Frank and the Clydesbuilt Group meant that LKH was not in a position where she could do so, or appear to be able to do so. Ensuring the impartiality of experts who give evidence becomes exceptionally important in view of the unique position they occupy in our adversarial system: unlike lay witnesses, they may draw on inferences and give opinions on matters which cannot be readily observed or inferred (*Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 ("*Vita Health*" at [79]). Moreover, experts are often "tendentious towards the party by whom [they are] retained" (*The "H156"* [1999] 2 SLR(R) 419 at [27]). However, as cautioned in *Vita Health* at [80]–[83]:

> 80 … While the party calling [an expert] remunerates him, he is *expected to remain detached from the fray and should not have any interest in the outcome of the proceedings nor partiality to the facts in issue*. An expert is now required under the rules of court, to acknowledge and accept that he owes a higher duty to the court in ensuring the veracity and probative value of his evidence: O 40A r 2(2) of the [ROC 2014]. This duty implicitly obliges him to give testimony that may harm or damage the contentions of his instructing party, if the facts warrant this.
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> …
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> 82 … while an advocate may be as biased as he chooses to be in pressing his client's cause, an expert cannot adopt such a stance. … An expert … should not evolve into a spokesperson for his client. Any opinions expressed must have a genuine foundation. It really cannot be disputed that:
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> > [I]t [is] necessary that expert evidence presented to the court should be, and should be seen to be, *the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation*.
> >
> > [per Lord Wilberforce in Whitehouse v Jordan [1981] 1 WLR 246 at 256–257.]
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> 83 … The expert should neither attempt nor be seen to be an advocate of or for a party's cause. If he appears to do this, he will inexorably lose his credibility. That said, it is entirely permissible for him to propound and press home the opinion he seeks to persuade the court to accept. In essence, *his advocacy is limited to supporting his independent views and not his client's cause*.

> [emphasis in original omitted; emphasis added]

97 In the circumstances, I find that LKH's independence has been severely hampered by reason of her and Knight Frank's relationship with the second defendant. Her failure to disclose this relationship to the court constitutes a particularly egregious breach of her duties as an expert. In this regard, s 47(4) of the EA provides that an expert's opinion which is otherwise relevant under s 47(1) of the EA is not relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant. In *The "Dream Star"* [2018] 4 SLR 473, Belinda Ang J (as she then was) observed at [37]:

> The independence and impartiality of an expert witness are paramount as the expert's duty is to assist the court to come to a decision. Under s 47(4) of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"), the court has a discretion to exclude the expert's evidence in circumstances where, as Prof Pinsler suggests, the expert's opinion would have a confusing and misleading effect as when there are doubts about good faith of the expert: Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) ("Pinsler") at para 8.040. Even if I choose not to exercise this discretion, I am of the view that the weight I give to an expert's opinion could well be reduced by the expert's lack of independence and impartiality.

98 Given my finding that LKH cannot be described as an independent and impartial expert, I am of the view that, even if I do not exclude her evidence pursuant to s 47(4) of the EA, the weight accorded to her evidence must be substantially discounted.

The valuation of the unsold units as at 13 May 2019

99 In general terms, both parties' property valuation experts had applied what is known as the "direct comparison method" in assessing the value of the

48 unsold units. In a summarised form, both LKH and TKC adopted the following steps in applying the direct comparison method:[135]

(a) First, a unit in Eleven@Holland was selected as the base unit. TKC had selected unit #01-27.[136]

(b) Second, the chosen base unit is compared against selected units from each expert's choice of properties that, in the view of the expert, are similar to Eleven@Holland (the "comparables"), and which were transacted in the market on or around the relevant valuation date.

(c) Third, for each of the comparables, a unit rate which is the transacted price per square foot ("psf") is determined from the recorded price of the transaction and the strata area of the comparable in question, excluding the strata void.

(d) Fourth, the "Value Based on Comparables" is derived by multiplying the transacted price psf of the comparable with the strata area, excluding strata void, of the base unit at Eleven@Holland that had been selected.

(e) Fifth, adjustments are then made, either upwards or downwards, to the "Value Based on Comparables" on account of the differences between the selected base unit at Eleven@Holland and that of the comparables in order to arrive at an adjusted value.

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135 See generally TKC's 16 August 2021 Report at paras 63–67 (PSB at Tab 1, page 25); LKH's 19 July 2021 Report at Appendix 8 and Appendix 9 (4DBAEIC at Tab 8, pages 23–32).

136 TKC's 16 August 2021 Report at para 66 (PSB at Tab 1, page 25).

(f) Sixth, all of the final adjusted "Values Based on Comparables" corresponding to each of the comparables are then added up and divided by the number of comparables in order to derive an average final adjusted value.

(g) Seventh, the final adjusted value is then divided by the strata area, excluding strata void, of the selected base unit at Eleven@Holland to derive a base unit rate.

(h) Eighth, each of the other 47 unsold units at Eleven@Holland is compared to the base unit, and adjustments are made to the account for differences between each of these units. The sum of the adjustments is then applied to the base unit rate in order to derive the adjusted base unit rate for each of the 47 units.

(i) Ninth, the adjusted base unit rate for each of the unsold units is then multiplied by the strata area of the unsold unit (excluding strata void) in order to determine the market value of that particular unsold unit.

(j) Tenth, the market value of each of the 48 unsold units at Eleven@Holland is added up to derive the collective valuation of these units.

100 Although TKC and LKH had used the same methodology (as described above at [99]) to assess the market value of the 48 unsold units, they both came to different valuations, as set out in the table at [73] above. For the reasons I have explained above (at [75]–[84]), the relevant date of valuation should be 13 May 2019. As of that date, TKC's valuation was $177,110,000 and LKH's valuation was $152,677,000. The different valuations are a result of the

different inputs which the two valuers had entered at various stages of the process.

101 The defendants attack TKC's valuations as unreliable for several reasons. First, they argue that TKC wrongly omitted as comparables certain transactions in 2018 and 2021 where FYTA had sold some of their units at Eleven@Holland.[137] In September 2018, FYTA had sold one unit at $3.25m.[138] Then, in 2021, FYTA had sold 11 units, after marketing 13 of their units for sale on an en-bloc basis at a price of $38m, *ie*, $2.8m per unit.[139]

102 It is not disputed that, in 2017, FYTA had sold seven units in Eleven@Holland to a related party, Char Yong (Dabu) Association, at an average price of $2.5m for each unit.[140] Both TKC and LKH are in agreement that these transactions in 2017 by FYTA cannot be used as comparables.[141] In other words, it is common ground that these transactions by FYTA in 2017 cannot be relied on because they are not reflective of the market price of the units. In fact, these sales in 2017 had given the appearance of a steep drop in the median price of Eleven@Holland units from 2013 to 2017.[142] TKC's evidence is that the 2018 and 2021 transactions by FYTA should also be

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137 DCS at paras 171–173; 193–200.

138 Affidavit of Evidence-in-Chief of Ow Chun Ming @ Victor Ow sworn on 30 June 2021 ("Mr Ow's AEIC") at para 113 (Defendant's Bundle of Affidavits of Evidence-in-Chief Volume 1 ("1DBAEIC") at Tab 1, page 37)

139 Mr Ow's AEIC at para 114 (1DBAEIC at Tab 1, page 37); TKC's 16 August 2021 Report at para 70(d) (PSB at Tab 1, page 27).

140 Mr Ow's AEIC at para 112 (1DBAEIC at Tab 1, page 37).

141 TKC's 16 August 2021 Report at para 70(a) (PSB at Tab 1, page 27); NE, 24 November 2021, page 71 line 24 to page 72 line 4.

142 See Graph 2 in TKC's 16 August 2021 Report at para 54 (PSB at Tab 1, page 22); Graph 4 at Re-Amended Reply Report by Tan Keng Chiam dated 21 August 2021 ("TKC's 21 August 2021 Report") at para 5 (PSB at Tab 2, page 6)

disregarded because they similarly do not reflect the market price of units at Eleven@Holland. He explained that the transacted prices for the FYTA transactions in 2018 and 2021 were well below the transactions in those same years in comparable developments such as Hillcrest Villa and The Teneriffe.[143] Moreover, TKC's view is that Hillcrest Villa and The Teneriffe are "entry level developments", *ie*, developments at the lower end of the market for cluster housing in the vicinity of Eleven@Holland.[144] Furthermore, TKC opines that Hillcrest Villa and The Teneriffe are cluster *terrace* developments, and as such would always have lower transacted prices than cluster *semi-detached* developments such as Eleven@Holland.[145] Thus, the fact that the transacted prices for the FYTA transactions in 2018 and 2021 were *even lower* than those of transacted units in Hillcrest Villa and The Teneriffe, meant that it was likely that FYTA continued to sell its units in 2018 and 2021 below market price. As such, TKC opined that those FYTA transactions should not be used as comparables because they are outliers. I accept TKC's evidence as being reasoned and logical. I do not accept the defendants' submissions that his approach is flawed because he excluded from consideration those FYTA transactions.

103 The defendants also attack TKC's choice of comparables. He had largely used transactions involving the same four comparable developments, *ie*, Eleven@Holland itself, Hillcrest Villa, The Teneriffe and Mont Timah, across all five valuation dates to ensure consistency. The defendants argue that TKC had wrongly excluded other comparable developments such as Watten Residences, Illoura and Ventura Heights, which were used by LKH as

143 TKC's 16 August 2021 Report at para 70(c) (PSB at Tab 1, page 27).

144 TKC's 21 August 2021 Report at paras 3 and 18 (PSB at Tab 2, pages 31 and 44).

145 TKC's 21 August 2021 Report at para 18 (PSB at Tab 2, page 44)

comparables.[146] TKC's explanation is that he had not used Watten Residences, Illoura, Estrivillas, and Ventura Heights as comparable developments because they were freehold properties, whereas Eleven@Holland is a 99-year leasehold property.[147] In his testimony, he further explained that the market perceived 99-year leasehold properties differently because of the duration of the tenure as compared to freehold properties. By confining his comparables to 99-year leasehold properties, TKC explained that this also obviated the need for him to make large adjustments to account for the different tenure of the properties.[148] His view was that the availability of 99-year leasehold cluster developments, such as Hillcrest Villa and The Teneriffe, which consistently generated a healthy sales volume over the years, would provide a sufficient pool of properties to serve as comparables.[149] In my judgment, TKC has given a sensible and coherent explanation for his choice of comparables and why he excluded some of those used by LKH. I do not accept the defendants' submission that his valuation is unreliable on account of his choice of comparables.

104 On a related point, I also noted that, across the five valuation dates, LKH had used, as part of her comparables, Illoura, Estrivillas, and Ventura Heights.[150] This was despite the fact that there was only one transaction in Illoura for each

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146 DCS at paras 188–192.

147 TKC's 21 August 2021 Report at para 9 (PSB at Tab 2, page 38).

148 NE, 17 August 2021, page 115 line 23 to page 116 line 7.

149 TKC's 16 August 2021 Report at paras 42–45 (PSB at Tab 1, pages 19–20); TKC's 21 August 2021 Report at para 7 (PSB at Tab 2, pages 34–35); NE, 17 August 2021, page 126 line 11 to page 127 line 7.

150 Defendant's Valuation Expert's Report by Low Kin Hon dated 5 July 2021 ("LKH's 5 July 2021 Report") at para 5.3 (3DBAEIC at Tab 3, pages 19–21).

of the years 2011, 2018 and 2020.[151] Of particular significance to the valuation date of 13 May 2019 is the fact that there was only one transaction in Estrivillas in 2019, and yet LKH had decided to use that development as a comparable for her valuation. I accept the plaintiff's submission that a single transaction for a comparable development in a year would not be a reliable indicator of the market price of units in that comparable development.[152] In this regard, I prefer the approach taken by TKC, which relied mainly on Hillcrest Villa and The Teneriffe as comparables. Hillcrest Villa had 11 transactions, and The Teneriffe had four transactions in 2019, which is the critical year in question. I accept TKC's testimony that, where more data points are used, greater accuracy can be achieved in determining whether the transacted prices reflect the market prices.[153]

105 I also accept as valid the plaintiff's criticism that LKH's choice of #01-10 as the base unit is not representative of the majority of the unsold units.[154] Unit #01-10 is a Type A unit, and only six out of the 48 unsold units are Type A units.[155] Out of these 48 unsold units, six are Type A units, 39 are Type B units, and three are Type C units. The most common unsold units are the Type B units, of which one of them should have been chosen as a base unit. In fact, a Type B unit was chosen by TKC has his base unit for his assessment (unit #01-27) (see [99(a)] above). While LKH explained that adjustments can be made to the other units if a Type A unit is chosen as the base unit,[156] I accept the point

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151 See Graph 5 in TKC's 21 August Report (PSB at Tab 2, page 37).

152 PCS at para 187.

153 NE, 17 August 2021, page 126 line 11 to page 127 line 7.

154 PCS at para 205.

155 TKC's 16 August Report at para 34 (PSB at Tab 1, pages 16–17).

156 NE, 23 November 2021, page 107 line 8 to page 109 line 24.

made by the plaintiff that the use of an inappropriate base unit affects the accuracy of the valuation as more adjustments have to be made to the valuation of the other units.[157] For that reason, the base unit should be "the unit that is most common within the development" (*ie*, a Type B unit) to minimise the amount of adjustments needed.[158] Not only that, the floor area of unit #01-10 was larger than the majority of units in Eleven@Holland – the floor area of unit #01-10 was 396m^2 while the majority of Type B units had a square area of 347m^2 (including unit #01-27, the unit selected by TKC as his base unit).[159] On the stand, LKH also conceded that Type A units such as #01-10 are the biggest units in Eleven@Holland.[160] In the circumstances, I agree with the plaintiff that LKH's choice of unit #01-10 as a base unit was less appropriate than TKC's choice of unit #01-27.

106 For the above main reasons, I find that the defendants have not been able to show that TKC's valuation of the 48 unsold units as at 13 May 2019 is flawed or unreliable. I thus find that that the 48 unsold units should be valued at $177,110,000 as of 13 May 2019 (see [73] above).

The first defendant's, his related entities', and his relatives' profits from the Project

107 The plaintiff submits that the first defendant had arranged for the profits generated by the Project to be earned by several companies in the Clydesbuilt Group, more specifically, CBPL (the main contractor) and HH-Uni (the

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157 PCS at para 206.

158 NE, 19 August 2021, page 44 lines 2–5.

159 LKH's 5 July 2021 Report at Appendix 1 (Schedule of Strata Unit/Strata Area) (3DBAEIC at Tab 3, page 23).

160 NE, 23 November 2021, page 108 lines 3–7.

consultant). As such, the plaintiff's position is that all the profits earned by these two companies through their participation in the Project should be regarded as part of the profits earned by the first defendant. Otherwise, the plaintiff argues that the first defendant would be permitted to effectively evade his obligations to account for profits from the Project by shielding himself behind the companies in the Clydesbuilt Group which he controlled.[161]

108 In addition to the profits earned by these companies, the plaintiff argues the court should also order the first defendant to account for all payments received by him as a director and/or officer of (i) CBPL, (ii) HH-Uni and (iii) the second defendant, whether such payments are in the form of directors' fees, salaries or other remuneration. The plaintiff argues that these sums could also be described as part of the profits that the first defendant had earned from the Project. The plaintiff also urges me to include, as part of such profits to be accounted for by the first defendant, the directors' fees, salaries and other remuneration that were paid by these companies to his relatives, such as his brother (Aldrin Ow) and his daughter (Carmen Ow).[162] In the case of the second defendant, the directors' fees, remuneration and other emoluments paid to the first defendant, Aldrin Ow and Carmen Ow from FY 2017 to FY 2020 totalled $1,022,965.[163] CBPL paid directors' fees, remuneration and other emoluments totalling $4,205,342 to the first defendant, Aldrin Ow and Carmen Ow from FY 2017 to FY 2020. As for HH-Uni, it paid directors' fees, remuneration and other emoluments to the first defendant, Aldrin Ow and Carmen Ow from

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161 PCS at paras 113–114 and 117–118.

162 PCS at paras 123–124.

163 Plaintiff's Accounting Expert's Amended Reply Report by Leow Quek Shiong dated 27 August 2021 ("LQS's 27 August 2021 Report") at para 6.6 (PSB at Tab 4A, page 150); 1PCSBOD at Tab 23, page 146.

FY 2017 to FY 2020 totalling $144,000.[164] In total, the second defendant, CBPL and HH-Uni paid to the second defendant and his relatives $5,372,307 by way of directors' fees, remuneration and other emoluments.[165]

109 The defendants argue that the court had, at the conclusion of the liability proceedings, only ordered the first and second defendants to account for their profits, and it is beyond the scope of that order for this court now to include any profits earned by CBPL and HH-Uni.[166] In the same vein, the defendants submit that any fees and remuneration paid to the first defendant's relatives by CBPL, HH-Uni and the second defendant would also be outside the ambit of these assessment proceedings.[167]

110 At the outset, I note that an errant fiduciary should only be accountable for the profits "properly attributable to the breach of fiduciary duty" (*CMS Dolphin Ltd v Simonet and another* [2001] 2 BCLC 704 at [97]). In *Graham Virgo*, it was explained at para 18.5.2 how one should determine what profits are attributable to the breach of one's fiduciary duties:

> Where the defendant has breached the trust or breached their fiduciary duty, it is necessary to ascertain what profits derive from the wrong by considering whether the profits fall within the scope of the fiduciary's duty of loyalty to the principal. This is determined by identifying a reasonable connection between the breach and the profits obtained. *If the profit is not obtained by use or by reason of the fiduciary position, the fiduciary will not be liable to account for it.*
>
> [emphasis added]

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164 LQS's 27 August 2021 Report at paras 6.7–6.8 (PSB at Tab 4A, page 151).

165 LQS's 27 August 2021 Report at para 6.8 (PSB at Tab 4A, page 151).

166 DCS at para 128.

167 DCS at para 130.

111 In *UVJ*, the Court of Appeal, after reviewing the authorities on this issue, similarly observed that the profits sought to be disgorged from an errant fiduciary via an account of profits must have been *caused* by the breaches of fiduciary duty (*UVJ* at [75] and [98]). In particular, causation would only be established if it is shown that the errant fiduciary would not have obtained the profit but for his breach of duty (*UVJ* at [88]). Put another way, profits which are unconnected with the fiduciary's breach of duty, and which would have been earned by the fiduciary in the absence of the breach, cannot be recovered by the beneficiary (*UVJ* at [98]).

112 In *Mona Computer*, the respondent fiduciary in that case had diverted a corporate opportunity to his own company ("MN") in breach of his fiduciary duties, and received, among other things, directors' fees and commissions from MN. He was found liable and ordered to account for his profits. In the assessment proceedings, the AR decided that the commissions were accountable to the appellant principal, but rejected the appellant's claim for an account of the directors' fees received by the respondent from MN. On appeal, the High Court judge decided that the respondent need not account for the commissions, but only the directors' fees he received from MN, although neither party had appealed against the AR's order that the respondent need not account for the directors' fees. On further appeal, the Court of Appeal decided that, as the appellant did not appeal against that part of the AR's order allowing the respondent to retain his directors' fees, the High Court's variation of the part of the AR's order relating to the directors' fees was irregular, and restored the order of the AR in that regard (at [30]). However, the Court of Appeal noted at [18]:

> … whether the Respondent would likely have continued in the Appellant's employment and continued to receive commissions from it had he not breached his fiduciary duty is not a relevant consideration in the fashioning of the account. The only question is what profit the Respondent gained which could be

> attributed to his breach of duty. In our view, the Judge erred in principle when he reasoned that the accounting of profits should not result in the Appellant enjoying a windfall. The commissions which the Respondent received from MN were derived from the profits which MN earned from the diverted contracts, and therefore fell squarely within the profits to be accounted to the Appellant. In our view, the AR was correct to order the Respondent to account for these commissions. As a matter of principle the Respondent should also have to account to the Appellant for the director's fees which he received from MN. If not for the profits obtained by MN from the diverted contracts, MN would not have had the funds to pay out the director's fees. …

113 The observations in the preceding paragraph might seem to suggest that causation is irrelevant in the sense that an errant fiduciary would have to account for *all profits* following the breach of his fiduciary duties, regardless of whether the fiduciary would have earned those profits had he had not breached his duties, and even where those profits were not attributable to the breaches. However, the Court of Appeal in *UVJ* clarified that the holding in *Mona Computer* – that it was irrelevant that the respondent fiduciary would likely have continued to receive commissions from MN had he not breached his fiduciary duties – must be understood in context (*UVJ* at [82]). Specifically, the Court of Appeal in *Mona Computer* was addressing the issue of whether any loss to the beneficiary would be relevant in determining the profits that the defaulting fiduciary had to account for. It was in that context that the Court of Appeal in *Mona Computer* observed that it is immaterial that the beneficiary might gain a windfall because an account of profits is a gains-based remedy which focuses on preventing an errant fiduciary from retaining profits *derived from his breach of duty*. Accordingly, the court should not make a deduction for amounts which the company would have had to pay the fiduciary had he dutifully secured the benefits for the company (see *Mona Computer* at [16]–[17]). It therefore followed that the commissions earned by the respondent fiduciary in *Mona Computer* were accountable to the appellant principal because those

commissions were "*attributable to the breach* in that case" [emphasis added]. However, *Mona Computer* should not be read as indicating that but-for causation is not necessary (*UVJ* at [83]).

114 In other words, in order for profits received by an errant fiduciary to be accountable to his principal, it remains necessary to establish that those profits were *caused* by the fiduciary's breach of duty, in the sense of being *attributable* or *derived from* the fiduciary's breach of fiduciary duties owed to his principal.

Profits earned by CBPL and HH-Uni from the Project

115 The defendants' accounting expert, Mr Chee Yoh Chuang ("CYC"), had confirmed in his report of 5 July 2021 that the first defendant had informed him that CBPL and HH-Uni had not undertaken any other projects since 2011.[168] The plaintiff submits that all revenue and costs recorded in CBPL's audited financial statements for FY 2011 to FY 2017 are therefore attributable to the construction of the Project.

116 In relation to the profits CBPL derived from providing construction services to the second defendant, LQS assessed that CBPL had earned profits amounting to $4,325,686 from the Project, on the basis that CBPL had received revenue of $66,057,562 and incurred costs of $61,731,876.[169] LQS assessed CBPL's revenue based on CBPL's audited financial statements and the invoices issued by CBPL to the second defendant.[170] However, as I found above at [65], the reasonable costs of the construction services provided by CBPL to the second defendant were only $41,323,375.03, and the *true* profits of the second

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168 CYC's 5 July 2021 Report at para 2.12.2 (3DBAEIC at Tab 5, page 40).

169 PCS at para 117; LQS's 27 August 2021 Report at para 6.4 (PSB at Tab 4A, page 149).

170 LQS's 5 July 2021 Report at para 12.7–12.40 (1PBAEIC at Tab 1, pages 161).

defendant have been adjusted upwards accordingly. In other words, the economic benefit of over $26m which had been transferred to CBPL by reason of the artificial inflation of the price of the contract between the second defendant and CBPL would effectively be included in the profits which the second defendant must account to the plaintiff. Therefore, to separately order the first defendant to account for the profits obtained by CBPL from providing construction services to the second defendant would lead to a situation of double recovery by the plaintiff.

117 Apart from that, the plaintiff says that CBPL had also earned profits of $735,064.36 which was derived from the revenue earned by CBPL from providing non-construction related services to the management corporation of Eleven@Holland, less CBPL's costs.[171] As for HH-Uni, LQS has assessed that the total direct and indirect costs as well as income tax expenses that were and might have been incurred by HH-Uni in providing consultancy services for the Project was $2,600,961.[172] Deducting that from HH-Uni's revenue of $3,424,000 (see [68] above), HH-Uni's profits would be $823,039.

118 In this regard, the defendant argues that there is no causative link between the first defendant's breach of fiduciary duties and the profits earned by CBPL and HH-Uni because, on a balance of probabilities, the plaintiff would have permitted the first defendant to bid for the Project, and the first defendant would then have engaged CBPL and HH-Uni to provide various services. I am unable to agree with this submission. As already mentioned at [7] above, I found in the liability proceedings that Ms Chen did not consent to the first

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171 LQS's 5 November 2021 Report at paras 2.1–2.10 (PSB at Tab 4B, pages 215–219); LQS 5 July 2021 Report at Appendix 69.

172 PCS at para 121; LQS's 5 July 2021 Report at 12.56 (1PBAEIC at Tab 1, page 169).

defendant's actions in bidding for the Project, *and* would not have consented even if she had known what he was doing.

119 Rather, applying the principles set out above at [110]–[114], I find that the profits earned by CBPL and HH-Uni mentioned at [117] above are properly attributable to, or caused by, the first defendant's breach of fiduciary duties, *ie*, his misappropriation of the Project. In the liability proceedings, I found that the first defendant had breached his fiduciary duties (i) not to place himself in a position where his personal interests would conflict with his duty to the plaintiff and (ii) not to abuse his position to make an unauthorised profit, by appropriating the maturing corporate opportunity belonging to the plaintiff (*ie*, the Project) (*Innovative Corp* at [72]–[93]). It was also found in the liability proceedings that the second defendant was incorporated as a vehicle to carry out the Project (see [1(d)] above). It follows that, if the first defendant had not breached his fiduciary duties by misappropriating the Project, the second defendant would not even have been incorporated, and would not have engaged CBPL or HH-Uni to provide services in respect of the Project. Consequently, CBPL would not have earned any profits from providing non-construction related services to the management corporation of Eleven@Holland, and HH-Uni would likewise not have earned any profits from providing consultancy services to the second defendant. Given the first defendant's position that CBPL and HH-Uni did not have any other projects in FY 2011 to FY 2017 besides the Project (see [115] above), I am of the view that CBPL and HH-Uni would not have earned those profits but for the first defendant's breach of fiduciary duties.

120 I am also unable to accept the defendants' submission that the first defendant cannot be ordered to account for the profits earned by CBPL and HH-Uni because there was no order for CBPL and HH-Uni to account for their profits. As mentioned above at [37], an errant fiduciary must also account for

profits which he has diverted to third parties, especially where those third parties are substantially connected with the fiduciary. In this regard, it was observed in *Ultraframe (UK) Ltd v Fielding and others and Conjoined Cases* [2005] EWHC 1638 that, while the mere fact that a fiduciary has a substantial interest in a company which knowingly receives trust property does not make the fiduciary personally accountable for the receipt, the case is otherwise where the company is a mere cloak or alter ego of the fiduciary (at [1576]). While I do not regard CBPL or HH-Uni as a mere cloak or alter ego of the first defendant, the undeniable fact is that the first defendant and his relatives wholly own both CBPL and HH-Uni (see [22] above). Therefore, any profits earned by CBPL and HH-Uni would ultimately accrue to the first defendant and his relatives. In fact, CYC's evidence is that CBPL and HH-Uni had declared $5,349,000 in dividends between 2011 and 2019, of which $4,906,550 went to the first defendant.[173] It would be inimical to the purpose of an account of profits, which is to prevent an errant fiduciary from enjoying any profit derived from his breach of duties (see [18] above), to allow the first defendant to retain profits which are attributable to his breach of fiduciary duties. That would also severely undermine the prophylactic function of equitable remedies in deterring breaches of fiduciary duties (see *Sim Poh Ping* at [97]).

121 In the premises, I find that the first defendant must account to the plaintiff: (i) the profits of $735,064.36 which CBPL derived from its provision of non-construction related services in relation to the Project; and (ii) the profits of $823,039 which HH-Uni derived from providing consultancy services to the second defendant in relation to the Project.

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173 Defendants' Accounting Expert Report by Chee Yoh Chuang dated 5 July 2021 ("CYC's 5 July 2021 Report") at paras 2.12.3–2.12.3 and 3.1.1 (3DBAEIC at Tab 5, pages 40–41 and 45).

Directors' fees, salaries and remuneration paid by the second defendant to the first defendant and his relatives

122 Applying the test of causation set out in *UVJ* to the present case, I am of the view that the directors' fees, salaries and remuneration paid to the first defendant and his relatives by the second defendant are properly attributable to, or caused by, the first defendant's breach of fiduciary duties owed to the plaintiff (*ie*, the misappropriation of the Project).

123 As already mentioned, the second defendant was a vehicle incorporated for the purpose of carrying out the Project (see [1(d)] above). That being the case, if the first defendant had not misappropriated the Project, the second defendant would not even have been incorporated. In other words, the first defendant would not have received any directors' fees, salaries and remuneration from the second defendant but for his breach of fiduciary duties. Therefore, the first defendant must account for the directors' fees, salaries and remuneration that he received from the second defendant, amounting to $69,855, to the plaintiff.[174]

124 For the same reason, I also find that Aldrin Ow and Carmen Ow would not have received any directors' fees, salaries and remuneration from the second defendant but for the first defendant's breach of fiduciary duties. If the first defendant had not misappropriated the Project, the second defendant would not have been incorporated, and Aldrin Ow and Carmen Ow would not have worked at, and received any emoluments, from the second defendant. Therefore, the first defendant must also account to the plaintiff for the directors' fees, salaries and remuneration paid to Aldrin Ow and Carmen Ow by the second defendant.

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174 LQS's 27 August 2021 Report at para 6.6 (PSB at Tab 4A, page 33); CYC's 5 July 2021 Report at para 2.7.3 (3DBAEIC at Tab 5, page 34).

This works out to the figure of $953,110, which comprises the amounts of $588,070 paid to Aldrin Ow, and $365,040 paid to Carmen Ow.[175]

Directors' fees, salaries and remuneration paid by CBPL and HH-Uni to the first defendant and his relatives

125 As for the directors' fees, salaries and remuneration paid to the first defendant and his relatives by CBPL and HH-Uni, I am unable to agree with the plaintiff's submission that these are sums which the first defendant must account to the plaintiff.[176] Unlike the emoluments paid by the second defendant to the first defendant and his relatives, I find that the emoluments received by the first defendant and his relatives from CBPL and HH-Uni are *not* properly attributable to, or caused by, the first defendant's breach of fiduciary duties.

126 Unlike the second defendant, CBPL and HH-Uni were not incorporated for the purpose of developing the Project. They were existing companies in the Clydesbuilt Group which had business and contracts before the inception of the Project. For that reason, even in the absence of any breach of fiduciary duties by the first defendant, the first defendant would still have been an executive director of CBPL and HH-Uni, and would have received emoluments for his work as an officer of CBPL and HH-Uni. Similarly, even if the first defendant had not breached his fiduciary duties owed to the plaintiff, Aldrin Ow and Carmen Ow would still have acted as executive directors and/or officers of CBPL and/or HH-Uni, and would still be paid for their work as officers of CBPL and/or HH-Uni.

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175 LQS's 27 August 2021 Report at para 6.6 (PSB at Tab 4A, page 150).

176 PCS at paras 123–124.

127 In short, there is simply insufficient evidence before the court to conclude that the first defendant and his relatives would not have received any directors' fees, salaries and remuneration from CBPL and HH-Uni but for the first defendant's misappropriation of the Project. In the circumstances, it cannot be said that the emoluments paid by CBPL and HH-Uni to the first defendant and his relatives were properly attributable to, or caused by, the first defendant's breach of fiduciary duties. Therefore, I am of the view that the directors' fees, salaries and remuneration that the first defendant, Aldrin Ow and Carmen Ow received from CBPL and HH-Uni cannot be regarded as part of the profits derived from the Project which the first defendant must account to the plaintiff.

Whether the first defendant is entitled to claim an equitable allowance

128 The position at law is that a defaulting fiduciary will only be granted an equitable allowance for his time, skill and effort sparingly because such an award is an exception to the overriding rule that the defaulting fiduciary should not be allowed to reap any profits from his breach of duty. The defendants rely on the well-known English decision of *Phipps v Boardman* [1964] 1 WLR 993, where the defaulting fiduciaries were granted a liberal allowance for the skill and work they had invested, which eventually reaped profits for the trust. There, the fiduciaries (the solicitor to a trust and one of the beneficiaries) breached their fiduciary duties by exploiting a business opportunity – they had purchased certain shares in a company in which the trust had a stake, with the aid of information gained by the solicitor when acting for the trust. It was subsequently shown that the purchase would have benefitted the trust, had it been made by the trust. The court found that the fiduciaries had acted in good faith by purchasing the shares in their personal capacity (and at their own risk) when the trust had neither the funds nor the will to purchase those shares. The defendants argue that, similarly on our facts, the first defendant had expended

much in terms of his effort and skill to successfully complete the Project and that he acted in the good faith belief that he was entitled to pursue this opportunity to develop the Project. As such, the defendants contend that there should be an equitable allowance granted in this case.[177]

129 There is no reported decision in the Singapore courts where the courts have granted a defaulting fiduciary an equitable allowance when he had to account for profits to the beneficiary. In *Mona Computer*, the Court of Appeal analysed the authorities on when an equitable allowance would be granted, and then set out some guiding principles. In that case, the defaulting fiduciary was a director of the claimant company, and had acted in breach of his duties by setting up a competing business. Through that competing business, the errant director submitted tenders for contracts with the claimant company's clients, thereby diverting contracts from the claimant company to his own rival company. The Court of Appeal held that the fiduciary had to account for the profits he had made, and dismissed his claim for an equitable allowance for the work that he did in generating the profits for the competing business.

130 In *Mona Computer*, the Court of Appeal observed (at [25]):

> This court has adopted [*Guinness plc v Saunders* [1990] 2 AC 663 ("*Guinness*")] and has, in the case of *Jumabhoy Rafiq v Scotts Investments (Singapore) Pte Ltd* [2005] 1 SLR(R) 45 ("*Jumabhoy*"), taken a restrictive approach to granting an equitable allowance to fiduciaries as recognition for work done. In that case, the defendant director claimed that he was entitled to remuneration from the company on a time-costs basis, or alternatively, remuneration on a *quantum meruit* basis. In rejecting the claim on the *quantum meruit* basis, this court stated that the concept of an equitable allowance for work done is inherently inconsistent with the prohibition against a fiduciary profiting from placing himself in a position of conflict. At [26] of *Jumabhoy*, this court quoted Lord Goff's observations

177 DCS at paras 93–99.

in *Guinness* at 700–701 which addressed the circumstances where an equitable allowance could be permitted to a fiduciary in breach despite the "no profit" and "no conflict" rules:

> Plainly, it would be inconsistent with this long-established principle [*viz*, that a fiduciary should not put himself in a position of conflict] to award remuneration in such circumstances as of right on the basis of a quantum meruit claim. But the principle does not altogether exclude the possibility that an equitable allowance might be made in respect of services rendered. That such an allowance may be made to a trustee for work performed by him for the benefit of the trust, even though he was not in the circumstances entitled to remuneration under the terms of the trust deed, is now well established.
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> …
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> The decision [in *Boardman v Phipps*] has to be reconciled with the fundamental principle that a trustee is not entitled to remuneration for services rendered by him to the trust except as expressly provided in the trust deed. Strictly speaking, it is irreconcilable with the rule as so stated. It seems to me therefore that it can only be reconciled with it to the extent that the exercise of the equitable jurisdiction does not conflict with the policy underlying the rule. And, as I see it, *such a conflict will only be avoided if the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees*.
>
> Not only was the equity underlying Mr Boardman's claim in *Phipps v Boardman* clear and, indeed, overwhelming; but the exercise of the jurisdiction to award an allowance in the unusual circumstances of that case could not provide any encouragement to trustees to put themselves in a position where their duties as trustees conflicted with their interests.

[emphasis in original omitted; emphasis added]

131 It is therefore clear that the court will only exercise its jurisdiction to allow the defaulting fiduciary an equitable allowance where to do so would not provide any encouragement to fiduciaries to put themselves in a position where their duties conflict with their interests (see *Guinness plc v Saunders*

[1990] 2 AC 663 at 701). The defaulting fiduciary would have to establish that it would be inequitable for the court to order him to account for all his profits. In assessing whether an equitable allowance should be awarded, the court will examine whether the fiduciary acted in good faith and honestly.

132 Applying these principles to the facts of this case, I find that this is not an appropriate case for the court to grant any equitable allowance to the first defendant. I fully appreciate that the first defendant had marshalled much of his time, effort, skill and experience into converting the business opportunity that he was presented with into the completed Project. I also note that the first defendant even had to provide a guarantee for approximately $159m in financing for the completion of the Project.[178] However, I find that these endeavours and risks undertaken by the first defendant to bring the Project to fruition were for the purpose of generating as much profits as possible for himself from the exploited business opportunity. Put simply, the first defendant was exercising his best efforts to ensure that he could maximise the benefits to himself from this opportunity. If he is awarded an equitable allowance, and permitted to effectively retain some of the profits from the Project, that appears to me to be contrary to the principle that fiduciaries, who misappropriate business opportunities that rightfully belong to their principals, should be compelled to disgorge all the profits they have made from the opportunity, even if this might result in a windfall for their principal: *Mona Computer* at [16]–[18].

133 Furthermore, this is a case where the first defendant cannot be said to have acted in good faith. Quite the contrary, he was found by the court to have

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178 Mr Ow's AEIC at paras 90–94 (1DBAEIC at Tab 1, pages 31–32) and pages 1544–1630 (Bundle of Defendants' Affidavits of Evidence-in-Chief Volume 2 ("2DBAEIC") at Tab 2, pages 1544–1630).

acted dishonestly when he took steps to appropriate for himself the opportunity to develop the Project, by concealing his intentions from the other director of the plaintiff, Ms Chen. In the liability proceedings, I found that Ms Chen had entrusted the first defendant with securing the Project for the plaintiff because she believed that he could impress FYTA's representatives with his credentials and experience, and because she felt that the Project committee was less than enamoured with her (*Innovative Corp* at [86]). However, the first defendant started actively pursuing the Project for himself by late February 2010, even before he resigned as a director of the plaintiff (which resignation, in any case, was motivated by his desire to acquire the Project) (*Innovative Corp* at [89]–[90]). In this regard, the evidence of Mr Leow Soon Guan, who headed the "Project committee" of FYTA, was that the first defendant had phoned him on 26 February 2010 and expressed an interest in becoming the developer for the Project (*Innovative Corp* at [33]).

134 Even if I am wrong in deciding that this is not a case where it would be appropriate for the court to grant the first defendant an equitable allowance, I find that the first defendant has not been able to establish that he should be permitted an equitable allowance in the amount of $35,254,794. The first defendant breaks down this figure into separate constituent parts as follows:[179]

(a) cost of equity capital in the second defendant amounting to $1,705,005;

(b) cost of the provision of personal financial guarantees for the term loan granted by Hong Leong Finance to the second defendant to

[179] DCS at para 100; Defendants' Expert's Report by Prof Ng Eng Juan and Assoc Prof (Practice) Jian Ming dated 5 July 2021 ("Prof Ng's and Assoc Prof Jian's 5 July 2021 Report) at paras 16–18, 29 and 33–35 (3DBAEIC at Tab 4, pages 22–23, 26 and 27–29).

finance the construction of the Project amounting to $22,974,789; and

(c) cost of time, skill and effort expended by the first defendant in working on the Project from 2011 to 2020 amounting to $10,575,000.

135 The first defendant candidly admitted, while under cross-examination, that prior to being asked to account for his profits, he never considered that any payment was due to him from the second defendant for having provided equity capital for the company, or for providing a guarantee for the loan facility to be given to the company, or for any compensation for his time, skill and efforts in addition to the fees and remuneration he had already received.[180] Be that as it may, let me consider each of these claimed items of equitable allowance.

Cost of equity capital in the second defendant

136 The defendants called two academics, Prof Ng Eng Juan ("Prof Ng") and Assoc Prof Jian Ming ("Assoc Prof Jian"), whose expert evidence was to the effect that the first defendant should be entitled to claim for the "cost of equity capital" in the second defendant. Prof Ng is a professor in accounting at the Singapore University of Social Sciences who had formerly worked as an auditor.[181] Assoc Prof Jian is an associate professor in accounting at Nanyang Technological University who had formerly worked as an accountant.[182] Both

180 NE, 25 August 2021, page 75 line 25 to page 76 line 25.

181 Curriculum Vitae of Prof Ng Eng Juan (3DBAEIC at Tab 4, pages 7–8).

182 Curriculum Vitae of Assoc Prof Jian Ming (3DBAEIC at Tab 4, pages 9–15).

of them have published their academic works in various publications such as The Business Times.[183]

137 The defendants claim that such costs should be factored into the equitable allowance that the court should grant the first defendant. The "cost of equity capital" was described by the two experts as a form of "equity financing".[184] In short, this was the cost of the first defendant's shareholding in the second defendant, which Prof Ng and Assoc Prof Jian say should now be deducted to compute the "real economic profit" of the second defendant.[185]

138 I am unable to agree that such "cost of equity capital" can be included as part of any claim by the first defendant for an equitable allowance. In the first place, I find that the analysis by the defendants' two experts ignores the fact that the first defendant did not hold any shares in the second defendant. CBI owned 100% of the shares in the second defendant, and the first defendant held shares in CBI. As such, strictly speaking, the "costs of equity capital" was borne by CBI, not the first defendant.

139 But, even if I were to accept the economic reality that, as CBI's 95% shareholder, it is the first defendant who would have provided the cash for the equity capital of the second defendant, I am still of the view that there is no proper basis to rely on the "cost of equity capital" as a proxy or measure for any equitable allowance to be granted to the first defendant. The plaintiff called an

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183 Prof Ng's and Assoc Prof Jian's 5 July 2021 Report at paras 2–3 (3DBAEIC at Tab 4, pages 17–18).

184 Prof Ng's and Assoc Prof Jian's 5 July 2021 Report at para 14 (3DBAEIC at Tab 4, page 21).

185 Prof Ng's and Assoc Prof Jian's 5 July 2021 Report at para 18 (3DBAEIC at Tab 4, page 23).

expert witness, Assoc Prof Ho Tuck Chuen ("Assoc Prof Ho"), who is an Associate Professor (Adjunct) in the Business School of the National University of Singapore, and a chartered accountant with over 40 years of experience. Assoc Prof Ho notes that Prof Ng and Assoc Prof Jian had used the Capital Asset Pricing Model ("CAPM") to estimate the cost of equity capital in order to arrive at the "real economic profit" of the second defendant.[186] The CAPM is not part of accounting standards such as the Singapore Financial Reporting Standards ("FRS"), and the "real economic profit" of a company (as opposed to its accounting profit) is not recognised under the FRS.[187] As Assoc Prof Ho explained, the "cost of equity capital" is a notional concept used by an investor to evaluate his investment gain or loss against his opportunity costs of making the investment.[188] It is a calculation usually used for internal management purposes.[189] Such costs would never actually be paid by the investee company to the investor, and will not constitute an expense of the investee company for the purposes of determining the company's accounting profits under the FRS.[190] When he was cross-examined, Prof Ng himself explained that he was focused not on the *actual* incurrence of costs by the second defendant, but the *value* of the services or contributions by the first defendant.[191]

140 The purpose of an equitable allowance is to grant errant fiduciaries an allowance for their work and skill in producing the profits (*Griffin Real Estate*

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186 Prof Ng's and Assoc Prof Jian's 5 July 2021 Report at para 16 (3DBAEIC at Tab 4, page 22).

187 Plaintiff's Expert's Report by Ho Tuck Chuen ("Prof Ho's 9 August 2021 Report") at paras 16 and 33 ("Prof Ho's AEIC") at pages 7 and 24.

188 NE, 19 August 2021, page 172 line 25 to page 173 line 10.

189 Prof Ho's 9 August 2021 Report at para 33 (Prof Ho's AEIC at page 24).

190 Prof Ho's 9 August 2021 Report at paras 30–32 (Prof Ho's AEIC at page 24).

191 NE, 24 August 2021, page 18 line 15 to page 20 line 10.

Investment Holdings Pte Ltd (in liquidation) v ERC Unicampus Pte Ltd [2019] 5 SLR 105). The defendants have not been able to cite any authority in support of their contention that the cost of equity capital can be used to determine the quantum of equitable allowance to be granted to a defaulting fiduciary. Leaving aside the lack of authority, I am unconvinced, as a matter of principle, that one can measure the value of the first defendant's skill and efforts in helping the second defendant generate profits by reference to the costs of his provision of equity capital for the second defendant. When the court grants an equitable allowance, it is to compensate the first defendant for his time, skill, efforts, and even expenditure of personal resources, towards the creation of the pool of profits. Based on the expert evidence, the cost of equity capital is not designed to measure these types of contributions by the first defendant. Rather, it is a measure of the opportunity costs incurred by the first defendant in providing the equity capital, so that he can properly determine the appropriate amount of equity return he should expect from his investment. That being the case, I reject the first defendant's argument that he should be granted an equitable allowance by reference to his costs of equity capital in the second defendant.

Cost of provision of a financial guarantee for the financing granted to the second defendant

141 Prof Ng and Assoc Prof Jian have also expressed the view that the first defendant should be entitled to claim from the second defendant his cost of providing a financial guarantee to enable the second defendant to get financing from Hong Leong Bank for the development of the Project.[192] The defendants then submit that such cost should be claimable by the first defendant as part of

[192] Prof Ng and Assoc Prof Jian's 5 July 2021 Report at paras 28–30 (3DBAEIC at Tab 4, pages 26–27).

his equitable allowance. To assess this cost of providing a financial guarantee, Prof Ng and Assoc Prof Jian have opined that this should be based on the "fair value differential", which represents the difference in the fair value of a loan with and without a personal guarantee.[193]

142 For largely the same reasons as in the case of the claim for the "cost of equity capital" (see [138]–[140] above), I am unable to agree that this cost of provision of a financial guarantee can be used as a measure of the quantum of any equitable allowance to be granted to the first defendant. First, since there is no contract between the first and second defendant which obliges the latter to pay the former for the cost of provision of a financial guarantee, this "cost" does not fall within the definition of an *expense* of the second defendant under accounting standards such as the FRS.[194] In other words, this "cost" is in truth an opportunity cost incurred by the first defendant, or alternatively, a benefit conferred on the second defendant; it is not strictly speaking an actual *expense* incurred by either the second defendant or the first defendant. There was also no actual expenditure by the first defendant of his own financial resources in relation to the guarantee. As such, I find that the cost of provision of a financial guarantee cannot be used as a measure of any skill and effort, or contribution, of the first defendant towards the creation of the profits of the second defendant. It follows that the cost of provision of a financial guarantee cannot be relied on to ascertain the amount of equitable allowance, if any, to be granted to the first defendant.

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193 Prof Ng and Assoc Prof Jian's 5 July 2021 Report at paras 25–26 (3DBAEIC at Tab 4, pages 24–26).

194 Prof Ho's 9 August 2021 Report at para 39 (Prof Ho's AEIC at page 25).

143 Second, I accept the submission by the plaintiff, and Assoc Prof Ho's evidence, that shareholders and directors of companies often provide personal guarantees for loans extended to their companies, and that it is uncommon, though possible, for such shareholders and directors to charge a fee for the provision of such guarantees.[195] I find that allowing the first defendant to claim an equitable allowance of $22,974,789, based on 2% of the loan amount extended to the second defendant (as Prof Ng and Assoc Prof Jian suggest),[196] would be contrary to the intentions of the first and second defendants when the financing was sought, and the guarantee was provided. There was never any intention that the first defendant would be permitted to charge the second defendant a fee for providing a guarantee. Instead, the first defendant was doing this in order to maximise the profits of the second defendant from the Project, which he could then extract as dividends from the company. To thus allow the first defendant an equitable allowance for this cost would be to effectively award him some of the benefits in terms of interest cost savings that he intended to confer on the second defendant to ensure the success of the Project.

Cost of time, skill and effort in addition to fees and remuneration already paid

144 Prof Ng and Assoc Prof Jian are also of the view that the cost of the first defendant's time, skill and effort spent in relation to the Project, less what he was already paid by the second defendant and the other companies in the Clydesbuilt Group involved in the Project, should be recoverable by him as an equitable allowance to be granted by the court.[197] The two expert witnesses

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195 PCS at paras 141–144; Prof Ho's 9 August 2021 Report at para 37 (Prof Ho's AEIC at page 25).

196 Prof Ng and Assoc Prof Jian's 5 July 2021 Report at paras 29–30 (3DBAEIC at Tab 4, pages 26–27).

197 Prof Ng and Assoc Prof Jian's 5 July 2021 Report at paras 32 and 35 (3DBAEIC at Tab 4, pages 27 and 29).

have, in their joint report, assessed this cost of the first defendant's time, skill and effort at a figure of $1.5m a year, which works out to a gross figure of $15m for the period of 2011 to 2020.[198] When one deducts what the first defendant had received during this period from the second defendant and the other related companies, which is a total figure of $4.425m, the defendants submit that an equitable allowance which reflects the net difference (*ie*, $10.575m) should be given to the first defendant.[199] In this regard, I have found above at [123] that the first defendant must account to the plaintiff $69,855 worth of directors' fees, salaries and remuneration received from the second defendant. This would affect the figures provided by Prof Ng and Assoc Prof Jian – based on their evidence, the first defendant would have received $69,855 less, and accordingly, should receive an equitable allowance of $10,644,855.

145 In the absence of a contract for the payment of such costs to the first defendant, the first defendant has no legal basis to claim this amount of $10.575m against the second defendant. So, like the earlier two items claimed as equitable allowances, this cost of time, skill and effort is also a notional figure that represented the *value* that the first defendant had conferred on the second defendant; it is not an *actual cost* incurred by the second defendant, and does not fall within the accounting definition of an expense under the FRS.[200] Nonetheless, as a matter of principle, I accept that the costs of time, skill and effort, if capable of being measured and quantified accurately, can be the subject of an equitable allowance granted by the court.

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198 Prof Ng and Assoc Prof Jian's 5 July 2021 Report at paras 33–34 (3DBAEIC at Tab 4, pages 27–29).

199 DCS at para 100(c).

200 Prof Ho's 9 August 2021 Report at para 45 (Prof Ho's AEIC at page 27).

146 However, I find Prof Ng and Assoc Prof Jian's assessment of the figure of $10.575m, as the costs of the first defendant's time, skill and effort, to be flawed. This is for two main reasons. First, it was the first defendant who himself suggested the figure of $1.5m a year to Prof Ng and Assoc Prof Jian, which was a figure which they found to be "fair".[201] There was an absence of any proper evidence to justify the appropriateness of this figure in the joint expert report. In any event, I question whether Prof Ng and Assoc Prof Jian have the expertise to assess the value of the work done by the first defendant for the Project. Prof Ng himself accepted, under cross-examination, that his view that the figure of $1.5m per annum was fair was "subjective" and based largely on the explanations and justifications given to him by the first defendant. Indeed, he admitted that he and Assoc Prof Jian did not do an audit to ascertain whether the information provided by the first defendant was true but had merely relied on "the trustworthiness of the information given to [them]".[202]

147 Second, and more significantly, the first defendant has already been remunerated for his work on the Project through the sums paid to him as directors' fees and other remuneration from CBPL and HH-Uni, both of which were paid significant sums by the second defendant for their work on the Project as main contractor and consultant respectively. I have found that he is entitled to retain those amounts that he was paid by CBPL and HH-Uni (see [125]–[127] above). From the description of the time, skill and effort which the first defendant relies on as the basis of his claim for this additional equitable allowance amounting to $10.575m, it appears to me that they largely overlap with the work being done by CBPL and HH-Uni. Those companies have

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201 Prof Ng and Assoc Prof Jian's 5 July 2021 Report at para 33 (3DBAEIC at Tab 4, page 27).

202 NE, 24 August 2021, page 39 line 18 to page 42 line 16.

already been paid for their services. It is thus difficult for the court to discern what other work the first defendant has done for which he has not already been compensated in terms of his labour. As such, I am unable to agree that the first defendant has shown that he should be granted an equitable allowance of $10.575m for his time, skill and effort towards the creation of the profits of the second defendant.

148 For all the above reasons, I do not agree with the defendants that the court should grant any equitable allowance in this case.

Quantification of the profits to be accounted by the defendants

149 The plaintiff called an accounting expert, LQS from BDO Advisory Pte Ltd, to carry out a computation of the profits earned by both defendants that arose from the Project. The defendants called their own accounting expert, CYC from RSM Chio Lim LLP, who made his own computation. The main difference in the computation between the two experts concerned whether adjustments should be made to the costs paid by the second defendant to CBPL and HH-Uni so as to reflect the true profits earned by the second defendant from the Project. I have already dealt with this at [26]–[68] of this judgment. Another difference which affected the computation was whether the directors' fees, salaries, and other remuneration paid to the first defendant and his related parties should be included as part of the profits to be accounted by the defendants. I have also already dealt with this at [107]–[127] of this judgment.

150 There remain two other material differences in the approach taken by LQS and CYC. The first is the treatment of a figure of $154,451 which was recorded in the income statements of the second defendant as an "impairment loss". It is not disputed that this sum of $154,451 is the balance amount owed

by FYTA to the second defendant, as recorded in the "Fong Yun Thai Association" sub-ledger for the period of 17 May 2010 to 31 October 2018 and also in the summary of accounts between the second defendant and FYTA for FY 2018.[203]

151 The defendants' accounting expert, CYC, gave evidence that this sum had been wrongly described in the financial statements as an "impairment loss", but was actually the balance remaining in FYTA's account with the second defendant after the two had reached an agreement on how they would settle their accounts.[204] As such, CYC opined that this sum should be regarded as an irrecoverable debt from FYTA, and should be written off.[205] On the other hand, LQS gave evidence that he had not seen any agreement or document showing that the second defendant and FYTA had agreed to write off this balance amount of $154,451 owed by FYTA.[206] As such, LQS was of the view that this receivable from FYTA should be regarded as an asset of the second defendant, and not written off, in his computation of the profits of the second defendant arising from the Project.[207]

152 From the evidence,[208] it is clear that FYTA and the second defendant had reached an agreement, and subsequently two other supplementary agreements, to finalise the accounts between them. However, the terms of these agreements

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203 PCS at para 104; DCS at paras 109–110.

204 Defendant's Accounting Expert's Reply Report by Chee Yoh Chuang dated 19 July 2021 ("CYC's 19 July 2021 Report") at para 2.2.1(I) (4DBAEIC at Tab 10, page 11).

205 NE, 17 November 2021, page 8 line 19 to page 9 line 21.

206 LQS's 5 July 2021 Report at para 10.8.12 (1PBAEIC at Tab 1, page 100).

207 LQS's 5 July 2021 Report at para 10.8.14 (1PBAEIC at Tab 1, page 101).

208 Plaintiff's Core Bundle of Documents Volume 1 ("1PCB") at Tab 4, page 160 (Annexure A to the First Supplementary Agreement); 1PCB at Tab 5, page 184 (Appendix C to the Second Supplementary Agreement).

do not indicate that they were to be a complete settlement of all claims between FYTA and the second defendant. CYC noted that, subsequent to these agreements, the second defendant continued to debit FYTA's account for various charges, including this sum of $154,451 which was charged to FYTA sometime after the second supplementary agreement between the parties. Then, in 2018, the second defendant made the decision to write this receivable off.[209] CYC confirmed that he did not sight any agreement between FYTA and the second defendant that this amount was deemed to be written off; his instructions from the first defendant was that this sum was to be written off because of an agreement between FYTA and the second defendant to settle all their claims against each other.[210] However, there was no evidence given by either defendant that this amount of $154,451 was to be written off because of some settlement between FYTA and the second defendant. That being the state of the evidence, I am constrained to agree with LQS that this amount ought to be included as part of the assets of the second defendant in the computation of its profits.

153 The second material difference between the computations of CYC and LQS concerns a sum of $100,000, which CYC had deducted from the profits of the second defendant. CYC described this as "miscellaneous expenses" in his first expert report,[211] but gave no explanation in the report as to what was meant by this. In his oral evidence, while under cross-examination, CYC explained that this figure of $100,000 was an estimate of the expenses that would have to be incurred by the second defendant for cleaning, touching up and painting of both the interior and exterior of the units before they are actually sold. He

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209 NE, 17 November 2021, page 9 lines 7–21.

210 NE, 17 November 2021, page 19 line 12 to page 21 line 24.

211 CYC's 5 July 2021 Report at para 2.13.3(c) (3DBAEIC at Tab 5, page 42).

calculated this figure by factoring in about $2,000 for such expenses for each of the 48 unsold units.[212]

154 I am unable to accept CYC's evidence in this regard. I agree with the plaintiff's submission that, because the 48 unsold units had been rented out, a significant part of the various maintenance costs described by CYC would already form part of the operating expenses that the second defendant would incur in renting out the units up to the time they are sold.[213] These expenses would already be captured in the accounts of the second defendant as operating expenses, and thus included in its financial statements as part of the company's costs. Further, I do not think that it is within CYC's expertise to give evidence of the quantum of such maintenance costs. If anything, such evidence should have come from the first defendant himself or some other officer of the second defendant. However, there was no such evidence before the court as to the additional maintenance expenses that the second defendant would likely have to incur if and when they sell the 48 units. As such, I agree with LQS that this sum of $100,000 as miscellaneous expenses should not be included in the computation of profits of the second defendant arising from the Project.[214]

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212 NE, 17 November 2021, page 35 line 23 to page 37 line 23.

213 PCS at para 110.

214 LQS's 27 August 2021 Report at paras 5.22–5.23 (PSB at Tab 4A, page 146).

155 Apart from the two abovementioned differences and the other issues canvassed earlier in this judgment, the other aspects of LQS's expert opinion as to the profits which the defendants derived from the Project are largely not challenged by the defendants. LQS has provided his computation in a detailed tabular format in his report of 27 August 2021,[215] whereas the table CYC provided was not as detailed nor as comprehensive as LQS's.[216]

156 I therefore set out my findings as to the profits that the second defendant derived from the Project which must be accounted to the plaintiff, based on the computation provided by LQS which I have adjusted according to my findings above, as follows:

S/N	Item	Profits to be accounted for by the second defendant ($)
	Revenue/potential revenue earned/to be earned from the 57 units in the Project ($236,439,295)	
1	Proceeds from the sale of the nine units[217]	37,117,570
2	Proceeds from the sale of the 48 unsold units	177,110,000
3	Rental proceeds from unsold units that have been rented out from July 2014 to 31 October 2020	21,528,105
4	Any other income earned/to be earned from the Project	683,620

215 LQS's 27 August 2021 Report at Table 13 (PSB at Tab 4A, pages 157–158); 1PCSBOD at pages 151–152.

216 CYC's 5 July 2021 Report at para 3.1.1 (3DBAEIC at Tab 5, pages 44–45).

217 LQS's 5 July 2021 Report at para 10.3.10 (1PBAEIC at Tab 1, page 58).

	Costs/potential costs incurred/to be incurred for the Project (less $259,566,084.04)	
5	Direct costs incurred by the second defendant to develop and construct the Project comprising, among other things, HH-Uni's consultancy fees and construction costs.	Less 218,351,470.04
6	Indirect costs incurred by the second defendant from developing and constructing the Project and from renting out the unsold units from July 2014 to 31 October 2020	Less 32,800,036
7	Income tax expenses incurred for the sale of the 9 units and income tax expenses recorded in the second defendant's unsigned financial statement for FY 2019	Less 965,868
8	Income tax expenses incurred for the prospective sale of the 48 units and income tax expenses	Less 4,604,860
9	Commission to be incurred to sell the 48 unsold units	Less 2,656,650
10	Conveyancing fees to be incurred to sell the 48 unsold units	Less 187,200
	Transfer of the 25 FYTA Units and FYTA's share of costs ($105,560,603)	

11	Transfer of the 25 FYTA Units	70,000,000
12	FYTA's share of costs to develop and construct the Project	35,560,603
	Expenses for non-Project related items that were previously deducted ($2,114,437)	
13	Legal fees	1,771,622
14	Discretionary expenses	342,815
Total		**84,548,250.96**

157 My findings as to the profits which the first defendant must account to the plaintiff are as follows:

S/N	Item	Profits to be accounted for by the first defendant ($)
15	Profits received by CBPL from the provision of non-construction related services	735,064.36
16	Profits received by HH-Uni from the provision of consultancy services	823,039
17	Directors' fees, salaries and remuneration received by the first defendant from the second defendant	69,855
18	Directors' fees, salaries and remuneration received by Aldrin Ow and Carmen Ow from the second defendant	953,110
Total		**2,581,068.36**

158 I will briefly explain some of the items, and the corresponding sum ordered to be accounted by the defendant to the plaintiff, in the preceding table.

159 In relation to item 2, I have found above at [106] that the 48 unsold units which the defendants are entitled to ownership of should be valued at $177,110,000 as of 13 May 2019.

160 Items 3 and 4 comprise rental income obtained from renting out the 48 unsold units, as well as other income stated in the second defendant's audited financial statement for FY 2011 to FY 2018 (such as government grants and sundry income), totalling $22,211,725. In this regard, the value LQS assessed as the income earned by the second defendant was $681,769 lower than that determined by CYC because CYC had included in his computations an additional sum of $681,769 for "[a]djustment to cost of development properties sold" which LQS did not.[218] However, the value LQS assessed as the expenses incurred by the second defendant was also $681,769 lower than that assessed by CYC. There is therefore effectively no difference in the computations of LQS and CYC in this regard, since the difference in the assessed values of the income of the second defendant is matched with the corresponding difference in the assessed values of the expenses of the second defendant.[219]

161 Item 5 pertains to direct costs incurred by the second defendant to develop and construct the Project. Such direct costs comprise the (i) acquisition cost and leasehold land and related costs; and (ii) development costs. The

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218 LQS's 5 July 2021 Report at paras 10.6.3–10.6.5 (1PBAEIC at Tab 1, page 66); CYC's 5 July 2021 Report at para 3.1.1 and Appendix 4 (3DBAEIC at Tab 5, pages 44–45 and 59–60).

219 LQS's 27 August 2021 Report at paras 5.2 and 5.5–5.7 (PSB at Tab 4A, pages 138–143).

development costs in turn comprise the construction costs of the Project and the consultancy costs paid to HH-Uni.[220] In LQS's report of 27 August 2021, he had assessed the direct costs incurred by the second defendant to be $213,771,786.64, based on LCH's assessment that the reasonable construction costs of the Project and the consultancy costs paid to HH-Uni totalled $40,167,691.63.[221] However, as I found above, the reasonable construction costs of the Project was $41,323,375.03 (see [64]–[65] above), and the consultancy costs paid to HH-Uni was $3,424,000 (see [68] above). Therefore, I find that the direct costs incurred by the second defendant to develop and construct the Project is $213,771,786.64, less $40,167,691.63, plus $41,323,375.03 and $3,424,000. That would lead to a sum of $218,351,470.04 as the direct costs incurred by the second defendant for the Project.

162 Item 6 pertains to indirect costs incurred by the second defendant to develop and construct the Project, and to rent out the 48 unsold units. Such expenses include, *inter alia*, advertising, promotion and marketing expenses, maintenance fees, directors' fees and remuneration, and legal fees.[222]

163 Item 7 pertains to income tax expenses incurred for the sale of the nine units which the defendants were entitled to ownership of. LQS determined the income tax expenses incurred in respect of the nine sold units belonging to the defendants by taking the total income tax expenses incurred by the second defendant in FY 2011 to FY 2018, and deducting from that amount the income tax expenses incurred from selling the units belonging to FYTA.[223] Conversely,

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220 LQS's 5 July 2021 Report at paras 10.7.1–10.7.12 (1PBAEIC at Tab 1, pages 71–75).

221 LQS's 27 August 2021 Report at paras 4.1–4.2 (PSB at Tab 4A, page 135).

222 LQS's 5 July 2021 Report at para 10.8.3 (1PBAEIC at Tab 1, pages 96–97).

223 LQS's 5 July 2021 Report at paras 10.9.1–10.9.6 (1PBAEIC at Tab 1, pages 102–103); LQS's 27 August 2021 Report at paras 5.3–5.4 (PSB at Tab 4A, pages 141–142).

CYC assessed the income tax expenses of the second defendant to be $1,854,414.[224] I accept LQS's explanation that CYC's figure was higher because it took into account the *total* income tax expenses as stated in the second defendant's financial statements, whereas LQS had only taken into account the income tax expenses *from the sale of the nine units belonging to the defendants* as stated in the second defendant's financial statements.[225] Therefore, I accept that the second defendant incurred $965,868 in income taxes from selling the nine units.

164 However, in both LQS's and CYC's reports, there is a glaring omission as to the income tax expenses that would be incurred for the *prospective* sale of the 48 unsold units belonging to the defendants. Given that the defendants' profits are being assessed on the basis that the 48 unsold units in their possession were sold on 13 May 2019, it is only reasonable, in my view, that any account of profits to be made by the defendants should take into account any income tax expenses that would be incurred in selling those 48 unsold units. In the absence of any evidence from either the plaintiff's or the defendants' expert witnesses, the best the court can do is to determine a rate from the income tax expenses incurred from the sale of the nine units as a percentage of the sale price of the nine units, and apply that rate to the expected sale price of the 48 unsold units, so as to determine the estimated income tax expenses that would be incurred from the sale of the 48 unsold units. Here, the nine units were sold for a total of $37,117,570, and income tax expenses of $965,868 were incurred. In other words, the income tax expenses incurred constituted around 2.6% of the sale price. Applying that rate to the sale price of the 48 unsold units as of 13 May 2019 ($177,110,000 (see [106] above)), the income tax expenses that would be

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224 CYC's 5 July 2021 Report at para 3.1.1 (3DBAEIC at Tab 5, page 44).

225 LQS's 27 August 2021 Report at para 5.4(b) (PSB at Tab 4A, page 142).

incurred for the prospective sale of the 48 unsold units would be around $4,604,860 (item 8).

165 Item 9 represents the commission to be incurred from selling the 48 unsold units, while item 10 represents the conveyancing fees which would be incurred from selling the 48 unsold units. LQS and CYC are in agreement that the following costs would be incurred in selling the unsold units:[226]

(a) agent's commissions of around 1.5% of the sale price; and

(b) legal costs of around $3,900 per unit.

166 Accordingly, the commission which would be incurred from selling the 48 unsold units is $2,656,650 (being 1.5% of $177,110,000), whilst the conveyancing fees which would be incurred from selling the 48 unsold units are $187,200 (being $3,900 multiplied by 48 units).

167 Items 13 and 14 pertain to legal fees and discretionary expenses respectively, which are unrelated to the Project, but were initially taken into consideration by LQS in his computations in his report of 5 July 2021.

(a) Legal fees of $1,771,622 had been incurred and recorded in the second defendant's financial statements for FY 2011 to FY 2020, which CYC states were incurred due to legal proceedings related to the present proceedings.[227] CYC stated in his report of 5 July 2021 that he excluded these legal fees in determining the total costs in connection with and

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226 CYC's 5 July 2021 Report at para 2.13.3 (3DBAEIC at Tab 5, pages 41–42); LQS's 27 August 2021 Report at para 6.1 (PSB at Tab 4A, page 148).

227 LQS's 27 August 2021 Report at para 5.12 (PSB at Tab 4A, page 144).

arising from the Project as these legal fees did not arise in connection with the Project.[228]

(b) In his report of 5 July 2021, CYC identified the expenses for (i) entertainment; (ii) gifts and donations; and (iii) travelling, as discretionary expenses totalling $342,815, but excluded these discretionary expenses in determining the total costs arising in connection with the Project "[t]o be prudent".[229]

168 In LQS's report of 27 August 2021, LQS stated that he had not originally "added back" the legal fees (of $1,771,622) and the discretionary expenses (of $342,815) into his computations in his report of 5 July 2021. As such, he "excluded" the abovementioned expenses in his computations in his report of 27 August 2021 by adding these sums to his computations.[230]

169 Item 15 pertains to the profits received by CBPL from the provision of non-construction related services in relation to the Project, while item 16 pertains to the profits received by HH-Uni from the provision of consultancy services in relation to the Project. I have found above at [121] that the first defendant must account for those sums to the plaintiff.

170 Finally, items 17 and 18 pertain to the directors' fees, salaries and remuneration paid by the second defendant to the first defendant and his relatives (Aldrin Ow and Carmen Ow) respectively, which I have found above at [123]–[124] must be accounted for by the first defendant to the plaintiff.

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228 CYC's 5 July 2021 Report at paras 2.6.4–2.6.6 (3DBAEIC at Tab 5, pages 31–32).

229 CYC's 5 July 2021 Report at paras 2.6.2–2.6.3 (3DBAEIC at Tab 5, page 31).

230 LQS's 27 August 2021 Report at para 5.13 (PSB at Tab 4A, page 144).

Conclusion

171 For the reasons above, I order the second defendant to pay the plaintiff the sum of $84,548,250.96. As for the first defendant, he is to pay the plaintiff the sum of $2,581,068.36.

172 I also order the defendants to pay the plaintiff the costs of the assessment proceedings which are to be taxed, if not agreed.

Ang Cheng Hock
Judge of the High Court

Chelva Retnam Rajah SC, Eusuff Ali s/o N B M Mohamed Kassim, Leo Zhi Wei, Tay Hui Yuan Denise, Lee Yen Yin, Joseph Tham Chee Ming (Tan Rajah & Cheah) and Chew Teck Lim (Chew Teck Lim) for the plaintiff;
Ling Daw Hoang Philip, Wong Si Hui Eunice, Lim Haan Hui and Yeow Ye Xi Lydia (Wong Tan & Molly Lim LLC) for the defendants.