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

[2023] SGHC 47

Suit No 821 of 2015

Between

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

… *Plaintiffs*

And

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

(14) Nova Raffles Holdings Pte Ltd

… *Defendants*

And

Kwan Ka Yu Terence

… *Third Party*

JUDGMENT

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

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Lakshmi Anil Salgaocar (suing as the administratrix of the estate of Anil Vassudeva Salgaocar) and another
v
Darsan Jitendra Jhaveri and others (Kwan Ka Yu Terence, third party)

[2023] SGHC 47

General Division of the High Court — Suit No 821 of 2015
Kannan Ramesh JAD
20–23, 27–30 April, 4–7, 11–12, 14 May, 2, 6–9, 13–15, 21 July, 17–18 August 2021, 17 March 2022

28 February 2023 Judgment reserved.

Kannan Ramesh JAD:

Introduction

1 This judgment is the final act in a long-running dispute that has spawned multiple satellite proceedings and seen the intervening passing of the original plaintiff. HC/S 821/2015 ("**Suit 821**") centres on an oral agreement that was allegedly made in December 2003 ("**the December 2003 Agreement**") between Mr Anil Vassudeva Salgaocar ("**Mr Salgaocar**") and the first defendant, Mr Darsan Jitendra Jhaveri ("**Mr Darsan**") pursuant to which a trust ("**the 2003 Trust**") was created with Mr Darsan as trustee. The gist of the December 2003 Agreement was that Mr Darsan would, as trustee: (a) be Mr Salgaocar's nominee shareholder and director in various special purpose vehicles ("**SPVs**") to be funded by Mr Salgaocar, and (b) act in accordance with

Mr Salgaocar's instructions. Following the December 2003 Agreement, six SPVs were initially incorporated in the British Virgin Islands ("**the BVI**") and funded by Mr Salgaocar (see [14] below). These six BVI SPVs were used to trade in iron ore – purchasing iron ore from entities owned or controlled by Mr Salgaocar and on-selling it to buyers in China. The profits made by these SPVs as a result were some US$690m between 2004 and 2012, and a significant portion of those profits was used to incorporate other SPVs and purchase assets and make investments through them. As pleaded, the equity in all the SPVs, the profits, and the assets and investments purchased using them constitute the trust assets. However, the plaintiffs' have clarified in their Opening Statement and Closing Submissions that they are not making a claim to the assets of the SPVs.

2 The plaintiffs' overarching case is that Mr Salgaocar and Mr Darsan entered into the December 2003 Agreement in the manner described above and that Mr Darsan breached his duties as trustee of the 2003 Trust by, *inter alia*, misappropriating the trust assets for the benefit of his family and himself. The first plaintiff thus seeks, *inter alia*, a declaration that Mr Darsan holds the assets subject to the 2003 Trust on trust for Mr Salgaocar's estate (subject to the clarification stated above). The first plaintiff also seeks reliefs against the second to fourteenth defendants that are consequential on the declaration that is sought against Mr Darsan being granted. The second plaintiff seeks reliefs against Mr Darsan and the second defendant that are independent of the reliefs sought by the first plaintiff.

3 The defendants contend that there is no December 2003 Agreement and therefore the 2003 Trust does not exist. In any event, the December 2003 Agreement, and thus the 2003 Trust, are unenforceable on the basis that the December 2003 Agreement was illegal under Indian law. Instead, the defendants claim that Mr Salgaocar and Mr Darsan had embarked on a shipping

venture (defined at [40] below as "**the Shipping Venture**"), the management and operations of which Mr Salgaocar would be responsible for. According to the defendants, Mr Salgaocar would underwrite any losses that Mr Darsan suffered in the Shipping Venture and Mr Darsan would share any profits that were made with Mr Salgaocar. Mr Darsan claims that pursuant to this venture, the parties agreed to keep a "running account" ("**the Running Account**") between them, which Mr Salgaocar and his estate have failed to settle or equalize. Thus, Mr Darsan seeks an account and inquiry in relation to the Running Account as part of his counterclaim against the first plaintiff. Mr Darsan also claims an indemnity against or contribution from a third-party, Mr Kwan Ka Yu Terence ("**Mr Kwan**"), in the event that he is found liable to the first plaintiff in respect of the misappropriation claim in relation to one of the SPVs incorporated in the BVI, Eltina Ltd ("**Eltina**"). I shall refer to Mr Darsan's claim against Mr Kwan as "**the Third-Party Action**".

4 Having considered the submissions of the parties and the evidence before me, I find that Mr Salgaocar and Mr Darsan did enter into the December 2003 Agreement pursuant to which the 2003 Trust arose. I also find that the December 2003 Agreement is not illegal under Indian law and therefore the 2003 Trust may be enforced. I further find that Mr Darsan breached the 2003 Trust and dismiss his counterclaim against the first plaintiff. Finally, I find that the plaintiffs have no claim against Mr Darsan for the sums that are subject of indemnity and contribution sought by Mr Darsan against Mr Kwan in the Third-Party Action. Accordingly, I dismiss the Third-Party Action. I now set out my reasons.

Facts

The parties

5 I begin by introducing the parties to Suit 821.

The plaintiffs

6 The first plaintiff, Mdm Lakshmi Anil Salgaocar ("**Mdm Lakshmi**"), is the widow of Mr Salgaocar. Suit 821 was commenced by Mr Salgaocar in August 2015. Unfortunately, Mr Salgaocar passed away suddenly intestate on 1 January 2016, which resulted in Mdm Lakshmi taking over the conduct of Suit 821 in her capacity as the sole administratrix of his estate. While he was alive, Mr Salgaocar was a businessman who engaged in a wide range of business interests. Within India, Mr Salgaocar and his family had owned iron ore mines, in Goa since 1955 and in Karnataka since 1972. The iron ore produced by these mines was sold and/or exported principally through Salgaocar Mining Industries Pvt Ltd ("**SMI**"), a company incorporated in India. Five of the BVI SPVs (see [14] below) bought iron ore exclusively from SMI while the sixth purchased iron ore from one of Mr Salgaocar's companies in Swaziland.

7 The second plaintiff is Winter Meadow Capital Inc ("**Winter Meadow**"). Winter Meadow is a company also incorporated in the BVI. Mdm Lakshmi is the sole shareholder in her capacity as sole administratrix of Mr Salgaocar's estate.

The defendants

8 The first defendant, Mr Darsan, is a businessman based in Hong Kong. Between 1981 to 2000, Mr Darsan was in the business of dealing in diamonds

and gemstones in India. Thereafter, Mr Darsan relocated to Hong Kong in order to expand his business into the Chinese market.

9 The second and third defendants are Mr Darsan's wife, Mdm Jhaveri Jashma Darsan, and daughter, Ms Pooja Darsan Jhaveri, respectively. The plaintiffs discontinued Suit 821 against the second defendant on 4 March 2019 and have not effected service of process on the third defendant.

10 The fourth to fourteenth defendants are SPVs incorporated in Singapore, of which Mr Darsan is a director and, either directly or indirectly, the sole shareholder. The 11 companies are as follows (see Annex 2 and Annex 3 below for the organisational structure of the 11 companies before and after restructuring by Mr Darsan):

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

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

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

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

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

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

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

(h) Singapore Star Properties Pte Ltd ("**Singapore Star Properties**");

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

(j) Millers Capital Investments Pte Ltd ("**Millers Capital**"); and

(k) Nova Raffles Holdings Pte Ltd ("**Nova Raffles**").

The Third-Party to Suit 821 – Mr Kwan

11 As alluded to at [3] above, in the Third-Party Action, Mr Darsan claims an indemnity against or contribution from Mr Kwan in the event that Mr Darsan is found liable to the first plaintiff in respect of the misappropriation claim relating to Eltina. Mr Kwan was hired by Mr Salgaocar to work in relation to the BVI SPVs (defined at [14] below). Specifically, Mr Kwan was involved in the sale of iron ore from India and Swaziland to buyers in China, through the BVI SPVs. Mr Kwan was the plaintiffs' witness in Suit 821.

Companies that comprise the assets of the 2003 Trust

12 The SPVs incorporated in the BVI and a number of the SPVs incorporated in Singapore are relevant to Suit 821. The plaintiffs claim that they are part of the assets of the 2003 Trust. By the plaintiffs' account, these companies were set up by Mr Salgaocar and he was the sole beneficial owner of all the shares issued by the SPVs as well as the monies, investments and other assets that were held by the SPVs. However, as noted above, the plaintiffs have clarified that they are not making any claims in Suit 821 against the assets of the SPVs.

13 The SPVs incorporated in the BVI are the six SPVs referred to at [1] above. I shall refer to them collectively as "**the BVI SPVs**". The SPVs incorporated in Singapore, 21 in total, include the fourth to fourteenth defendants, and are collectively referred to as "**the Singapore SPVs**".

14 The BVI SPVs are as follows:

(a) Ling Tao Trading Ltd ("**Ling Tao**") (now struck off);

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

(c) GBA Minmetals Trading Ltd ("**GBA Minmetals**") (now struck off);

(d) Cheermark Global Ltd ("**Cheermark**") (now struck off);

(e) Joyking Global Ltd ("**Joyking**") (now struck off); and

(f) Eltina.

15 Apart from the fourth to fourteenth defendants listed at [10] above, the other Singapore SPVs are:

(a) Trustworth Shipping Pte Ltd ("**Trustworth Shipping**");

(b) Agapimo Investments Pte Ltd ("**Agapimo Investments**") (now struck off);

(c) Albana Investments Pte Ltd ("**Albana Investments**") (now struck off);

(d) Cargills Investments Pte Ltd ("**Cargills Investments**") (now struck off);

(e) Great Newton Developers Pte Ltd ("**Great Newton Developers**") (now struck off);

(f) Great Newton Realtors Pte Ltd ("**Great Newton Realtors**") (now struck off);

(g) Innovale Investments Pte Ltd ("**Innovale Investments**");

(h) Mi Amorey Investments Pte Ltd ("**Mi Amorey Investments**") (now struck off);

(i) Nova Icap Pte Ltd ("**Nova Icap**") (now struck off); and

(j) Regent Shipping Pte Ltd ("**Regent Shipping**") (now struck off).

Background to the dispute

16 I now set out the brief background to the dispute.

17 Mr Darsan was introduced to Mr Salgaocar in the late 1980s. Thereafter, Mr Darsan frequently met Mr Salgaocar and/or his family members socially and for business and became a close friend of Mr Salgaocar and his family. Mr Darsan likened his relationship with Mr Salgaocar to that between a "father and son". This was not seriously challenged by the plaintiffs.

18 While SMI was in the 1950s and 1960s primarily in the business of exporting iron ore to Europe, the closure of the Suez Canal in June 1967 resulted in SMI pivoting to exporting iron ore to Japan instead. When demand from Chinese steel mills for iron ore grew, SMI started exporting iron ore to China as well. Save for Eltina, the other BVI SPVs were thus set up for the purpose of trading in iron ore between January 2004 and October 2009. Five of the BVI SPVs – Ling Tao, Sino Ling Tao (BVI), GBA Minmetals, Cheermark and Joyking – purchased iron ore from SMI, on a free on board ("**FOB**") basis, and on-sold it on a spot basis to the Chinese market on a cost and freight ("**CFR**") basis. The last BVI SPV, Eltina, purchased iron ore from one of Salgaocar's companies in Swaziland on a CFR basis for sale to the Chinese market also on a CFR basis. I shall refer to this manner of sales as "**the two-legged contracts**".

19 The two-legged contracts proved to be hugely profitable for the BVI SPVs. Between 2005 and 2012, the Singapore SPVs were incorporated, and they acquired vessels, shipping assets and real estate using the trading profits made by the BVI SPVs. However, the plaintiffs claim that from 2011 to 2014, Mr Darsan had without Mr Salgaocar's knowledge or approval, *inter alia*, arranged for the BVI SPVs to pay US$270,372,938 to himself or entities controlled by or connected to him. The plaintiffs also claim that Mr Darsan caused the transfer of various apartments in Newton Imperial, a residential project in Singapore, from the developer, Great Newton Properties, to himself and the second defendant, as well as third parties and 22 BVI companies owned by Million Dragon Wealth Ltd ("**Million Dragon**"). Million Dragon is a BVI company whose sole shareholder and director was the third defendant at the time of transfer of the apartments in question. When Mr Salgaocar found out about the events described above, his relationship with Mr Darsan started to fray and deteriorate.

20 On 14 May 2014, Holman Fenwick Willan Hong Kong ("**HFW**"), acting on Mr Salgaocar's instructions, issued a letter of demand to Mr Darsan ("**the HFW Letter**") for a return of the trust assets that were alleged to have been misappropriated. What transpired subsequently are events and correspondences in respect of which Mr Darsan has claimed "without prejudice" privilege, a matter which is further discussed below at [131]–[144].

21 Eventually, in or around December 2014, Mr Ajaib Haridass ("**Mr Haridass**"), a lawyer retained by Mr Salgaocar in relation to the recovery of the trust assets, approached representatives from Deloitte & Touche LLP ("**Deloitte**") to undertake an assessment of the assets that could be part of a settlement. In the subsequent months, Mr Haridass corresponded with Deloitte. Meetings involving Mr Haridass, Mr Darsan's representative Mr Rajiv Bhoj

("**Mr Bhoj**"), one of Mr Salgaocar's accountants Mr Nitin Sud ("**Mr Sud**"), and two directors from Deloitte took place in Mr Haridass' office. Eventually Deloitte was not engaged.

22 Mr Salgaocar commenced Suit 821 in August 2015 after, according to the plaintiffs, Mr Darsan failed to comply with some of Mr Salgaocar's demands in relation to the trust assets. Mr Darsan filed the defence on 6 October 2015 before applying by Summons No 6205 of 2015 ("**SUM 6205**") on 28 December 2015 to strike out the Statement of Claim ("**the SOC**") and for Suit 821 to be dismissed. This was on the basis that if the matters in the SOC were accepted as true, Mr Salgaocar's export arrangements to China through the BVI SPVs breached Indian law including the Customs Act 1962 (India) ("**the Customs Act**") and the Foreign Exchange Management Act 1999 (India) ("**the FEMA**"), as he was said to have not made a true declaration of the full export value of the iron ore sold in China, amongst others.

23 Subsequently, following Mr Salgaocar's passing in 2016, there was a lengthy impasse in the proceedings. This was because a dispute arose in the Family Justice Courts between Mdm Lakshmi and Ms Chandana Anil Salgaocar ("**Ms Chandana**"), Mr Salgaocar and Mdm Lakshmi's daughter, over the appointment of the administratrix of Mr Salgaocar's estate. As matters neared resolution, on 15 May 2017, Mdm Lakshmi's solicitors notified the court, copying Mr Darsan's solicitors, that a settlement of the issue on appointment was expected with the result that a single administratrix would administer the estate's affairs including the conduct of Suit 821.Several satellite litigation followed.

24 The next day, on 16 May 2017, Mr Darsan commenced proceedings against Mr Salgaocar's estate and Million Dragon in the BVI ("**BVI 83**"). In

BVI 83, Mr Darsan alleged that he was the beneficial owner of the sole share in Million Dragon, which had been transferred to Mr Salgaocar in July 2014. The transfer was allegedly made in return for Mr Salgaocar agreeing to transfer to Mr Darsan monies that were paid for the purchase of units in Newton Imperial by Million Dragon. As Mr Salgaocar failed to transfer the monies, Mr Darsan asserted that he was the beneficial owner of the share. About three weeks later, on 7 June 2017, Mdm Lakshmi filed Originating Summons No 627 of 2017 ("**OS 627**") in the High Court for an anti-suit injunction to restrain Mr Darsan from proceeding in BVI 83. The application was not granted by the High Court in April 2018 but later allowed by the Court of Appeal in July 2019. Mdm Lakshmi obtained the grant of letters of administration (dated 8 August 2017) of Mr Salgaocar's estate on 25 September 2017.

25 There were separate proceedings concerning caveats ("**the Caveat Proceedings**") which Mr Salgaocar had lodged against several properties in Newton Imperial, Waterford Residence and WCEGA Tower in 2015. The registered proprietors of these properties – namely, Mr Darsan and the second defendant; Capital Glory; Newton Noble and Sino Noble – had applied in Originating Summonses Nos OS 727 and 945 of 2015 ("**OS 727**" and "**OS 945**" respectively) for the caveats to be removed. OS 727 and OS 945 were allowed by the High Court on 16 October 2017, on the basis that the 2003 Trust relates, *inter alia,* to the shares in the BVI SPVs and Mr Salgaocar is therefore not entitled to pierce the corporate veil and reach into the assets held by the various SPVs. The appeal by Mr Salgaocar's estate was dismissed by the Court of Appeal.

26 On 15 November 2017, Mr Darsan applied in Originating Summons No 1293 of 2017 ("**OS 1293**") for a declaration that Suit 821 had been automatically discontinued pursuant to O 21 r 2(6) of the Rules of Court (Cap 322, R 5, 2014

Rev Ed) ("**Rules of Court**") on the basis that no party to the action had taken a step as reflected in the court records for over a year. This was resisted by Mdm Lakshmi, who applied in Summons 5581 of 2017 in OS 1293 for a declaration that Suit 821 was not deemed discontinued, alternatively that Suit 821 be reinstated. On 22 February 2018, the High Court determined that Suit 821 had not been automatically discontinued. Separately, Mr Darsan was granted leave to withdraw SUM 6205 (the striking out application) on 25 May 2018.

The parties' cases

The plaintiffs' case

27 As stated above, the plaintiffs' claim centres on the December 2003 Agreement, which is the source of the 2003 Trust. The defendants dispute that there was such an agreement. Establishing the December 2003 Agreement is therefore critical for the plaintiffs. The crucial elements of the December 2003 Agreement are as follows:

(a) Mr Salgaocar would set up SPVs (including, but not limited to the BVI SPVs) to conduct business and hold assets. In particular the BVI SPVs would be incorporated to conduct sale of iron ore to China. Mr Salgaocar would provide all the funding for the activities of the SPVs. This included funds for the capitalisation, acquisition of assets and operating expenses of the SPVs. Moreover, Mr Salgaocar would have "complete and unrestricted control" of the operations of the SPVs' businesses and finances.

(b) Mr Darsan was to serve as a shareholder and/or director of the SPVs. Mr Darsan was to hold the shares of the SPVs as Mr Salgaocar's nominee and/or on trust for Mr Salgaocar, and serve as his nominee director. Pursuant to this arrangement, Mr

Salgaocar would be the sole beneficial owner of all the shares of the SPVs and all assets acquired and investments made by them.

(c) In consideration, Mr Salgaocar would pay Mr Darsan US$0.50 for each wet metric ton ("**WMT**") of cargo sold by the BVI SPVs to the Chinese market on a CFR basis.

28 The plaintiffs claim that Mr Darsan had committed the following breaches of the 2003 Trust and/or fiduciary duties owed to Mr Salgaocar:

(a) From 2011 to February 2013, Mr Darsan made payments of about US$270,372,938, arising from the iron ore profits of the BVI SPVs, from the BVI SPVs to bank accounts of Mr Darsan, or persons or entities controlled by him;

(b) In or around July 2012, Mr Darsan prevented Mr Salgaocar from:

(i) conducting trading, business and investments using the iron ore profits of the BVI SPVs; and

(ii) dealing with the trust assets;

(c) Mr Darsan caused the conveyance of various properties held by the Singapore SPVs in breach of the December 2003 Agreement, including:

(i) misappropriating six units in Newton Imperial to himself and the second defendant by using the trust assets to pay for them;

(ii) selling eight units in Newton Imperial to third parties without paying over the proceeds to Mr Salgaocar;

(iii) selling two units in Residences@Evelyn without paying over the proceeds to Mr Salgaocar;

(iv) selling nine units in Waterford Residence without paying over the proceeds to Mr Salgaocar;

(v) selling 17 units in WCEGA Tower without paying over the proceeds to Mr Salgaocar.

(d) Mr Darsan procured the transfer of shares in Eltina and GBA Minmetals to himself without the knowledge and/or approval and/or consent of Mr Salgaocar;

(e) Mr Darsan falsified the accounting records of Singapore Star Holdings in order to show that sums which it owed to three of the BVI SPVs and Global Island Resources Ltd, a BVI-incorporated company operated by Mr Salgaocar, were instead owed to Mr Darsan or companies owned and/or controlled by him;

(f) Mr Darsan misappropriated vessels, cranes and machinery held by Sino Ling Tao (SG) by transferring them to companies owned and/or controlled by Mr Darsan; and

(g) After June 2012, Mr Darsan failed to act with reasonable skill and care in respect of vessels and machinery which formed part of the trust assets.

29 Further, the plaintiffs allege that despite Mr Salgaocar's repeated demands since August 2012, Mr Darsan failed to (a) transfer ownership of the trust assets, and (b) relinquish control over the same.

30 As result of the Caveat Proceedings, the plaintiffs do not make a claim to assets of the SPVs, including assets acquired and investments from the profits of the iron ore trade. Instead, the plaintiffs' claim is limited to the shares in the BVI SPVs and Singapore SPVs subject to the 2003 Trust. However, as some of these companies are now defunct, the 2003 Trust presently relates to shares in 10 companies – Eltina, Singapore Star Holdings, Great Newton Properties, Singapore Star Investments, Singapore Star Shipping, Singapore Star Properties, Sino Ling Tao (SG), Millers Capital, Sino Noble and Nova Raffles.

31 As regards illegality, the plaintiffs submit that the use of the BVI SPVs to sell iron ore to buyers in China pursuant to the December 2003 Agreement was not illegal. Even if it was, the plaintiffs contend that (a) neither the principle in *Foster v Driscoll* [1929] 1 KB 470 ("***Foster***") nor the principle in *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287 ("***Ralli Bros***") apply, and (b) enforcement of the December 2003 Agreement and the 2003 Trust would not violate international comity.

32 Finally, as regards the allegations in the Third-Party Action, the plaintiffs assert that Eltina is one of the BVI SPVs and therefore subject to the 2003 Trust. In the SOC, the plaintiffs claim that Mr Darsan had wrongfully arranged for payments of, *inter alia*, US$6.8m from Eltina's bank account to his bank accounts or a bank account in the name of Star Gold Ltd ("**Star Gold**"), a company beneficially owned by Mr Darsan. The sum of US$6.8m forms the basis of the claim in the Third-Party Action. However, this claim was not developed during the trial or in the plaintiffs' written submissions. Instead, the plaintiffs have not challenged Mr Kwan's position that the transfers amounting to US$6.8m were authorised by Mr Salgaocar. The plaintiffs' only submission in relation to the Third-Party Action is that even if there is any basis for Mr Darsan's claim against Mr Kwan for the US$6.8m, the proper plaintiff ought to

be Eltina and not Mr Darsan. As such, the plaintiffs invite the court to infer that the Third-Party Action was brought by Mr Darsan to intimidate Mr Kwan from testifying for the plaintiffs in Suit 821.

The defendants' case

33 As stated above, Mr Darsan disputes the existence of the December 2003 Agreement, and asserts that there is no evidence of Mr Salgaocar's intention to create the 2003 Trust. He argues that it was he, not Mr Salgaocar, who had funded the BVI SPVs, and procured and paid for the incorporation of, *inter alia*, Trustworth Shipping, Regent Shipping, Cheermark and Joyking.

34 A key pillar of Mr Darsan's case is his close friendship with Mr Salgaocar, which influenced the manner in which the two conducted their affairs. Mr Darsan claims that the pair shared a close relationship since Mr Darsan became acquainted with Mr Salgaocar's family in or around the late 1970s. Mr Darsan adds that both he and Mr Salgaocar confided in each other on the problems they faced in their respective businesses over a period of 30 years, and that both of them would try to help the other out. Mr Darsan points to several examples of this mutually beneficial friendship. For instance, Mr Darsan claims that he leveraged on his familiarity with Gujarati culture (Mr Darsan being from the state of Gujarat) to help negotiate and resolve a dispute that Mr Salgaocar had with Gujarati shipbreakers. Mr Darsan also claims that Mr Salgaocar invited him to use the premises of SMI rent-free when he was looking for office space in Mumbai for his business in gemstone trading and polymers in the late 1980s. As Mr Darsan's room was next to Mr Salgaocar's, Mr Salgaocar would occasionally ask him to help out with SMI's affairs. Thus, Mr Darsan helped Mr Salgaocar out for several years by issuing cheques that had been pre-signed by Mr Salgaocar in order to fulfil SMI's payment obligations, when Mr

Salgaocar was away from Mumbai. They continued to keep in touch even after Mr Darsan moved to Hong Kong. Whenever Mr Salgaocar was in Hong Kong, he would stay in one of Mr Darsan's apartments.

35 Mr Darsan explains the circumstances leading to his involvement in the iron ore trading as follows:

(a) Sometime in December 2003 or January 2004, Mr Salgaocar visited Hong Kong for about two to three weeks.

(b) During this time, Mr Salgaocar, shared with Mr Darsan that while Japanese iron ore purchasers had been pushing down the export prices of iron ore mined in Goa, there was a growing demand for the iron ore from Chinese steel mills. Mr Salgaocar wanted to explore the option of exporting iron ore to China. Mr Darsan responded by sharing his experiences about doing business in the Chinese market.

(c) Thereafter, on 23 January 2004, Mr Salgaocar incorporated Ling Tao in the BVI, which he used to sell iron ore to the Chinese market. In or about mid-2004, Mr Darsan became a signatory to Ling Tao's bank account in Hong Kong with The Hongkong and Shanghai Banking Corporation Limited ("**HSBC**"). Mr Darsan claims that this was done at Mr Salgaocar's request, as the latter only visited Hong Kong intermittently.

(d) Around late 2004, Mr Salgaocar and Mr Darsan met in Hong Kong, during which Mr Salgaocar told him about payment issues he was facing with the Chinese buyers. At this point, Mr Salgaocar had been selling iron ore to Chinese buyers through Ling Tao, GBA Products Ltd ("**GBA Products**") (a company

incorporated in Dubai) and Sino Source Industries Ltd ("**Sino Source**") (a company incorporated in Hong Kong). Mr Salgaocar said the Chinese buyers were either not paying promptly or at all.

(e) Mr Salgaocar recognised that "he did not have the contacts, experience, or patience to sell iron ore directly to Chinese buyers", and therefore invited Mr Darsan to join the iron ore trading business.

(f) Mr Salgaocar proposed that SMI would sell iron ore to Mr Darsan, who would then on-sell it to the Chinese market. Mr Darsan would assume the credit risk of the transactions and pay Mr Salgaocar the prevailing Indian iron ore export price, which was said to be higher than what Mr Salgaocar would receive from the Japanese buyers. Mr Darsan could then sell the iron ore to the Chinese buyers and profit on the margin.

(g) On or about October 2004, Mr Darsan orally agreed to Mr Salgaocar's business proposal. The business proposal from Mr Salgaocar which Mr Darsan accepted was not reduced into writing.

36 Pursuant to this business proposal, Mr Darsan incorporated Sino Ling Tao (BVI) on or about 12 November 2004. He funded all of the costs of incorporating and operating the company and was its sole director and shareholder. In or around mid-November 2004, Sino Ling Tao (BVI) started buying iron ore from SMI and selling it to Chinese buyers. Around that time, Ling Tao (Mr Salgaocar's SPV (see [35(c)] above)) began to wind down its iron ore trading activities and eventually ceased operations.

37 Sometime in early 2005, Mr Darsan met Mr Salgaocar in Hong Kong to discuss the logistics of Sino Ling Tao (BVI)'s iron ore trading business. Mr Salgaocar then advised Mr Darsan to set up a charter or fixture agent company to complement its iron ore trading business. Accordingly, Trustworth Shipping was incorporated in Singapore on or about 2 March 2005, as the freight and logistics arm of Sino Ling Tao (BVI)'s iron ore trading business. Mr Darsan held 99% of the issued shares in Trustworth Shipping, with the remaining shares held by a Singapore national as his nominee.

38 In April 2005, Mr Darsan had a "falling out" with Mr Salgaocar over the iron ore trading business. This was after several occasions in March 2005 when Mr Salgaocar allegedly threatened Mr Darsan with raising prices for the iron ore that SMI sold. Mr Salgaocar took the view that Sino Ling Tao (BVI)'s profit margins should be reduced. Mr Darsan "perceived that Mr Salgaocar was over-stepping his role and abusing his position" and feared that the pressures of doing business together was affecting their relationship. He therefore decided to end his iron ore trading relationship with Mr Salgaocar and SMI. Mr Darsan and Mr Salgaocar agreed over a phone call that the latter would buy over the former's shares in Sino Ling Tao (BVI) for US$32.6m. Mr Darsan asserts that this was the equivalent of the company's accumulated profits at that time. Pursuant to this agreement, Mr Darsan transferred his shares in Sino Ling Tao (BVI) to Mr Salgaocar on or about 19 April 2005.

39 However, according to Mr Darsan, Mr Salgaocar subsequently said that he could only pay the US$32.6m in instalments rather than in a lump sum. A few weeks after 19 April 2015, Mr Salgaocar proposed, and Mr Darsan agreed, that Mr Darsan would continue to buy iron ore from SMI for sale to Chinese buyers. In or around October 2005, they agreed, *inter alia*, that Mr Darsan would incorporate a new SPV for iron ore trading and have his own team in

Hong Kong to oversee its operations. Mr Salgaocar would provide advice where required and not interfere with Mr Darsan's iron ore trading business. Thus, on or about 15 November 2005, Mr Darsan procured the incorporation of GBA Minmetals, of which he was sole shareholder and sole director. Between January to May 2006, Mr Salgaocar also paid Mr Darsan the US$32.6m that was due for the shares in Sino Ling Tao (BVI) in four instalments.

40 In or around February 2006, Mr Salgaocar and Mr Darsan entered into an oral agreement to expand Trustworth Shipping's operations into a fully-fledged shipping venture ("**the Shipping Venture**"). This would "complement Mr Darsan's iron ore trading business". As part of the Shipping Venture:

(a) Trustworth Shipping would expand its operations from the provision of chartering agent services to vessel ownership and chartering;

(b) Mr Salgaocar would take over full responsibility for the management and operation of the Shipping Venture, and would underwrite and make whole all losses Mr Darsan might incur from the venture ("**the Shipping Underwriting Agreement**"). The net position between the two would be assessed at the end of the Shipping Venture, as part of the Running Account that would be maintained between them (see [3] above);

(c) Both Mr Darsan and Mr Salgaocar would contribute funding for the Shipping Venture; and

(d) Mr Salgaocar would be remunerated for managing the Shipping Venture, and Mr Darsan would share the audited profits with him.

41 Mr Darsan and Mr Salgaocar agreed that the Running Account would be kept between themselves. At the end of the Shipping Venture, they would take stock of their respective contributions to and withdrawals from the venture, and the profits made and the losses suffered (the losses would be underwritten by Mr Salgaocar under the Shipping Underwriting Agreement). Any sums due to Mr Darsan under the Shipping Underwriting Agreement would be added to the Running Account. While the Running Account was initially intended to apply to the Shipping Venture, it was over time extended to include other expenses that were not strictly connected to it.

42 Further to the Shipping Venture, in April 2006, Mr Salgaocar incorporated Sino Ling Tao (SG) and Sino Noble Holdings (now Singapore Star Holdings). At Mr Salgaocar's request, in August 2006, Mr Darsan took over Mr Salgaocar's shares in Sino Ling Tao (BVI) (which had previously been transferred by Mr Darsan to Mr Salgaocar (see [38] above)) as Mr Salgaocar claimed that he needed to divest his shareholdings in various SPVs that he had used for iron ore trading.

43 The Running Account forms the primary basis of Mr Darsan's counterclaim against the plaintiffs. Mr Darsan argues that the Shipping Venture ended at the latest when Mr Salgaocar passed away. However, Mr Salgaocar and/or his estate have failed to settle or equalize the Running Account.

44 Mr Darsan denies committing the breaches of trust and/or fiduciary duties alleged by the plaintiffs in [28] above. He also denies that Mr Salgaocar had demanded that he transfer the trust assets and that he had refused to do so.

45 In any event, Mr Darsan submits that even if the December 2003 Agreement was entered into, it breached Indian law, including the Customs Act and the FEMA, and therefore with the 2003 Trust was unenforceable.

46 In respect of the Third-Party Action, Mr Darsan claims that Mr Kwan had transferred US$6.8m to Mr Kwan's own bank account and is therefore liable for the amount as an unlawful recipient. Thus, to the extent that the first plaintiff is able to establish liability against Mr Darsan in respect of Eltina, he seeks an indemnity or contribution from Mr Kwan as regards the US$6.8m.

Issues to be determined

47 In view of the parties' respective cases above, the following issues arise for determination:

(a) Whether the December 2003 Agreement was entered into, thereby giving rise to the 2003 Trust ("**Issue 1**");

(b) If Issue 1 is resolved in the plaintiffs' favour, whether the December 2003 Agreement is unenforceable for breach of Indian law ("**Issue 2**");

(c) If Issue 2 is resolved in the plaintiffs' favour, whether Mr Darsan breached the 2003 Trust ("**Issue 3**"); and

(d) Whether Mr Darsan is entitled to an indemnity against or contribution from Mr Kwan as regards the sum of US$6.8m if Mr Darsan's liability to the first plaintiff under the 2003 Trust in respect of Eltina is established ("**Issue 4**").

Issue 1: The existence of the December 2003 Agreement and the 2003 Trust

48 The first issue that arises for consideration is whether Mr Salgaocar and Mr Darsan entered into the December 2003 Agreement, consequently giving rise to the 2003 Trust. In summary, I find that the December 2003 Agreement must have existed for the following three reasons:

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

(b) second, Mr Darsan's defence is implausible; and

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

Mr Salgaocar's management of the BVI and Singapore SPVs

General observations

49 I begin by considering the management and operations of the BVI SPVs and Singapore SPVs. I make some general observations. The evidence quite clearly points to Mr Salgaocar's close level of involvement with and oversight over these SPVs. *Such control is consistent with the plaintiffs' case that Mr Salgaocar owned and operated these SPVs.* I conclude accordingly.

50 Documentary evidence and the evidence of (a) Mr Kwan, (b) Mr Cheong Hock Wee ("**Mr Cheong**"), the general manager of Sino Ling Tao (SG) and Singapore Star Shipping from 2007 to 2010, and (c) Ms Tan Ai Kheng ("**Ms**

Tan"), a real estate agent, support the plaintiffs' position that all significant decisions concerning the trading of iron ore by the BVI SPVs were by Mr Salgaocar or at least were made with his approval. Moreover, all significant decisions on how the profits from the iron ore trading activities of the BVI SPVs should be invested by the Singapore SPVs were made by Mr Salgaocar.

51 In relation to the BVI SPVs, all significant decisions involving trading matters were made by Mr Salgaocar or required his approval. This included (a) the terms of sale of the iron ore to the Chinese market, (b) identification of the Chinese purchasers to whom the iron ore would be sold on a CFR basis, (c) the vessels nominated for each shipment of iron ore, and (d) the freight and charter hire rates for the vessels used to carry the iron ore. In contrast, notwithstanding his assertion that the BVI SPVs were his, Mr Darsan had *little or no* involvement in any of these matters. In fact, he was *not* substantially involved in the day-to-day trading operations, with his role limited to signing the relevant documents *as required by Mr Salgaocar*, either pursuant to instructions from Mr Salgaocar directly or conveyed through Mr Kwan and Ms Yuk Fang Chiang Mirrica ("**Ms Chiang**"), another employee of Mr Salgaocar.

52 The same may be said of the Singapore SPVs. Further, it is pertinent that Mr Darsan was appointed director and bank signatory for 17 of the 21 Singapore SPVs on and from 8 October 2011 on Mr Salgaocar's instructions *only after* one of Mr Salgaocar's nominees passed away in or around May 2011. Before this, Mr Darsan was only a director in Trustworth Shipping and majority shareholder and director in Singapore Star Holdings. In other words, until October 2011, Mr Darsan had no involvement in most of the 17 Singapore SPVs, and only then because Mr Salgaocar brought him into the picture. In fact, Mr Salgaocar continued to exercise sole control over the significant aspects of the operations,

asset purchases and investment activities of the Singapore SPVs *even after* Mr Darsan's appointment as director and bank signatory.

The BVI SPVs

53 I turn now to my findings on Mr Salgaocar's management of the BVI SPVs. Mr Kwan's evidence was key in understanding Mr Salgaocar's role in the management of the BVI SPVs and I found his evidence to be generally credible.

54 Mr Kwan testified that Mr Salgaocar wanted to hire him and Mr Darsan made the approach on Mr Salgaocar's behalf. Mr Kwan started working for Mr Salgaocar in June 2011. Mr Kwan was initially employed by a company called Horizon Villa Limited. He was later employed by Great Hero Services Limited ("**Great Hero**"), which was incorporated by Mr Darsan in Hong Kong on 31 August 2005. According to Mr Kwan, Mr Salgaocar informed him that Great Hero was incorporated by Mr Darsan on his instructions. Mr Salgaocar explained that Great Hero would employ staff who would help him manage the sale of iron ore to buyers in China.

55 According to Mr Kwan, the iron ore sales took place as described at [18] above namely, that one of the BVI SPVs would enter into a contract with a company in India to purchase iron ore on a FOB basis save for Eltina, which bought iron ore from one of Mr Salgaocar's companies in Swaziland on a CFR basis (see [18] above). The relevant BVI SPV would then arrange a vessel through Trustworth Shipping or Regent Shipping (collectively, "**the Chartering Companies**") to load the iron ore from a port in India or Mozambique for shipment to a port in China. While the vessel was on its way to China, the BVI SPV would enter into a contract with a buyer in China for the

sale of that shipment on a CFR basis. He testified that this arrangement was in place from the time he started working with Mr Salgaocar until he stopped in or around March 2014.

56 There are three key points from Mr Kwan's testimony.

57 First, Mr Kwan treated Mr Salgaocar as the owner-operator of the BVI SPVs. Mr Kwan took instructions directly from Mr Salgaocar, not Mr Darsan, and "had to seek [Mr Salgaocar's] approval on all matters" in relation to the sale of iron ore. Mr Darsan was content to allow this and did not raise any objections. Mr Kwan also stated that in many of their conversations, Mr Salgaocar had informed him that the BVI SPVs and the Chartering Companies belonged to Mr Salgaocar. Mr Kwan stated that while documents for remitting funds would have to go through Mr Darsan as he was appointed the bank signatory for these companies, Mr Darsan "never gave [Mr Kwan] any instructions in relation to and was not involved in the trade of iron ore". In this regard, Mr Darsan conceded during cross-examination that the instructions to Mr Kwan to prepare the documents to effect the transfers came from Mr Salgaocar.

58 Second, Mr Salgaocar controlled both legs of the two-legged contracts. As to the first leg, Mr Kwan testified that as the appointed representative of the BVI SPVs and the Chartering Companies, he would sign the contracts between the BVI SPVs and the vendors of iron ore in India and Swaziland, who were SMI and other companies owned by Mr Salgaocar. However, he was not involved in settling the terms of these contracts. Mr Salgaocar would give instructions to Mr Kwan through Ms Lorena D'Cunha ("**Ms D'Cunha**") to have these contracts signed. Ms D'Cunha was Mr Salgaocar's secretary in India. As to the second leg, Mr Kwan was clear that Mr Darsan never instructed him on the execution of the CFR contracts between the BVI SPVs and the buyers in

China. He testified that it was Mr Salgaocar who gave him the relevant instructions. Mr Kwan added that Mr Salgaocar "knew and personally dealt with" many of the buyers in China until 2014 and regularly held meetings with them at his office in Goa. These contracts were initially negotiated by Mr Salgaocar, who would instruct Mr Kwan to relay the key terms of the proposed CFR contracts to those buyers, including the amount, the quality and the selling price of the iron ore. Mr Kwan deposed that Mr Salgaocar provided the contacts of these buyers when he first started work as he did not have the knowledge or experience to trade in iron ore. However, as Mr Kwan gained experience, Mr Salgaocar eventually allowed him to conduct negotiations on the key terms of the CFR contracts with the Chinese buyers, although he had to seek Mr Salgaocar's approval before agreeing to any of the terms. As an example of Mr Salgaocar's instructions to him, Mr Kwan produced an email from Mr Salgaocar directing him to negotiate with "each of our regular Buyers contract for sale of 3/4 capesize shipments or quantity 400/500,000 tons depending on the size of the cape vessel". Mr Darsan was not at all involved in any of these matters.

59 Third, Mr Salgaocar's close management and oversight of the operations of the BVI SPVs demonstrates that he regarded these companies as his own. In this regard, Mr Kwan produced emails of daily reports to Mr Salgaocar which he said Mr Salgaocar required him to prepare and send in relation to the daily activities of the BVI SPVs. These daily reports, which Mr Kwan would send to Ms D'Cunha to be printed for Mr Salgaocar's review per his instructions, included information such as the sums that the companies had paid, had been paid and were expecting to be paid (in terms of ageing lists), and the status of the vessels that were shipping iron ore to China. Other emails produced by Mr Kwan show that Mr Salgaocar had emphasised that it was "very necessary" that he be provided these daily reports as he relied on them to monitor and make

decisions on the sale of iron ore. Mr Salgaocar had even admonished Mr Kwan that he needed to "change [his] style especially in the present depressed market where we are selling below cost". In another email sent by Mr Salgaocar, Mr Salgaocar told Mr Kwan to provide information on the "sold vessels, arrival disport, expected berthing and expected completion discharge" and to "consult [him] before making commitments on the sale price of each and every cargo" in his daily reports. Additionally, Mr Salgaocar would email Mr Kwan with instructions to remit funds from the BVI SPVs, including for payment to be made under the FOB contracts. All of this is *inconsistent* with Mr Darsan's claimed ownership of the BVI SPVs and the iron ore trading business.

60 While Mr Kwan copied Mr Darsan on the emails attaching the daily reports, Mr Kwan clarified that he had done so at Mr Darsan's request and because he did not see any reason to refuse. Nonetheless, when asked about these daily reports during cross-examination, Mr Darsan conceded that on his case, Mr Salgaocar would have had "no business" in receiving such details as the account balance of the BVI SPVs. It is telling that Mr Darsan was unable to produce "old emails" showing any instructions from him to Mr Kwan that he be given daily reports in the same manner as given to Mr Salgaocar. In fact, Mr Darsan only received the daily reports on copy when they were sent to Mr Salgaocar. That the emails were sent to Mr Salgaocar as the primary recipient strongly suggests that the daily reports were meant for his consumption, and not Mr Darsan's.

61 There is a further point to be made. It is significant that the FOB contracts entered into by the BVI SPVs were *only* with SMI and other companies owned by Mr Salgaocar (as mentioned at [58] above). In other words, the BVI SPVs were totally reliant on Mr Salgaocar's companies for their iron ore. Mr Darsan would have had no reason to restrict himself to only

purchasing from Mr Salgaocar's companies if he had truly been running his own iron ore trading business.

62 For these reasons, I am of the view that Mr Salgaocar's management of the BVI SPVs shows that he treated these entities as his own. This state of affairs is in keeping with the terms of the December 2003 Agreement and supports the conclusion that it was entered into.

The Singapore SPVs

(1) Trustworth Shipping

63 It is also clear that Mr Salgaocar operated and controlled Trustworth Shipping. Contemporaneous documentary evidence referred to by Mr Kwan bear this out. It shows that Mr Salgaocar arranged and negotiated the charterparties that Trustworth Shipping entered into with shipowners. The evidence includes: (a) several emails addressed to Mr Salgaocar from a shipbroker in the UK arranging charterparties on behalf of Trustworth Shipping, (b) fixture notes reflecting Trustworth Shipping as the charterer and "charts (or charts broker)" as Mr Salgaocar, and (c) an email from a staff at SMI showing a shipping schedule "in order to sell cargo". Furthermore, SMI also guaranteed charterparties on behalf of Trustworth Shipping. This would only make sense if Mr Salgaocar, not Mr Darsan, was the one who owned Trustworth Shipping. Indeed, between 8 December 2005 and 14 February 2006, the plaintiffs claim that Mr Salgaocar arranged for Sino Ling Tao (BVI) to transfer to Trustworth US$7.5m as initial working capital. Mr Kwan's evidence was that these amounts were remitted by him on Mr Salgaocar's instructions.

64 During cross-examination, Mr Darsan conceded that Trustworth Shipping *was under the management of Mr Salgaocar*. Mr Darsan tried to

explain that Mr Salgaocar's management of Trustworth Shipping was pursuant to an agreement between them (discussed below at [104]). As deposed by Mr Darsan in his affidavit of evidence-in-chief ("**AEIC**") dated 12 March 2020, Mr Salgaocar had promised to "help [him] with the logistical management of [Mr Darsan's] chartering agency" and "took charge of managing [its] operations" in accordance with what they discussed. This evidence, however, is inconsistent with an affidavit filed by Mr Darsan in OS 727 on 14 October 2015 ("**OS 727 Affidavit**"), in which he stated that he "always had majority ownership of Trustworth Shipping and it was under [his] management" up till 2014 when parties agreed that Mr Darsan would transfer certain assets to Mr Salgaocar. When asked about this discrepancy, Mr Darsan stated that he had previously so claimed as "[Mr Kwan] was involved in this and [Mr Kwan] was my man". Apart from this explanation not being cogent as it is not evident how Mr Kwan being his man was consistent with Trustworth Shipping being managed by Mr Salgaocar (as opposed to by Mr Darsan), it flies in the face of Mr Kwan's evidence as set out at [63] above. I therefore do not accept Mr Darsan's explanation as credible. The evidence suggests that it was Mr Salgaocar who owned and managed Trustworth Shipping.

(2) Sino Ling Tao (SG) and Singapore Star Shipping

65 I find that Sino Ling Tao (SG) and Singapore Star Shipping were also managed by Mr Salgaocar. In this regard, Mr Cheong's evidence, which is important, was not seriously challenged or contradicted by Mr Darsan. I make several observations.

66 First, Mr Cheong's evidence was that he regarded Mr Salgaocar as the owner and operator of Sino Ling Tao (SG) and Singapore Star Shipping. Mr Cheong deposed that after getting to know him while Mr Cheong was the

general manager of another shipbuilding company, Mr Salgaocar hired him. He stated that at a meeting with Mr Salgaocar, Mr Salgaocar explained that he owned iron ore mines in India which he sold and shipped to buyers in China, and that he wanted someone with sufficient experience to maintain and expand the shipment and transhipment fleet that was used, as well as expand the operations to include the shipping of coal from Indonesia to India. According to Mr Cheong, Mr Salgaocar "did not mention…Mr Darsan…or suggest that he (Mr Salgaocar) was at that meeting as anyone's representative or on someone else's behalf"; rather "it was clear" from the manner and substance of what Mr Salgaocar had said that he "was talking about his own businesses". Mr Cheong's testimony is that he agreed to be hired on the condition that he would only take instructions from Mr Salgaocar. Though Mr Cheong was employed by Sino Ling Tao (SG) and Singapore Star Shipping, Mr Salgaocar informed him that they were wholly owned subsidiaries of Sino Noble Holdings, which was incorporated by Mr Salgaocar. Mr Cheong deposed that he and the staff of both companies referred to Mr Salgaocar as "MD", short for "Managing Director".

67 It is clear from Mr Cheong's account that Mr Salgaocar was intimately involved in running the two companies and was regarded as their owner. Mr Cheong and the staff "took [their] instructions directly" from Mr Salgaocar and "sought [his] approval" on any decisions by the companies, including all payments for their purchases and day-to-day operations. Similar to Mr Kwan in the case of the BVI SPVs, the staff of Sino Ling Tao (SG) and Singapore Star Shipping were also expected to send Mr Salgaocar detailed daily reports. These reports consisted of a Word document that set out (a) matters affecting the companies and any matters requiring Mr Salgaocar's approval, and (b) scanned copies of a ledger recording the bank balances of the Singapore-incorporated companies which the staff would refer to collectively as "the Singapore office".

68 Second, Mr Salgaocar exercised direct control over the operations of Sino Ling Tao (SG) and Singapore Star Shipping. Contemporaneous documentary evidence shows that Mr Salgaocar had signed shipbuilding and related contracts in his capacity as the President of Singapore Star Holdings (which fully owned Sino Ling Tao (SG) and Singapore Star Shipping). Mr Salgaocar also monitored the prices of vessels and was intimately involved in acquiring them. For example, Mr Salgaocar sent Mr Cheong an email on 25 March 2009 enclosing a newspaper article on a potential decrease in iron ore prices which Mr Salgaocar told Mr Cheong would "bring shipping freight down" and which accordingly afforded an "opportunity to wait for [a] bottom price purchase" of new vessels.

69 Furthermore, Mr Salgaocar (a) directed Mr Cheong on the bidding price for vessels and what to do with them after acquisition, right down to such details as whether repairs and fitouts were required and what flag would be "convenient", and (b) sought clarifications on the daily reports that were sent. In addition to instructing Mr Cheong on the purchase of vessels, Mr Salgaocar personally negotiated contracts to purchase cranes and extension arms in order to, according to Mr Cheong, "improve the efficiency of his iron ore shipping operations", by enabling the vessels to load and unload iron ore at faster rates. Mr Cheong deposed that Mr Salgaocar ordered six ship loaders on behalf of Sino Ling Tao (SG). Contemporaneous emails show that Mr Salgaocar corresponded with the supplier and directed Mr Cheong to "push, phone and get them to make shipment", and if the supplier agreed to supply another ship loader "without any price increase", he should press for delivery of that as well. On one occasion when several ship loaders were delivered, Mr Salgaocar directed that four of them be installed onto two barges which would be moved to Goa for loading operations.

70 On the other hand, it is significant that Mr Darsan has adduced no evidence of being involved in the operations of Sino Ling Tao (SG) and Singapore Star Shipping. Mr Darsan's explanation that Mr Salgaocar was to manage the Shipping Venture (at [40] above) is not credible. There was no reason for Mr Salgaocar to closely manage these companies unless he regarded them as his own.

71 The findings above on the ownership of Trustworth Shipping, Sino Ling Tao (SG) and Singapore Star Shipping point to the conclusion that the Shipping Venture and consequently the Shipping Underwriting Agreement and the Running Account did not exist. I expand on this point below at [116]–[122].

(3) The Singapore Properties

72 Finally, it is clear that Mr Salgaocar was also closely involved in acquiring and managing numerous properties in Singapore that were registered in the names of various Singapore SPVs ("**the Singapore Properties**"). The Singapore Properties consists of units in (a) Residences@Evelyn; (b) Waterford Residence; (c) WCEGA Tower; (d) Newton Imperial and (e) The Sail @ Marina Bay. I make two points.

73 First, Ms Tan's testimony is that it was Mr Salgaocar who made the decisions on the purchase of the Singapore Properties. Ms Tan's testimony is critical, as she, is the real estate agent who assisted Mr Salgaocar in acquiring these properties and thereafter helped to manage them for him. I consider Mr Salgaocar's purchase of the Singapore Properties *in seriatim.*

74 In relation to the units purchased at Residences@Evelyn, Ms Tan deposed that she met Mr Salgaocar at the show flat at Evelyn Road on or about 18 January 2007. According to her, Mr Salgaocar decided to purchase four units

in the development that day. Subsequently, Mr Salgaocar directed Ms Tan to speak with his accountant, Mr Ramanujam ("**Mr Ramanujam**"), to prepare the booking forms for those units. The four units were registered in the names of Millers Capital, Cargills Investments, Sino Noble and Albana Investments respectively.

75 In relation to the units at the Waterford Residence, Ms Tan's testimony is that Mr Salgaocar decided to purchase 24 units in the development sometime in January 2007, after he had reviewed brochures which she had handed to him. Ms Tan was again told to speak with Mr Ramanujam to prepare the booking forms. Newton Noble then purchased 17 units and Capital Glory purchased seven units in the development.

76 WCEGA Tower was a commercial development. Mr Cheong deposed that he had suggested to Mr Salgaocar to purchase an office unit there, as Sino Ling Tao (SG) and Singapore Star Shipping's office premises were too small. Mr Salgaocar thus requested Mr Cheong to contact Ms Tan to discuss the purchase of a number of units in WCEGA Tower. Ms Tan confirmed that she met Mr Salgaocar in or around June 2008 for that purpose. During their meeting, Mr Salgaocar explained that the purchase was to expand the available office space for his employees. After a short discussion, Mr Salgaocar decided to purchase 60 office units in the development. These units were purchased by Sino Noble for S$24m following negotiations between Ms Tan (which were conducted on Mr Salgaocar's behalf) and the developer of WCEGA Tower.

77 In relation to Newton Imperial, the evidence of Ms Tan, Mr Kwan and Mr Cheong was that Mr Salgaocar had informed them in or around 2007 that he was developing a condominium called Newton Imperial in Newton Road. The evidence is clear that Mr Salgaocar dealt with the banks to obtain financing for

the project. This resulted in (a) a term loan for the purchase of the site and the construction cost for the development, which stipulated, as a condition precedent, a letter of undertaking *from Mr Salgaocar* to furnish his personal guarantee, and (b) a guarantee from Mr Salgaocar for the term loan. Mr Darsan conceded that he was not involved in securing financing and was not approached by the banks for any collateral or guarantee. I expand upon these points below at [125]–[129].

78 Ms Tan deposed that she attended at least three to four of the many meetings and site visits between Mr Salgaocar and the architects and contractors for the project. These meetings were organised by Mr Salgaocar. Mr Salgaocar would comment on aspects of individual apartments that were under construction, such as the marble for the apartment floor and the size of the four-bedroom units, which he regarded as too cramped (proposing instead that they be converted into three-bedroom *en suite* units). Mr Salgaocar's detailed observations suggest his intimate involvement in the project. Finally, when Newton Imperial obtained its Temporary Occupation Permit in or around 2011, it was Mr Salgaocar who asked Ms Tan to market the development, save for six units which he wished to keep for his family. These are the same units which Mr Darsan allegedly misappropriated to himself and the second defendant (see [28(c)(i)] above).

79 In relation to The Sail @ Marina Bay, Ms Tan deposed that in 2007, Mr Salgaocar informed her that he owned seven units on the 36th floor. Mr Salgaocar instructed Ms Tan to take over the keys, and handed her a letter from the developer which stated that the units were held by Sino Diamond Investments Pte Ltd, Mi Amorey Investments and Agapimo Investments. These were companies owned by Mr Salgaocar. Mr Salgaocar gave Ms Tan $50,000

in cash to refurbish the units and instructed her to lease and sell those units (as the case may be), which she did.

80 Ms Tan's interactions with Mr Salgaocar in relation to the purchase and management of the Singapore Properties is consistent with the plaintiffs' case that Mr Salgaocar treated the properties as his own.

81 Ms Tan's evidence as set out above was not challenged during cross-examination by Mr Darsan. In fact, Mr Darsan accepted that Ms Tan had no reason to lie and conceded during cross-examination that the manner in which Mr Salgaocar behaved in relation to properties such as the Newton Imperial development was consistent with ownership.

82 Second, Mr Salgaocar's ownership of the Singapore Properties is corroborated by an email sent by Mr Cheong to UOB Bank Ltd ("**UOB**") in order to obtain financing for shipbuilding contracts. The email dated 23 June 2009 notified a Ms Cindy Kong from UOB that the companies owned by Mr Salgaocar in Singapore include "a condominium development, 4 floors of light industrial offices in WCEGA Tower and 35 units of apartments in various developments".

83 For these reasons, I find that Mr Salgaocar's control and management of the Singapore SPVs is consistent with the plaintiffs' position that he was the owner-operator of Trustworth Shipping, Sino Ling Tao (SG), Singapore Star Shipping and the Singapore Properties (and the SPVs in whose names the Singapore Properties were registered). This state of affairs is in keeping with the terms of the December 2003 Agreement and points to its existence.

The implausibility of the defence and counterclaim

84 I turn now to consider Mr Darsan's defence and counterclaim in relation to the BVI SPVs and the Singapore SPVs. In summary, I find his defence and counterclaim implausible. The analysis and conclusion above that the BVI SPVs and the Singapore SPVs were Mr Salgaocar's speak in turn to the unsustainability of the defence and counterclaim. If the BVI SPVs and Singapore SPVs were Mr Salgaocar's, they could not have belonged to Mr Darsan. This points to the existence of the December 2003 Agreement and 2003 Trust, and the non-existence of the Shipping Venture, the Shipping Underwriting Agreement and the Running Account. The analysis which follows must be seen through this lens.

85 Mr Darsan claims that with the exception of Ling Tao (which Mr Salgaocar had already been using at the time that Mr Darsan allegedly became involved in the iron ore trading business, in late 2004), the rest of the BVI SPVs belonged to him. However, there are multiple difficulties with Mr Darsan's evidence as to how he became involved with the BVI SPVs. I do not find his evidence credible. I make several points.

86 First, Mr Darsan's qualification as regards Ling Tao itself raises questions. I note that the position that Ling Tao was in fact established by Mr Salgaocar was only taken by Mr Darsan in the first round of amendments that he had made to the defence on 30 October 2015. In contrast, in the first iteration of his defence, Mr Darsan had taken the position that *all* the SPVs which Mr Salgaocar asserted that he had set up in the SOC (*ie*, those listed at [10] and [14]–[15] above, *including Ling Tao*, were established by Mr Darsan). Similarly, in Mr Darsan's OS 727 Affidavit filed on 14 October 2015, he had taken the position that all the SPVs that had been mentioned by Salgaocar,

including Ling Tao, were "in fact established by [himself]" and "funded by monies which [he] had raised". When queried about the inconsistency on the ownership of Ling Tao, Mr Darsan responded that it was an "oversight" for him to have included Ling Tao as he "did not go through minutely the details of the companies" and was "referring to all my trading companies". This is not a convincing explanation and does raise doubts on how he came to be involved in the iron ore trading business. However, I do not rest my conclusion on this alone and I go further.

87 Second, Mr Darsan's version of events is not credible. As mentioned in [35(d)]–[35(f)] above, Mr Darsan deposed that Mr Salgaocar had approached him in late 2004, asking Mr Darsan to buy iron ore from him to sell to the Chinese market, as he was facing payment issues with Chinese buyers. According to Mr Darsan, it would be a "win-win" as SMI would sell iron ore to him or his designated business entity at prices higher than what he would have received from the Japanese buyers, though Mr Darsan would "effectively be assuming the risk of non-payment or delayed payment by the Chinese buyers". Mr Darsan deposed that Mr Salgaocar had confidence this would work given Mr Darsan's familiarity with Chinese buyers, albeit in a different industry. That Mr Darsan had business contacts in China and was located in Hong Kong would enable him to oversee the enforcement of payments more effectively. Sino Ling Tao (BVI) was thus set up in or around November 2004. At that time, Mr Salgaocar had been selling to the Chinese market through three companies – Ling Tao, GBA Products and Sino Source.

88 Yet, Mr Darsan adduced no evidence of difficulties in collection allegedly faced by Mr Salgaocar from Chinese buyers. All we have is Mr Darsan's bare assertion. Further, contracts produced by the plaintiffs show that even around a year after Sino Ling Tao (BVI) had been set up, SMI continued

to sell to Sino Source in addition to selling to GBA Minmetals, a company which Mr Darsan claimed that he had set up in order to undertake iron ore trading. If Mr Salgaocar had indeed been "facing difficulties in collecting money" and needed Mr Darsan's help, it is odd that Mr Salgaocar would continue to sell to Chinese buyers through Sino Source even after the purported agreement between him and Mr Darsan in late 2004. Mr Salgaocar would have surely channelled all his sales through companies incorporated by Mr Darsan specifically for this purpose, *ie*, Sino Ling Tao (BVI) and GBA Minmetals. Mr Darsan's explanation for this as a likely "long-term commitment" to Sino Source or that Mr Salgaocar might not have had problems with all the buyers is unconvincing, convenient and unsubstantiated.

89 On his first explanation, I observe the contracts with Sino Source do not appear to be long-term contracts, nor does Mr Darsan have evidence of such long-term commitments on Mr Salgaocar's part. That aside, Sino Source was Mr Salgaocar's company and it would have been easy for Mr Salgaocar to unwind any long-term commitments if they did exist.

90 The second explanation holds even less water. *SMI did not bear payment or credit risk of the Chinese buyers*. Under SMI's contracts with Sino Source, SMI would obtain payment against certain documents provided "through negotiating and opening Bank after reimbursement of sale proceeds".

91 The contracts between SMI and the intermediaries (Ling Tao, Sino Source and GBA Metals) provided that full payment would be made to SMI for the FOB value of the shipment after receipt by the intermediaries of the invoice and other supporting documents. In turn, the contracts between Ling Tao, Sino Source and GBA Products and the Chinese buyers provided for payments under letters of credit arrangements upon the relevant documents being presented. It

therefore appeared to be the case that the payments were structured such that SMI would receive them upon the relevant documents being presented to the issuing or negotiating bank. There was no credit risk to speak of.

92 When this was pointed out to Mr Darsan during cross-examination, he claimed that the risk was of Sino Source or GBA Products defaulting on its payment obligation to SMI, if the Chinese buyers were unable to pay the former. This was of course contrary to the point above that there was no credit risk given the letter of credit arrangement. Mr Darsan also claimed that there were issues concerning payment from Sino Source without producing any evidence to back this up. However, this is a non-starter as if Sino Source did not have a credit risk because of the letter of credit arrangement, then SMI would not have any difficulties *in collecting money from Chinese buyers*. In truth, Mr Darsan was not able to offer any credible explanation.

93 Third, the fact that in the defence, Mr Darsan had referred to Ling Tao, GBA Products and Sino Source as "SPVs" that "[Mr] Salgaocar was selling iron ore to China through" suggests that they were in fact Mr Salgaocar's all along. When asked about this inconsistency, Mr Darsan responded that this was another "oversight" and he did not know why he had so referred to them. Mr Darsan further explained that only Ling Tao should have been referred as an SPV, on the understanding that an SPV was a company owned by Mr Salgaocar that was incorporated to perform particular acts. Mr Darsan's explanation is difficult to accept as these are specific acknowledgements by Mr Darsan of Mr Salgaocar's ownership.

94 Fourth, Mr Darsan's claim that Mr Salgaocar assured him that (a) there would be the "necessary advisory and logistical support", (b) he could "pull out after a short trial period" of about six months if he felt that things were not

working out, and (c) he would be indemnified for any losses sustained during the trial period, is remarkable. In other words, this was a risk-free venture for Mr Darsan completely supported by and underwritten by Mr Salgaocar. Mr Darsan stated that the indemnity was relevant to his decision to join the iron ore trading business. However, it is unclear why Mr Salgaocar would even offer to underwrite Mr Darsan's losses. The very purpose of the arrangement, according to Mr Darsan, was for Mr Salgaocar to avoid assuming the credit risks that he was allegedly facing by leveraging Mr Darsan's relationships in the Chinese market. There is a further point. Any loss that Mr Darsan would incur would be as a result of the BVI SPVs having to pay for the iron ore purchased. But the vendors of the iron ore were companies owned by Mr Salgaocar. There would be no need for an indemnity from Mr Salgaocar. It is absurd to believe that in effect, Mr Salgaocar was indemnifying Mr Darsan for a liability that was owed to one of his companies. Indeed, the importance of the indemnity to Mr Darsan is not apparent given the "father-son" relationship that Mr Darsan claims he had with Mr Salgaocar.

95 Fifth, Mr Darsan has not offered a compelling reason why Mr Salgaocar would require his involvement in the iron ore trading business. As testified by Mr Kwan (see [58] above), the contacts of all the Chinese buyers were Mr Salgaocar's. It was Mr Salgaocar who negotiated the CFR contracts with these buyers. There is also no evidence that prior to 2004, Mr Darsan had any iron ore trading experience let alone in relation to the Chinese markets. Mr Darsan accepts this. At the material time, Mr Darsan's business was solely in gemstones and polymers, which is evidently not related to iron ore trading and certainly did not extend to the Chinese market (at least there is no evidence that it did). In other words, Mr Darsan did not have any relevant relationships in the iron ore business generally, let alone in the Chinese market. During cross-

examination, Mr Darsan conceded that he did not know the identity of a *single* Chinese buyer at that time and only knew, "not in minute details", what the general reasons were for the Chinese buyers to delay or withhold payments. If so, it is inconceivable how he would have been able to assist Mr Salgaocar with payment issues concerning the Chinese buyers. It is pertinent that Mr Darsan did not call for a list of outstanding account receivables from Chinese buyers prior to accepting Mr Salgaocar's offer. In other words, by his account, Mr Darsan went into the venture blind. He was prepared to enter the iron ore business without specifically knowing which buyers were the issue and what their reasons were for defaulting. Mr Darsan would have the court believe that he accepted Mr Salgaocar's offer with complete opacity as to the situation he would be facing. The contrived nature of the explanation for his involvement was apparent during cross-examination:

> Q: … If he was facing trouble selling or collecting payment from his contractual counterparty in China and had the option of continuing to sell to Sino Source and [GBA Products], why would he come to you, someone with no background, knowledge or experience in iron ore trading, to ask you to be the buyer?
>
> A: Because I was – he had confidence that I will be a good negotiator and a good expert in trading and collecting the money from the Chinese buyers.
>
> Q: But what did it matter to him, because if he continued to sell to [GBA Products] and Sino Source, he would look to them for payment and there is no evidence they were not paying. Why did he need to come to you, sir?
>
> A: The reason being that he must be having some difficulties with them too, which he did not explicitly tell me, that's why he came to me … I told him that I will be able to collect more efficiently than what he could have done.
>
> Q: You knew the iron ore buyers, did you, in October 2004, you knew them, yes?
>
> A: *I'm talking of the art of trading.*
>
> [emphasis added]

96 Further, Mr Darsan could not explain why, if it was indeed the case that Mr Salgaocar was facing payment problems from Chinese buyers, he would use a very similar name for his own company namely, Sino Ling Tao (BVI). Mr Salgaocar also sold through Ling Tao. During cross-examination, he stated that he had forgotten the meaning of "Sino Ling Tao", but recalled that "it was a good auspicious name, Chinese trade, something". On the other hand, Mr Cheong deposed that he was told by Mr Salgaocar that he (Mr Salgaocar) had chosen the name "Sino Ling Tao" in relation to the twelfth defendant, Sino Ling Tao (SG), as it combined the words "Sino", another name for "Chinese", and "Ling Tao" which is Mandarin for "leader". Similarly, Mr Darsan could not explain why he would have later chosen the name "GBA Minmetals" if that had already been used by GBA Products, an unrelated company according to him, save to say that it "was a good word for the Greater Bay area".

97 This suggests that it was Mr Salgaocar who incorporated Sino Ling Tao (BVI) and GBA Minmetals. This is reinforced by a point concerning the appointment of staff that Mr Darsan purportedly started Sino Ling Tao (BVI) with. Mr Darsan testified that Ms Chiang had assisted in the running of Sino Ling Tao (BVI) from its incorporation in or around November 2004, as "[s]he was looking into the affairs of Mr Salgaocar's Ling Tao Trading". Yet, he had deposed that he employed her, Mr Kwan and a clerical assistant Ms Esther Tam ("**Ms Tam**") in October 2005, as part of his "own team in Hong Kong to oversee and manage the operations of [his] iron ore trading business". Mr Darsan was unable to explain away the inconsistency. His inability to keep a consistent narrative suggests that it was Mr Salgaocar, not Mr Darsan, who had set up the companies and hired Mr Kwan and Ms Chiang. That was in fact Mr Kwan's evidence.

98 Sixth, on a related note, Mr Darsan's account of how he eventually managed to make the iron ore business work where Mr Salgaocar had failed is unconvincing. He claimed that once he got involved in the business and understood the type of buyers available, he had a "very defined strategy" to only sell to owners of steel mills, as opposed to traders in China or Hong Kong. This was because they would be interested in consistent and regular supply and would have lower chances of default or disputes. He stated that "maybe one or two" had been part of the group of buyers Mr Salgaocar had originally been selling to, but could not remember whom. According to Mr Darsan, he had come up with this strategy all on his own.

99 Mr Darsan's account is difficult to accept. As a person with vast experience and relationships, including the iron ore trade in the Chinese market, it is inconceivable that Mr Salgaocar could not have known that these steel mill owners were potential buyers. It is equally inconceivable that Mr Salgaocar, with his experience and contacts, would not have been able to formulate the same strategy devised by a novice (Mr Darsan) in the business, if that indeed offered the solution. In fact, Mr Darsan had deposed that Mr Salgaocar had shared with him in December 2003 or January 2004 that "Chinese steel mills were looking to purchase iron ore from India, and the demand from Chinese steel mills for iron ore was growing". It therefore could not have been a strategy that Mr Darsan formulated. Further, even if Mr Darsan had indeed identified this strategy, it is simply not believable that Mr Salgaocar would have been content to allow Mr Darsan to continue making such profit for himself from this group of buyers. After all, the iron ore was from mines owned by his companies and the contacts in the Chinese markets were his. If the solution to Mr Salgaocar's payment issues was simply a matter of strategy, there would be no need for Mr Salgaocar to trade through Mr Darsan – Mr Salgaocar could have

easily circumvented Mr Darsan and earned the profits himself. After all, the profits were significant. According to Mr Darsan, accumulated profits of Sino Ling Tao (BVI) over a period of about five months alone was US$32.6m (see [38] above).

100 Seventh, Mr Darsan's account of the "falling out" leading to the incorporation of GBA Minmetals was also difficult to believe. As noted at [38] above, Mr Darsan claimed that Mr Salgaocar had in or around March 2005 started to ask to share in some of the profits made by Sino Ling Tao (BVI), and threatened to raise prices for the iron ore sold by SMI. This is odd considering that as conceded by Mr Darsan, Mr Salgaocar had all the relationships with the Chinese buyers and knew how to run the business. Had Mr Salgaocar been truly dissatisfied about the profits purportedly being made by Mr Darsan, he would simply have conducted the business on his own, bypassing Mr Darsan, as noted at [99] above. At the same time, it is not clear why it would truly have been a threat to Mr Darsan for SMI to increase its prices for the iron ore sold to Sino Ling Tao (BVI). If so, it would surely have been open to Mr Darsan to decide not to purchase from Mr Salgaocar, especially in light of strong demand for iron ore from China. Apart from having been in the business of iron ore trading for five months, Mr Darsan had also, on his own account, set up a chartering company (as discussed at [104]) below. He therefore could have walked away and dealt with another supplier of iron ore. Mr Salgaocar would surely have known this (if this was the case). This suggests that *there were in fact no such threats by Mr Salgaocar*.

101 In the same vein, Mr Darsan's explanation for the sum of US$32.6m that Mr Salgaocar came to owe him for the alleged purchase of shares in Sino Ling Tao (BVI) is also contrived. This sum is alleged in the SOC as transferred on Mr Salgaocar's directions from Sino Ling Tao (BVI) to GBA Minmetals *as*

initial working capital for GBA Minmetals. The transfers were in four instalments between 16 January 2006 and 3 May 2006. On the other hand, Mr Darsan asserts that this sum was payment for shares in Sino Ling Tao (BVI) *purchased by Mr Salgaocar from Mr Darsan*. This requires explanation as the transfers were made from Sino Ling Tao (BVI) to GBA Minmetals and not from Mr Salgaocar to Mr Darsan (as purchaser and vendor). Mr Darsan's explanation is not credible. In his AEIC dated 12 March 2020, Mr Darsan asserts that as part of their agreement for the purchase of the shares, Mr Salgaocar asked Mr Darsan to make his son, Mr Arjun Salgaocar ("**Mr Arjun**"), and his son-in-law, Mr Gautam Radia ("**Mr Gautam**"), shareholders of Sino Ling Tao (BVI), with the result that the shareholders would be Mr Salgaocar, Mr Arjun and Mr Gautam. It is not apparent why this would be necessary as Mr Salgaocar could have himself transferred shares to Mr Arjun and Mr Gautam following his purchase of shares from Mr Darsan. Mr Salgaocar would have complete control of Sino Ling Tao (BVI) as Mr Darsan would also step down from his post as a director. In attempting to explain during cross-examination, Mr Darsan took an illogical position. He claimed that since Mr Arjun and Mr Gautam would become shareholders of Sino Ling Tao (BVI), they would also be liable to him for the sum of US$32.6m:

> Q: The obligation, according to your own narrative, to pay for the [US$]32.6[m] was not [Mr] Gautam's or [Mr] Arjun's but Mr Salgaocar's, correct?
>
> A: No.
>
> Q: Do you agree that the person who was supposed to pay you the [US$]32.6[m] was Mr Salgaocar, according to your narrative?
>
> A: *No, the shareholders and directors who will be responsible to pay the debt.*
>
> Q: … So going by your own statements, it was for him to pay the equivalent of [US]$32.6[m], correct?

> A: *Yes, but if he has transferred the company to Arjun and Gautam, as the shareholders and directors of the company they will also be liable to fulfil the debt of the company … because the company is going to pay me.*

The absence of logic in the explanation is only explicable if one accepts, which I do, that Mr Darsan was being untruthful.

102 There is a further point. As noted at [39] above, according to Mr Darsan, GBA Minmetals was set up by Mr Darsan after Mr Salgaocar stated he could only pay the agreed US$32.6m in instalments as he had "cash-flow problems". In response to Mr Darsan's unhappiness, Mr Salgaocar apparently suggested that Mr Darsan could get paid more quickly "if [Mr Darsan] helped him follow up with the Chinese buyers" on outstanding payments to be made to Sino Ling Tao (BVI). Mr Salgaocar then suggested, and Mr Darsan agreed, that Mr Darsan could "resume [his] iron ore trading business and continue to buy iron ore from [SMI]." This all sounds doubtful. First, it is difficult to believe that Mr Salgaocar was prepared to purchase the shares in Sino Ling Tao (BVI) for US$32.6m without realising that he did not have sufficient funds to pay the purchase price. Second, on Mr Darsan's case, payment issues with Chinese buyers should not have existed. He was brought to address that very issue.

103 In the final analysis, Mr Darsan has failed to provide a cogent explanation as to why Mr Salgaocar would have wanted him in the picture. Having set up and traded through Ling Tao, Mr Salgaocar could have easily repeated the exercise with the other BVI SPVs. Mr Darsan's explanations on the need for his involvement, as analysed above, do not pass muster and underscores the conclusion that the BVI SPVs were in fact Mr Salgaocar's.

The Singapore SPVs

(1) Trustworth Shipping

104 Mr Darsan's explanation for how he came to set up Trustworth Shipping as "[his] own company" is not convincing. He deposed that during one of Mr Salgaocar's visits to Hong Kong, Mr Salgaocar had discussed with him the logistics of the iron ore trading business. Mr Salgaocar had advised him to establish a charter agent company to "complement" the iron ore trading business of Sino Ling Tao (BVI). The company had been using external chartering agents and "due to the high demand for iron ore in the Chinese market at that time, [Mr Salgaocar] was concerned that there were not enough vessels" to ship the iron ore that Sino Ling Tao (BVI) was purchasing from SMI for sale to the Chinese market.

105 Mr Darsan was told he would be able to enjoy savings on agency fees by establishing a charter agent. Mr Salgaocar would be able to maximise his sales from SMI to Sino Ling Tao (BVI) "without having to worry about difficulties in arranging for shipment of iron ore to buyers in China". While he had reservations about venturing into another business in which he had little experience, Mr Darsan took comfort in the fact that Mr Salgaocar's family was involved in the shipping business. In fact, Mr Salgaocar was the general manager of one such company, Damodar Bulk Carriers Ltd. According to Mr Darsan, Mr Salgaocar told him he would "help [him] with the logistical management of [his] chartering agency" and Mr Darsan agreed, as he "trusted" Mr Salgaocar. I have difficulty with Mr Darsan's evidence, and make four points.

106 First, Mr Darsan's explanation for the rationale for a charter agency company kept changing. He started by explaining that a charter agency

company could address vessel shortage as one would then "be able to do a time charter and have a vessel totally at your service". When it was pointed out that a time charter would have been possible regardless, he stated that the idea was "to have the chartering business in a separate company where it is identifiable that the chartering is done in a separate company". Mr Darsan then stated that there was potential to enter the chartering business and possibly deal with other exporters on sub-charters. Mr Darsan conceded that this had not been mentioned on affidavit. In any case, this was odd since the purpose of the chartering business was, according to him, to deliver iron ore for Mr Salgaocar's companies to Chinese buyers using the BVI SPVs as intermediaries, and not to handle cargo from other exporters.

107 Second, Mr Darsan was unable to provide any evidence showing that he had in fact capitalised Trustworth Shipping when it was incorporated on 2 March 2005. He asserted that he had done it using his personal funds in Hong Kong. However, he could not remember the amount used to fund the start-up capital of the company. On the other hand, the plaintiffs' assert that Mr Salgaocar caused Sino Ling Tao (BVI) to transfer to Trustworth Shipping a total of US$7.5m in four transfers between 8 December 2005 and 14 February 2006 as initial working capital is corroborated by ledgers from Trustworth Shipping produced by Mr Kwan. When shown the ledger entries, Mr Darsan asserted that he did not "trust [these ledgers]". However, I accept the ledgers as credible evidence. They were kept for, *inter alia*, Trustworth Shipping's purposes, and Mr Kwan, who had access to and produced them, testified to their authenticity. I accept Mr Kwan's evidence that these ledgers were generated by Ms Chiang in the course of business (as with all ledgers relating to the operations and businesses of the BVI SPVs; see [203] below). These ledgers speak to Mr

Salgaocar capitalising Trustworth Shipping. I therefore do not accept Mr Darsan's testimony in this regard.

108 Third, Mr Salgaocar handled litigation involving the company in England. In December 2009, Golden Ocean Group Ltd ("**Golden Ocean**"), who were vessel owners, had commenced arbitration against Trustworth Shipping and SMI. Golden Ocean also commenced a suit against the same parties in the English High Court in March 2010. Golden Ocean had claimed that Trustworth Shipping repudiated a charterparty; that Trustworth Shipping had been nominated by SMI as charterers; and that the charterparty was guaranteed by SMI. Although Mr Darsan referred to the decision of the English High Court in 2011 in his AEIC dated 12 March 2020, he stated that he had not read the decision in full. Such detachment from significant litigation concerning a company that he claimed to be his own is not credible. Notably, Clarke J had in the decision also observed at [11] that "the evidence indicates that [Trustworth Shipping] was, in effect, the chartering arm of SMI." This observation was never disputed by Mr Darsan.

109 Fourth, the manner in which Mr Salgaocar had managed Trustworth Shipping shows that the company was his. For example, an email from Mr Salgaocar to Mr Kwan instructed the latter to, "in addition to [his] daily report in regard to the funds… also include sold vessels, arrival disport, expected berthing and expected completion discharge". Mr Darsan was not even copied on this email. I find such instructions by Mr Salgaocar strongly suggests that Mr Salgaocar was actively involved in the operations of Trustworth Shipping. This is consistent with Trustworth Shipping being his company.

110 There is perhaps one final point that fatally exposes Mr Darsan's case. This relates to the transfer by Mr Darsan to Mr Salgaocar on 19 March 2013 of

all the shares in Trustworth Shipping that Mr Darsan indirectly held for a nominal consideration of US$1. According to the plaintiffs, this formed part of Mr Salgaocar's demands for a return of the trust assets and attests to his true ownership of Trustworth Shipping. The plaintiffs claim that as Trustworth Shipping was involved in two ongoing disputes relating to its repudiation of two long-term charterparties (including the dispute involving Golden Ocean, as mentioned at [108] above), Mr Salgaocar had repeatedly demanded in late 2012 and/or early 2013 that Mr Darsan transfer the shares so that Mr Salgaocar could oversee the resolution of these matters. Mr Darsan was at that time the sole shareholder of Singapore Star Holdings (which was the sole shareholder of Singapore Star Shipping, which in turn was the sole shareholder of Trustworth Shipping). According to Mr Salgaocar, the paid-up capital of Trustworth Shipping was US$10.25m at the time of transfer. Furthermore, the plaintiffs claim that as part of settling the dispute involving Golden Ocean, Trustworth Shipping was to make a cash payment of US$20.5m. Pursuant to Mr Salgaocar's instructions, Mr Darsan arranged to transfer this amount out of the trust assets to Trustworth Shipping on 13 May 2013, which was then paid by Trustworth Shipping to Golden Ocean. A US$9.5m bank guarantee put up by GBA Minmetals was also released to Golden Ocean as part of the settlement.

111 I do not find Mr Darsan's attempts to explain the transfer credible. Mr Darsan claims that he had "demanded that [Mr] Salgaocar buy the shares of Trustworth Shipping" for US$6.65m (Mr Darsan's estimate of the net asset value of the company at the time) as Mr Salgaocar's conduct had led to the disputes as a consequence of which, the shares were transferred. Mr Darsan asserts that the purported purchase price remains outstanding. I make two points.

112 First, Mr Darsan was not able to satisfactorily explain why there would be a transfer of a significant company within the Shipping Venture before the venture came to an end. His explanation that this was because there was litigation involving a company which Mr Salgaocar managed does not make sense in light of the Shipping Underwriting Agreement and the Running Account. Any interim loss that was suffered as a result of the litigation would have been ironed out by the Shipping Underwriting Agreement and the Running Account, when the Shipping Venture came to an end.

113 Second, it is not credible that Mr Salgaocar would have been willing to pay US$6.65m *on top* of the Shipping Underwriting Agreement, or that Mr Darsan would not have sought to recover the purchase price for shares in Trustworth Shipping. As for the US$20.5m due to Golden Ocean which he claims he paid out of personal funds, Mr Darsan could only show that the amount had been transferred into his personal account from Ultra Best Limited ("**Ultra Best**", a company owned and controlled by him) on 13 May 2013 and subsequently transferred to Trustworth Shipping on the same date. However, he did not produce any bank statements from Ultra Best to show from whom Ultra Best received the monies. In this regard, Mr Haridass' evidence was that the US$20.5m came from GBA Minmetals which is one of the SPVs subject to the 2003 Trust.

114 Thus, the fact that Trustworth Shipping was transferred to Mr Salgaocar on 9 March 2003 strikes at the very heart of the Mr Darsan's assertion that it was a Darsan entity. It undermines Mr Darsan's position on the December 2003 Agreement and the 2003 Trust.

115 I therefore do not accept Mr Darsan's evidence as regards his ownership of Trustworth Shipping.

(2) Sino Ling Tao (SG) and Singapore Star Shipping, and the Shipping Venture

116 According to Mr Darsan, pursuant to the Shipping Venture, the Shipping Underwriting Agreement and the Running Account were agreed upon and Sino Ling Tao (SG) and Sino Noble Holdings incorporated. The question of ownership of Trustworth Shipping is central to whether there was in fact the Shipping Venture and indeed whether Sino Ling Tao (SG) and Sino Noble Holdings were Mr Darsan's or Mr Salgaocar's. If Trustworth Shipping was not owned by Mr Darsan, there would be no Shipping Venture and the counterclaim, which is premised on the alleged failure of Mr Salgaocar and his estate to equalise the Running Account at the end of the Shipping Venture, as mentioned at [43]) above, will fail.

117 It follows from my conclusion above that Trustworth Shipping was a company owned by Mr Salgaocar that there was no Shipping Venture. Consequently, Sino Ling Tao (SG) and Singapore Star Shipping were not incorporated pursuant to the Shipping Venture and were Mr Salgaocar's companies, and there was no Shipping Underwriting Agreement and Running Account as alleged by Mr Darsan. The counterclaim therefore fails.

118 There are further reasons not to accept Mr Darsan's evidence that there was a Shipping Venture pursuant to which there was a Shipping Underwriting Agreement and a Running Account.

119 Mr Darsan's account of what the Shipping Underwriting Agreement entailed is inconsistent with further and better particulars (the "**F & BP**") provided on 14 February 2020. In court, he stated that the amount to be underwritten would be calculated based on the accumulated profits or losses of the company or companies (depending on the number of entities that were part

of the Shipping Venture). However, in the F & BP he had stated that the losses to be underwritten"[did] not include the losses of the companies and business that were part of or became a part of the Shipping Venture". In other words, the profits or losses of the companies were not relevant in assessing the losses to be underwritten. When queried on this inconsistency, he changed his position again and stated that the "value of the assets" of the company would also be considered.

120 I do not also accept Mr Darsan's evidence on the Running Account, which was as follows:

> A: Imagine a company XYZ and in which the contribution by … me or [Salgaocar] … is say [$]100 million … this asset of [$]100 million, in this funding of this company of [$]100 million is the share capital … that can be used to purchase assets or working capital … Second is the company does operations and at the end of every year the accounts are audited and there will be a balance sheet, a P&L account, profit and loss. The profit and loss account is say for [$]10 million … The accumulated losses or profit will be derived after all the income and expenditure and also taking some depreciation of the assets, if any, in the company. So over a period of, say, five years, and we assume that the total contribution is, say, only [$]50/[$]50 million, at the end of 5-year support the company has made – the books of the account will show, suppose it has made $8 million of profit. That means the company has got assets plus 8 million … As far as the value of the company is concerned, these assets, our [$]100, may have depreciated to say maybe [$]75 million … So accumulated profits and losses is there and the value of depreciation of the assets will have been able to calculate the total value of the company So if the company is now winded up, closed or sold, the buyer will look at the total assets in the company, it will look into the total accumulated profit for loss of the company, and then will decide that yes, the value is supposed X or Y, which will then need to be calculated that yes, we have contributed so much and now the net value of this company is coming to a certain amount, so whether it is profit or loss.

Mr Darsan subsequently sought to explain that liabilities of the company (or companies) would include "contributions into the company whether by way of share capital or directors' contributions or actuals". However, this is odd: the equity and liability of a company are two different things. The suggestion that losses over a period of time could "[wipe out] the equity of the capital" is not accurate. The lack of clarity on what would be the "total value of the company" based on which the Running Account would be settled suggests that there was in fact no agreement on the terms of the Shipping Underwriting Agreement (of which the Running Account was a component).

121 It is significant that Mr Darsan did not keep track of the Running Account. Mr Darsan claims that he had proposed settling the Running Account with Mr Salgaocar sometime in early 2014 and that on Mr Darsan's calculations at the time, Mr Salgaocar owed him US$42,650,803 and £1,000,000 under the terms of the Running Account. However, Mr Darsan conceded during cross-examination that "there was no serious attempt to keep a separate book for it". He also claims that he could not recall the "exact amounts" transferred to Sino Noble Holdings or Sino Ling Tao (SG) pursuant to, *inter alia*, the Shipping Venture, or when these payments were made. He only produced a bank account statement for Sino Ling Tao (SG) showing that he had transferred US$800,000 to the company on 30 June 2007. His failure to keep track of the contributions to the Shipping Venture is remarkable considering the sums involved. Mr Darsan's explanation that he and Mr Salgaocar would simply rely on the audited accounts of "the shipping companies" in order to arrive at the settlement of the Running Account is unconvincing, since it is unlikely such statements would have fully included each party's contributions over time. In any event, that does not explain why he would not have kept a record of his contributions himself.

The failure to keep a proper record of contributions is inconsistent with there being a Running Account.

122 I therefore find implausible Mr Darsan's claim that the Shipping Venture, the Shipping Underwriting Agreement and Running Account were agreed upon.

(3) The Singapore Properties

123 As to the Singapore Properties, Mr Darsan claims that the idea of investing in real estate came from Mr Salgaocar. Sometime in late 2006, Mr Darsan expressed concerns about the Shipping Venture to Mr Salgaocar indicating that he would prefer that some of the profits from the venture and the trading profits from the BVI SPVs be channelled towards safer investments "as a hedge in relation to [his] investment in the Shipping Venture". Mr Salgaocar suggested that real estate would be an ideal investment and, according to Mr Darsan, promised to "help [him] identify investment opportunities in the Shipping Venture and in real estate investments in Singapore" given his experience in both areas. Mr Darsan accepted this and "effectively delegated the investment of [his] monies" to Mr Salgaocar. He deposed that he would reward Mr Salgaocar "as a sign of gratitude" if the real estate investments resulted a decent profit, although he did not mention that to Mr Salgaocar. A number of SPVs were thus set up for the acquisition of properties. Mr Darsan would simply need to make available the funds needed to purchase properties identified by Mr Salgaocar. Mr Darsan further claims that the funds for these purchases were deposited into Singapore bank accounts in the name of Sino Noble Holdings and Sino Ling Tao (SG).

124 As regards Newton Imperial, Mr Darsan deposed that he and Mr Salgaocar felt that it was a "good idea for [Mr Darsan] to invest in" a residential project in Singapore. It was understood that Mr Darsan would be the main investor. Mr Salgaocar would invest if and when appropriate, and Mr Darsan would make available to him units at a favourable price if Mr Salgaocar wanted to purchase the units. Mr Salgaocar said, and Mr Darsan agreed, that Mr Salgaocar would "oversee the preparatory steps for getting the Newton Imperial Project started".

125 I do not accept Mr Darsan's claim to the Singapore Properties and make three points.

126 First, the reason given by Mr Darsan for investing in Singapore real estate is not compelling. During cross-examination, he stated that he understood "hedge" to mean that the loss of money in one set of investments could be made up for in another set of investments. Yet, if his account of the Shipping Venture and the Shipping Underwriting Agreement is to be believed, he would never suffer any loss pursuant to the Shipping Venture, which he acknowledged in court. In fact, prior to the settling of the Running Account, any profits would go Mr Darsan first, as the companies were his, with any subsequent losses covered by the Shipping Underwriting Agreement. Thus, on Mr Darsan's own case, there ought to be no concern over the need to hedge against losses.

127 Second, Mr Darsan's claim that the funds for these SPVs "could have been [from his] personal money also" (as opposed to the trading profits of the BVI SPVs, as claimed by the plaintiffs) is also not backed up by any evidence. Despite claiming that Newton Imperial was his project and he "would be paying the money [to develop it]", there is no evidence that he put up the funds. Further, he did not even approach the bank for financing (see [77] above). Rather, it was

Mr Salgaocar who approached the bank, HSBC, and guaranteed the facility (see [128] below). In addition, Mr Darsan conceded that it was Mr Salgaocar who "incorporate[d] all the companies and [handled the] audit and secretarial work", and even approached Mr Ramanujam to be a director for Great Newton Properties, the developer of Newton Imperial.

128 Significantly, Mr Darsan was unable to satisfactorily explain why, if the project and funds thereto were his, HSBC in making an offer of loan facilities to Great Newton Properties on 4 April 2007 stipulated that *a personal guarantee was to be furnished by Mr Salgaocar*. An agreement providing for the facilities was eventually entered into between Great Newton Properties and HSBC on 23 April 2007. The agreement provided that Mr Salgaocar be guarantor and obligor, with the representations and warranties given by both Great Newton Properties *and Mr Salgaocar*. Mr Salgaocar did provide the personal guarantee. An extension of the loan facility in July 2009 again required a personal guarantee from Mr Salgaocar. Further, an email from HSBC concerning a supplemental facility letter dated 4 January 2010 requested a written statement from Mr Salgaocar's private banker attesting to his unencumbered net worth. When shown the 4 April 2007 letter from HSBC, Mr Darsan first stated that "this money was never taken", and subsequently stated that he was not aware of the agreement on 23 April 2007 as he "was not doing the micro management". This is not at all credible. Mr Darsan conceded during cross-examination that the bank would have wanted the true owner to "put his own money…on the line for the development and facility" and that there was no reason to mislead the bank as to who the true owner was. He also stated that the bank did not ask him for a guarantee or any collateral as "Mr Salgaocar was talking to them".

129 Third, in the face of Ms Tan's evidence on Mr Salgaocar's acquisition of these properties (as noted at [72]–[83] above), Mr Darsan's claim that Mr

Salgaocar was in fact buying the properties for Mr Darsan is contrived. When queried on Ms Tan's evidence, Mr Darsan conceded that he could not think of any reason why Mr Salgaocar would be untruthful with Ms Tan about purchases or the ownership of the units at The Sail @ Marina Bay. Significantly, there is no evidence that Mr Salgaocar had checked with Mr Darsan first before purchasing these units. Mr Darsan could not even remember if Mr Salgaocar had asked ahead of making any particular real estate purchase. Mr Darsan attempts to explain that it was not necessary for Mr Salgaocar to consult "for each and every purchase" as he had conveyed to Mr Salgaocar his intention to invest in properties. This is not credible. Surely Mr Darsan would have wanted to be consulted on every purchase and kept abreast of the things as, according to him, Mr Salgaocar *was using his money*. These were significant investments involving large sums of money. I therefore do not accept that the Singapore Properties were beneficially owned by Mr Darsan.

Events from 2014

130 I turn now to events following Mr Salgaocar's formal claim to the trust assets in 2014. Briefly, I agree with the plaintiffs that the conduct of Mr Darsan after the demand, in particular the transfer of assets to Mr Salgaocar, is consistent with the existence of the December 2003 Agreement and the 2003 Trust.

The HFW Letter

131 Before I consider the HFW Letter, there is a prior question that needs to be answered. Mr Darsan claims that (a) certain communications between himself and Mr Haridass in June and July 2014, (b) a 11 June 2014 meeting involving him, Mr Bhoj, Mr Sud and Mr Haridass, and (c) a July 2014 meeting involving him, Mr Salgaocar and Mr Haridass were conducted on a "without

prejudice" basis and therefore subject to the cloak the privilege provides. He asserts that Mr Haridass had "sought to act as a mediator to help us reach an amicable resolution" in his discussions with Mr Salgaocar, including the July 2014 meeting. In fact, he claims that his reply to the HFW letter on 22 May 2014 ("**the 22 May 2014 Letter**") was approved by Mr Haridass as his solicitor and marked "without prejudice". Further, Mr Darsan disputes the authenticity of, *inter alia*, certain correspondence and meeting notes relating to the period between June and July 2014 as well as in 2013 and 2015, and asserts without prejudice privilege in relation to them as well.

132 I do not agree with Mr Darsan that Mr Haridass mediated the dispute between both parties. It was not possible for Mr Haridass to have acted as a mediator in June and July 2014 as he had been retained in February 2014 to act for Mr Salgaocar in relation to the recovery of the trust assets. I find it doubtful that Mr Haridass would have accepted a retainer from Mr Darsan and advised him on the 22 May 2014 Letter in such circumstances. Mr Haridass denies this and I accept this evidence. It is not credible that Mr Haridass, a very experienced lawyer, would have accepted a retainer from Mr Darsan after being appointed by Mr Salgaocar in relation to the same dispute. Mr Darsan's narrative is made all the more unbelievable by the fact that the 22 May 2014 Letter was addressed to Mr Haridass. When questioned during cross-examination on why he would write a without prejudice letter to Mr Haridass (who he claimed was his lawyer), Mr Darsan's response was that he had simply written whatever Mr Haridass had dictated for him to write:

> Court: I understand your evidence to be that you had engaged Mr Haridass as your lawyer in relation to the demand that was received from Holman Fenwick; is that correct?
>
> A: Yes.

> Court: If so, why would you write a "without prejudice" letter to your own lawyer?
>
> A: No, *that's what he dictated, that's what I wrote.*
>
> Court: Why would you do that? Why would you write a WP letter to your own lawyer?
>
> A: I tell you what, at that time, *I went to him and I told him and whatever he instructed me that way, I wrote the letter.* To -- just to add one more point, even this phrase, you know, "hold his hands", that -- you know, that was also his grammar or his-- the thing. *So, whatever he said, I just wrote it.*
>
> [emphasis added]

Mr Darsan's contrived explanation does not pass muster and I find that Mr Haridass could not have therefore advised Mr Darsan to write the 22 May 2014 Letter.

133 Notwithstanding these prefatory observations at [132] above, I agree that the discussions involving Mr Darsan, Mr Salgaocar and Mr Haridass during this period was "without prejudice". Before giving my reasons, a brief overview on the applicable legal principles on privilege is appropriate.

134 The privilege, as statutorily enacted in s 23 of the Evidence Act 1893 (2020 Rev Ed) ("**the Evidence Act**"), "[governs] the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish" (*Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433 ("***Sin Lian Heng***") at [9], citing *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1299; *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 ("***Mariwu Industrial***") at [24]). It applies where there is the existence of a dispute and a genuine attempt to compromise it (*Compañia De Navegación Palomar, SA. And others v Ernest Ferdinand Perez*

De La Sala and another matter [2017] SGHC 14 ("***Ernest Ferdinand***") at [489]; *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 ("***Cytec Industries***") at [17]). Furthermore, it applies only to admissions against the maker's interest, as it would discourage settlement if the maker believed that such admissions (made in attempts to so compromise) could be held against him (*Mariwu Industrial* at [31]).

135 An "admission" is further defined by s 17 of the Evidence Act as "a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned". A genuine invitation to negotiate a settlement has been found to be sufficient, in and of itself, to constitute an admission against interest for the purposes of attracting "without prejudice" privilege (*Ernest Ferdinand* at [494]). At the same time, the availability of the privilege is not dependent on the use of the words "without prejudice" and whether a communication can claim such privilege is determined by objectively construing it as a whole in the context of the factual circumstances (see *Comptroller of Income Tax v BLO and another matter* [2017] 5 SLR 230 at [32]; *Cytec Industries* at [16]). However, where a communication is in fact marked "without prejudice", the presence of such words places the burden of persuasion on the party who contends that these words should be ignored (*Sin Lian Heng* at [60]).

136 As the 22 May 2014 Letter was expressly marked "without prejudice" and anticipated their meeting in June 2014, the plaintiffs had to show why the discussions surrounding this meeting ought to be admitted. In this regard, I did not agree with their argument that the privilege does not apply as there was no dispute. They rely on *Kim Eng Securities Pte Ltd v Tan Suan Khee* [2007] 3 SLR(R) 195 ("***Kim Eng Securities***") at [42] where Belinda Ang J (as she then

was) stated that privilege did not apply to apparently open communications that were designed only to discuss the repayment of an admitted liability (as opposed to intended to negotiate and compromise a disputed liability). In *Kim Eng Securities* at [51], Ang J found that an open email which referred to an "Amnesty" in the subject heading and referred to "forgiving" a debt in the main body of the text was not privileged, as it constituted an acknowledgment of liability such that there was no longer any dispute between parties. However, the 22 May 2014 Letter cannot be read as an acknowledgment of liability such that there remained no dispute. This is borne out by the very nature of a holding letter to the HFW Letter.

137 Furthermore, even if Mr Darsan could be said to have admitted liability in the 22 May 2014 Letter or subsequent correspondence, according to Mr Haridass, there remained at that point a dispute in terms of commission payable by Mr Salgaocar to Mr Darsan. As such, "without prejudice" privilege would have attached insofar as there remained a dispute as to the extent of that liability (*Sim Lian Heng* at [48]; [50]–[58]). It is clear that, on an objective reading, the correspondence and meetings that followed the 22 May 2014 Letter (see [145] above) were centred on the dispute between Mr Darsan and Mr Salgaocar. The correspondence and meetings are thus cloaked by the privilege. I say no more.

138 The plaintiffs also argue for the application of the exception that where there is a settlement, without prejudice communications would be admissible (Colin Passmore, *Privilege* (Sweet & Maxwell, 4th Ed, 2020) ("***Passmore on Privilege***") at para 10-149, citing *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378 ("***Standard Telephones***")). They submit that since Mr Darsan has pleaded that pursuant to "without prejudice" discussions, he reached two oral agreements with Mr Salgaocar in connection with 22 units at Newton

Imperial and shares in Winter Meadow respectively, Mr Darsan cannot claim privilege over the communications leading up to these agreements.

139 However, I disagree that the exception applies. The relevant passage in *Passmore on Privilege* cites *Muller and another v Linsley and Mortimer* [1996] PNLR 74 ("***Muller***") at 79, where Hoffmann LJ (as he then was) observed that:

> Many of the alleged exceptions to the rule will be found on analysis to be cases in which *the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute.* Likewise, a without prejudice letter containing a threat is admissible to prove that the threat was made … [emphasis added]

Thus, in *Standard Telephones*, which involved a claim by an employee against his employers for damages for personal injuries suffered, the issue arose as to whether the parties had reached an agreement for the liability to be split 50/50. Danckwerts LJ noted that as negotiations proceeded, various letters showed plainly there was an agreement between the plaintiff's solicitor and the insurance agent that the liability was not to exceed a figure of 50% of the damages which would be assessed; this was "constantly referred to as an 'agreement' in various letters" (*Standard Telephones* at 1381). It was in this context that he was of the view that the letters were admissible as "the point was whether there had been a concluded agreement of any kind between the parties in accordance with that correspondence and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence" (at 1382).

140 However, the issue here is not whether there was a concluded settlement as regards the 22 units in Newton Imperial or the shares in Winter Meadow. The issue concerns the existence of the December 2003 Agreement and whether Mr Darsan has breached his duties as trustee and fiduciary in relation to the 2003 Trust. There is no allegation that there was a concluded settlement of that dispute or that the alleged agreements involving Newton Imperial and Winter Meadow have relevance to the same. Accordingly, the exception relied upon by the plaintiffs does not apply. Moreover, the present case is not one where Mr Darsan had sought to adduce evidence of the negotiations, which would then suggest that he had waived his privilege in respect of the same (*Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] 2 SLR(R) 168 ("***Lim Tjoen Kong***") at [28]). In fact, a defendant may simultaneously object to the admission of settlement discussions on the basis of "without prejudice" privilege and provide his own version of events. That does not amount to a waiver of the privilege (*Lim Tjoen Kong* at [27]; *Sobell v Boston* [1975] 1 WLR 1587 at 1592–1593). This is what Mr Darsan did.

141 That said, although the privilege attaches to the content of communications, the *fact* that they took place may be referred to (as mentioned at [139] above (see *Walker v Wilsher* (1889) 23 QBD 335 ("***Walker***") at 338–339 and *RWE NPower plc v Alstom Power Ltd* [2009] 12 WLUK 734 ("***RWE NPower***") at [54]). This is at least where that fact is relevant to an issue in the case (*Briggs and others v Clay and others* [2019] EWHC 102 (Ch) at [128]). For example, in *Walker*, it was acknowledged such a fact may be relevant on a question of laches. In *RWE NPower*, the issue was whether a dispute had crystallised at a certain date. Equally, the conduct pursuant to without prejudice discussion would similarly be relevant provided that such conduct is not similarly cloaked, In the present case, the conduct of Mr Darsan after the

demand was made in the HFW Letter is pertinent as it is not consistent with his position that the December 2003 Agreement and the 2003 Trust do not exist, and that the SPVs (the BVI SPVs and Singapore SPVs) are his. It is pertinent that Mr Darsan does not assert privilege as regards such conduct. I am of the view that the fact that such conduct took place is relevant to whether the December 2003 Agreement was entered into. I turn to consider this next.

142 It is important to first state the assertions and demand in the HFW Letter to set the context. This was an open letter. The letter alleged that Mr Darsan held, "through various companies (which [he] now control[s])… several properties in Singapore and other assets… on trust for [Mr Salgaocar]". Mr Salgaocar thus "direct[ed]" that he [Mr Darsan] not "sell or deal with these properties, assets and cash in whatsoever manner pending resolution of all outstanding matters" between the two of them. The letter also alleged, *inter alia*, that between 2005 and 2012, Mr Darsan had beneficially owned and controlled and managed the BVI SPVs "as trustee" for Mr Salgaocar, and that Mr Salgaocar had through Trustworth Shipping and other related companies also entered into affreightment contracts to enable the CFR sales of the BVI SPVs. It was estimated that profits on about 20 tons of iron ore sold during this period exceeded US$550m. These profits were invested with Mr Salgaocar's agreement in various assets, such as properties in Singapore, including the Newton Imperial, and shipping-related assets such as offshore Anchor Handling Tug Supply vessels, tugs, barges and equipment.

143 In a similar vein to the SOC in Suit 821, the HFW Letter claimed that Mr Darsan had conveyed six units in Newton Imperial to himself and the second defendant, and 22 units in the development to 22 BVI companies which were in turn owned by a single BVI company, Million Dragon, of which the third defendant was the registered owner and director (and which she held on trust

for Mr Salgaocar). The HFW Letter demanded that Mr Darsan "take immediate steps to cause" the third defendant to transfer ownership of all shares in Million Dragon. As to the shipping-related assets, the HFW Letter claimed that they were owned by companies in which Mr Darsan held the shares on trust for Mr Salgaocar, and that Mr Darsan had not prudently managed those assets causing loss and deterioration of the assets. Consequently, the HFW Letter demanded that Mr Darsan (a) transfer to Mr Salgaocar "all assets…[that he held] as trustee" for Mr Salgaocar (the manner in which this was to be done to be agreed), (b) "give a full account of all monies received" by him from the CFR sales of iron ore, expenses incurred and balance proceeds of sale, and (c) transfer "all monies" which he held on trust according to these accounts. A deadline of 14 days was set to "hear…positively" from Mr Darsan, failing which legal proceedings would be commenced.

144 The 22 May 2014 Letter was sent as the first response to the HFW Letter. As stated above, this was a holding letter. Thereafter, Mr Salgaocar held his hands for more than a year before commencing legal proceedings. In that period, the parties engaged in negotiations and *Mr Darsan transferred some assets to Mr Salgaocar* (see [145] below). This was *conduct on the part of Mr Darsan that was not consistent with his position in Suit 821 that the trust assets were his and the 2003 Trust did not exist*. Such conduct fortifies the conclusions I draw on the December 2003 Agreement and the 2003 Trust. Having said that, the conclusions stand even if such conduct is not taken into account. I turn now to address Mr Darsan's conduct below.

Mr Darsan's conduct in transferring Winter Meadow and Million Dragon back to Mr Salgaocar

145 Following the 11 June 14 and July 2014 meetings, Mr Darsan transferred a number of assets which was consistent with some of the demands in the HFW Letter (as described above at [143]). Such transfers were not consistent with Mr Darsan's position that the assets were his and the December 2003 Agreement and 2003 Trust did not exist.

146 On or about 8 July 2014, Mr Darsan and the second defendant transferred the entire equity in Winter Meadow, comprising two shares, to Mr Salgaocar for US$2. The third defendant transferred the entire equity in Million Dragon, comprising one share in her name, to Mr Salgaocar for US$1. On or about 9 July 2014, Sino Ling Tao (BVI) and Winter Meadow (with Mr Darsan and Mr Salgaocar respectively as signatories) agreed to novate to Winter Meadow certain advances made by Sino Ling Tao BVI to third parties for marine equipment that had not yet been delivered.

147 In July and August 2014, pursuant to requests made to Mr Bhoj, Mr Haridass obtained the following documents relating to (a) the resignation of the third defendant as director of the 22 BVI companies which held the 22 units in Newton Imperial (at [143] above), and (b) the original notarised bills of sale for 19 barges, pursuant to which Mr Darsan had previously transferred the vessels from Sino Ling Tao (BVI) to Winter Meadow. Mr Haridass also requested documents relating to, *inter alia*, the sale of the 22 properties to the respective BVI companies and all tenancy agreements and contracts relating to these properties, to be handed over to Mr Salgaocar "as part of the logistics in him taking over the properties". Subsequently, in late July 2014, Mr Haridass informed Mr Bhoj that he had been asked by Mr Salgaocar to request that he

hand over "all accounts of [Trustworth Shipping], tally backups and files". A number of these documents and records were then delivered to Mr Haridass in August 2014. On 9 October 2014, Mr Bhoj also sent Mr Haridass a letter from the Inland Revenue Authority of Singapore for the company's income tax returns for 2014. Furthermore, in August to October 2014, Mr Bhoj delivered to Mr Haridass the keys and other documents for all but four of the units in Newton Imperial. These handovers and transfers were all in line with the allegations in the HFW Letter, and inconsistent with Mr Darsan's position in Suit 821 that the trust assets were his and the 2003 Trust did not exist.

148 Mr Darsan attempted to offer an explanation for these transfers. According to him, the transfers relating to the sole share in Million Dragon and the two shares in Winter Meadow were "for consideration" namely, the return of debts due from (a) Million Dragon to the third defendant, and (b) Winter Meadow to Mr Darsan or companies owned by him respectively, as part of "resolving matters between [them]". This explanation rings hollow as Mr Darsan has produced no such evidence of any debt. Moreover, when asked to explain during cross-examination, Mr Darsan was unable to state when payment for the shares was to be made by Mr Salgaocar. In any event, this explanation does not address the handover of the documents and keys relating to the apartments in Newton Imperial, and the documents relating to Trustworth Shipping.

149 Mr Darsan was also unable to satisfactorily explain the reason for the novation of advances by Sino Ling Tao (BVI) to Winter Meadow following the transfer of shares in Winter Meadow (see [145] above). Mr Darsan could only say that this was because Winter Meadow would otherwise "have issues getting deliveries" from the companies. However, it stands to reason that if Sino Ling Tao (BVI) was Mr Darsan's company as he has claimed, there would be no

reason to novate these advances as they were made for marine equipment *purchased by* Sino Ling Tao (BVI).

150 The transfer of Winter Meadow and Million Dragon to Mr Salgaocar thus supports the existence of the December 2003 Agreement and the 2003 Trust.

Conclusion on the existence of the December 2003 Agreement

151 For the reasons above, I conclude as follows on Issue 1. First, Mr Salgaocar and Mr Darsan reached the December 2003 Agreement pursuant to which the 2003 Trust was constituted. Second, the BVI SPVs and the Singapore SPVs were Mr Salgaocar's. Third, there was no Shipping Venture, Shipping Underwriting Agreement and Running Account as alleged by Mr Darsan. The final question that remains is whether the 2003 Trust was valid. I turn to address this next.

The validity of the 2003 Trust

152 The formation of an express trust requires three certainties to be present: certainty of intention; certainty of subject matter; and certainty of the objects of the trust (*Guy Neale and others v Nine Squares Pty Ltd* [2015] 1 SLR 1097 ("***Guy Neale (CA)***") at [51]). The defendants contest the first two elements.

153 The defendants contest the existence of certainty of intention (as mentioned at [33] above), *ie*, the certainty that Mr Salgaocar intended to create a trust, rather than impose a mere moral obligation or make a gift, or do some other act which was not a trust (*Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2020] 4 SLR 85 at [217], citing *Ernest Ferdinand* at [95]. Furthermore,

they argue that there was no certainty of subject matter, as it would have been a trust declared in respect of future property *ie*, property that did not exist at the time of the trust (*Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye* [2013] 2 SLR 715 at [49]). Finally, they argue that there is no contemporaneous record of the December 2003 Agreement and that it is "unbelievable" that Mr Salgaocar intended to enter into such an agreement. I will consider these arguments in turn.

154 The intention to create a trust may be inferred not only from the words and conduct of an alleged settlor, but also from the surrounding circumstances (*Xu Zhigang v Wang Fang* [2020] SGHC 254 at [7]; *The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) v Westacre Investments Inc and other appeals* [2016] 5 SLR 372 at [55]–[56]).

155 I find that Mr Salgaocar's close management of and oversight over the BVI and Singapore SPVs and Mr Darsan's lack of involvement in these companies demonstrates such intention to create the 2003 Trust. Taking the BVI SPVs for example, Mr Salgaocar's requirement for Mr Kwan to seek his approval on individual contracts for the sale of the iron ore to the Chinese buyers (see [58] above), demonstrates that he was clearly interested and indeed vested in the profits to be made on these contracts, and therefore could only have intended that any shares in Mr Darsan's name were held by Mr Darsan on trust for him. Mr Darsan agreed during cross-examination that Mr Salgaocar was an ambitious man who was in business to make money and would try to maximise the opportunities to do so. He understood from his discussion with Mr Salgaocar in December 2003 or January 2004 (at [34] above) that Mr Salgaocar intended for SMI to export iron ore to China and that he would retain the benefits therefrom. The following extract from Mr Darsan's cross-examination makes this clear:

Q: … based on what you yourself say … Mr Salgaocar was seeking to get the entire benefit of the additional price that the Chinese buyers were prepared to pay, correct?

A: Correct.

Q: … I'm talking about late 2003 or in January 2004, what was the price that the Japanese were paying Mr Salgaocar?

A: I don't remember.

Q: And what was the price that the Chinese were prepared to pay?

A: I don't remember.

Q: That was not discussed with you, correct?

A: No.

Q: Because that was a matter for Mr Salgaocar, because he was looking to gain the upside and he would have done his homework on that, correct?

A: Correct.

Q: *… You would have understood from those discussions … that Mr Salgaocar would have worked out that it makes business sense for him to move his business from Japan to China, correct?*

A: *Yes.*

Q: And in working that out, he would have worked out what was the prevailing market outside China, in Japan and within China, correct?

A: Yes.

Q: *Again, all with a view to maximise his returns, yes?*

A: *Yes.*

156 There could therefore have been no misapprehension in Mr Darsan's mind that the BVI SPVs existed to serve Mr Salgaocar's plan to maximise *his* returns from selling to Chinese buyers, with Mr Darsan acting as his nominee. If this were the case as regards the BVI SPVs, it must also be the case that the Singapore SPVs, which received and invested the profits from the iron ore

trading conducted by the BVI SPVs, were also held under the same arrangement. Accordingly, the requirement for certainty of intention is satisfied.

157 I also find that the requirement for certainty of subject matter is satisfied. A trust will not fail for want of certainty merely because its subject matter is at present uncertain, if its terms are sufficient to identify its subject matter in the future (*Pearson and others v Lehman Brothers Finance SA and other companies* [2010] EWHC 2914 (Ch) at [225]). The plaintiffs say that the subject matter of the 2003 Trust is all the shares issued in the SPVs (including but not limited to the BVI SPVs) and all monies, investments and assets held by them (though they have clarified that they seek no relief as regards the assets (see [1] above)). I consider these terms sufficient to identify its subject matter, even if these assets did not strictly exist in December 2003.

158 Furthermore, it has been recognised that a person can contract to create a trust in the event of receiving property in the future, although it is not the same as creating an immediate trust (Robert Pearce and Warren Barr, *Pearce & Stevens' Trusts and Equitable Obligations* (Oxford University Press, 7th Ed, 2018) at p 77). Thus, for example, the covenant to settle after-acquired property of the spouse that is commonly found in marriage settlements has been held to be good (*Pullan v Koe* [1913] 1 Ch 9 at 14). This may also said to be akin to reservation of title clauses where a supplier of materials contracts with a manufacturer to the effect that the latter will be trustee of proceeds of sale of manufactured goods which have used these materials, to the extent of the unpaid amount due and owing from the latter(Underhill and Hayton, *Law Relating to Trusts and Trustees* (LexisNexis, 19th Ed, 2016) at para 10.10; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 171 ALR 568 at [30]).

159 I therefore find that the December 2003 Agreement gives rise to a valid express trust namely, the 2003 Trust. I also find that 2003 Trust extended to the shares in the BVI SPVs and the Singapore SPVs. As some of these companies are now defunct, the 2003 Trust presently relates to the shares in the following ten companies – Eltina, Singapore Star Holdings, Great Newton Properties, Singapore Star Investments, Singapore Star Shipping, Singapore Star Properties, Sino Ling Tao (SG), Millers Capital, Sino Noble and Nova Raffles.

Issue 2: Whether the December 2003 Agreement is unenforceable for breaching Indian laws

160 Given my findings that the December 2003 Agreement and the 2003 Trust existed and the latter was constituted, the next issue is whether the December 2003 Agreement, and therefore the 2003 Trust, is void and unenforceable by reason of illegality under Indian law. For the purposes of the analysis that follows, a reference to the December 2003 Agreement is also a reference to the 2003 Trust since the latter would not exist if the former was determined to be void and unenforceable. In this regard, the defendants submit that the December 2003 Agreement is unenforceable as it would be illegal and in breach of the following Indian laws:

(a) the Prohibition of Benami Property Transactions Act 1988 (India) ("**the Benami Act**");

(b) the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015 (India) ("**Black Money Act**");

(c) the Prevention of Money Laundering Act 2002 (India) ("**the PMLA**");

(d) the Income Tax Act 1961 (India) ("**the Income Tax Act**");

(e) the Customs Act; and

(f) the FEMA.

161 Accordingly, two sub-issues arise for consideration. First, whether the December 2003 Agreement is illegal under Indian law. Second, whether the December 2003 Agreement is unenforceable by reason of illegality under Indian law as pleaded by Mr Darsan. I deal with these points in turn.

Assessment of the expert opinion

162 Two expert witnesses were called to assist the court on the issue of illegality under Indian law. The plaintiffs called Mr Justice Ramasubramanian Venkat Easwar ("**Mr Easwar**") and the defendants called Mr Justice Ajit Prakash Shah ("**Mr Shah**"). Both experts were retired judges of various High Courts of India.

163 As the evidence of Mr Shah and Mr Easwar was largely conflicting, I pause to address the antecedent question of which opinion I should prefer. In this regard, V K Rajah JA in *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 stated thus at [75]:

> Where there is conflicting evidence between experts it will not be the sheer number of experts articulating a particular opinion or view that matters, *but rather the consistency and logic of the preferred evidence that is paramount. Generally speaking, the court should also scrutinise the credentials and relevant experience of the experts in their professed and acknowledged areas of expertise…*
>
> [emphasis added]

164 I observe that Mr Easwar's credentials and relevant experience in the area of tax and revenue law was much more extensive than that of Mr Shah. Mr Easwar was a former judge of the Delhi High Court and has almost forty years

of experience in tax and revenue law. He joined the Income Tax Appellate Tribunal in 1991 and was appointed its President in 2010. He was also appointed as the Chairman of a 10-member committee to make recommendations for the Simplification of the Direct Tax Law provision in October 2015. Mr Shah was the former Chief Justice of the Madras High Court and subsequently the Delhi High Court until his retirement. The plaintiffs point out that while Mr Shah's resume states that he has delivered "some important judgments" and "dealt with [a] large number of commercial cases", none of them relate to tax or revenue law. While Mr Shah's AEIC refers to a wide breadth of cases that he heard while on the bench, it is notable that there is little to suggest that he has much specific experience on tax or revenue law matters. I therefore accept the plaintiffs' submission that Mr Shah's subject matter expertise on Indian tax and revenue law appears to be limited.

165 I also find Mr Easwar's evidence to be consistent and well supported by the cases that he cited and the reasoning he provided. He was a fair and unbiased expert. On the other hand, Mr Shah's evidence suffered at times from inconsistency. For example, in his first report, he referred to statutory provisions that the December 2003 Agreement allegedly breached, but then recanted on several of these opinions in his second report and during cross examination. I illustrate with one example.

166 Mr Shah's position in his first report was that the Benami Act applied to the transactions pleaded in the SOC. However, he subsequently changed his position at paragraph 8.1 of his second report and stated that his position in the first report was "not correct" as the Benami Act "is not extra territorial in operation" and that he had only referred to the Benami Act to show that if the action had been filed in India, the relevant transactions would have been caught by the Benami Act. Mr Shah's position changed yet again during the trial when

presented with paragraph 8.1 of his second report during cross-examination. The following extracts clearly demonstrates the point I make and I say no more:

> Q: Are you saying there that even though the transactions here took place outside India, had this suit in relation to these same transactions been filed in India, the Benami Act would apply?
>
> A: *It may not apply. I concede that.*
>
> Q: Thank you. So I would be grateful if you would explain to the court why, then, at paragraph 8.1 you said that if the suit had been filed in India, the same would be caught by the provisions of the Benami Act on account of the bar in section 4(1) of that Act?
>
> A: Perhaps *it was not clear to me whether all the assets and transactions are outside [India] …*
>
> …
>
> Q: Indeed, as we know from your earlier answers, paragraph 8.1, itself, is, again with no disrespect, sir, wrong, *because the information you had* ***before*** *you filed your second report and said what you did in paragraph 8.1, was that the transactions took place outside India; correct?*
>
> A: Yes.
>
> [emphasis added]

167 Moreover, Mr Shah had to be reminded by the court on several occasions to answer the questions that were put to him. The following exchanges are illustrative of the general tenor of the cross-examination:

> Q: Do you see anything in the statement of claim which says that Mrs Salgaocar was in control?
>
> A: Just one minute.
>
> Ct: Justice Shah, I think the question is, "Would you agree with me that you were told to assume that Mrs Salgaocar was in control and management" –
>
> A: I see it. Yes, I understood.

> Ct: So it's not a question of whether she was a beneficial owner or heir of the assets. The question was whether she was in control of these companies, and whether you were told to assume that. That's the question. It's a "yes or no" answer.
>
> A: Frankly, I do not remember whether I was asked to assume that, specifically. I cannot say that I was asked specifically to assume that she was in control. I think this is the heading which I -- 14B and 14C, and since it is to be read along with the Salgaocar case being in control and management, I mean, this was my perception, that she was in control and management, and this is what is in the discussions about the factual matrix. I think that must be the reason that this "control and management" has come.
>
> …
>
> A: Now, you may have a different approach to the report, but this is what I want to say and I think I've said it a number of times.
>
> Ct: Justice Shah, the question is a simple one. What's set out in paragraph 4.1 is not relevant to the point you are making in 3.13; correct?
>
> A: Correct. So I'm only explaining that after the amendment, an exception was carved out for real estate and banking, even after the amendment.
>
> Ct: I understand, but that provision in 4.1 doesn't apply because these companies were not set up after 2013.
>
> A: No, that's right. They are the --
>
> Ct: That's the only point that Mr Singh is asking you to --
>
> A: No, these companies were not set up.

168 Accordingly, I prefer Mr Easwar's evidence on the issue of Indian law illegality and have primarily relied on his expert reports in my reasoning below. Where relevant, I will also set out Mr Shah's views and explain why I have declined to accept his opinion.

Sub-issue 1: Whether the December 2003 Agreement is in breach of Indian law

169 I turn now to deal with the issue of whether the December 2003 Agreement is in breach of Indian law and consider the various Indian statutes that the defendants have pleaded *in seriatim*.

The Benami Act, Black Money Act and PMLA

170 It is convenient to begin by dealing with the defendants' arguments on the Benami Act, Black Money Act and PMLA collectively. While the defendants pleads that the December 2003 Agreement breached these Acts in their Defence, these arguments were not pursued with much vigour in their closing submissions. Notably, the plea was based on the opinion of Mr Shah.

171 In relation to the Benami Act, the defendants appear to have entirely abandoned their arguments that the December 2003 Agreement fell afoul of it. Indeed, I note that Mr Shah conceded during cross-examination that the Benami Act does not apply to the December 2003 Agreement. As mentioned at [[166] above, Mr Shah explained that the Benami Act is "not extra-territorial in operation" and given that "all the transactions … [and] assets are outside India", the "Benami Act would [therefore] not be attracted". The same view was expressed in Mr Easwar's expert report and subsequently accepted by Mr Shah. Mr Shah also agreed that his view in his first report that the transactions pleaded in the Defence would constitute an offence under the Benami Act was "not correct". The December 2003 Agreement therefore could not have been in breach of an Act that did not apply to it and I say no more on this point.

172 In relation to the Black Money Act, the parties are in agreement that it only came into force on 1 April 2016. As such, Mr Shah conceded that the

December 2003 Agreement could not have been prohibited by the Black Money Act. It must therefore follow that the purpose of the December 2003 Agreement could not have been to circumvent an Act that did not exist when it was entered into. This was also accepted by Mr Shah during the trial. While I note that Mr Shah had opined during cross-examination that the December 2003 Agreement could "become subsequently invalid because it voided certain provision of law", he subsequently recanted from this position and accepted that a contract that "had been consummated and concluded … well before 2016" would not be retrospectively voided because of the passing of the Black Money Act. Accordingly, I find the question of breach of the Black Money Act does not arise.

173 In relation to the PMLA, the parties are also in agreement that the Black Money Act is a predicate offence for the PMLA. Thus, "it could only have been a predicate for the PMLA on and after 1 April 2016", since the Black Money Act came into force on 1 April 2016. Mr Shah agreed that given that there was no Black Money Act predicate at the time of the December 2003 Agreement, all the transactions pleaded in the SOC would not attract any of the provisions of the PMLA. In any event, I note that it was Mr Easwar's unchallenged evidence that the PMLA does not have any extra-territorial application. Accordingly, I find that the PMLA does not apply to the December 2003 Agreement and therefore the question of breach of the PMLA Act does not arise.

The Income Tax Act

174 I turn now to consider whether Mr Salgaocar, the BVI SPVs and the Singapore SPVs breached the Income Tax Act. It is common ground that for the Income Tax Act to apply, the relevant entity would first have to be an Indian tax resident.

175 In relation to Mr Salgaocar, Mr Shah's position was that he had breached the Income Tax Act by failing to declare his income tax. This is an allegation not with regard to the illegality *per se* of the December 2003 Agreement but the manner in which it was performed. Mr Shah explained that this conclusion was premised on the instructions he received from the defendants that Mr Salgaocar was *an Indian tax resident since 2003*. However, this was not supported by the evidence before me – Mr Shah had also not seen any evidence that Mr Salgaocar was an Indian tax resident since 2003. Crucially, it was also not the defendants' pleaded case that Mr Salgaocar was an Indian tax resident since 2003. It is clear that this is a fact that must be established for the opinion to stand. As the party advancing that position, the burden is on the defendants to establish the facts that undergird the position. Accordingly, the defendants' submission that Mr Salgaocar violated the Income Tax Act necessarily fails at this stage.

176 In relation to the BVI SPVs and Singapore SPVs, the defendants' position is that these companies had an obligation to declare income tax in India as Mr Shah had opined that they were "controlled and managed by Mr Salgaocar *from India*". However, it is crucial that the defendants adduced no direct evidence of the factual premise that the companies in question were controlled and managed by Mr Salgaocar *from India* was indeed true. That undermines the basis of Mr Shah's evidence. Further, the defendants did not adduce any evidence that these companies did in fact fail to declare income tax in India.

177 However, even if I were to assume, *arguendo*, that Mr Salgaocar did control and manage the companies in question from India and these companies failed to declare income tax, I accept Mr Easwar's evidence that s 276C of the Income Tax Act only provides for prosecution of a *wilful* attempt to evade tax, which necessitates a "deliberate" omission. Mr Easwar elaborated that "wilful" "can have only one meaning that the correct information was not disclosed

deliberately to escape payment from duty". In other words, illegality under s 276C of the Income Tax Act requires proof of a *positive* act with the necessary *mens rea*. Here too, the defendants failed to adduce evidence that this was indeed the case. Thus, I am unable to conclude that there was a breach of the Income Tax Act by reason of any failure by the companies in question to declare that income tax in India.

The Customs Act

178 I turn now to the Customs Act. The defendants submit that s 14 read with s 50 of the Customs Act was contravened by the manner in which Mr Salgaocar sold iron ore from SMI to China, *ie*, through the BVI SPVs. Again, this is an allegation not with regard to the illegality *per se* of the December 2003 Agreement but the manner in which it was performed. Specifically, the defendants allege that the BVI SPVs were "mere conduits in the iron ore transactions" such that the transactions were not on an arm's length basis as the price of the iron ore as between SMI and the BVI SPVs was underdeclared. The defendants therefore contend that the December 2003 Agreement resulted in customs duty for the sale of iron ore being evaded – an offence under s 135 and s 140 of the Customs Act.

179 While the defendants have framed their case generally and have not specified the period in which the Customs Act was breached, it is important to clarify that s 14 of the Customs Act was amended with effect from 10 October 2007 to include the Customs Valuation (Determination of Export Goods) Rules 2007 (India) ("**the Export Valuation Rules**"). Mr Easwar's evidence was that the Export Valuation Rules did not require an exporter to declare the downstream price of the exported goods. Mr Easwar also highlighted that Rule 3(2) of the Export Valuation Rules provides that the "transaction value shall be

accepted" even where the buyer and the seller are related, provided that the relationship has not influenced the price.

180 The upshot of this amendment is that there are two time periods that are relevant in determining whether the Customs Act was breached by the December 2003 Agreement. The first is the period prior to the amendment, from April 2004 to 9 October 2007, which I shall refer to as "**the First Period**". The second is the period after the amendment took effect, from 10 October 2007 to July 2012, which I shall refer to as "**the Second Period**".

181 In relation to the First Period, it was common ground between Mr Shah and Mr Easwar that customs duty on iron ore was first imposed in 2009. This meant that prior to 2009, an exporter *was not required* to declare the true value of iron ore for the purpose of the Customs Act. In any event, there was also no evidence that SMI underdeclared the export value of the iron ore sold to the BVI SPVs. Moreover, Mr Shah agreed with Mr Easwar that in the First Period, the Customs Act did not contain any rules for the determination of the value of the exported goods, and that the value of the exported goods (*ie*, iron ore) was to be made with reference to the price at which they were ordinarily sold in the course of international trade (of which again there was no evidence). Mr Easwar explained that during the First Period, there was nothing in the Customs Act which required an exporter to declare the downstream price (*ie,* the CFR price) of the exported goods. Accordingly, there is no evidential basis on which to accept the view that performance of the December 2003 Agreement breached the Customs Act in the First Period.

182 In relation to the Second Period, Mr Easwar's unchallenged evidence was that there was nothing in the Export Valuation Rules that required an exporter to declare the downstream price of the exported goods. He elaborated

that where the Indian Parliament had considered the downstream price of goods to be relevant, it had expressly made provision for it in the relevant rules. For example, Rule 10(*d*) of the Customs Valuation (Determination of Value of Imported Goods) Rules 2007 (India) contains an express requirement for the value of the goods to take into account the proceeds of any subsequent resale of the imported goods. This requirement was not present in the Export Valuation Rules. Mr Easwar also elaborated that Rule 3(2) of the Export Valuation Rules provides that the "transaction value shall be accepted" even where the buyer and seller are related parties unless the relationship is proved to have influenced the price of goods exported. While I am cognisant that SMI and the BVI SPVs are related, I also note that it is not the defendants' position that Mr Salgaocar's ownership of SMI and the BVI SPVs affected the FOB price. Moreover, no evidence was led as to what SMI actually declared to the customs authorities. As such, there is no basis for me to conclude that the Customs Act was breached in the Second Period.

183 In any event, it would not have been possible for SMI to declare the CFR price when it shipped the iron ore to China as Mr Salgaocar would not have agreed on the CFR price with the Chinese buyers at the point of export. I accept the plaintiffs' position as pleaded in the SOC that it was only after the shipment of iron ore was loaded and the vessel was *en route* to China that Mr Salgaocar would sell the shipment of iron ore on a CFR spot basis to the Chinese buyers. It would therefore seem that declaration of the CFR price was not possible.

184 In this regard, I pause to note that Mr Kwan had explained the two-legged contracts on the basis that the CFR contracts could only be entered into after the subject cargo had been loaded and the vessel started sailing. Once the cargo had finished loading, a load quality certificate would be issued in about three to five days, on the basis of which negotiations with a buyer in China could

take place. For these reasons, I find that the Customs Act was not breached by the manner in which iron ore was sold through the BVI SPVs to China during the Second Period.

The FEMA

185 Finally, I consider whether the December 2003 Agreement breached the FEMA. At the outset, I accept Mr Easwar's evidence that any infringement of the FEMA would "not be an illegality because it is a rectifiable breach" such that "nobody can say that there is an illegality which voids the contract". Mr Easwar's opinion was based primarily on the 2020 Indian Supreme Court decision in *Vijay Karia v Prysmian Cavi E Sistemi S.R.L and others* [2020] SCC Online SC 177 ("***Vijay Karia***"), which contained the following observations:

> 91 … *It is important to remember that section 47 of FERA no longer exists in FEMA so that transactions that violate FEMA cannot be held to be void. Also, if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of the Reserve Bank of India may be obtained post-facto if such violation can be condoned.* Neither the award, nor the agreement being enforced by the award, can, therefore, be held to be of no effect in law. *This being the case, a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law.*
>
> …
>
> 93 It is important to note that this Court recognized that FEMA, unlike FERA, does not have any provision for prosecution and punishment like that contained in Section 56 of FERA. The observations [in Dropti Devi] as to conservation and/or augmentation of foreign exchange, so far as FEMA is concerned, were made in the context of preventive detention of persons who violate foreign exchange regulations. The Court was careful to note that any illegal activity which jeopardises the economic fabric of the country, which includes smuggling activities relating to foreign exchange, are a serious menace to the nation and can be dealt with effectively, inter alia, through the mechanism of preventive detention. *From this to contend that any violation of any FEMA Rule would make such violation an illegal activity does not follow.*

[emphasis added]

186 While counsel for the defendants submits that these observations from *Vijay Karia* do not stand for the broad proposition that a transaction in contravention of FEMA would not amount to an illegal activity and should be restricted to the facts of that case, I am not persuaded. Instead, I find it clear that the Supreme Court of India was making a statement of general principle in *Vijay Karia* that "a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law". In this regard, I accept Mr Easwar's evidence that the Supreme Court's observations were "not confined to a case of foreign inflows" and instead went "behind the rationale of the FEMA provisions" to conclude that "even if there is a prohibition, it does not amount to illegality". This being the case, it is clear to me that the statutory policy underpinning the FEMA is such that breaches of its provisions cannot be said to be an "illegality". The defendants' arguments on the FEMA thus fail on this ground.

187 For completeness, I pause briefly to address Mr Shah's views on the FEMA. Mr Shah sought to rely on the Indian Supreme Court decision in *National Agricultural Co-operative Federation v Alimenta SA* [2020] SCC Online SC 381 ("***National Agricultural***") as "it dealt with the question as to whether the enforcement of the award was in violation of the directions issued by the government of India, and consequently, against the public policy of India". However, I agree with Mr Easwar's evidence that Mr Shah's reliance on *National Agricultural* is misplaced in the present context as that case did not concern a breach of the FEMA or the invalidity of a contract on the basis of illegality.

188 Accordingly, I find that the December 2003 Agreement is not an illegality under the FEMA.

Sub issue 2: Whether the 2003 Trust is rendered unenforceable by reason of illegality under Indian Law

189 The second sub-issue does not arise in view of my conclusion that the December 2003 Agreement is not illegal under Indian law. Accordingly, it is not necessary for me to address the defendants' arguments based on the line of authority in *Foster* and *Ralli Bros*.

Conclusion on Issue 2

190 For these reasons, I conclude that the December 2003 Agreement is not illegal under Indian law and that the 2003 Trust is enforceable.

Issue 3: Whether Mr Darsan breached the 2003 Trust

191 The third issue is whether Mr Darsan breached the 2003 Trust.

192 As a preliminary point, reliefs that assert a direct claim in the assets of the SPVs that were acquired using the iron ore trading profits may be circumscribed in view of the fundamental principle that a company is a separate legal person from its shareholders. This issue arose in the Caveat Proceedings (see [25] above), where this Court found, and the Court of Appeal accepted, that Mr Salgaocar's claim that he had a direct interest in several of the Singapore Properties owned by the Singapore SPVs by reason of the 2003 Trust did not raise any serious issue to be tried (*Jhaveri Darsan Jitendra and others v Salgaocar Anil Vassudeva and others* [2018] 5 SLR 689 ("***Jhaveri Darsan***") at [85]). As regards the units in Newton Imperial which had been transferred to Mr Darsan and the second defendant, this was a claim by a shareholder of Great

Newton Properties, Mr Salgaocar, against an officer of the company, Mr Darsan, for wrongfully transferring assets belonging to the company to himself and his wife (the second defendant). The proper party to bring the action was therefore the company. If the company was unable to sue, Mr Salgaocar could seek to bring a derivative action in its name (*Jhaveri Darsan* at [73] and [78(a)]). The same point applies with regards to the units in Waterford Residence and WCEGA Tower (for which the registered proprietors were Capital Glory, Newton Noble and Sino Noble) save that there was an additional layer. Mr Salgaocar's claim was in relation to Singapore Star Properties (of which Mr Darsan was sole shareholder) which in turn was the sole shareholder of Capital Glory and Newton Noble. Mr Salgaocar's remedy would have been to recover title to the shares of Capital Glory, Newton Noble and Sino Noble, and bring the action to recover the properties (*Jhaveri Darsan* at [73] and [78(b)]).

193 Similarly, in *Lakshmi Anil Salgaocar v Vivek Sudarshan Khabya* [2017] 4 SLR 1124 ("***Vivek***"), which was commenced by Mdm Lakshmi against Mr Vivek Sudarshan Khabya, the chief executive officer of Million Dragon, George Wei J found that Mdm Lakshmi could not validly assert an interest in income and assets which belonged to Million Dragon and its subsidiaries, the 22 BVI SPVs which held 22 units in Newton Imperial. It was held that the 22 units and the rental income they generated belonged to the 22 subsidiaries and to Million Dragon respectively, which were legal entities separate from Mr Salgaocar (*Vivek* at [56]). Hence, although Mdm Lakshmi would be entitled to sue to recover, protect or preserve the shares in Million Dragon, of which Mr Salgaocar was sole director and sole shareholder, this did not extend to Million Dragon's income or assets (*Vivek* at [57]). There was no appeal from this decision.

194 As a consequence, the plaintiffs do not make a claim to the assets of the SPVs including those acquired using the iron ore trading profits of the BVI SPVs. However, as noted earlier, the plaintiffs claim that the shares in the BVI SPVs and the Singapore SPVs are also the subject of the 2003 Trust. As many of these companies are now defunct, the 2003 Trust is asserted as regards the shares in 10 companies – Eltina, Singapore Star Holdings, Great Newton Properties, Singapore Star Investments, Singapore Star Shipping, Singapore Star Properties, Sino Ling Tao (SG), Millers Capital, Sino Noble and Nova Raffles. Save for Eltina which is a BVI SPV, the others are Singapore SPVs. This is an important point which brings me to an argument that the defendants make.

195 In relation to the plaintiffs' claims of misappropriation of monies by Mr Darsan from the BVI SPVs, the defendants argue that the reflective loss principle precludes the plaintiffs from claiming for the same. The defendants argue that what is alleged to have been misappropriated are the assets of the BVI SPVs, as opposed to Mr Salgaocar's. They rely on the decision of *Shaker v Al-Bedrawi and others* [2003] 1 BCLC 157, where the English Court of Appeal held that the principle did not preclude an action brought by a claimant not as a shareholder but as a beneficiary under a trustee against his trustee for profit, unless it could be shown by the defendant that the whole of the claimed profit reflect what the company had lost and which it had a cause of action to recover (at [83]).

196 In my view, however, the reflective loss principle does not bar the plaintiffs' claims. As recently clarified by the Court of Appeal, the principle extends only to shareholders claiming *qua* shareholders, and only applies to claims by shareholders for the diminution in the value of their shareholdings or in distributions they receive as shareholders as a result of such actionable loss

suffered by their company (*Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management) and another* [2022] 1 SLR 884 ("***Tendcare***") at [206]). The court recognised that the principle would not extend to claims made by shareholders in "*other* capacities" (*Tendcare* at [206]) [emphasis in original].

197 It is pertinent that the plaintiffs are not claiming for diminution in the value of its shareholdings or in distributions received as shareholders of the BVI SPVs. Rather, they are claiming *qua beneficiary* for an order that Mr Darsan (a) accounts for and disgorges the benefits that he obtained as trustee of the shares in the BVI SPVs trust, or (b) pay for the losses that he caused from his failure to discharge his duties. While some of these benefits obtained by Mr Darsan or the losses he caused may also be losses directly suffered by the companies (and so ought to be properly pursued by them), it may be that some of the claimed losses are not merely reflective of the companies' losses. The distinction between the two will be clearer following a detailed account by the defendants and indeed is a matter to be determined in that process.

198 Indeed, the same point can be made as regards the equity of all the SPVs (not just the BVI SPVs) including Million Dragon, Winter Meadow and the 10 companies above. In view of the plaintiffs' assertion that the shares in these companies are also part of the trust assets, it may be said that any allegation of breach of trust that is alleged that relates to conduct concerning these assets would be made by the first plaintiff *qua beneficiary under the 2003 Trust*, and not as a *shareholder* of the companies.

199 With this in mind, I turn to consider the breaches of the 2003 Trust by Mr Darsan as asserted by the plaintiffs:

(a) misappropriating monies;

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

(c) misappropriating units in Newton Imperial;

(d) wrongfully disposing of units in Residences@Evelyn, Waterford Residence and WCEGA Tower;

(e) procuring the transfer of shares in GBA Minmetals and Eltina to himself;

(f) wrongfully altering the accounting records of Singapore Star Holdings, to reflect debts owed to Ultra Best;

(g) misappropriating assets held by Sino Ling Tao (SG); and

(h) failing to act with reasonable skill and care in respect of the vessels and machinery subject to the 2003 Trust.

Misappropriating monies

200 Mr Darsan is alleged to have arranged for transfers of a total of US$270,372,938 from the BVI SPVs to bank accounts in his name or the names entities controlled or connected to him. This was said to be done without the knowledge, approval or consent of Mr Salgaocar between 2011 and February 2013. Subject to an account by Mr Darsan, the transfers are set out in Annex 1 to this judgment, and are reflected in ledgers that were maintained by Mr Kwan and Ms Chiang, as described at [107] above in relation to Trustworth Shipping. As mentioned above, while it may *prima facie* be for the BVI SPVs to sue in respect of these monies given the separate legal status of the companies, it is also possible that the alleged misappropriations were not just wrongs to the

companies but also to the plaintiffs as beneficial owners of the shares in the BVI SPVs under the 2003 Trust.

Mr Darsan's objections to the ledgers

201 Given the relevance of the ledgers to Suit 821 (*eg*, [107]), I address the following objections by Mr Darsan concerning the authenticity and reliability of the ledgers:

(a) First, that the ledgers do not satisfy the requirements for primary or secondary evidence under ss 64 and 65 of the Evidence Act; and, although they were said to be prepared by Ms Chiang, the plaintiffs did not call her to testify;

(b) Second, the ledgers are incomplete, with missing periods of time that are not accounted for as well as differences in the opening balances and closing balances reflected;

(c) Third, the metadata of the ledgers reflect that the documents were modified by persons other than Ms Chiang raising suspicion; and

(d) Fourth, that there were discrepancies between the entries in the ledgers and the daily reports that were sent to Mr Salgaocar.

202 On the first objection, I agree with the plaintiffs that they have adduced sufficient evidence to rely on the ledgers as secondary evidence. Although s 66 of the Evidence Act provides that documents must be proved by primary evidence, *ie*, production of the document itself for inspection by the court (s 64), s 67(1)(*c*) provides that secondary evidence may be given of the existence, condition or contents of a document where the original has been destroyed or lost, in which case secondary evidence of the contents of the document is

admissible (s 67(2)). Furthermore, although a witness who proves a document must ordinarily be either the maker of the document or someone who was present when the maker created the document, authenticity may also be proved via indirect or circumstantial evidence (*CIMB Bank Bhd v World Fuel Services (Singapore) Pte Ltd and another appeal* [2021] 1 SLR 1217 at [56]–[57]).

203 Here, Mr Kwan's evidence was that while these ledgers were maintained by Ms Chiang and stored in her computer in the office, he no longer knew where the computer was as he had stopped working for Mr Salgaocar around March 2014. However, he was present when Ms Chiang updated the ledgers with all the transactions that the BVI SPVs entered into, by referring to supporting documents such as telegraphic transfer forms and bank statements. The banks would inform Ms Chiang once they received the monies from the sale of iron ore, and she would enter the information in the ledgers. The ledgers were therefore generated in the ordinary course of business. Mr Kwan would rely on the ledger to check whether clients had paid, and they would be sent by Ms Chiang to Mr Salgaocar. This was corroborated by Mr Darsan, who testified that Ms Chiang was responsible for entering the data into and updating these ledgers, on the basis of information regarding the operations and businesses of the companies that she received from Mr Kwan and others. His evidence was that Mr Kwan would have been aware of the contents of the ledgers given that he was in the office every day. Thus, the fact that Ms Chiang, who lives in Hong Kong, declined to testify is not determinative of the authenticity of the ledgers produced by the plaintiffs.

204 On the second objection, I consider it relevant that Mr Darsan conceded that these ledgers and other documents relating to the BVI SPVs were kept in his office in Hong Kong and were destroyed on his instructions. While Mr Darsan later testified that he had discussed the destruction of these documents

with Mr Salgaocar, and that this could have been due to "some regulatory inquiries" into Mr Salgaocar's companies in Goa as well as the fact that there was no requirement to maintain such records for BVI companies at the time, the explanation is unconvincing. Mr Darsan's explanation that he wanted to destroy them to prevent difficulties in subsequently returning to India does not make sense. If the documents were related to the inquiries, he ought to have preserved them. Moreover, if it was true that the trading arrangements were not illegal as he testified to believing, he would have kept the documents to exculpate himself. The fact that the ledgers might be incomplete should therefore not be held against the plaintiffs. That might have been a consequence of Mr Darsan's own actions.

205 On the third objection, I accept the evidence of Mr Sim Guan Seng, a forensic accounting expert for the plaintiffs, that the "Last Modified By" and "Last Modified Date" attributes in the metadata can change when a person opens and then saves the file, *regardless of whether any changes were made to the file*. Thus, the fact that the metadata of these ledgers reflect persons other than Ms Chiang and dates saved in 2014 does not inevitably imply that they had been tampered with.

206 On the fourth objection, it is more likely that there were errors in the daily reports. As acknowledged by Mr Kwan during cross-examination, these daily reports were not entirely accurate. Mr Kwan testified that while he "should have included every item [in the daily reports], even something as small as HK$10", he sometimes found it "too cumbersome and therefore, [he] would exclude things which [he] deemed unimportant or if the amounts were too small".

207 I therefore accept that the ledgers are authentic and admissible on the basis of having been the ordinary course of business (s 32(1)(*b*)(iv) of the Evidence Act; *Kiri Industries Ltd v Senda International Capital Ltd and another* [2021] 3 SLR 215 at [115]).

208 Accordingly, I find that Mr Darsan must account for these sums which flowed from the BVI SPVs, subject to the point made earlier that such account is sought on the basis of Mr Darsan being a trustee of the shares in these companies (see [196]–[198] above). That these outflows took place is also consistent with the evidence of Mr Kwan, who deposed to having been informed by Ms Chiang in or around August 2013 as to large sums of monies being remitted from GBA Minmetals, Cheermark, Joyking and Eltina to other companies.

Refusing to take instructions from Mr Salgaocar or preventing him from dealing with the trust assets

209 I am satisfied that Mr Darsan acted in breach of his fiduciary duties by preventing Mr Salgaocar from conducting trading, business and investments using the profits from the iron ore trade by the BVI SPVs, and from dealing with the trust assets.

210 Mr Darsan testified that he did not stop Mr Salgaocar from trading or continuing the business of the companies. Rather, after 2011 and into 2012, Mr Darsan continued to run the BVI SPVs and the Singapore companies, and Mr Salgaocar did not attempt to give instructions in relation to them. Although Mr Darsan did reorganise the structure of the Singapore SPVs and instructed the staff of these companies to take instructions from him thereafter, he claims that he was fully entitled to do so as the owner of the companies. As part of such reorganisation, Mr Darsan had (a) on 19 June 2012, changed the name of Sino

Noble Holdings to Singapore Star Holdings; (b) on 24 October 2012, changed the name of Sino Diamond Investments to Singapore Star Properties; (c) on 25 October 2012, changed the name of Millers Investments to Singapore Star Investments; and (d) declared himself the Chairman and Managing Director of "the Singapore Star Group of Companies". The result of changes which he effected in the group structure of the Singapore SPVs are reflected in Annex 2 (as at August 2012) and Annex 3 (as at March 2014).

211 I do not find credible Mr Darsan's claim that Mr Salgaocar did not attempt to assert control over the trust assets during this period. This is inconsistent, for example with Mr Kwan's evidence that he received instructions from Mr Salgaocar's on the CFR contracts and charterparties up till 2012 or 2013. Furthermore, the plaintiffs' claim is corroborated by Mr Haridass, who testified that sometime in 2012 or 2013, there was an "undercurrent" between Mr Salgaocar and Mr Darsan, with Mr Salgaocar claiming that Mr Darsan had "taken over the companies and made himself managing director and transferred all the shares to himself and [Mr] Salgaocar wanted his companies back". According to Mr Haridass, there was a "difference" in their relationship; and, Mr Salgaocar "wanted all the assets which [Mr] Darsan was holding on trust for him to be transferred" and this was resisted by Mr Darsan.

212 I also find untenable Mr Darsan's claim that Mr Salgaocar had at no time asked for a return of the trust assets or a full and complete account in respect of the same. This assertion completely lacks credit in view of documentary evidence such as the HFW Letter which demanded that Mr Darsan take "immediate steps to transfer or cause the various companies in Singapore and elsewhere to transfer [to Mr Salgaocar] all assets" which he held "as trustee".

213 Accordingly, I am satisfied that the acts of Mr Darsan in (a) refusing to comply with instructions from Mr Salgaocar in relation to the trust assets; (b) reorganising the structure of the Singapore SPVs without authorisation by Mr Salgaocar; and (c) instructing the staff of the Singapore SPVs that they were to report to him amounted to breaches of trust namely, the duty to perform the trust honestly and to act in good faith for the benefit of the beneficiaries (*Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 at [191]).

Misappropriating units in Newton Imperial and wrongfully disposing of units in Residences@Evelyn, Waterford Residence and WCEGA Tower

214 In relation to the Singapore Properties, I accept the plaintiffs' submission that Mr Darsan had committed breaches of trust in relation to (a) transfer of the six units in Newton Imperial to himself and the second defendant; and (b) selling eight units in Newton Imperial to third parties, without the knowledge of Mr Salgaocar in both instances. Mr Darsan agreed that the various transfers and sales of units in Newton Imperial, Residences@Evelyn, Waterford Residence and WCEGA Tower were made as alleged by the plaintiffs but claims that the funds came from his "personal bank account".

215 I am not convinced by Mr Darsan's claim that the monies for the six units which were transferred for a purchase price of S$18.7m on or about October 2012 were "from [his] personal accounts". Apart from the fact that he has not produced evidence of this transaction, bank account details from Great Newton Properties show that the amount was transferred from Great Newton Properties to Sino Noble Holdings on 24 October 2012. That same day, Sino Noble Holdings transferred the amount to Ultra Best. If it were true that all the companies were owned by Mr Darsan, there would not have not been a need for

these transfers to be made. The fact that they were made suggests that Mr Darsan was indeed using monies that were not his own to obtain the units.

216 As such, I find that Mr Darsan misapplied the trust assets by selling eight units in Newton Imperial and disposing of the units in Residences@Evelyn, Waterford Residence and WCEGA Tower. Given that these units were transferred by SPVs that were subject to the 2003 Trust, the first plaintiff's claim must be viewed in her capacity as a beneficiary under the 2003 Trust and not as a shareholder of these companies for reasons explained above at [196]–[198].

Procuring the transfer of shares in GBA Minmetals and Eltina

217 The plaintiffs submit that Mr Darsan had procured a Mr Madanmohan Rajendrarao Narsapur ("**Mr Narsapur**"), a member of Mr Salgaocar's staff, to transfer to him the single share in GBA Minmetals which he had been holding on trust for Mr Salgaocar. Mr Narsapur had also been Mr Salgaocar's sole nominee shareholder and director in respect of Eltina from around July 2011. This transfer is variously stated as having occurred in or around December 2011 and January 2013 in the SOC. However, Mr Darsan was crossed-examined on the basis the transfer took place in January 2013. The plaintiffs allege that Mr Darsan wrongfully procured the transfer of Mr Narsapur's shareholding in Eltina to himself in or around January 2013, also without the knowledge or approval of Mr Salgaocar. Mr Darsan agrees that the transfers took place as alleged. However, he takes the position that there was no obligation to notify on the basis Eltina was his. Based on my findings above on the ownership of the BVI SPVs, I am satisfied that these transfers constituted a misappropriation of trust assets and therefore a breach of the 2003 Trust. Again, this is subject to the

account being sought qua beneficiary under the 2003 Trust of the shares (see [196]–[198] above).

Wrongfully altering the accounting records of Singapore Star Holdings

218 The plaintiffs claim that Mr Darsan acted in breach of trust and fiduciary duties by altering the accounting records of Singapore Star Holdings and its subsidiaries between 2009 to 2012. This was in order to reflect that a total of about US$350m that was owed by the company and its subsidiaries to companies owned by Mr Salgaocar (including the BVI SPVs) was instead owed to Ultra Best. Ultra Best was a company owned and controlled by Mr Darsan (see [113] above). Subsequently, about US$250m of the amount was reflected as being owed to Mr Darsan, and US$100m was used by Mr Darsan to subscribe for 100 million shares in Singapore Star Holdings.

219 Mr Darsan does not dispute that these events took place, but claimed during cross-examination that they were due to a "streamlining exercise" as advised by the accounting staff. Conspicuously, such a claim was nowhere to be found in his pleadings or his AEIC. In any event, as I have found that Singapore Star Holdings and the BVI SPVs form part of the trust assets, the fact that Mr Darsan did so constitutes not only a breach of the duty to perform the trust honestly and to act in good faith, but also the no-profit rule *ie*, that a fiduciary may not obtain profit in connection with his position "without the informed consent of the person he is duty-bound to protect" (*Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 at [51], citing *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) at para 8.38). Mr Darsan's act of altering the accounting records to direct receivables to himself or a company

owned by him is a clear instance of profiting from his position as a fiduciary and in breach of the 2003 Trust.

Misappropriating assets held by Sino Ling Tao (SG)

220 The plaintiffs argue that sometime after July 2012, Mr Darsan procured the transfer of title to all the vessels, cranes and machinery held by Sino Ling Tao (SG) to Winter Meadow, which at the time was owned by Mr Darsan and the second defendant. Furthermore, on or about 1 July 2012, Mr Darsan is said to have wrongfully caused Sino Ling Tao (SG) to transfer title in various cranes to P.D. Holdings Limited ("**P.D. Holdings**"), a company owned and/controlled by Mr Darsan, without the knowledge or approval of Mr Salgaocar.

221 Mr Darsan accepts that these transfers took place, as well as the ownership of Winter Meadow and P.D. Holdings being with the second defendant and Mr Darsan respectively at the material time. Mr Darsan claims that as the shipping industry had been experiencing a sharp downturn in 2010 and in 2011 and 2012, Mr Salgaocar caused a number of vessels purchased using Mr Darsan's funds to be sold at a loss. As a result, Mr Darsan wished to cash out of the Shipping Venture and decided to consolidate all the assets of the venture' with a newly incorporated BVI company, Winter Meadow. Thus, although Sino Ling Tao (SG) belonged to him, there was nevertheless a need to transfer these assets to "an offshore structure" in case he wanted to sell them. He stated that if he had kept them in Sino Ling Tao (SG), there would have been regulatory issues, such as to do with licensing, of which there would be fewer in a BVI company.

222 When asked why he was apparently removing the assets of the Shipping Venture even before it had ended, Mr Darsan maintained that this did not affect

the Shipping Venture. Mr Darsan explained that Mr Salgaocar had not been attending to those assets since 2011. However, these explanations again do not hold water. There was no reason to transfer the assets to Winter Meadow and P.D. Holdings when neither company was in the shipping business. If the assets were truly wasting away, it would have made more commercial sense to simply sell them without transferring them to the other two companies. Lastly, it is not credible that there could have been regulatory issues given that these assets had already been with Sino Ling Tao (SG) for a number of years. Notably, no evidence was produced of such issues. I therefore find that the alleged acts of misappropriation of assets held by Sino Ling Tao (SG) are made out.

Failing to act with reasonable skill and care

223 The plaintiffs allege that in the period after June 2012, Mr Darsan failed to exercise reasonable skill and care in respect of the vessels and machinery held by him on trust for Mr Salgaocar. Rather than deploying them to generate a reasonable income, he had left them in storage, causing them to deteriorate and incur storage costs. Thus, in an email from Mr Salgaocar to Mr Darsan on 4 July 2014, Mr Salgaocar informed Mr Darsan that, "because it is not your money", a number of "[Anchor Handling Tug Supply vessels], Tow Tugs and Barges" were "totally neglected and getting irreparable damage"; and that, "because it is my money, [I] have intervened" and moved the vessels to Port Kelang to carry out immediate repairs. By an email dated 5 July 2014 to Mr Salgaocar, Mr Darsan "[denied] the contents" of that email and stated that he would "henceforth…not entertain any such emails from [Salgaocar] and nothing [Darsan had] said or done should be taken as [his] acceptance of what [Salgaocar had] said and alleged". Beyond these correspondences, however, the plaintiffs did not point to any other evidence in support of this contention. Accordingly, I find that the plaintiffs have not discharged its burden of proof.

Conclusion on Issue 3

224 For the reasons above, I conclude that Mr Darsan breached the 2003 Trust in relation to (a) misappropriating the monies that were held on trust, (b) refusing to take instructions from Mr Salgaocar and preventing him from dealing with the trust assets, (c) misappropriating units in Newton Imperial, (d) wrongfully disposing of units in Residences@Evelyn, Waterford Residence and WCEGA Tower, (e) procuring the transfer of shares in GBA Minmetals and Eltina to himself, (f) wrongfully altering the accounting records of Singapore Star Holdings, to reflect debts owed to Ultra Best, and (g) misappropriating assets held by Sino Ling Tao (SG).

Issue 4: Whether Mr Darsan may claim an indemnity against or contribution from Mr Kwan

225 As mentioned at [11] above, Mr Darsan claims that Mr Kwan had misappropriated the sum of US$6.8m from Eltina. As such, he claims a contribution or an indemnity in the Third-Party Action in the event he is liable for the same to the first plaintiffs. Briefly, I am of the view that while Mr Kwan received the sum of US$6.8m from Eltina, this was not misappropriated by Mr Darsan and therefore the first plaintiff has the basis to seek an account in relation to the same. Accordingly, there is no reason to order an indemnity or contribution as Mr Darsan is not liable to the plaintiffs for the same. However, there is the issue of costs of the Third-Party Action as the factual basis upon which Mr Darsan has brought the said proceedings is incorrect. There is a significant question mark as to Mr Darsan's reasons for doing so.

Mr Darsan's submissions

226 Mr Darsan submits that Mr Kwan was in fact the unlawful recipient of the sum of US$6.8m that the plaintiffs claim he had paid out from Eltina to

himself or entities controlled by him. According to Mr Darsan, Mr Kwan had procured the transfer of US$2m and US$1.8m from Eltina's bank account to Star Gold on 2 April 2013. Both Mr Darsan and Mr Kwan were the bank signatories of Star Gold. This was done using pre-signed blank fund transfer forms which Mr Darsan had signed and entrusted to him, and without the authorisation of Mr Darsan. On the same date, Mr Kwan transferred the sums from Star Gold into his personal bank account by signing the fund transfer forms as a bank signatory of the company. Furthermore, on or about 18 December 2013, Mr Kwan had procured the transfer of US$3m out of Eltina's bank account into his own bank account, again without the authorisation or consent of Mr Darsan.

Kwan's submissions

227 Mr Kwan's overarching submission is that the Third-Party Action is a concoction by Mr Darsan to try to disincentivise him from testifying for the plaintiffs against Mr Darsan.

228 In relation to the sum of US$3m, Mr Kwan submits that this was a gift from Mr Salgaocar, who had promised him in or around August 2011 that he would see to it that he could purchase a bigger home. In this regard, Mr Kwan deposed that Mr Darsan brought him to a bank branch on 18 December 2013, whereupon Mr Darsan transferred the US$3m to Mr Kwan's personal bank account. According to Mr Kwan, Mr Darsan had told him that the sum of US$3m was to assist him in repaying the remaining loan in respect of his house. Mr Kwan also states that he called Mr Salgaocar later that day to thank him.

229 In relation to the sums of US$2m and US$1.8m, Mr Kwan claims that Mr Darsan had "specifically instructed and approved" the transfer of these sums

in or around 2 April 2013. Thereafter, Mr Darsan had requested that from the total of US$3.8m, Mr Kwan transfer:

(a) US$247,105 to Ms Chiang;

(b) US$339,770 to Ms Tam;

(c) and US$2,570,000 to Star Gold.

230 The balance US$643,125 was kept by Mr Kwan, pursuant to Mr Darsan's instructions. Mr Kwan's explanation for his retention of this sum is that it was intended to compensate him for, *inter alia*, "accrued and unconsumed annual leave days since the start of [his] employment with Great Hero Services" and "accrued overtime pay for when [he] had worked on public holidays and weekends, accrued bonuses and a reward for [his] long service". This was because Great Hero was to be wound up later in 2013 for tax reasons. In this regard, Mr Kwan explained that since starting his employment with Great Hero in 2005, he had accrued over 300 days of annual leave which translated to the sum of US$643,125.

My decision and analysis

The circumstances under which the Third-Party Action was commenced

231 It is helpful to begin by considering Mr Kwan's submission that the Third-Party Action was commenced in order to dissuade him from testifying against Mr Darsan.

232 In this regard, it is pertinent that Mr Darsan's allegations of misappropriation against Mr Kwan was only made after he discovered that Mr

Kwan would be testifying for the plaintiffs. I summarise the chronology of the salient events for easy reference.

233 On 28 September 2020, Mr Darsan applied for leave to commence the Third-Party Action against Mr Kwan. Prior to this, on 4 December 2019, the plaintiffs' lawyers had written to Mr Darsan's lawyers to inform them that Mr Haridass and Mr Kwan would be testifying in Suit 821. In a letter dated 7 February 2020, Myra Li & Co., a law firm in Hong Kong, wrote on behalf of Mr Darsan to Mr Kwan ("**the Myra Li Letter**") to demand an explanation by 21 February 2020 in respect of a total of US$3.8m that Mr Darsan claimed was wrongfully transferred to himself from Eltina (which letter asserted to be Darsan's). The Myra Li Letter also queried whether Mr Kwan would be returning the amount. On or about 11 February 2020, Mr Bhasin Rajeev Kumar ("**Mr Kumar**"), a mutual friend of Mr Darsan and Mr Kwan, invited Mr Kwan to lunch that day. At the lunch, Mr Kumar told Mr Kwan that he heard about the Myra Li Letter and that Mr Kwan had a dispute with Mr Darsan. Mr Kumar also told Mr Kwan that if he agreed not to give evidence for the plaintiffs, he would not have to worry about the Myra Li Letter. Mr Kumar then invited Mr Kwan to go to office of Myra Li & Co. so that they could "explain" the matter to him. Mr Kwan declined the invitation.

234 Mr Kwan and Mr Kumar diverge on the motivation behind the repeated meetings that they had and the contents of their discussions. Mr Kwan's position is that Mr Kumar was the one who was eager to reach out to him, and their subsequent meetings were not a coincidence. Rather they were attempts by Mr Kumar to dissuade him from testifying against Mr Darsan. Mr Kumar's position is that it was Mr Kwan who had mentioned the issue of giving evidence for the plaintiffs when they met for lunch on 18 January 2020. The purpose of that lunch was for Mr Kwan to sign audit reports for one of Mr Kumar's restaurants,

in which Mr Kwan was an investor. According to Mr Kumar, Mr Kwan had told him at that time that he did not want to be a witness for the plaintiffs or to get involved in Suit 821. It was this conversation that triggered the 11 February 2020 meeting. Mr Kumar states that on 3 February 2020, he contacted Mr Kwan to meet to sign the relevant audit reports, but only managed to meet him on 11 February 2020. Mr Kumar also adds that Mr Kwan had called him the day before, on 10 February 2020, to tell him that he had received the Myra Li Letter.

235 I find Mr Kumar's position to be doubtful and prefer Mr Kwan's evidence. I make two points.

236 First, the WhatsApp messages disclosed by Mr Kumar do not support his position. The messages suggest that any signing of accounts for the restaurant in which Mr Kwan was an investor would have taken place in the week of 3 February 2020. That was the week that Mr Kumar had reached out, with Mr Kwan responding that he was only free to provide the signature the following Thursday. There was thus no reason for them to meet on 11 February 2020. Moreover, the WhatsApp messages also do not show at all that Mr Kwan was "very agitated" as Mr Kumar claims. Rather, the messages show Mr Kumar being the one to reach out to Mr Kwan displaying an eagerness to meet him. The following extracts make this clear:

16 January 2020

Mr Kumar:	Hi [Mr Kwan] are you in town
Mr Kwan:	In Hk
	This week in town, next week may be go to Singapore
Mr Kumar:	Hi can we meet tomorrow around 3pm
	Where can we meet
	…

Lets meet and discuss shall we meet maybe lunch tomorrow

Mr Kwan: Tomorrow can not. May be Saturday or Sunday?

Mr Kumar: Hi ok come to gaylord or namo for lunch

Have your wife join lunch too

Let me know

…

11 February 2020

Mr Kwan: Hi [Mr Kumar], you msg me?

Mr Kumar: Hi yes

Oh i have sent on other number

Mr Kwan: The other number without internet connection

only used when connected to wifi

Mr Kumar: Oh I didn't know

R u free to meet today around 3 in tst

Mr Kwan: Where?

Mr Kumar: Gaylord

Actually I wanted meet for lunch

But am still at home

…

20 February 2020

Mr Kumar: Hi [Mr Kwan]

I just finished my meeting in wanchai Restaurants

Are we meeting today

Come wanchai if u free

…

237 Second, I do not find credible Mr Kumar's claim that he only knew of Suit 821 in early 2020 through Mr Kwan, and Mr Darsan only disclosed this to him later when he called Mr Darsan in Mr Kwan's presence to try to help them

resolve their dispute. It is difficult to believe that Mr Darsan had not told Mr Kumar of Suit 821 as they were close friends of about 20 years. This is especially since Mr Kumar claims that on 21 January 2020, he met Mr Darsan for coffee and Mr Darsan had received a phone call and said he needed to make a short visit to his lawyers' office. This was a meeting at the offices of Myra Li & Co.. According to Mr Kumar, Mr Darsan asked Mr Kumar to accompany him and he did so, although he did not participate in the meeting with Mr Darsan's lawyers. The timing of this visit is suspicious given that Mr Kumar first reached out to Mr Kwan shortly after, on 3 February 2020 which was followed shortly after by the Myra Li Letter on 7 February 2020 and the call on and meeting on 11 February 2020. As such, the more likely situation is that Mr Kumar was aware of Suit 821 through Mr Darsan, who also told Mr Kumar that he was going to send the Myra Li Letter to Mr Kwan to discourage Mr Kwan from testifying.

238 As such, I agree that Mr Kumar's meetings with Mr Kwan were attempts to intimidate Mr Kwan into not giving evidence for the plaintiffs by raising the threat of the Third-Party Action being brought against him. There is, however, a further point.

239 The timing of the Third-Party Action also suggests that it was brought with the intention of intimidating Mr Kwan from giving evidence against Mr Darsan. The Third-Party Action concerns amounts that Mr Kwan allegedly misappropriated in 2013. However, it was only commenced in 2020, some seven years after this alleged misappropriation and six years after Suit 821. If the sums had been misappropriated as claimed by Mr Darsan, and they were significant, one would have expected Mr Darsan to procured Eltina to sue Mr Kwan for the same. Mr Darsan has not provided a convincing explanation for the belated commencement of this claim, save to claim that the alleged

misappropriation was only discovered in the course of Suit 821. However, this is at odds with his evidence during cross-examination where he claims that he had access to the ledgers of Eltina and Star Gold and was kept abreast of the transactions of these companies. The following extracts make this clear:

> Q: And when I say "these companies", I want to repeat, I'm referring to Trustworth, GBA, Cheermark, Joyking and Eltina. You would know, from having seen these documents which we call the ledgers, that they contain entries which appear to relate to the operations of these companies, correct?
>
> A: Yes.
>
> Q: As the owner of these companies, because that is your claim, you would have access to the ledgers, correct?
>
> A: Yes.
>
> Q: And indeed, Great Hero, according to you, was your company, yes?
>
> A: Yes.
>
> Q: And according to you, Terence and Mirrica were your employees, yes?
>
> A: Yes.
>
> Q: And because, according to you, these were your businesses, you would have wanted to keep tabs on what was happening in those businesses?
>
> A: Yes.
>
> Q: You would have wanted to know what money was coming into which account and what money was going out from which account.
>
> A: Yes.
>
> Q: And you would have done that daily, sir?
>
> A: Yes, whenever I was in Hong Kong.
>
> Q: Right. You were in Hong Kong until when?
>
> A: Until --
>
> Q: Until 2014 at least?
>
> A: Yes, yes, until that time.

240 It is therefore clear from Mr Darsan's testimony that he would have known of any alleged misappropriation by Mr Kwan *prior* to the commencement of Suit 821 given that he would have reviewed the ledgers of Eltina and Star Gold on a daily basis.

241 As such, I agree that the circumstances surrounding the commencement of the Third-Party Action point to an attempt by Mr Darsan to dissuade Mr Kwan from giving evidence in Suit 821. I turn now to consider the specific transfers that Mr Darsan claims were misappropriations by Mr Kwan.

The US$3m transfer on 18 December 2013

242 As regards the US$3m transfer from Eltina to Mr Kwan on 18 December 2013, I find that the evidence shows that the transaction was authorised by both Mr Salgaocar and Mr Darsan. This is notwithstanding the plaintiffs' position that is set out above at [32].

243 It is not in dispute that Mr Darsan was the sole signatory of the Eltina bank account. In this regard, Mr Kwan submits that the transfer of US$3m was effected by Mr Darsan personally, over the counter at the bank, and that Mr Darsan had signed for the transfer digitally. Mr Kwan's claim is supported by contemporaneous documentary evidence. This includes a copy of the withdrawal form that was produced by Mr Kwan which contained the remark "BY AC HOLDER MR JHAVERI DARSAN JITENDRA". When presented with this transfer slip during cross-examination, Mr Darsan was not able to provide an answer for how his signature ended up on the form. When asked by the court whether someone else had applied his signature on his behalf, Mr Darsan responded by saying that he "would not say someone has done… that" and that "[b]asically, [he does not] understand, because [he is] not able to certify

when this type of document is generated". I do not find Mr Darsan's explanation at all convincing and agree with Mr Kwan that the presence of the digital signature on the withdrawal form is clear evidence that Mr Darsan was present with Mr Kwan at the bank and had authorised the transfer from Eltina.

244 Given that the plaintiffs also do not challenge Mr Kwan's claim that the US$3m was given by Mr Salgaocar as a gift to him, I find Mr Kwan did not misappropriate the US$3m that was transferred on 18 December 2013.

245 It also follows from the plaintiffs' acceptance that this sum was a gift by Mr Salgaocar to Mr Kwan, that the question of misappropriation does not arise. Accordingly, Mr Darsan ought not to be liable to the plaintiffs for this sum. However, the issue of the costs of the Third-Party Action remains in view of the facts outlined above.

The US$3.8m transfer

246 As regards the US$3.8m transfer from Eltina to Star Gold and subsequently from Star Gold to Mr Kwan, it is common ground between Mr Darsan and Mr Kwan that there is no documentary evidence which points to Mr Kwan effecting the first leg of the transfer – Eltina to Star Gold – or that the transfer forms concerning the transfer were in fact signed by Mr Kwan. The question that remains is whether Mr Kwan misappropriated the US$2m and US$1.8m from Star Gold when he transferred the sums to his personal bank account.

247 I find that Mr Kwan has sufficiently explained the basis and reasons for the US$3.8m transfer from Star Gold to his personal bank account (see [229] above). He has also produced documentary evidence in support of the flow of funds from Star Gold to Ms Chiang and Ms Tam, and explained the basis for

his retention of the US$643,125. On the other hand, Mr Darsan has not produced any evidence to verify or refute Mr Kwan's version of events. He offers no confirmation from Ms Tam or Ms Chiang that they did not receive the funds from Mr Kwan. More pertinently, Mr Darsan has also failed to produce the Star Gold bank statements, which are within his control. These statements are relevant in proving whether Mr Kwan did not actually remit the sum of US$2,570,000 back to Star Gold as Mr Kwan claims (see [229] above) and instead misappropriated it as Mr Darsan claims (see [226] above).

248 Finally, I find it significant that the plaintiffs did not challenge Mr Kwan's version of events during the trial or in closing submissions, even though the sum of US$3.8m was pleaded in the SOC as having been misappropriated by Mr Darsan from Eltina (see [32] above). This raises the question of the principle in *Browne v Dunn* (1893) 6 R 67. That aside, the plaintiffs' failure to challenge Mr Kwan's testimony supports his case that the sum of US$3.8m was withdrawn with Mr Salgaocar's authorisation.

249 There is a further point. As noted above at [32], the thrust of the plaintiffs' case during cross-examination and in closing submissions is that the Third-Party Action has been brought to intimidate Mr Kwan from testifying for the plaintiffs in Suit 821. This argument does not address the core factual issue of whether the sum of US$3.8m was in fact misappropriated by Mr Darsan, which is the plaintiffs' case, or was authorised by Mr Salgaocar to be transferred, which is Mr Kwan's position. If it were the latter, Mr Darsan would not be liable to the plaintiffs for this sum. That aside, by contending that the Third-Party Action is an abuse of process, the plaintiffs accept that Mr Darsan has no claim for an indemnity or contribution against Mr Kwan. This is an implicit acceptance of Mr Kwan's position that the sum was authorised by Mr

Salgaocar to be transferred to him for the purposes he has described in his evidence.

250 In the premises, I find that Mr Kwan did not misappropriate the US$3.8m that was withdrawn from Eltina's bank account. It therefore follows that the question of misappropriation by Mr Darsan of the sum US$3.8m does not arise in the main action. This being the case, Mr Darsan ought not to be liable to the plaintiffs for the sum of US$3.8m.

Conclusion on Issue 4

251 For the reasons above, I find that Mr Kwan did not misappropriate the sum of US$6.8m from Eltina ("**the Third-Party Sum**") and Mr Darsan ought not to be liable to the plaintiffs for the Third-Party Sum as well. I therefore dismiss the Third-Party Action in its entirety, leaving the question of costs to be addressed.

Conclusion

252 I therefore find that Mr Darsan held the shares in the BVI SPVs and Singapore SPVs on trust for the estate of Mr Salgaocar, and as some of the companies are now defunct, presently holds the shares in 10 companies – Eltina, Singapore Star Holdings, Great Newton Properties, Singapore Star Investments, Singapore Star Shipping, Singapore Star Properties, Sino Ling Tao (SG), Millers Capital, Sino Noble and Nova Raffles on trust, under the 2003 Trust. Accordingly, I dismiss Mr Darsan's counterclaim for an account and inquiry in relation to the Running Account, and for the first plaintiff to pay over or deliver to Mr Darsan all monies and assets due to him. I also dismiss the Third-Party Action in its entirety.

253 For the purpose of the reliefs to follow, I shall define the equity in the BVI SPVs and the Singapore SPVs, past and present, as the trust assets. This includes the shares in the following 10 companies:

(a) Eltina;

(b) Singapore Star Holdings;

(c) Great Newton Properties;

(d) Singapore Star Investments;

(e) Singapore Star Shipping;

(f) Singapore Star Properties;

(g) Sino Ling Tao (SG);

(h) Millers Capital;

(i) Sino Noble; and

(j) Nova Raffles.

254 I note that the first plaintiff has sought amongst other things an account and inquiry on a wilful default basis. Such an account is premised on misconduct by the trustee and the beneficiary must allege and prove at least one act of wilful neglect or default (*UVJ and others v UVH and others and another appeal* [2020] 2 SLR 336 at [25]; *Daniel Fernandez v Edith Woi and another* [2021] 5 SLR 712 at [146]); *Innovative Corp Pte Ltd v Ow Chun Ming and another* [2022] SGHC 233 at [10]). Ordering an account and inquiry on a wilful default basis has ramifications for the trustee. It is wider in scope than a common account, as the trustee must not only account for what he has received, but also

for what he might have received but for the default. On the present facts, I am satisfied that Mr Darsan's conduct as outlined above at [191]–[224] justifies ordering an account and inquiry on a wilful default basis.

255 In arriving at this conclusion, I am mindful that the court in *Eller, Urs v Cheong Kiat Wah* [2020] SGHC 106 at [126] ("*Eller*") had expressed the view that an account and inquiry on a wilful default basis is ordered when a trustee breaches his management stewardship duty. However, a careful review of the judgment in *Eller* will show that the court intended to illustrate one instance when such an account would be ordered. Indeed, the authorities cited above make it clear that the key ingredient is misconduct by the trustee of his duties regardless of the nature of the duties that have been breached – whether that be the custodial or the management stewardship duty. The present case involves both aspects.

256 To the extent that the fourth to fourteenth defendants dealt with any of the trust assets, I agree with the plaintiffs that they are liable to account as constructive trustees. I find that an institutional constructive trust may be imposed over these assets. Such a trust is "imposed whenever the defendant knows that the property in question has been dealt with in an unconscionable manner" (*Guy Neale (CA)* at [124]). Bearing in mind that a corporate defendant may be attributed with the state of mind of the person who is the directing mind and will in relation to the act or omission in question (*MKC Associates Co Ltd and another v Kabushiki Kaisha Honjin and others* [2017] SGHC 317 at [287]), I find that to the extent Mr Darsan caused the fourth to fourteenth defendants to deal with the trust assets in breach of trust, the latter are liable to account as constructive trustees.

257 I note that the second plaintiff, Winter Meadow, has also sought an account from Mr Darsan of all its assets and the delivery up or transfer of all its books and records for the period that he was its director. However, it is unclear what cause of action Winter Meadow seeks to rely on for these reliefs. The SOC discloses no claim of misappropriation by Mr Darsan from Winter Meadow in the period that he was its director. Moreover, the plaintiffs' position is that Winter Meadow is not one of the SPVs that were set up by Mr Salgaocar pursuant to the December 2003 Agreement and therefore is not a trust asset (defined at [253] above) *per se*. Instead, the plaintiffs' position as regards Winter Meadow is that Mr Darsan had caused Sino Ling Tao (SG) to transfer its assets to Winter Meadow in breach of the 2003 Trust. The relief for this transfer is encapsulated in the primary relief that I will order in relation to Sino Ling Tao (SG), which is a trust asset as defined at [253] above. There is therefore no basis for Winter Meadow to ask for an account of the movement of assets thereafter as that is effectively seeking relief against the assets of Sino Ling Tao (SG), which the plaintiffs have confirmed they are not pursuing. As such, I decline to order the reliefs sought by Winter Meadow against Mr Darsan and dismiss the claim it has brought.

258 I therefore give judgment for the plaintiffs as follows:

(a) I grant a declaration that Mr Darsan and the fourth to fourteenth defendants hold the trust assets (as defined at [253] above) save for the Third-Party Sum on trust for the first plaintiff;

(b) Mr Darsan is to provide an account of the trust assets (as defined at [253] above) save for the Third-Party Sum, interests and traceable proceeds of the same to the first plaintiff on a wilful default basis;

(c) Mr Darsan and the fourth to fourteenth defendants are to cause or procure the delivery up, transfer of possession or title or ownership to the first plaintiff of all the trust assets (as defined at [253] above) save for the Third-Party Sum, interests and traceable proceeds, including profits generated by the trust assets and the books and records of the BVI SPVs, the Singapore SPVs and their subsidiaries;

(d) I grant an injunction restraining Mr Darsan and all entities, parties and/or persons controlled by him, as well as the fourth to fourteenth defendants from disposing of the trust assets (as defined at [253] above) save for the Third-Party Sum with the plaintiffs at liberty to apply for an expansion of the injunction in the event they establish such further assets that rightfully belong to the 2003 Trust; and

(e) In the event the plaintiffs elect not to seek an account, Mr Darsan is to pay the first plaintiff damages to be assessed.

259 I invite submissions on costs, including quantum, which are to be filed within 21 days from the date hereof, limited to 20 pages each.

Kannan Ramesh
Judge of the Appellate Division

Davinder Singh s/o Amar Singh SC, Jaikanth Shankar, Gerald Paul Seah Yong Sing and Lo Ying Xi John (Davinder Singh Chambers

LLC) (instructed), Kanapathi Pillai Nirumalan and Bryan Looy Chye Shen (Niru & Co LLC) for the plaintiffs;
Tan Chee Meng SC, Lim Wei Lee, Koh Jia Wen, Wang Yufei and Kara Quek (WongPartnership LLP) (instructed), Ramesh Kumar s/o Ramasamy, Koh Zhen-Xi, Benjamin, Leong Yi-Ming and Nicholas Ng Wei Jie (Allen & Gledhill LLP) for the first defendant and fourth to fourteenth defendants;
Suresh s/o Damodara, Ong Ziying Clement and Lim Dao Yuan Keith (Damodara Ong LLC) for the third party.

Annex 1

Misappropriation from GBA Minmetals		
Receiving Party	**Payments (US$)**	**Date**
Mr Darsan	100,000	12 July 2011
	5,000,000	15 August 2011
	19,900	26 August 2011
	250,000	7 September 2011
	133,508	15 December 2011
Parag Kothari/Parthik Kothari	5,000,000	30 May 2013
Ultra Best Ltd	1,001,165	13 March 2012
	8,997,625	14 March 2012
	8,727,571	19 March 2012
	8,618,000	3 April 2012
	20,005,000	18 April 2012
	14,302,000	26 April 2012
	25,000,000	30 April 2012
	10,000,000	2 May 2012
	13,558,000	8 May 2012
	8,267,000	18 May 2012
	23,350,000	22 May 2012
	10,278,000	7 June 2012
	4,310,000	6 July 2012

Misappropriation from GBA Minmetals		
Receiving Party	**Payments (US$)**	**Date**
Ultra Best Ltd	4,910,000	14 August 2012
	10,000,000	27 September 2012
	4,091,000	30 October 2012
	7,936,000	4 December 2012
	5,145,000	7 February 2013
Total	**US$198,999,769**	

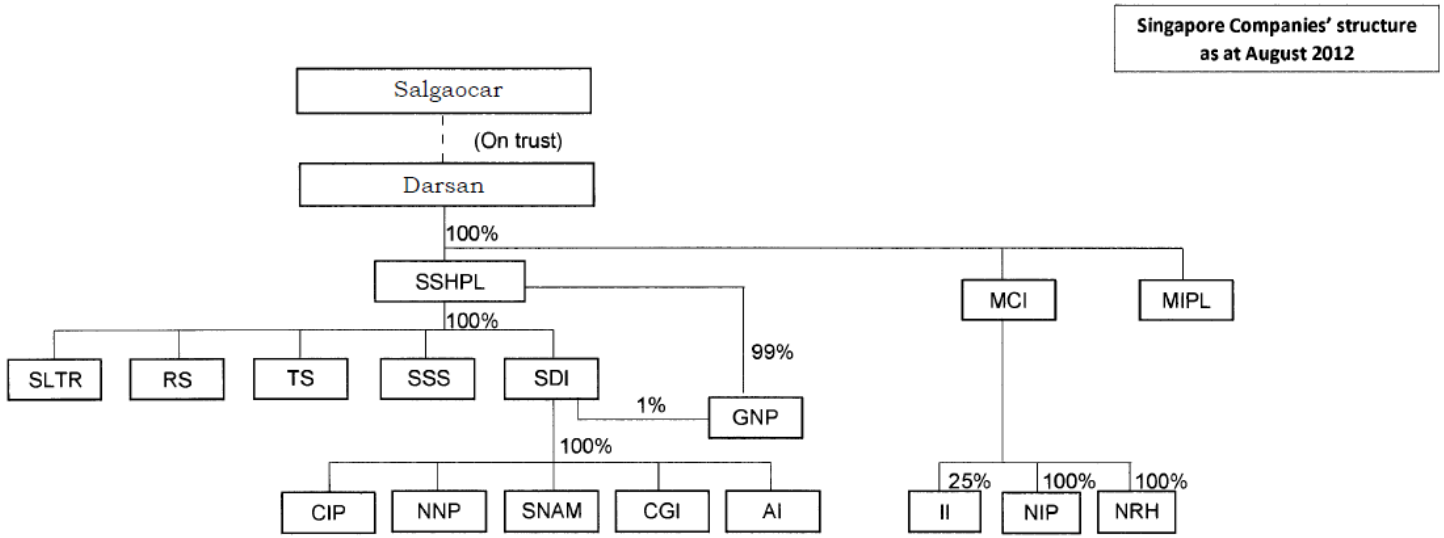
Misappropriation from Joyking		
Receiving Party	**Payments (US$)**	**Date**
Mr Darsan	4,500,000	18 July 2011
	385,000	26 July 2011
	2,000	27 July 2011
	1,500,000	29 July 2011
	400,000	9 August 2011
	380,000	11 August 2011
Boon Ventures	550,000	8 April 2011
Star Gold Limited	400,000	28 July 2011
Total	**US$8,117,000**	

Misappropriation from Cheermark		
Receiving Party	**Payments (US$)**	**Date**
Mr Darsan	100,000	27 September 2011
P.D. Holdings Ltd	100,000	28 October 2011
	1,900,000	15 August 2011
Villingen Limited	1,000,000	22 September 2011
	11,000,000	31 October 2011
Total	**US$14,100,000**	

Misappropriation from Eltina		
Receiving Party	**Payments (US$)**	**Date**
Mr Darsan	98,205	18 January 2012
	49,613	24 February 2012
	3,000,000	18 December 2013
	13,000,000	18 December 2013
Gems Luck HK Ltd	1,800,000	4 November 2013
Mbada Diamonds Pty Ltd	2,432,351	11 August 2011
PD Holdings Ltd	1,500,000	14 February 2012
Sino Star Trading DMCC	100,000	4 March 2013
Sky Joy Ltd	200,000	12 November 2013
Star Gold Ltd	1,800,000	4 February 2013
	2,000,000	4 February 2013
	1,000,000	4 September 2013
Twinklediam Hongkong Ltd	1,600,000	2 January 2012
Ultra Best Ltd	650,000	13 March 2012
	1,400,000	19 March 2012
	496,000	4 March 2012
	3,745,000	6 July 2012
	3,651,000	22 June 2012
	3,648,000	14 August 2012

Misappropriation from Eltina		
Receiving Party	**Payments (US$)**	**Date**
Ultra Best Ltd	136,000	4 August 2012
	5,850,000	24 April 2012
Villingen Limited	1,000,000	29 February 2012
Total	**US$49,156,169**	

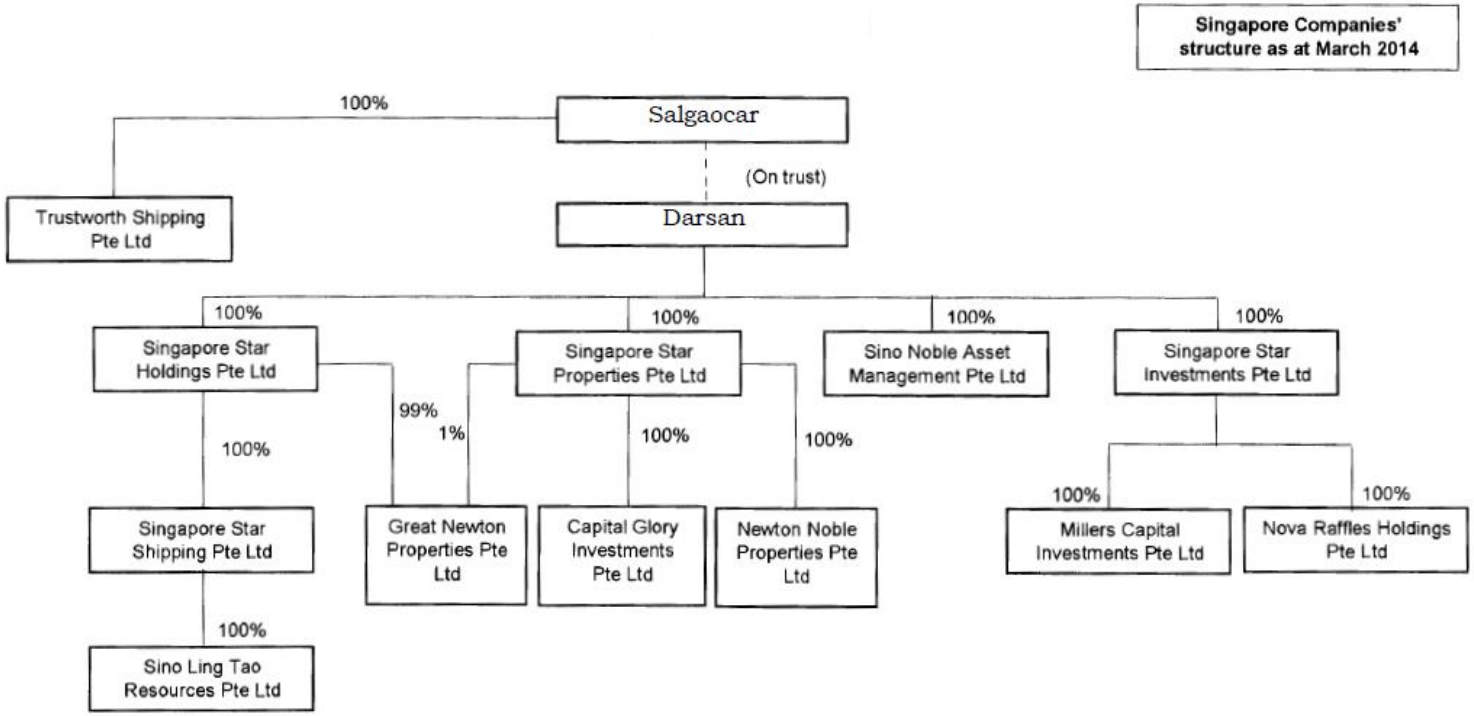
Annex 2



SSHPL: Singapore Star Holdings Pte Ltd
SLTR: Sino Ling Tao Resources Pte Ltd
RS: Regent Shipping Pte Ltd
TS: Trustworth Shipping Pte Ltd
SSS: Singapore Star Shipping Pte Ltd
SDI: Sino Diamond Investments Pte Ltd
GNP: Great Newton Properties Pte Ltd
CIP: Cargills Investments Pte Ltd
NNP: Newton Noble Properties Pte Ltd

SNAM: Sino Noble Asset Management Pte Ltd
CGI: Capital Glory Investments Pte Ltd
AI: Albana Investments Pte Ltd
MCI: Millers Capital Investments Pte Ltd
MIPL: Millers Investments Pte Ltd
II: Innovale Investments Pte Ltd
NTP: Nova ICAP Pte Ltd
NRH: Nova Raffles Holdings Pte Ltd

Annex 3



Note:

- Singapore Star Holdings Pte Ltd was formerly known as Sino Noble Holdings Pte Ltd.
- Singapore Star Properties Pte Ltd was formerly known as Sino Diamond Investments Pte Ltd.
- Singapore Star Investments Pte Ltd was formerly known as Millers Investments Pte Ltd