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

[2024] SGHC 203

Originating Summons No 288 of 2022

Between

British and Malayan Trustees Ltd

… Applicant

And

(1) Ameen Ali Salim Talib
(2) Helmi bin Ali bin Talib
(3) Murtada Ali Salem Talib
(4) Saadaldeen Ali Salim Talib
(5) Shawqi Ali Salem Taleb
(6) Lutfi Salim bin Talib
(7) Zayed bin Abdul Aziz Talib

… Respondents

GROUNDS OF DECISION

[Trusts — Trustees — Administration actions — O 80 r 2 of the Rules of Court (2014 Rev Ed)]
[Trusts — Trustees — Powers — Right of recoupment]

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v
Ameen Ali Salim Talib and others

[2024] SGHC 203

General Division of the High Court — Originating Summons No 288 of 2022
Hri Kumar Nair J
12, 16 July 2024

8 August 2024

Hri Kumar Nair J:

Introduction

1 British and Malayan Trustees Limited (the "Trustees") applied for relief under O 80 r 2 of the Rules of Court (2014 Rev Ed) ("ROC 2014") in respect of trusts established under an Indenture of Settlement dated 10 September 1921 between Shaik Sallim bin Mohamed bin Sallim bin Talib (the "Settlor"), of the one part, and the Settlor, Shaik Salleh and Shaik Ahmad of the other part, and various supplemental indentures including a Supplemental Indenture dated 7 October 1933 (the "Trust").

2 Due to an erroneous interpretation of the terms of the Trust, the Trustees had, for approximately two decades, made over- and under-payments to several beneficiaries of the Trust. The key questions in this application were whether these over-payments could be recouped and redistributed to the beneficiaries

who had been underpaid, and whether the terms of the Trustees' proposed plan to achieve this redistribution were appropriate.

3 On 16 July 2024, I issued my brief written grounds, ruling that the Trustees had the right to recoup the overpayments and sanctioning the terms of the Trustees' plan. As the application concerned the equitable right of recoupment which has thus far not been considered by our courts, I now issue my detailed grounds of decision.

Facts

The Trust

4 The Trust comprises a portfolio of real estate holdings and shares.[1] Pursuant to its terms, the Trust will expire on 26 September 2029.[2]

The parties

5 The Trustees are a trust corporation incorporated in Singapore, appointed as sole trustee of the Trust by an Order of Court dated 31 March 1989.[3] The Trustees were responsible for, *inter alia*, the distribution of the net income of the Trust property (the "Trust Income") among the beneficiaries of the Trust, in accordance with its terms.[4]

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1 Affidavit of Ngiam Hai Peng dated 24 March 2022 ("Aff 1st Ngiam") at para 10.

2 Aff 1st Ngiam at para 13.

3 Aff 1st Ngiam at para 9; Affidavit of Zayed bin Abdul Aziz Talib dated 1 November 2022 ("Aff 2nd 7R") at paras 5, 18.

4 Aff 1st Ngiam at para 10; Aff 2nd 7R at paras 5, 19.

6 The first to fifth respondents were beneficiaries of the Trust. By an Order of Court dated 30 September 2022, they were appointed as the representatives of 15 other beneficiaries in these proceedings.[5]

7 The sixth and seventh respondents, Mr Lutfi Salim bin Talib ("Mr Lutfi") and Mr Zayed bin Abdul Aziz Talib ("Mr Zayed") respectively, were also beneficiaries of the Trust.[6]

Background to the dispute

8 The background to these proceedings has been succinctly set out by Vincent Hoong J ("Hoong J") in *British and Malayan Trustees Limited v Ameen Ali Salim Talib and others* [2023] 4 SLR 630 at [1]–[5].

9 A dispute arose between the Trustees and some beneficiaries over the interpretation of a particular term of the Trust. It concerned the question of whether the share in the Trust Income of a deceased beneficiary who passed without issue should be divided amongst, and held on trust for:

(a) all surviving beneficiaries (the "*Pari Passu* Interpretation"); or

(b) only those beneficiaries whose shares in the Trust Income were derived from the same child of the Settlor from who the deceased beneficiary's share devolved (the "Branch Interpretation").

I shall refer to this as the Interpretation Question.

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5 Affidavit of Ameen Ali Salim Talib dated 1 November 2022 ("Aff 1R") at para 3.

6 Aff 2nd 7R at para 4.

10 The Trustees applied in HC/OC 163/2019 ("OC 163") for the Interpretation Question to be determined. On 20 November 2019, Hoong J decided in favour of the Branch Interpretation: *British and Malayan Trustees Limited v Lutfi Salim bin Talib and others* [2019] SGHC 270 at [50(c)]–[51].

11 Prior to this determination, the Trustees had considered the Interpretation Question on several occasions, including four occasions where a beneficiary had passed away without leaving any issue (or was deemed as such under the terms of the Trust):

(a) On 30 October 1980, the then-trustees of the Trust received legal advice that the *Pari Passu* Interpretation applied.[7]

(b) On 21 November 2001, Mr Salem bin Ahmad bin Salamah Talib ("Mr Salem"), a grandchild of the Settlor and beneficiary of the Trust, passed away. Mr Salem had several children, including Mdm Hana bte Salem Taleb ("Mdm Hana"). At the time of Mr Salem's death, Mdm Hana was deemed under the terms of the Trust to have passed away without issue as she was married to a non-Mohammedan. Mr Salem's share of the Trust Income was initially distributed to Mdm Hana's siblings only. In 2003, adjustments were made to the relevant beneficiaries' entitlements to the Trust Income to the effect that Mdm Hana's share was distributed in accordance with the *Pari Passu* Interpretation from 21 November 2001.[8] The Trustees took this approach after receiving legal advice from a law firm ("the Firm").[9] The

7 Aff 1st Ngiam at para 16(1).

8 Aff 1st Ngiam at para 32

9 Aff 1st Ngiam at para 33.

Trustees informed the beneficiaries of this decision by way of a circular dated 6 October 2003.[10]

(c) On 4 June 2003, Mdm Noor bte Ali bin Sallim bin Talib ("Mdm Noor"), another grandchild of the Settlor and beneficiary of the Trust, passed away without issue.[11] The Trustees distributed Mdm Noor's share of the Trust Income in accordance with the *Pari Passu* Interpretation after receiving legal advice from the Firm.[12] The Trustees informed the beneficiaries of this decision by way of the same circular dated 6 October 2003.[13]

(d) On 18 June 2008, Mr Salleh bin Amir Talib ("Mr Salleh"), another grandchild of the Settlor and beneficiary of the Trust, passed away without issue.[14] The Trustees distributed Mr Salleh's share of the Trust Income in accordance with the *Pari Passu* Interpretation. This was after the Trustees had sought legal advice from the Firm because Mr Salleh had a step-child.[15] The Trustees informed the beneficiaries of this decision by way of a circular dated 21 November 2008.[16]

(e) On 2 May 2014, Mr Shafeeq bin Salim Talib ("Mr Shafeeq"), another grandchild of the Settlor and beneficiary of the Trust, passed away without issue.[17] His brothers, Mr Lutfi and Mr Kamal bin Salim

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10 Aff 1st Ngiam at para 34.

11 Aff 1st Ngiam at para 37.

12 Aff 1st Ngiam at para 38.

13 Aff 1st Ngiam at para 39.

14 Aff 1st Ngiam at para 42.

15 Aff 1st Ngiam at para 43.

16 Aff 1st Ngiam at para 44.

17 Aff 1st Ngiam at para 48.

Talib ("Mr Kamal"), asserted that Mr Shafeeq's share in the Trust should devolve to his relatives in accordance with Singapore intestacy laws, alternatively under Muslim law.[18] The Trustees consulted the Firm, which advised that Mr Shafeeq's share be distributed in accordance with the *Pari Passu* Interpretation.[19] The Firm maintained its position after considering an opinion from a Queen's Counsel engaged by the Trustees.[20] On 30 June 2017, the Trustees resolved that Mr Shafeeq's share be distributed in accordance with the *Pari Passu* Interpretation.[21]

12 Dissatisfied with the Trustees' decision, Mr Lutfi and Mr Kamal obtained an opinion from another Queen's Counsel, which supported the Branch Interpretation. As a result, the Trustees filed OC 163. Hoong J's decision that the Branch Interpretation was preferred meant that the Trust Income had been erroneously distributed for almost two decades from 21 November 2001 – some beneficiaries had received more than what they were entitled to (the "overpaid beneficiaries") and conversely, some beneficiaries had received less (the "underpaid beneficiaries").[22]

13 Since the decision in OC 163, the Trustees have applied the Branch Interpretation to the distribution of the Trust Income.[23] As such, over- and under-payments were limited to the period 21 November 2001–November 2019.

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18 Aff 1st Ngiam at para 49.

19 Aff 1st Ngiam at para 50.

20 Aff 1st Ngiam at paras 53–54.

21 Aff 1st Ngiam at para 56.

22 Aff 1st Ngiam at paras 23, 25.

23 Aff 1st Ngiam at para 24.

Events after the determination of the Interpretation Question in OC 163

14 The parties in OC 163 thereafter attempted to agree on how the over- and under-payments should be resolved.[24] However, no consensus could be reached.[25]

15 The Trustees applied in OC 163 to seek directions on the issue of the recoupment of over-payments ("the Consequential Issue Application").[26] Therein, the parties set out their respective positions:

(a) The Trustees took the view that recoupment for the period May 2014 (*ie*, when the objection to the application of the *Pari Passu* Interpretation was first raised) to November 2019 represented the fairest approach.[27] This took into account that (i) the beneficiaries of the Trust had acquiesced to the application of the *Pari Passu* Interpretation from 2001 until May 2014; (ii) neither group of beneficiaries had, at the time of the Consequential Issue Application, taken the position that there should be recoupment of distributions from 2001; and (iii) recoupment from May 2014 would entail a smaller amount and ameliorate any inconvenience to the overpaid beneficiaries.[28] In addition, the Trustees proposed a plan to effect the recoupment for this period.[29]

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24 Aff 1st Ngiam at para 73.

25 Aff 1st Ngiam at para 81.

26 Aff 1st Ngiam at para 83.

27 Aff 1st Ngiam at para 86.

28 Aff 1st Ngiam at para 87.

29 Aff 1st Ngiam at para 88.

(b) A group of the overpaid beneficiaries[30] took the position that it would not be appropriate for the court to hear the Consequential Issue Application as it was not prayed for in OC 163 and it involved matters of fact which were disputed.[31] If the Consequential Issue Application was heard, they maintained that there should be no recoupment at all.[32] They also criticised the Trustees' recoupment plan as impractical, haphazard and arbitrary.[33]

(c) A group of beneficiaries represented by Mr Lutfi and Mr Zayed took the position, *inter alia*, that the recoupment should take effect from the date of the death of the beneficiary who passed without issue. The Trustees understood this to be 21 November 2001, coinciding with the death of Mr Salem, and therefore applying to all previous erroneous distributions.[34]

16 On 23 July 2021, Hoong J held that the Consequential Issue Application was outside the scope of, and not suitable to be heard in, OC 163.

17 As a result, the Trustees filed this application.

OC 230

18 Then came a significant development.

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30 Aff 1st Ngiam at para 72(1)

31 Aff 1st Ngiam at para 90.

32 Aff 1st Ngiam at para 91.

33 Aff 1st Ngiam at para 92.

34 Aff 1st Ngiam at para 94(1).

19 On 18 April 2023, Mr Lutfi and Mr Zayed commenced an action in HC/OC 230/2023 ("OC 230") against the Trustees. They claimed to represent 31 other individual beneficiaries (collectively, the "OC 230 Claimants").[35] The OC 230 Claimants sought, *inter alia*, an order for the Trustees to be made personally liable for the sums underpaid to them from May 2014 due to the wrongful application of the *Pari Passu* Interpretation.[36]

20 On 26 April 2024, the OC 230 Claimants and the Trustees entered into a confidential settlement agreement (the "Settlement Agreement").[37] Under the Settlement Agreement, the Trustees, without admission of liability, agreed to pay into the Trust a sum of $1,185,281.61 – being the total sum of net under-payments for the period of 2 May 2014 to November 2019 – and thereafter cause the relevant amounts to be distributed to the beneficiaries who had been underpaid for the same period.[38] The Trustees also agreed that it would not seek to recoup or recover any overpaid distributions of the Trust Income from 2 May 2014.[39]

21 OC 230 was discontinued on 6 May 2024.[40]

The unresolved over- and under-payments

22 As a result of the Settlement Agreement, the issue of under- and over-payments for the period 2 May 2014–November 2019 was resolved. That left

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35 Affidavit of Ngiam Hai Peng dated 14 June 2024 ("Aff 9th Ngiam") at para 13.

36 Aff 9th Ngiam at para 14.

37 Aff 9th Ngiam at para 15.

38 Aff 9th Ngiam at para 16.

39 Aff 9th Ngiam at para 17.

40 Aff 9th Ngiam at para 18.

the issue of the erroneous distribution for the period 21 November 2001–1 May 2014. The Trustees determined that this amounted to a sum of $1,464,607.94.[41]

23 In its affidavit filed after the Settlement Agreement was entered, the Trustees highlighted the lack of consensus between the beneficiaries in relation to this outstanding matter, and that it would "stand guided by the Honourable Court on how and whether recoupment should be undertaken in the circumstances of this case".[42]

The parties' cases

The Trustees' case

24 The Trustees sought directions on the exercise of its right of recoupment against the overpaid beneficiaries from their future entitlements to the Trust Income. According to it, this was a question that the court could determine under O 80 r 2 of ROC 2014,[43] given that the beneficiaries of the Trust had taken different positions on the Trustees' right of recoupment and how the Trustees should proceed in the circumstances of this case.[44]

25 The Trustees also proposed a plan to recover the overpaid distributions for the period 21 November 2001–1 May 2014 (the "Proposed Plan") in the event recoupment could be undertaken.

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41 Aff 9th Ngiam at para 26.

42 Aff 9th Ngiam at para 37.

43 Applicant's Written Submissions dated 5 July 2024 ("A Subs") at paras 18, 54.

44 A Subs at paras 18(5), 31–32.

The Proposed Plan

26 The Proposed Plan was as follows:[45]

(a) Any recoupment would be made for over-payments to beneficiaries for the period 21 November 2001–1 May 2014, from their future entitlements to the Trust Income. Thereafter, the Trustees intended, upon such recoupment, to pay such sums to the underpaid beneficiaries with a view to making up the underpaid amounts to them.

(b) There would be no recoupment or further recoupment from overpaid beneficiaries who have passed away before or during the recoupment exercise as their interest in the Trust would have devolved, in turn eliminating any future entitlement to the Trust Income. Any shortfall due to the underpaid beneficiaries resulting from the inability to recoup from the overpaid beneficiaries who are deceased would not be paid to the underpaid beneficiaries. At the time of my decision, this shortfall amounted to $285,797.45.[46]

(c) The recoupment exercise would be undertaken over a 36-month period, with (i) each overpaid beneficiary's overpaid amount to be recouped divided on a straight-line basis over a 36-month period; and (ii) the total amount of recouped amount each month accumulated and paid out to the underpaid beneficiaries or their estates every six months in the proportion of the total underpaid amount each was owed.

(d) Where a deceased underpaid beneficiary's estate's personal representative could not be located without undue burden or costs to the

45 Aff 9th Ngiam at para 28.

46 Aff 9th Ngiam at para 31.

Trust, the said sums would not be paid to the said estate and would instead be paid to the rest of the underpaid beneficiaries in the relevant proportions.

The first to fifth respondents' case

27 The first to fifth respondents opposed the application. They consistently – since OC 163 to the hearing of this application –[47] took the position that there should be no recoupment from the overpaid beneficiaries at all. They first argued, at the hearing, that the application was improper because the Trustees had already committed to the position that there should be no recoupment prior to May 2014. They next argued that the underpaid beneficiaries' primary cause of action ought to lie against the Trustees personally and no right of equitable recoupment would lie as against the overpaid beneficiaries until this primary remedy had first been exhausted.[48]

28 The first to fifth respondents then maintained that there should be no recoupment because the beneficiaries of the Trust had fully accepted and acquiesced to the application of the *Pari Passu* Interpretation prior to May 2014.[49] In these premises, it would be unconscionable for the underpaid beneficiaries to ask for recoupment for the period 21 November 2001–1 May 2014 and they were estopped from doing so.[50] They further submitted

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47 Aff 1R at paras 19–20; Affidavit of Helmi bin Ali bin Talib dated 27 June 2024 at paras 6, 9, 16.

48 1st to 5th Respondents' Written Submissions dated 5 July 2024 ("1–5R Subs") at paras 18, 49–52.

49 1–5R Subs at para 33.

50 1–5R Subs at para 33.

that the underpaid beneficiaries were estopped by convention from challenging the application of the *Pari Passu* Interpretation for the same period.[51]

29 In relation to the Proposed Plan, the first to fifth respondents submitted that it would entail incurring additional costs, especially to locate the personal representatives of the deceased underpaid beneficiaries[52] as well as the cost of the proceedings in OS 288 and OC 230.[53] They also submitted that the impact of the Proposed Plan to the overpaid beneficiaries was significant as it would be "in the range of 9% to 15% of the overpaid beneficiaries' entitlements for one year".[54]

The sixth and seventh respondents' case

30 Mr Lutfi and Mr Zayed argued that the Trustees should exercise its right of recoupment for the period 21 November 2001–1 May 2014,[55] that they did not acquiesce to the application of the *Pari Passu* Interpretation for the same period[56] and that the first to fifth respondents "had not demonstrated any concrete prejudice arising out of recoupment".[57]

Issues to be determined

31 This application raised three issues:

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51 1–5R Subs at paras 53–56.

52 1–5R Subs at para 34.

53 1–5R Subs at para 36.

54 1–5R Subs at para 35.

55 6th and 7th Respondents' Written Submissions dated 5 July 2024 ("6–7R Subs") at paras 4(a), 19–20.

56 6–7R Subs at paras 4(b), 26–33.

57 6–7R Subs at paras 4(c), 35–43.

(a) whether it was appropriate for the Trustees to seek directions in the circumstances of this case;

(b) whether the Trustees' right of recoupment was barred on account of any acquiescence or estoppel; and

(c) assuming the right of recoupment could be exercised, whether the Proposed Plan should be approved.

The notion of recoupment

32 It is apposite to first understand the notion of recoupment. In certain situations, due administration of a trust, particularly one that makes distributions out of the trust fund, may require adjusting the amounts to be paid. This may be where a beneficiary has been overpaid or instigated a breach of trust, such that the trustee may 'recoup' the loss; or where a trustee has paid trust expenses out of her personal resources, she may 'recoup' the expenses from the trust funds: see Charles Mitchell and Jessica Hudson, "Trustee Recoupment: A Power Analysis" (2021) 35(1) Trust Law International 3 ("*Trustee Recoupment*") at 3, in which the learned authors of the article provide an in-depth and helpful study of how recoupment works and when it is possible.

33 The authors of the abovementioned article identified five typical situations in which recoupment is carried out:

(a) "where a trustee pays a beneficiary money to which she is not entitled under the trust terms, future payments to the beneficiary can be reduced by the amount of the overpayment";

(b) "where a breach of trust is committed by a trustee who is also a beneficiary, future payments made to her in her capacity as beneficiary can be reduced to make good the loss sustained by the trust fund";

(c) "where a trustee commits a breach of trust at the instigation of a beneficiary [and] they are jointly and severally liable for the loss", property that would have been distributed to the beneficiary can be used to reimburse the trustee if she was compelled to pay more than her fair share of the common liabilities;

(d) "where a beneficiary defaults on a duty of care she owes to contribute to the trust fund, payments to her out of the trust fund can be reduced by the amount of her liability"; and

(e) "where a trustee pays a third party to discharge a debt incurred by the trustee in carrying out the trust business, she can reimburse herself".

34 Recoupment has been observed as the making of "an adjustment to the trust accounts". In particular, "recoupment against a particular beneficiary adjusts her entitlement to the benefit of trust property and her right to due administration". The trustee's corresponding duties to that beneficiary are also changed, as are the trustee's duties of due administration to the other beneficiaries: *Trustee Recoupment* at 7.

35 Recoupment plans can offer "a practical and sensible way to cause the least inconvenience to the [beneficiaries] whilst nevertheless ensuring all were treated fairly and equitably, even if over the longer-term": *Australian Prudential Regulation Authority v Kelaher* [2019] FCA 1521 ("*Kelaher*") at [308]. In this regard, recoupment is but one of the several options that could be available to

solve a misadministration of trust; alternatives include "for the trustee to reinstate the trust estate out of her personal resources, or … to bring proceedings against the beneficiary" to recover an over-payment or unpaid contribution. Recoupment, however, "offers advantages over the bringing of legal claims because it enables trustees to avoid the risks and costs of litigation and the risk of the beneficiary becoming insolvent": *Trustee Recoupment* at 12.

The Trustees could seek direction from the court

36 Order 80 r 2(1) of the ROC 2014 states:

> An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.

37 An administration action exists to provide guidance to personal representatives in the performance of their duties or protection to beneficiaries and creditors against the actions of personal representatives: Cavinder Bull, gen ed, *Singapore Civil Procedure 2024* (Vol 1) (Sweet & Maxwell, 2024) ("*Singapore Civil Procedure*") at para 32/1/2, citing *Shafeeg bin Salim Talib and another v Helmi bin Ali bin Salim bin Talib* [2009] SGHC 180 at [24]. Such an action is concerned with those aspects of administration which require the assistance of the court and does not extend to contentious matters, *eg*, matters involving breach of trust or wilful default: *Singapore Civil Procedure* at para 32/1/2.

38 It is recognised that there are at least four situations in which a court can be involved in the administration of a trust, as categorised in *Public Trustee v Cooper* [2001] WTLR 901 ("*Cooper*"):

> At the risk of covering a lot of familiar ground and stating the obvious, it seems to me that, when the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well).
>
> (1) The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or a statute or both. … It is not always easy to distinguish that situation from the second situation that I am coming to …
>
> (2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. …. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are *prima facie* in a much better position than the court to know what is in the best interests of the beneficiaries.
>
> (3) The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. … The difference between category (2) and category (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion.
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> (4) The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. …
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> …
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> There may be variations within each category; and a particular application may straddle more than one category. Moreover, some caution needs to be exercised before assuming that there is always a bright-line distinction between the case where trustees surrender their discretion and a case where they do not.

39 The four categories in *Cooper* were affirmed by the High Court in *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 1 SLR 211 ("*Foo Jee Seng*") at [25]. The High Court further explained that the court does not perform the function of supervising the day-to-day exercise of discretion by the trustees; instead, the court is dependent on the beneficiaries of the trust to bring alleged instances of improper trustee behaviour to the court's attention: *Foo Jee Seng* at [25].

40 The Trustees submitted that its application fell within Category (1) in *Cooper*, namely that the issue was whether the Trustees could exercise the right of recoupment. Mr Lutfi and Mr Zayed took the same position. In contrast, the first to fifth respondents argued that the present application was one falling within Category (2) since the Trustees had already taken the position that there should be no recoupment prior to May 2014.

41 The parties' submissions warrant a further examination of the Category (1) and Category (2) situations.

42 In a Category (1) situation, the court considers questions such as the extent of the trustee's powers and the proper construction of the trust instrument: *Foo Jee Seng* at [25]; see also Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th Ed, 2020) ("*Lewin on Trusts*") at para 39-087. In such a situation, precisely because the trustee is unclear as to its powers, the trustee is unable to act and discharge its duties, prompting the need to seek guidance from the court. Thus, the court is tasked with determining if such powers exist, or the scope or extent of those powers.

43 Conversely, in a Category (2) situation, the trustee may seek to legitimise a proposed exercise of its power by asking for the court's approval of its intended course of action: *Foo Jee Seng* at [25]. While the court does not, and should not, get involved in decisions which a trustee has been appointed to make, as noted in *Cooper*, an application for approval may be suitable where the decision is particularly 'momentous' for the trust. This has been explained as "a decision of real importance for the trust": *Rep of Otto Poon Trust* [2015] JCA 109 at [14]. Importantly, the application would also provide an avenue for beneficiaries who may oppose the trustee's decision to express their views for the court's consideration. In fact, contention among the beneficiaries may turn a decision which would otherwise be taken by the trustee without recourse to the court into a 'momentous' one for which it would be reasonable to seek the courts approval: *Lewin on Trust* at para 39-093 citing *Hawksford Jersey Ltd v A and others* [2018] JRC 171 at [41]–[42].

44 The question then arises as to the role of the court. In *Cooper*, Hart J noted that the duties of the court in considering a Category (2) case "will depend on the circumstances of each case" but the court had to be satisfied, after due consideration of the evidence, that (a) the trustee had in fact formed the opinion that it should act in the particular way relevant to that case; (b) the opinion of the trustee was one which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived at; and (c) the opinion was not vitiated by any conflict of interest under which the trustee was labouring. I will return to this later in my review of the Proposed Plan.

45 The effect of approval, if given, is that no beneficiary may thereafter complain that the exercise of the power so approved was a breach of duty on the part of the trustee: *Lewin on Trusts* at para 39-092.

46 The value of the court's approval can thus be observed from the approach taken and the effect of that approval: the court ensures that the trustee's proposed course of action is proper and the approval protects the trustee's acts from attack in the future.

47 In comparing the Category (1) and Category (2) situations, the key difference is that in the former, the trustee is seeking guidance for what it can or cannot do, notwithstanding that it may have tentative views of its own; in the latter, the trustee is aware of the power it has and intends to exercise that power in a particular manner, but seeks the blessing of the court because of the significance of that decision – and collaterally, the prospect that the proposed exercise of that power may expose the trustee to criticism and attack. Neither of these should be understood as a delegation of the trustee's discretion to the court. This is not to say that a trustee is at liberty to seek the guidance of the court whenever it is uncertain. The trustee is appointed to make decisions in the administration of the trust and it is not for the court to perform that role or provide the trustee a security blanket in instances of indecision. Applications for guidance under Category (1) when the trustee's power is clear or under Category (2) when the exercise of that power is not 'momentous' will likely be dismissed with adverse cost orders against the trustee: *Lewin on Trusts* at para 39-093(7).

48 Applying the above principles, I rejected the first to fifth respondents' argument that the Trustees' application herein was inappropriate.

49 While it was uncontroversial that the Trustees' general powers included the right of recoupment, some of the overpaid beneficiaries had made legal and factual arguments as to why recoupment for the period 21 November 2001–1 May 2014 should not be allowed, which raised the question of whether the

right of recoupment was impaired. This was further complicated by the fact that the very act of recoupment is rarely exercised and there is scant local authority on how it operates.

50 In addition, it was relevant that the Trustees were not a neutral party. Indeed, in OC 230, Mr Lutfi and Mr Zayed sought to hold the Trustees personally accountable for applying the *Pari Passu* Interpretation, including alleging that the Trustees had acted wilfully and dishonestly. This led to the Settlement Agreement wherein the Trustees agreed to *personally* make good the under-payments for the period 2 May 2014–November 2019. In a similar vein, the overpaid beneficiaries had submitted that the underpaid beneficiaries should pursue the Trustees for any under-payments before 1 May 2014.

51 For the above reasons and given (a) the entrenched, conflicting positions taken by the two different groups of beneficiaries; and (b) that the Trustees faced the prospect of being attacked in the event it either exercised the right of recoupment or failed to do so, it was evident that the Trustees were in a difficult position as to whether it could exercise the right of recoupment. In my judgment, this fell within the Category (1) situation where it was appropriate for the Trustees to seek the court's directions.

52 For completeness, the first to fifth respondents' argument was supported by a false premise. It was not the case that the Trustees had committed to the position that there should be no recoupment prior to May 2014. Granted that while the Trustees had initially indicated its views, it was clear that the Trustees had *not* committed to a position, particularly after the Settlement Agreement. Indeed, the Trustees were especially concerned with the fact that the two groups of beneficiaries were asserting diametrically opposing positions. Even if it could be said that this case fell within Category (2) – which I reject – I would have found that the decision was important enough for the Trustees to seek the court's

directions for the same reasons set out in [49]–[51] above, as well as the fact that the recoupment was to address erroneous payments made over two decades.

53 The first to fifth respondents referred to the decision of the High Court in *ADP and others v ADT and others* [2014] 3 SLR 904 ("*ADP*") for the proposition that the court cannot be asked to make decisions for the Trustees even if the Trustees are faced with conflicting demands by the beneficiaries of the Trust. *ADP* does not assist the first to fifth respondents. The court in *ADP* construed the application by the executors in that case as one asking the court to make a decision which the executors were themselves able to make. While no reference was made to *Cooper*, the reasoning of the court suggests that it considered the situation to fall within Category (3) in *Cooper*, involving the surrender of the trustee's discretion to the court for no good reason. For the reasons above, that is not the case here.

54 With respect to the terms of the Proposed Plan, this was submitted on the basis that there was a right to recoupment. The Trustees' application for the court's approval of the Proposed Plan clearly fell within Category (2) since it is premised on the Trustees exercising its power but asking to obtain the blessing of the court because its decision is particularly controversial given the objections of the overpaid beneficiaries and the other circumstances of the case referred to above. There was no question of the surrender of discretion by the Trustees to the court. I therefore found that the Trustees were permitted to seek the court's direction on the terms of the Proposed Plan.

The Trustees have the right of recoupment

The Trustees' right of recoupment had arisen as a result of the over-payments

55 A trustee who has made an over-payment or a wrong payment to a beneficiary may recoup the over-payment out of any trust capital or income remaining in, or coming into, the hands of that beneficiary to which he would be entitled: *Lewin on Trusts* ([42] *supra*) at para 42-010.

56 The case of *In re Musgrave, Machell v Parry* [1916] 2 Ch 417 ("*Musgrave*") provides a clear example of the operation of recoupment in circumstances where an over-payment was made. In *Musgrave*, certain annuities and legacies were given to the beneficiaries "without deduction" and there was an ambiguity as to what that phrase meant. Eventually, the phrase was held to mean without any deduction except that of income tax. However, prior to this determination, certain payments had been made not accounting for the income tax to be deducted. The question arose whether, in making future payments to the same beneficiaries, the trustees were entitled to recoup the amount overpaid. Neville J at 425 held that "the Court in a proper case – of course there may be cases in which it would be most inequitable to do it – will adjust the rights between the [beneficiary] and the trustee who has overpaid through an honest and, so to speak, permissible mistake of construction, or of fact." Accordingly, the trustees were entitled to deduct from future payments to the relevant beneficiaries the amount of income tax which the trustees had failed to deduct from the past payments.

57 In more recent times, the English High Court in *Burgess and others v BIC UK Ltd* [2018] EWHC 785 (Ch) ("*Burgess*") at [162] held that in a case of

over-payment of sums out of a trust, the trustee would, in principle, have the right and *duty* to recoup in order to recover any sums overpaid.

58 Similarly, in the Australian case of *Blue Sky Private Equity Limited v Crawford Giles Pty Ltd & Ors* [2012] SASC 28 ("*Blue Sky*") at [103], the court considered that it was a "general rule of equity that, in the administration of an estate, errors of account between trustees and beneficiaries *will, as far as possible, be corrected*" [emphasis added]. In *Blue Sky*, particular investors in a unit trust ("unitholders") had received over-payments and the trustee proposed to deal with this issue by recognising the excess payment as a credit to the capital account of each of those unitholders, and off-setting future distributions to which those unitholders may be entitled to until the point where each unitholder of the trust had been treated rateably and therefore fairly. The court agreed, noting that the approach was consistent with the principle that a trustee may recover an over-payment out of any interest the beneficiary still has under the trust, or out of future payments of income due to that beneficiary.

59 Turning to the present case, it was undisputed that because of the wrongful application of the *Pari Passu* Interpretation, there have been over-payments of the Trust Income to the overpaid beneficiaries. As such, the Trustees' right to recoupment had arisen, and it was under a duty to exercise this right and recover any overpaid sums as far as possible.

There was no prerequisite to the exercise of the Trustees' right of recoupment

60 The first to fifth respondents, relying on the decision of *In re Diplock, Diplock v Wintle (and associated actions)* [1948] 1 Ch 465 ("*Diplock*") submitted that an underpaid beneficiary's right of recoupment as against an overpaid beneficiary only arises after exhausting his remedy against the

executor who made the wrong payment.[58] However, it is important to distinguish the right of recoupment belonging to a *trustee* on one hand, and the right to recover payments that is personal to an *underpaid beneficiary*. *Diplock* concerned the latter scenario.

61 There is no authority to support the first to fifth respondents' argument that, in an action by *the trustee* for recoupment, the under-paid beneficiaries must first exhaust their remedy against the defaulting trustee; neither is there good reason for such a requirement – the exercise of recoupment by a *trustee* is an effort to administer the trust faithfully and correctly, and should not be dependent on the inaction of a beneficiary. A trustee is, and remains, under a *duty* to adhere to the terms of the trust, as determined by the settlor.

62 In addition, the first to fifth respondents had not, beyond a bare assertion,[59] suggested what remedies have yet to be exhausted by the underpaid beneficiaries against the Trustees. In particular, it was not suggested what causes of action the underpaid beneficiaries may have or how these were not time barred.

There was no acquiescence on the part of the beneficiaries

63 The first to fifth respondents argued that the right of recoupment was defeated by the actions (or lack thereof) of the beneficiaries prior to 2 May 2014. They primarily argued that the beneficiaries had acquiesced to the application of the *Pari Passu* Interpretation,[60] and, as such, it would be unconscionable for the underpaid beneficiaries to assert that recoupment should

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58 1–5R Subs at para 14.

59 1–5R Subs at para 18.

60 1–5R Subs at para 32.

take place and that they were estopped from taking such a position.[61] I rejected that submission.

64 In *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30 at [112], the High Court, citing the decision of the Court of Appeal in *Genelabs Diagnostics Pte Ltd v Institut Pasteur and another* [2000] 3 SLR(R) 530, explained the scope of the equitable defence of acquiescence and the requirements for it to operate:

> The defence of acquiescence is described in the following manner in *Halsbury's Laws of England* vol 16 (4th Ed Reissue) at para 924, which was cited by the Court of Appeal in *Genelabs (supra)* at [76]:
>
> > The term acquiescence is … properly used where a person having a right and seeing another person about to commit, or in the course of committing an act infringing that right, stands by in such a manner as really to induce the person committing the act and who might otherwise have abstained from it, to believe that he consents to its being committed; a person so standing-by cannot afterwards be heard to complain of the act. In that sense the doctrine of acquiescence may be defined as [quiescence] under such circumstances that assent may reasonably [be] inferred from it and is no more than an instance of the law of estoppel by words or conduct …

65 There are two situations in which acquiescence can be established: the first is where a person abstains from interfering while a violation of his legal rights is in progress; and the second is where he refrains from seeking redress when a violation of his rights, which he did not know about at the time, is brought to his notice: see *Koh Wee Meng v Trans Eurokars Pte Ltd* [2014] 3 SLR 663 at [120].

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61 1–5R Subs at para 33.

66 In my judgment, the first to fifth respondents' submission on acquiescence failed. First, they did not explain how the doctrine of acquiescence applied to the exercise of the *Trustees'* right of recoupment. In the present context, the "right" that was infringed was the right of the underpaid beneficiaries to receive their full entitlements to the Trust Income under the application of the Branch Interpretation. Accordingly, even if acquiescence was made out, it was the underpaid beneficiaries who may be said to have acquiesced and not the Trustees.

67 Second, the defence of acquiescence requires the person whose legal right has been violated to know of such infringement to begin with. The Trustees had applied the *Pari Passu* Interpretation since 2001 and there was no evidence that the beneficiaries had any reason to believe that approach was wrong or that their rights were being violated. The Branch Interpretation was first raised by Mr Lutfi and Mr Zayed to the Trustees in May 2014, and the Trustees, on legal advice, maintained that the *Pari Passu* Interpretation was correct.[62] The issue was only settled with the decision in OS 163 in November 2019. The underpaid beneficiaries were therefore not aware that their rights were being infringed prior to May 2014 and thus, it could not be said that they had acquiesced to the violation of those rights from 2001 to 2014.

68 In the same vein, it could not be said that the beneficiaries *should* have been aware. It was evident that they trusted and relied on the Trustees, who were professionals, to administer the Trust properly and in accordance with its terms. Nor can it be – and it was not – argued that the underpaid beneficiaries were wilfully blind or apathetic as to their rights.

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62 Aff 1st Ngiam at paras 49–55.

69 Third, there was no evidence that the overpaid beneficiaries were in any way *induced* by the underpaid beneficiaries' inaction or believed that the underpaid beneficiaries had consented to the violation of their rights. The violation was committed by the Trustees and all the beneficiaries believed that they were receiving what they were entitled to under the Trust.

The Trustees were not estopped by convention from retrospectively challenging the prior distributions and recouping any over-payments

70 The first to fifth respondents submitted that the underpaid beneficiaries were estopped by convention from bringing a challenge to the application of the *Pari Passu* Interpretation for the period 21 November 2001–1 May 2014.[63]

71 The doctrine of estoppel, and its requirements, was recently summarised by the High Court in *Turms Advisors APAC Pte Ltd v Steppe Gold Ltd* [2024] SGHC 174 at [115]:

> The doctrine of estoppel by convention operates to hold parties to a certain agreed interpretation of the contract (*Day, Ashley Francis v Yeo Chin Huat Anthony* [2020] 5 SLR 514 at [200]). The requirements are well-established: (a) first, the parties must have acted on an incorrect assumption of fact or law in the course of dealing; (b) second, the assumption was either shared by both parties pursuant to an agreement (or something akin to an agreement), or made by one party and acquiesced to by the other; and (c) third, it is unjust or unconscionable to allow the parties or one of them to go back on that assumption (*Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 2 SLR 200 at [49], citing *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 at [31]).

72 I did not accept the first to fifth respondents' submission. First, even if the *underpaid beneficiaries* were estopped, this argument did not apply where *the Trustees* were seeking recoupment.

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63 1-5R Subs at para 53.

73 Second, the first to fifth respondents did not demonstrate how it would be unjust or unconscionable to allow the parties, whether the Trustees or the underpaid beneficiaries, to go back on their position relating to the application of the *Pari Passu* Interpretation for the period 21 November 2001–1 May 2014. Instead, they merely asserted that "the interests of the overpaid beneficiaries would undoubtedly be affected if recoupment were to be ordered".[64] While the future distributions of the overpaid beneficiaries would be reduced if recoupment was effected, this did not by itself translate to injustice or unconscionability. Since the overpaid beneficiaries were not entitled to the over-payments to begin with, the recoupment would be in the interests of justice. Further, the recoupment would be against the *future* distributions of the Trust Income to the overpaid beneficiaries, and the first to fifth respondents did not explain why that would be unconscionable.

The overpaid beneficiaries cannot raise a defence of change of position

74 Where the overpaid beneficiary is not being asked to pay back that which he has already received and instead will experience a reduction of future payments, the defence of change of position does not generally apply. However, the overpaid beneficiary may show *special circumstances* such as a commitment already entered to make future expenditures based on the expectation of trust income to be received without any reduction. As the learned authors of *Lewin on Trusts* ([42] *supra*) at para 42–013 note:

> It has been suggested that there is a defence of change of position in connection with the equitable right of recoupment. But change of position cannot be a defence, since the overpaid or wrongly paid beneficiary is not defending any claim, but rather merely suffering a reduction in the amount which would be paid to him apart from the recoupment. If the overpaid or wrongly paid beneficiary wants to contest the recoupment on

64 1–5R Subs at para 56.

> the ground of change of position, he must claim payment in full, and so use change of position as a sword, not a shield. *We consider that in the ordinary course change of position will not prevent recoupment since the beneficiary is not being asked to pay back that which he has already received, and the fact that he may already have spent the money wrongly received does not seem to be a good reason why he should not suffer a deduction from future payments. But there may be special circumstances where change of position is relevant, for example where the beneficiary has not only spent the money wrongly received but also committed himself to spend the amount to which he would have been entitled apart from the recoupment.* [emphasis added]

75 On the facts, no special circumstances existed. There was no evidence that any of the overpaid beneficiaries had committed herself or himself to spending her or his expected entitlement to the Trust Income without any reduction. In any case, it was not the first to fifth respondents' case that there was a defence of change of position.

The defence of limitation

76 It was common ground between the parties that the right of recoupment is not subject to any limitation period. Indeed, limitation is no bar to the right of recoupment, which is a matter of adjustment of accounts by the trustee: *Lewin on Trusts* at para 42–010, citing *In re Robinson, Mclaren v Public Trustee* [1911] 1 Ch 502 ("*Robinson*") and *Harris v Harris (No. 2)* (1861) 29 Beav 110 ("*Harris*").

77 In *Harris*, a husband was entitled, under a marriage settlement, to £5,000 consols (*ie*, bonds) transferred to him for his own use. In lieu of transferring the £5,000 consols, the trustees by mistake sold out sufficient consols to raise the sum of £5,000, which they paid to the husband. This caused the husband to receive, out of the trust funds, £5,000, which was £1,170 more than the equivalent of the £5,000 consols. More than a decade later, a suit was instituted to compel the husband to restore the £1,170 which he had received in excess of

his rights. The applicability of the relevant limitation act was at issue. John Romilly MR held that the husband was liable to repay the amount on the basis that "any member of a family who has obtained possession of a trust fund has been compelled to repay it, *at any distance of time*, if there have been no improper *laches* on the part of the person who sought to recover it" [emphasis added]. The decree in *Harris* did not require the husband to pay into the trust the abovementioned amount, but ordered the husband to make good that amount out of the other interests he had in the trust.

78 *Harris* can be contrasted against the case of *Robinson*. In *Robinson*, the trustee had paid certain monies to the beneficiary which, as it turned out, ought not to have been so paid. Another beneficiary claimed against the trustee for those monies and the defence of limitation was raised. The difference with *Harris* was that the beneficiary in *Robinson* was effectively making a money demand against the trustee, instead of a remedy related to the execution of the trust. This critical distinction led Warrington J to find that the claim was in substance a money demand, and one which could not be maintained at common law as it was time barred.

The terms of the Proposed Plan are reasonable and appropriate

79 Having determined that the Trustees had a right of recoupment, I turned to the second part of the application which concerned the question of whether the Proposed Plan was appropriate and should be undertaken.

80 I have set out the approach of the court when considering an application falling under Category (2) in *Cooper* (see above at [44]). In addition, as noted by the court in *Foo Jee Seng* ([39] *supra*) at [26] , the analysis is primarily informed by the principle of non-intervention, which states that where the trustee has absolute discretion to do or refrain from doing a particular action,

and if its conduct is informed, *bona fide* and free from the influence of improper motives, then the court will not interfere in the trustee's exercise of its powers.

81 However, where the exercise of the trustee's powers was made *imperative* in any way, this would effectively be a *duty*, and the court would be more willing to enforce performance: *Foo Jee Seng* at [27]. This qualification was important in this case given that it was the duty of the Trustees to properly administer the Trust, including taking any reasonable steps to address any erroneous payments such as to exercise the power of recoupment: *Burgess* ([57] *supra*) at [162]; see also *In re Horne, Wilson v Cox Sinclair* [1905] 1 Ch 76 at 79.

82 However, that is not to say that a trustee *must* exercise the power of recoupment regardless of the circumstances. The trustee should consider, *inter alia*, (a) the amount to be gained for the trust fund by way of recoupment; as compared with (b) the costs of exercising that power, for example the costs associated with seeking the court's advice, and/or of providing disclosure to the affected beneficiaries and engaging with any potential disputes; and (c) the circumstances of individual beneficiaries liable to recoupment, including their financial and other circumstances, such as the hardship or distress that might be caused by recoupment: *Trustee Recoupment* ([32] *supra*) at 21, citing *Capita ATL Pension Trustees Ltd and another v Gellately and others* [2011] EWHC 485 ("*Capita*") at [90]–[91] and *Kelaher* ([35] *supra*).

83 In *Capita*, the determination of how a pension scheme should have been administered in the past meant that most pensioners had been underpaid but only three widows of deceased members had been overpaid by £10,200. The question therefore arose as to whether the trustees should take any steps to recoup the past over-payments. The court agreed with the trustees' reluctance to take steps

to recoup the over-payments in view of the small scale of the problem, the distress that any attempt to recover the sums would inevitably cause, and the likelihood that the exercise would not be cost-effective.

84 This accords with the holding in *Musgrave* ([56] *supra*) that recoupment would not be permitted where it would be inequitable. The concerns relevant to inequitability are of the kind that motivate the defence of change of position or estoppel: *Trustee Recoupment* at 22.

85 The first to fifth respondents' objections to the Proposed Plan (see above at [29]) were limited. It was not their case that the Proposed Plan was not *bona fide* and free from the influence of improper motives. Rather, they took objection to the content of the Proposed Plan and how it would affect them, the other overpaid beneficiaries and/or the Trust.

86 First, they pointed out that the overall impact of the Proposed Plan to the overpaid beneficiaries would be in the range of 9% to 15% of their entitlements for one year which was "not an insignificant amount".[65] This submission was not supported by any calculations.[66]

87 In any case, these figures were irrelevant given that the recoupment exercise was to take place over a 36-month period and not one year. In fact, the Trustees had proposed a 36-month period precisely to minimise inconvenience to any overpaid beneficiary who may have come to expect or rely on the monthly distributions of Trust Income.[67] On the Trustees' tabulation – which was not challenged – the estimated impact to the overpaid beneficiaries'

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65 1–5R Subs at para 35.

66 Aff Ngiam at pp 60–63.

67 A Subs at para 41; Aff 1st Ngiam at para 89.

entitlement to the Trust Income would be a reduction of 5% or less per year.[68] The first to fifth respondents did not suggest that this was a significant reduction.

88 Second, while I accept that *some* costs will be expended in locating the personal representatives of the underpaid beneficiaries, no evidence was led as to what those costs would be or why they would be onerous. The Trustees have expressly committed that there would be no redistribution to the estates of deceased underpaid beneficiaries if the personal representative(s) cannot be located without undue burden or costs to the Trust, and I see no reason to doubt that commitment. Further, such costs would clearly be insignificant compared to the sum of $1,178,810.49 ($1,464,607.94[69] less $285,797.45[70]) which the Trustees intended to recoup under the Proposed Plan.

89 As to the costs of the proceedings, the objection appeared misdirected. The question was whether the *Proposed Plan*, and not the *present proceedings*, is of concern. As such, any objections as to costs must be in relation to the costs of the Proposed Plan, which has been dealt with above.

90 I therefore found that the terms of the Proposed Plan were reasonable and appropriate to be implemented.

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68 Aff 9th Ngiam at para 32.

69 Aff 9th Ngiam at para 30.

70 Aff 9th Ngiam at para 31.

Conclusion

91 To summarise, I found that the Trustees have the right of recoupment. I also found that the terms of the Proposed Plan were reasonable and appropriate to be implemented.

92 The parties agreed, and I ordered, that their costs be taxed and paid out of the Trust.

Hri Kumar Nair
Judge of the High Court

Mak Wei Munn, Xu Jiaxiong Daryl and Chia Su Min Rebecca (Allen & Gledhill LLP) for the applicant;
Lem Jit Min Andy and Lin Shuang Ju (Harry Elias Partnership LLP) for the first to fifth respondents;
Lin Shumin, Cheng Si Yuan Shaun and Song Yihang (Drew & Napier LLC) for the sixth and seventh respondents.