

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2015/0047

BETWEEN:

KATHRYN MA WAI FONG

Claimant/Applicant

and

**[1] INCREDIBLE POWER LIMITED
[2] WONG KIE YIK
[3] WONG KIE CHIE
[4] RAYLEY COMPANY LIMITED
[5] ESBEN FINANCE LIMITED**

Defendants/Respondents

Appearances:

Mr. Orlando Fraser, QC with him Mr. Hermann Boeddinghaus, QC, Mr. James Noble, Mr. Ben Mays, Ms. Amelia Tan and Ms. Monique Hansen for the Claimant
Mr. Stephen Atherton, QC with him Mr. Oliver Clifton and Ms. Tamara Cameron for the First and Fifth Defendants
Mr. David Alexander, QC with him Mr. Simon Hall and Mr. Scott Tolliss for the Second and Third Defendants
Ms. Laure-Astrid Wigglesworth for the Fourth Defendant

2020: June 8, 9, 10, 11, 15, 16, 17, 18, 24, 25;
July 2, 3;
2021: March 18, April 15, May 4.

JUDGMENT

[1] **WALLBANK, J. (Ag.):** This is the Judgment of the Court following the trial of this claim. For the reasons below, the Court determines that the claim succeeds.

1. Introduction

- [2] The Claimant brings this claim on her own behalf as the Executrix of the Estate of her late husband and derivatively on behalf of the Fourth Defendant ('Rayley').
- [3] The thrust of the claim is that, in April and July 2013, three substantial misappropriations were made from Rayley, in the sums of AU\$6,617,783, US\$331,565.55 and SG\$917,513.32 respectively, and paid to the First Defendant ('Incredible Power') and the Fifth Defendant ('Esben'), whence the funds have allegedly disappeared without trace, to Rayley's detriment. The Claimant alleges that these misappropriations were carried out at the behest of the Second and Third Defendants ('WKY' and 'WKC' respectively).
- [4] The Claimant alleges that the payment to Incredible Power (instead of to Rayley) and the transfers from Rayley to Esben were not made for any legitimate commercial purpose of Rayley and were not in Rayley's interest.
- [5] The Claimant alleges that WKY and WKC were *de facto* directors of Rayley at the time of the alleged misappropriations. She alleges that WKY and WKC thus owed Rayley statutory and/or fiduciary duties to act honestly and in good faith and in Rayley's best interests, which they breached when they caused the impugned payment and transfers to be made. The Claimant alleges that a Mr. Tiang Teng Hoong Richard ('Mr. Tiang') acted as WKY and WKC's agent in their capacity as *de facto* directors of Rayley.
- [6] The Claimant claims that, as a result of such breaches by WKY and WKC, Rayley has suffered loss and damage in an amount equal to the payment and transfers and the interest that would have been earned thereon.
- [7] The Claimant alleges that Incredible Power and Esben hold the sums paid to them on constructive trust for Rayley, and that they are accordingly liable to pay Rayley those sums, on the basis that Incredible Power and Esben had actual or constructive knowledge that these sums and all benefits attached thereto were assets of Rayley. The Claimant alleges that WKY and WKC were also *de facto* directors of Incredible Power and directors of Esben. The Claimant alleges that knowledge that the sums represented assets of Rayley is to be imputed to Incredible Power and Esben through WKY and WKY's directorships (or *de facto* directorships) of the companies on both sides of the transactions, or, in the case of Incredible Power, that the nominee directors of Incredible Power (a Mr. Fui Kiun Lo ('Mr. Lo') and a Ms.

Suet Fun Kwan ('Ms. Kwan')) had actual or constructive knowledge that the sums represented assets of Rayley. Their receipt of the sums was, in all the circumstances, dishonest. Thus, claims the Claimant, Incredible Power and Esben are liable to account to Rayley in 'knowing receipt'.

- [8] The Claimant alleges, in the alternative, that Incredible Power and Esben were unjustly enriched by the payment and transfers at the expense of Rayley and they are thus liable to compensate Rayley for its loss and damage.
- [9] The Claimant alleges that WKY and WKC dishonestly assisted Mr. Tiang when he caused the payment to be paid to Incredible Power, in breach of trust and statutory and/or fiduciary duties alleged to be owed by Mr. Tiang to Rayley. The Claimant alleges that in doing so, Mr. Tiang acted either as a *de facto* director of Rayley, or as an agent of Rayley's *de jure* director Mr. Lo, alternatively as an agent of Rayley.
- [10] The Claimant seeks orders against Incredible Power and Esben to restore the monies to Rayley, and against the Second and Third Defendants to account to Rayley as constructive trustees, and by way of equitable compensation or restitution. The Claimant also claimed against all four of these Defendants damages for conspiracy, but did not pursue that claim. The Claimant also seeks an order that she be indemnified out of Rayley's assets for her costs of and occasioned by this action.
- [11] The substantive Defendants strenuously denied the claims.

2. Background

- [12] For narration purposes I will generally adopt the present tense, irrespective of whether the matters are still as they were when the case came on for trial.
- [13] The Claimant ('Madam Ma') is the widow of the late Mr. Wong Kie Nai ('WKN') and the executrix of his Estate. Madam Ma was appointed as such pursuant to probate of a will made by WKN dated 9th November 2012 (the 'Will'). Following WKN's death, probate of the Will was granted by a court of Liberia in October 2013. Madam Ma, together with her two children Mr. Neil Wong and Miss Mimi Wong, are the ultimate beneficiaries of WKN's Estate under the Will.

- [14] WKN's Estate includes shares in more than sixty companies.
- [15] WKY and WKC were WKN's brothers. They, and Madam Ma, are from Malaysia. At the time the present proceedings were commenced, WKY resided in Sarawak, Malaysia. WKC, on the other hand, resided in New South Wales, Australia. Madam Ma appears to have divided her time between Australia and Malaysia.
- [16] The corporate Defendants are family companies, owned beneficially in equal shares by WKY, WKC and the Claimant as WKN's Executrix. These companies are part of what can be called the WTK Group.
- [17] Rayley is incorporated in Liberia as a Non-Resident Domestic Corporation. At the times material to this dispute, it had a sole registered director, Mr. Lo. Madam Ma alleges that Mr. Lo is a nominee director who acts on the instructions of WKY and WKC.
- [18] Incredible Power is a company incorporated in the Territory of the Virgin Islands ('BVI'). Its registered directors are Mr. Lo and Ms. Kwan.
- [19] Esben is also a company that was incorporated in the BVI. It was struck off the register of companies on or about 1st May 2014 for non-payment of fees. The Claimant alleges this was while Esben was under the direction of WKY and WKC, whilst, she believes, it was solvent. It was restored to the Register on or about 13th June 2017. It was joined to these proceedings in June 2017.
- [20] Madam Ma alleges that Mr. Lo is a 'known business associate' of WKY; they are common shareholders of a company incorporated in Hong Kong called Guymon Enterprises Limited and Ms. Kwan is and was at all material times an employee of Guymon Enterprises Limited.
- [21] Madam Ma alleges that WKY and WKC were *de facto* directors of Rayley, *de facto* directors of Incredible Power, and directors of Esben.
- [22] Madam Ma also alleges that WKY and WKC were directors of a company called Richardson & Wrench Holdings Pty Limited ('Richardson & Wrench').

3. The circumstances of the Claim

[23] The following is what I apprehend happened.

[24] WKN, WKY and WKC were three brothers. Their father was a gentleman called Datuk Wong Tung Kwong. 'Datuk' is an honorific title in the Malay language.¹ Datuk Wong was the founder of what is now a large group of companies in Malaysia, which we can refer to as the WTK Group. He was a highly successful businessman.

[25] The WTK Group's main operations are in Malaysia, dealing primarily with forest ownership and management, timber logging, oil palm production, and construction. The WTK Group has also diversified into other commercial activities, including property and real estate development, hotel and hospital services, insurance and shipping services. The WTK Group is headquartered in Sibu, Malaysia.

[26] The WTK Group had and has a 'flagship' company. It is called WTK Realty Sdn Bhd ('WTK Realty'). WTK Realty was incorporated in 1981. Datuk Wong and WKY were its first directors and shareholders. WKN, WKY and WKC were all directors of WTK Realty since the 1980s.

[27] WKN was the first son to join the family business. At the time, WKY and WKC were still abroad pursuing studies. WKN became the manager of WTK Realty in 1983 and its managing director in 1986. WKN was responsible for managing the day-to-day operations of the WTK Group.

[28] WKN married Madam Ma in 1970 and together they had two children, Miss Mimi Wong (in 1972) and Mr. Neil Wong (in 1973). Both Miss. Mimi Wong and Mr. Neil Wong were appointed to the board of directors of WTK Realty.

[29] Madam Ma took no part in the management or business of the WTK Group companies.

¹ <https://en.wikipedia.org/wiki/Datuk#>.

- [30] WKY eventually returned to Malaysia from the United Kingdom, where he had studied and trained in London, in English, for several years, as an accountant, and then joined the family business in Sibü.
- [31] I find it very likely that by dint of his study and training experience in England WKY was and is entirely proficient in English.
- [32] WKY was put in charge of a company called Song Logging Sdn Bhd. This was a company that had been set up by Datuk Wong. At the time, it held the biggest timber concession amongst the WTK Group.
- [33] WKY had a son, Mr. Patrick Wong, who was also appointed to the board of directors of WTK Realty.
- [34] WKC was Datuk Wong's youngest son. He attended high school in Australia and then enrolled at the University of New South Wales, studying for a Bachelor of Science in general science, chemistry and microbiology. He finished studies in Australia and then also joined the family business in Sibü. He was put in charge of two companies within the WTK Group whose business was the sale of sawn timber using logs of the 'Ramin' tree in Malaysia. When the Malaysian government banned the sale of sawn Ramin timber, WKC moved back to Australia and became a permanent resident there in 1984. Ever since then he has resided in Sydney, Australia.
- [35] WKC was put in charge of the family businesses / interests in Australia. In 1991, upon the instructions of Datuk Wong, WKC took over the role of overseeing the management of Richardson & Wrench. WKC was a director of Richardson & Wrench and its sole bank account signatory, although, WKC said in his oral evidence, other family members could also sign cheques and telegraphic transfer forms for Richardson & Wrench. WKC gave evidence that WKN assumed the *de facto* role of Managing Director, although there was no official managing director as such. WKN would visit Australia around once a month and spent a day at Richardson & Wrench on such trips.
- [36] WKC also gave evidence that all the management of Richardson & Wrench were Australian nationals.

- [37] I find it is very likely that by dint of his long experience in Australia, first as a schoolboy, then as an undergraduate student, and subsequently as a resident overseeing the English speaking and communicating management staff of a company doing business in Australia, WKC was and is entirely proficient in English.
- [38] I remark upon WKY's and WKC's proficiency in English because both relied upon an interpreter at the trial. It was obvious that they understood everything and did not really need the interpreter: they were just hiding behind the interpreter when it suited them.
- [39] Richardson & Wrench was part of the WTK Group and did business as an incorporated franchise property agent in Australia. WKC left Richardson & Wrench in August 2013. The company then had around 100 branches throughout Australia.
- [40] In around 2019, WKC garnered some publicity in Australia as a 'Rich List 2019 Debutante', with an estimated worth of around AU\$1 billion, made in part through investment of some AU\$1 million in a mining company that had grown exponentially. WKC prevaricated during cross-examination about this estimate, denied that it was correct, but did not deny the gist of the report.
- [41] As at the trial date, WKC was afflicted to a certain extent by Parkinson's disease.
- [42] WKC acquired a flat in Singapore in around 1970 to 1980, and used it until sometime in the 2000s. He then allowed his son to use it. WKC nonetheless continued to visit Singapore. He gave evidence that he passed through Singapore about once every month on the way to Sibu in Malaysia.
- [43] The WTK Group was built and developed on the basis of confidence and trust among Datuk Wong and his three sons.
- [44] As the business interests of the WTK Group began to expand, Datuk Wong started to incorporate non-Malaysian companies for the purpose of trading in timber logs. This practice of incorporating non-Malaysian companies for the same purpose continued whilst WKN was managing director of the WTK Group. These were often incorporated in offshore jurisdictions

such as Liberia and here in the BVI. For convenience such non-Malaysian companies can be referred to as 'the Offshore Companies'.

- [45] The book-keeping and other financial transaction matters in relation to the Offshore Companies were centralised in Singapore. These were performed by a company called Double Ace Trading Pte Ltd ('Double Ace'). This was also a company within the WTK Group. WKC was a part-owner and director of Double Ace. The person primarily responsible within Double Ace for the provision of such services was Mr. Tiang. Mr. Tiang's role was as the accounts clerk for Double Ace. He was responsible for maintaining the financial records of the Offshore Companies, liaising with the banks in relation to the bank accounts of the Offshore Companies and assisting with the remittances from the Offshore Companies to various suppliers. His job included maintaining hard copy ledgers, cashbooks and journals to record all the movements of monies to and from the Offshore Companies.
- [46] Mr. Tiang had been hired by Datuk Wong and was employed by Double Ace from 1989. Mr. Tiang used to report directly to Datuk Wong.
- [47] Only three permanent staff were based at Double Ace: Mr. Tiang, a Mr. Ong and a typist. Datuk Wong had a room at the Double Ace office in Singapore, which was allowed to stand unused after his death. The three brothers shared another room at the Double Ace office for use when they visited.
- [48] This was not the three brothers' only office. At the WTK Group headquarters building in Sibuluh, they each had an office room on the sixth floor.
- [49] They were not the only Wong family members to have such office rooms there. Various other family members also had office rooms in the headquarters building on the sixth floor. These included Mr. Neil Wong and Miss Mimi Wong, both of whom have, at some points in time, been directors of WTK Realty. WKC's and WKY's evidence conflicted over whether Mr. Neil Wong's and Miss Mimi Wong's office rooms were on the sixth or seventh floor. WKY's son, Mr. Patrick Wong, also had an office room. He too has been a director of WTK Realty. WKY's wife had an office room, also on the sixth floor. Madam Ma used WKN's office room.

- [50] These seemingly minor domestic details are significant for two main reasons. First, it shows that, certainly whilst WKN was alive, the extended Wong family was quite closely knit. Secondly, and importantly for this case, whilst not all extended Wong family members might be particularly knowledgeable about or involved in the affairs of the Group, and whilst they were not necessarily all together in the same building at the same time, they had the facility to be aware of and understand, at a high level of generality, who ran the WTK Group, the decision-making hierarchy and division of responsibilities.
- [51] I am persuaded that, whilst it is correct that Madam Ma did not herself witness discussions between WKY and WKC about the Offshore Companies and that she gleaned such information from documents about the transactions she has impugned, at the same time she had a good general understanding of the manner in which WKY and WKC worked together.
- [52] In 1993, Datuk Wong suffered a stroke. WKN took over the running of the business of the Offshore Companies and Mr. Tiang then took his instructions directly from WKN. From time to time, WKY was also approached by Mr. Tiang to sign telegraphic transfer forms and cheques regarding transfers being made by Offshore Companies, including Incredible Power and Rayley. Sometimes, he said, WKY was asked to sign blank telegraphic transfer forms and cheques at WKN's request. When WKY did so, he said, WKN's signature was already on the form or cheque, or WKY was told by Mr. Tiang that he was being asked to sign on WKN's instructions.
- [53] WKN was the person responsible for incorporation of Incredible Power and Rayley. The three brothers initially each held a one third beneficial interest in these companies through a trustee called Swan Nominees Limited ('Swan Nominees'). This arrangement was instigated by WKN. Swan Nominees was an entity incorporated in Hong Kong. Its services were provided by a professional corporate service provider.
- [54] WKN also instigated that nominee directors should be appointed to the boards of Incredible Power and Rayley. Thus, the director of Incredible Power came to be a company incorporated in Hong Kong, called Ramillies Limited, and for Rayley the director was a BVI incorporated company, called Kaliwood Corporation ('Kaliwood').

- [55] Until WKY took over from WKN's day-to-day running of the business of the Offshore Companies in 2011, WKN was the brother who gave the nominee directors their instructions. As WKY agreed in cross-examination, the nominee directors did not have management control of the Offshore Companies.
- [56] The three brothers were signatories of the bank accounts held by both Incredible Power and Rayley with The Hongkong and Shanghai Banking Corporation Limited ('HSBC') in Singapore. A director's resolution produced by Kaliwood in respect of Rayley, dated 1st April 2011, resolved that each of WKN, WKY, WKC and also Mr. Neil Wong were to have single signing authority over Rayley's HSBC bank account. Each company had a United States Dollar and a Singapore Dollar account with HSBC.
- [57] WKN moved to Australia from Sibü in 2011 for medical treatment. Madam Ma had, herself, moved to Australia in 2003. Upon WKN's move to Australia in 2011, WKN ceased to have day-to-day control of WTK Realty and handed this over to WKY. WKY would come to Australia every few months, or, WKC would visit him in Sibü. Between such visits, WKC and WKY would communicate mainly by telephone.
- [58] WKN never returned to Sibü. He passed away in Australia on 11th March 2013.
- [59] Almost immediately, WKY and WKC on the one hand and Madam Ma and Mr. Neil Wong on the other hand came in open conflict. Tensions between WKY and WKC on the one hand and Madam Ma on the other hand had probably been brewing below the surface for quite some time, if only to be managed by these opposing parties maintaining distance from each another. There is no evidence that WKC had any, or any regular, social contact with Madam Ma although they both lived in Australia. Moreover, it would be remarkable if the explosive falling-out between WKY, WKC and their sister-in-law which happened upon WKN's death (all the details of which the Court need not recount), and which has persisted to this day, had had no antecedents.
- [60] Very shortly after WKN's death, on or about 18th March 2013, Mr. Neil Wong arrived in Sibü, with the intention of attempting to assert control over the WTK Group. WKY and WKC resisted this. As WKY admitted in cross-examination, WKY did not want to lose control of the WTK Group, and he did not want to be sacked by Mr. Neil Wong as acting managing director of the

WTK Group. He also did not want the Group's Chief Financial Officer, Ms. Janice Ting, to be sacked.

- [61] Some ten days after WKN passed away, and about three days after Mr. Neil Wong had arrived in Sibü, and about one day after Madam Ma likewise left Sydney for Sibü, by a letter dated 21st March 2013, Kaliwood resigned as sole director, president, treasurer and secretary of Rayley as of 22nd March 2013. WKY's evidence was that, upon the advice of Ms. Janice Ting, WKY then appointed a business partner of his, Mr. Lo, as the sole director of Rayley from the same date. WKY admitted in cross-examination that Mr. Lo was 'only a nominee director'² and that he (WKY) gave Mr. Lo his instructions because he was WKY's nominee.³
- [62] WKY did not consult with Madam Ma or her children about this, as, ostensibly, he did not consider it necessary since WKN's Estate was not as yet then represented.
- [63] Ramillies similarly resigned as sole director of Incredible Power as of 22nd March 2013 and, as with Rayley, WKY gave evidence that Ms. Janice Ting gave WKY advice and in consequence he similarly then appointed Mr. Lo as this company's sole director.
- [64] None of the Defendants disclosed any correspondence with Kaliwood or Ramillies, or their professional corporate service provider principals, that could show the reasons for and/or how it came to be that they resigned. WKY suggested in cross-examination that Kaliwood had already wanted to resign before WKN's death, but he did not explain why.
- [65] Madam Ma's position is that the reality was that WKY had instructed them to resign – sacked them – because they had been WKN's appointees, and now that WKY and WKC were in conflict with Madam Ma and Mr. Neil Wong, WKY wanted his own appointees.
- [66] WKY denied this. However, there was a Board resolution of Rayley of the same day resolving that Mr. Lo should fill the vacancies. WKY, or Ms. Ting on his behalf, must therefore already

² Transcript of 17th June 2020, page 54.

³ Transcript of 17th June 2020, page 55.

have told Kaliwood, before Kaliwood resigned, that Mr. Lo was going to replace Kaliwood. WKY disagreed, without explaining why he did so.

- [67] Madam Ma's position in this regard is more probable than not. It fits the events, the overall timing, and the dynamics between WKY and WKC for the one part and Madam Ma and Mr. Neil Wong for the other. It fits WKY's own admitted case that he wished to resist Mr. Neil Wong's take-over bid and retain control. This explanation competes successfully in my judgment with a resignation, as presented by WKY, that makes no sense, as it was presented in an apparent documentary void, for no stated reasons, with no explanation whether it was at the service providers' own initiatives, or if not, at whose initiative they were resigning. I accept the suggestion put forward on behalf of Madam Ma that a professional service provider would not lightly resign of its own volition, because it provides a service for reward.
- [68] There appears to be no reason why the Ramillies' resignation was any different. The circumstances appear to have been of a piece with Kaliwood's resignation. Ramillies' resignation occurred the same day as Kaliwood's resignation, and the consequence was identical, that Mr. Lo became the sole director. I conclude that this too had been done so that WKY could replace them with his own appointee, whom WKY could trust to be friendly towards his and WKC's intentions and interests.
- [69] It thus appears to me that WKY's version of events, that Kaliwood and Ramillies resigned, and then, as a reaction to that, he appointed Mr. Lo, is not true.
- [70] Just over a month later, on 26th April 2013, WKY and WKC, on behalf of Rayley, instructed Rayley's bank, HSBC, to close a US Dollar and a Singapore Dollar account belonging to Rayley with effect from 30th April 2013. The US Dollar account contained a credit balance of US\$331,565.55, whereas the Singapore Dollar account contained a credit balance of SG\$917,513.32. WKY and WKC instructed HSBC to transfer both credit balances to bank accounts maintained at HSBC in the name of Esben. Madam Ma was not informed about these transfers of Rayley's assets to Esben. Esben has declined to return or credit Rayley with this money.
- [71] In the last iteration of their pleaded Defence, dated 5th February 2018 (i.e. some five years after the transfers), WKY and WKC asserted that Madam Ma had not been entitled to be informed of

the transfers because she had not yet been appointed as Executrix of WKN's Estate, and further, that there was no obligation on Esben to return the money to Rayley 'because there existed an outstanding debt between [Rayley] and Esben against which the credit balance sums were applied in order to reduce that debt'.

[72] WKY and WKC claimed in their Defence that there had been an outstanding debt of US\$1,535,549.85 owing from Rayley to Esben and the transfers were made to offset the outstanding debt.

[73] The third impugned transaction took place about three months later, on 25th July 2013. On this day, a subsidiary of Richardson & Wrench paid a sum of AU\$6,617,783 to a bank account of Incredible Power at HSBC in Singapore.

[74] The events surrounding this transfer are common ground (although their motivation is very much in dispute). Rayley had loaned AU\$6,819,500 to Richardson & Wrench pursuant to a commercial loan deed dated 1st December 2002. The loan was repayable by 30th November 2012. It was not repaid by that deadline. As at 23rd July 2013 the amount owing stood at AU\$6,617,783. On that day, WKY, on behalf of Rayley, authorized and/or instructed Mr. Tiang to write to Richardson & Wrench requesting it to remit the outstanding sum to Incredible Power's bank account. Madam Ma's position is that WKY did this, she infers (and I accept), with WKC's knowledge and consent. So, Mr. Tiang duly sent a demand letter to Richardson & Wrench the same day. The very next day, WKY, WKC and WKY's son, Patrick, in their capacity as directors of Richardson & Wrench resolved to comply with the demand letter. The payment was made the following day, 25th July 2013, and Mr. Tiang, for Rayley, immediately issued a letter to Richardson & Wrench confirming receipt of the payment in full and final settlement of the loan.

[75] Madam Ma likewise was not informed of this transaction, ostensibly for the same reason.

[76] WKY and WKC explained in their Defence (dated 5th February 2018) that, as at July 2013, there existed outstanding inter-company advances in the approximate sum of SG\$11,808,495.05 due and owing by Rayley to Incredible Power. This debt, claimed WKY and WKC, represented a series of sums advanced by Incredible Power to Rayley on WKN's direct instructions in settlement of invoices issued by a WTK Group company called Faedah Mulia

Sdn Bhd ('Faedah Mulia') to Rayley in respect of timber log consignments to Rayley. This, claimed WKY and WKC, had been an arrangement between WKN and Mr. Tiang that they had not known about. But, following WKN's death, WKY claimed that he thought it would be in the best interests of Rayley to extinguish a significant portion of this alleged debt.

- [77] WKY and WKC also claimed in that Defence that the Board of directors of Rayley (in the shape of Mr. Lo) ratified the transfer to Incredible Power instead of to Rayley. WKY and WKC claim that such ratification was done on 6th August 2013. As we shall see below, however, that is so unlikely as to have been impossible. It is compelling, rather, to date this ratification to sometime in or after 2016. In other words, on a balance of probabilities, this 'ratification' was an incompetent fabrication, falsely devised to bolster WKY and WKC's version of events after the commencement of these proceedings.
- [78] In early April 2014, WKY decided that an additional director should be added, apparently on account of ill health suffered by Mr. Lo. Ms. Kwan was known to WKY and so she was appointed as a second director of Incredible Power with effect from 8th April 2014.
- [79] Madam Ma obtained probate of WKN's Will on 11th April 2013 in Malaysia (i.e. before the impugned transfers), Liberia on 15th October 2013, Australia on 12th June 2013, the BVI on 7th February 2014, the Cayman Islands on 28th February 2014, Papua New Guinea on 6th March 2014 and Singapore on 23rd June 2014.
- [80] Madam Ma and her two children Mr. Neil Wong and Miss Mimi Wong are the ultimate beneficiaries of the estate under the Will. The Will devised and bequeathed parts of WKN's Estate (his Australian and Malaysian assets) to a number of corporate entities who would hold the assets thus bequeathed on trust for Madam Ma, Mr. Neil Wong and Miss Mimi Wong.
- [81] The Offshore Companies ceased to do business in around March 2014. Double Ace nonetheless continued to be retained to service the bookkeeping needs of those companies.
- [82] In around August 2014, Mr. Tiang somehow attracted unwelcome attention from the Commercial Affairs Department of the Singapore police (the 'CAD'). Mr. Tiang admitted to the CAD that he had stolen company property by means of around 300 individual misappropriations, which took place between January 2007 and March 2014. The

misappropriations amounted to a very significant sum, of about SG\$46.2 million. Mr. Tiang had bilked these from the very same Offshore Companies (Rayley, Incredible Power and Esben) as are involved in these proceedings, as well as another Offshore Company named Lismore Trading Company Limited. He was convicted and sentenced on or about 7th February 2019 to 18 years' imprisonment in Singapore on 15 criminal charges, including criminal breach of trust and the subsequent falsification of accounting records. The CAD seized a quantity of documents pertaining to the Offshore Companies in August 2014, in what appears to have been an unannounced raid. I shall refer to these as the 'CAD Seized Documents'.

[83] Curiously, despite the enormity of these dishonest offences, WKY and WKC took no steps to sack him. They even intended to rely upon him as their main witness in these proceedings, despite the obvious likelihood that Mr. Tiang would not be considered a credible witness. Mr. Tiang destroyed any residual credibility he might have had when, in his witness statements in these proceedings, Mr. Tiang 'strenuously' denied any wrongdoing in respect of the matters investigated by the CAD. This assertion was flatly contradicted by Mr. Tiang's own Plea in Mitigation in the Singapore criminal proceedings, which records that he 'readily confessed to his misappropriation from the moment he was called up by the police for investigation'. That investigation, and thus Mr. Tiang's confession, occurred in August 2014, long before he made his witness statements in these BVI proceedings. These statements cannot both be true. Mr. Tiang was ultimately not able to give evidence in these proceedings, not because of his incarceration, but because he sadly suffered a stroke.

[84] WKY and WKC sought to explain, rather unconvincingly, that they had not sacked Mr. Tiang out of loyalty in light of his long service and because he was a good employee. The more likely, and real reason, it seems to me, was that they wanted to use Mr. Tiang and his crooked 'creative accounting' skills in their court battles with Madam Ma.

[85] Mr. Tiang claimed that WKN had instructed him in April 2012 to remove all documents and records relating to WKN, including all records of the Offshore Companies in which WKN had an interest and his family's personal files from the Singapore office. Mr. Tiang says he complied with this request. Sometime later (Mr. Tiang does not say when), according to Mr. Tiang, WKN instructed Mr. Tiang to destroy all documents and records relating to the Offshore Companies, including the financial records. Mr. Tiang stated in his first witness statement that he did so in September 2014. He qualified this in a later, second witness statement, in which he stated that

he had kept one folder containing photocopies of telegraphic transfer forms instructing HSBC to remit monies from the Offshore Companies to WKN and his family members, claiming to have forgotten about this folder. As Madam Ma's legal representatives have observed, this folder 'conveniently' comprises the principal documents relied on by WKY and WKC in support of a separate claim they have made in Singapore against Madam Ma's son Mr. Neil Wong. Other documents which similarly escaped the alleged destruction also surfaced.

- [86] Mr. Tiang did not mention that the CAD had seized a quantity of documents pertaining to the Offshore Companies at the time they summoned him in August 2014 to help them with their inquiries. The CAD later returned these documents, apparently in around June 2016 (some six months before standard disclosure in these proceedings). The Defendants asserted that they were not relevant, as part of a hard-fought disclosure battle. WKY and WKC had first claimed that they had 'forgotten' about the CAD Seized Documents. The documents clearly were relevant and, as shown at trial, contained key documents, including bank statements, that disproved the Defendants' case. The Claimant's primary case is that Mr. Tiang did not in fact destroy documents, because the Defendants were able to come up with documents throughout the proceedings that supported their case whenever their convenience required it. Their secondary case is that, if Mr. Tiang destroyed documents, he did so not to honour any request from WKN but to destroy evidence in light of the CAD's investigation into his embezzlement activities. This is an explanation that WKY and WKC also adopted during the trial, in a complete change of their previous tack, which had been to accept Mr. Tiang's explanation.
- [87] On 20th May 2014, Swan Nominees transferred its interest in Incredible Power to WKY, WKC and Madam Ma (as executrix of the estate of WKN) in equal one third shares. WKY's and WKC's interests are held by registered shareholders, Mr. Lo and Ms. Kwan.
- [88] On 29th March 2016, Swan Nominees transferred its interest in Rayley to WKY, WKC and Madam Ma (as executrix of the estate of WKN), such that they now directly and jointly hold the one issued and outstanding share in Rayley.
- [89] It appears from a letter dated 5th February 2016 from Swan Nominees to WKY, WKC and Madam Ma (as executrix of the Estate of the late WKN) that Swan Nominees had decided that it was unable to continue to act as the nominee shareholder for the beneficial owners under its policy, in light of the conflict between WKY, WKC and Madam Ma as disclosed by the

Amended Statement of Claim in these proceedings, in which Swan Nominees was (then) named as one of the Defendants. That letter also records that Swan Nominees had asked that it should be permitted to transfer back the share in Rayley in September 2014, but that that request had been declined. Swan Nominees' February 2016 decision was not immediately accepted by WKY and WKC, and Swan Nominees ultimately forced their hand to achieve this.

4. The trial

[90] In the course of oral testimony the following principal points emerged:

- (1) The Defendants' case largely rests on Mr. Tiang's evidence that two debts existed to justify the payments from Rayley to Esben (Payments 1 and 2) and Incredible Power (Payment 3). However, this evidence proved completely unreliable.
- (2) Apart from Mr. Tiang's status as a convicted fraudster, the basis on which he claims to have calculated the alleged Rayley-Esben inter-company debt is fundamentally flawed, because the six payments by Esben to Harbour View and Ocarina on behalf of Rayley in respect of consignments of timber logs invoiced to Rayley, alleged by Mr. Tiang to have given rise to the purported debt, were more than matched by six corresponding payments clearly received by Esben in respect of the same consignments to the ultimate customers. The Defendants rely on the outgoing payments to Harbour View and Ocarina but no witness could coherently explain why the Court should leave out of account the incoming payments. This means the Court cannot accept that there was any Rayley-Esben debt as alleged.
- (3) The alleged Rayley-Esben inter-company debt is not supported by a single item of direct documentary evidence. Nor is it in fact materially supported by any witness statement evidence, since the alleged recollection of Mr. Tiang, as set out in his witness statement of 23rd November 2017 (for what it is worth), was only that Rayley 'did not repay any of its debts owing to Esben': absent any free-standing evidence of such debt (and there was none), this alleged recollection takes matters no further.
- (4) Similarly, the basis on which Mr. Tiang claims to have calculated the alleged Rayley-Incredible Power inter-company debt is fundamentally flawed, because the sixty payments by Incredible Power to Faedah Mulia on behalf of Rayley in respect of consignments of timber logs invoiced to Rayley, alleged by Mr. Tiang to have given rise to the purported debt, were again more than matched by fifty-seven corresponding

payments clearly received by Incredible Power in respect of the same consignments to the ultimate customers. The Defendants rely on the outgoing payments to Faedah Mulia but no witness could explain why the Court should leave out of account the incoming payments. Again, this means that the Court cannot accept that there was any Rayley-Incredible Power debt as alleged.

- (5) It is apparent to the Court that the Defendants sought to hide evidence of the incoming payments, by strenuously resisting disclosure of the CAD Seized Documents in which that evidence was to be found.
- (6) Even if the basis for Mr Tiang's calculation for the Rayley-Incredible Power debt were not fundamentally flawed, the figure he claims to have calculated as the total for the sixty invoices paid (SG\$11,808,495.05) cannot be correct because, as the Defendants accepted, one of those invoices (no. 37 in Mr. Tiang's list of sixty invoices, with a value of US\$80,606.05) should not have been included as it was not addressed to Rayley – it was addressed to Esben. It was only included in the list of invoices by reason of an admitted clerical error, made in early 2016. Ms. Ting attempted to defend the calculation by suggesting that Mr. Tiang must have applied the wrong exchange rate to the wrong base figure (the sum of 60 invoices rather than the sum of 59 invoices) to arrive at the right Singapore Dollar amount, but it is clear that her explanation was speculative since she admitted that it was Mr. Tiang (and not she) who had carried out the calculation. In any event, her explanation can be wholly discounted: it would be an extraordinary coincidence if by using two incorrect multipliers Mr Tiang nevertheless reached the 'right' conclusion.
- (7) Aside from the flawed (and incorrect) Tiang calculation, the alleged Rayley-Incredible Power debt is supported by only a single item of documentary evidence (which is the documentary thread by which the Defendants' case hangs), namely a disputed Board Resolution of 6th August 2013 ('the Disputed Board Resolution'). But this document is unlikely to be true: it mentions the same figure of SG\$11,808,495.05 in terms, which now appears to have been a figure calculated by Mr Tiang in early 2016 – some three years later - on the basis of an incorrect set of invoices. Therefore, in all probability, the Disputed Board Resolution is a document that was only created in 2016 and reflected the same clerical error.

- (8) There are a number of other grounds for concluding that the Disputed Board Resolution was not created in August 2013, but instead was created after these proceedings started in response to the claims made in them. Among other things, (i) it has not been proved by its ostensible author, Mr. FK Lo, despite Madam Ma's 15th April 2020 notice to prove the document (the Defendants having refused without explanation to call Mr. Lo as a witness), and although Messrs. Walkers produced the original of the document for inspection on day 4 of the trial, they did not indicate where the original had been located; (ii) Ms. Ting's evidence at trial (though not in her witness statements) was that the document was created by Mr. Tiang, but, as it was also her evidence that Mr. Tiang used only a typewriter and it is obvious that the document was created by a word processor or computer and then printed, she invented an implausible new story (also not in her witness statement) that Mr. Tiang arranged for a friendly lawyer in Singapore to create the document on his behalf; (iii) the complete absence of any contemporaneous documentary records whatsoever to prove Ms. Ting's story that it was created by Mr. Tiang in early August 2013, before being sent to her, and then being sent to Mr. Lo for execution on or about 6th August 2013; and (iv) given that it was created by word processor or computer (whether by a lawyer instructed by Ms. Ting after these proceedings started, or the unidentified Singapore lawyer now said by Ms. Ting to have produced the document for Mr. Tiang in 2013) the Defendants ought to have been able to disclose at least the metadata for the document, but they have not (and they have not even explained what searches, if any, have been carried out for that purpose). Accordingly, the Disputed Board Resolution is most likely to have been created after these proceedings started, using a false figure of SG\$11,808,495.05 fabricated by Mr. Tiang and/or Ms. Ting.
- (9) Furthermore, both WKC and WKY gave evidence at trial that they had no knowledge of the SG\$11,808,495.05 figure (and never saw the Disputed Board Resolution) prior to the commencement of the proceedings.
- (10) The Defendants therefore have no credible evidence to rely on to support the alleged Rayley-Incredible Power debt other than (i) the alleged recollection of Mr. Tiang as set out in his 10th March 2017 witness statement, claiming to recall that the figure of SG\$11,808,495.05 appeared in inter-company ledgers he claims to have destroyed three years earlier in September 2014; (ii) the alleged recollection of Mr. Tiang as set out in his 10th March 2017 witness statement, claiming to recall that he had informed Ms.

Ting in a July 2013 conversation that Rayley owed Incredible Power the sum of SG\$11,808,495.05; and, (iii) the alleged recollection of Ms. Ting as set out in her 10th March 2017 witness statement, claiming that she was told by Mr. Tiang in July 2013 that there was a 'substantial outstanding balance' owed by Rayley to Incredible Power, which she then told the Court at trial she remembers as a figure of SG\$11.8m.

- (11) However, Mr. Tiang's witness statement evidence, though formally admitted, merits no or only negligible weight on any significant disputed issues, unless it is clearly and directly corroborated by independent and reliable evidence. Quite apart from this, it is wholly implausible that he was able to recall to the nearest cent, in March 2017, a figure mentioned to Ms. Ting in a conversation some four years earlier in July 2013, or that he was able to recall to the nearest cent a figure he had seen in inter-company ledgers in July 2013 (or indeed in around April 2012, which is when he claims he removed the Offshore Company records from the Double Ace offices prior to their alleged destruction in September 2014).
- (12) As for Ms. Ting's evidence, her testimony that she could remember a figure of SG\$11.8m based on a telephone conversation she had with Mr. Tiang on 23rd July 2013, when she had not thought to mention that figure in her witness statement, is not credible (for reasons explained below). Furthermore, it was plain that she could not recall any of the details of her alleged conversation with Mr. Tiang in which she claimed to have been informed about that figure. Therefore, her evidence on this point is of no real value either (and is, in any event, discredited by her other testimony).
- (13) Mr. Atherton, QC, leading counsel for Incredible Power and Esben, sought to circumvent these difficulties by advancing a new case during his opening submissions (for which he attempted to extract supporting evidence from WKY and Ms. Ting during a series of leading questions) to the effect that Rayley may have owed a debt to Incredible Power on some completely different basis and that there were figures in some of the recently-disclosed Offshore Company records (i.e. within the CAD Seized Documents) that, when added together, suggested a figure – SG\$12,241,257.35 – not all that far apart from Mr. Tiang's figure of SG\$11,808,495.05. This was unheralded by any pleaded allegation, evidence or even his own written opening submissions and contradicts the evidence his clients and the other Defendants have relied upon (Mr. Tiang's figure was very precise and was supposedly arrived at – and confirmed – by a wholly different route, namely the

discharge by Incredible Power of Faedah Mulia invoices addressed to Rayley). It is also entirely speculative.

(14) Over and above these points, there is a further important flaw to the Defendants' inter-company debt allegations (and also Mr. Atherton, QC's new case), which is that they do not take account of the net overall inter-company accounting position as between Rayley and Esben and as between Rayley and Incredible Power, respectively. The Defendants had already accepted this prior to the start of trial, as well as confirming that it is now impossible, in light of the unavailability (for whatever reason) of the Offshore Companies' financial records, to reconstruct the full inter-company accounting picture between the various family companies. No testimony given by any witness suggested these concessions were wrongly made. Nor did any witness give evidence that Mr. Tiang's trial balance documents, even to the extent it was possible to understand them and date them, could be regarded as a reliable record in circumstances where he admitted in Singapore criminal proceedings that he had falsified the Offshore Company financial records.

(15) Furthermore, in so far as there were any relevant records of Mr. Tiang before the Court, and in so far as they are reliable, they appeared to show that Mr. Tiang himself at the time did not consider there were any such pleaded Rayley-Esben or Rayley-Incredible Power debts. In this respect, his 30th November 2012 trial balance for Rayley, which should by that date have shown 99% of the relevant alleged debts accruing, showed instead a completely different picture, with Esben owing Rayley over SG\$854,000, and Rayley owing Incredible Power either nothing or less than SG\$1.5m.

[91] In addition, it was plain, both from their testimony and from the terms in which they (and Ms. Ting) spoke of the Offshore Companies, that WKY and WKC were now, and had at all material times been, in charge of those companies – they were the masters and everyone else concerned with those companies was a servant. It was clear that Mr. Tiang was not and never had been in charge of them and it was clear that the nominee directors were not and never had been in charge of them. In particular, the following principal points emerged in relation to this issue and the related issue of breach of duty:

(1) At the time WKY and WKC caused Rayley to close its bank accounts and transfer the credit balance sums to Esben (April 2013), both were *de facto* directors of Rayley. In all

probability they had assumed that status as long ago as WKN's move to Australia in March 2011.

- (2) WKY and WKC caused Rayley to transfer its credit balance sums to Esben knowing the transaction was not in the best interests of Rayley or for any legitimate commercial purpose of Rayley, or (at best) without any regard to whether this was the case. Both gave evidence that, at the time of the transfers, they had no knowledge of the alleged debt to Esben – a justification they only learned of (and only relied upon) after Esben was joined as a defendant to the proceedings.
- (3) At the time WKY and WKC caused Rayley to divert the Richardson & Wrench loan repayment to Incredible Power (July 2013), both were *de facto* directors of Rayley, and both were *de facto* directors of Incredible Power. In all probability, again, they had assumed that status (in relation to Incredible Power as in relation to Rayley) as long ago as WKN's move to Australia in March 2011.
- (4) WKY and WKC caused Rayley to divert the Richardson & Wrench loan repayment to Incredible Power knowing the transaction was not in the best interests of Rayley or for any legitimate commercial purpose of Rayley, or (at best) without any regard to whether this was the case. Under cross-examination by Madam Ma's leading counsel, both gave evidence that, at the time of the diverted payment, they had no knowledge of the alleged debt to Incredible Power – a justification they only learned of (and only relied upon) after the commencement of these proceedings.

[92] In relation to Madam Ma's position, the following principal points emerged in the course of oral testimony:

- (1) Although it was intimated that Incredible Power and Esben would be making an allegation that Madam Ma had not come to the Court with clean hands, there is no basis on which it could be said that she has come to court other than with clean hands. Mr. Atherton, QC sought to suggest she did not come with clean hands (which was another unpleaded allegation and not addressed with any particularity in opening) but his attempts to extract or point to evidence to that effect were in vain, and it was not in fact even arguable that any conduct of Madam Ma to which she was taken in cross-examination could constitute relevant conduct for the purposes of this claim. The test is not general moral culpability, but rather the much more limited question of whether relief should be denied because there is a sufficiently close connection between the alleged

misconduct and the relief sought.⁴ Nor were the attempts to undermine Madam Ma's credibility as a witness successful.

- (2) The Defendants also failed to establish that Madam Ma had and has no standing to bring these proceedings as a matter of Liberian law derivatively on behalf of Rayley – with Mr. Padmore, Madam Ma's expert, giving highly persuasive expert evidence that Liberian law would permit her to bring such claims to protect the interest of WKN's Estate's interest in this regard. In any event, the Defendants are estopped from re-running a standing defence, having already issued, in 2015, and then withdrawn, in 2016, an application to strike out the claim on that basis.

[93] In the end, the non-existence of the two specific inter-company debts not only means, as set out above, that the breach of duty claims are made out against WKY and WKC, but that the unjust enrichment and knowing receipt claims against Incredible Power and Esben are made out also. Furthermore, in circumstances where WKY and WKC must have known that what they were doing was not in Rayley's best interests, the dishonest assistance claims are made out too.

[94] Furthermore, it is obvious that the Defendants have had no intention of treating Madam Ma fairly, either at the time of the disputed transactions or at any time since, in the context of these proceedings:

- (1) Their protestations that they did not consult her about the transactions because she had not yet been granted probate are a pretence – the real reason for proceeding without her knowledge was plainly to avoid prevention and detection.
- (2) They repeatedly blocked her attempts to gain information about the Offshore Companies even after she had been appointed Executrix.
- (3) When it came to disclosure, they must have instructed their lawyers to adopt a highly restrictive approach – even though she was an equal shareholder of the Offshore Companies and entitled to full and proper disclosure as a matter of BVI procedural law.
- (4) They were unable to explain why if, as they insisted, Rayley's operations had shut down by the time its bank accounts were closed, they did not simply distribute its remaining assets to its shareholders – which would have been the right thing to do.

⁴ Snell's Equity (34th edn., Sweet & Maxwell 2019) 5-010.

- (5) When asked whether he would cause Mr. Lo to give an undertaking that any funds which Rayley receives as a result of these proceedings will be shared eventually between himself, WKC and Madam Ma on a liquidation, WKY acknowledged that this was a fair proposal, 'because we are the common shareholders and also holding share equally ... in the same group of company'; but he nevertheless refused to instruct Mr. Lo to give the undertaking. Madam Ma accordingly submitted that, if the Court is minded to grant relief in respect of her derivative claim, such relief should involve securing any funds directed to be paid to Rayley pending any distribution from, or liquidation of, the same. The Court can see the force in that.

5. Factual witnesses

- [95] Madam Ma called one witness (herself).
- [96] WKY and WKC called three witnesses (themselves and Ms. Janice Ting) and adduced hearsay evidence from Mr. Tiang, who is now sadly unfit to give evidence.
- [97] Rayley did not call any witnesses, consistent with its position as a nominal party.
- [98] Esben and Incredible Power indicated shortly before the start of trial that they would rely on the evidence of the witnesses called by WKY and WKC. This was unsurprising given that they are controlled by WKY and WKC. What was surprising however was the request by their leading counsel, Mr. Atherton QC, to cross-examine some of those witnesses (namely WKY and Ms. Ting): ultimately his instruction to do this must have emanated from WKY and WKC themselves. As became quickly evident, he used this opportunity to lead evidence from those witnesses in an attempt to shore up the defences of all substantive Defendants by seeking to plug certain perceived gaps in their evidence. The value of this additional evidence is considered below.

5.1 Madam Ma as a witness

- [99] Madam Ma made and served a witness statement for use at trial dated 10th March 2017. In it, she gave unexceptional evidence concerning her original claim, confirming what had been pleaded in her Statement of Claim and admitted in the Defences, and referring to the documents so far as available to her at that time. She did not comment on matters in relation to which she had no personal knowledge, save in respect of this point: she gave sound reasons for her belief that WKY and WKC had been involved in the Offshore Company affairs prior to

WKN's death by citing a number of documents, including reference to a Service Agreement between Tengis Limited and WKN, WKY and WKC in relation to Rayley; Madam Ma noted that the Service Agreement was signed by WKN, WKY and WKC and that it further stated that 'The Client shall be entirely responsible for the conduct of the business of the Company'. Madam Ma said that this meant WKN, WKY and WKC were all responsible for the conduct of Rayley's business, and not solely WKN. She stated that she was unaware of any legitimate purpose for Payment 3, unaware of any basis for concluding that at the material time Rayley was indebted to Incredible Power (as it and WKY and WKC claimed in their defences), and unaware of any documents evidencing any such debt (or any documents now no longer in existence that evidence any such debt).

[100] Madam Ma's witness statement was filed before the addition of her claim in respect of Payments 1 and 2 to Esben: that additional claim, which is based entirely on information and evidence provided by the Defendants since the commencement of these proceedings, was supported by Madam Ma's statement of truth in her pleading (and the Defendants' own evidence) and not by a separate witness statement.

[101] Madam Ma was a careful and honest witness. She recognised she was not directly involved in the matters giving rise to these proceedings and was careful to respect the boundaries of the evidence she was able to give. She was also a straightforward and helpful witness, willing to work with the Defendants' counsel to get through the evidence. This was in marked contrast to WKY and WKC, who were tenaciously evasive and obstructive, refusing to concede even the most obvious or uncontentious points – see below.

[102] The Defendants' counsel both took very little time with Madam Ma on the matters pertinent to these proceedings. Instead, they focused their energies on trying to undermine her credibility and to cast her in a bad light generally. These attempts missed their mark:

- (1) Criticism was made of the litigation initiated by Madam Ma, in an attempt to portray her as a 'serial litigator' (although, not in terms, a 'vexatious litigator'). I am not in a position to decide whether she is a 'serial litigator'. First, although that description is clearly intended to carry a pejorative connotation (the word 'serial' often being used in conjunction with other negative identifiers), 'serial litigator' is not a legal term of art that designates someone whose conduct should necessarily be deprecated. Secondly, insufficient evidence was led to show the circumstances of lawsuits brought by Madam Ma: it might have been perfectly reasonable for her to bring lawsuits as her only means

of obtaining redress. Madam Ma's evidence was clear and compelling: she does not appear to be the aggressor in the family feud. The wider family dispute appears to have been triggered by WKY and WKC attempting – immediately after WKN died – to shut WKN's branch of the family out. Madam Ma gave powerful evidence about being shunned and chased away, of income being cut off and information being refused:

“Wong Kie Chie never speak to me. We only speak to each other in court, if you really want to know. So how can I be present? ... what I am telling you is after they sue me we never speak to each other. When I go to the office, everybody run away as if I am some person with a disease, you know, in WTK office. That's why after he died I just move out of the office in June, July. ... They never speak to me. They chase me away in the member's meeting in April 2013. So you keep on asking were you present. I was never present. They never allow me in. They never spoke to me. And then when I went back from Sydney to Sibu on the 20th of March 2013, WKC and I met each other in the golden lounge signing. He just walk by, never speak to me. And then you keep on asking me were you there, were you there. I was never there. I am sorry.”⁵

As Madam Ma explained, she has been trying to extricate her branch of the family from the opposing branch of the family on equitable terms – including by seeking just and equitable winding-up of various companies and challenging certain steps taken by the Defendants and family companies now under their control.

- (2) Incredible Power and Esben also sought to run an unparticularised clean hands point (unheralded in their pleaded defences, or in evidence, or even – on a properly particularised basis – in their written or oral opening submissions). Madam Ma could, in these circumstances, for example, have been forgiven for not having an answer to why particular payments that she was taken to by Mr. Atherton QC had been made to her and her two children by the Offshore Companies over the years (as indeed WKY could not provide an answer in respect of payments made to him). Rather, Madam Ma gave clear evidence that the payments to her represented gifts by WKN from his entitlement to Offshore Company payments.⁶ This evidence was not seriously challenged; and it is notable that there is no indication that the Defendants have ever previously suggested the payments to Madam Ma were wrongful in any way.

[103] Madam Ma was also candid that she had no first-hand knowledge of the business affairs that she now seeks to impugn. She admirably stated that the only part of a judgment that interests

⁵ Day 3/92/8–25 and 93/1–7.

⁶ Day 4/101/11 to 102/24.

her is the result. Madam Ma calmly, politely (in the face of firm, even aggressive, cross-examination), and without hesitation told the Court matters simply as they were.

[104] The Court accordingly accepts Madam Ma's evidence.

5.2 The Defendants' witnesses

[105] None of the Defendants' witnesses distinguished themselves in the witness box and I am satisfied that the Court cannot safely rely on any of their written or oral evidence without independent corroboration from genuine contemporaneous documentation.

5.3 WKC as a witness

[106] WKC demonstrated very early on that signing a Statement of Truth was, the Court is sorry to say, a mere formality that meant nothing to him, in circumstances where he had certified his Re-Re-Amended Defence as true, but then made it clear that he had no idea what his Esben defence was, even when taken through the relevant paragraph⁷ of the document. Similarly, although he signed his methodology affidavit quite recently before the trial on 16th March 2020, he was completely unable to provide any particulars of any of the discussions he claimed in it to have had with Ms. Ting about the legal principles of disclosure and the identities of her assistants in the disclosure process. WKC's first witness statement also contained evidence⁸ to the effect that he understood that Mr. Tiang had destroyed all the Offshore Company records in 2014, although he admitted in the witness box to knowing in 2015 that the CAD had many such documents themselves, so they could not have all been destroyed, and was unable to explain his failure to mention this in the witness statement.

[107] WKC also resorted to what appeared to the Court to be some obvious untruths, such as (i) his claim to recollect not reading the Tengis Agreement (which contained some evidence that he was intended to be part of the Offshore Company management) when he signed it, although it was nearly 25 years ago that he signed it; (ii) his claim that he only knew in 2015 that the CAD had taken the Offshore Company records on 20th August 2014, and only knew of their return by the CAD in 2016 in 2020; (iii) his claim that he only dropped into the Double Ace offices to look at a collection of old bank notes and coins there, and would incidentally then sign cheques and not look at Offshore Company records before doing so; and, (iv) his prolonged pretence that he could not understand a simple table showing corresponding payments concerning Esben (the

⁷ Paragraph 38A.

⁸ At paragraph 23.

Esben Corresponding Payments table), and subsequent refusal to accept that such corresponding payments came from Rayley customers, without being able to point to any other likely source of such payments. WKC did not come across as a truthful witness.

5.4 WKY as a witness

- [108] WKY showed that he was prepared to give unreliable evidence in the witness box very early on – his opening evidence that he first heard about Mr. Tiang stealing from the Offshore Companies in 2018 was plainly a fabrication, as was his attempted row-back ten or fifteen minutes later, when he admitted to 2015 as being the date of such knowledge. It is simply inconceivable that WKY was not aware in the summer of 2014, or made aware by the CAD, of the theft allegations against Mr. Tiang, as they involved SG\$46.3m (about US\$34m) stolen from the Offshore Companies controlled by WKY at that time, *via* many cheques signed by WKY personally. The first three sentences of paragraph 31 of Mr Tiang's first witness statement provided ample confirmation that WKY and WKC knew of such alleged thefts in the summer of 2014, as Mr. Tiang says there that WKY and WKC were aware of the allegations before Mr. Tiang was himself interviewed in August 2014. I am satisfied that is more likely than not.
- [109] WKY gave further incredible evidence when (i) he claimed that he was not aware that the Offshore Companies were paying the relevant WTK onshore companies for logs; (ii) he admitted going to the Double Ace offices every two months between March 2011 and March 2013 to sign cheques (when WKN was sick in Australia), but still claimed that neither he nor anyone else looked at any Offshore Company records during this period; and, (iii) he tried to claim his evidence⁹ was true that Kaliwood resigned voluntarily as a director of Rayley on 21st March 2013, forcing him then to need to find Mr. Lo as a director, when it was plainly false by reference to the 21st March 2013 board minute itself.
- [110] WKY also showed he was prepared to say anything in the witness box if he thought it helped his case, however untruthful, when, for example: (i) he claimed in the witness box on day 6 of the trial that the funds were transferred to Esben on 26th April 2013 to pay off Rayley's alleged debt to it, when paragraph 15 of his second witness statement made it clear that he did not know about such (alleged) debt until after these proceedings; (ii) he claimed to the Court, in response to a question from the Bench, that Rayley itself received payment from its customers

⁹ In paragraph 23 of his first witness statement.

for the logs invoiced by Faedah Mulia, when it is plain from its bank account statements that it received no such payments, which instead were going to Incredible Power, as a table of corresponding payments concerning Incredible Power (the Incredible Power Corresponding Payments table) clearly showed; and, (iii) his explanation that he did not disclose the existence, in his hands, of the CAD Seized Documents in his 13th December 2016 disclosure statement because he 'forgot about' their return in June 2016 was not a truthful answer, especially as he admitted personally instructing Mr. Ong to pick them up for him from the CAD. WKY did not come across as a truthful witness either.

- [111] Both WKC and WKY showed themselves to be entirely mercenary with regard to the truth. The similarity of their approach strongly suggested that they had colluded and agreed together how they were going to present their evidence. Apart from having the same basic, broad, case concept in mind, they were clueless when pressed on the detail contained in their witness statement evidence. To all appearances, they simply signed off on what they were given to say by lawyers who had prepared their statements. They both also sought refuge in alleged confusion when confronted with stark, simple, contrary evidence. Such confusion was clearly studied and feigned: they simply refused to admit the obvious. I have had due regard to the possible latent effects of age and neurological deterioration in both WKC and WKY, even granting that to me, at least, there was very little, if any, overt sign of any serious memory difficulties or other debilitation in either of these gentlemen.

5.5 Ms. Janice Ting as a witness

- [112] Ms. Ting also did not come across as a witness of truth. She was well-presented, articulate, mentally agile, clever and creative. But, although she clearly thought she was convincing, her attempts to make things up as she went along were obvious and crude. She showed herself to be manipulative and shallow. It is clear that hers were supposed to be the 'brains' behind the Defendants' defence within their organization, at least since the loss to their team of Mr. Tiang.
- [113] Ms. Ting commenced her evidence by refusing to accept that she was heavily involved in all the litigation between WKY/WKC and Madam Ma and Mr. Neil Wong, saying she was only involved as CFO providing information, when the evidence was that she was a significant actor in all the litigation, not least as the main point of contact between WKY and WKC and their lawyers in all litigation. Shortly afterwards, her initial reaction to two unhelpful letters written in August and September 2013 to Madam Ma's Australian lawyers, Messrs. Rockwell Olivier, by Mr. Tiang on her instructions, was to deny any involvement in them, only to have to backtrack

on both occasions when shown her involvement in providing drafts for him. Indeed, Ms. Ting's involvement in a (dishonest) letter of WKY of 9th September 2013, where he falsely denied being a director of Esben to Messrs. Rockwell Olivier, despite having been supplied with confirmation by Mr. Tiang of his directorship on 4th September 2013, in itself caused the Court to be wary of relying on her as a witness.

- [114] As with WKY, Ms. Ting gave some wholly incredible evidence as to when she first heard about Mr. Tiang's thefts – first claiming it was in September 2017, before admitting she must have known from Mr. Tiang's 10th March 2017 witness statement, but still refusing to admit that she must, like WKY, have known from mid-2014 of these thefts.
- [115] Further vivid examples of Ms. Ting's unsatisfactory approach as a witness can be seen in her untrue evidence that: (i) she allegedly did not report to WKY before WKN's death in March 2013, when paragraph 8 of her first witness statement made it clear that she did report to him from March 2011, when WKY went to Australia following his diagnosis with cancer; (ii) WKY and she allegedly were not giving instructions to Mr. Tiang as to the conduct of the Offshore Companies' business between March 2013 and December 2014, when Mr. Tiang as a book-keeper plainly had to receive instructions from some member of the Wong family after WKN's death (if not before), and Mr. Tiang in his first witness statement (at paragraphs 18 and 25) had indeed made it clear this was precisely what was happening; and, (iii) Ms. Ting did not know about WKY's August 2014 CAD interview until 2017, and was not allegedly aware that the CAD had taken Offshore Company financial records from the offices of Double Ace on 20th August 2014 until 2019, despite her roles as WKY's CFO, director of litigation against Madam Ma with responsibility for disclosure and the main point of contact with his lawyers, and provider of instructions to Mr. Tiang. This latter evidence was desperate and appears to have been designed solely to avoid responsibility for her manifest role in the Defendants' culpable failure to disclose the CAD Seized Documents in 2016, or at any point thereafter until 28th October 2019.
- [116] Finally, as regards Ms. Ting, if, as seems overwhelmingly likely, the 6th August 2013 Disputed Board Resolution was fabricated after these proceedings began, then not only are parts¹⁰ of her first witness statement false, but she also gave remarkably dishonest oral evidence on this subject for nearly 20 pages of transcript on day 9 of the trial, involving: invented August 2013 conversations with WKY, an unnamed lawyer in Sibuluan, and Mr. Tiang himself; a narrative about

¹⁰ The second and third sentences of paragraph 21.

Mr. Tiang's nameless friendly lawyer in Singapore (to try to explain the type-written issue away); the use of couriers to get the unsigned board resolution from Mr. Tiang in Singapore to Ms. Ting in Sibü and on to Mr. Lo in Hong Kong; and, a conversation with Mr. Lo asking him to execute it. I am persuaded that all this was wholly fictional, and a further strong reason why the Court cannot safely rely on any of Ms. Ting's evidence without genuine contemporaneous documentation to corroborate it.

5.6 Mr. Richard Tiang's witness statement evidence

- [117] Mr. Tiang was unable to testify at the trial, not only because he was convicted and sentenced to 18 years' imprisonment in Singapore but also because he sadly suffered a severe left frontal lobe stroke in April 2019 which left him mentally and physically unfit to give evidence.
- [118] On 20th April 2020, WKY and WKC sought an order that the witness statements of Mr Tiang dated 10th March 2017 and 23rd November 2017 be admitted as hearsay evidence at trial and an order that the need for Mr Tiang to be called as a witness at trial be dispensed with. Madam Ma did not oppose that application (subject to the production of originals and the question of costs) and the Court made that order. However, on 22nd May 2020 WKY and WKC filed further evidence explaining that they had not, after all, been able to locate the originals of his witness statements.
- [119] Mr. Tiang's witness statement evidence should be accorded very little weight, except where patently probable or true. Mr. Tiang was plainly an unreliable narrator. He had committed theft against the Offshore Companies on a monumental, industrial scale, and falsified their documents in an attempt to cover up his theft. He had, on his own account of events, destroyed the books and records of the Offshore Companies, making the wholly implausible assertion that he was acting under instructions from an individual no longer able to contradict him. He has been shown to give misleading and/or selective evidence to this Court, in claiming in his first witness statement (of 10th March 2017) that he strenuously denied the accusations against him in Singapore whilst, from the other side of his mouth, in fact admitting his dishonesty to the Singapore authorities *ab initio* in August 2014.
- [120] Mr. Tiang's witness statements are also discredited by reason of the inherent improbability of many of his assertions – considered in detail below. An analysis of his evidence also shows that his assertions on the material issues are discredited by reason of their association with the similar or overlapping evidence given by the Defendants' other witnesses.

- [121] In addition, and of greatest significance to the key issues on which he gives evidence, Mr. Tiang's witness statements are discredited by fundamental flaws in arriving at his two figures for the Esben and Incredible Power debts. These flaws are explained in the next two sections of this Judgment. The clear inference is that both inter-company debts – the entire foundation of the defence – are *ex post facto* fabrications.
- [122] I am therefore persuaded that it is appropriate to discount Mr. Tiang's witness statements on all significant disputed issues, unless it is clearly and directly corroborated by independent and reliable evidence.

5.7 Mr FK Lo

- [123] The Defendants elected not to call Mr. FK Lo, the *de jure* director of Incredible Power and Rayley at the time of the disputed transactions. This was regrettable and surprising (if the Defendants' evidence was to be true), but unsurprising when viewed as a fabrication. Mr. Lo is an admitted long-term business associate of WKY, remains a *de jure* director of Rayley and Incredible Power, and was alleged to have been the author of the Disputed Board Resolution, said by the Defendant to have been signed on 6th August 2013. The Court also has no evidence from him as to the role played by WKY and WKC in relation to the management of Rayley and Incredible Power and the nature of their instructions to him – although it is clear from the testimony of the witnesses who did give evidence that Mr. Lo simply did what he was told to do by WKY and WKC: none of them pretended otherwise.

6. Evidence as regards the Corresponding Payments issue

6.1 Introduction

- [124] It is the cornerstone of the defence case that, when Payments 1 and 2 were made, Rayley owed US\$1,535,549.85 to Esben (i.e. the Esben Outstanding Debt) and that, when Payment 3 was made, Rayley owed SG\$11,808,495.05 to Incredible Power (i.e. the IPL Outstanding Debt). Payments 1, 2 and 3, so the Defendants allege, were for the legitimate, commercial purpose of part-payment of those debts and, accordingly, they were in Rayley's best interests.
- [125] In this section it is appropriate to commence with an outline of Mr. Tiang's evidence of the two alleged inter-company loans based on the payment by Esben and Incredible Power of a series of invoices addressed to Rayley, before explaining the first fundamental flaw of his evidence, which was to ignore the corresponding incoming payments associated with almost every one of those invoice payments.

[126] As a consequence of this fundamental flaw in Mr. Tiang's evidence, the Defendants' case is without foundation.

6.2 Mr. Tiang's evidence about the alleged Rayley / Esben debt

[127] In both his statements, Mr Tiang asserted that an inter-company loan arose between Rayley and Esben, and that the two bank transfers by Rayley to Esben (Payments 1 and 2) served partially to discharge that inter-company loan.

[128] In Mr. Tiang's first witness statement, the amount of the alleged debt was unspecified. He merely said, '[a]ccording to the inter-company ledgers which existed at the time, Rayley owed monies to Esben in respect of funds advanced by Esben on Rayley's behalf in relation to the sale of timber logs.' He explained elsewhere in his first witness statement that the inter-company ledgers he was referring to no longer existed because he had destroyed all of the documents and records of the Offshore Companies in September 2014.

[129] In his second witness statement, however, Mr. Tiang gave much more specific evidence about this debt: he referred to (and produced a table of) a total of six invoices issued by certain of the WTK onshore companies, Harbour View and Ocarina, to Rayley between 17th January and 26th June 2012 (copies of which he stated were provided to him by WKY and WKC's lawyers, who obtained them from Ms. Ting) (which I will refer to as Invoice Table 1). He also exhibited the six invoices. These, he says, were settled on Rayley's behalf by Esben, generating an inter-company debt of US\$1,535,549.85 (i.e. the Esben Outstanding Debt).

[130] Mr. Tiang was very specific about how he said this debt arose:

"[Esben] made advances on behalf of Rayley, which advances comprised payments made by [Esben] regarding invoices issued by [Harbour View] and [Ocarina] to Rayley in relation to the sale of timber log consignments. As all the Financial Records of Rayley have been destroyed (other than those copy documents I refer to at paragraph 15 below), I am unable to state the exact amount owed to Esben Finance by Rayley. However, based on the invoices issued to Rayley by Harbour View and [Ocarina], I am able to state that, Rayley owed at least US\$1,535,549.85 to Esben Finance in relation to those advances."

[131] He was also very specific about how and on the basis of what information and documents he said he prepared Invoice Table 1:

"The details have been obtained from the Harbour View and [Ocarina] invoices and the bank statements and bank credit advices (where available) of Harbour View and [Ocarina]. The Harbour View and [Ocarina] documents were provided to me by WKY and WKC's lawyers, who obtained the documents from Janice Ting. These documents explain the composition of the Esben Outstanding Debt."

6.3 Mr. Tiang's evidence about the alleged Rayley / Incredible Power debt

[132] In his first witness statement, Mr. Tiang gave a detailed account of how the alleged inter-company loan arose between Rayley and Incredible Power.

[133] He referred to (and produced a table of) a total of 60 invoices issued by one of the WTK onshore companies Faedah Mulia to Rayley between 1st January 2008 and 25th January 2013 (copies of which he states were provided to him by Ms. Ting) (which I will refer to as Invoice Table 2). These, he stated, were settled on Rayley's behalf by Incredible Power, generating an inter-company debt of RM32,724,075.25, 'which when converted into Singapore Dollars at the exchange rate applicable at the time, amounted to SG\$11,808,495.05 (i.e. the IPL Outstanding Debt)'.

[134] Mr. Tiang was very specific about how he said this debt arose and that he explained this to Ms. Ting in July 2013:

"During my dealings with Janice Ting, I informed her that according to the inter-company ledgers of those companies [Rayley and Incredible Power], there was a substantial outstanding balance owed by Rayley to Incredible Power as a result of advances and payments made by Incredible Power on Rayley's behalf (the "Rayley Outstanding Debt"). Based on the Financial Records in my possession at the time, I informed Janice Ting that Rayley owed Incredible Power a total sum of SGD\$11,808,495.05 according to the relevant inter-company ledgers."

[135] He was also very specific about how and on the basis of what information and documents he said he prepared Invoice Table 2:

"The details have been obtained from the Faedah Mulia invoices and the bank statements of Incredible Power and Faedah Mulia. The Faedah Mulia documents were provided to me by Janice Ting following an oral request from me for the documents which were required in order to explain the composition of the Rayley Outstanding Debt for these proceedings."

6.4 The corresponding payments

[136] At the 31st October 2019 hearing before me, counsel for Madam Ma indicated that the Defendants' case on the alleged inter-company debts was undermined by bank statement evidence which indicated that, although Esben and Incredible Power indeed transferred funds to the relevant onshore companies to discharge invoices issued to Rayley, they themselves were placed in funds to make these payments by unknown third parties, usually just before the outgoing payment was made. Furthermore, the bank statements showed that the incoming payment to Esben and Incredible Power each carried a reference number which was identical to the WTK invoice number, save for the addition of the letters '-CTN' as a suffix.

- [137] Madam Ma's subsequent analysis of the CAD Seized Documents, which were belatedly disclosed nearly three years after the December 2016 disclosure deadline, showed that they provide key evidence that the incoming payments were indeed made in respect of the relevant onshore company invoices, and thus contradicted the suggestion that Rayley owed debts to Esben and Incredible Power in respect of such invoices.
- [138] In this respect, within the CAD Seized Documents were dozens of matching invoice pairs from the 2012–2014 period which demonstrated that Mr. Tiang's *modus operandi* at Double Ace's offices in Singapore was: (i) to receive an invoice from an onshore WTK Group logging company (an onshore company) addressed to a WTK Group Offshore Company, in respect of a consignment of timber; and, (ii) immediately to re-issue that same invoice in the name of the Offshore Company in respect of the same timber to a third party buyer, with the same shipping port and shipping destination, and the same vessel and voyage number, altered only to add a suffix letter/s '-CTN' or '-A' to the invoice number, and to vary the amount charged (usually increased). The third-party buyer subsequently paid the invoice to the bank account of an Offshore Company (not always the invoicing Offshore Company), which payment always bore the reference of the slightly altered Offshore Company invoice number; and the onshore company invoice was paid out of that Offshore Company's bank account, usually just after receipt of the third party buyer's payment. This was a simple transaction structure, in which the Offshore Company was used as a 'pass-through facility' or conduit for payment in respect of logs by customers, with the Offshore Companies ultimately earning a profit.
- [139] Madam Ma's counsel took the Court through six examples. The clear inference from these and other similar documents located within the CAD Seized Documents, and from the Offshore Company bank statements, is that there exist or existed (undisclosed by the Defendants) similar matching invoice pairs for the 66 invoices relied on by the Defendants in respect of the alleged Rayley / Esben and Rayley / Incredible Power inter-company debts – not least because 63 of the 66 invoice payments made by Esben and Incredible Power to the relevant WTK Group company were financed by an incoming payment bearing the reference of the identical invoice number, altered only with the suffix letters '-CTN' added to the invoice number, as described above.
- [140] In such circumstances, it is plain that Esben and Incredible Power, not Rayley (which would have issued the missing onward corresponding invoice), received the corresponding third-party payments in respect of the WTK Group timber consignments to Rayley that are the subject of the invoices relied upon by the Defendants.

[141] Far from Esben and Incredible Power having advanced sums on behalf of Rayley in such a way as to give rise to inter-company debts in their favour as alleged by the Defendants, the true position is that Esben and Incredible Power received third party payments in respect of the timber consignments that, taken as a whole substantially exceeded the payments relied upon by the Defendants. In the case of the six invoices discharged by Esben that are relied upon by the Defendants, it is apparent that Esben received US\$114,399.96 more than it paid out on behalf of Rayley. In the case of the 60 invoices discharged by Incredible Power that are relied upon by the Defendants, it is apparent that Incredible Power received US\$5,022,964.50 (or SG\$5,795,046.87) more than it paid out on behalf of Rayley.

6.5 Madam Ma's December 2019 Request for Information about the corresponding payments

[142] By her Request for Information dated 9th December 2019, Madam Ma sought further information about the alleged inter-company debts, including why payments were made into Esben and Incredible Power's bank accounts corresponding (in amount or approximate amount as well as in date or approximate date) to payments out in respect of the onshore company invoices addressed to Rayley, by whom such corresponding payments were paid, how the corresponding payments were accounted for, and how the corresponding payments affected the alleged Rayley / Esben and Rayley / Incredible Power inter-company debts.

[143] The Defendants all stated in identical responses on 10th January 2020 that they were not able to confirm the purpose of the payments that were made into the Esben and Incredible Power bank accounts, the identity of the payors or how these amounts were accounted for, and asserted that such payments do not affect the existence of the inter-company debts addressed by Mr. Tiang in his first and second witness statements. This was tested at length in cross-examination of the other defence witnesses.

6.6 The evidence of the other defence witnesses

[144] Mr. Tiang was the only defence witness to provide any detail about the composition of the alleged debts in his witness statements. The Defendants' other witnesses had the following to say about the alleged debts and the corresponding payments analysis. As appears from this review of their evidence, they were determined to be unhelpful about shedding any further light on the nature of the incoming corresponding payments, but were ultimately unable to provide any alternative explanation for the obvious explanation put forward by Madam Ma; and so far as the alleged debts themselves were concerned, none had any knowledge about those debts

independently of what they were allegedly told by Mr. Tiang, apparently only after the start of proceedings.

6.7 WKC's evidence about the alleged debts and the corresponding payments issue

- [145] WKC referred only in passing, in his second witness statement, to the alleged Esben debt 'as dealt with at paragraphs 8 to 12 of TH Tiang's second witness statement, a draft of which I have read'. He did not claim to have any independent knowledge of the alleged debt, or any knowledge about the debt prior to June 2017.
- [146] In his first witness statement, WKC stated that he had no knowledge of the alleged Incredible Power debt '[u]p until' he was 'subsequently informed' by WKY that such a debt existed as a result of advances and payments made by Incredible Power on Rayley's behalf to, amongst other things, discharge the Faedah Mulia invoices. He did not claim to have any independent knowledge of the alleged debt, or any knowledge about the debt prior to being informed about it by WKY (which must therefore have been after the commencement of proceedings).
- [147] In his testimony, he confirmed that the first he knew about the alleged Esben debt was when he saw a draft copy of Mr. Tiang's second witness statement of November 2017 and told the Court that he could not recall when he first knew about the alleged Incredible Power debt but it was 'most probably' only after the start of the proceedings in 2015 – and that when instructing Mr. Tiang to direct the diversion of the loan repayment to Incredible Power there was no benefit in his mind that Rayley was going to get from this.
- [148] As regards the corresponding payments, it was unclear (and he initially refused to answer) whether he had considered the Esben Corresponding Payments Table annexed to the Claimant's Skeleton Argument before the trial – but eventually he said he had not seen it at all until taken to it in cross-examination, which seems incredible, especially as his leading counsel (Mr. Alexander, QC) had made an application on day 3 of the trial to have it struck out. At the start (before being asked a single question about the table) he refused to engage with it at all (saying any questions about the table should be put to Ms. Ting since she was the CFO, even though the Defendants' evidence, including Ms. Ting's own evidence, was that she had had nothing to do with the Offshore Companies). He was determined not to address his mind to the figures in the table, obdurately saying that he knew nothing about the debt on which his defence to the Esben transfers was based. He later said the same about the Incredible Power debt on which his defence to the loan repayment diversion was based. At the start he even refused to accept that the figures in the bank statements are the same as the figures in the

table, saying that he was '*not going to continue*' and '*I have a financial man to look after that. I don't do financial statements*' – and made Madam Ma's leading counsel take him through the bank statements for each and every row of the table to show him that the figures in the table represented what was in the bank statements. He would often look up at the ceiling, not even attempting to engage, and protesting that it was all very confusing. It was not. In fact, the concept behind the table was very simple, and it must be that he was just pretending not to understand it. His testimony was simply not plausible coming from a man who has been at the helm of a substantial Australian business (Richardson & Wrench) for decades, a director (and part-owner) of sundry WTK Group onshore and Offshore Companies for even longer, and has recently proved himself to be an extremely successful investor.

[149] Eventually, he agreed the information derived from the bank statements, when taken through the table on a row-by-row basis, and he said that the figures table 'could be correct', but that he did not know 'if there is any other thing there.' Then, at the start of the second day of his testimony (day 4 of the trial) he agreed, having taken advice from his lawyers overnight with the permission of the Court, that the figures in both the Esben table and in the Incredible Power Corresponding Payments Table were correct in representing the information set out in the bank statements referenced in those tables.

[150] Nevertheless, in relation to Esben (and Incredible Power – see below), he refused to accept that the incoming corresponding payments represented payments by third party customers for the same consignments of timber logs as were the subject of the invoices issued to Rayley. His testimony about this was implausible and also suggested that he had come into Court having already made up his mind that, though he realised what the payments were about (and what they implied for his defence), he would not give an inch on this. So, for example:

“Q: Do you accept that the payment coming in to Esben was from a third party customer paying?

A: I don't know nothing about third party. I stick to my gun.

...

Q: Do you accept that the payment coming in on the 22nd June was to fund the payment we see going out on the 25th June?

A: I don't know. I don't know that. I'm not the accounting man.

...

Q: And, therefore, do you, are you willing to accept that, having shown you that information that the Esben payment to WT, to Ocarina in row 5 was financed by a payment coming in from a Rayley's third party customer?

A: Not correct. I don't know who third party is.

...

Q: Do you accept that after Harbour View and Ocarina invoiced Rayley, rather Mr. Tiang, would in turn simply send a slightly altered invoice to third party customers who were actually getting in and paying for the logs?

A: I don't know. I never involved in the accounting."

[151] Even when taken to examples of matching invoice pairs (included within the bundle of CAD Seized Documents, and relating to transactions other than those on which the Esben debt was based), and even though he accepted that the invoice pairs always bore the same numbers (with the addition of the suffix '- CTN' added to the invoice issued by the Offshore Company), related to the same timber logs, with the same shipment details, and that payment of the invoice to the third party customer passed through the same bank account as the source of the onward payment in discharge of the invoice to the WTK Group company, his answer was that 'I don't know the nature of the transaction . . . No. I don't know whether third party or not. I don't know' or similar. As the questions went on, his answers became almost farcical, seeking to imply that because he did not have any first hand details about the particular transactions represented by invoice pairs he was unable to understand what they represented as a concept: thus, at one point he sought to hide behind the fact that he did not know the identity of a particular third party company (Multi Agro Impex was one of the buyers listed in an invoice issued by Rayley); and at another point he said that he thought the invoices were not prepared by him but were prepared by the old marketing manager, whom he was unable to identify because 'I live in Australia'. Ultimately, he was unable to offer any other credible explanation for the incoming payments, even though he was repeatedly given the opportunity to do so.

[152] He therefore also refused to accept, equally implausibly, that these payments meant there was no Esben debt as alleged in his Defence.

[153] What made his answers even more implausible was that he must have had personal knowledge of payments into and out of the Esben account – he was, after all, both a director of Esben and an authorised signatory of its accounts, as well as a director of the WTK Group onshore companies supplying the timber logs. Indeed, he accepted that either he or WKY (or both) would have authorised a series of ten payments from Esben to various WTK Group onshore companies totaling around US\$4 million made within the space of around seven weeks to which he was taken. In those circumstances, it is simply not credible that he did not

understand how the flow of payments worked, and the ultimate source of payments for the timber log consignments.

[154] Similarly, he initially refused when asked about the Incredible Power Corresponding Payments Table (on day 4 of the trial) to accept that the incoming payments must represent customer payments in respect of the same timber log consignments as those that were the subject of the invoices Incredible Power discharged on behalf of Rayley. His answers on this occasion were equally implausible:

Q: Looking at the information in columns H, I and J, which you accept are true, the correct information, do you accept those corresponding payments were made by third party customers for the logs supplied under the Faedah Mulia invoices listed in column C?

A: I don't know what's third party.

...

Q: Do you accept that the payments we see in column I which have the same invoice number, you can see in column H, with just the letters "CTN" attached, as the invoice numbers in ... column B, do you accept that those payments were made by Rayley's customers for the logs supplied under those invoices listed in column B?

A: Where are we now? My Lord, I need the interpreter to have a look for the meeting.¹¹

...

Q: Do you accept that the payments listed in column I were made by Rayley's customers to fund the payments listed in column D?

A: I don't understand.

[155] Eventually, he 'collapsed', figuratively speaking, cut short the questions and said that he did accept that funds paid in to the Incredible Power bank account were payments by customers that Incredible Power then used to discharge the Faedah Mulia invoices, and indeed that this applied to all 60 invoices listed in the table. He even accepted that, as a consequence of the incoming payments, Incredible Power received a net surplus of \$5m.

[156] However (and unbelievably), he did not accept the obvious implication of that evidence, which is that these payments meant that there was no Incredible Power debt as alleged in his Defence. Instead, he retreated into his usual mantra: 'Disagree. I don't know the – first of all, I was not involved in this sort of thing. Secondly, I don't know the nature of the transactions. And thirdly, the purpose of the payment.'

¹¹ Day 4/219/6–14. This was the first recourse WKC had made to the interpreter in nearly two full sessions of testimony in which he had shown not the slightest difficulty in understanding English – and it was an obvious device to stall a difficult question.

6.8 WKY's evidence about the alleged debts and the corresponding payments issue

- [157] In his second witness statement, WKY stated that, after Esben was joined as a party to the proceedings (i.e. after 27th June 2017), he spoke to Mr. Tiang and Ms. Ting in order to understand the utilisation of funds between the Offshore Companies and other companies in the WTK Group, and that it was from those discussions that he learned that an inter-company debt had arisen between Rayley and Esben of at least US\$1,535,549.85. He referred to Mr. Tiang's second witness statement and Mr. Tiang's Invoice Table 1, where he said details of this were set out. He did not claim to have any independent knowledge of the alleged debt, or any knowledge about the debt prior to June 2017.
- [158] In his first witness statement, WKY stated that, after WKN's death (he did not specify when) he spoke to Mr. Tiang and Ms. Ting in order to understand the utilisation of funds between the Offshore Companies and other companies in the WTK Group, and that it was from those discussions that he learned that an inter-company debt had arisen between Rayley and Incredible Power based on the discharge by the latter of invoices issued by Faedah Mulia to the former. He referred to Mr. Tiang's first witness statement and Mr. Tiang's Invoice Table 2, where he said details of this were set out. He also stated that according to Mr. Tiang, in July 2013, he (Mr. Tiang) had informed Ms. Ting that a substantial amount was owed by Rayley to Incredible Power, and that the amount owed by Rayley to Incredible Power was SG\$11,808,495.05, and that until then he and WKC had no knowledge 'at the time' that 'such significant sums' had been advanced by Incredible Power to Rayley. He did not claim to have any independent knowledge of the alleged debt, or any knowledge about the debt prior to his conversation with Mr. Tiang – although the date of that alleged conversation was not clear.
- [159] In his testimony, he specifically confirmed that his discussions with Ms. Ting and Mr. Tiang only took place after June 2017.
- [160] Similarly, he specifically confirmed that his discussions with Ms. Ting and Mr. Tiang only took place after the commencement of proceedings:
- Q: Did these discussions, like the Esben discussions, happen after these proceedings started?
- A: Yes.
- [161] Although WKC had by then already agreed (on the basis of advice from his lawyers) that the figures in the Esben Corresponding Payments Table were correct in representing the information set out in the bank statements referenced in those tables (see above), WKY initially refused to do so. Eventually he accepted the accuracy of the figures in the table, but refused to

accept any significance in the similarity of the invoice numbers, saying that he did not know what the letters 'CTN' stood for.

- [162] It was also clear from the outset that he came to court determined to disagree that, in relation to the 6 payments relied on in support of his Defence, the incoming payments showed that Esben was paid directly by Rayley's customers for the timber logs.
- [163] Like WKC, WKY was questioned at length about these payments. As in the case of WKC, his answers were evasive and implausible. He repeatedly said 'I don't know nature of the payment, who pay and for what purpose', or minor variations of this answer. This must have been a pre-prepared line: he said it no less than seven times – sometimes even when not asked about the payments – even though it must have been obvious to him that the incoming payments were for the same timber log consignments as the outgoing payments.
- [164] Like WKC, he was unable to offer any other credible explanation for the incoming payments – even though he was repeatedly given the opportunity to do so – and even though he agreed earlier that WTK companies sold a lot of logs through the Offshore Companies to third party customers.
- [165] The truth was that WKY did know the purpose of the payments: he was heavily involved in Offshore Company affairs from at least March 2011 onwards, and in charge of them at least from after WKN's death in March 2013 (if not earlier), so he knew for the same reasons relied upon for WKC, only *a fortiori* given his greater involvement than WKC. Indeed, when taken to the very first pair of example invoices (and possibly before he awoke to the direction of this line of questions) he accepted that both invoices represented the same consignment of timber logs. His subsequent refusal to accept even this first element of the analysis in relation to similar matching pairs of invoices was wholly at odds with his training as a certified accountant and many years' experience, first in auditing practice in London and then as a director (1981 to 2011) and eventually managing director of WTK Realty (2011 onwards) and chairman of WTK Holdings, a listed public company (1998 to 2017) – and can only be regarded as evasive (and implausible).
- [166] It was only towards the end of his testimony on this topic that he eventually accepted both elements of the analysis (and what must have been obvious to him all along), which was that the matching invoice pairs and corresponding payments signified that customer payments were being received in respect of the same consignments of timber logs. Despite even this, however, he said he did not agree that this meant that no debt was due from Rayley to Esben

as Mr. Tiang claimed in his witness statement. When pressed by the Court to explain why it was he did not agree, he reverted to form, repeating the mantra that he did not know who paid the debt or the purpose of the payment and – eventually when pressed further – that he did not understand the question.

[167] He was then shown the Incredible Power Corresponding Payments Table, and pretended not to understand this either, even though he had previously seen (and eventually accepted) the Esben table and both had been accepted by WKC on the advice of their lawyers. Once again, he eventually accepted the accuracy of the information in the Incredible Power table but could offer no alternative explanation to that put to him by Madam Ma's leading counsel for the incoming payments in a number of sample rows to which he was taken (rows 6, 9 and 10 of the table), repeating the mantra already referred to above about not understanding the nature or purpose of the payments. He then said, in answer to a series of questions put by the Court, that Faedah Mulia sold logs to Rayley, Rayley then sold those logs to overseas buyers, and that the overseas buyers paid money for those logs. And then came the following key exchange, where the witness for once gave positive evidence:¹²

The Court: So which company did those overseas buyers pay the money to?

A: Pay to Rayley.

The Court: So the overseas buyers paid the money to Rayley?

A: Correct.

The Court: I see. Thank you very much, Mr Wong.

Mr Fraser QC: Mr Wong, in respect of your last answer to His Lordship, Rayley didn't receive any monies for any of these invoices listed in rows 1 to 60 of our table, did they, did it?

A: Rayley did receive the money.

Mr Fraser QC: Well, we have Rayley's bank accounts from way back and they don't show any of these payments, do they? I can take you to them. You can try and find them for me, but you won't find them there. I think you can take it from me.

A: I still don't follow the question.

Mr Fraser QC: Do you accept that Rayley's bank accounts do not show them receiving any funds from customers in respect of the invoices listed in rows 1 to 60 of Incredible Power corresponding payments table? Do you accept that? Rayley's bank statements don't show any of these payments coming into it, do they?

A: I don't know what you are driving at.

¹² Day 7/26/11 to 27/17.

Mr Fraser QC: Well, I can let your counsel produce the bank statements in re-examination if they think they can show all these payments going to Rayley instead of Incredible Power.

[168] Unsurprisingly (because they do not show any such receipts), Mr. Alexander, QC did not take WKY to any Rayley bank statements in re-examination, and nor did Mr. Atherton QC in the course of over two hours of friendly cross-examination on days 7 and 8 of the trial. The US Dollar Rayley accounts for the entire period covered by the 60 invoices were in the trial bundle, and these did not show Rayley receiving any payments that corresponded in any way with the 60 invoices. WKY gave evidence about this that, as he must have known, was untrue.

[169] In spite of all of this, WKY still said he did not agree that the incoming payments meant that there was no debt to Incredible Power as claimed by Mr. Tiang in his witness statement.¹³

6.9 Ms. Ting's evidence about the alleged debts and the corresponding payments issue

[170] In her second witness statement, Ms. Ting stated that she was not aware that Esben discharged invoices that had been issued to Rayley by Harbour View and Ocarina until after the commencement of the proceedings. She also mentioned that, following an oral request from WKY and WKC's lawyers, she collated the invoices issued to Rayley by Harbour View and Ocarina and the relevant bank statements and bank credit advices of Harbour View and Ocarina, to explain the composition of the alleged Esben debt for the purpose of these proceedings, and explained that copies of those documents were exhibited to Mr. Tiang's second witness statement. She therefore did not claim to have any independent knowledge of the alleged debt, or any knowledge about the debt prior to the commencement of the proceedings.

[171] In her first witness statement, Ms. Ting gave some vague evidence about the alleged inter-company debt in favour of Incredible Power, stating that, on the basis of this indebtedness she did not consider Payment 3 to be an illegitimate diversion of funds. In addition, she stated that she was informed by Mr. Tiang in July 2013 (she did not state when in July 2013) about the debt owed by Rayley to Incredible Power 'for advances by Incredible Power in respect of payments made on Rayley's behalf', and that it was substantial, but also stated that she was not aware that Incredible Power had advanced funds on behalf of Rayley to settle Faedah Mulia invoices addressed to Rayley until after the commencement of the proceedings. She

¹³ Day 7/27/18 to 28/5.

therefore did not claim to have any independent knowledge of the alleged debt, and it was not clear when precisely she claimed first to have learned about the alleged debt.

[172] In her testimony, she claimed that Mr. Tiang had told her the precise amount of the Incredible Power debt on 23rd July 2013 (of which she claimed, some seven years later, to remember the figure SG\$11.8m). This was evidence that had not featured anywhere in her witness statements and she had no explanation for its omission (despite its obvious significance). She could also not explain why, if she had been told about the debt, no reference to it was made in the letter of instruction to Mr. Tiang which she claimed she prepared for WKY and WKC. It was clear, when the point was explored further, that she could recollect no further details of the conversation she claimed she had with Mr. Tiang. Then, when trying to explain why mention of the debt did not feature in the letter, she said: 'After all we don't talk about the debt. Wong Kie Nai treat all these offshore company as one legal entity . . .' thus undermining the evidence she gave moments later that she did specifically tell WKY about this debt on that day (notably before he signed the letter of instruction to Mr. Tiang) – another item of evidence that had not featured in her witness statements. Internal inconsistencies of this kind are the hallmark of fabricated evidence: I am persuaded that her evidence about these conversations concerning the alleged debt is an invention. Once again, she had no explanation for the omission from her witness statements of her new evidence of her alleged conversation with WKY about the debt on 23rd July 2013 – which evidence was also inconsistent with the account WKY himself gave when cross-examined by Madam Ma's leading counsel, which was that the discussions he had with Ms. Ting and Mr. Tiang (in which he said he was first informed about the alleged Incredible Power debt) only took place after the commencement of these proceedings. It is also inconsistent with WKY's evidence to the effect that WKY only learned of the alleged debt once the payment had already been received in Incredible Power's bank account.

[173] Ms. Ting was unable to shed any light on the corresponding payments issue. Surprisingly, given her ostensible absence of involvement in the Offshore Companies' affairs (unlike WKY and WKC who were both involved in making outgoing payments) and her claim that she had never seen their financial records, she was asked about them by Mr. Atherton, QC in friendly cross-examination.¹⁴ She claimed that it was impossible 'as an accountant' to say anything

¹⁴ Day 10 31/10 to 43/20. At one point she referred to Mr Atherton, QC as "Steve".

about the 'nature' or 'purpose' of the payments.¹⁵ Ms. Ting delivered this line of argument with saccharine earnestness, hoping, clearly, that the Court would adopt the same approach to the material. Whilst an accountant conducting an audit might want documentary support before expressing definitive conclusions about a transaction, a judge's approach to the assessment of evidence is different. A judge in civil matters is concerned to assess the evidence as a whole to determine the facts on a balance of probabilities. A judge looks for the best evidence available, even if it is not complete or perfect, and tries to construe it sensibly in order to ascertain, as far as possible, what the facts are on a balance of probabilities. This means that a judge should not and does not block himself from reaching an intelligent conclusion just because some details may be missing. Ms. Ting's suggestions here were entirely unrealistic and simply underscored the fact that she was prepared to say whatever she thought would achieve the substantive Defendants' desired outcome. Although she did naturally try to pour further scorn on the value of the Corresponding Payments tables, she unwisely did so by giving evidence that such information meant nothing without underlying records to see how Mr. Tiang posted these sums into his ledgers. This was unwise evidence to give in circumstances where: (i) the evidence suggests that such records exist but have been withheld by the Defendants from Madam Ma; and, (ii) such limited ledgers of Mr. Tiang as were disclosed, such as his Rayley trial balance (or list of debtors and creditors) for 30th November 2012 show, if anything, that Mr. Tiang did indeed take into account the Rayley customer payments coming in, as no such accumulated Rayley-Esben or Rayley-Incredible Power debts are showing as of that date (which they should have been, on the Defendants' pleaded case). In any event, however, her (opinion) evidence on this question was unrealistic; once the pattern of incoming and outgoing payments was detected in the bank statements, and married with the information contained in such matching invoice pairs as have been disclosed with the CAD Seized Documents, it was obvious that the incoming payments must represent customer payments.

6.10 Conclusion on the evidence on the inter-company debts issue

[174] In light of the corresponding payments analysis, the evidence of Mr. Tiang, WKY, WKC and Ms. Ting summarised above on the composition of the alleged inter-company debts is wholly implausible and the Court rejects it. The Court has heard from three defence witnesses who all claim to have no understanding of the effect of the incoming payments. The Court therefore

¹⁵ Day 10/39/18 to 43/20. At Day 10/42/25, she deployed exactly the same mantra as WKC and WKY had used: *"Without the source document, you would not know who made the payment and what is the purpose of the payment, what is the nature of this transaction."*

finds, on the balance of probabilities, that the incoming payments represented customer payments in respect of the same timber log consignments as were the subject of 63 out of 66 of the invoices that Esben and Incredible Power discharged on behalf of Rayley, and that, accordingly, no inter-company debts arose as pleaded. The Court further concludes that, even by looking at the Esben bank statements, Mr. Tiang must have recognised that the Esben debt (of which he was the author) did not exist; and that, even by looking at the Incredible Power bank statements, Mr. Tiang must have recognised that the Incredible Power debt (of which he was the author) did not exist; and that this must have been equally apparent to Ms. Ting, had she looked at the Incredible Power bank statements at the time she allegedly informed WKY about the Incredible Power debt (when she eventually did so). WKY and WKC would have known this also from the bank statements, or from Mr. Tiang and/or Ms. Ting, and their evidence that they would not have been told by those individuals that the debt figures were made up further undermines their credibility as witnesses.

[175] Properly analysed, Mr. Tiang's Invoice Tables amount to nothing and the Defendants' evidential basis for the debts is without foundation.

[176] Complaints by the Defendants that Madam Ma had not pleaded nor given witness evidence in advance of trial of her analysis of the corresponding payments issue are misplaced: it was the Defendants' own evidence that self-destructed when held up against bank statements the Defendants themselves eventually and reluctantly disclosed. Madam Ma was fully entitled to test the Defendants' case by cross-referencing their (carefully selected) documents against their own disclosed documents. Their complaints are nothing more than a desperate attempt to prevent Madam Ma from exposing the truth about the Defendants' deception to the Court.

6.11 Conclusion on the corresponding payments issue

[177] As appears from the analysis of the evidence in this section, the Defendants' witness evidence on the inter-company debts issue, and the documentary evidence relied on to show how the debts were composed, is without foundation because it does not address the corresponding payments. In the next section, I consider the other documentary evidence relied upon by the Defendants, which shows why, in light of that and other evidence, their debt defences are fundamentally flawed, even aside from the corresponding payments point.

7. Other evidence as regard the alleged inter-company debts

7.1 Introduction

- [178] The Defendants no doubt sought to place reliance upon Mr. Tiang's Invoice Tables because there is no direct documentary evidence of the alleged inter-company indebtedness. So far as such evidence is concerned, the high point in their case is referenced by Mr. Tiang in his first and second witness statements to undisclosed 'inter-company ledgers' in which the indebtedness of Rayley to each of Esben and Incredible Power allegedly appeared, but which he says he deliberately destroyed with other company records. The 'inter-company ledgers' are accordingly allegedly unavailable for inspection by the Court or Madam Ma. Given the poor credibility of Mr. Tiang's witness statement evidence, the Court approaches with considerable scepticism what is set out there on this important issue, unless it is clearly and directly corroborated by independent and reliable evidence – including whether any material Offshore Company records were destroyed at all by Mr. Tiang, or are simply being withheld by the Defendants from Madam Ma. In any event, for reasons explained in this section, any Offshore Company records to which Mr. Tiang may have been referring, even assuming his recollection of them was accurate, are to be regarded as inherently unreliable given the evidence as to the condition of those records.
- [179] The Defendants also place heavy reliance on a single item of documentary evidence that refers indirectly to the Incredible Power debt. This is the purported written Rayley board resolution signed and dated 6th August 2013 by Mr. FK Lo, its sole *de jure* director (i.e. the Disputed Board Resolution). It is the only item of documentary evidence even referring to any such indebtedness (and there is no equivalent document for the alleged Esben debt). Mr. Lo was not called to prove this resolution, and Madam Ma does not accept that it was signed on that date (or at any time prior to 2016), for reasons explained below.
- [180] The Defendants are therefore left with Mr. Tiang's Invoice Tables. However, quite apart from the corresponding payments point, there is a second important flaw in the Invoice Tables. Put simply, even if accepted at face value, they represent a partial and selective attempt at reconstructing the inter-company accounting position between the relevant Offshore Companies. For reasons explained in this section, that approach is unrealistic and unwarranted.

7.2 The Defendants' reliance on destroyed inter-company ledgers

[181] In his first witness statement, under a heading entitled 'Treatment of Offshore Companies as a single entity', Mr. Tiang gave background evidence about the inter-company ledgers, stating that he was aware that

"WKN had established a practice of using the funds from any one of the Offshore Companies which had available funds to make payments on behalf of other Offshore Companies which did not have sufficient funds to discharge their own debts. There was no proper system whereby debit and credit notes, invoices, demand notes and/or receipts were raised in relation to the advances made by the Offshore Companies and instead the balances of the Offshore Companies were recorded in the ledgers and journals to reflect the advances".¹⁶

[182] He explained that, as a matter of practice, whenever one of the Offshore Companies had insufficient funds to settle its debts or expenses or make advances, WKN would instruct him (usually by telephone or in person) to transfer funds from the account of another Offshore Company and record the payments in inter-company ledgers.

[183] At paragraph 22 of his first witness statement, he had this to say about Rayley and Incredible Powers' inter-company ledgers:

"In July 2013, I was informed by WKY that Richardson & Wrench intended to repay the amount owing under the Loan Deed to Rayley. I then reminded WKY that Rayley no longer had a bank account to which the sum could be remitted. I suggested to WKY that the said monies could be remitted to Incredible Power's bank account as it still had an active bank account to receive monies. WKY then informed me that Janice Ting would contact me to arrange for the payment to be made to Incredible Power's bank account. During my dealings with Janice Ting, I informed her that according to the inter-company ledgers of those companies, there was a substantial outstanding balance owed by Rayley to Incredible Power as a result of advances and payments made by Incredible Power on Rayley's behalf (the "Rayley Outstanding Debt"). Based on the Financial Records in my possession at the time, I informed Janice Ting that Rayley owed Incredible Power a total sum of SGD\$11,808,495.05 according to the relevant inter-company ledgers." (Emphasis added.)

[184] As the Claimant's learned counsel submitted, this is the stuff of pure fantasy. Mr. Tiang's evidence in the same witness statement was that, before arranging for the physical destruction of the documents and records of the Offshore Companies in September 2014, pursuant to an instruction (allegedly) given by WKN in around May 2012, he had already been instructed by

¹⁶ Mr. Tiang's WS1 paragraph 9.

WKN 'sometime in April 2012' to remove all documents and records from the Singapore office, and that he did so. He gave a detailed account of how he initially stored the records in a vacant lot next to Double Ace's office before arranging for them to be moved to a storage facility provided by a company called Focal Logistics. If his witness statement evidence in that regard is to be believed, the financial records had long since left the Double Ace offices in Singapore by July 2013, and he cannot (as he implies) have consulted those records, since there were no longer any such records in his 'possession at the time'. The Defendants have suggested no basis for resolving this internal inconsistency in his evidence. In particular, it is not their case that the inter-company ledgers he claims to have consulted survived the alleged removal to storage and subsequent destruction of records, and it bears saying that the alleged ledgers have never been disclosed. It is inconceivable that he was able to remember the figure of SG\$11,808,495.05 a year or so after the financial records had been removed into storage. This, in turn, undermines his witness statement evidence that he passed the figure on to Ms. Ting (and further undermines her testimony that she received it from him at that time).

[185] Quite apart from this, it is wholly implausible that Mr. Tiang was able to recall to the nearest cent, in March 2017 when making his first witness statement, a figure mentioned to Ms. Ting in a conversation in July 2013.

[186] With Esben, Mr. Tiang did not overreach himself in this way. He did not claim to be able to recall any precise figure in the relevant inter-company ledgers, merely explaining that Esben had made advances on behalf of Rayley and that (as the financial records of Rayley had been destroyed) he was 'unable to state the exact amount owed to [Esben] by Rayley' but that, 'based on the invoices issued to Rayley by Harbour View and [Ocarina], I am able to state that, Rayley owed at least US\$1,535,549.85 to [Esben] in relation to those advances' – and (wholly implausibly, given the interval of more than 4 years) 'I recall that Rayley did not repay any of its debts owing to Rayley Finance'. As such, whatever may have been contained within any Rayley / Esben inter-company ledgers, it provides no independent evidential support for the alleged Esben debt. Be that as it may, even on this occasion Mr. Tiang tripped up on internally inconsistent evidence: he claimed that, after the transfers were made (which would have been after 30th April 2013), he 'recorded the transfers in the inter-company ledger as showing an increase in [Esben]'s bank balance and a reduction in the Esben Outstanding Debt', which, he explained, was now no longer available for inspection as it was subsequently destroyed. He thereby overlooked that it was *also* his evidence that he had removed the financial records from Double Ace's offices a year earlier.

- [187] Accordingly, Mr. Tiang's alleged recollections as to the contents of the inter-company ledgers add no evidential weight to the Defendants' case. They serve only to illustrate further their willingness to fabricate evidence to support their case.
- [188] Furthermore, there is no evidence that ledgers of the kind described by Mr. Tiang even existed for the Offshore Companies. Ms. Ting gave evidence (under friendly cross-examination by Mr. Atherton, QC) that the Offshore Companies did not maintain a proper accounting system and did not even, for example, maintain a general ledger (of which inter-company ledgers would be a form of sub-ledger).¹⁷ There are a number of documents within the body of the CAD Seized Documents that appear possibly to be inter-company ledgers¹⁸, but Mr. Tiang did not identify the nature of these documents or comment upon them at all (despite the Defendants undoubtedly being in possession of those documents from no later than June 2016¹⁹) and it is difficult to see how he could have maintained proper inter-company ledgers if it is true that he maintained no general ledger.
- [189] If Mr. Tiang *had* commented upon the documents in the CAD Seized Documents (which were only disclosed in October 2019) he would have had to explain why the figures appearing in at least two groups of such documents were completely at odds with his figures for the alleged Esben and Incredible Power debts:
- (1) The documents in question (for what they are worth – see below) can be dated 30th November 2012 or thereabouts, given that they contain the same figure for a Rayley / Harvard Rank inter-company indebtedness as another document which bears that date, namely SG\$2,399,450.01. The documentation indicates that, far from Rayley owing Esben at least US\$1,535,549.85 as at April 2013, as at 30th November 2012 Esben in fact owed Rayley SG\$854,474.20, and, since every one of the six invoices relied on in support of the alleged Esben debt pre-dated November 2012, they cannot be relied upon to alter that figure. Similarly, the documentation indicates that, far from Rayley owing Incredible Power SG\$11,808,495.05 as at July 2013, as at 30th November 2012 it owed Incredible Power an amount of only SG\$1,460,707.00,²⁰ and, since all but two of the 60

¹⁷ See Day 10/40/16 to 42/19.

¹⁸ Such as J1(1), p. 7, 11, 13, 14.

¹⁹ As indicated by a letter from Messrs. Maples and Calder dated 20th November 2019.

²⁰ Another version of J1(1), p. 161, which appears at J1(1), p. 163, shows Rayley owing Incredible Power (and vice versa).

invoices relied on in support of the alleged Incredible Power debt pre-dated 30th November 2012, with the two subsequent invoices (nos. 59 and 60) having a combined value of only US\$156,406.70, they cannot be relied upon materially to alter that figure.²¹ Those figures are quite different to those supposedly recalled by Mr. Tiang.

- (2) The documents in question also appear to include a Rayley trial balance (or inter-company ledger, or list of debtors and creditors). Although undated, it indicates (for what it is worth) that, far from Rayley owing Esben anything, Esben in fact owed Rayley SG\$1,961,446.15 at the date of the document; and that Rayley owed Incredible Power an amount of only SG\$4,708,495.05 – much less than the figure supposedly recalled by Mr. Tiang.

[190] But it did not end there. Even leaving to one side Ms. Ting's disparaging remarks about Mr. Tiang's accounting system (see above), the documents formerly in his possession cannot be regarded as a reliable record in circumstances where he admitted (and pleaded guilty to) around 300 individual misappropriations, taking place between January 2007 and March 2014, which it transpired involved not only the (admitted) falsification of Offshore Company payment vouchers, but also the falsification of Esben and Incredible Power cashbooks in order to cover up such theft of Offshore Company funds for many years. In such circumstances, there can be no knowing how such falsifications affected the apparent inter-company accounting position as it stood in April and July 2013, when the three payments in issue in these proceedings took place. Accordingly, even if Mr. Tiang had been capable of perfect (and reliable) recollection of what was indicated in the inter-company ledgers, it would add no evidential weight to the Defendants' case.

7.3 The 'clerical error' in respect of invoice no. 37, and the Disputed Board Resolution

[191] There is another aspect of the evidence that adds significantly to the weight of evidence that the inter-company loan justification is a fabrication. This is a 'clerical error' in respect of invoice

²¹ In the course of his evidence, WKC was taken to these documents. As was readily apparent he had no difficulty reading them (in contrast to his pretended inability to understand the corresponding payments tables set out in Annex 1 to Madam Ma's counsel's skeleton argument and the documents underlying those tables). However, despite following the sequence of figures in the documents and that these appeared to show that Esben owed money to Rayley, he refused to accept that certain documents, taken together, were inconsistent with the idea that Rayley owed Esben a debt of SG\$1.5m on the relevant date, once more hiding behind the explanation that he was not an accountant: Day 3/198/9 to 200/5.

no. 37 of Mr Tiang's Invoice Table 2 and what it reveals about the true date of the Disputed Board Resolution.

- [192] The Disputed Board Resolution, signed by Mr. FK Lo (the sole *de jure* director of Rayley at the time), was ostensibly created on 6th August 2013, and purports to record the ratification of Payment 3 by a resolution of the board of directors of Rayley passed on that day. The resolution itself is in the following terms:

RACTIFICATION [*sic*] OF INSTRUCTIONS

That the authorization and instructions of Datuk Wong Kie Yik and Wong Kie Chie to Richard Tiang to request Richardson & Wrench Holdings Pty Limited to remit the full principal loan amount and interest due from Richardson & Wrench Holdings Pty Limited to the Company [Rayley] to the bank account of Incredible Power Limited at the Hongkong Bank Account No. 260-068184-178 for the purpose of part settlement of the Company's indebtedness to Incredible Power Limited be and is HEREBY confirmed and ratified.

- [193] As regards the indebtedness referred to, the Disputed Board Resolution contains two recitals which are in the following terms:

Whereas as at 23 July 2013, the Company was indebted to incredible Power Limited in the amount of SGD11,808,495.05.

Whereas the amount received by Incredible Power Limited (AUD6,617,783.00 or approximately SGD7,702,437.00) shall be treated as part settlement of the Company's indebtedness to Incredible Power Limited of SGD11,808,495.05.

- [194] The figure of SG\$11,808,495.05 is of course the figure seen at the bottom of Mr. Tiang's Invoice Table 2, which he says he assembled in order to explain the composition of the Incredible Power debt.²²
- [195] The Court was shown a copy of invoice no. 37. Like all the other invoices listed in Invoice Table 2, it is an invoice issued by Faedah Mulia in respect of a consignment of timber logs. It was dated 1st December 2010, claims payment of US\$80,606.05, and bears the invoice reference number FM-002/12/10. However, unlike all the other invoices referred to in Invoice Table 2, it is addressed to Esben, not Rayley. Therefore, on no basis can it be said to have been discharged on behalf of Rayley, and on no basis should it have been counted with the other invoices referred to in Invoice Table 2 when calculating the IPL Outstanding Debt. This means that the total at the bottom of invoice Table 2 (SG\$11,808,495.05) needs to be reduced by US\$80,606.05.

²² See Mr. Tiang WS1 paragraph 23.

[196] Messrs. Maples and Calder’s response on behalf of WKY and WKC, when asked about invoice no. 37 in March 2019, was as follows:

“We are instructed that there was a clerical error when the invoices were compiled for the purpose of the Proceedings and an invoice addressed to Esben Finance was wrongly included in Mr. Tiang’s Summary of Invoices. That invoice was paid by Incredible Power to Faedah Mulia on behalf of Esben Finance and not Rayley.”

[197] In their Response dated 10th January 2020 to Madam Ma’s Request for Further Information of 9th December 2019, WKY and WKC explained that this clerical error was made in 2016:

“... the clerical error was made in by Janice Ting in early 2016 when she was collating the relevant invoices to support the [IPL] Outstanding Debt.”

[198] Ms. Ting confirmed when testifying that an error had been made, and that it was made after proceedings had started:

“during comparing [compiling] my colleague has made a mistake and it’s my oversight and the final entry was issued [to] Esben and should not be include in there.”²³

[199] This means three things. First, the correct total at the bottom of Mr. Tiang’s Invoice Table 2 (i.e. the alleged Incredible Power debt) should not be SG\$11,808,495.05, but US\$80,606.05 less than that figure, because invoice no. 37 needs to be excluded from his calculation. Secondly, on the basis of WKY and WKC’s Response (and Ms. Ting’s testimony), Mr. Tiang only calculated the Incredible Power debt in 2016 at the earliest. Thirdly, the true date on which the Disputed Board Resolution was produced cannot be earlier than 2016, since it adopts the figure of SG\$11,808,495.05 that Madam Ma now knows was wrongly calculated no earlier than early 2016.

[200] In a remarkable passage of oral evidence, Ms. Ting sought to explain what Mr. Tiang must have done wrong. She explained – in what appeared to be a pre-prepared speech – that he must have used the wrong conversion rate when converting the Malaysian Ringgit figure into the Singapore dollar figure. Though not easy to follow, she appeared to say that Mr. Tiang must have used the wrong base figure (the sum of 60 invoices when he should have used the sum of only 59 invoices), and only got to the right answer (SG\$11,808,495.05) because he had used the wrong conversion rate – an extraordinary coincidence. The Court does not believe any of this; and although it was pure speculation, and not evidence (which Mr. Alexander, QC made no attempt to clarify by way of re-examination), it is a clear illustration that Ms. Ting was

²³ Day 8/88/3–23.

fully prepared to lie to the BVI Court in order to cover up the shortcomings in her employers' case.

[201] The clear inference to be drawn from Mr. Tiang's botched (to use the Claimant's learned counsel's word) calculation is that the Disputed Board Resolution is a fabricated document, produced in or after 2016, in an attempt to justify Payment 3 by providing an evidential basis for the alleged inter-company debt.

7.4 The Defendants' failure to prove the Disputed Board Resolution

[202] Madam Ma sought disclosure of documents which might enable the Court to reach a more reliable basis for dating the Disputed Board Resolution and might provide other further information about its genesis. In response:

- (1) WKY and WKC explained in affidavit evidence that the native electronic format copy of the Disputed Board Resolution could not be located. I will return to this point when considering Ms. Ting's testimony about the genesis of the document.
- (2) WKY and WKC explained in their Response dated 10th January 2020 to Madam Ma's Request for Information of 9th December 2019 that, according to the best of Ms. Ting's recollection the Disputed Board Resolution was provided as an unsigned document by Mr. Tiang to Ms. Ting in early August 2013, and that Ms. Ting thereafter sent the unsigned document to Mr. FK Lo on or before 6th August 2013 and instructed him by telephone to execute it.
- (3) WKY and WKC explained (also in their Response to Madam Ma's Request for Further Information) that Ms. Ting does not have any email or hard copy correspondence under cover of which the unsigned Disputed Board Resolution was provided to her by Mr. Tiang, or by her to Mr. FK Lo, nor does she have any notes of the oral instructions given to Mr. Lo.

[203] Accordingly, on 15th April 2020, Madam Ma served a Notice under rule 28.18, Civil Procedure Rules 2000 ('CPR') requiring WKY and WKC to prove the Disputed Board Resolution.

[204] However, the Defendants have manifestly failed to do so.

[205] Mr. Lo, who signed the document, provided an affirmation dated 2nd June 2016 in which he stated (at paragraph 21): 'I confirm that the signature on the Board Resolution is my signature and that to the best of my recollection, the Board Resolution was signed on or about 6 August 2013'. However, he was not called as a witness – even though he could easily have attended

via remote video-link (he is understood to be resident in Hong Kong, and the same time zone as WKY and Ms. Ting). The Defendants have not explained why he was not called as a witness. It is probable that the Defendants have deliberately chosen not to make Mr. FK Lo available because they knew that his evidence on these central issues of fact would be unhelpful or would not withstand cross-examination. The fact that even Ms. Ting conceded in her evidence that the document was dated '6 August 2013' by the person who created the document, but signed by Mr. Lo on a date later than 6th August 2013 gives rise to further questions as to the value of his untested affirmation.

[206] Messrs. Walkers produced the original, notifying Messrs. Carey Olsen by letter dated 11th June 2020 (day 4 of the trial) that it had been received by them on 8th June 2020 and that it had been and would be available for inspection at their offices in the BVI throughout the course of the trial. Messrs. Carey Olsen inspected it on the next working day (15th June 2020) and concluded that there was no reason to think that it had not been signed by Mr. Lo, but also that there was no indication as to the date when the document was created. The document appeared to have been produced by word processor (which Ms. Ting agreed was the case when testifying) and lacked the 4 annexures referred to on the face of the document. Messrs. Walkers did not explain where the original had been located (and nor is it clear why the original was produced by Messrs. Walkers rather than by Messrs. Appleby, who are the firm representing Rayley in these proceedings).

[207] Since it was clear that the document was produced by word processor, the Defendants should have been able to disclose the metadata for the document, but they did not (and they have not even explained what searches have been carried out for that purpose).

7.5 The evidence of the defence witnesses about the Disputed Board Resolution

[208] WKY stated in his first witness statement (at paragraph 49) that in early August 2013 he called Ms. Ting and 'authorised' her to request Mr. Lo to execute whatever document was necessary to ratify Payment 3 to Incredible Power. The consequence of this request, he claimed, was that on 6th August 2013 Mr. Lo passed a written resolution ratifying the instructions given by WKY and WKC to Mr. Tiang to request Richardson & Wrench to make Payment 3.

[209] WKC stated in his first witness statement (at paragraph 32) that he had no involvement in WKY's decision to 'authorise' Ms. Ting to request Mr. Lo to ratify Payment 3.

[210] Both WKC and WKY gave evidence at trial that they never saw the Disputed Board Resolution (and had no knowledge of the SG\$11,808,495.05 figure) prior to the commencement of the

proceedings. WKY agreed that this meant he could not say whether it had been created and signed on 6th August 2013. He was unable to recall details of his alleged conversation with Ms. Ting in which he said he instructed her to obtain a board resolution, other than that Ms. Ting had told him that 'lawyer advice is best to have a board resolution.'

[211] Ms. Ting stated in her first witness statement²⁴ (at paragraph 21) that, in early August 2013, WKY called her and 'authorised' her to request Mr. Lo to execute whatever document was necessary to ratify Payment 3 to Incredible Power. She stated that, on 6th August 2013, Mr. Lo passed a written resolution ratifying the instructions given by WKY and WKC to Mr. Tiang to request Richardson & Wrench to make Payment 3.

[212] Ms. Ting told the Court that the source of the SG\$11,808,495.05 referred to in the board resolution was Mr. Tiang, who she said had taken it from his inter-company ledgers.

[213] As regards the production of the board resolution document, Ms. Ting told the Court that she was advised by the WTK Group's lawyer that it would be best to execute a board resolution to ratify the transaction. She claims that the conversation with the lawyer took place on the same day as WKY had instructed her to do what was necessary to ratify the payment. She said she had no notes of her conversation with WKY or with the lawyer, and she did not think that the lawyer had any notes either, because he was a local Malaysian lawyer who acted for the WTK Group all the time and was on a retainer. She then said that she called WKY back and told him that the unnamed lawyer had advised her that a board resolution ratifying the payment should be produced. She could not explain why the alleged conversation with the lawyer and the alleged second conversation with WKY were not mentioned in her witness statement. She then, even more improbably, said that she asked Mr. Tiang to deal with the document. She said she called Mr. Tiang 'to arrange the board resolution as he has all the documents and I do not have them . . . I do not have the ledger to confirm the balances, only Richard Tiang can confirm that, he has everything . . .'²⁵

[214] And then the following exchange took place:²⁶

Q: Why did you ask Mr. Tiang to do this? He wasn't a lawyer, was he? He was only a bookkeeper?

²⁴ At paragraph 21.

²⁵ Day 9/49/2-10.

²⁶ Day 9/49/13 to 50/7. See also Day 9/50/7 to 64/20.

A: Yes, I asked him to seek help whoever know how to do this board resolution. He has contacts. He has been in Singapore. He is Singaporean. He has contact. He will know what to do because this matter really concern him because the loan agreement was signed by him, the ledger balances were recorded by him and the letters that he received from Wong Kie Yik and Wong KC and then he wrote a letter to Richardson & Wrench and then from Richardson & Wrench he received the money and subsequently he acknowledged and said that the debt was fully paid. And Richard Tiang was involved. He was more involved than me. So he is the right person to call somebody to help him to draft this board resolution.

Q: But we have just seen how he used you to get lawyer's advice, didn't he?

A: No.

Q: He didn't get lawyers himself, did he?

A: But this board resolution, easily he can get help from somebody in Singapore."

[215] The Court disbelieves this evidence. It is obvious that Ms. Ting, having woken up to the fact that the board resolution was a word-processed document, and that the Defendants' previous position was both that Mr. Tiang only used a typewriter, and that Mr. Tiang was responsible for the production of the board resolution, now found it convenient to point its authorship to an unidentified lawyer 'contact' of Mr. Tiang in Singapore where the native electronic version of the document could not be traced, even though: (i) Rayley was not a Singapore company, (ii) she had herself (according to her story) been receiving legal advice from the WTK Group's own retained lawyer about the very resolution in question; and, (iii) her other interactions with Mr. Tiang (such as her assistance with his responses to the letters from Messrs. Rockwell Olivier) indicated very clearly that, where legal advice was required, she (and not Mr. Tiang) took charge of it. Most significantly, no part of this account features in either of her witness statements or in the Response to the Request For Further Information of 10th January 2020 (for which she had no credible explanation), and nor have either she, nor WKY or WKC, provided the Court with any account of what searches, if any, have been carried out to secure a copy of the unidentified Singapore lawyer's electronic file which would show the date of production of the board resolution document. Furthermore, Mr. Tiang himself made no reference at all to the board resolution in his witness statements – which would be an extraordinary omission if he had indeed played the role now ascribed to him by Ms. Ting.

7.6 Conclusion as regards the Disputed Board Resolution

[216] For the reasons set out above, on the balance of probabilities, the Disputed Board Resolution is not an authentic document but was created after the commencement of these proceedings in order to mislead the Court and bolster the defence case. It is obvious, *inter alia* from the Defendants' responses to Madam Ma's Request for Further Information and disclosure

concerning the document, from their response to her notice to prove, and from the evidence of their witnesses – by which they had been given every opportunity to prove the document – that the Defendants are unable to show that the Disputed Board Resolution is a document created before these proceedings started.

- [217] WKY and WKC have formally confirmed that, aside from the Disputed Board Resolution, there are no existing notes or other records recording the amount of SG\$11,808,495.05 allegedly owed by Rayley to Incredible Power. The Defendants are therefore driven back to Mr. Tiang's Invoice Tables.

7.7 Mr. Tiang's Invoice Tables: the second important flaw

- [218] The second important flaw with Mr. Tiang's Invoice Tables is that, whatever they may show in isolation, they provide no safe basis for concluding that inter-company debts in favour of Esben and Incredible Power existed at the material times as alleged.
- [219] As to this, it is the Defendants' own evidence that the debts they rely on were not (and are therefore not to be regarded as) a pair of simple, bilateral debts (Rayley–Incredible Power; Rayley–Esben): the 'inter-company ledger' mentioned earlier is said to have recorded transfers between Rayley, Incredible Power and other family companies. WKY and WKC also make multiple references in their evidence to 'a general practice of offsetting the [family] companies' balances against one another'. Importantly, it is not (and has never been) their case that the two alleged inter-company debts represented the net overall inter-company accounting position as between Rayley and Esben and as between Rayley and Incredible Power, respectively. On that basis alone the information they seek to derive from Mr. Tiang's Invoice Tables is literally meaningless.
- [220] In short, it is simply unreal to suggest that the Defendants can cherry-pick a handful of invoices addressed only to Rayley (and corresponding bank statements showing the discharge of those invoices by Incredible Power and Esben) and say that, because these add up to a liability on the part of Rayley, there has been no misappropriation. WKY and WKC themselves have confirmed (in evidence filed in response to Madam Ma's specific disclosure application) that it will not be possible to reconstruct the full inter-company accounting picture between the various family companies.
- [221] The Court considered this question in the context of Madam Ma's specific disclosure application, and in its Judgment dated 30th January 2020 had this to say:

“57. It is worth observing that the importance of a ledger as a key document stands to reason where a case is being advanced that payments were part of an alleged practice of inter-company settlements.

58. In the present case, the Defendants, and WKY and WKC in particular, rely upon their own explanation, not documentary evidence, to explain the underlying accounting treatment in relation to the impugned payments. For the reasons set out in the preceding paragraph, this explanation would have been covered, in whole or in part, by the allegedly destroyed ledger.

59. It is tempting then to accept the Claimant’s powerful submission that such primary documents as may still exist which can be used to reconstruct the ledger and stand as independent evidence of the Defendants’ explanation are plainly relevant, should have been disclosed as part of standard disclosure, and can and should now be ordered to be disclosed by way of an order for specific disclosure.

60. A difficulty with this submission is that not all the financial and accounting documents pertaining to inter-company balances will be directly relevant to the existence and eventual composition of the alleged debts. . . .

63. . . . we are presented with the difficulty that from the Claimant’s and the Court’s perspective it is impossible to know which of the financial and accounting materials are indeed directly relevant without seeing them first. Ordering disclosure of all such documents, including irrelevant documents, is not appropriate.”

[222] This led the Court to say the following:

“79. I confess this has been a difficult point for me to decide, in relation to the financial and accounting materials sought. The reasons why this has been difficult are as follows. All those documents sought appear to be directly relevant to the circumstances surrounding the existence of the alleged debts. A close analogy appears to be the delineation of parcels of land under the pre-registration land system, under which one’s parcel was defined by reference to where it was not – that is, by the boundaries of the neighbouring lands on all sides. In the same way, the Claimant hopes to reconstruct the financial position of the material companies surrounding the alleged debts so that their existence and composition may become sufficiently clear to enable her to test the Defendants’ case. As a matter of principle therefore, all such documents in this category that are not ‘directly relevant’ will either be completely irrelevant or might beg the question whether they might be ‘directly relevant’. In other words (and I chose the words of the preceding sentence carefully), they lead to a train of enquiry as identified in *Peruvian Guano*. . . .

86. As the Claimant points out, certain of the documents (bank statements) the Respondents have chosen to disclose show ‘a multitude of unexplained payments’ (Claimant’s emphasis) made by the corporate Respondents to three other companies that may alter the inter-company picture the Respondents have chosen to ‘paint’. The Claimant contends that she should be allowed to have the disclosure needed to be able to analyse this. But this point cuts the other way too. If the Respondents will not be able to explain adequately at trial the affect or otherwise of those payments, this could seriously affect the credibility of the Respondents’ apparently perfect recollection and reconstruction of the alleged debts and impugned payments. In short, documents that explain these other payments are desirable but not necessary for the fair disposal of the claim.” (Emphasis added.)

[223] So it has transpired. On the basis of what has been disclosed, the Defendants have failed to make good their allegations.

7.8 Mr. Atherton, QC's new case

[224] Mr. Atherton, QC sought to circumvent the fundamental flaws in the Defendants' case by advancing a new case during his oral opening submissions (for which he attempted to extract supporting evidence from WKY and Ms. Ting during a series of leading questions) to the effect that Rayley may have owed a debt to Incredible Power on some completely different basis, based on some of the recently disclosed CAD Seized Documents. The new case does not provide an alternative basis for the Esben debt.

[225] There appear to be three strands to this case. The first is purely impressionistic: it is based on three documents located in the CAD Seized Documents,²⁷ all dating back to the mid-1990s, that appeared to show that, at least by reference to those documents, as he prompted Ms. Ting, 'there was an historic record of Rayley being indebted to Incredible Power; would you agree?' Ms. Ting was happy to agree.

[226] The second strand is also impressionistic: it is based on a suggestion (which Ms. Ting was likewise only too happy to adopt in friendly cross-examination) that a number of WTK Group company receipts (issued by companies named Song Logging, Sut Sawmill, First Count, Limpah Mewah, Sanitama, Ninjas Development, Piramid Intan and Interglobal Empire – but not Faedah Mulia) were to be found in the CAD Seized Documents that appeared to show that Incredible Power may have discharged invoices that had been issued to Rayley, thereby creating inter-company indebtedness, and that, if one looked at enough examples of this, it was apparent that, as Mr. Atherton, QC prompted Ms. Ting, 'you end up with a debt in excess of 11.5 million. Would you agree that's roughly right?' Ms. Ting was again happy to agree.

[227] The third strand – which appears to be connected with the second, although what Mr. Atherton, QC had in mind was not entirely clear – involved tracing (or apparently tracing) what had become of the AU\$6,617,783 paid into Incredible Power's US\$ bank account on 26th July 2013 based on banking records contained within the CAD Seized Documents, and attempting to show that the Singapore Dollar equivalent of the deposit amount as at around 17th March 2014, when added together with a figure appearing in an undated trial balance document,²⁸

²⁷ J1(2), p 468 and J2(1), p. 669 and 659.

²⁸ J1(1), p. 20.

suggested a figure – SG\$12,241,257.35 – not all that far apart from Mr. Tiang’s figure of SG\$11,808,495.05. Once again, Ms. Ting was happy to agree – as was WKY when led through the same documents (remarkably, given that this accounting analysis involved greater peregrination than the comparatively straight-forward corresponding payments table that WKY professed himself unable to understand).

[228] Mr. Atherton, QC’s new case was unpleaded, was not supported by the witness statement evidence of any defence witness and did not feature in his Skeleton Argument.

[229] The first strand to Mr. Atherton, QC’s new case was speculative to the point of being meaningless.

[230] There are two points which clearly undermine the two remaining strands to Mr. Atherton, QC’s new case. Both arise from the Defendants’ own evidence.

7.9 The first defect in Mr. Atherton, QC’s new case

[231] The first defect is as follows:

- (1) As Mr. Tiang has explained in his first witness statement²⁹, the reason Ms. Ting provided him with Faedah Mulia invoices was because the (alleged) debt to Incredible Power was composed of payments in respect of Faedah Mulia invoices.
- (2) He did not suggest in his evidence that the Incredible Power debt was composed of payments in respect of invoices from other WTK companies. Indeed, this would have contradicted his evidence. If that had been his position, he would no doubt have referred to such invoices in his witness statement, and such invoices would have been exhibited and disclosed.

[232] In her evidence to the court, Ms. Ting confirmed that she was asked for Faedah Mulia invoices as Mr. Tiang had told her the Incredible Power debt was composed of Faedah Mulia invoices.

7.10 The second defect in Mr. Atherton, QC’s new case

[233] The second defect (flowing from the first) is as follows:

- (1) In her specific disclosure application, Madam Ma specifically sought invoices from all WTK companies to Incredible Power or Esben.

²⁹ At paragraph 23.

- (2) Madam Ma also specifically sought payment vouchers, bank credit advices and similar documents (i.e. also receipts) in relation to such invoices.
- (3) The position of WKY and WKC was that such invoices (and any related payment vouchers, bank credit advices and similar documents) were not relevant, and they instructed Ms. Mooney of Messrs. Maples and Calder to swear an affidavit saying that this was so.
- (4) Similarly, and as regards Mr. Atherton, QC's own clients, a Mr. D'Addona stated in an affidavit on behalf of Incredible Power and Esben (in opposition to Madam Ma's specific disclosure application) that '[t]he document sought by the Claimant in Items 2 to 4 are not directly relevant to the issues in dispute in these proceedings.'
- (5) Ms. Mooney also had this to say:³⁰

"Mr. Tiang has explained that the Rayley Outstanding Debt was comprised of an outstanding balance owed by Rayley to Incredible Power as a result of advances and payments made by Incredible Power to Faedah Mulia on Rayley's behalf (see paragraph 22 of Mr. Tiang's First Witness Statement). Mr. Tiang has referred to the relevant Faedah Mulia invoices and bank statements of Incredible Power, which he was able to locate with the help of Ms. Ting, for the purpose of these proceedings and which explain the composition of the Rayley Outstanding Debt. Similarly, Mr. Tiang has referred to the necessary documents evidencing the composition of the Esben Outstanding Debt. There is nothing selective about Mr. Tiang's approach or that of WKY and WKC in relation to their disclosure provided to date. Mr. Tiang has simply referred to the documents which evidence the composition of the Rayley Outstanding Debt and the Esben Outstanding Debt. There is therefore nothing further that can be required in order to prove (to the extent required of a civil claim of this nature) the existence of the Rayley Outstanding Debt or the Esben Outstanding Debt, and WKY and WKC confirm there are no other directly relevant documents to be disclosed in this regard." (Emphasis added.)

- (6) Conversely, WKY and WKC instructed Ms. Mooney to swear an affidavit saying that none of the CAD Seized Documents were directly relevant to the proceedings 'in that WKY and WKC do not intend to rely on the documents to support their case on how the Rayley Outstanding Debt and the Esben Outstanding Debt were composed, the documents do not adversely affect WKY and WKC's case in this regard and they do not tend to support the case of Madam Ma' (emphasis added).³¹

³⁰ At Ms Mooney's first affidavit, paragraph 49.

³¹ At Ms Mooney's second affidavit, paragraph 7.

[234] Mr. Atherton, QC's new case is thus wholly incompatible with the case advanced by the Defendants.

[235] Finally, and quite apart from the absence of evidential support (or any grounding in the pleaded defences), and its generally speculative nature, Mr. Atherton, QC's new case is also misconceived, because his concluding submission involves adding two debit items (assets) in an undated Incredible Power trial balance: one of those items, Mr. Atherton, QC suggested, was an amount of SG\$7,532,762.30 representing the approx. AU\$6.6m diverted loan repayment received from Richardson & Wrench on 26th July 2013, but even if that is correct his reasoning involves adding a Rayley asset to an Incredible Power asset, when the hypothesis of his theory is that both assets are Incredible Power assets (it is noteworthy that it is shown in a suspense account, which means that its correct allocation was uncertain). It also does not explain, of course, why the sum of the two figures (which is SG\$12,2412,257.35) is quite different from the figure relied on in the Defences of Incredible Power, WKY and WKC, namely SG\$11,808,495.05. Mr. Atherton, QC's hypothesis is also inconsistent with Mr. Tiang's treatment of the Richardson & Wrench loan diversion, and moreover provides no explanation why Rayley suddenly had a debt to Incredible Power of SG\$12,2412,257.35 in July 2013 when, as at 30th November 2012, according to the documents³² of the same volume of Offshore Company records, Rayley owed either nothing or less than SG\$1.5m – in particular as: (i) there is no evidence of Incredible Power discharging Faedah Mulia invoices on behalf of Rayley of over SG\$11m in this short 8-month period; and, (ii) there is no other evidence as to how such a debt from Rayley to Incredible Power suddenly arose over this period. Nor does Mr. Atherton, QC's hypothesis make any allowance at all for the unreliability of Mr. Tiang's records due to falsifications.

[236] Mr. Atherton, QC's new case was a desperate and speculative attempt to find support for the already discredited outstanding payments theory.

7.11 Conclusion on inter-company debts issue

[237] The inter-company debt allegations are the foundation of the Defendants' case. For the reasons set out in this and the preceding sections, the Court rejects them.

³² At p. 158 and 161–163.

8. The Defendants' disclosure

[238] As the trial proceeded, it became increasingly apparent that the Defendants had taken a completely unsatisfactory approach to their disclosure obligations. In particular, as regards the financial records of the Offshore Companies, which would either prove or disprove their inter-company debt allegations – the foundation of their defence – it is now obvious that, contrary the evidence given by and on behalf of the Defendants, these were never destroyed on WKN's 2012 instructions in September 2014 (or, even if some were destroyed, that a body of documents escaped destruction for one reason or another) and that it is possible for the Defendants to “dip into” this body of documents when it suits them.

[239] Not only did the Court have before it in this regard as (at one time) undisclosed exceptions to this alleged general destruction both (i) the vol. I Neil Wong Separate Folder Documents; and, (ii) the CAD Seized Documents, but two further striking examples of this emerged on the last two days of witness testimony:

- (1) In an attempt to demonstrate that, contrary to what appeared from the documents previously available to the Court, Mr. Neil Wong may not have had single signing powers over the bank accounts of Rayley, they disclosed a bundle of documents³³ comprising communications between the Offshore Companies and HSBC concerning the status of the companies' bank mandates; and
- (2) In an attempt to explain why Rayley and Incredible Power had been able to threaten detailed claims against Mr. Neil Wong in April 2016, which would evidently have required access to Offshore Company documents not disclosed until 28th October 2019 (the only documents disclosed that provided the information on which the allegations in the April 2016 letters were made, were among the CAD Seized Documents), Ms. Ting explained that she had in her possession a bundle of 50 telegraphic transfer forms that formed the basis of the Neil Wong claims – claiming that Mr. Tiang had sent them to her at some point – in itself an implausible story, which has never featured either in her witness statements or in the various responses given on behalf of the Defendants in response to Madam Ma's disclosure requests.

³³ Supplementary Bundle 16.

[240] When questioned about this late disclosure of Offshore Company records, Ms. Ting protested (in relation to the banking records) that she did not consider it directly relevant to the proceedings. What she did not say was that the documents had not been disclosed because they had been destroyed. This evidence completely undermines any remaining credibility to the destruction of records allegations. Having regard to this evidence, and the evidence that emerged throughout trial in relation to the alleged destruction of Offshore Company records, the Court concludes that on the balance of probability, if Mr. Tiang did destroy documents pertaining to the Offshore Companies, such destruction was only partial, and that there remained a considerable corpus of records that were not destroyed but have been deliberately withheld from Madam Ma.

9. The *de facto* directorship issue

9.1 Introduction

[241] WKY and WKC were at all material times registered directors of Esben.

[242] Madam Ma's case is that, at all material times, WKY and WKC were also:

- (1) *de facto* directors of Rayley; and
- (2) *de facto* directors of Incredible Power.

[243] Further, WKY and WKC admit that Mr. Tiang was an agent of Rayley. In his capacity as an agent of Rayley with day-to-day responsibility for managing the company's affairs, as a matter of law, Mr. Tiang owed fiduciary duties to Rayley – and WKY and WKC did not deny this.

[244] Accordingly, Madam Ma's case is that:

- (1) WKY and WKC owed fiduciary duties to Rayley;
- (2) WKY and WKC's knowledge is to be imputed to Incredible Power and Esben; and
- (3) Mr. Tiang owed fiduciary duties to Rayley sufficient to underpin a claim in dishonest assistance against WKY and WKC.

9.2 *De facto* directors: the law

[245] Pursuant to the BVI Business Companies Act 2004 ('BCA 2004'), section 2:³⁴

³⁴ No. 16 of 2004, BCA 2004, section 120.

“director” ... includes a person occupying or acting in the position of director by whatever name called.’

[246] A person is a *de facto* director if – despite not being formally appointed as a director – he acts as a director. There is no one definitive test, but the principles to be applied are well established.³⁵

- (1) The question is whether the person was part of the corporate governance system of the company and whether the person assumed the status and function of a director so as to make himself responsible as if he were a director.
- (2) The concept is not limited to circumstances in which there has been an invalid appointment. The question is whether the person has assumed responsibility to act as a director.
- (3) The Court may have to determine in what capacity the director was acting. This means that if the act could lawfully have been done by the individual when wearing another hat (for example, shareholder or manager, or director of the corporate director of the company), the Court must assess which hat they were in fact wearing.³⁶ However, it does not mean that a quintessentially directorial act can be re-classified because the defendant also wears another hat that they prefer.³⁷
- (4) The Court will, in general have to determine the corporate governance structure of the company so as to decide in relation to the company’s business whether the defendant’s acts were directorial in nature. The corporate governance system will vary from company to company, and so the judge will need to make findings about the role which the defendant played in running the company in question.³⁸ For example, the company may be ‘a family company ... run with a high degree of informality with decisions not necessarily being taken at board meetings but whenever relevant family members were

³⁵ The principles set out in the following sub-paragraphs are drawn from *Smithton v Naggar* [2015] 1 WLR 189, paragraphs 31–45 (Arden LJ), supplemented as indicated in the footnotes.

³⁶ For example, where a company (A) has a sole corporate director (B), if the human director of B is acting within the ambit of the discharge of their duties and responsibilities to B, then their acts are to be attributed to their capacity as director of B; they cannot be a *de facto* director because they are simply not carrying out any directorial acts in respect of A (*Revenue and Customs Commissioners v Holland* [2010] UKSC 51).

³⁷ See also *Smithton v Naggar* [2015] 1 WLR 189 paragraphs 66, 70, 72 (Arden LJ).

³⁸ See also *Smithton v Naggar* [2015] 1 WLR 189 paragraph 61 (Arden LJ).

in communication with each other' and the defendant family member may have been 'one of the nerve centres from which the activities of the [c]ompany radiated'.³⁹

- (5) The Court is required to look at what the defendant actually did and not any job title the defendant had.
- (6) A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.
- (7) The Court must look at the cumulative effect of the activities relied on and look at all the circumstances 'in the round'.
- (8) It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.
- (9) Relevant factors include: (i) whether the company considered the defendant to be a director and held him out as such (although there is no requirement that the defendant is held out as a director);⁴⁰ and, (ii) whether third parties considered that he was a director.
- (10) The fact that a person is consulted about directorial decisions or their approval does not in general make him a director because he is not making the decision.
- (11) Acts outside the period in which the defendant is said to have been a *de facto* director may throw light on whether he was a *de facto* director in the relevant period.
- (12) Whether a person is a *de facto* director is a question of fact and degree.
- (13) The role of a *de facto* director need not extend over the whole range of a company's activities.

[247] If the defendant is a signatory on the company's bank account, that is a strong indicator pointing towards the assumption of the role of director – including if the intention of the defendant was to protect his investment in the company.⁴¹

[248] The Court must look at all the circumstances of the particular case, and test them against 'the usual split of powers between shareholders and directors' – i.e. 'on the basis that the powers of

³⁹ Re Mumtaz Properties Ltd [2011] EWCA Civ 610 paragraph 46–47 (Arden LJ).

⁴⁰ Re Mumtaz Properties Ltd [2011] EWCA Civ 610 paragraph 30 (Arden LJ).

⁴¹ Secretary of State for Trade and Industry v Jones [1999] BCC 336, 349–350 (Jonathan Parker J).

management of the company's business are delegated to the directors and the shareholders cannot intervene except by special resolution'. If the company's Articles provide that the directors are to manage the business, the shareholders cannot take the conduct of the business out of the directors' hands.⁴²

9.3 WKY and WKC as *de facto* directors

[249] There is abundant evidence that WKY and WKC were *de facto* directors both of Rayley and Incredible Power at the time of the disputed transactions (April and July 2013) and acted as *de facto* directors in relation to those transactions.

[250] Perhaps the most striking point of all is that, after WKN's death, which is when the transactions took place, there were no other individuals who could possibly be put forward as candidates as having fulfilled the role of directors. As to this:

- (1) It is obvious, from testimony given throughout the course of trial, that Mr. Lo had almost no dealings or involvement at all in the affairs of the Offshore Companies – and there is specific evidence that he had nothing to do with either the April payments or the July payment (other than his alleged subsequent role in August 2013 to sign the ratification resolution, which Ms. Ting said she instructed him to sign in a conversation that took place over the telephone).
- (2) It is equally obvious that Mr. Tiang's role was not the role of a director – he was the book-keeper, and deferred to WKN, WKC and WKY ('the Brothers') (and Ms. Ting) on anything of importance, including, notably, both the April 2013 transfers and the July 2013 loan diversion. He was not even authorised to make routine payments – these could only be made if authorised by WKY and/or WKC (or WKN before his death).
- (3) No other individuals are said by the Defendants to have had any meaningful role in relation to the Offshore Companies.

[251] Furthermore, Mr. Tiang himself makes it clear in his witness statement evidence that he looked to the Brothers (and not anybody else) for his directions – initially to WKN and then (after WKN's departure and death) to WKY. Mr. Tiang states that, in WKN's absence and then more so after WKN's death, WKY had 'some involvement' in the Offshore Companies but then goes on to say that his understanding was that after WKN's death WKY took over the role of WKN in

⁴² Salmon v Quin and Axtens [1909] AC 442.

‘overseeing the Offshore Companies’ (paragraph 18 of his first witness statement). This could hardly be clearer: but Mr. Tiang consolidates his evidence (extending what he says about WKY to WKC) by saying (at paragraph 25 of the same witness statement) that ‘after WKN’s death I took instructions from them [WKY and WKC] in the same manner as I had taken instructions from WKN previously.’

[252] As for WKY, it was clear, even from his witness statement evidence, that he saw no difference in substance between his position vis-à-vis Incredible Power and Rayley, and his position vis-à-vis Esben (of which he has always been a director). In his second witness statement, he claimed that, prior to the death of WKN, he and WKC were not actively involved in the management of Esben’s business and affairs, save for acting as authorised signatories for its bank accounts with HSBC, but that after WKN’s death he took over ‘the limited management of Esben’s affairs as agreed with WKC’. He also stated that, after WKN’s death, WKC had agreed that he (WKY) should manage and handle the affairs of Esben, Incredible Power and Rayley on his behalf. Of course, the nature of the Offshore Companies involved in these proceedings appears to have been that they were limited to little other than receiving payments from customers, and passing the funds received on to the onshore companies who had supplied them with timber logs – so although it might be said that the role was ‘limited’ it is not as though he was managing a large operating company.

[253] Both WKY and WKC sought to downplay their roles as the individuals who controlled the Offshore Company purse strings – and seemed desperate to repeat the point that they were ‘only’ authorised signatories. By doing so, they merely showed they had come to court with a series of pre-prepared answers about their positions as *de facto* directors (or otherwise) of Rayley and Incredible Power.⁴³

[254] Thus, one mantra was that WKY and WKC only instructed HSBC to transfer the Rayley cash balances to Esben because they were authorised signatories. So, for example, WKY said that by instructing HSBC to transfer Rayley’s cash balances he only signed as an authorised signatory and not as a director⁴⁴ – while on another occasion explaining that he had delayed doing this until after WKN’s death (even though he had allegedly already been told by Mr. Tiang that HSBC wanted the accounts closed) as, until then, WKN had remained managing director

⁴³ Day 6/50/5-20.

⁴⁴ Day 6/50/5-20

of the company, so he did not take a decision until WKN died.⁴⁵ He repeatedly sought to remind the Court that he and WKC were authorised signatories only – so much so that it is clear that this was a prepared response to any question that suggested, however loosely, that his role as a signatory implied he had control over Rayley and Incredible Power: for example, he agreed that he would drop in at Double Ace's offices when in Singapore to sign telegraphic transfer forms and cheques, but '[o]nly as authorise signatures'.⁴⁶ There are many similar examples.⁴⁷ On one occasion this mantra was misapplied to a completely different context: thus, he initially maintained that he could not instruct Mr. Lo to give the undertaking Madam Ma had recently requested from Rayley (that any funds which Rayley receives as a result of these proceedings will be shared eventually between himself, WKC and Madam Ma on a liquidation) because 'myself and [WKC] is only authorised signatories and beneficiaries'.⁴⁸ Clearly, the purpose of these answers was to deceive the Court into thinking that an individual or individuals other than he and WKC directed Rayley – at any rate at the time of the disputed transactions.

[255] Ultimately, WKY acknowledged that he took over from WKN as the managing director of Rayley from WKN after his death.⁴⁹ Indeed, he gave that as the reason for waiting until after WKN had died before instructing HSBC to close the Rayley accounts and transfer their credit balances to Esben. The reality is that, by then at the latest, he took on the role of managing director of the other Offshore Companies too.

[256] As for WKC, in relation to why his signature had been necessary to arrange for the loan repayment diversion, WKC gave evidence that Mr. Tiang needed signatures as the payment involved a big sum of money and accepted that Mr. Tiang wanted the transaction to be authorised by WKY and WKC.⁵⁰ This in itself is powerful evidence that, both generally and in particular with respect to the transaction, he was regarded by all three concerned as a *de facto* director. WKC added that he did not know about any involvement on the part of Mr. Lo or what Mr. Lo might have been thinking about the transaction – an example of testimony that can

⁴⁵ Day 6/42/17-20

⁴⁶ Day 16/98-10.

⁴⁷ Day 6/18/9-10, Day 6/27/1-2, Day 6/50/12, Day 6/51/12-13, Day 8/8/11, Day 8/11/9-10.

⁴⁸ Day 7/54/18-24. Shortly afterwards he accepted that he could in fact instruct Mr Lo to give an undertaking, since Mr. Lo was his nominee: Day 7/55/3.

⁴⁹ Day 6/42.

⁵⁰ Day 4/204/6 to 205/4.

leave the court in no doubt that Mr. Lo played no meaningful role in relation to the companies (or, specifically, in relation to the disputed transactions).⁵¹

[257] Lastly, there are the following points:

- (1) The Defendants admit that the *de jure* directors of both Rayley and Incredible Power were merely nominee directors who acted in 2013 on the instructions of WKY and WKC.
- (2) The companies had no employees, and the evidence of their only manager, Mr. Tiang (who had no account signing powers), is that he also acted on the instructions of WKY and WKC (see above).
- (3) WKY and WKC personally effected the disputed transfers and payment of April and July 2013, and it is obvious, from testimony given throughout the course of trial, that it was they (and not anybody else) who took the decision that those transfers and that payment should be made.

9.4 Attribution of knowledge: the law

[258] As to attribution of knowledge to a company, ‘the company’s constitution [or] the ordinary rules of agency ... will normally supply the answer’, and ‘the answer ... is always to be found in consideration of the context and the purpose for which the attribution is relevant’.⁵² On this basis:

- (1) where a claim is made against a company for a wrong done to a third party, the knowledge and actions of the company’s directors will be attributed to the company; but
- (2) “where a company has been the victim of wrongdoing by its directors, the wrongdoing of the directors cannot be attributed to the company as a defence to a claim brought against the directors – and their co-conspirators – ... for the loss suffered by the company as a result of the wrongdoing”.⁵³

[259] It is trite law that a director’s knowledge is to be imputed (i.e. attributed) to the company.⁵⁴ Further:

⁵¹ Day 4/205/7.

⁵² *Singularis Holdings Ltd v Daiwa Capital Markets* [2019] 3 WLR 997 at paragraph 28, 34 (Baroness Hale of Richmond PSC).

⁵³ *Singularis Holdings Ltd v Daiwa Capital Markets* [2019] 3 WLR 997, paragraph 30 (Baroness Hale of Richmond PSC).

⁵⁴ *El Ajou v Dollar Land Holdings plc* [1994] BCC 143, 154B–C (Hoffmann LJ).

“management and control is not something to be considered generally or in the round. It is necessary to identify the natural person or persons having management and control in relation to the act or omission in point ... [I]n regard to the requisite status and authority, the formal position, as regulated by the company’s articles of association, service contracts and so forth, though highly relevant, may not be decisive. Here [the judge] adopted a pragmatic approach [and he] was right to do so.”⁵⁵

[260] Mr. Atherton, QC suggested, in his oral opening submissions, that **El Ajou v Dollar Land Holdings**⁵⁶ stands for the proposition ‘that it doesn’t automatically follow that where a party or an individual holds dual directorships, knowledge or information that is possessed by the individual in one capacity is automatically or may be imputed or attributed to the other company of which that party is a director or agent’.⁵⁷ This is not correct.

- (1) There are two questions to consider: whether the director’s knowledge is the knowledge of the company because the director is the directing mind and will of the company, and whether the director’s knowledge *qua* agent is to be attributed to the company:

“Because a company’s directing mind and will are often the mind and will of one or more of its directors and because a director is for many purposes an agent of the company, there is a danger of confusion between the two grounds ... But they are ... quite separate.”⁵⁸

- (2) **El Ajou** confirms that, where an agent acts for two parties (A and B), the agent’s knowledge obtained acting *qua* agent for party A is not necessarily imputed to party B. The position is entirely different where the individual in question constitutes the directing mind and will of the companies in respect of the act or omission in point; in that case, the person’s knowledge will be the company’s knowledge.⁵⁹

9.5 Conclusions on the *de facto* directorship issue

[261] WKY and WKC were at all material times in charge of the Offshore Companies. They were the masters. WKY and WKC were *de facto* directors of Rayley and Incredible Power and, as the directing mind and will of these companies, their knowledge was the companies’ knowledge – save that, as a matter of law, their knowledge cannot be attributed to Rayley in order to deprive Rayley of its claims.

⁵⁵ *El Ajou v Dollar Land Holdings plc* [1994] BCC 143, 151A–C (Nourse LJ).

⁵⁶ [1994] BCC 143.

⁵⁷ 2/163/6–14.

⁵⁸ *El Ajou v Dollar Land Holdings plc* [1994] BCC 143, 150D–F (Nourse LJ).

⁵⁹ *El Ajou v Dollar Land Holdings plc* [1994] BCC 143, 152B–C, 154F, 155H–156A.

10. The transfer payments from Rayley to Esben

10.1 Introduction

- [262] Madam Ma makes a number of claims in respect of Payments 1 and 2, which, she alleges, were made by Rayley to Esben for no consideration at the behest of WKY and WKC acting as *de facto* directors of Rayley.

10.2 The relevant facts

- [263] Until the end of April 2013, Rayley maintained a US Dollar-denominated bank account with HSBC at its Singapore Office branch, and a Singapore Dollar-denominated bank account with HSBC at its Singapore Office branch.
- [264] On 26th April 2013, WKY and WKC signed and sent a letter on Rayley notepaper instructing HSBC to close the two bank accounts with effect from 30th April 2013 and to transfer the outstanding credit balances to two bank accounts maintained with HSBC in the name of Esben. The letter made no reference to their reason for requesting the transfers or the closure of the accounts.
- [265] As at 26th April 2013, there was a balance of US\$331,565.55 standing to the credit of Rayley's US Dollar bank account and a balance of SG\$917,513.32 standing to the credit of Rayley's Singapore Dollar account.
- [266] On 30th April 2013, HSBC transferred the Rayley credit balances to Esben in accordance with the letter of instruction, as appears from the relevant Esben bank statements – as well as the aforementioned Rayley bank statements. In addition, HSBC closed the two accounts. There are no further communications between Rayley and HSBC in the materials available to the Court concerning the closure of the two accounts.
- [267] As at 30th April 2013, when the sum of US\$331,565.55 was received by Esben, the Esben US\$ account was already in credit (in the sum of US\$583,523.35). As appears from a review of the bank statements, over the course of the next four months (and beyond), the account only briefly went into overdraft on one occasion (16th July 2013) and seldom had a credit balance of less than US\$331,000. Often, the credit balance was in excess of US\$1m. There is therefore no indication from the account statements themselves that Esben was under any US Dollar cash flow pressure.
- [268] Similarly, as at 30th April 2013, when the sum of SG\$917,513.32 was received by Esben, the Esben Singapore Dollar account was already in credit (in the sum of SG\$76,943.78). As

appears from a review of the bank statements, over the course of the next four months (and beyond) the account remained in credit, with a substantial credit balance. There is therefore no indication from the account statements themselves that Esben was under any Singapore Dollar cashflow pressure.

[269] When issuing instructions on behalf of Rayley to HSBC on 26th April 2013, WKY and WKC were acting as *de facto* directors of Rayley: see above.

[270] They were also, at that time, directors of Esben (as they admit).

10.3 The justification put forward in respect of the Esben transfers

[271] WKY and WKC admit the transfer of Rayley's credit balances to Esben (Payments 1 and 2) and that it was they who instructed HSBC to make these transfers. The justification put forward by WKY, WKC and Esben for the Esben transfers is that, at the time of the transfers, Rayley owed at least US\$1,535,549.85 to Esben. WKY and WKC allege that the Esben debt was in respect of invoices issued by Harbour View and Ocarina to Rayley and which had been settled by Esben on Rayley's behalf.

[272] In fact, there is no substance to this justification, as the alleged inter-company loan did not exist at the relevant time: see above.

[273] Furthermore, and unsurprisingly in light of the above, the evidence that emerged at trial is that neither WKC nor WKY had any appreciation that the debt they now allege was owed by Rayley to Esben. Still less was it in their minds when instructing HSBC to make the transfers. I now consider this in further detail.⁶⁰

10.4 WKC's evidence in respect of the Esben transfers

[274] WKC said that when signing the 26th April 2013 letter, he merely followed WKY in signing it.⁶¹ It was clear that he could not recall any details of alleged conversations referred to in paragraph 17 of his first witness statement, where he claimed that he had been informed by WKY that Mr. Tiang had advised him (WKY) that HSBC intended to close all the bank accounts held by Incredible Power and Rayley and (in a subsequent conversation) HSBC's alleged reasons for wanting them to close the accounts. He could not explain why none of this was

⁶⁰ Ms. Janice Ting claims she had no involvement at all in the April 2013 payments.

⁶¹ Day 4/161/20.

mentioned in the letter to HSBC, or why the request to close the accounts came from Rayley and not from HSBC.

[275] He admitted that he and WKY took no steps to seek to open another account for Rayley, or to secure a return of the funds to Rayley from Esben. He kept saying the debt was the reason for making the transfer payments,⁶² but then admitting he did not know about the debt.⁶³ He gave the appearance of trying to stick to an agreed script but failing. It was clear that he also had no idea about alleged Esben cash flow explanations given by other witnesses:⁶⁴ when asked what was in his mind when he signed the letter, he said 'I just signed the letter. That's it'⁶⁵ – an admission that he did not address his mind to why the transfers could possibly be in Rayley's interests. He obdurately refused to accept that the transfers were a gift⁶⁶ (even though he accepted that the cash was an asset of Rayley⁶⁷) and could not explain what Rayley derived in exchange. He also admitted that he did not consult Madam Ma about the transfer, although he knew she was an Executrix of WKN's will (just not 'officially at the time').⁶⁸

10.5 WKY's evidence in respect of the Esben transfers

[276] WKY, similarly, gave incoherent and contradictory explanations for the Esben transfer payments. At one point he said the transfers were made because Esben needed funds for cash flow reasons (an explanation not given in his first witness statement evidence where he first described the transfers). He was referred to his alleged conversation with Mr. Tiang in 'early 2013' about the alleged request by HSBC to close the Offshore Company bank accounts, but, other than claiming that the conversation took place before WKN's death, it was clear he could recall no details about it at all.⁶⁹ As to this explanation, he pretended not to understand when asked whether he instructed Mr. Tiang to take steps to secure the return of the funds to Rayley in due course.⁷⁰ Moreover, he agreed that, although the WTK Group had seven

⁶² See e.g. Day 4/170/10, 171/23, 172/18, 173/6, 173/22.

⁶³ Day 4/172/4 and 172/21.

⁶⁴ Day 4/171/3–14.

⁶⁵ Day 4/172/9.

⁶⁶ See e.g. Day 4/172/25, 173/4 and 173/14.

⁶⁷ Day 4/168/23, 172/16.

⁶⁸ Day 4/180/20 to 181/17.

⁶⁹ Day 6/39/16 to 41/4.

⁷⁰ Day 6/48/5–23.

principal bankers, he made no effort to open an alternative bank account either with those banks or their Singapore branches⁷¹ – the account closure explanation was therefore never going to serve as a good justification for making the transfers. He then said that Rayley had already stopped trading so there was no need to open another bank account,⁷² but would not accept that in such circumstances the right thing to do was not to pay away Rayley's assets but to distribute the remaining assets to its shareholders.⁷³ His answer to this suggestion was that Rayley had a liability to Esben to discharge, and 'that's why we transferred some cash to pay off the debt'⁷⁴ – but this, of course, overlooked his witness statement evidence that he had no knowledge of the alleged indebtedness to Esben until after the commencement of the proceedings,⁷⁵ evidence that he specifically confirmed when asked about this on day 7 of the trial.⁷⁶ When confronted with this inconsistency, he stated – after lengthy prevarication – that, of the two inconsistent statements, the one in his second witness statement⁷⁷ was the one that was true, i.e. he had no knowledge of the alleged debt when instructing HSBC to make the transfers.⁷⁸ And once that point was established, it quickly became clear that he was unwilling to understand or agree the only remaining option, which was that he either knew the payments to Esben were of no benefit to Rayley or simply did not address his mind to whether they were:⁷⁹ eventually he simply said, 'I don't know what you are trying to ask me.'⁸⁰

[277] WKY, like WKC, also gave the appearance of having come to Court with a series of pre-prepared answers about the Esben transfers. One mantra (mentioned above) was that the purpose of the transfer payments was that Esben needed cash flow. Another was that the Rayley bank accounts were closed because HSBC had asked Rayley to close the accounts.⁸¹ However, he refused to engage with the question why, if it was true that HSBC wished to close

⁷¹ Day 6/44/23 to 45/18.

⁷² Day 6/45/23.

⁷³ Day 6/46/3.

⁷⁴ Day 6/34 || 5–13.

⁷⁵ WS2 paragraph 15.

⁷⁶ Day 7/12/23 and Day 7/13/1.

⁷⁷ At paragraph 15.

⁷⁸ Day 6/47/3 to 48/4.

⁷⁹ Day 6/48/15 to 50/4.

⁸⁰ Day 6/50/25.

⁸¹ Day 6/39/11 and 41/7.

all the accounts of the Offshore Companies as he claimed, the accounts of Esben and Incredible Power were not closed until 2014.⁸²

[278] Another stock answer was that Rayley transferred its cash balances to Esben because the two companies had equal shareholders (or some variation of that answer). This was not an ordinary stock answer: it was a stock answer that did not even feature in his witness statements. For example, on one occasion (when asked what benefit Rayley would get from the transfer), he said 'There were shareholders within the same group, I don't think they have anything to send'.⁸³ At the end of his testimony, Mr. Atherton, QC led him to agree that 'it also made sense to transfer the money to Esben because that money would be available for the whole group', and that this could include 'using the money to pay debts of Rayley' – for which Mr. Atherton, QC was rewarded with the *non sequitur*. 'Correct, I agree. They are the common shareholders with equal share and also within the same group of the WTK offshore company'.⁸⁴ It is interesting that, when asked whether the undertaking that had recently been requested by Madam Ma from Rayley, namely that any funds which Rayley receives as a result of these proceedings will be shared eventually between himself, WKC and Madam Ma on a liquidation, he replied that, in his view, this was a fair proposal, 'because we are the common shareholders and also holding share equally . . . in the same group of company'.⁸⁵ It speaks volumes, however, about WKC's true intent, that, despite its admitted fairness, he refused to instruct Mr. Lo to give the undertaking.⁸⁶

[279] Yet a further evidential point against the existence of the alleged inter-company Esben debt, or its justification for the Esben transfers, is that as the transfers were made in the middle of the conflict between WKY and WKC, and Madam Ma and Mr. Neil Wong, the real reason for such transfers probably was not a friendly one. In this respect, the suspicion caused by the fact that WKY and WKC have been unable to give a convincing explanation for why they actually caused Rayley to enter into the disputed transactions is added to by the evidence that they were shutting Offshore Company bank accounts, like Rayley's accounts, to which Madam Ma's son (Mr. Neil Wong) was signatory, or was believed by the Brothers to be a signatory (with

⁸² Day 6/42/25 to 43/13.

⁸³ Day 6/48/18.

⁸⁴ Day 8/9/11–19.

⁸⁵ Day 7/54/2–17.

⁸⁶ Day 7/54/18 to 55/11.

power to sign alone), which was not the case for the Esben and Incredible Power bank accounts (which were not shut down). The new documents disclosed on day 10 of the trial by the Defendants to address this point (being new Offshore Company records yet again conveniently discovered and disclosed by the Defendants where they thought they assisted their case) do not dispel this suspicion as: (i) the Esben account status is not affected by them; and, (ii) paragraph 19 of WKY's first witness statement is clear that the April 2011 application was effective to make them all, including Mr. Neil Wong, signatories, signing singly. So, it looks like the application to add Mr. Neil Wong to the Rayley accounts was in the end successful, and also that this is what the Brothers themselves believed had happened. In any event, what is clear is that, while the Court need make no finding of a particular *mala fides* motive for Madam Ma to succeed on any of the pleaded causes of action, the Court cannot safely proceed on Mr. Atherton, QC's premise⁸⁷ that there was none.

10.6 Conclusion on the evidence

[280] The essential points to be derived from the evidence are clear: (i) the cash balances were assets belonging to Rayley, as WKY and WKC both knew; (ii) the money was transferred to Esben with no appreciation on the part of either WKY or WKC that Rayley was receiving any benefit in return, both WKY and WKC accepting that they had no knowledge of any debt owed by Rayley to Esben when instructing HSBC to make the payment; (iii) the cash balances were in fact paid to Esben for no consideration (there being no inter-company debt), and were thus not in the best interests of Rayley; and, (iv) WKY and WKC each knew that the transfer of the cash balances were not in the best interests of Rayley, or failed to address their minds to this question.

10.7 Madam Ma's claims in respect of the Esben transfers

[281] Madam Ma claims that, by causing Payments 1 and 2 to be made to Esben, WKY and WKC acted in breach of their fiduciary and/or statutory duties, as a consequence of which Rayley suffered loss and damage in an amount equal to those payments and the interest that would have been earned on them.

[282] She further claims that Esben was unjustly enriched at the expense of Rayley, and thereby rendered itself liable to account to Rayley as a constructive trustee.

⁸⁷ See paragraph 66–69 of Mr Atherton's Skeleton Argument.

[283] She further alleges that WKY and WKC's knowledge that the sums standing to the credit of its US and Singapore Dollar accounts were assets belonging to Rayley is to be imputed to Esben (of which they were both registered directors), which accordingly also had actual knowledge that Payments 1 and 2 were made for no legitimate commercial purpose and were not in Rayley's best interest and that by causing those payments to be made WKY and WKC acted in breach of their fiduciary and/or statutory duties. Esben was therefore a knowing recipient of the payments and all benefits attached thereto, and thereby rendered itself liable to account to Rayley as constructive trustees.

10.8 The standard of proof

[284] These claims will not turn on the burden of proof.

[285] As to Mr. Alexander, QC's submissions about the standard of proof,⁸⁸ although it is right to say that the inherent probability or improbability of an allegation is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the allegation is made out, the Court must bear in mind:

- (1) the standard of proof is still whether the matters in question are more likely than not;⁸⁹ and
- (2) "there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."⁹⁰

⁸⁸ Mr. Alexander, QC's Skeleton Argument, paragraphs 90–91 and 136.

⁸⁹ *Yates Associates Construction Company Ltd v Blue Sand Investments Ltd* BVIHCVAP 2012/0028 at paragraphs [80] – [81] (Blenman JA).

⁹⁰ *In re B (Children)* [2009] 1 AC 11 at paragraph 72 (Baroness Hale of Richmond).

10.9. Directors' duties: the law

[286] A *de facto* director owes directors' duties to the company in question.⁹¹

[287] The law concerning those duties is as follows.

10.10 Duty to act honestly and in good faith and what the director believes to be in the best interests of the company

[288] Pursuant to BCA 2004, section 120:

“a director of a company, in exercising his or her powers or performing his or her duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company.”

[289] This has been described as the 'core fiduciary duty of a director'.⁹² The key aspects of the analysis are as follows:⁹³

- (1) If the director has applied his mind to the matter in question, then the enquiry is largely, though by no means entirely, a subjective one: the question is not whether, viewed objectively, the act or omission which is challenged was in fact in the interests of the company, nor is it whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind.
- (2) However, (i) without detracting from the subjective nature of the test, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interests; and, (ii) the director's *bona fides* is not sufficient if his acts are completely irrational.
- (3) Further, where there has been a failure by the director to consider the separate interests of the company, or there is a challenge by the claimant to the good faith of the director, the test then becomes an objective one: whether an intelligent and honest person in the

⁹¹ This is expressly accepted by *Incredible Power and Esben* (paragraph 71 of Mr. Atherton, QC's Skeleton Argument) and appears to be accepted by WKY and WKC (because Mr. Alexander, QC's Skeleton Argument addresses directors' duties without suggesting they do not apply), but it is in any event clear: see *Vivendi SA v Richards* [2013] EWHC 3006 at paragraph 135 (second sentence) (Newey J).

⁹² *Antow Holdings Limited v Best Nation Investments Limited BVIHCMAP 2017/0010* (unreported, delivered 21st September 2018), paragraph [22] (Pereira CJ).

⁹³ *Antow Holdings Limited v Best Nation Investments Limited BVIHCMAP 2017/0010* (unreported, delivered 21st September 2018), paragraph [22]–[26] (Pereira CJ).

position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company.

- (4) There will be a failure to consider the separate interests of the company where the company is part of a group of companies, and the director has considered only the interest of the group as a whole or of other companies in the group: each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company.⁹⁴

10.11 Powers to be exercised for a proper purpose

[290] Pursuant to BCA 2004, section 121:

“A director shall exercise his or her powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company.”

[291] A company director is a fiduciary, and the exercise of a director’s powers is limited to acting for the purpose for which the powers were conferred.

[292] The proper purpose rule:

“is one of the main means by which equity enforces the proper conduct of directors. It is also fundamental to the constitutional distinction between the respective domains of the board and the shareholders. These considerations are particularly important when the company is in play between competing groups seeking to control or influence its affairs.”⁹⁵

[293] The Court must follow four stages: first, identify the power whose exercise is in question; secondly, identify the proper purpose for which that power was delegated to the directors; thirdly, identify the substantial purpose for which the power was in fact exercised; and, fourthly, decide whether that purpose was proper.⁹⁶

⁹⁴ Antow Holdings Limited v Best Nation Investments Limited BVIHMAP 2017/0010 (unreported, delivered 21st September 2018), paragraph [29] (Pereira CJ).

⁹⁵ See Eclairs Group Ltd v. JKC Oil and Gas Plc [2016] 1 BCLC 1 at paragraph 37 (Lord Sumption), expressing the judgment of the majority – see paragraphs 46–47.

⁹⁶ Extrasure Travel Services v Scattergood [2003] 1 BCLC 598 at paragraph 92 (Mr. Jonathan Crow, as he then was); adopted in Antow Holdings Limited v Best Nation Investments Limited BVIHMAP 2017/0010 (unreported, delivered 21st September 2018) at paragraph 71 (Pereira CJ).

[294] The test is subjective in that the Court must identify the purpose for which the director was acting,⁹⁷ but is otherwise essentially objective, as a director may commit a breach of s. 121 without realising it and without any bad faith on his part.⁹⁸

[295] If the court concludes that the directors had more than one purpose, it must decide what was their 'substantial', 'primary', or 'dominant' purpose.⁹⁹

10.12 Reliance on records and reports

[296] In Mr. Atherton, QC's Skeleton Argument, Esben sought to raise a new, unpleaded defence,¹⁰⁰ namely BCA 2004, section 123, which provides as follows:

"(1) Subject to subsection (2), a director of a company, when exercising his or her powers or performing his or her duties as a director, is entitled to rely upon the register of members and upon books, records, financial statements and other information prepared or supplied, and on professional or expert advice given, by—

(a) an employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;

(b) a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence; and

(c) any other director, or committee of directors upon which the director did not serve, in relation to matters within the director's or committee's designated authority.

(2) Subsection (1) applies only if the director—

(a) acts in good faith;

(b) makes proper inquiry where the need for the inquiry is indicated by the circumstances; and

(c) has no knowledge that his or her reliance on the register of members or the books, records, financial statements and other information or expert advice is not warranted."

[297] This defence is not open to the Defendants:

- (1) It is not pleaded, and it was too late to introduce it on the eve of trial. Pursuant to CPR 10.7, a defendant 'may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree.'

⁹⁷ *Extrasure Travel Services v Scattergood* [2003] 1 BCLC 598 at paragraph 93 (Mr. Jonathan Crow).

⁹⁸ *Eclairs Group Ltd v. JKC Oil and Gas Plc* [2016] 1 BCLC 1 at paragraph 15–16 (Lord Sumption). A good illustration of this principle is provided by the case of *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 821, where the trial judge found that the directors were not acting out of self-interest (at 831E), but the Privy Council nevertheless held that they had acted for an improper purpose (at 838C).

⁹⁹ See *Howard Smith v. Ampol* [1974] AC 821, at 831G, 832F–G and 833E–F.

¹⁰⁰ Mr Atherton's Skeleton Argument, paragraph 50.l. and 60.c.

- (2) As noted above, the parties have agreed that there is no material difference between BVI law and foreign law in respect of any of the issues of foreign law identified in the pleadings, and the Court can and should decide all issues of foreign law on the basis that foreign law is materially identical to BVI law. However, that agreement does not extend to matters not identified in the pleadings at the time of the agreement. The question is therefore one of Liberian law, and no expert evidence is before the Court on this point.
- (3) Further, the Defendants cannot simply say that, in the absence of expert evidence on Liberian law, the Court must apply BVI law and therefore s. 123. This is not the proper approach: the Defendants cannot seek to benefit from their own default in not pleading and proving relevant matters, especially when Liberian law experts have given evidence, and then relying on that failure to take advantage of a generous provision available in the BVI in circumstances where there is no indication that a similar provision applies in Liberia. This is patently self-serving.¹⁰¹ In any event, the application of any such rule seems particularly inapposite in the case of s. 123. First, this is a statutory provision applying in terms only to a BVI company (BCA 2004, section 3(1)).¹⁰² Further, section 123 is a 'nice to have' for a company director but it is not a fundamental principle, and so the Defendants cannot argue that there is a lacuna here that needs to be filled. Indeed, if the Defendants had considered that such a fundamental principle applied as a matter of Liberian law, they would have pleaded it. The Court therefore declines to find that section 123 applies.

[298] In any event, this defence is not made out on the facts, as explained below.

10.13 Unjust enrichment: the law

[299] It appears the parties are agreed that the outcome in this case will not turn on a nuanced analysis of the ingredients of a claim in unjust enrichment: funds have been paid away, and either those payments were made and accounted for properly (in which case, the claim fails) or they were not (in which case, subject to defences, the claim succeeds).¹⁰³

¹⁰¹ *Livingston Properties Equities Inc v JSC MCC Eurochem BVIHCMAP 2016/0042–0046* (unreported, delivered 18th September 2018) at paragraph [49] (Webster JA (Ag.)).

¹⁰² *Shaker v Al-Bedrawi* [2003] Ch 350 at paragraphs 65–67 (Peter Gibson LJ).

¹⁰³ This is the analysis underlying paragraph 76 of Mr. Atherton, QC's Skeleton Argument, and Madam Ma does not argue with this (although she does disagree with his description of the facts).

[300] The only defence advanced – which was raised for the first time in Mr. Atherton, QC’s Skeleton Argument – is a defence of change of position. This is not open to Incredible Power or Esben.

- (1) The defence is not pleaded. If a defence of change of position is to be relied upon in defence to a restitutionary claim, it must be fairly and squarely put forward in the defendant’s statement of case so that its factual merits can be explored at the trial. This did not happen in this case, and it is now far too late to introduce it.¹⁰⁴
- (2) Even if Incredible Power and Esben are permitted in principle to run this unpleaded defence, it cannot be of any assistance to them: they will need the defence only if the Court rejects the story they tell about the Payments, implicit in which is a finding that they knew of the facts entitling Rayley to restitution and, accordingly, that payment away was made in bad faith, which, in turn, disentitles these Defendants from relying on this defence.¹⁰⁵
- (3) Further, as a matter of principle, it is in general not a detriment to pay off a debt which will have to be paid off sooner or later.¹⁰⁶ This must, as a matter of principle, include debts owed by other companies treated together with Incredible Power and Esben as a single economic entity.
- (4) Still further, the defence would be for Incredible Power and Esben to prove, and they have not done so. In particular, it is necessary to show at least that, but for receipt of the enrichment, the defendant would not have suffered the detrimental change of circumstances in question,¹⁰⁷ but there is no evidence before the Court that the payments out in question would not have been made but for the diversion of the Rayley funds to Incredible Power and/or Esben.

10.14 Knowing receipt: the law

[301] Again, (i) there is no difference between the parties as to the applicable legal principles; and, (ii) in the end, the outcome follows inevitably on the Court’s findings as to the alleged justification for the Payments and the role of WKY and WKC.

¹⁰⁴ *Adrian Alan Limited v Fuglers (a firm)* [2002] EWCA Civ 1655 at paragraph 16 (Brooke LJ).

¹⁰⁵ *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 580C–D (Lord Goff).

¹⁰⁶ *Scottish Equitable v Derby* [2001] EWCA Civ 369 at paragraph 35 (Walker LJ).

¹⁰⁷ *Scottish Equitable v Derby* [2001] EWCA Civ 369 at paragraph 31 (Walker LJ).

- [302] The elements of the cause of action are: (i) a disposal of assets in breach of fiduciary duty; (ii) the beneficial receipt by the recipient of the claimant's assets or their traceable proceeds; and, (iii) knowledge on the part of the recipient that the assets he received are traceable to a breach of fiduciary duty (or in other words, that the assets were trust property and had been transferred in breach of trust).¹⁰⁸
- [303] As to knowledge, the question is whether the recipient's state of knowledge is such as to make it unconscionable to retain the benefit of the receipt.¹⁰⁹ There is no requirement to show that the defendant acted dishonestly.¹¹⁰
- [304] As is helpfully confirmed in Mr. Atherton, QC's Skeleton Argument,¹¹¹ it is '*plainly*' the case that property subject to a trust has been transferred; that this property (or its identifiable proceeds) was received by Esben; and that the receipt was for Esben's own benefit. Furthermore, Esben admits that it received the trust property with knowledge that it was trust property.
- [305] The defence of change of position is not available on a claim for knowing receipt.¹¹²
- [306] The dispute between the parties therefore centres on whether there was a breach of trust and whether Esben knew this. For the reasons explained elsewhere, if there was a breach of trust and the Court accepts Madam Ma's case as to the role of WKY and WKC, then WKY and WKC's knowledge in respect of that breach of trust will, as a matter of law, be imputed to Esben. Therefore, the nub of this issue is, again, the view the Court forms of the circumstances surrounding the Payments.

10.15 Submissions on liability

- [307] Drawing the above submissions together, Madam Ma submitted that her causes of action as regards the Esben transfers have all succeeded.
- [308] As set out above, both WKY and WKC were, or were acting as, *de facto* directors, at the time of the transfers and/or in procuring the transfers.
- [309] In respect of the section 120 best interests breach of duty claims against WKY and WKC, the balances were transferred by Rayley for no consideration to Esben, which was not in Rayley's

¹⁰⁸ BCCI v Akindele [2001] Ch 437 at paragraph 34 (Nourse LJ).

¹⁰⁹ BCCI v Akindele [2001] Ch 437 at paragraph 69 (Nourse LJ).

¹¹⁰ BCCI v Akindele [2001] Ch 437 at 448G–H (Nourse LJ).

¹¹¹ At paragraph 73–74.

¹¹² BCCI v Akindele [2001] Ch 437 at 456F (Nourse LJ).

best interests. WKY and WKC both knew that. Alternatively, if they did not know this fact, then that is because they did not apply their minds to the question, in which case the Court must apply an objective test; and, looking at the matter objectively, an intelligent and honest person in the position of a director of Rayley could not, in the whole of the existing circumstances, have reasonably believed that the transfers were for the benefit of the company.

[310] In respect of the section 121 proper purpose breach of duty claims against WKY and WKC:

- (1) the power exercised by WKY and WKC was the power to manage Rayley's affairs, business and property;¹¹³
- (2) the purpose for which that power is delegated to the directors is, put most broadly, to enable them to further Rayley's interests;
- (3) although the Court can only infer from the evidence what purpose, or substantial purpose, WKY and WKC had in directing the transfers, it is obvious that assets were removed from Rayley without reference to Rayley's interests (and Madam Ma is not obliged to show bad faith); and
- (4) any such purpose is plainly improper.

[311] As a consequence of these breaches, Rayley suffered loss and damage in an amount equal to the Payments and the interest that would have been earned on them.

[312] In respect of the unjust enrichment claims against Esben, in receiving these transfers for no consideration, and in the absence of any alleged Rayley-Esben debt to justify their retention, and with no change of position defence to rely on, Esben has been unjustly enriched at Rayley's expense. Esben was thereby rendered liable to account to Rayley as a constructive trustee.

[313] In respect of the knowing receipt claims against Esben, Esben received the Payments with knowledge through WKY and WKC that: (i) they were assets of Rayley; and, (ii) they were not in Rayley's best interests, and thus is liable as a knowing recipient of the Payments and all benefits attached thereto to account to Rayley as a constructive trustee.

¹¹³ Art III Section 1 of Rayley's Articles.

11. The loan repayment diversion from Rayley to Incredible Power

11.1 Introduction

- [314] Madam Ma makes a number of claims in respect of Payment 3, which she alleges was made by Rayley to Incredible Power for no consideration at the behest of WKY and WKC acting as *de facto* directors of Rayley, at a time when they were also *de facto* directors of Incredible Power.

11.2 The relevant facts

- [315] Under a commercial loan agreement dated 1st December 2002, Rayley advanced AU\$6,819,500 to Richardson & Wrench. As at 23rd July 2013, AU\$6,617,783 remained owing by Richardson & Wrench to Rayley under that loan.
- [316] On 23rd July 2013, WKY and WKC signed and sent a letter on Rayley notepaper addressed to Mr. Tiang, which was in the following terms:

“Dear Richard,

Re: Repayment of Loan from Richardson & Wrench

This is to authorise you to write and inform Richardson & Wrench to remit the repayment of principle loan including interest to the account of Incredible Power with The Hong Kong Bank, Account No. 260-068184-178.”

- [317] Although the letter used the expression ‘*authorise you to write*’ it is clear that the letter was an instruction from WKY and WKC to Mr. Tiang: neither WKY nor WKC gave any suggestion in their evidence that compliance with the request in the letter was a matter for Mr. Tiang’s discretion.
- [318] In accordance with the letter of instruction, and also on 23rd July 2013, Mr. Tiang sent a letter of demand on Rayley notepaper addressed to Richardson & Wrench, which was in the following terms:

“Dear Sirs,

Re: Repayment of Principle Loan & Interest

Please remit the full amount of outstanding principle loan plus interest due to Rayley Company Limited to Incredible Power Limited. The account details of Incredible Power Limited are as follows:-

Bank: : THE HONGKONG BANK
ADDRESS : 21, COLLYER QUAY
#01-01, HONGKONG BANK BUILDING
SINGAPORE 049320

Beneficiary :
ACCOUNT NO: 260-068184-178”

- [319] At the time these letters were sent, Richardson & Wrench was a WTK Group family company, controlled by WKC and WKY (who were both directors), and WKC was its managing director, and had been since 1991.
- [320] On 24th July 2013, WKY, WKC and Mr. Patrick Wong (WKY's son), in their capacity as directors of Richardson & Wrench, signed a written directors' circular board resolution resolving that Richardson & Wrench should comply with the letter of demand. The Court also has minutes of a meeting of directors of Richardson & Wrench in respect of a meeting of the directors held on 24th July 2013, at which the directors present (WKY and WKC) resolved that Richardson & Wrench should comply with the letter of demand.
- [321] On 25th July 2013, Richardson & Wrench complied with Rayley's letter of demand by arranging for its wholly-owned subsidiary, Rinfast Pty Ltd, to pay the outstanding sum due under the loan on its behalf to Incredible Power. The sum paid (AU\$6,617,783) was credited to Incredible Power's US Dollar bank account on 26th July 2013, being converted into US\$6,066,182.53, as appears from Incredible Power's relevant bank statement.
- [322] On 25th July 2013, Mr. Tiang sent a further letter to Richardson & Wrench confirming receipt of the sum of AU\$6,617,783 in full settlement of the principal loan and accrued interest.
- [323] When issuing instructions on behalf of Rayley to arrange the diversion of the loan repayment to Incredible Power on 23rd July 2013, WKY and WKC were acting as *de facto* directors of Rayley: see above.
- [324] They were also, at that time, *de facto* directors of Incredible Power: see above.

11.3 The 2016 justification put forward in respect of the payment to Incredible Power

- [325] WKY and WKC admit the diversion of the loan repayment from Rayley to Incredible Power (Payment 3) and that it was they who instructed Mr. Tiang to arrange this. The justification put forward by WKY, WKC and Incredible Power for the loan diversion to Incredible Power is that, at the time of the diversion, Rayley owed SG\$11,808,495.05 to Incredible Power. WKY and WKC allege that the Incredible Power debt represented a series of sums advanced by Incredible Power to Rayley in settlement of invoices issued by Faedah Mulia to Rayley in respect of the sale of timber log consignments to Rayley.
- [326] This justification was put forward for the first time in their Amended Defences, which were filed on 31st May 2016, 13 months after the commencement of proceedings and only after WKY,

WKC and Incredible Power had issued and then withdrawn a pair of strike-out applications on the issue of Madam Ma's standing.

[327] In fact, as with the Rayley to Esben transfers, there is no substance to this justification, as the alleged inter-company loan did not exist at the relevant time: see above.

[328] Furthermore, and unsurprisingly in light of the above, the evidence that emerged at trial is that neither WKC nor WKY had any appreciation that the debt they now allege was owed by Rayley to Incredible Power. Still less was it in their minds when arranging the diversion of the loan repayment. I now consider this in further detail.

11.4 WKC's evidence in respect of the payment to Incredible Power

[329] WKC agreed that, at the time he signed the 23rd July 2013 letter, he had no idea that Rayley owed any funds to Incredible Power.¹¹⁴ He claimed that he was just a signatory, and that it was WKY (not he) who was responsible for the detail: he was not involved, he said, and he was happy to allow WKY to do whatever he thought fit.¹¹⁵ He accepted that he did nothing to ensure that Rayley received an asset of equivalent value in return.¹¹⁶ He recognised that the repayment amount was an asset of Rayley¹¹⁷ but refused to accept that it was a gift; however, he was unable to point to any intention he had when giving the instruction except by referring to the alleged Incredible Power debt,¹¹⁸ which he agreed he did not know about at the time.¹¹⁹

[330] He was then taken to what he said at paragraph 28 of his first witness statement, about an alleged conversation he had had with WKY concerning the alleged Incredible Power debt. It was clear he could remember no details about this alleged conversation, and, even when a wide range of dates was put to him as to when it took place (March 2013 all the way to 2017), he said he did not know. When asked whether he was told after the proceedings started he said that this was most probably so.¹²⁰

¹¹⁴ Day 4/197/23 and 198/2.

¹¹⁵ Day 4/198/16–21.

¹¹⁶ Day 4/198/22 to 199/3.

¹¹⁷ Day 4/198/9.

¹¹⁸ Day 4/199/6, and the same again at 201/23 and 202/13.

¹¹⁹ Day 4/199/10.

¹²⁰ Day 4/199/16 to 201/11.

- [331] When it was put to him that his debt repayment explanation did not work, he then resorted to saying (manifestly untruthfully) that he ‘gave no instruction. I was not involved.’¹²¹ When asked how he honestly believed at the time of the payment, that the diversion was in Rayley’s best interest, he said he ‘presumed there must be some form of debt, but cannot be exactly sure . . . I don’t know’¹²² – which the Court accepts as pure invention since the suggestion that he presumed there may have been a debt was not in his witness statement, or pleaded, and is contrary to his testimony that he did not know whether he thought about Rayley’s best interests or not. Ultimately, he said that he did not know how to answer the question whether there was any legitimate commercial purpose to divert the loan to Incredible Power.¹²³
- [332] It also transpired that he could not remember any of the details about signing the 23rd July 2013 letter, where he was when he signed it, or the circumstances in which it was signed.¹²⁴ At one point he even said that the reason he signed the letter (along with WKY) was because they were both authorised signatories and that maybe the bank required two signatures¹²⁵ (resorting to a stock response used throughout the testimony of both brothers), but of course this letter had nothing to do with the bank.
- [333] Lastly, he agreed that Richardson & Wrench acted on the letter of demand, but did not accept that it was improper to do so, without being able to give any coherent explanation why it was right for Richardson & Wrench to pay what he knew was a Rayley asset to another company.¹²⁶

11.5 WKY’s evidence in respect of the payment to Incredible Power

- [334] WKY’s evidence in respect of the payment to Incredible Power was in the same vein as his evidence in respect of the Esben transfers: ultimately, he was unable to give a convincing account of why he had arranged the diversion, or how it could possibly be of benefit to Rayley.
- [335] Once again, he gave the appearance of having prepared a series of stock answers to explain his conduct. One of these was that the payment was justified because the companies had common shareholders. So, for example, he was guided by Mr. Atherton, QC into saying:

¹²¹ Day 4/202/8.

¹²² Day 4/202/18.

¹²³ Day 4/202/23.

¹²⁴ Day 4/193/6 to 196/24.

¹²⁵ Day 4/197/4–19 and, similarly, Day 4/204/9–14.

¹²⁶ Day 4/205/21 to 208/7.

‘Correct. Common shareholder. Common holder, shareholder. They are owned equally.’¹²⁷ And when, later, Mr. Atherton, QC sought his agreement that it would be appropriate for Rayley to pay its debt that it owed to Incredible Power, he replied (clearly not with the answer Mr. Atherton, QC was hoping for): ‘I agree, because we are common shareholders.’¹²⁸ The Court is not deceived into thinking that this was his motive for diverting the loan repayment to Incredible Power, any more than that this was his motive for directing that the cash balance transfers be paid over to Esben.

[336] Taking his evidence in the round, he gave a series of wholly implausible explanations for the loan diversion to Incredible Power. As with the Esben transfers, he said that the diversion of the loan repayment to Incredible Power was made ‘to reduce the debts of Rayley’¹²⁹ but, when he was reminded that he had given testimony earlier on the same day that he did not know about the (alleged) Incredible Power debt until after the commencement of proceedings¹³⁰ (see the transcript of day 7/5/25 to 6/7), he retreated into his ‘*I don’t remember*’ standard response.¹³¹ He accepted that the sum that was due by Richardson & Wrench was an asset of Rayley,¹³² but, when asked why he did not make sure at the time that Rayley got something in exchange for the diversion, he retreated into his ‘I don’t understand the question’ stock response.¹³³ There were other inconsistencies too. In his first witness statement he said¹³⁴ that he had made the loan repayment in order to get the money out of Richardson & Wrench before Madam Ma and Mr. Neil Wong took control of Richardson & Wrench, but, in his oral evidence, he denied this.¹³⁵ Then, in answer to the question what the commercial purpose was for Rayley, he once again became obdurate (‘I don’t agree’, ‘I don’t understand the question’).¹³⁶ When asked about the Incredible Power payment by Mr. Atherton, QC on day 8 of the trial, he initially only said that it was done at Mr. Tiang’s suggestion because the Rayley

¹²⁷ Day 8/13/20.

¹²⁸ Day 8/17/3.

¹²⁹ Day 7/44/22 and see also Day 7/45/16–19 and Day 8/13/15.

¹³⁰ See Day 7/5/25 to 6/7.

¹³¹ Day 7/45/23.

¹³² Day 7/44/9. See (similarly) Day 7/45/10–13.

¹³³ Day 7/44/13.

¹³⁴ At paragraph 39.

¹³⁵ Day 7/46/3.

¹³⁶ Day 7/46/6 and 12.

bank accounts had been closed,¹³⁷ but then added (in response to the question ‘Have you finished your answer Datuk’) that it was ‘to reduce the debt of Rayley’¹³⁸ – of which he knew nothing. He then gave yet another explanation for the transfer, which was the common shareholding explanation.¹³⁹ At this juncture, Mr. Atherton, QC led him to say that he became aware of the debt – not the exact amount but that it involved a substantial sum – in July 2013,¹⁴⁰ which was inconsistent with his evidence on day 7 of the trial. This extraction of evidence contradicting earlier evidence taken in hostile cross-examination illustrated neatly the dangers of friendly cross-examination of a witness who was the ultimate source of the examiner’s instructions. Where there is a discrepancy, the evidence taken in hostile cross-examination, is to be preferred.

[337] Not one of these explanations was plausible.

11.6 Conclusion on the evidence

[338] The essential points to be derived from the evidence are clear: **(i)** the sum owed by Richardson & Wrench was an asset belonging to Rayley, as WKY and WKC both knew; **(ii)** the loan repayment was diverted to Incredible Power with no appreciation on the part of either WKY or WKC that Rayley was receiving any benefit in return, both WKY and WKC accepting that they had no knowledge of any debt owed by Rayley to Incredible Power when instructing Mr. Tiang to arrange the payment; **(iii)** the sum owed by Richardson & Wrench was in fact paid to Incredible Power for no consideration (there being no inter-company debt), and was thus not in the best interests of Rayley; and, **(iv)** WKY and WKC each knew that the payment was not in the best interests of Rayley, or failed to address their minds to this question.

11.7 Madam Ma’s claims in respect of the payment to Incredible Power

[339] Madam Ma claims that, by causing Payment 1 to be made to Incredible Power, WKY and WKC acted in breach of their fiduciary and/or statutory duties, as a consequence of which Rayley suffered loss and damage in an amount equal to those payments and the interest that would have been earned on them.

¹³⁷ Day 8/13/10.

¹³⁸ Day 8/13/15.

¹³⁹ Day 8/13/20.

¹⁴⁰ Day 8/13/22 to 14/19.

[340] She further claims that Incredible Power was unjustly enriched at the expense of Rayley, and thereby rendered itself liable to account to Rayley as a constructive trustee.

[341] She further alleges that WKY and WKC's knowledge that the sum owed under the Richardson & Wrench loan together with the benefits attached thereto was an asset of Rayley is to be imputed to Incredible Power (of which they were both *de facto* directors), which accordingly also had actual or constructive knowledge that Payment 3 was made for no legitimate commercial purpose and was not in Rayley's best interest and that by causing Payment 3 to be made WKY and WKC acted in breach of their fiduciary and/or statutory duties. Incredible Power was therefore a knowing recipient of the payment and all benefits attached thereto, and thereby rendered itself liable to account to Rayley as constructive trustees.

11.8 The law

[342] Substantially the same issues of law arise in relation to the Incredible Power claim as in relation to the Esben claim.

[343] Accordingly, Madam Ma simply repeated and adopted the review of the relevant legal principles set out in the preceding section of this Judgment. In addition, the following is to be noted in relation to dishonest assistance.

11.9 Fiduciary duties of agents: the law

[344] A person will owe fiduciary duties where that person has undertaken to act for or on behalf of another in a particular matter in circumstances that give rise to a relationship of trust and confidence.¹⁴¹ This must include a person who has day to day responsibility for managing the company's affairs.

11.10 Dishonest assistance: the law

[345] A claim in dishonest assistance arises where: (i) there has been a breach of trust or fiduciary duty; (ii) the defendant assisted in that breach of trust or breach of fiduciary duty, or he procured it; and, (iii) the defendant was objectively dishonest.¹⁴² There is no need for a formal trust; any fiduciary relationship between a person and property suffices.¹⁴³

¹⁴¹ Vivendi SA v Richards [2013] EWHC 3006 at paragraphs 137–139, 141.

¹⁴² Harney Westwood and Riegels: British Virgin Islands Commercial Law (4th edn., Sweet & Maxwell 2018) 8.551.

¹⁴³ Baden v Société Générale SA [1993] 1 WLR 509 at paragraph 242 (Peter Gibson J).

[346] There does not appear to be any significant disagreement between the parties as to the principles to be applied (although Mr. Alexander, QC raises a number of points that simply do not arise given the facts of this matter: paragraph 54 of Mr. Alexander, QC's written closing submissions). The test for conscious dishonesty is as set out in **Royal Brunei Airlines v Tan** as clarified in **Barlow Clowes v Eurotrust**. In particular:

- (1) The dishonest state of mind "may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge ... Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards".¹⁴⁴
- (2) All that is required is "consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It [does] not also require [the defendant] to have thought about what those standards were".¹⁴⁵

[347] The court in **Royal Brunei Airlines v Tan** noted the truisms that "[h]onest people do not knowingly take others' property [and] [u]nless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries".¹⁴⁶

[348] It is necessary to say something about the allegation of dishonesty in Madam Ma's pleadings.

- (1) Mr. Atherton, QC and Mr. Alexander, QC rely on **Three Rivers District Council v Bank of England (No 3)** in support of the proposition that Madam Ma's pleading is inadequate.¹⁴⁷ They rely on the two dissenting judgments, which put the test in a particularly inhospitable way.
- (2) The position is as follows:
 - i. "The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts

¹⁴⁴ *Barlow Clowes v Eurotrust* [2006] 1 WLR 1476 at paragraph 10 (Hoffmann LJ).

¹⁴⁵ *Barlow Clowes v Eurotrust* [2006] 1 WLR 1476 at paragraph 16 (Hoffmann LJ).

¹⁴⁶ *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 389F (Lord Nicholls).

¹⁴⁷ *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1.

pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact ‘which tilts the balance and justifies an inference of dishonesty’.”¹⁴⁸

- ii. “Further, if allegations of fraud or deceit rest upon drawing inferences about a defendant’s state of mind from other facts, then those other facts must be clearly pleaded, and the inference of dishonesty must be more likely than one of innocence or negligence ... In applying these principles, however, the court may take a “generous approach to pleadings” given that the defendant may have ‘tried to shroud his conduct in secrecy’.”¹⁴⁹
 - iii. In respect of an argument that ‘the facts relied on [were] ... equally consistent with negligence’, Lord Hope said “the substance of that argument is directed not to the pleadings as such, which leave no doubt as to the case that is being alleged, and the basis for it in the particulars, but to the state of the evidence. The question whether the evidence points to negligence rather than to misfeasance in public office is a matter which must be judged in this case not on the pleadings but on the evidence. This is a matter for decision by the judge at trial”.¹⁵⁰
 - iv. Where ‘dishonesty is specifically pleaded by virtue of the very particular claims advanced ... D can thus be in no doubt as to what is alleged ... [and] it is not to the point that D disputes some of these facts’.¹⁵¹
- (3) These last two quotations lead to the next point, which is that this sort of argument is one for a strike out or summary judgment application, and not one for trial.¹⁵² The question is whether the claim is pleaded in clear terms and in sufficient detail to enable the defendant to prepare a defence.¹⁵³ ‘[A] balance must be struck between the need for fair notice to be given on the one hand and excessive demands for detail on the other’; and it is not appropriate to seek particularisation ‘when it is not really required [and] when in truth each party knows perfectly well what case is made by the other and is able properly

¹⁴⁸ JSC Moscow Bank v Kekhman [2015] EWHC 3073 (Comm) at paragraph 20 (Flaux J).

¹⁴⁹ Raja v McMillan [2020] EWHC 951 (Ch) at paragraph 22 (Hon. Sarah Worthington, QC).

¹⁵⁰ Three Rivers District Council v Bank of England (No 3) [2003] 2 AC 1 at paragraph 56 (Hope LJ).

¹⁵¹ Raja v McMillan [2020] EWHC 951 (Ch) at paragraphs 23–24 (Hon. Sarah Worthington, QC).

¹⁵² See also JSC Moscow Bank v Kekhman [2015] EWHC 3073 (Comm) at paragraph 20 (Flaux J).

¹⁵³ Three Rivers District Council v Bank of England (No 3) [2003] 2 AC 1 at paragraph 4 (Steyn LJ).

to prepare to deal with it'. The Defendants have pleaded their Defences and made such further requests for further information as they wished, and they have opted not to bring an application seeking a strike out or summary judgment. The Claimant gave such particulars of her case as was within her knowledge. The Defendants knew perfectly well what the case was that was being advanced against them. The pleadings went through various iterations by way of amendments, and Requests for Further Information were put. Two rounds of factual witness statements took place. Numerous interlocutory and case management hearings took place, at which any genuine uncertainty could be corrected, in the five years or so between commencement of the claim and the trial. The submission that the Claimant had not properly pleaded her case was clearly disingenuous. It is also far too late now to take a point on the pleadings at the trial. The issues of fact and law have been sufficiently articulated by the parties in the pre-trial phase to enable all parties to receive a fair hearing at the trial.

- (4) The evidence to which the Court should have regard includes the documents, the witness statements and evidence elicited in cross-examination.¹⁵⁴

11.11 Submissions on liability

[349] Drawing the above submissions together, Madam Ma submitted that her causes of action as regards the loan repayment diversion to Incredible Power have all succeeded. The Court agrees.

[350] As set out above, both WKY and WKC were, or were acting as, *de facto* directors, at the time of the loan repayment diversion and/or in procuring the loan repayment diversion.

[351] In respect of the section 120 best interests breach of duty claims against WKY and WKC, the loan repayment diversion was effected for no consideration to Rayley, which was not in Rayley's best interests. WKY and WKC both knew that. Alternatively, if they did not know this fact, then that is because they did not apply their minds to the question, in which case the court must apply an objective test; and, looking at the matter objectively, an intelligent and honest person in the position of a director of Rayley could not, in the whole of the existing circumstances, have reasonably believed that the loan repayment diversion was for the benefit of the company.

[352] In respect of the section 121 proper purpose breach of duty claims against WKY and WKC:

¹⁵⁴ Three Rivers District Council v Bank of England (No 3) [2003] 2 AC 1 at paragraph 136 (Hutton LJ).

- (1) the power exercised by WKY and WKC was the power to manage Rayley's affairs, business and property;¹⁵⁵
- (2) the purpose for which that power is delegated to the directors is, put most broadly, to enable them to further Rayley's interests;
- (3) although the Court can only infer from the evidence what purpose, or substantial purpose, WKY and WKC had in directing the loan repayment diversion, it is obvious that an asset was removed from Rayley without reference to Rayley's interests (and Madam Ma is not obliged to show bad faith); and
- (4) any such purpose is plainly improper.

[353] In respect of the unjust enrichment claims against Incredible Power, in receiving the loan diversion payment for no consideration, and in the absence of any alleged Rayley-Incredible Power debt to justify its retention, and with no change of position defence to rely on, Incredible Power has been unjustly enriched at Rayley's expense. Incredible Power was thereby rendered liable to account to Rayley as a constructive trustee.

[354] In respect of the dishonest assistance claims against WKY and WKC: (i) Mr. Tiang as the Brothers' Offshore Company manager, was a fiduciary in relation to Rayley's property, and owed a duty to apply its property only for proper purposes; (ii) for the same reasons given above, Mr. Tiang breached this duty in instructing Richardson & Wrench to divert the loan repayment to Incredible Power when he knew that the loan repayment diversion was not in Rayley's best interests; (iii) WKY and WKC procured and assisted the breach of trust, by instructing Mr. Tiang to so act, and by ensuring that Richardson & Wrench complied with Mr. Tiang's instructions; and, (iv) WKY and WKC knew that Mr. Tiang's instructions to Richardson & Wrench were not in Rayley's best interests, and were objectively dishonest in that sense.

[355] Furthermore, it is not open to the Defendants to say that neither WKY and WKC nor Mr. Tiang owed fiduciary duties in respect of the loan repayment diversion. Somebody must have owed Rayley a duty to ensure its assets were not dissipated.

[356] In respect of the knowing receipt claims against Incredible Power, Incredible Power received the loan repayment diversion with knowledge through WKY and WKC that: (i) this was an asset of Rayley; and, (ii) the loan repayment diversion was not in Rayley's best interests, and thus

¹⁵⁵ Art III Section 1 of Rayley's Articles.

Incredible Power is liable as a knowing recipient of the Payment and all benefits attached thereto to account to Rayley as a constructive trustee.

12. Standing

12.1 Introduction

[357] From the very outset of these proceedings, the substantive Defendants have been trying to shut Madam Ma out from bringing this claim before the Court, on the basis that she does not have standing as a matter of Liberian law to bring this claim. The Defendants are estopped from vexing Madam Ma or the Court further on this point because they are: (i) resurrecting arguments they ran and lost or abandoned in 2015/2016, and/or, (ii) running arguments that could and should properly have been run in 2015/2016. The Defendants are not permitted to have a second bite at the cherry. The standing objection was pressed at the trial by Esben, which pointed out that it had not previously challenged Madam Ma's standing and was thus entitled to do so. However, Madam Ma was entitled to succeed nonetheless on this issue, because the expert evidence was unequivocally in her favour:

- (1) Madam Ma had standing as a matter of Liberian law to bring claim in April 2015 *qua* Executrix in respect of the Estate's beneficial interest in Rayley (the evidence of Mr. Padmore is to be preferred to that of Mr. Cooper in this regard);
- (2) the Defendants have not adduced any Liberian law expert evidence to justify any claim that Madam Ma has lost her standing since the issue of proceedings in April 2015, and, without that evidence, the Court must proceed on basis that Madam Ma continued to have such standing post April 2015 and still does;
- (3) the fact that Madam Ma *qua* Executrix now also has a legal interest in Rayley following the transfer of legal title to the share in Rayley from Swan Nominees has no negative effect on her standing – it cannot undermine the fact that Madam Ma continues to bring the claim *qua* Executrix in respect of all the Estate's interest in Rayley, including the Estate's beneficial interest in Rayley (which beneficial interest Incredible Power and Esben at least expressly admit still exists); and
- (4) Madam Ma was not required to make efforts to secure the initiation of this action by the board of Rayley.

[358] In summary:

- (1) when WKN died, the beneficial interest he had in the Share continued in the shape of his Estate;

- (2) the Estate continues to hold the beneficial interest in the Share;
- (3) the whole policy of Liberian law is to preserve that interest;
- (4) in circumstances like the present, it would be very surprising if WKN's heirs would be left powerless with no remedy; and
- (5) all it takes is somebody to be appointed to administer the Estate's beneficial interest.

[359] The arguments on standing are a sideshow and a (further) example of Defendants, whose factual case is flawed, fleeing for refuge into legalistic technicalities. Justice Sir Bernard Eder, QC expressed the Court's 'gross distaste' with this 'huge waste of time by the parties or by those representing the First, Second and Third Defendants' (including the Court's time) as far back as July 2016. The Court now reiterates the same view in respect of this yet further attempt.

12.2 The Associations Law

[360] The provision of Liberian law in question is section 7.16 of the Associations Law, which provides (so far as relevant) as follows:

"7.16. Shareholders' derivative actions

1. Right to bring action. An action may be brought in the right of a corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates.
2. Ownership requirement. In any such action, it shall be made to appear that the plaintiff is such a holder at the time of bringing the action and that he was such a holder at the time of the transaction of which he complains, or that his shares or his interest therein devolved upon him by operation of law.
3. Effort by plaintiff to secure action by board. In any such action in Liberia, the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort."

12.3 Background

[361] As early as 11th June 2015, Messrs. Walkers asserted that it was 'obviously and immediately apparent that [Madam Ma did] not have, and [had] never had, any standing or capacity to bring these Proceedings'. Madam Ma's then solicitors, Messrs. Harneys, responded on 17th June 2015 to explain that 'amongst other things, Liberian law entitles [Madam Ma] to bring derivative proceedings on behalf of [Rayley] in her capacity as executrix of the [Estate] and as an individual with a beneficial interest in the shares of [Rayley]'. Similar correspondence was exchanged with Messrs. Maples and Calder on 31st July 2015.

- [362] In August 2015, Incredible Power and WKY and WKC filed defences confined to disputing that Madam Ma had standing and they launched strike out applications ('Strike Out Applications'). (Esben was not at that stage a party to the proceedings.)
- [363] The grounds of WKY and WKC's Strike Out Application included the assertion that, as a holder of a partial beneficial interest in the Share, Madam Ma was not entitled to bring a derivative action and consequently these proceedings (i.e. a point on section 7.16.2).
- [364] The grounds of Incredible Power's Strike Out Application included the following assertions:
- (1) Madam Ma did not possess, and had never possessed, in her capacity as executrix of the Estate or otherwise, the requisite standing to give instructions in connection with, or to commence, the proceedings for and on behalf of Rayley (i.e. a point on section 7.16.2).
 - (2) The proceedings would fail as a derivative action because, contrary to Liberian law, Madam Ma had not pleaded with particularity either her efforts to secure the initiation of an action by the board of directors of Rayley, or the reasons for not making such an effort (i.e. a point on section 7.16.3).
- [365] Strikingly, between them the witness statements on Liberian law filed by WKY and WKC and Incredible Power supported Madam Ma's position: the evidence filed by Incredible Power included confirmation that Madam Ma had standing as executrix, and the evidence filed by WKY and WKC included confirmation that section 7.16.3 does not apply to actions brought outside Liberia.
- [366] Madam Ma's pleadings were amended slightly (including to make clear the proceedings were brought by Madam Ma *inter alia* as Executrix of the Estate, derivatively on behalf of Rayley) and the Strike Out Applications were withdrawn. The Defendants argued that Madam Ma should pay their costs but, ultimately (after further outings before the Court), they were ordered to make a substantial payment on account of Madam Ma's costs.
- [367] The Strike Out Applications were before the Court on 24th February 2016, 19th April 2016 and 5th July 2016.
- [368] Following the hearing before Justice Bannister on 24th February 2016, it was abundantly clear that Madam Ma's capacity to bring the claim as Executrix in respect of the Estate's beneficial interest was no longer in issue:

- (1) Counsel for Incredible Power confirmed that Incredible Power was not pursuing its Strike Out Application because fatal defects to a pleading had been cured and 'it necessarily follow[ed] that [Incredible Power's] application [had] been disposed of'.
- (2) Counsel for WKY and WKC accepted that their Strike Out Application could not have succeeded.
- (3) The question whether Madam Ma was entitled to rely on the Estate's beneficial interest was squarely before the court.
- (4) In his judgment, Justice Bannister dismissed the idea that the Strike Out Applications had concerned only a pleading issue. He recorded that the applicants each positively asserted that Madam Ma had no *locus standi* to instigate the claim and applied for the claims to be struck out as a consequence; that those assertions had subsequently been abandoned; that Madam Ma made it clear at an early stage that this was a derivative claim but the applicants said that was wrong and applied to strike out on that basis; that Madam Ma's *locus standi* was now conceded; that the applicants undertook the burden of proving that Madam Ma had no *locus standi* and that burden had not been discharged, which was the fundamental point on which the Strike Out Applications were based; and accordingly the applicants were jointly and severally liable for Rayley's costs. There was no appeal from this order.
- (5) Justice Bannister made an order for payment of Rayley's costs, but the matter came back before the Court to consider whether costs incurred by Madam Ma should be paid by the applicants. In the course of a further hearing before Justice Bannister on 19th April 2016, the judge noted that Madam Ma was 'the person promoting the derivative action which is now accepted that she is entitled to do'. Neither counsel for WKY and WKC nor counsel for Incredible Power took any issue with this assessment.
- (6) Counsel for WKY and WKC and Incredible Power indicated they were not equipped to address the application for Madam Ma's costs on 19th April 2016. The judge considered that Madam Ma's claim for her costs was sufficiently clear to warrant making a provisional order for WKY and WKC and Incredible Power, jointly and severally, to pay the costs of both Strike Out Applications (the '**Provisional Order**'), but adjourned the matter to a further hearing at which the Provisional Order would be sealed unless the Court could be persuaded otherwise (or the matter was disposed of by consent).

[369] A further hearing took place before Justice Sir Bernard Eder, QC on 5th July 2016. Leading counsel for WKY and WKC said that the Provisional Order should not be made final either (i) because Madam Ma had brought the derivative claim in breach of section 184C, or (ii) because Madam Ma had amended her pleadings. The Court heard detailed submissions on these points but gave them very short shrift. It was clear from this hearing (if not before) that section 7.16.3 of the Associations Law and section 184C of the BCA 2004 are no longer in issue:

- (1) Incredible Power had already conceded, on 24th February 2016, that its application (which included an argument based on section 7.16.3) had been disposed of (see above).
- (2) Leading counsel for WKY and WKC asserted that the Associations Law does not attempt to impose procedural requirements on actions brought outside Liberia – and in particular, that section 7.16.3 is ‘expressly confined to Liberian proceedings’. This was a necessary plank of his submissions, because it was only if that was correct that WKY and WKC could advance the argument that section 184C must therefore step in to fill a ‘procedural void’.
- (3) It is possible Incredible Power did not address the Court on section 184C because it had already accepted at the hearing before Justice Bannister on 24th February 2016 that section 184C did not apply: counsel for Incredible Power had argued on that occasion that, before Madam Ma’s amendments, her claim would have required permission from the BVI Court, but as a result of the amendments, ‘that BVI defect was cured’. In any event, given the matter at stake was the liability of WKY and WKC and Incredible Power, jointly and severally, to pay the costs of both Strike Out Applications, it must be the case that Incredible Power adopted the submissions on the law advanced by leading counsel for WKY and WKC, and accordingly must be bound by the outcome.
- (4) Justice Sir Bernard Eder, QC held that there was ‘absolutely no warrant whatsoever’ for the submission that section 184C applies to this derivative claim, that BVI law does not impose any particular procedural limitations or requirements in relation to a foreign company, and ‘there is nothing as a matter of BVI law which required Ms. Ma to obtain the leave of the Court to bring this particular derivative claim’.
- (5) Justice Sir Bernard Eder, QC also reiterated that the Strike Out Applications were baseless:

“... from the very beginning it was absolutely plain that this was a derivative claim brought by Ms. Ma in the right of [Rayley] and that the whole of the proceedings have been, or to date have been directed to seeking to strike out that claim because in effect there was no right to bring that claim as a matter of Liberian law. Once it was recognized that that was completely hopeless and the strike out applications were abandoned, then it seems to me that the attempt to regularize the position was nothing more than an attempt to deal with what seems to me to be applications in relation to strike out which were doomed from the very beginning. In my view, this has been a huge waste of time by the parties or by those representing the First, Second and Third Defendants. It has been a waste of time, so far as the court is concerned, which it has had to be troubled with this [sic] on at least three occasions ... it is right that the Court should express its gross distaste of this kind of litigation.”

[370] This should have been an end of the matter. However, the substantive Defendants maintained an argument on standing in their amended Defences.

[371] On 20th June 2017, Justice Kaye asked why anybody wanted to ‘raise [Madam Ma’s standing] for a third time’, indicating that this would be appropriate only if the issues had changed. Counsel for WKY and WKC indicated that there had been ‘a change of facts and circumstances which is why’. This submission mirrored the point that had been made in correspondence: in response to Madam Ma’s stance that it was no longer open to the Defendants to argue that Madam Ma lacked standing, Messrs. Maples and Calder responded that ‘the issue of whether [Madam Ma] has fulfilled the ownership requirement ... was not, and indeed could not have been, conceded in the strike out application. At the time that the strike out application was withdrawn, [Madam Ma’s] position was different to her current position as a joint holder of [the Share]’. Therefore, by 2017, the only argument WKY and WKC considered they were able to advance was in respect to Madam Ma’s standing as joint holder of the legal interest in the Share. This was opportunistic, and (as is explained further below) irrelevant. Nevertheless, it is how the matter was, in due course, put in Mr. Atherton, QC’s Skeleton Argument, and by Mr. Alexander, QC in his oral opening submissions.

[372] The position on the pleadings is as follows. WKY and WKC plead that Madam Ma did not, at the time the proceedings were brought, and still does not, fulfil the ownership requirements under section 7.16.2 of the Associations Law (but they accept that section 7.16.3 does not apply). Incredible Power in its pleadings makes no admissions as to Madam Ma’s standing to bring the proceedings but avers that section 7.16.3 of the Associations Law (which imposes a procedural requirement) applies and alleges that Madam Ma falls foul of this because she has not attempted to secure the initiation of an action by the board. Esben makes no admissions

as to Madam Ma's standing to bring the proceedings, but has, with Incredible Power, filed expert evidence alleging that Madam Ma does not meet the requirements of Liberian law.

[373] The parties were given permission to file expert reports by 26th April 2018 and reports were eventually served in June 2018. Esben and Incredible Power filed expert evidence taking the positive position that Madam Ma does not fulfil the requirements of Liberian law. WKY and WKC served no expert evidence of their own, instead giving notice (dated the same day as the expert report in question) that they intend to rely upon the expert evidence filed by Esben and Incredible Power. This was a surprising state of affairs, and moreover Incredible Power and Esben's approach in pleading their case is contrary to CPR 10.5, which requires a defendant to explain its case.¹⁵⁶ The obvious inference is that the substantive Defendants considered that this approach had some strategic benefit to them.

[374] Two years on, on day 9 of the trial and on the very day of Mr. Cooper's cross-examination, Incredible Power and Esben sought to lodge a supplemental report prepared by Mr. Cooper, which (it was said at the hearing) addressed an additional point that Mr. Cooper had thought of and an additional point he had been asked to consider by Mr. Atherton, QC. Although Mr. Atherton, QC did not divulge which point was which, one of the points was the point on joint legal ownership that had been flagged by Messrs. Maples and Calder in correspondence in 2017 as the grounds for saying that the matter of standing remained open; the other was an entirely new suggestion that Madam Ma's Letters Testamentary might be revoked if some unspecified person were to petition the Liberian court to that effect.

[375] The Court refused permission to admit this unheralded evidence, ruling that it would be 'grossly unfair to let that report in now'.¹⁵⁷

12.4 The experts

[376] Following the experts' oral testimony, it is clear that Madam Ma has standing to pursue these claims: (i) she has capacity (*qua* Executrix in respect of the Estate's beneficial and legal interest in Rayley); and, (ii) section 7.16.3 does not apply, and thus there was no requirement for Madam Ma to approach Rayley's directors before bringing this claim.

¹⁵⁶ CPR 10.5(1), (3)–(5).

¹⁵⁷ Day 9/146/21–23.

12.5 Credibility

- [377] The Defendants' expert, Mr. Cooper, was an unreliable witness, in the sense that he: (i) omitted relevant material from his written report; (ii) could not give the Court confidence in his opinions; and, (iii) was prepared to go along with Mr. Atherton, QC's leading attempts to patch up his evidence in re-examination. Save where Mr. Cooper's evidence corroborates the evidence of the Claimant's expert, Mr. Padmore, it is of no assistance to the Court.
- [378] An example of how Mr. Cooper could not provide the Court with any confidence in his opinions, was in response to a straightforward question about ownership of the beneficial interest in Rayley after death and before probate (a key issue, and one Mr. Cooper would have been alive to, having read Mr. Padmore's expert report), Mr. Cooper said 'I don't have an answer for that question because it requires much reflection'.¹⁵⁸
- [379] Mr. Cooper's credibility is further undermined by his willingness to put forward a last-minute supplemental report (not in fact accepted by the Court, as set out above) in order to help Mr. Atherton, QC with an additional point that was thought to help the Defendants' case.
- [380] By the close of his cross-examination (in which learned counsel for Madam Ma demolished Mr. Cooper's evidence), Mr. Cooper was forced to explain that he had not 'consciously' breached his duty as an expert in leaving out of his written report key material that directly conflicted with the stance taken in his report (and subsequently abandoned in his oral evidence).
- [381] Mr. Padmore, by contrast, was a compelling witness. Mr. Padmore bore with patience and good humour Mr. Atherton, QC's long-winded attempts – at every turn unsuccessful – to undermine his ability to opine on Liberian law and his credibility generally (culminating in irrelevant and unsupported insinuations that Mr. Padmore had been involved in disreputable business in Liberia).¹⁵⁹ Mr. Padmore was helpful, and he gave clear and frank evidence that was supported by cogent reasons.
- [382] Mr. Padmore acquitted himself well in respect of new material and arguments that had been sprung on him only very shortly before the hearing, consistent with an expert witness who can rest comfortably on his knowledge and experience with a clear conscience.

¹⁵⁸ Day 9/169/18–23; see also 167/21 to 168/3.

¹⁵⁹ Day 10/86–105.

12.6 Capacity / relevant interest

- [383] There was no clear challenge to Madam Ma's standing to bring the proceedings *qua* Executrix administering the Estate's beneficial interest until the oral evidence.
- [384] Mr. Cooper accepted in oral evidence that a beneficial interest suffices for the purpose of section 7.16.1, and that WKN could have brought a derivative action before his death, and could bring one now if he was alive, relying on his beneficial interest.¹⁶⁰ However, Mr. Cooper then went on (albeit his evidence was tremulous) to ask the Court to accept: (i) the surprising premise that an executrix has no power of management if there is a will; and, (ii) the completely implausible notion that the beneficial interest did not form part of the Estate until probate – and indeed that the Estate had not 'come into effect' before probate.¹⁶¹ When he was asked squarely whether 'it was just a void, was it, the ownership of this beneficial interest?', Mr. Cooper said 'I would think one could say that'.¹⁶² This is unlikely as a matter of principle; it is contrary to Incredible Power and Esben's express agreement, in their pleadings, that the Estate holds a beneficial interest; and it was cogently rebutted by Mr. Padmore.
- [385] Indeed, Mr. Cooper did not hold fast to this line. He accepted, on another occasion, that ownership was with the Estate, '[f]or its management and action in accordance with the will of the deceased',¹⁶³ although he then said the beneficial interest was owned by the executor,¹⁶⁴ before going on to deny this was what he had said.¹⁶⁵ The Court cannot have confidence in such an expert.
- [386] Mr. Cooper proceeded on an error of fact, namely his assertion that the Will specifically distributed WKN's interest in Rayley (it did not). Mr. Cooper, on occasion, accepted that Madam Ma *qua* Executrix could manage the Estate,¹⁶⁶ but at other times took the extreme position that she could not manage the Estate because there was a will.¹⁶⁷ This may not much matter: in the end, his evidence is that Madam Ma could manage the Estate (including power

¹⁶⁰ Day 9/162/17 to 163/12.

¹⁶¹ Day 9/163/13 to 168/18.

¹⁶² Day 9/170/5–7. See also Day 9/171/7–18.

¹⁶³ Day 9/172/19–21.

¹⁶⁴ Day 9/173/4–6.

¹⁶⁵ Day 9/173/14–16.

¹⁶⁶ Day 9/165/7, 172/19–21, 173/14–16.

¹⁶⁷ Day 9/167/14–20, 173/25 to 174/10, 175/13 to 176/15.

to get in the assets including the right to sue in respect of them) save where assets have been disposed of specifically by the Will, which in this case (given the beneficial interest in Rayley was not disposed of by the Will) is equivalent to accepting that Madam Ma could manage the Estate and sue in respect of the Estate's beneficial interest in Rayley. However, it would be surprising if an executrix could protect property not specifically disposed of by will but is not empowered to protect property that had been allocated to a particular beneficiary. The weakness of this point is illustrated by the fact that Mr. Atherton, QC did not put it to Mr. Padmore.

[387] Further, Mr. Cooper accepted that, assuming he was wrong and that Madam Ma, *qua* Executrix, had the right to bring an action in respect of the Rayley share, she would have had standing to bring the Estate's derivative claims in April 2015.¹⁶⁸

[388] As Mr. Padmore cogently explained, the true and straight-forward position is as follows:

“[I]f you look at Section 1.13 of the Decedent Estate Law, it defines an estate as the interest that a person holds in property or the aggregate of all the property and assets of that person. The estate is something that exist. When the individual is alive he obviously controls his estate. When the individual dies, the estate doesn't go away. The interest is still there. It's just that the decedent obviously cannot act and someone has to act for him and that's what the Decedent Estate Laws of Liberia deals with. It is not called that, but it is more like the administration of estates. If you look at the law, basically the estate always had that one-third interest. It never lost it because the man died. That would not make sense. What happened is that with his death, someone had to act for the estate. No one is authorised to do that until the Probate Court issues letters of administration.”¹⁶⁹

[389] Mr. Atherton, QC did not challenge this evidence. Instead, he followed it up with the following exchange:

“Q. Or letters testamentary as they have been referred to; is that correct?

A. Or letters testamentary, yes.

Q. That means that all the letters testamentary would do is permit an individual to act on behalf, in the ordinary situation, to act on behalf of the Estate, that's correct?

A. To act on behalf of the estate and to protect the interest of the estate.

Q. Very well. But it doesn't actually vest any interest of a beneficial nature in the executor or executrix, does it?

A. In my opinion the beneficial interest stays with the estate. The executor or executrix is simply the agent of the estate who carries that out. In this case, however, it turns out

¹⁶⁸ Day 9/176/22 to 177/2.

¹⁶⁹ Day 10/107/23 to 109/6.

that the executrix, because of the fact that she was a widow and a named beneficiary under the Will with her children, also in that capacity had a beneficial interest under Liberian law.

...

Q. -- in the ordinary case, the effect of the letters testamentary would be that they simply permit an individual to act on behalf of the estate to get in the assets, in effect, is that correct?

A. To act on behalf of the estate, to manage the assets in some circumstances, not in all, and to protect the estate against claims by others, to examine those and so forth and so on, yes.¹⁷⁰

[390] Mr. Atherton, QC did not challenge this, save (later in his cross-examination) by trying to suggest to Mr. Padmore that his report did not say that the beneficial interest is in the Estate and Madam Ma as executrix is exercising that interest on behalf of the Estate – but this point is made plainly in Mr. Padmore’s report.¹⁷¹ Mr. Padmore gave entirely consistent evidence at two later points in his cross-examination.¹⁷²

[391] Mr. Atherton, QC went on to press Mr. Padmore to give his opinion on matters of Malaysian law, namely the construction of WKN’s Will.¹⁷³ Mr. Padmore was not drawn to give evidence he was not able to give (mainly because he is not an expert in Malaysian law but also because he had not reviewed the Will previously),¹⁷⁴ but he showed his willingness to assist the Court in agreeing the passages Mr. Atherton, QC had directed him to. The Court notes that the Will goes on to identify Madam Ma, Mr. Neil Wong and Miss Mimi Wong as the beneficiaries of the named trusts, and that Mr. Cooper’s evidence was that Madam Ma was in fact a legatee and had a beneficial interest under the Will.¹⁷⁵

[392] Mr. Atherton, QC expended some energy establishing that, following the share transfer, Madam Ma, WKY and WKC are joint holders of the share in Rayley.¹⁷⁶ This is clear from the documents. However, Mr. Atherton, QC did not then go on to put to Mr. Padmore any particular consequences of this (for example, as to the need for consent of the other shareholders), and so this line of cross-examination went nowhere.

¹⁷⁰ Day 10/109/8 to 110/14.

¹⁷¹ Day 10/137/20 to 138/14 and at paragraph 26 of Mr. Padmore’s report.

¹⁷² Day 10/150/8–21, 153/9 to 155/15.

¹⁷³ Day 10/113/3 to 116/5, 138/15 to 139/7, 142/22 to 143/5.

¹⁷⁴ Day 10/138/22 to 139/5, 142/22 to 143/5.

¹⁷⁵ Paragraph 7.13 of Mr. Cooper’s report.

¹⁷⁶ Day 10/122/19 to 126/16, 134/21 to 136/1.

[393] Mr. Atherton, QC spent some time on the new suggestion that an interested party might apply for Madam Ma's Letters Testamentary to be set aside (Mr. Atherton, QC did not suggest who this applicant might be, nearly seven years after the Letters Testamentary were granted). Mr. Padmore explained that if the Letters Testamentary were set aside, he believed that the Liberian court would do the necessary to ensure that the affairs of the Estate could be administered in keeping with the law;¹⁷⁷ and he also explained that the purpose was that the interest of the Estate should be preserved for the benefit of the legatees and he did not believe a Liberian court would do anything harmful to that interest simply because there were technical difficulties, but on the contrary would carve out a remedy that would allow the best interests of the Estate to be preserved.¹⁷⁸ He also explained that, regardless of what might happen on some speculative future application, 'for so long as the Letters Testamentary remain in place, they are valid. They cannot be changed except by the order of the Probate Court. So, as we speak today they are valid and binding on all.'¹⁷⁹ In re-examination, he confirmed that the provision he had in mind was §107.3 of the Liberian Decedents Law. Mr. Atherton, QC said he did not disagree.

[394] As Mr. Padmore succinctly put it, 'the estate always had the beneficial interest, and whoever had the authority under Liberian law to act for the estate had that beneficial interest on behalf of the estate. So, when she became executrix, she now had the authority to act for the estate, and in that sense, the beneficial interest was with her but in a representative capacity, not in a personal capacity ... He could have picked a stranger to whom he intended to leave nothing to be the executrix and that person would have had the responsibility and the obligation to protect the interest of the [E]state and to act for the [E]state in that regard'.¹⁸⁰ Indeed, as Mr. Atherton, QC acknowledged, Madam Ma's right as Executrix to represent the Estate is reflected in the fact she is now one of the registered holders of the Share.¹⁸¹

[395] The overwhelming weight of expert evidence favours this answer, as do common sense and justice – to accept Mr. Cooper's evidence, the court would need to find that:

¹⁷⁷ Day 10/126/16 to 134/20.

¹⁷⁸ Day 10/152/1–13.

¹⁷⁹ Day 10/151/1–12.

¹⁸⁰ Day 10/143/17 to 144/9.

¹⁸¹ Day 10/148/25 to 149/5.

- (1) on death, the testator's property enters a void until the executrix receives letters testamentary;
- (2) although WKN was the beneficial owner of 33% of Rayley when he died, shortly thereafter the events giving rise to these proceedings took place, and shortly after that WKN's widow was recognised as his executor by the Liberian courts, nevertheless Liberian law does not allow Madam Ma to take action in respect of those wrongs prior to her appointment when there was no-one at the helm of the Estate. There would have to be something very wrong with Liberian law if it did not allow Madam Ma to take action – but of course there is not anything wrong with Liberian law in this respect: Madam Ma's entitlement to do so is clearly set out in section 7.16.2 of Liberia's Association Law.

12.7 Demand requirement

[396] Mr. Cooper accepted the following propositions:

- (1) if the language of a Liberian statute is clear and unambiguous, there is no need at all for the process of construction to find its meaning;¹⁸²
- (2) if one does embark on a construction exercise, then the statute must be construed with reference to the intended objective of the legislation; to ascertain the objective of a statute, the court will examine the reason for its enactment, the defect in the former law and the remedy provided in the new law; and a statute must be given the construction that is best calculated to secure the intended benefits of the statute;¹⁸³
- (3) if one does embark on a construction exercise, the same rule of plain language applies, that is, that words and phrases shall, unless inconsistent with the manifest intent of the legislature or unless another different meaning is expressly indicated, be given their usually accepted meaning according to the approved usage of the language;¹⁸⁴ and
- (4) reference to English or US law is not appropriate as a statement of Liberian law when there is existing Liberian statute or case law on the same subject (although he said they can be a persuasive influence if one has to go down the route of construction).¹⁸⁵

¹⁸² Day 9/159/14–19.

¹⁸³ Day 9/160/10 to 161/3.

¹⁸⁴ Day 9/161/5–14.

¹⁸⁵ Day 9/161/15–23.

[397] Mr. Cooper began by being clear that in his report there was ‘no room for doubt’ in his mind that section 7.16.3 applies to these proceedings to deny Madam Ma standing,¹⁸⁶ but his evidence collapsed fairly comprehensively:

- (1) Mr. Cooper agreed that his conclusion was at odds with the wording of section 7.16.3.¹⁸⁷
- (2) Mr. Cooper said that ‘if one in another jurisdiction followed the language here outside of Liberia, it would not be violative of Liberian law’.¹⁸⁸ That is completely different from saying that section 7.16.3 imposes a requirement.
- (3) Although he was somewhat coy about it, Mr. Cooper very quickly accepted that “[t]his action is being taken outside Liberia, in the BVI. The demand requirement, which set forth for an action which is instituted ‘in Liberia’ does not demand or require the BVI court to accept or require a demand”.¹⁸⁹

[398] This was clear evidence (as the Court noted),¹⁹⁰ and it makes sense on a reading of the section in light of the principles of Liberian law agreed by Mr. Cooper at the outset of his cross-examination and in light of Mr. Padmore’s decisive evidence on this issue.

[399] However, Mr. Atherton, QC then took the perilous step of attempting to patch up Mr. Cooper’s evidence in re-examination. Mr. Atherton, QC took Mr Cooper to a passage (paragraph 6.3) of his report, in which Mr. Cooper referred to section 5.93 of the Liberian Civil Procedure Law as an aid to construction of section 7.16.3, while noting that section 7.16.3, as the later in time, prevailed. Mr. Atherton, QC attempted (through a series of leading questions) to elevate section 5.93 to a substantively applicable provision, but although Mr. Cooper seemed keen to follow Mr. Atherton, QC’s lead, in the end he confirmed his written opinion, namely that the later in time prevails.¹⁹¹ This confirmed the opposite of what Mr. Atherton, QC had tried to elicit.

[400] This passage of evidence created confusion.¹⁹² If there was any lingering doubt whether the Court could accept the evidence of Mr. Cooper as an impartial and conscientious expert, that

¹⁸⁶ Day 9/178/17 to 179/18.

¹⁸⁷ Day 9/181/9–13.

¹⁸⁸ Day 9/180/22–24; see also Day 9/182/2–14, 185/4–5, 186/2–3.

¹⁸⁹ Day 9/171/1 to 186/20.

¹⁹⁰ Day 9/187/15–17.

¹⁹¹ Day 9/187/12 to 193/18; this answer also applies to the Judge’s question at Day 9/193/21 to 194/13.

¹⁹² Day 9/195/1–8.

was finally laid to rest when leading counsel for Madam Ma took Mr. Cooper to his own treatise on Liberian law, which states squarely that the demand requirement ‘does not have extraterritorial effect’ and ‘[w]here, therefore, a derivative action is brought in another jurisdiction in which the law does not require that any demand or ‘efforts’ be made upon the directors to assert a claim ... the suit will not be the subject of dismissal on account of the lack of such demand or an excuse for not making such demand although the action may involve a Liberian corporation’.¹⁹³ Mr Cooper was forced to explain that he did not ‘consciously’ breach his duty to the Court in failing to refer to these sections of his treatise in his report.¹⁹⁴

[401] At this juncture it is convenient to note that Mr. Cooper in his evidence and Mr. Atherton, QC in his submissions have made much of the assertion that the demand requirement is substantive rather than procedural – presumably on the basis that, for substantive matters, one looks to the place of incorporation of the company. However, this does not get them anywhere, because one always returns to the words ‘any such action in Liberia’.

[402] Mr. Cooper accepted that section 7.16.3 does not apply to these proceedings. Mr. Atherton, QC did not challenge Mr. Padmore on his clear view that section 7.16.3 does not apply. It is therefore clear that section 7.16.3 does not apply, and the Court need consider it no further.

12.8 Conclusion on the issue of standing

[403] As noted at the outset of this section, Madam Ma succeeds on the merits.

[404] It is too late for the substantive Defendants to seek to shut Madam Ma out from having her claims adjudicated upon: the time for that has passed and the Court should (and does) not permit the Defendants to vex her again on this issue. In any event, the arguments had no merit when they were first made, and they have no merit now. For all those reasons, the Court dismisses the substantive Defendants’ arguments that Madam Ma has no standing.

13. Conclusion

[405] For the reasons outlined above, the Court grants the relief sought in the Claim Form.

[406] Costs will follow the event. A number of interlocutory costs issues require determination and the Court will hear the parties further on these.

¹⁹³ Day 9/197/2 to 198/13.

¹⁹⁴ Day 9/198/14 to 200/5.

[407] I take this opportunity to thank both sides' learned counsel for their assistance during this matter. In particular, I am grateful to learned counsel for the Claimant, whose written closing submissions I have largely adopted.

Gerhard Wallbank
High Court Judge

By the Court

Registrar