IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 49

Civil Appeal No 127 of 2019

Between

(1) UVJ
(2) UVK
(3) UVL

… Appellants

And

(1) UVH
(2) UVI
(3) UVO
(4) UVP
(5) UVQ

… Respondents

Civil Appeal No 172 of 2019

Between

(1) UVH
(2) UVI

… Appellants

And

(1) UVJ
(2) UVK
(3) UVL
(4) UVO
(5) UVP
(6) UVQ

… *Respondents*

In the matter of High Court (Family Division) Suit No 6 of 2016 (Taking of Accounts or Inquiries No 1 of 2017)

Between

(1) UVH
(2) UVI

… *Plaintiffs*

And

(1) UVJ
(2) UVK
(3) UVL
(4) UVO
(5) UVP
(6) UVQ

… *Defendants*

JUDGMENT

[Equity] — [Fiduciary relationships] — [Duties]
[Equity] — [Remedies] — [Account]

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UVJ and others
v
UVH and others and another appeal

[2020] SGCA 49

Court of Appeal — Civil Appeals Nos 127 and 172 of 2019
Judith Prakash JA, Steven Chong JA and Woo Bih Li J
3 March 2020

18 May 2020 Judgment reserved.

Woo Bih Li J (delivering the judgment of the court):

Introduction

1 This is yet another sad tale of a family dispute between siblings after the death of the patriarch of the family ("the Patriarch"). The High Court judge's ("the Judge") main decision in the Taking of Accounts or Inquiries No 1 of 2017 in High Court (Family Division) Suit No 6 of 2016 ("HCF/S 6") can be found in *UVH and another v UVJ and others* [2019] SGHCF 14 ("the Judgment"), and her decision on pre-judgment interest can be found in *UVH and another v UVJ and others* [2019] SGHCF 22 ("the Supp GD").

Background

2 The two plaintiffs and the three defendants in HCF/S 6 are five children of the Patriarch (collectively "the Siblings"). The two plaintiffs are the sisters

("the Sisters") and the three defendants are the brothers ("the Brothers"). They were born in the following order:[1]

(a) the first defendant ("B1");

(b) the second defendant ("B2");

(c) the first plaintiff;

(d) the second plaintiff; and

(e) the third defendant ("B3").

3 The Patriarch passed away on 30 May 1997. The grant of probate was issued on 4 September 2000. His will was dated 8 May 1996 ("P's Will"): the Judgment at [2]. The Brothers were appointed the executors and trustees of P's Will. Under P's Will, there was a pecuniary legacy to two other children from the Patriarch's relationship with a mistress.[2] We will refer to these two other children as the "half-siblings". They were given $500,000 each. The rest of his estate was given to his wife ("the Mother") and the Siblings (*ie*, the parties in the action), with 50% to the Mother and 10% to each of the Siblings. We will refer to the Patriarch's estate as "the Estate".

4 On 4 September 2002, the half-siblings filed HC/OS 1241/2002 ("OS 1241") to compel the Brothers to provide certified true copies of the most recent accounts of the Estate, as well as to state on affidavit what steps (if any) had been taken in administering the Estate.

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1 Record of Appeal ("ROA") Vol 3(A) at p 9 at para 15.

2 B3's affidavit filed in OS 1241 at para 5.

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5 OS 1241 was resolved on 4 December 2002 with no substantive order made but the court ordered costs against the Brothers for the reason that it was the lack of information from the Brothers that had led to the application: see the Judgment at [5]. These costs and the Brothers' own legal fees for OS 1241 were charged to the Estate. Thereafter, the half-siblings were each paid their entitlement of $500,000 on 19 October 2004. The Brothers did not inform the Sisters about OS 1241, the legal costs and fees or the payment to the half-siblings: the Judgment at [5].

6 The Patriarch owned a unit in a development which the Judge referred to as the "Eastern Mansion" property. After he passed away, his mistress continued to stay there until it was sold pursuant to an *en bloc* sale for $909,207.90: the Judgment at [10]. The sale proceeds were distributed to the Siblings and the Mother in 2006 pursuant to P's Will.[3]

7 The Patriarch also owned a piece of land in Johor Bahru, Malaysia ("the JB Land"). This was sold in 2011 for $879,800. The Brothers distributed $1m to the Siblings in 2011[4] but nothing to the Mother. The reason why this was done is disputed. The $1m comprised the sale proceeds of the JB Land and some dividends received by the Estate from shares in companies: the Judgment at [11].

8 The Mother passed away in November 2015. The Brothers were also appointed executors and trustees under her will dated 8 April 2011. Under her will, the Mother gave: (a) one property to the Siblings in equal shares; (b) shares

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[3] ROA Vol 3(A) at p 72.

[4] ROA Vol 3(A) at pp 72, 73.

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in various companies to the Brothers; and (c) the remainder of her estate to the Siblings in six shares, with B3 receiving two shares and the other four children receiving one share each.[5]

9 On 17 March 2016, the Sisters sent a letter to the Brothers seeking a statement of account. The Brothers rendered a statement of account on 15 April 2016. The Sisters were not satisfied with the account provided and commenced HCF/S 6: the Judgment at [13]. The Brothers were named as defendants in their personal capacities. They were also named as defendants in their capacity as personal representatives of the Mother's estate, making a total of six defendants. The orders made by the Judge against the Brothers were made against them in their personal capacities.

10 The Sisters subsequently filed HCF/SUM 370/2016 ("SUM 370") which was a summary application for an account to be taken of the Estate on a wilful default basis. The Judge granted an order substantially on the terms of the application on 10 April 2017 ("the April 2017 Order"): the Judgment at [13]. Therefore, the account was to be taken on a wilful default basis.

11 After the Brothers provided an account pursuant to the April 2017 Order, there was a further hearing on 7, 8, 11 and 12 February 2019 ("the February 2019 hearing"). Directions were given on 15 February 2019. Thereafter, written submissions were tendered, followed by oral submissions on 4 April 2019. The Judge then made various substantive orders on 3 June 2019. She eventually also made orders on interest, costs and the substitution of new executors in place of the Brothers on 18 July 2019 and on 16 August 2019. All

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5 Appellants' Core Bundle in CA 127/2019 ("ACB") Vol II at pp 61 to 64.

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of these orders are found in an engrossed order of court filed on 10 September 2019 ("the Main Order").

12 We will set out the terms of the Main Order later. In summary, the Judge ordered that:

(a) the Brothers were to pay to the Estate:

(i) $20,978,689.90 being directors' remuneration over 20 years from three companies (referred to in this judgment as "A Trading", "B Development" and "T Investments" (see [100] below), which we collectively refer to as "the three companies") (the Judgment at [47]);

(ii) $174,000 and $360,000 being benefits-in-kind enjoyed by B1 and B2 respectively from renting, below annual value, two properties at Shelford Road ("the Shelford Road properties", which were owned by a family company we refer to as "HS") (the Judgment at [50]);

(iii) $5,500.65 being costs and legal fees charged to the Estate for OS 1241 (the Judgment at [69]);

(b) there be no surcharge on the Estate's account for rental income that might have been collected from the Eastern Mansion unit (the Judgment at [65]);

(c) the sum of $1m stated as owing from the Estate to the Mother's estate be falsified and removed as an outstanding liability from the Estate's accounts (the Judgment at [60]);

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(d) the probate granted to the Brothers be revoked, *ie*, the Brothers be removed as executors of the Estate (the Judgment at [74]);[6]

(e) the Brothers were to pay the Sisters costs of $360,000 plus reasonable disbursements;[7]

(f) letters of administration with P's Will annexed be granted to two lawyers;[8] and

(g) the Brothers were to pay to the Estate interest on the sums stated in [12(a)(i)] to [12(a)(iii)] above at 5.33% per annum from the date of the Writ until payment (the Supp GD at [37]).

13 The sums which the Brothers were ordered to pay as mentioned at [12(a)(i)] and [12(a)(ii)] above were sums which arose by way of an account of profits made by the Brothers: see the Judgment at [51].

14 The Brothers then filed CA/CA 127/2019 ("CA 127") to appeal against some of the orders made by the Judge, *ie*:

(a) that they were to pay the Estate their:

(i) directors' remuneration;

(ii) the two sums of $174,000 and $360,000 representing benefits-in-kind;

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6 HCF/JUD 1/2019.

7 HCF/JUD 1/2019.

8 HCF/JUD 1/2019.

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(iii) $5,500.65 being costs and legal fees in OS 1241;

(b) the decision to falsify the $1m entry for the Mother's estate; and

(c) their removal as executors of the Estate.

15 The Sisters filed CA/CA 172/2019 ("CA 172") to appeal against the Judge's decision to award them interest only from the date of their Writ of Summons ("the Writ") and not from an earlier date before the Writ. There was no appeal by the Sisters against the decision of the Judge refusing to impose a surcharge on the Estate's account for rental income that might have been earned from the Eastern Mansion unit.

16 Therefore, the main substantive issues in dispute before us arise from the appeal of the Brothers.

17 However, the Brothers also disputed the process under which they were ordered to account for profits and removed as executors. Hence their appeal raised both procedural and substantive issues.

Procedural issues

18 As mentioned, the Judge made the April 2017 Order for an account to be taken of the Estate on a wilful default basis. After the Brothers provided the account, the Judge decided that the Brothers were liable to render an account of their profits in respect of their directors' remuneration from the three companies and benefits-in-kind from HS.

19 She then directed that the Brothers were to pay the Estate sums representing the directors' remuneration and the benefits-in-kind and also

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ordered other relief, including the removal of the Brothers as executors of the Estate. The replacement executors were appointed subsequently.[9]

20 The Judge was of the view that the order to render an account of profits came within the scope of the April 2017 Order and that the remedies requested, including the removal of the Brothers as executors of the Estate, had been sufficiently prayed for in the Statement of Claim (Amendment No 1) ("the SOC"): the Judgment at [20]. Further, the court was entitled to order an account of profits as a remedy or consequential relief following the rendering of accounts by the Brothers on a wilful default basis. The Judge identified the issue to be "one of proper notice and opportunity to address any necessary points": the Judgment at [24] and [25].

21 The Brothers contended that the Judge had gone beyond the scope of the April 2017 Order when she decided that they were liable to render an account of profits, as well as to remove them as executors of the Estate, although they did not dispute that their removal as executors of the Estate was sought in the SOC.[10] We refer to this as their "procedural challenge". Their contention was essentially that the Sisters ought to have been required to file a separate application for an order for an account of profits or that this issue should have been dealt with at trial and not at the taking of an account pursuant to the April 2017 Order.[11] Likewise, their removal as executors should not have been dealt

9 HCF/JUD 1/2019.

10 See Notes of Evidence ("NEs"), 4 April 2019, page 5, lines 9 to 12; Appellants' Case in CA 127/2019 at paras 16 and 86.

11 Appellants' Case in CA 127/2019 at para 22.

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with under the taking of an account pursuant to the April 2017 Order.[12] In other words, the taking of accounts pursuant to the April 2017 order should have been restricted to accounting for the Estate's assets, or assets that ought to have been brought into the Estate by the Brothers. The Brothers asserted that this would not include, *eg*, the remuneration they had received as directors of the three companies.[13]

22 The Sisters supported the Judge's decision and argued that upon an account being taken on the basis of wilful default, unpleaded remedies can be awarded.[14] Further, the Sisters had sought an account of profits in their notice of objection and non-admissions filed on 22 September 2017 ("the Notice of Objection") and then in more detail in an outline of quantum for surcharge and falsification ("the Outline of Quantum") sent to the Brothers and to the court by way of a letter dated 14 December 2018.[15] The relief claimed in the SOC also included "[a]ll such or other accounts, enquiries, directions or reliefs the Court deems just".[16]

23 Before we set out the terms of the April 2017 Order and of the Main Order, it is important to distinguish between:

(a) an account of administration on a general or common basis;

(b) an account of administration on a wilful default basis; and

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12 Appellants' Case in CA 127/2019 at para 86.

13 Appellants' Skeletal Arguments in CA 127/2019 at para 15.

14 Respondents' Case in CA 127/2019 at para 17.

15 Respondents' Skeletal Arguments in CA 127/2019 at paras 13 and 14.

16 ROA Vol 2 at 111.

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(c) an account of profits.

24 The former two are procedures for the accounting of funds. As Vinodh Coomaraswamy J explained in *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2019] 4 SLR 714 ("*Cheong Soh Chin*"):

> 72 A common account, otherwise known as the general account, or the account in common form, does not depend on wrongdoing. The practical significance of this is that the beneficiary is entitled 'as of right' to be given an account in common form of the trustee's stewardship of the trust assets, without the beneficiary having to show that the trustee has committed a breach of trust (see the Court of Appeal's decision in *Foo Jee Seng v Foo Jhee Tuang* [2012] 4 SLR 339 at [87]; Lord Millett NPJ's judgment in *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 ('*Libertarian Investments*') at [167]).
>
> …
>
> 74 The claim for a common account is divided into three phases ([*Chng Weng Wah v Goh Bak Heng* [2016] 2 SLR 464] at [22]). First, the question is asked whether the claimant has a right to an account. Second, the taking of the account. Third, the court grants consequential relief. It can thus be observed that the taking of an account is a *process*. It is not, in itself, a remedy (see also [*Lalwani Shalini Gobind v Lalwani Ashok Bherumal* [2017] SGHC 90] at [26]).
>
> …
>
> 77 A trustee's account, once furnished, may disclose discrepancies. The beneficiary can then decide whether he wishes to falsify a discrepant entry, or to surcharge the account. …
>
> [emphasis in original]

25 In contrast, an account on the footing of wilful default is distinguishable from a common account in *at least* two ways. First, an account on the footing of wilful default is premised on misconduct by the trustee and is not available to a beneficiary as of right. The beneficiary must allege and prove at least one act of wilful neglect or default: see *Ong Jane Rebecca v Lim Lie Hoa and Others*

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[2005] SGCA 4 ("*Ong Jane Rebecca*") at [61]; *Cheong Soh Chin* at [80] and [81]. Second, the scope of an account on a wilful default basis is wider than that of an account on a common basis. As we held in *Ong Jane Rebecca* at [55]:

> … In a common or standard account, … the trustee need only account for what was actually received and his disbursement and distribution of it. In an account on the basis of wilful default, the trustee is not only required to account for what he has received, but also for what he might have received had it not been for the default. In the latter case, the accounting party also carries a much more substantial burden of proof than that which applies to him in the case of a common account: see *Glazier v Australian Men's Health (No 2)* [2001] NSWSC 6.

26 The scope of an account taken on the basis of wilful default is also broader in that the judge or registrar taking the account is entitled to look into all aspects of the trustee's management of the trust property and require the trustee to explain any suspect transaction, even if that particular transaction has not been complained of by the beneficiary: *Cheong Soh Chin* at [83].

27 We emphasise two further points. First, that following the taking of an account, the beneficiary is entitled to ask for an inquiry to discover what the trustee did with any money that was misappropriated. The taking of an account is merely a step in the process. Second, that while the beneficiary may elect whether to call for an account or further inquiry, it is the court which always has the last word. As Lord Millett NPJ explained in *Libertarian Investments Ltd v Thomas Alexej Hall* (2013) 16 HKCFAR 681 ("*Libertarian Investments*"):

> 167. It is often said that the primary remedy for breach of trust or fiduciary duty is an order for an account, but this is an abbreviated and potentially misleading statement of the true position. In the first place an account is not a remedy for wrong. Trustees and most fiduciaries are accounting parties, and their beneficiaries or principals do not have to prove that there has been a breach of trust or fiduciary duty in order to obtain an order for account. Once the trust or fiduciary relationship is established or conceded the beneficiary or principal is entitled

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to an account as of right. Although like all equitable remedies an order for an account is discretionary, in making the order the court is not granting a remedy for wrong but enforcing performance of an obligation.

168. In the second place an order for an account does not in itself provide the plaintiff with a remedy; it is merely the first step in a process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good. Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. …

169. *But the plaintiff is not bound to ask for the disbursement to be disallowed. He is entitled to ask for an inquiry to discover what the defendant did with the trust money which he misappropriated and whether he dissipated it or invested it, and if he invested it whether he did so at a profit or a loss.* If he dissipated it or invested it at a loss, the plaintiff will naturally have the disbursement disallowed and disclaim any interest in the property in which it was invested by treating it as bought with the defendant's own money. If, however, the defendant invested the money at a profit, the plaintiff is not bound to ask for the disbursement to be disallowed. He can treat it as an authorised disbursement, treat the property in which it has been invested as acquired with trust money, and follow or trace the property and demand that it or its traceable proceeds be restored to the trust *in specie*.

170. If on the other hand the account is shown to be defective because it does not include property which the defendant in breach of his duty failed to obtain for the benefit of the trust, the plaintiff can surcharge the account by asking for it to be taken on the basis of 'wilful default', that is to say on the basis that the property should be treated as if the defendant had performed his duty and obtained it for the benefit of the trust. Since *ex hypothesi* the property has not been acquired, the defendant will be ordered to make good the deficiency by the payment of money, and in this case the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss.

…

172. At every stage the plaintiff can elect whether or not to seek a further account or inquiry. The amount of any unauthorised disbursement is often established by evidence at the trial, so that the plaintiff does not need an account but can

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> ask for an award of the appropriate amount of compensation. Or he may be content with a monetary award rather than attempt to follow or trace the money, in which case he will not ask for an inquiry as to what has become of the trust property. *In short, he may elect not to call for an account or further inquiry if it is unnecessary or unlikely to be fruitful, though the court will always have the last word.*
>
> [emphasis added]

28 Upon the taking of an account, whether on a wilful default or common basis, discrepancies may be discovered and consequential orders made. For example, a beneficiary may decide to falsify a wrongful expense or loss charged to the account. In simple terms, this means that the beneficiary may require that that entry in the account be deleted or disallowed so that the expense or loss is no longer charged to the account. The trustee has to reconstitute the trust fund *in specie* or in monetary terms (*Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] SGCA 35 ("*Winsta*") at [112]). On the other hand, the beneficiary may seek to have the account surcharged, for example, where the beneficiary can show that the trustee received more than the account records indicate: *Cheong Soh Chin* at [79]. In the context of an account taken on the basis of wilful default, this extends to treating the assets which the trustee failed to obtain for the benefit of the trust in breach of his duties as having been obtained (see *Winsta* at [120]). In simple terms, the benefit is added to the account. A surcharge would ordinarily be the remedy sought following the taking of an account on the basis of wilful default (see *Winsta* at [120] and *Libertarian Investments* at [170]), although this is not to say that it is the *only* remedy that can be ordered. We emphasise that an account of profits is conceptually *distinct* from a surcharge, with the focus of the former being on the gain to the fiduciary (see below at [30]), and the latter being focused on the *loss* to the trust fund (*Winsta* at [120]–[121]). In our respectful view, some

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confusion was caused in the present case by the conflation of these two distinct remedies.

29 The taking of accounts may also *reveal* breaches of fiduciary duty for which an account of profits may be ordered. Unlike the taking of accounts, an account of profits is a *remedy* as opposed to a process. In *Lalwani Shalini Gobind and another v Lalwani Ashok Bherumal* [2017] SGHC 90 at [26], Aedit Abdullah JC explained that:

> … the taking of accounts on either [a common basis or a wilful default basis] should not be conflated with an account of profits. While there is a common aspect between the taking of accounts and the accounting of profits in that they both attempt to quantify the deficit, if any, in the trust fund that must be made good by the defendant to the claimant, the taking of accounts is a process, while *accounting of profit is a remedy. Thus, an account of profits is usually the very relief sought by claimants, whereas the taking of accounts may only be the first step, to be followed by the beneficiary's objections to the accounts presented and his claim for specific reliefs* ([*Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015] at para 20-017; Lord Millett NPJ, *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [168]). There are other nuanced differences. For instance, the taking of accounts arises generally in custodial fiduciary relationships, such as *vis-à-vis* trustees, executors, or custodial agents. *An account for profits, however, may be relevant as a remedy for the breach of any form of fiduciary duty, regardless of whether the relationship is predicated on the custody of assets.* Indeed, an account of profits may exceptionally be invoked even in cases beyond the fiduciary context (*Ng Bok Eng Holdings Pte Ltd and another v Wong Ser Wan* [2005] 4 SLR(R) 561at [54]). Further, the taking of accounts on a common basis, unlike an account of profits, is also not predicated on the allegation or establishment of a breach (see, in the context of partnerships, *Ang Tin Gee v Pang Teck Guan* [2011] SGHC 259 at [86]). [emphasis added]

30 We note also that, as we have stated in *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 ("*Mona Computer*") at [13] and [16], an account of profits is a gains-based remedy not related to whether the

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beneficiary has suffered any loss or whether the beneficiary would have made the profit if not for the breach.

31 The procedural issues therefore are:

(a) whether the order for an account of profits was outside the scope of the April 2017 Order;

(b) if so, whether the Judge had erred in requiring the Brothers to render an account of profits in respect of the directors' remuneration and benefits-in-kind and ordering payment thereof without another hearing; and

(c) whether the Judge had erred in removing the Brothers as executors of the Estate without another hearing.

32 We now set out the terms of the April 2017 Order:[17]

> 1. That an account be taken of all assets belonging to the [Estate] as stated in the claim endorsed on [the Writ];
>
> 2. That the said account be taken on a wilful default basis;
>
> 3. The [Brothers] do make restitution to the [Estate] of any sums found due to have been misapplied, misappropriated or wrongly incurred by the [Brothers] by and/or on behalf of the [Estate];
>
> 4. The [Brothers] do pay to the [Sisters] the amounts found to be due from the [Brothers] to the [Sisters] on the taking of such account.
>
> 5. Interest as claimed be assessed at such rate and for such period as the Court thinks fit;
>
> 6. The costs of this application be fixed at S$18,000 (excluding disbursements to be agreed);

[17] HCF/ORC 155/2017.

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> 7. The costs of the taking of accounts be reserved to the end of the taking of accounts; and
>
> 8. The [Brothers'] costs in defending this action shall not be paid out of the [Estate].

33 Thereafter, the Brothers were ordered to account for their profits derived by way of the directors' remuneration and benefits-in-kind, which were ordered to be paid along with other reliefs. The terms of the Main Order are:[18]

> 1. The [Brothers] to pay to [the Estate]:
>
> > a. The sum of $20,978,689.90, being the total directors' remuneration received by the [Brothers] for the accounting period between Financial Year 1997 to Financial Year 2017, for [the three companies];
> >
> > b. The sums of $174,000 and $360,000, being the benefits-in-kind enjoyed by [B1 and B2] respectively from renting the [Shelford Road properties] below annual value; and
> >
> > c. The sum of $5,500.65, being the legal fees accrued from [OS 1241] (collectively, the '**Judgment Sum**').
>
> 2. There be no surcharge on the Estate's account for the rental income that would have been collected until the Eastern Mansion property was sold in 2006;
>
> 3. The sum of $1,000,000 that is stated as owing from the Estate to the [Mother's estate] be falsified, and removed as an outstanding liability from the Estate account;
>
> 4. The probate granted to the [Brothers] for the Estate on 1 September 1997 and issued on 4 September 2000, being Probate No. 184 of 1997, be revoked; and
>
> **IT IS FURTHER ADJUDGED** on 18 July 2019 that:
>
> 5. The [Brothers] shall pay to the [Sisters] the costs of the proceedings, such costs fixed at S$360,000 plus reasonable disbursements (including the expenses of the [Sisters'] expert) to be agreed, with liberty to apply if such disbursements not agreed; and

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[18] HCF/JUD 1/2019.

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> 6. Letters of administration with the will of [the Patriarch] annexed be granted to [two named persons], by consent; and
>
> **IT IS FURTHER ADJUDGED** by way of the Honourable Court's letter dated 16 August 2019 that:
>
> 7. The [Brothers] shall pay to the Estate interest (which runs from the date of the [W]rit at 5.33% per annum) on the Judgment Sum; and
>
> **IT IS FURTHER ADJUDGED** on 6 September 2019 that:
>
> 8. The requirement of sureties for the grant of letters of administration be dispensed with by consent; and
>
> 9. Liberty to apply.
>
> [emphasis in original]

The scope of the April 2017 Order

34 The first step is to determine the scope of the April 2017 Order.

35 The Judge was of the view that paras 1 and 2 of the April 2017 Order sufficiently dealt with all remedies arising out of the taking of an account. Paragraph 3 stipulated restitution for any sums misappropriated and, in any event, could not be said to limit any wider remedy for any misfeasance established from paras 1 and 2. The Sisters had in the Notice of Objection filed in response to the account provided by the Brothers, pursuant to the April 2017 Order, specifically included a "surcharge" by which they meant an account of profits, for "[u]nauthorised profits made" by the Brothers: the Judgment at [20].

36 The Sisters also argued that in an order for an account to be taken on a wilful default basis, the court is granted "a roving commission" to inquire into all aspects of the fiduciary's administration. Thus misconduct that was "neither pleaded nor mentioned at the hearing at which the accounting was directed" may be investigated and the court "may charge the defendant accordingly" (*Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 34th Ed, 2019)

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("*Snell's Equity*") at 20-025).[19] In *Cheong Soh Chin* ([24] *supra*), the High Court also referred, at [83], to a "roving commission" citing *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] 1 Ch 515 at 546.

37 We agree with the Brothers that the Judge had erred on the scope of the April 2017 Order in holding that paras 1 and 2 of the order sufficiently dealt with all remedies arising out of the taking of the account. Paragraphs 1 and 2 of that Order merely state that an account would be taken of the Estate's assets on a wilful default basis. They do not deal with any remedy after the account is taken. That is dealt with in para 3 under which the Brothers are to make restitution to the Estate of any sums "misapplied, misappropriated or wrongly incurred". However, any remuneration or profit which the Brothers received from the three companies by reason of their fiduciary position as executors of the Estate would not be a sum which they had misapplied or misappropriated from or wrongly incurred on behalf of the Estate.

38 Furthermore, para 3, read in context with paras 1 and 2, does not include the remedy of an account of profits. Paragraph 3 is consistent with paras 1 and 2 which are only for an account on a wilful default basis. It does not limit or expand the width of paras 1 and 2 which do not themselves provide for an account of profits.

39 The Judge did not rely on para 4 of the April 2017 Order. In any event, para 4 pertains only to payments to be made from the Brothers to the Sisters "in the taking of such account". To be clear, the reference to an "account" in para 4,

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19 Respondents' Case in CA 127/2019 at para 40.

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read in context, refers to the taking of an account on a wilful default basis and not an account of profits as such.

40 As for the Notice of Objection and Outline of Quantum, that is a separate point. They did not extend the scope of the April 2017 Order although they would have given notice to the Brothers of further remedies which the Sisters were seeking over and above those stated in the April 2017 Order. Notice is relevant to the question of whether any prejudice was caused to the Brothers by having the orders made at that particular point in time, instead of in a separate application or reverting to trial, a point which we return to at [48] below.

Whether the Judge erred in requiring an account of profits and ordering the Brothers to make payment without another hearing

41 As stated in *Chng Weng Wah v Goh Bak Heng* [2016] 2 SLR 464 ("*Chng Weng Wah*") at [22], cited in *Cheong Soh Chin* ([24] *supra*) at [74], the taking of an account is merely the second step in a three-step process, and is not a remedy for a wrong. Following the taking of an account, a plaintiff can elect whether or not to seek a further inquiry, although the court will always have the last word (see [27] above).

42 It appears to be undisputed that, *as a matter of general principle*, an account of profits can be ordered following the taking of an account on the basis of wilful default.[20] The Brothers implicitly accepted this but argued that, given the manner in which the April 2017 Order was framed, the reliefs sought could only have been granted if a separate application was made or if the breaches of

[20] Appellants' Case in CA 127/2019 at page 16; ROA Vol 3(FF) at page 136, para 51.

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fiduciary duty were proven at trial, presumably, the main trial of HCF/S 6.[21] They submitted that the February 2019 hearing was only in respect of the taking of an account pursuant to the April 2017 Order and not the hearing of the underlying action in HCF/S 6. The Judge had directed that the Brothers give oral evidence first even though they were the defendants in the action and the Sisters eventually decided not to give oral evidence. There was also a suggestion that the Sisters would have had to give evidence first at a trial.

43 On the other hand, the Sisters argued that the February 2019 hearing was a hearing of the main action in HCF/S 6 as well. This was in addition to their argument that they had adequately prayed for an account of profits in the SOC, and that they had given sufficient notice of this in documents such as the Notice of Objection and the Outline of Quantum.

44 We do not accept the Sisters' contention that the February 2019 hearing was also a hearing of the main action. We note that the various probate case and pre-trial conferences between the date of the April 2017 Order and the February 2019 hearing suggest that there was often no clear distinction drawn by the court or the parties between the taking of an account pursuant to the April 2017 Order and the trial. Often, the two were dealt with together. For example, in determining that a category of documents sought by way of specific discovery was relevant, the Assistant Registrar hearing the application referred *both* to the April 2017 Order for the accounts to be taken *and* the assertions in the SOC.[22]

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21 Appellants' Case in CA 127/2019 at para 22.

22 Minute Sheet dated 29 January 2018.

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45 However, the Judgment has the heading, "High Court (Family Division) Suit No 6 of 2016 (Taking of Accounts or Inquiries 1 of 2017)". This suggests that the February 2019 hearing was in respect of the taking of an account pursuant to the April 2017 Order only. The substance of the Judgment supports this view. For example, [19] of the Judgment states that at various junctures (of the February 2019 hearing), the Brothers' counsel had suggested that the matter (regarding an account of profits) be listed again for trial or that a new statement of claim be filed, but no authorities were tendered in aid of this proposition.

46 Indeed the oral arguments on 4 April 2019, after the February 2019 hearing, show that the Judge was aware that the Brothers' counsel was contending that the question of an account of profits be dealt with, for example, at a trial.[23] While the Judge considered the extent to which the relief sought had been sufficiently prayed for in the SOC, she also went on to consider whether the remedies sought could be ordered notwithstanding the manner in which the April 2017 Order had been framed. It is significant that the Judge did not say that the terms of the April 2017 order were *irrelevant* because she was hearing the trial contemporaneously in any event. It seems that she instead concluded that the continuation of the trial was unnecessary in the light of the evidence that had already been adduced and she then proceeded to make final orders.

47 In the circumstances, we agree with the Brothers that the February 2019 hearing was the hearing for the taking of an account on a wilful default basis and not the trial. However, that is not the end of the matter. We accept that the Judge was entitled, in taking the account on the basis of wilful default, to

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[23] NEs, 4 April 2019, pages 2 to 13.

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consider and hear evidence on the Brothers' remuneration and benefits-in-kind received. The court is granted a "roving commission" to inquire into all aspects of the fiduciary's management of the trust property when an account is taken on a wilful default basis. In doing so, further breaches may be uncovered and established, as in the present case.

48 In any event, the Judge at [25] of the Judgment held that the "issue must be one of proper notice and opportunity to address any necessary points". In essence, this was to ask whether any prejudice resulted to the Brothers from the Judge's decision to make the orders at that point in time, as opposed to following, for example, a separate summons or trial. The Judge found that the Brothers had had sufficient notice and time to address all the allegations thoroughly and to make all arguments in their own favour. This consideration was rightly taken into account. It is not disputed that the Brothers knew that the Sisters were also seeking an account of profits from the Brothers in respect of the directors' remuneration and benefits-in-kind. An account of profits in respect of the directors' remuneration was expressly sought in the Sisters' opening statement for the taking of accounts and before the Judge on 15 February 2019.[24] The Brothers' opening statement also indicated that they understood the Sisters were seeking an order for them to "account for all remuneration/directors' fees/benefits received by [the Brothers]".[25] An account of profits was also sought in relation to both the remuneration and the benefits-in-kind in the Sisters' closing submissions.[26] Indeed, the Brothers had also made

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24 ROA Vol 3(FF) at p 20 and 32; ROA Vol 3(CC) at pp 65 and 66.

25 ROA Vol 3(FF) at p 32 at para 11.

26 ROA Vol 3(FF) at pp 59 and 84, para 65.

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submissions before the Judge on whether an account of profits should be ordered, on whether causation is necessary, and had also argued that a reasonable allowance should be given to the Brothers for their work in the three companies even if they were to be held liable to account for their profits.[27]

49 For these reasons, we agree that the Brothers had been given sufficient notice, time and opportunity to make all relevant arguments. In the circumstances, there was no good reason to require a discrete summons or revert to the trial.

50 As we mentioned above at [42], the Brothers appeared to suggest that the Sisters would have to give evidence first at the trial.[28] That is not necessarily the case. Even if a separate trial had been held later or if the main trial had been heard together with the taking of the accounts, it would have been for the Judge to decide which party is to give evidence first, although this would ordinarily be the plaintiffs. Further, the Brothers appear to have assumed that the Sisters must give evidence but that is not the case. The Sisters could have elected to stand or fall by the evidence already available. Indeed, it appears that this is what transpired in the February 2019 hearing. They made their case, for better or worse, on the evidence already available. Furthermore, the Brothers had given their evidence by way of an affidavit and at the February 2019 hearing with knowledge of the Sisters' allegations against them.

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27 ROA Vol 3(FF) at pp 171 to 174.

28 See also ROA Vol 3(FF) at pp 138 to 140.

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Whether the Judge erred in removing the Brothers as executors of the Estate without a further hearing

51 The Brothers also contended on appeal that their removal as executors of the Estate pursuant to s 32 of the Probate and Administration Act (Cap 251, 2000 Rev Ed) could not be ordered in the course of the taking of an account, and must instead be the subject of a separate application.[29] They did not cite any relevant authority for this proposition, and we are not persuaded that it is correct as a matter of principle despite the fact that the April 2017 Order did not *expressly* allow for this order to be made.

52 The Sisters specifically prayed for the revocation of the grant of probate to the Brothers and for professional trustees to be appointed in their place in the SOC, and, similarly, were content to stand or fall on the evidence already available. As above, the Brothers were given reasonable notice, time and opportunity to address this prayer in submissions, and to give any evidence they deemed necessary. Indeed, the Brothers had made extensive submissions on whether they should be removed as executors, including that it would be a "waste of time and costs" for replacement executors to be appointed since the administration of the Estate was nearing an end.[30] As such, in our view, the Judge was entirely justified to proceed on the evidence and arguments before her in making a determination as to whether the Brothers should be removed and replaced as executors, and to make the relevant orders.

29 Appellants' Case in CA 127/2019 at para 86.

30 ROA Vol 3(FF) at pp 181 to 185.

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Conclusion on Procedural Issues

53 In the circumstances, we are of the view that the Judge was entitled to proceed as she did. No useful purpose would have been served by a discrete summons or reverting to trial. We therefore move to the substantive issues.

Substantive issues

Account of profits

54 The account of profits ordered for the directors' remuneration and benefits-in-kind raised the following issues:

> (a) the duties owed by the Brothers as executors of the Estate;
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> (b) whether the Brothers breached any duty;
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> (c) whether any profits were made;
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> (d) whether causation between the profits made and the breach of fiduciary duty is necessary; and
>
> (e) if so, whether causation is established.

The duties owed by the Brothers as executors of the Estate

55 The Sisters alleged that the Brothers owed them fiduciary duties. The Brothers were under a general duty to act honestly and in good faith for the benefit of the beneficiaries (relying on *Armitage v Nurse and others* (1998) Ch 241 at 253). The Brothers also owed a general duty of loyalty (referring to Peter

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Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney Law Review 389 ("Devonshire") at 390).[31]

56 More specifically, the Sisters alleged that the Brothers owed:[32]

(a) a duty to inform them as beneficiaries of the existence and terms of their interest in the Estate and to furnish an account of the Estate;

(b) a duty to distribute the Estate's assets in a timely manner;

(c) a duty not to place themselves in a position where their duties and interest conflict ("the no-conflict rule"); and

(d) a duty not to make a profit from the use of their fiduciary position without the beneficiaries' informed consent ("the no-profit rule").

57 The Brothers did not dispute that these duties applied as a matter of law.[33] Their submissions were instead focused on showing that breaches of these duties had not been proven by the Sisters.

Whether the Brothers breached any duty

58 The next question is whether the Brothers were in breach of their fiduciary duties.

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[31] Respondents' Case in CA 127/2019 at paras 28, 45 and 105.

[32] Respondents' Case in CA 127/2019 at paras 46, 48.

[33] See ROA Vol 3(FF) at pp 147 and 148 – Brothers' closing submissions at paras 85, 89–90.

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59 Some difficulty arose in this case from the lack of clarity as to what precise breaches were alleged and found by the Judge.

60 In the Sisters' written submissions, they argued that the Brothers had breached the no-profit and no-conflict rules by leaving the Estate's shares undistributed and the Sisters uninformed so that the Brothers could continue receiving remuneration and taking benefits-in-kind. They had also charged the Estate account with their own legal fees.[34] The Sisters asserted that the Brothers had breached their duties by: (a) concealing from the Sisters the Estate's shares in the three companies and HS under P's Will; (b) not distributing the Estate's interest in those companies; and (c) voting on the shares in those companies to approve their own remuneration and to reap various benefits without disclosing to, or obtaining, the consent of the Sisters.[35]

61 Their written submissions also implied that the Brothers were in a position of conflict because of their concurrent positions as directors of the three companies and HS, as well as executors of the Estate since the remuneration they received from the three companies could otherwise have been paid out to shareholders as dividends.[36] At the hearing before us, Mr Philip Jeyaretnam SC ("Mr Jeyaretnam"), counsel for the Sisters, focused on the non-distribution of the Estate, because this allowed the Brothers to act without interference, for example, by remaining as directors and receiving the remuneration. Accordingly, Mr Jeyaretnam stated that the Sisters' concern was with what he referred to as fundamental breaches of the core duty of loyalty, by intentionally

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34 Respondents' Case in CA 127/2019 at paras 49 and 50.

35 Respondents' Case in CA 127/2019 at para 5.

36 Respondents' Case in CA 127/2019 at para 68a.

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failing to distribute the shares to further their own interests. The latter was said to be a breach of the no-conflict rule.

62 We turn now to examine these alleged breaches.

(1) Not informing the Sisters of their interest in the Estate

63 The Sisters alleged that the Brothers did not inform them of their interests in the Estate and of the Estate's interest in the companies in question for over 19 years after the Patriarch passed away. Nor did the Brothers render any account prior to the Sisters' request in 2016.[37] In contrast, the Brothers alleged that the Sisters were aware that they were beneficiaries of P's Will even before he passed away. In any event, the Sisters knew that they were beneficiaries from the payments they received in 2006 and 2011 (see [6] and [7] above).[38] It was undisputed that they did not render any account to the Sisters prior to 2016.

64 The Judge found at [74] of the Judgment that the Brothers had *intentionally* kept the Sisters uninformed for their own benefit, and that this was in breach of their core duties of loyalty and fidelity and placed them in a position of conflict. The Brothers submitted in the proceedings below that whether a trustee has complied with his duty to supply documents and information is a *fact-sensitive* exercise in every case (relying on *Chiang Shirley v Chiang Dong Pheng* [2015] 3 SLR 770 ("*Chiang Shirley*") at [89]).[39] To be clear, as we

37 Respondents' Case in CA 127/2019 at para 48.

38 Appellants' Case in CA 127/2019 at para 33.

39 ROA Vol 3(FF) at p 148.

understand it, executors are under a continuing duty to keep proper accounts and also to provide these *upon request* (*Cheong Soh Chin* ([24] *supra*) at [73], *Chiang Shirley* at [89], *Foo Jee Boo and another v Foo Jhee Tuang and others* [2016] SGHC 260 at [80]). The authorities we are aware of do not go so far as to say that the failure to *voluntarily* provide accounts would in and of itself be a breach. However, given the manner in which the Brothers' non-disclosure was characterised by the Judge, the Brothers would be in breach of their fiduciary duties if the Judge's factual finding is upheld. On the facts of this particular case, our view is that the Judge's inference that the Brothers had intentionally kept the Sisters uninformed does not warrant appellate intervention.

(2) Non-distribution of the Estate's assets, including its shares

65 The Brothers gave various reasons for their failure thus far to distribute the Estate's assets, including the shares held in the three companies and HS. The material question here is whether the Brothers had good reason for their delay in distributing the assets held: see *Lim Heng How v Lim Meu Beo* [2020] SGHC 49 at [42]. The Judge did not accept the reasons offered by the Brothers. She stated at [74] of the Judgment that:

> 74 The taking of accounts has also now established further breaches. ***Ignoring their core duty of loyalty and fidelity, the Brothers have omitted to distribute dividends and the shares held by the Estate without any reasonable justification.*** At the time of the summary hearing, the Brothers contended that the market had not recovered from the financial crisis until 2004, which was when they distributed the pecuniary bequests to their Half-Siblings. Nonetheless, their obligation commenced with the grant of probate in 2000, and during cross-examination at the taking of accounts, they were unable to furnish any good reason why they had not distributed the Estate shares *in specie. Doing so would not have required cash.* The Sisters' component of the Estate shares was also small: they could have valued and then purchased the Sisters' shares. Despite the small number of the shares, the substantial

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> real estate portfolios the Companies held would have made the shares valuable. But whether in cash or *in specie,* no distribution was contemplated up to the time this suit was filed. Their contention was that of oversight because they were not professional executors. This contention is disingenuous considering that [B1] has held multiple senior corporate positions. The executors would well have known that it was incumbent on them to seek and follow legal advice, as they had for [OS 1241]. Excuses proffered ranged from needing funds to maintain the JB Land, to requiring money to develop the JB Land, to engaging in a joint venture with a third party in respect of the JB Land. *In truth, attempt at either form of distribution of the shares, whether in cash or in specie, would have alerted the Sisters to their share in a valuable stable of companies.* ***The Brothers' purpose was to keep their Sisters uninformed, in order to continue to extract value from the Companies in their capacity as directors.*** In so doing, they have acted in conflict with, and to the detriment of, their Sisters' interest. A new executor, or executors, as the case may be, are appropriate to ensure a timely and proper realisation and distribution of the assets.
>
> [emphasis added]

66 We accepted at [64] above that the Brothers had intentionally kept the Sisters uninformed of the Estate's shareholding in the three companies and HS for their own benefit. One of the ways they did so was by omitting to distribute dividends and the shares held by the Estate. It would follow from this that they did not have good reason for the delay in distributing the Estate's assets.

(3) Voting the Estate's shares in favour of the directors' remuneration

67 The Brothers appeared to accept that they ought not to have voted the Estate's shares in favour of the directors' remuneration without the informed consent of the Sisters. However, they argued that their breach had no causative relationship with the remuneration they received.

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(4) Breaches of the no-conflict and no-profit rules

68 The Judge found a breach of the no-conflict rule because the Brothers intentionally kept the Sisters uninformed (see [64] above). It was not in dispute that the Brothers did not inform the Sisters that they were receiving remuneration from the three companies in which the Estate held shares and that the Estate's shares were used to vote in favour of the resolutions approving such remuneration. The Brothers also appeared to accept that a conflict of interest arose from the fact that the Brothers' remuneration drew on the funds that might otherwise have been distributed to shareholders as dividends: the Judgment at [41] and [42].[40]

69 In the circumstances, we are of the view that they ought to have disclosed to the Sisters the Estate's shares in the three companies, distributed the Estate's assets in a timely manner, and in the interim, ought not to have voted the Estate's shares to approve the remuneration. Therefore, the Brothers were in breach of duty in:

> (a) intentionally keeping the Sisters uninformed of the Estate's shares in the three companies and HS for their own gain;
>
> (b) not distributing the shares to the Sisters in a timely manner; and
>
> (c) using the Estate's shares to vote in favour of the directors' remuneration.

[40] ROA Vol 3(EE) at page 177 – NEs, 4 April 2019, page 19, lines 7 to 11.

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Whether profits were made by the Brothers

70 The Brothers submitted that the directors' remuneration from the three companies "[did] not amount to profit because the remuneration was not obtained by virtue of holding or voting the trust shares".[41] As we understand it, this was in essence an argument that the remuneration was not profit that was attributable to their position as executors of the Estate. This was allegedly so since the Brothers had been shareholders of the three companies and HS prior to the Patriarch's death. Further, B2 and B3 had been appointed directors of the three companies and HS before the Patriarch's death. B1 was appointed a director of HS before the Patriarch passed away and he was appointed a director of the three companies after the Patriarch's demise.[42] They had earned the remuneration in their capacity as directors of the three companies and as payment for their services.[43] Further, the directors' remuneration was not obtained by voting the Estate's shares as the Estate was only a minority shareholder in each of the three companies.[44]

71 As a preliminary point, we agree with the Judge (at [40] of the Judgment) that any prior appointment of the Brothers as directors did not exculpate them from their responsibilities as executors of the Estate. It only meant that remuneration or profits earned before they became executors would not be subject to an account of profits. After all, the re-appointment and

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41 Appellants' Case in CA 127/2019 at para 55.

42 Appellants' Case in CA 127/2019 at para 43.

43 Appellants' Case in CA 127/2019 at paras 48 and 50.

44 Appellants' Case in CA 127/2019 at paras 42 and 47.

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remuneration of directors were also approved at general meetings subsequent to the Patriarch's demise (see the Judgment at [8]).

72 As we have foreshadowed above at [70], the material question raised by the Brothers' submissions is whether the profits the Judge ordered to be repaid to the Estate were attributable to any breach. In this regard, the Brothers contend that even if the Estate's shares had not been exercised, there would have been "absolutely no difference to the outcome".[45] This is the question of "causation" we discuss in the next section.

Whether causation is necessary

73 The key question is whether causation between the breach or breaches and the directors' remuneration (and benefits-in-kind) has to be established. Put in another way, as framed in *Mona Computer* ([30] *supra*) at [18], the key question is whether the directors' remuneration (and benefits-in-kind) was attributable to a breach of fiduciary duty by the Brothers as executors of the Estate. To be clear, this is a *distinct* question from that of whether any loss to the beneficiaries needs to be caused before a fiduciary is obliged to account for unauthorised profits. On this latter question, this court has in our previous judgment of *Mona Computer* provided clear guidance, as we explain in some detail below at [79].

74 It may be noted at the outset that the parties agree that the profits for which the fiduciary is to account must bear some "reasonable relationship" to the breach of fiduciary duty (adopting the language from *Ultraframe (UK) Ltd*

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[45] Appellants' Case in CA 127/2019 at para 54.

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v Fielding [2005] EWHC 1638 (Ch) at [1588(iii)]; *Snell's Equity* at para 7-055; *Colin Robert Parr v Keystone Healthcare Ltd* [2019] EWCA Civ 1246 ("*Parr*") at [18]).[46]

75 There is no question that there must be *some* relationship between the profits for which the fiduciary is ordered to account and the breaches of fiduciary duty. Indeed, such a requirement would follow from basic principles of fairness: in Devonshire at 395, referred to by the Sisters, it is said that "it must at least be demonstrated that there is *some* causal link between the gain and breach of duty. … Accordingly, an account must be rendered in respect of profits made within the scope of the fiduciary's duty" [emphasis in original].[47] Instead, the question before us is whether this relationship needs to be one of but-for causation. Put in another way, the question is whether the profits would have been made by the fiduciary in any event without the breach.

(1) Parties' submissions

76 In short, the Brothers' contention was that causation is necessary. They argued that the use of the Estate's shares was immaterial to the approval of the directors' remuneration as the resolutions would have been passed in any event since the Estate only held a very small minority shareholding in the three companies and was also a small minority shareholder in HS. Further, even if the Sisters had been told about the Estate's shares in the three companies and HS, this would not have had any practical effect as the Brothers would still have

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46 Appellants' Case in CA 127/2019 at para 47; Respondents' Case in CA 127/2019 at para 62.

47 Respondents' Bundle of Authorities in CA 127/2019 Vol III at pp 676 and 682.

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obtained the remuneration they received.[48] The Brothers therefore contended that the orders made against them were punitive.[49]

77 The Sisters' primary argument was that causation was not relevant as the duty to account for unauthorised profits is a strict one. According to the Sisters, this is since the objective of the no-profit rule is that of deterrence.[50] The Sisters instead contend that, following the principles set out by the High Court of Australia in *Warman International Limited and another v Dwyer and others* (1995) 182 CLR 544 ("*Warman*") at [23], a fiduciary must account for a profit or benefit obtained either: (a) where there was a conflict or possible conflict between the fiduciary's duty and personal interest; or (b) by reason of his fiduciary position or by reason of his taking advantage of an opportunity or knowledge derived from his fiduciary position. The Sisters submitted that these requirements were met in the present case.[51]

(2) The court's decision

78 We acknowledge at the outset that there are cases, some of which were relied upon by the Sisters, which suggest that but-for causation in the sense we have referred to above at [75] is *not* necessary. The cases cited to us by the Sisters did not concern a similar factual matrix, although the general principles espoused therein may still be applicable.

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48 Appellants' Case in CA 127/2019 at paras 47 and 48.

49 Appellants' Case in CA 127/2019 at p 20.

50 Respondents' Case in CA 127/2019 at paras 53 to 55.

51 Respondents' Case in CA 127/2019 at paras 67 and 68.

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79 We begin with the case of *Mona Computer* ([30] *supra*), which the Sisters also relied on. In *Mona Computer,* the respondent-fiduciary was an officer of Mona Computer Systems (S) Pte Ltd ("Mona Computer") and was found to have breached his fiduciary duties by diverting business opportunities from Mona Computer to his newly-incorporated company, MN Computer Systems (S) Pte Ltd ("MN"): see *Mona Computer* at [1], [4] and [6]. MN's business was in direct competition with that of Mona Computer, and it paid commissions to the fiduciary at the same rate and on the same basis as Mona Computer had done. Before the High Court judge hearing the assessment of account of profits, one argument made was therefore that, had the fiduciary not breached his obligations to Mona Computer, the latter would have had to pay those commissions to him anyway (at [8]). The High Court judge set aside the order requiring the fiduciary to account for the commissions he obtained from MN. He found that had the fiduciary not set up MN and diverted the contracts, he would have continued his employment with Mona Computer and continued to receive commissions for his services. Therefore, the account of profits should take into account the commissions which Mona Computer would have had to pay to the fiduciary had he not breached his fiduciary duties. He held that, otherwise, Mona Computer would enjoy a windfall (at [9]). On appeal, this court said (at [13]–[14]):

> **Whether the account of profits should exclude sums which the principal would have had to pay the fiduciary, had the fiduciary not breached his duties**
>
> 13 Where an individual has illegitimately profited by exploiting his fiduciary position, the claimant may elect between an account of profits and compensation for loss. In this case, Ang J [who heard the trial] ordered the remedy of account. *This is a gains-based remedy and is not related to the restitution or compensation of the principal. Its award is unrelated to whether the fiduciary's conduct has caused any loss to the principal.* The

> remedy gives effect to that 'inflexible rule of a Court of Equity' that:
>
> > … a person in a fiduciary position … is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.
>
> [*Per* Lord Herschell in *Bray v Ford* [1896] AC 44 at 51.]
>
> 14 In this connection we would cite that celebrated passage in *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 ('*Regal*') at 144–145:
>
> > The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made.
>
> [emphasis added]

80 *Mona Computer* thus held that the order for an account of profits is unrelated to whether the fiduciary's conduct has caused loss to the principal. However, in our view, on a correct reading of the case, it did *not* say that causation was irrelevant to the question of the fiduciary's profit, *ie*, that it does not matter if the breach does not cause the profit.

81 The Sisters rely on Yip Man and Goh Yihan, "Navigating the maze: Making sense of equitable compensation and account of profits for breach of fiduciary duty" (2016) 28 SAcLJ 884 ("Yip & Goh") at para 73, in which it was said that the current approach towards the primary duty to account in Singapore, particularly as seen in *Mona Computer*, is "unyieldingly stringent, with *no concern for causation* or good faith on the part of the errant fiduciary"

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[emphasis added].[52] This appears to have been because, in *Mona Computer*, this court held that it was irrelevant that it was likely the employee would have continued to receive commissions from Mona Computer had he not breached his fiduciary duties (at [16]–[18]): see Yip & Goh at para 68. The authors in Yip & Goh assert that this court in *Mona Computer* favoured the stricter approach under which a fiduciary is held accountable for the entire business which had been set up in breach of his fiduciary duties and its profits. This was as opposed to only holding the fiduciary liable for the particular benefits which flowed to him in breach of his duty. The authors opine that this court in *Mona Computer* "clearly preferred" the stricter approach, referring to the court's citation of *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 ("*Regal*") and *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 ("*IDC*"): Yip & Goh at paras 66–67.

82 This court's holding at [16]–[18] of *Mona Computer* that it was irrelevant that the employee would likely have continued to receive commissions from Mona Computer had he not breached his fiduciary duties should be understood in context. In that judgment, we had been addressing the question of whether any *loss* to the beneficiary is relevant. This can be seen from [16] and [17] of *Mona Computer*, in which we stated that:

> 16 *Because this is a gains-based and not a restitutionary remedy, it is possible that the beneficiary will gain a 'windfall' –* ie*, benefits it might not otherwise have earned itself. The cases are well known.* In *Regal*, the plaintiff company's directors were held liable to account for profits earned from the sale of shares in a subsidiary company, which they had purchased when the plaintiff company did not have the funds to subscribe for it. Lord Porter stated (at 157) that this 'may be an unexpected windfall [for the plaintiff company], but whether it be so or not,

52 Respondents' Case in CA 127/2019 at para 57.

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> the principle that a person occupying a fiduciary relationship shall not make a profit by reason thereof is of such vital importance that the possible consequence in the present case is in fact as it is in law an immaterial consideration'. Similarly in [*IDC*], the director was liable to account for all the profits derived from a contract which he obtained for himself, and which he had previously unsuccessfully tried to obtain for his company. Roskill J explained that as long as the director was still a director of the company, he 'had one capacity and one capacity only in which he was carrying on business at that time', and he ought not retain profits obtained solely by reason of placing himself in a position of conflict, even if this meant that the company would receive a benefit which it was unlikely to have gotten for itself (at 451 and 453).
>
> 17 The thrust of these decisions is that the fiduciary should not be allowed to retain any of the profit derived from his breach of duty. *A deduction for what the company would have had to pay the defendant had he dutifully secured the benefits for the company instead is out of place given the gains-based basis for disgorgement.*
>
> [emphasis added]

83 It was in this context that we went on to state that whether it was likely that the fiduciary would have continued in the appellant's employment and received commissions from it was not a relevant consideration in the fashioning of an account (at [18]). This was also why we then went on to say that the High Court judge in that case had erred when he reasoned that the accounting of profits should not result in Mona Computer enjoying a windfall. As such, while we held that the commissions earned were attributable to the breach in that case, we do not think that the decision in *Mona Computer* should be read as indicating that but-for causation is not necessary. We also note that while loss to the beneficiary and gain to the fiduciary are often two sides of the same coin, this is not necessarily true of all cases. One need not follow the other.

84 Indeed, part of *Mona Computer* was in fact *suggestive* of but-for causation. On the director's fees the fiduciary had earned, we reasoned that (at [18]):

> … As a matter of principle the Respondent should also have to account to [Mona Computer] for the director's fees which he received from MN. *If not for the profits obtained by MN from the diverted contracts, MN would not have had the funds to pay out the director's fees. …* [emphasis added]

85 While we referred to the decisions of *Regal* and *IDC* in *Mona Computer*, these were referred to for the purposes of making the point that it is immaterial whether the company would, if an order for an account of profits is made, receive a benefit it was unlikely to have gotten for itself. Moreover, the *passage cited* from *Regal* (see *Mona Computer* at [14], reproduced above at [79]) does not *incontrovertibly* state that causation in the sense we are presently concerned with is not relevant. While the passage states at the last sentence that, "[t]he liability arises from the mere fact of a profit having, in the stated circumstances, been made", this must be read in context. The stated circumstances referred to are that the trustee's fiduciary position was *used* to make a profit. In our view, the language of these judgments are in fact consistent with the view that *some form* of a causal element between the breaches of fiduciary duty and the profits to be accounted for must be found, although we acknowledge that these cases do not go so far as to say *but-for* causation in the strict sense must be established.

86 *Murad and another v Al-Saraj and another* [2005] All ER (D) 503 (Jul) ("*Murad*") is a case which would appear to support the proposition that causation is not necessary. In *Murad*, the majority held that the fiduciary was liable to account for the whole profit he had made as a result of a joint venture,

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even though some profit might still have been made had the fiduciary not breached his fiduciary duties (see [47] and [67] of *Murad*). Arden LJ said:

> 61. The position is no different in Australia: see [*Warman*], where the High Court [of Australia] specifically rejected the notion of unjust enrichment:
>
> > 'It has been suggested that the liability of the fiduciary to account for a profit made in breach of the fiduciary duty should be determined by reference to the concept of unjust enrichment, namely, whether the profit is made at the expense of the person to whom the fiduciary duty is owed, and to the honesty and bona fides of the fiduciary (23). *But the authorities in Australia and England deny that the liability of a fiduciary to account depends upon detriment to the plaintiff or the dishonesty and lack of bona fides of the fiduciary."* (page 557)
>
> 62. *The High Court went on to say that (in a context such as this) the fiduciary will be liable to account (only) 'for a profit or benefit if it was obtained ... by reason of his taking advantage of [an] opportunity or knowledge derived from his fiduciary position' (page 557). It must of course be the case that no fiduciary is liable for all the profits he ever made from any source. However, it is clear that the High Court contemplated that the relevant profits would be ascertained through the process of the account. The court held: 'Ordinarily a fiduciary will be ordered to render an account of the profits made <u>within the scope and ambit of his duty</u>.'* (page 559)
>
> …
>
> 67. The fact that the fiduciary can show that that party would not have made a loss is, on the authority of the *Regal* case, an irrelevant consideration so far as an account of profits is concerned. *Likewise, it follows in my judgment from the* Regal *case that it is no defence for a fiduciary to say that he would have made the profit even if there had been no breach of fiduciary duty.*
>
> …
>
> 75. I accept that any rule that makes a wrongdoer liable for all the consequences of his wrongful conduct or for actions which did not cause the injured party any loss needs to be justified by some special policy. But the authorities just cited show that in the field of fiduciaries there are policy reasons which have for a long time been accepted by the courts.

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> 76. *For policy reasons, the courts decline to investigate hypothetical situations as to what would have happened if the fiduciary had performed his duty. In [the]* Regal *case at page 154G, Lord Wright made the following point, to which I shall have to return below:*
>
> > 'Nor can the court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person being charged. They are matters of surmise; they are hypothetical because the inquiry is as to what would have been the position if that party had not acted as he did, or what he might have done if there had not been the temptation to seek his own advantage, if, in short, interest had not conflicted with duty.'
>
> 77. *Again, for the policy reasons, on the taking of an account, the court lays the burden on the defaulting fiduciary to show that the profit is not one for which he should account: see, for example,* Manley v Sartori *[1927] Ch 157. This shifting of the onus of proof is consistent with the deterrent nature of the fiduciary's liability. The liability of the fiduciary becomes the default rule.*
>
> 78. This principle was applied by the High Court of Australia in the *Warman* case:
>
> > 'It is for the defendant to establish that it is inequitable to order an account of the entire profits. If the defendant does not establish that that would be so, then the defendant must bear the consequences of mingling the profits attributable to those earned by the defendant's efforts and investment, in the same way that a trustee of a mixed fund bears the onus of distinguishing what is his own.'
>
> [emphasis added]

87 While there are passages in *Murad* which conclude that causation is not relevant in ordering an account of profits, most notably, *Murad* at [67], which is reproduced above, we ask whether this is a position that we should adopt. In so far as *Murad* relied on "long-standing" authority in England (*Murad* at [100]), such authority does not bind this court.

88 One concern raised in the judgment of Arden LJ is that, for policy reasons, the courts decline to investigate hypothetical situations as to what would have happened if the fiduciary had performed his duty (see *Murad* at [75] to [77] cited above). We see the intuitive force in this argument, particularly since the rules on fiduciary duties, particularly the no-conflict rule, are undergirded by considerations of deterrence, and have been said to play a prophylactic role. However, courts routinely have to consider the question of what might have happened but for a wrongful act – this is not an unfamiliar question to most areas of law. The recent judgment of *Winsta* ([28] *supra*) in fact held at [240] and [254(c)] that no equitable compensation for non-custodial breaches of fiduciary duty can be claimed in respect of loss which the fiduciary can show would have been sustained in spite of the breach. If this investigation can be carried out in situations involving equitable compensation, there is no reason why it cannot be similarly done for an account of profits (see Graham Virgo QC, *The Principles of Equity & Trusts* (Oxford University Press, 3rd Ed, 2018) at pp 528-529). It is also no answer as to why, in situations where the counterfactual can be determined, this should not be a limit on the scope of the fiduciary's liability to account. Deterrence should not be a password to avoid causation.

89 Further, Arden LJ appears to have been influenced by the irrelevance of the beneficiary's loss to an account of profits in holding that it is no defence for a fiduciary to say that he would have made the profit even if there had been no breach of fiduciary duty, *ie*, that there was no but-for causation (see [59]–[67] of *Murad*). As we have explained above, we do not think that this would be the correct approach. The reason why a beneficiary's loss is irrelevant is that an account of profits, as a gains-based remedy, is concerned with the gain of the

fiduciary. This would not explain why causation between the fiduciary's gain and his breach of duty would be irrelevant.

90 The Brothers rely primarily on *In Re Gee* [1948] 1 Ch 284 ("*Re Gee*"). There, some beneficiaries of an estate brought a claim for the benefit of an estate against one of the executors for all remuneration received by him as director or managing director of a company since the death of the testator. As in the present case, the estate in that case held shares in the company. The plaintiffs alleged that the defendant had made use of his position of trust under the testator's will to obtain his remuneration which was accordingly recoverable by the estate (at 293).

91 Harman J found as a fact that no use was made of the trust shares in the appointment of the defendant as director. The other shareholders voted in favour of the resolutions and, even if it had been the defendant's duty to vote against his own interest, the resolutions would still have been passed. As such, the defendant's appointment was not procured by the use of estate's shares (at 296). He therefore dismissed the claim. It is true that he also observed that there was no suggestion that the remuneration was excessive or that the defendant had acted in bad faith (at 296). Nevertheless, the observations he made are wide enough to apply to the facts before us even though there is evidence in the case before us that the Brothers' remuneration was excessive and that they did not act in good faith when they voted in favour of the relevant resolutions. The latter was considered by the Judge at, *inter alia*, [74] of the Judgment and it is not necessary for us to reiterate her reasoning here. It may be that the Brothers are liable to the three companies and to HS for breach of duty or liable to the Estate for oppression but, in our view, these are separate issues.

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92 At 295, Harman J said:

> I conclude from this review [of the authorities] that a trustee who either uses a power vested in him as such to obtain a benefit (as in *In re Macadam* [[1946] Ch 73]) or who (as in *Williams v. Barton* [[1927] 2 Ch 9]) procures his co-trustees to give him, or those associated with him, remunerative employment must account for the benefit obtained. Further, it appears to me that a trustee who has *the power, by the use of trust votes, to* ***control*** *his own appointment* to a remunerative position, and refrains from using them with the result that he is elected to the position of profit, would also be accountable. *On the other hand, it appears not to be the law that every man who becomes a trustee holding as such shares in a limited company is made ipso facto accountable for remuneration received from that company independently of any use by him of the trust holding, whether by voting or refraining from so doing. For instance, A who holds the majority of the shares in a limited company becomes the trustee of the estate of B, a holder of a minority interest;* ***this cannot, I think, disentitle A to use his own shares to procure his appointment as an officer of the company, nor compel him to disgorge the remuneration he so receives, for he cannot be disentitled to the use of his own voting powers, nor could the use of the trust votes in a contrary sense prevent the majority prevailing***. [emphasis added]

93 At 296, he added:

> … If, then, the shares in which the testator's estate was interested had all been used against the resolutions, they would still have been carried, and therefore the appointment was not procured by the use of the trust interest vested in the defendant executors or any of them by the will of the testator in which alone the plaintiffs are interested.

94 Both the Sisters and Brothers relied on the High Court decision in *Cheong Soh Chin* ([24] *supra*),[53] which referred to *Re Gee*.

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[53] Appellants' Case in CA 127/2019 at para 53; Respondents' Case in CA 127/2019 at para 53.

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95 The Sisters relied on [218]–[219] of *Cheong Soh Chin* where the High Court cited the decision of the Court of Appeal in *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 ("*Goh Chan Peng*") at [51] and [54]:

> 218 … In the recent decision of [*Goh Chan Peng*], the Court of Appeal made the following observations as to the operation of the no-profit rule at [51]:
>
> > The no-profit rule obliges a director not to retain any profit which he has *made through the use* of the company's property, information or opportunities to which he has access by virtue of being a director, unless he has the fully informed consent of the company. The rule is a strict one and liability to account arises simply because profits are made … The no-profit rule can be seen as a particular application of the no-conflict rule, that a fiduciary may not obtain profit in connection with his position without the informed consent of the person he is duty-bound to protect …
>
> 219 The Court of Appeal further observed at [54] that the rule captures profits obtained by the fiduciary so long as they were obtained in connection with his position as fiduciary:
>
> > … payments that flout the no-profit rule need not strictly flow to the fiduciary *qua* director. Instead, the profit merely has to be obtained in connection with his position as a director … or by 'reason or in virtue of his fiduciary office' (S*nell's Equity* … at para 7-041).
>
> [emphasis added]

96 We do not think [219] of *Cheong Soh Chin* which cites [54] of *Goh Chan Peng* indicates clearly one way or another whether causation is relevant, although the use of the phrase "by *reason* of" [emphasis added] would seem to be suggestive of a form of causation. Furthermore, at [225] of *Cheong Soh Chin,* the High Court cited Harman J's observation in *Re Gee* (at 295) that a fiduciary is not disentitled from using his majority shares to procure his appointment as an officer of the company, nor will he be compelled to disgorge the remuneration he receives as a result. In *Cheong Soh Chin,* the High Court found

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that a structuring fee was not obtained as a result of the defendants' fiduciary position. This was because the latter were not in a position to award themselves fees by virtue of their position as fiduciaries, and could not have exploited their control over the principals' shareholding to vote themselves the fees. Accordingly, the fees were not obtained as a result of their fiduciary position (at [224]–[226]).

97 Thus, *Cheong Soh Chin* reinforces the proposition that causation is necessary although, on the facts in that case, the court concluded that the fiduciaries had given sufficient disclosure and obtained informed consent (at [227]–[228]).

98 For the above reasons, it is our opinion that the profits sought to be disgorged via an account of profits must be caused by the breaches of fiduciary duty, whether this be that the trustee acted in conflict of interest or was guilty of some other breach. To find otherwise would be for equity to become an unruly horse where any breach by a fiduciary can be used to recover a profit however unconnected the two may be, and even if the profits would have been earned by the fiduciary in the absence of the breach. We do not take a position, in this judgment, as to which party would bear the burden of proof in showing that causation can be established where a claim is made for an account of profits. The parties did not address us on the burden of proof and, for reasons we explain below, it is not necessary to decide the point in the present case. We therefore leave it open for another occasion where we will have the benefit of full submissions on that issue.

Whether causation is established

99 The next question is whether causation has been established. As the question is fact-centric, we elaborate on the facts pertaining to the Estate's shares in the three companies and HS.

100 As we indicated above, the remuneration received by the Brothers (as directors' salaries or fees) were from the three companies, namely, A Trading, B Development and T Investments.[54]

101 Another company is also relevant. This is a family company set up by the Patriarch which we have referred to as "HS". HS is relevant because it holds 34% of the shares in A Trading and 37.92% of the shares in B Development. In turn, A Trading holds 97.56% of the shares in T Investments (see Annex A below).[55]

102 HS is also the owner of the two Shelford Road properties which were used by B1 and B2 respectively as their residences[56] and for which use the Brothers were ordered to pay the difference between the rent B1 and B2 had paid and the annual value of the properties being the benefits-in-kind which they had received (the Judgment at [50]).

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54 ROA Vol 3(A) at p 45 and 53.

55 ACB Vol II at pp 16 and 17.

56 ROA Vol 3(A) at paras 37(a) to 37(e).

103 We set out in the table below the shareholding in the companies held by HS, the Estate and the Brothers in their own names. Further details of the holdings of other shareholders can be found in Annex A.

	A Trading	**B Development**	**T Investments**	**HS**
HS	34%	37.92%	-	-
The Estate	1.67%	2.22%	0.19%	12.5%
B1	0.10%	0.11%	-	29.17%
B2	0.10%	0.11%	0.14%	29.17%
B3	0.10%	0.11%	0.14%	29.17%
Note: For T Investments, the major shareholder is A Trading holding 97.56% of the shares (see Annex A).				

104 As can be seen from the above information, the Sisters do not hold any shares in their own names in any of the three companies or HS. Their interest is as beneficiaries of the Estate and also as beneficiaries of the Mother's estate. Together, they hold 20% of the remainder of the Estate (after the specific legacies to the half-siblings) and they hold 33.33% of the Mother's residuary estate. As between the Siblings, the Brothers effectively hold slightly more than 60% of the Estate and the Sisters hold less than 40% of the Estate, if the Mother's interest in the Estate is divided between them in accordance with her will.

105 It appears that whatever shares the Brothers held in their names would have been transferred or given to them by either the Patriarch or the Mother when they were alive, or by the Mother through her Will. Indeed, as mentioned above, she bequeathed shares in companies to the Brothers under her will. These

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were shares in T Investments, A Trading and HS.[57] The Mother did not give any of her own shares in any of the three companies or HS to the Sisters under her will.

106 As we have indicated above, the Brothers' main argument was that the remuneration which they received as directors of the three companies could not be attributed to any breach of duty on their part as executors, including any breach arising from their use of the Estate's shares. This was because the Estate held a very small minority interest in the three companies and the resolutions would have been carried whether the Estate's shares were used to vote in favour of or against the resolutions. Indeed, even if the Estate's shares were used to vote against the resolutions, the resolutions would still have been carried. The initial impression given by the Brothers was that their own shareholding exceeded that of the Estate but, as can be seen from the information on the shareholdings, they themselves, even as a group of three of them, hold a small percentage of the shares directly. It is HS, the family company, which holds a substantial stake in each of A Trading and B Development, and A Trading which in turn holds 97.56% in T Investments. We do not think it matters whether the Brothers hold a substantive shareholding in each of the three companies directly in their own names or through HS. The more important point is that the Estate holds a very small minority interest in the three companies and is also a minority shareholder in HS.

107 We add that there are other shareholders who together hold more than 50% of the shares in A Trading and B Development (see Annex A). Indeed, the

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[57] ACB Vol II at pp 61 to 64.

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three companies were set up by the Patriarch with members of two other unrelated families. Some of these other shareholders also approved the directors' remuneration and a few also received directors' remuneration over the years after the demise of the Patriarch.

108 It is clear from the facts that the Brothers' use of the Estate's shares made no difference to the outcome. Even if the Estate's shares had been used to vote against the resolutions re-appointing the Brothers as directors and approving their remuneration, the outcome would have been the same. The Judge said that the Estate's shares were not instrumental in procuring the passing of the resolutions which approved the directors' remuneration (see the Judgment at [42]). We agree. The Judge also said that shareholder approval was a foregone conclusion because those voting were receiving the remuneration voted upon (at [43]). We add that it was a foregone conclusion also because HS's stake in each of A Trading and B Development was much larger that the Estate's. We do not have details as to which of the other shareholders attending each of the general meetings voted in favour of the resolutions, although it would seem that some shareholders, who were not directors and not personally invested in the approval of the remuneration, may have voted in favour of the resolutions. In any event, the parties proceeded on the basis that the Estate's shares would not have made a difference. The arguments by the Sisters would otherwise have been presented differently.

109 Although the Brothers' direct shareholding in each of A Trading and B Development was small and HS was the one that held a more substantial shareholding in these two companies, the Brothers were majority shareholders in HS. The Estate held only 12.5% of the shares in HS. The Brothers were entitled to use their shares in HS to remain as directors in HS and thereafter to

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use the votes of HS in the resolutions of A Trading and B Development to remain as directors of these two companies and to vote on the directors' remuneration. They were also entitled to use the votes of A Trading in T Investments to remain as directors in T Investments and vote on the directors' remuneration. Whether they acted in breach of duty *qua* directors of the respective companies or had acted oppressively in the affairs of the companies are separate issues.

110 In other words, the position remains the same whether the Brothers themselves had a more substantial shareholding in the three companies or not. The fact remains that the Brothers' use of the Estate's shares did not make a difference.

111 However, the Judge also concluded at [43] of the Judgment that it was the non-disclosure by the Brothers that allowed continuation of the remuneration for many years. This was the focus of the Sisters' arguments on appeal. It is not entirely clear what non-disclosure the Judge was referring to. She was perhaps referring to non-disclosure of the Estate's shares in the three companies and HS, and non-disclosure of the fact that the Estate's shares were used to vote for the directors' remuneration.

112 The Judge was of the view that had disclosure been made, the Sisters would not have been without remedy if they did not agree with the manner in which the Estate's shares were being used: see the Judgment at [43]. For instance, the Judge observed that the Sisters could have brought a claim in minority oppression, presumably if the disclosure was accompanied by a distribution *in specie* of the Estate's shares to the beneficiaries. We note as an

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aside that the Judge's approach would in fact seem to suggest that she too was of the view that causation was relevant.

113 In so far as the Judge's view suggested that the Sisters would have taken steps to stop the continuation of the directors' remuneration, this is speculative. The Sisters did not give evidence. Furthermore, while there is insufficient evidence for the court to determine what might have happened if disclosure (and distribution) had been made, it is undisputed that the Sisters only sought an account from the Brothers in March 2016 (see [9] above), a few months after the Mother passed away in November 2015. This delay cannot be attributed to their ignorance of the fact that they were beneficiaries of the Estate. After all, they had received distributions from the Estate in 2006 and 2011 (see [6] and [7] above). Moreover, as the Brothers argued, the Sisters had signed formal documents as beneficiaries pertaining to the transfer of the Eastern Mansion unit and the sale of the JB Land.[58] It appears that they chose to refrain from taking any steps until after the Mother had passed away. It is unnecessary for us to say whether this was because they were afraid of being cut off from her will, as the Brothers alleged.

114 In any event, even if the Sisters would have taken steps to stop the remuneration, that is not the same as saying that the Brothers' breaches of non-disclosure and non-distribution had caused the remuneration. The Judge essentially held that, if not for these breaches, the Sisters could have taken steps to put a stop to the remuneration received by the Brothers. We are not persuaded that this suffices to show that the Brothers' remuneration were caused by their

[58] Appellants' Case in CA 127/2019 at para 33.

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non-disclosure and non-distribution. First, this would assume that the Sisters would have been able to establish a good case of, for example, minority oppression. Second, even if the Sisters could establish minority oppression and demand that the remuneration be distributed as dividends instead, the Brothers would still have received a significant portion of the dividends by virtue of the shareholding structure we have outlined above and their own interest as beneficiaries of the Estate. Third, while we note that the timely administration of the Estate and distribution of shares *in specie* to the Sisters would certainly have prevented the Brothers from acting in conflict by voting on the Estate's shares as the voting rights of some shares would then have been exercisable by the Sisters, we have said above that the voting of the Estate's shares did not cause the profits to be earned. We are therefore of the view that the situation envisaged by the Judge does not constitute causation which would entitle the Sisters to claim the remuneration from the Brothers.

115 Therefore, the Sisters' claim for the Brothers to account for the directors' remuneration from the three companies fails.

116 We note that before the Judge, the Sisters had an alternative claim for equitable compensation. However, no such alternative claim was advanced before us and we need not say any more about it.

117 We come now to the liability of the Brothers to pay the benefits-in-kind being the difference between the rent that B1 and B2 respectively paid for staying in two properties at Shelford Road and the annual value of those properties. As mentioned, these properties belong to HS. There was no evidence that these brothers used the Estate's shares in HS to fix the rent which they paid. While HS's financial statements make reference to the rental of properties by

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directors, which were then approved by the directors and the annual general meeting, it would seem that no specific resolution was tabled to approve the rentals.[59] It appears that B1 and B2 simply paid whatever rent that they thought was appropriate.

118 The Sisters' position in respect of these benefits-in-kind is no better than their position *vis-a-vis* the directors' remuneration. As we pointed out at the hearing of the appeal, issues such as rental of the properties owned by a company would not, in most cases, be approved by the shareholders. Mr Jeyaretnam asserted that the Sisters would have known of the properties, and been entitled to ask what was happening with them. This is plainly insufficient. It follows that the Sisters' claim for the Brothers to account for the benefits-in-kind also fails.

$1m sum allegedly owing to the Mother's estate

119 After the Brothers sold the JB Land in 2011, they distributed $1m to the Siblings. As mentioned, the $1m comprised the proceeds from the sale of the JB Land and some dividends from companies that had been accumulated in the Estate's account. The Mother did not receive any portion of this $1m before she passed away on 7 November 2015.

120 The Brothers' position was that as the Mother was entitled under P's Will to 50% of his residuary estate, she was entitled to receive $1m as her 50% share since the Siblings had received $1m as their 50% share. The Brothers contended that one of the Sisters had refused to sign the relevant transfer

[59] NEs, 8 February 2019, page 37, lines 12 to 22.

documents for the JB Land unless the Mother's share of the sale proceeds was divided among the five of them and the Mother had agreed to defer receipt of her share: the Judgment at [54].

121 The Sisters' position was that the Mother had waived her entitlement to her 50% share: see the Judgment at [58].[60]

122 We agree with the Judge that the sum of $1m is not owing to the Mother's estate and that the $1m debt said to be owing by the Estate to the Mother should be falsified.

123 First, on the Brothers' version, one of the Sisters was not willing to sign the relevant documents unless the Mother's share of the sale proceeds was distributed to the Siblings. Since the documents were signed by all the beneficiaries of the Estate, this would mean that the Sisters were led to believe that the Mother had waived her entitlement as demanded. There would otherwise have been no substantive benefit to the Sisters if the Mother had agreed only to defer receiving her share. Indeed, there was no suggestion that the Sisters were informed that the Mother had only agreed to defer payment of her share.[61] This meant that the only basis for the Brothers' assertion was their own evidence.

124 Second, there was no document to corroborate the assertion that the Mother was to be paid the $1m later. The accounts of the Estate kept by a clerk

60 Appellants' Case in CA 127/2019 at paras 78 and 79; Respondents' Case in CA 127/2019 at paras 79 to 82.

61 Respondents' Case in CA 127/2019 at para 82.

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at HS did not reflect that this amount was to be paid to the Mother at a later date. The Brothers argued that the initial accounts produced was not a balance sheet showing assets and liabilities, and therefore that the absence of such an entry does not mean that the S$1m was not owing to the Mother.[62] However, it appears that a debt of $66,000 owing to the Mother for her payment of estate duty on behalf of the Estate was in fact recorded.[63] Yet there was no mention of any shortfall in distribution to her. The question of the $1m debt would seem to be an afterthought that only arose after the commencement of action by the Sisters.

$5,500.65 costs and legal fees in OS 1241

125 The Judge found that a sum of $5,500.65 being legal costs paid to the plaintiffs in OS 1241 (the action commenced by the half-siblings) and the Brother's legal fees for that action, should not have been charged to the Estate: the Judgment at [68].

126 While the Brothers appealed against the Judge's decision to falsify the legal expenses incurred, this was not the focus of their appeal before us, in which the emphasis was on the account of profits ordered. In any event, we agree with the Judge for the reasons she gave that this sum should be falsified. OS 1241 was filed because the Brothers had not informed the half-siblings as to what steps had been taken to realise their interest in the Estate or provided the Estate's accounts (see [4] above). It follows from this that these expenses were not reasonably incurred.

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62 Appellants' Case in CA 127/2019 at para 82.

63 ACB Vol II at pp 71 to 73.

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Removal of the Brothers as Executors

127 The Judge found that the Brothers had failed to provide any account to the Sisters for many years until the Sisters began to ask for accounts in March 2016 (the Supp GD at [5]). The Brothers also failed to distribute the assets except for the distributions already mentioned. In her view, the taking of accounts established further breaches pertaining to, *inter alia*, the directors' remuneration and the benefits-in-kind.

128 While we have found that the Sisters have failed to establish causation in respect of the directors' remuneration and the benefits-in-kind, this does not mean that we approve of the Brothers' conduct.

129 In addition to their intentional failure to inform and to distribute, the Brothers' attempt to belatedly include a claim for the Mother's estate for the sum of $1m and their inclusion of the $5,500.65 as an expense of the Estate were particularly egregious since the latter sum was incurred because of their omission to provide reasonable information to the half-siblings of their entitlement and to pay them accordingly. Their conduct suggested a want of probity even if the latter sum is a small one.

130 Furthermore, as it would seem that there may have been breaches of the duties the Brothers owed *qua* directors of the three companies and HS, there is also a possibility that there may be valid claims that can be brought on behalf of the Estate, as a shareholder, against the Brothers in their capacity as directors. This is a further consequence of the Brothers' improper administration of the Estate and their disregard for the Sisters' interests, and an additional reason in favour of the appointment of replacement executors. Replacement executors

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should be appointed to consider these courses of action although we hope that good sense will prevail and further legal action will be avoided.

131 We agree with the Judge that the Brothers ought to be removed and replaced as executors of the Estate.

Interest

132 As for the Sisters' appeal for interest to be imposed before the date of the Writ, this carries less significance as we have held that the Brothers are not liable to pay the directors' remuneration and the benefits-in-kind to the Estate. Only their reimbursement of the legal costs and fees in OS 1241 remain.

133 In any event, we agree with the Judge's reasons for not allowing interest before the Writ. The Sisters had delayed making inquiries and taking action as we have explained above.

Conclusion

134 In the circumstances, we allow the Brothers' appeal in CA 127 in respect of the directors' remuneration and benefits-in-kind and set aside that part of the Main Order which relates to these items. The rest of the appeal in CA 127 is dismissed.

135 The Sisters' appeal in CA 172 is dismissed.

Costs

136 Parties are to file and serve written submissions on the costs of these appeals as well as costs below, limited to ten pages, within 14 days from the date of this decision.

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Judith Prakash	Steven Chong	Woo Bih Li
Judge of Appeal	Judge of Appeal	Judge

Narayanan Sreenivasan SC and Lim Shu Fen (K&L Gates Straits Law LLC) for the appellants in CA 127 and the first to third respondents in CA 172;
Philip Antony Jeyaretnam SC, Chua Weilin and Lee Jie Min Nicolette (Dentons Rodyk & Davidson LLP) for the first and second respondents in CA 127 and the appellants in CA 172;
Deborah Evaline Barker SC and Tan Sheng An Jonathan (Withers KhattarWong LLP) for the third to fifth respondents in CA 127 and the fourth to sixth respondents in CA 172.

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Annex A

A Trading		
Shareholder	**Number of shares**	**Total shareholding**
HS	7,140	34.00%
The Estate	350	1.67%
The Mother	950	4.52%
B1	20	0.10%
B2	20	0.10%
B3	20	0.10%
HS and the Family of the Patriarch including the Mother:		40.49%
NHH (Singapore) Pte Ltd	3,100	14.76%
Tjin LM	2,800	13.33%
Lie KS	50	0.24%
Estate of Tjia HN	5,500	26.19%
Tjia SJ	1,050	5.00%
Total:	21,000	100.00%
B Development		
HS	341,300	37.92%
The Estate	20,000	2.22%
B1	1,000	0.11%

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Shareholder	Number of shares	Total shareholding
B2	1,000	0.11%
B3	1,000	0.11%
HS and the Family of the Patriarch: 40.47%		
NHH (Singapore) Pte Ltd	253,000	28.11%
Lie KS	2,000	0.22%
Estate of Tjia HN	235,700	26.19%
Tjia SJ	45,000	5.00%
Total:	900,000	100.00%
T Investments		
The Estate	1,400	0.19%
The Mother	4,000	0.54%
B2	1,050	0.14%
B3	1,050	0.14%
The Family of the Patriarch including the Mother: 1.01%		
NHH (Singapore) Pte Ltd	5,200	0.70%
A Trading	720,000	97.56%
Estate of Tjia HN	4,200	0.57%
Lie KS	50	0.0068%
Tjia SJ	1,050	0.14%
Total:	738,000	100.00%

HS		
Shareholder	**Number of shares**	**Total shareholding**
The Estate	25,000	12.5%
B1	58,333	29.17%
B2	58,334	29.17%
B3	58,333	29.17%
Total:	200,000	100.00%