IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 10

Suit No 3 of 2018

Between

Baker, Michael A (executor of the estate of Chantal Burnison, deceased)

… *Plaintiff*

And

(1) BCS Business Consulting Services Pte Ltd
(2) Marcus Weber
(3) Renslade Holdings Limited

… *Defendants*

JUDGMENT

[Trusts] —— [Express trust] — [Formation]
[Trusts] —— [Resulting trusts] —— [Formation]
[Contract] —— [Illegality and public policy] —— [Illegality under international and foreign law]

TABLE OF CONTENTS

Baker, Michael A (executor of the estate of Chantal Burnison, deceased)
v
BCS Business Consulting Services Pte Ltd and others

[2020] SGHC(I) 10

Singapore International Commercial Court — Suit No 3 of 2018
Quentin Loh J; Carolyn Berger IJ; Dominique Hascher IJ
11–16 November 2019; 3, 6 February 2020

29 April 2020 Judgment reserved.

Quentin Loh J, Carolyn Berger IJ and Dominique Hascher IJ:

The parties

1 The plaintiff, Michael Baker ("Baker"), is the executor of the estate of Chantal Burnison ("Chantal" or "the Estate", as the case may be), who succumbed to cancer on 2 October 2016 in Los Angeles. Baker is a practising attorney in the State of California and was a friend and confidante of Chantal. Chantal, who divorced her husband in 1993, is survived by two daughters, Heika Burnison ("Heika") born in 1987 and Birka Burnison ("Birka") born in 1990.

2 The 2nd defendant, Marcus Weber ("Weber"), is a Swiss national who operated out of Zurich until 2002 when he obtained a permit to work in Singapore. Weber became a permanent resident of Singapore in 2003.

3 The 1st defendant, BCS Business Consulting Services Pte Ltd ("BCS"),

is a company incorporated in Singapore on 31 March 1999.[1] It was incorporated as BCS Business Commercial Services Pte Ltd with a change of name to its present name on 26 July 2002. Weber is a director and the sole shareholder of BCS. The 3rd defendant, Renslade Holdings Limited ("Renslade (HK)") is a company incorporated in Hong Kong on 5 November 2007 and Weber is the sole shareholder of Renslade (HK). It is not disputed that Weber in effect owns and controls BCS and Renslade (HK). A reference to "the Defendants" includes a reference to Weber, BCS and/or Renslade (HK) as the context so requires.

4 Baker, as executor of Chantal's estate, sues the Defendants for breach of fiduciary duties as trustees under an oral trust or oral agreement to hold and manage assets for Chantal and for breach of a loan agreement of Swiss Francs ("CHF") 9.5 million with 3% p.a. interest ("the Loan Agreement"). Renslade (HK) is sued for dishonestly assisting BCS and Weber in their breach of fiduciary duties. The Defendants are also sued for conspiring and acting together with the intention of injuring Chantal and/or the Estate.

The background

5 The following background facts are not really in dispute. Insofar as they are, they constitute our findings of fact. Chantal co-invented a compound called Ethocyn in 1980. Her co-inventor, one Walter J. Kasha ("Walter"), does not feature in the evidence but nothing turns on that. The Ethocyn compound had to be manufactured or synthesized in a laboratory. It was a skin product that was said to make the skin look younger and better toned. There was a finished product sold over the counter or through other channels like television and

[1] 1 Agreed Bundle ("AB") pp 257–258.

telemarketing. The Ethocyn compound was also sold to cosmetic manufacturers who would incorporate this compound into their products.

6 Chantal was a gifted individual. As a chemist and scientist,[2] she co-invented the Ethocyn compound and co-authored a number of articles in relation to compounds and products in relation to her areas of interest and work. She was also a Member of the California State Bar from 1981 with a juris doctor degree (1981, the University of West Los Angeles) and was admitted to practice in the Supreme Court of California and the Central District Court. She was a partner in a law firm, Allison Williamson & Burnison (1981-1983) and General Corporate Counsel to a public pesticide company.[3]

7 Sometime prior to 21 May 1982, Chantal and Walter assigned their rights to the inventions and patents of Ethocyn ("the Ethocyn Rights") to CBD Inc, a Californian company, which in turn licensed the Ethocyn Rights to CBD Pharmaceutical Corporation (which was incorporated in 1979 as Innovations International Inc and changed its name to Chantal Pharmaceutical Corporation in 1982).[4] On 21 May 1982, CBD Pharmaceutical Corporation licensed those rights to Chantal Pharmaceutical Corporation ("Chantal Pharmaceutical"). In March 1994, Chantal Pharmaceutical licensed the Ethocyn Rights to Chantal Skin Care Corporation ("CSC").[5] Chantal Pharmaceutical and CSC will be collectively referred to as "the Chantal Companies" in this judgment. All the aforementioned companies are Californian corporations. For the purposes of

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2 1 AB p 269.

3 1 AB pp 527–528.

4 1 AB p 269.

5 Baker's affidavit of evidence-in-chief ("AEIC") at paras 16–18.

this judgment, we find, and it is not really in dispute, that Chantal was resident in California, more particularly, in or in the vicinity of Los Angeles. However, her business encompassed at least the USA, Asia and Europe.

8 On 6 May 1996, a class action was commenced against Chantal Pharmaceutical and Chantal by purchasers of the common stock of Chantal Pharmaceutical for allegedly issuing false statements on the financial performance of Chantal Pharmaceutical by overstating its revenues, which operated to artificially inflate the price of Chantal's common stock. It was alleged that Chantal sold at least 300,000 of her stock for at least US$6.3 million. It is alleged that, because of these false statements, the stock rose from "$6-9/16 on July 10, 1995 to $28-1/8 on December 29, 1995" but when certain reports concerning its financial condition surfaced, the stock fell from "$19-1/8 per share to $7-5/16 per share on January 8, 1996 on a huge volume of 7.7 million shares".[6] The class action was brought pursuant to the Securities Exchange Act of 1934 (15 U.S.C. §§78j(b) and 78t(a)) and rules promulgated by the Securities and Exchange Commission (17 C.F.R. §240.10b-5).[7]

9 That class action was still pending when an involuntary Chapter 11 bankruptcy petition was filed on 17 February 1999 against Chantal Pharmaceutical. Chantal Pharmaceutical's subsidiary, CSC, then filed for voluntary insolvency on 12 March 1999. On the same day, Chantal Pharmaceutical filed a consent to enter an order for relief and a voluntary petition in the Chapter 11 case. The order for relief was entered on 15 March 1999 and the case was thereby converted to a voluntary debtor in possession

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6 1 AB pp 160–162.

7 1 AB p 162.

Chapter 11 case.[8]

10 A Creditors' Committee was appointed by the United States Trustee for the Chantal Companies. The Creditors' Committee retained the Kriegsman Group and an investment banker and the latter also engaged the services of one Stan Teeple ("Teeple"), a work-out consultant, in locating a potential buyer for the debtors' rights and assets.[9] It is not in dispute that a prospectus was prepared and sent out to about 20 prospective buyers. A draft of this prospectus was sent to Chantal and her lawyer on 19 June 1999[10] which was said to be prepared by one Jerry Seelig (a Managing Director with the Kriegsman Group[11]) based on an earlier version by Teeple. There is evidence, marked "Draft", of a reply from Mr Esterkin, Chantal's lawyer, noting, *inter alia*, that Chantal had no control over the selection of the Kriegsman Group or its activities or its gathering of information for the brochure and that she has no control over the parties to whom the brochure would be sent.[12] That letter also corrected inaccuracies and distanced Chantal from the projections made in the brochure. There may have been subsequent discussions between the parties on the terms and conditions and the sale of the Chantal Companies' assets before the prospectus was sent out to prospective buyers identified and chosen by the Kriegsman Group and/or Teeple as parties likely to have an interest to purchase the Ethocyn Rights and assets from the Chantal Companies.

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8 1 AB pp 298 and 369.

9 1 AB p 370; Baker's AEIC at para 30.

10 1 AB p 264.

11 1 AB p 266.

12 1 AB pp 290–294.

11 There were no bidders for the purchase of the Chantal Companies' assets save for a New Zealand corporation, Renslade Holdings Limited ("Renslade (NZ)"). An asset purchase agreement dated 22 September 1999 ("APA") was, subject to approval by the Bankruptcy Court, entered into between the Chantal Companies and Renslade (NZ).[13] A Joint Motion by the Chantal Companies and the Creditors' Committee was filed to seek approval of the sale of the Ethocyn Rights and assets, together with certain conditions, to Renslade (NZ).[14] At the hearing of the Joint Motion on 19 October 1999, the Bankruptcy Court granted the order, *inter alia*, approving the sale as there were no over bidders.

12 The material terms of the APA were as follows:

(a) CBD Pharmaceutical transferred its patent rights (which expired in 2004) to the Chantal Companies; this was effected through a Patent and Licence Transfer Agreement with the Chantal Companies on 20 October 1999;[15]

(b) the Chantal Companies' assets were its intangible intellectual property rights, including the patent rights, licences, trademarks, customer lists and rights to the patented compounds that included Ethocyn and some miscellaneous inventory; these were sold and transferred to Renslade (NZ) pursuant to the order of the Bankruptcy Court for the sum of US$325,000 which was broken down into a payment of US$75,000 for the assets of the Chantal Companies and

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13 1 AB p 334.

14 1 AB pp 359–405.

15 2 AB pp 596–602.

US$250,000 as an advance against the on-going royalty payments based on revenues from Renslade (NZ)'s future sales (calculated as 2% of the annual gross revenues as defined in the APA up to US$5 million; 4% of annual gross revenues in excess of US$5 million and less than US$10 million and 5% of annual gross revenues in excess of US$10 million);

(c) the transfer of the patent rights and licences to Renslade (NZ) was free and clear of all liens, encumbrances and claims;

(d) certain releases were given by the Chantal Companies for possible claims against CBD Pharmaceuticals, their agents, employees, attorneys, successors and assigns including Chantal; and

(e) as a condition of the sale, Chantal entered into a consultancy agreement with Renslade (NZ) to serve as Chairman and Chief Executive Officer on agreed terms which included a payment of US$100,000 a year for business transition services and US$50,000 a year for similar services to Renslade (NZ)'s US subsidiary, E Cosmetics ("the Consultancy Agreement").

13 On 23 May 2000, Renslade Singapore Pte Ltd (subsequently re-named Renslade Holdings Pte Ltd ("Renslade (S)")) was incorporated. The Ethocyn Rights were subsequently transferred from Renslade (NZ) to Renslade (S). When exactly this occurred is not clear. Baker deposes that it was probably sometime in 2002, between BCS's name change on 26 July 2002 and Chantal's email to Weber of 20 September 2002 when she expressed her preference for

BCS to be the distributor of Nu Skin products.[16] There is an assignment of the Ethocyn Rights dated 24 May 2000 from Renslade (NZ) to Renslade (S), where Weber signed on behalf of Renslade (S).[17] Evidence emerged that this decision was probably made in September 2001 but it was decided to backdate this assignment to 24 May 2000.[18]

14 On or around 22 May 2001, the Class Action Suit against Chantal and the Chantal Companies was brought to an end with the filing of a Stipulation of Settlement.[19]

15 On 1 April 2002, the Ethocyn Rights were transferred from Renslade (S) to BCS.[20]

16 In 2002, Renslade (S) bought out the Chantal Companies' rights to the Ethocyn Royalty ("the Royalty Buyout") for US$135,000. This Royalty Buyout, which was supported by the Creditors' Committee, was sanctioned by the US Bankruptcy Court on 23 July 2002.[21]

17 As noted above, Renslade (HK) was incorporated in Hong Kong on 5 November 2007. In or around 2007, money was transferred from BCS to Renslade (HK). There were probably other sums so transferred as Renslade

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16 Baker's AEIC at paras 222–231; 10 AB pp 4998–5000.

17 2 AB p 877.

18 Notes of Evidence (13 November 2019) at p 79 line 15 to p 80 line 6

19 3 AB p 1069.

20 Statement of Claim (Amendment No. 3) dated 5 July 2019 ("Statement of Claim (Amendment No. 3)") at para 20; Baker's AEIC at para 227.

21 3 AB pp 1283–1286.

(HK) was used as a repository of the profits earned from the sale of Ethocyn products.

18 While the facts set out in [13]–[17] are not really in dispute, the surrounding circumstances, the reasons behind those facts, and the conclusions to be drawn from them are disputed.

19 Baker, as executor of the Estate, alleges that Chantal provided the monies for the purchase of the Ethocyn Rights and the Royalty Buyout and set up Renslade (NZ) to hold these assets. All monies earned over the years from these Ethocyn Rights belonged to Chantal. These were eventually transferred to Renslade (S), a company incorporated in Singapore by Weber. Weber alleges that he was offered and he purchased the Ethocyn Rights from Renslade (NZ) as a personal investment opportunity and the Ethocyn Rights and all monies earned from them belong to him and his companies.

20 This is therefore an appropriate juncture to set out the parties' pleaded cases.

The parties' pleaded cases

The plaintiff's case

21 When the Chantal Companies filed for bankruptcy, Chantal wanted to purchase the Ethocyn Rights but she faced opposition. Chantal therefore instructed a lawyer, Shane Weir ("Weir"), to choose and use a company to purchase those rights. Weir chose Renslade (NZ). Renslade (NZ) negotiated with the Chantal Companies and the Creditors' Committee and reached an agreement as set out in the APA, the essential terms of which are set out above (at [12]). There were no other entities willing to purchase those rights despite

the efforts of the Creditors' Committee, their merchant bankers, the Kriegsman Group and the experienced work-out specialist, Teeple. The Bankruptcy Court approved the APA on 19 October 1999. On 20 October 1999, CBD Inc and CBD Pharmaceutical entered into the Patent and Licence Transfer Agreement with the Chantal Companies to transfer the Ethocyn Rights to the Chantal Companies, and the Ethocyn Rights were duly transferred to the Chantal Companies. On or around 20 October 1999, Renslade (NZ) acquired the Ethocyn Rights for US$325,000 from the Chantal Companies and this sum was provided by Chantal. Renslade (NZ) held the Ethocyn Rights on trust for Chantal and Weir was responsible for managing the trust.[22]

22 In or around November 1999, Chantal entered into an agreement with Weber, pursuant to which Weber would acquire the Ethocyn Rights from Renslade (NZ) and hold any income or proceeds generated from the Ethocyn Rights on trust for Chantal ("the Trust", and we shall use the term "the Trust Agreement" as set out in the parties' Agreed Issues, see [63] below) (the "Oral Agreement") on the following terms:[23]

(a) Renslade (NZ) would transfer the Ethocyn Rights to a company incorporated in Singapore ("the Acquiring Company") and owned or controlled by Weber;

(b) the Acquiring Company would not have to provide any monetary consideration for its receipt of the Ethocyn Rights;

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22 Statement of Claim (Amendment No. 3) at paras 12–13.

23 Statement of Claim (Amendment No. 3) at para 14.

(c) the Acquiring Company and any company that acquired the Ethocyn Rights or any income or proceeds generated therein, would hold it on trust for Chantal, save for 5% of the said income or proceeds which would be paid to Weber ("the Trust Assets");

(d) the Trust Assets would be ultimately held by a Singapore entity which will be a trustee; and

(e) Weber would be responsible for managing and overseeing the Trust.

23 By way of an assignment dated 24 May 2000, Chantal transferred the Ethocyn Rights from Renslade (NZ) to Renslade (S), a company incorporated in Singapore on or about 23 May 2000. Weber was the sole shareholder of Renslade (S). By way of a Deed dated 1 April 2002, Weber transferred the Ethocyn Rights from Renslade (S) to BCS ("the Deed of Assignment"). BCS became the trustee of the express trust over the Ethocyn Rights and any income or proceeds generated from them and of which Chantal was the sole beneficiary. On August 2002, Renslade (NZ) or Renslade (S) paid US$135,000 to the Chantal Companies to buy out the Chantal Companies' rights to the Ethocyn Royalty. This sum was provided by Chantal.[24]

24 In the alternative, on the above facts, a resulting trust was created over the Ethocyn Rights in favour of Chantal as the sole beneficiary. Chantal provided the sum of around US$325,000 for Renslade (NZ) to acquire the Ethocyn Rights from the Chantal Companies and a sum of US$135,000 for

[24] Statement of Claim (Amendment No. 3) at paras 19–20A.

Renslade (NZ) or Renslade (S) to buy out the Chantal Companies' rights to the royalties of the Ethocyn Rights. When Renslade (NZ) transferred the Ethocyn Rights to Renslade (S), Renslade (S) did not give any monetary consideration for the transfer. Chantal did not intend to give the Ethocyn Rights to Renslade (NZ) or Renslade (S) or to any other company to which the Ethocyn Rights were transferred. Instead, Chantal and Weber agreed to make Renslade (S) or any other company which held the Ethocyn Rights the legal owner so as to keep Chantal's interest in the Ethocyn Rights confidential.[25]

25 On 26 June 2003, BCS entered into a supply and distribution agreement ("the Nu Skin SDA") with Nu Skin International Inc ("Nu Skin"). Chantal negotiated and executed the Nu Skin SDA on behalf of BCS. Under the Nu Skin SDA, BCS agreed to supply Ethocyn to Nu Skin for its usage and distribution. In return, Nu Skin would make direct payments to BCS. From around 2007 to 2017, Nu Skin made payments under the Nu Skin SDA to BCS. 95% of the monies paid by Nu Skin to BCS were held on trust for Chantal ("the Trust Monies"), while the remaining 5% were retained by BCS or Weber as commission. In or around 2016, the Defendants started retaining 10% of the monies paid by Nu Skin to BCS without Chantal's knowledge and/or consent.[26]

26 In or around 2007, Weber informed Chantal that the Trust Monies would be transferred from BCS to Renslade (HK). Renslade (HK) acted as BCS's and Weber's agent in relation to the Trust Monies.[27]

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25 Statement of Claim (Amendment No. 3) at para 21.

26 Statement of Claim (Amendment No. 3) at paras 22–24.

27 Statement of Claim (Amendment No. 3) at para 25.

27 From time to time, upon Chantal's request, Weber would transfer the Trust Monies from BCS and/or Renslade (HK) to Chantal, entities controlled by her and/or entities involved in the production and/or marketing of the Ethocyn products or protection of the Ethocyn Rights. To date, BCS and/or Renslade (HK) are still in possession and/or control of all or some of the Trust Monies and BCS is still in possession of the Trust Assets.[28]

28 In or around June 2014, Weber asked and Chantal agreed to lend Weber CHF6 million from the Trust for Weber's investment in a ski resort. Weber agreed to pay 3% interest p.a. on the borrowed sum. In 2015, Chantal discovered that Weber had in fact taken CHF9.5 million from the Trust instead.[29]

29 In September 2015, Chantal was diagnosed with colon cancer. From May 2016 until her death in October 2016, Chantal repeatedly sought an account of the Trust Assets and the Trust Monies from the Defendants. After Chantal's passing in October 2016, Baker on behalf of the Estate repeatedly sought an account and return of the Trust Assets and Trust Monies from the Defendants but to no avail.[30]

30 Heika also attempted to seek an account of the Trust Assets from the Defendants.[31]

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28 Statement of Claim (Amendment No. 3) at paras 26–27.

29 Statement of Claim (Amendment No. 3) at para 28.

30 Statement of Claim (Amendment No. 3) at paras 29–30.

31 Statement of Claim (Amendment No. 3) at para 31.

(a) In July 2016, Heika attended a meeting in Zurich with Weber and Urs Wehinger ("Wehinger"), a Swiss attorney ("the July 2016 Meeting").

(b) At the July 2016 Meeting, BCS and/or Weber provided a summary of the Trust Monies owing to Chantal's Estate. The said summary showed that at least US$41,823,541.14 is owing to Chantal. Heika discreetly took a photograph of the said summary. Heika was also shown a note recording the loan of CHF9.5 million; the bond was signed by Weber and stated that CHF9.5 million was payable with interest of 3% in or around June 2017.

(c) At a meeting on 12 December 2016 ("the December 2016 Meting"), attended by Heika, Wayne Johnson ("Johnson", the attorney for Chantal's Estate), Weber, Wehinger, and Ralf Wojtek ("Wojtek", an attorney acting for BCS), the various means by which the Trust Monies and Trust Assets would be returned and/or transferred to Chantal's Estate were discussed. During the December 2016 Meeting, Weber and Wehinger also represented to Heika and Johnson that Weber had established a foundation and contributed the Trust Assets to the foundation, with Heika and Birka as the beneficiaries. However, no such foundation had been established.

31 By way of two letters dated 3 May 2017 and 12 May 2017 from Baker to Johnson, and Johnson to Wojtek, Baker sought an account of the Trust Monies and Trust Assets by 15 May 2017.[32] The Defendants failed to do so.

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[32] 10 AB pp 4891–4893.

32 Baker, on behalf of the Estate, makes the following claims against the Defendants:[33]

(a) BCS breached its fiduciary duty to Chantal or Baker as trustee of the Trust by failing to provide an account of the Trust and the Trust Monies; and failing to return the Trust Assets and Trust Monies to the Estate;

(b) Weber breached his fiduciary duty to Chantal and/or Baker as manager of the Trust by failing to provide an account of the Trust and Trust Monies to Chantal and Baker; failing to procure BCS and/or Renslade (HK) to return the Trust Assets and the Trust Monies to the Estate; and failing to return the CHF9.5 million which Weber took from the Trust in or around 2014 along with 3% interest;

(c) Weber breached the Loan Agreement by failing to return the CHF9.5 million with 3% interest;

(d) Renslade (HK) dishonestly assisted BCS and Weber in their breaches of fiduciary duty; and

(e) the Defendants conspired and/or acted together with the intention of injuring Chantal and/or Baker.

33 Baker, on behalf of the Estate, claims and/or seeks the following remedies:[34]

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33 Statement of Claim (Amendment No. 3) at paras 35–39.

34 Statement of Claim (Amendment No. 3) at para 39.

(a) a declaration that BCS and/or Renslade (HK) hold the Trust Assets and/or Trust Monies on trust for the Estate of Chantal;

(b) an order that the Defendants provide, within 14 days, a detailed account of all transactions that have taken place in respect of the Trust Assets and/or Trust Monies;

(c) an order that the Defendants transfer, within 14 days, the Trust Assets and/or Trust Monies, free from encumbrances, to the Estate of Chantal;

(d) an order for all necessary accounts and inquiries to enable the Estate to trace and recover the Trust Assets and the Trust Monies;

(e) judgment against Weber for CHF9.5 million together with 3% interest; and

(f) interest and costs.

The Defendants' defences

34 BCS and Weber deny there was any kind of agreement between Chantal and Weber for Weber to acquire and hold the Ethocyn Rights and any income or proceeds generated on trust for Chantal.

35 The Defendants aver that Chantal wished to locate a purchaser for the Ethocyn Rights and assets held by Renslade (NZ) and Chantal was introduced to Weber by a mutual friend. Weber saw the sale of the Ethocyn Rights as a good business opportunity and agreed to purchase the same from Renslade (NZ) for his own benefit. Renslade (S), a company controlled by Weber, acquired the assets from Renslade (NZ) for US$325,000 which was paid for by BCS with

monies belonging to BCS and/or Weber and this sum was not provided for by Chantal.[35]

36 BCS and Weber acquired the Ethocyn Rights using Renslade (S) because:[36]

(a) in 2000, Weber was carrying on business in Singapore through BCS and he wanted to administer all his businesses from Singapore; and

(b) Weber did not want to transfer the Ethocyn Rights to BCS as BCS already had other business streams and Weber did not want to conflate those with the new business concerning the Ethocyn Rights.

37 Nu Skin did not want to contract with Renslade (S) since Renslade (S) was a shell company. Hence, the Ethocyn Rights were transferred to BCS for BCS to deal with Nu Skin.[37]

38 From 25 May 2000, until her death, Chantal worked for Renslade (S) as a consultant and assisted Renslade (S) and BCS with the exploitation of the Ethocyn Rights.[38]

39 Pursuant to the Nu Skin SDA, Nu Skin would pay BCS for products made with Ethocyn.[39]

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35 Defence (Amendment No. 4) dated 8 July 2019 ("Defence (Amendment No. 4)") at paras 15 and 18C.

36 Defence (Amendment No. 4) at para 20A.

37 Defence (Amendment No. 4) at para 24A.

38 Defence (Amendment No. 4) at para 26A.

39 Defence (Amendment No. 4) at para 28B.1.

40 BCS paid E. Cosmetics corporation and, subsequently, BCS Pharma Corporation to formulate and package Ethocyn products for Nu Skin. As BCS's consultant, Chantal agreed to procure the incorporation of BCS Pharma Corporation as a subsidiary of BCS so that BCS could maintain control over the production of the Ethocyn products. BCS and/or Renslade (HK) paid for the costs of producing the Ethocyn products and other expenses from the sums Nu Skin paid to BCS in advance. The net sums constituted profits which belonged to the Defendants.[40]

41 Renslade (HK) claims that it has no knowledge or involvement in the alleged Trust never held any monies on trust for Chantal; and did not act as the agent of BCS and Weber in relation to the alleged Trust or Trust Monies.[41]

42 For tax reasons, the profits generated from the Ethocyn products were transferred to Renslade (HK) in Hong Kong and only 5% (from 2007 to 2014) and 10% (from 2016) of the proceeds of sale of the Ethocyn products was retained by BCS in Singapore. The only monies transferred to Chantal or entities controlled by her was for operating and productions costs. Chantal claimed costs on behalf of E. Cosmetics corporation and/or BCS Pharma Corporation which were higher than the actual costs incurred. BCS paid BCS Pharma Corporation US$18,377,465.23 in excess of the actual costs, which Chantal kept as profit.[42]

43 On the facts pleaded by the Estate, the alleged Trust was governed by

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40 Defence (Amendment No. 4) at paras 28B.3–28B.5.

41 Defence (Amendment No. 4) at para 29B.

42 Defence (Amendment No. 4) at paras 29C–29D.

California law and no valid trust could have been created under California law:[43]

(a) there was no intention to create a trust and the alleged Trust was made orally with no documentation confirming or evidencing Chantal's intention to create a trust; and

(b) there is no documentary evidence as to the designation of identity of any beneficiary of the alleged Trust.

44 The alleged Trust or alleged Oral Agreement would be for an illegal purpose:[44]

(a) the Ethocyn Rights were purchased by Renslade (NZ) pursuant to the US Bankruptcy proceedings in which, *inter alia*, Chantal's orchestration of the purchase of the Ethocyn Rights was not disclosed;

(b) Chantal stated in her declaration, in support of the sale of the Ethocyn Rights to Renslade (NZ), under penalty of perjury, that she "did not ask Renslade (NZ) to require that the patents be transferred as part of the [Chantal Companies'] sale of their rights and assets";

(c) Chantal's declaration exhibited a proposed order authorising and approving the sale of the Chantal Companies' assets, wherein she declared that "… [Renslade (NZ)] has an arm's length relationship with the [Chantal Companies] … and … [Renslade (NZ)] is purchasing the [a]ssets in good faith"; and

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43 Defence (Amendment No. 4) at paras 13C–13D.1.

44 Defence (Amendment No. 4) at para 13D.2.

(d) on the basis of Chantal's declaration, the US Bankruptcy Court found that:

(i) Renslade (NZ) had an arm's length relationship with the Chantal Companies and that all terms were fully disclosed; and

(ii) neither Renslade (NZ) nor the Chantal Companies engaged in conduct that would cause the sale of the Ethocyn Rights to be avoided under US Bankruptcy Law.

45 Chantal's arrangement for Renslade (NZ) to purchase the Ethocyn Rights is illegal under ss 152 and 157 of Title 18 of the United States Code.[45]

46 Furthermore, no valid trust can be created where the settlor and the beneficiary are one and the same person. Even if there is a valid Trust, the Trust must be accompanied by the issuance of a separate Taxpayer Identification Number under US estate tax law, failing which, the Trust Assets cannot be claimed by the estate of the settlor.[46]

47 In addition, the alleged Oral Agreement and/or alleged Trust would be illegal, void or unenforceable as being contrary to the public policy of Singapore. On the Estate's case, Chantal and Weber would be carrying out a fraudulent transaction under US Bankruptcy Law and/or fraud on the creditors of the Chantal Companies in the US Bankruptcy Court proceedings.[47]

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45 Defence (Amendment No. 4) at para 13D.2.3.

46 Defence (Amendment No. 4) at para 13E.

47 Defence (Amendment No. 4) at para 17B.

48 On 6 May 1996, a class action suit was commenced by purchasers of common stock of Chantal Pharmaceutical against Chantal and Chantal Pharmaceutical for securities fraud. When the Ethocyn Rights were being sold to Renslade (NZ), the class action suit was still ongoing.

49 On 21 May 2001, counsel for the class action suit proposed a settlement of the same. Counsel had concluded that Chantal and Chantal Pharmaceutical would be unable to satisfy any money judgment as Chantal had no significant assets and Chantal Pharmaceutical was undergoing insolvency proceedings. As part of the settlement agreement, Chantal had stated that her net worth was less than US$350,000 and agreed to deliver detailed financial information to prove the same. The settlement was approved by the court on 31 July 2001.[48]

50 Weber denied there was any loan to him. As the controlling shareholder of Renslade (HK), Weber invested CHF9.5 million from the profits generated by the Nu Skin business in bonds.[49]

51 After Chantal was diagnosed with cancer, Chantal asked Weber to ensure that her daughters would be financially supported until they reached the age of 28 in the event of her passing and Weber agreed. Weber intended to create a fund of monies to be released to the two daughters, and was going to put some of the profits generated from the Ethocyn Rights into the fund. This was not done as Weber was sued by the Estate.[50]

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48 Defence (Amendment No. 4) at para 25A.

49 Defence (Amendment No. 4) at para 31A.

50 Defence (Amendment No. 4) at para 32A.

52 Heika attended the meeting in Zurich in or around July 2016 on behalf of Chantal as she was too ill to travel. At the meeting, Weber showed Heika a draft account of the estimated sums for the income generated by the Ethocyn Rights to assure her and Chantal that there were monies available for the creation of the fund.[51]

53 At the December 2016 Meeting, Heika said she wanted to acquire the majority shareholding of the company to be established to hold the Ethocyn Rights and the Nu Skin SDA from BCS. No agreement was eventually reached as no reasonable purchase offer was presented and BCS and Weber wanted to maintain ownership and control over the Ethocyn Rights and profits generated therefrom.[52]

54 The Defendants therefore deny they owed any fiduciary duty towards Chantal or the Estate. The Defendants deny all claims and reliefs sought by the Estate in their claim.

The Plaintiff's reply

55 Baker avers that Singapore law is the governing law of the agreement and the Trust. He denies that no valid trust could have been created on the facts pleaded by the Estate.[53]

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51 Defence (Amendment No. 4) at para 34C.

52 Defence (Amendment No. 4) at para 34G.3.

53 Reply (Amendment No. 4) dated 23 July 2019 ("Reply (Amendment No. 4)") at paras 12A–12G.

(a) Sections 15201 and 15202 of the Probate Code do not require written documentation of a settlor's intention to create a trust and written documentation of the beneficiary's identity and there is clear and convincing evidence of the existence of the Trust.

(b) Baker denies that the agreement and the Trust would be for an illegal purpose.

(c) Chantal's arrangement of using Renslade (NZ) to purchase the Ethocyn Rights in the US Bankruptcy proceedings was not contrary to Chantal's declaration and/or ss 152 and 157 of Title 18 of the United States Code and/or illegal.

56 Baker also submits that a self-settled trust is not invalid under California law. In addition, the Trust is not an irrevocable trust, so the US Estate tax law requirements highlighted by the Defendants do not apply.[54]

57 Even if the Trust and/or Agreement were invalid under California law:[55]

(a) BCS, as the trustee, would hold the legal title to the Trust Assets or Trust Monies on a resulting trust for Chantal who is the settlor of the Trust; and

(b) pursuant to ss 2223 and 2224 of the California Civil Code, BCS would hold the Trust Assets/Monies as an involuntary trustee and, accordingly, a California court would impose a constructive trust on the

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54 Reply (Amendment No. 4) at paras 12H–12I.

55 Reply (Amendment No. 4) at para 12J.

Trust Assets/Monies in favour of Chantal and her Estate in order to prevent the unjust enrichment of the Defendants.

The Issues

58 The parties have put forward an Agreed List of Issues. There was also a list of issues by the Estate that were not agreed to by the Defendants and a list of issues put forward by the Defendants that were not agreed to by the Estate.

59 The Agreed List of Issues are as follows.

(a) Was there a Trust Agreement between Chantal and Weber as pleaded by the Estate in paras 13 and 14 of the Statement of Claim (Amendment No. 3)?

(b) When was such Trust Agreement formed, between whom and what were the terms thereof?

(c) Did Renslade (NZ) hold the Ethocyn Rights on trust for Chantal?

(d) Who provided the funds, if any, for Renslade (S) to acquire the Ethocyn Rights from Renslade (NZ)?

(e) Did Renslade (NZ) or subsequently Renslade (S) acquire legal and beneficial ownership to the Ethocyn Rights and assets?

(f) If a Trust Agreement existed between Chantal and Weber, what is the governing law of any alleged Trust (as defined at para 13C of the Defence (Amendment No. 4) ("Defence (Amd 4)") dated 8 July 2019)?

(g) If the Alleged Trust was invalid, are the Defendants nevertheless holding the Trust Assets and/or Trust Monies (as defined at paras 14(c) and 24 of the Statement of Claim (Amendment No. 3) ("Statement of Claim (Amd 3)") dated 5 July 2019) and/or any other income of proceeds generated from the Trust Assets on a resulting trust and/or constructive trust for Chantal's Estate under California Law?

(h) If the Alleged Trust was valid under California law, can the assets alleged to be held on trust be claimed by Chantal's Estate?

(i) Are the Trust Agreement and/or Alleged Trust illegal, void, or unenforceable as being contrary to the public policy of Singapore?

(j) If the Alleged Trust is illegal, void, or unenforceable as being contrary to the public policy of Singapore, are the Defendants nevertheless holding the Trust Assets and/or Trust Monies and/or any other income or proceeds generated from the Trust Assets on a resulting trust for Chantal's Estate under Singapore law?

(k) What was the reason for the 5% and/or 10% proceeds retained by BCS from the sale of the Ethocyn products pursuant to the Nu Skin SDA?

(l) What was the purpose of the transfer of monies from BCS and/or Renslade (HK) to:

(i) Chantal;

(ii) entities controlled by Chantal; and/or

(iii) entities involved in the production or marketing of Ethocyn products or the protection of the Ethocyn Rights?

(m) If the Alleged Trust and/or Trust Agreement existed between Chantal and Weber, was BCS's and/or Weber's retention of 10% of the monies paid by Nu Skin to BCS from in and around 2016 without Chantal's knowledge and/or consent a breach of the Trust Agreement?

(n) If the Alleged Trust and/or Trust Agreement existed between Chantal and Weber, was the CHF9.5 million which the Defendants withdrew from the profits made under the Nu Skin SDA an unauthorised withdrawal from the Trust Monies?

(o) If a Trust Agreement existed between Chantal and Weber, did Chantal, Baker and/or Heika and Birka seek an account of the Trust from the Defendants?

(p) What took place at the meetings between, *inter alia*, Heika and Weber in or around July 2016 and on or around 12 December 2016?

(q) Was there an agreement entered into at the meeting on or around 12 December 2016 for the Defendants to transfer Trust Assets and/or Trust Monies and/or any other income or proceeds generated from the Trust Assets to Chantal's Estate?

60 The Estate put forward a list of additional issues that were not agreed to by the Defendants.

(a) Did Chantal provide the funds for Renslade (NZ) to acquire the Ethocyn Rights from the Chantal Companies?

(b) Who provided the funds for Renslade (NZ) or Renslade (S) to buy out Chantal Companies' rights to the Ethocyn Royalty?

(c) Were the Ethocyn Rights and assets transferred from Renslade (NZ) to Renslade (S) because Weber saw the sale of the Ethocyn Rights and assets as a good business opportunity and agreed to purchase them for his own benefit?

(d) Were the Ethocyn Rights and assets transferred from Renslade (S) to BCS because Nu Skin did not want to enter into a contract with Renslade (S)?

(e) If the Trust and/or Trust Agreement pleaded by Chantal's Estate is governed by California law, was the Trust and/or Trust Agreement invalid under California law?

(f) What was the purpose of the transfer of proceeds generated under the Nu Skin SDA to Renslade (HK)?

(g) What was Chantal's role in relation to BCS's business and transactions with Nu Skin under the Nu Skin SDA?

(h) Was there an agreement, as alleged by the Defendants, between Chantal and Weber for Weber to ensure that Chantal's daughters were financially supported until they reached the age of 28 in the event of Chantal's passing and for Weber to create a fund of monies, using some of the profits generated from the Ethocyn Rights, to be released to Chantal's daughters?

61 The Defendants also put forward a list of additional issues that were not

agreed to by the Estate.

(a) Did Chantal provide the funds for Renslade (NZ) to acquire the Ethocyn Rights from the Chantal Companies and, if so, were these out of her own funds?

(b) Did Chantal provide the funds for Renslade (NZ) or Renslade (S) or BCS to buy out Chantal Companies' rights to the Ethocyn Royalty and, if so, were these out of her own funds?

(c) If the Alleged Trust (as defined at para 13C of the Defence (Amd 4)) pleaded by the Estate is governed by California law, was the Alleged Trust valid, legal and enforceable under California law?

(d) Did Chantal claim and receive operating and production costs from BCS and/or Renslade (HK) on behalf of E. Cosmetics Corporation and/or BCS Pharma for manufacturing Ethocyn products, which were higher than the actual costs incurred, leading to a profit taken of more than US$18 million by Chantal?

62 Many of the above "issues" in [60] and [61] are more in the nature of findings of fact. Some of them, like that set out in [61(d)], do not arise from the pleadings and the Defendants have not filed a counterclaim for the US$18 million allegedly over-paid to Chantal. The answers to the relevant questions will be found, expressly or impliedly, in our findings of fact in this judgment.

63 At the heart of this dispute are two underlying issues:

(a) Was there a Trust Agreement between Chantal and Weber and his companies (BCS and Renslade (HK)) to hold the Ethocyn Rights and

all income and proceeds therefrom on trust for Chantal ("Trust Agreement") or did Weber purchase the Ethocyn Rights for his own investment in his own right?

(b) If there was a valid Trust Agreement, was it unenforceable or void as a result of an illegality under Singapore law and/or California law?

There is a discrete issue, depending upon our findings, as to the existence of the Trust Agreement, relating to the alleged loan and recovery of CHF9.5 million with 3% interest.

The Defendants' election not to call evidence and a submission of no case to answer

64 At a Case Management Conference held on 19 July 2019, the Defendants applied to have foreign law proved by way of submissions from registered foreign lawyers. The Estate consented and a consent order was entered. Counsel also agreed that the factual witnesses from both sides would give evidence first and the registered foreign lawyers' submissions on California law would be taken up thereafter.

65 The Estate called Baker, Heika and the Estate's lawyer Johnson as witnesses. After they gave their evidence, the Defendants elected not to call any evidence and submitted that there was no case to answer. As a result of this election, the affidavits of evidence-in-chief ("AEICs") of Weber and Wojtek, a lawyer representing Weber, were not admitted into evidence.

The burden of proof when electing not to give evidence and submission of no case to answer

66 The Defendants have the right to submit that there is no case to answer, following the exercise of their right to elect not to call evidence: O 35 r 4(3) and O 110 r 3(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Not surprisingly, counsel for the plaintiff and the defendants, Mr Cavinder Bull SC and Mr Alvin Yeo SC respectively, gave different emphases to the tests that should be applied when a defendant elects not to call evidence and submits that there is no case to answer.

67 The Court of Appeal in *Lena Leowardi v Yeap Cheen Soo* [2015] 1 SLR 581 ("*Lena Leowardi*") ruled that where there is a submission of no case to answer, the test is whether the plaintiff's evidence at face value establishes no case in law or whether the evidence led by the plaintiff is so unsatisfactory or unreliable that its burden of proof has not been discharged (at [23]). The threshold against which the claims are to be assessed is that of whether the plaintiff has established a *prima facie* case against the defendant, and the plaintiff need not prove his case on a balance of probabilities (*Lena Leowardi* at [24], citing *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549 at [37]).

68 In assessing whether the plaintiff has established a *prima facie* case, the court will assume that any evidence led by the Appellant was true unless it was inherently incredible or outside of common sense. Where circumstantial evidence is relied on, it need not give rise to an irresistible inference as long as the desired inference is one of the possible inferences (*Lena Leowardi* at [24], citing *Relfo Ltd (in liquidation) v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 ("*Relfo*") at [20]).

69 These tests have been authoritatively set out in *Lena Leowardi* and we do not understand how Mr Bull SC or Mr Yeo SC can submit otherwise. However, when those principles are applied to the facts before us, there are nuances and allied principles which come into play:

(a) Mr Yeo SC is quite correct to say that he can test the Estate's evidence to see if they do indeed establish a *prima facie* case. For example, Mr Yeo SC submits that the Estate has no evidence – besides an allegation by Baker – to show that the Ethocyn Rights were assigned from Renslade (NZ) to Renslade (S) for no consideration, and Baker was not even privy to or possessed with personal knowledge of the events then. In a sense, the Estate has to prove a negative. Instead, Mr Yeo SC submits that the available evidence – a Deed of Assignment – although backdated, does recite that it was assigned for value (see *Lena Leowardi* at [25], citing *Lim Eng Hock Peter v Lin Jian Wei* [2009] 2 SLR(R) 1004 at [210]). Whether that takes the Defendants beyond the gates will be examined below.

(b) Mr Yeo SC is also entitled to submit that even if the Estate has established a *prima facie* case, the trust was illegal or not enforceable as being tainted with illegality.

(c) Mr Bull SC on the other hand can legitimately submit that if circumstantial evidence is relied upon, it does not have to give rise to an irresistible inference as long as the desired inference is one the possible inferences (see *Lena Leowardi* at [24], citing *Relfo* at [20]); and so long as that evidence and inference is not inherently incredible or outside of common sense, the court will assume it is true.

(d) Mr Bull SC is also entitled to emphasize that, if the Estate makes out a *prima facie* case and the Defendants choose not to call evidence and submit that there is no case to answer, then, bearing in mind the above principles, the failure to offer evidence could be fatal to the defendants' case (see *Thio Keng Poon v Thio Syn Pyn and others and another appeal* [2010] 3 SLR 143 at [42]).

(e) It is correct that no adverse inference ought to be drawn by a defendant's making of a submission of no case to answer. However, if a court were to look at a particular email or letter authored by the defendant and its contents can be fairly said to point to the existence of certain facts that satisfy the *prima facie* test, but the court does not have the benefit of an explanation from the defendant that that was not what the defendant meant, the plaintiff's construction of the particular email or letter would prevail.

(f) We also note that a number of Chantal's emails, facsimiles and documents are cryptic. She is no longer around to explain them or to fill any gaps that exist. Baker may tell us what he thinks it means, either from what Chantal may have told him whilst she was alive or from what he knows or concludes by going through her many documents. What weight we give to his evidence must be carefully calibrated when applying the tests enumerated above.

(g) Similarly there are emails and facsimiles from one Christine Yong ("Christine") and one Hartono, who were employees of the Defendants, to Chantal or other persons. The Estate's construction of these emails and facsimiles will prevail as long as the construction or inferences are reasonable and not inherently incredible or outside of

common sense. The defendants are in no position to attempt to put forward the context in which they should be read. The rules to be applied are those set out above at [67] and [68].

70 Having set out these principles to be applied on an election by the defendants not to call evidence and submit that there is no case to answer, we now turn to consider the evidence.

Evaluation of the evidence and findings of fact

71 It will be convenient to make our findings of fact and state our conclusions in stages.

The purchase of the Ethocyn Rights from the Chantal Companies

72 We find that Chantal wanted to purchase the Ethocyn Rights from the Chantal Companies in the Chapter 11 proceedings but she did not want anyone – including the creditors, the Creditors' Committee, the Kriegsman Group, Teeple, their lawyers and the Bankruptcy Court – to know that she was behind the bid for the Ethocyn Rights. There was evidence, and we so find, that there were quite a large number of affected stockholders and creditors, some of whom had lost significant amounts of money. In a second application filed on 3 November 1999 by Chantal Companies' counsel in the US Bankruptcy Court for an interim payment of their fees and disbursement, they state that they answered numerous telephone calls from the 1,500 creditors and over 1,750 stockholders and added that "[u]nfortunately, many people have lost significant amounts of money and it would be inappropriate to ignore their telephone

calls…".[56] This application for interim payment was granted by the US Bankruptcy Court on 23 November 1999.

73 We have no direct evidence from Chantal for her motives for doing so. Baker and Heika gave evidence that Chantal had received death threats from disgruntled shareholders who had lost money in the failure of the Chantal Companies and they would have taken any purchase by Chantal of the Ethocyn Rights badly.[57] There was some evidence, described as *prima facie* evidence by Mr Bull SC, that there were such death threats. In her AEIC, Heika, who was 12 years' old at the time of the bankruptcy proceedings, remembered that her mother received death threats and became fearful for their safety. Heika deposes that her mother changed their residence to her grandfather's house, diverted all her mail there and hired a bodyguard to protect her and Birka. Heika exhibited a picture of herself and a man, who she claimed to be her bodyguard.[58] Heika was not challenged on this. Baker too was not directly challenged on this in cross-examination. All Baker was cross-examined on was that Chantal could not have been fearful of death threats so many years later (in 2010, 2011, 2013 or 2014) and that these death threats were a cover to explain the inconsistencies in the documents.[59] We note that Baker only met Chantal in 2002. In his AEIC, Baker could only tell us what Chantal had told him at some later point in time after 2002. However, his credibility upon cross-examination on this issue

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56 2 AB p 670.

57 Baker's AEIC at paras 31–35; Heika Burnison's AEIC dated 27 September 2019 ("Heika's AEIC") at para 6.

58 Heika's AEIC pp 67–68.

59 Tr/14.11.19/95/7–96/1.

remained intact and we accept it but caution ourselves as to its weight.[60] There is also unchallenged documentary evidence that Chantal used her father's address for correspondence and corporate documents and even her death certificate carries the address of her father's house.[61] We should point out two things. First, other than bare statements, albeit on oath, we have no evidence at all as to the nature of or form of these death threats, whether by telephone calls or anonymous notes or letters in the post. Secondly, we would have expected that with death threats of a serious nature, some reports would have been made to the police. There was however, no such evidence. Nevertheless, this court has to assume that the evidence led by the Estate is true unless it was inherently incredible or outside of common sense (*Lena Leowardi* at [24]). In this case, that Chantal received death threats from disgruntled shareholders or creditors who had lost significant amounts of money is one of the *possible inferences* of the circumstantial evidence and we accordingly accept that to be the case. Had Weber come to trial to challenge Baker's evidence on this, for example, by testifying that Chantal had never told him of any death threats, we may well find otherwise. In any event, the issue of whether Chantal actually received death threats is not a pleaded issue and should not be of disproportionate significance.

74 We also think it more likely than not that Chantal believed in her own product or invention and needed to put her and her companies' financial problems behind her so that she could exploit her invention to its full potential. If the Creditors' Committee knew she was interested in buying the Ethocyn Rights, they were likely to have tried to extract a higher price; whether they

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60 Tr/15.11.19/13/9–16/4.

61 2 AB pp 819, 822; *eg*, 2 AB pp 739–741, 3 AB pp 1397, 1420, 1431, 1440, 1453, 1469, 1484, 1499, 1514, 1528 and 1542; 11 AB p 5091.

could succeed or not is an entirely different matter and there is no direct evidence on this. There is nothing intrinsically wrong with or exceptional in a debtor wanting to purchase its own assets, but there certainly would have been heightened scrutiny of the sale and accompanying agreements if this had been made known. We think Chantal also had an interest in securing the Ethocyn Rights free and clear of all claims, liens and encumbrances as well as settling the Class Action suit against her. Chantal also wanted to move the Ethocyn Rights offshore to maintain opacity as to its ownership and to take advantage of more favourable tax regimes.

75 We find that the Estate has made out its case that Chantal was responsible for deciding upon a New Zealand corporation to purchase the Ethocyn Rights. There was ample evidence on this score. Pursuant to her decision, Chantal instructed Weir, a lawyer practising in Hong Kong, to use a company in New Zealand and this resulted in the acquisition of a shelf company, which was re-named Renslade (NZ). Chantal's business activities had hitherto, and we say unsurprisingly, not been confined to the USA. It is stated in the draft prospectus prepared to attract bids, which we accept, that in 1995 the Chantal Companies entered into additional distribution agreements with a Hong Kong company for the Pacific Rim;[62] "Hong Kong" was later corrected by Chantal's lawyer to Taiwan. The distributor was one Roger Chang who is mentioned in the US Bankruptcy Court filings[63] (although it also appears that there was a former Chantal product distributor in Hong Kong called Lisa Lai).[64] Under

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62 1 AB p 269.

63 1 AB pp 277, 543.

64 2 AB p 822.

Article XII of the APA, notices to be sent to the purchaser Renslade (NZ) were to be sent to: "c/o Weir & Associates, 5th Floor, Landmark East, 12 Ice House Street, Central, Hong Kong".[65] The notice provision in the Consultancy Agreement between E. Cosmetics (a Nevada corporation) and Chantal dated 19 October 1999 provided for service on E. Cosmetics at 5757 West Century Boulevard, Los Angeles (the address of the Chantal Companies) with a copy to "Shane Weir" at his Hong Kong office address.[66] There is a facsimile dated 25 June 1999 from Weir to Ken Whitney of New Zealand law firm Ross & Whitney to acquire a shelf company in New Zealand.[67] Weir wrote:

> Further to your fax of 24th June 1999, we have confirmed that the client is interested in acquire [*sic*] Renslade Holdings Ltd immediately.
>
> Can you please clarify whether any shareholders have been registered and the number of issued shares. The concept would be to have the same shares own by Granville Ltd (the same company that owns Legendary Trading International Ltd). Carrie Chan will act as a Sole Director of the Company in the same manner as the Legendary Trading structure.
>
> I have copied the enclosed to Ms Carrie Chan who will be communicating directly to you concerning all documents she requires for establishment of bank accounts. Since bank accounts may take several weeks because of distance, we would ask for your confirmation that if necessary payments on account that Renslade Holdings Ltd might be made to your offices for the credit to Renslade Holdings bank account.
>
> **Please confirm immediately that we can utilize Renslade now it is essential we have a corporate name for the purpose of an acquisition by end of day.**
>
> Please confirm me [*sic*] by fax on receipt and if necessary call me to discuss any matters in question.

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65 1 AB p 351.

66 1 AB p 506.

67 2 AB pp 653–654.

(emphasis in bold in original, typographical errors in original)

76 There are sufficient emails, facsimiles and documents to back up Baker's account in his AEIC, *viz*, that Renslade (NZ)'s first directors were two partners of Ross & Whitney, Kenneth Whitney and Ian Ross; they were replaced on 15 October 1999 by one Ms Ka Wai Chan, who Baker believes to be Weir's nominee.[68] That would in all probability be the "Carrie Chan" referred to in Weir's facsimile (at [75] above), as we also see a reference to "KW Chan in Hong Kong" in an email from Giles Kennedy to Noel Conway dated 21 November 1999 reporting the receipt of documents from her in relation to the issue of shares in Renslade (NZ) for filing in New Zealand[69] as well as a Change of Directors Form filed for Renslade (NZ).[70] We also find that Chantal was considering a holding company, Granville Limited ("Granville"), which was also controlled by Weir on behalf of Chantal. Legendary was another associated company and the facsimile referred to at [75] above states that it is also held by Granville. With these private companies and shareholdings, control could easily be structured or re-structured to maintain opacity in beneficial ownership.

77 We also find that Chantal considered using other nominal owners, called "figure heads" by her, to conceal the beneficial ownership of Renslade (NZ). This included one Dr Lalaine de la Cruz ("Lalaine") who was a friend of her father's working in the Philippines.[71] The companies may also have been structured to accommodate investors in the business going forward. We see

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68 Baker's AEIC at para 39.

69 2 AB p 658.

70 2 AB p 709.

71 Baker's AEIC at paras 88–94.

Wehinger, although a friend of Chantal, representing a group of investors called "SIG" who were settled out and mentioned in the US Bankruptcy Court papers. We find that Chantal suddenly lost her trust in Weir in November 1999 and changed her lawyer to a US attorney, Noel Conway.[72] There was also a change of New Zealand lawyers to Colin Beyer and Giles Kennedy of Simpson Grierson Law, a law firm in Auckland ("Simpson Grierson").[73]

78 Whilst Baker might not know all the details, the documentary evidence, including emails and facsimiles, does show, quite convincingly, that it was Chantal putting all these arrangements in place. We see her ability to change lawyers and the lawyers taking instructions from her.

Chantal provided the funds to purchase the Ethocyn Rights and assets from the Chantal Companies

79 We find that Chantal provided the funds through her family company, SBC Pharmaceutical, to Renslade (NZ) to purchase the Ethocyn Rights and assets from the Chantal Companies in the Chapter 11 proceedings. The Defendants did not produce any documentary evidence or otherwise to contradict this, having elected not to call evidence. Mr Yeo SC tried valiantly to challenge the conclusions to be drawn from some of the documentary evidence. He did not succeed, not, we must say, for want of trying. We do accept that the emails, facsimiles and documents provided by the Estate do have some gaps and do not contain complete explanations. However, they are sufficient, at the very least on a *prima facie* basis, to piece together how Chantal set about

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72 2 AB p 690, 12 AB pp 5734–5736.

73 Baker's AEIC at para 72.

getting a New Zealand corporation to make a bid for the Ethocyn Rights and assets of the Chantal Companies.

80 We accept the evidence given by the Estate that CBD Pharmaceutical Corporation, a company owned by Chantal's family, transferred US$800,000 to P F Wong & Co, Solicitors in Hong Kong ("P F Wong"), as evidenced in a Hang Seng Bank Credit Advice dated 7 January 1999,[74] and Chantal records this as a fact in her own handwriting.

81 There is a handwritten note in the Agreed Bundle dated 1 March 2000, entitled "CHRONOLOGY" ("the Handwritten Chronology").[75] We find the handwriting has been convincingly identified – by both Heika and Baker – as that of Chantal's. At the trial, Mr Yeo SC challenged whether the handwriting in the Handwritten Chronology was in fact Chantal's:[76]

> Yeo: … Mr Baker, you haven't called any handwriting expert to attest that this handwriting is that of [Chantal], have you?
>
> Baker: No, we haven't.
>
> Yeo: Beyond your say so, that this was prepared by [Chantal], there is no evidence before the court that that is, in fact, the case, correct?
>
> Baker: None.

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74 1 AB p 256.

75 2 AB pp 760–761.

76 Tr/12.11.19/108/5–12.

82 Baker, however, explained on re-examination that he was familiar with Chantal's handwriting as he had seen many of Chantal's notes and that her daughters would be familiar with them as well:[77]

> Bull: Mr Baker, how familiar are you with Chantal Burnison's handwriting?
>
> Baker: Fairly -- fairly familiar. I've seen many of these notes and many of the notes she wrote and she wrote notes to me sometimes in handwriting also.
>
> Bull: Mr Baker, where did you find [the Handwritten Chronology]?
>
> Baker: I -- I'm pretty sure these were also -- these were also in her house in her bedroom also. That's where she kept her stuff -- bedroom office, that's what it is, so she used her bedroom as an office.
>
> Bull: Mr Baker, who else would be familiar with her handwriting?
>
> Baker: I believe her daughters.

83 More importantly, Heika also explained in detail, why she was sure that the Handwritten Chronology was her mother's handwriting:[78]

> Bull: … At pages 760 to 761, we see [the Handwritten Chronology]. Can I ask you, do you recognise that handwriting?
>
> Heika: I do recognise it. It is my mother's handwriting. I can tell for many reasons. I have lived with her and her handwriting for almost three decades … she has a very particular way of writing her upper case Rs, her upper case Es. She also has many up-ticks at the end of her letters. She told me this was because when she was in university, she was dating someone who was a handwriting expert and they told her that if you up-tick at the end of your letter then it means you're a positive

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77 Tr/15.11.19/35/24–36/12.

78 Tr/15.11.19/140/1–11.

> and well-balanced person and that she worked on her handwriting when she was young to reflect these things.

Heika also was able to point out other notations in various documents that were not in Chantal's handwriting.[79] We accept her and Baker's evidence on this score.

84 Although the Defendants contend that the handwriting in the Handwritten Chronology was not proved to be Chantal's, they neither adduced independent evidence to support their claim nor called a handwriting expert to do so. We accept the evidence of Heika and Baker that the Handwritten Chronology, as well as those other notes or notations identified by them, as having been written or prepared (*eg*, typed) by Chantal and find that the Handwritten Chronology was written on or about 1 March 2000.

85 The Handwritten Chronology was a log or record by Chantal of significant events or facts that occurred in relation to the purchase of the Ethocyn Rights and assets of the Chantal Companies from 7 January 1999 to 23 Dec 1999.[80]

(a) The first entry records: "JAN.7 1999 $800,000 wire transfer to P.F. Wong (solicitors) trust account in H.K. by CBD Pharmaceutical Corporation." This tallies with the Hang Seng Bank Credit Advice to P F Wong (see [80] above).

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79 Tr/15.11.19/144/10–24; Tr/15.11.19/145/13–23; Tr/15.11.19/146/4–7.

80 2 AB pp 760–761.

(b) The second entry records: "JAN 14 1999 Legendary Trading Ltd acquires 10 kilos of Ethocyn and componentry fr Chantal Skin Care products in consideration for $100,000 [undecipherable] $775,000 loaned from P.F. Wong to Legendary." We find this to show the transfer of monies from P F Wong to a company called Legendary Trading International Ltd ("Legendary").

(c) The third entry records: "Jan-Sept: Legendary business of Chantal products so far to AC7/HSN $641,000 revenue."

(d) The fourth entry records: "Sept 14, 1999 Renslade Ltd purchases for $25,000 7 kilos of Ethocyn plus componentry."

(e) The fifth entry records: "Oct 19, 1999 Renslade purchases assets (intellectual property + inventory of 70 kilos of Ethocyn + componentry for $325,000 ($50,000 assets + $275,000 goodwill). Patents expire in 2004. Cosmetic and pharmaceutical products."

(f) The sixth entry records: "Oct.1999 E. Cosmetics LLC, Nevada corp. do telemarketing sales of cosmetics in Los Angeles. A 100% wholly owned subsidiary of Renslade N$75,000/mo income."

(g) The seventh entry records Chantal's trip in November 1999 to Hong Kong with Noel Conway. There is a reference to Rio Investments "purchases, assume debt and " " 80% of Renslade (including E Cosmetics) and add if note for $25,000 Legendary assets (not corporation [undecipherable]). ?Note. issue ~~$800,000~~ $775,000 on balance sheet."

(h) The eighth entry records: "Dec.23, 1999 Rio Investments, Nova Derm Ltd (Victoria Medical Group Investors Ltd) acquires Renslade. Shareholder is Victoria Medical Investors 80% and Granville (20%). Noel Conway 'mistakenly' puts Victoria shares in his name (10 shares). Now have an assignment to Lalaine de law Cruz (who agrees to serve as 'figure owner' and has executed an assignment to Compagnie Carmesti-[undecipherable] S.A., a Panamanian company (presently dentist doctor friend of my father working in Philipines [*sic*]." We agree with Mr Bull SC when he submits that "figure owner" is Chantal's description of someone who is a nominee owner for someone else. There are references in the evidence that at one stage of Chantal's planning and structure, Chantal intended for one Lalaine, who was her father's friend, to be her nominee "owner" on record. Many aspects of these notes are also corroborated by the documentary evidence, including corporate records or filings made with the respective regulatory authorities. It is also undeniable that these were all documents found by Baker in Chantal's papers after she passed away.

(i) The remainder of the Handwritten Chronology logged as November 1999 records Chantal's trip to Budapest to look into a laboratory and a reference to Noel Conway and the purchase of laboratory equipment from some landlord in exile in Switzerland and a reference to Wehinger.

86 We find the evidence shows Chantal working hard to set up corporate structures outside the USA, with the help of foreign lawyers and her new adviser, Noel Conway, who also appeared to have mistakenly issued shares in his name, as well as exploring laboratory facilities to synthesise the Ethocyn

compound for the future as the German laboratory had been closed down.

87 We have stated at [80] above that US$800,000 was transferred from CBD Pharmaceutical to P F Wong. From the Handwritten Chronology (see [85(b)], P F Wong then transferred, in the form of a loan, US$775,000 to Legendary. The discrepancy of US$25,000 was not explained. Legendary is owned by Granville, which is in turn, controlled by Weir & Associates, Weir's company. This is evident from the following evidence.

(a) In a facsimile dated 25 June 1999 from Weir to Mr Ken Whitney of the law firm, Ross & Whitney, Weir referred to Granville as "***the same company that owns [Legendary]***".[81] As noted above, Weir also stated that "the client is interested in acquire [*sic*] Renslade Holdings Ltd immediately".[82]

(b) Mr Ken Whitney was the sole shareholder of Renslade (NZ), until he transferred his share to Granville.[83]

(c) Granville's address is listed to be "c/- Weir & Associates".[84]

(d) In a letter dated 20 December 1999 from Simpson Grierson to Noel Conway, Granville is referred to as "***a company controlled by Weir & Associates and Carrie Chan in Hong Kong***".[85]

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81 2 AB pp 653–654.

82 2 AB pp 653–654.

83 2 AB p 694.

84 12 AB pp 5706–5716.

85 2 AB p 690.

88 We find that the evidence shows a *prima facie* case that Legendary then provided US$750,000 to Renslade (NZ) to bid for the purchase of the Ethocyn Rights in the US Bankruptcy Proceedings. This can be seen from two documents. First, there was an email dated 20 December 1999 from Noel Conway to Chantal, where Noel Conway stated that the sum of US$775,000 transferred from P F Wong to Legendary was to ensure that "there could be an even USD 750,000 at LA at the time of the bidding in court":[86]

> The USD 18790 paid to Weir and Assoc on 11/11 was for time and cost spent relating to the sale/purchase from the Bankruptcy court.
>
> The payment to Legendary was for the money loaned by [L]egendary so that there could be an ***even USD 750,000 at LA at the time of the bidding in court***".
>
> [emphasis added in bold italics]

89 At the trial, Mr Yeo SC asserted that there was a discrepancy between the US$775,000 and the US$100,000 (as expenses) recorded in the Handwriting Chronology, against the US$750,000 in Noel Conway's email to Chantal above.[87] Baker explained that the difference was because Legendary used US$25,000 to "[buy] some product".[88] While not a complete explanation (in that it was not supported by independent documentary evidence), the Defendants did not suggest what else could the USD750,000 be used for. We find that the reference to "bidding in court" at that period was in all probability referring to the bidding of the Ethocyn Rights at the US Bankruptcy Proceedings.

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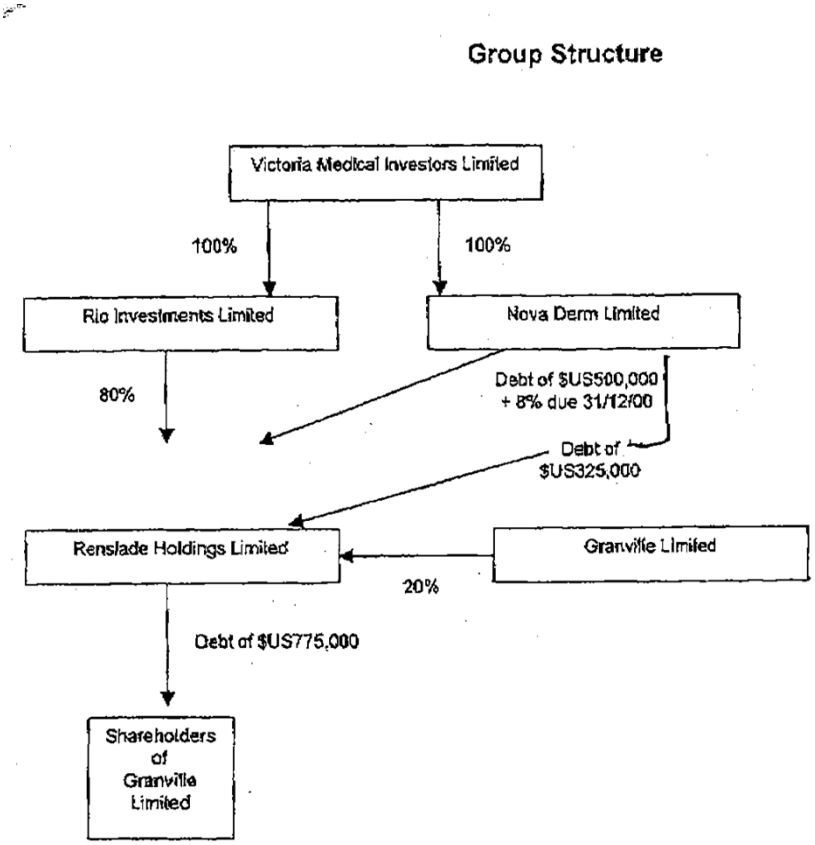
86 2 AB pp 688–689.

87 Tr/12.11.19/142/8–143/4.

88 Tr/12.11.19/141/14–17.

90 Secondly, there was a facsimile from Simpson Grierson to Noel Conway dated 21 February 2000 attaching a group structure of the companies including Renslade (NZ). In that group structure, it was specifically stated that Renslade (NZ) had a debt of US$775,000 owed to the "shareholders of Granville Limited", which as we have found at [87] above, owns Legendary:[89]



91 This was accompanied by a tax advice dated 3 February 2000, setting out specifically how the "USD 775,000 debt … to Renslade [(NZ)]" should be

[89] 2 AB pp 751–753.

structured to reduce tax liabilities.[90] For the foregoing reasons, we find that Baker has shown a *prima facie* case that Legendary loaned US$750,000 to Renslade (NZ) to bid for the Ethocyn Rights. Our finding in this regard is further supported by the fact that the Handwritten Chronology, specifically listed in chronological order, first, a transfer of $800,000 to P F Wong, and then the loan of $775,000 from P F Wong to Legendary, and then "Oct 19, 1999[,] [Renslade (NZ)] purchases assets (*intellectual property* …) for $325,000". Being listed in a single chronology, we find that the payment of US$325,000 by Renslade (NZ) for the purchase of the Ethocyn Rights in the US Bankruptcy Proceedings came from the loan of US$775,000 from P F Wong to Legendary, which in turn, loaned the same to Renslade (NZ).

92 Although Baker did not adduce evidence showing the direct transfer of funds from Legendary to Renslade (NZ), the evidence establishes, on a *prima facie* basis, that Chantal had provided the funds for Renslade (NZ)'s purchase of the Ethocyn Rights. The Defendants, save for highlighting arithmetical inconsistency and challenging the authenticity of the Handwritten Chronology, did not proffer any alternative explanation for the movement of funds. Further, the arithmetical inconsistencies were not, by far, of the magnitude that made them incredible or inherently unbelievable or outside of common sense. There were obviously (and there are references to these items in the documents before us) payments to lawyers, purchases of Ethocyn, as well as some earnings from sales transactions.

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90 2 AB p 735.

There were no other bidders for the Ethocyn Rights and assets of the Chantal Companies

93 As we observed to counsel during closing submissions, it is of some importance to note that the Ethocyn Rights and assets were not an off-the-shelf machinery or product, nor was it like a piece of land or a building. The Ethocyn Rights were comprised in intellectual property which did not have a long shelf life and the last of the patents would expire in 2004. Further, from the draft prospectus, it recites that the Chantal Companies' laboratory in Germany had closed down. Any further exploitation involved setting up another laboratory to synthesize the Ethocyn compound. There is evidence of Chantal exploring this in November 1999.[91] The existing stocks of Ethocyn compound had degraded somewhat, although it appears they could be salvaged. Also, to properly exploit these rights, investments had to be made. The prospectus mentions at least US$1 million in the initial investment. Further, even if a purchaser had the marketing ability and knowledge of the cosmetics industry, without someone with the knowhow to direct and supervise a laboratory to synthesize the Ethocyn compound, its true value is unascertainable and cannot be captured if there was no one to oversee the production and marketing of the Ethocyn compound. There was also a need in the longer term for further research as the last of the patents expired in 2004. We will return to these factors when we consider the statements made by Chantal to the US Bankruptcy Courts and the issues of illegality.

94 Although not surfaced by counsel, it appears, and we so find, that Renslade (NZ) had made a first offer, earlier on in the Chapter 11 proceedings,

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[91] 2 AB p 761.

on behalf of "investors from Hong Kong", of US$500,000 cash payment plus royalties to purchase the Ethocyn Rights, but this was rejected by the Creditors' Committee. This appears in the second application by counsel for the Chantal Companies, Messrs Peitzman, Glassman & Weg, to the US Bankruptcy on 23 November 1999 for payment of their fees referred to above.[92] In their application, they state that, after the rejection of Renslade (NZ)'s offer, they then had to work independently with the Creditors' Committees' investment banker, the Kriegsman Group, to find another buyer. Counsel assisted the Kriegsman Group in preparation of the "book" on the debtors and their rights and assets and spoke to several interested parties. However, no one was willing to make a written offer to purchase the Chantal Companies' rights and assets. They state: "After several weeks went by without any new prospective purchaser appearing on the scene, [the Applicant] initiated a new negotiation with Shane Weir in Hong Kong."[93] It is clear to us and we find that there was no one else interested to purchase the Ethocyn Rights and assets of the Chantal Companies despite the efforts of the independent Creditors' Committee, the Kriegsman Group and the work-out specialist, Teeple.

Transfer of the Ethocyn Rights from Renslade (NZ) to Renslade (S): who was the beneficial owner of the Ethocyn Rights?

95 The next issue to be determined is the beneficial owner of the Ethocyn Rights after they were transferred from Renslade (NZ) to Renslade (S). In all the documentary evidence reviewed so far, Weber is not mentioned. The documentary evidence shows Chantal liaising fairly intensely with the lawyers

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92 2 AB p 659.

93 2 AB p 667.

and advisers mentioned and this included the running of the business, dealing with the shipments of goods and products, accounts and payments and organisational issues like having a director, Carrie Chan, in Hong Kong to deal with emergencies like another company attempting to register the trademark "Ethocyn" in China.[94] That documentary evidence extends into 3 February 2000 with tax advice from James Jan of Simpson Grierson Law and 6 March 2000 with Noel Conway trying to sort out the accounts between the various companies.[95]

96 The first document featuring Weber is an email from Weber to Chantal dated 9 March 2000.[96] It will be relevant at this stage to recapitulate the parties respective cases in the pleadings:

> (a) The Estate avers that, in or around November 1999, Chantal entered into an agreement with Weber pursuant to which Weber would acquire the Ethocyn Rights from Renslade (NZ) and hold the Ethocyn Rights and any income or proceeds generated from the Ethocyn Rights on trust for Chantal.[97] We note an earlier version of the Statement of Claim and further and better particulars furnished therein gave the date of this meeting as being in or around February 1999. However the Statement of Claim (Amendment No. 2) was amended in July 2018 to the aforesaid date. By an assignment dated 24 May 2000, Chantal procured the transfer of the Ethocyn Rights from Renslade (NZ) to

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94 2 AB pp 688 and 689.

95 2 AB p 767.

96 2 AB p 770.

97 Statement of Claim (Amendment No. 3) at para 13.

Renslade (S), a company incorporated in Singapore on or around 23 May 2000. Weber was the sole shareholder of Renslade (S). By a deed dated 1 April 2002, Weber procured the transfer of the Ethocyn Rights from Renslade (S) to BCS and BCS became the trustee of the express trust. This deed was assigned shortly after BCS's name change on 26 July 2002 and backdated to 1 April 2002.

(b) The Defendants deny that there was an agreement of any kind between Chantal and Weber for the latter to acquire and hold the Ethocyn Rights and any income and/or proceeds generated from the Ethocyn Rights on trust for Chantal. Renslade (S), a company controlled by Weber, acquired the Ethocyn Rights and assets from Renslade (NZ) for the sum of US$325,000 and the purchase price was paid for by BCS with monies that belonged to BCS and/or Weber and were not provided for by Chantal. Weber decided on the purchase because he saw an opportunity to exploit the Ethocyn Rights and assets through a business deal with Nu Skin. Weber had to transfer the Ethocyn Rights to BCS, which was an active company with several business streams, to secure the business with Nu Skin.

97 It is not disputed that Renslade (NZ) transferred the Ethocyn Rights to Renslade (S). As we set out the events that led to the transfer, it will be evident, and we so find, that it was Chantal who spearheaded and made key decisions in relation to the transfer of the Ethocyn Rights from Renslade (NZ) to Renslade (S). We find that Weber, contrary to the Defendants' case as set out above, was in fact working for Chantal as her business advisor and followed her instructions in all matters. We reject Weber's case that he purchased the Ethocyn Rights from Renslade (NZ) for his own investment.

98 The documentary evidence shows that Chantal already had a working relationship with Wehinger from as early as 10 August 1989. This is evident from a copy of a distribution agreement between Chantal Pharmaceutical Corporation and private investors, the latter being represented by Wehinger.[98] By November 1999, Chantal had lost her trust in Weir and decided to move business operations to Singapore for tax reasons.[99] On 3 March 2000, Wehinger emailed Chantal confirming that Weber and himself can "support [her] business in the future" and will "initiate the agreed upon structure" in Singapore:[100]

> … I strongly believe ***we can meet your requirements and support your business in the future***. Together with [Weber] I will monitor the set-ups and personally manage the ultimate owner of the operating companies in a most discrete manner.
>
> [Weber] told me today that instructions have been given to ***initiate the agreed upon structure*** …
>
> [emphasis added in bold italics]

It is clear that Wehinger and Weber were putting themselves forward as persons who could assist Chantal in her future business plans and that Weber had been given instruction to initiate the agreed corporate structures. They would monitor the corporations and manage matters for the "owner" of the operating companies "in a most [discreet] manner", *ie*, they would be very discreet about the true owner of the companies.

99 The first time Weber features in the documentary evidence is his email to Chantal dated 9 March 2000 ("9 March 2000 Email").[101] He was obviously

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98 1 AB pp 128–158.

99 12 AB pp 5734–5736.

100 Plaintiff's Core Bundle ("PCB") p 86; 2 AB p 833.

101 2 AB p 770.

known to Chantal by then; he refers to Chantal's emails to him and apologises for not replying earlier due to problems with his email. Weber refers to various matters, like an employee's arrangements (one Sara Harve who was trained by Chantal for laboratory set up and management), who Chantal can contact in BCS and states: "I'a was very impressed about our meeting. It will take also some time to get in to all the details of your activitie and to check all. I hope this will give you not other problems" [*sic*]. There is no trace of any language or expression pointing to an interested purchaser of the Ethocyn Rights or business. On the contrary, the chain of correspondence with Weber that follows shows him being described by Chantal as an "accountant"[102] and Weber doing as she instructs and reporting back to her. In another email to Weber, which appears to have been sent on 10 March 2000, Chantal tells Weber that she has told her own US attorney in the Chapter 11 proceedings, Mr Richard Esterkin, that Weber is the accountant of Nova Derm Ltd (New Zealand) and the "Singapore owner company (name not given—I recall it is Renslade Holdings pte.ltd(is this correct)..." and the "agreed structure" of these companies, BCS and the proposed Delaware corporation to be called Nova Derm.[103]

100 In the 9 March 2000 Email, Weber states that the "foundation in S has been done". On a hardcopy print-out of the 9 March 2000 Email, Chantal wrote "[F]oundation in S "Renslade Holdings Pte Ltd" owner: Dr Lalaine de la Cruz".[104] At the trial, Mr Yeo SC challenged Baker's assertion that the "S" in "foundation in S" referred to by Weber in the 9 March 2000 Email was a

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102 2 AB p 771.

103 2 AB p 771.

104 PCB p 70; 2 AB p 770.

reference to Renslade (S). Mr Yeo SC suggested instead that "S" referred to one SIG Investment Group Establishment ("SIG"):[105]

> Yeo: Mr Baker, when Mr Weber says "The foundation in S has been done***", if "S" refers to "Singapore", that is a reference to SIG,*** the company set up in Singapore to take over the distribution rights of SIG Liechtenstein. Would you accept that?
>
> Baker: No. Absolutely not. In fact, on the same page, not to move anywhere, number 1, it says: "Foundation in S, Renslade Holdings Pte Ltd owner de la Cruz -- Lalaine de la Cruz, directors, officers [et cetera]."
>
> Yeo: Whose handwriting is that, Mr Baker?
>
> Baker: Chantal Burnison's.
>
> [emphasis added in bold italics]

We set out the above to illustrate the typical approach of the Defendants in trying to cast doubts on the Estate's version of events in an attempt to show the Estate are unable to establish a *prima facie* case.

101 We find "S" to be a clear reference to Renslade (S) and not SIG. Chantal herself wrote on the hardcopy of the 9 March 2000 Email that "foundation in S" is Renslade (S). Further, in an email from Chantal to Weber on 15 March 2000, Chantal also expressly asked:[106]

> … Is the "foundation in S" Renslade Holdings pte.ltd by name?

In Chantal's facsimile dated 21 March 2000 to Weber, in which she raises her questions and discusses her "open" issues, she asked again: "Has Singapore company been formed with name Renslade Holding pte. Ltd? …Please advise

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105 Tr/13.11.19/64/1–12.

106 2 AB p 776.

me – via fax – not e-mail – if above Company now exists; address; etc."[107] Weber confirms by facsimile on 23 March 2000 that the Singapore company has been formed with the name Renslade Pte Ltd Singapore.[108]

102 On re-examination, Baker also asserted that it was obvious that "foundation in S" refers to Renslade (S):[109]

> Bull: Can you help us about this phrase, "foundation in S"?
>
> Baker: I think it becomes pretty obvious that the third line from the bottom and she says: "***Is the 'foundation in S' Renslade Holdings Pte Ltd by name?" And so the "S" obviously is the "Singapore***" and she wanted the "Holdings" part. She mentioned that before and he said he could do it and she hadn't seen the paperwork yet, so she's saying, "Did we do 'Holdings' in there?" Definitely "S" is Singapore -- excuse me, Renslade Singapore.
>
> [emphasis added in bold italics]

103 In the 10 March 2000 email referred to above from Chantal to Weber (and, importantly, not the other way around), Chantal informed him that a new Delaware company, Nova Derm Corporation, would be formed to perform the role of "the North American distributor for the Chantal Products owned by Nova Derm Ltd/Renslade Pts. Ltd/(de la Cruz)". Notably, Chantal emphasised that Weber's "*assistance [sic] in structure of subject agreements;* and that of Singapore attorney you advise for drafting according to Singapore law, will be very important".[110]

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107 2 AB p 799.

108 2 AB p 808.

109 Tr/15.11.19/59/14–25.

110 PCB pp 71–72; 2 AB pp 771 – 772.

104 In the 21 March 2000 facsimile from Chantal to Weber asking him whether Renslade (S) has been formed, Chantal also informed Weber that she wished for Renslade (S) to be owned by Lalaine.[111] On 23 March 2000, Weber sent Chantal a facsimile, setting out the following structure:[112]

(a) BCS, a company incorporated in Singapore and owned by Weber, would incorporate a US subsidiary named Nova Derm Corporation in Delaware.

(b) Renslade (S) would be incorporated to sell Ethocyn and/or the production rights of Ethocyn to Nova Derm Corporation.

(c) Nova Derm Corporation and Renslade (S) would sign a distribution agreement. BCS would remain a shareholder without any contribution to the business.

(d) The "beneficial owner is Lalaine Delacruz, or if ***you [ie, Chantal] like, BCS Singapore***" [emphasis added].

(e) Chantal and Weber will "transfer the commercial things to [Renslade (S)] and the patents [etc] to BCS."

105 The whole tenor of this facsimile is that of an accountant or other professional agent – Weber – reporting back to the owner – Chantal – as to what he has done so far on the "agreed" structure. He says: "So finally I hope to get the right company organisation as follows: .." Crucially, Weber ended the

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111 2 AB pp 799–801.

112 PCB pp 76–78; 2 AB pp 808–810.

telefax stating that he was working on Chantal's files. This is wholly inconsistent with his case that Chantal was his business advisor and he was the purchaser of the Ethocyn Rights:

> ***You see I am working on your files***. For me it is a little heavy as I have to read all documents and to understand all what you like and what they have done. I have also to check if the way we go is the right one. Anyway I will do my best and so fast as possible."
>
> [emphasis added in bold italics]

106 Weber's 23 March 2000 facsimile to Chantal is also important because we see Weber proposing himself (through BCS Singapore) instead, or Dr Lalaine De La Cruz, as the 'figure owner':

> So the legal office of Colin Andrew Nielsen Beyer must be informed that the beneficial owner is Lalaine Delacruz, ***or if you like, BCS Singapore***.
>
> [emphasis added in bold italics]

Weber later states:

> Concerning the contract with Hongkong, I can give you in Singapore only the possibility to use BCS. It is also possible to use a new company but this will take us another four weeks. I don't see any reason why not using BCS and afterwards create directly in Hongkong a offshore company which makes the business directly.

107 This early correspondence between Weber and Chantal convincingly suggests that, from the beginning, Weber was *assisting* Chantal to set up a structure in Singapore (*ie* Renslade (S)) for Chantal's transfer of the Ethocyn business to Singapore. This is inconsistent with the Defendants' case that it was Weber who saw a business opportunity to purchase and exploit the Ethocyn Rights and procured his company, Renslade (S), to purchase the Ethocyn Rights from Chantal.

108 Further, this early correspondence also supports the Estate's case that Chantal and Weber entered into the Trust Agreement (*ie*, as set out in [22] above and paras 13 and 14 of the Statement of Claim) in *November* 1999. First, Chantal knew Weber prior to 1999. In a declaration filed by Wehinger in US proceedings dated 17 September 2018, Wehinger confirmed that he did refer Weber to Chantal.[113] In a motion filed by Wehinger in support of the same proceedings, Wehinger confirmed that he "did introduce [Chantal] to Weber some time prior to 1999".[114] Secondly, in a chronology prepared by Chantal, she recorded that she moved the Ethocyn Business in *December* 1999 from Hong Kong to Singapore for tax reasons.[115] This is consistent with the fact that Chantal and Weber entered into the Trust Agreement in November 1999, *before* Chantal actually moved the Ethocyn Business to Singapore one month later. Thirdly, there was also an email from Chantal to Noel Conway on 5 March 2000. In this email, Chantal referred to a "Chinese lady" in the "Orient", presumably Christine, and mentioned that she wished for Christine's attorneys to handle the transactions with Colin Beyer in New Zealand in relation to the transfer of the Ethocyn Business from New Zealand to Singapore, as she wanted her "Swiss relationship to remain confidential". It is reasonable for us to presume, that this "Swiss relationship" refers to Chantal's relationship with Weber. Last, and as we have pointed out above at [99], it is clear from the 9 March 2000 Email that Weber was already known to Chantal then, and they already had prior discussions in relation to the Ethocyn Business. Therefore, Weber's claim in his AEIC (which was not admitted as evidence at the trial) that he met Chantal for

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113 11 AB pp 5374–5375.

114 11 AB p 5353.

115 12 AB pp 5734–5735.

the first time in 2000 cannot be true.[116] As regards the date at which Chantal and Weber entered into the Trust Agreement, we find that the Estate has proved on a *prima facie* basis that this was entered into in November 1999. We move on to consider the subsequent correspondence to show that it was Chantal who spearheaded the transfer of the Ethocyn Rights from Renslade (NZ) to Renslade (S).

109 On 27 March 2000, Chantal sent a letter by facsimile to Weber stating her preference for BCS to be the beneficial owner and asked for his comments. In this letter, Chantal is clearly giving directions on the legal agreements to be entered into between which entities and asked whether Renslade (S) could be re-named Renslade Holdings Pte Ltd. Chantal ended the facsimile by thanking Weber for "all [his] efforts, accomplishments, and work product for the many subjects and files".[117] On 30 March 2000, Weber sent a facsimile to Chantal and expressed his preference to act solely on her instructions rather than her consultants.[118] On the same day, Chantal emailed Weber and instructed him to prepare for the transfer of the Ethocyn Rights from Renslade (NZ) to Renslade (S) and thanked him "for the assitance [sic]" and the "consult" which Weber had "so professionally and expediously [sic] provided".[119]

110 On 13 April 2000, Chantal sent a facsimile to Weber and asked him to "finalize the agreements and contracts and start the sale of products".[120] Weber

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116 Weber's AEIC dated 30 September 2019 ("Weber's AEIC") at para 20.

117 PCB pp 79–82; 2 AB pp 821–824.

118 PCB pp 83–84; 2 AB pp 825–826.

119 PCB p 85; 2 AB p 827.

120 2 AB pp 841–842.

responded on 20 April 2000, expressing difficulties in finding a Singaporean willing to be a director of Nova Derm Corporation.[121] On 9 May 2000, Christine, the company secretary of BCS (and therefore, in effect, an employee of Weber), emailed Chantal and assured her that the name "Renslade Holding Pte Ltd" had been reserved and would offer Chantal "all the assistance" she required.[122]

111 On 10 May 2000, Chantal sent a facsimile to Weber, explaining to him her plan for the assignment of the Ethocyn Rights from Renslade (NZ) to Renslade (S). She said that she would draft the terms of the transfer agreement and told Weber that Singapore would provide her with "better (than New Zealand) tax benefits":[123]

> 1. Drafting (and signing) a Renslade Holdings Pte. Ltd. Asset Purchase (transfer)agreement to obtain (and now hold in Renslade Pte.) all the assets purchased by Renslade Ltd(New Zealand) from Chantal Pharmaceutical last October 19,1999. The best date for this agreement transferring the assets to the Singapore company would be December 24, 1999. Of course, Renslade Pte. Would have been 'another named (shelf) company at December 24,1999 when this transfer of assets occurred. ***Is this possible: to have a shelf company in Singapore (which existed on December 24th) which company changed/is changing its name to Renslade Holdings Pte. Ltd.?*** …
>
> I will fax- in next 24 hours- you a 'draft 'of what I suggest the terms of the above'transfer of assets' agreement/document between Renslade N.Z and Renslade Pte. be …
>
> …
>
> 2. Owner of Renslade Pte. Ltd: ***The owner of Renslade Pte. is/can be Dr. La Laine de la Cruz, or another Person you suggest***. She/he will be the signatory to the transfer agreement. … Basically: the decision to transfer the Chantal products' assets from New Zealand company to Singapore

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121 PCB pp 91–92; 2 AB pp 843–844.

122 PCB p 95; 2 AB p 858.

123 PCB pp 96–101; 2 AB pp 859–864.

> company (to be named Renslade Holding Pte.) will be explained to be:" " "After business and tax consultants' evaluation the decision was that: ***Singapore has better(than New Zealand) tax benefits*** and operations situs for a company holding such assets and contemplated future operations and sales."”
>
> …
>
> Thank you for all you have done
>
> [emphasis added in bold italics, typographical errors in original]

112 Weber responded to Chantal's facsimile on 15 May 2000, but did not suggest who the "owner" of Renslade (S) should be.[124] On 16 May 2000, Chantal sent another facsimile to Weber, informing him again that "Dr. Lalaine De La Cruz can be the owner of [Renslade (S)] ***or another person you nominate***" [emphasis added in bold italics].[125] It should be noted that previously, Weber informed Chantal (see [106] above) that the beneficial owner could be "Lalaine" or if she liked, BCS. This is not inconsistent with Chantal's email to Weber on 10 May 2000, where Chantal mentioned that the owner could be "Lalaine" or whoever Weber nominates. Chantal was simply giving Weber the option to choose who the owner of Renslade (S) should be. Weber responded to Chantal's facsimile on 19 May 2000, but did not reply in relation to who the owner of Renslade (S) should be.[126]

113 Renslade (S) was incorporated on 23 May 2000. On 13 July 2000, Donaldson and Burkinshaw LLP was instructed to transfer Renslade (NZ)'s assets, including the Ethocyn Rights, to Renslade (S).[127] On 23 July 2001,

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124 2 AB p 865.

125 2 AB p 867.

126 2 AB pp 874 – 875.

127 2 AB pp 932–933.

Chantal emailed Weber, informing him that her plan was to draft a long form "Transfer/assignment Document between [Renslade (NZ)] and [Renslade (S)]" backdated to 24 May 2000 ("the 23 July 2001 Email").[128] Weber replied on 7 August 2001 that "it woud be verry fine" (sic).[129] On 11 September 2001, Christine informed Chantal that Renslade (NZ) and Renslade (S) had executed an assignment for the transfer of the Ethocyn Rights to Renslade (S).[130] The assignment between Renslade (NZ) and Renslade (S) was executed on or around September 2001 and *backdated* to 24 May 2000 ("the Assignment"). The Assignment provided for the transfer of all "right, title and interest in and to all rights and obligations" of Renslade (NZ) to Renslade (S), and stated that the assignment was for valuable consideration. The Assignment however, does not state the form or amount of the consideration:[131]

> For ***valuable consideration***, the receipt and sufficiency of which are hereby acknowledged, [Renslade (NZ)], hereby assigns all of its right, title and interest in and to all rights and obligations recited in that certain October 19,1999 Asset Purchase Agreement between [Renslade (NZ)] and [the Chantal Companies] to [Renslade (S)], a Singapore Incorporated Company and [Renslade (S)] hereby accepts such assignment.
>
> [emphasis added in bold italics]

114 As noted above at [35], the Defendants' case is that Weber had bought the Ethocyn Rights from Renslade (NZ) for US$325,000 with monies belonging to BCS and/or himself. Weber's case is that Chantal wanted to sell the Ethocyn Rights and Weber saw a good business opportunity and therefore agreed to

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128 PCB pp 151–152; 3 AB pp 1121–1122.

129 3 AB p 1153.

130 3 AB pp 1161–1162.

131 Weber's AEIC at paras 26–27; Defence (Amendment No. 4) at para 20A; 2 AB p 877.

purchase the same for his own benefit.[132] The Estate has provided documents, including communications from Chantal to Weber and vice versa, to prove their case. In none of the above contemporaneous documents is there any hint of Chantal wanting to sell and Weber wanting and then deciding to buy the Ethocyn Rights. Weber has not produced any document or other evidence which shows:

(a) negotiations with Chantal over the sale of the Ethocyn Rights;

(b) the price at which this purchase was to be made; or

(c) how he paid for the Ethocyn Rights.

115 Although Weber's AEIC was not admitted into the evidence, it is interesting to note that Weber says nothing about the issues stated at [114(a)] to [114(c)] above in his AEIC. Crucially, he did not depose that he paid US$350,000 for the purchase of the Ethocyn Rights from Renslade (NZ). Weber did state that, after he acquired the Ethocyn Rights, he paid over US$120,000 to transport the manufacturing equipment from Hungary to the United States and took over the obligation to pay royalties to the Chantal Companies.[133] However, not all of the documents (in German) referred to in his AEIC were translated. Those that were only showed shipment receipts and payment instructions. Even though the Assignment states that the transfer of Ethocyn Rights from Renslade (NZ) to Renslade (S) was for "valuable consideration", Weber tellingly claims that he could not recall the details of the payment:[134]

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132 Defence (Amendment No. 4) at para 15A.3.

133 Weber's AEIC at paras 28–35, Tab 11.

134 Weber's AEIC at paras 32 and 33.

> ***However, I am unable to recall exactly how or when the payment was effected as the transactions relating to the acquisition of the Ethocyn Rights by Renslade SG took place about 20 years ago***. For several years now I have been handling a number of different businesses and managing various different streams of income. It is not easy to trace a payment made about 20 years ago, and it is not reasonable to expect such payment records to be retained for 20 years when the retention period in Singapore was only 7 years.
>
> [emphasis added in bold italics]

It is of significance that despite pleading in the Defence (Amd 4) that he purchased the Ethocyn Rights for the sum of US$325,000, Weber's AEIC does not even mention this sum.

116 On the contrary, the documentary evidence supports Baker's case that the transfer of the Ethocyn Rights from Renslade (NZ) to Renslade (S) was not for monetary consideration. First, on 7 October 2002, Christine emailed Chantal asking if a nominal consideration of US$1 could be put up for the Assignment:[135]

> With the situation today, I can confirm to [Shaun] that it's a 1-step direct assignment from Chantal Pharmaceutical to Renslade Singapore (as TM owner). However, we are still short of one input from you, i.e. the monetary consideration (sale price) for each of the assignment. ***It was recommended to us that we need put a nominal amount on all assignments. Can we proceed with say US$1 each?***"
>
> [emphasis added in bold italics]

117 Secondly, Chantal emailed Weber on 1 November 2000, stating that the "legal consideration" for the Assignment is the assumption of ongoing obligations and royalty payments.[136] These emails were not challenged in cross-

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135 PCB pp 186–187; 3 AB pp 1321–1322.

136 2 AB p 969.

examination. We therefore find that no, or at most, nominal consideration was paid for the transfer of the Ethocyn Rights from Renslade (NZ) to Renslade (S).

118 At the trial, Mr Yeo SC challenged Baker's case, on multiple occasions, that there was no agreement between Weber and Chantal for Weber to hold the Ethocyn Rights on trust for Chantal, since in all the correspondence so far, there was no mention of any "trust" or equivalent terms:[137]

> Yeo: Do you see anything in [the 9 March 2000 Email] which ***refers to [Chantal] being the beneficial owner*** or Mr Weber holding the assets on trust for her?
>
> Baker: No, but it does say that the -- Lalaine de la Cruz will still be the owner and, in fact, when she is talking about this was Esterkin, she will not say ever to him that she is the owner in any way, shape or form.
>
> …
>
> Yeo: Does [Chantal] refer to Ms de la Cruz ***holding on trust*** or being a figure owner for [Chantal] in [the 9 March 2000 email]?
>
> Baker: No, she said de la Cruz will continue to hold that, not Mr Weber.
>
> …
>
> Yeo: Mr Baker, there is nothing, I suggest to you, in [the email on 10 March 2000 from Chantal to Weber] that ***refers to Mr Weber or his entities holding Ethocyn rights on trust for [Chantal].***
>
> …
>
> Baker: … What [the fax from Chantal to Weber on 21 March 2000] does is it shows her setting up everything, in that Weber doesn't seem to understand much about anything …
>
> …

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137 Tr/13.11.19/78/6–79/1; 91/1-10; 94/20–95/1.

> Yeo: … Mr Baker, I'm simply suggesting to you that if your story is correct, ***then there would be a reference by this time to Mr Weber holding the companies on trust for [Chantal]***. You can agree or disagree. Let's move on.
>
> Baker: I disagree. I don't think it needs to be said right here …
>
> [emphasis added in bold italics]

119 Mr Yeo SC also suggested at the trial that Chantal was merely fulfilling her duties as the Chief Operating Officer of Renslade (NZ) and Weber was advising her in respect of Renslade (NZ)'s business.[138] As noted above, the correspondence, however, did not support the Defendants' case at all. On the contrary, it was clear that Weber took Chantal's instructions, and Chantal directed the transfer of the Ethocyn Rights from Renslade (NZ) to Renslade (S) for nominal consideration. From the start (the email from Wehinger to Chantal on 3 March 2000), Wehinger told Chantal that both he and Weber will support ***her business***. Throughout the correspondence between Chantal and Weber, Chantal thanked Weber repeatedly for his ***assistance and consultations***, and Weber (tele-facsimiled on 23 March 2000) acknowledged that he was working on Chantal's files. Chantal was also the one who decided that, instead of Lalaine, BCS should be the "figure owner" of Renslade (S).

120 For the reasons above, we find that none of these documents show that Weber was the beneficial owner of the Ethocyn Rights (or that it was purchased by him). On the contrary, Chantal remained the beneficial owner of the Ethocyn Rights (after acquiring it at the US Bankruptcy Proceedings).

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138 Tr/13.11.19/92/14–93/2; 117/21–118/1.

Who provided the US$135,000 for the Royalty Buyout?

121 On 23 July 2002, the US Bankruptcy Court approved a royalty buyout where Renslade (S) bought out the Chantal Companies' rights to the Ethocyn Royalty for US$135,000. Baker's pleaded case is that it was Chantal who provided the sums for the Royalty Buyout. On the contrary, the Defendants claim that it was BCS who provided these sums and not Chantal. As we set out the events that led to the Royalty Buyout, we find that the evidence supports Baker's claim that, on a *prima facie* basis, it was Chantal who provided the US$135,000 for the Royalty Buyout.

122 On 25 May 2000, Renslade (S) entered into an exclusive distribution agreement with BCS for the latter to distribute Ethocyn-related products ("BCS-Renslade Distribution Agreement"). On 26 May 2000, BCS entered into two separate distribution agreements with E. Cosmetics LLC and Nova Derm Corporation to appoint them as sub-distributors ("the Sub-Distributors Agreement").[139] These distribution agreements appear, and we so find, to have been arranged on Chantal's instructions. E. Cosmetics LLC and Nova Derm Corporation were entitles controlled by Chantal.[140] Further, in an email from Christine to Chantal on 21 September 2000, Christine took instructions from Chantal in relation to the preparation of the distribution agreements and asked if Chantal had any comments on this:[141]

> Yesterday, Mr Weber was in BCS office and we had a discussion on some of the outstanding matters.
>
> …

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139 2 AB pp 880–927.

140 Baker's AEIC at para 171.

141 2 AB p 954.

> 2) Distribution agreement
>
> We assume that the assignment of the rights from Renslade NZ to ASTC is confirmed. As such ***we will proceed with the preparation of [the distribution agreements]*:**
>
> …
>
> These 3 Distribution Agreement will take the effective date of 1st April 2000. We proposed this date because we started the reporting of gross revenue from Singapore at this date. (***Do you have any comments on this?***) Mr Weber's opinion is that these 3 agreements should be kept as simple as possible …
>
> [emphasis added in bold italics]

123 On 11 November 2000, Weber sent Chantal an email requesting that Chantal "make sure that we have finalisised [*sic*] the royalty problem."[142] Chantal replied two days later to inform Weber that she had informed Mr Esterkin of Renslade (S)'s offer to pay US$225,000 to buy out the Creditors' Committee's rights to the Ethocyn Royalty and that this was conveyed to the Creditors' Committee. The fee payable for the Royalty Buyout was eventually reduced to US$135,000.[143]

124 Chantal then had numerous email exchanges with BCS's Christine in relation to Chantal's payment of US$135,000 for the Royalty Buyout:[144]

(a) On 19 March 2002, Chantal emailed Christine, asking her for the bank account information to transfer monies from Nova Derm Corporation to Renslade (S).

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142 2 AB p 981.

143 2 AB pp 983–984.

144 3 AB pp 1187–1188, 1190.

(b) Christine replied the next day, asking Chantal whether the upcoming transfer would include the "amount need [*sic*] for royalty buy-out (USD 135,000)".

(c) Chantal responded on 21 March 2002, confirming that these funds would "include $135,000 for royalty buy out".

125 On 20 April 2002, Chantal transferred US$167,154.82 from Nova Derm Corporation to Renslade (S). This was recorded in a set of typewritten notes, which we find were made by Chantal, titled "Instructions for Bank America transactions sat; April 20, 2002".[145] The transfer was carried out on 22 April 2002. On the same day, Chantal informed Christine of the transfer of monies from Nova Derm Corporation to Renslade (S) and requested her to inform Mr Esterkin (Chantal's lawyer in the Chapter 11 proceedings) that they would be wiring him "the $135,000 Royalty Buyout monies later this week":[146]

> Dear Christine,
>
> ***I hope you have received wire transfer of $167,154.82*** …
> It was sent to … Renslade Holdings Pte. Ltd
>
> …
>
> I recommend you email Estrekin back as follows:
>
> Dear Mr. Esterkin,
>
> …
>
> We will be ***wiring to you the $135,000 Royalty Buy monies*** later this week.
>
> [emphasis added in bold italics]

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145 3 AB p 1270.

146 3 AB p 1273.

126 Between 24 July 2002 to 6 August 2002, Chantal instructed Christine to follow up on the completion of the Royalty Buyout. For example, on 24 July 2002, Chantal asked Christine to send Mr Esterkin an email, asking him to update her (Christine) on the "status regarding [the] approval of Royalty Buy Out AGreemnt [*sic*]". On 26 July 2002, Mr Esterkin informed Christine that the US Bankruptcy Court has approved the Royalty Buyout. Subsequently, on 6 August 2002, Christine emailed Chantal asking Chantal if the "royalty buy-out issue [was] closed" and whether Chantal still required her assistance.[147]

127 The Defendants do not dispute that Nova Derm Corporation transferred the sum of US$167,154.82 to Renslade (S) on 22 April 2002. Notwithstanding the correspondence referred to above, Mr Yeo SC challenged at the trial that it was BCS who provided the funds for the Royalty Buyout as Nova Derm Corporation was a subsidiary of BCS, and the payment of US$167,154.82 was for royalties due to Renslade (S) under the Sub-Distributors Agreement:[148]

> Yeo: [I]sn't it correct that Nova Derm was incorporated as a subsidiary of BCS? … Nova Derm was a subsidiary of BCS, correct?
>
> Baker: … I agree.
>
> Yeo: Thank you. Not only that, Nova Derm had entered, by this time, into a distribution agreement or sub-distribution agreement with BCS whereby they were supposed to pay royalties to BCS, correct?
>
> Baker: Correct.
>
> Yeo: In turn, BCS would pay royalties to Renslade Singapore, correct?
>
> Baker: Correct.

147 3 AB pp 1287–1289, 1296–1298.

148 Tr/14.11.19/39/22–40/25.

> Yeo: … Mr Baker, ***isn't this simply a case of Nova Derm transferring its royalty payments direct to Renslade Singapore, rather than going through BCS?***
>
> Baker: Absolutely not. I disagree … Chantal Burnison controlled everything -- money, payments, whether she made the royalty payments or not …
>
> [emphasis added in bold italics]

128 We accept that there is documentary evidence supporting Weber's assertion that Nova Derm Corporation was BCS's subsidiary. For example, Cl 2.3 of the BCS-Renslade Distribution Agreement provides that Nova Derm Corporation was the subsidiary of BCS:[149]

> … For the avoidance of doubt, [BCS] has the right to appoint its subsidiaries (namely Nova Derm Corporation and E-Cosmetics LLC) as sub-distributors of the Products in North America.

129 Furthermore, in an email from Chantal to Weber on 9 May 2000, Chantal stated that "Renslade [(S)] needs to provide Royalty committee a copy of the [BCS-Renslade Distribution Agreement] between Renslade [(S)] and BCS (which holds Nova Derm Corp and E. Cosmetics LLC--U.S. subsidiaries of BCS distributing Chantal products)".[150] In another email from Chantal to one Steve dated 24 September 2002, Chantal stated that "NowaDerm [*sic*] Corporation is the U.S. subsidiary of BCS which runs North American operations …"[151]

130 It was therefore in this context that Baker referred to an email from Weber to Chantal dated 13 April 2000, where Weber referred to "your [Chantal]

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149 2 AB p 881.

150 2 AB p 855.

151 3 AB p 1316.

company in USA".[152] However, this line of questions by Mr Yeo SC completely ignores the fact that it was, as we have found at [122] above, Chantal who set up Nova Derm Corporation for the purposes of distributing the Ethocyn Products in the US and decided it would be a subsidiary of BCS in her planned corporate structure to exploit her product. This is evident from Chantal's email to Weber on 10 March 2000, where she informed Weber that she had arranged for the incorporation of a new Delaware company, Nova Derm Corporation, to perform the role of "the North American distributor for the Chantal Products".[153] In addition, on 13 April 2000, Chantal sent Weber Nova Derm Corporation's incorporation papers.[154] Therefore, the fact that Nova Derm Corporation was BCS's subsidiary did not necessarily lead to the conclusion that the funds for the Royalty Buyout were provided by BCS.

131 We reject Weber's claim, made through his counsel, Mr Yeo SC, that the transfer of US$167,154.82 from Nova Derm Corporation to Renslade (S) was for royalties due to Renslade (S). There are no documents supporting such a claim and Weber chose not to give evidence. Not only did the correspondence between Christine and Chantal refer to the US$167,154.82 as the payment for the Royalty Buyout, it was clear that Chantal was providing the funds for the Royalty Buyout and Christine was acting on Chantal's instructions to transfer US$135,000 out of this US$167,154.82 to Mr Esterkin for the Royalty Buyout. There was also an email from BCS's Ms Oer Yan Fern to Chantal dated 13 March 2003, where Ms Fern specifically referred to the US$167,154.82 as sums

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152 2 AB p 843.

153 2 AB p 771.

154 2 AB p 841.

transferred for the Royalty Buyout. In the same email, Ms Fern also referred to a separate payment of US$69,996.50 and enquired if that payment was a royalty payment from Nova Derm to Renslade (S):[155]

> Dear Dr Chantal,
>
> …
>
> 1) Since the last remittance of USD167,154.82 in April 2002 from Nova Derm ***for the royalty buy-out***, Renslade a/c did not receive money from Nowa Derm [*sic*] or any other agents/distributor …
>
> 2) We received yesterday a sum of USD69,996.50 in our BCS a/c with your name as a reference. Please advise how we should treat this sum. ***Is this royalty payments from Nowa Derm [sic] to Singapore?***
>
> …
>
> [emphasis added in bold italics]

132 The Estate's case is that Chantal was directing professionals and persons and set up this structure to keep her ownership opaque, to move the assets offshore to a more friendly tax regime and to structure her production and sales channels through corporations set up at her direction. The documentary evidence set out above is consistent with their case. In addition we have the evidence of Baker and Heika. Bearing in mind the burden of proof and the tests to be applied (see [66] to [70] above), we accept the version put forward by the Estate and find not only that the Estate has made out a *prima facie* case but also that the Defendants have not been able to discredit the witnesses under cross-examination or impugn the relevant documents and their contents as contended by the Estate. As noted previously, this is a case where Weber has

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155 3 AB p 1330.

chosen not to give evidence to explain why his emails and facsimiles should not be given their plain and natural meaning.

133 Finally, we add that there is sufficient *prima facie* evidence put forward by the Estate of how Nova Derm obtained the sum of USD$167,154.82 which it subsequently transferred to Renslade (S). On 19 April 2002, a sum of US$994,595.30 was transferred from one Chicago Title Insurance Company to Nova Derm Corporation's bank account. Baker claims that this came from a loan of US$ 1 million which Chantal had taken out from Wells Fargo bank by way of a mortgage on her home at Sarbonne.[156] Approximately $6,000 was used to pay the fees incurred in taking out this loan, and the remaining sums were transferred to Nova Derm Corporation's bank account, increasing Nova Derm Corporation's bank account balance from US$16,331.47 to US$1,010,926.77.[157] At the trial, parties agreed that the Ethocyn Rights did not generate any significant income prior to the Nu Skin SDA. As such, the evidence does suggest that the US$ 1 million in Nova Derm Corporation's bank account came from monies raised by the mortgage taken out by Chantal. Although the Defendants submit that Baker's claim is baseless, they are unable to provide any documentary evidence nor any alternative explanation as to where the US$1 million in Nova Derm Corporation's bank account could possibly have come from, given that it is also their claim that Nova Derm Corporation is BCS's subsidiary.[158]

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156 2 Supplementary Agreed Bundle ("SAB") pp 3–4, 67–70.

157 3 AB pp 1243–1245.

158 Defendants' Closing Submissions at paras 398, 399.

134 Baker also explained in his AEIC that parties had never truly intended the monies due under the Distribution Agreements (BCS-Renslade Distribution Agreement and the Sub-Distributors Agreements) to be royalties payable to Renslade (S). The royalty payment due to Renslade (S) was described as such in order for Renslade (S) to hold the income generated from the Ethocyn Rights on trust for Chantal.[159] Whether we find this to be true depends on whether we accept Baker's case that there was indeed a trust agreement between the parties. For this issue, it suffices for us to conclude and find that the Estate has made out a *prima facie* case that Chantal provided the funds for the Royalty Buyout from the monies raised by her mortgage of her home at Sarbonne.

Who Arranged for the Transfer of the Ethocyn Rights from Renslade (S) to BCS?

135 The Ethocyn Rights were eventually transferred from Renslade (S) to BCS pursuant to the Deed of Assignment. As we set out the events that led to this transfer, we find that the Estate has established on a *prima facie* basis that it was Chantal who arranged for the transfer of the Ethocyn Rights from Renslade (S) to BCS. The Estate's case is that the Deed of Assignment was entered into around 26 July 2002 and backdated to 1 April 2002. The Defendants' case is that Weber arranged for the Ethocyn Rights to be transferred from Renslade (S) to BCS pursuant to the Deed of Assignment that was executed on 1 April 2002.

136 Reviewing the documentary evidence (which was not challenged in cross-examination), we find that it was Chantal who arranged for the transfer of

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159 Baker's AEIC at paras 207–210.

the Ethocyn Rights from Renslade (S) to BCS for the purposes of the Nu Skin SDA. This is consistent with our findings at [145] below that Chantal was the driving force behind the Nu Skin negotiations. In an email from Chantal to Weber on 20 September 2002, Chantal updated Weber on her ongoing negotiations with Nu Skin and specifically mentioned that she wanted the Nu Skin SDA to be signed with BCS:[160]

> ANyway, The Nu SKin agreement..as it is being prepared for NON-North American distribution countries ***should also be with SIngapore COmpany[BCS?]*** …
>
> [emphasis added in bold italics, typographical errors in original]

137 Subsequently, on 24 September 2002, Chantal sent an email to one Mr Steve Schwartz of International Research Services, Inc., a clinical research company, and updated him that the Ethocyn Rights were assigned to BCS Business Commercial Services Pte Ltd:[161]

> … Renslade Holdings and BCS Business Commercial Services PTE … have assigned all patents to BCS Business COmmercial Servicces Pte. Ltd in SIngapore …
>
> [typographical errors in original]

BCS Business Commercial Services Pte Ltd was BCS's previous corporate name. BCS changed its corporate name to BCS Business Consulting Services Pte Ltd on 26 July 2002.[162]

138 In an email dated 16 February 2012 from Chantal to Weber, Chantal requested Weber to forward her the Deed of Assignment between Renslade (S)

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160 3 AB pp 1314–1315.

161 3 AB p 1316.

162 10 AB pp 4998–5000.

to BCS which she "guess[ed]" occurred shortly after BCS's name change.[163] We find that the correspondence above does prove on a *prima facie* basis that it was Chantal who arranged for the assignment of the Ethocyn Rights from Renslade (S) to BCS. Weber did not come to trial to contend otherwise. However, the correspondence above did not support the Estate's case that the Deed of Assignment was backdated. Nowhere in the emails did Chantal mention that the Ethocyn Rights had yet to be transferred. Even Chantal herself was uncertain when the Ethocyn Rights was transferred, as she "*guess[ed]*" that it occurred after BCS's name change. Therefore, we find that the Ethocyn Rights were transferred on 1 April 2002, as stated in the Deed of Assignment.

The Nu Skin SDA and the management of the alleged Trust Monies (2002 – September 2015)

139 We now turn to the period from after the Royalty Buyout to September 2015 when Chantal was diagnosed with cancer.

140 To recapitulate, Renslade (S) assigned the Ethocyn Rights to BCS under the Deed of Assignment dated 1 April 2002 (see [138] above). The US Bankruptcy Court approved the Royalty Buyout on 23 July 2002. On or about 26 June 2003, BCS entered into a supply and distribution agreement with Nu Skin, a Utah corporation, which we refer to as "the Nu Skin SDA" (see [25] above). This was a significant contract as it generated very large revenues. The following events, which are not disputed, also took place:

(a) Chantal signed the Nu Skin SDA on behalf of BCS. Under the Nu Skin SDA, BCS agreed to supply Ethocyn to Nu Skin for Nu Skin's

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163 5 AB pp 2349–2350.

distribution.[164] Pursuant to cl 7.9 of the BCS-Renslade Distribution Agreement, BCS retained a "distribution fee of [5%]", which was subsequently increased to 10% on 2 January 2015.[165]

(b) Renslade (HK) was incorporated on 5 November 2007 with Weber as its sole shareholder. After BCS retained a "distribution fee" of 5% from the payments made by Nu Skin, the remaining sums were transferred to Renslade (HK) for tax reasons. These sums are referred to as the "alleged Trust Monies".[166]

(c) From 2008 to 2011, a total of US$9,450,000 was paid by BCS or Renslade (HK) to E. Cosmetics Corporation, an entity incorporated in the United States that is controlled by Chantal.[167]

(d) From 2011 to 2017, a total of US$24,555,000 was paid by BCS or Renslade (HK) to BCS Pharma Corporation, an entity incorporated in the United States that is controlled by Chantal. Both E. Cosmetics Corporation and BCS Pharma Corporation manufactured and produced Ethocyn products.

141 This appears to be a period of smooth cooperation and functioning between Chantal and Weber, BCS and Renslade (S) (and later Renslade (HK)). There were no disagreements or conflicts apparent from the evidence. However,

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164 3 AB pp 1335–1355.

165 2 AB p 888.

166 4 AB pp 1866–1879; 10 AB pp 4959–1966; 5 AB pp 2010–2088; and 12 AB pp 5786–5787.

167 Baker's AEIC at para 310.

we need to examine the evidence as each side has a different interpretation of the events and evidence and has put forward conflicting contentions.

142 It would be useful at this juncture to recapitulate the parties' pleaded cases in relation to the management of the alleged Trust Monies:

(a) Baker claims that, from around 2007 to 2017, Nu Skin made payments under the Nu Skin SDA to BCS. 95% of the monies paid by Nu Skin to BCS were held on trust for Chantal. The remaining 5% were retained by BCS or Weber as commission. In or around 2016, BCS and/or Weber started retaining 10% of the monies paid by Nu Skin to BCS without Chantal's knowledge and/or consent. Upon Chantal's requests, Weber would transfer alleged Trust Monies from BCS and/or Renslade (HK) to Chantal or entities controlled by her, or entities involved in the production and marketing of the Ethocyn products or the protection of the Ethocyn rights.

(b) The Defendants claim that, from 25 May 2000 till her death, Chantal worked for Renslade (S) as a consultant and aided Renslade (S) and BCS with the exploitation of the Ethocyn Rights. BCS paid E. Cosmetics Corporation and BCS Pharma Corporation to formulate and package Ethocyn products for Nu Skin. BCS and/or Renslade (HK) paid for the costs of producing the Ethocyn products and other expenses from the sums Nu Skin paid to BCS in advance. The net sums constituted profits which belonged to the Defendants. Renslade (HK) has no knowledge or involvement in the alleged Trust and never held any monies on trust for Chantal. It was for tax purposes that the profits generated from the Ethocyn products were transferred to Renslade (HK) in Hong Kong, and 5% (2007 to 2014) and 10% (from 2015) was

> retained by BCS in Singapore as distribution fee. Further, Chantal claimed costs on behalf of E. Cosmetics Corporation and/or BCS Pharma Corporation, which was higher than the actual costs incurred. As a result, BCS paid an excess of US$18,377,465.23 in costs which was profited by Chantal.

143 It is of some significance to note that, despite the Defendants' pleaded case that Chantal misled them into overpaying her the sum of US$18,377,465.23, the Defendants have not filed a counterclaim for the same. We therefore need not dwell on this overpayment any further.

144 Having considered the evidence, we find the evidence, especially the documentary evidence, surrounding the alleged Trust Monies to be consistent with Baker's case that the Ethocyn Rights and Trust Monies beneficially belonged to Chantal for the following reasons.

145 First, we agree with and accept the evidence of Baker, who deposed in his AEIC that the documentary evidence shows that Chantal was the driving force for all dealings with Nu Skin.[168] She negotiated with Nu Skin and was the primary decision maker. Chantal had started negotiating deals with Nu Skin from November 2000. For example, in an email from Chantal to Weber dated 20 September 2002, Chantal informed Weber that she was in final agreement with Nu Skin for the launch of Ethocyn products in Japan.[169] Chantal also decided on the pricing of the Ethocyn products with Nu Skin. In an email from

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168 Baker's AEIC at paras 253–302.

169 3 AB pp 1314–1315.

Chantal to one Hartono Sianto (a director of Renslade (HK),[170] "Hartono") and Weber on 16 January 2014, Chantal agreed to a 6% price reduction when Nu Skin made a large order.[171] Throughout the period of collaboration with Nu Skin from 2003 to 2016, it was Chantal who drove the entire Ethocyn business with Nu Skin. When Nu Skin required the Ethocyn products, Nu Skin would send its purchase orders directly to Chantal.[172] There was also an email from one Blaine Knight (Nu Skin's representative) to Baker on 13 February 2018, confirming that his primary point of contact was with one Mark Lehman, BCS Pharma Corporation's legal counsel.[173] Chantal was the one who updated BCS's staff on the business development with Nu Skin and it was Chantal's companies who manufactured and produced the Ethocyn products. At the trial, the Defendants did not challenge Chantal's control over the Nu Skin business. There is no evidence that one would expect to find where the chief operations officer ("COO") reports back to the owner on the significant stages of the Nu Skin SDA to obtain the owner's agreement. Chantal made the decisions.

146 Secondly, Chantal would reimburse Weber for his out-of-pocket expenses that he incurred for the Ethocyn business. For example, on 16 August 2000 (before the Nu Skin SDA), Weber emailed Chantal requesting payments for (a) royalties, (b) invoices by other companies for business related expenses and (c) "invoice for [his] services".[174] In another email from Chantal to Weber on 8 September 2002, Weber informed Chantal that he would send her an

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170 10 AB p 4962.

171 7 AB pp 3400–3401.

172 4 AB pp 1631–1634.

173 1 SAB p 55.

174 2 AB p 949.

invoice "for the expedition of the Ethocy[n] to USA" and that he had paid for that invoice. On 20 September 2002, Chantal replied, reminding Weber to "always pay [his] expenses and needs/fees regarding [Ethocyn] from the money in Switzerland by Amalfino", which was where Chantal would transfer the funds to.[175] The Defendants did not challenge these documents in cross-examination.

147 Thirdly, Weber had to account for the alleged Trust Monies to Chantal. We list four notable instances:

(a) On 4 March 2012, Weber emailed Chantal, updating her that "we have had more th[a]n USD 6.3[m] sen[t] over to you in the past 12 months …" In response, Chantal asked Weber to "send [her] an itemization (by month) of [the] past 12 months' transfers" in the amount of US$ 6.2 million. Weber subsequently sent Chantal a report of all the payments made from Renslade (HK) to E. Cosmetics Corporation and BCS Pharma Corporation.[176]

(b) In an email correspondence between Chantal and Weber on 30 November 2012, Weber informed Chantal that Renslade (HK) "needed some cash as [they] haven't got any income this year … so [he] have put some cash in". Chantal was concerned and replied, stating that she was "surprised that there was [no] money from years before accumulated", and asked Weber to provide an account of the alleged Trust Monies

175 3 AB pp 1313–1315.

176 5 AB pp 2422–2426.

between 2003 and 2011. Weber responded that he "will check the cash flow and will give [Chantal] a list" and told her not to worry about it.[177]

(c) In an email correspondence between Chantal and Weber on 10 and 11 December 2012, Chantal emailed Weber and enquired about BCS's balance of accounts, asking him if he had "look[ed] at the balance of accounts in Singapore". Weber replied, stating that he "will send [her] all the details about Renslade [the same] week" and explained that he had "made some investments" to justify the differences in the figures.[178]

(d) On 4 August 2014, Chantal emailed Weber and requested the "balance remaining at this date in account regarding Nu Skin monies [*sic*] received in 2013 and 2014". Weber replied the next day, informing Chantal that he would provide the details as soon as he was in Singapore. On 17 August 2014, Weber emailed Chantal the accounting information of Renslade (S) from 2012 to 2014.[179]

148 Fourthly, as regards the alleged Trust Monies transferred to the companies controlled by Chantal (E. Cosmetics Corporation and BCS Pharma Corporation), we find that the evidence supports Baker's case on a *prima facie* basis that the alleged Trust Monies were transferred on Chantal's instructions. From 2007 to 2016, BCS and Renslade (HK) would, at Chantal's request, unquestioningly transfer millions of dollars each year to companies controlled

177 6 AB pp 2654–2655.

178 6 AB pp 2671–2674.

179 8 AB pp 3530–3532, 3564–3565.

by Chantal.[180] For example, on 31 March 2008, Chantal sent an email to BCS requesting a transfer of US$150,000 to her Los Angeles bank account:[181]

> KIndly [*sic*] wire transfer $150,000 to our E. Cosmetic , Los Angeles bank account at your earliest convenience …

This was done on the same day without any question on the purpose of the transfer:[182]

> Dear Dr. Chantal,
>
> Kindly be informed that we have proceeded with the wire transfer of USD 150,000.00 to E. Cosmetics via Wells Fargo Bank today.
>
> Best Regards,
>
> Hartono

149 In addition, there was also an instance when the Defendants transferred US$500,000 to Chantal for her medical bills. On 15 August 2016, Chantal emailed Hartono requesting a transfer of US$500,000 to her BCS Pharma's Wells Fargo Los Angeles bank account for the payment of her medical bills, and this was done on the same day without any question:[183]

> Kindly write to Wells Fargo Los Angeles account the $ sum of $500,000 [a]t you [*sic*] earliest convenience(Preferably today).
>
> ***There are numerous medical bills that are immediately need [sic] for surgeries and hospitals*** (surgeons and hospitals).
>
> In the next days I will be able to email to a proforma of the next 30 days' anticipated wire transfers. ***This first $500,00,000***

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180 See Baker's AEIC, Table 5 and 6, Annex A.

181 4 AB pp 1716–1717.

182 4 AB p 1715.

183 9 AB pp 4391–4392, 4415–4416.

> ***today transfer request is immediately needed*** (today/tomorrow).
>
> [emphasis added in bold italics]

150 At the trial, Mr Yeo SC put to Baker that this personal transfer was a one-off exception for Chantal given her medical condition, and that it was an act of charity:[184]

> Yeo: Mr Baker, I suggest to you this is a ***one-off request*** which Mr Weber had no difficulty acceding to, given the personal circumstances of [Chantal], who urgently needed to pay for medical treatment …
>
> Baker: I'm sure my counsel will ask Mr Weber that next week, but ***I disagree vehemently that this is an act of charity of a half million dollars.***
>
> Yeo: Mr Baker, this is not an instant you can rely on to show that [Chantal] was truly the owner of all the companies' assets. You can agree or disagree.
>
> Baker: I disagree. I think this further illustrates that any time she asked for money, for any reason, whether it was health, medical, just -- "I just feel like having $200,000 sent to me", he always did that and that's exactly what happened, and ***if it's contrary, then that's for Mr Weber to say.***
>
> [emphasis added in bold italics]

151 Whilst it may well be that the transfer of US$500,000 could be a one-off transfer out of charitable sentiments in other situations, it remains the case of Baker and the Estate *in this case* – and Baker has given emphatic evidence, which we accept – that the transfer of US$500,000 on 15 August 2016 was not such a charitable act, as it was Chantal's monies and she needed and wanted them transferred over for her medical expenses. By that stage, Baker was assisting Chantal and would have personal knowledge of this. That is certainly

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184 Tr/14.11.19/191/19–192/10.

an explanation or reason that was not so inherently incredible or unbelievable or beyond the remit of common sense. Furthermore, importantly, Weber has *chosen not to give evidence* of his version of why this US$500,000 was sent to Chantal. We therefore find there is no basis for Mr Yeo SC to suggest otherwise and we accept Baker's evidence. There was an email from Hartono to Weber on 15 August 2016, where Hartono forwarded Chantal's email above and told him it was "[f]or [his] info".[185] The email, however, only showed Hartono merely informing Weber about the transfer, and Hartono did not actually obtain Weber's consent before transferring US$500,000 for Chantal's medical expenses. The Defendants did not call Hartono to give evidence on this aspect.

152 The Defendants submit that these monies were for operating expenses and costs related to the Ethocyn business.[186] In support of this submission, the Defendants' counsel painstakingly compiled all the transfer requests from Chantal to BCS.[187] Having reviewed the documents, we find that Chantal indeed classified these transfer of monies (except the one-off request for medical expenses above) for the purposes of operating costs and production. In short, Chantal *directed* the transfer of the alleged Trust Monies to various entities and stated that these transfers were for operating expenses and costs related to the Ethocyn business. We also find that Chantal did, in a few instances, provide justifications for these transfers. For example, on 17 August 2009, Chantal requested a transfer of US$200,000 and explained that "[t]his amount is higher than usual request due to a combined payment for [Ethocyn] clinical trials in

185 9 AB p 4392.

186 Defendants' Closing Submissions at paras 424–437.

187 See Annex A of the Defendants' Closing Submissions for a list of all the documents.

progress and the forthcoming Nu Skin compound production".[188] On 30 August 2013, Chantal requested a transfer of US$585,000 and explained that this was for the costs of purchasing "raw ingredients" for the Ethocyn products.[189]

153 The classification of these transfers as operating costs and expenses may on one view appear inconsistent with Baker's case that these are actually Trust Monies owed to Chantal. Baker explained in his AEIC that the payments were classified as such only for auditing and tax purposes.[190] His explanation would account for Chantal asking for transfers from BCS, as she had the discretion on how much she could call for and how they were to be booked in BCS's ledgers. There was evidence showing that these funds were first characterised as "loans", but then re-characterised as "expenses",[191] which Baker argues supports his claim that the alleged Trust Monies belonged to Chantal. There was also no evidence on how these funds were used or accounted for in the other companies. It is not unknown for businessmen to classify payments received under one ledger or category or another, whether for tax or accounting reasons. Suffice to say, at this stage, the documentary evidence supports our finding that Chantal *directed* the transfer of funds, and these were *largely done without question*. The Estate has given an explanation and reasons that, again, are not inherently incredible or unbelievable. On the contrary, it is in accord with how many private limited companies operate within a private corporate group structure and is consistent with why Chantal, having chosen to keep her beneficial ownership opaque, was nonetheless driving the exploitation of her Ethocyn product.

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188 4 AB pp 1864–1865.

189 7 AB pp 3232–3233.

190 Baker's AEIC at paras 328–330.

191 4 AB pp 1811–1812; 3 AB p 1417.

154 At the trial, Mr Yeo SC tried contesting the documentary evidence by putting to Baker that BCS complied with Chantal's requests for monies because their staff, Christine and Hartono, trusted Chantal:[192]

> Yeo: Mr Baker, I'm suggesting to you, ***because the BCS people, for instance, Christine Yong, trusted [Chantal]*** and because they believed Nowa Derm [*sic*] and E.Cosmetics were subsidiaries of BCS, they complied readily with these requests and not because [Chantal] was the beneficial owner. You can agree or disagree.
>
> Baker: I disagree, and if that were true, then you would have Ms Christine Yong here as a witness …
>
> [emphasis added in bold italics]

155 Mr Yeo SC also sought to suggest that, in 2011, Chantal and Weber had developed a personal relationship and Weber therefore trusted that Chantal was using the monies for operating expenses without having to be given proof:[193]

> Yeo: … Is it correct, Mr Baker, that by this time, 2011, [Chantal] and Mr Weber were not just working together but they had formed a personal relationship?
>
> Baker: I have no knowledge of that.
>
> …
>
> Yeo: Mr Baker I suggest to you this was the case of an owner who trusted his COO and they were on personal terms … You can agree or disagree with that.
>
> Baker: I disagree with it. The fact that we're here in court today shows you what trust does.

156 We note Christine and Hartono were not at any time slated as witnesses for the Defendants and therefore neither testified at the trial nor filed any

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192 Tr/14.11.19/58/13–21.

193 Tr/14.11.19/71/13–17; 103/24–104/5.

affidavits in support of Mr Yeo SC's assertions above. Weber chose not to give any evidence at the trial. Mr Yeo SC's suggestion that Christine, Hartono and Weber did not ask for any proof of expenses as they blindly trusted Chantal is accordingly unsupported speculation and we are, in a no case to answer scenario, entitled, indeed bound, to accept that Baker and the Estate's versions are true; they are not so inherently incredible or outside of common sense. We would also add that, on the facts of this case, we would readily accept the reasons and explanation put forward by Baker and the Estate as convincing evidence on this issue.

Chantal's attempts at an account of the alleged Trust Assets

157 We now examine the evidence and events that occurred from September 2015, when Chantal was diagnosed with metastatic colon cancer, to her passing on 2 October 2016.

158 We find this evidence to be very important because if the Defendants' case were true, when Chantal repeatedly sought an account of the Trust Assets and Trust Monies from May 2016, we would have expected protestations from Weber and observations by others, like Wehinger, to Chantal that she was not the owner of the Ethocyn Rights. Instead the documentary evidence, including emails and facsimiles written by Weber, were in terms that acknowledged the obligation to account to Chantal.

159 In Weber's AEIC (that was not admitted into evidence), he stated that he knew that Chantal was diagnosed with cancer around May 2016.[194] On 24

[194] Weber's AEIC at paras 72–74.

May 2016, Chantal had called for a meeting and emailed Weber, requesting "paper records/statements" ("the Financial Records") in relation to a 5% compensation for services provided by Weber to her or BCS Pharma Corporation for their meeting in Los Angeles the following weekend:[195]

> … I request the following be accomplished at our LA meeting:
>
> …
>
> 4. Paper records/statements re specifics of our agreed 5% of all revenues BCS Pharma/BCS Singapore receive each year; which 5% is our agreed compensation for your services provided me/BCS Pharma each year since our coming together;

160 At the trial, Mr Yeo SC suggested that this email was prepared by Baker in his attempt to gather information for a legal claim, and that Baker had "planted in [Chantal's] mind that there was an agreed 5 per cent of all revenues".[196] Baker denied the assertion, and Mr Yeo SC did not produce any independent evidence suggesting otherwise. More importantly, if Weber truly owned the assets, he could have, and indeed we would have expected him to have, disputed Chantal's claim in the email that he was only entitled to a 5% compensation. Instead, Weber replied that he would be happy to see Chantal and answer all her questions:[197]

> Dear Chantal
>
> Thanks for your long mail. I am ***very happy to see you and to answer all your questions***. I know how you feel and I have no words about. So for the moment all the best and looking forward to see you soon.
>
> Warmest

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195 9 AB pp 4301–4302.

196 Tr/14.11.19/143/23–144/8.

197 9 AB p 4303.

> Marcus
>
> [emphasis added in bold italics]

161 On 25 May 2016, Chantal forwarded Weber's reply to Wehinger. Wehinger replied on the same day, informing Chantal that he had met with Weber and that Weber had informed him that he was in "a position to give [her] an overall picture of the present financial status and its history".[198]

162 It is apposite at this moment to shed light on Chantal's relationship with Wehinger, since Wehinger features prominently in the documentary evidence. The Estate's case is that, from Chantal's perspective, Wehinger had always been acting as her attorney:

(a) in the email from Chantal to Weber on 24 May 2016 mentioned above, Chantal told Weber that she "asked [Wehinger] … to now please take this attorney position";[199]

(b) Chantal forwarded Weber's reply email to Wehinger on 25 May 2016;[200]

(c) Wehinger replied on 25 May 2016, informing Chantal that Weber will give her an overall picture of the financial status and history;

(d) on 6 June 2016, Chantal wrote to Wehinger, requesting that Wehinger not reveal to Weber her communications with Wehinger, and told Wehinger "to be [her] representative and handle all these related

198 9 AB pp 4304–4305.

199 9 AB pp 4301–4302.

200 9 AB p 4304.

transactions and decisions with [Weber] regarding [her] monies and contracts";[201] and

(e) Chantal and Wehinger had a short call on the morning of 8 June 2016. In an email on 9 June 2016 from Chantal to Wehinger recording the details of the call, Chantal stated that Wehinger assured Chantal of his "continued support for [her] children" and that he was "doing so many legal work things to assure [her] that [Weber] delivers to [Chantal and her children] what is promised and owed very soon".[202] Wehinger replied, telling Chantal that he will "prepare with [Weber] the papers" and that he was "finishing all the legal documentary work".[203]

163 This documentary evidence is consistent with Chantal's perception of Wehinger as an attorney who was acting for her. Heika, however, claimed that, based on her correspondence and meetings with Wehinger, she found that Wehinger was in fact acting in Weber's interests instead of Chantal's.[204] The Defendants made no mention as to the nature of Chantal's relationship with Wehinger. It is not necessary for this Court to determine the exact nature of Chantal's relationship with Wehinger (*ie*, whether he was in fact acting as Chantal's lawyer) as it is not an issue raised by the parties. We make only the observation that Chantal believed that Wehinger was acting on her behalf and, on the evidence before us, Wehinger never disabused her of her belief.

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201 9 AB pp 4322–4324.

202 9 AB p 4331.

203 9 AB p 4330.

204 Heika's AEIC at para 17.

164 On 30 May 2016, Weber, Wehinger, Chantal and Baker met in Los Angeles to discuss the handling of the alleged Trust Monies ("the May 2016 Meeting"). Weber, however, did not bring any Financial Records to this meeting and said he would provide the Financial Records after Chantal's surgery in August 2016.[205] Baker recorded some of the matters discussed at the May 2016 Meeting. Baker alleged that, during this meeting, Weber admitted that Chantal was the beneficial owner of the Trust Assets and agreed to transfer the assets back to Heika and Birka. Baker claimed that Wehinger proposed to carry out the transfer as a gift. However, the meeting ended without any resolution as to how the alleged Trust Assets were to be transferred back to Chantal.[206]

165 On 2 June 2016, Baker emailed Wehinger to expedite the preparation of the Financial Records before Chantal's surgery in August 2016. In this email, Baker emphasised that he needs the Financial Statements to be "disclosed right away" and then to "work with [Wehinger] to set up foundations or other entities to have control over the assets".[207] On 4 June 2016, Wehinger replied, stating that he "will closely look into the bank statements and other documents evidencing the total assets" before getting back to Baker. Crucially, on 4 June 2016, Weber sent Chantal a letter, stating that he will show Chantal the Financial Statements in Zurich, and that "***every cent will go to [her] or to [her daughters]***" ("Weber's 4 June Letter"):[208]

> I can confirm you only that next year hopfully [*sic*] I can show you personally in Zurich all documents and all other ***statements evidencing all the operations***. I will show that

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205 Baker's AEIC at paras 401–404; 9 AB p 4316.

206 9 AB p 4306.

207 9 AB p 4316.

208 9 AB pp 4317–4319.

> also in advance to Birka and Heika in Zurich, but to nobody else. The reason seems more than clear.
>
> I confirm also that all the points discussed will be handled in the way as agreed upon and that ***every cent will go to you or to your daugthers [sic] ...***
>
> ... I will charge Urs to do all the necessary with your law [firms to] organise the right structure [for the] new contracts. After that we will of course transfer all patents and property rights to this new structure.
>
> Trust is my business and I can understand that not all persons are willing to understand this. Without trust I don't like to go on, also I was sure to be the ***best consultant and partner for you and your girls*** ...
>
> [emphasis added in bold italics]

166 Weber's 4 June Letter to Chantal, on its face, constitutes very strong evidence that Chantal sought an account of the alleged Trust Assets/Monies as a beneficial owner. If Weber truly owned the alleged Trust Assets/Monies, there would be no reason for Weber to account to Chantal "all the statements regarding her operations"; to acknowledge that every cent would go to her and her daughters; and to admit that he only wanted to be the "best consultant and partner" for Chantal and her daughters. Mr Yeo SC suggested at the trial that Weber merely intended to take care of Heika and Birka financially by setting up a foundation:[209]

> Yeo: I'm suggesting to you, Mr Baker, that when Mr Weber wrote this letter to Ms Burnison, ***it was in the context of the foundation that had already been set up in 2014*** and which was being discussed again at the meeting with Ms Burnison on 30 May 2016. He was making those statements in the context of the foundation, not of the alleged trust that the estate asserts in these proceedings. You can agree or disagree.

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209 Tr/14.11.19/186/14–24.

> Baker: I disagree, and I believe the court itself can take a look at it and read this …

167 Mr Yeo SC's interpretation of Weber's 4 June Letter was totally unpersuasive, to say the least, as the letter itself did not mention any foundation or Weber's intention to care for Chantal's daughter financially out of his goodwill. On the contrary, we find that the overall tone of the letter shows that Weber was in fact *accounting* to Chantal for the alleged Trust Monies. Weber did not appear at the trial to contend otherwise or indeed try and explain how else his emails were to be interpreted.

168 It was around this period that Chantal began suspecting that Weber may not return her the alleged Trust Monies. After receiving Weber's 4 June Letter, Chantal emailed Wehinger on 6 June 2016 stating that Weber should not be telling her how to handle ***her "monies at BCS"***. Chantal also expressed her frustration at Weber for not having prepared the Financial Statements and stated that she suspected Weber to have misappropriated her monies. Notably, Chantal referred to the alleged Trust Monies repeatedly as hers, Weber as a *fiduciary*, and "contracted (oral)" assets:[210]

> Dear Urs,
>
> …
>
> I find Marcus arrogant and wrong in his reply, tone and content email to me. . I don't feel he should be telling me ***how and when he will communicate and handle my monies at BCS*** … I specifically wrote him a long email, before you and he came to LA, **asking specifically for detailed statements and accountings** …
>
> …

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210 9 AB pp 4322–4324.

> I want you, as I wrote to Marcus before the trip you both made to LA, to be my representative and handle all these related transactions and decisions with Marcus regarding ***my money and contracts*** … **I want all assets, paperwork and information communicated/transferred to you as my representative before my August surgery; preferably before July 15th**. Marcus' proposed ' next year for communication and ***fiduciary*** owed documents production is not acceptable" …
>
> … This communication of Marcus today validates (**as I was not sure before**) my mistrust that he has ***misappropriated or hidden my money*** and it is not available for immediate disclosure and transfer (if I asked).
>
> …
>
> … [Baker] only wants to help us get my money and ***contracted (oral) assets in a secure, known place*** …
>
> …
>
> [emphasis in original in bold, in underlined, and in bold underlined; emphasis added in bold italics]

169 Subsequently, on 8 June 2016, Chantal and Wehinger had a short telephone call, the details of which were recorded in Chantal's follow-up email to Wehinger on that same night. In that email, Chantal stated that Wehinger assured her that he was doing the "legal work" to ensure that "[Weber] delivers to [Chantal and her children] what is promised and owed very soon". Chantal also told Wehinger in that email that the "agreement from the beginning in 1999 was 5% participation to singapore [*sic*] in gross singapore [*sic*] managed funds".[211] In Wehinger's reply to Chantal on 9 June 2016, Wehinger acknowledged that "[Weber] told [him] that BCS would receive for its overall services a commission".[212] Wehinger's correspondence with Chantal is consistent with Baker's case that there was indeed a Trust Agreement between

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211 9 AB pp 4338–4341.

212 9 AB p 4338.

Weber and Chantal. There was no reason for Wehinger to assure Chantal that Weber would deliver to her "what is promised" if Weber was the beneficial owner of the alleged Trust Assets. This email was not challenged during cross-examination and Weber and Wehinger did not testify at the trial.

170 As Chantal was not physically able to travel to Zurich, she tasked Heika to meet Wehinger and Weber in Zurich. This occurred on 8 July 2016 ("the July 2016 Meeting"). At the meeting, Weber showed Heika a summary of the monies that were held by Renslade (HK) ("the July 2016 Summary"). The July 2016 Summary reflected a sum of US$41,823,541.14 as "Net Amount before expenses". Heika was also showed another document titled "Situation Cash Flow Renslade", which reflected a sum of US$ 33 million as "Net due to Foundation" ("the Cash Flow Statement").[213] Although Weber did not allow Heika to take copies of any documents, Heika secretly took photographs of the two documents referred to above. Both these documents were included in the Agreed Bundles before the Court. The Defendants did not deny that these were the documents they showed Heika in Zurich.

171 Heika attested that during the July 2016 Meeting, she was assured that the return of Chantal's assets would be arranged. Heika claimed that Wehinger and Weber spoke to her about a foundation in Panama called the Amarillis Foundation ("the Foundation"). Weber proposed to transfer the ownership of the alleged Trust Assets/Monies from BCS and Renslade (HK) to the Foundation as a vehicle to return these assets to Chantal. At the meeting, Weber and Wehinger also showed Heika the Regulations of the Foundation, which they

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213 Heika's AEIC at paras 54–56; 12 AB pp 5649–5650.

explained was a "draft of the rules and regulations … that would govern how they would manage [Chantal's] assets and monies, and after her passing, for [Heika] and Birka".[214] The Regulations are included in the Agreed Bundle before the Court.[215]

172 At the trial, Mr Yeo SC challenged Heika's case on the basis of the inconsistency between the Cash Flow Statement and the July 2016 Summary, which Heika explained was due to the CHF9.5m loan that Weber took from Chantal for the Ski Lodged investment:[216]

> Yeo: Mr Weber or Dr Wehinger could not, on the one hand, be telling you that 33 million would be going into the foundation and then telling you, at the same time, 41 million would be going into the foundation. It must be one or the other, isn't it?
>
> Heika: I disagree. The discrepancy, from what I understand, was because of the loan that Marcus took from my mother for the ski lodge …

173 As we have stated *ad nauseam*, Weber did not come to the trial to explain the discrepancy in the figures. Neither did he get into the witness box to explain why he drew up these documents in the way that he did, the language he used, nor to explain that he meant something else. In any event, we find that, in presenting these figures, Weber was accounting to Heika for the alleged Trust Monies that the Estate should expect to receive.

174 The Defendants' pleaded case in relation to the events of the May 2016 and July 2016 Meetings is that they were meetings to discuss the setting up of

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214 Heika's AEIC at paras 48, 49, 53 and 59.

215 9 AB pp 4377–4379.

216 Tr/15.11.19/176/19–177/1.

the Foundation. This is not inconsistent with Heika's account in some aspects. The Defendants, however, alleged that Weber intended to set up the Foundation and put some profits from the Ethocyn business into the Foundation to support Heika and Birka financially, and had nothing to do with any trust.[217] This unsupported pleading was also put to Baker at the trial:[218]

> Yeo: The discussion or the meeting that took place in May of 2016, which you attended, was to explain to you the foundation that had already been set up by Ms Burnison and Mr Weber ***to look after Ms Burnison's children***, correct?
>
> Baker: Incorrect.
>
> [emphasis added in bold italics]

175 The Defendants' claim that the Foundation is a charitable fund that Weber intended to set up for Heika and Birka *is contradicted by a subsequent Skype conversation* between Heika and Wehinger (who was also present at the July 2016 Meeting) on 15 September 2015 (with Baker listening in to the conversation ("the Skype Conversation"). In this conversation, Wehinger explained that the Foundation was incorporated in 2014 with Renslade (HK)'s shares donated to the Foundation. This was for the purposes of transferring BCS and Renslade (HK)'s alleged Trust Assets to the Foundation. The Estate's claim is that the Foundation would then hold the alleged Trust Assets (including the alleged Trust Monies) on trust for Chantal:[219]

> URS WEHINGER: … Now, [Weber] holds the shares but the shares are in my possession in Zurich. They are in a safe and he made the donation to the foundation. … [T]he donation is signed but it's not dated. The foundation is also in my

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217 Defence (Amendment No. 4) at paras 32A and 34C.

218 Tr/14.11.19/147/23–148/3.

219 11 AB pp 5313 and 5316.

> possession … So if your mother should pass away, then we -- we take the donation declaration, have it dated, and then the -- the foundation becomes the -- the owner. Now, this is for your security but it doesn't resolve the problem that even if your mother passes away, you know, ***[Weber] cannot go to the banks and say, "Listen, I'm no longer the beneficial owner" but beneficial owners are now you and your sister*** -- …
>
> …
>
> URS WEHINGER: … So that means if anything happens to [Weber], then I have the share certificate in -- in my office and we have the foundation in place and we have the proof that you and your sister are the owners of the Singaporean company.
>
> [emphasis added in bold italics]

176 In the Skype Conversation, Wehinger also explained to Heika that BCS was merely an investment vehicle and Weber acted as a fiduciary for Chantal:[220]

> URS WEHINGER: … BCS is a company which is owned by [Weber] but ***BCS is only the front company*** which is in -- in the contractual relationship with Nu Skin and funds coming into BCS then they -- they paid the -- the bills, et cetera, and the leftover goes in -- ***into the Singaporean company***. The Singaporean company's more or less the investment vehicle and it has bank accounts, et cetera. And whenever you have bank accounts, you have to give the bank the name and the -- the datas [*sic*] of the ultimate beneficial owner. And since your mother could never act in such a capacity, ***[Weber] acted as a fiduciary -- fiduciary beneficial owner.***
>
> [emphasis added in bold italics]

177 Pursuant to a Case Management Plan dated 4 September 2018,[221] the Defendants initially listed Wehinger as a witness to attest to the circumstances under which Weber acquired the Ethocyn Rights and the nature of the relationship between Weber and Chantal. The transcript of the Skype

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220 11 AB pp 5312–5313.

221 Defendants' Case Management Plan (Amendment No 1) dated 4 September 2018, Tab 10, p 3.

Conversation was disclosed on 18 October 2018.[222] It was also around this period that the Defendants decided not to call Wehinger as a witness. Therefore, Wehinger did not file any AEIC nor was he at the trial to explain what he meant, if it was otherwise than as it appears in the transcript. The reasonable inference that we draw from the conversation between Wehinger and Heika supports Baker's case that Weber had all along acted as a fiduciary for Chantal and the May and July 2016 Meetings were for the purposes of discussing how to return the alleged Trust Assets/Monies back to Chantal and her daughters, though the Foundation.

178 At the trial, Mr Yeo SC put to Baker and Heika that the amended regulations of the Foundation stated that Weber would be the first beneficiary to the Foundation's assets and revenue, with Heika and Birka only becoming the second beneficiaries after Weber's death. Mr Yeo SC submits that this is consistent with the Defendants' case that Weber was the true beneficial owner of the alleged Trust Assets:[223]

> Yeo: … [W]hat this foundation provided was that Mr Weber is the first beneficiary to all the foundation's assets and its revenues, and Heika and Birka would become the second beneficiaries only upon his death. That's correct, isn't it?
>
> Baker: That's what it says.
>
> …
>
> Yeo: … You would appreciate that you and Birka, under the terms of these regulations, do not start to receive any benefits until Mr Weber passes away.
>
> Heika: That is not my understanding … and not how it was explained to me at the July meeting …

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222 Estate's Supplementary List of Documents dated 18 October 2018.

223 Tr/14.11.19/156/16–21; Tr/15.11.19/171/8–12.

179 We give Mr Yeo SC credit for highlighting the amended regulations of the Foundation and suggesting the implications of such amendments. Even if Heika was shown the amended regulations at the July 2016 Meeting, she had explained at the trial that it was Weber who had *insisted* on being named as the first beneficiary of the Foundation, as the alleged Trust Assets were presently under his name, and, if he was not named as the first beneficiary, it would be difficult for him to represent himself as having title of the assets to the banks. There was no reason for Heika to suspect otherwise:[224]

> Yeo: … I'm going to suggest to you that the references to Mr Weber being a fiduciary beneficial owner were made in the context of the foundation in the sense that when he passes on, the assets in the foundation would then pass to you and your sister. You can agree or disagree with that.
>
> Heika: I disagree, your Honour. The way it was explained to me at the meeting was that ***Marcus had to be named because the assets were presently in his name***, and the conversation with Urs, the Skype call, also discussed that he was claiming to be the first beneficial owner, but, in fact, he was not and ***then it would be difficult for him to go to the banks and to say such.***
>
> [emphasis added in bold italics]

180 Without Weber in the witness box to contest otherwise, the Defendants are on very thin ice. Heika's evidence is also consistent with the transcript of the Skype Conversation where Wehinger told Heika that Weber could not go to the banks and say that he was no longer the beneficial owners of the assets (see [175] above).

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224 Tr/15.11.19/171/20–172/9.

181 Subsequently, a meeting was held on 12 December 2016 ("the 12 December 2016 Meeting") between Johnson, Heika, Weber, Wojtek (the lawyer representing BCS) and Wehinger at Wehinger's office. Heika testified that this was the *first time* that Weber claimed that the alleged Trust Assets and Trust Monies belonged to him.[225] Johnson stated in his AEIC that there were discussions at the 12 December 2016 Meeting regarding the transfer of the alleged Trust Assets/Monies from the Defendants to the Estate via an Irish company, instead of the Foundation, for the purposes of protecting Weber from potential tax liabilities.[226] This was confirmed by Heika in her AEIC. Heika explained in her AEIC that the Irish company would purchase all the alleged Trust Assets and Trust Monies from the Defendants. The Irish company was to be structured in a manner where Heika and Birka would each hold 45% of the shares, while Weber held the remaining 10%. Heika said that the reason for Weber holding 10% of the shares was that it would have been strange had Weber not controlled at least a small portion, given that he had controlled everything up to this stage. This was also consistent with Weber wishing to increase his commission under the Nu Skin SDA from 5% to 10%. Heika also claimed that, eventually, Weber's interest would be "taken out" after the Irish company has acquired all the alleged Trust Assets and Trust Monies.[227] The Defendants' case is that the 12 December 2016 Meeting was instead a discussion on Heika's interest in acquiring the Ethocyn business from BCS (or Weber) on an arm's length basis.[228]

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225 Heika's AEIC at para 102.

226 Johnson's AEIC at paras 22–30.

227 Heika's AEIC at paras 106–113.

228 Defence (Amendment No. 4) at para 34G.

182 We find the Defendant's case that Heika wished to acquire the Ethocyn business from the Defendants to be contrary to the evidence given at the trial as well as the Skype Conversation. At the trial, Mr Yeo SC pointed out that Johnson's notes of the December 2016 Meeting were inconsistent with the Estate's case. Mr Yeo SC stated that Johnson recorded that there was one "valuation of BCSS assets",[229] and put to Johnson that it supports the Defendants' case that Heika intended to purchase the Ethocyn assets:[230]

> Yeo: … [T]he valuation was to derive the purchase price. "Yes" or "No"?
>
> Johnson: Determine arm's length value.
>
> Yeo: Thank you. Which was to be used as the purchase price for the purchase, correct? For the asset acquisition, yes?
>
> Johnson: Yes.

183 The Defendants also submit that Johnson's testimony at the trial was riddled with inconsistencies. For example, Johnson initially testified that Wojtek was acting for Wehinger, but later said he could not recall if that was the case. Further, when probed about Renslade (HK), Johnson first said he knew of Renslade (HK) at the 12 December 2016 Meeting, but later changed his answer to say that he did not know what he knew at that point.[231] Given the inconsistencies in Johnson's testimony at the trial, we find him to be an unreliable witness and we accord lesser weight to his evidence. Nevertheless, as regards the Defendants' case that Heika intended to purchase the Ethocyn Rights and that Johnson's notes recorded a "valuation", Johnson explained that

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229 9 AB pp 4494–4495.

230 Tr/16.11.19/71/16–72/4.

231 Defendants' Closing Submissions at paras 110–114.

the valuation was only a façade for Weber to avoid potential tax liability and that Weber would be provided the funds for the transfer of assets (from BCS and/or Renslade (HK) to the Irish company) through a loan that was never intended to be repaid:[232]

> Yeo: … What the parties were discussing was a real asset purchase at which real money would change hands. You can agree or disagree.
>
> Johnson: I completely disagree. ***This was all a façade for [Weber's] benefit. [Weber] was going to put the money in. He was going to give a note that he wouldn't necessarily enforce.*** This was all for [Weber's] benefit. Our objective was simply to get the assets back from [Weber].
>
> [emphasis added in bold italics]

184 Johnson's explanation in this regard was consistent with the documentary evidence. What we find is that, first, the Defendants intended to set up the Foundation for the purpose of transferring the Trust Assets back to the Estate. The regulations of the Foundation were also amended for Weber to be the first beneficiary such that he can represent himself as having title of the assets to the banks. Subsequently, the Defendants considered the use of an Irish company instead of the Foundation to protect Weber from potential tax liabilities. Johnson *only came in* at this stage of the discussion and, as such, was understandably unfamiliar with the background of the Ethocyn business. In any event, and as we have repeatedly mentioned, Weber did not come to trial to explain his version of events as to whether the valuation was indeed only a façade for him to avoid potential tax liability.

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232 Tr/16.11.19/90/21–91/4.

185 More importantly, we find the Skype Conversation to be consistent with the Estate's case. In the Skype Conversation, Wehinger confirmed that the Defendants proposed the incorporation of a new company in Ireland to hold the alleged Trust Assets for Heika and Birka. In the Skype Conversation, Wehinger mentioned that Heika and Birka will become the "beneficial owners":[233]

> URS WEHINGER: …Now, one proposal was the -- the forming -- the formation of a company in Dublin, nows [*sic*] -- in -- in – in Ireland. And then he would become a first subscriber and you and your sister would become the -- the other subscriber … ***And then we would actually transfer the funds into the -- in -- into the Dublin company***.… But the idea is really that sooner or later, you and your sister will -- will become the -- the beneficial owners.
>
> …
>
> HEIKA BURNISON: … I mean, is that the idea? Essentially? ***That everything that's in Singapore now would go to Ireland?***
>
> URS WEHINGER: Which go -- would be shifted to Ireland, yes. But the way how it is -- it can be done is still an open issue.
>
> [emphasis added in bold italics]

186 Baker claimed that, following the December 2016 Meeting, Johnson and Wojtek exchanged correspondence to implement the agreement reached at the meeting. There was, however, a lack in progress.[234] On 7 April 2017, Baker informed Johnson that if the Nu Skin SDA and US$6m were not transferred to the Estate, he will commence necessary legal actions.[235] This was not done. On 20 November 2017, Baker commenced the Suit.

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233 11 AB pp 5314–5315 and 5323.

234 Baker's AEIC at paras 441–447.

235 10 AB pp 4825–4828.

Summary and answers to some of the Agreed Issues

187 In summary, we find that Baker has established, at least, on a *prima facie* basis (and on some of its constituent aspects, more than a *prima facie* case) the existence of an oral Trust Agreement between Chantal and Weber on the terms as set out at [22] above. The evidence throughout each stage of the development of the Ethocyn business, to the date of Chantal's death and beyond, points to the same conclusion that Chantal had always been the beneficial owner of the Ethocyn Rights, the Trust Monies and the Trust Assets. Weber had always been working for Chantal and was obliged to account to Chantal in relation to the Trust Monies and Trust Assets. We also find that many of the agreements and corporate structures were structured in a specific manner to maintain opacity of beneficial ownership and to avoid tax liabilities.

188 Having considered the evidence and our findings made above, our answers to the Agreed Issues covered so far (see [59] above) are as follows.

(a) We find there was a Trust Agreement between Chantal and Weber as pleaded in paras 13 and 14 of the Estate's Statement of Claim. The terms are as set out in paras 13 and 14 of the Estate's Statement of Claim and [22] above.

(b) The Trust Agreement was reached sometime between November 1999 and 3 March 2000 between Chantal and Weber and the trust was constituted on or about the 24 May 2000 when the Ethocyn Rights were assigned or transferred from Renslade (NZ) to Renslade (S).

(c) Yes, Renslade (NZ) held the Ethocyn Rights on trust for Chantal until they were assigned or transferred to Renslade (S).

(d) Chantal provided the funds, if any, for Renslade (S) to acquire the Ethocyn Rights from Renslade (NZ); insofar as there were any funds required by Renslade (S) to acquire the Ethocyn Rights, whether through the assumption of ongoing obligations and royalty payments or for a nominal $1 or otherwise, it was provided by Chantal or through the US Corporations managed or owned by Chantal.

(e) Renslade (NZ) and subsequently Renslade (S) acquired legal ownership of the Ethocyn Rights and assets by the Royalty Buyout in or around July 2002. Chantal was always the beneficial owner of the Ethocyn Rights.

…

(k) The retention of 5% of the proceeds (and, subsequently, subject to (m) below, 10% of the proceeds) by BCS from the sale of the Ethocyn Products pursuant to the Nu Skin SDA and other similar agreements, if any, was commission or remuneration for Weber and the 1st and 2nd Defendants under the Trust Agreement between Chantal and Weber.

(l) BCS and/or Renslade (HK) transferred monies to Chantal, entities controlled by Chantal, and entities involved in the production or marketing of Ethocyn products or the protection of the Ethocyn Rights for their expenses or costs as well as monies for Chantal's use as she was the beneficial owner of these Trust Monies.

…

(o) Yes, Chantal, Baker and Heika sought an account of the Trust Monies and assets pursuant to the Trust Agreement from Weber from May 2016 after Chantal was diagnosed with metastic colon cancer.

(p) In the July 2016 Meeting, Wehinger and Weber proposed the transfer of the Trust Assets/Monies from BCS and Renslade (HK) to the Estate through the Foundation. At this meeting, Weber also showed Heika the July 2016 Summary and the Cash Flow Statement. In the 12 December 2016 Meeting, the Defendants proposed the transfer of the Trust Assets/Monies from BCS and Renslade (HK) to the Estate via an Irish company instead of the Foundation. This was done for the purpose of protecting Weber from potential tax liabilities. The Irish company was to be structured in a way where Heika and Birka would each hold 45% of the shares in the Irish company, while Weber would hold the remaining 10%. After the Trust Assets/Monies were transferred, Weber's interest would be "taken out", though the exact mechanics of this were not discussed.

(q) There was an agreement at the 12 December 2016 Meeting for the Defendants to transfer the Trust Assets and/or Trust Monies to Chantal's Estate via an Irish company as set out at (p) above. This was however not done.

189 Although parties have also put forth a list of additional issues which are not agreed, where relevant, we have dealt with it in our findings of facts.

Weber's 5% Commission

190 We now turn to the pleaded issue as to whether Weber unilaterally increased the commission due to him as a trustee under the Trust Agreement from 5% to 10% without Chantal's knowledge and consent. We find this to be so. It was initially agreed between the parties that, under the Trust Agreement, Weber was to hold the Trust Assets on trust for Chantal, save for 5% of such income or proceeds as commission (see [22] above). From around 2007 to 2017, Nu Skin made payments under the Nu Skin SDA to BCS and 5% of these payments were retained as commission. In around 2016, the Defendants started retaining 10% of the monies paid by Nu Skin to BCS. Having found the existence of the Trust Agreement, we accept the Estate's case that the payments made by Nu Skin constitute Trust Monies, 5% of which the Defendants were entitled to retain as commission. In addition, the documentary evidence shows that Chantal had *no knowledge* and *did not consent* to the Defendants (or Weber) increasing their commission from 5% to 10% from 2016.

(a) On 24 May 2016, Chantal emailed Weber and requested the Financial Records in relation to a 5% "agreed compensation" for services provided by Weber to her (see [159] above). If Chantal knew that Weber had increased the commission to 10%, she would have represented otherwise.

(b) On 9 June 2016, Chantal emailed Wehinger and informed him that the "agreement from the beginning in 1999 was 5% participation to singapore [*sic*] in gross singapore [*sic*] managed funds" (see [169] above). Chantal did not mention that Weber had increased this commission to 10% as she was not aware of this fact at that time. This email was not challenged during cross-examination.

(c) There was an amendment agreement between BCS and Renslade (HK) where the "distribution fee" under cl 7.9 of the BCS-Renslade Distribution Agreement was increased from 5% to 10% on 2 January 2015 (see [140(a)] above). However, in the July 2016 Summary, the Defendants described the 5% retention by BCS Singapore as "Less 5% BCS commission (10% *since 2016*)". The July 2016 Summary reflected the actual sums (and retention of commission) held by Renslade (HK) and we find that Weber unilaterally increased the commission due to him *from 2016*.

(d) The Defendants did not adduce any evidence showing that Chantal knew that the commission was increased from 5% to 10%.

191 We will deal with the consequence of the Defendants (or Weber) increasing their commission from 5% to 10% unilaterally without Chantal's knowledge or consent *after* we analyse whether the Trust is valid and enforceable under Singapore or Californian law. We will also deal with the remedies at the appropriate juncture.

The CHF9.5 million "loan"

192 We now turn to the discrete issue of the CHF9.5 million loan. To recapitulate the parties' respective cases:

(a) The Estate alleges that, sometime in or around 2014, Weber asked Chantal for a loan of CHF6 million so that he could invest in a ski resort. Weber agreed to pay 3% interest on the loan. Chantal agreed. In or around 2015, Chantal discovered that Weber had instead taken CHF9.5 million from the Trust Monies.

(b) The Defendants deny there was any Trust Agreement. Weber purchased the Ethocyn Rights from Renslade (NZ) as his own investment; the Defendants allege that the CHF9.5 million was part of the proceeds generated by the Nu Skin SDA and were invested in bonds by Weber, dealing with his own monies, as the controlling shareholder of Renslade (S), on behalf of the Renslade (S).

193 We have found that the Estate has succeeded in establishing the Trust Agreement as pleaded and one of the terms was that Weber was entitled to retain 5% of the income or proceeds generated from the Ethocyn Rights as his commission or remuneration. We have also found that, from 2016, Weber started retaining 10% of the income or proceeds without informing Chantal or otherwise obtaining her consent.

194 We find that the Estate has established its case that Weber asked Chantal for a 3-year loan of CHF6 million to invest in a ski resort he was interested in and Weber agreed to pay 3% interest. In an email dated 4 August 2014, Chantal asked Weber for the balance remaining in the account regarding the Nu Skin SDA monies received in 2013 and 2014. Chantal also referred to the loan as follows:[236]

> When I was last time in Zurich we discussed **$6mm loan** to you for possible 3 year "ski resort building development"; … (emphasis in original)

However, in his reply email dated 5 August 2014 to Chantal, Weber stated that he invested: "Switzerland in total sFR. 9.5 Mio. until 30.6.17."[237] If this was

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236 8 AB p 3530.

237 8 AB pp 3530–3532.

Weber's own investment, we would have expected Weber to correct Chantal that it was not a loan. Instead, Mr Yeo SC suggested to Baker that Weber was referring to an investment that had been made with company funds and that Weber was corresponding with Chantal in her capacity as COO of BCS and Renslade (HK).[238] We rejected Mr Yeo SC's suggestion and accept Baker's evidence. The rest of the email on the accounting for the Nu Skin earnings and expenses clearly show Chantal corresponding as owner with Weber as Trustee.

195 On 5 August 2014, Chantal replied by email to Weber and said: "Thought Switzerland was to be USD 6 million and for three years at 3%. Possible reduce it to this…as my understanding(perhaps I misunderstood) re discussion in Zurich was $6 million amount and a three year loan time? Have other investments I wish to do in next months before 2014 year end."[239] Weber's only answer in his email to Chantal was: "No problem we can arrange all."

196 Mr Yeo SC's only construction of this email exchange was to suggest to Baker that the emails from Chantal sounded very pointed and Baker must have been involved in instructing Chantal to compose this email in order to help him set out the basis of the Estate's current claim.[240] Baker strenuously denied this and we accept his evidence, not least of all because, in 2014, Chantal had yet to be diagnosed with cancer and no disputes had arisen between Chantal and Weber. Further, Mr Yeo SC's construction of this email exchange goes beyond the language used by the parties in this exchange of emails. In the email, Chantal told Weber that she wished the loan to be reduced from CHF9 million to CHF6

238 Tr/14.11.19/121/1–6; 121/24–122/2.

239 8 AB p 3561.

240 Tr/14.11.19/117/10–119/16.

million because she *wanted to make other investments*. There was no suggestion that such investments were on behalf of BCS or Renslade (HK), and Weber merely responded that he could arrange it all. This goes against the Defendants' claim that Weber was in fact dealing with his own monies. Again, Weber has chosen not to give evidence of possible background and a possible explanation as to why he sent the emails in the language that he did. We also note that this was not even something addressed in his unadmitted AEIC.

197 Some nine months later on 22 May 2015, Chantal had forwarded Weber's email dated 5 August 2014 to him. Chantal complained in the subject header of the email that: "Marcus email to me last August. Took 9.2 mill sFR on June 30, 2014. Repayment is at 3% interest (hope it is per year and not over the three years!) and plans to repay June 30, 2017. I thought he said $6million. Am not happy."[241]

198 Baker's AEIC[242] also refers to the Skype Conversation between Heika and Wehinger on 15 September 2016, where Baker was a silent witness. Heika questioned Wehinger on the loan and Wehinger confirmed that such a loan had been taken in the form of a bond and assured Heika that the loans had been documented:[243]

> ***"HEIKA BURNISON: ... But my other question was regarding the money that Marcus has borrowed for his investment in his --***
>
> ***URS WEHINGER: Yup.***
>
> ***HEIKA BURNISON: -- ski lodge. Is there any paperwork --***

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241 8 AB p 3837.

242 Baker's AEIC at para 386.

243 11 AB pp 5316–5318.

> ***URS WEHINGER: Yup.***
>
> ***HEIKA BURNISON: -- on that?***
>
> ***URS WEHINGER: Yah, sure.***
>
> HEIKA BURNISON: Does he have it or do you have it or --
>
> URS WEHINGER: We have it in the office and --
>
> HEIKA BURNISON: You have it?
>
> URS WEHINGER: -- they are bonds, printed bonds in -- in -- in paper form and they become due in -- in a -- in a year -- year and a half. And all --
>
> HEIKA BURNISON: The --
>
> URS WEHINGER: He has also taken money from other people and they all have received these bonds.
>
> HEIKA BURNISON: Okay. And the other -- ***the interest for that is at the same time, right? The --***
>
> ***URS WEHINGER: It's an annual interest of 3%, yup."***
>
> [emphasis added in bold italics]

199 On the evidence and our findings above, the answer to the Agreed Issue set out at [59(n)] is that Weber had asked Chantal for a loan of CHF6 million for a period of three years, 30 June 2014 to 30 June 2017, with interest at 3% per annum. Chantal had acceded to Weber's request. However, Weber, without Chantal's knowledge or consent, took more than the agreed amount, *viz*, CHF9.5 million from the profits made under the Nu Skin SDA, and has not repaid that loan or, it appears, subject to any rendering of accounts, any interest, to date.

The governing law of the Trust Agreement

200 We now turn to the law applicable to determine the validity of the Trust Agreement between Chantal and Weber. The law of the forum supplies the choice of law rules to determine the substantive law to apply to resolve the

dispute between the parties (*Halsbury's Laws of Singapore* Volume 6(2) (LexisNexis, 2016) ("*Halsbury's*") at para 75.273), and so Singapore's choice of law rules determine whether Singapore law or California law applies. The first step in the choice of law analysis is characterisation, also known as classification (*Halsbury's* at 75.252). This involves characterisation of the legal issue, as the applicable choice of law rules are determined by the issue in the case (*Halsbury's* at 75.253).

Legal nature of the Trust Agreement

201 The Estate's pleaded case on the Trust Agreement and our findings have already been set out above. We have found that the Estate has made out its case of an express oral trust, and we now apply the choice of law rules that apply to trusts to ascertain the governing law.

202 We make it clear that this finding of a valid trust is a tentative conclusion. Knowing whether, under the Trust Agreement, Chantal had the intention of setting up a trust and whether this trust is valid are issues to be resolved under the applicable law, once identified. We address those issues at [215] to [226] below.

The governing law

203 In *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd and another and another appeal* [2017] 2 SLR 814 ("*Trisuryo*") at [41], the Court of Appeal held that the proper law of an express trust is the law chosen by the trustee or, in the absence of such choice, the system of law to which the trust has the closest connection. Since the Court of Appeal also held that the general rules established for determining the choice of law in relation to contracts are

applicable in determining the governing law of the trust (at [41]), we turn to the established approach to determine the governing law of a contract set out in *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 ("*Rappo Tania*") at [80], citing *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [82]. First, the court will examine the contract itself to determine whether it states expressly what the governing law is. In the absence of an express statement, the court considers whether the intention of the parties as to the governing law can be inferred from the circumstances. If that cannot be done, the court then identifies the system of law with which the contract has its closest and most real connection: in essence, this is an objective analysis undertaken from the perspective of a reasonable person in the position of the parties at the time of the contract. The court may bypass the second stage and move to the third stage where neither party addressed their mind to the question of which law is to govern (*Pacific Recreation* at [47]). We therefore assess the governing law of the Trust Agreement between the parties according to the three stages.

204 At the first stage, we find there was no express choice of law provision as Chantal and Weber did not agree upon or stipulate the governing law. At the second stage, as to whether there was an implied choice of law, the search is for a real and not merely hypothetical common intention of the contracting parties, but as objectively ascertained from the terms of the contract and the surrounding circumstances (*Trisuryo* at [42]). The mere fact that there was no written agreement, but only an oral one, is not a bar to a finding that there was an implied choice of law. Where one party seeks to rely on the parties' course of dealing for the purpose of determining the governing law of the relationship, the

relevant course of dealing is that at the outset of the dealings (*Rappo Tania* at [80]).

205 The Court of Appeal in *Trisuryo* found that there could be an implied choice of law in an oral agreement, and we find the facts there to be highly relevant to the present case. In *Trisuryo*, the parties reached an oral agreement (although the nature and terms of which were heavily contested), and the parties incorporated a Singapore company on 12 November 2012 as a special purpose vehicle for their transaction (at [19]). The dispute was whether a trust had been created over the shares in that Singapore company. After examining all the relevant facts and circumstances, the Court of Appeal held that there was an implied choice of Singapore law (at [43]). The Court of Appeal made two remarks:

(a) First, it was not uncommon for a company to be incorporated as a special purpose vehicle. In *Trisuryo*, the parties did so for the sole purpose of holding shares in another company and not to have any business activity beyond that. This was a common occurrence in the complex commercial environment existing today, frequently because of tax reasons or other perceived advantages for being incorporated in a particular jurisdiction, and the fact that the sole objective of the parties in incorporating the company was for it to hold certain assets would not in itself provide a sufficiently strong basis to assume that the governing law of those assets is also the law applicable to the ownership of shares in the company itself (at [45]).

(b) Secondly, it would be anomalous to ignore the structure that the parties chose to govern their arrangements by focusing on the governing law of the underlying assets. The parties chose to incorporate a separate

> entity and made a deliberate decision that Singapore should be the jurisdiction in which the company would be constituted (at [46]).

206 Where a trustee is a corporate vehicle specially incorporated for a particular purpose, it may be inferred that the law of the place of incorporation was intended as the governing law for the trust (*Halsbury's* at para 75.332). Just as in *Trisuryo*, where the Court of Appeal considered that the parties' choice of corporate structure to effect their agreement was a key feature, similarly, in the present case, Chantal initially chose a New Zealand incorporated company, managed by Weir, to buy out the Ethocyn Rights. Thereafter, she lost faith in Weir and decided to use Weber instead. Chantal and Weber deliberately chose a Singapore incorporated company to hold the Ethocyn Rights because they concluded that Singapore had a more favourable tax regime. Weber incorporated Renslade (S) in May 2000 upon the instructions of Chantal to hold the Ethocyn Rights. In the very first email from Weber to Chantal, he refers to the "foundation in S", which we found to be a reference to the Singapore-incorporated Renslade (S). Chantal herself referred to the drafting of distributorship agreements according to Singapore law. It seems that Chantal and Weber always knew that a Singapore incorporated company would be used; even though these structures were implemented after the agreement had been concluded, this does not undermine what would have been the parties' intentions at the time of the agreement. As in *Trisuryo*, the later implementation of the agreed upon plan is evidence of the implied choice. For that reason, we find that there was an implied choice of Singapore law between the parties at the outset of their dealings.

207 In the event we are wrong, and this is taken up elsewhere, we turn to the third stage and consider the question of the system of law with which the

transaction has its closest and most real connection. The aim of this stage is not to divine any "intent" of the parties but to consider, on balance, which law has the closest connection with the agreement in question and the circumstances surrounding the inception of that agreement. It is a pragmatic exercise acknowledging that parties do not always have a governing law in mind when they enter into contracts (*Pacific Recreation* at [48]). Nonetheless, as acknowledged by the Court of Appeal in *Pacific Recreation*, whilst it is not always the case that the parties' intention on the governing law can be realistically inferred, the court might find it more productive to move to the third stage, although the same factors as those in the second stage would have to be addressed (at [47]). However, the aim is not to divine any "intent" of the parties but to consider what is the proper weightage to be given to the factors, on the facts and circumstances of the case at hand, to consider, on balance, which law has the closest connection with the contract (see [48] and [49]).

208 The connecting factors pointed to various jurisdictions.

(a) The following factors pointed in favour of Singapore law:

(i) Weber was a Swiss citizen but had become a Singapore permanent resident in 2002; we note that Weber claims he was already carrying out business in Singapore in 2000 and administered all his business from Singapore.[244] In so saying, we have not overlooked the fact that, like many businessmen whose transactions are in multiple jurisdictions, Weber does not always stay in one place. However, by the same token, the specific

244 Weber's AEIC at para 26.

selection of a jurisdiction to incorporate companies for a specific transaction can be of significance.

(ii) Weber incorporated BCS in Singapore in March 1999.

(iii) Weber incorporated Renslade (S) in Singapore in May 2000 at Chantal's direction. Singapore was chosen specifically for tax reasons.

(iv) The Ethocyn Rights were transferred to Renslade (S) in May 2000 and assigned to BCS in April 2002. BCS entered into the Nu Skin SDA in 2003, and Nu Skin made direct payments to BCS from 2003 onwards. Monies were paid from Singapore to other companies (within the structure) for their expenses, including the manufacture and sale of the Ethocyn Products.

(v) The distributorship agreements between Renslade (S) and BCS, and BCS and its sub-distributors, were expressly stated to be governed by Singapore law.

(b) The following factors pointed in favour of California or US law:

(i) Chantal was resident in California at all material times. When she required funds, they were transferred to her Los Angeles bank account.

(ii) As Chantal made the decisions in the management of the Ethocyn Rights from California – or wherever else she happened to be at that time – that was also the seat of decision-making.

(iii) The Ethocyn Rights themselves were United States patents (though some were registered outside the USA). BCS's

> sub-distributors, E. Cosmetics LLC and Nova Derm, had their registered offices in California. Nu Skin, the largest customer, was a Utah corporation.

209 Not all of the factors listed above should be given the same weight. For example, whilst the Ethocyn business had strong ties with the US, these are but links with third parties, and we find that they have little bearing on the relationship between Chantal and Weber. Moreover, as we have found, Chantal made a conscious decision to move the Ethocyn Rights offshore. As for the Distribution Agreements, these were, on Baker's case, essentially sham agreements designed to manage tax exposure that involved Weber contracting with himself. We do not think these factors add much weight in favour of either California law or Singapore law.

210 Similarly, the place of Weber's residence is only relevant because he is the owner and controlling mind of the Singapore companies who were the legal trustees, and into whose account the monies from the Nu Skin SDA were paid. Article 7 of the Hague Convention on the Law Applicable to Trusts and on Their Recognition ("the Hague Convention") lists the place of residence or business of the trustee as *one* factor in the second half of the list of criteria for identifying the closest connection. As Chantal was herself resident in California, the parties did not even have the same nationality or domicile. Their place of residence is therefore less relevant for determining the applicable law. Chantal's own residence may have been the seat of decision-making where the Ethocyn business was concerned, but, given her deliberate choice for opacity over her beneficial interest in the business, we do not think much weight should be assigned to this either.

211 We turn to consider the use of the Singapore incorporated trust vehicles, Renslade (S) and later BCS, which held the Ethocyn Rights. The location of assets is less significant in cases of movable property (*Halsbury's* at para 75.332). The Ethocyn Rights could have been held in companies incorporated anywhere in the world and, in today's modern context with the international nature of business, this could have been done quite easily; they were transferred from Renslade (NZ) to Renslade (S). Nevertheless, it is of great relevance in this case that Chantal and Weber chose a Singapore incorporated company deliberately, because of the tax regime.

212 According to Mr Yeo SC, the court is only permitted to consider factors in place at the inception of the Trust Agreement in November 1999, which were Chantal's California residency and the business' links to the United States. The connecting factors to Singapore law and, in particular, the incorporation of Renslade (S), only arose after the parties made the Trust Agreement, and so they should be disregarded.

213 The transfer of property to the trustee is essential to the creation of an inter vivos trust (*Halsbury's* at 110.469). A trust is only properly constituted at the time when the trust assets vest in the trustee. Though the Trust Agreement may have occurred in November 2019, it is undisputed that the trust assets were first held in Renslade (NZ) and only vested in Renslade (S) after it had been incorporated. The trust could only have been constituted at the time when the Ethocyn Rights were transferred to Renslade (S). We may therefore consider the factors that were in existence at that time. To our mind, the strongest factor in favour of Singapore law is the use of Renslade (S), a vehicle incorporated for the deliberate purpose of holding the trust assets. Singapore was the place of administration of the trust chosen by Chantal as settlor. This factor is identified

hierarchically as the first one on the list of criteria of Article 7 of the Hague Convention. It is very relevant that Chantal's unwavering intention was to have the Ethocyn Rights held by a company outside the United States.

214 We therefore find that there is sufficient evidence that supports an implied choice of Singapore law and, if we are wrong, Singapore law also has the strongest connecting factors with the case. The answer to [59(f)] above on the Agreed List of Issues is that Singapore law is the appropriate governing law, and we consider the enforceability of the Trust Agreement under Singapore law. However, for completeness, we will also consider its enforceability under California law below.

The validity of the trust

Under Singapore law

Whether there was an express trust

215 Notwithstanding our use of the shorthand phrase "Trust Agreement" to refer to the oral agreement between Chantal and Weber, we must also be satisfied that the said agreement amounted to a trust.

216 First, we consider whether the oral agreement amounted to an express trust as pleaded by the plaintiff (at [22] and [23] above). The formation of an express trust in Singapore law requires three certainties: (a) certainty of the settlor's intention, (b) certainty of subject matter, and (c) certainty of object (*Guy Neale and others v Nine Squares Pty Ltd* [2015] 1 SLR 1097 ("*Guy Neale*") at [51]).

217 Certainty of intention requires proof that a trust was intended by the settlor. The principle is that in what was said or done by the settlor, there must be clear evidence of an intention to create a trust. It must be certain that the settlor intended to create a trust rather than to impose a mere moral obligation or to make a gift or to do some other act which was not a trust (*Compania De Navegacion Palomar, S.A. and others v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [95], citing Alastair Hudson, *Equity and Trusts* (Routledge, 7th Ed, 2013)). Intention may be inferred from the settlor's words or conduct, the surrounding circumstances and the interpretation of any agreements that might have been entered into (*Guy Neale* at [50]–[53]).

218 It is undisputed that Chantal never used the label of a "trust" in her communications. While it is unnecessary for the settlor to use the word "trust" before an intention to create a trust can be found, as Mr Yeo SC acknowledged, Chantal was familiar with trust structures and would have understood the implications of the term. Mr Yeo SC submits that the fact that she did not use the word "trust" therefore suggests that she did not intend a trust.

219 From our review of the evidence set out above, we have found that, when the Chantal Companies were facing financial difficulties and entered into Chapter 11 proceedings, Chantal came up with the plan to purchase the Ethocyn Rights through an offshore corporation and to move the assets offshore (see [72] to [79] above). The offshore corporation and associated corporate structures would enable her to keep her beneficial ownership opaque. It allowed Chantal to start anew in an offshore location that would also have a more favourable tax regime. In furtherance of this plan, she instructed Weir to get her a New Zealand corporation to hold the Ethocyn Rights and structure a holding and associated companies for different aspects of the Ethocyn business. That was, in essence,

an intention to form a trust because Chantal intended to split the legal and beneficial interest of the asset. Weir was Chantal's professional agent and trustee who would own and control the offshore corporations and holding companies. The Ethocyn Rights were thus acquired by Renslade (NZ) from the Chantal Companies with the sanction of the US Bankruptcy Court on 19 October 1999. Chantal thus had her first trust arrangement, as she intended, in place.

220 As we found (see [77] above), sometime in November 1999, Chantal lost confidence in Weir and began exploring other options. She engaged another lawyer, Noel Conway,[245] and considered other corporate structures. It was at or around this time (her loss of confidence in Weir) that Weber, through his collaboration with Wehinger, offered his services. We see from Chantal's Handwritten Chronology that she travelled to Hungary in November 1999 to look into laboratory space. She also referred to the purchase of some laboratory equipment from an exile in Switzerland and referred to Wehinger: "Dr Wehinger set w/ him."[246]

221 Through her relationship with Weber, Chantal then planned to shift the location of the trust assets from New Zealand to Singapore, by changing her "trustee" from Renslade (NZ) to the as-yet-unincorporated Renslade (S). By Weber's email of 9 March 2000, he was already apprised of Chantal's plan and had begun work on the "foundation in S", which we found to be Renslade (S) (see [101] above). We therefore found that sometime in November 1999, an oral agreement was reached between Chantal and Weber that Chantal would transfer

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245 2 AB pp 690; 12 AB pp 5734–5736.

246 2 AB p 761.

the ownership of the Ethocyn Rights from Renslade (NZ) to a Singapore corporation and all income and proceeds from the exploitation of the Ethocyn Rights would be held on trust for Chantal save that Weber was entitled to deduct 5% for his commission or remuneration (see [108] above). Work on that process began immediately *ie*, changing lawyers, undoing the corporate structure set up by Weir and setting up the new corporate structure with Weber and Wehinger. As noted above (see [75] to [78] and [109] to [112]), the documentary evidence shows Chantal, not Weber, spearheading multiple fronts during this period. In her correspondence around March to April 2000, she referred to Renslade (S) as if it was already in existence. In an email dated 10 May 2000 from Chantal to Weber, she referred to drafting and signing the "asset purchase agreement" of the Ethocyn Rights from Renslade (NZ) to Renslade (S) and asked, notably, whether it could be backdated to 24 December 1999.[247] Renslade (S) was incorporated on 23 May 2000 pursuant to Chantal's direction and involvement. Weber seems to have delayed this as we see Chantal sending chaser emails and facsimiles to Weber for confirmation as to whether this had been done. The assignment of the Ethocyn Rights is dated 24 May 2000 but the evidence shows it was backdated from sometime in September 2001 (see [113] above).

222 Chantal had already formed the necessary intention for a trust even before the sale of the Ethocyn Rights by the US Bankruptcy Courts. That intention was initially directed at the trust in Renslade (NZ) with Shane Weir, but after the assets had been transferred, she changed her mind. Her intention to create a trust remained but she decided to rely on Weber instead of Weir, based on the oral agreement that they reached sometime in November 1999. From the

247 2 AB p 860.

time the agreement was reached, there were many matters to sort out, many arrangements to be made for the business going forward, and some of the legal paperwork fell behind. The incorporation of Renslade (S) was delayed because of Weber's delays. We therefore find that the trust in Renslade (S) was properly constituted from 24 May 2000, the date specifically chosen by the parties for the transfer of the Ethocyn Rights from Renslade (NZ) to Renslade (S). This was the day after the incorporation of Renslade (S), which had been incorporated specifically for holding the Ethocyn Rights.

223 We therefore find that this arrangement was a trust where a company, owned and controlled by Weber, would hold the Ethocyn Rights on trust for Chantal; the income or proceeds generated by the Ethocyn Rights were to be held on trust for Chantal, save that Weber was entitled to 5% of the proceeds as his commission or remuneration. The Trustees were Renslade (S), who were subsequently replaced with BCS, and with Renslade (HK) holding some proceeds on trust after 2007 as well, and Weber also is a trustee by virtue of his ownership and control of these companies.

224 As we have found above (see [72] to [74] and [132] above), Chantal had her reasons for keeping her beneficial ownership of the Ethocyn Rights opaque, and this also included her plan to have reduced exposure to taxes. Consequently, she wanted to avoid setting up a formal trust with all its formalities and rigidity. At the same time, there is no dispute that she intended to split the *legal* and *beneficial* title of the assets. That is supported by the evidence, which shows that she retained ownership and decision-making power over the assets even though legal ownership was held in Weber's companies. We find that there is sufficient evidence of Chantal's certain intention to create a trust; whether that is an illegal trust will be dealt with below.

225 As for the two other requisite certainties of subject matter and of beneficiaries, it is relatively uncontroversial in this case that the subject matter would be the Ethocyn Rights and the proceeds and profits they generated. The intended beneficiary at the time of the Trust Agreement would have been Chantal herself and, given her demise, her Estate.

226 We therefore find that the Trust Agreement led to the formation of a valid express trust.

Whether there was a resulting trust

227 Alternatively, Baker pleaded that a resulting trust was created over the Ethocyn Rights in favour of Chantal as the sole beneficiary (at [24] above) through Chantal's provision of the funds to acquire the Ethocyn Rights and in the Royalty Buyout.

228 A resulting trust is characterised by an absence of intention to part with the beneficial interest in favour of the person taking title to the property (*Halsbury's* at 110.546). Resulting trusts are imposed by law and arise in two main ways: (a) the transfer of property from one person to another for no consideration, and (b) the failure of an express trust to exhaust the entire beneficial interest (*Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108 ("*Lau Siew Kim*") at [34]). The first category is also known as a "presumed resulting trust", as there is a presumption that the payor did not intend to make a gift to the payee. The beneficial interest remains with the payor. In *Lau Siew Kim*, the leading case on resulting trusts in Singapore, the Court of Appeal highlighted the difference between the presumption of resulting trust and the resulting trust itself (at [35]). The presumption is an inference of fact drawn from the existence of other facts, whereas the resulting trust is the

equitable response to those facts, proved or presumed. The facts that give rise to a resulting trust are a transfer of property to another in circumstances in which the provider does not intend to benefit the recipient; the facts that give rise to the *presumption* of resulting trust are a transfer of property to another for which the recipient does not provide the whole of the consideration.

229 Weber claims he provided consideration for the Ethocyn Rights or, more accurately, Mr Yeo SC points to documents that there was consideration, as Weber did not give any evidence. We have already found that Chantal provided the funds for the Ethocyn Rights and the Royalty Buyout (at [79] to [92] and [132] to [134] above), which form the core of the Trust Assets. The Ethocyn Rights were also transferred from Renslade (NZ) to Renslade (S) for, in effect, no consideration (at [116] to [120] above). Even without relying on what we found to be Chantal's intention to create an express trust (see [217] to [224] above), the facts would give rise to the presumption of a resulting trust. Though the presumption of a resulting trust may be rebutted by clear evidence of the payor's intention to make a gift to the recipient (*Tay Yok Swee v United Overseas Bank Ltd and others* [1994] 2 SLR(R) 36 at [17]), there is no indication that Chantal intended to make a gift to Weber; she met him less than a year before Renslade (S) was incorporated. As set out above, Weber appeared to be an accountant for Chantal, particularly in the early years (at [99] and [105] above).

230 We therefore find that a resulting trust will also arise on the facts, and we address the implications of this below.

Under California law

231 For completeness, we also consider the parties' cases on the formation of a trust under California law. The parties agreed for California law to be proved by way of submissions rather than expert evidence (see [64] above). Baker was represented by Ms Rachel J. Harris and Mr Jeffrey A. Krieger, and the Defendants were represented by Ms Manya Devanatan and Mr Howard M. Ehrenberg.

232 California trust law largely mirrors Singapore law. The existence of an oral trust is established when there is clear and convincing evidence that: (i) the settlor intended to create a trust; (ii) there is trust property; (iii) the purpose of the trust is valid; and (iv) there is an identified beneficiary: see Cal. Prob. Code. §§ 15201–15203, 15205, 15207.

233 The "clear and convincing" standard may be satisfied in several ways (*Fahrney v. Wilson*, 4 Cal. Rptr. 670, 673 (Cal. Ct. App. 1960)):

> It is often said that the evidence to prove an oral trust of personalty must be clear and convincing, and especially so in cases where the alleged declarant is dead at the time of suit. However, the application of this test is primarily for the trial court, whose determination cannot be attacked on appeal if there is substantial evidence to support the judgment. The required proof may be indirect, consisting of acts, conduct and circumstances....

234 The trial court may consider self-serving declarations of a decedent, made before or after the alleged trust was created, and it may draw inferences supported by substantial evidence: see *Hansen v. Bear Film Co*., 28 Cal. 2d 154, 173–175 (Cal. Sup. Ct., 1946).

235 Two of the four oral trust requirements cannot be seriously contested. The trust property is the Ethocyn Rights and related assets; and Chantal was the beneficiary. The real issues are whether Chantal intended to create a trust and whether the trust is invalid under Cal. Prob. Code § 15203 because it was "created for [a] purpose that is…illegal or against public policy".

Whether Chantal intended to create a trust

236 The evidence discussed in the analysis of Singapore law leads to the same conclusion under California law – Chantal intended to create a trust. She devoted most of her adult life to the creation and exploitation of Ethocyn. She invented the compound (with one other person) in the early 1980s; obtained patents for its use in skin care products; and licensed the Ethocyn Rights to companies she controlled. In 1999, when the Chantal Companies were in bankruptcy, Chantal provided the funds for Renslade (NZ) to acquire the Ethocyn Rights from the Bankruptcy Court. A few years later, she settled the class action securities fraud lawsuit with her own funds. Thereafter, at her direction, the Ethocyn Rights were transferred several times, until they came to be held by BCS Singapore.

237 From 2002, until her death in 2016, Chantal ran the Ethocyn business successfully. She arranged for and supervised the manufacture of Ethocyn, and she negotiated licensing agreements with distributors. She relied on Weber to structure the business entities, manage accounts, and reap the profits. He received a 5% commission for those services.

238 There is no contemporaneous reference to the creation of an oral trust in any of the many emails, notes or other documents in evidence. Even in later communications, there is no written evidence from Chantal stating that Weber

was holding her assets in trust. But the parties' conduct over more than 15 years clearly evidences a trust relationship. Chantal ran the business as her own and Weber took her directions without question. She regularly instructed that funds be transferred to her accounts, often asking that the transfer be made within 24 hours. At one point, the parties discussed how to book those transfers and they decided to call them operating expenses.[248] Chantal demanded, and received without question, reports of the payments made by distributors.[249] Once, when Weber told her he was short on funds, Chantal responded by asking how that was possible in light of the company's income stream. As noted above (see [147(b)] above), Weber essentially apologized for raising the issue. He told Chantal not to worry about it, and said that he had used available funds to make investments.[250]

239 In 2016, after she had been diagnosed with cancer, Chantal asked Weber to provide business records and they agreed to meet in Los Angeles to review them. But Weber brought no records, and Chantal became concerned. She insisted that the records be provided without delay and noted her disappointment in Weber's new attitude. Weber then wrote the 4 June 2016 letter that totally contradicts his claimed ownership of the Trust Assets, and provides compelling evidence of the existence of an oral trust (see [165] above). In that letter, Weber "confirmed" that all the BCS Singapore assets "will go to you or to your daughters"; that he will transfer all assets to a new structure agreed upon by

248 4 AB pp 1792–1794.

249 5 AB pp 2422–2423; 8 AB pp 3530–3532.

250 5 AB pp 2653–55, 2671.

Chantal's attorneys; that "[t]rust is [his] business"; and that, since Chantal no longer trusts him, he will not continue working with her.[251]

240 In sum, we find clear and convincing evidence that Chantal intended to and did create a trust and it is recognisable under California law.

The enforceability of the Trust

241 Though we have found that there is an express trust under both Singapore and California law, the crux of the Defendants' defence is that, even on the Estate's own case, the Trust is unenforceable by reason of illegality.

The factual bases of the Defendants' case on illegality

242 To recapitulate, the Defendants' case on illegality is that Chantal orchestrated Renslade (NZ)'s purchase of the Ethocyn Rights, provided the funds to acquire the same and arranged for Weber to acquire the Ethocyn Rights from Renslade (NZ) and hold the same and any income or proceeds generated from them on trust for her. However, Chantal made the following false declarations on 23 September 1999 in support of the Joint Motion in the US Bankruptcy Proceedings to approve the sale of the Ethocyn Rights to Renslade (NZ):[252]

> 9 … None of the [Chantal Companies'] insiders are owners, officers or directors of Renslade (NZ) or its affiliates
>
> …

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251 9 AB pp 4317–4319.

252 1 AB p 399.

> 12 … I did not ask Renslade (NZ) to require that the patents be transferred as part of the [Chantal Companies'] sale of their rights or assets.

243 The Defendants point out that Chantal also exhibited in her declaration a proposed order authorising and approving the sale of the Ethocyn Rights, where it was falsely stated that Renslade (NZ) "… has an arm's length relationship with [the Chantal Companies], all terms and conditions of the transactions contemplated by the Sale Motion and the [APA] have been fully disclosed and [Renslade (NZ)] is purchasing the Assets in good faith."[253]

244 The Defendants submit that what Chantal did, *viz*, arranging for Renslade (NZ) to purchase the Ethocyn Rights out of bankruptcy and to have them held on trust for her benefit, using funds secretly provided by her, would have been contrary to her declaration under oath to the US Bankruptcy Courts under Sections 152 and 157 of Title 18 of the United States Code, which provisions are part of the Federal Criminal Code. The Defendants also aver in the alternative that the alleged Trust Agreement would be void for illegality, but do not otherwise particularise or state why this is so.

245 Mr Bull SC tried to argue that the declarations were in fact true because Chantal was not an "owner, officer or director" of Renslade (NZ) since she was not the *legal* owner of Renslade (NZ). We are unable to accept this submission as it draws an unnecessary fine line when the clear purpose of such a declaration would be to assure the Bankruptcy Court and the creditors that Chantal did not have any interest in Renslade (NZ). We found above that the Estate has made out its case that Chantal was responsible for deciding upon a New Zealand

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253 1 AB p 535.

corporation, Renslade (NZ), to purchase the Ethocyn Rights. We also found that it was Chantal who funded the purchase of the Ethocyn Rights. Therefore, the declarations implying that Chantal was not affiliated to Renslade (NZ) in any way, and that she did not ask Renslade (NZ) to acquire the Ethocyn Rights, were false.

246 It was on these declarations and the other facts and evidence before the US Bankruptcy Court, including the submissions of counsel representing the opposing interests, that the US Bankruptcy Court approved the sale and one of the bases must have been that Renslade (NZ) had an arm's length relationship with the Chantal Companies.

247 The Defendants also rely on the May 2001 Stipulation of Settlement in the class action suit against her and Chantal Pharmaceuticals (see [14] above). A clause of the settlement stated that Chantal "hereby represents and warrants… that as of 1 May 2001, her net worth was less than $350,000."[254] According to the Defendants, that is false because, on the plaintiff's own case, Chantal was in fact the beneficial owner of Renslade (NZ) and the Ethocyn Rights. However, the Defendants have not produced any evidence of the value of Renslade (NZ) or the Ethocyn Rights at that point in time, and we cannot find that the statement was false without evidence.

248 The Defendants also point to Chantal's statements at the time of the Bankruptcy Court's approval of the Royalty Buyout (see [16] above).[255]

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254 Defendant's Closing Submissions at para 494; 3 AB p 1078.

255 Defendant's Closing Submissions at para 495; Defendant's US Bankruptcy Law Submissions at paras 95 to 98.

Specifically, they submit that, on the plaintiff's case, Chantal's statement that the Chantal Companies received money from Renslade (NZ) at the closing of the Sale Agreement was false as Chantal herself had provided the money. Likewise, Chantal's statement that the Bankruptcy Court approved a sale of the assets to Renslade (NZ) as "only bare legal title was transferred" was also false. We think the Defendants pitch their case too high when they say that these statements were false as they were in fact true. The money was in fact paid from Renslade (NZ) to the Chantal Companies and the assets were sold.

249 We therefore find that Chantal's 1999 declarations in the US Bankruptcy Proceedings set out at [242] above were false, but her subsequent statements were not. We move on to consider the effect of the false declarations on the enforceability of the Trust Agreement under both Singapore law and California law.

Illegality under Singapore law

250 The *locus classicus* on the law on illegal agreements in Singapore is the recent decision of the Court of Appeal in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid Trading*"). The Court of Appeal set out a two-stage test to ascertain whether or not an agreement may be unenforceable due to illegality (at [64] and [65]).

251 The *first stage* of the inquiry is to ascertain whether the contract, as opposed to merely the conduct, is prohibited either pursuant to a statute or an established head of common law public policy (at [22] and [64]). If the contract is prohibited by statute, *eg*, an unlicensed moneylending contract falling afoul of the Moneylenders Act (Cap 188, 1985 Rev Ed), then there can be no recovery

whatsoever pursuant to the illegal contract; the contract is void and unenforceable. If the contract falls foul of established heads of common law public policy, then that would also render a contract unenforceable. Examples of this include contracts prejudicial to the administration of justice (including contracts to stifle a prosecution and contracts savouring of maintenance or champerty); contracts to deceive public authorities; contracts to oust the jurisdiction of the courts; contracts to commit a crime, tort or fraud; contracts prejudicial to public safety; contracts prejudicial to the status of marriage (including marriage brokerage contracts as well as agreements by married persons to marry and agreements between spouses for future separation); contracts promoting sexual immorality; contracts that are liable to corrupt public life; and contracts restricting personal liberty (at [29]).

252 Under the second category of common law illegality, there are a category of contracts which are not unlawful *per se* but which are tainted by illegality in that they nevertheless involve the commission of a legal wrong in their formation, purpose or manner of performance. The traditional approach was that the court would not enforce these agreements as they were tainted with illegality. In *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 ("*Ting Siew May*") and *Ochroid Trading*, the Court of Appeal departed from the traditional approach and held that the enforcement of this category of contracts is subject to the limiting principle of *proportionality* (at [39] and [64]). To determine whether these contracts are enforceable under the principle of proportionality, the court has to undertake a fact-centric enquiry and consider different factors, including:

(a) whether allowing the claim would undermine the purpose of the prohibiting rule;

(b) the nature and gravity of the illegality;

(c) the remoteness or centrality of the illegality to the contract;

(d) the object, intent, and conduct of the parties; and

(e) the consequences of denying the claim.

253 In the case of such contracts, the court will consider the proportionality of refusing to enforce the contract in deciding whether or not it is prohibited under the first stage. If the contract is not prohibited, the court may enforce it.

254 If the contract is prohibited, the court then moves on to the *second stage* of the inquiry, which is to ascertain whether, notwithstanding the fact that there can be no recovery pursuant to the (illegal) contract, there might, nevertheless, be restitutionary recovery of the benefits conferred thereunder (as opposed to recovery of full contractual damages) (*Ochroid Trading* at [42] and [65]). There are three possible avenues for restitutionary recovery:

(a) Where the parties are not *in pari delicto*, or equally at fault, the plaintiff may seek restitutionary recovery (at [43]).

(b) Where the plaintiff is permitted a *locus poenitentiae* or opportunity for repentance, the plaintiff may obtain restitutionary recovery of benefits he has transferred pursuant to an illegal contract (at [44]).

(c) Where the plaintiff has an *independent cause of action* such that he or she does not have to rely on the illegal contract in a substantive legal matter, the parties may be returned to a position they would have

been in if they had never entered into the illegal transaction at all (at [50]). Traditionally, this involved claims in tort and the law of trusts premised on the plaintiff's property or title (at [51]). The Court of Appeal also held that restitutionary recovery may be available on a claim in unjust enrichment, subject to the defence of illegality and public policy (at [139]).

255 The Court of Appeal addressed the possibility of an independent cause of action in unjust enrichment in detail. The ordinary requirements for a claim in unjust enrichment are necessary, one of which is the existence of an unjust factor (at [140]). The claim is also subject to the usual defences to unjust enrichment of illegality and public policy – the issue of illegality therefore arises again not in the contractual sense, but as a defence (at [143]). The guiding principle is *stultification,* and a claim in unjust enrichment will be precluded where allowing it will undermine the fundamental policy that rendered the underlying contract void and unenforceable in the first place (at [145]).

256 The Court of Appeal also considered the application of the principle of stultification to the other independent causes of action, such as the traditional claims in tort and trusts (at [161]). It was of the view that independent causes of action may be similarly disallowed if allowing them would *stultify* or undermine the fundamental policy that rendered the agreement illegal in the first place (at [168]).

257 We now apply these principles to the case before us.

Whether the Trust Agreement is illegal or tainted by illegality

258 The Trust Agreement is not prohibited under any Singapore statute. Nor

is it prohibited under any established heads of common law public policy. We therefore turn to whether the Trust Agreement is tainted by illegality. A Singapore court will not enforce a contract "if its object or purpose would involve doing an act in a foreign and friendly state which would violate the law of that state" (*BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] 4 SLR 1 at [175]). According to the Defendants, the object and purpose of the Trust Agreement was to deceive the creditors and the Bankruptcy Court by keeping Chantal's assets out of their reach. The Defendants also argue that the performance of the Trust Agreement was unlawful because Chantal had made false declarations and continued to conceal her beneficial interest in the Ethocyn Rights.

259 We find that the object of the Trust Agreement was not unlawful. It is not unlawful for A to arrange for B to hold intellectual property and attendant rights on trust for A with B being remunerated from the proceeds generated from those rights. The Defendants' argument that the object of the Trust Agreement was to keep the Trust Assets out of the creditors' reach is misconceived. We have already found above there were no other buyers interested in the Ethocyn Rights despite the efforts of the Creditors' Committee (see [94] above); we are not surprised, given their nature, the specialist effort required to be able to exploit them and the need to put in more capital to do so. If Chantal had not made the false statements, it would, in all probability, only result in the creditors attempting to obtain a better price for the Ethocyn Rights. Whether Chantal would have agreed to pay more, or whether the Creditors' Committee would have thrown in the towel at some point, especially given the expiry of the patents in 2004, the lack of interest from potential bidders and the need to sink in more capital, will be pure speculation. Chantal's declarations to the Bankruptcy Court were made in September 1999 but the Trust Agreement

was made sometime in November 1999. These declarations predate the Trust Agreement, and so they cannot be said to have formed the object and purpose of the Agreement. The Defendants certainly do not plead or imply they knew of Chantal's plans from early 1999 to September and October 1999. On the contrary, the Defendants distance themselves from this by pleading the purchase of the Ethocyn Rights from Renslade (NZ) in or around May 2000 or later. The Defendants then argue that the object and purpose of the Trust Agreement was to deceive the creditors and the Bankruptcy Court but, by the time of the Trust Agreement, the deception had already occurred. It is also misguided to refer to the "performance" of the Trust Agreement as unlawful because, by the time the Trust Agreement had been reached, the unlawful acts had already been performed.

260 There was some suggestion that the purpose of the Trust Agreement was to evade taxes, with the defendants highlighting the consequences of evasion of US taxes.[256] However, this was not pleaded, possibly because Weber himself would be implicated in any such scheme. We therefore do not consider this part of the object and purpose of the Trust Agreement.

261 However, we find that the Trust Agreement may not have been unlawful *per se* but it was tainted by illegality. Chantal's false declarations to the Bankruptcy Court were undoubtedly part of the basis upon which the US Bankruptcy Court approved the sale of the Ethocyn Rights to Renslade (NZ). At the time of Chantal's communications with Weir and the purchase of the Ethocyn Rights by Renslade (NZ), she clearly intended to hide her interest in

256 Defendants' California Trust Law Submissions at para 11.

the Ethocyn Rights. The corpus of the Trust was obtained partly through making false declarations (see [242] above). The Estate cannot "wash" that illegality through the later Trust Agreement and incorporation of Renslade (S).

262 The Trust Agreement therefore falls under the category of contracts discussed in *Ochroid Trading* ([250] *supra*) to which the principle of proportionality will be applied (at [39]). The courts examine the relevant policy considerations underlying the illegality principle so as to produce a proportionate response to the illegality in each case (*Ting Siew May* ([252] *supra*) at [66]). This is a fact-centric analysis, and the proportionality of enforcing the Trust Agreement must be considered in light of the factors set out at [252] above.

263 Upon consideration of the proportionality factors, we find that they point to the disproportionality of refusing to enforce the Trust Agreement. Without downplaying the severity of Chantal's conduct in the Bankruptcy Proceedings, we do not think that the nature and gravity of the false declarations is so severe as to weigh against enforcement of the Trust Agreement. There is no prohibition against a debtor in bankruptcy proceedings buying back its own assets; the only difference is that the courts will apply a higher level of scrutiny to ensure that the sale is fair. The question is whether the bankruptcy sales were fair.

264 We detailed the conduct of the Bankruptcy Proceedings above (see, *eg*, [10] above). Crucially, we note that there was an active Creditors' Committee, and they hired the Kriegsman Group as an investment banker and other consultants to market the products to 20 potential buyers. In spite of the best efforts of the Creditors' Committee, no other offers were made for the Ethocyn Rights. Renslade (NZ) remained the best offer. In fact, as we highlighted at [94],

Renslade (NZ) had actually made a higher offer for the Ethocyn Rights first *and had been rejected*. That, to us, is clear evidence that Chantal was not manipulating the Bankruptcy Proceedings for her own benefit. Even when the APA between the Creditors' Committee and Renslade (NZ) was presented to the court, there was an option for other potential buyers or "overbidders" to purchase these assets at the hearing, and yet there were no overbids (at [11] above). Though that might seem suspicious, it is easily explained by the unique nature of the Ethocyn Rights, as highlighted at [93]. There was no ready market for the Ethocyn Rights as they consisted of intellectual property, and not any buyer would have been able to exploit them. Chantal, as the inventor, was possibly one of the few people in the world uniquely able to use these assets. Aside from a vague claim that full disclosure would have led to "stricter scrutiny" of the sale, the Defendants have not shown how the disclosure of Chantal's interest in Renslade (NZ) would have materially affected the bankruptcy sale.

265 Another factor in the proportionality analysis is the remoteness of the illegality; this means that some real or central connection must be demonstrated by the party relying on the defence of illegality between the contract concerned and the unlawful intention (*Ting Siew May* ([252] *supra*) at [67]). We find that the false declarations are remote from the Trust Agreement. A key indication as to whether the illegality is too remote from the contract lies in whether any overt step in carrying out the unlawful intention was taken in the contract itself (*Ting Siew May* at [67]). The declarations were made in September 1999, before the Trust Agreement had been reached and Weber was not yet in the picture. There could not have been any "overt step" in carrying out the unlawful intention as said unlawful act had been carried out by the time of the Trust Agreement. As stated above, at its highest, the corpus of the Trust is tainted by illegality as it

was obtained on the basis of false declarations set out at [242]. As noted, those false declarations were not the only bases upon which the US Bankruptcy Court approved the sale. Further, this approval was some 20 years prior to these proceedings. From 2002 to 2015, parties abided by the Trust Agreement in managing the Trust Assets. We do not think the false declarations had a strong or central connection to the Trust Agreement.

266 We add that the US Bankruptcy Court approved the APA on 19 October 1999 (see [11] above), the class action suit against Chantal and Chantal Pharmaceutical was settled in May 2001 (see [14] above) and the Bankruptcy Court approved the Royalty Buyout in 2002 (see [16] above). Since then, it appears that no action has been taken in those proceedings and the Bankruptcy Court orders still stand. Nothing has been done that would impugn those orders and, even if something can be done, it is not clear which party would have standing to do so. This court is not the proper forum to nullify the order. That weighs in our consideration of the remoteness of the alleged illegality.

267 As for the conduct of the parties, Chantal deliberately hid her interests from the Bankruptcy Court, and her alleged motive of facing death threats, on the facts and circumstances of this case, should not, as stated above, be given disproportionate significance. We have also found that Chantal was in all likelihood also motivated by a desire to exploit own product (see [74] above). At the same time, we think Weber's conduct in the performance of the Trust Agreement is also relevant. Under the Trust Agreement, he was to manage the assets on behalf of Chantal and yet now he stands to benefit from all her work over the past two decades. We also find that the consequences of denying the Estate's claim weigh in favour of enforcing the Trust Agreement, because Weber will stand to benefit. Weber is a trustee, acting in flagrant breach of his

duties as such and attempting to misappropriate trust properties.

268 Finally, we address the issue of whether allowing the claim will undermine the purpose of the prohibiting rule. This relates to the principle established in *Ochroid Trading* ([250] *supra*) of stultification, which applies at the second stage of the inquiry (we address that principle below at [274]). In the present case, the rule that was violated is that a party in bankruptcy proceedings should not make false declarations to the court, and it exists because the court must have all material information available so that it can protect the creditors' interest. Undoubtedly, Chantal's false declarations would have fallen afoul of this rule. At the same time, the Defendants have not shown how the falsity of these declarations made a difference in the conduct of the Bankruptcy Proceedings. If Chantal is able to lay claim to the Trust Assets, we do not think it would undermine or make a mockery of the Bankruptcy Proceedings. That might be the case if she had purchased the assets at an undervalue, but there is no evidence of that.

269 Applying the principle of proportionality, we find that there is no reason not to enforce the Trust Agreement, and it is not prohibited under the first stage of the inquiry.

Whether there is an independent cause of action

270 Even if we are wrong, and the Trust Agreement is prohibited under a common law head of public policy, we find that the Estate still has an independent cause of action under Singapore law under a resulting trust, as we found at [227] to [230] above that a resulting trust is presumed to arise on the facts.

271 The resulting trust is one of the traditional independent causes of action that have been recognised as allowing the recovery of benefits conferred under an illegal transaction (*Ochroid Trading* ([250] *supra*) at [51]). The leading case on this is the decision of the UK House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 ("*Tinsley*"), which was discussed by the Court of Appeal in *Ochroid Trading* (at [54] to [59]).

272 In *Tinsley*, the parties purchased a house in which they cohabited as a couple. The house was conveyed into the name of the plaintiff, but both parties had provided money for the purchase. The aim was to allow the defendant to claim social security benefits from the state, which would only be distributed if she did not own a home. The parties fell out and the plaintiff moved out. The plaintiff then brought an action for possession to claim that the house was hers, while the defendant brought a counterclaim for an order of sale and a declaration that the plaintiff held the property on trust for both parties in equal shares. The majority of the House of Lords found in favour of the defendant, holding that illegality did not bar the defendant's claim because the presumption of resulting trust allowed the defendant to establish an equitable interest in the property. The defendant did not have to rely on the underlying illegal agreement to establish a proprietary interest in the house.

273 *Tinsley* has been subject to criticism because of its perceived arbitrariness. As the Court of Appeal in *Ochroid Trading* ([250] *supra*) noted at [163], it is "subject to the accidents of pleading"; after all, had the parties in *Tinsley* been married, the presumption of advancement could have applied to bar the defendant's claim and he would then be unable to rely on the illegal agreement to rebut that presumption. In *Ochroid Trading*, the Court of Appeal considered the possibility of departing from *Tinsley,* but left the question open

for a future case (at [166] to [168]). However, the Court of Appeal's criticism of *Tinsley* was in the context of its discussion of the case of *Nelson v Nelson* (1995) 184 CLR 538, a decision of the High Court of Australia where the plaintiff had to rely on the illegal agreement to rebut the presumption of advancement (*Ochroid Trading* at [165]). The facts of that decision do not arise in the present case. Instead, the present case involves a classic example of the plaintiff's entitlement to property based on the independent cause of action of the presumption of resulting trust. No "reliance" on the illegal agreement, in the formal or procedural sense or in the normative or substantive sense (Ochroid Trading at [128] to [130]), is necessary, because any "reliance" by Weber on the Trust Agreement would affirm, rather than rebut, the trust, by establishing Chantal's clear intention to retain an interest in the Ethocyn Rights. The case falls squarely within the *Tinsley* category of cases and, as it has not been overruled, the Estate can rely on the resulting trust.

274 In *Ochroid Trading* ([250] *supra*), the Court of Appeal also considered whether the principle of *stultification* applies to independent property claims in the law of trusts (at [168]). Though it did not reach a conclusive view on the issue, we nonetheless consider whether the principle of stultification would operate such that we should disallow the claim in resulting trust. The principle of stultification precludes allowing a claim if to do so would undermine the fundamental policy that rendered the underlying contract void and unenforceable in the first place (*Ochroid Trading* at [145]). We have set out our reasons for finding that allowing the claim would not undermine the fundamental policy that rendered the Trust Agreement illegal in our analysis on proportionality above (see [263] to [269] above), and we would reach the same conclusion here. Specifically, in the context of a claim for restitutionary remedies, we find that allowing the Estate to claim title to the Trust Assets on

the basis of a resulting trust does not undermine the policy in prohibiting false declarations in bankruptcy proceedings.

275 We therefore find that the Estate would have an independent cause of action against the Defendants in a resulting trust, as Chantal provided the funds involved in the purchase of the Ethocyn Rights and the Royalty Buyout, and the Ethocyn Rights were transferred to Renslade (S) for no consideration. However, we highlight that, under this independent cause of action, the parties may only be returned to the position they would have been in had they never entered into the illegal transaction (*Ochroid Trading* ([250] *supra*) at [50] and [129]).

Conclusion

276 In conclusion, we find that the Trust Agreement is not unenforceable by reason of illegality under the governing law of the trust, *ie*, Singapore law. To answer [59(i)] and [59(j)] of the Agreed List of Issues above, the Trust Agreement is not illegal, void or unenforceable as being contrary to public policy, and even if it was, the Defendants nevertheless hold the Trust Assets and Trust Monies on a resulting trust for the Estate.

Illegality under California law

277 For completeness, we also address the parties' arguments on whether the Trust would be invalid by reason of illegality or as against public policy under California law.

Whether the Trust is enforceable assuming it was created for an invalid purpose

278 Under California law, a trust may be created for any purpose that is not illegal or against public policy: see Cal. Prob. Code § 15203. The purpose of the trust was to allow Chantal to continue to conduct her business without revealing that she was the beneficial owner of the Trust Assets. As a general matter, a trust established to maintain confidentiality is perfectly valid under California law: see Cal. Prob. Code § 15203. The death threats may have been the motive behind Chantal's desire for confidentiality, but they do not justify her actions and we have already found that the statements to the Bankruptcy Court were false. The Creditors' Committee accepted Renslade (NZ)'s proposal and the Bankruptcy Court approved the sale on the belief that Chantal had no relationship to Renslade (NZ).

279 A trust created for the purpose of defrauding creditors is illegal under California law: see *Goodrich v. Briones (In re Schwarzkopf)*, 626 F.3d. 1032, 1037 (9th Cir. 2010). But, the analysis does not end there. Even if the express trust is set up for an illegal purpose, the court may impose a resulting trust to do justice to the case. The Defendants contend that Chantal's false declarations to the U.S. Bankruptcy Court were criminal acts under 18 U.S.C. §§ 152 and 157. They acknowledge that Chantal was never prosecuted; and that private parties have no standing to pursue a claim based on those statutes. But they argue that "the court is entitled to take cognisance of [Chantal's] criminal conduct".[257] (D's Closing Submissions at 530). We agree that Chantal's conduct is one aspect of the analysis of the enforceability of an illegal trust. Calling it criminal conduct

[257] Defendant's Closing Submissions at para 530.

does not change the analysis. As set out in *In re Torrez*, 827 F.2d 1299 ("*In re Torrez*"), 1301 (9th Cir. 1987), California courts look to four factors in deciding whether to enforce an illegal trust:

> [T]he completed nature of the transaction, such that the public can no longer be protected by invocation of the rule that illegal agreements are not to be enforced; the absence of serious moral turpitude…; the likelihood that… the party asserting the illegality [will] be unjustly enriched at the expense of the other party; and disproportionality of forfeiture as weighed against the nature of the illegality.

280 The facts of *In re Torrez* were uncontroversial. A couple purchased 120 acres of land but registered the title of the land in the names of their son and daughter-in-law. The purpose of this arrangement was to exceed the son and daughter-in-law's maximum allotment of federally subsidised irrigation water. When the son and daughter-in-law were in a precarious financial position, the parents directed that the property be conveyed to their daughter as trustee, and this was done so for no consideration. The son and daughter-in-law subsequently became bankrupt, and had to sell the property. They sought an order to reconvey the property to them, while the parents opposed it on the grounds that an express oral trust existed or, alternatively, that the land was held in a resulting trust in their favour. The son and daughter-in-law argued that any trust would be void because the purpose of the trust was illegal, *ie*, to avoid federal law governing allotment of irrigation water.

281 The 9th Circuit applied all four factors to determine whether the defence of illegality applied. It found that the contract had been completed, and was not executory, and so an invocation of the rule against illegality would benefit the public only by way of example. The conduct of the parents did not involve serious moral turpitude; the only penalty for their conduct would have been the loss of eligibility for irrigation water. What the 9th Circuit found "most

compelling" was the likelihood that the children would be enriched at the expense of their parents; they would benefit from the sale of property upon which they had never paid a cent, nor worked, nor otherwise expended any effort, and this would amount to unjust enrichment. As for disproportionality, the land would be forfeited when the original penalty was mere disentitlement to federally subsidised water. The 9th Circuit therefore concluded that the factors weighed in favour of imposing a resulting trust, and the son and daughter-in-law were precluded from relying on illegality as a defence.

282 Similarly, applying *In re Torrez* to the present case, all four factors favour enforcement of the Trust. The bankruptcy proceedings were concluded 20 years ago. Chantal's conduct did not involve serious moral turpitude. She did not use the trust to hide assets, and she did not attempt to purchase the Trust Assets until after the Creditors' Committee, with professional assistance, was unable to find another buyer. Though she may have hoped to purchase the Trust Assets at a low price, there is no real evidence that, had she disclosed her interest in Renslade (NZ), the price would have been higher – there was no other buyer of the Ethocyn Rights. If Weber were allowed to keep the Trust Assets, he would be unjustly enriched, perhaps by as much as $41 million, and that result would be greatly disproportionate to the mere fact of Chantal's false declarations in the bankruptcy proceedings. We therefore find that, even if Chantal's purpose of creating the trust was illegal, under California law, Baker would prevail on his claim that the Trust is an enforceable resulting trust.

Whether the Trust violates public policy

283 The Defendants maintain that, because Chantal's false statements to the Bankruptcy Court constituted a fraud on the court, public policy prohibits enforcement of the Trust. They rely on *In re Roussos* 541 B.R. 721 ("*In re*

Roussos") (Bankr. C. D. Cal. 2015), where the Bankruptcy Court denied a motion to dismiss a claim to set aside a sale order, holding that, "[t]he fraud alleged here was so serious as to prevent the judicial machinery from performing "in the usual manner its impartial task of adjudging cases…."" (*In re Roussos* at 725). The fraud allegations in *In re Roussos*, however, were far more serious than the facts of this case.

284 In the early 1980s, August Michaelides ("August") and two Roussos brothers agreed to buy two apartment buildings, with August owning one third of one property and ten percent of the other property. Ten years later, after August died, his wife, Lula Michaelides ("Michaelides"), learned that the Roussos brothers had failed to include August on the deeds to the properties. She sued to quiet title and obtained a judgment quieting title and awarding her $1.1 million in damages and fees.

285 The Roussos brothers then conspired to extinguish Michaelides' interest in the properties. They set up two corporations, filed individual chapter 11 bankruptcy petitions, and then filed a motion to sell the properties to their corporations. The Roussos brothers falsely declared that they had no interest in the corporations; that the sale was at arms-length; and that the properties were over-encumbered. The end result was that Michaelides lost her interest in the properties and the Roussos brothers and their corporations obtained bankruptcy protection as discharged debtors and good faith purchasers. The Bankruptcy Court noted that fraud on the court is a fraud that "defiles the court itself" (*In re Roussos* at 729). The facts of *In re Roussos* fit that definition because the Roussos brothers basically used the court as an unwitting participant in a scheme to defraud Michaelides.

286 Chantal's misrepresentations, although worthy of condemnation, did not rise to the level of a fraud on the court. There was an active Creditors' Committee that hired independent professionals to seek buyers, without success. There is no evidence that Chantal hid any assets or otherwise interfered with the bankruptcy proceedings.

287 The facts here are more like those in *Matter of Met-L-Wood Corp* (861 F.2d 1012 (7th Cir. 1988) ("*Matter of Met-L-Wood Corp*"), where the successful bidder at a foreclosure sale was a shill for the debtor. Met-L-Wood was indirectly owned by one Frederick Pipin. When it entered financial trouble, it conducted a public foreclosure sale. The sale was advertised in major newspapers, and letters were sent to 40 creditors announcing the date, time, and place. Bids were solicited and received, and there were only two bids – one by Thomas Smith and one by Gerald Thompson. The creditors preferred Thompson's bid, and the sale was approved. Six months later, a trustee was appointed who concluded that both Smith and Thompson were shills for Pipin; it emerged that, after the sale, Thompson had sold the only profitable part of the business back to Pipin.

288 The court noted that all of the unsecured creditors had been notified of the sale, and there was an active committee of creditors that had participated actively through counsel in the hearings before the bankruptcy court. There was no indication that the assets were worth more than what was bid, nor that the defendants had done anything to impede or discourage the bidding at the sale. As the creditors who appeared had actively urged the judge to approve the bid, the court found that a fair inference could be drawn that the bid was in the best interest of all creditors. If the debtor used his control to obtain the bankruptcy

assets "for a song", it would be a fraud on the creditors, but not a fraud on the court.

289 Given the similarities between *Matter of Met-L-Wood Corp* and the present case, we conclude that the Trust Agreement did not involve illegality or fraud on the court.

Whether the court would impose a constructive trust

290 We have set out why a court applying California law would find an express trust or, at the very least, a resulting trust. The Estate also submitted that the court should impose a statutory constructive trust over the assets arising out of the Weber's wrongful act in order to prevent unjust enrichment, as Weber had promised to hold the assets on an express trust but failed to do so.[258] They did not pursue this argument with great vigour, and we do not think we need to say any more about this given our finding that the Trust is valid and enforceable.

Whether the Trust is an irrevocable self-settled trust

291 The parties also ran arguments on whether or not the Trust was an irrevocable self-settled trust. Although this was somewhat a peripheral issue, we address it for completeness as, if the Defendants' arguments are true, it may undermine our findings on the enforceability of the Trust.

292 An irrevocable self-settled trust is one that cannot be revoked by the settlor during his lifetime, and where the same individual is both settlor and

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258 Plaintiff's Closing Submissions at para 418; Plaintiff's California Trust Law Submissions at para 32.

beneficiary. Such a trust is prohibited under California law by reason of public policy because it places the property of the settlor beyond the reach of their creditors.[259] The Defendants submit that the Trust was such an invalid irrevocable self-settled trust as Chantal was both the settlor and the beneficiary, and given that she intended to keep her assets out of the reach of her creditors, she must have intended an irrevocable trust.

293 On the other hand, Baker denies that the Trust was an invalid irrevocable self-settled trust, as emails exchanged between Chantal and Weber – where Chantal sought an accounting of the Trust Assets – clearly demonstrate that Chantal obviously intended that the assets would be returned to her. Baker also relies on Cal. Prob. Code § 15400, which states that a trust is revocable unless by its terms it is expressly made irrevocable. Even if it was an irrevocable trust, pursuant to Cal. Prob. Code § 15304, the court would merely invalidate the provision that renders the trust irrevocable and not the entire trust.[260]

294 Cal. Prob. Code § 15400 states:

> Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor. This section applies only where the settlor is domiciled in this state when the trust is created, where the trust instrument is executed in this state, or where the trust instrument provides that the law of this state governs the trust.

295 It is undisputed that Chantal was domiciled in California at the time the Trust was created, and the Trust must have been a revocable one. We do not think the Defendants are correct to suggest that, because Chantal intended to

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259 Defendant's California Trust Law Submissions at paras 42 and 44.

260 Plaintiff's Closing Submissions at para 430.

keep the assets out of the reach of her creditors *at the time of the bankruptcy proceedings*, she must have intended an irrevocable trust which would keep the assets out of her own hands *for her lifetime*. This supports the evidence, set out above, that Chantal treated the Trust Assets as her own and clearly expected them to be returned to her.

296 Our conclusion is fortified by Cal. Prob. Code § 15304, which states:

> If the settlor is a beneficiary of a trust created by the settlor and the settlor's interest is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, the restraint is invalid against transferees or creditors of the settlor. The invalidity of the restraint on transfer does not affect the validity of the trust.

297 Admittedly, the present case involved an oral trust and not a trust instrument for an express trust. What Cal. Prob. Code § 15304 reflects is that the invalidity of the restraint on transfer does not lead to the invalidity of the entire trust. Instead, the courts will just treat it as a revocable trust.

298 In conclusion, under California law, the Trust created here will be recognised as a valid trust. To answer [59(g)] and [59(h)] of the Agreed List of Issues above, the Trust is valid under California law and, if it were not so, there would still be a valid resulting trust.

Conclusions and Judgment/Remedies

299 Having found the Trust Agreement to be valid and enforceable, we find that the Defendants have breached their fiduciary duty to Chantal by failing to provide an account of the Trust and the Trust Monies. In addition, the Defendants have breached the Trust Agreement by unilaterally increasing the commission from 5% to 10% from 2016 to 2017 without Chantal's knowledge

and consent. We also find that Weber breached his fiduciary duty to Chantal by failing to procure BCS or Renslade (HK) to return the Trust Assets, and breached his contractual obligation *vis-à-vis* Chantal to return the CHF9.5 million borrowed from the Trust with 3% annual interest. The Defendants, having claimed both legal and beneficial ownership over the Trust Assets and Trust Monies, conspired with the intention of injuring Chantal and/or the Estate.

300 Consequently, taking into account the remedies sought by the plaintiff at [33] above, we make the following orders.

(a) We declare that BCS and/or Renslade (HK) hold the Trust Assets and/or Trust Monies and/or any other income or proceeds generated from the Trust Assets on trust for the plaintiff.

(b) We order the Defendants to provide a detailed account of all transactions taken place in respect of the Trust Assets and/or Trust Monies within 14 days from the date of this judgment. We grant the order for the taking of accounts of the Trust Assets and/or Trust Monies thereafter and, if necessary, for an order for the plaintiff to trace and recover the Trust Assets and the Trust Monies. The Defendants shall pay the plaintiffs all sums due to the plaintiff on the taking of the account. Parties are at liberty to apply to court for any orders or directions in relation to the taking of accounts.

(c) The parties are to settle the order of court to reflect our judgment, failing agreement of the terms, the Court shall settle the same.

(d) We enter judgment in favour of Baker, on behalf of the Estate, against Weber in the sum of CHF9.5 million plus interest at the rate of

3% per annum to the plaintiff, calculated from the date of the loan to the date of judgment; thereafter, for the avoidance of doubt, interest at 5.33% per annum shall run pursuant to para 77 of the Supreme Court Practice Directions.

(e) The sum of US$10,330,658.91 paid by Renslade (HK) into court pursuant to the Order of Court No 2 of 2020 dated 11 January 2020 shall be released to the plaintiff and/or his solicitors.

301 Costs must follow the event. If the costs cannot be agreed between the parties, parties are to file written submissions on costs, limited to 15 pages, within 14 days from the date of this judgment.

Quentin Loh
Judge

Carolyn Berger
Judge

Dominique Hascher

Cavinder Bull SC, Woo Shu Yan, Gerald Tay, Regina Lim and Sun Fangda (Drew & Napier LLC) for the plaintiff;
Alvin Yeo SC, Monica Chong, Vithiya Rajendra, Nurul Ayu Fajarani and Daryl Wong (WongPartnership LLP) for the defendants.