Status: Negative Judicial Treatment

# Polyline Development Ltd v Ching Lin Chuen

Date of Judgment: 3 March 2021

Court of First Instance

CFI

High Court Action No 2319 of 2019

HCA 2319/2019

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| Citations: | [2021] HKCFI 483<br>[2021] HKEC 686 |
| Presiding Judges: | Recorder Manzoni SC in Chambers |
| Phrases: | Civil procedure - striking-out - action for (inter alia) breach of fiduciary duties and unlawful means conspiracy - whether disclosed no reasonable cause of action, vexatious and frivolous and/or abusive of process |
| Counsel in the Case: | Mr Barrie Barlow SC, instructed by William K W Leung & Co, for the plaintiff<br>Mr Horace Wong SC and Mr Michael Lok, instructed by Wilkinson & Grist for the 1st, 6th to 12th, 14th to 16th and 18th defendants<br>Mr Anson Wong SC and Mr Martin Kok, instructed by Chungs Lawyers, for the 4th defendant |
| Cases cited in the judgment: | ADS v Wheelock Marden & Co Ltd [1994] 2 HKC 264<br>Asgain Co Ltd v Cheng Ka Yan (No 2) [2018] 2 HKLRD 641<br>China Medical Technologies Inc v Wu Xiaodong ([2019] HKCFI 1266, [2019] HKEC 1529)<br>Chung Pui Tong v Qian Zhen ([2020] HKCFI 187, [2020] HKEC 132)<br>Davy v Garrett (1878) 9 Ch D 473<br>De Krassel v Chu Vincent [2010] 2 HKLRD 937<br>Galsworthy Ltd v Liu Por ([2019] HKCFI 2397, [2019] HKEC 3168)<br>Hollywood Shopping Centre Owners Committee Ltd v Incorporated Owners of Wing Wah Building, Mongkok, Kowloon (HCA 1582/2007, [2010] 5 HKLRD L6)<br>Hotung Investment (China) Ltd v Ernst & Young (a firm) [2012] 5 HKLRD 421<br>Kensland Realty Ltd v Tai Tang & Chong (2008) 11 HKCFAR 237<br>Law Pak Fun v Tai Lee Fat International Ltd [2015] 4 HKLRD 339<br>Li Shiu To v Cheung Pik Ng (No 2) [2018] 1 HKLRD 934<br>Libertarian Investments Ltd v Hall (2013) 16 HKCFAR 681<br>Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221 |

New China Hong Kong Group Ltd v Ng Kwai Kai Kenneth (HCA 519/2010, [2011] HKEC 210)

Paragon Finance v Thakarar [1999] 1 All ER 400

Peconic Industrial Development Ltd v Lau Kwok Fai (2009) 12 HKCFAR 139

Prime Sight Ltd v Lavarello [2014] AC 436

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The Estate of Yang Sen Hui (Decd) & Others v Pao Yuen Tung Hsing Yieh Co Ltd [1983] HKLR 124

Three Rivers District Council v Bank of England No 3 [2003] 2 AC 1

Westdeutsche Landesbank v Islington LBC [1996] AC 699

Williams v Central Bank of Nigeria [2014] AC 1189

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Yeu Shing Construction Co Ltd v Attorney General [1988] HKC 710

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JUDGMENT:

Recorder Manzoni SC in Chambers

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## A. Introduction

1. This is an application by the 1st, 6th to 12th, 14th to 16th and 18th defendants ("the WG defendants") and the 4th defendant to strike out the statement of claim. I hope that the individual parties will not take offence if I do not continuously refer to them by name, but by the epithet D1, D2 etc.

2. The WG defendants' summons, dated 21 August 2020, seeks, amongst other things, the following relief [1] :

"The ⋯ statement of claim ⋯ be struck out and the present action be dismissed on the grounds that the statement of claim (a) discloses no reasonable cause of action; (b) is scandalous, frivolous, or vexatious; (c) may prejudice, embarrass or delay the fair trial of the action; and/or (d) otherwise constitutes an abuse of the process of the court in that the claims purportedly made there in our either time-barred or are barred by the equitable doctrine of laches;

further alternatively, all such parts of the statement of claim that the court considers as (a) disclosing no reasonable cause of action; (b) scandalous, frivolous, or vexatious and/or (c) otherwise constituting an abuse of the process of the court, including but not limited to the specific pleas as to (i) resulting trust (at paragraph 20-21); (ii) constructive trust/unjust enrichment (at paragraph 22-23); (iii) breach of directors' duties and account (at paragraph 24-28, 30-32); (iv) sham transactions (at paragraph 29); (v) the Conveyancing and Property Ordinance (at paragraph 33-42) and/or (vi) dishonest assistance ⋯, be struck out."

3. The summons goes on to seek security for costs in the alternative.

4. D4's summons, dated 20 August 2020, is somewhat simpler. It seeks that the statement of claim be struck out on the basis that it discloses no reasonable cause of action, is scandalous, frivolous, or vexatious, and/or is otherwise an abuse of the process of the court.

5. By Summons dated 27 October 2020 the plaintiff applied for leave to amend its statement of claim in accordance with the amendments shown in the draft attached to that summons. By order of Mr Registrar Kwang, the various strike out summonses and the amendment summons were adjourned, with directions, to be heard before a judge in chambers, with 1 days reserved. It is that hearing to which this judgment relates.

6. As is normal within a strikeout summons hearing, I will consider the strikeout by reference to the draft amended statement of claim (which I will refer to simply as the statement of claim).

7. Mr Barlow SC, counsel for the plaintiff, who was not the drafter of the statement of claim save for some proposed further amendments to paragraphs 49 and 50, confirmed that his client would stand or fall on the draft, together with the further alteration to paragraphs 49 and 50 concerning D4 which I will address below. The plaintiff did not seek to make further amendments to the statement of claim and did not suggest that further amendments or further particulars would be forthcoming. Therefore, I deal with the matter on the basis of the draft statement of claim only, and do not consider the question of whether it may be improved by further amendment or by the provision of further particulars.

8. At the outset I note that for the purposes of assessing the strikeout applications the court has been provided with:

(1) 9 affirmations, running to almost 200 pages, of which 5 are in support of the WG defendants' application (including 2 from Mr Osman Mohammed Arab, who gives evidence as an insolvency expert), 2 are in support of D4's application and 2 resist the applications. In addition to the two expert affirmations, there is also a 64 page expert report prepared by Mr Arab, addressing what he says a reasonably competent liquidator would have done, when he would have done it, and what he would be likely to have discovered had he done it.
(2) 16 box files of exhibits, running to 3721 pages.
(3) a "skeleton" submission by the WG defendants running to 102 pages.
(4) a list of authorities from the WG defendants amounting to some 93 materials or cases, which number has subsequently expanded by the provision of further authorities.
(5) Somewhat more modest skeleton submissions from D4 and the plaintiff.

9. It may be thought that if such voluminous material is necessary in order to persuade the court that the claim is obviously unsustainable, the application is somewhat ambitious. Notwithstanding that, I address the application on its merits, based upon the way it has been argued. Unfortunately however, the length and complexity of the propositions put forward has led to a very long judgment, and I apologise to the readers for that length.

## B. The Principles Applicable to Strike Out Applications

10. As a matter of general principle, it is trite that [2]:

(1) a strikeout application will only be successful in a plain and obvious case. The claim

> must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out.
> (2) However, plain is not the same as simple, and obvious is not the same as short. If, on a careful reading of the statement of claim, however complicated, it can be seen that there is no cause of action or the claim will obviously not succeed, then it will be struck out despite the apparent complexity.
> (3) There should be no trial upon affidavit and disputed facts should be taken in favour of the party sought to be struck out. Where the legal viability of a cause of action is sensitive to the facts, an order to strikeout should not be made. However, the court should remain vigilant to ensure that its processes are not abused by the prosecution of hopeless claims [3].
> (4) The court should not decide difficult points of law in striking out proceedings.
> (5) It is for the party seeking to strikeout the pleading to demonstrate that the case is a plain and obvious one in which the other party's claim is bound to fail. However, in the context of limitation, once a limitation defence is raised, the onus is on the plaintiff to prove that the cause of action relied upon accrued within the limitation period, even in a strike out application [4].

11. Insofar as the application is premised upon the proposition that there is no reasonable cause of action, I must proceed on the basis that the facts alleged in the statement of claim will be established. No evidence is admissible in relation to this limb of the applications and I must address the matter simply on the basis of what is pleaded. Where a pleading is defective only in not containing particulars to which the other side is entitled the correct approach is to order particulars rather than strikeout the pleading [5].

12. Insofar as the pleading is alleged to be scandalous, it will only be struck out if it is degrading, indecent and irrelevant to matters which are material [6].

13. Insofar as "frivolous or vexatious" is concerned [7], the object of the rule is to stop cases which ought not to be launched. A proceeding is frivolous when it is not capable of reasoned argument or is without foundation or cannot possibly succeed. A proceeding is vexatious when it is oppressive or lacks bona fides. In Yifung Properties Ltd v Manchester Securities Corp HCA 1341 and 1359/2014 (unreported), Au-Yeung J stated:

> 12. "··· Where a litigant brings a claim knowing that there is no substance in it or that it is bound to fail, or if the claim is on its face so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and abuse of process: see [1974] ICR 72 at 76D-E ···
> 13. ··· Vexatiousness implies the doing of something over and above that which is necessary for the conduct of the litigation, and suggests the existence of some spite, or desire to harass the other side to the litigation, or some other improper motive.
> 14. To decide that the litigant has been frivolous or vexatious and thus abused the process of the court is a serious finding to make, for it will generally involve bad faith on his part and one would expect the discretion to be sparingly exercised. [1974] ICR 72 at 76G-H"

14. Insofar as it is said that the statement of claim may "prejudice, embarrass or delay the fair trial of the action", the court will generally [8] give a liberal interpretation to these words but they are aimed at identifying pleadings which are unnecessary in a way which will cause undue difficulty at trial or undue difficulty to the other side because it is unable to understand the case that it has to meet. However, it is not the purpose of this rule to dictate to a party the way in which it should frame its case, and the court will generally not strikeout a claim on this ground merely because it is unnecessarily long or complicated provided that it pleads the necessary elements of the relevant causes of action and does not offend against the general rules of pleading. The rule is therefore aimed at genuine embarrassment in dealing with the case or at matters which are wholly immaterial or irrelevant and which may involve expense trouble or delay in the overall resolution of the action.

15. Insofar as "Abuse of the process of the court" is concerned [9], this is designed to ensure that the machinery of the courts is used for a bona fide purpose, and is not abused. A claim can be struck out as an abuse of the process of the court where it is groundless, including where the claim is obviously and plainly time-barred: see Ronex Properties Ltd v John Laing [1983] QB 398 at 408B-D, per Stephenson LJ:

"There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strikeout the plaintiffs' claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statue barred. Then the plaintiff and the court know that the Statute of Limitations will be pleaded; the defendant can, if necessary, file evidence to that effect; the plaintiff can file evidence of an acknowledgement or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process; and the court will be able to do so, in I suspect most cases, what was done in Riches v Director of Public Prosecutions [1973] 1 WLR 1019: strike out the claim and dismissed the action…"

16. This approach was endorsed by Kwan JA in Yanfull Investment Limited v Datuck Ooi Kee Liang [2017] 5 HKC 42 at [41] where she said:

"The limitation issue was raised in the context of whether there was a serious question to be tried as to the merits of the claims, the threshold of which is equated to striking out. Provided that the court was entirely satisfied there was no serious question to be tried as to the merits in view of the limitation ground, which had been clearly raised and fully argued, there is no jurisdictional obstacle for the court to exercise the power of its own motion to strike out a plainly vexatious suit which was an abuse of process."

17. The relevant test in this context was concisely stated by McHugh NPJ in Kensland Realty v Tai Tang & Chong (2008) 11 HKCFAR 237 at [153], quoting from Ronex Propertie s, where he stated that:

"An order striking out a statement of claim, which is based on a limitation defence, can only be sustained if that defence is 'manifestly and immediately destructive of the plaintiff's claim'".

18. It is logical to start with the question of whether a reasonable cause of action has been pleaded, or exists, and only if that is shown to be the case, to move on to decide whether the other grounds for striking out have been made out, albeit that, in such circumstances, they can not be made out on the basis that no reasonable cause of action has been pleaded. However, even if a reasonable cause of action is disclosed in the statement of claim, the other grounds might be made out because, for example, any cause of action is hopeless due to limitation problems.

19. As a result it is necessary first to analyse in some detail the statement of claim.

## C. The Statement of Claim

20. The statement of claim has been described by the WG defendants as being a "kitchen sink", containing every possible cause of action that the pleader could think of. I summarise the material averments that it contains:

### C.1 The Parties

21. The plaintiff was incorporated in Hong Kong on 8 August 1991 and was wound up by order made on 25 June 2003. Between 8 August 1991 and 25 June 2003 it was a developer of small village houses in the New Territories known as Ding Houses [10].

22. D1, Madam Tam Shui (who is deceased, but whose personal representatives are D2, and who I shall refer to as D2) and D3 were the directors between 8 August 1991 and 23 December 2002 [11], and they owed various fiduciary duties to the plaintiff [12]. I shall refer to them as the directors. The date that they ceased to be directors is relevant to the causes of action alleged.

23. It is pleaded that:

(1) D1 was (at all material times) a director of a company called Chi Tat Hong Development Limited, which was a director of D12 from 28 September 1999 to 18 July 2003 [13].

(2) D3 was (at all material times) a director of a company called Heng Yu Holdings Limited which was a director of D12 from 28 September 1999 to 30 June 2008.

24. D1 then replaced Chi Tat Hong Development Limited as a director D12 from 18 July 2003 and D4 replaced Heng Yu Holdings Limited as a director of D12 from 30 June 2008.

25. Of the other personal WG defendants:

(1) D6 was a director of D14 from 8 January 2010.

(2) D7 and D8 were each a director of D16, which in turn was a director of D15 from 18 September 2012. They were also each a director of a non defendant company known as C&D Associates.

(3) D9, D10 and D11 were each a director of D17.

## C.2 The Fiduciary Duties

26. Paragraph 17 sets out the fiduciary duties which D1, D2 and D3 owed to the plaintiff in their capacity as directors of the plaintiff. The precise content of the duties alleged is not particularly important, but the allegations follow broadly the normal fiduciary duties that are considered to be owed by directors to a company.

27. However it is significant to note that there are no fiduciary duties alleged to be owed:

(1) By any person other than D1, D2 and D3.

(2) To any person or entity other than the plaintiff.

(3) As a result of any relationship other than that of D1, D2 and D3 each being a director of the plaintiff.

## C.3 The Business Model

28. Paragraphs 18A and 18B of the statement of claim set out 9 steps which the plaintiff would take to develop Ding Houses, which effectively sets out the business model of the plaintiff.

29. Without repeating the statement of claim verbatim, the steps to be taken include land acquisition, the assignment of the land to a special purpose vehicle which would then transfer the land to a Ding for no, or a nominal, consideration. There was then the creation of the necessary trusts and other documents from the Dings to ensure that the profits were channelled back to the plaintiff or its SPVs, applications for the necessary licences including the necessary (albeit false) declarations by the Dings as to legal and beneficial ownership, then construction of the house, and ultimately lease or sale.

30. The proceeds of any sale of the Ding Houses would be channelled back to the plaintiff or the SPVs. If the Ding House was not sold, it is said that at some unspecified point in time (and in some unspecified manner) the property would be transferred back to the plaintiff.

## C.4 The Transactions

31. Paragraph 19 of the statement of claim then sets out a large number of particulars of acquisition, assignment and transfer of land made by the plaintiff, to various parties, including various of the defendants, and further transfers from, in many cases, one defendant to another. The full particulars of the transfers are set out in Schedules 1, 2 and 3 of the statement of claim, and the various parcels of land are referred to by reference to which schedule they are found in. It is to be noted that:

(1) The only direct transferee from the plaintiff in respect of plots of land listed in Schedules 1 and 3 to the statement of claim was D12 (paragraph 19.41), and all such transfers were made on 30 May 2001 (the Schedule 1 First Layer Transfers). By paragraph 19(5) it is said that these Schedule 1 First Layer Transfers to D12 were made with the intent of completing Step 3 of the 9 step development plan that was the business of the plaintiff.

(2) On 30 November 2002 D12 transferred all the Schedule 1 Plots except one, which went to a non defendant on 15 February 2002, to D13 (the Schedule 1 Second Layer transfers).

(3) D13 transferred those plots variously to:

(a) D16 on 24 November 2011.

(b) D7 on 9 April 2005.

(c) D14 on 29 August 2003.

(the Schedule 1 Third Layer Transfers).

(4) There were additional, fourth layer, transfers in respect of some of the Schedule 1 plots, but I do not need to set them out here.

(5) The land listed in Schedule 2 to the statement of claim was transferred or assigned by the plaintiff to various non defendants on 29 September 1992. The plaintiff then repurchased one of those plots on 3 March 1996, but resold it again, to a non defendant, on 21 November 1996.
(6) There were thereafter various second layer, third layer and fourth layer transfers of the Schedule 2 plots from at the earliest 18 January 2006 as a result of which all of the Schedule 2 plots of land passed through the hands of at least one defendant at some point in time after 2006.
(7) Insofar as the Schedule 3 plots are concerned, the plaintiff transferred all the Schedule 3 plots to D12 on 30 May 2001 and according to paragraph 19(5) did so with the intent to complete step 3 of the 9 step development plan which constituted the plaintiff's business. On 26 June 2002 D12 transferred them all to D15 which held them until 10 September 2007, when it transferred them all to a non defendant.

## C.5 Resulting Trust

32. Based on the facts and matters pleaded in paragraphs 1-19, paragraphs 20 to 21B of the statement of claim make a claim for a resulting trust. They contend that:

(1) D7, D12 and D13 to D18 did not pay any consideration for the various Schedules 1 and 3 lots that were transferred to them.
(2) Consequently, those defendants hold the relevant properties, and any assets or proceeds representing those properties on a resulting trust for the plaintiff.
(3) Alternatively the lots were assigned to D12 at a gross undervalue, and hence D12 holds those lots on resulting trust for the plaintiff.
(4) The plaintiff is entitled to trace the properties or the proceeds of their sale in the hands of D7 and D12 to D18.

## C.6 Constructive Trust

33. Paragraphs 22 - 23 of the statement of claim make a claim for a constructive trust. They contend that:

(1) D7 and D12 to D18 did not pay any consideration for the Schedule 1, 2 and 3 lots that were transferred to them, and they have therefore been unjustly enriched by the value of the lots transferred to them such that it is unconscionable for them to deny the plaintiff's beneficial interest in those properties.
(2) Alternatively the 3 directors of the plaintiff conspired to cause:
(a) The Schedule 1 First Layer Transfers to D12 at undervalue, and thereafter they have conspired to cause D12 to effect the Schedule 1 Second Layer Transfers. In a way which is not clear, it is also said that the conspiracy involves causing D12 to effect the Schedule 1 Third and Fourth Layer Transfers such that the Schedule 1 lots ended up in the hands of D16, even though D12 was not involved in those transfers so it is not clear how D12 could have effected or caused them; and
(b) The Schedule 3 First Layer Transfers to D12 at undervalue and thereafter they have conspired to cause D12 to effect the Schedule 3 Second Layer Transfers to D15 and then to other individuals, although again it is not clear how the alleged conspiracy or even D12 itself caused or effected the Schedule 3 Third and Fourth Layer Transfers as none of D1, D2, D3 or D12 were involved in those transfers.

34. The transfers and conspiracy are to the detriment of the plaintiff such that it is unconscionable for D7, D12 to D16 to deny the plaintiff's beneficial interest in the Schedules 1 and 3 properties.

35. Consequently, it is said, D7, D12 to D18 hold the properties, or their proceeds on constructive trust for the plaintiff.

## C.7 Breach of Fiduciary Duty

36. Paragraphs 24 to 28 plead breaches of fiduciary duty owed by each of the directors to the plaintiff, that being the only fiduciary duty alleged in the statement of claim:

(1) Between 1992 and 2000 the directors caused the transfer of Schedule 1, 2 and 3 properties to D12 to D18 for no consideration. The statement of claim goes on to say that such transfers were done recklessly and with actual or blind-eye knowledge [14], although precisely what they were reckless about, or had knowledge of is not clear.

(2) Alternatively, in breach of their fiduciary duties owed to the plaintiff the directors recklessly and with actual or blind-eye knowledge (in this instance the reckless indifference and knowledge is somewhat more specifically pleaded) caused the transfer of the Schedule 1 and 3 properties to D12 at a gross undervalue [15];
(3) Between 1992 to late 2011 the directors recklessly and with actual or blind-eye knowledge diverted an opportunity which rightfully belonged to the plaintiff, to develop various lots as Ding Houses, by transferring the Schedule 1 and 3 lots to D12 to D16 either for no consideration or at a gross undervalue [16]. It is not clear how this could be in breach of fiduciary duty owed to the plaintiff if such transfers occurred after 23 December 2002, because D1, D2 and D3 were not directors of the plaintiff after that date and cannot have owed fiduciary duties to it. Indeed the plaintiff was in liquidation as from 25 June 2003.
(4) Between 1992 to late 2011, the directors exercised their powers not for the purposes for which they were conferred by diverting the opportunities to develop Ding Houses, by transferring the Schedule 1 and 3 Lots to D12 to D16 [17]. It is said that this was done recklessly and with actual or blind-eye knowledge (although of what is not entirely clear). Again, it is not clear how this could be in breach of fiduciary duty owed to the plaintiff if such transfers occurred after 23 December 2002, because D1, D2 and D3 were not directors of the plaintiff after that date.

## C.8 Sham Transactions

37. Paragraph 29 alleges that all of the Schedule 1 and Schedule 3 transfers were sham transactions, because it was the common intention of the plaintiff, through its directors, and D12, that they would not create legal relations, but were intended to give the appearance of transfers to third parties. The actual legal relationship between the plaintiff and D12 was one of trusteeship as previously pleaded.

## C.9 Claim for an Account

38. Paragraphs 30 to 32 plead that as a result of the breaches of fiduciary duty, and the sham transactions the directors and D7 and D12 to D18 have an obligation to account, and the plaintiff is entitled to an account of the lots and any proceeds arising therefrom.

39. A claim for an account is not a remedy for a wrong, but is a claim as of right once a trust or fiduciary relationship is established: See Libertarian Investments Ltd v Hall (2013) 16 HKCFAR per Lord Millett NPJ at [167]. Consequently, whilst it is correct for the statement of claim to plead the entitlement, as it is not a cause of action in itself I do not need to address it further. It will stand or fall with the other causes of action pleaded.

## C.10 Unlawful Means Conspiracy

40. Paragraphs 32A to 32D plead an unlawful means conspiracy between the directors, D7 and D12 to D16 to defraud the plaintiff and misappropriate the Schedules 1 and 3 lots. The unlawful means was the transfers previously pleaded as being for no consideration or at a gross undervalue. The particulars of each transaction identify the acts which are said to have been unlawful, and the way in which each defendant has been involved in that unlawful act. Thus in order to understand the conspiracy claim it is necessary to look at each individual transaction. No particulars have been given of how or when the alleged conspiracy arose, or, insofar as the corporate defendants are concerned, between which human agents it arose.

41. Paragraph 32B(3) pleads that each of D7 and D12 to D16 have acted dishonestly and with knowledge that the transfers to them had been effected in breach of fiduciary duty owed by the directors to the plaintiff. The paragraph goes on to plead particulars of the knowledge alleged to have been held by each of the relevant defendants.

42. Paragraph 31B(4) pleads that "throughout" the directors and D7 and D12 to D16 have concealed, and continue to conceal all of the matters pleaded in paragraph 31, and the whereabouts of the proceeds.

43. Paragraph 32D then expands the plea to say that:
(1) the directors are liable:
(a) to compensate the plaintiff for breach of fiduciary duty;
(b) to account for the sums misappropriated.

(2) D7 and D12 to D16 are liable to the plaintiff for dishonestly assisting in the breach of fiduciary duty of the directors, although this is actually pleaded as a liability through a constructive trust.
(3) D1 to D3, D7 and D12 to D16 are jointly and severally liable to pay damages for conspiracy.

## C.11 Intent to Defraud Creditors

44. Paragraphs 33 to 42A are under the heading "Dispositions to Defraud Creditors, Fraudulent Trading and Knowing Receipt". They allege that:

(1) The non payment of any consideration (or alternatively the gross undervaluation) by D7 and D12 to D16 [18], and D15, D17 and D18 [19] indicates an intention by those defendants, together with the directors, to carry on the business of the plaintiff for a fraudulent purpose or so as to defraud the creditors of the plaintiff, on the basis that the transactions occurred recklessly, or with actual or blind-eye knowledge as to the fact that the transactions would render the plaintiff insolvent.
(2) The transactions are void under s60(1) of the Conveyancing and Property Ordinance (Cap 219).
(3) Each of D12 to D16 are liable to account to the plaintiff for the lots, and all proceeds therefrom on the basis of knowing receipt.

## C.12 Dishonest Assistance and Knowing Receipt

45. Paragraphs 43 to 73 then plead, as against each of D1 to D11 (with the exception of D2) some particulars of the knowledge alleged to have been possessed by each such defendant and the proposition that, in the light of that knowledge, they each acted dishonestly in assisting the breaches of trust by the directors in the transfer of the various relevant properties for no consideration or at a gross undervalue.

## C.13 Limitation

46. Paragraphs 74 to 78 plead that there is no limitation defence available to the defendants:

(1) The plaintiff did not discover the fraud until 16 November 2016 despite the exercise of all reasonable diligence. The plaintiff relies upon the matters pleaded under the heading of unlawful means conspiracy in this respect.
(2) Further, the plaintiff alleges that material facts were concealed by the defendants and the plaintiff did not discover, and could not have, discovered the concealment or those true facts until on or about 16 November 2016. The paragraph goes on to set out particulars of how the plaintiff's liquidators discovered the matters of which complaint is now made.
(3) Paragraph 77 pleads that Section 26(1)(a) and/or(b) of the Limitation Ordinance applies.
(4) Paragraph 78 pleads that if and insofar as any claims fall within s20(1)(a) and/or (b) of the Limitation Ordinance, then that section applies, with the consequence that no limitation period applies.

## D. No Reasonable Cause of Action

47. The WG defendants have addressed this aspect of the strike out application last in their skeleton argument, but it seems to me to be logical that it should be addressed first. I am not entitled to look at any evidence to assess the extent to which the claim discloses a reasonable cause of action, and I must look only to the statement of claim, assuming that all facts set out in the statement of claim will be made out. Further, if I am of the view that there is no reasonable cause of action, it becomes strictly unnecessary to assess the other grounds for striking out, because the claim will have been struck out in any event. The plaintiff has endorsed this approach in its skeleton argument.

## D.1 Pleading Fraud

48. The WG defendants start off by reminding me of the principles relating to the pleading of fraud, including that fraud must be distinctly alleged and proved, and sufficiently particularised and that allegations of "ought to have known" are inadequate to support allegations of dishonesty.

49. If the allegations of dishonesty are made without a cogent evidential basis then they ought to be

struck out.

50. As to this last point, which is one the WG defendants press upon me, in my view this does not address the question of whether a reasonable cause of action is made out, because the court cannot look at evidence for that purpose. Thus, the proposition that there is inadequate evidence to support a claim for fraud is to be considered when making an assessment under the other limbs of a strike out application, and not under the limb of no reasonable cause of action.

51. Of course, I bear the general propositions about pleading fraud in mind. However, in my view there is a danger of misconception in the simple use of the word "fraud" without referring it back to the particular cause of action alleged. In both civil and criminal cases the courts have been slow to define "fraud", and in England it was not defined in a criminal statute until the Fraud Act 2006, which gave a broad definition insofar as a criminal action is concerned. The concept of fraud has a long and complex history in common law and equitable civil actions. I refer to it as a concept, rather than a specific cause of action, because overall that is what it is. It is not a specific cause of action, save where it is expressly referred to in statutes conferring a cause of action, but it is related to a type of behaviour which prompts the law to respond both in terms of formulating forms of action and fashioning remedies. That is why one finds the word used in many and diverse cases, albeit as a shorthand expression, to refer to the different types of behaviour which are under scrutiny in each case.

52. Overall therefore, it is a portmanteau expression with different meanings in different contexts, and is descriptive of a range of acts, behaviours or omissions which the law characterizes to a greater or lesser degree as unconscionable or dishonest. The law proceeds and develops, in relation to both the overall portmanteau and the individual causes of action which are included within it, incrementally on what has been described as the "hard anvil of facts", rather than setting out a prescriptive set of rules that must inevitably be followed every time an allegation of "fraud" is made.

53. Thus, when a cause of action can be considered as coming within the portmanteau of fraud, the court will be astute to ensure that the necessary particulars of that individual cause of action are distinctly set out in the pleading, and are distinctly proved. What is necessary will depend upon each individual cause of action and cannot be globally identified.

54. The WG defendants also urge upon me the proposition that when the cause of action requires dishonesty, a plea of facts which are consistent with honesty is unsustainable and must lead to a conclusion that the action should be struck out. For that proposition they rely upon Fok JA sitting as a judge of the court of first instance in The New China Hong Kong Group Limited & Another v Ng Kwai Kai Kenneth & Others HCA 519/2010 (unreported, 11 February 2001) and Sakhrani J in Krassel v Chu Vincent [2010] 2 HKLRD 937 , which was not a strike out case, at [44], in which both judges described the proposition as "trite". They also rely upon Au-Yeung J in Li Shiu To v Cheung Pik Ng (No 2) [2018] 1 HKLRD 934 (not a strike out case) at [55], where she quoted the passage from Lord Millett's judgment in Three Rivers District Council v Bank of England No 3 [2003] 2 AC 1 at [184] to [187].

55. In the context of a strike out, Fok JA put the matter this way at [65]:

"In this regard, it is trite that fraud or dishonesty must be 'distinctly alleged and as distinctly proved' and that it must be 'sufficiently particularised'. Particulars of facts which are consistent with honesty are not sufficient. It is not open to the court to infer dishonesty from facts which have not been pleaded from facts which have been pleaded but are consistent with dishonesty: see Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1 per Lord Millett at [184] & [186]."

56. The proposition stems from the dissenting judgment of Lord Millett in Three Rivers. Three Rivers was a strike out case, but nonetheless it seems to me that the proposition needs careful consideration by reference to what the other judgments in that case say, and what Lord Millett stated, in order to understand the proposition fully, particularly at the interlocutory stage:

57. At [55], Lord Hope of Craighead stated the principles as follows:

"A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of

dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Millett LJ said in Armitage v Nurse [1998] Ch 241, 256G, it is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct fraudulent are pleaded. But this will not do if language used is equivocal: Belmont Finance Corporation Ltd v Williams Furniture Ltd [1979] Ch 250, 268 per Buckley LJ. In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence."

58. At [122] Lord Hutton quoted the well known passage from Davy v Garrett (1878) 9 Ch D 473-489 :

"It appears to me that a plaintiff is bound to show distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts within themselves, and it is not to be presumed that they were done with a fraudulent intention.

and then he continued:

I would observe that the last two sentences of this passage have to be read together with the sentence that immediately proceeds them. In Belmont Finance Corpn v Williams Furniture [1979] Ch D 250, 268 Buckly LJ stated:

'In the present case, do the facts alleged in the statement of claim suffice to bring home to the defendants or any of them a charge that (k) the object of the alleged conspiracy was a dishonest one; and (b) that they actually knew, or must be taken to have known, that it was so? An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word "fraud" or a word "dishonesty" must necessarily be used; see Davy v Garrett 7 ChD 473-489 per Thesinger LJ.'

The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

59. At [160] Lord Hobhouse, also in a dissenting judgment, stated:

"Where an allegation of dishonesty is being made as part of the cause of action of the plaintiff, there is no reason why the rule should not apply that the plaintiff must have a proper basis for making an allegation of dishonesty in his pleading. The hope that something may turn up during the cross-examination of a witness at the trial does not suffice. It is of course different if the admissible material available discloses a reasonable prima facie case which the other party will have to answer at the trial."

60. The fullest statement of the relevant principles is that of Lord Millett, in his dissenting judgment, from [184] onwards:

> 184. "It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see 7th ed (1952), p 644; Davy v Garrett (1878) 7 Ch D 473, 489; ; [1901] AC 196; , 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and

> circumstances which are consistent with negligence do not do so.
> 185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.
> 186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

61. His Lordship then analysed the judgment of Thesiger LJ in Davy v Garrett and the judgments of the court of Appeal in Armitage v Nurse and continued at [189]:

> 189. "It is not, therefore, correct to say that if there is no specific allegation of dishonesty it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud. If the observations of (unreported) 21 July 1999 are to the contrary, I am unable to accept them."

62. On a full reading, Lord Millett has not said that the plaintiff must plead primary facts which are consistent only with dishonesty. That much is made clear by the majority judgment of Lord Hope at [55] quoted in paragraph [57] above. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". That is also recognised by the oft stated proposition that dishonesty will be found if the act is not one that "any honest man would undertake".

63. At the interlocutory stage, when the court is considering whether the plea of fraud or dishonesty is a proper one, or whether to strike it out on the basis of it disclosing no reasonable cause of action, the court is concerned only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial. An assessment of whether the evidence ultimately justifies the inference is a matter for the trial judge. It is axiomatic within that principle that after trial a judge may take the view that the facts do not demonstrate dishonesty, in which case it must follow that they are consistent with honesty. But the possibility of such a finding does not lead to the conclusion that the pleading is bad, and yet that is the proposition which the WG defendants appear to urge upon me. I do not agree with it.

64. In my view this approach is consistent with the majority of the opinions in Three Rivers. Thus I take the view that, at least where dishonesty is expressly pleaded, the necessary particulars of facts for the relevant cause of action do not need to be in themselves consistent only with a conclusion of dishonesty or fraud for the pleading to be legitimate.

65. Thus, I do not accept that it is a trite proposition that a pleading which expressly pleads dishonesty needs also to plead facts which are consistent only with dishonesty and which cannot themselves permit of an innocent explanation, and that if it does not it should be struck out. If Fok JA (as he then was, albeit sitting as an additional judge of the court of first instance) has indeed expressed the contrary view (which is not entirely clear given the limited scope of his analysis of the point), with the greatest of respect to his seniority and experience, I do not consider myself to be bound by it and I do not consider it to be right.

66. With those introductory remarks, I turn then to the statement of claim in this case.

## D.2 Overall Comments

67. At its heart, as described by Mr Barlow during oral submissions, this case concerns what is said to be a scheme to strip the assets of the plaintiff, leaving the creditors with no remedy, and leaving the assets that would rightly belong to the plaintiff in the hands of others who, it is said by Mr Barlow, are owned or controlled by D1, a director of the plaintiff until 23 December 2002 [20].

68. The business model of the plaintiff was that it would purchase land in villages, would pass that land to an SPV, who would then pass it at nil or nominal consideration to a Ding, who would sign various declarations of trust in favour of the SPV or the plaintiff such that any costs incurred by the plaintiff in developing the Ding House would then be recovered by the plaintiff through either the transfer of the land (and house) back to the plaintiff if it was not sold, or through the Ding passing the proceeds of any sale back to the plaintiff by virtue of the trust which had been established. That business model is pleaded in paragraph 18B of the statement of claim.

69. Mr Barlow says that this has not happened, and that the assets have been transferred away, but nothing has come back. Essentially what he contends (at least orally) is that there was an overall scheme, in which all of the defendants have played some part, by which the assets have been passed to others without the proceeds being passed back to the plaintiff. When looked at in this light, and with the pleading of the business model as set out in paragraph 18B, one can see that the real complaint is not the passing of the properties to persons or entities for no or no adequate consideration; indeed the business model itself anticipates that the properties will pass to at least 2 persons other than the plaintiff for no or no adequate consideration. The real complaint is that the plaintiff has not retained a trust interest in either the land or the proceeds of any sale throughout the transfers, and thus has been deprived of the rewards that it was otherwise expecting and (it says) was entitled to.

70. But the difficulty for the plaintiff is that most of the statement of claim does not reflect that description of the case.

71. The thrust of the statement of claim is that D1, D2 and D3 have acted in breach of their fiduciary duties owed to the plaintiff as directors of the plaintiff by causing the transfer of the properties out of the ownership of the plaintiff for no, or no adequate, consideration (see paragraphs 24 to 27 of the statement of claim). It is this alleged breach by the directors of the plaintiff which is the foundation of all of the subsequent causes of action, other than possibly the resulting trust claim. And yet from the statement of claim it is clear that:

> (1) All of the Schedule 1 and Schedule 3 First Layer Transfers were made from the plaintiff to D12;
>
> (2) Those transfers are pleaded as having been made with an intent to complete Step 3 of the plaintiff's business model [21]. Hence, on the pleaded facts, those transfers cannot be said to have been made in breach of fiduciary duty to the plaintiff.
>
> (3) There is no plea that D1, D2 or D3 have effected a legitimate transfer but breached their fiduciary duty by failing to ensure that subsequent proceeds would be held on trust for the plaintiff.

72. There is no plea of how D1, D2, D3 are said to have caused D12 to have transferred the properties to others, and there is no pleading that D12 owes any fiduciary duty to the plaintiff pursuant to the business model or otherwise, or that D12 has breached any such duty.

73. The closest that the statement of claim gets to making an assertion that D12 owes any duties to the plaintiff is in paragraphs 20 to 21B, where the claim is made for a resulting trust. But that resulting trust is said to arise because of the fact that D12 was assigned the properties at no, or no adequate, consideration and not because D12 owed fiduciary duties to the plaintiff as a result of the plaintiff's business model.

74. D1, D2 and D3 were still directors of the plaintiff when D12 effected the Schedule 1 and Schedule 3 Second Layer Transfers to D13 and D15, but there is no pleading as to how D1, D2 and D3 caused D12 to effect those transfers, or how such transfers by D12 might breach the fiduciary duties owed by D1, D2 and D3 to the plaintiff. All that is said is that they were done for no, or no adequate, consideration and that in itself does not demonstrate a breach of any fiduciary duty. It is pleaded that

Step 4 of the plaintiff's business model expressly anticipates that the land passed to the SPV would be passed to a Ding and a nominal, or at zero, consideration. Thus it cannot be said that the mere fact of nil consideration is a breach of fiduciary duty owed to the plaintiff. Something more is necessary.

75. It may be that the something more would consist of a separate and distinct allegation that the transfers were effected without the establishment of a trust over the land or the proceeds of any further sale, but that is not expressly pleaded. The only way in which one could arrive at a conclusion that the plaintiff maintained any interest in the properties would be by reference to the resulting trust, which is pleaded and which I consider below.

76. D1, D2 and D3 were not directors of the plaintiff at the time of any of the Schedule 1 and Schedule 3 Third Layer Transfers, and it is difficult to see how those transfers of themselves can have been made in breach of the fiduciary duty of D1, D2 and D3 owed to the plaintiff. Again, it may be that such transfers were simply a further part of the overall scheme, so that the real complaint is not in the transfer at no or no adequate consideration, but lies in the fact that the plaintiff did not retain some residual beneficial interest in either the land or the proceeds. But that is not pleaded, other than possibly by reference to the resulting trust.

77. As a result, taking an overall view of the statement of claim, it seems to me that there is a fundamental problem with it, in that the only transfer of any land out of the ownership of the plaintiff was done expressly pursuant to the plaintiff's own business model and cannot be said to have been done in breach of fiduciary duty, whether it was done for nil consideration or not. No allegation is made that the directors of the plaintiff at the time breached their duty by failing to ensure that the plaintiff retained some beneficial interest in either the land or the proceeds. The only allegation is that no or no adequate consideration was paid, and that fact is not at all inconsistent with the business model of the plaintiff. The same is true for all subsequent transfers pleaded. They also suffer from the additional problem that there is no pleading that, and indeed no discernible way by which, the plaintiff is owed any duties by any person concerned with those subsequent transfers, other than possibly as a result of the resulting and constructive trusts alleged to have arisen during the initial transfer, because that transfer was at no or no adequate consideration.

78. Against that background I turn to assess the detail of the statement of claim to see whether there is any reasonable cause of action contained within that detail which might survive the problems that I have just identified.

## D.3 Resulting Trust

79. The resulting trust is alleged to arise because the transactions were undertaken at no, or no adequate, consideration.

80. A resulting trust may arise if there is a gratuitous passing of property such that the transferor is presumed not to have parted with the beneficial ownership. The presumption is easily rebutted: see Westdeutsche Landesbank v Islington LBC [1996] AC 699 per Lord Browne-Wilkinson at 708:

> "where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer."

81. That statement has been applied in Hong Kong in the context of a transfer of property from A to B: see Ng J in Law Pak Fun v Tai Lee Fat International Limited [2015] 4 HKLRD 339 at [26] to [27]:

> "Where a transferor of property causes the legal interest in it to vest in another person in circumstances where it is unclear whom the transferror intends to have the beneficial interest in it, a resulting trust may arise by operation of law for the benefit of the transferror. One such circumstance is the gratuitous transfer of property. In this regard the law gives effect to a default presumption about the intention of the person in making a gratuitous transfer of

property-although he has transferred the legal interest, he would generally not intend the transferee to take the property beneficially."

82. The existence of a resulting trust is consistent with the plaintiff's case that the intention of its business model was that the plaintiff would retain a beneficial interest in the property or the proceeds of sale, and so the pleaded facts are not inconsistent with a resulting trust arising in the manner just described.

83. The statement of claim is not perfect in this regard, but I accept that the statement of claim is sufficiently particularised such that it has pleaded a reasonable cause of action for a resulting trust of the Schedule 1 and Schedule 3 properties in the hands of D12 to the extent that there was no consideration paid.

84. As a result, I am satisfied that, based on the statement of claim alone, a reasonable cause of action arises in respect of the Schedule 1 and 3 properties in the hands of D12, based on a resulting trust if no consideration was paid as alleged.

85. Insofar as the resulting trust said to arise in the event that an inadequate consideration was paid, I do not think that a resulting trust is adequately pleaded. The presumption which I have referred to would not arise if consideration was paid, and so a resulting trust would have to arise on a different basis. Whilst I can foresee circumstances in which such a resulting trust might arise (for example in the form of a Quistclose trust, which would be included within the second limb of trusts referred to by Lord Brown Wilkinson in Westdeutsche Landesbank), that would have to be expressly pleaded and it has not been. Hence I strike out the claim insofar as the resulting trust is said to be premised upon some, albeit inadequate, consideration having been paid.

86. Once a resulting trust is established the plaintiff would be entitled to trace the trust property into the hands of others, subject to the normal defences that others may bring. Those defences do not mean that there is no cause of action, and hence I accept that there is a properly pleaded cause of action in respect of all Schedule 1 and Schedule 3 properties in the hands of all relevant defendants based upon the proposition that D12 held those properties on resulting trust for the plaintiff because no consideration was paid by D12.

87. No such allegation is made in respect of the Schedule 2 properties and hence no cause of action for a resulting trust arises in respect of those properties.

88. I note that the WG defendants contend that any claim that no consideration was paid is bound to fail because it is built on what the WG defendants have described as mere conjecture. I do not address that proposition under the heading of "No Reasonable Cause of Action" as it requires evidence to assess it and therefore it should be assessed under one of the other heads of strike out. As will become clear from paragraphs [126] to [130] below, I actually have formed the view that even this resulting trust claim should be struck out because, based on the evidence, it is bound to fail.

## D.4 Constructive Trust

89. If there is a resulting trust of the properties then no constructive trust would arise.

90. The pleaded basis of the constructive trust is simply unconscionability based upon the lack of adequate consideration. For reasons that I have already identified in paragraphs 67 to 78 above, in the circumstances of the business model I do not think that, beyond a resulting trust, complaint can be made about the lack, or inadequacy, of consideration. Therefore, I do not think that any unconscionability can arise simply as a result of that fact. If there are particular aspects of the transactions other than the inadequacy of consideration, which are complained about and which might give rise to a constructive trust, they have not been pleaded and I cannot consider them.

91. A second pleaded basis for the constructive trust is the conspiracy alleged between D1, D2 and D3 to cause:

> (1) The Schedule 1 First Layer Transfers to D12 at undervalue, and thereafter to cause D12 to effect the Schedule 1 Second Layer Transfers. In a way which is not clear, it is also said that the conspiracy involved causing D12 to effect the Schedule 1 Third and Fourth Layer Transfers such that the Schedule 1 lots ended up in the hands of D16, even though D12 was not involved in those transfers so it is not clear how D12 could have effected or

caused them; and
(2) The Schedule 3 First Layer Transfers to D12 at undervalue and thereafter to cause D12 to effect the Schedule 3 Second Layer Transfers to D15 and then to other individuals, although again it is not clear how the alleged conspiracy or even D12 itself caused or effected the Schedule 3 Third and Fourth Layer Transfers as none of the D1, D2, D3 or D12 were involved in those transfers.

92. It is said that as a result of that conspiracy the plaintiff has been stripped of its assets.

93. There is no detail of the alleged conspiracy pleaded and there is no detail of the way in which the directors have caused D12 to effect the subsequent transfers.

94. In my view this pleading does not disclose a reasonable cause of action in conspiracy. Nor does it identify any basis on which a constructive trust may arise. Consequently it should be struck out.

## D.5 Breach of Fiduciary Duty

95. The breaches of D1, D2 and D3 are pleaded as being the transfers of each of the Schedules 1, 2 and 3 properties to D12 to D18 for no consideration.

96. Insofar as D12 is concerned given the plea in paragraph 19(5) that these transfers were pursuant to the business model, the plea that it was also in breach of fiduciary duty is demurrable and should be struck out. It cannot be both pursuant to the business model and yet still in breach of fiduciary duty.

97. Insofar as the subsequent transfers of the Schedules 1 and 3 properties are concerned:
(1) There is no pleading of how D1, D2 or D3 caused those subsequent transfers, albeit that D1 and D3 were, at various relevant times directors of D12.
(2) There is basis on which it can be ascertained how the transfer by D12, even if caused by D1 and D3, could be said to be in breach of D1, D2 or D3's fiduciary duty owed to the plaintiff.
(3) There is no explanation of how causing transfers after the date of resignation of D1, D2 and D3 as directors of the plaintiff could be in breach of fiduciary duty to the plaintiff. After D1, D2 and D3 resigned as directors they did not owe fiduciary duties as alleged in paragraphs 17 of the statement of claim. There is no pleading that they owed further or different duties.

98. Very similar points apply to the other alleged breaches of fiduciary duty pleaded.

99. In my view the statement of claim does not identify any basis for a breach of fiduciary duty claim based upon the facts alleged. It should be struck out as disclosing no reasonable cause of action.

## D.6 Sham Transactions

100. The only transactions which are said to be sham transactions are those between the plaintiff and D12. I do not think that the plea of the transfers being sham transactions demonstrates a reasonable cause of action.

101. It is well settled that the essential ingredients for a transaction to be a sham are that:

> (1) "the common intention of (2) both parties (3) that the document was not to create legal rights (4) but to give to 3rd parties the appearance of the document creating legal rights between (5) different from the actual legal rights between the parties ."

102. The statement of claim makes an averment of a common intention, but beyond that mere averment, the only particulars that are given are the reckless indifference or blind-eye knowledge of D1, D2 and D3 pleaded elsewhere.

103. The reckless indifference and blind-eye knowledge are vague and inadequately particularised but at best they relate only to the "stripping of assets" from the plaintiff and do not show a common intention that the relationship between the parties should be anything other than that which is shown by the document alleged to be a sham.

104. Further, there is nothing which identifies where or how D12 formed that common intention and the plea of a common intention that the transactions are sham transactions is inconsistent with the plea that the transfers to D12 were legitimately part of the 9 step process which comprised the business model of the plaintiff.

105. In my view this plea does not demonstrate a reasonable cause of action that can be established on the facts alleged in the statement of claim. It should be struck out.

## D.7 Claim for an Account

106. I do not address this separately, as the claim for an account follows from the other causes of action alleged.

## D.8 Unlawful Means Conspiracy

107. In my view there is no reasonable cause of action pleaded. The requirements for pleading a conspiracy have been set out in ADS v Wheelock Marden & Co Ltd [1994] 2 HKC 264 per Bokhary JA ar 272D-G

> "When it comes to a claim for the tort of conspiracy, what the pleader has to do in regard to pleading an overt act or overt acts is this. He has to plead at least one overt act which is the act of all the alleged conspirators or, failing that, a number of overt acts which include at least one act on the part of each conspirator. And the overt act or overt acts pleaded must be such as to show: (i) that the conspiratorial agreement alleged against the defendants had been entered into by each and every one of them; (ii) that the agreement, and not merely the intention of one person alone, was implemented; and (iii) that such implementation caused the damage complained of.
>
> If the pleader fails to do that, then, depending on whether the failure is in respect of all the defendants or only some of one of them, then either the plea is liable to be struck out altogether or it is liable to be struck out as against some or one of the defendants."

108. In the statement of claim there is no pleading of the conspiratorial agreement between each of D1, D2, D3, D7, D12, D13, D14, D15, D16, other than the mere assertion that they conspired together, or as between 2 or more of them. There is no suggestion as to when the agreement was reached, or between whom or how it was reached, and there is no indication of the nature of the agreement other than that it was to "defraud Polyline and/or misappropriate the Schedules 1 and 3 lots and to conceal such fraud and/or misappropriation and the proceeds thereof from Polyline". In my view that is not sufficient.

109. The unlawful means alleged are pleaded, but without a pleading of the nature of the agreements pursuant to which those unlawful means were undertaken, the pleading of conspiracy must fail.

110. I strike out this claim.

## D.9 Intention to Defraud Creditors

111. This is a claim which is made without direct reference to Section 275(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), but which by its nature is clearly intending to engage that section. The section provides that:

> (1) "if in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the Official Receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

112. Thus it is clear that the statutory cause of action for fraudulent trading does not vest with the

company itself, but vests in the Liquidator, or any creditor or contributory. As a result, the Company does not have a cause of action for fraudulent trading, or carrying on the business of the company with an intent to defraud creditors. Therefore such a claim should be struck out. I am not aware of any common law cause of action of similar effect.

113. As for the claim within this section of the statement of claim relating to s60 of the Conveyancing and Property Ordinance (Cap 219), the only relevant transfer within the pleaded Schedules 1 and 3 can be that made by the plaintiff to D12. Subsequent transfers are not a disposition of property by the Company, and hence would not fall within s60. To the extent that the claim is intended to apply to subsequent transfers, then does not fall within the statute and must be struck out.

114. As for the transfers to D12, they are pleaded as having been made for the purposes, and expressly with the intent, of permitting the business model of the plaintiff to operate. In those circumstances, it is not possible to say that they were made with an intent to defraud creditors, and the claim must fail on the pleaded facts. It should be struck out.

## D.10 Dishonest Assistance and Knowing Receipt

115. A necessary element of each of the causes of action of knowing receipt and dishonest assistance is that there has been a breach of fiduciary duty. It is necessary to plead that breach of fiduciary duty.

116. In each case the plaintiff has pleaded that the relevant breach of fiduciary duty which has given rise to the unconscionable receipt or which the relevant defendant has dishonestly assisted is the breaches of fiduciary duty alleged as against D1, D2 and D3 owed to the plaintiff in their capacity as directors of the plaintiff.

117. For the reasons that I have already articulated, any claim in respect of those breaches is to be struck out as failing to disclose a reasonable cause of action. It follows that each of the causes of action of knowing receipt and dishonest assistance must also fail on the facts and premises pleaded. Hence I strike out those claims.

118. I must however also deal with the proposed further amendment to paragraphs 49 and 50 which relate to the case against D4. The proposed amendments materially allege that:

> (1) D4 "became aware" (when he became a director of D12 on 30 June 2008) that D12 had acquired its properties at no or no adequate consideration.
> (2) D4 acted dishonestly in assisting D1 and D3 in their "breaches of trust" pleaded in paragraphs 19(6), 19.52(6) to (9) and 32B(3)(f) and (g) by exercising his power as a director of D12 to facilitate D12 transferring the land onwards for nil consideration.

119. This pleading purports to go wider than any other part of the statement of claim has done, and I suspect that this was a deliberate decision of Mr Barlow who clearly knows this area of the law and understands the overall scheme that he contends for. As a result, he has pleaded a "breach of trust" rather than the more limited plea of breach of fiduciary duty that the remainder of the statement of claim makes. But in my view the problems remain, despite Mr Barlow's attempt to overcome them:

> (1) None of the paragraphs that are referred to actually identify a breach of trust. The paragraph that gets closest is the reference to paragraph 19(6), in which the plaintiff alleges that all proceeds of sale were to be channelled back to the plaintiff. But that paragraph does not plead a trust, and does not plead a breach of trust. It simply alleges that this was the intended business model of the plaintiff. If a trust were to be alleged, it would need to be specifically pleaded, and the breach of it would need to be specifically pleaded too. None of that is done, and the most that can arise is the resulting trust of the properties in the hands of D12 that I have identified above.
> (2) In any event, the knowledge alleged is inadequately pleaded. It is not sufficient in a plea of dishonest assistance to allege that the defendant simply "became aware". Knowledge is subjective, and the particulars of exactly what he knew, and how he knew the matters alleged needs to be pleaded. This is part of the overall concept that particulars and allegations of dishonesty or fraud need to be distinctly pleaded and distinctly proved. It is not an adequate plea simply that somebody "became aware", as the defendant cannot know from such a plea what case he has to meet as to what he knew, and how he came to know it.

120. Consequently I do not think that the proposed new paragraphs 49 and 50 save the pleading as against D4.

## D.11 Summary of Reasonable Cause of Action

121. To summarise my findings so far, I find that the only reasonable cause of action pleaded is the claim for a resulting trust arising out of the Schedule 1 and Schedule 3 lots to D12 for nil consideration. All other claims are demurrable.

## E. The Case is mere Conjecture

122. In their skeleton argument, the WG defendants argue that the entire case is based on the proposition that the properties were transferred either at nil consideration or at a gross undervalue, and that as a result the directors are in breach of their fiduciary duties. They argue that a sale at a gross undervalue does not (without more) identify a breach of fiduciary duty and that, based on the evidence, the claim that there was a nil consideration is hopeless. As a result the WG defendants contend that the claims are based on mere conjecture and should be struck out.

123. I find the phrase "mere conjecture" to be somewhat misleading as to the relevant test. The fact that something is conjecture is no bar. What must be shown is that the claim is bound to fail, and it is only if this can be shown that the claim can be struck out as an abuse of the process of the court or as being frivolous (and both of these limbs of the rule appear to be used interchangeably for this purpose).

124. The only cause of action which is reasonably disclosed in the statement of claim is the resulting trust claim based on nil consideration. As a result I only need consider whether the resulting trust claim should be struck out on this basis, and I do not go further to address other claims.

125. If the WG defendants are correct in this assertion, then the resulting trust claim would be bound to fail because it cannot be made out on the facts, and it would be an abuse of process.

126. The WG defendants contend that the claim of nil consideration cannot succeed because each transaction contains a clause which acknowledges receipt of the consideration thereby creating a contractual estoppel to the effect that the consideration was paid and received. They also rely upon an estoppel by deed. The receipt clause is in the following terms (using B1/34/617 as an example):

"In consideration of the sum of HONG KONG DOLLARS TWO HUNDRED AND FIFTY THOUSAND ONLY (HK$250,000.00) paid by the Purchaser to the Vendor (receipt thereof the Vendor hereby acknowledges) the Vendor as Tenants in Common in the aforesaid shares as Beneficial Owner HEREBY ASSIGNS to the purchaser the land described in the schedule hereto …"

127. In Prime Sight Ltd v Lavarello [2014] 436 the Privy Council confirmed the concept of contractual estoppel could apply to a contractual receipt clause. The clause in question in that case included the words "In consideration of the sum of £499,950 now paid by the assignee to the assignor (receipt and payment of which the assignor hereby acknowledges) …". However it was common ground that no payment had in fact been made. Lord Toulson identified the position at [45] and [46] as follows:

> 45. "The law is correctly analysed in Spencer Bower, 4th edition page 197:
> 'an estoppel by convention need not involve any misleading of a representee by a representor, nor is it essential that the representee shall be shown to have believed in the assumed state of facts or law. The full facts may be known by both parties; but if, even knowing those facts to the full, they are shown to have assumed a different state of facts or law as between themselves for the purposes of a particular transaction, then a convention will be established. The claim of the party raising the estoppel is, not that he believed the assumed version of facts or law was true, but that he believed (and agreed) that it should be treated as true.'
> 46. This passage refers to estoppel by convention and not expressly to estoppel by deed. However, there is no logical reason to treat declaratory statements in a deed which are intended to be contractually binding as less effective than any other express or implied contractual convention. The law as stated by Spencer Bower not only carries the considerable authority of Dixon J, who was a master of the common law,

> and is supported by earlier authorities to which reference has been made, but more fundamentally it accords with the principle of party autonomy which underlines the common law of contract."

128. The principle has been upheld in Hong Kong in Asgain Co Ltd v Cheng Yan Kan (No 2) [2018] 2 HKLRD 641 (court of appeal), Chung Pui Tong v Qian Zhen [2020] HKCFI 187 per Mimmie Chan J at [69] and [70], Szeto Wing Hong v Maintown Industries Ltd & Another [2021] HKCFI 179 per Linda Chan J.

129. The plaintiff contends that the whilst the principle may apply as between the contracting parties (subject to the ordinary rules of contract law which might undermine the estoppel), it cannot apply to prevent a claim by a company against a director for a breach of fiduciary duty in entering into the contract in the first place, or as against any accessories to that breach of fiduciary duty. Without a detailed analysis of that proposition I accept that it may well be correct, but it does not assist the plaintiff in the circumstances of this case. I have struck out all claims other than the resulting trust claim based on nil consideration, and have allowed that claim only on the basis that the statement of claim pleads enough facts to justify the presumption of a resulting trust arising out of the gratuitous passing of the property from the plaintiff to D12. Therefore there is no claim left for breach of fiduciary duty and no claim left for any accessorial liability. The only question is whether the receipt clause creates a contractual estoppel as between the parties to the very contract in which it is contained so as to prevent the plaintiff from asserting as against D12, that no consideration was paid.

130. In my view the receipt clause does create a contractual estoppel such that the plaintiff cannot now contend, as against D12, that there was a gratuitous passing of the properties. Hence, whilst the statement of claim pleads sufficient facts to establish a reasonable cause of action in this respect, when the evidence is taken into account it is clear that those facts cannot be established, and hence the claim must be struck out as bound to fail.

## F. Limitation

131. In the light of my conclusions it is not necessary for me to address the limitation and laches arguments that have been raised. However, much time has been invested in them by the WG defendants and in case I am subsequently shown to be wrong in my analysis above, I think that it is appropriate for me to set out the conclusions that I reach on these arguments.

132. I do not need to consider the question of limitation in respect of the resulting trust claims against D12, because the WG defendants accept that no period of limitation applies to the resulting trust claims made against D12. However they contend that as a result of s20(2) of the Limitation Ordinance, a limitation period of 6 years from any breach of trust would apply to all subsequent holders of the property. In my view that is the correct position despite Mr Barlow's attempt to persuade me otherwise. I agree with the WG defendants that all subsequent holders of the property beyond D12 are not trustees of the first type described by Millett LJ in Paragon Finance v Thakarar [1999] 1 All ER 400 at 414, and Lord Hoffmann in Peoconic Industrial Development Ltd v Lau Kwok Fai (2009) 12 HKCFAR 139 at [17]-[19], and s20(2) of the Limitation Ordinance therefore applies a 6 year limitation period to any claims against them.

133. The WG defendants allege that even those claims against which no limitation period applies are still to be barred by the doctrine of Laches, and as a result, similar considerations apply as arise when considering whether an extended limitation period applies under s26 of the Limitation Ordinance. As a result, I must to consider those similar questions in any event for the purpose of addressing the doctrine of Laches.

### F.1 Primary Limitation Periods

134. As can be seen from the statement of claim, the plaintiff's claims stem from the transfer from its ownership of the various properties listed in Schedules 1, 2 and 3 of the statement of claim, either for no consideration or at a gross undervalue. The transfers from the plaintiff's ownership all occurred on or prior to 30 May 2001.

135. The writ was issued on 16 December 2019, and there is an immediately obvious limitation issue to be considered on the basis that the primary limitation period is generally 6 years from the accrual of the cause of action.

136. However, given the numerous causes of action which have been pleaded, the WG defendants have addressed each one separately in order to ascertain the date on which the cause of action accrued, and the relevant limitation period. This exercise is set out in great detail in paragraphs 43 to 78 of their skeleton argument.

137. Their concluding submissions on these issues can be summarised as follows:

| Causation of action | Date of Accrual | Relevant Limitation Period | Expiry of the Primary Limitation Period |
|---|---|---|---|
| Resulting Trust claim against D12 | 30 May 2001 | No limitation period as a result of s20(1)(b) of the Limitation Ordinance | No Expiry |
| Resulting Trust claim against D7 and D13 to D18 | 30 May 2001 | 6 years as a result of s20(2). | 30 May 2007 |
| Claim for an account against D1 | 30 May 2001 | By application of the LO by analogy under s4(7), no limitation as a result of s20(1)(b) | No Expiry |
| Claim for an account against D1 | 30 May 2001 | By application of the LO by analogy under s4(7), 6 years as a result of s20(2). | 30 May 2007 |
| Conspiracy claims | 30 May 2001 | 6 years | 30 May 2007 |
| Fraudulent Trading claim | 18 September 2007 (the appointment of the Liquidators-being the later of the two possible dates) | 6 years as a result of the application of s4(1)(d) of the LO and s275(1) of the Companies (winding Up and Miscellaneous Provisions) Ordinance (Cap 32) | 18 September 2013. |
| Claim voiding Transactions under s60 of the Conveyancing and Property Ordinance | 30 May 2001 Subject to the correctness of the decision in Lau Hak Sing referred in paragraph 71 of the WG defendants' Skeleton) | 12 years (because the action is based on a statute and thus an action on a specialty) | 30 May 2013, subject to whether the debt continues and Lau Hak Sing is correct |
| Constructive Trust/unjust enrichment as against D12 | 30 May 2001 (date of transfer) | 6 years by analogy | 30 May 2013 |
| Constructive Trust/unjust enrichment as against D7 | 9 April 2005 | 6 years by analogy | 9 April 2011 |
| Constructive Trust/unjust enrichment as against D13 | 30 November 2002 | 6 years by analogy | 30 November 2002 |
| Constructive Trust/unjust enrichment as against D14 | 29 August 2003 | 6 years by analogy | 29 August 2003 |
| Constructive Trust/unjust enrichment as against D15 | 18 January 2006 and 26 November 2002 | 6 years by analogy | 18 January 2012 and 26 November 2008 |
| Constructive Trust/unjust enrichment as against D16 | 24 November 2011 | 6 years by analogy | 24 November 2017 |
| Constructive Trust/unjust enrichment as against D17 | 29 June 2007 And 22 August 2011 | 6 years by analogy | 29 June 2013 and 22 August 2017 |
| Constructive | 28 October 2011 | 6 years by analogy | 28 October 2017 |

| Causation of action | Date of Accrual | Relevant Limitation Period | Expiry of the Primary Limitation Period |
|---|---|---|---|
| Trust/unjust enrichment as against D18 | | | |
| Sham transactions | 30 May 2001 | 12 years if it is an action to recover land, or no limitation period if it is an action to recover trust property in the hands of the trustee | 30 May 2013, or no expiry. |

138. Hence other than the claims in respect of which there is no limitation period, and subject only to one or two further arguments which do not affect the overall conclusion, the primary period of limitation in respect of all claims has expired as against all defendants. For the purpose of this hearing I accept that as correct.

## F.2 The Extended Limitation Periods

139. Section 26 of the Limitation Ordinance provides as follows:

> (1) "Subject to subsection (4), where in the case of any action for which a period of limitation is prescribed by this Ordinance, either -
> (a) The action is based upon the fraud of the defendant;
> (b) Any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
> (c) The action is for the relief from the consequences of a mistake,
> The period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence discovered it."

140. The WG defendants suggest that my task is therefore to examine whether on the basis of the statement of claim and evidence the plaintiff has an arguable case that section 26(1)(a) and/or (b) of the Limitation Ordinance is made out. It suggests that the answer is "a resounding No".

141. I accept that what I must do is make an assessment as to whether or not there is an arguable case for extension of the limitation period based upon the grounds for an extension in s26. However, I must bear in mind that whilst the burden rests on the plaintiff to prove that its case comes within the limitation period, at this stage it does not have go further than to demonstrate that it has an "arguable case" that it does. Further, there should be no trial upon affidavit and disputed facts should be taken in favour of the plaintiff. The limitation defence has to be "manifestly and immediately destructive to the plaintiff's claim".

142. S26(1)(a) requires that the claim must be based on the fraud of the defendant.

143. It is well settled that a cause of action for dishonest assistance amounts to fraud for these purposes (See China Medical Technologies Inc v Wu Xiaodong [2019] HKCFI 1266 at [82])

144. By the same token, s. 26(1)(a) will apply to a claim for fraudulent trading, which also requires a plaintiff to show that the defendant was knowingly party to the carrying on of the business in a fraudulent manner and also to a claim under s60 of the Conveyancing and Property Ordinance.

145. The essential ingredient required to establish liability for knowing receipt is unconscionability. Unconscionability in this context is arguably sufficient to constitute fraud for the purpose of bringing knowing receipt within the ambit of s. 26(1)(a): Williams v Central Bank of Nigeria [2014] AC 1189 at [119] per Lord Neuberger; Yeu Shing Construction Co Ltd v Attorney General [1988] HKC 710 at 714C per Godfrey J. Similar arguments will apply to the claim for a constructive trust based on unconscionability.

146. I have not been addressed on any authority as to whether s26 may apply to the cause of action for unlawful means conspiracy, but it is certainly at least arguable that it does, particularly when the unlawful means alleged is a fraudulent breach of fiduciary duty as in this case. I am aware of several

authorities which suggest this to be the case: see for example Galsworthy Ltd v Liu Por [2019] HKCFI 2397 at [398]-[399] per Marlene Ng J and the authorities she there cites. There are also several UK authorities to similar effect. However, as I have not been addressed on them, I do not deal with the principle other than to say that I am of the view that it is certainly arguable that s26 can apply to a claim for unlawful means conspiracy.

147. In my view a similar position is also likely to apply to a claim that transactions are a sham transaction, and hence the proposition that s26 can apply to such a claim is arguable.

148. Consequently I am satisfied that it is at least arguable that s26(1)(a) is capable of being activated in respect of all causes of action.

149. But in addition, it has to be arguable that the plaintiff could not, with reasonable diligence have discovered the fraud of the relevant defendant. In paragraph 85 of their skeleton the WG defendants set out 8 sub-paragraphs as to why the plaintiff could, with reasonable diligence, have discovered the fraud more than 6 years prior to 16 December 2019.

150. The WG defendants rely upon the fact that the liquidators are officers of the court who have a positive duty to investigate the affairs of the company and to do so with all due speed.

151. They rely upon the 64 page expert report of Mr Arab, together with his two affirmations, to suggest that it is unarguable that the liquidators did not do so in this case. Further they suggest that there is evidence that the liquidators had actual knowledge of the impugned transactions in 2007, because they wrote a letter to the Official Receiver suggesting that the transactions were made "at very low value to a closely related company [D12]", and that the plaintiff had sold the properties "to a related company at grossly undervalue" [23]. They contend that the claim for an extension under s26(1)(a) must inevitably fail.

152. In response the Liquidators, both in the statement of claim and in the affidavits of Mr William Leung dispute what Mr Arab says, and dispute what the WG defendants say that they knew, and what Mr Arab says they ought to have known had they acted with reasonable diligence. Insofar as the alleged knowledge evidenced by the letters to the official receiver in 2007 are concerned, the Liquidators say that they knew that properties had been sold at a gross undervalue, and that may have given rise to suspicion of fraud, but it does not give rise to knowledge of fraud for the purposes of s26.

153. The Liquidators say that it was not until Madam Lam Ching Sheung came to see them in 2013, and brought to the attention of the liquidators two Judgments on related matters that they "have gained further information on how, when and what the defendants have defrauded Polyline's creditors " [24].

154. The pleading on limitation states that the date of knowledge relevant for s26 purposes is 16 November 2016, and it sets out the following factors as being relied upon to extend the limitation period:

> (1) The alleged conspiracy pleaded. Although I have struck this out as not disclosing a reasonable cause of action in conspiracy, it seems to me that the requirements of pleading for limitation purposes may be somewhat less rigorous, and hence I do not think that this proposition is demurrable as a plea for an extension to the limitation period.
> (2) The visit by Madam Lam on 5 June 2013.
> (3) The reappointment of the liquidators in March 2015, given that they had been released on 1 December 2011.
> (4) Their continued investigations thereafter, leading to knowledge on 16 November 2016.

155. There is no doubt in my mind that the delays in bringing this action are extraordinary. I am very troubled by the fact that the Liquidators were appointed in 2003 and yet did not commence this action until nearly 2020.

156. However, irrespective of my very considerable scepticism, my role is limited. I must be satisfied that the limitation defence is "manifestly and immediately destructive of the plaintiff's claim". In that regard, I take the view that unless I can say with certainty that the Liquidators had knowledge that would start time running, it is not open to me to strike out the claim on a limitation ground.

157. Despite the attractive way in which Mr Horace Wong SC, Counsel for the WG defendants, has put the case on limitation, I cannot resolve disputes on affidavit, and I cannot take the voluminous expert evidence as to what a reasonable liquidator ought to have done, and ought to have known, as being manifestly and immediately destructive of the plaintiff's plea of ignorance. Within the boundaries of the rules of procedure in Hong Kong, I take the view that I have no choice other than to let the matter go to trial, because I cannot pin point an indisputable moment when time started to run.

158. The closest that one can get to such a moment is the letter to the Official Receiver in August 2007, and its follow up in September 2007 in which the Liquidators have said that the sales were at " ridiculously low prices" and "the whole circumstance looks like fraudulent preference transactions[25].

159. The parties have not made submissions to me as to exactly what is meant by the phrase "has discovered the fraud" within s26 of the Limitation Ordinance and in those circumstances I will assume that it means that all necessary elements of the fraud have been actually discovered. I accept that there may be lesser thresholds of "discovery" which are equally consistent with the wording and purpose of the statute, and I also accept that the court of appeal has indicated that s26 ought to be strictly construed against a plaintiff: see Kwan JA in Hotung Investment (China) Ltd v Ernst & Young (a firm) [2012] 5 HKLRD 421 at [35], where interestingly she also said that time would run when "the truth" was discovered, which may be thought as being consistent with my approach. However, absent detailed submissions on this point I proceed on the basis that I have identified.

160. I do not think that the letters in 2007 demonstrate an actual discovery of the fraud. What the letters demonstrate is suspicion. But on the basis that I am proceeding upon, that is not enough. The letters may allow one to say that the Liquidators could, with reasonable diligence at some point thereafter have discovered the fraud, but it is disputed that they could have discovered the fraud until 16 November 2016, and I cannot determine that dispute on a strike out application.

161. Consequently having read everything that has been said in the statement of claim and in the evidence, and being mindful of the very limited scope that I have to strike out a statement of claim in respect of which there are disputes on material facts, I do not believe that this is a case in which I can strike out the statement of claim on this basis. I must take any disputes as being resolved in favour of the plaintiff, and I should not in any event strike out a claim, the legal viability of which is factually dependent.

162. In the circumstances, I believe that it is not appropriate for me to say anything further about the facts or the disputes, that have emerged from my reading of the evidence. I must leave any consideration of those matters to the ultimate trier of those matters, and the less I say the better. I limit myself to saying that the WG defendants, and D4, have failed to establish that the limitation period for all claims has unquestionably and inevitably expired. As a result, the claim would have to proceed to whatever resolution of those issues as is appropriate.

## G. Laches

163. The WG defendants rely upon the doctrine of Laches so as to prevent the bringing of the action in respect of any claim which is not already time barred by virtue of the Limitation Ordinance.

164. Operation of the doctrine depends upon an assessment of all of the circumstances in order to reach a conclusion that in all of those circumstances it would be "practically unjust" (per Sir Barnes Peacock in Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221 at 239) or "where the balance of justice lies" and whether it would "in all the circumstances be unconscionable for a party to be permitted to assert his rights" (per Recorder Yuen SC in Hollywood Shopping Centre Owners Committee Ltd v Incorporated Owners of Wing Wah Building Mongkok Kowloon HCA 1582/2007 (unreported, 16 August 2010 at [95]). Sir Barnes Peacock emphasised that:

"Two circumstances, always important in such cases, are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other so far as it relates to the remedy."

165. The WG defendants rely upon The Estate of Yang Sen Hui (Decd) & Others v Pao Yuen Tung Hsing Yieh Co Ltd [1983] HKLR 124 per Kempster J at page 147 to demonstrate that the court can allow a defence to laches to determine a strike out application:

"Again making every sensible allowance and despite the fact that the industry of counsel has failed to honour the reported instance in which a claim has been dismissed at this stage on the ground of laches I do not believe we are bound to accede to the submission that the action should be allowed to go to trial in case the image in the glass should then become distinct to the plaintiff's advantage. I consider it plain and obvious that the plaintiff's tardiness has barred their claim to equitable as well as to legal relief and that we are entitled to and should interfere. I would allow the defendant's appeal and dismissed the action as vexatious and an abuse of the process."

166. Accepting that guidance, it would be necessary for the WG defendants to demonstrate a "plain and obvious" case. For the same reasons that I have identified in relation to s26 of the Limitation Ordinance, I do not consider that this case is plain and obvious. It depends upon the assessment that a court will take as to the expert evidence which has been adduced, and that is not something that can be done at this stage.

167. Further, in relation to Laches, it depends upon the overall balance of justice and when the knowledge and understanding of the Liquidators is disputed, the question of where the balance of justice lies is not plain and obvious.

168. Therefore, I do not think that I can strike out the claim based on the defence of Laches being plain and obvious, or manifestly and immediately destructive of the claim.

## H. Conclusions and The Way Forward

169. In conclusion therefore:

(1) As set out in paragraphs 67 to 121 above, the only claim in the statement of claim, as against any of the WG defendants or D4 that discloses a reasonable cause of action is the claim for a resulting trust arising from the properties having been passed to D12 for no consideration.

(2) However, for the reasons set out in paragraphs 126 to 130 above based upon the evidence and in particular the contracts, all of which contain an acknowledgment and receipt of consideration clause, that claim is bound to fail, and thus should also be struck out.

(3) For the avoidance of doubt, if it had been necessary for me to consider the question of limitation in detail, for the reasons that I have set out in paragraphs 131 to 168 above, I would not have struck out any claims on limitation or laches grounds.

170. In the circumstances, I strike out the statement of claim as against each of the WG defendants and D4.

171. Those defendants also ask that I dismiss the action as against them. This does not automatically follow from my striking out the statement of claim, and I must make a separate decision as to whether or not to do so having regard to all the circumstances.

172. On the basis that the plaintiff has chosen to stand or fall on the statement of claim as produced to me, I do not look to the possibility of further amendments being forthcoming. Consequently, without the statement of claim, the case is bound to be dismissed ultimately, and thus, I agree with the WG defendants and D4 that the case against them ought to be dismissed.

173. It follows that I do not need to make any assessment of the WG defendants' application for security for costs, and I do not do so.

174. Costs should follow the event, and I make a costs order Nisi that the plaintiff is to pay the WG defendants and D4 their costs of the action to be taxed if not agreed. If either party wishes to seek a variation of this order they may apply in writing within 7 days of the handing down of this judgment, limited to 5 pages. The other parties may reply within 5 days thereafter, limited to 3 pages, with a final rejoinder of the applying party 3 days thereafter, also limited to 3 pages.

175. The parties are to draw up an appropriate order to reflect this decision for the court's approval.

176. Finally, I thank all parties and their counsel for the very helpful and clear analysis and assistance that they have provided me throughout this hearing. I am indebted to them all.

[1] Bundle A2/22/334
[2] Hong Kong Civil Procedure 2021 These principles are generally summarized from the Edition at Note 18/19/4 et seq, but without the detailed citations given therein.
[3] Per New China Hong Kong Group Ltd & Another v Kwai Kai Kenneth & Others HCA 519/2010 The , unreported, decision dated 11 February 2011 Fok JA at [40]
[4] per Kensland Realty Ltd v Tai Tang & Chong (2008) 11 HKCFAR 237 McHugh NPJ at [153].
[5] Hong Kong Procedure 2021 See Edition, at note 18/19/5.
[6] Hong Kong Procedure 2021 See Edition, at note 18/19/6.
[7] Hong Kong Procedure 2021 See Edition, at note 18/19/7.
[8] Hong Kong Procedure 2021 See Edition, at note 18/19/8.
[9] Hong Kong Procedure 2021 See Edition, at note 18/19/9.
[10] Paragraph 6 at A2/23/342, a Ding being a male villager in the New Territories.
[11] Paragraph 7 at A2/23/342.
[12] Paragah 17 at A2/23/345.
[13] Paragraph 10.
[14] Paragraph 24.
[15] Paragraph 25.
[16] Paragraph 26.
[17] Paragraph 27.
[18] Paragraph 34.
[19] Paragraphs 36 and 37.
[20] There is a dispute concerning the precise date, because Mr Barlow says that the document was not received by the Companies Registry until March 2003, but I do not consider anything turns on this so I do not address it further.
[21] See paragraph 19(5).
[22] PerPoon Ka Man Jason v Cheng Wai To[2019] HKCFI 1141 Coleman J in at [100]
[23] B16/96/4293 and B16/97/4295
[24] Paragraph 30 of Mr Leung's 4th Affirmation at A3/32/587.
[25] B16/96/4293 and B16/97/4295