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Smart Trike Mnf Pte Ltd v Chiu Sui Chun

Date of Judgment: 12 June 2024

Court of First Instance

CFI

Intellectual Property Case No 76 of 2019

HCIP 76/2019

Citations:

[2024] HKCFI 1562
[2024] HKEC 2041

Presiding Judges:

Lok J

Phrases:

Tort - intentional tort - breach of fiduciary duties - dishonest assistance of breach of fiduciary duties - breach of confidence - conspiracy to injure by unlawful means - whether established on evidence

Counsel in the Case:

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Ms Winnie Tam, SC, Mr Benny Lo and Mr Liang Zixin, instructed by Wilkinson & Grist, for the Defendants

Cases cited in the judgment:

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Ackroyds (London) Ltd v Islington Plastics Ltd [1962] RPC 97
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Hong Jing Co Ltd v. Zhuhai Kwok Yuen Investment Co Ltd [2013] 1 HKLRD 441
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She Tsu Yi v. Tsu Ki Ting HCA 1684/2004

University of Hong Kong v. Hong Kong Commercial Broadcasting Ltd [2016] 1 HKLRD 536

Zhang Heng v. Kingstone International Wealth Management CACV 56/2017

JUDGMENT

Lok J

1. This case was first commenced as an intellectual property claim. After a few rounds of amendments of pleadings, the Plaintiffs dropped all the intellectual property claims, and the existing claim is one based on breach of fiduciary duties, dishonest assistance of breach of fiduciary duties, breach of confidence and conspiracy by unlawful means.

2. The main parties in this case are Mr Yoram Baron ("Yoram") and Ms Susanna Chiu ("Chiu") who are the 3rd Plaintiff and the 1st Defendant respectively. They became acquainted in the early 1990s and had since had some kind of business relationship. In essence, the Plaintiffs are complaining that the Defendants operated or assisted in the operation of a business which was in direct competition with that of the Plaintiffs. On the other hand, the Defendants contend that Chiu's role in relation to the Plaintiffs' business was limited and peripheral, and she only offered certain shipping, translation and liaison services to the Plaintiffs' business which were logistical and administrative in nature, and so there was no fiduciary duty owed by any of them to the Plaintiffs. Neither had they committed the other wrongs as contended for by the Plaintiffs.

BACKGROUND AND THE PARTIES

3. Yoram (an Israeli citizen) is the owner of a tricycle business for the development, design, manufacturing, and distribution of children tricycles around the globe ("the Tricycle Business"). Yoram is the beneficial owner and person in control of the 1st and 2nd Plaintiffs, namely Smart Trike Mnf Pte Limited ("STML") and Smart Trike Limited ("STL"), which are companies incorporated by Yoram in Singapore and Hong Kong respectively for the purposes of operating and conducting the affairs of Yoram's Tricycle Business.

4. As part of the Tricycle Business, the Plaintiffs have developed, designed, manufactured, and distributed tricycle products including *inter alia* the following models: Model No ST 129 ("ST 129"), Model No ST 126 ("ST126"), Model No ST 157 ("ST157") and Model No ST 179 ("ST179").

5. It is the Plaintiffs' case that these tricycle products have the following four unique features which make them a success in the market: (i) modularity; (ii) rotating front wheel, (iii) parent's steering handle attached to the child's steering wheel; and (iv) perimeter safety bars and belts.

6. Chiu is a businesswoman. Mr Choi Fat Yee ("Choi") and Ms Loretta Choi ("Loretta"), who are the 2nd and 3rd Defendants, are the husband and sister-in-law of Chiu respectively.

7. Mr Ye Lifa ("Ye"), who is the 4th Defendant herein, was and is the owner and controller of two Mainland companies which manufacture children's products, namely: (i) "Foshan Shunde Zhenhao Industrial Co Ltd" ("Shunde Zhenhao") and (ii) "Foshan Shunde Little General Stroller Industrial Co Ltd" ("Little General"; collectively "Ye's Companies").

8. Global Wise Limited ("Global Wise") and Capital Key Development Limited ("Capital Key"), which are companies incorporated in Hong Kong, are the 5th and the 6th Defendants herein respectively. It is not in dispute that at all material times, Chiu had overall management and control over Global Wise and Capital Key. It is the Plaintiffs' case that Choi and Loretta were also positively involved in the operations and affairs of both corporate entities, as: (i) they were at all material times the only two directors and shareholders of Capital Key; and (ii) Choi was the company secretary of Global Wise from 29 December 2009 to 3 January 2011, with Loretta then serving as company secretary as from 3 January 2011.

9. Apart from Global Wise and Capital Key, there are a few more Hong Kong companies involved in this case:

(i) Golden Pride Limited ("Golden Pride") incorporated in 1994 which was registered under the name of Choi and a Taiwanese called Tsai Chien Ying;

(ii) Golden Pride (Hong Kong) Limited incorporated in 1995 with Chiu and Choi as the sole shareholders and directors;

(iii) Golden Pride Enterprises (Hong Kong) Limited incorporated in 1999 with Chiu and Choi as the sole shareholders and directors; and

(iv) GP Enterprise China Limited ("GP China") incorporated in BVI with Choi as the sole shareholder and director.

10. I refer these companies collectively as "Golden Pride Companies". They were companies used by Chiu to conduct her own business of importing and exporting toys, household and other goods. According to Chiu, they were used initially to provide

shipping services to customers and were subsequently used to conduct merchandising business. Apart from providing services to Yoram, Golden Pride also provided similar services to other clients.

WITNESSES AT THE TRIAL

11. Though there are well-established legal principles governing the finding of fiduciary relationship, the outcome of this case depends very much on the determination of the various factual issues. After all, the court has to examine the relationships between the parties throughout the years in order to determine whether any of the Defendants owed some kind of fiduciary duty to the Plaintiffs. Whether the Defendants are liable for the other claims is also fact-sensitive.

12. The following witnesses gave oral testimony at the trial:

(i) Yoram in support of the Plaintiffs' case;

(ii) Chiu, Mr Yehuda Einav ("Einav"), Ye, Mr Chen Chun Wei ("Chen"), Choi, Loretta and Ms Fong Mei Yuk ("Fong") in support of the Defendants' case.

13. Apart from these witnesses, the factual evidence by Ms Ria Darya ("Darya") and the expert evidence by Professor Rawet was admitted without cross-examination. Both of them are witnesses in support of the Plaintiffs' case.

(i) The Plaintiffs' witnesses

14. Yoram is the main and only witness who testified in support of the Plaintiffs' case. He had been extensively cross-examined by the Defendants' counsel, and his oral testimony lasted for about 5.5 days. He gave evidence in Hebrew.

15. Yoram gave a rather comprehensive account about his dealings with Chiu, Choi and Ye dating back to the early 1990s. According to Yoram, he found Chiu to be a trustworthy and able person, and they co-operated for the development of the Tricycle Business. Yoram trusted her and Choi by, *inter alia*: (i) appointing Chiu and Choi as bank signatories for various key bank accounts of the Tricycle Business, including the bank accounts of STML, STL and the companies owned by Yoram to run the Tricycle Business; (ii) appointing Chiu as a director of STL from March 2008 to December 2014: (iii) entrusting Chiu with the management of the Tricycle Business in the Far East with various duties and powers in the management of the said business; and (iv) providing Chiu with access to the Plaintiff's confidential information with vital competitive significance, including the production files and specifications of the Plaintiffs' products ("the Confidential Designs") and the pricing information and the customers list and related information concerning the Plaintiffs' customers ("the Confidential Customers Information").

16. As the products of the Tricycle Business were produced in the Mainland and shipped to the customers either directly or through Hong Kong, Yoram, being an Israeli not living in Hong Kong, had to rely on Chiu to help him to take care of various matters in the operation of the Tricycle Business, including liaising with the factories in the Mainland for the production of his tricycle products. In return, Chiu would obtain reasonable financial rewards depending on the success of the Tricycle Business. Throughout the years, Chiu was getting 5% of the total amount paid by the Tricycle Business to the suppliers as remuneration.

17. Yoram also told the court how he found out about the competing business operated by Chiu with his former employees and business associates, how he confronted Chiu in a meeting in October 2012 ("the October 2012 Meeting"), and how Chiu confessed to him and promised not to carry on with her competing business. According to Yoram, Chiu gave him access to her computer, and as a result he obtained the meeting note ("the Meeting Note") of a meeting attended by Chiu, Ye, Einav (an Israeli) who used to be one of the designers engaged by STML in developing some of its products) and one Mr Lior Harisan (an Israeli who used to be STML's quality controller) ("Harisan") in February 2012 ("the February 2012 Meeting"), in which the parties discussed the plan to start a competing business involving the production and sale of children bicycles, tricycles and other kinds of ride-ons.

18. Yoram also told the court how he came to switch the production of the Plaintiffs' products to Ye's Companies, and how he entrusted Ye with the Confidential Designs and the Confidential Customers Information relating to the Tricycle Business.

19. During his testimony, he expressed frustration about Chiu's betrayal of the trust he placed on her. Having being kept in the dark, he did not know that Chiu engaged in a competing business with his former employees and business associates. In my judgment, Yoram provided straightforward answers to the questions put to him in cross-examination, and it is fair to say that his evidence has remained unshaken after cross-examination.

20. Ms Tam SC, counsel for the Defendants, attacks the credibility of Yoram's evidence on the purported grounds that: (i) there are inconsistencies between Yoram's evidence as contained in his witness statements and his oral testimony; (ii) there are internal inconsistencies in Yoram's evidence; (iii) some of Yoram's evidence is inherently improbable; and (iv) some of Yoram's evidence is unsupported by contemporaneous documents. A substantial part of the challenge relates to Yoram's evidence about Chiu's investment in an Israeli company known as "Ofrat Baby Toys Manufacturing Limited" ("Ofrat"). I will deal with these challenges in the next part of this Judgment when I address the various incidents in the past years. At this stage, it suffices for me to say that these challenges have no merit at all.

21. The Plaintiffs have relied on the witness statement of Darya the contents of which is not challenged in court. Her evidence is about the offers made by Global Wise to her (who posed as a potential purchaser) about "Baby Trike", which was a product with

substantial similarity, if not identical, to the Plaintiffs' ST 129 (Plastic) in or around 2017.

22. The Plaintiffs have also adduced an expert report by one Professor Rawet. The said report is admitted as evidence without any cross-examination. The Defendants do not seek to produce any expert report to substantiate their case. Professor Rawet made a detailed examination of the Plaintiffs' product ST 129 (Plastic) and "Baby Trike" offered for sale by Global Wise. He found that a lot of the parts for "Baby Trike" were produced using the same moulds for the production of the Plaintiffs' ST 129 (Plastic). More importantly, some minor changes were made to the moulds for the purpose of concealing that the ST 129 moulds were used to produce "Baby Trike". Apparently, the Defendants do not dispute that but claim that, for some reasons, Ye owned the ST 129 moulds. No matter who owns the moulds concerned, I agree with Mr Wong SC, counsel for the Plaintiffs, that this fact supports the Plaintiffs' case that Global Wise's "Baby Trike" (produced by Ye) is substantially similar if not identical to the Plaintiffs' ST 129 (Plastic), which makes it a direct competing product vis-à-vis the Plaintiffs' ST 129 (Plastic).

23. In her final submissions, Ms Tam argues that the Plaintiffs have made a tactical choice in choosing only Yoram to testify at the trial. According to her, the Plaintiffs should have called Yoram's wife Dafna and Ms Anat Pinto ("Anat") [1] to testify because they were involved in the operation of the Tricycle Business and they could testify about their relationship with the Defendants. However, since Yoram was the main person involved in the running of the Tricycle Business and responsible for dealing with Chiu, Choi and Ye, no criticism can be made for not calling Dafna and Anat to testify at the trial. Indeed, their evidence may unnecessarily prolong the already very lengthy trial, and certainly no adverse inference can be drawn against the Plaintiffs for not asking them to testify in court.

(ii) The Defendants' witnesses

24. Chiu is the main witness for the Defendants' case. Her evidence lasted for about 4 days. Like Yoram, she had been extensively cross-examined by the counsel for the Plaintiffs.

25. Chiu gave her own version about her relationship with Yoram and her role in the operation of the Tricycle Business. According to Chiu, her role was limited and peripheral and she only offered certain shipping, translation and liaison services to the Plaintiffs which were logistical and administrative in nature. She always had to follow the instructions of Yoram and his management team in running the operation of the Tricycle Business and disposing the funds in the bank accounts of which she was a signatory.

26. Chiu was not seriously disputing that she and Global Wise had engaged in the business of selling children bicycles or tricycles. However, she maintained that she had the right to do so and her products were not similar to those offered for sale by the Plaintiffs. She also denied that, *inter alia*: (i) she had made any investment in the business operated by Ofrat; (ii) she had made use of the Plaintiffs' Confidential Customers Information in running her business; or (iii) she had introduced Ye or Mr Mo Yuen Fai ("Mo") [2] to Yoram for the production of the Plaintiffs' products.

27. I do not find Chiu to be a credible or reliable witness, I will explain why when I address the factual disputes in the next part of this Judgment. At this stage, it suffices for me to say that Chiu, being a smart and sophisticated businesswoman, was very evasive when she was testifying about her relationship with Yoram, in particular in the period from the 1990s to about 2004. It is quite clear from the evidence that the parties were quite close by that time, both on business and personal levels, and there were then considerable trust and confidence developed between the parties. Her story does not sit well with the subsequent close working relationship developed between the parties for the operation of the Tricycle Business.

28. Choi is Chiu's husband. He had been working in China Light and Power for a long time before resigning in 1998. His works by that time included, *inter alia*, internal auditing and financial accounting works. He gave evidence on the operation of the bank accounts of the Tricycle Business, and his evidence basically corroborates that of Chiu, in particular about her role in the operation of the Tricycle Business. He was not present in the February 2012 Meeting, and he denied that he was involved in any sort of conspiracy against the Plaintiffs.

29. Like Chiu, Choi was a sophisticated businessman. Given his previous background, Choi knew full well about the implications and the advantages of conducting business through different corporate vehicles. The fact that Chiu and Choi had set up different companies for their business speaks for itself. Choi was also evasive when he was cross-examined about their relationship with Yoram. He tried to distant himself from some of the meetings between Yoram, Chiu and himself by saying that he was not interested in the contents of the discussions and he just walked around in the vicinity. In my judgment, this does not make a lot of sense and he was just trying to dodge the fact that they had a close relationship with Yoram at the relevant times.

30. Ye also testified at the trial. He gave his account about how he came to manufacture the products for the Plaintiffs' Tricycle Business. Ye came to know Yoram when he was a contractor of a company known as "Fu Yu" (富裕). After the breakdown of the relationship with Fu Yu, Yoram switched the production to Ye's Companies. Ye also received the moulds for the production of Yoram's products, but Ye always had to modify the moulds himself in order to suit the actual manufacturing process.

31. Ye denied that he had received any Confidential Drawings from the Plaintiffs. For the drawings given by Yoram for the production of the Plaintiffs' ST 157, ST 126 and ST 129, they did not contain any confidential information. For the children tricycles produced by himself including models 908016, 2029021 and 202SP3 ("Ye's Products"), Ye claimed that they were original products which were not similar to those of the Plaintiffs. Though Ye did attend the February 2012 Meeting, he was not involved in

any conspiracy against the Plaintiffs. He also gave his own version about his dispute with the Plaintiffs about the ownership of the moulds after the breakdown of their relationship.

32. Whilst Ye was at pain trying to point out the differences between the Plaintiffs' products and Ye's Products, it cannot change the fact that they were very similar and highly competitive products. Irrespective of whether Ye owned the moulds for the production of the Plaintiffs' products, I cannot understand why Ye was entitled to use those moulds to manufacture Ye's Products. By reason of such observation and the reasons given in the latter part of this Judgment, I do not find Ye to be a reliable witness and I reject his evidence.

33. Loretta also testified at the trial. According to her, she was only a nominal shareholder and director of Capital Key and nominal company secretary of Global Wise. She was not involved in the business operated by either company. It was Chiu who actually run the business of Global Wise and Chiu and Choi who run the business of Capital Key. Neither is there any evidence adduced by the Plaintiffs to show that Loretta was somewhat involved in the competing business.

34. In his final submissions, Mr Wong, quite fairly, does not make any submissions on the liability of Loretta. The evidence shows that she was only a nominal office holder and was not involved in the operation of the competing business. There is simply no basis for the court to find any liability on her, whether for breach of fiduciary duty, dishonest assistance of breach of fiduciary duty or any other causes of action relied on by the Plaintiffs. I therefore dismiss the claim against Loretta. When I address the liability of the Defendants in the remaining part of this Judgment, I mean all the Defendants excluding Loretta.

35. Another witness for the Defendants' case is Einav who used to be one of the designers engaged by STML in developing some of its products. Einav denied that he was involved in any kind of conspiracy against the Plaintiffs. For the February 2012 Meeting, the participants of the meeting only discussed the prospect of future business after the termination of their business relationship with the Plaintiffs. For the Meeting Note obtained by Yoram in respect of that meeting, he claimed that it was stolen from his notebook and he made a report to the police in Israel.

36. Einav's evidence is of limited assistance. There is no dispute that the February 2012 Meeting did take place. No matter how Yoram obtained the Meeting Note, there is no serious dispute that the Meeting Note contained a summary of the matters discussed in the meeting. As for his allegation that the Meeting Note was stolen from him, I dismiss such allegation for the reasons given in the latter part of this Judgment.

37. Chen, who was engaged by Shunde Zhenhao as a technician responsible for product development, gave evidence in support of the Defendants' case. According to him, Shunde Zhenhao owns the copyright in the original drawings for Ye's Products. However, the shapes and the dimensions of the products speak for itself. As I will demonstrate in the latter part of this Judgment, I have great reservation about the truth of Chen's assertion. In any event, Chen's evidence cannot change the fact that Ye's Products were close competing products with those of the Plaintiffs.

38. Fong, a retired shipping clerk formerly working for Golden Pride, also testified at the trial. She gave an account about the work she did for the shipment of the Plaintiffs' products, and she maintained that the shipping services provided by Golden Pride were logistical and administrative in nature. Ms Tam submits that there is no basis for the court to doubt the credibility of Fong's evidence. Whist such observation may be true, Fong's evidence is of limited assistance. Fong left Golden Pride in 2006, and so she only worked for a brief period of time after the commencement of the Tricycle Business. More importantly, being only a shipping clerk, she does not have personal knowledge about the full agreements made between Yoram and Chiu relating to the latter's role in the operation of the Tricycle Business. She was only able to give a limited picture about the work she did, and she could not offer any meaningful assistance on the other major factual issues which are crucial in determining the actual working relationship between the Plaintiffs, Chiu and Choi.

39. The evidence in this case covers the relationship of the parties over a period of about 20 years. In his final submissions, Mr Wong for the Plaintiffs has grouped the factual disputes into the following 3 broad areas:

(i) the Tricycle Business and the relationships between Yoram and Chiu and Choi;
(ii) Chiu's role and responsibilities in respect of the Tricycle Business; and
(iii) the Defendants' alleged competing business.

40. Indeed, Ms Tam has also addressed the court in more the less the same order in her final submissions. I agree that this should provide a good starting point for the court to analyze the various factual disputes in this case, and so I would adopt the same categorization in my analysis of the evidence below.

FACTUAL ISSUES I: THE TRICYCLE BUSINESS AND THE RELATIONHIPS BETWEEN YORAM AND CHIU AND CHOI

(i) The 1990s: Yoram's early relationship with Chiu and Choi

41. In the early 1990s, Yoram came to know Chiu when the latter was working as a salesperson in a company known as "Deep Source Ltd" ("Deep Source"). At the time, Yoram and his brother Eli (through a company named "Etzbaony") were ordering toys and children's products from Deep Source. It is also not in dispute that Chiu was assigned by Deep Source to handle Yoram's

business, and she basically handled all of Yoram's business with Deep Source. It is common ground that from the time when Chiu was working at Deep Source, Chiu had known and maintained working relationships with factories in the Mainland.

42. According to Yoram, he had regular communications with Chiu and he was impressed with her working ability. It is common ground that in or around July 1993 , Chiu became the 50% shareholder of Ofrat together with Yoram. Ofrat was an Israeli company set up by Yoram for manufacturing and selling children's products, in particular four-wheel ride-ons. The Plaintiffs' case is that Chiu was an equity investor in Ofrat. On the other hand, Chiu's case is that she had " *lent* " Yoram her identity to enable him to start the joint venture company. Chiu also asserts that she had " *never been a beneficial owner of the shares held in Ofrat in [her] name* ".

43. Against this background, it is the Plaintiffs' case that, after Chiu left Deep Source to start Golden Pride in 1994, Yoram continued to buy toys and children's products from Chiu for a few years, during which time he " *built up a close business and personal relationship* " with Chiu. Yoram and his wife Dafna also became " *close friends* " with Chiu's husband Choi. On the other hand, the Defendants' case is that Chiu did not specifically meet up with Yoram or do business with him between 1994 and 2004. Whilst they had a few dinners with Yoram and his family prior to 2004, they were not close friends with Yoram and Dafna.

44. A substantial part of the attack on the credibility of Yoram's evidence relates to Chiu's alleged investment in Ofrat. Though this has never been a material issue in this case (except that it may be relevant in determining the overall credibility of the witnesses), I feel obliged to deal with the Defendants' challenge in this regard.

45. Ms Tam first challenges the alleged inconsistencies in Yoram's evidence on this matter. According to her, Yoram did not mention their cooperation in Ofrat in his first witness statement, stating that he was the sole shareholder and director of Ofrat. It was only in his supplemental witness statement that he asserted that Chiu had been an "equity investor". Yoram never mentioned in his witness statements about the advantage of using Ofrat to get subsidy from the Israeli authorities. Ms Tam further submits that Yoram was evasive when he was asked about the capital of US$50,000 injected into Ofrat, how Chiu was able to raise such sum for the investment and why he himself did not make any capital contribution for Ofrat.

46. Ms Tam further attacks Yoram's evidence as inherently improbable. First, it is unbelievable that, back in 1993, Chiu had US$50,000 to invest in Ofrat. Second, even if Chiu and Choi somehow had US$50,000 to spare, it is unlikely that they would have invested in Ofrat. Third, it is unbelievable that Chiu would have agreed to supply all the initial capital of Ofrat, when Yoram himself did not have to pay any capital contribution (at least at the initial stage). Fourth, it is unlikely that Yoram would have invited Chiu to invest in Ofrat. Fifth, Yoram claimed that he made a " *business plan* " for Ofrat and showed it to Chiu, but neither she nor Yoram had sufficient English proficiency at the time to read or write a sophisticated " *business plan* ". Sixth, Chiu gave an inherently plausible explanation of why she was named as a shareholder of Ofrat, namely, to allow Yoram to take advantage of benefits provided by the Israeli authorities to Israeli joint ventures with foreign entities. Seventh, as the booth of Golden Pride was relatively small back in 1995, there would not have been space for Golden Pride and Ofrat to exhibit their products together as claimed by Yoram. Nor would there have been a need to do so, since in those days anyone who applied could have a booth. Eighth, it is unbelievable he and Chiu sold Ofrat's assets for only about US$200,000 (NIS 700,000) as claimed by Yoram. Ninth, as Chiu confirmed during cross-examination, she would not have been allowed to solicit customers of Deep Source within 2 years after leaving. Therefore, it is unbelievable that Yoram, a customer of Deep Source, would have switched to purchasing toys from Golden Pride in 1994. Tenth, given the limited ability of Yoram and Chiu to communicate in English, it is unbelievable that Yoram would have become " *close personal friends* " or " *close friends* " with Chiu and Choi.

47. No matter which version is the truth, this episode shows that there was considerable degree of trust and confidence developed between the parties by that time. Yoram is an experienced businessman. If the Defendants' case were true, Yoram must have placed substantial trust in Chiu, as he was content to allow Chiu to hold 50% shares in his company Ofrat without requiring any nominee shareholding agreement or documentary record to protect his interests. On the other hand, Chiu was quite content to provide Yoram with her indentity card, and did not require any agreements to be signed at all. If she had not placed substantial trust in Yoram, it is utterly unthinkable that she would have simply " *lent* " her identity to Yoram to allow him to set up an Israeli joint venture. Such trust and confidence certainly fit the Plaintiffs' case that the relationship of the parties was close by that time and they were by then prepared to engage in some form of business cooperation. On the other hand, it does not sit well with Chiu's evidence that the relationship of the parties was quite remote by that time.

48. Further, I do not find that Ms Tam's challenge undermines the credibility of Yoram's evidence in any way. It is clear that Yoram and Chiu were able to communicate in simple English throughout the years, perhaps sometimes with the assistance of Yoram's wife Dafna who have a better command of English, otherwise the parties would not have entered into the business cooperation relating to the establishment of Ofrat, whether it was for the purposes as contended for by either party. In fact, It was because of the good working relationship established at the outset (when Chiu was working for Deep Source) that certain degree of trust had developed between the parties, which eventually led to the possibility of further business cooperation which included the business of Ofrat. Though the investment of US$50,000 might be a substantial amount by that time, there might be ways for Chiu and Choi to raise the money, perhaps with the help of the family as suggested by Yoram. As to the reasons for inviting Chiu to join Ofrat, I do not find anything unusual as there was a good working relationship between the parties by that time and they were exploring ways to foster a better business relationship. Indeed, given the fact Chiu left Deep Source to start her own business, it was only natural that Chiu would be eager to look for different business opportunities by that time. Further, the fact that there might be tax benefit from the presence of a foreign investor like Chiu does not mean that Chiu could not be a genuine investor in the business.

49. Obviously, the relationship of the parties was extremely good by that time, and so it is not surprising that the parties only made a loose agreement for their investment in Ofrat without reducing all the details into writing. Further, as there were a lot of uncertainties in the future of their joint venture and it was difficult to quantity the contributions by either party, the court cannot say that the arrangement made by the parties by that time (as claimed by Yoram) was unreasonable.

50. One also cannot expect Yoram to have given the full account of the Ofrat incident in his earlier witness statements. As mentioned before, this episode has never been a material issue in this case, and Yoram has already made detailed and lengthy witness statements covering many other issues in this case. It is only natural that, after lengthy and meticulous cross-examination by the Defendants' counsel, Yoram supplied more details about the Ofrat investment. It is also true that Yoram was the sole shareholder and director of Ofrat after Chiu's exit from the joint venture. Yoram's answers were direct and straightforward and I do not find any evasiveness on his part when he testified in court. For these reasons, I prefer to accept the evidence of Yoram about their relationship in the early 1990s and the investment in Ofrat.

51. Chiu remained a 50% shareholder of Ofrat for nearly two decades until 2011. There is again dispute between the parties as to how Chiu exited from the joint venture. For the sake of chronological order, it would be more desirable for me to deal with this dispute in the latter part of this Judgment.

52. According to Yoram, since 1994, he (together with his wife, Dafna) would visit Hong Kong to attend trade fairs almost on a yearly basis, and Yoram and Chiu would meet up at these toy fairs. There is some confusion as to when Ofrat stopped participating in the Hong Kong trade fairs, but I do not find that such minor matter would in any way undermine the credibility of Yoram's evidence. On each occasion that Yoram visited Hong Kong, Yoram, Dafna, Chiu, and Choi would have dinner gatherings at a restaurant that was usually booked by Chiu.

53. I find Chiu and Choi to be evasive when they were asked about these dinners. Obviously, they wanted to portrait a picture that they did not have a close relationship with Yoram. Chiu testified at the trial that she did not have such dinner gatherings with Yoram as from 1994, which is inconsistent with what she and Choi said in their witness statements. Insofar as Choi agreed that he did attend some of these dinner gatherings, he claimed that he only walked around and did not participate in the conversations. To me, this is quite absurd. Choi is the husband of Chiu and so it would be extremely surprising that Choi was not interested in the contents of the discussions which concerned his wife. In particular, there was no reason to keep Choi away from these discussions.

54. It would be naïve to say that the parties had not explored the possibility of future business cooperation in their discussions, after all Chiu should have been eager to expand her business after leaving Deep Source. In fact, it was from these dinner conversations that Chiu informed Yoram that she had left Deep Source and established Golden Pride. Yoram became close friends with both Choi and Chiu, and they shared updates on their personal lives and families with each other. For instance, it is common ground that Chiu showed Yoram the photos of her wedding, and also gifted Yoram a wedding photo for him to keep (which Yoram has kept over the years). As a further example, Chiu would share her experiences about caring for babies (who were born in 1995, 1997 and 2001) with Yoram and Dafna. All these do not sit well with Chiu's assertion that the relationship between the parties was remote by that time. Yoram also provided Chiu with updates on their investment in Ofrat during their meetings in Hong Kong.

55. As far as Chiu is concerned, she even went so far to say in the witness box that after she left Deep Source in 1994, she only met Yoram during toy fairs and did not even have any lunch or dinner with Yoram or Dafna. I agree with Mr Wong that not only is Chiu's oral evidence inconsistent with Choi's narratives, such evidence is plainly incredible in that it cannot explain why the parties came to co-operate with each other in late 2003 or early 2004 as further elaborated below.

56. It is not in dispute that when Chiu was operating the Golden Pride Companies in the 1990s, Chiu had built up contacts with factories in the Mainland. Indeed, it is Chiu's own evidence that she had maintained a good reputation amongst manufacturers in the 1990s. One should also note that, as evidenced by the invoices produced by Chiu, the products sold by the Golden Pride Companies before 2004 were mainly miscellaneous household products, kitchenware and toys, but not tricycles, bicycles, scooters or ride-ons.

(ii) The making of the Fu Yu agreement and the parties' cooperation in 2003 and 2004

57. It is the Plaintiffs' case that in late 2003, Yoram approached Chiu with a business plan for his intended Tricycle Business. Following a series of discussions, Yoram and Chiu reached an agreement for cooperation with respect to the Tricycle Business in around January 2004.

58. Yoram's evidence in this regard is certainly supported by the making of an agreement titled "Agreement on Authorizing to Process and Product" between "Golden Pride" [3] and "Fu Yu Plastic" dated 10 January 2004 ("the Fu Yu Agreement"). It is not disputed that Chiu signed on such agreement. The express clauses of the Fu Yu Agreement provide that Chiu would play a role in the production and manufacturing process for the Tricycle Business, and that Chiu (*i.e.* "Golden Pride") would also be entrusted with the diagrams, samples, and moulds for producing the Plaintiffs' products to be provided to Fu Yu. [4] According to Yoram, he did pass the confidential production files for the Plaintiffs' products to Chiu. Such allegation is certainly consistent with the terms in the Fu Yu Agreement.

59. I agree with Mr Wong that the Fu Yu Agreement is important in the following contexts:

(i) The Fu Yu Agreement contradicts the Defendants' case that Chiu had virtually no contact with Yoram since 1994. In fact, clause 8 of the Fu Yu Agreement imposed personal liability on the part of "Golden Pride". It is utterly unthinkable that Chiu would have agreed to sign the Fu Yu Agreement upon Yoram's request out of the blue, if (as the Defendants allege) Yoram was only an ordinary customer with whom she had essentially no or little contact for a decade.

(ii) It shows that Yoram and Chiu were in a relationship of trust and confidence at that time. In particular, Yoram was singularly dependent on (and hence vulnerable towards) Chiu to ensure the confidentiality of the information (*i.e.* diagrams, samples, moulds, production information) to be passed to Fu Yu, as well as to enforce the terms of the Fu Yu Agreement (including the confidentiality clause) on his behalf.

60. The terms of the Fu Yu Agreement also support the Plaintiffs' case that Chiu had already built up connections and contacts with factories and manufacturers in the Mainland, and for the purposes of commencing the Tricycle Business, Yoram asked Chiu to locate qualified manufacturers with plastic, metal, and assembly production capabilities in the Mainland.

61. On the other hand, the Fu Yu Agreement does not sit well with the Defendants' case. In fact, Chiu did not make any explanation about this agreement in her witness statements. It was only in cross-examination that Chiu said, upon having minimal contact with Yoram since 1994, Yoram somehow invited her to meet at a hotel room in Hong Kong. During that meeting, Yoram invited her to help him to manage his new business, but Chiu only agreed to manage the shipping paperwork for him.

62. I do not accept that Chiu was telling the truth. Chiu is a smart and sophisticated businesswoman. If she only agreed to do some shipping paperwork for Yoram, why would she have agreed to sign the Fu Yu Agreement which contained elaborate provisions about her role and duties in Yoram's new business? Her evidence also does not make a lot of sense as to why, after having no or minimal contact with her over the years, Yoram suddenly invited her for a meeting and requested her to sign an elaborate cooperation agreement.

63. In a further attempt to explain why she signed the Fu Yu Agreement, Chiu said she only read clause 11 of the Fu Yu Agreement before signing. As a further excuse, she said it would be "embarrassing" if she did not sign. Again, these excuses do not make much sense. First, as mentioned above, Chiu is a smart and sophisticated businesswoman. She would not have signed the Fu Yu Agreement having only read just one clause. Further, on Chiu's own case, she had virtually no contact with Yoram for the past decade, and Fu Yu was an unknown manufacturer to Chiu and it was not introduced by her. Under such circumstances, why would it be embarrassing for her not to sign the Fu Yu Agreement?

64. Choi's evidence is equally unbelievable. In an attempt to distant himself from the business discussions, Choi claimed that he had no idea what happened during the hotel room meeting because he was too busy strolling around in the hotel. However, having not met Yoram for quite some time (as alleged by Chiu), it is very surprising that Choi would not be interested in what his wife was discussing with Yoram at the time.

65. I find that Yoram was telling the truth about the making of the Fu Yu Agreement, which actually laid the ground for the future cooperation between the parties. Yoram would pay Chiu financial rewards to be assessed depending on the future success of the Tricycle Business. Chiu was also fully aware that Yoram's tricycles were new products, and the information she obtained must remain confidential. That was reflected in the terms of the Fu Yu Agreement.

66. In trying to attack the credibility of the Plaintiffs' case, Ms Tam submits that the Yoram and Chiu could not have entered into the elaborated pleaded oral agreement in 2004, which has been defined as "the Fundamental Agreement and Understandings" in §18 of the latest amended Statement of Claim. Apart from not being mentioned in Yoram's witness statements and the lack of supporting written documents, it is impossible for Chiu to have agreed to such vague terms about loyalty and non-competition, given that she had her own business to run by that time.

67. As I see it, the Plaintiffs are not relying very much on the terms of the oral discussions in 2004 with a view to establish fiduciary duty on the part of the Defendants. Rather, the Plaintiffs are seeking to rely on the course of dealings between the parties, in particular the making of the Fu Yu Agreement, the works undertaken by the Defendants and the trust and confidence developed between the parties throughout the years, in order to establish fiduciary relationship. In any event, Yoram and Chiu must have had certain prior discussions (no matter how loose those discussions were) in order to form the basis for the future business cooperation between the parties. Having considered the actual working relationship subsequently developed between the parties (as further elaborated below), I have reasons to believe that Yoram and Chiu did reach certain understandings as defined in §18 of the latest amended Statement of Claim.

(iii) The development of the Tricycle Business from 2005 to 2010

68. Yoram then started the Tricycle Business. He obtained the business registration in Hong Kong for a sole proprietorship business named "Smart Baby Toys" on 1 January 2005. As shown from its business registration record, the recorded address for Yoram was in fact the residential address of Chiu and Choi. I agree with Mr Wong that this exemplifies the trust and confidence between the parties at the time.

69. Smart Baby Toys then opened its bank account on 5 July 2005. It is common ground that Fong, who was Chiu's shipping staff in Golden Pride, was appointed as a signatory of the bank account of Smart Baby Toys. Yoram hardly knew Fong at the time, and this again shows that Yoram fully trusted Chiu and agreed to appoint Fong as a bank signatory. After Fong left Golden Pride, Yoram agreed for Choi, again upon Chiu's suggestion, to replace Fong as the bank signatory with effect from 2 May 2006. By the end of 2007, it is common ground that the business of Smart Baby Toys had expanded and that it was making substantial profits, which was also a fact known to Chiu. Again, Yoram's appointment of Choi to act as the bank signatory of Smart Baby Toys reinforces the trust and confidence which he placed on both Chiu and Choi, and reflects Yoram's dependency and vulnerability towards them.

70. In 2006, the Tricycle Business had expanded and Fu Yu was unable to meet the demand of the orders. According to Yoram, upon the endorsement of Mo and Chiu, Yoram agreed to engage Ye as the manufacturer for his tricycle products. Yoram instructed Chiu to liaise with Ye for the production of tricycles, and Ye's Companies in turn commenced with the production of ST 126 (which was a new model at the time) and ST 129.

71. According to Ye, Chiu first came to know him in around the second half of 2005, and that Chiu was introduced to him by Mo. Chiu confirmed that, by that time, Ye already knew that she assisted Yoram with his Tricycle Business. Ye also confirmed that Yoram entrusted Chiu to visit Ye's Companies to negotiate the terms of the cooperation, during which time Chiu guaranteed to Ye that, in the case of non-payment by Yoram, Chiu would make the payment on Yoram's behalf.

72. I agree with Mr Wong that, on the Defendants' own evidence about the making of such guarantee, it is another fact which demonstrates the trust and confidence which Chiu and Yoram placed on each other. It is simply contrary to common sense that Chiu would have made such guarantee on behalf of Yoram if Chiu's role was only limited to the provision of shipping or translation services as alleged by the Defendants.

73. Ye began to manufacture Yoram's tricycle products in September 2005. There is then an issue as to the nature of the design drawings provided to Ye for the production of the products. Obviously, with a view to undermine the confidential nature of the production files and drawings passed through Chiu and to limit her role in the coordination of the manufacturing process, the Defendants tried to say that Ye did not require any design drawings to produce the tricycle products.

74. I agree with Mr Wong that the Defendants' case in this regard is inherently improbable and contrary to common sense. The design drawings for the Plaintiffs' products produced to the court are very detailed, containing specifications, dimensions, angles, and also instructions on assembly. It is difficult to see how Ye could have assembled the Plaintiffs' products without having any of the design drawings. As explained by Yoram, it was necessary for any manufacturer to have the full production files (including the design drawings) for the purpose of assembling the Plaintiffs products, which only accords with common sense. Further, design drawings were needed for the purpose of improving or replacing the moulds of the Plaintiffs' products. Indeed, Ye's own evidence is that he was provided with some design drawings of ST 157, which assisted him with making improvements on the moulds in a more efficient manner. It does not make sense for Ye to maintain that he was somehow provided with only limited design drawings of ST 157, and that he did not receive the full set of design drawings for the Plaintiffs' products (including ST 126 and ST 129) with the production files. Indeed, there is no reason for the Plaintiffs to have withheld the design drawings from Ye when Ye was manufacturing the tricycle products for the Plaintiffs.

75. Ye also confirmed that during his first meeting with Yoram, the parties reached an understanding that Ye would not manufacture any tricycles for the competitors of the Plaintiffs' Tricycle Business. Further, Yoram conveyed to Ye that no unauthorised personnel shall be permitted to enter the production factories.

76. Since the scale of the Tricycle Business became larger, Yoram incorporated STL on 12 December 2007.

77. It is the Plaintiffs' case that Choi (who had experience in accounting work) and another accountant recommended Yoram to incorporate a company for his Tricycle Business in order to reduce the risk of running the business under a sole proprietorship. Since Yoram trusted Choi and his experience, Yoram proceeded to incorporate STL for the purpose of operating the Tricycle Business.

78. On 13 March 2008, Yoram appointed and nominated Chiu as his director on the board of STL. On the same day, Yoram appointed Chiu as his trustee to hold 49% of the shareholding of STL on his behalf. Though Yoram might be the beneficial owner of STL (or even later STML) and the whole arrangement might attract certain tax benefit, such appointment further reinforces the substantial trust and confidence which Yoram had placed on Chiu. It is also fair to say that, under such circumstances, Yoram would have had a legitimate expectation that Chiu would act in his best interests and that of the Tricycle Business (in Yoram's words, as a " *close partner* ").

79. In the exercise of her powers as STL's director, Chiu signed a board resolution (as the "Chairman" of the board) authorizing the company to open an account with Industrial and Commercial Bank of China ("the ICBC Account") on 20 May 2008. The ICBC Account was used to hold the funds of STL, including the monies of and payments received by the Tricycle Business. Further, Chiu and Choi were appointed as the only two signatories to STL's ICBC Account and either of them could make withdrawals from the account. Yoram was not even a bank signatory himself. From time to time, the ICBC Account held substantial amounts of funds belonging to STL or Yoram. For instance, the ICBC Account held more than HK$21 million and HK$26 million in January and

February 2009 respectively. Based on these undisputable facts, it is fair to say that Yoram had fully trusted Chiu (and Choi) to take control of STL's finances, and that he was also dependent on and vulnerable towards them at the time.

80. At the time of STL's incorporation, Yoram's business included the production and sale of ST 129 and ST 126. Later in around October 2009, ST 157 was introduced into the market, and there is no dispute that Yoram further engaged Ye's Companies to manufacture ST 157. By 2007 to 2009, Ye was aware that Yoram's business was improving and had attracted some big European clients, and hence Ye ensured that his factories passed various European tests and standards. Though there was another contractor Tetro, by the end of 2000s, Yoram had substantially relied on Ye's Companies to manufacture the Plaintiffs' products.

81. On 16 December 2009, Yoram further incorporated another company, STML, for the Tricycle Business. According to Yoram, STML was established for two reasons: (i) at the time, Yoram was concerned that the then marital problems between Chiu and Choi might adversely affect the Tricycle Business; and (ii) following a tax pre-ruling in Israel, Yoram was advised that it would be more appropriate for a new company to be set up in Singapore with proper corporate governance structures.

82. Chiu was appointed the Vice President (Operation) of STML upon its incorporation in December 2009. Chiu confirmed in the STML's bank account opening form that she was the "Manager" of STML.

83. It is not in dispute that Chiu was appointed as the sole signatory of one of STML's HSBC accounts ("the HSBC Account"), which was set up to hold the funds and monies of the Tricycle Business to meet its daily operations. By contrast, even the two directors of STML were not expressly authorised to operate the account. It is also clear from the bank statements of the HSBC Account that: (i) Chiu continued to have access and control over STML's funds; and (ii) Chiu was also trusted by the Plaintiffs to make payments for and on behalf of the Tricycle Business. For instance, as shown in the monthly statement ending 28 January 2011, the HSBC Account had a balance of HK$449,833.15. During that month alone, Chiu had made 92 withdrawals in Hong Kong currency and 15 withdrawals in United States currency for the Tricycle Business.

84. It is not in dispute that from 2004 to around 2009, Chiu *via* the Golden Pride Companies provided services for the Plaintiffs' Tricycle Business. Upon the establishment of STML in late 2009, Yoram (upon the accountant's advice according to him) wanted to ensure that the arrangements relating to STML's affairs be reduced into writing. Chiu then introduced another corporate entity, Capital Key, to continue to provide the services for the Plaintiffs in place of Golden Pride. Thereafter, Capital Key (with the same staff) provided the same services as Golden Pride for the Plaintiffs' Tricycle Business.

85. On 12 January 2010, Capital Key entered into the "Management and Administrative Agreement" with STML. Subsequently on 31 May 2012, Capital Key and STML entered into a further "Management and Administrative Agreement" which was signed by Choi on behalf of Capital Key. I refer these two agreements collectively as "the Management Agreements".

86. There is a non-competition clause in both Management Agreements. [5] There is dispute between the parties about the enforceability of the non-competition clause under Singapore law which is the governing law of the Management Agreements. I will resolve the dispute in the latter part of this Judgment, but I agree with Mr Wong that such clause reflects and reinforces the existence of the fiduciary relationship between the parties. It demonstrates that Chiu (together with Choi and Capital Key) well understood and agreed that they were not entitled to engage in any competing business with the Plaintiffs' Tricycle Business.

87. Choi and Loretta were at all material times the shareholders and directors of Capital Key. According to Mr Wong, Chiu had chosen to use Capital Key (a corporate entity of which she was neither a shareholder nor director) to enter into the Management Agreements with STML with a view of avoiding her potential liability under the non-competition clause. I do not find it necessary to resolve this particular issue. No matter what was the real purpose for using Capital Key to enter into the Management Agreements, Chiu, Choi and Capital Key itself should have known that it was not proper for them to engage in business which was in competition with the Tricycle Business.

FACTUAL ISSUES II: CHIU'S ROLE AND RESPONSIBILITIES IN RESPECT OF THE TRICYCLE BUSINESS

88. It has all along been the Plaintiffs' contention that Chiu had undertaken extensive role and responsibilities for the Plaintiffs and acted as the Plaintiffs' agent and representative, as well as exercised a wide range of managerial and administrative powers on behalf of the Plaintiffs. Chiu had therefore undertaken to act in the interests of the Plaintiffs in a relationship of trust and confidence, and Chiu had assumed or would owe fiduciary duties to the Plaintiffs. On the other hand, the Defendants are maintaining that Chiu's role in the Tricycle Business was " *limited* " confining to the provision of shipping and translation services. According to them, the Plaintiffs have provided a distorted and exaggerated account about Chiu's role and responsibilities.

89. In the latter part of this Judgment, I will discuss whether the court should impose fiduciary duties on the part of the Defendants. In this section, I will resolve the factual issues concerned, in particular the role of Chiu in the operation of the Tricycle Business.

90. Chiu maintained that the services provided by her to the Tricycle Business were limited to shipping and translation services, and there was only an "arm-length relationship" between the parties. This is far from the truth. It may be true that there was a special team in Israel responsible for sales and marketing of the Tricycle Business and that Yoram, Dafna and Anat might have actively engaged in its operation making some of the important business decisions. Yet Chiu played a significant part in the

operation of the Tricycle Business. Further, Yoram and the other Plaintiffs placed substantial trust and confidence on Chiu, which was essential for the Tricycle Business to operate in Hong Kong without the continuing presence of Yoram.

91. These can be reflected in Chiu's role and responsibilities in the following aspects about the operation of the Tricycle Business.

(i) The control and power over the finances of the Tricycle Business

92. An important aspect of Chiu's role and responsibilities for the Tricycle Business was to manage the ICBC Account and the HSBC Account, which held substantial funds for the operation of the Tricycle Business. It is clear that Chiu had control and power over the finances of the Tricycle Business. I have already mentioned above as to how Chiu and Choi became the signatories of the ICBC Account and Chiu became the signatory of the HSBC Account. Though they might have to follow the instructions of the Plaintiffs in using the funds in these accounts, one cannot ignore the facts that there were given complete *de facto* control over these bank accounts and Yoram was entirely dependent on and vulnerable towards them with respect to the finances of the Tricycle Business.

93. It is plain that Chiu had exercised powers in large numbers of withdrawals each and every month: (i) in March 2009, there were over 70 withdrawals from the ICBC Account; and (ii) in April 2009, there were over 100 withdrawals. These withdrawals covered a wide range of payments, including payments to Ye's Companies and other entitles for the production of tricycles, samples and moulds, payments to staff members of Yoram's companies, payments for the testing costs of the Plaintiff's products, payments for design fees, commissions, magazines publications and public relation fees and postal charges. [6]

94. The Defendants suggest that "each and every payment" required Yoram's prior approval, and that Chiu and Choi just did what they were told to do by the Plaintiffs. However, in view of the huge volume of withdrawals and the wide range of payments involved, such assertion does not make a lot of common or business sense. How could Yoram be in a position to dictate and micro-manage how Chiu would use the funds in the accounts? Furthermore, if the Defendants' allegation were true, one would expect that there should have been volumes of documents evidencing Yoram's prior consent or approvals, and yet none has been produced to substantiate such allegation. On the contrary, there is evidence to support that Chiu made certain payments without consulting the Plaintiffs first. [7]

95. Hence, I accept that Chiu and Choi, as part of their managerial roles and functions for the Tricycle Business, routinely made payments and withdrawals on behalf of the Plaintiffs. The Plaintiffs were dependent upon and vulnerable towards them to look after the Plaintiffs' interests with respect to the finances of the Tricycle Business. That was also why Yoram and Dafna would occasionally call them to inquire about the balances in the bank accounts.

(ii) Chiu's managerial role relating to manufacturing and supply of the products of the Tricycle Business

96. Mr Wong is right in pointing out that Chiu's role and functions extend to a wide range of the affairs of the Tricycle Business.

97. First, the Fu Yu Agreement set out the basis of the cooperation arrangement between the parties, which provided the role of Chiu and Golden Pride for the business including coordinating production, manufacturing, shipment and delivery. Further, Chiu was provided with confidential information of the Plaintiffs including the Confidential Drawings and the Confidential Customers Information.

98. Second, Chiu was the main contact person on behalf of Smart Trike with Ye's Companies in the Mainland. In particular, all of Shunde Zhenhao's invoices relating to the production of samples and moulds were addressed to Chiu expressly on behalf of Smart Trike (or previously, Smart Baby Toys).

99. Third, there is no dispute that Chiu was authorised to make payments to Ye's Companies on behalf of the Tricycle Business. According to Chiu's evidence, the employees of Golden Pride would prepare an excel spreadsheet titled " *Already Load Invoice* " showing breakdowns of customers' names and amounts to be paid to Ye's Companies on a monthly basis, which contained the Plaintiffs' Confidential Customers Information.

100. Fourth, Chiu also exercised her managerial role in conducting negotiations for contractual arrangements on behalf of the Plaintiffs. It is not in dispute that Chiu had typed the blue text on the written Working Agreement entered between Smart Trike and Ye in or around July 2010 ("the Working Agreement"), which recorded Ye's position in the negotiation process. The Working Agreement involved the provision of a loan of €1 million from Smart Trike to Ye. Chiu admitted that she was involved in the negotiation of this agreement as both sides had confidence in her and the agreement involved the provision of a substantial loan. This clearly shows that Chiu's role and duties were not limited to shipping and translation works.

101. Fifth, it is not in dispute that Chiu was responsible to oversee and liaise with Ye on the production plan and schedules for the Plaintiffs' products which, according to Chiu, involved a complicated process since different products had different production cycles. Though Chiu may not be a technician herself, she had good connections and working relationships with the Mainland factories. Chiu had to ensure that the production of the Plaintiffs' products was smooth and on schedule. On some occasions, Chiu had to act as a mediator between Ye and the Plaintiffs' staff in order to resolve their disagreements on matters such as production and shipping schedules.

102. Sixth, the evidence shows that Chiu acted on behalf of the Plaintiffs in conducting negotiations relating to the production of moulds. [8]

103. Seventh, Chiu's managerial role for Smart Trike extended to the sourcing of fabrics and arranging the same for supply to Ye's factories for production. [9] Chiu tried to say that it was "Ella" from the Plaintiffs who handled the sourcing of fabrics, but such allegation does not sit well with the contents of the email dated 12 October 2012, which expressly mentioned that Ella was handling the matter on behalf of Chiu. Further, the said email was sent from Ella's Golden Pride email address, and Eran Blizovsky of Smart Trike expressly told Chiu in her email dated 5 November 2012 that Ella was not on Smart Trike's payroll and she specifically requested Chiu to pay for all other personnel's salary except Ella's. In fact, " *Ella for Susanna* " also managed and handled payments from Golden Pride's HSBC bank account. This would be inexplicable if Ella was an employee of Smart Trike.

104. Even if, as contended for by the Defendants, Ella was technically an employee of the Plaintiffs with salary paid by them, it does not alter the fact that Yoram placed considerable trust on Chiu in assisting the Plaintiffs to hire such "employee". The evidence also supports that there was a close working relationship between Ella and Chiu and the role of the latter should not have been limited to the provision of only administrative and logistics services.

105. Eighth, Chiu's managerial role for the Plaintiffs' Tricycle Business also extended to dealing with issues of product quality including testing and inspection of the Plaintiffs' products. Chiu was named as the contact person and representative of Smart Trike in some of the inspection documents. Further, there were instances when there were issues arising from the inspection of products, Smart Trike's staff members would seek guidance from Chiu [10] , and Chiu also advised the Plaintiffs relating to their products and related quality issues [11] . This is certainly inconsistent with Chiu's allegation that her role was only limited to the provision of shipping and translation services.

106. Ninth, it is not in dispute that Chiu would also visit Ye's factories in the Mainland on behalf of Yoram, and Chiu would seek reimbursement for all the related expenses from Yoram. Chiu also accepted that if there was anything " *unexpected* " happening, she would visit Ye's factories to sort the matters out. The evidence shows that Choi accompanied Chiu in some of these visits.

107. Tenth, the works provided by Chiu for the Tricycle Business are also consistent with the terms in the Management Agreements, which provided that Capital Key had to provide "management and administrative services" for STML and not just limited to shipping or translation services.

108. In an attempt to minimize her role in the management of the Tricycle Business, the Defendants seek to argue that: (i) Mo was involved in supervising the production at the initial stage; and (ii) Mr Harisan Lior ("Harisan") (presumably as opposed to Chiu) was Yoram's " *own eyes* " in the factories at the later stage. Even if it were true, it does not affect that Chiu and Choi played a significant role in the management of the Tricycle Business and that the Plaintiffs placed considerable trust and confidence on them in the operation of such business.

109. In respect of the managerial role of Chiu, there are also issues as to: (i) Whether Chiu was responsible for introducing Fu Yu or Ye to the Plaintiffs? (ii) Whether Chiu was responsible for signing contracts on the Plaintiffs' behalf? (iii) Whether Chiu was responsible for sales?

110. Ms Tam submits that as Yoram (or through his brother) knew Fu Yu and Mo before 2004, it was unlikely that Fu Yu or Ye was introduced to Yoram by Chiu. The parallel production of the Plaintiffs' products at Tetro also shows that Yoram had his own contacts with the Mainland factories. Further, as the Plaintiffs had a special team in Israel responsible for sales and marketing, it is a gross exaggeration for Yoram to say that Chiu was the Plaintiffs' agent and representative in various parts of the world. According to Ms Tam, Yoram was evasive when he was cross-examined on such issue and he had made up a lie in cross-examination that Chiu was in charge of sales in Hong Kong.

111. I do not accept that any of these challenges would undermine the credibility of the Plaintiffs' case. On the contrary, Yoram was frank in his oral testimony in clarifying the role of Chiu in the management of the Tricycle Business. From the evidence, it is clear that Chiu had good contacts with various factories in the Mainland for the production of toy tricycles, otherwise Chiu would have signed the Fu Yu Agreement whether on her own behalf or on behalf of Smart Trike. Even if Yoram might have known Mo or Ye before, there is reason for the court to believe that Yoram could not have developed a good working relationship with Mo or Ye without the assistance of Chiu. The fact that Chiu signed on the Fu Yu Agreement speaks volume about her substantial role in the operation of the Tricycle Business.

112. Further, though there was a special marketing team in Israel, Chiu was responsible for a lot of the other works as mentioned above. As the Plaintiffs were not based in Hong Kong and a lot of works for the Tricycle Business had to be done here, the Plaintiffs had to rely on Chiu to perform some important works, such as troubleshooting, liaison and finance management works. Chiu sometimes had to carry out sourcing works and sales works (for Hong Kong) as well. Under such circumstances, it is not an exaggeration for Yoram to describe Chiu as the Plaintiffs' agent and representative. Indeed, Chiu had to liaise with the Plaintiffs' customers all over the world.

(iii) Chiu's managerial role relating to shipping matters

113. It has all along been the Defendants' contention that Chiu was only involved in the provision of shipping and other insignificant services to the Plaintiffs and that the shipping services were only logistical and administrative in nature. Further, there were other staffs in the Plaintiffs' team in Israel responsible for supervising the shipping arrangements.

114. However, one cannot ignore the facts that: (i) the production of the Plaintiffs' products took place in the Mainland; and (ii) the shipment of these products had to be coordinated through Hong Kong. It was therefore an important duty on the part of Chiu to ensure that the Plaintiffs' products were delivered on time in accordance with the customers' requirements. There is also considerable evidence to show that Chiu was personally involved in managing and coordinating the shipping arrangements of the Plaintiffs' products, and she made managerial or business decisions in the process. [12] Chiu also assisted in liaising with the factories to ensure that the shipments were on schedule. [13] I do not think that these works could be done in the remote office in Israel.

115. Insofar as Fong's evidence on this subject is concerned, I have already explained in the earlier part of this Judgment as to why her evidence is of limited assistance in this case. [14]

(iv) Receipt of Confidential Customers Information

116. It cannot be seriously disputed that, in the course of discharging the aforesaid managerial duties, Chiu and Choi received considerable Confidential Customers Information relating to the Tricycle Business, including the identity of the Plaintiffs' customers, the prices they paid and the quantities they ordered for the Plaintiffs' products. The fact that Yoram and the other Plaintiffs permitted them to have access to such sensitive confidential commercial information clearly shows that the Plaintiffs placed considerable trust and confidence on them and they were very much dependent upon and vulnerable towards Chiu and Choi for acting in the best interest of the Plaintiffs.

117. In trying to deny the receipt of the Confidential Customers Information, the Defendants contend that the full names and addresses of the customers were somehow not necessary for arranging shipment. However, Fong confirmed in her oral testimony that she did receive full names and addresses for the purpose of handling shipment, and that such information would be necessary when a booking was made with the shipping company. Further, if the Plaintiffs were prepared to let Chiu and Choi to handle the finances of the Tricycle Business and to obtain the production files for the Plaintiffs' products, there is no reason why the Plaintiffs did not allow Chiu and Choi to possess such information for the purpose of arranging shipment.

118. For these reasons, insofar as the factual issues relating to Chiu's role and responsibilities in the operation of the Tricycle Business, I prefer to accept the evidence of Yoram on these issues.

FACTUAL ISSUES III: THE DEFENDANTS' COMPETING BUSINESS

119. I then deal with the third group of factual issues which relate to the Defendants' competing business.

(i) The sale of "202SP3" as early as October 2008

120. The Defendants confirmed that Global Wise first offered for sale the model 202SP3 in the Canton Fair in October 2008. Since the Plaintiffs' claim is not based on copyright infringement, it is not necessary for me to determine whether these products were copies of the Plaintiffs' copyright work. For the Plaintiffs' existing claim, it suffices for me to say that there was substantial similarity between the Plaintiffs' ST 129 (Metal) and the Defendants' 202SP3, which made the latter a competing product vis-à-vis the Plaintiffs' Tricycle Business.

121. In trying to explain this episode, Chiu claimed that Global Wise was not incorporated in October 2009 and the corporate entity which offered for sale 202SP3 in the Canton Fair was GP China. In any event, Chiu agreed that she and Choi jointly decided to offer 202SP3 for sale in the Canton Fair, and such products were sourced from Ye through GP China.

(ii) The incorporation of Global Wise in early 2009

122. After the incorporation of Global Wise on 9 January 2009, there is no serious dispute that Global Wise became the main corporate entity used by Chiu and Choi to conduct the business of selling similar tricycle products.

123. There is also no dispute that Ye (through his company Bill Kee [15]) supplied tricycle products (including models 202SP3, 2029021, 908016, 9032, 90313 and "Baby Trikes"/"Feber") to Global Wise, and Chiu and Choi (*via* Global Wise) then sold these tricycle products on the market. These products were similar to those of the Plaintiffs, and undoubtedly, in direct competition with the Plaintiffs' products.

124. There was also an investigation in the trial as to who was responsible for the operation of Global Wise, as one Ms Fan Ngai Shan ("Fan") is and was the sole shareholder and director of Global Wise. As Chiu admitted that she and Choi were the true beneficial owners of Global Wise and they made use of this corporate vehicle to engage in the business of merchandizing children bicycle and tricycle products, it would be quite sufficient for the purpose of the present claim. Though the Plaintiffs may have a

strong case on this, I do not find it necessary to determine whether the whole arrangement (i.e. by making Fan the sole director and shareholder of Global Wise) was made for the purpose of concealing the interests of Chiu and Choi in the competing business.

(iii) Global Wise's participation in toy fairs and sale of competing products from early 2009

125. The undisputed evidence is that Global Wise participated in various toy fair since early 2009:

(i) the Hong Kong Fairs in January of 2009, 2010, 2011 and 2012;
(ii) the Canton Fairs in April and October of 2009, 2010 and 2011;
(iii) the Nuremberg Fairs in February 2010 and January to February 2013;
(iv) the Germany Cologne Fair in May 2011; and
(v) another fair of an undisclosed venue in November 2014.

126. There is ample evidence, including Global Wise's own contemporaneous notes in the notebooks and name cards, to show that Chiu and Global Wise had approached and solicited the Plaintiffs' clients during these fairs. These clients included, *inter alia*, Mookie, Marko, Ardh Alemar and TRU France. In Annexes 1 and 2 of Mr Wong's final submissions, he has respectively set out in some details: (i) the references to the Plaintiffs in the name-cards collected and the notebooks recording the contacts in the trade fairs (which supports that both the Plaintiffs and Global Wise were selling similar and competing products); and (ii) the Plaintiffs' customers approached by Global Wise during trade fairs between 2009 to 2013.

127. As Golden Pride had assisted the Plaintiffs in handling shipping arrangements, Chiu and therefore Global Wise must have known that those were then customers of the Plaintiffs. Even worse, some of these customers (including Ardh Alemar and TRU Frances) had compared Global Wise's products with those offered by the Plaintiffs, whether by reference to quality or price or both. As Global Wise (through Chiu) knew about all the sensitive and confidential information about the Plaintiffs' products, customers and prices, Global Wise would have been in an advantage position to solicit such orders.

128. Chiu, in her testimony, tried to hide her disloyalty by saying that she had no regard to the prices offered by her competitors. This is simply contrary to any commercial or common sense. Indeed, as Chiu had admitted during cross-examination, Global Wise's staff would do market research by visiting the websites of potential customers and competitors and to check the tricycles merchandized by them. It is self-evidently advantageous for the Defendants to compete on the same market, equipped with the confidential pricing information of their competitors including the Plaintiffs.

129. Indeed, customers attending the toy fairs found the products offered for sale by the Plaintiffs and Global Wise to be confusingly similar, which is reflected in a number of remarks made by the potential customers in the notebooks kept by Global Wise. [16] It would be impossible for Global Wise, Chiu and Choi to say that they were not competing with the Plaintiffs in an unfair way.

130. It is also clear from the evidence that Global Wise approached the Plaintiffs' customers, Darpeje and J&E, in 2011 to 2012. [17] By that time, Chiu and Global Wise knew full well that they were then customers of the Plaintiffs.

(iv) Meeting between Chiu, Ye and other persons to commence a competing business on 18 February 2012

131. It is not in dispute that Chiu, Ye, Harisan, and Einav had a meeting on 18 February 2012 (i.e. the February 2012 Meeting).

132. The contents of the discussions at the February 2012 Meeting were recorded in a contemporaneous meeting note (i.e. the Meeting Note). Einav's evidence is that he prepared the English version of the note to summarise the discussions around two days after the meeting, and Einav sent the same to Chiu by email.

133. According to the Meeting Note, the relevant parties would set up a company engaging in the production of children bicycles, tricycles and ride-ons (the products were described as "Bicycle" [18], "Full Bicycles" [19], "Alien bike" [20] and "Suitcase" [21]). Further, it listed out, *inter alia*, the agreement between the parties relating to the division of shares and the respective responsibilities of the parties in the operation of the joint venture. It also mentioned the negotiation of the price of the products with Mr Robert Kramer ("Kramer") who was the Plaintiffs' agent in the United States.

134. The Defendants' witnesses testified that the February 2012 Meeting lasted for one to two hours in Ye's factory, and that Chiu had come over from Guangzhou to attend the meeting. It is not disputed that the attendees discussed how to market the products of their joint venture business in the meeting.

135. In Chiu's and Einav' witness statements, they claimed that the attendees of the meeting intended to start their new joint venture business after the termination of their " *business relationships* " with the Plaintiffs. I agree with the observation made by Mr Wong that this shows that they were fully aware they were not entitled to compete with the Plaintiffs whilst their relationships with the Plaintiffs subsisted.

136. In their oral testimony, Chiu and Einav made an attempt to clarify their evidence by saying that they would start their business after the termination of only Harisan's relationship with the Plaintiffs. However, if that was the case, why would they have used the

terms " *we* " and " *our* " in describing the ending of their business relationships with the Plaintiffs? Further, Chiu was fully aware that Harisan was only an employee of Smart Trike. It is odd for them to have used the term " *business relationship* " in describing the alleged relationship between the Plaintiffs and Harisan. Hence, there is certainly weight in Mr Wong's submission that this was a last minute attempt by them to reduce the damage resulting from the observation made by him as stated in the preceding paragraph.

(v) The contact with and the involvement of Kramer in the competing business in the period from March to May 2012

137. There is also no serious dispute that the attendees of the February 2012 Meeting sought to get Kramer, the Plaintiffs' agent in the United States, involved in their new competing business. Chiu was aware that Kramer was introduced to be an agent of Yoram on the introduction by Einav. Einav also confirmed during cross-examination that while he could not remember precisely if he had explained to the others Kramer's relationship with Yoram, it would have been "r *easonable* " for him to have done so.

138. In the Meeting Note, it was mentioned that they would " *close the price* " with Kramer in the United States. After the February 2012 Meeting, there was email correspondence between the attendees mentioning about a visit by Kramer to the Mainland on 17 April 2012 and making use of such opportunity for them to discuss with Kramer about the latter's participation in their new business, and Choi was specifically invited to participate in the meeting with Kramer. There is no serious dispute that relationship between Kramer and Yoram had already turned sour at the time. Indeed in a reply email from Harisan to Ye, Chiu and Einav dated 29 March 2012, Harisan specifically reminded them to ensure that that Mr Haim Shmueli ("Haim"), who was an employee of Smart Trike, would not be present in the Mainland factories during Kramer's visit. Such email clearly demonstrates that the proposed participants in the competing joint venture business were well aware that their intended activities were wrongful and harmful to the Plaintiffs' interests, such that they attempted to conceal the plan from the employees of the Plaintiffs.

139. With such piece of damaging evidence, the Defendants' witnesses tried to give some explanations but none of them is satisfactory. Chiu attempted to claim that she did not know who Haim was. This cannot be true as she had twice made references to Haim in two emails to Anat in November 2012. Einav tried to explain away the email by stating that this was Harisan being " *paranoid* ", but this cannot explain why he was minded to ensure that Haim would not be around during Kramer's visit. Ye's attempted explanation is that as Haim was somehow attending the Canton Fair in April, Harisan was trying to make sure that the schedule did not overlap. This excuse makes no sense at all, as it does not explain why the parties wanted to ensure that Haim would not be in the factories at the time of Kramer's visit. Chiu and Ye also tried to use language barrier to say that they might not understand all the things discussed in the February 2012 Meeting and that Ye did not know the relationship between Smart Trike and Kramer. In my judgment, these are only excuses given by them with a view to exonerate their responsibility. They are both sophisticated businesspersons. It would be too naïve to say that they did not understand what was going on by that time.

140. During the visit by Kramer, there is no dispute that Ye showed some samples and products to Kramer. After the visit, Kramer placed orders for samples under the name "MY Trikes", including samples with model number "MT 30" and "MT 40". Einav's evidence is that he provided the samples as he was merely voluntarily " *helping his friend* ". I do not accept his evidence in this regard. In fact, Einav agreed that he knew MT 30 was to be sold under "My Trike". It is quite clear that the samples were provided to Kramer for the purpose of advancing the competing business.

141. By May to June 2012, Kramer further set up a business under the registered trade name "MY Trike" trading as MY Trike. Its website shows that Kramer had been selling the competing tricycle products in the United States. It is also indisputable that MT 30 was very similar in design with: (i) 903 manufactured by Global Wise; and (ii) ST 179 of Smart Trike. In fact, Ye confirmed that MT 30 and 903 were both manufactured by Ye's factories.

142. Though Chiu was not present in the visit by Kramer, it would be quite unarguable for her to deny knowledge of the visit or the purpose of the visit. First, she was present in the February 2012 Meeting. Second, her name was listed as a recipient of the various email correspondence relating to Kramer's visit. Third, in Harisan's email to Einav on 8 May 2012, Harisan inquired as to whether Einav had talked with Chiu as previously discussed, as well as the progress of " *the other project* ". According to Einav, Harisan had sent the said email because he was concerned about the progress of the cooperation between the participants of the competing venture. I agree with Mr Wong's observation that the said email demonstrates that Einav had provided updates to Chiu regarding the competing business.

(vi) The provision of the safety testing report for 903 in April 2012

143. The contemporaneous evidence also shows that Chiu or the Defendants, through Global Wise, commissioned a testing report with Intertek for 903 (which is very similar to the Plaintiffs' ST 179) dated 1 April 2012 ("the Testing Report"). The safety test in the Testing Report failed because of problems arising from the length of the seatbelt.

144. There is no dispute that 903 had been sold by Global Wise. According to Chiu, it was Ye who sought Global Wise's help for the purpose of commissioning Intertek to deal with testing of his products in Hong Kong. This was also confirmed by Ye. The Testing Report was addressed to Global Wise with attention to " *Kenneth* ". Chiu confirmed that the Testing Report would have been passed to Ye since 903 was produced by his factory.

145. The failed Testing Report led to subsequent email correspondence between Ye, Harisan and Einav. The point to note here is that there is no reason why they were involved with the testing of 903 of Global Wise. I agree with Mr Wong that such episode shows the said parties had used Global Wise as the corporate entity to engage in the competing business.

146. I also find that the explanations given by the Defendants' witnesses in respect of the Testing Report incredible. For Einav, he claimed that he could not even remember whether Harisan had sent him the report in the first place. This is of course unbelievable, since Einav was the one who claimed that the Testing Report had been retrieved without his permission from his computer. For Ye, he claimed that it was Harisan who requested a US-standard test report (美標報告) from Ye, and that somehow it was Ye who gave Harisan a part of the failed Testing Report for 903. According to Ye, Intertek accepted his claim that the test for "rope" was different from the test for "belts". But for some inexplicable reason, Ye still asked for a report of "ZOO" (i.e. ST 157) nevertheless. Indeed, Ye's purported "explanation" is contradicted by the email correspondence. Ye's email dated 11 April 2012 shows that it was Ye who asked Harisan for a report, in order to show the laboratory that the safety belt of 903 was safe. The subsequent emails further show that Harisan and Einav were discussing the way to rectify the problem and to pass the test. Facing such problem, Ye eventually accepted what was plainly stated in the email, namely that it was Ye who asked Harisan if there were any similar products or reports which showed that the treatments of "ropes" and "belts" were different, so as to convince Intertek that 903 was safe. Ye also claimed that Harisan never provided him with the report.

147. It is clear to me that the Defendants had attempted to use the Plaintiffs' ST 157 in order to resolve the safety issue of 903, i.e. to speed up the process of obtaining approval. I agree with Mr Wong that this shows that the design and safety features of ST 157 were so similar to 903, such that they could be copied or used interchangeably for the purpose of the safety test. Further, Harisan only ceased employment with the Plaintiffs in December 2012. Hence, even on the Defendants' case that they were intending to start their business venture after Harisan had ended his relationship with the Plaintiffs, it is clear that they had already set up and began their competing venture well before then (as of at least April 2012).

(vii) The meeting between Yoram and Chiu in October 2012

148. According to the Plaintiffs, they became aware of a competitor known as "Global Wise Limited" marketing and selling substantially similar tricycles upon the information given by Ilan Kabalo of Darpeje to Yoram. Ilan Kabalo informed Yoram that Darpeje had received an email dated 30 November 2011 from Global Wise, by which Global Wise invited Darpeje to attend the Hong Kong Fair in January 2012, and supplied it with a quotation featuring tricycles very similar to those sold by the Plaintiffs. Further, the Plaintiffs' then Austrian client, Hofer, suddenly stopped business with STML in mid-2012. Instead, Hofer started purchasing children's tricycles substantially similar to those produced by the Plaintiffs from Global Wise.

149. Subsequently in 2012, Yoram engaged a private investigator to look into the business of "Global Wise Limited", and it uncovered that "Global Wise Limited" had links with Chiu, Choi and Loretta. He then proceeded to confront Chiu at a meeting on 14 October 2012 (i.e. the October 2012 Meeting) with respect to her competing business activities through Global Wise.

150. There is no dispute that the October 2012 Meeting did take place, but Yoram and Chiu gave different versions about what happened in that meeting.

151. According to Yoram, Chiu made the following admissions in the meeting:

(i) Chiu was part of a "conspiracy" to divert business away from the Plaintiffs' Tricycle Business. Chiu also told Yoram about the other participants (including Choi) of the competing venture.

(ii) The competing venture planned to manufacture, market, and sell tricycles which were identical or largely similar to the Plaintiffs' products.

(iii) The competing products were directly marketed to the Plaintiffs' clients through distribution channels set up by the Tricycle Business, and that Global Wise was one of the corporate vehicles by which the competing venture carried out their business.

152. Chiu agreed that, having confronted by Yoram, she admitted that she had through Global Wise sold tricycles manufactured by Ye to a Hong Kong company known as "Hudora", which in turn resold the tricycles to Hofer. As shown by Hudora's name-card collected from the 2010 Nuremberg Fair with the marking " *SM* " (referring to the Plaintiffs), it is clear that Chiu was aware Hudora was a customer of Smart Trike. Chiu also confirmed that before the October 2012 Meeting, she had not disclosed that: (i) she was operating Global Wise as a competing business selling trikes: and (ii) some of Global Wise's customers were also the customers of the Plaintiffs.

153. Chiu agreed that she made an apology to Yoram at the October 2012 Meeting. However, she denied that she had done anything wrong and she apologized only to comfort Yoram who was very unhappy by that time.

154. According to Yoram, there was then a break in the meeting since some customers arrived at his showroom. They later resumed their meeting in Chiu's office, at which time Yoram asked Chiu to show him Einav's emails relating to the competing venture. Upon Yoram's request, Chiu copied all of the emails into his memory stick, and amongst the documents copied were: (i) the Meeting Note (both in Hebrew and English): (ii) the Testing Report; and (iii) the internal communications between Einav, Harisan, and Kramer. Yoram then passed on the memory stick to Anat for further analysis (collectively "the Disclosed Documents").

155. Einav claimed that the Meeting Note and the Testing Report had been "stolen" from him. However, since there is no issue about the authenticity of these documents, the way through which Yoram obtained the said documents is very much a non-issue. In any event, I have great reservation about the truth of Einav's allegation by reason of the following observations:

(i) Einav referred to a chat-room record purportedly showing that an unidentified employee of STML (who addressed himself or herself as "Angle") using the email address "oritmelech64@gmail.com" to communicate with his wife Shira. In his oral evidence, Einav confirmed that "Angle" contacted Shira in May 2012. Einav, however, failed to produce any email correspondence before late June 2012 to show these contents and could not explain why he could not do so. Further, the email correspondence did not show that "Angle" had told Einav that Yoram had stolen the documents from him. While Einav claimed that "Angle" conveyed the aforementioned information to him in a private chat room, Einav failed to produce any photographs or screenshots of the parties' alleged discussions.

(ii) While Einav alleged that that the original copy of the Meeting Note was torn off from his notebook, Einav failed to produce the notebook in evidence, or even a simple photograph showing that the pages were torn off.

(iii) There is no documentary evidence showing that Einav had contacted the police in Israel about the alleged theft from his computer.

(iv) Taking into account the stake involved, Einav's allegation that he did not check with the " *computer expert company* " to verify his allegation of theft because " *cost would be significant* " is quite unbelievable. Further, it is also absurd for Einav to say that it did not occur to him that he could have asked Chiu to bear such costs, and for Chiu to say that she did not offer to pay such costs for Einav, when both of them are so adamant that the said documents were "stolen" from Einav's computer.

156. As to the last category of the Disclosed Documents (i.e. internal communications between Einav, Harisan and Kramer [22]), Einav had never alleged in his witness statements that these email communications were "stolen" from his computer. The contents of the email correspondence supports the case that Einav had provided copies of the relevant emails to Chiu as part of his updates to Chiu on the competing venture and Yoram in turn obtained these emails from Chiu at her office.

157. Ms Tam submits that Yoram's evidence relating to how he obtained the Disclosed Documents should be rejected. First, there is confusion in Yoram's evidence as to how he obtained the Disclosed Documents, as Chiu did not own a portable computer by that time and she was a "computer idiot" not knowing how to operate one. Second, Yoram could not have obtained some of the email correspondence as Chiu was not a party to such correspondence. Third, the Meeting Note was written in Hebrew which Chiu did not understand, and there is no evidence to show that it was attached to any email sent to Chiu. Ms Tam also submits that it does not make sense for Chiu to have mentioned Einav or Harisan in her "confession", and there is confusion in Yoram's testimony when he was confronted on such issue during cross-examination.

158. I do not accept these submissions. First, I am not surprised by the details revealed by Chiu in the October 2012 Meeting. It might well be the case that some degree of honesty might salvage the relationship between the parties. Second, Yoram had made a detailed clarification as to how he obtained the Disclosed Documents from Chiu's computer. It is also quite unbelievable that Chiu, being a sophisticated businesswoman, would not have been able to switch on her computer and read the emails. Third, I am not surprised that Chiu had in her computer some of the emails of which she was not expressly listed as a recipient, as there is some indication in the evidence to show that Einav had provided updates to Chiu about the progress of their planned joint venture. As Chiu was a party to the February 2012 Meeting and an important member of the competing venture, I am not surprised that the Meeting Note (both in Hebrew and English) could be retrieved from Chiu's computer. Though Chiu may not be able to understand Hebrew, she could certainly read the English version of the Meeting Note which contained an important summary of the discussions about their planned business venture.

159. After the October 2012 Meeting, Yoram told Anat about the admissions made by Chiu, and Anat immediately sent an email to Chiu making enquiry about such matter. In the reply email, Chiu replied that " *OK, NO PROBLEM. I'M NOT [INVOLVED] WITH GLOBAL WISE AND NOT MY FAMILY* ".

160. Chiu denied that she had sent such email. She claimed that such email was written by Anat, and Chiu agreed to send such email written by Anat because she wanted to reclaim the outstanding service fees. This does not make much sense. If Chiu was genuinely minded to recover the service fees, Chiu could have talked with Yoram directly or initiated action against Smart Trike. There is no reason for Chiu to make a "promise" as contained in the email that she could not have kept and had no intention of keeping. Further, in the subsequent email correspondence between Chiu and Dafna, Dafna twice referred to the apology made by Chiu and Chiu's email. If Chiu's story were indeed true, Chiu could have easily and readily clarified it was indeed Anat who had written the said email and the same did not reflect her true views. But she did not do so.

161. I therefore reject Chiu's evidence in this regard. I also agree with Mr Wong that the reply email clearly shows that Chiu was fully aware that neither she nor her family were entitled to operate the competing business through Global Wise.

162. It is quite clear that Chiu continued to lie about her continuing involvement in the competing business in the email correspondence between Chiu and Dafna in February 2013. Upon being challenged in cross-examination, Chiu eventually had to accept that it was wrong for her to deny her control over Global Wise.

163. I also see no merit in Ms Tam's argument about the alleged confusion in Yoram's evidence. Yoram's initial evidence was that he was not sure if it was Anat or Michal (not "Michael" as suggested by the Defendants) who followed him to Hong Kong, and he

only recalled that she was a lady. "Michal" is a reference to Michal Zohar, a lady who worked for the Plaintiffs in the sales department.

(viii) Manufacturing agreement between Little General and STML in November 2012

164. According to Yoram, after the October 2012 Meeting, he confronted Ye over his involvement in the competing business at a meeting in or around October 2012. At the said meeting, Ye admitted his involvement in the competing business, and he promised Yoram that he would withdraw from the competing venture.

165. Ye did not dispute that a meeting took place in or around October 2012. However, Ye's case is that Yoram made no complaint against him during their meeting. I agree with Mr Wong that this is totally incredible. At the time of the meeting between Yoram and Ye, it is common ground that Chiu had already informed Yoram that the products sold by Global Wise were manufactured by Ye. It is inherently unbelievable that Yoram would have sit quiet and chosen not to confront Ye about his participation in the competing business.

166. At that particular point in time, the Plaintiffs' Tricycle Business was dependent on Ye's Companies for the production of the Plaintiffs' products. This fact was confirmed by Ye during cross-examination. As such, it is understandable that Yoram did not wish to sever his business relationship with Ye, since this would invariably lead to substantial losses to the Plaintiffs. Indeed, at that time, Ye was holding onto significant amounts of money paid in advance by the Plaintiffs, and there were also existing unfulfilled orders by Ye. Further, Ye was still in possession of a large number of moulds for the Plaintiffs' products. It is quite clear that Yoram was by then in a position of dependency and vulnerability towards Ye.

167. The parties then made the Manufacturing Agreement between Little General and STML dated 1 November 2012 ("the Manufacturing Agreement"). Ms Tam attacks the reasons given by Yoram for making the Manufacturing Agreement as incredible. First, the loan of €1 million granted by Smart Trike to Ye cannot be a reason for the making of such agreement. Second, Smart Trike could always have switched the production to another company Tetro. However, given the circumstances as stated in the preceding paragraph, it was sensible for Yoram to have agreed for STML to enter into the written Manufacturing Agreement with Little General.

168. There was a confidentiality and non-competition clause in Clause 13 of the Manufacturing Agreement. According to the Plaintiffs' case of which I accept, Ye had all along agreed to be bound by these covenants since the commencement of their business cooperation and such clause only reconfirmed the pre-existing obligations. This must be the case, otherwise Ye would not have agreed to such clause in view of the deteriorating relationship between the parties.

169. According to Ye, he was somehow forced to sign the Manufacturing Agreement without first understanding its contents. During cross-examination, he also raised for the first time that he signed the agreement because of his worry about his factory workers. This is inherently incredible. As mentioned above, the Manufacturing Agreement was signed at a time when the parties' relationship was deteriorating, and it is completely implausible that Ye, being a businessman of some experience, would have signed the same without first understanding or reading it. Further, there is no evidence or basis for Ye to allege that there was any genuine concern about his workers at all. Even if it were true, it would only have been sensible for him to read the document before signing it.

(ix) The continuing operation of the competing business

170. It is indisputable that Chiu (and indeed the other Defendants), through Global Wise, further marketed and sold the competing tricycle products which were identical or substantially similar to the Plaintiffs' products to others, including one Fung Kwok Hiu ("Fung") and Yip Pan Wai ("Yip"). These products were sold without the consent of the Plainiffs, and hence there were infringing products. Having acquired such infringing products from Chiu (*i.e.* ZOO/ST 157), Fung and Yip in turn put them up for sale online and in the Hong Kong market. In this regard, STML and Yoram commenced an action against Fung and Yip in HCA 1989/2014 [23], in which STML and Yoram, *inter alia*, contended that the infringing products sold by them were identical or substantially similar to the Plaintiffs' ST 157. It was revealed from the defence of Fung and Yip that they purchased the infringing products from Chiu in or about January 2013.

171. Indeed, it is clear from the contemporaneous evidence that: (a) Chiu was selling the infringing products through Global Wise, as seen from the email from Yip to Ella; and (b) Chiu further assisted Fung and Yip in marketing such infringing products by advising them on the contents of the advertisements. Moreover, in an attempt to persuade Fung and Yip that the infringing products were genuine, Chiu even put forward a test report issued by Intertek Testing Services dated 10 July 2012, which clearly showed that the applicant was STML.

172. Chiu had never disclosed to nor sought consent from the Plaintiffs for selling the Plaintiffs' products to third parties *via* Global Wise (including Fung and Yip). Quite the contrary, Chiu lied in her email to Dafna dated 18 February 2013, when she stated that there had yet been business dealings between Yip and her relating to "trike".

173. In his witness statement, Ye claimed that he had "auctioned" the Plaintiffs' products so as to pay for storage costs. However, such assertion is contradicted by Chiu's evidence. Chiu's case is that Ye regarded the Plaintiffs' products as " *garbage* ", and Chiu

simply proceeded to take the Plaintiffs' products for sale without their consent. Further, such assertion is also inconsistent with Ye's new excuse given in his oral testimony for the first time, i.e. that the Plaintiffs were somehow owing suppliers large sums of money at the time and hence Chiu saw fit to take the Plaintiffs' products for sale with proceeds used to repay these suppliers. In any event, this is not a defence for selling the Plaintiffs' products without their consent. Ye was expressly prohibited by clause 5.1 of the Manufacturing Agreement to dispose of the products in such manner. Further, the evidence shows that by February 2013, Ye still retained RMB136,000 from the deposit under clause 7 of the Manufacturing Agreement which could be used to secure non-payment on the part of Smart Trike.

(x) The Nuremberg fair in 2013

174. Subsequently, Chiu (and indeed the other Defendants) participated in the Nuremberg Toys' Fair in January 2013 whereby Global Wise marketed and offered for sale the various competing tricycle products, which is evidenced by the contemporaneous product catalogues and price quotations of Global Wise for the year 2012/2013. Chiu had confirmed that all trikes shown in the brochure, save for the scooters (*i.e.* Model 305), were produced by Ye's factories.

175. In the Einav's name card distributed at the Nuremberg Fair, Einav was described as the " Product Designer" and "Marketing Manager" of Global Wise. Chiu confirmed that she asked her staff to make these name cards for Einav. This further provides concrete evidence as to the carrying out of the competing business through Global Wise.

176. The Plaintiffs sought and obtained an injunction against Global Wise with respect to the infringing products offered for sale at the Nuremberg Fair. The injunction covered, *inter alia*: (i) the seizure of the infringing products at Global Wise's booth; and (ii) the prohibition against the sale or marketing of 2029021 and 903 by Global Wise.

177. Further, at the Nuremburg Fair in January 2013, Yoram was able to find carton boxes discarded at Global Wise's booth, which inexplicably had labels bearing the name of the Plaintiffs' clients (*i.e.* Redgwoods) and references to the Plaintiffs' products (e.g. " *Lollipop* " and " *1233500* "). Indeed, ST 129 (Plastic) had been marketed as " *Lollipop-1233500* ", as shown in the Plaintiffs' English sales catalogue from or around 2010. The Defendants could not provide any innocent explanation for this, and it reinforces that they had continued to market and sell competing and infringing tricycle products.

(xi) Dispute as to the return of the moulds

178. There was a complete breakdown of the relationship between the parties after the Nuremburg Fair, and there was then a dispute about the return of the Plaintiffs' moulds. I do not propose to resolve the issue about the ownership of the moulds in the first part of the trial on liability. In any event, I find that the excuse given by Ye for the failure to return the moulds unconvincing.

179. Ye insisted that the Plaintiffs, in order get back the moulds, would need to produce a list together with invoices signed by him and stamped with his company chop. Yet, Ye had access to all of the documents and invoices relating to the moulds, and he should be the best person to identify the moulds in his own possession. It was completely pointless for Ye to have insisted the Plaintiffs to provide such documents. I agree with Mr Wong's observation that this was only an attempt by Ye to make life difficult for the Plaintiffs.

(xii) The continuance of the competing business after the Nuremburg Fair

180. The contemporaneous evidence (including written orders, invoices, shipping documents and payment records) shows that Chiu (and indeed the other Defendants) through Global Wise continued to sell and offer for sale competing and infringing products to customers, including Toys R US (Redgwoods), Marko, InterToys, and MaxiToys, after the Nuremburg Fair. It is also clear that Chiu was aware that the said entities were by then existing clients of the Plaintiffs. The Defendants cannot seriously dispute such evidence.

181. It is also the uncontradicted evidence of Darya that Chiu and Global Wise had offered to sell the "Baby Trike" to her in or around 2017. According to the Plaintiffs, the "Baby Trike" was in fact an infringing copy of the Plaintiffs' ST 129 (Plastic), a model of the Plaintiffs' tricycles which had been marketed and sold by the Plaintiffs for a number of years.

182. In fact, Ye acknowledged that Little General used the moulds of ST 135 to develop its "201" model, *i.e.* the "Baby Trike". Further, Professor Rawet (the Plaintiffs' expert witness) confirmed that the Plaintiffs' and the Defendants' tricycles were " *totally identical, except for minor changes that only a professional eye can notice them* ". More importantly, some minor changes to the moulds were apparently made to produce "Baby Trike", presumably for the purpose of " *concealing* " the fact that they were the same moulds used to produce ST129 (Plastic). There is no challenge against the expert evidence of Professor Rawet.

183. The Defendants point out that there is a dispute about the ownership of the moulds, but I cannot see how such issue, even if it were decided in favour of Ye, would have entitled Little General to use such moulds to produce the Plaintiff's products. [24]

184. In a desperate attempt to exonerate his responsibility, Ye claimed that he was no longer a shareholder of Little General as from 14 June 2013. I have serious doubt about the truthfulness of such assertion. First, in the earlier versions of the Defence, Ye positively confirmed that he was at all material times the owner of Little General. Second, Ye was somehow able to adduce

evidence in these proceedings of the contracts and invoices of Little General issued in 2017. Third, it is Chiu's own case that immediately before the Canton Fair in 2017, Ye informed Chiu that Little General had developed a new model of children tricycle called "Baby Trike". If Ye had ceased to hold any interest in Little General as from 2013, Ye clearly could not have informed Chiu about "Baby Trike" or asked Chiu to place a sample at Global Wise's booth in 2017.

(xiii) Chiu's sale of Ofrat shareholding back to Yoram in 2011

185. Before leaving this topic, I will back-track a bit and deal with a side issue about the buying-back of the shares in Ofrat. As mentioned in the earlier part of this Judgment [25] , Yoram and Chiu had some sort of business cooperation in respect of an Israeli company known as Ofrat. The Plaintiffs' case is that in around 2011, as the business of Ofrat was not successful, it was agreed between Yoram and Chiu that Chiu's shareholding would be bought back by Yoram.

186. It is clear that the Plaintiffs' assertion is supported by contemporaneous evidence, which includes the written Sale of Shares Agreement dated 1 March 2011 signed by Chiu and Yoram ("the Sales of Shares Agreement"). Contrary to the Defendants' case, the preamble of such agreement stated that " *[Chiu] is the owner of 2,194,114 ordinary shares of [Ofrat]* ". The aggregate purchase price for the 50% shares was stated to be 350,000 NIS.

187. There is no dispute that Ofrat made two payments to Capital Key in the respective sums of: (i) HK$54,904.30 on 7 March 2011; and (ii) US$39,963.20 on 12 April 2012. It is the Plaintiffs' case that these payments represented the consideration for purchasing Chiu's Ofrat shares.

188. Chiu alleges that the Sales of Shares Agreement was essentially a sham with the purpose of deceiving the Israeli authorities that the " *joint venture* " between Chiu and Yoram was " *genuine* ". Apart from the fact that it is only a bare assertion, this serious allegation does not make a lot of sense. As Chiu had never appeared on the record as a shareholder or director of Capital Key, any payments made to Capital Key could not possibly have given the appearance as to the genuineness of the " *joint venture* " between Chiu and Yoram. I also agree with Mr Wong's observation that, even if the transaction were indeed a sham (which I do not accept it to be the case), Chiu's allegation that she would participate in the sham can only serve to highlight the fact that both parties had placed considerable trust and confidence on each other by that time.

189. Chiu further testified that the two sums paid into Capital Key's account were subsequently withdrawn and repaid back to Dafna. As to the first sum of US$54,904.30 on 7 March 2011, the Defendants rely on: (i) the customer receipt (showing that a sum of US$54,000 was withdrawn) about 4 months later on 5 July 2011; and (ii) the handwritten note in a remittance slip. For the second sum of US$39,963.20, the Defendants refer to a receipt signed by Dafna dated 27 April 2012, which stated on its face "received cash US$40,000".

190. However, even if these payments were made, the documentary evidence speaks little about the purposes of these payments. It is not in dispute that Yoram and Dafna did receive money from Chiu from time to time since she had control over the finances of Smart Trike. As explained by Yoram and further supported by the documentary evidence, Chiu's practice was to ask Yoram or Dafna to sign receipt to acknowledge cash receipts from Chiu in relation to Smart Trike. Even though Yoram, quite understandably, could not recollect precisely the purpose of the payment of US$40,000, Yoram recalled that such amount was possibly for the payment of commissions to one of Smart Trike's Hong Kong representatives. Further, the handwritten note in the remittance slip is no more than a self-serving statement by Chiu. Hence, I do not accept that these assertions can take the Defendants' case any further. Furthermore, contrary to Chiu's allegation in cross-examination, the said payment of USD40,000 did not come from Capital Key's bank account (as shown in Capital Key's bank account statements). This also undermines the credibility of the Defendants' case in this regard.

191. For these reasons, even if this is only a peripheral issue, I accept the Plaintiffs' case relating to the investment in Ofrat.

CONCLUSION ON THE FINDINGS ON FACTUAL ISSUES

192. Having analysed the development of the various events throughout the years, I accept the evidence given by Yoram as the truth. On the other hand, I reject the evidence of the Defendants' witnesses (in particular Chiu, Choi and Ye) on the factual issues. Obviously, there are serious disputes between the parties about their relationships throughout the years. Yet, it is quite clear that Chiu, Choi, Ye and the relevant parties had engaged in a competing business selling similar products as those of the Plaintiffs. The Defendants try to establish that Chiu and Capital Key played only a limited role in the operation of the Tricycle Business and hence the Defendants were entitled to run a business selling competitive products, this simply cannot be right given the trust and confidence developed between the parties throughout the years and the actual works carried out by Chiu and Capital Key for the Tricycle Business. Given these factual findings, I then address the question as to whether the Defendants are liable for the various pleaded causes of action.

BREACH OF FIDICUARY DUTIES AND DISHONEST ASSISTANCE OF BREACH OF FIDUCIARY DUTIES

193. I first start with breach of fiduciary duties and dishonest assistance of breach of fiduciary duties.

(i) Relevant legal principles

194. Fiduciary duties may arise in certain relationships. In Libertarian Investments Ltd v Hall (2013) 16 HKCFAR 681 [26], Ribeiro PJ cited with approval the following statement by Mason J in Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 [27] as to the " *critical feature* " of fiduciary relationships:

> " *The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.* "

195. The categories of fiduciary relationship are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship. [28]

196. In *Snell's Equity*[29], the learned authors summarized some of the principles as follows:

> (i) A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence".
> (ii) The undertaking can be implied in the circumstances, particularly where someone has taken on a role in which fiduciary duties are appropriate.
> (iii) Fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct or affairs of another.
> (iv) The concept encaptures a situation where one person is in a relationship which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interest of the principal.
> (v) The expectation is assessed objectively, and so it is not necessary for the principal subjectively to harbour the expectation. Nor is it relevant whether the person who is alleged to be a fiduciary subjectively considered himself or herself to be undertaking fiduciary duties.

197. The mere existence of trust and confidence between the relevant parties is not sufficient by itself to give rise to fiduciary obligations. [30]

198. Regarding the scope of the fiduciary duties, Ribeiro PJ said the following in *Libertarian Investments*[31] :

> 73. *"Where a party is found to have undertaken an obligation to act in another person's interest, it is necessary to determine what precisely the fiduciary duty owed consists of. ... ...*
> 74. *The basic obligation of the fiduciary to act in the interests of another may find expression in various ways, depending on the circumstances: He may be said to be under a duty to act in good faith; not to make a profit out of his trust; not to place himself in a position where his duty and his interest may conflict; or not to act for his own benefit or the benefit of a third person without the informed consent of his principal."*

199. In other words, a meticulous examination of the facts of each case is required in order to determine what fiduciary and non-fiduciary duties are owed, so as to be able to determine the effect that fiduciary principles will have in the case. [32] This is because the nature and scope of the fiduciary duty will vary based on the nature and scope of the non-fiduciary duties (for example those arising from contractual duties) owed by the fiduciary.

200. In respect of the claim for dishonest assistance, it is well established that there are four requirements that need to be proved: (i) breach of trust or fiduciary duty by someone other than the defendant; (ii) the defendant's assistance; (iii) dishonesty; and (iv) resulting loss. [33]

201. Based on the aforesaid factual findings, did the Defendants owe any fiduciary duties to the Plaintiffs? Were they in breach of such duties? Were the other Defendants liable for dishonest assistance of Chiu's breach of fiduciary duties? In my judgment, the answers are clearly affirmative. In explaining my reasons, I will deal with the liabilities of each of the Defendants in turn.

(ii) Breach of fiduciary duties on the part of Chiu

202. I agree with Mr Wong that the Plaintiffs have an overwhelming case against Chiu for breach of fiduciary duties.

203. It is common ground that Chiu was a director of STL, and on the basis of her office alone owed fiduciary duties to the Plaintiffs. [34]

204. More importantly, based on my factual findings, Chiu had indisputably undertaken to act in the interest of the Plaintiffs in a relationship of trust and confidence.

205. With an attempt to downplay her role and to negate the finding of fiduciary relationship, Ms Tam seeks to argue that Chiu had no power to and did not make any discretionary decisions on behalf of the Plaintiffs. Furthermore, she relies on the *dicta* of Leggatt LJ in Al Nehayan v Kent [2018] 1 CLC 216 [35] to argue that the duty to avoid conflict of interests is to promote " *loyal decision-making* ". Since there were no decisions to be made by Chiu in the operation of the Tricycle Business, the court should not find fiduciary relationship in the case of Chiu. However, despite Ms Tam's able submissions, such kind of argument cannot advance Chiu's case in any way.

206. First, such line of argument had been clearly rejected by the court in Libertarian Investments Ltd v Hall (2013) 16 HKCFAR 681 . [36] According to the Court of Final Appeal [37] , a person assumes fiduciary duties where he or she undertakes an obligation to act in the interests of another, and the categories of fiduciary relationships are varied ranging from the trustee to the errand boy the latter of which certainly has no discretion in the performance of his work . In Hong Jing Co Ltd v. Zhuhai Kwok Yuen Investment Co Ltd [2013] 1 HKLRD 441 [38], the Court of Appeal also held that the " *crucial elements* " in a fiduciary relationship are " *confidence and trust on the defendant, and dependence and vulnerability of the plaintiff* ". "Discretion" is not a requirement or element at all.

207. Ms Tam tries to distinguish *Libertarian* by saying that it was a case relating to " *a breach leading directly to damage to or loss of the trust property* ". However, I agree with Mr Wong that there is no rational basis to support such distinction. More importantly, the Court of Final Appeal had never made such distinction in rejecting the defendant's argument that "discretionary powers" was needed for imposing fiduciary duties. Indeed, there is no authority to support the proposition that "discretion" is a requirement or element for finding fiduciary relationship.

208. With no relevant supporting authorities, Ms Tam tries to rely on the views expressed by Ernest Weinrib in an article on Canadian law. [39] I do not propose to discuss the views expressed by the learned author in any details here. It suffices for me to say that it is an article on Canadian law in 1975 which pre-dated important authorities such as *Hospital Products* and *Libertarian Investment.* Hence, the views expressed in the article, even if they are relevant here (of which I doubt), should not carry any significant weight in determining the Hong Kong law in this area.

209. In the present case, it is clear that the cooperation relationship between Chiu and Yoram (dating back from 1990s) was based on trust and confidence, and Chiu had undertaken obligations to act in the interest of the Plaintiffs in such relationship of trust and confidence, such that Chiu had assumed and would owe fiduciary duties to the Plaintiffs. It is indisputable that Chiu had extensive powers in managing the finances for the Plaintiffs, as she exercised effective control over the HSBC Account and the ICBC Account. Chiu plainly exercised managerial role and powers over a range of business matters for the Plaintiffs, and she was the director of STL and the Vice President (Operations) and "Manager" of STML. Chiu also indisputably possessed confidential information of the Plaintiffs, including the Confidential Customers Information relating to customer names, addresses and pricing information, etc, which Chiu was able to make use of in running her competing business. Under such circumstances, it is clear that the Plaintiffs were in a position of "vulnerability", in the sense that they had to rely on and trust the fiduciary to look after their interests. [40] I agree with Mr Wong that it would make a mockery of the law if it were to permit someone in Chiu's position to engage in a competing business keeping her principal entirely in the dark.

210. There is no question that Chiu was in breach of the fiduciary duties. It is Chiu's own case and evidence that she started to offer for sale the 202SP3 tricycles from as early as October 2008. As seen from the contemporaneous evidence, Chiu had implemented and carried out her competing business, namely to market, sell, and distribute competing and infringing tricycle products in competition with the Plaintiffs, since at least October 2008. Chiu had also diverted substantial business opportunities belonging to the Plaintiffs over a number of years, and had reaped considerable profits from her breach of fiduciary duties. Chiu had of course never disclosed her position of conflict and misconduct to the Plaintiffs as her principal. I agree with Mr Wong that this is a most clear and obvious case of breach of fiduciary duties.

211. Ms Tam seems to rely on the *dicta* relating to the " *scope of business* " as referred to in §87 in Poon Ka Man Jason v Cheng Wai Tao (2016) 19 HKCFAR 144 [41] to argue that there was somewhat a " *modification* " of the fiduciary duties owed to the Plaintiffs, to the effect that the fiduciary duties did not include one not to compete with the Plaintiffs' Tricycle Business. However, as pointed out in *Poon Ka Man Jason* itself, the onus of establishing that there is agreement or acquiescence to restrict the scope of the company's business in a particular way thereby modifying the fiduciary duties is on the fiduciary. [42] Based on the findings in this case, without knowing that the Defendants were engaging in the competing business, there is simply no basis to suggest that there was any agreement or acquiescence to modify the fiduciary duties. After all, it is common ground that Yoram and the other Plaintiffs were very frustrated when they first learnt about the Defendants' competing business, and Yoram had insisted the Defendants not to carry on with the competing business after the October 2012 Meeting. Under such circumstances, this kind of argument cannot take the defence case any further.

212. Ms Tam also seeks to advance another argument by asserting that Global Wise had not competed with the Plaintiffs because their products were different. Such contention has no merit at all. First, it is quite clear that the products sold by Global Wise were very similar to those offered for sale by the Plaintiffs. At the very least, Global Wise sold and marketed bicycles and tricycles for children, and these products were competing in the same market as that of the Plaintiffs' products. Second, even if the products sold

by Global Wise were entirely different, Global Wise was not entitled to compete with the principal in a case where its personal interest " *possibly may conflict* " with its duty. [43] This was certainly the case here.

213. Ms Tam also relies on the assertion that Chiu was only given a nominal remuneration for her directorship in STL with a view to negate the imposition of fiduciary duties. This is another unsound argument. First, Chiu was rewarded financially for her service for the Plaintiffs under the parties' cooperation agreement. In any event, as a matter of law, it is irrelevant for the purposes of fiduciary duties that a director is paid only nominal remuneration. [44]

(iii) Breach of fiduciary duties and dishonest assistance of Chiu's breach of fiduciary duties on the part of Choi

214. Similarly, Choi was in breach of the fiduciary duties owed to the Plaintiffs.

215. The evidence shows that Yoram and Choi placed significant trust and confidence on each other. Choi permitted Yoram to use the address of his own property for the business registration of Smart Baby Toys. He was also appointed as a signatory of the bank account of Smart Baby Toys and the ICBC Account which held substantial funds. Choi exercised control over the financial affairs of the Tricycle Business, and was almost single-handedly responsible for signing all customer receipts authorising the transfer of money made to the Plaintiffs' suppliers. In handling the bank accounts, Choi was aware of the operation of the Plaintiffs' Tricycle Business, including *inter alia*: (i) the names of the Plaintiffs' customers; (ii) the revenue, turnover, and profit of the business; and (iii) the names of manufacturers or suppliers of the business. Further, Choi " *did everything dealing with bank* " and the finances, and he also monitored the operation of the Tricycle Business in Hong Kong since Chiu would usually spend more time in the Mainland.

216. Being placed in trust and confidence by the Plaintiffs which were in a position of dependency and vulnerability towards Choi, it would be quite clear the latter owed fiduciary duties to the Plaintiffs including not to compete with the Plaintiffs' business. By assisting Chiu and the other Defendants to run the competing business, Choi was in breach of the fiduciary duties owed by him personally to the Plaintiffs, or at the very least, dishonestly assisting Chiu in breach of her fiduciary duties owed to the Plaintiffs.

217. In his witness statements and oral testimony, Choi was at pains to distance himself from Chiu's business. However, the evidence clearly shows that Choi worked closely with Chiu and played a crucial role in the Defendants' competing business, including *via* corporate entities such as GP China and Global Wise.

218. Further, Choi was fully aware that all along Chiu owed fiduciary duties to the Plaintiffs, and he nevertheless continued to assist Chiu in breach of her fiduciary duties.

219. First, from as early as October 2008, 202SP3 was published and offered for sale at the Canton Fair *via* GP China, and Choi was the sole director and shareholder of GP China. In fact, it was the joint decision of Chiu and Choi to offer 202SP3 for sale in the Canton Fair.

220. Second, since early 2009, Choi had participated in the business of Global Wise with full knowledge that it was in competition with the Plaintiffs' business. Chiu confirmed during cross-examination that Chiu and Choi were the true beneficial owners of Global Wise, and Choi admitted in witness box that he managed the accounts and the finances of Global Wise. Choi was the account signatory of Global Wise, and was responsible for payment of invoices and receipt of sums from customers. Choi further admitted that he had access to invoices issued to Global Wise and information such as the bank details of the counterparties.

221. I agree with Mr Wong's observation that Choi wanted to conceal his involvement in Global Wise in his witness statement, and yet his involvement came to light upon cross-examination of Chiu and Choi. In fact, Choi was the company secretary of Global Wise until 3 January 2011. Prior to his resignation, Choi assisted in the completion and submission of the Annual Returns for Global Wise. Even after his resignation, Choi had continued to be the presenter of the Annual Returns. Indeed, for the Annual Return of 2013, Choi signed the Annual Return in his capacity as "director" of Global Wise.

222. Third, Choi was a shareholder and director of Capital Key, and he admitted that Capital Key's business belonged to himself. Despite his attempt to minimize his role in the management of Capital Key's business, it is quite clear that he was involved in handling the finances of the company. Taking into account the background of this case, it is unbelievable that Choi would have simply let his colleagues to handle the finances of his company without his supervision or involvement.

223. Fourth, the evidence clearly shows that Choi was fully aware that: (i) Yoram reposed trust and confidence in Chiu and himself; and (ii) Chiu was not entitled to operate any competing business in competition with Yoram's Tricycle Business. Being the account signatory of Smart Baby Toys and the ICBC Account of STL, Choi must have known that the funds in the ICBC Account were generated from the sale of children tricycles. He was also aware of the reason why Choi (and initially Fong) was asked to be the account signatory of the Smart Baby Toys account, i.e. Yoram himself was not frequently in Hong Kong. Further, being the husband of Chiu and having involved in the various meetings and social gatherings between Yoram and Chiu, Choi must have been fully aware of the cooperation agreement between Chiu and Yoram for the Tricycle Business and Chiu's substantial involvement in such business. In fact, Choi admitted in cross-examination that he had seen various email correspondence between the parties relating to the operation of the Tricycle Business. Choi himself also signed the second Management Agreement on behalf of Capital

Key with STML, and he was aware of the nature of the services (including shipping and logistics services) provided by Golden Pride and Capital Key to Yoram's Tricycle Business.

224. I also find that there was dishonesty on the part of Choi when he offered assistance to Chiu and the other Defendants in operating the competing business. The impropriety of operating the competing business was obvious, in particular to a sophisticated businessman like Choi who has experience in running businesses through different corporate vehicles.

225. For these reasons, I find that Choi was in breach of his own fiduciary duties owed to the Plaintiffs and he had further dishonestly assisted in Chiu's breach of fiduciary duties.

(iv) Breach of fiduciary duties and dishonest assistance of Chiu's breach of fiduciary duties on the part of Ye

226. The evidence in this case supports the Plaintiffs' contention that: (i) Yoram had placed trust and confidence in Ye; and (ii) Yoram was in a position of dependency and vulnerability towards Ye. Despite the reservation I have expressed at the time when the parties made their opening submissions, Ye was more than a mere contractor manufacturing tricycles for the Plaintiffs.

227. According to the evidence of Yoram of which I accept as the truth, from the beginning of the cooperation between Ye and Yoram in 2006, there was an understanding between Yoram and Ye that the latter was not entitled to manufacture any tricycles for the competitors of the Plaintiffs' Tricycle Business. Ye and Yoram also agreed that Ye would not allow any unauthorised personnel to enter Ye's factories. Further, in manufacturing the Plaintiffs' products, Ye was given access to various confidential information in relation to the Tricycle Business, including: (i) the production files containing the confidential designs (*i.e.* the design drawings and moulds of the Plaintiffs' Products); and (ii) the Confidential Customers Information of the Plaintiffs.

228. Indeed, since the start of the cooperation between the Plaintiffs and Ye, the Plaintiffs had clearly reposed trust and confidence in Ye, effectively shifting the entire production line of the Plaintiffs' products to Ye's factories. Ye's factories were tasked with producing a variety of the Plaintiffs' Products, including ST 126, ST 129, and later ST 157. While the Plaintiffs developed two separate production lines for ST 157 in around 2009, Yoram continued to trust Ye's factories in the production of ST 157. As explained by Yoram, Ye remained responsible for producing ST 157 for particular end-customers who also ordered ST 126 or ST 129 within the same order. The trust and confidence placed on Ye is further exemplified from the fact that Yoram had agreed to invest €1 million into Ye's factories to help increase their production capacity. It is also clear from the evidence that Ye was in possession of a large number of moulds for the production of the Plaintiffs' products. Between 2009 to 2011, Ye had issued many invoices to the Plaintiffs for the production of moulds or modification charges.

229. The fiduciary relationship between the parties is also reinforced by the terms in the Manufacturing Agreement made between STML and Little General dated 1 November 2012. Clauses 5.1, 12, and 13.3 therein contain provision which prohibit Ye to put himself in a position of conflict of duty and interest with the Plaintiffs (including the duty not to compete with the Plaintiffs). Though this Agreement only came about at a later stage, such arrangement probably reflected the common understanding of the parties throughout the years. [45]

230. Based on all these reasons, Ye owed a fiduciary duty to the Plaintiffs not to compete with them. But even if Ye owed no such duty to the Plaintiffs, it is clear that Ye had dishonestly assisted Chiu in breach of her fiduciary duties owed to the Plaintiffs.

231. First, since late 2008, Ye, together with Chiu and Choi (and their corporate entities GP China and Global Wise), had engaged in the business of selling tricycle products in competition with the Plaintiffs. There is no dispute that: (i) Ye *via* his factories did manufacture various models of tricycles (including the models 908016, 2029021, 202SP3, and 903) and supplied them to the other Defendants; and (ii) Chiu *via* Global Wise did sell these competing products to various customers in the market.

232. Obviously, Ye was aware that Chiu and himself were not entitled to compete against Yoram's Tricycle Business. Even on the Defendants' own case, when Chiu first came to know Ye in around the second half of 2005, Ye already knew that Chiu had assisted Yoram with his Tricycle Business. Ye was fully aware that Chiu operated and controlled Global Wise, which since 2009 sold the competing and infringing products supplied by Ye. Ye was also aware that Chiu had assumed an important position in the Plaintiffs' Tricycle Business, and her duties included: (i) the settling of invoices issued by Ye's Companies to the Plaintiffs; (ii) handling shipment of the Plaintiffs' products; (iii) negotiating the working agreements between the Plaintiffs and Ye; (iv) negotiating on behalf of the Plaintiffs on the payment for the production of moulds; and (v) acting as the "mediator" when the parties had any disagreements on the production plans.

233. Second, it is indisputable that Ye had combined with Chiu, Einav, and Harisan in carrying out the competing business as agreed and envisaged in the February 2012 Meeting. The fact that they intended to start their business after the termination of their business relationship with the Plaintiffs shows that Ye was clearly aware of the impropriety of running their competing business. Further, Ye was also involved in the plan of arranging the visit of Kramer to his factory in April 2012 avoiding the presence of the Plaintiffs' staff.

234. Third, Ye was aware of the substantial similarities between the Plaintiffs' products and the Defendants' competing and infringing products, both of which were produced at Ye's own factories. Further, there is reason for the court to believe that Ye had made use of the Plaintiffs' Confidential Drawings in producing his own products. In particular, the design drawing of model

908016 (the front rotating axle) was substantially similar to that of Yoram's design drawing of the pedal bar for ST 129. As further evidence of copying, the design drawing was named "129 前輪曲軸", and there is simply no innocent explanation as to why this was the case. There are also substantial similarities in design drawings between the Plaintiffs' and Defendants' products, such as the front fork of 202SP3 and ST 129 and the body steel part of 202SP3 and ST 129, including the precise measurements of several parts of the designs. While Ye claimed that his company would undergo market research in developing a new product, yet he has produced no documents to support such bare allegation. In my judgment, there is weight in Mr Wong's submission that the designs of the Defendants' products were created based on the designs of the Plaintiffs' products.

235. Fourth, based on the contemporaneous notes on the name cards collected by the Defendants in various toy fairs, it can be seen that Global Wise arranged for potential customers to visit Ye's factories which produced the competing products.

236. Based on the aforesaid, it is quite clear that Ye knew about the impropriety on the part of Chiu in conducting the competing business, and yet he assisted Chiu, the other Defendants and the other participants of the competing venture in manufacturing and supplying the competing products. In doing so, Ye had dishonestly assisted in Chiu's breach of fiduciary duties and further breached his own fiduciary duties owed to the Plaintiffs.

(v) Breach of fiduciary duties and dishonest assistance of Chiu's breach of fiduciary duties on the part of Global Wise and Capital Key

237. According to the latest version of the Statement of Claim, the Plaintiffs claim against both Global Wise and Capital Key for dishonest assistance. For the breach of fiduciary duties claim, the Plaintiffs only make such claim against Capital Key but not against Global Wise.

238. It is not disputed that Chiu (and indeed Choi) at all material times controlled and managed both Global Wise and Capital Key. Since Chiu was the person in *de facto* management or control over these entities (being their " *directing mind and will* "), Chiu's knowledge would be attributed to Global Wise and Capital Key. [46]

239. As demonstrated above, Global Wise was the key corporate vehicle through which the competing business was carried out. There is no question that Global Wise is liable for dishonest assistance of breach of fiduciary duties on the part of Chiu.

240. On the other hand, Capital Key was used by Chiu in place of Golden Pride to provide services for the Plaintiffs. Since there is no direct evidence to show that Capital Key had played any role in the marketing or distribution of the competing products, the Plaintiffs' claim on dishonest assistance against Capital Key is one based on the access and provision of the Plaintiffs' Confidential Customers Information. According to the Plaintiffs, in providing services to the Plaintiffs, Capital Key had obtained Confidential Customers Information which was retained and utilised by the Defendants for the purposes of the competing business. For instance, Capital Key had assisted the Plaintiffs in handling the shipment documents of a client named "Alisa". When Global Wise subsequently approached "Alisa" in the Nuremberg Fair in 2013 for the first time, Global Wise was already aware that Alisa was a client of the Plaintiffs.

241. In my judgement, the Plaintiffs have successfully established a case of dishonest assistance against Capital Key. It may well be the case that Global Wise had used its own contact to approach "Alisa". However, there was a reference to " *SM 客* " (customer of Smart Trike) in the contact note kept by Global Wise in the Nuremberg Fair. In other words, Global Wise knew that "Alisa" was a then customer of the Plaintiffs, and it must have obtained such information from Capital Key. Such confidential information, together with other details relating to the previous sales by the Plaintiffs to "Alisa", would certainly have assisted Chiu and Global Wise to solicit business for the competing venture. Hence, Capital Key is liable for the dishonest assistance claim.

242. Further, Mr Wong submits that Chiu and Choi deliberately chose Capital Key (instead of any of the Golden Pride Companies) to enter into the Management Agreements so as to ensure that they could continue to carry out the competing business, as Chiu was neither a shareholder nor director of Capital Key. In such case, Capital Key rendered assistance to Chiu's wrongdoing by " *enable[ing] the breach by the trustee to be committed* ". While it is not necessary for me to make any definite finding as to why Chiu had chosen Capital Key to provide the services, Mr Wong's observation is a fair one in view of the evidence of the case.

243. There is a side issue as to whether Capital Key was also in breach of the non-competition clause in the Management Agreements. On such issue, both sides have adduced expert evidence on the question as to whether the non-competition clause is enforceable under Singapore law which is the governing law of the Management Agreements.

244. In my judgment, it is not necessary for me to determine this particular question of foreign law. One must bear in mind that the Plaintiffs' complaint against Capital Key is one based on the provision of confidential information to others to facilitate them to run the competing business. Even if there was no such non-competition clause, Capital Key was not entitled to disclose the Plaintiffs' confidential information to others, whether such information was used for the purposes of running a competing business or not.

245. In any event, I prefer to accept the Plaintiffs' evidence on Singapore law in this regard. Having considered the expert evidence, I find that:

(i) There is no authority to support that "goodwill" is the only matter which is protectable by a restrictive covenant as contended for by the Defendants. [47]

(ii) The Singapore cases seem to support the proposition that, in order to determine whether a restrictive covenant is enforceable, the question to be asked is whether there is a legitimate interest of the covenantee which should be protected. [48] In the present case, there is certainly such legitimate interest in the case of the Plaintiffs.

(iii) The lack of a geographical limit should not render the clause unenforceable as the Plaintiffs' Tricycle Business has a strong global presence.

(iv) The non-competition clause is restrictive in scope as it only restrains Capital Key from providing services to companies that may be in competition with the business conducted by STML. [49] Clause 5 defines the scope of restriction to activities or services which are " *in competition with the business conducted by* " STML. The only natural interpretation of this phrase is that Capital Key is prohibited from engaging in business activities with or providing services to the business of the third-party company that is in competition with the business of STML. The provision of service to the business of a third-party company where there is no real sensible possibility of conflict would not be caught by the clause.

246. As I find that both Global Wise and Capital Key are liable to the Plaintiffs for the dishonest assistance claim, it is quite unnecessary for me to consider whether Capital Key itself is also liable for breach of fiduciary duties owed to the Plaintiffs. In any event, it would not be difficult for the court to find fiduciary relationship between the Plaintiffs and Capital Key, as the latter possessed a lot of sensitive business information relating to the Tricycle Business. One would not expect someone like Capital Key to betray its principals (i.e. the Plaintiffs) by providing confidential information to their competitors.

THE CLAIM FOR BREACH OF CONFIDENCE

247. The Plaintiffs also claim against the Defendants for breach of confidence for their alleged misuse of the Confidential Designs and the Confidential Customers Information.

248. The three elements to establish a claim for breach of confidence are well-established, namely that: (i) the information itself has " *the necessary quality of confidence about it* "; (ii) the information has been " *imparted in circumstances importing an obligation of confidence* "; and (iii) unless restrained there is " *likely to be an unauthorised use of that information* " to the detriment of the claimant. [50]

249. For the Confidential Designs, it is quite clear that it was confidential information. There is also no question that the Defendants were fully aware of the confidential nature of these designs.

250. Given the substantial similarities between the Plaintiffs' products and the Defendants' competing products, there is reason for the court to believe that the Plaintiffs' design drawings had been misused by the Defendants. [51] Further, the indisputable facts are that Chiu, Global Wise and Ye were able to manufacture and sell the competing products as early as October 2008. I agree with Mr Wong that this would not have been possible without the Defendants' misuse of the Confidential Designs.

251. For the Confidential Customers' Information, it is clear that the customers and pricing information in respect of the Tricycle Business was confidential in nature. Given the competition between the Plaintiffs' Tricycle Business and Chiu's competing business, the said confidential information was of considerable commercial value to the latter.

252. There is ample basis for the court to infer misuse of such information on the part of the Defendants. In the various name cards collected at the trade fairs, there were multiple references to " *SM* " (Smart Trike) or " *SM客* " (customers of Smart Trike), showing that Global Wise was acutely aware that these customers were customers of the Plaintiffs' Tricycle Business. It is also clear from the multiple entries in the notes of contact and correspondence that these customers were comparing the prices of the Plaintiffs' and the Defendants' products. For example, the notebook entry for TRU France was marked " *客 (customer): Better price than Smart Trike* ".

253. The prices of the Plaintiffs' products were certainly sensitive business information. With such confidential information, the Defendants were able to sell their products at a lower price. By way of example, during the 2011 Cologne Fair in Germany, a client in the name of Golden Baby Ltd remarked that the trikes sold by Global Wise were very similar to those of the Plaintiffs. In an attempt to undercut the price offered by STML, Global Wise offered to sell 2029021 (very similar product to the Plaintiffs' ST 126) to this client at $27.5, much less than the offering price of STML in 2011-2012 (US $65).

254. The Defendants dispute the claim on breach of confidence on the following grounds:

(i) There is no evidence to show that Chiu or Ye had received the Confidential Designs from the Plaintiffs.

(ii) The information contained in the Confidential Designs would no longer be confidential after it entered the public domain.

(iii) The Defendants did not use the Confidential Designs for the business of Global Wise. Even if such designs had been used, only Ye should be held liable.

(iv) The names of the Plaintiffs' customers were not confidential information.

(v) Global Wise developed its own customers base through connections made at trade fairs. The markings on the name cards and notebooks used by Global Wise's staff during trade fairs were only information supplied by the customers, and the fact that Global Wise' products were sold at a lower price does not mean that Global Wise used the Plaintiffs' Confidential Customers Information in pricing its own products.

(vi) Even if confidential information had been used in selling Global Wise's products, only Chiu and Global Wise should be held liable.

255. Despite the able submissions of Ms Tam, I do not accept that these arguments can exonerate the Defendants.

256. First, Yoram testified clearly that he had handed over the production files of the Plaintiffs' products to Fu Yu through Chiu. Ms Tam challenges Yoram's evidence in this regard because it was not mentioned in his witness statements. However, one cannot expect Yoram to have mentioned all the minute details in his already very lengthy witness statements. Indeed, taking into account the trust and confidence then developed between the parties and that Yoram was not stationed in Hong Kong, it was very probable that Yoram handed the production files to the Mainland factories through Chiu. Ye was also evasive when he testified that he did not need the Confidential Designs to produce the tricycles. If it was not necessary, I wonder why the Plaintiffs would have needed to prepare such detailed production files in the first place. [52]

257. Second, the production files created in relation to the Plaintiffs' products were never in the public domain. They consisted of detailed specifications and dimensions relating to the production of the Plaintiffs' products. Further, the fact that the Plaintiffs' products have been published in public does not destroy the confidentiality of the design drawings. [53]

258. Third, it may be very difficult for a claimant to prove actual use of confidential information by direct evidence. Nevertheless, if the claimant can show that the defendant had access to such information, the claimant can ask the court to draw an inference, based on the circumstantial evidence in the case, that the defendant had used the confidential information. Based on the matters referred to in §§249 to 253 above, there is ample evidence for the court to draw the inference that the Defendants had misused the Confidential Designs and the Confidential Customers Information of the Plaintiffs.

259. Fourth, authorities such as JN Dairies Ltd v. Johal Dairies Ltd [2009] EWHC 1331 [54] explained why sensitive business information such as customers and pricing information may amount to confidential information. In *JN Dairies Ltd*[55] :

(i) The court found that the information contained in invoices was of considerable commercial value given the intense competition between various suppliers. [56] The court went on to hold that the fact that the price of rival competitors could have been revealed by the customers themselves does not render the pricing information non-confidential, and " *it was commonplace for customers if asked to say that they were paying prices lower than they actually were, to see whether they would be offered prices lower still* " and " *there is an obvious advantage in knowing whether the customer is telling the truth or simply adopting a negotiating position.* " [57]

(ii) The court held that the information contained in the invoices were plainly confidential information — " *information such as was contained in the claimant's invoices about the quantities of goods purchased by a particular customer and the prices charged to him is information which possesses the necessary degree of confidentiality.* " [58]

(iii) Further, the court held that the identity of the claimant's customers, at least as collected together in the form of a list, can be properly described as confidential to some degree. A list or collection of names of customers is not something that the claimant or anybody in its position would ordinarily make public, precisely because of the commercial advantage that competitors can obtain from it by targeting their competitive efforts. [59]

260. Applying these principles, the information contained in the Plaintiffs' invoices was confidential in nature. The examples in the name cards clearly show that the prices of the Plaintiffs' products were discussed between Global Wise and its potential customers, for example Mookie in which " *Smart Trike $12* " was mentioned. There was a " *clear advantage* " on the part of Global Wise to know whether " *the customer [was] telling the truth or simply adopting a negotiating position* ". Further, the names of the Plaintiffs' customers in a list (for example the lists of customers prepared by Capital Key) clearly constituted confidential information.

261. Finally, regarding the liability of the respective Defendants, I find that Chiu, Ye and Global Wise are liable for breach of confidence in respect of the misuse of the Confidential Designs. The competing products sold by Global Wise, which were manufactured by Ye's factories, were very similar to those of the Plaintiffs' products. As the court has reason to believe that Ye had used the production files of the Plaintiffs to produce these products, the said parties should be held liable. Indeed, Chiu had passed the Confidential Drawings to Ye, and she should have known that the products to be sold by Global Wise were manufactured by Ye using the Confidential Drawings. For breach of confidence in respect of the Confidential Customers Information, I find that Chiu, Global Wise and Capital Key are liable. They are the parties who made use of such information to facilitate the sales of the competing business.

THE CLAIM FOR UNLAWFUL MEANS CONSPIRACY

262. The relevant principles for the claim of unlawful means conspiracy can be summarised as follows:

(i) An unlawful means conspiracy is committed where " *two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage* " [60].

(ii) It is not necessary for the injured party to prove that causing him or her damage was the main or predominant purpose of the combination but that purpose must be part of the combiners' intentions. [61]

(iii) It is now established that a breach of fiduciary duty can amount to "unlawful means" for the purposes of the conspiracy tort. [62]

(iv) It is sufficient for the claimant to show a " *constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue* " [63].

(v) The requisite intention can be " *evidenced by the fact that it could be reasonably foreseen* " that the concerted action would cause loss to the claimant. [64]

(vi) A company, being a separate legal person, can conspire with its directors; and the knowledge of the company may be found in the person (usually a director) who has management or control (as its "alter ego") for the transaction or act in question. [65]

263. The Plaintiffs claim that the Defendants, by having an agreement or understanding to run a competing business as discussed in the February 2012 Meeting, were committing a tort of unlawful means conspiracy against the Plaintiffs. The Plaintiffs allege that the Defendant intended to cause loss to the Plaintiffs, or at the very least it could be reasonably foreseen that the Defendants' concerted action would cause loss to the Plaintiffs, and so the requirement for showing "intention" for the tort is satisfied in the present case.

264. I hope I do not need to repeat the reasons as to why I accept the Plaintiffs' case in this regard. The participants of the February 2012 Meeting conspired to run a competing business behind the back of the Plaintiffs, whilst at the time continued to deal with the Plaintiffs in respect of the Tricycle Business. The participants were fully aware of the impropriety of their conducts which would certainly cause loss to the Plaintiffs. Hence, I find in favour of the Plaintiffs on the conspiracy claim.

265. The Defendants oppose the claim on the following grounds:

(i) The Plaintiffs have failed to show any independently unlawful means.

(ii) There was no agreement or "conspiracy" to injure the Plaintiffs. The alleged "conspiracy" is primarily based on the Meeting Note of the February 2012 Meeting. However, the products discussed in that meeting were different products which were not the same as the products complained of in the present action. Further, the mere facts that Choi helped with handling finances for Global Wise and Ye sold tricycles to Global Wise do not mean that they were part of a "conspiracy" to injure the Plaintiffs. Neither of them had any intent to injure the Plaintiffs either as an end in itself or as a means to an end, since they were not directly competing with the Plaintiffs at all. *A fortiori*, Capital Key was not involved in the business of Global Wise and had no intent to injure the Plaintiffs.

266. For the first argument, as a breach of fiduciary duty can amount to "unlawful means" for the purposes of the conspiracy tort [66] and that the Plaintiffs have managed to establish such breach of fiduciary duty, the first ground of opposition must fail.

267. For the second argument, it is clear that the products discussed in the February 2012 Meeting were very similar to those of the Plaintiffs. At least, they were highly competing products. Further, the participants of the meeting knew full well that it was improper for them to engage in the competing business, for examples: (i) they planned to start the competing business after the termination of their business relationship with the Plaintiffs; and (ii) they had made arrangement to ensure that the Plaintiffs' staff would not be present when Kramer visited Ye's factory on 17 April 2022. Hence, it cannot be argued that there was no such conspiracy to injure the Plaintiffs.

268. Insofar as the respective liability of the different Defendants is concerned, there is no question that Chiu, Ye and Global Wise are liable because they were the participants of the February 2012 Meeting and Global Wise was the corporate vehicle for the operation of the competing business. Though Choi and Capital Key might have assisted the operation of the competing business, there is no evidence to show that they were parties actually involved in the conspiracy agreement itself. Hence, I agree with the Defendants that Choi and Capital Key should not be held liable for such claim.

CONCLUSIONS

269. For the sake of completeness, the Plaintiffs have also pleaded other causes of action against the Defendants including unlawful inference with the Plaintiffs' business and conspiracy to defraud. However, the Plaintiffs are not pursuing these claims at the trial.

270. In the final submissions, Mr Wong has for the first time invited the court to make an order for the return of the moulds. But as I have pointed out at the trial, the parties had not even arranged a visit to Ye's factories to take some photographs about the different moulds allegedly used to produce the Plaintiffs' products. Since the moulds ownership issue has not been fully canvassed in the evidence and there is no means to identify the different moulds which would be the subjects of the order for the return of the moulds, I prefer to leave the matter to be decided at the second stage of the proceedings.

271. In her final submissions, Ms Tam argues that, even if the Defendants were held liable, there should be limited durations for the respective liabilities. As I see it, after the ruling on liabilities, this case will proceed to the second stage involving account and inquiry and assessment of damages. It would be difficult for the court to set a fixed duration for the respective liabilities at this stage without knowing the details of the actual instances of wrongdoing. Obviously, the wrongs committed by the respective Defendants will be fully investigated at the second stage of the proceedings, and so I would prefer to leave the related matters to be dealt with by then. In any event, the final wording of the order has yet been canvassed by the parties at the trial. Hence, I will direct the parties to submit an agreed order to the court for approval within 28 days. In the case of any disagreement or the Defendants would seek further adjudication on the time duration issue or the mould ownership issue, the parties are at liberty to restore the matter for further argument.

272. I also make an order *nisi* that:

(i) the costs of the action incurred up to the date hereof be paid by the 1st, 2nd, 4th, 5th and 6th Defendants to the Plaintiffs with certificate for two counsel;

(ii) there be no order as to costs vis-à-vis the Plaintiffs and the 3rd Defendant.

273. The costs order *nisi* shall be made absolute 28 days after the date of the handing down of this Judgment.

[Postscript: this judgment has been corrected by corrigendum of 24 July 2024 issued by the Judiciary.]

[1] according to the Defendants, Anat was the Chief Executive Officer of the Tricycle Business based in Israel

[2] Mo was a person engaged by Yoram to offer technical assistance in the production of the moulds for the Tricycle Business

[3] the agreement does not specify which company in the Golden Pride Companies

[4] see clauses 1-6

[5] clause 5 in both agreements

[6] Mr Wong has provided the particulars of these payments in §96 of his final submissions

[7] see: correspondence relating to the payment for display boxes in around 15 July 2009

[8] see: the email from Chiu to Michael of Smart Trite dated 29 October 2009, the email correspondence between Chiu and Harisan between 14 to 15 December 2009 and the email from Michael of Smart Trike to Chiu on 24 January 2010

[9] see: email from the Plaintiffs to Chiu dated 5 November 2012

[10] see: Ellen Lam's email dated 25 January 2010

[11] see: the email correspondence relating to the quality of the zippers in November 2012

[12] see for example: Chiu's email dated 16 March 2010, in which Chiu requested Elina Ginsburg of the Plaintiffs to confirm the release of the shipping order to the factory, since the container was already full

[13] *SMARTY TRIKE HK* see: email by Chiu on behalf of " " to Tetro's employee on 10 March 2010, and email from Elina Ginsburg to Ellen Lam dated 20 May 2010

[14] §38 above

[15] the Chinese name was "標記塑膠五金廠"

[16] the remark made by Greg Hopkins of David Lowe & Co Ltd in the Nuremberg Fair 2010, and similar remarks by Golden Baby Ltd and Luderix International SAS

[17] see: email sent to "Valued Customers" including Darpeje dated 30 November 2011, email sent to J&E dated 16 May 2012

[18] a tricycle very similar to Model 908 marketed by Global Wise

[19] a product identical to Comet (501) marketed by Global Wise and very similar to the "Balance Bike" and "Running Bike" sold by the Plaintiffs

[20] according to Chiu, "Alien Bike" was later manufactured by Ye and sold in the market to Global Wise's customers

[21] a product similar to the ride-ons offered for sale by the Plaintiffs

[22] see §154 above

[23] STML eventually obtained summary judgment against Fung and Yip on 22 June 2016

[24] see §173 above

[25] see §§41-51 above

[26] (2013) 16 HKCFAR 681 at §68

[27] Leung Ping Chiu Roy v Wai Chen [2021] HKCA 941 (1984) 156 CLR 41, at p 96; this statement was also applied in , at §128

[28] *Libertarian Investments Ltd v. Hall, supra,* at §63

[29] (34th ed), at §7-005

[30] *per* A Company v Secretariat Consulting Pte Ltd [2021] 4 WLR 20 Al Nehayan v Kent [2018] 1 CLC 216 , at §41 per Coulson LJ; . at §§163, 165 Leggatt LJ (as Lord Leggatt JSC then was)

[31] *supra* , at §§73 & 74

[32] *Snell's Equity, supra* , §7-012

[33] *per* Cheung Sai Lon v. Cheung Sai Ha, HCA 2218/2019 (5 October 2020), at §21, Coleman J

[34] *per* Poon Ka Man Jason v. Cheng Wai Tao (2016) 19 HKCFAR 144 , Spigelman NPJ at §82

[35] *dictadicta* Lac Minerals Ltd v International Corona Resources Ltd [1990] FSR 441 Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 [2018] 1 CLC 216, at §159; Ms Tam also makes reference to the of Mason J in , at 97 and of Sopinka J in , at 485

[36] (2013) 16 HKCFAR 681 , at at §§109 to 110

[37] *supra* , at §§60 & 63

[38] [2013] 1 HKLRD 441 , at §37.23

[39] *The Fiduciary Obligation* " " (1975) 25 UTLJ 1

[40] *dicta* Kao Lee & Yip v. Koo Hoi Yan [2003] 3 HKLRD 296 see also the of Ma J (as Ma CJ then was) in , at §37

[41] (2016) 19 HKCFAR 144

[42] *supra,§§89 and 125* at

[43] *per* Kao Lee & Yip v. Donald Koo [2003] 3 HKLRD 296 Zhang Heng v. Kingstone International Wealth Management, CACV 56/2017 at §66, Ma J (as he then was); see also (22 September 2017), at §13(3)

[44] Central Bank of Ecuador v. Conticorp SA [2015] Bus LR D7, [2015] UKPC 11 , at §45

[45] see §168 above

[46] *per* China Metal v. UBS AG [2021] HKCFI 918 , at §§45-46, DHCJ Le Pichon

[47] Lee Gwee Noi v. Humming Flowers [2014] SGHC 64 Heller Factoring v. Ng Tong Yang [1993] 1 SLR 495 at §§52-53; see also at §§13 & 15(c)

[48] *Lee Gwee Noi v. Humming Flowers, supra,* §§37-38

[49] CLASS Medical v. Ng Boon Ching [2010] 2 SLR 386 see , at §53

[50] *perper* University of Hong Kong v. Hong Kong Commercial Broadcasting Ltd [2016] 1 HKLRD 536 Coco v. A N Clark (Engineers) Ltd [1969] RPC 41 , at §38 G Lam J (as he then was), citing , at 47, Megarry J

[51] see §234 above

[52] see §§73 & 74 above

[53] *seeGurry on Confidencesee* Ackroyds (London) Ltd v Islington Plastics Ltd [1962] RPC 97 Force India v 1 Malaysia [2012] EWHC 616 (Ch) , at §104, (2nd ed) at §5.32; also at §222

[54] *Gurry on Confidence* [2009] EWHC 1331, see also (2nd ed), at §6.14

[55] *supra*

[56] at §100

[57] at §102

[58] at §111

[59] at §112

[60] *Clerk & Lindsell on Torts* (23rd ed), at §23-105

[61] *Clerk & Lindsell on Torts* , at §23-105

[62] *Clerk & Lindsell on Torts* , at §23-117

[63] *per* JSC BTA Bank v. Ablyazov [2020] AC 727 , at 745, at §13, Lord Sumption and Lord Lloyd-Jones JJSC

[64] *per* She Tsu Yi v. Tsu Ki Ting, HCA 1684/2004 & HCMP 3290/2004 (5 November 2007, Poon J (as he then was), at §154

[65] *Clerk & Lindsell on Torts* , at §23-103

[66] see § above