IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 14

Suit No 975 of 2015

Between

Traxiar Drilling Partners II Pte Ltd
(in liquidation)

… *Plaintiff*

And

Dvergsten, Dag Oivind

… *Defendant*

GROUNDS OF DECISION

[Companies] — [Directors] — [Duties]

[Companies] — [Directors] — [Liabilities]

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v
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[2018] SGHC 14

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23 January 2018

Aedit Abdullah J:

Introduction

1 In this case, the liquidators of the plaintiff company ("the Liquidators") sought, among other forms of relief, damages arising from the defendant's breaches of directors' duties as well as a declaration that the defendant had carried on the plaintiff's business with an intent to defraud creditors under s 340(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the CA"). Having considered the submissions and the evidence, I concluded that breach of directors' duties was made out, but that the requisite threshold for fraud was not established. Both the Liquidators and the defendant have appealed against my decision. I now set out the reasons for my decision.

Background facts

Relevant parties

2 The plaintiff company, Traxiar Drilling Partners II Pte Ltd ("the Plaintiff"), was incorporated in Singapore by the defendant, Mr Dag Oivind Dvergsten ("the Defendant"), on 12 April 2013 as a special purpose vehicle.[1] At all material times prior to its liquidation, the Defendant was a director of the Plaintiff. The Defendant was one of two directors of the Plaintiff when it was first incorporated, and was its sole director from 20 December 2013 until the Plaintiff was wound up on 3 June 2015.[2]

3 At the time of the Plaintiff's incorporation, the Plaintiff had an issued share capital of $1, comprising a single share held by First Marine Holdings Pte Ltd ("First Marine"), a Singapore-incorporated company.[3] Subsequently, on or about 22 December 2013, an additional 999 shares were allotted to various other parties such that the overall shareholding of the Plaintiff became as follows:[4]

(a) First Marine – 21%;

(b) Ms Hege Anfindsen – 3%;

(c) the Defendant – 25%; and

(d) Treatmil Holdings Limited ("Treatmil"), a Cyprus-incorporated entity – 51%.

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1 Seah Chee Wei's Affidavit of Evidence-in-Chief ("AEIC") at para 12; Defendant's AEIC at para 21.

2 Defence (Amendment No. 2) at para 3.

3 Seah Chee Wei's AEIC at para 14; Defendant's AEIC at para 22.

4 Seah Chee Wei's AEIC at paras 14 and 16; Defendant's AEIC at para 73.

4 First Marine's sole shareholder was Dag Dvergsten Pte Ltd ("DDPTE").[5] DDPTE was in turn wholly owned by Dag Dvergsten AS ("DDAS"), a Norwegian company.[6] The Defendant was a director and the sole shareholder of DDAS[7] and was also a director of DDPTE.[8] DDAS owned 36.5% of the shares in Treatmil.[9] Treatmil was the sole shareholder of Atlantic Marine Services Asia Pacific Limited, which in turn previously owned Atlantic Marine Services Singapore Pte Ltd ("AMS SG").[10] The Defendant was also a director of Treatmil.[11]

5 The Plaintiff did not open or operate any bank accounts in its own name from the time of its incorporation. Instead, the Defendant utilised DDPTE's pre-existing bank account with DBS Bank Pte Ltd ("DBS") ("DDPTE's Bank Account"), both to receive funds from third parties as well as to make payments in connection with the Plaintiff's affairs.[12]

Facts leading up to the dispute

6 The dispute arose primarily from the Plaintiff's proposed business venture to acquire a jack-up drilling rig known as the "*Somnath*" that was being offered for sale by GOL Offshore Fujairah LLC FZE ("GOL Offshore") for US$215m. Negotiations between the Plaintiff and GOL Offshore culminated in

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5 Seah Chee Wei's AEIC at paras 21(a)–(b); Defendant's AEIC at para 22.

6 Seah Chee Wei's AEIC at para 21(d); Defendant's AEIC at para 22.

7 Seah Chee Wei's AEIC at paras 21(e)–(f); Defendant's AEIC at para 12.

8 Seah Chee Wei's AEIC at para 21(c); exhibit SCW-3, p 134.

9 Seah Chee Wei's AEIC at para 19; Defendant's AEIC at para 15.

10 Defendant's AEIC at paras 17–18; Defence (Amendment No. 2) at para 3.8

11 Seah Chee Wei's AEIC at para 21(h); Defendant's AEIC at para 14.

12 Seah Chee Wei's AEIC at para 9; Defendant's AEIC at para 23.

the Plaintiff entering into the following agreements with GOL Offshore on 11 December 2013: a Memorandum of Agreement ("the Second MOA") and a Supplemental Agreement to the Second MOA ("the Supplemental Agreement") (collectively, "the *Somnath* Purchase Agreements").[13]

7 In connection with the purchase of the *Somnath*, the Defendant negotiated for the Plaintiff to enter into various loan transactions. First, a loan for US$3m was obtained from AMS SG on 30 September 2013, which carried an interest rate of 6% per annum and was due to be repaid on 31 December 2016 ("the AMS Loan").[14] The AMS Loan was disbursed to the Plaintiff by AMS SG over three tranches on 17, 18 and 23 October 2013.[15]

8 Second, to finance the payment of, *inter alia*, the first deposit of US$15m as required by the *Somnath* Purchase Agreements ("the First Deposit"),[16] the Plaintiff obtained a "bridging loan" of US$15m from Symphony Ventures Pte Ltd ("Symphony") on 23 December 2013 ("the Symphony Loan").[17] The Symphony Loan was due to be repaid in full on 27 December 2014.[18] Clause 2.2 of the Symphony Loan agreement expressly stated that the borrower (*ie*, the Plaintiff) was to apply the Symphony Loan monies "for the purpose of financing the [First Deposit]" and "for other expenses related to" the

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13 Seah Chee Wei's AEIC, exhibit SCW-16, pp 614–629 and 639.

14 ABD1, p 124.

15 ABD5, pp 3002, 3004 and 3006.

16 Seah Chee Wei's AEIC, exhibit SCW-16, p 628.

17 Defendant's AEIC at para 74.

18 Defendant's AEIC at para 83; Seah Chee Wei's AEIC, exhibit SCW-19, pp 858 and 861.

Somnath and the Second MOA.[19] When Symphony first attempted to remit the first tranche of US$6m to the Plaintiff on 24 December 2013, it was unsuccessful. This was because the Defendant had provided Symphony with DDPTE's Bank Account details but named the Plaintiff as the payee. Thus, DBS informed Symphony that for that particular bank account number, the corresponding named payee should have been DDPTE and not the Plaintiff. Symphony then enquired with the Defendant as to the discrepancy, and asked for the Defendant to provide the details of a bank account held in the Plaintiff's name.[20] In his email reply dated 24 December 2013, the Defendant informed Symphony that "DBS bank could not process the New account in time" and thus the monies should be sent to DDPTE's Bank Account. The Defendant also stated in the same email that he would appreciate Symphony remitting the monies in the morning so that "we can start processing for rig Already thursday [*sic*]".[21] Symphony then transferred US$6m to the DDPTE's Bank Account on 26 December 2013.[22]

9 As matters transpired, only the first tranche of the Symphony Loan was disbursed to the Plaintiff instead of the two tranches as planned. It was this amount which formed a central aspect of the Plaintiff's claim against the Defendant: the US$6m from the first tranche of the Symphony Loan, together with the US$3m from the AMS Loan, were the material borrowed funds ("the Borrowed Funds").

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19 Seah Chee Wei's AEIC, exhibit SCW-19, p 860.

20 ABD2, p 996.

21 ABD2, p 995.

22 ABD2, pp 1003–1004.

10 Several outgoing transactions were made by the Plaintiff in the period spanning 2013 to 2015. First, on 1 December 2013, the Plaintiff entered into an agreement with DDAS for the provision of "high level business services supporting [the Plaintiff] and in particular related to the acquisitions of rig *Somnath* and the financing of such assets and support services".[23] It appeared that in 2014 and 2015, the Plaintiff entered into further similar agreements with DDAS (collectively, "the Management Fee Agreements").[24] In connection with the services allegedly provided by DDAS in 2013, 2014 and 2015, the Plaintiff made payments to DDAS in the amounts of US$830,800, US$750,000 and US$300,000 respectively, totaling US$1,880,800 ("the DDAS Payments").[25]

11 Second, the Plaintiff granted a loan of US$1.7m to DDPTE ("the DDPTE Loan"). There were two documents which allegedly recorded the DDPTE Loan: one stated that the loan agreement was entered into on 1 December 2013,[26] while the other stated that the loan agreement was entered into on 1 November 2014.[27] Regardless, both documents stated that the DDPTE Loan carried an interest rate of 4% per annum and was due for repayment only on 31 December 2023. The DDPTE Loan was allegedly made pursuant to a novation agreement between DDPTE, the Plaintiff and First Marine dated 14 November 2014 ("the Novation Agreement").[28] The Novation Agreement provided for the DDPTE Loan in exchange for the novation of First Marine's rights under an agreement entered into with PT Harmoni Drilling Services ("PT

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23 ABD1, p 131.

24 Defendant's AEIC at paras 156 and 169.

25 Defendant's AEIC at para 171.

26 ABD1, p 267.

27 ABD1, p 266.

28 ABD1, pp 270–271.

Harmoni") to the Plaintiff. The terms of the Novation Agreement also provided that "work provided by [DDPTE] and invoiced as management services and outlays" would be "offset against the [DDPTE Loan]". This was a reference to a business services agreement entered into by DDPTE and the Plaintiff on the same day (*ie*, 14 November 2014) ("the Business Services Agreement"), under which the Plaintiff was to pay US$50,000 per month to DDPTE as management fees.[29]

12 Third, the Plaintiff transferred a total of US$3.25m to a company known as TY Global LLC ("TY Global"). On 15 December 2013, the Defendant had instructed Mr Abraham Thomas ("Abraham"), the owner of TY Global, to send invoices to the Plaintiff's address, to which Abraham replied "[w]hat is the amount of the invoice I should make".[30] On 27 December 2013, the Plaintiff transferred a total of US$3.25m[31] to TY Global based on the following invoices ("the TY Global Payments"):

(a) US$2,472,500 for "Upfront brokerage commission payable on Rig Somnath";[32] and

(b) US$777,500 for "Advisory and Financial consulting for acquisition of Rig Somnath".[33]

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29 ABD1, pp 268–269.

30 ABD2, p 990.

31 ABD5, p 3028.

32 ABD5, p 3007.

33 ABD5, p 3008.

13 On 30 December 2013, TY Global transferred US$2.25m to AT Offshore LLC ("AT Offshore"),[34] an entity controlled by Abraham.[35] On 3 January 2014, AT Offshore transferred US$2m to Rocky Point International LLC ("Rocky Point"),[36] an entity wholly and ultimately controlled and owned by the Defendant.[37] This money was then used to make payments for Rocky Point's outstandings.[38]

14 Fourth, on 27 December 2013, the Plaintiff transferred US$1.28m to Treatmil ("the Treatmil Payment") under the Defendant's directions.[39] The monies were transferred from DDPTE's Bank Account (which was being utilised in connection with the Plaintiff's affairs, as stated at [5] above) to DDAS's bank account[40] (which Treatmil was allegedly utilising as its own).[41] The Treatmil Payment was allegedly a partial repayment of the AMS Loan, pursuant to a tripartite agreement between AMS SG, Treatmil and the Plaintiff dated 20 December 2013 ("the Tripartite Agreement"). This Tripartite Agreement was possible because AMS SG had extended a US$3m loan to the Plaintiff (see [7] above) and separately, there were also inter-company loans between Treatmil and AMS SG. The Tripartite Agreement itself had not been signed by AMS SG.[42] There was also a payment schedule attached to the

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34 ABD1, p 463; ABD5, p 3032.

35 Seah Chee Wei's AEIC at paras 124 and 127.

36 ABD1, p 472.

37 ABD1, p 289.

38 ABD7, p 4821.

39 Seah Chee Wei's AEIC at paras 138–139.

40 ABD1, p 150; ABD5, p 3025.

41 Plaintiff's Closing Submissions at para 8.

42 ABD1, pp 148–149.

Tripartite Agreement which recorded that the US$3m owed under the AMS Loan had been reduced to US$1.72m, two different versions of which were produced during the course of proceedings. One version was unsigned[43] and this was the copy which was in the records of the Plaintiff's auditor and in the Plaintiff's company records which were presented to the Liquidators. The other version bore the signature of Mr Alfred Schwegler ("Alfred"), the director of AMS SG at the material time, in the bottom right-hand corner ("the Signed Payment Schedule").[44] However, AMS SG's proof of debt dated 9 July 2015 stated that the Plaintiff still owed AMS SG the full amount of the AMS Loan plus interest, amounting to the sum of US$3,318,575.34.[45]

15 In April 2014, Symphony chanced upon a news article stating that the *Somnath* was no longer available for purchase.[46] Concerned, Symphony emailed the Defendant on 21 April 2014 seeking to clarify the contents of the article. The Defendant insisted that the Plaintiff still had the rights to purchase the *Somnath*.[47] On 4 June 2014, Symphony then verbally requested that the Defendant provide particulars as to how the first tranche of the Symphony Loan (amounting to US$6m) had been utilised. The Defendant provided a breakdown of items on the same day but did not provide any supporting documents for those listed expenditures.[48] On 6 June 2014, Symphony's solicitors requested that the Defendant provide all correspondence between the Plaintiff and GOL Offshore

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43 ABD4, p 2939.

44 Seah Chee Wei's AEIC, exhibit SCW-45, p 1378.

45 ABD4, p 2908.

46 ABD2, pp 1093–1094.

47 ABD2, p 1092.

48 ABD2, pp 1140–1141.

that reflected the present status of the Plaintiff's right to purchase the *Somnath*.[49] On 17 June 2014, the Defendant sent Symphony an email enclosing a letter from GOL Offshore dated 16 June 2014, stating that the Plaintiff had defaulted in making the deposit to GOL Offshore.[50] On 18 June 2014, Symphony then requested for all correspondence between the Plaintiff and GOL Offshore relating to the default in making the deposit and the Plaintiff's right to purchase the *Somnath*.[51]

16 On 19 June 2014, the Defendant provided Symphony with various letters that had been exchanged between the Plaintiff and GOL Offshore.[52] This correspondence revealed that in a letter dated 28 April 2014 ("GOL Letter"), GOL Offshore had amended the quantum of the First Deposit to US$7.5m,[53] and that the Plaintiff had failed to pay the First Deposit to GOL Offshore by the stipulated deadline.[54] On 20 June 2014, the Defendant confirmed in a telephone call with Symphony's representative, Mr Subramaniam, that the Plaintiff had received compensation of US$1.5m from GOL Offshore for the latter having sold the *Somnath* to a third party.[55] In Mr Subramaniam's email to the Defendant on 20 June 2014, he pointed out that a "side letter" dated 11 December 2013 entered into between the Plaintiff and GOL Offshore referred to in the correspondence between the same had never been produced to Symphony, and

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49 ABD2, p 1143.

50 ABD2, pp 1151–1152.

51 ABD2, pp 1153–1154.

52 ABD2, pp 1155–1161.

53 ABD2, p 1157.

54 ABD2, pp 1160–1161.

55 ABD2, p 1163.

requested for a copy of the same.[56] The Defendant did not respond. On 2 July 2014, Symphony served a Notice of Default and Acceleration on the Plaintiff and Treatmil stating that, *inter alia*, the non-disclosure of correspondence between the Plaintiff and GOL Offshore constituted an event of default.[57] Subsequently, on 1 August 2014, the Plaintiff entered into a settlement agreement with Symphony and Treatmil ("the Settlement Agreement").[58] The Settlement Agreement provided for, *inter alia*, the repayment of the first tranche of the Symphony Loan by 26 December 2014.

17 In summary, the Plaintiff made, *inter alia*, the following transactions to third parties (collectively, "the Four Transactions") out of the Borrowed Funds:

(a) the DDAS Payments amounting to US$1,880,800;[59]

(b) the DDPTE Loan of US$1.7m as well as monthly payments of US$50,000 to DDPTE under the Business Services Agreement;[60]

(c) the TY Global Payments amounting to US$3.25m;[61] and

(d) the Treatmil Payment of US$1.28m.[62]

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56 ABD2, pp 1162–1163.

57 ABD2, pp 1170–1172.

58 ABD1, pp 239–261.

59 Defendant's AEIC at paras 99, 156, 169 and 171.

60 Defendant's AEIC at para 152.

61 Defendant's AEIC at paras 87 and 171.

62 Defendant's AEIC at paras 92 and 171.

18 The Plaintiff was eventually unable to acquire the *Somnath* and was wound up by an order of court dated 3 June 2015.[63] Ms Tan Suah Pin and Mr Seah Chee Wei were appointed as the Plaintiff's joint and several liquidators.

The Liquidators' case

19 The Liquidators' primary contention was that the Defendant had fraudulently and/or dishonestly caused the Plaintiff to make the Four Transactions to companies of which he was the ultimate beneficial owner, and/or to himself and/or to his nominees or other participants in the fraud.

20 In summary, the Liquidators relied on four primary legal strands:

(a) The Defendant had breached his duties to act honestly in the discharge of his duties as a director under s 157(1) of the CA and/or his duty to act *bona fide* in the interests of the Plaintiff under the common law in carrying out the Four Transactions.[64]

(b) The Defendant had breached his duty to take into account the interests of the Plaintiff's creditors. The Defendant had dissipated the Plaintiff's assets to the prejudice of Symphony and AMS SG by making unjustified payments to his own companies.[65]

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63 Defendant's AEIC at para 2.

64 Plaintiff's Closing Submissions at paras 48–53.

65 Plaintiff's Closing Submissions at paras 57–61.

(c) The Defendant had breached the "actual conflict rule" by making payments to his related companies.[66]

(d) The Defendant intended to defraud the Plaintiff's creditors in contravention of s 340(1) of the CA. The Plaintiff's business had been carried on with the intention of defrauding its creditors. The Defendant was a knowing party to the business being carried out fraudulently because he was its sole and controlling director.[67]

21 In making out its case against the Defendant, the Liquidators attacked the propriety of each of the Four Transactions and labelled each of the agreements that the Defendant relied upon to justify these transactions as a "sham". First, in relation to the DDAS Payments, the Liquidators argued that there was no evidence of any management services ever having been provided by DDAS to the Plaintiff – there were no detailed invoices, work reports, breakdowns, disbursement accounts, or any other documentation which would justify the payment of fees. Yet, the Defendant caused the Plaintiff to make the DDAS Payments out of the Borrowed Funds, even where it had been represented to creditors that the Borrowed Funds would be used to pay the deposit for the purchase of the *Somnath*. The Liquidators argued that the Defendant's act of procuring the Plaintiff to enter into an agreement to pay out of the Borrowed Funds to DDAS, his own wholly-owned company, for non-existent management services was not only fraudulent conduct, but also a breach of directors' duties to act honestly in the interests of the company, to prioritise the interests of creditors as well as the "actual conflict" rule.[68]

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66 Plaintiff's Closing Submissions at paras 54–56.

67 Plaintiff's Closing Submissions at paras 62–72.

68 Plaintiff's Closing Submissions at paras 12, 53, 59 and 69.

22 Second, in relation to the DDPTE Loan, the Liquidators argued that the Novation Agreement was a sham document. It was argued that the Defendant had signed on behalf of all three parties. It was also pointed out that DDPTE had not provided any consideration to the Plaintiff and was not even a party to the agreement between First Marine and PT Harmoni (the rights under this agreement being the subject of the Novation Agreement) and yet, DDPTE stood to reap the largest benefit (*ie*, the DDPTE Loan with favourable terms and a further 1.15% commission payable for each rig sourced to the Plaintiff under the Novation Agreement). With respect to the Business Services Agreement, the Liquidators argued that the monthly payment of US$50,000 was not justifiable – DDPTE had no employees and there were no documents evidencing that any work had been done by DDPTE. The Liquidators thus argued that both the DDPTE Loan and the monthly payments were made pursuant to a fraudulent scheme or were made without good faith in breach of the Defendant's duties to act in the best interests of the Plaintiff, to prioritise the interests of the creditors as well as the "actual conflict" rule.[69]

23 Third, with respect to the TY Global Payments, the Liquidators pointed out that US$3.25m had been paid out of the Plaintiff's funds to TY Global even though there was no record of TY Global having done any work for the Plaintiff. The Liquidators adduced evidence to show that the TY Global Payments had been made pursuant to an arrangement between the Defendant and Abraham, whereby Abraham agreed to run the Plaintiff's US$3.25m through his entities before taking a cut of US$15,000 and remitting the remaining sum of US$3.235m to Rocky Point, a US-incorporated company controlled by the

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69 Plaintiff's Closing Submissions at paras 15–16, 53, 59 and 69.

Defendant.[70] The transaction between TY Global and Rocky Point was "legitimised" by an invoice dated 20 December 2013 for "Asset Transactional Fee" of US$3.235m which had been sent by the Defendant to Abraham.[71] The Liquidators argued that the TY Global Payments had thus been made in furtherance of the Defendant's dishonest fraudulent scheme to misappropriate the Plaintiff's funds and also amounted to a breach of the Defendant's directors' duties.[72]

24 Lastly, with respect to the Treatmil Payment, the Liquidators pointed out that neither the Tripartite Agreement nor the attached payment schedule had been signed by any authorised representative of AMS SG.[73] Further, it was pointed out that the past and current directors of AMS SG confirmed that AMS SG was unaware of the Tripartite Agreement and the Treatmil Payment.[74] The Liquidators argued that monies had thus been fraudulently and dishonestly redirected by the Defendant to DDAS's bank account (which Treatmil was supposedly utilising as its own) for his own benefit.[75]

The Defendant's case

25 The Defendant's primary case was that the Four Transactions were all legitimate *bona fide* transactions, which the Defendant honestly and reasonably believed were commercially sound and beneficial to the Plaintiff in achieving

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70 ABD2, p 1049.

71 ABD2, pp 993–994.

72 Plaintiff's Closing Submissions at paras 17–23, 41, 59 and 70.

73 ABD1, pp 148–149.

74 ABD4, pp 2912–2913, 2956–2957 and 2976–2979.

75 Plaintiff's Closing Submissions at paras 9, 38–39 and 68.

the purpose for which it was incorporated (*ie*, the successful acquisition of the *Somnath*), even if creditors' interests were to be taken into account.[76] In particular, it was argued that:[77]

(a) For the DDAS Payments, the Defendant had been personally involved in the extensive work that DDAS had undertaken in relation to the acquisition of the *Somnath* and he thus believed that DDAS was entitled to remuneration for its work.

(b) For the DDPTE Loan, the Defendant genuinely believed that it was a legitimate business loan granted to DDPTE in exchange for real benefits to the Plaintiff in the form of the novated rights under the Novation Agreement and interest payments.

(c) For the TY Global Payments, the Defendant honestly believed that the Plaintiff ought to remunerate the brokers for performing a substantial amount of work to the Plaintiff's benefit and hence that the TY Global Payments were commercially justifiable.

(d) For the Treatmil Payment, the Defendant had no reason to disbelieve the Plaintiff's auditor and/or doubt the signature on the Signed Payment Schedule that AMS SG had agreed to a partial repayment of the AMS Loan through Treatmil.

26 The Defendant additionally argued that he did not come under the duty to take into account the interests of the Plaintiff's creditors because that duty

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76 Defendant's Closing Submissions at paras 61 and 83; Defendant's Reply Submissions at paras 18 and 41–137.

77 Defendant's Closing Submissions at paras 96–155.

had not arisen in the first place: the Plaintiff was neither in a parlous financial position nor perilously close to being insolvent. Even if such a duty had arisen, the Defendant had acted *bona fide* and reasonably in carrying out the Four Transactions.[78]

27 With respect to the Liquidators' case that he had breached the "actual conflict" rule, the Defendant argued that none of the Four Transactions breached the rule because:[79]

(a) The Plaintiff's interests were not prejudiced or subordinated in favour of the other companies.

(b) In relation to the TY Global Payments, there was no conflict because the Defendant had no personal interest in TY Global.

(c) As regards DDPTE and DDAS, the use of related companies to structure payments in rig deals was a common practice in the industry.

(d) The Defendant had given express written notice of his interest in related entities (including DDAS, DDPTE, Treatmil and Rocky Point) at the time he was appointed as director of the Plaintiff.

(e) Even if the Defendant had put himself in a position of conflict, his breach was exonerated by the informed consent of the majority agreement of the shareholders, *ie*, Treatmil (which held 51% of the shareholding in the Plaintiff).

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78 Defendant's Closing Submissions at para 219; Defendant's Reply Submissions at paras 24–28.

79 Defendant's Closing Submissions at paras 66–71; Defendant's Reply Submissions at paras 21–23.

28 Even if the Defendant were found to be in breach of his duties as director, the Defendant argued that he should be excused from liability under s 391 of the CA because he had acted honestly and reasonably and it was fair to excuse him for his default, relying on the same reasons stated at [25] above as to his honest and reasonable beliefs in relation to the Four Transactions.[80]

29 With respect to fraudulent trading under s 340(1) of the CA, the Defendant argued that the Liquidators had failed to discharge their burden of proof to demonstrate that the Plaintiff's business was fraudulent.[81]

30 Lastly, it was argued that the losses allegedly suffered by the Plaintiff had no basis in law and the Liquidators had failed to prove the losses and/or damages they have sought.[82]

My decision

31 Having considered the Parties' submissions and the evidence, I concluded that the Liquidators had made out their claims for the Defendant's breaches of directors' duties. However, I could not conclude that the Defendant had committed fraud.

32 Before I analyse the Liquidators' case for breach of directors' duties, I must point out that the Liquidators were not entirely specific on the breaches of duties complained of; this may owe, I suspect, to the overlapping duties at common law and statute, and between different categories of obligations.

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80 Defendant's Closing Submissions at paras 156–164.

81 Defendant's Closing Submissions at paras 169–214; Defendant's Reply Submissions at paras 29–34.

82 Defendant's Closing Submissions at paras 230–255.

Nevertheless, the Liquidators had to my mind sufficiently pleaded, led evidence on and argued on the basis of breaches of the duty to act honestly under s 157(1) of the CA, the duty to act *bona fide* in the interests of the company under common law, the duty to take into account the interests of the Plaintiff's creditors, and the duty to avoid conflict and actual conflict at common law. I will analyse each of these duties separately.

The analysis

Breach of duty to act bona fide *and honestly under s 157(1) of the CA*

33 As a preliminary point, I note that the Liquidators raised two related breaches:

(a) breach of the duty to act honestly under s 157(1) of the CA; and

(b) breach of the duty to act *bona fide* in the interests of the Plaintiff under common law.

It is unnecessary, however, to consider these two breaches separately as the content of both duties do not materially differ (see Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) ("*Corporate Law*") at para 09.020). As expressed by the Court of Appeal in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597 at [59]:

> In our view, the appellant's duty of honesty and duty to act *bona fide* may be regarded as a ***composite obligation***. The appellant's duty of honesty, which is said to require him to "act honestly in the discharge of his duties as a director", appears to be a reference to the statutory duty imposed on directors under s 157(1) of the CA. This duty is the ***statutory equivalent*** of the duty to act *bona fide* which exists at common law: see *Cheam Tat Pang v PP* [1996] 1 SLR(R) 161 at [19]; *Lim Weng Kee v PP* [2002] 2 SLR(R) 848 at [32]; *Vita Health Laboratories Pte*

> *Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [14]. These two duties impose *a unitary* obligation to act "*bona fide* in the interests of the company *in the performance of the functions attaching to the office of director*" [emphasis added]: see *Marchesi v Barnes* [1970] VR 434 at 438, affirmed locally in *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1994] 1 SLR(R) 513 at [22]. [emphasis in original; emphasis added in bold italics]

34 Section 157(1) of the CA provides that a "director shall at all times act honestly". This has been interpreted by the Court of Appeal to mean that the director must act *bona fide* to "promote or advance the interests of the company" (see *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 ("*Ho Kang Peng*") at [35]). The Defendant did not dispute that this duty is owed by a director to his company.[83]

35 In *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 ("*Intraco*"), the Court of Appeal (at [28]–[29]) enunciated an objective test for determining whether this duty has been breached. The question is whether an "honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of [the company]." This test was re-affirmed in *Ho Kang Peng* at [38], where the Court of Appeal added a qualification (at [37]) that the court will be slow to interfere with a director's commercial decision which has been made honestly even if it turns out, on hindsight, to be financially detrimental to the company. The Court of Appeal also made it clear (at [38]) that just because the court will be slow to interfere, it "does not mean that the court should refrain from exercising any supervision over directors as long as they claim to be genuinely acting to promote the company's interests." For instance, where the transaction is "not objectively in the company's interest", the court may draw an inference

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83 Defendant's Closing Submissions at para 58.

that the director did not act honestly: *Ho Kang Peng* at [38], citing with approval *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ("*Walter Woon on Company Law*") at para 8.36. Further, the Court of Appeal in *Ho Kang Peng* (at [39]) referred to [17] and [19] of the High Court decision of *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] 4 SLR(R) 162 and remarked that "the requirement of *bona fide* or honesty will not be satisfied if the director acted *dis*honestly even if for the purported aim of maximising profits for the company" [emphasis in original].

36 After I rendered my decision, these principles were re-affirmed in the Court of Appeal's recent decision in *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592, where the court emphasised at [35]–[36] that even if the director in question had subjectively believed his actions to be in the company's best interests, he would still be held to have breached his duty if, on the *Intraco* test, his actions on an objective view were not in the company's best interests.

37 It is imperative to note that a director owes duties even if he is the sole director and the owner or effective owner of the company. Such a director may breach his directors' duties even if creditors' interests have not been impinged on, *ie*, in a solvent company (see *Ong Bee Chew v Ong Shu Lin* [2017] SGHC 285 at [86]).

38 The Defendant argued, citing *Intraco*, that the duty to act *bona fide* in the interests of the company does not preclude a director from considering the interest of a group of companies as a single economic entity and act for the benefit of the group as a whole. On this basis, it was permissible for the Defendant to also take into account the interests of the other companies

(including Treatmil, DDPTE and DDAS) when making commercial decisions for the Plaintiff.[84]

39 While it might be permissible to consider the collective interests of the companies in a group, it must not be forgotten that a director must still act in good faith in the interests of *each* individual company. This flows from the fact that a company is a separate legal entity, and the fact that the liabilities of the company do not ordinarily attach to its shareholders or officers. The advantages of corporate personality must be in return for certain obligations. The same applies for groups of companies since each company within the group can have its own separate set of creditors (see *Walter Woon on Company Law* at para 8.31). While some commercial leeway may be given to those who act as directors of associated companies within a group, the obligations owed to each company do not disappear. As such, a director must not act with the intention of furthering the interests of the group as a whole to the prejudice or detriment of a company within the group (see *Walter Woon on Company Law* at para 8.31). This much is clear from the High Court decision of *Golden Village Multiplex Pte Ltd v Phoon Chiong Kit* [2006] 2 SLR(R) 307, which (at [36]) endorsed and applied the approach laid out by Pennycuick J in *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74 in relation to directorship of companies within a group:

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84 Defendant's Reply Submissions at paras 11–14.

> *Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company.* This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company. [emphasis added]

40 Preliminarily, the Defendant accepted that the Four Transactions were either directed or authorised by him. The only dispute was whether these transactions were in the interests of the Plaintiff. After careful consideration, I was satisfied that the Defendant had breached his duty to act *bona fide* in the interests of the Plaintiff.

DDAS Payments

41 In respect of the DDAS Payments, the Liquidators argued that the Management Fee Agreements relied on by the Defendant were sham documents and even if they were not, the circumstances did not show that the DDAS Payments were in the interests of the Plaintiff.[85] The Defendant did not deny the fact that in the years 2013 and 2014, he had caused the Plaintiff to make payments to DDAS for management services the latter had purportedly provided, in the amounts of US$850,000 and US$750,000 respectively. The Defendant instead argued that the DDAS Payments were legitimate, commercially justifiable payments for services rendered, which the Defendant honestly and reasonably believed the Plaintiff was required to pay. It was argued

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85 Plaintiff's Closing Submissions at paras 170–188.

that DDAS's services were necessary since the Plaintiff was only an "asset holding entity" and did not have any resources or employees of its own.[86]

42 The DDAS Payments were made in 2013, 2014 and 2015. I begin with the payment in 2013. The Defendant orally testified that the management fees of US$850,000 charged by DDAS to the Plaintiff for the year 2013 was for services rendered since the Plaintiff's incorporation (*ie*, 12 April 2013) until the end of the year.[87] When the Defendant was questioned by the Plaintiff's counsel as to why he had caused the Plaintiff to pay for work done since the Plaintiff's incorporation when the Second MOA had only been entered into between the Plaintiff and GOL Offshore eight months later on 11 December 2013, the Defendant was unable to provide a satisfactory answer:[88]

> Q: So the management fee agreement of 850,000 you say was for work done from April 2013 and despite the fact that the first MOA was only 17th of September 2013, you are charging Traxiar, the company the full management fees of DDAS, is that right?
>
> A: Excuse me, the---the fer---
>
> Q: See, there's a ***Traxiar Ventures Limited who entered into the first MOA***, correct?
>
> A: ***Yes***, I'm not---I'm not---I'm not charging Traxiar Drilling Partner cost which is related to a different project.
>
> Q: Okay, so what you're saying to us then is that from 11th December 2013 when the [Second] MOA was signed between Traxiar and GOL---
>
> A: Mm.
>
> Q: ---until the payment of 850,000---
>
> A: Yes.

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86 Defendant's Closing Submissions at paras 126–138.

87 NE, 3 March 2017 (Day 4), p 103, lines 26–29.

88 NE, 3 March 2017 (Day 4), p 105, line 16 to p 106, line 2.

> Q: ---that is the only period in which DDAS was being used and it was charge 850,000 am I right?
>
> A: Erm, as I'm saying, ***there was a lot of work going on*** during all of 2014 [*sic*] but it's---it's---***it's not all of that is related to the Somnath.***
>
> [emphasis added in bold italics]

By way of explanation, the reference to "the first MOA" in the excerpt of the transcript above is to a Memorandum of Agreement dated 17 September 2013, which, according to the Defendant's affidavit of evidence-in-chief ("AEIC"), had been entered into between "GOL [Offshore] and Traxiar Ventures Limited, a company incorporated in Cyprus (the "First MOA")".[89]

43 From the evidence, it was clear to me that the Defendant had not acted honestly in charging the Plaintiff US$850,000 for work done by DDAS for the year 2013. In his AEIC, the Defendant stated that from June to August 2013, he and the DDAS team did work in relation to "prospective financing partners" and that he "took part in investor presentations and conducted road-shows with prospective investors in Asia, Middle East and Europe".[90] However, this work was done in respect of the First MOA, a contract that the Plaintiff was not a party to and therefore not a beneficiary of. Further, the First MOA was terminated in late September 2013.[91] It was therefore clear that the work done from June to August 2013 was in relation to the First MOA entered into between GOL Offshore and Traxiar Ventures Limited, and *not* the Second MOA entered into by the Plaintiff with GOL Offshore. Even if, as argued by the Defendant,

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89 Defendant's AEIC at para 34.

90 Defendant's AEIC at para 29.

91 Defendant's AEIC at paras 37–38.

the Second MOA was more attractive for the Plaintiff than the First MOA,[92] I agreed with the Liquidators that there was simply no evidence of any work done by DDAS for the Plaintiff – there were no work reports, breakdowns, disbursement accounts or any other form of documentary evidence which could justify the large payment of US$850,000 to DDAS.

44 In December 2014, the Defendant once again retrospectively caused the Plaintiff to enter into another management services agreement with DDAS to make payment of US$750,000 for work done in the year 2014. Again, no invoices or proof of work were adduced in evidence to justify this additional payment. The Defendant's answer to the lack of evidence was that it was not "industry practice" to keep such documentary records and that since he was personally involved in the work done, he "obviously knew what work had been done".[93] I could not accept this bare allegation without any objective evidence of independent support.

45 This was not the only instance when the Defendant attempted to rely on his industry knowledge and personal experience as evidence. While directors may be accorded considerable leeway to exercise commercial judgment in their specific fields, where concerns have been raised about the decisions made, it is not sufficient for a director to merely invoke his expertise and experience as a justification. In other words, if the director's judgment is in issue, a claim of expertise or experience would in many instances need to be buttressed by independent evidence. The court would otherwise be left to rely exclusively on evidence from the very person whose judgment is impugned. That is not only

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92 Defendant's Reply Submissions at para 102.

93 Defendant's Reply Submissions at para 110; Defendant's Closing Submissions at para 132(e).

improper but also insufficient to establish an acceptable and legitimate practice in the vast majority of cases.

46 For the year 2015, the Defendant claimed that the Plaintiff had incurred US$300,000 in management fees to DDAS. However, the Defendant claimed that this US$300,000 had merely been invoiced, but had not yet been paid by the Plaintiff.[94] I disagreed with the Defendant that the US$300,000 had not been paid. In their closing submissions, the Liquidators provided the following computation,[95] which incorporated the figures from the Defendant's statement of defence in the context of accounting for the US$10.5m received by the Plaintiff (comprising US$9m in Borrowed Funds and US$1.5m from GOL Offshore as compensation for having sold the *Somnath* to a third party buyer)[96]:

Description	**Amount (US$)**	**Balance of US$10.5m**
TY Global Payments	3,250,000	7,250,000
Treatmil Payment	1,280,000	5,970,000
Management fees to DDAS (2013)	830,800	5,139,200
Management fees to DDAS (2014)	750,000	4,389,200
Incorporation fees	12,198	4,377,002
Legal, accounting and miscellaneous payments	157,842	4,219,160
Payment to Symphony	2,750,000	1,469,160

94 NE, 2 March 2017 (Day 3), p 69, lines 5–13.

95 Plaintiff's Closing Submissions at para 185.

96 Defence (Amendment No. 2) at para 59.

Management fees to DDAS (2015)	300,000	1,169,160[97]
DDPTE Loan	1,118,972.14 [US$ equivalent of S$1,566,561]	~ 0
Total	10,449,812.14	

The second column reflects the figures provided in the Defendant's statement of defence. The third column reflects the balance after each figure in the second column is deducted from US$10.5m. The Liquidators applied an exchange rate of US$1 to S$1.40 to the figure for the DDPTE Loan, and demonstrated that the total of all the figures provided by the Defendant (including the US$300,000 sum for management fees to DDAS in 2015) comes up to US$10,449,812.14,[98] which is approximately equivalent to the US$10.5m received by the Plaintiff. The Liquidators' computation demonstrates that the Defendant must have accounted for the payment of US$300,000 (or an even higher sum) out of the US$10.5m. The Defendant's response to the Liquidators' computation was that it was merely a product of "reverse-engineering" and that it was premised entirely on an "arbitrary USD-SGD exchange rate of 1:1.4", which was not the prevailing exchange rate at that time.[99] Even if the Liquidators' calculation involved a degree of reverse-engineering, the Defendant was unable to point to any other significant outgoings from the Plaintiff's funds that affected the logical conclusion drawn from the above computation. I also did not find the exchange rate chosen by the Liquidators to be arbitrary given that it closely

97 It should be noted that the Plaintiff's Closing Submissions contained a mathematical error which wrongly reflected this figure as US$1,069,160.

98 Plaintiff's Closing Submissions at para 185.

99 Defendant's Reply Submissions at paras 116–119.

approximated the exchange rate in November 2015,[100] when the Defendant's statement of defence was first filed.

47 For these reasons, I found that the Defendant had procured the Plaintiff to pay US$300,000 in management fees to DDAS despite the lack of evidence of any management fees agreement having been executed for the year 2015 and any invoices to that effect.

48 I accordingly found that all the DDAS Payments had been made despite the absence of any proper support and justification that DDAS had done any work for the Plaintiff. This could not be reflective of an objective *bona fide* assessment of the interests of the Plaintiff.

DDPTE Loan & Business Services Agreement

49 The Liquidators' position was that the DDPTE Loan had been made solely for the purpose of enabling the Defendant to dishonestly benefit DDPTE (and consequently himself) at the Plaintiff's expense. The Liquidators raised three primary reasons for why the DDPTE Loan was a sham by the Defendant to retain the Plaintiff's monies:[101]

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100 Defendant's Reply Submissions, Annex C.

101 Plaintiff's Closing Submissions at paras 153–169.

(a) There were two separate documents that allegedly recorded the DDPTE Loan – one dated 1 December 2013 and another dated 1 November 2014. The Liquidators argued that the latter document had been fabricated by the Defendant.

(b) If the DDPTE Loan had indeed arisen from the Novation Agreement between the Plaintiff, First Marine and DDPTE as the Defendant contended, it was strange that DDPTE benefited by receiving the DDPTE Loan (US$1.7m) since it brought nothing to the table in respect of the Novation Agreement. The Novation Agreement involved First Marine's novation of all its rights under its agreement with PT Harmoni to the Plaintiff.

(c) Not only did DDPTE benefit from the DDPTE Loan extended to it by the Plaintiff, that loan was subject to set-offs of US$50,000 per month under the Business Services Agreement that the Defendant had caused the Plaintiff to enter into with DDPTE.

50 The Defendant argued that he believed that the DDPTE Loan benefited the Plaintiff because the Plaintiff obtained valuable rights under the Novation Agreement.[102]

51 In my judgment, whilst the first reason cited by the Liquidators was by itself inconclusive to prove that the Defendant had not acted in the Plaintiff's best interests, the latter two reasons convinced me that the Defendant had breached his duty to do so in connection with the DDPTE Loan.

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102 Defendant's AEIC at paras 148–153; Defendant's Reply Submissions at para 126.

52 As mentioned at [11], the Novation Agreement purported to transfer First Marine's rights under the agreement entered into with PT Harmoni to the Plaintiff. DDPTE did not provide any consideration for the Novation Agreement. Yet, the commercial reality under the whole arrangement was that DDPTE stood to gain the most from the Novation Agreement. The Novation Agreement states:[103]

> - As a compensation for these rights, [the Plaintiff] will secure the project work through a commission agreement and a loan agreement (the "Loan") to [DDPTE] of up to USD 1,700,000.- to cover project related expenses.
>
> - All work provided by [DDPTE] and invoiced as management services and outlays, will be offset against the Loan.

53 The Defendant's explanation as to why the Plaintiff had extended a loan to DDPTE under the Novation Agreement despite the Plaintiff gaining nothing from DDPTE was that the loan was required to cover "project related expenses":[104]

> Q: So my question again, is this: What was the reason for granting DDPTE a loan of 1.7 million as a result of this agreement?
>
> A: To se---very simple. To secure that the work related to the sourcing of the three units was secured. If we would give something over, we have to make sure that, er, the---the---the work of actually doing this was continued and not stalled. It's quite common in many industries that you---you hand over rights, but you make sure that, so when the rights are handed over, that the financing of these rights is being taken care of, and that was the basics for this contract.

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103 ABD1, p 270.

104 NE, 2 March 2017 (Day 3), p 116, line 28 to p 117, line 9.

> Q: Now, I won't belabour the point. I'm just going to ask you one more time: what was the rights that was being given up by DDPTE to Traxiar?
>
> A: Erm, DDPTE didn't give up any rights. First Marine Holdings gave up their rights.
>
> Q: But DDPTE got a loan of 1.7 million from Traxiar.
>
> A: Yes, to cover the project related expenses.

54 In my view, this was insufficient justification for the DDPTE Loan. First, it was not clear to me why DDPTE had to be the party that had to undertake this project. Second, the Defendant failed to convince me that the allegedly beneficial Novation Agreement could not have taken place without the grant of the DDPTE Loan, *ie*, the DDPTE Loan was a precondition or a condition precedent to the Novation Agreement. Most tellingly, the Defendant himself admitted in evidence that the DDPTE Loan was not beneficial to the Plaintiff which went towards proving his lack of *bona fides* in causing the Plaintiff to grant the DDPTE Loan, thereby acting contrary to the Plaintiff's interests:[105]

> Q: … From the company's perspective, is the company honestly better off extending a loan at 4% when it cost the company substantially more and when the loan repayments period--- repayment periods were longer at the 4% than it was for AMS and Symphony? From your perspective. Is the company better off or not? Yes or no?
>
> A: *I would say---to that question, I would answer "no", but I would also like to remark that I was part of a---the tri-party three agreements.*
>
> [emphasis added]

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105 NE, 3 March 2017 (Day 4), p 5, line 29 to p 6, line 4.

The Defendant's act of causing the Plaintiff to enter into the Novation Agreement where DDPTE stood to gain at the expense of the Plaintiff was evidence of the Defendant's breach of his duty to act in the Plaintiff's interests.

55 Even if the Novation Agreement and Business Services Agreement were commercially justifiable, there was nothing to support the contention that work had been done by DDPTE. The Business Services Agreement stipulated that invoices had to be provided by DDPTE before it could set-off the US$50,000 and expenses from the DDTPE Loan extended by the Plaintiff.[106] No such invoices were adduced in evidence and the Defendant, despite being the director of both the Plaintiff and DDPTE, testified that he was unaware as to whether such invoices had been rendered by DDPTE in order to set off the loan.[107]

56 Most significantly, by the Defendant's own figures provided in his statement of defence, the figure reflecting the DDPTE Loan appeared to have been reduced. The DDPTE Loan was for US$1.7m. Yet, the Defendant said in his statement of defence (in the context of accounting for the US$10.5m) that the DDPTE Loan was S$1,566,561,[108] which is equivalent to US$1,118,972 (again applying the exchange rate of US$1 to S$1.40). There was no conceivable reason why that DDPTE Loan figure should have been reduced, other than if a set-off had been applied. It was clear that the Defendant had unilaterally reduced the amount owed by DDPTE to the Plaintiff under the DDPTE Loan by applying a set-off. If the DDPTE Loan taken in November 2014 was US$1.7m and if the balance remaining in DDPTE's account after the

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106 ABD1, pp 268–269.

107 NE, 2 March 2017 (Day 3), p 119, line 12 to p 120, line 10.

108 Defence (Amendment No. 2) at para 69.

liquidation was S$1,566,561 (as stated in the statement of defence), it would mean that the amount used as a set-off to pay down the DDPTE Loan under the Business Services Agreement was approximately US$581,028. This is equivalent to about 12 months' worth of service (at US$50,000 per month under the Business Services Agreement) rendered for the Plaintiff. In other words, this would mean DDPTE had provided services for 12 months since 14 November 2014 (see [11] above), *ie*, until October 2015. This would have been well after the winding-up order was made against the Plaintiff in June 2015. This clearly could not be possible and showed that the Defendant had been dishonest in connection with the Business Services Agreement.

TY Global Payments

57 The Liquidators argued that the TY Global Payments amounted to fraudulent misappropriation of the Plaintiff's monies. It was their case that the Defendant conspired with Abraham, the person behind TY Global, to move the Plaintiff's monies through Abraham's companies and for such monies to eventually end up in the bank account of Rocky Point, a company controlled by the Defendant.[109]

58 The Defendant, on the other hand, argued that the TY Global Payments comprised the commission for the brokers and their fees (commensurate with market practice) for work they had done beyond their scope of work under a brokerage agreement dated 7 October 2013 ("the Brokerage Agreement"). The Defendant also argued that there was an oral agreement or understanding that

[109] Plaintiff's Closing Submissions at paras 189–248.

the commission which the brokers received (through TY Global) would be re-invested in the *Somnath* project as equity ("the Reinvestment Agreement").[110]

59 In my judgment, the TY Global Payments should not have been made. I did not accept the Defendant's arguments that the payments were justified. The payments were essentially upfront payments for potential benefits that might never materialise. This was a clear departure from the general industry practice, and there was no commercial imperative to pay out the amounts involved.

60 The Defendant stated in his AEIC that the "general practice for brokerage commissions is that the brokers *only* get paid at the *end of the deal* by *the sellers*, based on a percentage of the purchase price" [emphasis added].[111] The Defendant stated, however, that he chose to depart from the usual practice and pay *upfront* the seller's brokers *despite being the buyer*:[112]

> Q: Now, your case is that you departed from this general practice. You say it's a general practice, yes? And you used the company's money to pay TY Global upfront at 2.425 million just upon signing of an MOA and not at the end of the deal. Is that---am I getting your case correct?
>
> A: Er, that's correct.

61 The Defendant explained that the departure was justified because the brokers secured "exclusivity" in the purchase of the *Somnath*[113] pursuant to a letter from GOL Offshore dated 17 July 2014. However, this explanation flew

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110 Defendant's Closing Submissions at paras 96–111.

111 Defendant's AEIC at para 56.

112 NE, 3 March 2017 (Day 4), p 7 line 31 to p 8 line 3.

113 NE, 3 March 2017 (Day 4), p 16 lines 20–22.

in the face of the documentary evidence. Clause 2.4 of the Supplemental Agreement stated as follows:[114]

> In the event that the transaction cannot be completed as per the provisions of the [Second] MOA then and in that event the Seller shall pay to the Buyer a commission equivalent to US$1,500,000 (United States Dollars One point Five Million). The said commission will be paid only upon the sale of the [*Somnath*] to a third party.

62 The Supplemental Agreement thus did not foreclose the sale of the *Somnath* to a buyer other than the Plaintiff. This was also accepted by the Defendant at trial:[115]

> Q: Would you agree with me that clause 2.4 contemplates that the vessel may be sold to a third party?
>
> A: Yah, yes.

63 The Defendant's position on exclusivity was also inconsistent with the fact that the *Somnath* was eventually sold to a third party[116] which resulted in the activation of cl 2.4 of the Supplemental Agreement, and the Plaintiff being paid a "break-up" fee of US$1.5m by GOL Offshore (see [16] above).

64 Even if I had accepted that this "break-up" fee had been specially negotiated for by the brokers such that they should be exceptionally remunerated, this was a sum far less than the US$3.25m paid to the brokers as upfront brokerage commission and advisory and consulting fees. Curiously, the Brokerage Agreement had been executed in October 2013 *before* the Second MOA. Thus the Defendant, when causing the Plaintiff to enter the Brokerage

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114 Seah Chee Wei's AEIC, exhibit SCW-16, pp 628–629.

115 NE, 3 March 2017 (Day 4), p 17, lines 28–30.

116 ABD4, p 2934.

Agreement with TY Global, could not have known that US$1.5m would be returned as a "break-up" fee *per* cl 2.4 of the Supplemental Agreement.

65 Most significantly, given the Defendant's alleged familiarity and experience with similar transactions,[117] the Defendant's insistence that the brokers were working for *both* sides of the transaction beggared belief. The Defendant knew that the brokers were being paid commission by the sellers.[118] Yet, he insisted that the same brokers were also acting in the interests of the buyer (*ie*, the Plaintiff):[119]

> Q: You agree with me that TY Global was sellers' agents?
>
> A: Yah. They came to me as sellers' agents, yes.
>
> Q: So when you say they were negotiating the best terms for you and that is one of the reasons why you paid them upfront, as sellers' agents, weren't they also supposed to negotiate the best terms for the sellers?
>
> A: Er, yes, I will assume so but, er, as I also said earlier I had the feeling that they were, erm, erm, represent---they were, erm, er, working, you know, erm, on both sides, so that---on the transaction.

66 Most reasonable businessmen would recognise the inherent difficulties or even the near impossibility of obtaining the "best deal" for both sides in a commercial transaction. Being the seller's brokers, it is more likely that the brokers would have worked to ensure that they obtained the best deal for the sellers (*ie*, GOL Offshore).

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117 Defendant's AEIC, paras 6–7.

118 ABD1, p 649.

119 NE, 3 March 2017 (Day 4), p 14 line 30 to p 15 line 6.

67 Given that such a large sum of money had been paid upfront to the brokers despite the Plaintiff not being guaranteed its purchase of the *Somnath* and not receiving much corresponding benefits, I was unable to see how making the TY Global Payments and departing from the established commercial practices was in the best interests of the Plaintiff. Even though courts will be slow to second-guess commercial judgments, under the objective test, there must still be some reasonable basis for the director's decision to pursue a certain transaction (see [35] above). In the present circumstances, there was simply insufficient evidence of any commercial imperative to justify the making of the TY Global Payments.

68 As mentioned, the Defendant also invoked the Reinvestment Agreement as an additional justification for the TY Global Payment – this was allegedly an oral agreement that the commissions paid to the brokers would be transferred to TY Global for subsequent reinvestment into the *Somnath* project as equity. However, there was again no evidence whatsoever of the Reinvestment Agreement. Despite the significant amount of money being invested, the Defendant had no explanation as to why the Reinvestment Agreement between himself and the brokers had not been documented in any written agreement and/or correspondence:[120]

> Q: Now there are massive amounts in documents here. Why is there no email whatsoever from Thomas or Raman Mullick or Sid Roy or you to them reference any such reinvestment arrangement or agreement?
>
> A: I can't tell you, just the verbal agreement that was the understanding, that---that's the way it was done.

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120 NE, 3 March 2017 (Day 4), p 37, lines 3–7.

Given that the Defendant was a veteran and experienced businessman, I found it difficult to believe that he would have agreed to the Reinvestment Agreement without certainty as to its precise terms or at least a reasonable extent of negotiations leading up to the agreement. It also escaped me as to why the brokers would need to be paid first before re-investing when they could have been directly issued shares by the Plaintiff as remuneration for their work.

69 The propriety of the Reinvestment Agreement was also at serious odds with the eventual flow of a portion of the funds to Rocky Point. The Defendant argued that this arrangement was to ensure that the monies would be "safe-guarded and available for reinvestment once it was time to do so".[121] However, what transpired demonstrated that the monies were far from being "safe-guarded" because they were in fact used to pay Rocky Point's outstandings. There was documentary evidence of such payments being made out of Rocky Point's accounts to settle its arrears.[122] This was also the evidence that Ms Courtney Turall ("Turall"), an independent contractor who facilitated payments made by Rocky Point, had given in US proceedings for the recovery of the Plaintiff's funds that had been diverted to Rocky Point.[123] The Defendant accepted that Turall was a truthful witness who had no reasons to lie in her deposition.[124]

70 The evidence revealed that Rocky Point was urgently in need of funds. Prior to receiving the inward transfers from TY Global, as at 31 December 2013,

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121 Defendant's Closing Submissions at para 105.

122 ABD7, p 4821.

123 Seah Chee Wei's AEIC, exhibit SCW-40, p 1279, lines 8–10.

124 NE, 3 March 2017 (Day 4), p 61, lines 8–11.

Rocky Point's bank account only contained US$1,919.22.[125] In fact, the Defendant accepted that Rocky Point had no money in its account to pay its outstandings to its vendors and mortgage prior to receiving the funds from TY Global.[126] On 31 December 2013,[127] Turall emailed the Defendant informing him that the funds had not been received and if the monies were not received "no one can be paid today".[128] The Defendant agreed that Turall's email indicated that there was a *rush* to get the funds in.[129] The Defendant then forwarded Turall's email to Abraham – this gave rise to a reasonable inference that the monies referred to by Turall in her email was the US$3.235m that the Defendant expected to enter Rocky Point's bank account. More tellingly, the Defendant was clearly anxious that Rocky Point should receive those funds. This was evident from his reaction when Turall informed him by email that the funds had still not been received. Upon receipt of Turall's email, the Defendant forwarded that email to Abraham, stating: "[w]hat is going on here? The wire should have been in this morning. I want an explanation asap".[130]

71 The evidence clearly showed that the Defendant urgently required the funds from Abraham in order to make payments to Rocky Point's creditors. The Defendant (through Rocky Point) stood to gain significantly from his arrangement with Abraham. As can be seen from the exchange of correspondence above, the Defendant was clearly agitated that Abraham did not

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125 ABD7, p 4821.

126 NE, 3 March 2017 (Day 4), p 68, lines 12–19.

127 Seah Chee Wei's AEIC, exhibit SCW-40, p 1267, lines 21–23; p 1268, line 21 to p 1269, line 18.

128 ABD2, p 1005.

129 NE, 3 March 2017 (Day 4), p 59, lines 6–14.

130 ABD2, p 1006.

appear to be holding up his end of the bargain. To be clear, even though US$3.25m was transferred from the Plaintiff's funds to TY Global, only US$2m was eventually transferred to Rocky Point. Abraham had pocketed the remaining sum of $1.25m.

72 Separately, to justify the payments made to Rocky Point, the Defendant relied on an alleged cash pooling arrangement between Rocky Point and DDAS, under which both entities shared a common pool of funds which could be used to pay off their creditors.[131] However, if such an arrangement truly existed, Rocky Point would not have had to desperately wait for the incoming funds to be received before paying off its outstandings – DDAS could simply have made these payments on Rocky Point's behalf.

73 In the round, the Defendant's allegations that the monies were to be placed in Rocky Point pursuant to a Reinvestment Agreement or a cash pooling arrangement were highly unbelievable, given that neither of the above was backed by any evidence. In the circumstances, I found that these additional justifications had been cooked up by the Defendant to cloak the TY Global Payments with legitimacy as such monies eventually found their way, albeit via a circuitous route, from the Plaintiff's coffers into the Defendant's hands.

Treatmil Payment

74 The Treatmil Payment similarly could not be said to have been in the Plaintiff's best interests. I accepted the Liquidators' argument that the Defendant's justification for the Treatmil Payment, *ie*, the Tripartite Agreement,

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131 NE, 3 March 2017 (Day 5), p 8, line 27 to p 9, line 7.

was seriously lacking in evidence.[132] While the Defendant relied on the Signed Payment Schedule (see [14] above), there were serious doubts about this evidence that, to my mind, rendered it unsafe to rely on it to rebut the Liquidators' evidence that there were questionable aspects to the transaction.

75 On 1 September 2015, the Liquidators contacted Mr Bob Ashman ("Ashman"), a director of AMS SG, and sought clarification about the Treatmil Payment in December 2013, a US$1.28m payment which was allegedly a partial repayment of the AMS Loan. In an email dated 6 October 2015, Ashman stated that as he had only been appointed in May 2015, he had asked Alfred, AMS SG's director at the material time, whether he was aware of the Treatmil Payment. The email further stated that "[n]either [Alfred] nor AMS [SG] were aware of [the Tripartite Agreement]. The management accounts of AMS [SG] do not have a record of such a transfer".[133]

76 In the course of discovery in these proceedings, the Defendant produced a copy of the Tripartite Agreement with the Signed Payment Schedule which bore, on its bottom right-hand corner, Alfred's short-hand signature.[134] Although the Tripartite Agreement itself was unsigned, the Defendant relied on Alfred's signature on the attached schedule to support his position that AMS SG knew about the Tripartite Agreement and the Treatmil Payment:[135]

> Q: Yes. So there's only one document there with Alfred's signature and you are suggesting to the Court and to us that Alfred's signature signifies that he knew about the 1.28 pay---million payment---

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132 Plaintiff's Closing Submissions at paras 100–116.

133 ABD4, p 2912.

134 Seah Chee Wei's AEIC, exhibit SCW-45, p 1378.

135 NE, 7 March 2017 (Day 5), p 25, lines 1–6.

A: Okay, that---

Q: ---to Treatmil, is that correct?

A: I already answered to that, yes.

77 The Liquidators contacted Alfred on 25 February 2016, enquiring about the Tripartite Agreement and his signature on the attached schedule. Alfred responded on 26 February 2016 stating that he was "unaware of it's [*sic*] alleged existence" and stated that neither AMS SG nor himself had signed the Tripartite Agreement.[136] With regard to his signature on the schedule, Alfred stated in further correspondence with the Liquidators that:[137]

> The schedule of payment brought forward by [the Defendant] … seems to contain a "digital" copy of my initials.
>
> This digital copy was available and has been used by the CFO/Hege Anfindsen.
>
> I have not provided consent to CFO/Hege Anfindsen or anyone else to use the digital copy of my initials to sign the schedule of payment.

78 The Defendant also did not deny that Alfred's signature on the schedule to the Tripartite Agreement was a digital signature.[138] This lent credence to Alfred's version of events, *ie*, that his digital signature had been appended to the schedule without his knowledge, and that AMS SG was accordingly unaware of the Tripartite Agreement.

79 The Defendant also relied on the account of events provided by the Plaintiff's auditor, Ms Ann A Nargeswari from Subracco LLC, who testified[139]

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136 ABD4, pp 2956–2957.

137 ABD4, p 2978 (Clarification 2).

138 NE, 7 March 2017 (Day 5), p 30, lines 5–13.

139 ABD4, p 2927; NE, 2 March 2017 (Day 3), p 18, line 25 to p 20, line 13.

that she had made enquiries about the repayment of the AMS Loan and that she was satisfied with the answers obtained that AMS SG was aware of this arrangement.[140] However, as argued by the Liquidators, it was unsurprising that Ms Ann would corroborate the Defendant's version of events. Ms Ann, being the Plaintiff's auditor, would only know as much as she is informed by the Defendant. Further, since Ms Ann did not conduct any further investigations, she would be unlikely to state that she was unsatisfied with the answers obtained, as that would be tantamount to admitting to negligence.[141]

80 In the absence of any credible evidence from the Defendant that AMS SG was aware of the arrangements, all that was left for me to go on was the correspondence from Alfred and Ashman, the past and present directors of AMS SG, positively confirming that AMS SG was not aware of the Treatmil Payment and more importantly, of the existence of the Tripartite Agreement.

81 In the circumstances, due to the flimsy factual foundation of the Tripartite Agreement, it was difficult for me to find that the AMS Loan had been correspondingly reduced as a result of the Treatmil Payment. It is accordingly impossible to conclude that the Treatmil Payment was made in the best interests of the Plaintiff since the Plaintiff reaped no corresponding benefit from making this payment to Treatmil. In all likelihood, the Liquidators' version of events – that this was a ploy by the Defendant to transfer the Plaintiff's monies to his other companies – seemed more plausible.

82 For these reasons, I found that each of the Four Transactions was in breach of the Defendant's duty to act *bona fide* in the interests of the Plaintiff.

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140 Defendant's Closing Submissions at para 119.

141 Plaintiff's Reply Submissions at paras 51(f)–51(g).

Breach of the duty to take into account the interest of creditors

83 It is uncontroversial that when a company is insolvent, or even in "a parlous financial position", directors have a fiduciary duty to take into account the interests of the company's *creditors* when making decisions for the company (see *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 ("*Progen Engineering*") at [48]). As expressed by the Court of Appeal in *Progen Engineering*, the rationale for this duty is as follows (at [52]):

> … [W]hen a company is insolvent, the creditors' interests come to the fore as the company is effectively trading and running the company's business with the creditors' money. Because of the limited liability principle, the risks (of trading when the company is insolvent) on shareholders would be minimal as they would at worst lose only what they have already invested in the company in their capacity as shareholders. Unsecured or partially secured creditors on the other hand may never recover any monies due to them. Unlike shareholders who have the most to gain from risky ventures, unsecured creditors, in particular, have everything to lose when illegitimate risks are taken. As such, it is only right that directors ought to be accountable to creditors for the decisions they make when the company is, or perilously close to being, insolvent …

84 The greater the concern over the company's financial health, the more weight the directors must accord to the interests of creditors over those of the shareholders: *Parakou Shipping Pte Ltd (in liquidation) v Liu Cheng Chan and others* [2017] SGHC 15 at [62] ("*Parakou Shipping*"), citing *Dynasty Line Ltd (in liquidation) v Sukamto Sia and another and another appeal* [2014] 3 SLR 277 ("*Dynasty*") at [34]. This duty "principally obliges directors to ensure that the company's assets are not dissipated or exploited to the prejudice of creditors' interests": *Prima Bulkship Pte Ltd (in creditors' voluntary liquidation) and another v Lim Say Wan and another* [2017] 3 SLR 839 at [62].

85 Against this backdrop, the Liquidators submitted that the Defendant had breached his duty to take into account the interests of the Plaintiff's creditors

because he had dissipated the Plaintiff's assets to the prejudice of its creditors (*ie*, Symphony and AMS SG) through making unjustified payments to his own companies.[142]

86 The Defendant accepted that the obligation owed to the Plaintiff is subject to an overlay where the Plaintiff is insolvent or in a parlous state.[143] However, the Defendant alleged, *inter alia,* that:[144]

(a) the Plaintiff was not insolvent as at 30 September 2013 and/or end of October 2013 and/or at the latest 1 December 2013;

(b) the Plaintiff was not even in a parlous financial position or perilously close to being insolvent; and

(c) in any event, the Defendant did not breach his fiduciary duties to take into account the interests of the Plaintiff's creditors.

87 I declined to find in favour of the Defendant on any of these grounds.

88 The first two points raised the question as to the threshold for insolvency. In *Parakou Shipping*, the High Court recognised that when deciding whether a director has a duty to take creditors' interests into account, the company need not be *technically insolvent* (at [65]):

> … [F]or the purposes of deciding whether a director has a duty to take creditors' interests into account, *the company need not be technically insolvent.* It is sufficient if the company *is in a parlous financial position or perilously close to being insolvent* … A strict and technical application of the cash flow and balance

142 Plaintiff's Closing Submissions at paras 59–61.

143 Defendant's Closing Submissions at para 219(d).

144 Defendant's Closing Submissions at para 219.

> sheet tests, which are used in the context of a winding up action, would be of limited utility and *a broader assessment of the surrounding circumstances of the case is called for*; ***as long as there are reasons to be concerned that the creditors' interests are or will be at risk because of difficult financial circumstances***, directors ignore those interests at their peril: *Dynasty* at [33]–[35]. [emphasis added in italics and bold italics]

These observations were not disturbed on appeal (see *Parakou Investment Holdings Pte Ltd and another v Parakou Shipping Pte Ltd (in liquidation) and other appeals* [2018] SGCA 3).

89 The purpose of applying a broad-based assessment is to prevent errant directors of a company from relying on the technical balance sheet and/or cash flow tests to escape liability for their breach of duties in relation to the interests of the company's creditors. Indeed, this concern for protecting creditors' interests was echoed in *Dynasty*, where the Court of Appeal held at [34]–[35] that:

> … this [broad-based] assessment would include a consideration of all claims, debts, liabilities and obligations of a company. The general financial health and solvency of the company is considered in this context in order to ascertain if there was reason to doubt or to be concerned over the financial viability of the company, especially at the time of the [relevant transactions].
>
> … Moreover, the interests of the creditors are not to be considered in an arid and technical way as if all such considerations are irrelevant or capable of being ignored until and unless the company is found to be technically insolvent …

90 I also note that England likewise does not require technical or actual insolvency to be established. For instance, in *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153, Mr Leslie Kosmin QC (sitting as a Deputy High Court Judge) observed as follows (at [74]):

> … Where a company is *insolvent or of doubtful solvency or on the verge of insolvency* and it is the creditors' money which is at

> risk the directors, when carrying out their duty to the company, must consider the interests of the creditors as paramount and take those into account when exercising their discretion. [emphasis added]

91 Balance sheet and/or cash flow insolvency is thus not required, rather the question is whether the company is in fact financially imperiled. It is in such situations that the directors come under a fiduciary duty to take into account the creditors' interests.

92 Based on the facts before me, I accepted the Liquidators' argument that this state was reached *at the latest* by 27 December 2013.[145] The Plaintiff's creditors were placed at great risk by that time because a substantial sum of some US$4.53m (consisting of both the TY Global Payments and the Treatmil Payment) had been transferred out of the Plaintiff's funds, following earlier transfers. These transfers would undoubtedly have placed the creditors at great risk, seen in light of the following facts:

(a) the Plaintiff had a nominal paid-up capital of only S$1;

(b) despite the nominal paid-up capital, the Plaintiff had significant liabilities, amounting to at least US$9m in the form of the Borrowed Funds;

(c) the Plaintiff did not have its own bank account but used DDPTE's Bank Account;

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145 Plaintiff's Reply Submissions at para 31.

(d) the Plaintiff did not have any independent revenue stream that could constitute assets and the Plaintiff recorded no revenue for the financial year ending in 2013;[146]

(e) the Treatmil Payment of US$1.28m was made merely a day (*ie*, 27 December 2013) after Symphony disbursed the first tranche of US$6m under the Symphony Loan to the Plaintiff; and

(f) similarly, the TY Global Payments of US$3.25m were made merely a day (*ie*, 27 December 2013) after the disbursement of the first tranche of the Symphony Loan.

With no independent streams of revenue, the Four Transactions must necessarily have been funded by the Borrowed Funds. The Plaintiff's liabilities would in all likelihood have exceeded its assets. This would have undoubtedly resulted in the Plaintiff being in a parlous financial position by 27 December 2013.

93 Therefore, from 27 December 2013, it was incumbent on the Defendant to take into account the interests of Symphony and AMS SG, the Plaintiff's creditors. Yet, instead of utilising the Plaintiff's Borrowed Funds to procure the *Somnath*, the Defendant procured the Plaintiff to make payments to DDAS, DDPTE and TY Global out of the same. The Defendant therefore was in clear breach of his fiduciary duty to take into account the interests of the Plaintiff's creditors, particularly those of Symphony, which had expressly lent its funds to

146 ABD5, pp 3548–3549.

the Plaintiff for the acquisition of the *Somnath* and other related expenses, as can be seen from cl 2.2 of the Symphony Loan agreement.[147]

94 The Defendant's acts of procuring the Plaintiff to extend the DDPTE Loan of US$1.7m (regardless of whether this had occurred in December 2013 or November 2014) and setting-off US$50,000 per month for alleged services rendered by DDPTE under the Business Services Agreement showed a clear intention to make payments to his own companies in preference to the interests of the Plaintiff's creditors. The same can be said of the TY Global Payments – I have found above at [73] that those payments were made ultimately for the purpose of benefiting himself, through Rocky Point. These payments cannot be said to have been in Symphony's interests; its interest was for its funds to be used in connection with the Plaintiff's purchase of the *Somnath*, and clearly not for the monies to end up in the Defendant's pockets.

95 Subsequently, the Defendant's act of procuring the Plaintiff to pay DDAS management fees in 2014, even though instalments were at the time due to Symphony under the Settlement Agreement,[148] evidenced the fact that payments to DDAS (a company beneficially owned by the Defendant) were made in preference to repayment of monies owed to the Plaintiff's creditors. For this reason, I found the Defendant was once again in breach of his directors' duties to take into account the interests of the Plaintiff's creditors.

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147 Defendant's AEIC, exhibit DOD-24, p 374.

148 ABD1, p 249.

Breach of the duty not to place in a position of conflict

96 The Liquidators argued on the basis of both the "actual conflict" and "no conflict" rules. I must note, however, that the Liquidators were not very precise in the use of these legal terms. For the benefit of clarity, I shall reproduce in full the helpful observations made by Steven Chong J (as he then was) in *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957 ("*Nordic*") at [53]–[56]:

> 53 The no-conflict rule obliges a director, as a fiduciary, to avoid any situation where his personal interest conflicts with or may conflict with that of the company whose interest he is bound to protect, such that there is a risk he may prefer his interest over that of the company's. The rule is strict: where a director is found to have placed himself in a position of conflict of interest, he will not be permitted to assert that his action was *bona fide* or thought to be in the interests of the company (*Walter Woon on Company Law* at para 8.44, citing *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 834). A director can be in breach of the rule even though his or her own conduct has caused no loss to the company (*Company Directors: Duties, Liabilities, and Remedies* (Simon Mortimore ed) (Oxford University Press, 2009) at para 14.11, citing *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 ("*Regal (Hastings)*") at 134 and 153).
>
> 54 The no-profit rule obliges a director not to retain any profit which he has made through the use of the company's property, information or opportunities to which he has access by virtue of being a director, without the fully informed consent of the company. The rule is again a strict one and liability to account arises simply because profits are made (see *Regal (Hastings)* at 144).
>
> 55 The rule against self-dealing prohibits a director from entering, on behalf of the company, into an arrangement or transaction with himself or with a company or firm in which he is interested (see *Tan Hup Thye v Refco (Singapore) Pte Ltd* [2010] 3 SLR 1069 at [29]). There is "self-dealing" because the director essentially acts on behalf of both parties in such a transaction.
>
> 56 It can be seen that there is indeed overlap between the no-conflict rule, no-profit rule and rule against self-dealing. A director who enters into a self-dealing transaction would inevitably be in a position of conflict and, if a profit is made, would be in breach of the duty not to make a profit out of his

> position. For that reason, the no-profit rule and rule against self-dealing have been described as particular instances of the broader duty of a director not to place himself in a position of conflict (see *Walter Woon on Company Law* at para 8.45). In turn, there is overlap between the no-conflict rule and a director's duty to act in the best interests of the company, "for when a director makes his interests paramount, invariably he will not be acting in the best interests of his company" (*Walter Woon on Company Law* at para 8.39).

97 From these observations, it becomes clear that the two relevant duties in the present case are the "no-conflict rule" and the "rule against self-dealing", both of which are part of the "broader duty" of a director not to place himself in a position of conflict.

98 From my findings above, it was apparent that the Defendant had breached both these duties.

99 The Defendant had clearly breached the rule against self-dealing because he purported to represent the interests of all parties or more than one party in the following agreements/transactions:

(a) the Management Fee Agreements for the years 2013 and 2014 between DDAS and the Plaintiff;

(b) the Novation Agreement between First Marine, DDPTE and the Plaintiff where the Defendant represented all three parties;

(c) the DDPTE Loan agreement and the Business Services Agreement, where the Defendant signed on behalf of DDPTE and the Plaintiff; and

(d) the Tripartite Agreement between the Plaintiff, Treatmil and AMS SG where the Defendant signed on behalf of the Plaintiff and Treatmil (and where AMS SG *did not* sign the Tripartite Agreement).

100 From these facts, the Defendant also contravened the no-conflict rule in respect of the Four Transactions – he placed himself in situations where his personal interest might conflict with those of the Plaintiff, whose interest he was bound to protect, giving rise to a risk that he may prefer his interest over the Plaintiff's.

101 The Defendant was a director of the Plaintiff and the chairman of Treatmil,[149] giving rise to a breach of the no-conflict rule in relation to Treatmil Payment. A breach also existed with respect to the TY Global Payments: the Plaintiff's money was transferred (albeit via an indirect route) to Rocky Point, a company wholly and ultimately controlled and owned by the Defendant. As for the DDPTE Loan and the DDAS Payments, the Defendant also contravened the no-conflict rule because he had used the Plaintiff's funds essentially to extend loans to and/or engage the services of companies of which he was the ultimate beneficial shareholder.

102 In particular, with respect to the DDPTE Loan, the Defendant caused the Plaintiff to enter into the Business Services Agreement purportedly for the provision of DDPTE's services to ensure that the novation of First Marine's rights to the Plaintiff would be successful. However, the Defendant was *also* a key player in DDPTE:[150]

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149 ABD1, p 289.

150 NE, 2 March 2017 (Day 3), p 115, line 21 to p 116, line 5.

> Q: Okay. Let me ask you this question again. What was DDPTE bringing to the table? There is [First Marine], there is Traxiar, and there is DDPTE. What was DDPTE bringing to the table such that Traxiar must give it a loan of 1.7 million?
>
> A: Erm, DDPTE represents all the---the software or the human capital, the competence, er, to actually, erm, make this, erm, project viable.
>
> Q: But did you not just tell us that DDPTE has no employees except you?
>
> A: I will---just also said to you that all of the services in DDPTE, er, was mostly supported by the, er, organisation in Oslo.
>
> Q: I see. And [First Marine], all the services were supported by whom, since it has no employees?
>
> A: The commer---the commercial services of [First Marine] is a combination of, er---of, er, the director and also the same set up, the services in Norway.
>
> Q: So, conveniently, you are the person behind all these companies?
>
> A: Er, yes in the sense of---
>
> Q: Thank you.
>
> Ct: Hold on slowly. So your answer is "yes"?
>
> A: Yes.

103 As acknowledged by the Defendant, he was also the person behind DDPTE but yet he moved the Plaintiff to engage DDPTE's services. The facts in relation to the genesis of and purpose underlying the Novation Agreement, DDPTE Loan agreement and Business Services Agreement pointed to the Defendant's blatant breach of the no-conflict rule.

104 Although the no-conflict rule would have been breached even where there was no actual conflict or loss to the company as long as there was a *risk* of conflict (see [96] above, citing *Nordic* at [53]), the present case involved an actual materialisation of the said risk because the Defendant had in fact used the

Borrowed Funds to make payments to his related companies instead of using the said funds for their intended purpose of purchasing the *Somnath*. As a result of his actions, which had been taken to benefit his other companies in breach of the no-conflict rule, the Plaintiff failed to purchase the *Somnath* and defaulted on its instalment payments due under the Settlement Agreement with Symphony.

105 The Defendant argued[151] that he did not breach these rules because he had on 12 April 2013, pursuant to s 156(5) of the CA, disclosed his interests in DDAS, DDPTE, Treatmil and Rocky Point to the Plaintiff's board of directors.[152] This argument was a non-starter. A director's statutory obligation to disclose interests to the company's board under s 156 of the CA is independent of the general duty to avoid conflicts of interests stemming from the no-conflict rule and the rule against self-dealing (see also *Corporate Law* at para 09.084 and *Walter Woon on Company Law* at para 8.52). In fact, s 156(14) of the CA expressly provides that s 156 "shall be *in addition to and* ***not in derogation of*** the operation of any rule of law" [emphasis added in italics and bold italics]. As such, the Defendant's submission conflated the director's statutory obligation to disclose his interests in related entities with the director's obligation to avoid conflicts of interest at general law. If anything, disclosure pursuant to s 156(5) of the CA would only mean that the Defendant would not incur civil and criminal liability under s 156 of the CA which was, in any event, not the Plaintiff's case.

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151 Defendant's Closing Submissions at para 67; Defendant's Reply Submissions at para 22.

152 ABD1, pp 288–289.

106 Instead, at general law, a breach of the no-conflict rule will be avoided only where there is full disclosure to all the shareholders of all the material facts and shareholders' approval is subsequently obtained (see *Dayco Products Singapore Pte Ltd (in liquidation) v Ong Cheng Aik* [2004] 4 SLR(R) 318 at [13], citing with approval the English Court of Appeal's decision in *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 131 at [65]). This is clearly distinct from the statutory obligation under s 156 of the CA: disclosure under the CA is made to the company's *board of directors* and is governed by the parameters stipulated in s 156 of the CA, while disclosure under general law is to the *shareholders* and full disclosure of all the material facts is required.

107 Accordingly, the Defendant could have avoided a breach of the no-conflict rule only if full disclosure had been made to the Plaintiff's shareholders of all the material facts relating to the Four Transactions. I now turn to address this alternative submission, which is also germane to the other breaches of duties allegedly committed by the Defendant.

Relevance of shareholders' ratification

108 The Defendant submitted that he ought to be excused from the alleged breaches because he had obtained the informed consent of Treatmil, its majority shareholder.[153] In support, the Defendant relied on the minutes of a meeting of Treatmil's board of directors dated 3 December 2013 ("the Minutes").[154] Even if majority shareholder approval is sufficient to excuse a director from his

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153 Defendant's Closing Submissions at paras 68–71; Defendant's Reply Submissions at para 23.

154 Defendant's Bundle of Documents, Tab 2, pp 4–6.

breaches as a matter of law (see *Ho Kang Peng* at [59]), I found that there was no such ratification on the facts for three reasons.

109 First, Treatmil's consent was purportedly obtained on 3 December 2013, at a time when it had yet to become the majority shareholder of the Plaintiff. In fact, the very purpose of the meeting was to approve Treatmil's subscription to a 51% share in the Plaintiff.[155] The Defendant provided no case law in support of his point that a prospective majority shareholder could prospectively approve of a prospective transaction to be undertaken by its prospective company.

110 Second, even if Treatmil's consent could be said to have been valid until it became a majority shareholder of the Plaintiff, Treatmil's informed consent had not been obtained through full and frank disclosure. It is established law that shareholders can only release directors from their obligations to the company, following a full and frank disclosure made by the directors (see *Ho Kang Peng* at [59], citing *Bamford v Bamford* [1970] Ch 212 at 237H–238B). Chong J in *Nordic* described this rule as demonstrating that the "informed consent of the shareholders" was required (at [92]). A perusal of the Minutes[156] did not reveal any evidence of full and frank disclosure capable of giving rise to informed consent on Treatmil's part allowing the Defendant to undertake the Four Transactions. There was no specific reference to the Defendant's arrangements to make payments to DDPTE, DDAS, Treatmil and TY Global. Although the Minutes did state in very broad and vague fashion that "[e]ach of the Directors present formally notified the Meeting of any interest in the

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155 Defendant's Bundle of Documents, Tab 2, p 4.

156 Defendant's Bundle of Documents, Tab 2, pp 4–6.

business to be dealt with at the Meeting",[157] there was no evidence as to what had actually been disclosed for me to conclude that Treatmil's informed consent had been obtained. In any event, this disclosure would have been in the Defendant's capacity as Treatmil's director to Treatmil's board, and not in his capacity as the Plaintiff's director to its majority shareholder. This is especially in light of the fact that the context of the meeting involved Treatmil's acquisition of shares in the Plaintiff – any disclosure would likely have pertained to that order of business.

111 Third, even where full disclosure is made, where creditors' interests are at risk, the shareholders' purported ratification of a director's actions is ineffective. The Court of Appeal briefly considered this question in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2013] 1 SLR 374 ("*Raffles Town Club*") at [45]:

> In our view, in the absence of any factor that would disqualify shareholders from ratifying unauthorised or unlawful acts of directors, we see no reason why a company may not waive any claims it may have against its directors for any kind of liability ***where the company is solvent***. As Street CJ said in [*Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722 ("*Kinsela*")] (at 730 and 732):
>
> > … In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled to, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets …
> >
> > …

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157 Defendant's Bundle of Documents, Tab 2, p 4.

> It is … legally and logically acceptable to recognise that, where directors involved in a breach of their duty to the company affecting the interests of shareholders, then shareholders can either authorise that breach in prospect or ratify it in retrospect. *Where, however,* ***the interests at risk are those of creditors*** *I see no reason in law or in logic to recognise that the shareholders can authorise the breach …*

[emphasis added in italics and bold italics]

112 In my judgment, I do not think the Court of Appeal in *Raffles Town* intended to confine its decision solely to cases of technical insolvency, to the exclusion of cases of near insolvency or "parlous financial state". This can be discerned from its endorsement of Street CJ's observations in *Kinsela* that the relevant yardstick is whether the creditors' interests are at risk and not whether the company was technically insolvent. This reading is also in line with the Court of Appeal's previous decision in *Progen Engineering* which observed that directors have a fiduciary duty to take into account the interests of the company's creditors *even when* the company is not technically insolvent but in a "parlous financial position" (see [83] above). Further, two of the three judges who decided *Progen Engineering* were in the *coram* which decided *Raffles Town Club* two years later. Most importantly, the rationale as to why ratification by shareholders should not be given effect in cases of actual insolvency is similarly applicable to cases where the company is *near* insolvency. When creditors' interests may be compromised in the future, it is not the proper role of the shareholders to ratify the actions of directors which might otherwise expose these directors to liability – this is because the duties held by the directors are not just for the benefit of the shareholders, but also for the benefit of its creditors. Accordingly, I took the view that shareholders cannot ratify the wrongdoings of the company's directors where the company is insolvent or where the creditors' interests are endangered.

113 This rule was infringed in this case. As mentioned, the Defendant relied on the Minutes which were dated 3 December 2013. This pre-dated the latest possible point in time that the Plaintiff entered a parlous financial state, *ie*, 27 December 2013 (see [92] above). Any prior consent by the shareholders would have been subject to a consideration of the creditors' interests by that time. That date was critical because most of the monies involved in the Four Transactions were transferred out of the Plaintiff on or after 27 December 2013.

114 For these reasons, I found that the Defendant's breaches of directors' duties could not be excused on account of ratification.

Intent to carry out a fraudulent scheme under s 340(1) of the CA

115 While I found that the Defendant had not acted *bona fide* in the interests of the Plaintiff, I could not conclude that the Defendant had engaged in fraudulent trading under s 340(1) of the CA. I note that it was also not the Liquidators' case that such a conclusion would automatically follow from a finding of a breach of directors' duties.

116 Although the criminal standard of proof is not required and the standard of proof remains that of one on a balance of probabilities, the more serious the allegation of fraud, the more the party bearing the burden of proof may have to do to make out its case: *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 ("*Tang Yoke Kheng*") at [14].

117 For the Liquidators to make out their case for fraudulent trading under s 340(1) of the CA, they had to show that (1) the Plaintiff's business had been carried out with the intention of defrauding the Plaintiff's creditors or creditors of any other person or for any fraudulent purpose and (2) the Defendant was knowingly a party to the business being carried out in that manner (see *M+W*

Singapore Pte Ltd v Leow Tet Sin and another [2015] 2 SLR 271 at [102]). I found that the first element was not established on the facts before me.

118 For fraud to be shown, there must be an element of dishonesty which results in the deception of a creditor (see *Tang Yoke Kheng* at [7]) and it must also be demonstrated that the directors had intended to gain an advantage (see *Liquidator of Leong Seng Hin Piling Pte Ltd v Chan Ah Lek and others* [2007] 2 SLR(R) 77 at [17]). For such an inference of dishonesty to be drawn from the evidence, as observed by Menzies J in the High Court of Australia decision of *Hardie v Hanson* (1960) 105 CLR 451 at 467, "something else, such as misrepresentation of the position or an intention to use goods purchased on credit for the purposes of dishonest gain, which gives it a fraudulent character" must be shown.

119 While there were some areas of concern that arose on the evidence before me, they were ultimately not sufficiently strong to support a finding of fraud on the Defendant's part, even on the civil standard. In relation to the Symphony Loan, the Liquidators argued that the Defendant's fraudulent intentions could be discerned from the following facts: the retention of the Symphony Loan monies in DDPTE's Bank Account instead of being used to secure the purchase of the *Somnath*, the Defendant's misrepresentation to Symphony on the use of the first tranche of funds, and the Defendant's non-disclosure of the side letter mentioned at [16] above ("Side Letter").[158] None of this was sufficient to convince me that the Defendant intended to defraud Symphony because there was an alternative explanation that could justify these actions.

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158 Plaintiff's Closing Submissions at paras 121–150.

120 I deal first with the point on the retention of the Symphony Loan monies in DDPTE's Bank Account. In my view, this mere fact was insufficient to support the Liquidator's conclusion that the Defendant had intended to defraud Symphony by "ring-fencing" its funds to prevent recovery in enforcement proceedings. The Defendant's use of DDPTE's Bank Account was not for want of trying – there was some documentary evidence that the Defendant did try to open a new bank account in the Plaintiff's name.[159] The Defendant also explained that several of the companies within his group shared the use of DDPTE's Bank Account. This was explicable given that most of these companies were essentially controlled by him and it could have been more expedient to use the same bank account. The Defendant also testified that all monetary transactions in and out of DDPTE's Bank Account had been duly and properly accounted for and were subject to an auditing process.[160] These points militated against a finding of fraudulent intention.

121 On the Liquidators' point of the Defendant's use of the first tranche of the Symphony Loan for other purposes other than the purchase of the *Somnath*, I have concluded above that the Four Transactions were in breach of the Defendant's duty to act *bona fide* in the best interests of the Plaintiff. However, this did not inevitably lead to the conclusion that he was defrauding Symphony because the Symphony Loan agreement did not proscribe these payments. I was sympathetic to the Defendant's argument on its understanding of the Symphony Loan agreement.[161] Clause 2.2 of the Symphony Loan agreement permitted the Plaintiff to use the Symphony Loan "for other expenses related to the

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159 NE, 2 March 2017 (Day 3), p 55, line 28 to p 57, line 5.

160 NE, 7 March 2017 (Day 5), p 128, lines 14–32.

161 Defendant's Reply Submissions at paras 143–144.

[*Somnath*]".[162] Thus, contrary to the Liquidators' submissions, the Symphony Loan was not solely required to be used to pay the First Deposit to GOL Offshore. Accordingly, in the absence of clear evidence that the Four Transactions had been undertaken with the intention of avoiding repayment of the Symphony Loan, I was unable to find fraud on the part of the Defendant.

122 In relation to the alleged misrepresentation made by the Defendant to Symphony in an email dated 4 June 2014, the Defendant was upfront and candidly admitted in his AEIC as well as at trial that the email was "imprecise" and contained inaccuracies.[163] From a perusal of the email,[164] it was likely that these inaccuracies were not merely an honest mistake given that the two largest payments were false. However, even if the Defendant had lied in this email, this did not lead to the inevitable conclusion that he had intended to defraud Symphony all along. This lie could very well have been developed in response to Symphony's request for information as to how the first tranche had been spent, simply to appease Symphony that some payments in connection with the acquisition of the *Somnath* had been made. Lastly, with respect to the non-disclosure of the Side Letter, I was satisfied with the Defendant's explanation at trial[165] that he believed that the Plaintiff was contractually bound to observe the confidentially obligations to GOL Offshore pursuant to the terms of the Side Letter.[166]

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162 Defendant's AEIC, DOD-24, p 374.

163 Defendant's AEIC at paras 128 –130; NE, 7 March 2017 (Day 5), p 36, line 19 to p 38, line 19.

164 ABD2, pp 1140–1141.

165 NE, 7 March 2017 (Day 5), p 64, line 23 to p 65, line 4.

166 ABD1, pp 132–147.

123 With respect to the AMS Loan, given my findings above that AMS SG was unaware of the sham Tripartite Agreement and the consequent proposed arrangement to reduce the quantum of the loan amount to the Plaintiff, it could not be said that AMS SG had been deceived by the actions of the Defendant. In fact, AMS SG's records[167] still showed that the full amount of the AMS Loan with interest was owed by the Plaintiff (see [14] above).

124 Overall, I had serious doubts as to whether the Defendant had the dishonest intention to defraud the Plaintiff's creditors when he procured the Symphony Loan and the AMS Loan, for two reasons.

125 First, there was unchallenged evidence that the Defendant had worked with the brokers, GOL Offshore and various other parties for more than two years to secure contracts for the purchase of the *Somnath*.[168] There was also evidence of contracts signed to purchase the *Somnath* and the Liquidators did not make the argument that these were sham documents (unlike numerous other documents concerning the Four Transactions which the Liquidators sought to label as sham documents). In this context, it was more likely that both the Symphony Loan and the AMS Loan had truly been procured to fund the intended purchase of the *Somnath*, as the Defendant had represented to these creditors, and not for the purpose of allowing the Defendant to siphon those funds. There was accordingly insufficient evidence of any misrepresentation or dishonest intention on the part of the Defendant in procuring these loans.

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167 ABD4, p 2908.

168 Defendant's AEIC at paras 12 and 62.

126 Second, as the Defendant pointed out,[169] it was telling that the AMS Loan had been secured on the Defendant's *personal* assets.[170] If someone had truly intended to deceive another, it would be completely incongruous for the first-named person to take on personal liabilities and put his own assets at risk in connection with the very same act of deception. For that reason, I was of the view that at least with regard to the AMS Loan, this was a strong factor militating against the finding of a dishonest intention.

127 Overall, there was insufficient evidence that the Defendant had intended to deceive the Plaintiff's creditors in procuring these loans. I was not convinced that the Defendant had possessed this dishonest intention to deceive the Plaintiff's creditors *from the very outset* when procuring the Borrowed Funds. He was undoubtedly unscrupulous in his dealings between the Plaintiff and his related companies but he did not appear to me to be a fraudster who took the loans from Symphony and AMS SG with no intention of repaying them. In fact, he did pay back Symphony close to half of the Symphony Loan (*ie*, US$2.75m) under the Settlement Agreement. For these reasons, I declined to find in favour of the Liquidators under s 340(1) of the CA.

Losses claimed

128 At the trial, the Liquidators claimed damages amounting to US$7,579,960.[171] This amount was different from that claimed in the Plaintiff's statement of claim, which stated a higher amount of US$8,092,751.29.[172]

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169 Defendant's Closing Submissions at paras 39–40.

170 ABD1 at p 127.

171 Seah Chee Wei's AEIC at paras 175 and 200.

172 Statement of Claim at para 145.

129 The Liquidators acknowledged that the quantum of damages claimed in their SOC was higher than that at trial, but argued that it caused no prejudice to the Defendant given that the amount at trial was significantly lower and the Liquidators had confirmed their willingness to proceed on the basis of the lower amount.[173]

130 I accepted that the amount claimed by the Plaintiff, at least for trial, was US$7,579,960. While this was a deviation from the amount pleaded, the Liquidators' pleadings sufficiently raised the question of damages, and the lower amount could be proceeded with even without any amendment to the pleadings. I was satisfied that the sum of US$7,579,960 represented the loss that had been suffered by the Plaintiff through the breaches of the Defendant identified above in making the Four Transactions, giving due credit for legitimate outgoing payments that reduced the amount lost.

131 I should add that the Defendant's case was primarily concerned with rebutting the claims of breaches of directors' duties and consequently, there was limited consideration on the question of the appropriate quantum of damages to be awarded.

132 Accordingly, I awarded the sum of US$7,579,960 as damages, reflecting the loss caused by the Defendant's breach of his duties owed as director, with the usual interest.

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173 Plaintiff's Reply Submissions at para 106.

Miscellaneous

133 The Defendant additionally submitted that he had acted honestly and reasonably and that having regard to all the specific circumstances, he ought fairly to be excused from liability pursuant to s 391 of the CA.[174] For relief under s 391 of the CA to be granted, the director must show that (1) he has acted honestly, (2) he has acted reasonably, and (3) that it is fair to excuse him for his default (see *W&P Piling Pte Ltd v Chew Yin What* [2007] 4 SLR(R) 218 at [77]). Based on my findings above, since the Defendant had made payments out of the Plaintiff's coffers to his related companies and failed to provide any evidence of corresponding benefits that were received by the Plaintiff, his breaches could not properly be excused under s 391 of the CA.

134 For completeness, I note that at the start of the proceedings, the Liquidators had sought to admit two hearsay statements in support of their claim against the Defendant.[175] These were affidavits made by two witnesses in the US proceedings, Abraham and one Gwendolyn Rosales ("Rosales"). Primary reliance was placed on s 32(1)(*j*)(iii) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"). However, I found that the Plaintiff had failed to establish that it was not practicable to secure the attendances of both witnesses, as required under that section. On what was before me, I could not find that the Plaintiff had expended proportionately reasonable efforts to secure their attendances. In addition, I found that the alternative ground for admissibility under s 32(1)(*c*) of the EA was not made out with respect to Abraham as there was inconclusive evidence of the statements made by him indicating any adverse interests. There remained other equally plausible explanations for what had transpired. In

174 Defendant's Closing Submissions at paras 156–164.

175 Plaintiff's Written Submissions dated 27 February 2017 at para 2.

respect of Rosales, the Plaintiff additionally relied on the grounds for admissibility contained in s 32(1)(*j*)(iv) of the EA and in the alternative, O 38 r 2(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). I did not think that there was sufficient evidence to establish that Rosales was recalcitrant, nor did I find that there were sufficient grounds to exercise my discretion to admit the hearsay evidence. The Plaintiff accordingly failed on both grounds.

Conclusion

135 For the above reasons, I ordered the Defendant to pay the Plaintiff the sum of US$7,579,960 flowing from the Defendant's breaches of director's duties. No declaration or order was made under s 340(1) of the CA. I ordered costs and disbursements to be fixed at S$180,000 to be paid by the Defendant to the Plaintiff.

Aedit Abdullah
Judge

Letchamanan Devadason and Bernice Leong Huiqi (LegalStandard LLP) for the Plaintiff;
Kronenburg Edmund Jerome, Ho Mingjie Kevin and Tan Po Nin Jeslyn (Braddell Brothers LLP) for the Defendant.