IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 252

Suit No 1242 of 2016

Between

Evotech (Asia) Pte Ltd

… Plaintiff

And

(1) Koh Tat Lee
(2) Lily Bey Lay Lay

… Defendants

GROUNDS OF DECISION

[Companies] — [Directors] — [Duties]

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Kannan Ramesh J
28 February; 1, 2, 7–9, 13, 14 March; 10 May; 4, 8 October 2018

20 November 2018

Kannan Ramesh J:

Introduction

1 Suit 1242 of 2016 was the plaintiff's claim against its former directors for breach of fiduciary duties in authorising payments to various parties after their removal as directors of the plaintiff. There were seven payments made to four different parties including the first defendant himself. The first defendant also brought a counterclaim against the plaintiff for salary and housing allowance during the notice period of his termination as an employee of the plaintiff.

2 At the end of the trial which spanned eight days, I reserved judgment. Having considered the evidence of the nine witnesses and the submissions of the parties, I gave oral judgment on 8 October 2018, finding in the plaintiff's favour on the claim and the counterclaim. The defendants have appealed against my judgment. I now render my grounds of decision.

Background facts

3 The plaintiff is a company incorporated in Singapore in the business of installation of industrial machinery and mechanical engineering works. The plaintiff is wholly owned by Black Sand International (Singapore) Pte Ltd ("BSI"), which is in turn wholly owned by Black Sand Enterprises Limited ("BSE"). BSI is incorporated in Singapore whereas BSE is incorporated in Hong Kong. The ultimate holding company of the group is Union Asia Enterprise Holdings Limited ("UAE"), formerly known as Pan Asia Mining Ltd, which is a company incorporated in the Cayman Islands and listed in Hong Kong. Annexed is a chart showing the corporate structure of the group ("the UAE group").

4 The first and second defendants were appointed directors of the plaintiff on 16 September 2013 and 26 July 2011 respectively. They were removed on 23 May 2016. The first and second defendants were notified of their removal as directors by way of letter and fax both dated 30 May 2016. The second defendant is the first defendant's niece.

5 On 20 May 2016, shortly before the defendants were removed as directors, the plaintiff appointed two new directors, namely Ms Yip Man Yi ("Ms Yip") and Mr Titus Shiu Chi Tak ("Mr Shiu"). On the day of the defendants' removal as directors, Mr Thomas Au Siu Yung ("Mr Au") was also appointed as a director of the plaintiff. Ms Yip and Mr Shiu were also executive directors of UAE, having been appointed on 14 November 2015.

The plaintiff's claim

6 Following their removal as directors on 23 May 2016, the defendants authorised the plaintiff to make seven payments (collectively "the payments") to various parties in the following sums, which payments formed the basis of the plaintiff's claim:

(a) To Kesterion Investments Limited ("Kesterion"),

(i) S$1,400,000 paid on 25 May 2016,

(ii) S$200,000 paid on 31 May 2016,

(iii) US$570,000 paid on 1 August 2016;

(b) To the first defendant,

(i) S$300,000 paid on 26 May 2016;

(c) To Yao Jun,

(i) S$250,000 paid on 26 May 2016,

(ii) US$500,000 paid on 21 July 2016;

(d) To Yew Eng Piow ("Yew"),

(i) S$135,000 paid on 25 May 2016.

7 Kesterion is a company incorporated in the British Virgin Islands. Its sole director and shareholder is the first defendant's wife, Ms Eva Wong. The first defendant's position was that up to sometime in November 2015, he was the single largest shareholder in UAE through shares held by him and convertible bonds held by Kesterion. Notably, on record, the sole shareholder

of Kesterion was Ms Eva Wong. The first defendant's position suggested that the shares in Ms Eva Wong's name were held on trust for the first defendant. This would mean that all the payments to Kesterion were in substance payments to the first defendant, if one disregarded the separate legal personality of Kesterion. This was relevant when assessing the conduct of the first defendant in making the payments to Kesterion.

8 The payments were made from proceeds realised from the surrender of the plaintiff's leasehold property at 42 Gul Circle Singapore 629577 to the Jurong Town Corporation. There were no board resolutions approving the payments.

9 It was not disputed that as at 31 March 2016, UAE was indebted to Kesterion in the sum of HK$92,855,948 ("the Debt"), which was recorded as HK$92,831,000 in UAE's 2016 Annual Report. It was also not disputed that the plaintiff itself was not indebted to Kesterion.

10 Ms Yip and UAE were added to the present suit as third parties by the defendants, but the third party claim was withdrawn on the first day of trial with costs to be paid by the defendants to Ms Yip and UAE. Another company, Aquaterra China Trading (Shanghai) Company Limited ("Aquaterra"), was also introduced as a third party to the present suit, but service was not effected on it. Consequently, Aquaterra did not participate in the present suit.

The first defendant's counterclaim

11 The first defendant was appointed as general manager of the plaintiff on 1 April 2016 under a contract of employment of the same date. His basic salary was at that time S$15,000 a month. Under the terms of the contract of

employment, the plaintiff might terminate the first defendant on three months' notice under cl 8 if "[his] service or [his] position is no longer required", and alternatively might also terminate the first defendant under cl 9 on two months' notice if "[his] performance is not satisfactory and not up to [the plaintiff's] expectation or [the first defendant is] found to be lazy, misconduct [*sic*], unsatisfactory attendance, attending to personal matters or sleeping, blogging, internet surfing, frequent or lengthy chatting on phone on private matters during working hours or [his] working attitude is unsatisfactory in the opinion of the [plaintiff]".

12 The plaintiff issued a notice of termination of the first defendant's employment on 28 September 2016, giving him two months' notice ("the Notice"). The relevant portion of the Notice read as follows:

> We regret to inform you that the preliminary findings of the [internal control review] report reveal numerous serious misconducts being committed by you and/or other director and/or other employees of the [plaintiff] which include but not limited to the following:-
>
> 1. unauthorised disposal of fixed assets;
>
> 2. invalid authorisation of payment/fund transfer; and
>
> 3. improper accounting treatment on the disposal of fixed assets.
>
> In view thereof, the [plaintiff] has decided to hereby terminate your employment pursuant to paragraph 9 of the Employment Agreement dated 1 April 2016 … by giving you 2 months' notice.

13 After the notice of termination, the first defendant did not turn up for work. The first defendant counterclaimed in the present suit for salary and housing allowance owed to him up to 28 December 2016, which took his last day of employment as three months from the date of the Notice. He filed an application by way of HC/SUM 3084/2017 for salary and housing allowance

owed to him up to 28 September 2016, *ie*, up to the date of the Notice, and has since obtained judgment in his favour for the sum of S$88,999 in outstanding salary for the period 1 April 2016 to 28 September 2016 and S$12,464 in housing allowance for the period 18 August 2016 to 28 September 2016. The point of contention hence remained as regards his entitlement to salary and housing allowance for the period after 28 September 2016.

14 The first defendant had pleaded an additional counterclaim for the sum of US$330,000, being the total of sums allegedly loaned to the plaintiff by Kesterion in 2012. The first defendant alleged that the debts were subsequently assigned by Kesterion to the first defendant. However, this counterclaim has been withdrawn.

The parties' cases

The plaintiff's case

The plaintiff's case in relation to its claim

15 The plaintiff's case was essentially that despite having been removed as directors on 23 May 2016, which as noted earlier was notified to the defendants by way of letter and fax on 30 May 2016, the defendants continued to act as *de facto* directors, and caused the payments to be made in breach of their fiduciary duties. The removal of the defendants as directors was as a result of the board having lost confidence in their ability to act in the plaintiff's best interests. This was in part due to attempts by the first defendant to use his position as a director of BSI to cause BSI to sell its shares in the plaintiff initially to the second defendant personally for a nominal consideration, and subsequently to one Best Pace Holdings Limited. These attempts eventually fell through as the requisite approvals from the Hong Kong authorities and shareholders of UAE had not

been obtained. On the plaintiff's case, following their removal as directors and in a last-ditch attempt to serve their own interest before they lost control of the plaintiff, the defendants caused the payments to be made. Apart from pointing out that one of the payments was to the first defendant, the plaintiff asserted that the other payments were to related parties.

16 The plaintiff emphasised that it was not itself indebted to Kesterion. The defendants did not dispute this – they accepted that the Debt was owed by UAE to Kesterion. The plaintiff asserted that the maturity date of the Debt had been extended from 19 November 2016 to 19 November 2017 pursuant to a letter of extension signed on 24 June 2016 between UAE and Kesterion. This again was not disputed. According to the plaintiff, if the payments to Kesterion on 25 May 2016 (S$1,400,000) and 31 May 2016 (S$200,000) had been approved or authorised by Ms Yip, Mr Shiu and Mr Au (which was the defendants' case), there would have been no reason for UAE to extend the maturity date for the *full amount* of the Debt on 24 June 2016. The plaintiff asserted that this showed Ms Yip and indeed the others were unaware that the defendants had caused payments to be made by the plaintiff to Kesterion after their removal as directors. The plaintiff further asserted that Ms Yip, Mr Shiu and Mr Au also did not, on behalf of the plaintiff, approve or authorise the payment to Kesterion on 1 August 2016 (US$570,000). There was no need for that payment to have been made since the maturity date for the Debt had very recently (on 24 June 2016) been extended to November 2017. The payments to Kesterion were hence a clear attempt by the defendants to prefer Kesterion's interests, in anticipation of the possibility that UAE might be unable to repay Kesterion in the future.

17 The defendants asserted that the payments to Yao Jun on 26 May 2016 (S$250,000) and 21 July 2016 (US$500,000) were for the purpose of paying

administrative fines incurred by Aquaterra. Aquaterra is an ultimate subsidiary of UAE and its legal representative is Denny Wong, the first defendant's brother-in-law. The plaintiff argued that there was no evidence that the sums paid to Yao Jun were indeed for this purpose, and that in any case the defendants were not entitled to make the payments without authorisation from the plaintiff's board, especially when alternatives to payment of the fine should have been explored. Further, during cross-examination, Ms Yip testified that the board of UAE had decided that UAE should not be responsible for the fine, since it was incurred as a result of a mistake by an employee of Aquaterra in selling expired water. The plaintiff asserted that in making payments to Yao Jun, the defendants were preferring the interests of Denny Wong, who would be exposed to personal liability if the fines remained unpaid, over the interests of the plaintiff.

18 As for the payment of S$300,000 to the first defendant, the plaintiff's initial case was that no debt was owed by the plaintiff to the first defendant personally. The plaintiff appeared, however, to concede in its closing submissions that there was a sum of S$230,000 owing to the first defendant personally, but argued that there had been no proper demand made for this sum to be repaid or any approval of such repayment.

19 The defendants asserted that the payment to Yew on 25 May 2016 (S$135,000) was to discharge a debt owed by the plaintiff to Yew. The plaintiff denied that it owed a debt to Yew. While the plaintiff acknowledged that it had received the sum of S$135,000 from Yew, it asserted that the sum was not received as a loan as alleged by the defendants. Instead, the sum was merely channelled through the plaintiff, converted to US dollars and paid out to one Liu

Tao. As such, no debt was owed by the plaintiff to Yew to justify the payment to him.

20 Given that none of the payments were in discharge of obligations owed by the plaintiff, the plaintiff's position was that they were clearly not for the plaintiff's benefit, regardless of whether they might have been for the benefit of UAE or its related entities. The plaintiff argued that authorising payments to parties who were not creditors of the plaintiff was clearly not in the plaintiff's interest, given that its own creditors had not been paid because of its poor financial state. Further, by making the above payments, the defendants placed themselves in a position where their interests conflicted with that of the plaintiff's, and they failed to make full disclosure of these conflicts to the plaintiff's board. The plaintiff also argued that the defendants' assertion that they were acting in the interests of UAE and of the UAE group as a whole was also unsustainable, as they were at the material time officers of the plaintiff, not UAE, and therefore owed fiduciary obligations to the plaintiff only.

21 The plaintiff asserted that there was no approval of the payments by either Ms Yip, Mr Au or Mr Shiu. Ms Yip was unaware of the payments to Kesterion, the first defendant, Yao Jun, and Yew, and did not approve of or authorise these payments. Ms Yip did not even know who Yao Jun and Yew were, and averred that they were not employees of the plaintiff or any of the parent companies. Similarly, Mr Au and Mr Shiu were not informed of any of the impugned transactions by the defendants, and did not give their approval or authorisation thereto.

22 The plaintiff also took issue with the defendants' argument that the second defendant was a mere employee of the plaintiff rather than a *de facto* director, as this was not pleaded.

The plaintiff's case in relation to the first defendant's counterclaim

23 The plaintiff disputed the first defendant's entitlement to salary for the period of the Notice, on the basis that the first defendant was absent from work for that period, in breach of his contract of employment. The plaintiff rejected the first defendant's position that he had accrued leave from his employment at BSE, due to the lack of documentary evidence of the same, and submitted in any case that such leave entitlement could not be transferred from BSE to the plaintiff.

The defendants' case

The defendants' case in relation to the plaintiff's claim

24 According to the defendants, they were unaware of their removal as directors of the plaintiff until sometime in June 2016, which during the trial was clarified to be 1 June 2016. The defendants also argued that it was not clear that the second defendant was a *de facto* director at the material time, as her role in the plaintiff was merely confined to executing transfers approved by the first defendant since she was a bank account signatory. As such, the plaintiff failed to prove that the second defendant had purported to act as a director of the plaintiff following her removal as a director, and hence the second defendant should not be liable for any of the payments.

25 The defendants did not dispute that the payments had been made, but argued that they were made with approval and via proper procedures. According

to the defendants, the background facts leading to these payments were as follows. Sometime in September 2015, the first defendant contemplated selling his controlling interest in UAE, partly because he intended to move from Hong Kong to Singapore with his wife. The first defendant appointed Cheong Lee Securities Limited ("Cheong Lee Securities") as his placement agent to sell the convertible bonds in UAE held by Kesterion, which represented the single largest block of shares in UAE upon conversion. After interested purchasers were identified by Cheong Lee Securities, the first defendant entered into a verbal agreement with the purchasers of his controlling interest in UAE ("the new owners") whereby the defendants would assist the new owners in the management and control of the UAE group, which would include liquidating the assets of the UAE group to pay off the debts of the various entities ("the Verbal Agreement"). The first defendant did not have direct contact with the new owners, and the sale of his interest was brokered by Mr Antony Kwok and Ms Clarea Au of Cheong Lee Securities. The first defendant also liaised with Ms Yip who was presented to him as the representative of the new owners. Ms Yip denied the existence of the Verbal Agreement. Notably, there was no documentary material evidencing the Verbal Agreement, nor was the Verbal Agreement referred or alluded to by the defendants prior to the filing of their defence in this suit.

26 The defendants claimed that, after the sale of the convertible bonds to the new owners, the sale proceeds of HK$120m were received by Kesterion. Out of these sale proceeds, approximately HK$68.5m was paid to UAE's creditors, China Shipbuilding Industry Complete Equipment Logistics (Hong Kong) Co Ltd and Magic Stone Fund (China), and another HK$2m was loaned to UAE for its operating expenses. These sums, together with some other loans to entities in the UAE group which were consolidated as loans to UAE, formed

the Debt, which as noted earlier, was recognised in UAE's books as owing to Kesterion.

27 The defendants claimed that all the impugned transactions were made with the approval of the plaintiff's new directors (Ms Yip, Mr Shiu and Mr Au), and that in particular Ms Yip had expressly approved the payments. Further, the fact that no questions were raised during the internal audit of the plaintiff in July 2016 showed that the new management and directors had accepted that all the payments were in order. Ms Yip's approval was allegedly secured through conversations on the phone, as Ms Yip did not want the discussions to be recorded in writing. Even though Ms Yip denied having authorised the payments, the defendants submitted that she was evasive and uncooperative on the stand and therefore an unreliable witness.

28 The payments to Kesterion were made to reduce the Debt, *in accordance with the Verbal Agreement*. To support their position that the payments were authorised, the defendants relied on an email sent by UAE to the first defendant's wife Ms Eva Wong on 29 September 2016. This email attached a letter signed by Ms Yip, seeking Ms Eva Wong's acknowledgment that Kesterion had received S$2,805,127 from UAE as repayment of a loan. Ms Eva Wong replied on 4 October 2016, asking who she was dealing with and for a breakdown of the sum. There was no reply from Ms Yip after that. According to the defendants, the sum of S$2,805,127 represented the sums claimed by the plaintiff at [6] above, excluding the sums paid to Yao Jun.

29 The payment of S$300,000 to the first defendant personally was a partial repayment of money owed by the plaintiff and its parent company BSI to the first defendant. The defendants relied on the plaintiff's 2016 financial

statements, which indicated a sum of S$230,000 due and owing to a director as at 31 March 2016, and footnote 11 of the statements which stated that the amount due to a director was repayable on demand. There were no further details pleaded as to the remaining S$70,000 of the S$300,000, although during trial the defendants took the position that the balance represented the repayment of a debt owed to Kesterion (see below at [57]). However, no evidence was produced of this alleged debt.

30 As mentioned above, the defendants claimed that the payments to Yao Jun were for the purpose of discharging a fine imposed on Aquaterra, and were advanced as loans by the plaintiff to Aquaterra. Aquaterra was involved in the distribution of mineral water in Shanghai, and had incurred the said fine imposed by the Shanghai authorities for failure to meet certain food safety standards. Yao Jun was used as the conduit for these payments because of foreign exchange controls on moneys transferred into China directly. Apart from the payments to Yao Jun, the plaintiff also attempted to transfer a sum of US$1,120,000 to Aquaterra for the payment of the fine, but this transfer was disallowed. The payment was subsequently returned to the plaintiff by the State Administration of Foreign Exchange. According to the defendants, there was urgency in advancing the loan to Aquaterra, as any delay in payment of the fine would have resulted in Aquaterra incurring additional penalties in the sum of 3% of the fine amount per day. The defendants argued in the alternative that the payments to Aquaterra were made pursuant to an inter-company loan agreement between the plaintiff and Aquaterra. At trial, the first defendant appeared to deviate from the pleaded position that the payments to Yao Jun were made to pay the administrative fine imposed on Aquaterra, and claimed instead that they were for the purpose of paying the litigation fees arising out of a lawsuit faced

by Aquaterra, which were separate and distinct from the fine imposed by the Shanghai authorities.

31 As mentioned earlier, the defendants' case was that the payment to Yew was repayment of a loan by Yew to the plaintiff sometime in April 2016. The loan was given on the understanding that it would be repaid by 30 June 2016. Yew's cheque to the plaintiff was exhibited in the first defendant's AEIC. According to the defendants, Yew agreed to lend because he and the first defendant had been friends since their days in Junior College, and there were no further discussions on the purpose of the loan or why the plaintiff required the funds. Notably, during the trial, both defendants testified that the moneys received from Yew were fully used to assist Aquaterra to pay its fines. To this extent, the plaintiff and the defendants were on common ground.

32 The defendants argued that the payments benefited UAE and the UAE group, and that they were entitled as a matter of law to consider the interests of the UAE group collectively in exercising their discretion as directors of the plaintiff. In making this argument, the defendants relied on the Court of Appeal's decision in *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 ("*Intraco*") as well as the Australian case of *Equiticorp Finance Ltd* (*in liq) v Bank of New Zealand* [1993] 32 NSWLR 50 ("*Equiticorp*").

The first defendant's case in relation to his counterclaim

33 The first defendant submitted that he was entitled to be paid three months' salary for the period commencing 28 September 2016, *ie* the date of the Notice. According to the first defendant, he "did not accept the termination of 2 months' notice" and instead "claim[ed] against the Plaintiff … 3 months' notice under Clause 8 of the employment agreement". The first defendant

testified that he did not report for work after the Notice because he took leave from work, and that the leave he had accrued with other companies in the UAE group could be used with the plaintiff because that had always been the policy of the UAE group.

My decision

The plaintiff's claim relating to the seven payments

The timing of the payments and the defendants' awareness of their removal as directors

34 Before embarking on an analysis of the parties' respective cases and the evidence, a brief discussion on the timing of the payments is relevant. I believe that a bright line can be drawn between payments made when the defendants were aware that they had been removed as directors, and payments when they were not. Before I explain the significance of the distinction, I first address where the bright line should be drawn.

35 To recap, the plaintiff's position was that the defendants were notified of their removal as directors on 30 May 2016, whereas the defendants claimed not to have known about their removal until 1 June 2016. On the evidence before me, I was inclined to give the defendants the benefit of the doubt, and found that they indeed came to know of their removal only on 1 June 2016. The first defendant's unchallenged evidence was that he was likely overseas on 30 and 31 May 2016. As the primary mode of notification was by way of fax, it was not likely that the fax sent on the evening of 30 May 2016 was brought to his attention while he was away. Mr KC Wong, the plaintiff's financial controller, who was frequently in the plaintiff's office and would have notified the first defendant of an important fax concerning him, testified that he was not in the

office at least on 30 May 2016. While a letter notifying the first defendant of his removal was sent to the plaintiff's office address on 30 May 2016, it was for the same reason conceivable that the first defendant would not have read it until perhaps 1 June 2016. In the absence of other evidence that would suggest that the defendants (or at least the first defendant) would have known of their removal on 30 or 31 May 2016, I found that they only became aware of the same on 1 June 2016. This is where the bright line should be drawn.

36 The payments would therefore fall on either side of the bright line drawn on 1 June 2016. For payments before 1 June 2016, the defendants would not have known that they had been removed as directors when they made or authorised the payments. On the other hand, for payments after 1 June 2016, it would follow that the defendants would have known that they did not have the authority to make or authorise the payments. Of the seven payments, only two payments, namely the third payment of US$570,000 to Kesterion on 1 August 2016, and the payment of US$500,000 to Yao Jun on 21 July 2016, were made *after* the defendants became aware of their removal (the "August Payment" and "July Payment" respectively; collectively, the "July and August Payments"). The remaining five payments, including the payment to Kesterion on 31 May 2016 in the sum of S$200,000, were all in May 2016 (the "May Payments"). Thus, the defendants would not have been aware of their removal as directors of the plaintiff at the time the May Payments were made or authorised.

37 This was significant for two reasons. First, as the July and August Payments were made after the defendants became aware of their removal as directors, they must accept that they were aware they did not have the authority to make or authorise those payments. They therefore could not rely on ignorance of their removal as evidence of their lack of *mala fides.* It ought to have been

crystal clear to the defendants that they did not have the authority to make the payments or at the very least that their authority to do so was deeply in question. When this was seen against the fact of the August Payment being to a related entity and on the first defendant's case an entity owned and controlled by him, namely Kesterion; and the fact that the July Payment to Yao Jun was not for the plaintiff's purpose, the integrity of the defendants' conduct must be called in question. It did not aid the defendants to say that the July and August Payments were not made in breach of fiduciary duties because they benefitted the UAE group, even if that were relevant, since they should not in the first place have been acting at all.

38 Second, as regards the May Payments, it must follow that the defendants would not have sought the approval of Ms Yip, Mr Shiu and Mr Au to make these payments. In this regard, it is important to note that it was only on 1 June 2016 that the defendants became aware for the first time that they had been removed as directors on 23 May 2016, and that Ms Yip and Mr Shiu, and Mr Au had been appointed as directors on 20 May 2016 and 23 May 2016 respectively in their place. So there would have been absolutely no reason to turn to Ms Yip, Mr Shiu or Mr Au as the defendants would have operated under the belief that they were authorised to make the May payments.

39 The defendants have asserted that they had obtained the approval of Ms Yip, Mr Shiu and Mr Au for the May, July and August payments. However, as noted at [38] above, this could not be the case once one drew the bright line at 1 June 2016. It was certainly more possible as regards the July and August payments. I consider this further at [65]–[70] below and reach the conclusion that the defendants did not seek their approval.

40 But the analysis did not end there. Having found out on 1 June 2016 about their removal and the appointment of the new directors, the defendants would have realised that they had authorised the May Payments when they did not have the authority to do so. But the defendants did not run the case that they sought ratification of these payments any time after 1 June 2016.

41 Accordingly, if the defendants did not seek approval (as regards the July and August Payments) or ratification (of the May Payments), that raised serious questions as to their *bona fides*. This must be seen in the context of three facts. First, the payments were made to related entities or the first defendant personally (including payments made ostensibly to Kesterion). Second, the payments were not for the plaintiff's purpose. Third, the payments were made when the plaintiff was in poor financial health.

42 Even though the analysis in relation to the May Payments, and the July and August Payments differed, I should highlight that it did not affect the analysis as to whether the defendants were at all material times *de facto* directors of the plaintiff. The test relating to *de facto* directors is an objective one – the subjective intentions of the person are hardly relevant (see *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163 ("*Raffles Town Club*") at [61]). Hence in the present case, regardless of whether the defendants were aware of their removal as directors of the plaintiff at the time of making the payments, they would have owed duties to the plaintiff as its *de facto* directors as long as the objective facts were such that they discharged responsibilities typically held by company directors. It was not disputed that the first defendant did discharge such responsibilities. However, as the defendants claimed that the second defendant

was a mere employee and not a *de facto* director of the plaintiff, I deal with this specifically at [75]–[76] below.

Existence and relevance of the Verbal Agreement

43 The parties have painted two different pictures of the circumstances leading up to the payments in question. On the plaintiff's account, the payments were instances of the defendants seeking to protect their own interests or those of related parties, shortly after their removal as directors under somewhat acrimonious circumstances. On the defendants' case, the payments were not only made with the requisite authority and approval, but also with the interests of the UAE group as a whole in mind, and pursuant to the Verbal Agreement for the first defendant to deliver UAE as a "clean shell" to the new owners.

44 I deal firstly with the Verbal Agreement, since it formed a substantial plank of the defendants' case. The relevant payments in this regard were the payments to Kesterion as they related to the discharge of the indebtedness of UAE to Kesterion. I was not convinced on the evidence before me that the Verbal Agreement was reached for the following reasons.

45 First, apart from the evidence of the first defendant himself, there was not a shred of evidence, documentary or otherwise, of the Verbal Agreement. It was telling that there was no explanation as to why an agreement of such considerable importance was not reduced into writing or at the very least referred to or evidenced in contemporaneous or subsequent documents. In fact, even though the first defendant was at that time a board member of UAE and the Verbal Agreement had a direct impact on UAE, there was also no evidence that it was disclosed to, tabled for approval and approved by the UAE board. In this regard, it was relevant that UAE was a listed company. As the Verbal

Agreement purported to relate to the affairs of UAE and its affiliates but was not in fact an agreement to which UAE was a party, it seemed a matter of proper governance as well as common sense that it would need to be presented, debated and approved by UAE's board. The first defendant had every opportunity to do so but did not. The failure was inexplicable.

46 Second, the circumstances in which the Verbal Agreement was reached were quite remarkable. The parties to the Verbal Agreement had no direct interaction or communication, dealing only through intermediaries, Mr Antony Kwok and Ms Clarea Au of Cheong Lee Securities, who as noted in [25] above, brokered the deal. It seemed strange to even say that there was a verbal agreement between parties who never met, though I accept that the possibility might not be remote. In any event, one would have thought that at the very least it would be necessary for the defendants to call the new owners, as the counterparty to the Verbal Agreement, as witnesses to corroborate the first defendant's position and explain why the agreement was reached in such an unusual manner. Further, if indeed the Verbal Agreement was reached through intermediaries, their evidence would equally be crucial. Yet, Mr Antony Kwok and Ms Clarea Au were not called as witnesses by the defendants. There was also no evidence adduced of communication between the first defendant and the intermediaries that would support the assertion that the Verbal Agreement was discussed and concluded. Surely such communication must exist if the Verbal Agreement was indeed concluded. The evidence of Mr Antony Kwok or Ms Clarea Au would have been even more important since the first defendant's testimony at trial appeared to suggest that the Verbal Agreement was formulated as a result of their advice for the first defendant to deliver a "clean shell" to the new owners:

> Q Now, let me go to the---apart from this issue that you mention about the appointment of a new director, any other things that was mentioned?
>
> A Oh, there are plenty of things when you sell a shell, Mr Leng. Although I'm not an expert in it, but there are a lot of things you need to clean. You need to give people a clean shell. As a honourable businessman, when you---when you want to deliver something to people you got to ensure that you deliver it accordingly. So, Cheong Lee is an expert in this, I am not. So, a lot of actions, I was instructed by then [*sic*] to do.

47 Third, the existence of the Verbal Agreement was contradicted or at least not supported by the evidence of the other witnesses. The first defendant claimed that Ms Yip was also privy to this Verbal Agreement, but Ms Yip denied there ever being such an agreement. The second defendant also testified that it was not made known to her that the first defendant wished to assist the new owners to settle the debts of the UAE group and deliver a clean shell.

48 Lastly, it seemed to be fairly obvious that if there was indeed a Verbal Agreement, the first defendant would have made the new owners a party to the present suit. As it was the first defendant's case that the cause of the payments to Kesterion was the Verbal Agreement, the first defendant would surely have taken steps to introduce the new owners as a party to the present suit.

49 All of the above spoke to only one conclusion – that the Verbal Agreement was a figment. I therefore did not accept that the Verbal Agreement existed. In any case, even if the Verbal Agreement existed, it would have been an agreement made between the first defendant in his capacity as the facilitator of the sale of the UAE convertible bonds held by Kesterion and the new owners as purchaser of those bonds. It did not bind UAE nor its related entities, and certainly not the plaintiff.

50 The finding that there was no Verbal Agreement had significant ramifications for the payments that the first defendant asserted were made as a result of it. As noted earlier, the relevant payments were those to Kesterion in purported discharge of the Debt. Crucially, this meant the defendants' case that those payments were authorised and made as a result of the Verbal Agreement, must be disbelieved.

51 When this was seen against my observations at [37]–[38] above on the May Payments, and the July and August Payments, the natural conclusion was that the defendants acted purely of their own accord and for their own interests. It must be emphasised again that the payments to Kesterion were, on the first defendant's case, in substance payments to himself. This would be conflict of interest at its highest. The defendants' breach of fiduciary duties in this regard was therefore clear.

Were the payments made to discharge debts owed by or liabilities of the plaintiff?

52 The next issue to consider was whether any of the payments were made to discharge a debt owed by or liabilities *of the plaintiff*. If not, it called into question whether the defendants were acting in the plaintiff's interest in making the payments.

53 The defendants' pleaded case was that the payments to Kesterion and the payments to Yao Jun were made to discharge the Debt (which was owed by UAE) and to assist Aquaterra with its administrative fine respectively. Therefore, it was indisputable that none of the payments to Kesterion or Yao Jun were made to discharge the plaintiff's liabilities. Whereas the second defendant in the course of her oral testimony suggested that part of the payment

to Kesterion was for debts owed by the plaintiff through BSE and BSI, this was not pleaded and was not asserted in her AEIC. Notably, this was not a position that the first defendant had asserted. Ms Eva Wong also testified that at least according to the records, Kesterion only loaned money to UAE and not to any of the other entities in the UAE group, due to the practice of upward consolidation of loans. Since the payments to Kesterion and Yao Jun were not made in discharge of the plaintiff's obligations, the defendants were clearly in breach of their fiduciary duties in authorising the payments.

54 The only payments that were supposedly made to repay debts owed by the plaintiff were the payments to Yew in the sum of S$135,000 and to the first defendant personally in the sum of S$300,000. I shall hence deal with whether these two payments were indeed made to discharge the plaintiff's obligations.

55 The relevant question as regards the payment to Yew was perhaps not whether it was in discharge of an indebtedness owed by the plaintiff to him but instead whether the first defendant ought to have procured the plaintiff to borrow the sum of S$135,000 from Yew in the first place. The defendants testified that the sum was eventually sent to Aquaterra to pay its fines. If the first defendant caused the plaintiff to assume a liability to Yew in order to pay the debts of another company, that would be a breach of his fiduciary duties. That breach would flow into the subsequent repayment to Yew. The breach was compounded by the fact that the loan involved an interested party, as the first defendant's brother-in-law Denny Wong was in charge of Aquaterra.

56 Further, I was not persuaded that there was in fact a debt owing by the plaintiff to Yew. There was no evidence to show that the payment from Yew was recorded in the plaintiff's records as a *loan* from Yew to the plaintiff. The

first defendant was not able to explain this. In this regard, there was also correspondence between the first defendant and Mr KC Wong to the effect that the S$135,000 was to be charged to Kesterion, suggesting that it was a debt to be borne by Kesterion and not the plaintiff. The first defendant could not satisfactorily explain this. When the second defendant was asked about this during cross-examination, she responded that there was a verbal conversation between Mr KC Wong and the first defendant to the effect that Kesterion would only pay if the plaintiff was unable to repay the loan to Yew. I was hesitant to give this assertion any weight since it arose at such a late juncture, and could not be found in any of the AEICs. It was relevant that the first defendant did not mention any such oral conversation in his testimony. In any case, I found it strange that Yew had supposedly advanced a considerable sum of money to the plaintiff without any question, on the first defendant's mere request, even taking into account that he was close friends with the first defendant. It begged the question whether this was actually a loan to the first defendant rather than the plaintiff, which was conveniently channelled through the plaintiff to Aquaterra. I was therefore not persuaded that the plaintiff incurred a debt to Yew in the sum of S$135,000.

57 As regards the payment to the first defendant in the sum of S$300,000, it was unclear whether it corresponded if at all to his loan of S$230,000 to the plaintiff. Firstly, I should point out that according to the first defendant's pleaded defence, the sum of S$300,000 represented the repayment of the first defendant's loan to the plaintiff as well as BSI. Yet, it was not clear how this was to be apportioned between the plaintiff and BSI. In any event, using the plaintiff's funds to repay a loan made by the first defendant to BSI would be a breach of fiduciary duties as that would not have been in discharge of the plaintiff's obligations. On the other hand, the second defendant testified that the

sum of S$300,000 was intended to be for Kesterion, even though it was received by the first defendant. This was not consistent with the defendants' pleaded case. The first defendant later testified that the S$300,000 was repayment of a director's loan to himself as well as a repayment of a loan to Kesterion, and that the full sum was paid into his personal account because he became entitled to the amount owed to Kesterion due to an assignment of debt. Apart from this being a departure from his pleaded case and not something asserted in his AEIC, when it was pointed out to him that the assignment of debt occurred in December 2016 whereas he directed payment of the sum of S$300,000 in May 2016, the first defendant could not give a satisfactory answer. This showed that the first defendant's case in this regard was built on shifting sands. In any event, authorising repayment to the first defendant of a loan that he himself had made to the plaintiff would plainly be a conflict of interest. I return to this point at [72]ff below. Further, even though the loan was recorded as being repayable on demand, no demand was made by the first defendant to the plaintiff.

58 Hence, in view of the evidence before me, I found that the payments were made in breach of the defendants' fiduciary duties as *inter alia* they were not in discharge of the plaintiff's obligations. It should also be borne in mind that these payments must be seen against the backdrop of the plaintiff's poor financial health at the material time.

Relevance of the interests of UAE and the UAE group

59 I now deal with the defendants' submission that they did not breach their fiduciary duties to the plaintiff in authorising the payments, as they were made for the benefit of UAE or the other entities under UAE (such as Aquaterra). The defendants' submission rested on the basis that directors are legitimately

entitled to take into consideration the interests of the business group as a whole in exercising their discretion. I pause here to note that this was not part of the pleaded defence.

60 Before considering whether directors are indeed entitled to act in the interests of the business group as a whole, I should add that I was not convinced that the defendants were indeed motivated by the interests of the UAE group when they authorised the payments. First, at the time of the payments, neither of the defendants were officers of UAE. The first defendant was previously chairman and executive director of UAE, but had ceased to be so on 31 December 2015 and 29 March 2016 respectively. Hence, the contention that the defendants were motivated by the interests of the UAE group, when they held no appointments in UAE, must be viewed with suspicion. Second and more importantly, in so far as the predicate for the payments was the Verbal Agreement, the argument fell away. If the defendants acted as they say they did because of the Verbal Agreement, then there could be no room for them to also say that they were motivated by the interests of the UAE group. The position on the Verbal Agreement has been covered above at [44]–[50].

61 Are the interests of the group relevant in the first place? In my judgment, the law is clear. The defendants' position was untenable. Whereas it is permissible for directors to consider the interests of a business group as a whole when making decisions, this cannot be done at the expense of the interests of the company within the group which they represent (*Intraco* at [28] and [29], citing with approval the decision in *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62). This is a necessary corollary of the trite principle that entities within a group are nevertheless separate legal entities with separate rights and liabilities, even if the financial accounts of the group are often

consolidated – such consolidation of financial accounts does not mean that the debts and liabilities of different companies within the same group can be treated interchangeably (see *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 ("*Beyonics*") at [71]–[72]).

62 In the present case, the plaintiff had its own unpaid creditors and was in poor financial health. Therefore, in using the plaintiff's assets to pay off the creditors of UAE and related entities, the defendants breached their fiduciary duties to the plaintiff. This was the case even if one were to disregard the fact that the creditors preferred by the defendants were those related or connected to them. Hence, the repayments of debt owed by UAE or related entities were clearly not in the interests of the plaintiff, and in such circumstances it became irrelevant as to whether the defendants acted in the interest of UAE or other related entities.

63 The defendants relied extensively on *Intraco* in support of their position that they were entitled to act in the interests of the group as a whole. The facts of that case, however, were completely different from the present. *Intraco* involved a case where the directors made the management decision to enter into a rescue plan involving the assignment of debts owed by related entities, which decision on hindsight turned out to be a poor one. However, it is important to note that the test that was applied by the Court of Appeal was whether "an honest and intelligent 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) (see *Intraco* at [28] and [29], citing with approval the decision in *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62). Thus, the focus of the test remains the interest of the company and not of the group. In

Intraco, the company had taken an assignment of debts of related entities so that it could start a new and potentially lucrative business of paper manufacturing. In return, the creditor whose debts were assigned converted its debt to equity and granted loans to the company, and was appointed the sole distributor of the paper products that were to be manufactured. The directors had taken the view that this was in the interest *of the company* when seen in the context of the group. This is quite different from the present scenario where the plaintiff's funds were used to pay off liabilities of related companies without any benefit to the plaintiff or its creditors, and in the context of the defendants having a clear personal interest in such payments. Even if the related companies might have benefited from a reduction of their loan to their creditors, it did not behove the defendants to say that they acted in the interest of the group as a whole when they acted against the interest of the plaintiff.

64 Similarly, the defendants' reliance on *Equiticorp* was misplaced. In that case, the chairman, chief executive and major shareholder of a group of companies associated by common or interlocking shareholders decided to apply the liquidity reserves of three companies within the group towards discharge of the debt of a wholly owned subsidiary of another of the companies within the group, and did so under commercial pressure from a creditor. The Court of Appeal held there (at 146F–148G), albeit with reservations, that the correct test was to ask whether an intelligent and honest man *in the position of the director of the companies holding the liquidity reserve* could, in all the circumstances, have reasonably believed that the application of the liquidity reserve towards discharge of the subsidiary's debt was *for the benefit of those companies*. In other words, the director concerned must nonetheless act in the interests of the companies to which he owed fiduciary duties, and not subordinate the interests of these companies to others within the same business group. This is consistent

with the principle alluded to above at [61], that directors must act in the interest of the company they represent, even when considering the interests of other companies in the same group. This was clearly not done in the circumstances of the present case for reasons spelt out above at [62] – the defendants could not in good conscience say that using the plaintiff's funds to pay the debts of other companies was in the plaintiff's best interests.

Did the plaintiff's board approve the payments?

65 As noted in [27] above, the defendants claimed that all the impugned transactions were made with the approval of the new directors (Ms Yip, Mr Shiu and Mr Au), and that in particular Ms Yip had expressly authorised the payments. Regardless, it is important to again revert to the bright line that I had drawn earlier. As noted above, if it was accepted that the defendants only became aware of their removal as directors and the appointment of Ms Yip, Mr Shiu and Mr Au on 1 June 2016, there would be no reason to turn to all or any one of them for approval of the May Payments. If the defendants did not know that the new directors had in fact been appointed, there was absolutely no reason for their approval to be sought. The defendants could not have it both ways. This would mean that in so far as the defendants allege that approval for the May Payments had been sought from Ms Yip, Mr Shiu and Mr Au, they were not being truthful. This did colour the assessment of the credibility of any allegation that approval had been sought for the July and August Payments.

66 Further, the defendants' position was contrived for two other reasons. First, if the payments, at least in so far as they relate to Kesterion, were pursuant to the Verbal Agreement, there would be no need to turn to Ms Yip, Mr Shiu or Mr Au for approval. The defendants would have acted under the belief that they

were authorised to do so. Second, and putting aside the Verbal Agreement, it was difficult to believe that Ms Yip, Mr Shiu or Mr Au would have approved and allowed the defendants to make the payments when the defendants had been removed as directors. In this regard, five of the payments, *ie*, the May Payments, were made very shortly after the removal of the defendants as directors. If the defendants had indeed sought approval prior to those payments, they would have been told straightaway that they had been removed from office and were not authorised to make the payments. This would in turn mean that the defendants would have known about their removal before 1 June 2016, which was contrary to the position that they took at trial. Again, the defendants could not have it both ways.

67 I should mention that it was not immediately apparent whether the defendants' position was that the payments were duly authorised by all the directors of the plaintiff, or whether this was only done by Ms Yip. The defendants' case as pleaded was that at the time of the payments, the new directors had already been appointed, and all the payments were made with the approval of the new directors. This of course, as noted above, could not be relevant to the May Payments as the defendants did not know of the appointment of the new directors when those payments were made. Notwithstanding this, no evidence was adduced in the AEICs or at trial to show any form of authorisation by Mr Shiu and Mr Au. During his oral testimony, the first defendant also seemed to take a step back from his pleaded case that there was approval and knowledge on the part of Mr Shiu and Mr Au, and stated instead that he did not report the Kesterion payments to the plaintiff's board because he regarded it as Ms Yip's duty to do so. Hence, it did not appear to be disputed that the defendants did not take the transactions to the plaintiff's board. The first defendant's explanation for this failure to make the necessary disclosures was

simply that he was used to doing business "on a handshake basis". I found this strange. Given that the payments were not in discharge of the plaintiff's obligations and were in several instances to related parties and on one occasion to the first defendant himself, and bearing in mind the plaintiff's poor financial position and the defendants' somewhat unceremonious removal as directors, the defendants surely would have been at pains to ensure that approval was obtained from the entire board.

68 Therefore, it was clear that as presented, the defendants' case at its highest was that only Ms Yip had authorised these payments, whereas Mr Shiu and Mr Au also somehow had actual or constructive knowledge of them. This was also reflected in the defendants' further and better particulars served on 6 April 2017, which stated that the directors who approved the transactions were Ms Yip and the first defendant himself, via a telephone conversation, and which made no mention of Mr Shiu or Mr Au. Indeed, in their closing submissions, the defendants claimed that "[a]t the heart of this action is whether or not the [seven] Payments were authorised by UAE and [the plaintiff] through Yip. It is the Defendants' case that Yip authorised each of the [seven] Payments verbally, over the telephone".

69 Given the earlier conclusion that the defendants had no reason to turn to the new directors as regards the May Payments, it must follow that the allegation that Ms Yip authorised the May Payments could not be correct. Further, on the defendants' case, the payments to Kesterion were made pursuant to the Verbal Agreement, and hence there would be no reason to seek Ms Yip's approval. That would leave only one payment that was neither a May Payment nor a payment that was pursuant to the Verbal Agreement – the second payment to Yao Jun on 21 July 2016. However, the first defendant's case was not that he

sought approval from Ms Yip for just this one payment; his case was that he sought approval from Ms Yip for all seven payments. If I therefore concluded one way for the other six payments, it seemed difficult to isolate just this one payment and take a different view.

70 With this mind, I turn to Ms Yip's evidence. The defendants' case that the payments were approved by Ms Yip was contradicted by Ms Yip. Ms Yip gave consistent evidence that the first defendant did not seek her approval during a supposed conversation in May or June 2016 for the plaintiff to make payments for the Aquaterra fine or to repay the loans to Kesterion and the first defendant, and she was emphatic that such a conversation did not occur. The defendants submitted that Ms Yip was being untruthful in her answer as she had in her AEIC denied ever speaking to the first defendant on the phone during the same period, and yet she testified orally that she did in fact speak to the first defendant on the phone. I, however, disagreed that that was the tenor of her evidence – the assertion in her AEIC of not having had a telephone conversation with the first defendant was clearly in relation to the specific issue of the first defendant asking for approval to make the payments, and not about having phone conversations with him generally during that period. As such, Ms Yip's evidence on this point remained firm, and I found no reason to doubt her credibility. Ms Yip's position on this also appeared to be supported by the documentary evidence or rather the lack thereof – Ms Yip was not copied in any of the emails on payment instructions sent by the first defendant to Mr KC Wong. According to the first defendant this was because Ms Yip supposedly expressed a preference "not to be involved" and to be "kept out [of] the loop", and not wanting her discussions with the first defendant recorded in writing. This was strange. Why would Ms Yip say this if she had authorised the payments? The first defendant would have had every reason to document the

approval given that the payments were to related entities and himself, not for the plaintiff's purposes, and the plaintiff's parlous financial situation. The first defendant in his oral evidence further testified that Ms Yip had given approval for the payments for Aquaterra sometime around 18 or 19 July 2016, but this supposed conversation was not mentioned in his AEIC. In fact, the first defendant's AEIC was bereft of any details of how authorisation was given by Ms Yip. Finally, I accepted the plaintiff's contention that there would be no reason for UAE to extend the repayment of the full amount of the Debt to November 2017 if Ms Yip had indeed approved the payments to Kesterion. In the circumstances, I found Ms Yip's evidence that she did not give authorisation for any of the payments more credible than that of the first defendant's.

71 The defendants relied on an email sent to Ms Eva Wong on 29 September 2016 (see above at [28]) as an acknowledgment of all the payments made by the plaintiff, with the exception of the payments to Yao Jun. The email attached a letter signed by Ms Yip, asking for confirmation that Kesterion had received a total sum of S$2,805,127 from UAE. According to the defendants, this email showed that the payments were authorised by Ms Yip, as she would not have otherwise asked for an acknowledgment of receipt. Ms Yip was cross-examined on this email and letter at length, and explained that UAE was merely seeking Kesterion's confirmation that it had indeed received the payments, because there were no documents on UAE's side of these payments having been made. Around the time this email was sent, the auditors had uncovered books and vouchers stating payments were made to Kesterion totalling S$2,805,127, and as such the email and letter were sent for investigation purposes. I found this to be a plausible explanation in the circumstances. In any case, the contents of the email and letter were certainly not unequivocal as to the issue of

authorisation of the payments mentioned, and hence in totality I did not find them to be helpful to the defendants' case.

72 Putting aside the fact that the payments were not made in discharge of the plaintiff's liabilities, which remained an extremely pertinent fact, two other things must be emphasised. First, the plaintiff's poor financial health at the time of the payments. Second, that the payments engendered issues of conflict of interest. It was undisputed that the recipients of the impugned payments were all connected to the defendants in one way or another. Kesterion was owned by the first defendant's wife or perhaps even the first defendant – whilst the shares in Kesterion were legally owned by the first defendant's wife Ms Eva Wong, it appeared from Ms Eva Wong's testimony that she mostly followed the first defendant's instructions in the conduct of Kesterion's business. In fact, Ms Eva Wong made no request for repayment of Kesterion's loans, and it was the first defendant who made such a request "on behalf of Kesterion". The first defendant has also consistently asserted that he was, prior to the sale of his interest in UAE to the new owners, the single largest shareholder in UAE by virtue of the convertible bonds held by Kesterion – this would suggest that the first defendant regarded himself and was in fact the true owner of the shares in Kesterion held by Ms Eva Wong. Further, Aquaterra was controlled by the first defendant's brother-in-law, Yew was a close friend of the first defendant, and then there was also the payment to the first defendant personally.

73 In the circumstances, the prudent and necessary thing for the defendants to have done was to take these transactions to the plaintiff's board, make a full disclosure of their conflicts of interest and seek the board's approval for these payments, or have them ratified. As noted earlier, this was not done.

74 Hence, I found that none of the payments were authorised by Ms Yip, Mr Au or Mr Shiu. I did not find the first defendant to be at all a credible witness. Since these payments represented related-party transactions which were not duly authorised by the plaintiff's board, and were not in discharge of the plaintiff's obligations, the defendants were clearly in breach of their fiduciary duties to the plaintiff in making these payments.

The second defendant's position

75 Lastly, I turn to the defendants' submission that the second defendant was not a *de facto* director, and had at all times merely followed the first defendant's instructions in signing the necessary documents. Even though this was not her pleaded defence, the burden was nonetheless on the plaintiff to prove the elements of its case, and hence it was still necessary to consider whether the second defendant was indeed a *de facto* director as alleged by the plaintiff. In this regard, I was guided by the case of *Raffles Town Club*, which held (at [58] and [59]) that a *de facto* director is one who undertook functions in relation to the company which could properly be discharged only by a director, who participated in directing the affairs of the company on an equal footing with the other directors, and who exercised "real influence" in the corporate governance of the company.

76 In totality, I was satisfied that the second defendant was a *de facto* director, even if she might have at times acted on the instructions of the first defendant. It was clear that the second defendant was a director of the plaintiff prior to her removal – the second defendant did not deny this. She was appointed as a bank account signatory in her capacity as a director of the plaintiff. Accordingly, when she authorised the May, July and August Payments as the

bank account signatory, she could have only done so in her capacity as a director of the plaintiff. She was also clearly purporting to act as a director. The point seemed unarguable. In fact, it was not clear in what other capacity she could have been acting – whereas the second defendant testified orally that she was also an employee of the plaintiff, no evidence was adduced to support this, and this was also strangely omitted from her AEIC. Indeed, this contradicted her own earlier oral testimony that she was only employed by BSI and not the plaintiff. I saw no reason why she should not be deemed a *de facto* director at least in terms of authorising the payments. I was further mindful of the fact that the second defendant claimed not to have been aware of her removal as a director until "early June" and relied on this fact to show her lack of dishonesty. If so, she must surely have thought that she was a director and acted as such in authorising the May Payments. She could not therefore in the same breath disavow being under a fiduciary obligation in that intervening period.

Conclusion on the plaintiff's claim

77 To sum up, when the defendants' conduct was viewed in totality, it was clear that they were in breach of their fiduciary duties in making the payments. Even though they might not have been aware of their removal as directors for the May Payments, the fact remained that the defendants authorised payments which were not in discharge of the plaintiff's obligations. Whether or not the payments benefited the UAE group as a whole was irrelevant in the circumstances. The payments were also related-party transactions which gave rise to clear conflicts of interest, and yet no attempts were made to seek approval or ratification from the plaintiff's board. In the circumstances, the defendants clearly breached their fiduciary duties to the plaintiff, and I thus allowed the plaintiff's claim in its entirety.

The first defendant's counterclaim

78 The first defendant received the Notice on 28 September 2016, giving him two months' notice. It was not disputed that the first defendant did not turn up for work from that day onwards.

79 To my mind, the first defendant's counterclaim was unsustainable both legally and factually. The common law position is that where a contract of employment is silent on the issue of salary in lieu of notice, such as in the present case, the employer is entitled to terminate the contract of employment by paying salary in lieu of notice (see *Beyonics* at [90]). That is a prerogative open *only* to the employer. In the instant case, the plaintiff elected to terminate the contract of employment by giving the Notice, which it was entitled to do pursuant to the terms of the contract of employment. It could not be disputed that the first defendant had no entitlement to reject the Notice and to claim for salary in lieu of notice. In order for the first defendant to succeed in his counterclaim for salary during the notice period, he would thus have to show that he was entitled to be paid his salary because he had complied with his contractual obligations as an employee during the notice period.

80 If the first defendant had turned up for work during the notice period, then he would be entitled to be paid salary. In the present case, however, it was clear that the first defendant did not turn up for work upon receiving the Notice, and hence could not possibly claim salary for the notice period. Indeed, he had breached his contract of employment in failing to report for work. The first defendant appeared to take the position at trial that it should have been made clear in the Notice that he needed to report for work to serve out his notice period. Apart from not being pleaded, that was quite an astounding position. As

a default, it was for the first defendant to report for work as a matter of contractual obligation, and not for the plaintiff to tell him that he must. Indeed, it should be obvious that unless the plaintiff had agreed to pay salary in lieu of notice, the first defendant had an obligation to continue reporting to work during the notice period.

81 At trial, the first defendant also took the position that he did not turn up for work because he had applied for leave, such leave being carried over from BSE, a different company, to the plaintiff as was permitted in the UAE group. These assertions were conspicuously absent from the pleadings and the first defendant's AEIC. Further, there was no evidence to support such a practice, or that leave had in fact accrued to the first defendant in BSE and a leave application had been submitted and approved. Whereas the first defendant had relied on WhatsApp messages allegedly showing that he had 43 days of leave carried over from BSE, it was clear from the content of those messages that the first defendant was merely asserting that that was the case, not that there was any approval or confirmation by the plaintiff of this assertion or the alleged practice of porting leave from BSE to the plaintiff. In any event, it seemed incorrect as a matter of principle to port leave accrued in another company to the first defendant's leave entitlement with the plaintiff unless that was permissible under the first defendant's terms of employment with the plaintiff. It was apparent from a review of the first defendant's employment contract that that was not the case.

82 As such, since the first defendant did not turn up for work from 28 September 2016 onwards, he was disentitled to his salary during the notice period having not provided consideration. For the same reason, the first defendant was not entitled to claim housing allowance during this period. In the

circumstances, it was irrelevant whether the first defendant was entitled to two or three months of notice. In this regard, I should say that given the conclusions I have drawn as regards the first defendant's conduct, it seemed that the plaintiff was fully entitled to terminate the first defendant's employment with two months' notice pursuant to cl 9 of the contract of employment. I accordingly dismissed the counterclaim.

Conclusion

83 For the foregoing reasons, I found that the defendants had breached their fiduciary duties to the plaintiff in authorising the following payments:

(a) To Kesterion,

(i) S$1,400,000 paid on 25 May 2016,

(ii) S$200,000 paid on 31 May 2016,

(iii) US$570,000 paid on 1 August 2016;

(b) To the first defendant,

(i) S$300,000 paid on 26 May 2016;

(c) To Yao Jun,

(i) S$250,000 paid on 26 May 2016,

(ii) US$500,000 paid on 21 July 2016;

(d) To Yew,

(i) S$135,000 paid on 25 May 2016.

84 Judgment was therefore awarded in favour of the plaintiff against the defendants jointly and severally in the total sum of S$2,285,000 and US$1,070,000. Interest ran on each of these sums from the date of the writ, *ie* 23 November 2016, at the rate of 5.33% per annum. The first defendant's counterclaim was disallowed.

85 On costs, parties were directed to file written submissions limited to ten pages within two weeks. The plaintiff submitted that it should be awarded total costs of S$360,000 plus disbursements, whereas the defendants submitted that costs of S$130,800 plus reasonable disbursements should be awarded to the plaintiff. Parties have since informed me that they have agreed for the defendants to pay the plaintiff disbursements in the sum of S$71,973.05. I am of the opinion that given the complexity of the case, and having regard the Costs Guidelines, a daily rate of S$18,500 was reasonable. Applying the tariff discount of 20% for the sixth to eighth days of trial as per the same Costs Guidelines, this amounted to S$92,500 for the first five days of trial and S$44,400 for the next three days of trial, for a total of S$136,900. In addition, I will award S$9,000 for the interlocutory applications and the pre-trial conferences for which costs have yet to be fixed, for total costs of S$145,900 to be paid by the defendants to the plaintiff, exclusive of the disbursements agreed between the parties.

Postscript

86 On 27 June 2018, prior to the release of the oral judgment, Kesterion commenced Suit No 653 of 2018 ("Suit 653") against the plaintiff to recover a purportedly outstanding loan of S$400,000 made on 16 June 2016. After the plaintiff filed its defence in Suit 653, the defendants filed Summons No 3862 of

2018 ("Summons 3862") to admit the cause papers filed in Suit 653 as evidence in the present suit, and to recall Mr Au, Mr Shiu and Ms Yip as witnesses, on the basis that the plaintiff had taken inconsistent positions in Suit 653 and the present suit. I heard and dismissed the application on 4 October 2018, and I explain my decision here very briefly.

87 The plaintiff's defence in Suit 653 was essentially that the sum of S$400,000 was a repayment of and liable to be set-off against a loan of S$500,000 made to Kesterion in May 2016. This loan of S$500,000 comprised a payment of S$200,000 made to Kesterion on 31 May 2016 and a payment of S$300,000 made to Kesterion on 26 May 2016, which overlapped with two of the seven payments in the present suit. The defendants contended in Summons 3862 that the plaintiff could not assert in Suit 653 that these two payments represented loans to Kesterion when it had taken the position in the present suit that they were unauthorised. This justified the re-opening of the present suit.

88 The defendants' argument in this regard was to my mind a *non sequitur*. I did not see why the position that the payments were unauthorised by the plaintiff's new directors at the time of payment, was necessarily inconsistent with the position that they were to be characterised as loans *vis-à-vis* Kesterion. As clarified by Mr Au in his affidavit filed for Summons 3862, the plaintiff's position was that its new directors only discovered these payments after the auditors performed a review at the end of August 2016. Hence, its defence in Suit 653 was consistent with the plaintiff's position in the present suit that the payments were unauthorised at the time of payment. The plaintiff maintained that the payments were neither authorised nor ratified at any point of time.

89 Even if there was any inconsistency between the plaintiff's positions in the present suit and Suit 653, it was not clear how re-opening the trial in the present suit would be helpful to the defendants. The defendants' case in relation to the payment of S$200,000 to Kesterion was that this was pursuant to the Verbal Agreement to discharge the debt of UAE. Even if the plaintiff's evidence in Suit 653 suggested that this payment was approved by the new directors, it would have been approved as a loan to Kesterion, and not for the purpose asserted by the defendants in the present suit. As for the payment of S$300,000 to the first defendant, the defendants' case was that this was a partial repayment of a loan extended by the first defendant, which case did not appear to rely on any express approval by the new directors. Any purported approval of this payment as a loan to Kesterion would not advance the defendants' case to any extent. Hence, since any inconsistency revealed did not map onto the defendants' case theory, I did not see how re-opening the trial would assist them.

90 I was cognisant that there might be an issue of double-recovery if the plaintiff's claim in the present suit was allowed, but this was something that could be resolved in Suit 653, and did not necessitate the re-opening of the trial in the present suit. I therefore dismissed Summons 3862, and maintained my findings in relation to the present suit.

Kannan Ramesh
Judge

Leng Siew Wei Aloysius, Jonathan Tan Yi Wen, Koh Jian Ying and Sarah Phang Shih Min (AbrahamLow LLC) for the plaintiff; Nicholas Jeyaraj s/o Narayanan (Nicholas & Tan Partnership) (instructed counsel), Nichol Yeo (JLC Advisors LLP) (instructed counsel) and Lim Seng Sheoh (Seng Sheoh & Co) for the defendants.

Annex: Corporate structure of the UAE group