IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 285

Suit No 655 of 2011
Suit No 179 of 2012

Between

Hocen International Pte Ltd
(In liquidation)

… *Plaintiff*

And

Ong Shu Lin

… *Defendant*

And Between

Ong Bee Chew

… *Substituted Plaintiff*

And

Ong Shu Lin

… *Defendant*

(By original writ and order to carry on)

GROUNDS OF DECISION

[Companies] — [Directors] — [Duties]

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v
Ong Shu Lin

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29 November 2017

Vinodh Coomaraswamy J:

1 Hocen International Pte Ltd ("Hocen") was in the business of selling and distributing power cables. It carried on this business from the time it was incorporated in May 2005 until it went into liquidation in October 2007. Hocen has only ever had two shareholders and two directors: Ong Bee Chew and Ong Shu Lin. The two Ongs are, respectively, the plaintiff and the defendant in the two suits now before me. It does not appear that the two Ongs are related to each other.

2 Hocen went into liquidation in 2007 because the defendant secured an order for it to be compulsorily wound up on the just and equitable ground. Acting by its liquidators, Hocen commenced these suits against the defendant in 2011 and 2012. In 2013, the liquidators assigned Hocen's causes of action in

these suits to the plaintiff. The plaintiff was then substituted for Hocen and progressed these suits to trial before me.

3 The plaintiff's claim is that the defendant breached the statutory and fiduciary duties which he owed to Hocen by causing Hocen to make payments of about S$1.8m which were of no corporate benefit to Hocen.[1] The plaintiff's case is that these payments were part of the defendant's scheme to procure business for Hocen by corruption. The plaintiff accordingly seeks to hold the defendant liable to pay damages or equitable compensation equivalent to the value of the payments.[2]

4 The defendant denies any breach of duty. His defence is that the payments were indeed of corporate benefit to Hocen because they led to and sustained Hocen's substantial business selling cables.[3] The defendant's alternative defence is that, even if he did breach his duty to Hocen, the plaintiff always knew the purpose of the payments[4] and is therefore obliged to contribute equally to the defendant's liability in these suits.[5]

5 I have accepted the plaintiff's case that the purpose of the payments was to procure business for Hocen by corruption, and that involving Hocen in this scheme was not in Hocen's interests. But I have also accepted the defendant's case that the plaintiff is equally culpable for this corrupt scheme and therefore equally in breach of his duty to Hocen. As a result, I have ordered the plaintiff to make a contribution of 50% to the defendant's liability in these suits.

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1 Statement of Claim (Amendment No. 2), paras 12–13.

2 Statement of Claim (Amendment No. 2), paras 16(a) and (d).

3 Defence and Counterclaim (Amendment No. 1), para 8.

4 Defendant's Reply Submissions, para 7.

5 Defence and Counterclaim (Amendment No. 1), paragraph 20.

6 As will be seen (at [187]–[190] below), the net result of these suits, given the terms on which Hocen's causes of action were assigned to the plaintiff, is that the plaintiff is no better off after judgment than he was before it. This litigation has therefore been thoroughly pointless. For that reason, as well as the parties' equal culpability for the corrupt scheme, I have made no order as to the costs of the suits.

7 Both the plaintiff and the defendant have appealed against my decision in each of the two suits before me. I therefore now set out my grounds.

Background

8 The plaintiff is an experienced businessman. He was introduced to the defendant sometime in 2004 through a business partner by the name of Andy Heng.[6] At that time, the plaintiff and Heng were running a company unrelated to this dispute which was in the business of selling and distributing power cables for use in port cranes. Heng invited the defendant to join that company to expand its business through the defendant's business contacts in China. With the plaintiff's support, the defendant accepted.[7]

Hocen is established

9 In 2004, the relationship between the plaintiff and Andy Heng broke down.[8] As a result, the plaintiff and the defendant decided in May 2005 to set up a new company to take over the existing business.[9] Hocen was that company.

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6 Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, para 17.

7 Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, paras 18–19.

8 Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, paras 20–21.

9 Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, para 25.

10 The plaintiff and the defendant were each allocated a 50% shareholding in Hocen and were each appointed a director of Hocen. The defendant was appointed Hocen's managing director.[10] The parties have always been equal shareholders of Hocen and its only two directors.

11 It is common ground that it was the defendant who ran Hocen's day-to-day operations, and that he did so without the plaintiff's day-to-day involvement or supervision. The actual scope of the plaintiff's role in Hocen is, however, disputed. I examine this issue in detail at [106]–[119] below.

12 Hocen's cable business was, on the surface, very simple. It bought cables from an Australian company called Olex Pty Ltd ("Olex") and sold the cables at a profit to a Chinese company known as Shanghai Zhenhua Port Machinery Co Ltd ("ZPMC"). ZPMC manufactures cranes for Chinese container ports and has need for significant quantities of cables. One of ZPMC's major customers is Yantian International Container Terminals ("YICT").[11]

13 Three of Hocen's employees gave evidence at trial in these suits. They are Davin Chan, an administrative manager; Raymond Goh Lnai Mun, a sales manager; and Loh Siew Choong, also a sales manager.[12] All three were employed by Hocen from August 2005, shortly after it was incorporated, until it went into liquidation in October 2007.

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10 Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, para 31.

11 Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, para 47; Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, para 71.

12 Substituted Plaintiff's Bundle of Documents Vol 5, pp 2450–2451, para 6.

Hocen engages Crossbridge

14 Soon after Hocen commenced operations, it engaged the services of a Hong Kong company called Crossbridge International Pte Ltd ("Crossbridge"). It is common ground that it was the defendant who introduced Crossbridge to Hocen.[13]

15 Crossbridge is owned by one Tsui Wai Mun and one Yu Kit Ching. Yu's brother-in-law, Daniel Cheng, was also an officer of Crossbridge. He was at the same time an equipment manager with YICT.[14] Cheng's role in Hocen's arrangement with Crossbridge is a matter of dispute in this case.

The Crossbridge payments

16 Between September 2005 and October 2006, the defendant caused Hocen to issue a total of ten cash cheques[15] and to make eight bank remittances[16] to Crossbridge. I will refer to these transactions collectively as the Payments. The total amount debited from Hocen's account by way of the ten cheques was S$855,225 and US$52,700. The total amount debited from Hocen's account by way of the eight remittances was US$567,200.

17 The defendant drew each cash cheque on Hocen's account with the United Overseas Bank Ltd ("UOB") and personally cashed the cheque over the counter at a UOB branch. He then physically delivered the cash to a representative of Crossbridge: either Daniel Cheng, Tsui Wai Mun or Yu Kit Ching.[17] It is the defendant's evidence that he delivered the cash drawn against

13 Substituted Plaintiff's Bundle of Documents Vol 3, pp 1370-1371, para 15(b).

14 Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, para 47; Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, para 71.

15 Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, para 6.

16 Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, para 7.

the last two cheques to Crossbridge for onward payment to a third party who had supplied materials to Crossbridge.[18] But there is no suggestion that the last two cash cheques are any different in kind from the first eight. I therefore treat the claim on all ten cash cheques as standing or falling together.

18 There is no independent evidence whatsoever to show that the defendant actually delivered all of the S$855,225 and US$52,700 in cash to Crossbridge, as he claims. The plaintiff has his suspicions about this[19] and suggests that the defendant pocketed some of the money for himself. But the evidence which the plaintiff puts forward to support this suggestion is entirely circumstantial and extremely slight. In any event, the claim against the defendant is based on a lack of corporate benefit rather than on misappropriation for personal benefit. The plaintiff therefore does not need to prove that his suspicions are true in order to succeed. I assume for present purposes, therefore, that the defendant handed over all of the cash to Crossbridge, retaining none for himself.

The Crossbridge contracts

19 Between March 2006 and January 2007, Hocen entered into four written contracts with Crossbridge.[20] I shall call them the "Crossbridge Contracts". The terms of the four contracts are identical to each other in all material respects.

20 The purpose of the Crossbridge Contracts was apparently to formalise an existing arrangement between Hocen and Crossbridge. The contracts ostensibly obliged Crossbridge to provide quality assurance and progress

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17 Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, paras 61-62.

18 Ong Shu Lin 3rd Affidavit dated 20 March 2013, Exhibit OSL-1; Substituted Plaintiff's Bundle of Documents Vol 1, p 577.

19 Plaintiff's Closing Submissions, paras 110–119.

20 Substituted Plaintiff's Bundle of Documents Vol 7, pp 3580–3608.

monitoring services (collectively, "the Services") when cables sourced from Hocen were installed in cranes manufactured by ZPMC.

Hocen goes into liquidation

21 The relationship between the plaintiff and the defendant began to deteriorate in the middle of 2006.[21] As a result, Hocen's operations and business became deadlocked. This led the defendant to apply in August 2007 for Hocen to be wound up by the court on, amongst others, the just and equitable ground.[22] The court made the winding up order in October 2007 and appointed three accountants as Hocen's liquidators.[23]

22 It is important to point out that Hocen, though now in liquidation, is far from insolvent. After paying all of its creditors and defraying the liquidation expenses, there is in fact a substantial surplus which remains to be distributed equally to Hocen's only two shareholders: the plaintiff and the defendant.

23 After taking office in October 2007, the liquidators duly reviewed Hocen's affairs and records. In the course of the review, they interviewed both the plaintiff and the defendant.[24] In September 2009, they submitted a confidential report of their findings to the Commercial Affairs Department ("CAD"). The CAD considered the liquidators' report and took the position that it disclosed no criminal offence. The CAD decided not to investigate any further.[25]

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21 Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, para 24.

22 Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, para 25; Substituted Plaintiff's Bundle of Documents Vol 2, pp 742–744.

23 Substituted Plaintiff's Bundle of Documents Vol 3, p 1665, para (ii).

24 Substituted Plaintiff's Bundle of Documents Vol 1, pp 8–9, para 10.

25 Defendant's Bundle of Cause Papers Vol 3, p 1500, para 12.1.

24 The plaintiff was dissatisfied with the CAD's decision. He instructed his lawyers to obtain a copy of the liquidators' report. Thus, in October 2010, the plaintiff applied under ss 315 and 284 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") for the liquidators to disclose the outcome of their review insofar as it related to Crossbridge.[26] In April 2011, the High Court ordered the disclosure.[27]

25 The essence of the liquidators' findings in their report was that the Payments did not appear to have conferred any corporate benefit on Hocen.[28] In particular, the liquidators found a lack of documentary evidence that Crossbridge had actually provided any of the Services.[29] The liquidators were also unable to verify that the defendant had indeed delivered the cash withdrawn from Hocen's account to Crossbridge, as he claimed.[30]

26 The liquidators nevertheless considered that "no useful purpose would be served" by bringing civil proceedings against the defendant for breach of duty. Their view was that the outcome of the proceedings was uncertain and the associated costs unjustifiable.[31] They noted that all the cheques and remittance instructions for the Payments had also been approved and signed by the plaintiff himself, in addition to the defendant. It therefore appeared to the liquidators that both directors and shareholders knew of and approved the Payments. The liquidators were also unable to investigate the Payments further because they could not interview Hocen's former employees or the recipients of the

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26 Certified Transcript, 8 March 2016, p 102 (line 22) to p 103 (line 14).

27 Defendant's Bundle of Cause Papers Vol 4, pp 2356–2360.

28 Substituted Plaintiff's Bundle of Documents Vol 1, pp 9–10, para 11.

29 Substituted Plaintiff's Bundle of Documents Vol 1, p 13, para 18.

30 Substituted Plaintiff's Bundle of Documents Vol 1, pp 20–21, para 34.

31 Substituted Plaintiff's Bundle of Documents Vol 5, pp 2447–2448, para 12.

Payments.[32] Subsequently, however, the liquidators were able to interview a number of Hocen's former employees.

Hocen sues the defendant

27 In September 2011, with funding from the plaintiff, the liquidators commenced the first of the two suits now before me.[33] Hocen was named as the plaintiff in the suit. This first suit alleges that the defendant breached his duties to Hocen by paying away the cash drawn on the ten cash cheques for no corporate benefit.

28 In March 2012, the liquidators commenced the second of the two suits now before me. This second suit alleges that the defendant breached his duties to Hocen by causing it to make the eight bank remittances to Crossbridge for no corporate benefit.

29 In due course, the defendant filed counterclaims in both suits, pleading that the plaintiff was liable to contribute towards any sums which the defendant may be found to be liable to pay Hocen.

30 In May 2012, the liquidators applied for an order that the defendant account for the cash which he had withdrawn against the cash cheques. In January 2013, the court ordered the defendant to furnish the account.[34] As required by the order, the defendant filed an affidavit in March 2013 which stated essentially that he had handed all of the cash to different representatives of Crossbridge on various occasions (see [17] above).[35]

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32 Substituted Plaintiff's Bundle of Documents Vol 5, pp 2447–2448, para 12.

33 Certified Transcript, 8 March 2016, p 103 (line 24) to p 104 (line 1).

34 Substituted Plaintiff's Bundle of Documents Vol 1, pp 569–570.

35 Substituted Plaintiff's Bundle of Documents Vol 1, pp 573–579.

31 In April 2013, the liquidators agreed to permit the plaintiff to take over the carriage of these suits.[36] In November 2013, with the High Court's sanction, the liquidators caused Hocen to assign to the plaintiff its causes of action against the defendant.[37] The plaintiff was then substituted for Hocen as the plaintiff in both suits. I examine the terms of the assignment more closely at [188]–[189] below.

32 The plaintiff adopted the liquidators' case against the defendant in both suits. The suits were never formally consolidated but were ordered to be tried together with evidence in one being evidence in the other. Both suits were ultimately tried before me.

33 Before turning to the parties' cases, I make this general observation. The parties' business relationship began on the basis that the plaintiff would bring to the table his capital and access to financing while the defendant would bring to the table the business opportunity to sell cables in China and his personal relationships with Chinese buyers. In short order, and supercharged by corruption, Hocen's business proved lucrative beyond either party's expectations (see [89] below). Each party then suspected the other of trying to take over the entire corrupt business for himself. The resulting deadlock led to the defendant's application to wind up Hocen in 2007. It also led the plaintiff to fund the liquidators to pursue the defendant in these suits, and eventually to take over as the plaintiff in both suits. The parties' business relationship has obviously ended in acrimony. I accept the defendant's submission that the plaintiff has brought these suits against him as part of a vendetta arising from the defendant's decision to kill the goose that laid the golden egg by winding up Hocen in 2007.[38]

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36 Substituted Plaintiff's Bundle of Documents Vol 1, p 597, para 17.

37 Substituted Plaintiff's Bundle of Documents Vol 1, pp 737–738.

Parties' cases

34 The plaintiff's pleaded case is that the defendant breached his duties to Hocen by effecting payments to Crossbridge which did not confer any corporate benefit on Hocen.[39] The plaintiff submits that Hocen derived no corporate benefit from the Payments for two reasons: (a) because Crossbridge did not, in fact, provide any of the Services to Hocen; and (b) because the defendant caused Hocen to make the Payments pursuant to a scheme to engage and fund Crossbridge to procure business for Hocen from ZPMC by corruption. The plaintiff also claims that he was not complicit in the defendant's breaches of duty because the plaintiff had little knowledge about Hocen's dealings with Crossbridge and trusted the defendant in that regard.

35 The defendant, on the other hand, claims that he did not breach his duties to Hocen. He argues that Hocen derived three corporate benefits from the Payments: (a) Crossbridge did, in fact, provide the Services; (b) Crossbridge entertained individuals from ZPMC and bought them gifts to induce them not to make complaints about cables supplied by Hocen; and (c) Crossbridge also entertained individuals from YICT and bought gifts for them.[40] The defendant also claims that, despite appearances, the Payments were paid without corrupt intent and not pursuant to a scheme to procure business for Hocen by corruption. In the alternative, the defendant argues that if he did breach his duties to Hocen, the plaintiff is equally culpable. The plaintiff knew that Hocen was making the Payments to Crossbridge and knew the purpose of the Payments. Accordingly,

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38 Defendant's Closing Submissions, paras 143–154.

39 Statement of Claim (Amendment No 2), para 10.

40 Certified Transcript, 15 March 2016, p 29 (line 20) to p 30 (line 2) and p 40 (lines 9–20)

the defendant seeks a 50% contribution from the plaintiff in respect of any sum for which he is found liable in these suits.

Issues

36 There are three broad issues to be decided:

(a) Did the defendant breach his duties as a director to Hocen?

(b) Did the plaintiff breach his duties as a director to Hocen?

(c) Can the defendant rely on the doctrine of *ex turpi causa non oritur actio* so as to defeat the claim?

37 I address these three issues in turn.

Issue 1: The defendant's breach of duty

38 It is common ground that the Services, if performed, would have constituted a corporate benefit to Hocen. To decide whether the defendant breached his duty to Hocen, therefore, I must first decide whether Crossbridge performed the Services. If I find that Crossbridge did not, I then have to decide the true purpose of the Payments and whether that purpose conferred a corporate benefit on Hocen. Finally, in the light of my findings on these two issues, I must decide whether the defendant breached his duties to Hocen.

Did Crossbridge perform the Services?

39 The ostensible purpose of the Crossbridge Contracts was to place Crossbridge under a contractual obligation to perform the Services. In broad terms, Crossbridge's ostensible role was to ensure that ZPMC complied with Hocen's specifications in carrying out its cable installation works. The actual

scope of the Services is set out with precision in cl 2 of the Crossbridge Contracts.[41] They include:

(a) nominating a full-time English and Chinese speaking project manager in Shanghai to perform the Services (cl 2.1);

(b) establishing a detailed "Tests and Inspection Schedule" for the entire manufacturing and assembly period, which will indicate the number and type of personnel Crossbridge shall require for each week (cl 2.2);

(c) obtaining all drawings pertaining to the electrical cable installation works that are necessary to perform the inspection (cl 2.3);

(d) sending a list of the certificates/inspection or test records to Hocen, and doing so bi-weekly (cl 2.4);

(e) notifying Hocen of any discrepancies between ZPMC's and Crossbridge's interpretation of the pass/fail criteria of the cable installation works (cl 2.5); and

(f) holding a monthly work progress review meeting with ZPMC and reporting to Hocen any possible delays in installation works (cl 2.6).

Plaintiff's submissions

40 The plaintiff advances three principal reasons in support of his case that Crossbridge did not perform the Services.

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41 Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, pp 1838–1839.

41 First, he submits that there is no documentary evidence that Crossbridge ever performed any of the Services:[42]

(a) The liquidators did not find any correspondence between Hocen and ZPMC showing that Crossbridge had performed the Services. While there was some correspondence between Hocen, ZPMC and Olex on damaged cables in China, that correspondence contained no mention of Crossbridge's role in inspecting or testing these cables.

(b) The liquidators found none of the documents which Crossbridge was contractually obliged to generate and furnish to Hocen under the Crossbridge Contracts. Clause 2.3 of the Crossbridge Contracts required Crossbridge to prepare a list of certificates or test records every fortnight. Clause 2.4 required Crossbridge to establish a detailed test and inspection schedule. None of these documents were found amongst Hocen's records.

(c) The liquidators found none of the documents which Crossbridge was likely to have generated and furnished to Hocen if it had in fact performed the Services. Clause 2.6 of the Crossbridge Contracts required Crossbridge to hold monthly work progress review meetings with ZPMC. The liquidators found no reports, updates or minutes of these meetings amongst Hocen's records.

42 Second, the plaintiff submits that the documentary evidence which the defendant has produced to show that Crossbridge performed the Services is flimsy.[43] This evidence comprises a fax dated 19 September 2007 from one Huang Xing Fei, allegedly an employee of ZPMC. The plaintiff points out that

[42] Plaintiff's Closing Submissions, para 91.

[43] Plaintiff's Closing Submissions, paras 92–93.

this fax is of doubtful provenance because the liquidators did not find it amongst Hocen's records. Further, the plaintiff objects to the admissibility of the fax on the basis that it is hearsay evidence: Huang did not testify at trial.[44] Finally, even if one puts aside these points, the fax merely states that Hocen "previously engaged subcontractors at ZPMC ChangXing Base site".[45] It does not identify Crossbridge as one of these subcontractors.

43 Third, the plaintiff submits that the defendant's oral evidence should not be believed because it is inconsistent and constantly evolving.[46] The plaintiff suggests that the defendant does not himself believe that Crossbridge ever performed any of the Services. The thrust of the defendant's evidence, as presented in his affidavit of evidence-in-chief ("AEIC"), is that Hocen engaged Crossbridge to procure business from ZPMC, not to perform the Services for Hocen.[47] It was only under cross-examination that the defendant attempted to support a case based on ZPMC's actually performing the Services by alleging – for the first time – that he had personally witnessed Crossbridge inspecting the installation of Olex cables at the ZPMC site. Unsurprisingly, the plaintiff submits that the defendant's oral evidence is an afterthought and should not be believed.[48] In any event, even if the defendant's claim to have visited the ZPMC site "a couple of times" is true, this does not address Crossbridge's failure to prepare and furnish documentation to Hocen as stipulated in the Crossbridge Contracts.[49] It is also unbelievable, says the plaintiff, for the defendant to claim that this documentation was unnecessary or that he could not obtain it as he was

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44 Plaintiff's Closing Submissions, Annex A, para 34.

45 Substituted Plaintiff's Bundle of Documents Vol 1, p 263.

46 Plaintiff's Closing Submissions, paras 94–104.

47 Plaintiff's Closing Submissions, para 95.

48 Plaintiff's Closing Submissions, para 96.

49 Plaintiff's Closing Submissions, para 97.

shorthanded. The defendant's own position is that Crossbridge was engaged to inspect Olex cables and ensure that ZPMC properly installed the cables to protect Hocen against possible claims by ZPMC. On this hypothesis, it is likely that the defendant would have ensured that Hocen was actually protected by insisting that Crossbridge prepare and furnish the stipulated documentation, for Hocen to have available in case ZPMC ever made a claim against Hocen arising from the installation work.[50] The complete absence of any of the stipulated documentation amongst Hocen's records means that it is more likely that Crossbridge never performed any of the Services.

Defendant's submissions

44 The defendant, in turn, has four principal submissions. First, he submits that the lack of documentation does not mean that Crossbridge did not perform the Services. He claims that counterparts in China do not place much emphasis on ensuring that documentation is complete and up to date. He did nevertheless satisfy himself, by visiting the ZPMC site, that Crossbridge had performed the Services. The reason that both he and the plaintiff did not ask Crossbridge for any reports is because they were satisfied that everything was running smoothly.[51]

45 Second, the defendant argues that the fax dated 19 September 2007 from Huang Xing Fei (see [42] above) is credible proof that Crossbridge was one of the subcontractors whom Hocen engaged to inspect the installation of the cables which Hocen supplied to ZPMC. The defendant submits that the liquidators saw an email between the defendant and Huang in which the defendant had asked Huang to confirm the presence of Hocen's subcontractors at ZPMC's site. Little

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50 Plaintiff's Closing Submissions, paras 100–101.

51 Defendant's Closing Submissions, para 43.

weight should therefore be given to the fact that Hocen's liquidators did not find the fax, which contained words to similar effect, in Hocen's records.[52]

46 Third, the defendant relies on a photograph said to be of one Joe Liang at the ZPMC site as evidence that Crossbridge did indeed monitor the installation of cables at the ZPMC site.[53] Liang is the person who signed the Crossbridge Contracts on behalf of Crossbridge,[54] and he was at the ZPMC site as a "site manager" for Crossbridge.[55] The photograph shows a person said to be Liang stripping cables in the presence of a ZPMC worker. According to the defendant, at the time the photograph was taken, ZPMC had complained that water had seeped into a cable which had been installed. Olex required the cable to be stripped and tested,[56] which was what Liang was doing.

47 Fourth, the defendant contends that there are at least two individuals who can give independent evidence about Crossbridge's work at the ZPMC site.[57] The first is Loh Siew Choong, a former employee of Hocen. Loh used to visit the site frequently from 2005 to 2007. The defendant called Loh as a witness. Loh's evidence is that he saw Daniel Cheng and his staff at the ZPMC site and that they acknowledged each other.[58] The second person is one Zhang Yixiao, a former employee of ZPMC. Zhang filed an affidavit on the defendant's behalf opposing the liquidators' application in May 2012 for the defendant to account for the Payments (see [30] above).[59] The defendant now

52 Defendant's Closing Submissions, para 44(c)(ii).

53 Defendant's Bundle of Documents Vol 5, p 1699A.

54 See, for example, Substituted Plaintiff's Bundle of Documents Vol 7, pp 3583 and 3598.

55 Certified Transcript, 16 March 2016, p 140 (lines 18–19).

56 Certified Transcript, 16 March 2016, p 141 (lines 7–9).

57 Defendant's Closing Submissions, paras 44(d)–44(e).

58 Loh Siew Choong's Affidavit of Evidence-in-Chief dated 4 January 2016, para 6.

relies on the fact that in that affidavit, Zhang stated that he had heard about Crossbridge from a colleague in ZPMC.[60] The liquidators in May 2008 corresponded with Zhang over Hocen's debt to ZPMC. The defendant points out that, at that juncture, neither the liquidators nor the plaintiff expressed any doubt to Zhang about the existence of Crossbridge or that it had performed the Services.[61]

Analysis and decision

48 In my judgment, the plaintiff has proved, on the balance of probabilities, that Crossbridge did not perform the Services. I come to this conclusion for the following reasons.

49 First, it there is no documentary evidence that Crossbridge performed the Services. One of the liquidators gave evidence at trial that the liquidators did not find any documentation in Hocen's records to suggest that Crossbridge had actually performed the Services.[62] The liquidator's evidence was not challenged. The liquidator is an officer of the court. Neither party has suggested that he has acted without impartiality or independence, whether in giving evidence at trial or in his investigation of Hocen's affairs. I accept his evidence. It is important also to note that the defendant does not suggest that Crossbridge did, in fact, generate and furnish to Hocen the documentation which it was obliged to generate under the Crossbridge Contracts or that it was likely to generate in the course of performing the Services, but that the documentation is, for whatever reason, no longer amongst Hocen's documents or otherwise unavailable.[63]

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59 Zhang Yixiao's Affidavit in Summons No 2660 of 2012/H dated 5 October 2012, para 5.

60 Defendant's Closing Submissions, para 44(e).

61 Defendant's Closing Submissions, para 44(e).

62 Substituted Plaintiff's Bundle of Documents Vol 5, p 2445, para 5.

50 Second, I am not persuaded by the defendant's explanation for the lack of documentation. His answer that Hocen was "very shorthanded" and that "the Chinese … are not so good [at] paperwork at that point of time" is not credible.[64] It is understandable that a small company like Crossbridge may, for various reasons, fail to document thoroughly the services which it performs for a customer. But the complete lack of even the simplest form of direct or even indirect documentation in this case strongly suggests that Crossbridge never performed any of the Services at all. At the very least, as the plaintiff argues, the fact that Crossbridge failed to generate the documentation which the Crossbridge Contracts expressly obliged it to generate as part of the Services necessarily means that Crossbridge did not perform the Services in full.[65] Furthermore, one would think that Hocen would consider it important to generate and retain some sort of documentation, however incomplete or indirect, to protect itself against claims by ZPMC. That was, after all, Hocen's ostensible purpose in engaging Crossbridge to provide the Services.

51 Third, I agree with the plaintiff that Huang Xing Fei's fax is inadmissible hearsay. Huang did not testify at trial to prove the fax and to be cross-examined on its contents. Even then, it is not clear that his direct evidence would have addressed the hearsay objection. There is no evidence that the contents of Huang's fax – tendered to prove that Crossbridge in fact performed the Services – was within Huang's personal knowledge.

52 Even if the fax were admissible, it would carry little evidential weight. Although it refers to "subcontractors", there is no mention that Crossbridge was one of the subcontractors. Even if I were to assume that Huang was referring to

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63 Defendant's Closing Submissions, para 43.

64 Certified Transcript, 16 March 2016, p 159 (lines 3 and 7–8).

65 Plaintiff's Reply Submissions, para 19.

Crossbridge, the statement that Hocen "engaged" Crossbridge to provide quality assurance services is merely evidence that Hocen entered into the Crossbridge Contracts. That is an undisputed and indisputable fact. The point in dispute is whether Crossbridge actually performed the Services. That is not a fact which Huang's statement asserts. Even if I were to read Huang's statement as confirming that Crossbridge actually did perform the Services, the statement does not assert – and therefore cannot prove – that Crossbridge performed the Services in accordance with the Crossbridge Contracts so as to have earned the Payments.

53 Fourth, I attach little weight to the photograph allegedly showing Joe Liang stripping cables on site. There is no independent evidence that the person in the photograph is in fact Joe Liang. There is also nothing in the photograph to suggest that it was taken at the ZPMC site. And even if it was, it would at best be evidence that on one specific occasion, one representative of Crossbridge was on site to remedy one specific issue with the cables. It hardly supports the claim that Crossbridge performed the Services in accordance with the Crossbridge Contracts so as to have earned the Payments.

54 Fifth, I do not accept the defendant's evidence that he "personally witnessed" Crossbridge inspecting the installation of cables at the ZPMC site.[66] The defendant did not make this allegation at any time when the liquidators interviewed him. Nor did he make this allegation in any of his affidavits in this litigation. During cross-examination, the defendant claimed that "Crossbridge has a few letters to Hocen saying that I have been to the site to accept the work done".[67] But no letter of this nature has been adduced in evidence. I therefore accept the plaintiff's submission that this aspect of the defendant's evidence is

66 Certified Transcript, 15 March 2016, p 117 (line 8).

67 Certified Transcript, 15 March 2016, p 117 (lines 18-20).

not credible and is a mere afterthought.[68] In any event, the defendant's evidence is merely that he was at the site "a couple of times"[69] or "a few times" because he had a "busy schedule".[70] Taking the defendant at his word, then, he is hardly in a position to testify generally that Crossbridge performed the Services in accordance with the Crossbridge Contracts so as to have earned the Payments.

55 Finally, Loh Siew Choong's and Zhang Yixiao's evidence, in my view, does not assist the defendant's case at all. Loh's evidence is that he told the liquidators that he ran into Daniel Cheng once at ZPMC's canteen on ChangXing Island.[71] Although Loh recalls being told that Cheng was "from Crossbridge", he did not know that Cheng also worked for YICT.[72] Accordingly, the fact that Cheng was spotted on the island by someone other than the defendant hardly corroborates the defendant's oral evidence that Crossbridge performed the Services: Cheng could have been there not for Crossbridge but for YICT. And even if he had been there for Crossbridge, that in itself says nothing about whether Crossbridge performed the Services in accordance with the Crossbridge Contracts so as to have earned the Payments. Loh's ignorance about Crossbridge's operations is underscored by his evidence that he knew nothing about the people associated with Crossbridge, including Joe Liang.[73]

56 As regards Zhang, his evidence does not show that Crossbridge performed the Services. While he claims to have heard of Crossbridge, he also says that he "did not have direct contact and/or communication with

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68 Plaintiff's Closing Submissions, para 96.

69 Certified Transcript, 15 March 2016, p 114 (line 11).

70 Certified Transcript, 15 March 2016, p 138 (lines 3–6).

71 Certified Transcript, 17 March 2016, p 25 (line 23) to p 26 (line 6).

72 Certified Transcript, 17 March 2016, p 26 (lines 11–13) and p 27 (line 8).

73 Certified Transcript, 17 March 2016, p 29 (lines 21–25) to p 30 (lines 1–6).

Crossbridge".[74] He therefore has no personal knowledge about Crossbridge's activities. Importantly, Zhang does not assert that Crossbridge was Hocen's subcontractor or that it was engaged in performing services for Hocen in connection with Hocen's business with ZPMC. Accordingly, I give his evidence no weight.

Burden of proof

57 I close with an observation on the burden of proof. The observation is necessitated by the defendant's submission that the plaintiff has failed to discharge his burden of proving his case on this point because he has adduced no evidence that Crossbridge did *not* perform the Services.[75] The suggestion is that the plaintiff is attempting to shirk the legal burden of proving his case by relying on an absence of evidence that Crossbridge performed the Services. I do not accept that suggestion. Instead, I find that the plaintiff has produced evidence which is not inherently incredible – for example, in the form of the liquidator's evidence that no documentation was found in Hocen's records suggesting that Crossbridge had performed the Services – which suffices to raise an inference that Crossbridge did not in fact perform the Services. The evidential burden of rebutting that allegation thus falls properly upon the defendant. For the reasons I have given, the defendant has failed to produce weighty or even credible evidence to the contrary. The distinction between the legal and evidential burdens of proof are well-established and are explained fully in the Court of Appeal's decision in *Britestone Pte Ltd v Smith & Associates* [2007] 4 SLR(R) 855 at [57]–[60]. The plaintiff has correctly cited that case on this point.[76] I need not repeat the applicable principles here.

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74 Zhang Yixiao's Affidavit in Summons No 2660 of 2012/H dated 5 October 2012, para 7.

75 Defendant's Closing Submissions, para 42.

58 For the reasons above, I find that Crossbridge did not perform the Services. Accordingly, compensating Crossbridge for the Services cannot have been the defendant's true purpose in causing Hocen to make the Payments.

What was the true purpose of the Payments?

59 I turn now to examine the defendant's true purpose for causing Hocen to make the Payments to Crossbridge. As will be seen, there is a substantial degree of common ground between the parties on this issue. Their differences are in the final analysis inconsequential and do not change the fact that, in my judgment, the defendant caused Hocen to make the Payments pursuant to a scheme to engage and fund Crossbridge to procure business for Hocen from ZPMC by corruption. I begin with the plaintiff's submissions.

Plaintiff's submissions

60 The plaintiff's submissions on the true purpose of the Payments may be understood in three parts. First, the plaintiff contends that on the defendant's own evidence, Crossbridge's main purpose was to procure business for Hocen from ZPMC:[77] see [43] above. According to the defendant, Crossbridge was the "middleman between Hocen and ZPMC", and its role was to help Hocen "break into the Chinese market".[78] The defendant also told the liquidators that Crossbridge was appointed to "help in the marketing of [Hocen's] products".[79] In both instances, the defendant made minimal reference to performing the Services being Crossbridge's role. This in turn meant that the Services,

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76 Plaintiff's Reply Submissions, para 23.

77 Plaintiff's Closing Submissions, para 42.

78 Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, paras 49–50.

79 Substituted Plaintiff's Bundle of Documents Vol 7, p 3896, para 4.

including providing inspection reports and certifications, were "meaningless",[80] in the defendant's own words.

61 Second, the plaintiff argues that the Payments were intended specifically for Crossbridge to pay on as bribes.[81] Again, the plaintiff relies to a large degree on the defendant's own evidence for this contention. The defendant said in his affidavit filed to oppose the liquidators' application for an account in May 2012 (see [30] above) that because Hocen's directors were not prepared themselves to pay any "bribes or kick-backs", he and the plaintiff appointed Crossbridge as a "middle man" to do so.[82] During cross-examination, the defendant admitted that Crossbridge was paid by Hocen to "entertain the ZPMC people at site" and to "buy them gifts" such as "mobile phones".[83] Crossbridge did this, in the defendant's own words, "to make the site people happy" as and when they had complaints about Hocen's cables.[84] Accordingly, says the plaintiff, the Payments were used to fund corrupt inducements to the recipients, and were therefore bribes.[85]

62 Third, the plaintiff advances the further contention that Crossbridge was bribing Daniel Cheng to use his influence in YICT to cause YICT to specify Olex cables in YICT's orders of cranes from ZPMC,[86] and that this was one of the ways in which Crossbridge procured business for Hocen from ZPMC. The defendant himself describes Cheng as being both a representative of

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80 Substituted Plaintiff's Bundle of Documents Vol 1, p 244, para 14.

81 Plaintiff's Closing Submissions, paras 55–57.

82 Substituted Plaintiff's Bundle of Documents Vol 1, p 243, para 12.

83 Certified Transcript, 11 March 2016, p 198 (lines 14–15) and p 199 (lines 13–14).

84 Certified Transcript, 11 March 2016, p 196 (line 21).

85 Plaintiff's Closing Submissions, paras 58 and 62.

86 Plaintiff's Closing Submissions, paras 71 and 76.

Crossbridge and an equipment manager at YICT.[87] The defendant implicitly accepted in cross-examination that Cheng used his position and influence in YICT to cause YICT to specify Olex cables for the cranes which YICT was ordering from ZPMC. The defendant also gave evidence that Cheng was able, in one instance, to convince YICT as the end user to accept defective cables supplied by Hocen.[88] The plaintiff also points out that the defendant omitted any mention of Cheng when the liquidators interviewed the defendant.[89] The plaintiff argues that that this omission was deliberate, in order to conceal the defendant's knowledge that part at least of the Payments were being channelled through Cheng as bribes to YICT.[90]

Defendant's submissions

63 The defendant does not deny that Crossbridge's purpose was to procure business for Hocen from ZPMC. His case is that Crossbridge was engaged to perform an inseparable "package" of services.[91] One component of that package was to perform the Services. The other component was to procure business for Hocen by marketing its Olex cables in China.[92] Thus, having accepted that Crossbridge did not provide any reports or certifications to Hocen as it was obliged to by the Crossbridge Contracts, the defendant is eager to show that Crossbridge was nevertheless "resourceful in providing other 'value added services'". These other services included, among other things, "[e]ntertaining the [YICT] and ZPMC staff to maintain good relations so that they would not

87 Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, paras 47 and 69(d).

88 Certified Transcript 15 March 2016, p 78 (line 25) to p 79 (line 7).

89 Plaintiff's Closing Submissions, para 82.

90 Plaintiff's Closing Submissions, paras 83 to 87.

91 Defendant's Reply Submissions, para 13.

92 Defendant's Reply Submissions, para 39.

complain or create trouble."[93] Accordingly, the defendant appears not to dispute the substance of the plaintiff's first submission on the purpose of the Payments (see [60] above) and the facts underlying the plaintiff's second submission on the issue (see [61] above).

64 What the defendant does dispute is the plaintiff's allegation that Crossbridge procured business for Hocen from ZPMC *by corruption*. The defendant's central submission on this issue is that he caused Hocen to make the Payments to Crossbridge without any corrupt intent. One reason for this, he says, is that Hocen did not instruct Crossbridge to buy gifts for people at ZPMC or to entertain them; instead, Crossbridge did this of its own accord to further Hocen's business interests.[94] Another reason he gives is that it is common practice in China to buy gifts or host meals to build and develop a business relationship.[95] He suggests that it is "surely legitimate"[96] for Crossbridge to engage in this conduct, thereby implying that it is equally legitimate for Hocen to fund Crossbridge's conduct. The defendant also submits that the plaintiff is speculating on Daniel Cheng's role and that there is no evidence to show that Cheng was in a position to influence or cause YICT to specify Olex cables when it ordered cranes from ZPMC.[97]

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93 Defendant's Closing Submissions, para 58.

94 Defendant's Reply Submissions, para 47.

95 Defendant's Reply Submissions, para 53; Defendant's Closing Submissions, para 61.

96 Defendant's Reply Submissions, para 53.

97 Defendant's Reply Submissions, para 57.

Analysis and decision

65 In my judgment, the plaintiff has proved on the balance of probabilities that the defendant made the Payments pursuant to a scheme to engage and fund Crossbridge to procure business for Hocen from ZPMC by corruption.

66 I begin by noting that I am making findings about the true nature of the Payments in the context of determining whether a director has breached his duty to the company. In that context, there is no technical definition of corruption is which is applicable. There is such a definition in the penal legislation which criminalises corruption. That definition contains the mental and physical elements which a prosecutor must prove to secure a conviction for corruption. But the broad question in this part of my analysis is whether the defendant breached his duty to Hocen as a director and not whether he is guilty of the crime of corruption. A director may breach his duties as a director by giving a corrupt payment as defined in the criminal law. But that is not the only way in which he may breach that duty. In any event, much will depend on the circumstances. Therefore, it would be inappropriate for me to suggest or to adopt a comprehensive legal definition of what corruption is for the purposes of determining whether a director is in breach of duty.

67 In this connection, the plaintiff refers me to *Black's Law Dictionary* (10th Ed, 2014), which defines a bribe as a "reward, gift or favour given or promised with a view to pervert the judgment of or influence the action of a person in a position of trust".[98] I respectfully adopt that as a working definition for present purposes.

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98 Plaintiff's Closing Submissions, para 62(a).

68 I now turn to explain why I have found that the defendant caused Hocen to make the Payments pursuant to a scheme to engage and fund Crossbridge to procure business for Hocen from ZPMC by corruption.

69 First, the defendant himself accepts that the Payments went towards entertaining and buying gifts for the representatives of ZPMC and YICT. He said that these "kickbacks" (to use his own word) helped to "make the site people happy" and to ensure that they did not complain about the quality of the Olex cables.[99] The defendant sought to explain that Crossbridge's use of the Payments in this way did not amount to corruption because no actual money was paid to ZPMC's representatives.[100] That is, however, a distinction without a difference. The entertainment, gifts and favours which Crossbridge extended to the representatives of ZPMC amount to corruption because they were given for the purpose of influencing the decisions which the recipients made on behalf of ZPMC.

70 Second, I accept that Daniel Cheng used his position and influence in YICT to cause YICT, as the end user, to specify Olex cables over rival manufacturers' cables in its contracts with ZPMC with the expectation that ZPMC would source the Olex cables through Hocen. Although the evidence which the plaintiff has presented as the foundation for this inference is circumstantial in nature, it is nevertheless compelling in effect when viewed in the round. Much of this evidence, again, comes from the defendant's own mouth. Its key strands are as follows:

(a) Daniel Cheng was in a position to influence YICT for Hocen's benefit. As a representative of Crossbridge, who had been engaged and

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99 Certified Transcript, 11 March 2016, p 196 (lines 15 and 21).

100 Certified Transcript, 11 March 2016, p 199 (lines 13–15).

funded by Hocen to procure business, Cheng was alive to Hocen's business interests. At the same time, he was also an equipment manager with YICT, according to the defendant.[101] As Cheng was, in the defendant's own words, "wearing two hats",[102] he was especially well-placed to pursue Hocen's interests from within YICT, who had decisive influence on whether ZPMC would need to purchase Olex cables from Hocen.

(b) In that connection, Hocen had a strong need to exert this influence over YICT. ZPMC stated in a letter to the defendant "[t]he fact that OLEX cables are expensive, we would only agree to purchase it if the customers would strongly insist to have OLEX cables in their cranes."[103] What made YICT "strongly insist" on the use of Olex cables, then? The answer is Crossbridge, as the defendant explains in his submissions:[104]

> It is undisputed that locally made cables are cheaper than Olex cables. There would have been no compelling reason for ZPMC to use more expensive cables when it could make a larger profit by using China-made cables unless Crossbridge had recommended Olex cables to [YICT], and [YICT] specifically requested for ZPMC to use Olex cables.

(c) In fact, Crossbridge did influence YICT through Daniel Cheng. The defendant himself has described Cheng as "the link between [YICT] and Crossbridge".[105] More specifically, the defendant did not deny that Cheng had a role in causing YICT to specify Olex cables in its dealings

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101 Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, para 47.

102 Certified Transcript, 11 March 2016, p 127 (lines 2–3).

103 Defendant's Bundle of Documents Vol 2, p 1379, para 2.

104 Defendant's Closing Submissions, para 51.

105 Certified Transcript, 11 March 2016, p 67 (lines 22–23).

with ZPMC; in fact, he implicitly accepted that Cheng had such a role, as can be seen in the following exchange in cross-examination:[106]

> Q. So when you make these payments to Crossbridge, did you consider that Mr Daniel Cheng will use his position in [YICT] to cause [YICT] to specify Olex cables? Is that something you considered?
>
> A. Because when we engage Crossbridge, and Crossbridge actually belongs to Mr Tsui and Ms Yu, who is -- Ms Yu is the sister-in-law of Daniel --
>
> Q. I see.
>
> A. -- and as I said, in a way, that's the link between the whole thing.

(d) ZPMC and YICT both behaved as if they had been bribed by behaving in a manner which was ostensibly against their own interests and in favour of Hocen. The defendant's own evidence is that Crossbridge persuaded ZPMC to forgo valid legal claims against Hocen for late delivery and defective goods.[107] One example took place in September 2007, when Crossbridge convinced ZPMC not to press Hocen for damages for defective delivery of a reeling cable.[108] The defendant also testified that Daniel Cheng was able to persuade YICT to accept cables which had presented problems caused by twisting at their core.[109]

(e) Finally, I accept that the defendant deliberately concealed from the liquidators the existence and role of Daniel Cheng in Hocen's

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106 Certified Transcript, 15 March 2016, p 33 (lines 21–25) to p 34 (lines 1–5).

107 Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, para 69(a).

108 Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, para 69(c).

109 Certified Transcript, 11 March 2016, p 66 (lines 2–6); Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, para 69(d).

business with ZPMC in order to avoid discovery of his corrupt scheme. Despite having several opportunities to do so, the defendant did not mention Cheng's name to the liquidators when they were questioning him about Crossbridge. He suppressed Cheng's name even though it was on account of the "special relationship between Daniel Cheng of Crossbridge and Hocen" that ZPMC gave favourable credits to Hocen when Hocen was first established.[110] When the defendant was later cross-examined on the misleading nature of his answers to the liquidators, he gave evasive and unconvincing answers. This is apparent from the following exchange:[111]

> Q. Mr Ong, the question asked you: have you ever met representatives from Crossbridge? Please provide details of those meetings, date, place, persons met. Your answer is: I have met Mr Tsui and Ms Yu, correct? That's your answer?
>
> A. I'm not sure wrong on that.
>
> Q. Yes, you're not wrong. But are you at least being incomplete? Would that be fair? It's incomplete?
>
> A. Incomplete in?
>
> Q. Because you don't mention Daniel Cheng. If the question asked you, "Who did you meet from Crossbridge?", you say Mr Tsui and Ms Yu.
>
> A. I'm not wrong.
>
> Q. You're not wrong. But if you don't mention Mr Daniel Cheng, is that an incomplete answer?
>
> A. I don't think so.
>
> …
>
> Q. Mr Ong, when you replied to the liquidators, you knew that you had met Daniel Cheng, correct?
>
> A. Yes.

110 Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, para 74.

111 Certified Transcript, 11 March 2016, p 50 (line 13) to p 51 (line 4) and p 51 (lines 14–22).

> Q. The liquidators asked you who from Crossbridge you had met, correct?
>
> A. Yes.
>
> Q. Why did you not see fit to say Daniel Cheng as well? That's my question. Why?
>
> A. It's -- it's Mr Tsui and Ms Yu.

71 I therefore reject the defendant's submission that the plaintiff's contentions as to Daniel Cheng's role procuring business for Hocen by corruption at YICT are mere speculation. I am satisfied on the balance of probabilities that Cheng exercised improper influence over YICT, through bribes such as entertainment and gifts, to cause YICT to specify Olex cables in its contracts with ZPMC. And funding these inducements to YICT was at least part of the defendant's purpose in making the Payments to Crossbridge.

72 Third, the defendant's argument that he had no corrupt intent in making the Payments misses the point. What matters is whether he intended the Payments to be used to influence decision-makers in a position of trust at ZPMC and YICT. And that was indeed the defendant's intention. It is his own case that the Payments went towards entertaining ZPMC officers and buying them gifts so that they would, among other things, not pursue valid claims against Hocen for defective cables or poor installation. While he seems to deny that Daniel Cheng played a crucial role in bribing YICT officers, he does not deny that the only way YICT would insist on Olex cables was if it had been persuaded to do so, and that Crossbridge was paid to do the persuasion (see [70(b)] above).

73 For these reasons, I accept the plaintiff's case that the defendant made the Payments pursuant to a scheme to engage and fund Crossbridge to procure business for Hocen from ZPMC by corruption.

Did the defendant breach his duty to Hocen?

74 I turn now to whether, in the light of these facts, the defendant breached his duty to Hocen as a director. In my view, he did. I begin with the applicable principles.

Applicable principles

75 Section 157(1) of the Act imposes upon every director of every company two distinct statutory obligations in discharging the duties of his office: (a) at all times to act honestly; and (b) at all times to use reasonable diligence. These distinct obligations are based respectively on a director's fiduciary duty under the general law to act *bona fide* in the interests of the company and on his common law duty to exercise reasonable care and diligence: Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing 2015) ("*Corporate Law*") at paras 09.020 and 09.028. The plaintiff's pleaded case rests on both obligations.[112] I must therefore consider whether the defendant, as a director of Hocen, failed to act *bona fide* in Hocen's interests by causing Hocen to make the Payments to Crossbridge, or whether he failed to exercise reasonable care and diligence in doing so.

76 I begin by considering the first of these distinct obligations.

77 To determine civil liability for breach of the duty to act *bona fide* in the interests of a company, the court will assess the intention of a director on a subjective and an objective basis: *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] SGCA 40 ("*Goh Chan Peng*") at [35]–[36]. At the subjective level, the court must consider whether the director acted *bona fide* in what he believed (and not what the court believes)

112 Statement of Claim (Amendment No 2), paras 12(a) and 12(e).

to have been in the interests of the company (at [35]). At the objective level, the court has to assess whether an intelligent and honest man in the position of the director could, in the whole of the existing circumstances, have reasonably believed that acting in that way would be for the benefit of the company (at [36]). Where a director's act is not objectively in the company's interests, the court may draw the inference that the subjective element is also not satisfied (at [36]).

78 Having framed the analysis as incorporating a discrete subjective element, the Court of Appeal in *Goh Chan Peng* then endorses the observation in *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) that the courts in practice often apply a more objective test (at [36]). In this connection, I add that *Goh Chan Peng* may be read in two ways. First, it may be read as relying on the objective assessment of a director's intention purely as an evidential basis upon which to draw an inference as to his subjective intention. To the extent that this is true, *Goh Chan Pheng* departs from the Court of Appeal's earlier approach in *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 ("*Ho Kang Peng*"). That case has been regarded in a leading local text as laying down a purely objective approach to determining a civil breach of the duty to act *bona fide* in the interests of a company: *Corporate Law* at paras 09.022–09.023. The second way in which *Goh Chan Pheng* may read is that it lays down a substantive objective component, consonant with *Ho Kang Peng*. *Goh Chan Pheng* was not available at the time the parties made their closing submissions. In fairness to the parties, therefore, I shall read *Goh Chan Pheng* as being consistent with *Ho Kang Peng*.

79 Also relevant to the present case is the idea that a director who creates a sham contract and who causes the company to participate in corruption cannot be said to be acting *bona fide* in the interests of the company even if his

subjective intent is to maximise the company's profits. This proposition forms the *ratio* of *Ho Kang Peng*. That is a case on which the plaintiff relies heavily. The basis of the proposition appears to be twofold, according to *Ho Kang Peng* at [40]. First, it is not in the interests of a company to maximise profits by any means. It is in the interests of a company, which ultimately comprises its shareholders (at least, while it is solvent), "to have its directors act within their powers and for proper purposes, to obtain full disclosure from its directors, and not to be deceived by its directors". Second, a director who causes a company to participate in corruption runs the risk of exposing the company to criminal liability, a risk which can never be justified as being in the company's interests. The same would, of course, be true of a director who causes a company to make a payment to an intermediary, intending the intermediary to make the corrupt payments in place of the company.

80 I make two conceptual observations about the principle in *Ho Kang Peng*. First, it seems to me that for the principle in *Ho Kang Peng* to have any teeth, the test for determining whether a director is in breach of his duty to act *bona fide* in the interests of the company must necessarily incorporate a discrete objective element. That is because the principle in *Ho Kang Peng*, by definition, circumscribes the interests of a company and the justifiability of the risks which it may take in purely objective terms: terms which may be entirely at variance with a director's subjective intentions. Thus, in *Ho Kang Peng*, the Court of Appeal accepted (at [37]) that the director in question, subjectively speaking, had the financial benefit of the company in mind and did not act to further his own interests: see also *Corporate Law* at para 09.022. The Court nevertheless went on to observe that, objectively speaking, the director acted against the company's interests by causing it to participate in a corrupt scheme because his act exposed the company to potential criminal proceedings (at [40]).

81 By finding that the director in *Ho Kang Peng* had breached his duty to act *bona fide* in the company's interests solely by virtue of the objective result of his actions and not his subjective intention in acting as he did, the Court of Appeal effectively exercised a supervisory jurisdiction over directors by drawing a consequentialist line in the sand. A director who crosses that line will be held to have breached his duty to the company and will be held responsible for the result or potential result of his acts without regard to his subjective intention. The consequentialism behind the rule in *Ho Kang Peng* is unmistakeable: directors cannot be allowed, by crossing that line, to put at risk the wider interests which all stakeholders have in the company. In that case, the director was held to have crossed the line by exposing the company to criminal liability when he acted to maximise the company's profits by participating in a corrupt scheme.

82 This leads to my second observation, which is that the objective approach seems quite unexceptional in a case like *Ho Kang Peng* but can seem anomalous in a case like the present. The company in *Ho Kang Peng* was a large public listed company (see *Ho Kang Peng* at [41] and [70]). As such, it had widely-held shares, a broad base of diverse stakeholders and well-developed governance structures going far beyond the minimum required the Act. The director in *Ho Kang Peng* undermined all those underlying interests when he breached his duty. Hocen, on the other hand, is a small, closely-held private company. It has never had more than four employees. Its internal governance is no more than the bare minimum required by the Act. It has a complete coincidence of identity and interests between the directors, the shareholders and the company. That was the case throughout its life, and even now when it is in liquidation. Creditors' interests have not intruded because it is solvent. In that sense, the plaintiff and the defendant *are* the company. I shall refer to such a

company as a "one-man company". I use that term to mean a company, whether solvent or insolvent, which is under the *de facto* ownership and control either of a single person or of a group of persons who are acting entirely in concert, all of whom I shall refer to as "director-shareholders".

83 In a one-man company, it may be said that the consequentialism of the objective approach loses a measure of force, at least so long as it is solvent. There is no true separation between ownership and control. As a consequence, there is no principal-agent problem for the law on directors' duties to target and address. In other words, there is in reality and in substance no abstract third party known as the "company" who has a diverging interest which the law must be astute to protect. Instead, the shareholders, the directors and the company are, *ex hypothesi*, voluntarily assuming all of the risks which they choose to take on in order to maximise the company's profits. There is a strong argument for saying that, in those circumstances, company law should not intervene to prescribe a consequentialist line beyond which a director's act will be a breach of the director's duty regardless of his subjective intention. If the director's act exposes the company to risk, and the risk eventuates, the consequences that follow are within the province of the general law, both criminal and civil and both at the corporate and the individual level. If the risk does not eventuate, however, it could be said that company law has no basis to intervene and hold the director to be in breach of duty merely in exposing the company to that risk. Hence, the consequentialist approach, if it is to apply to a solvent one-man company such as Hocen, must be justified on grounds other than addressing the tensions inherent in the principal-agent problem. And there are at least two grounds.

84 First, the law on directors' duties serves not only to vindicate the shareholders' private interest in having their capital applied in accordance with

their agreement and for proper corporate purposes in order to maximise returns but also to vindicate a public interest in holding directors to minimum standards of commercial morality in directing a company's affairs. No doubt that minimum standard must set a very low baseline in order to avoid unnecessary interference with the central role of the enterprise and of risk-taking in wealth creation. But not causing the company to participate in a scheme to procure business by corruption is not too much for company law to ask of a director. Because this interest is a public interest, it will subsist and can be vindicated at the suit of the company even in a one-man company, and even if the company is solvent. Of course, as a practical reality, this public interest will not be vindicated unless control of the company's right to bring action changes, either through share transfers, through a successful application under s 216A of the Act or, as here, through the imposition of external administration such as the appointment of liquidators. But recognising that practical reality does not undermine the conceptual basis of the court's supervisory jurisdiction.

85 Second, it is preferable for company law to take a single approach to all companies, whether large or small and whether widely or closely held. Just as all directors are subject to the same fiduciary, common law and statutory duties regardless of the size and nature of their companies, so too all directors must be subject to the same objective approach regardless. Making an exception to the objective approach for companies like Hocen would have to rest upon difficult distinctions of fact around the constitution and composition of a given company. These distinctions would have either have to be fixed *a priori* by drawing bright lines, which are always essentially arbitrary, or would have to be resolved after the fact by judge-made law on a case by case basis. Either approach runs the risk of introducing uncertainty and possible incoherence into the law.

86 The upshot is that there is good reason for the part-subjective and part-objective approach to breach of duty in *Ho Kang Peng* to prevail even in the case of a solvent one-man company like Hocen.

Analysis and decision

87 I turn now to apply these principles to the facts of the present case.

88 I begin by finding that, in causing Hocen to make the Payments, the defendant's subjective intent was to confer an economic benefit on Hocen and not on himself. In a very broad sense, of course, it is true that the defendant's ultimate objective in making the Payments was to derive a personal economic benefit by way of the fees he would earn as a director of Hocen and the dividends he would receive as a shareholder of Hocen. But, on the assumption I have set out at [18] above, his intention at all times was that those benefits should not accrue to him directly but only indirectly through the medium of the company. That would mean that he intended those benefits be equally available to all stakeholders in accordance with Hocen's corporate constitution and the Act. And indeed both the plaintiff and the defendant did earn substantial director's fees and dividends from Hocen so long as its business with ZPMC continued. There is therefore no reason for me to doubt that, as a question of fact, the defendant subjectively intended the Payments to result in an economic benefit for Hocen rather than for himself.

89 The next point I make is that, in a purely factual sense, the Payments indeed resulted in a significant economic benefit for Hocen. The defendant engaged and paid Crossbridge to procure business for Hocen from ZPMC. The defendant told the liquidators in clear terms that "the tie up with Crossbridge brought us more sales because of their connection (*guanxi*) as they have high

level contacts with ZPMC".[113] The effectiveness of Crossbridge is borne out by the figures. Hocen achieved the remarkable feat of booking almost S$23.7m in revenue and earning over S$4.7m in profit in just two and a half years of operations, achieving a profit margin of just under 20%. Further, it managed to do all of this with no sales staff at all in China and only three sales staff in Singapore.[114] Virtually 100% of this business came from just one customer: ZPMC.

90 However, I agree with the plaintiff that, on the authority of *Ho Kang Peng*, the defendant breached his duty to act *bona fide* in the interests of Hocen when he secured this economic benefit for Hocen through corruption. Now, it is true that in this case, unlike *Ho Kang Peng*, the defendant did not deceive the company in securing the benefit. For reasons I will come to, I find that the plaintiff knew and understood how Hocen intended to and managed to attract this staggering volume of extraordinarily profitable business from ZPMC in such a short time. The sham Crossbridge Contracts and the Payments were therefore tacitly but unanimously approved by both organs of the company: the shareholders and the directors. In that sense also, the defendant did not act dishonestly, at least not as against the plaintiff or Hocen. Nevertheless, a number of factors lead me to conclude that the court's supervisory jurisdiction over directors is engaged in this case so as to render the defendant's conduct a breach of his duty to Hocen.

91 The first factor is my finding that the defendant made the Payments pursuant to a scheme to engage and fund Crossbridge to procure business for Hocen from ZPMC by corruption. In the words of the Court of Appeal in *Ho Kang Peng* (at [40]), the defendant by making the Payments created an

113 Substituted Plaintiff's Bundle of Documents Vol 7, p 3896, para 2 and p 3897, para 5.

114 Defence (Amendment No. 1), paragraph 4(c).

"unjustified risk of subjecting [Hocen] to criminal liability". That risk is objectively contrary to Hocen's interests. The defendant personally created that risk by initiating and making the Payments.

92 The second factor is my finding that the Crossbridge Contracts were sham contracts. As I have found (see [48]–[56] above), Crossbridge did not perform the Services for Hocen as stipulated in the Crossbridge Contracts. Crossbridge's true role was to procure business for Hocen from ZPMC by corruption. But the truth is nowhere reflected in any agreement between Hocen and Crossbridge, and certainly not in the Crossbridge Contracts.[115] I find that Hocen and Crossbridge intended the Crossbridge Contracts from the very outset to be nothing more than a plausible legal pretext for the corrupt scheme. They entered into the contracts with absolutely no intention whatsoever that Crossbridge should ever perform the stipulated Services. The result is that the Crossbridge Contracts were a sham. They were not unlike the sham consulting agreement which the director in *Ho Kang Peng* executed on behalf of his company as a plausible legal pretext for the corruption in that case. That was one reason the Court of Appeal found that the director had breached his duty to act honestly under s 157 of the Act: *Ho Kang Peng* at [41]. Similarly, the fact that the Crossbridge Contracts were a sham taints indelibly the defendant's conduct in causing Hocen to make the Payments, ostensibly pursuant to those contracts.

93 A third factor is that the defendant deliberately structured the corrupt scheme to create a defence of plausible deniability. He needed this defence not as against the plaintiff, who for reasons I will explain knew the truth from the outset, but as against external parties such as Hocen's auditor, a liquidator who

115 Substituted Plaintiff's Bundle of Documents Vol 7, pp 3580–3608.

might take over control of the company and criminal investigators such as the CAD who might investigate the Payments. The defendant's own evidence is that he interposed Crossbridge in Hocen's dealings with ZPMC because he wanted an intermediary to do what he euphemistically calls the "leg work" and what I would call the dirty work:[116]

> This is also to ensure that the end customers/users will be happy with the cables supplied, and do not cause trouble by complaining about quality and delivery (which is a common practice in China to obtain gratification and kick back). As [the plaintiff] and I were not prepared to pay any kick back, [the plaintiff] himself had proposed using a middle man to do the necessary leg work and to ease the paper works. This was agreed between the 2 directors, and the Company needed Crossbridge to service the customers in China, without the 2 directors being accused of paying bribes or kick-backs. In fact, this was the idea of [the plaintiff], who wanted to keep his nose clean and use others to facilitate the business, and now after we have our fall out, [the plaintiff] is trying to get me into trouble by alleging that I pocketed the money.

This indicates, at the very least, that the defendant interposed Crossbridge specifically to remove Hocen by one step from future gratifications to ZPMC. Further, the defendant made the majority of the Payments in cash delivered directly to Crossbridge. That was no doubt to make it harder for anyone with an interest to trace the flow of funds and the purpose of the Payments. All of this was a deliberate attempt to engage plausible deniability and to misdirect investigation of the Payments by external parties.

94 It will be recalled that the plaintiff's pleaded case is that the defendant breached his duties to Hocen by effecting various payments to Crossbridge which did not confer any corporate benefit on Hocen: see [38] above. The plaintiff has asserted that the Payments had three purposes (see [35] above). The sole legitimate purpose is as compensation to Crossbridge for performing the

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116 Substituted Plaintiff's Bundle of Documents Vol 1, p 243, para 12.

Services. As Crossbridge did not perform the Services, it follows that Hocen made the Payments for illegitimate purposes. The Payments did, however, earn huge profits for Hocen. But that economic benefit cannot be regarded as a corporate benefit because that economic benefit was derived by corruption, at the cost of exposing Hocen to criminal liability. All of that points to the defendant breaching his duty to act *bona fide* in the company's interests rather than complying with it.

95 All of this also points to the defendant having breached his duty to exercise reasonable care and diligence rather than complying with it. It is apposite to note here that the Court of Appeal's analysis in *Ho Kang Peng* found that the director's act in causing the company to enter into a sham contract as a pretext for making corrupt payments was a breach not only of his fiduciary duty, but also of his duty to exercise reasonable diligence and to exercise reasonable care and skill: see *Ho Kang Peng* at [40], [42] and [44].

96 Accordingly, the plaintiff has succeeded in proving his pleaded case. The defendant is in breach of duty to Hocen. That suffices to dispose of the defendant's primary case in defence.

Issue 2: The plaintiff's breach of duty

97 I turn now to consider the defendant's alternative case in defence. That case is that the plaintiff knew and approved of the defendant's scheme to engage and fund Crossbridge to procure business for Hocen from ZPMC by corruption and is therefore liable to make a contribution of 50% to the defendant in respect of his liability. I begin with the defendant's submissions.

Knowledge of Hocen's transactions with Crossbridge

Defendant's submissions

98 The defendant's case on the plaintiff's knowledge of Hocen's transactions with Crossbridge is this: the plaintiff knew the true purpose of involving Crossbridge in the parties' planned business even before Hocen was incorporated. After Hocen was incorporated, the plaintiff was an equal participant in all of Hocen's major decisions, particularly those involving Hocen's business and finances. The plaintiff approved all 18 of the Payments and countersigned the relevant cheques or remittance instructions together with the defendant.[117] He did so with knowledge of Crossbridge's role and the purpose of the payments. The defendant relies on three broad strands of evidence to show that the plaintiff had the necessary knowledge.

99 First, the defendant relies on his evidence that the plaintiff accompanied the defendant when the defendant went to UOB on two occasions to withdraw cash from Hocen's account against a cash cheque in order to make a cash payment to Crossbridge. The first occasion took place at a UOB branch at MacPherson Road. The plaintiff accepts that he visited this branch with the defendant.[118] The date on the cheque is 23 September 2005,[119] which means that they must have visited the MacPherson branch at or around that time. The second occasion took place at a UOB branch at Shenton Way. The date on the cheque is 30 November 2005.[120] The plaintiff has accepted that this was Hocen's "2nd payment" to Crossbridge, and that he was at the bank with the defendant

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117 Substituted Plaintiff's Bundle of Documents Vol 7, pp 3614, 3617, 3620, 3623, 3626, 3630, 3634, 3642, 3645, 3650, 3652, 3658, 3663, 3666, 3672, 3681, 3682 and 3694.

118 Substituted Plaintiff's Bundle of Documents Vol 1, p 419.

119 Substituted Plaintiff's Bundle of Documents Vol 7, p 3613.

120 Substituted Plaintiff's Bundle of Documents Vol 7, p 3616.

when the defendant withdrew the cash against this cheque.[121] It is not disputed that these two cash cheques went towards the first two Payments to Crossbridge. The defendant argues that the plaintiff's knowledge of these two cash cheques corroborates the defendant's case that the plaintiff "had known about Crossbridge from the *beginning*, and agreed to the engagement of Crossbridge and its payment arrangement" [emphasis in original].[122]

100 Second, the defendant points to the fact that the plaintiff knew that Hocen's auditor had asked Hocen to confirm that the amounts that Hocen was paying to Crossbridge were genuinely for cable installation services.[123] The auditor's request was communicated to Hocen by a letter dated 28 July 2006 which was addressed to the plaintiff and the defendant.[124] The defendant initially prepared a draft response stating that Crossbridge's "value-added services … enables us to win projects".[125] This draft response was never sent. Hocen's actual response to the auditor, sent on 20 September 2006, deleted any mention of Crossbridge enabling Hocen to win projects.[126] The defendant says that it was the plaintiff who refused to approve the letter until those words were deleted and the he did so because he was worried that those words could be read as an implicit admission that Hocen was involved in corruption.[127]

101 Third, the defendant points out that the plaintiff was a co-signatory of each of the cash cheques and of each of the telegraphic transfer application

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121 Substituted Plaintiff's Bundle of Documents Vol 7, p 3914.

122 Defendant's Closing Submissions, para 101.

123 Defendant's Closing Submissions, paras 119 and 124.

124 Defendant's Bundle of Documents Vol 2, p 1278.

125 Defendant's Bundle of Documents Vol 2, p 1279, para 3.

126 Substituted Plaintiff's Bundle of Documents Vol 7, p 3996, para 3.

127 Defendant's Closing Submissions, para 122.

forms for the Payments.[128] The defendant's point is that the plaintiff knew the purpose of these transactions. The defendant relies on the plaintiff's own evidence that he is a careful businessman who approved each Payment only after sighting the relevant underlying documentation, after being satisfied of the purpose of the payment and after ascertaining that the sum to be paid was in fact due and payable.[129] The defendant highlights two payments totalling over S$520,000 which were made within three weeks in December 2006.[130] The plaintiff's evidence is that he did not believe this to be a large sum and did not ask why it had to be paid.[131] The defendant asks me to reject this evidence, pointing to the plaintiff's own evidence about the care he takes in approving payments.

Plaintiff's submissions

102 The plaintiff's central submission in response to the defendant's alternative case in defence is that the defendant has failed to discharge his burden of proof. The plaintiff argues that this defence cannot succeed unless the defendant can prove that the plaintiff knew that Crossbridge's true role was to be to procure business for Hocen from ZPMC by corruption and that the plaintiff agreed to that role in 2004, even before Hocen was incorporated. The plaintiff relies on three principal arguments to submit that the defendant has failed to discharge his burden of proof on the balance of probabilities, and that the defendant's claim for contribution must necessarily fail.[132]

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128 Defendant's Closing Submissions, para 110.

129 Defendant's Closing Submissions, para 103.

130 Defendant's Closing Submissions, para 111.

131 Defendant's Closing Submissions, para 112.

132 Plaintiff's Closing Submissions, paras 122–123.

103 First, the plaintiff submits that I should reject the defendant's self-serving oral evidence that the plaintiff knew of Crossbridge's true role. That evidence consists only of the defendant's bare assertion that "[the plaintiff] and I decided to appoint Crossbridge as Hocen's agent".[133] Further, the defendant has given inconsistent accounts of when he and the plaintiff purportedly decided to appoint Crossbridge.[134] Finally, the defendant failed to lead any evidence from any of the officers from Crossbridge to show that the plaintiff was complicit in the defendant's true arrangement with Crossbridge.[135]

104 Second, the plaintiff submits that the defendant told him that Crossbridge's role was only as a subcontractor and not to procure business. The plaintiff refers to the latter role as that of an "agent". As a result, says the plaintiff, his understanding of Crossbridge's true role all along was that it was a subcontractor and not an agent. He says that the defendant himself maintained the position that Crossbridge was a subcontractor before this litigation was commenced.[136] Thus, for example, the defendant told Hocen's auditor that Crossbridge was a subcontractor. He also told the accountant appointed by the plaintiff to investigate Hocen before it was wound up that Crossbridge was a subcontractor.[137] As a result, relying on the defendant's statements, the plaintiff has also taken the position consistently that Crossbridge was a subcontractor and not an agent. He took this position in his affidavits opposing Hocen's winding up in 2007, in his answers to Hocen's liquidators, and in his evidence

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133 Plaintiff's Closing Submissions, paras 149–150.

134 Plaintiff's Closing Submissions, paras 152–158.

135 Plaintiff's Closing Submissions, paras 139–140.

136 Plaintiff's Closing Submissions, para 166.

137 Plaintiff's Closing Submissions, paras 178-179; Substituted Plaintiff's Bundle of Documents Vol 2, pp 1152–1153, para 4.3.1.

in this trial. That is what the plaintiff believed when he approved and co-signed Hocen's payments to Crossbridge.

105 Third, the plaintiff argues that he did not know and could not reasonably have known that Crossbridge was procuring business for Hocen from ZPMC by corruption at the time the defendant was making the Payments. It was the defendant and not he who ran Hocen.[138] The plaintiff also did not deal with Crossbridge.[139] Hocen's employees had either no knowledge or only limited knowledge of Crossbridge. They did not testify that the plaintiff knew that Crossbridge was procuring business for Hocen from ZPMC at all, let alone by corruption.[140] Finally, the final form of Hocen's formal response dated 20 September 2006 to Hocen's auditor's letter dated 28 July 2006 (see [100] above) does not show, as the defendant submits, that the plaintiff knew that Crossbridge was procuring business for Hocen from ZPMC by corruption.[141]

Analysis and decision

106 I find that the plaintiff was complicit in the scheme to engage and fund Crossbridge to procure business for Hocen from ZPMC by corruption. The objective evidence, albeit largely circumstantial, is compelling. When coupled with the defendant's oral evidence, which I accept, it suffices to discharge the defendant's burden of proof.

107 I accept the defendant's evidence that the plaintiff knew from the outset, even before Hocen was incorporated, that Crossbridge was to be engaged to procure business for Hocen from ZPMC. I accept also that the plaintiff knew

138 Plaintiff's Closing Submissions, paras 185–205.

139 Plaintiff's Closing Submissions, paras 206–214.

140 Plaintiff's Closing Submissions, paras 215–223.

141 Plaintiff's Closing Submissions, paras 224–233.

that Crossbridge's role would be to procure business for Hocen from ZPMC by corruption.[142] The plaintiff's evidence is that he found out the truth only in the course of winding up proceedings which the defendant commenced in 2007.[143] For the reasons which follow, I reject that evidence.

108 I find that the plaintiff was an active participant in Hocen's significant business decisions.[144] Although the plaintiff was not the managing director of Hocen or directly involved in its sales function, the defendant kept the plaintiff updated from time to time on Hocen's affairs. After all, it was largely the plaintiff's capital which was at stake. I accept the defendant's evidence that he would discuss every one of Hocen's projects with the plaintiff, including purchase orders and contracts.[145] This evidence is supported by the testimony of a member of Hocen's staff, Goh Lnai Mun.[146]

109 I find also that the plaintiff knew that Hocen was making payments to Crossbridge. It is a fact that the plaintiff signed all the cash cheques and all of the remittance instructions.[147] He was also with the defendant on at least one occasion when the defendant withdrew cash from Hocen's account for Crossbridge against a cash cheque. That took place at a UOB branch at MacPherson Road.[148] The date on the cheque indicates that this took place in

142 Certified Transcript, 11 March 2016, p 71 (line 12) to p 82 (line 25).

143 Plaintiff's Closing Submissions, para 168.

144 Defendant's Closing Submissions, para 88.

145 Defendant's Closing Submissions, 88–89; Certified Transcript, 16 March 2016, p 71 (lines 19–20).

146 Certified Transcript, 17 March 2016, pp 91–92.

147 See, for example, Substituted Plaintiff's Bundle of Documents Vol 7, pp 3616, 3649, and 3692.

148 Agreed Bundle of Documents Vol 7, p 3914; Defendant's Closing Submissions, para 98; Ong Shu Lin's Affidavit of Evidence-in-Chief dated 4 January 2016, para 61; Ong Bee Chew's Affidavit dated 10 August 2012, para 14.

September 2005: see [99] above. The plaintiff explained in cross-examination that it was a "coincidence" that he and the defendant had visited UOB together on that occasion.[149] The plaintiff says that the defendant had told him that he needed to go to the bank. As it happened, so did the plaintiff. And so, according to the plaintiff, it was purely by coincidence that they went together. The plaintiff claims that he was there only to "settle [his] family issues", and that he did not know that the defendant was there to withdraw cash to pay Crossbridge.[150]

110 I reject the plaintiff's explanation as an afterthought. I find that the plaintiff knew exactly the purpose of the defendant's visit to the MacPherson branch of UOB to do in September 2005. The plaintiff had signed the cash cheque which the defendant took with him to UOB that day. And, when the plaintiff asked the defendant the purpose of the payment (as the plaintiff testified he always did), I find that the defendant would have told him the true purpose of the payment in order to obtain the defendant's signature on it. Moreover, the weight of the plaintiff's own evidence is that he knew that the defendant was at the branch to cash a cheque. That is what he told Hocen's liquidators when they interviewed him in 2008.[151] That is what he pleaded in his reply and defence to the defendant's counterclaim in 2015. In fact, his assertion there is even broader: he pleaded that he "knows that the Cash Cheques were encashed by the Defendant", without qualifying when he acquired that knowledge.[152] This suggests that the plaintiff always knew that the defendant cashed the cheques which the plaintiff had countersigned. And as he stated in his AEIC in 2016, he knew that the defendant had cashed a cheque when they

149 Certified Transcript, 2 March 2016, p 111 (lines 13-15).

150 Certified Transcript, 2 March 2016, p 113 (line 19) and p 115 (lines 8–9).

151 Substituted Plaintiff's Bundle of Documents Vol 7, p 3914.

152 Plaintiff's Reply and Counterclaim (Amendment No 1) dated 31 March 2015, para 42.

visited the UOB branch at MacPherson together.[153] In cross-examination, the plaintiff disclaimed that statement in his AEIC, asserting that it had arisen as a result of "some misunderstanding during [his] communication with [his] lawyers".[154] I do not find this explanation convincing in view of the rest of the plaintiff's own evidence.

111 In this connection, it must be borne in mind that the essence of the plaintiff's evidence is that, from the very outset in 2005 until Hocen went into liquidation in 2007: (a) he believed that Crossbridge's role was purely as Hocen's subcontractor; and (b) he held that belief because that was what the defendant told him. That is why the plaintiff in his evidence – which I have just referred to – is willing to admit that Crossbridge wanted payment in cash and that he knew that the defendant had some role in facilitating such payments at least on one occasion, *ie*, in September 2005.[155] The foundation of the plaintiff's claim of ignorance in this regard is effectively an assertion that the defendant – while he was making the 18 Payments to Crossbridge and when the plaintiff questioned the defendant on the need for each of the Payments, as the plaintiff claims he did – consistently and repeatedly lied to the plaintiff that Crossbridge was merely a subcontractor and that Hocen was paying Crossbridge these large sums of money purely for the never-performed Services.

112 In my judgment, the defendant had no reason to lie consistently and repeatedly in this manner. I attach little weight to the fact that the plaintiff has historically referred to Crossbridge consistently as a subcontractor, a point the plaintiff emphasises in his submissions: see [104] above. That fact is equally consistent with the view that the plaintiff knew all along that Crossbridge was

153 Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, para 78.

154 Certified Transcript, 2 March 2016, p 129 (lines 14–15).

155 Ong Bee Chew's Affidavit of Evidence-in-Chief dated 5 January 2016, para 78.

procuring business from ZPMC for Hocen by corruption – which is the defendant's alternative case – and that the plaintiff knew well enough to conceal his knowledge of the corrupt scheme to protect himself. That, I find, is what in fact happened. The plaintiff has offered no sensible reason why the defendant would lie to him consistently and repeatedly over a two-year period. Even if the defendant did tell him that Crossbridge was merely a subcontractor, I reject the plaintiff's evidence that he simply took the defendant's word at face value and authorised Hocen's payments to Crossbridge on that basis. As I explain below at [119], the plaintiff's own evidence is that he is a careful businessman. More importantly, my finding on the plaintiff's attempt to conceal his own knowledge is supported by how the plaintiff dealt with the auditor's letter dated 28 July 2006. On this point, I accept the defendant's submission that the plaintiff's actions in relation to that letter point to an unwillingness to be seen as authorising bribes (see [100] above).

113 It is useful at this point to elaborate on the auditor's letter. The auditor addressed that letter to the defendant and copied to the plaintiff. In it, the auditor sought confirmation that the payments to Crossbridge were for cable installation services commissioned by Hocen and that the services had actually been rendered by Crossbridge.[156] The defendant prepared a draft response to the letter.[157] The draft expressly stated that Crossbridge's "value-added services … enable[d] [Hocen] to win projects".[158] Although that phrase does not mention corruption, it is an obvious euphemism whose meaning could not have been lost

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156 Defendant's Bundle of Documents Vol 2, pp 1277–1278.

157 Defendant's Bundle of Cause Papers Vol 6, p 3573; 2 Defendant's Bundle of Documents Vol 2 at pp 1279–1280; Certified Transcript, 4 March 2017, p 66 (lines 12–17).

158 Agreed Bundle of Documents Vol 10, p 1279.

on any sophisticated and experienced businessman such as the plaintiff: see [118]–[119] below.

114 At trial, the plaintiff accepted that he knew the contents of the auditor's letter and of the defendant's initial draft response.[159] I accept the defendant's evidence that it was the plaintiff who insisted that the defendant delete the reference to Crossbridge's value-added services enabling Hocen to win projects. So Hocen's response on 20 September 2006 to the auditor's letter had those words deleted.[160] Although the response was signed by Goh Lnai Mun rather than either the plaintiff or the defendant, they both signed a letter about two weeks later endorsing the contents of the response.[161] The plaintiff acknowledged at trial that this joint letter was akin to a board resolution.[162]

115 It is significant to me that the plaintiff felt unable to deny in cross-examination that he had seen the auditor's letter or that he wanted the reference to Crossbridge helping Hocen to win projects deleted. All he could say, repeatedly, was that he could not remember:[163]

> Q. Do you remember seeing this letter, 11 August 2006, at the material time?
>
> A. I can't remember.
>
> Q. […] This letter of 11 August 2006, was first exhibited in your AEIC for the winding up action. And that can be found at defendant's bundle of cause papers volume 6, page 3506. Do you see that? Companies Winding Up 99, your second affidavit filed on 1 October 2007.

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159 Certified Transcript, 4 March 2017, p 66 (lines 6–11).

160 Defendant's Bundle of Documents Vol 2, p 1280.

161 Defendant's Bundle of Documents Vol 2, p 1281.

162 Certified Transcript, 4 March 2017, p 68 (line 19) to p 69 (line 3).

163 Certified Transcript, 4 March 2016, p 64 (line 17) to p 67 (line 20).

A. Yes.

Q. If you turn to page 3573, this document, the 11 August draft was in your possession at all the material times.

A. I can't remember.

[…]

Q. […] Mr Ong, I'm putting it to you that you must have seen this letter of 28 July 2006, found at page 1277.

COURT: On or about 28 July 2006?

MR CS LEO: Yes. On or around that period. Because it was cc'd to you.

A. I saw the letter but I've really forgotten about it.

Q. I put it to you that you have also seen the draft reply prepared by Mr Kelvin Ong sometime around 11 August 2006, as found at 10AB 1279. Because it is exhibited in your affidavit in the companies winding up action. Do you agree?

A. Yes.

[…]

Q. You didn't want to sign the letter of 11 August 2006 because, in particular, the letter said: "These value added services also enables us to win projects."

A. I really can't remember.

Q. And the reason why you're not happy with this line is because that may be construed as a bribe.

A. I don't remember the contents. I have also forgotten about this letter. So I can't recall now.

116 To similar effect are the plaintiff's disingenuous responses in a second passage in his cross-examination:[164]

COURT: So Mr Leo Cheng Suan is asking you now: is it true what it says in paragraph 3, that the

164 Certified Transcript, 4 March 2016, p 85 (line 14) to p 86 (line 13).

> outsourcing jobs are a form of value added services which we provide to our customers which also enable us to win projects?
>
> A. That was what [the defendant] told me.
>
> MR CS LEO: So why then did you refuse to sign it?
>
> A. I don't know why I didn't sign it then.
>
> Q. I'm instructed that you refused to sign it because that may be deemed as a bribe.
>
> A. I don't remember.
>
> Q. Because otherwise you would just sign everything under your nose like what you have said before.
>
> A. But subsequently, after he had explained to me, I have signed on the documents and sent them to the auditors.
>
> COURT: Mr Leo's point is that what you signed on is different; it's different from the document that you didn't sign. And he's putting it to you that the differences are: one, on your direction; and two, because you were concerned that the words in the unsigned letter could be interpreted as admitting paying bribes.
>
> A. Perhaps I was of the view that I couldn't sign. That was after hearing my assistant's explanations, and made that decision, I asked them to prepare another document.

117 The plaintiff is being disingenuous in these two passages. I find that the reference to Crossbridge enabling Hocen to "win projects" in the response to the auditor's letter was indeed deleted on the plaintiff's direction. Further, it was deleted because the plaintiff knew that Crossbridge had been engaged and funded to procure business for Hocen from ZPMC by corruption and the plaintiff did not want even to hint at that true purpose to any person outside Hocen.

118 The plaintiff has also shown himself to be an experienced and astute businessman. He has more than 20 years of experience in business.[165] He actively runs his family business, Hocen Machinery, and was running two other companies, Cheng Hock Heng Machinery Pte Ltd and Ong Tuan Seng Development Pte Ltd, during the period that Hocen was operating.[166] He was by no means a babe in the woods. He would have understood precisely what the defendant was doing in entering into the Crossbridge Contracts and in causing Hocen to make the Payments.

119 The plaintiff is also a careful businessman who seeks clarification before signing cheques. In an affidavit which the plaintiff filed on 5 September 2007 to oppose the defendant's winding up application, the plaintiff asserted that it is his practice to sign cheques only "after being satisfied that such payments were due and payable and upon sight of the relevant documents or clarification from the [defendant] or [Hocen]'s staff".[167] He confirmed this again in another affidavit filed on 1 October 2007.[168] I therefore find it difficult to believe the plaintiff's suggestion that he would have signed letters, cash cheques and remittance instructions simply because the defendant told him to do so.[169] I find that the plaintiff signed the cash cheques and remittance instructions after ascertaining from the defendant the true reason for each Payment and because he knew and accepted the corrupt scheme of which the Payments were a part. Further, given the defendant's practice of keeping the plaintiff informed of contracts that Hocen entered into, it is highly unlikely that the plaintiff would

165 Ong Bee Chew's Affidavit dated 10 August 2012, para 6; Certified Transcript, 3 March 2016, p 5 (line 14).

166 Plaintiff's Closing Submissions, para 197; Certified Transcript, 3 March 2016, p 13 (lines 9–10).

167 Substituted Plaintiff's Bundle of Documents Vol 2, p 884, para 36.

168 Substituted Plaintiff's Bundle of Documents Vol 3, p 1595, para 49.

169 See, for example, Certified Transcript, 4 March 2016, p 69 (lines 11–15).

be ignorant of Crossbridge's true role, or that he would not have asked and been honestly informed of the true nature of the "value-added services" that Crossbridge was performing.[170]

120 Finally, I accept the defendant's submission that the plaintiff's belief in the success of Hocen's arrangement with Crossbridge was precisely what drove his attempt, after Hocen was wound up in 2007, to replicate Hocen's business with Andy Heng's assistance through another company called Hocen International (1986) Pte Ltd.[171] At trial, Heng testified that in 2008, the plaintiff sent him to Shenzhen to meet Daniel Cheng of Crossbridge to "explore business opportunity [*sic*]" with ZPMC.[172] In the event, Cheng was unwilling to help. But the point here is that the plaintiff's actions show that he must have known about the true nature of the arrangement between Hocen, Crossbridge and ZPMC, and about the substantial profits which this arrangement yielded for Hocen while it lasted.

121 For all of these reasons, I find that the plaintiff knew from the outset, even before Hocen was incorporated, that Crossbridge was to be engaged and funded, and was indeed engaged and funded, to procure business for Hocen from ZPMC by corruption.

The Pinkerton reports

122 Before leaving this section, I should briefly mention the significance to this case of two reports prepared by a firm of private investigators called Pinkerton (Singapore) Pte Ltd ("Pinkerton"). The plaintiff engaged Pinkerton

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170 Defendant's Closing Submissions, para 122.

171 Defendant's Closing Submissions, para 130.

172 Certified Transcript, 2 March 2016, p 99 (lines 15–16).

in August 2007 to carry out checks on Crossbridge and on ZPMC. The plaintiff accepts that portions of Pinkerton's first report, and the entirety of its second report, are inadmissible hearsay.[173] In any event, the contents of the two reports are also of little significance. The plaintiff submits that these reports prove that Crossbridge was a company existing only on paper. The plaintiff intended this to support his additional contention that the defendant must have pocketed part of the Payments because Crossbridge had no real existence.[174] As the plaintiff does not need to succeed in this contention in order to succeed in his claim (see [18] above), I need not analyse this contention further.

123 What is significant about the Pinkerton reports, however, is this. It might be argued that the plaintiff's conduct in engaging a private investigator to inquire into Crossbridge and ZPMC suggests that the plaintiff did not know Crossbridge's role in procuring business for Hocen from ZPMC. I do not accept that argument. The context in which the plaintiff engaged Pinkerton must be borne in mind. By mid-2007, the relationship between the plaintiff and the defendant had seriously deteriorated. The plaintiff's evidence is that he filed an application to inspect Hocen's accounting and other records in order to pursue his suspicions about the defendant's management of Hocen. Instead of cooperating, the defendant deflected the plaintiff's application by applying to wind up Hocen.

124 I reject the plaintiff's evidence entirely. For the reasons I have given above, I accept the defendant's evidence that he always kept the plaintiff truthfully informed about Hocen's dealings with Crossbridge. The plaintiff, on the other hand, was always careful to distance himself from the corrupt scheme. Commissioning the Pinkerton reports is equally consistent with the view that,

173 Substituted Plaintiff's Closing Submissions, Annex A at paras 2-4.

174 Substituted Plaintiff's Reply Submissions, para 45.

after the plaintiff fell out with the defendant, and when the plaintiff realised that he could not continue to earn profits through Hocen's business with ZPMC, the plaintiff engaged Pinkerton to gather dirt on the defendant for the plaintiff to use in his intended vendetta against the defendant: see [33] above.

125 The Pinkerton reports do not assist the plaintiff's denial that he was privy at the material time to the corrupt scheme involving Crossbridge.

Breach of duty

126 Having found that the plaintiff was complicit in the defendant's corrupt scheme, I find also that plaintiff's conduct breached his duties to Hocen. Applying the principles stated at [75]–[86] above, I hold firstly that the plaintiff satisfies the subjective aspect of the test for breach of duty because he had actual knowledge that Crossbridge had been engaged and funded to procure business for Hocen from ZPMC by corruption. Next, given that the Payments were part of a corrupt scheme, and given that the plaintiff authorised the Payments with knowledge of the scheme, he like the defendant must be considered objectively to have failed to act *bona fide* in the interests of Hocen.

127 Further, I find that the plaintiff's breach of duty is no less culpable than the defendant's breach of duty. The fact that the plaintiff was not the one who cashed the cheques or delivered the cash to Crossbridge is no mitigation. The plaintiff and the defendant both agreed, as I have found, to engage and fund Crossbridge to procure business for Hocen from ZPMC by corruption. They simply had different roles in carrying out a single corrupt scheme, which was from start to finish entirely contrary to Hocen's interest. I therefore see no basis to move beyond an equal apportionment of liability.

128 Thus, I find that the plaintiff is obliged to contribute to the defendant's liability in these suits in the proportion of 50%.

Issue 3: *Ex turpi causa non oritur actio*

Introduction

129 I have found that both the plaintiff and the defendant are in breach of duty to Hocen because they both participated in a scheme to engage and fund Crossbridge to procure business for Hocen from ZPMC by corruption. That brings me to the defendant's final alternative defence: the doctrine of *ex turpi causa non oritur actio* or, as it is sometimes known, the defence of illegality. Although this doctrine is not a defence in the true sense of the word, it probably does no harm to refer to it as such, so long as it is always recognised that *ex turpi causa* is founded on high public policy rather than the parties' private interests: see *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666 ("*ANC Holdings*") at [78].

130 I should point out that the defendant has not pleaded his reliance on the *ex turpi causa* doctrine. Instead, he raises it only in his submissions, and even then only in his reply submissions.[175] But because *ex turpi causa* rests on public policy, a court is required to act in any case to which it applies, if necessary of its own motion: *ANC Holdings* at [84]; *Les Laboratoires Servier v Apotex Inc* [2014] 3 WLR 1257 ("*Les Laboratoires*") at [23]. Both parties have also had the opportunity to make oral submissions on *ex turpi causa*.

131 It is well-established that the *ex turpi causa* doctrine is not confined to criminal wrongdoing but extends even to non-criminal conduct which carries the necessary degree of turpitude: see *ANC Holdings* at [82] and *Les*

175 Defendant's Reply Submissions, para 120.

Laboratoires at [25]. I use "turpitude" as a term of art encompassing all conduct, criminal or otherwise, which is capable of invoking the *ex turpi causa* doctrine.

132 The classic statement of the *ex turpi causa* doctrine is that "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act" *per* Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341 at 343. Put that way, there are three elements which must be present in order for the doctrine to arise. They correspond to each of the Latin words "*ex*", "*turpi*" and "*causa*", though not in that sequence. The three elements are: (a) there must be turpitude; (b) the claimant must found his cause of action on that turpitude; and (c) the turpitude must be the claimant's own turpitude.

133 On the last element, I consider that the person whose turpitude I must examine is Hocen, not the plaintiff. That is because the cause of action which the plaintiff asserts in these suits is a cause of action vested in Hocen, and which the plaintiff has acquired only by assignment. The policy underlying the *ex turpi causa* doctrine is to prevent an inconsistency in the law by holding a plaintiff to be entitled to relief in one context while holding that the conduct underlying that entitlement is illegal in another context: *ANC Holdings* at [80]. That underlying policy requires consistency to be tested as between the counterparties to the substantive cause of action and not as between the procedural parties to litigation which arises out of that cause of action. Otherwise, the purpose of the doctrine could be easily evaded by the artifice of assignment.

134 It is not seriously disputed that the first of the three elements I have set out at [131] above is established in this case. Engaging and funding an intermediary to procure business from a commercial counterparty by corruption is undoubtedly turpitude. Arriving at that conclusion does not require me to

consider or make any findings on the niceties of the criminal law on corruption, whether in Singapore or in China. That is because, as I have pointed out, the concept of turpitude is not confined to criminal conduct. A corrupt scheme of this nature is undoubtedly turpitude within the meaning of the *ex turpi causa* doctrine.

135 So too, the second element is established in this case. The corrupt scheme is in substance an essential ingredient of Hocen's cause of action against the defendant. That cause of action asserts that the defendant's conduct in causing Hocen to make the Payments is a breach of duty because Hocen derived no corporate benefit from the Payments. The turpitude is an essential ingredient of the cause of action because it is the turpitude which negates the undoubted economic benefit which Hocen derived from the Payments and renders that economic benefit incapable of being a corporate benefit.

136 Only the third of the three elements therefore arises in this case. That requires me to determine whether the turpitude in this case is Hocen's *own* turpitude. The fundamental question is one of attribution: is the defendant's turpitude attributable to Hocen such that the turpitude is Hocen's own?

Is the turpitude Hocen's own?

137 In my view, the defendant's turpitude is not attributable to Hocen. The principle is that a company who makes a claim against a director arising from the director's breach of duty is treated in law as being a victim of that breach of duty. In those circumstances, the law will not allow the director to attribute any turpitude involved in his breach of duty to the company in order to invoke the *ex turpi causa* doctrine and defeat the company's claim.

138 This principle is part of the general approach to attributing a director's conduct – whether involving turpitude or otherwise – to a company. The general approach is to treat the applicable rule of attribution as being dependent on the purpose and context in which the question of attribution arises. It is thus entirely possible, and indeed entirely just, for the same act of a director to be attributable to the company for one purpose or in one context and not to be attributable to the company for other purposes or in other contexts.

139 I will now elaborate on the position, beginning with the applicable principles.

Applicable principles

140 The principles by which the acts of a natural person will be attributed to a company are well-settled. They are derived from Lord Hoffmann's analysis in the decision of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 ("*Meridian*"). Lord Hoffmann grouped the rules of attribution into three sets. The first set comprises the primary rules of attribution which are found in the company's constitution or implied by company law which deem certain acts by certain natural persons to be the acts of the company (at 506D). The second set comprises the general rules of attribution by which a natural person may have the acts of another attributed to him, *ie*, the principles of agency; and by which a natural person may be held liable for the acts of another, such as estoppel, ostensible authority and vicarious liability (at 506F). The third and final set comprises special rules of attribution which the court must fashion in exceptional cases where applying the first or second set of principles would defeat the policy underlying a particular provision of the substantive law as it was intended to apply to a

company (at 507D–F). Lord Hoffmann's analysis was endorsed by the Court of Appeal in *Ho Kang Peng* ([78] *supra*) at [47]–[48].

141 In my view, what is critical in the present case is the purpose for which these rules of attribution exist. It is important to distinguish between two kinds of purposes. I shall call them the functional purpose and the substantive purpose.

142 The functional purpose of the rules of attribution, as the name suggests, describes the function of those rules. In the Court of Appeal's words in *Ho Kang Peng* at [47], "[a]ttribution rules…serve to determine when and which natural person's acts and thoughts are to be treated as the company's own". In *Meridian* (at 506C), Lord Hoffmann provided the conceptual basis for these rules: they are a necessary part of corporate personality. A company exists, as Lord Hoffmann said, only because there is a rule (usually in a statute) which deems the company to exist as a juridical person and to have certain of the powers, rights and duties of a natural person. But there is little sense in deeming a juridical person to exist unless there are also rules to determine which acts of the natural persons associated with it are to be treated in law as its own acts: *Meridian* at 506B-C. The important point, however, is that the functional purpose of the rules of attribution does not explain the reason for invoking a particular rule of attribution in a particular case.

143 It is the substantive purpose of the rules of attribution which supply that reason. The special rules of attribution in Lord Hoffmann's third set (see [140] above) are a clear example of this concept. One such rule was crystallised and applied as a distinct rule of attribution in *Meridian.* In that case, two senior employees of Meridian Global Fund Management Asia Ltd ("Meridian") caused Meridian to acquire shares in a listed company in New Zealand, Euro-

National Corporation Ltd ("ENC"). Both employees knew that the acquisition was sufficiently large to require Meridian, under New Zealand's securities legislation, to give immediate notice both to ENC and the New Zealand stock exchange that Meridian had become a substantial shareholder of ENC. But Meridian failed to give the required notice. In acquiring the shares, the two employees acted with the company's authority but without the knowledge of its board of directors and of its managing director. Meridian's directors therefore did not know that Meridian had become a substantial shareholder of ENC. Lord Hoffmann had no hesitation in holding that the underlying policy of New Zealand's securities legislation required the employees' knowledge that Meridian was a substantial shareholder of ENC to be attributed to Meridian without any need to consider whether either of the two employees was the directing mind and will of Meridian. The intent of the notice requirement was to compel a person who had become a substantial shareholder of a public company to give immediate notice of that fact, *ie*, as soon as he knew of it. In order to avoid defeating the policy of the legislation, and given its intent as it applied to companies, it was appropriate to attribute to Meridian the knowledge of the natural person who had caused Meridian to acquire the relevant shares: *Meridian* at 511D. Lord Hoffmann concluded by surveying other English cases which had applied what might appear to be inconsistent rules of attribution on superficially similar facts and said at 512B: "Each [special rule of attribution] is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule."

144 Of course, not every case in which a question of attribution arises requires the court to tailor a rule of attribution to support the underlying policy of a substantive rule of law as it was intended to apply to companies. But the court must, in every case, have regard to the reason for which a particular rule

of attribution is being invoked. That is why, narrowing the focus to directors for the time being, the law distinguishes between cases in which a director's knowledge or acts are sought to be attributed to the company: (a) when a third party seeks to hold a company liable for breach of a duty owed to the third party; and (b) when a company seeks redress from a director for breach of duty owed to the company.

145 This distinction is a valid one in both a moral and a legal sense. It is entirely just that a company should be bound by the knowledge or acts of its directors when an innocent third party sues the company for a breach of duty, even if the director's knowledge or acts may, in other contexts, not be attributed to the company. By the same token, it is equally just that a company should not be bound by the knowledge or acts of a director when the company itself sues the director as the victim of his breach of duty, even if the director's knowledge or acts may, in other contexts, be attributed to the company. These two propositions, and the underlying distinction between the two types of cases, was articulated by the English Court of Appeal in *Bilta (UK) Ltd (liquidation) v Nazir (No 2)* [2014] Ch 52 ("*Bilta (CA)*") at [34]–[35] and approved by the Singapore Court of Appeal in *Ho Kang Peng* at [70].

146 To the second proposition above, *Ho Kang Peng* suggests an exception. The court said at [70]:

> … [T]he [director] was not acting in the interests of the Company when he entered into the [sham] Agreement and effected the Payments. This is not a one-shareholder company but a publicly-listed company. The Appellant could have protected himself by having the proposed arrangement approved by the Board. Alternatively, he could have sought ratification from the general body of the Company. The Appellant did none of that.

The suggested exception appears to be in two parts. First, it suggests that, if a company is a one-man company, any act by the sole director-shareholder which is a breach of duty will be attributed to the company without the need for further formality, even if the act amounts to turpitude. Second, it suggests that even if the company is not a one-man company, any act by a director which is a breach of duty will be attributed to the company if the act is approved formally by the board or ratified formally by the shareholders, even if the act amounts to turpitude.

147 I should point out that the existence and scope of this suggested exception was not part of the *ratio* of *Ho Kang Peng*. The company in that case was not a one-man company and the director in that case had no board approval or shareholder ratification whatsoever for carrying on with the corrupt scheme. The exception, however, is pertinent in the present case. The plaintiff and the defendant, as I have found, acted in concert in engaging and funding Crossbridge to procure business for Hocen from ZPMC by corruption. That makes Hocen for present purposes conceptually indistinguishable from a one-man company. If the suggestion at [70] of *Ho Kang Peng* is correct, the directors' corrupt scheme is attributable to Hocen despite the turpitude involved and even in a claim by Hocen against the directors for breach of duty arising from that turpitude.

148 Yet, as plaintiff's counsel accepted during oral submissions, it is not clear even from *Ho Kang Peng* that all types of breach of duty by a director can be approved by a company's board or ratified by its shareholders. Even if they can be, the limits of the effect of such approval or ratification are not clear when it is the company who is suing the directors for breach of duty. If the effect were unlimited, there would be no substantive protection for shareholders against

rogue directors and no substantive protection for creditors against either rogue shareholders or rogue directors.

149 This approach would also mean that, as long as the shareholders and directors of any company act unanimously, the court in the exercise of its limited supervisory jurisdiction cannot hold the directors to the minimum standard of commercial morality even in those limited circumstances where that jurisdiction might, in practical terms, come to be exercised (see [84] above). To deal with this difficulty, it seems appropriate for me to examine a number of cases in which a company proceeded against a director for breach of duty where the director was either formally or informally authorised to commit that breach.

150 I begin with the leading case of *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] 1 Ch 250 ("*Belmont*"). *Ho Kang Peng* at [71] cites *Belmont* with approval for the proposition that "where a company makes a claim against a director premised on the latter's breach of duty, the company is a victim, and the law will not allow the enforcement of that duty to be compromised by the director's reliance on his own wrongdoing". I shall refer to this as the *Belmont* principle. This principle is a generalisation of an older principle, known as the *Hampshire Land* principle after the leading case of *In re Hampshire Land Co* (1896) 2 Ch 743 at 749.

151 In *Belmont*, the directors of Belmont Finance participated in a scheme to extract value from the company by making it buy shares at a highly inflated price. The directors concluded that transaction with board approval. The company then went into receivership. The receivers brought an action in the name of the company against the directors for breach of duty in causing the company to buy the shares. The English Court of Appeal held that the directors could not rely on the *ex turpi causa* doctrine against the company because their

knowledge of the true nature of the transaction was not to be attributed to the company. Buckley LJ (with whom Orr and Goff LJJ agreed) held at 261-262:

> But in my view, such knowledge should not be imputed to the company, for the essence of the arrangement was to deprive the company improperly of a large part of its assets. As I have said, the company was a victim of the conspiracy. I think it would be irrational to treat the directors who were allegedly parties to the conspiracy, notionally as having transmitted this knowledge to the company; and indeed *it is a well-recognised exception from the general rule that a principal is affected by notice received by his agent that, if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principal.*
>
> So in my opinion the … company should not be regarded as party to the conspiracy, on the ground of lack of the necessary guilty knowledge.
>
> [emphasis added]

The words I have italicised in the passage above explains why the *Belmont* principle has also been referred to as the "fraud exception". But subsequent cases show that fraud is not the only type of breach of duty which attracts the operation of the principle.

152 In *A-G's Ref (No 2 of 1982)* [1984] QB 624, a criminal case, the English Court of Appeal applied the *Belmont* principle. The defendants were charged with theft from solvent companies which they wholly owned and controlled. The issue was whether, for the purposes of s 2(1)(*b*) of the English Theft Act 1968, the defendants had appropriated the property of another "in the belief that [they] would have the other's consent if the other knew of the appropriation and the circumstances of it". The English Court of Appeal acknowledged the rule of attribution which attributes to a solvent company the unanimous decision of all of its shareholders (at 640). But the court did not consider this principle to be applicable. It also rejected the argument that the companies, having no will other than that of their directors, must be taken to have consented to whatever the

directors did. One of the court's reasons for rejecting this argument was the *Belmont* principle. Kerr LJ, who delivered the leading judgment, cited the passage from Buckley LJ's judgment (which I have reproduced at [151] above) and said that "[s]o far as the authorities in the realm of the civil law are concerned, [*Belmont*] directly contradicts the basis of the defendants' argument in the present case". He held, further, that there was no reason why the position in criminal law should be any different (at 641).

153 The next case is *Pertamina v Thahir Kartika Ratna and others* [1981–1982] SLR(R) 653 ("*Pertamina*"). This is the first reported local decision to apply the *Belmont* principle. *Pertamina* was a dispute over the beneficial interest in money held in Singapore banks by a deceased Indonesian national, Thahir. His employer, Pertamina, claimed that it was entitled to the money because it represented the proceeds of bribes which Thahir had received in breach of duty to Pertamina. His wife applied to strike out Pertamina's claim, arguing that Pertamina's claim was obviously unsustainable because a number of named employees of Pertamina knew and consented to Thahir receiving the bribes. Sinnathuray J rejected the wife's argument as being itself obviously unsustainable on the basis of the passage from Buckley LJ's judgment in *Belmont* (see [151] above) It is implicit in Sinnathuray J's reasoning that he considered that the consequence of applying the *Belmont* principle was that even if Pertamina's other employees did have knowledge of Thahir's breach of duty, their knowledge was not attributable to Pertamina itself in its claim against Thahir for breach of duty.

154 The *Belmont* principle is now a well-established rule of attribution in English and Singapore company law. What has been a matter of controversy until relatively recently is whether a one-man company is either outside the *Belmont* principle altogether or within an exception to that principle such that

that the director-shareholders' wrongdoing may nevertheless be attributed to the company.

155 The House of Lords divided 3:2 on this issue in the very difficult case of *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] 1 AC 1391 ("*Stone & Rolls*"). In *Stone & Rolls*, an insolvent one-man company, acting by its liquidators, brought an action against its auditors for breach of duty for failing to detect and terminate the fraud which the company's sole director-shareholder, Stojevic, had perpetrated on its bankers using the company as his vehicle. The auditors argued that the company's claim was defeated by the *ex turpi causa* doctrine, the company being a fraudster.

156 The majority of the House of Lords – comprising Lords Walker, Brown and Phillips – agreed with the auditors. Lords Walker and Brown came to their conclusion by applying a rule of attribution. They accepted that a one-man company is outside the *Belmont* principle such that Stojevic's fraud *was* attributable to the company and the *ex turpi causa* doctrine defeated the claim: *Stone & Rolls* at [167]–[168] and [200].

157 Lord Phillips agreed with Lords Walker and Brown that the company's claim should fail, but for a fundamentally different reason. In Lord Philips' view, that result followed, not primarily because of a rule of attribution, but because the principles of public policy which underlie *ex turpi causa* led to it: *Stone & Rolls* at [67]. Those principles did so because: (a) the auditors owed a duty of care only to the company and its members and not to its creditors; (b) all those to whom the auditors owed their duty of care were complicit in the company's fraud; and (c) the company's liquidators were now pursuing the claim for the ultimate benefit of the creditors, parties to whom the company's auditors owed no duty of care in tort: *Stone & Rolls* at [83]–[86].

158 The minority in the House of Lords comprised Lords Scott and Mance. They rejected the one-man company limit on the *Belmont* principle. They held instead that the *Belmont* principle operated even in the case of a one-man company, if only to protect the company's creditors. I quote from Lord Mance's speech at [229]:

> Neither in *Belmont Finance* nor in *Attorney General's Reference (No 2 of 1982)* is there any suggestion that the application of the principle in *Hampshire Land* depends upon there being some innocent constituency within the company to whom knowledge could have been communicated. Moreover, *Attorney General's Reference (No 2 of 1982)* is direct authority to the contrary. The two defendants were charged with theft, consisting of the abstraction of the assets of companies, of which they were "the sole shareholders and directors" and "the sole will and directing mind" (pp.635D-F and 638F-G). They contended that the companies were bound by and had consented to the abstractions precisely because they were its sole shareholders, directors and directing mind and will (pp. 634E-F and 638F-H). The Court of Appeal acknowledged the rule of attribution attributing to a solvent company the unanimous decision of all its shareholders (p.640A-D), but roundly rejected its application to circumstances where the sole shareholders, directors and directing minds were acting illegally or dishonestly in relation to the company. The court cited *Belmont Finance* as "directly contradict[ing] the basis of the defendants' argument" (p. 641B-C). The defendants' acts and knowledge were thus not to be attributed to the companies – although there was no other innocent constituency within the companies. Another justification for this conclusion may be that the effect of the limitations recognised by Lord Hoffmann in *Meridian* … is that in such situations there is another innocent constituency with interests in [Stone & Rolls], since it is not open even to a directing mind owning all a company's shares to run riot with the company's assets and affairs in a way which renders or would render a company insolvent to the detriment of its creditors.

159 *Stone & Rolls* was not a claim by a company against its director arising from the director's breach of duty. Instead, it was a claim by a company against a third party arising from the third party's breach of duty to the company. In this context, Lords Phillips and Walker expressed the view that the *Belmont*

principle applies only when the company is a "primary victim" of the director's wrongdoing (in the sense that the director's acts result directly in the company's loss) and not a "secondary victim" (where the company's loss arises only in consequence of the company having to compensate the primary victim for its loss): *Stone & Rolls* at [5] and [55] *per* Lord Phillips and at [171]–[174] *per* Lord Walker. On this analysis, the company in *Stone & Rolls* was merely a secondary victim, because Stojevic targeted the company's fraud at the company's banks and not at the company itself. This distinction, if valid, would mean that Stojevic's knowledge would have been equally attributable to the company, despite the *Belmont* principle, if the company had been suing Stojevic for breach of duty in *Stone & Rolls*.

160 In their discussion of *Stone & Rolls*, the learned authors of *Corporate Law* ([75] *supra*) give short shrift to the distinction between primary and secondary victims for the purpose of deciding when the *Belmont* principle applies. They prefer instead to distinguish between cases where the company is seeking redress against a director for breach of duty and cases where a third party is holding the company liable for a wrong: *Corporate Law* at 07.042. They call this the "redress-liability" distinction: *Corporate Law* at 07.044. And this is the distinction drawn in *Bilta (CA)* and adopted in *Ho Kang Peng*, as I have noted at [144] above.

161 The authors of *Corporate Law* draw support for the redress-liability distinction from the speeches of Lords Mance and Scott (who were in the minority) in *Stone & Rolls*. What is relevant to the present case is that their Lordships considered that the *Belmont* principle applied even to a one-man company, as long as it was invoked in the context of a company seeking redress against a director for breach of duty. On this analysis, and contrary to the implication of Lords Philips' and Walker's view (at [159] above), the *Belmont*

principle would have applied to prevent the knowledge of Stojevic from being attributed to the company were the company to sue Stojevic for breach of duty. I quote from Lord Scott's speech at [109] (but see also Lord Mance's view at [229] quoted at [157] above):

> It is noteworthy that there appears to be no case in which the 'sole actor' exception to the *Hampshire Land* rule has been applied so as to bar an action brought by a company against an officer for breaches of duty that have caused, or contributed to, loss to the company as a result of the company engaging in illegal activities. I can easily accept that, for the purposes of an action against the company by an innocent third party, with no notice of any illegality or impropriety by the company in the conduct of its affairs, the state of mind of a 'sole actor' could and should be attributed to the company if it were relevant to the cause of action asserted against the company to do so. But it does not follow that attribution should take place where the action is being brought by the company against an officer or manager who has been in breach of duty to the company.

162 In *Lim Leong Huat v Chip Hup Kee Construction Pte Ltd* [2009] 2 SLR(R) 318, the plaintiff sought to add the defendant company's managing director as an additional defendant to the plaintiff's action alleging that the company and the director had conspired unlawfully to cause the plaintiff loss. The managing director was allegedly the controlling mind of the company. The High Court allowed the application on the basis that the managing director and the company were, in law, separate legal entities and therefore capable of conspiring with each other (at [30]). Again, this is not a case involving a company bringing a claim against its director. However, *dicta* in that case support the redress-liability distinction as the explanation for when the *Belmont* principle operates. Andrew Ang J opined that where the company seeks redress from a director as a "victim" of a conspiracy involving the director, the *Belmont* principle operates to preclude the director's conduct or knowledge being attributed to the company so as to render the company a co-conspirator (at [22]–[23]):

> … *Belmont Finance (No 1)* makes it clear that an important threshold question is whether the company is a victim of the alleged conspiracy …
>
> In other words, where the company is a *victim* of an alleged conspiracy of its directors and sues its directors for breach of duties, the company does not become a co-conspirator with its directors just because its directors are the conspirators … The rationale underlying such an interpretation is that it prevents the company's errant directors from otherwise escaping liability by contending that, as co-conspirator, the plaintiff tortfeasor company cannot sue the errant tortfeasor directors for damages resulting from the directors' conspiracy.

Andrew Ang J's observations were echoed by the High Court in *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda and another suit* [2014] 2 SLR 673 at [55]–[56].

163 Finally, I come to the decision of a supernumerary panel of the UK Supreme Court in *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No. 2)* [2015] 2 WLR 1168 ("*Bilta (SC)*"). As I have mentioned (see [144] above), the English Court of Appeal's decision in this case, *Bilta (CA)*, was cited with approval in *Ho Kang Peng*. The company in *Bilta* was in liquidation. Its liquidators commenced an action in the name of the company against its two directors, one of whom was its sole shareholder, arguing that they had unlawfully conspired with other parties to cause it loss. The directors allegedly did so by involving the company in a carousel VAT fraud, which left the company with a liability to account to the tax authorities for output VAT in excess of £38m but with no assets with which to discharge that liability. The directors applied to strike out the company's claim. One of their arguments was premised on the *ex turpi causa* doctrine: the directors contended that their own knowledge of the fraud was to be attributed to the company. The English Court of Appeal rejected this argument and held that the judge at first instance had been right in refusing to strike out the claim. The Supreme Court dismissed the directors' appeal against the Court of Appeal's decision.

164 The central and unanimous holding of the Supreme Court in *Bilta (SC)* was summarised by Lord Neuberger (with whom Lords Clarke and Carnwath agreed) at [7]:

> Both [Lord Sumption's and Lord Toulson's] judgments reach the conclusion which may, I think be stated in the following proposition. Where a company has been the victim of wrong-doing by its directors, or of which its directors had notice, then the wrong-doing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrong-doing, even where the directors were the only directors and shareholders of the company, and even though the wrong-doing or knowledge

> of the directors may be attributed to the company in many other types of proceedings.

165 This proposition is a clear statement that the *Belmont* principle applies even to one-man companies, albeit when the company is in liquidation. Their Lordships in *Bilta (SC)* offered two possible ways of characterising this proposition. According to Lord Mance (with whom Lords Neuberger, Clark, Carnwath, Toulson and Hodge agreed on this point: *Bilta (SC)* at [9] and [191]), the question of attribution is always an open one. Whether or not it is appropriate to attribute a director's act, knowledge or state of mind to a company in a given claim must depend on the nature and factual context of the claim in question: *Bilta (SC)* at [37]–[44]. As Lord Neuberger put it (at [9]):

> … [I]t seems to me that [the *Belmont* principle] is not so much an exception to a general rule as part of a general rule. There are judicial observations which tend to support the notion that it is, as Lord Sumption JSC says …, an exception to the agency-based rules of attribution, which is based on public policy or common sense, rationality and justice. … However, I agree with Lord Mance JSC's analysis … that the question is simply an open one: whether or not it is appropriate to attribute an action by, or a state of mind of, a company director or agent to the company or the agent's principal in relation to a particular claim against the company or the principal must depend on the nature and factual context of the claim in question.

Lord Mance (at [41]) traces the origin of this view back to Lord Hoffmann in *Meridian*, who "made clear" that "the key to any question of attribution is ultimately always to be found in considerations of context and purpose". In a similar vein, I too read *Meridian* as standing for a broader concept of bearing in mind the substantive purpose for invoking rules of attribution: see [142] above.

166 On the other hand, Lord Sumption took the narrower view that the *Belmont* principle was better regarded as an exception *only* to the agency-based rules of attribution, *ie*, only to the rules of attribution in the second set of Lord Hoffmann's rules of attribution: see [140] above. That is why Lord Sumption

refers to it as the breach of duty "exception": *Bilta (SC)* at [71]. The basis of the exception is public policy, or as Lord Neuberger paraphrased it, "common sense, rationality and justice": *Bilta (SC)* at [9]. The policy in question can be readily discerned: to allow a director to rely on his own turpitude in resisting a claim by the company in respect of a breach of duty involving that turpitude would undermine the very reason and utility of that duty.

167 Inherent in Lord Sumption's characterisation of the *Belmont* principle as an "exception" only to "agency-based rules" of attribution is a desire to keep the principle within definable bounds for the sake of certainty in articulation and clarity in analysis. These values are undoubtedly desirable. Nevertheless, I prefer the view taken by Lord Mance and the rest of their Lordships. In my view, Lord Sumption's view of the *Belmont* principle as an exception is too narrow, insofar as that view confines the principle's operation only to the second set of Lord Hoffmann's attribution rules: see [140] above. In each of the cases I have discussed which involve one-man companies, the turpitude of the director could have been attributed to the company under the first set of Lord Hoffmann's attribution rules as well, *ie*, the primary, corporate, rules of attribution. Thus, in *Belmont* itself, the director's wrongdoing had been performed under board approval. In *A-G's Ref (No 2 of 1982)*, the two directors, as the companies' only two shareholders, may be regarded as having informally approved their own scheme to misappropriate the company's funds. This being the case, it is conceptually more accurate for the *Belmont* principle to be described as part of the approach which takes the question of attribution to be an open one that is always rooted in the context and purpose of the claim in which that question arises.

168 At a fundamental level, however, it seems to me important to appreciate that Lord Sumption's view shares the same normative roots as Lord Mance's,

namely, Lord Hoffmann's idea in *Meridian* that the purpose for which attribution is relevant is all-important. Thus Lord Sumption observes that the concept of a breach of duty "exception" is a "valuable tool of analysis, but it is no more than that". His Lordship then goes on to say at [92]–[93] of *Bilta (SC)*:

> … Another way of putting the same point is to treat it as illustrating the broader point made by Lord Hoffmann in *Meridian* … that the attribution of legal responsibility for the act of an agent depends on the purpose for which attribution is relevant. Where the purpose of attribution is to apportion responsibility between a company and its agents so as to determine their rights and liabilities to each other, the result will not necessarily be the same as it is in a case where the purpose is to apportion responsibility between the company and a third party.
>
> This makes it unnecessary to address the elusive distinction between primary and secondary victimhood. That distinction could arise only if the application of the breach of duty exception depended on where the loss ultimately fell, or possibly on where the culpable directors intended it to fall. If, however, the application of the breach of duty exception depends on the nature of the duty and the parties as between whom the question arises, the only question is whether the company has suffered any loss at all.

169 Having reviewed these authorities, I have no hesitation in agreeing with Lord Neuberger's statement of the rule in *Bilta (SC)* at [7] (see [164] above). I return to the distinction between the functional purpose and the substantive purpose of the rules of attribution which I drew at the beginning of this discussion: see [141]–[143] above. The authorities make it clear that as between the two, the substantive purpose is the logically anterior. One must first consider the nature of the claim which is brought, and the nature of the rights and liabilities to be determined, before deciding the applicable rule of attribution. Where a company claims that those who wholly own and control the company are in breach of duty to the company, the turpitude of the defendants will not be attributed to the company such that the company's claim is defeated by the *ex turpi causa* doctrine.

170 Of course, the elephant in the room remains: what about the theoretical objection that in the case of a one-man company, there is a complete identity of interests between the director-shareholders and the company? As I have mentioned at [83] above, there is no distinction in fact between ownership and control in such a company and therefore no real principal-agent problem. Can it sensibly be said that the acts and knowledge of its sole director-shareholder will not be attributed to the company if the company were to sue the director for breach of duty?

171 It may be tempting to corral the elephant by suggesting that the answer lies in the traditional anthropomorphic view of the company as an independent person, *ie*, by holding that there *always* exists a company "as such", separate from its members, to be protected. But the modern law has moved away from that idea. Lord Hoffmann famously stated in *Meridian* at 507A that "[t]here is in fact no such thing as the company as such, no *ding an sich*, only the applicable rules." The result, in Lord Hoffmann's view, is that "[t]o say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company" (at 507A). The transparency and boldness of this statement will not be lost on the careful reader: it is an assertion of the brutal fact that one must simply look to the rules which the courts have fashioned to decide what counts as the act of a company. Consequently, the only question is whether those rules are sound. This may be theoretically problematic, but at least the source of the problem is clear. Lord Sumption describes it in the following terms in *Bilta (SC)* at [66]:

> A natural person and his agent are autonomous in fact as well as in law. A company is autonomous in law but not in fact. Its decisions are determined by its human agents, who may use that power for unlawful purposes. This gives rise to problems which do not arise in the case of principals who are natural persons.

172 Therefore, is the *Belmont* principle, as refined by the UK Supreme Court in *Bilta (SC)*, a sound principle? In my view, it is. It effectively addresses a specific problem arising from abuse of directors' powers, that is, it prevents an errant director from relying on his own turpitude to avoid being held accountable for his acts or knowledge. It also draws a valid distinction between cases in which a company seeks redress against the director and cases in which a third party seeks to hold the company liable. And it enables external administrators of a company (whether liquidators or receivers) to hold the company's directors to a minimum standard of commercial morality, which is in the public interest. That is as much the case for a solvent company as it is for an insolvent company.

173 Having considered the applicable law, I turn now to apply it to the facts.

Analysis and decision

174 My findings of fact necessarily entail that both shareholders of Hocen knew that the directors of Hocen engaged and funded Crossbridge to procure business for Hocen from ZPMC by corruption and approved the directors' conduct, albeit informally. That result follows from the nature of Hocen, because its shareholders *are* its directors. As the plaintiff and the defendant were acting in concert in this corrupt scheme, Hocen was effectively a one-man company, like the companies in *A-G's Ref (No 2 of 1982)* ([152] *supra*), *Stone & Rolls* ([155] *supra*) and *Bilta (SC)* ([163] *supra*).

175 Yet, as I have shown from the cases, the *Belmont* principle applies even to companies like Hocen. By that principle, the plaintiff's and the defendant's corrupt scheme cannot be attributed to Hocen in a claim by Hocen against them

for breach of duty in involving Hocen in that scheme. That is because Hocen is seeking redress against its directors for wrongs they have committed against Hocen.

176 On one view, however, it could be argued that unlike the companies in *Belmont* ([150] *supra*), *A-G's Ref (No 2 of 1982)* ([152] *supra*) and *Bilta (SC)* ([162] *supra*), Hocen did not actually suffer "loss". Quite the contrary: the bribes which the parties caused Hocen to pay yielded substantial profits for Hocen (see [89] above). I do not accept that as a valid distinction. I have held on the authority of *Ho Kang Peng* that the profits which Hocen earned through corruption (and the opportunity to earn those profits by those means) cannot be regarded as a corporate benefit which the defendant acquired for Hocen: see [94] above. Accordingly, there remains a breach of duty sufficient to invoke the *Belmont* principle against the defendant. The result is that Hocen, and therefore the plaintiff (to whom Hocen assigned its cause of action), is not barred from proceeding against the defendant just because Hocen's director-shareholders informally assented to this corrupt scheme. To be clear, I say nothing about a case in which the company cannot in any sense be regarded as having suffered loss or detriment.

177 It follows that the defendant cannot rely on the *ex turpi causa* doctrine to defeat the claim in this case. These suits cannot be regarded as resting on Hocen's own wrong because the *Belmont* principle prevents the defendant from attributing his turpitude to Hocen. For the same reasons, the plaintiff's turpitude is not attributable to Hocen either.

Two points by way of postscript

The Duomatic *principle*

178 Before concluding, I turn to deal with two cases whose reasoning appears to be inconsistent with the analysis I have adopted. Essentially, the inconsistency arises because those cases appear to take the view that a company may be precluded from bringing a claim against its director for breach of duty if the breach was approved by the board or by the shareholders. The first of these cases is *Ho Kang Peng*. As I mentioned at [146] above, the Court of Appeal suggested that the director in that case would have "protected himself" from a future claim by the company if he had obtained board approval before signing the impugned agreements. However, this was *obiter dicta* as no board approval was in fact obtained in that case. So I need say no more about it.

179 The second case is *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 ("*Yong Kheng Leong*"). In that case, a company sued a director for having caused the company to pay the director's wife a salary over a period of 17 years when she had done no work for the company to earn that salary. In that case too, the only two shareholders of the company were its only two directors (at [26]). The director argued that the other shareholder could be taken to have impliedly assented to the salary payments such that the company could no longer seek to avoid the payments and recover them from the defendant director (at [25]). It was true that the director had made

no attempt to conceal the salary payments from management or the other shareholder. However, on the facts of that case, the Court of Appeal held that the other shareholder's conduct amounted, at most, to some degree of forbearance rather than to implied assent (at [26]). In order for the company to be bound such that it could no longer recover the salary from the director, there must be a sufficient basis for the court to infer that: (a) there was an agreement between the shareholders with regard to the impugned act; and (b) what the key contents of that agreement were (at [25]).

180 It does not appear that the *Belmont* principle or any of the cases in that line of authority were cited to the Court of Appeal in *Yong Kheng Leong*. The court's in-principle acceptance of the argument from implied assent must be considered in that light. To be specific, counsel for the director in that case, Dr Tang Hang Wu, presented the implied assent argument in reliance on "the principle [in *Re Duomatic Ltd* [1969] 2 Ch 365] … where all the shareholders, particularly in a closed private company with a track record of informality in their deals, assent to a particular course of dealing, even in relation to the disposal of assets, this may be effective to bind the parties" (at [25]). This is a well-established principle which falls under the primary rules of attribution, *ie*, the first set of the rules of attribution which Lord Hoffmann identified in *Meridian Global*: see *Bilta (SC)* at [187]. It was also a principle which the court in *A-G's Ref (No 2 of 1982)* decided specifically to override on the authority of *Belmont*: see [152] above. In other words, the *Belmont* principle does not deny or contradict the *Duomatic* principle. Instead, to borrow Lord Sumption's analytical language, it constitutes an "exception" to it, just as it is, on his view, an exception to the agency-based rules of attribution which would ordinarily apply: see [167] above. As Lord Neuberger said in *Bilta (SC)* at [7], the *Belmont*

principle applies "even though the wrong-doing or knowledge of the directors may be attributed to the company in many other types of proceedings".

181 Hence, it is appropriate to read *Yong Kheng Leong* as saying that the company could have met Dr Tang's argument with the *Belmont* principle. The company could have argued that even if the other shareholder had impliedly assented to the payments, the *Belmont* principle would operate to preclude the director from attributing that shareholders' assent to the company. This argument, of course, was not raised in *Yong Kheng Leong*. There was also no need for the court to consider this argument because, on the facts, the court found that there was in fact no implied assent. Accordingly, there is no real inconsistency between my analysis and the decision in *Yong Kheng Leong*.

Unclean hands

182 I have thus far focused on the position of Hocen. That is because at the centre of the *ex turpi causa* analysis is the issue of whether the defendant's turpitude can be attributed to Hocen (see [133] above). It is convenient at this juncture to consider the plaintiff's position and to deal with a point unrelated to attribution. It could be said that the plaintiff has brought these suits with unclean hands and that that is a sufficient reason not to hold the defendant liable in equity. That point can be disposed of quickly for two reasons.

183 The first reason is that, although the plaintiff is, on my finding, in breach of duty to Hocen, the plaintiff does not assert in these suits a personal cause of action vested in him. He asserts in these suits a corporate cause of action initially vested in Hocen and which the liquidators have assigned to him. Hocen, as a company, does not have unclean hands because the acts of its directors cannot be attributed to it (for the reasons set out at [174]–[177] above).

184 The second reason is that, even if the allegation of unclean hands is available as against the plaintiff, I have found the defendant to have breached not only his fiduciary duties but also his statutory and common law duties. The defence of unclean hands may defeat a claim in equity but cannot defeat a statutory or a common law claim.

Judgment

185 In light of my findings in each of the two suits, I have entered judgment: (a) requiring the defendant to pay the plaintiff the full sum which the plaintiff claims in that suit; and (b) requiring the plaintiff upon receiving that sum from the defendant, to pay the defendant back half of that sum.

186 As for costs, the claim and the counterclaim have succeeded in each suit. Therefore, the event in both suits goes in both directions. Further, the issues raised by the counterclaim – about the plaintiff's own knowledge and culpability for the Payments – were relevant not only to the counterclaim but also to the claim, going to an aspect of the defendant's defence. Because the facts and the law on the claim and the counterclaim were indistinguishably bound up with each other, and because the events in both suits negate each other, I have exercised my discretion to make no order as to costs on both the claim and the counterclaim in both suits.

187 There is another reason for my decision to make no order as to costs. This has been utterly pointless litigation. The plaintiff and the defendant each had and have an equal interest in Hocen. While Hocen was trading, they divided the considerable profits from Hocen's business with ZPMC between themselves in accordance with Hocen's corporate constitution and with the Act. The plaintiff and the defendant now have an equal interest in Hocen's substantial

liquidation surplus. If Hocen had not assigned its causes of action to the plaintiff, the result of my findings would be (putting on one side the issue of costs) that each defaulting director would pay 50% of the Payments to the liquidators who would then immediately return the same money to the same individuals as shareholders together with 50% of the liquidation surplus which the liquidators already hold.

188 The liquidators' decision to assign Hocen's cause of action underlying these two suits to the plaintiff has changed nothing. That is because the plaintiff paid nothing for the assignment and, in return, promised under cl 2.4 of the assignment to pay over to the liquidators 50% of any sum which he recovers from the defendant in these suits. Further, by cl 2.4(iv) of the assignment, the plaintiff authorised the liquidators to pay that 50% to the defendant alone.

189 The plaintiff's rights and obligations under the assignment are subject only to the following provision on costs: (a) the plaintiff is allowed to retain any sum which the defendant pays to the plaintiff pursuant to a costs order by the court; and (b) the plaintiff is allowed to retain out of the principal sum which he recovers from the defendant in these suits a further sum equivalent to 33% of any costs award. The purpose of this proviso is to allow the plaintiff to recover 133% of any costs award which the court might make at the conclusion of the litigation as an approximation of indemnity costs. I have found that the plaintiff is not entitled even to an award of party and party costs by way of a partial indemnity for the costs which he has incurred in pursuing this litigation.

190 The outcome of this litigation, therefore, is a pointless merry-go-round of money. Under my judgment, the defendant must pay over to the plaintiff 100% of the Payments. Also under my judgment, the plaintiff must immediately pay 50% of what he has just received back to the defendant. Under cl 2.4 of the

assignment, the plaintiff must pay the other 50% of what he has just received without deduction (there being no award of costs in the plaintiff's favour) to the liquidators. Under cl 2.4(iv) of the assignment, the liquidators will then pay over to the defendant the 50% which they have just received from the plaintiff.

191 The pointlessness of this litigation is another reason I have made no order as to costs.

Vinodh Coomaraswamy
Judge

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