Ho Kang Peng *v* Scintronix Corp Ltd (formerly known as TTL Holdings Ltd) [2014] SGCA 22

Case Number	: Civil Appeal No 24 of 2013
Decision Date	: 30 April 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; V K Rajah JA
Counsel Name(s)	: Alvin Tan Kheng Ann (Wong Thomas & Leong) for the Appellant; Tony Yeo and Fong King Man (Drew & Napier LLC) for the Respondent.
Parties	: Ho Kang Peng — Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)

Companies – Directors – Breach of duty

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 2 SLR 633.]

30 April 2014 Judgment reserved

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This appeal arises from the decision of the High Court in Suit No 207 of 2009 ("the Suit"). The appellant, Ho Kang Peng ("the Appellant"), who at the relevant time was the chief executive officer ("CEO") and a director of the respondent, TTL Holdings Limited ("the Company"), was found liable for the breach of various fiduciary duties owed to the Company. The liability arose from certain payments made by the Company to a third party which the High Court found to be unauthorised. The key issues in this appeal concern the purpose for which the payments were made, whether they were duly sanctioned by the Company, and whether the Company is precluded from claiming against the Appellant because it was allegedly equally at fault.

Facts

Parties to the dispute

2 The Company is a publicly listed company on the Stock Exchange of Singapore ("SGX") and is engaged in the manufacture and supply of moulds and finished plastic components.

3 The Appellant was the CEO of the Company from 1 November 2005, an executive director of the Company from 24 November 2005 and the executive chairman of the Company from 23 November 2007. He stepped down as the CEO and executive chairman on 28 March 2008, but remained as a non-executive director of the Company until 23 October 2008.

Background to the dispute

4 In the Suit, the Company claimed against the Appellant for breach of fiduciary, statutory, and contractual duties as a director, and against one Chow Weng Fook ("Chow") for breach of duties of fidelity and contractual duties as an employee. The claims against Chow were dismissed by the High Court judge ("the Judge"). However, the Appellant was found to have breached his fiduciary duties by

failing to seek the approval of the Company's board of directors ("the Board") for the remuneration packages of certain contracted advisors and by authorising payments to a Taiwanese company known as Bontech Enterprise Co Ltd ("Bontech"). These payments were made pursuant to a supposed consulting agreement between the Company and Bontech for unspecified services ("the Bontech Agreement"). The present appeal relates only to the decision of the Judge that the Appellant was in breach of his fiduciary duties by authorising the Payments to Bontech pursuant to the Bontech Agreement.

5 The Appellant signed the Bontech Agreement on behalf of the Company on 1 August 2006. It was to operate for a year. The Bontech Agreement was in title a "Consulting Agreement" and the relevant terms are as follows:

> **1**. **Retention of Consultant**; Services to be performed. CLIENT hereby retains CONSULTANT for the terms of this Agreement to provide the consulting services set forth in Schedule A for CLIENT (Services).
>
> ...
>
> **2**. **Payment.** CLIENT shall pay CONSULTANT for work done for that month through Cheque payment. Payment shall usually be made on a quarterly basis for United States Dollar Fifteen Thousand and Five Hundred (USD15,500) equivalent. …
>
> ...
>
> **4**. **Term and Termination.**
>
> (a) Unless terminated at an earlier date in accordance with Section 5 (b), this Agreement shall commence as of the date first written above and shall continue for one year.

6 It is common ground that there was in fact no "Schedule A" to the Bontech Agreement, a schedule which was supposed to set out the scope of Bontech's services to be provided to the Company. Notwithstanding the fact that no services were rendered by Bontech to the Company, the latter nevertheless made eight payments totalling S$169,644.97 to Bontech purportedly under the Bontech Agreement ("the Payments"). The Payments were made in United States dollars and on each occasion pursuant to payment vouchers signed by the Appellant. No invoices or receipts were issued by Bontech for the Payments. The details of the Payments are as follows:

S/N	Date of Payment	Description	Amount (S$)
1	4 August 2006	Professional fee from August 06 – October 06, US$15,500	24,484.25
2	3 November 2006	Professional fee from November 06 – December 06, US$15,500	24,311.75
3	31 January 2007	Professional fee from November 06 – January 07, US$15,500	23,939.75
4	25 April 2007	Professional fee from February 07 – April 07, US$16,000	24,344.00
5	26 July 2007	Professional fee from May 07 –July 07, US$16,062.12	24,616.00

6	14 November 2007	Professional fee from August 07 – October 07, US$16,000	23,192.00
7	30 November 2007	Out-of-pocket money, US$500	724.75
8	29 February 2008	Professional fee from November 07 – January 08, US$16,996.43	24,034.47
Total sum of the payments to Bontech			**169,644.97**

7 The Payments were allegedly handed over to one of the Company's Shanghai-based directors, Oh Chye Huat ("Oh"). The Appellant's evidence in this regard was that Oh had passed the Payments over to an individual based in Shanghai known only as "Mr Lee", in exchange for Mr Lee's undertaking to procure business worth RMB$4m monthly or approximately RMB$50m annually from a major client of the Company known as Pioneer Technology (Shanghai) Co Ltd ("Pioneer"), a company incorporated in China.

8 It is not disputed that there was no formal resolution of the Board authorising the Appellant to enter into the Bontech Agreement or to make the Payments thereunder. However, at trial and in this appeal, the Appellant drew the attention of the court to a resolution dated 22 March 2005 passed by the Company's remuneration committee ("the RC Resolution"), which approved a total monthly payment of RMB$40,000 for "outstation allowances", to be paid and split amongst three directors based in Shanghai, namely Sze Man Kuen ("Sze"), Lau Che Hung ("Lau"), and Oh. According to the Appellant, these outstation allowances were meant for onward payment to Mr Lee so as to procure the Pioneer business.

9 The position of the Company was that it was not aware of the Bontech Agreement and the Payments purportedly made thereunder until the publication of an internal audit report dated 26 September 2008 ("the Audit Report"), six months after the Appellant stepped down as the CEO and executive chairman of the Company. The Audit Report noted that the Appellant had signed the Bontech Agreement which did not specify the nature of the consultancy services to be provided, and that the Company continued to make payments to Bontech even after the Bontech Agreement expired.

10 Accordingly, on 20 May 2009, the Company commenced the Suit against the Appellant. It claimed that the Appellant failed to act *bona fide* in the best interest of the Company and to ensure that the Company's affairs were properly administered. It relied on the fact that the Appellant had signed the Bontech Agreement for unspecified services, paid sums to Bontech without receiving invoices and without obtaining Board approval, and continued to make such payments even beyond the expiry of the Bontech Agreement. The Appellant's defence was that the Bontech Agreement and the payments made thereunder were for the purposes of procuring business from Pioneer, and that such payments had been approved by the Company's management even before the Appellant became the CEO of the Company.

The decision below

11 The Judge in his grounds of decision ("the GD") found that the Bontech Agreement was fictitious as no consultancy services were in fact provided. It was therefore incumbent on the Appellant to show that the payments were made for some alternative purpose which was in the

Company's interests.

12 The Judge rejected the Appellant's defence on the ground that there was insufficient evidence to support the Appellant's claim that the Bontech Agreement and the Payments were meant to procure the Pioneer business. In particular, he took issue with the Appellant's version of events as the Company's sales figures to Pioneer did not substantiate the Appellant's assertion; neither did the remuneration accounts of the three Shanghai-based directors nor the dearth of evidence surrounding the receipt of the Payments and the purported recipient, Mr Lee, help the Appellant's case. As a result, the Judge found that the Appellant had failed to show that the Payments were made in the Company's best interests and therefore that he had breached his fiduciary duty to the Company.

The parties' submissions

13 Before us, it is still common ground that there was neither any "Schedule A" to the Bontech Agreement nor any actual "consultancy services" performed by Bontech for the Company pursuant to the Bontech Agreement. The Appellant maintains that the payments were made for the purpose of procuring the Pioneer business for the Company, and that the Company's management was at all material times aware of the Payments. He argues that the Judge erred in discounting the evidence adduced regarding the practice of paying sums to Mr Lee to procure the Pioneer business, the correlation between the Payments and the Company's sales figures with Pioneer and the remuneration records of the Shanghai-based directors, and the reasons which led to the creation of the Bontech Agreement.

14 The Company's case, on the other hand, is that once it was established that the Appellant had signed a sham agreement for non-existent services and made payments thereunder without formal Board authorisation, the burden shifted to the Appellant to prove that he had acted in the best interest of the Company. The Company argues that the Judge was correct in finding that the evidence adduced by the Appellant was inconclusive as to the purpose of the Bontech Agreement and the Payments, and that the Appellant has therefore failed to satisfy his evidential burden. In the alternative, the Company avers that even if it could be proven that the Bontech Agreement and the Payments were meant for procuring the Pioneer business for the Company, such payments were improper and deceptive, and therefore could not have been in the best interests of the Company.

Issues in this appeal

15 The appeal gives rise to the following issues for our consideration:

(a) What was the purpose of the Payments made under the Bontech Agreement.

(b) Whether by entering into the Bontech Agreement and making the Payments thereunder, the Appellant acted honestly and *bona fide* in the interests of the Company.

(c) Whether the Company is precluded from claiming against the Appellant on account of its knowledge of the purpose of the Bontech Agreement and the Payments, and/or its approval and participation in the same.

In relation to (b), we would observe that the Judge in the GD and the parties in their respective submissions have used the phrase "best interests of the Company" interchangeably with "interests of the Company" *simpliciter*. However, as we do not think that anything significant is added by the insertion of the adjective "best" before the noun "interests", we will hereinafter proceed without the use of the adjective. Ultimately, whether a decision or act is in the interests of the company would

be determined by the circumstances of the case.

The purpose of the Bontech Payments

16 The Judge held that the Bontech Agreement was fictitious and that the Payments were not made for any actual consultancy services. However, he declined to make a finding regarding the purpose of the Bontech Agreement and the Payments. Since the specific issue of the Appellant's liability for facilitating the Bontech Agreement and the Payments is now before us on appeal, it is necessary that this court makes a finding in relation to the purpose for which the Appellant so acted. In the circumstances, this court is entitled to examine the evidence adduced at trial, draw the appropriate inferences and make its findings. In our view, the relevant evidence can be analysed under the following heads: (1) evidence concerning the genesis of the Payments, and whether it points to a consistent practice by the Company for any particular purpose; (2) sales figures between the Company and Pioneer, and whether these correspond with the incidence of the Payments; (3) the remuneration records of the Shanghai-based directors; and (4) the gaps in the Appellant's evidence as identified by the Judge, and whether these detract from the Appellant's case as to the purpose of the Payments.

The genesis of the Bontech Payments

Oh's evidence

17 Evidence was given by Oh, who was a director of the Company before the Appellant joined the Company as its CEO in November 2005. Oh was stationed in Shanghai throughout the relevant period when the RC Resolution and the Bontech Agreement were in effect. He claimed to be the person who personally handed over the moneys he received from the Company to Mr Lee.

18 Oh's evidence was that when the Company first started its operations in Shanghai, it was approached and offered an arrangement to pay RMB$120,000 per quarter to Mr Lee in exchange for him procuring RMB$4m worth of business each month for the Company, or about RMB$50m per year. Oh claimed that he conveyed the offer to the then management of the Company, who agreed to it. It was not clear from Oh's oral and affidavit evidence whom this management comprised, but a consistent figure in Oh's account was the former CEO of the Company, one Quek Tiang Yew ("Quek"). The gist of Oh's evidence was that he had obtained informal oral approval from at least Quek.

19 According to Oh, the payments of RMB$120,000 per quarter to Mr Lee commenced in mid- to end-2003. Oh said that later the payments to Mr Lee took the form of RMB$40,000 in monthly outstation allowances paid by the Company to be divided amongst Lau, Sze and Oh. These allowances were given formal approval through the RC Resolution. Oh further explained that after Sze and Lau left their Shanghai postings in mid-2005 and early 2006 respectively, the outstation allowance arrangement was discontinued because he did not want to bear the sole responsibility for the taxes due on the whole RMB$40,000 paid per month to Mr Lee. Oh claimed to have explained the matter to the Appellant, who at that time had just taken over as CEO of the Company. From August 2006, Oh's outstation allowance was replaced by the quarterly sums of RMB$120,000 which he received pursuant to the Bontech Agreement and which he passed on to Mr Lee.

Agnes Leong's evidence

20 Another important witness was one Agnes Leong ("Agnes"), who joined the Company as its group human resources and admin manager in November 2000 and worked in that capacity until her promotion to group human resources director in July 2008, and later the director of corporate

communications. She left the Company in 2010. Her evidence was given by way of a statutory declaration ("SD") which was recorded at the Company's request before she left its employment, as well as on the witness stand in court. Agnes stated in her SD that, after the Appellant had stepped down as CEO of the Company, the Bontech Agreement became the subject of discussion at a meeting of the Company's audit committee on 15 October 2008 ("the AC Meeting"). The minutes of the AC Meeting, which were available in evidence, recorded the Appellant as having been invited to the meeting and informed the meeting that the Bontech Agreement and the Payments were a continuation of "the previous management marketing strategies to make such payment in order to secure the business from Pioneer", that "[i]nitially such payments were made through a special allowance to Executives in China", and that "Mr Chow and Mr Ng, the previous board members were aware of the arrangement, as they had been informed verbally". "Mr Ng" was a reference to Ng Hock Ching ("Ng"), an executive director of the Company from September 2005 to April 2007. Agnes was recorded in the minutes as having informed the meeting that "there was a resolution passed for payment of overseas allowances to the Executives in China". When cross-examined on this statement, Agnes stated that she was referring to the RC Resolution, and that she knew that the RC Resolution was meant to authorise payments to procure the Pioneer business. She stated that she knew this because Quek had told her about it.

21 Agnes also told the court that after the operative period of the RC Resolution had expired, the Company continued to make payments to Mr Lee through the Shanghai-based directors. She claimed to have raised this at a Board meeting (although it was not recorded in any minutes), and that this had caused a search for a new mode of making the payments to Mr Lee:

> A ---I remember that subsequently they pay---according to this [RC Resolution], they're supposed to pay until … December or something like that for a period of a few months. Then subsequently when this period lapse, China continue to pay. So when I was doing their tax, er, equalisation, I picked up for the accounts that "Aye, how come there's this additional payment?" and I raised this up during one of the Board meeting.
>
> Q With who?
>
> A During the Board meeting, I think I raised it up. I do not know whether it is recorded in any minutes. And that was the reason how they rectify using a third party instead of paying outstation allowance because they were saying that even---if you pay outstation allowance, all these directors have to pay tax in China. So besides this amount of money, we still have to pay tax. … So in the end, they say that maybe we should, er, think of other arrangement.

This accords somewhat with Oh's evidence that Bontech was roped into the payment arrangement because of tax concerns raised by Oh.

22 We note that the Judge did not make any mention of Agnes' evidence in the GD with regards to the issues which are now before us on appeal. However, Agnes' evidence is in our view significant because she was a long-serving staff of the Company, having worked under three successive CEOs, including the Appellant. She was therefore able to give an account of the discussions and practices of the Company prior to the Appellant taking over the reins of the Company, as well as the discovery and investigation of the Bontech Agreement and the Payments after the Appellant had left the Company. Her account was consistent and she was for all intents and purposes an independent witness.

23 We also note that the Appellant's account as to the purposes of the Bontech Agreement and the Payments was one which he had consistently put forward ever since the Company first started

inquiring into the matter in September 2008. In an e-mail dated 25 September 2008, the Company's then group financial controller asked the Appellant to explain the Bontech Agreement and the accounts showing the payments made to Bontech. The Appellant replied the next day, stating:

> The payment was for marketing expenses (Commission paid) to secure our Pioneer business in Shanghai. It was started by the previous management. I was reported [*sic*] that Mr Sze and Mr Oh negotiated the deal during their time, it was paid as a "special allowance" through the three directors in China. Namely, Mr Sze Mun Keong, Mr Lau Chee Hong and Mr Oh Chye Huat. Since the three directors eventually all left the company, the payment then changed to paying through Bontech.

This e-mail correspondence was exhibited in an affidavit of the Company's main witness, an executive director named Tan Kee Liang ("Tan"). The Appellant gave the same explanation when he was questioned about the Bontech Agreement and the Payments at the AC Meeting on 15 October 2008 (see [20] above).

Sales figures and dates of payments

24 Before the court below, the Company presented evidence of its sales to Pioneer from 2002 till 2010 through a report prepared by its expert witness, Lee Dah Khang ("the Sales Report"). The Sales Report contained two sets of sales figures — one obtained directly from Pioneer's finance department ("the Pioneer Sales Listing"), and the other compiled after the Pioneer Sales Listing figures had been subject to various auditing procedures ("the Audited Pioneers Sales Figures"):

FY under review	Total Sales to Pioneer entities (RMB$ and RMB$ equivalent)		
	The Pioneer Sales Listing	The Audited Pioneer Sales Figures	Variance
2002	9,333,135	3,700,000	5,633,135
2003	29,778,977	31,200,000	-1,421,023
2004	28,577,987	35,100,000	-6,522,013
2005	46,958,804	39,000,000	7,958,804
2006	50,898,926	31,300,000	19,598,926
2007	50,913,820	41,500,000	9,413,820
2008	48,739,782	43,800,000	4,939,782
2009	13,407,408	12,600,000	807,408
2010	5,441,649	5,200,000	241,649

25 We note that both sets of figures showed a significant increase between 2002 and 2003 and a drop between 2008 and 2009, coinciding with the evidence as to the commencement of payments to Mr Lee and the cessation of such payments (see [19] above). However, we also note that the Pioneer Sales Listing figures exceeded the allegedly promised RMB$50m mark only in 2006 and 2007, and never reached this mark at all in the Audited Pioneer Sales Figures presented to the Court. Significantly, the drop in both sets of figures in 2009 coincided with the advent of the global financial crisis in late 2008, thus making it difficult to determine whether the cessation in payments to Mr Lee

under the Bontech Agreement was causally linked to this decrease in sales to Pioneer. Tan, the Company's executive director, attributed this fall in sales figures to poor business generally in 2009 and the fact that the Company had moved a chunk of its operations to Vietnam. Mr Lim Han Seng ("Lim"), who took over from Oh as the general manager of the Company's Shanghai operations, also gave evidence that the 2008 financial crisis had caused the Company's business with all its customers, including Pioneer, to decline.

26 Although the rise in sales figures from 2003 to 2008 is very significant, it is hard to say that these figures alone are conclusive of the link between the Payments and the Company's level of business with Pioneer. Moreover, in none of the years had the sales to Pioneer in fact achieved the annual target of RMB$50m; even based on the figures furnished by Pioneer, the annual target sales to Pioneer was only achieved in two years, namely 2006 and 2007. We are therefore in no position to find that the Judge was wrong to think that the sales figures were inconclusive as to the purposes of the Bontech Agreement and the Payments.

Remuneration records

27 On the other hand, we find that the remuneration records of the Shanghai-based directors lend some support to the Appellant's account of the transition and relationship between the outstation allowance arrangement and the subsequent Bontech Agreement and the Payments. First, the monthly outstation allowance of RMB$40,000 corresponds with the alleged quarterly payments to Mr Lee of RMB$120,000. RMB$120,000 was also roughly equivalent to the quarterly payments of US$15,500 stipulated in the Bontech Agreement (see [5] above). Secondly, the signing of the Bontech Agreement came a few months after Lau left the Shanghai office in early 2006. This makes it possible that the Bontech Agreement was meant to replace the outstation allowances arrangement. Thirdly, Oh's remuneration records also show that in December 2005, January 2006, and February 2006, he received three increased allowances of RMB$128,500, RMB$34,000 and RMB$52,000 respectively. These were larger sums than previously received, and support Oh's claim that the burden fell wholly on him to receive the entire RMB$40,000 monthly outstation allowance after Sze and Lau left their posts in mid-2005 and early-2006 respectively. These three large sums totalled RMB$214,500 and further taking into account that Oh continued to receive RMB$14,000 each month as allowance, the moneys received by Oh during this time was equivalent to roughly six months' worth of RMB$40,000 allowances.

Gaps in the Appellant's evidence

28 The Judge took issue with a number of gaps in the Appellant's account, in particular the absence of satisfactory evidence of receipt of the Payments, the lack of details regarding the identity of the purported recipient, Mr Lee, and the inexplicably circuitous nature of the Payments. Indeed, Oh's evidence on his transactions with Mr Lee also leaves many questions unanswered. Both Oh and the Appellant claimed not to know Mr Lee's full name, address, designation, employer, or his relationship with Pioneer. Oh was apparently introduced to Mr Lee through a friend when the Company commenced its Shanghai operations in 2001, and was only able to contact Mr Lee through the person who had introduced them. In order to make payments to Mr Lee, Oh would contact the introducer who would then designate a venue for Oh and Mr Lee to meet. The payments were only made in cash because that was what Mr Lee stipulated. There were no documentary records of receipt because Mr Lee had apparently refused to sign anything.

29 In the light of this dearth of evidence, it can be understood why the Judge approached the question of the Appellant's liability from an evidential point of view, and found that the Appellant had not fulfilled the burden of establishing an affirmative defence. However, we find that the lack of

information from Oh and the Appellant about the exact identity of Mr Lee and the lack of documentation surrounding the payments to Mr Lee do not necessarily undermine the Appellant's position as to the purpose of the Payments. In fact Oh's evidence was candid and points quite clearly to the purposes and nature of the Payments. The following exchanges in cross-examination are telling:

> Q Mr Oh, do you agree that such payments are illegal?
>
> A Because it's---personally for my view, because we go there to do business, my---our main goal are to earn money.
>
> …
>
> Q Mr Oh, you're not answering my question. Are these payments proper, are these payments illegal?
>
> A Whether it's proper or not, but I feel that in China, mostly they do it this way. If not---if not we would not have any business.
>
> …
>
> Q Mr Oh, do you think it is correct practice for a listed company to pay money to get business?
>
> A If it was agreed between the partners, as I've said, if it's in China, especially in China.

No doubt, Oh's answers were really his personal perceptions regarding doing business in China which are nothing more than obvious generalisations. More importantly, Oh seemed to accept that the purpose of the Payments was to procure business for the Company.

30 The Appellant himself also made similar concessions under cross-examination which he sought to qualify immediately thereafter:

> Q … Don't you think it is wrong to pay money to get business from someone?
>
> A I did not felt [*sic*] that it was wrong because in China, this is very common for us to pay people money to procure business.

31 The Appellant then tried to explain that he was referring only to spending money on entertainment in order to build relationships which he believed was part and parcel of doing business in China. However, the fact is that the Payments were made to a third party company, Bontech, to be handed over to Mr Lee and could not have been used by the Company's staff to entertainment clients or business contacts. The Appellant's qualification in this regard is therefore difficult for us to accept.

Our finding on the purposes of the Bontech Agreement and the Payments

32 In our view, the Payments were just a continuation of the previous under-the-table payments, which were then labelled as outstation allowances, and were meant to establish personal relationships and secure business from Pioneer for the Company. All these payments (under the label of "outstation allowances" and later the Bontech Agreement) were effectively bribes. The "gaps" in the Appellant's evidence, namely the irregularity of the payment figures, the mystery surrounding Mr Lee, the absence of any documentary evidence of receipt, the circuitous nature of effecting the Payments,

and the fact that the Payments were made both before and after the expiry of the Bontech Agreement, only serve to underscore the abnormal nature of the arrangements and the Payments. The shady and undocumented way in which the Payments were effected was wholly in line with their less than proper character.

33 We also note that both the Appellant and Oh conceded on the stand that payments of this nature were meant to secure business for the Company in China (see [29]–[30] above). More importantly for our consideration in this regard is that if the Appellant was really seeking to conceal some other misuse or misappropriation of the sums paid to Bontech, it is highly improbable that he would resort to such a route, where so many queries would be apparent on the face of the transaction and he would be exposed to possible liability. The whole arrangement was too sloppy for that.

34 Looking at the matter as a whole, it is far more likely than not that the Payments under the Bontech Agreement were meant for the purposes asserted by the Appellant, *ie*, as gratuities to a third party for the procurement of the Pioneer business, and we do so hold.

Whether the Appellant acted *bona fide* in the interests of the Company

35 Under s 157 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"), a director is required at all times to act honestly, which means to act bona fide to promote or advance the interests of the company (see *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and others* [1994] 1 SLR(R) 513 at [22]).

36 As we have found that the Appellant signed the Bontech Agreement and authorised the making of the Payments so as to procure business deals for the Company, it leaves us to determine whether these actions could be said to have been done in the interests of the Company.

37 As a preliminary observation, we note that it was not the Company's case that the Appellant had acted to further his own self-interest or stood to gain something in particular from the Bontech Agreement and the Payments. In that sense, the Payments can be said to have been made in order to benefit the Company financially (at least in the short term). It is clear that the court will be slow to interfere with commercial decisions of directors which have been made honestly even if they turn out, on hindsight, to be financially detrimental (see *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 ("*Intraco (CA)*") at [30]). As stated by Lord Greene MR in *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306, directors "must exercise their discretion *bona fide* in what they consider – not what a court may consider – is in the interests of the company". It is therefore "theoretically possible for a board of directors to make a decision which is commercially ludicrous and yet act perfectly honestly" (see *Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) at para 8.36) ("*Walter Woon*").

38 However, this does not mean that the court should refrain from exercising any supervision over directors as long as they claim to be genuinely acting to promote the company's interests. First, "where the transaction is not objectively in the company's interests, a judge may very well draw an inference that the directors were not acting honestly": see *Walter Woon* at para 8.36. The test in *Charterbridge Corporation Ltd v Lloyds Bank Ltd and another* [1970] 1 Ch 62 (at 74) of "whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company", has been accepted and applied by this court in *Intraco (CA)* (at [28]). On the other hand, it will be difficult to find that a director has acted *bona fide* in the interests of the company if he "take[s] risks which no director could honestly believe to be taken in the interests of the

company": *Cheam Tat Pang and another v Public Prosecutor* [1996] 1 SLR(R) 161 at [80] ("*Cheam Tat Pang*").

39 Secondly, it seems that the requirement of *bona fide* or honesty will not be satisfied if the director acted *dis*honestly even if for the purported aim of maximizing profits for the company. In *Vita Health Laboratories Pte Ltd and others v Pang Meng Seng* [2004] 4 SLR(R) 162 ("*Vita Health*"), the plaintiff companies claimed that the defendant director had breached his duties by, *inter alia*, creating false and unrecoverable receivables purportedly due from third parties so as to create an illusion that the company was successful and profitable. While the court acknowledged the sanctity of business judgment, it made clear that immunity from suit for poor commercial decisions was meant to protect "[*b*]*ona fide* entrepreneurs and honest commercial men [who] should not fear that business failure entails legal liability", and to encourage commercial risk and entrepreneurship (*Vita Health* at [17]). On the other hand (*Vita Health* at [19]):

> A director who causes accounts to be misstated, flagrantly abuses his position and breaches his corporate duties. Being in breach of his duties to the very company itself, he cannot evade his responsibility by attempting to hide behind the cloak of corporate immunity. Apart from this, he may also face issues of liability and or indemnities apropos his fellow directors, shareholders, auditors and third parties. In appropriate cases, the cloak of corporate immunity will be readily lifted by the court. Creative accounting of a deceitful nature ought to be severely denounced as it strikes at the very heart of commercial intercourse which depends upon the integrity of company accounts and financial statements.

40 With these principles in mind, the question is whether a director who creates a sham contract and makes unauthorised and irregular payments out of the company's funds for the purpose of securing business for the company, can be said to be acting *bona fide* in the interests of the company. In our view, the answer must be in the negative. Such a director would not be acting honestly even if he claims to be furthering the company's financial interests in the short term. The " interests of the company" is not just profit maximisation. Neither is it profit maximisation by any means. It is as much in the interests of the company (comprising its shareholders) 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. Furthermore, there can be no doubt that a director who causes a company to make payments which are in effect gratuities, thereby running the unjustified risk of subjecting the company to criminal liability, is not acting in the company's interests. This is a risk which "no director could honestly believe to be taken in the interests of the company" (see *Cheam Tat Pang* at [80]). The wrong committed by the Appellant in the present case cannot be regarded as an error of judgment – it arose because he failed to exercise any judgment at all. He simply continued a highly irregular and improper practice which he understood to have been initiated by the previous management under a different form without so much as inquiring why it was made, whether it would implicate the Company, and whether proper sanction had been obtained. He had failed to exercise reasonable care. In this connection, it is pertinent to note that Lim, who took over from Oh as the general manager of the Company's Shanghai operations, said that he was unaware of the Payments and that he would not have made such payments of bribes because it would be against the law.

41 In the present case, the Appellant not only facilitated the payment of gratuities, but his actions involved concealment and deception through a sham agreement and acting without proper authorisation. In our view, no matter how profitable the yields were, the irregular acts and the deception perpetrated on the shareholders of a publicly-listed company cannot be regarded as having been in the Company's interests.

42 Furthermore, the duty under s 157(1) of the Act extends to a duty to use reasonable diligence in the discharge of one's directorial duties. This is in turn based on the director's fiduciary duties at common law (see *Cheam Tat Pang* at [19]). The position was restated in *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 at [28]:

> ... [T]he *civil* standard of care and diligence expected of a director is objective, namely, whether he has exercised the same degree of care and diligence as a reasonable director found in his position. This standard is not fixed but a continuum depending on various factors such as the individual's role in the company, the type of decision being made, the size and the business of the company. However, it is important to note that, unlike the traditional approach, this standard will not be lowered to accommodate any inadequacies in the individual's knowledge or experience. The standard will however be raised if he held himself out to possess or in fact possesses some special knowledge or experience. [emphasis in original]

43 The Appellant was not inexperienced in the running of companies. Prior to, and in the course of his appointment as CEO of the Company, he was the director of at least ten other Singapore-incorporated companies, of which at least two were public-listed companies. Furthermore, the Appellant occupied the position of CEO and executive director of the Company. Yet the Appellant appears to have paid little care to the details of transactions on which he was briefed when he became the CEO. He simply accepted wholesale what he was told about this kind of payment of bribes being a historically-approved company practice. He conceded that when he became the CEO and was told by one Daniel Cheng, the then chief financial officer ("CFO"), about the practice of making payments to procure the Pioneer business, he "did not check" whether this practice was approved by management because: "[Daniel Cheng] had worked in the company for many years"; he (the Appellant) had no time to look into every issue; and he felt that a sum of RMB$120,000 per quarter was "not a substantial amount". The Appellant claimed that it had never occurred to him to call up any of the Company's other directors to check whether the practice of making payments to Mr Lee through the outstation allowance arrangement to procure the Pioneer business was approved by the Board. He had also never seen the RC Resolution document itself prior to the commencement of this Suit by the Company against him. Furthermore, he conceded that he had no way of knowing whether the sums paid to Oh under the outstation allowances arrangement, or under the Bontech Agreement, were actually passed to Mr Lee or pocketed by Oh (not that we suggesting that this was so). He did not even know the nature of the relationship between Mr Lee and Pioneer, and never asked Mr Lee how he managed to procure the Pioneer business for the Company despite having, on some occasions, accompanied Oh to meetings with Mr Lee where cash payments were handed over to the latter.

44 In our view, it does not lie in the mouth of a man who was the CEO of the Company to deflect his duty to exercise reasonable diligence by arguing that he was simply following what was told to him by subordinate officers of the Company to be an established practice, especially in relation to a payment of the kind such as the present which is *prima facie* improper and indeed illegal. As stated in *Ong Chow Hong (alias Ong Chaw Ping) v Public Prosecutor and another appeal* [2011] 3 SLR 1093 at [33], "each director of a listed company has a solemn and non-delegable duty of due diligence to ensure compliance with market rules and practices". It was incumbent upon the Appellant, when he took over as the CEO, to apprise himself of transactions which the Company was involved in, and in particular, to determine the appropriateness of even a long-standing practice where the possible impropriety would have been evident to any reasonable businessman or director. The making of payments to an unidentified individual based on absent documentation was, on its face, a matter which called out for at least some inquiry (see *Secretary of State for Trade and Industry v Swan* [2005] BCC 596 at [217]). This the Appellant did not do. Neither did he bring it up to the Board for discussion. We therefore have no hesitation in finding that despite what appeared to be a measure to

promote the Company's immediate financial position, the Appellant did not exercise the diligence and care that a reasonable director of a company ought to have exercised bearing in mind the possible implications for the Company. Moreover, as the in-coming CEO, he did not even consider whether the illegal payment achieved the sales target to Pioneer (see [25]–[26] above). He simply sanctioned a new way to effect the bribe without much thought. We therefore hold that the Appellant was in breach of his duties to the Company.

Whether the Company is precluded from claiming against the Appellant

45 A related but separate line of argument raised by the Appellant is that the management of the Company knew all along of the Bontech Agreement and the Payments made thereunder, and, therefore, the Appellant could not be said to have failed to act *bona fide* in the interests of the Company. The Appellant, upon our request for further submissions, moreover contended that Ng, Chow, and himself had had knowledge of the Bontech Agreement and the Payments, and that the three of them were, at the time, the "directing mind and will" of the Company. This meant that the knowledge of Ng, Chow, and the Appellant ought to be attributed to the Company with the result that "the [A]ppellant's appeal should be allowed".

46 The Appellant's submissions related only as to how knowledge should be attributed from Ng, Chow, and himself to the Company. This addresses the issue that a company, by its very legal character, can only act through its officers and agents. However, a company's knowledge (through its officers or agents) of wrongdoing by one or more of its directors cannot, without more, be an answer to its claim against those directors acting in breach of their duties. The Appellant has not established why the Company's knowledge on that basis (if any) should disentitle it from making the claim against him. In making the submission that Ng, Chow, and himself were the "directing mind and will" of the Company, the Appellant seems to be suggesting that the Company should be precluded from pursuing its claim against him for two reasons: (1) the Company had implicitly authorised the Appellant's acts, thereby releasing the Appellant from his duty or breach of that duty; and (2) the Company was implicated in the Appellant's improper act and cannot sue upon its own improper act according to the principle of *ex turpi causa non oritur actio*.

47 In relation to both these points, it is first necessary to identify the corporate organ which mind and actions may be attributed to the Company. As stated above at [46], a company, unlike an individual, has no mind or body of its own, and can only act through natural persons (see the English House of Lords decision of *Lennard's Carrying Company, Limited v Asiatic Petroleum Company, Limited* [1915] AC 705). Decisions on the company's behalf can be taken by its primary decision-making bodies (such as the board of directors or the members in general meeting), or by officers, agents or employees of the company. Only human agents, either collectively or individually, would have a mind and, in turn, knowledge and/or intention (see Paul L Davies and Sarah Worthington, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 9th Ed, 2012) at para 7-1). Attribution rules therefore serve to determine when and which natural person's acts and thoughts are to be treated as the company's own. This was well explained by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 ("*Meridian*") at 506:

> Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called "the rules of attribution."

48 Lord Hoffmann went on to set out three distinct rules of attribution. First, the company's "primary rules of attribution" found in the company's constitution or in company law, and which vest certain powers in bodies such as the board of directors or the shareholders acting as a whole (*ie*, the unanimous consent rule). Secondly, general rules of attribution (which are equally available to natural persons), comprising the principles of agency which allow for liability in contract for the acts done by other persons within their actual or ostensible scope of authority, and vicarious liability in tort. Thirdly, "special rules of attribution" fashioned by the court in situations where a "rule of law, either expressly or by implication, excludes the attribution on the basis of the general principles of agency or vicarious liability", an example being where a rule requires some act or state of mind on the part of the person *himself* as opposed to his servants or agents (see *Meridian* at 507). Lord Hoffmann's analysis has been adopted by the Singapore High Court in *The Dolphina* [2012] 1 SLR 992 at [237].

49 Lord Hoffmann also took the opportunity to re-examine the "anthropomorphical" approach of identifying a certain person or persons as the "directing mind and will" of the company and automatically attributing that person's or those persons' knowledge or acts to the company. To him, the term "directing mind and will" was simply a *description* of the person identified as the one whose knowledge and acts are to be attributed to the company under the above-mentioned rules of attribution. It is not a rule of attribution in itself. Lord Hoffmann said at 511 that "[i]t will often be the most appropriate description of the person designated by the relevant attribution rule, but it might be better to acknowledge that not every such rule has to be forced into the same formula".

50 The Appellant's argument that the knowledge of Ng, Chow, and himself could be attributed to the Company as long as he could show that they were the directing mind and will of the Company evidenced a lack of appreciation of the rules of attribution. Any inquiry regarding the attribution of knowledge must begin from identifying the legal rule which is sought to be applied in relation to the Company. The purpose of identifying that rule and the context within which it would operate will determine whether there should be an attribution of knowledge from the persons involved in the matter to the company, and if so how such attribution happens. The term "directing mind and will" of the company is but a convenient label for the persons whose knowledge or acts should be attributed to the company for the purpose of applying that legal rule. Following this clarification of the law by Lord Hoffmann, we now turn our attention to the two questions before us.

Authorisation by the Company

51 In determining whether there has been authorisation of an act of a director by the company, the primary rules of attribution ought to apply. These may be found in the company's articles of association, or else in general principles of company law.

52 One such general principle is that there is a need for collective action of the board of directors in managing the business of the company. The authorisation of a director's acts should be done by way of a resolution of the board of directors at a meeting convened and conducted in accordance with the company's constitution. In addition, the informal assent of all the directors of a company would suffice as well (see this court's decision in *SAL Industrial Leasing Ltd v Lin Hwee Guan* [1998] 3 SLR(R) 31, where it was held that where both the directors of a company gave their assent to an agreement but only one of them signed the agreement on behalf of the company, such assent was binding on the company vis-à-vis third parties). This court in arriving at its decision relied on the English High Court decision of Simon Brown J (as he then was) in *Runciman v Walter Runciman plc* [1992] BCLC 1084, where it was held that the extension of a director's term of office without a formal board resolution was valid where there was unanimous agreement of all the directors, and was binding as between the company and that director. In short, both a decision of a majority of directors at a board meeting and an informal decision taken by *all* of the directors of a company are attributable to

the company and would be binding on the company.

53 In the present case, it is not disputed that there was never any formal board approval of the Bontech Agreement and the Payments, or even of the outstation allowance arrangement. Therefore, the Appellant must show that all the directors of the Company at the material time consented or acquiesced to the Bontech Agreement and the Payments.

54 The evidence as we see it, however, is that Chow was the only director of the Company at the time who might have known about the Bontech Agreement and the Payments. Chow was the executive chairman of the Company from November 2005 to November 2007. The Appellant's evidence was that pursuant to Oh's tax concerns (see [19] and [21] above), the Appellant had discussed alternatives to the outstation allowance arrangement for sending money to Oh for the procurement of the Pioneer business, and that it was Chow who had suggested a contact, one Albert Goh, and it was this contact who then liaised with Daniel Cheng to come up with the Bontech Agreement which the Appellant signed. This was corroborated by Agnes who said that when she managed to contact a representative of Bontech in Shanghai as part of the Company's 2008 investigation into the Bontech Agreement, the representative told her that he had been introduced to the Appellant by someone named Albert Goh. The Appellant also pointed to the minutes of the AC Meeting, where the Appellant was recorded as stating that "Mr Chow and Mr Ng, the previous board members were aware of the [Bontech] arrangement as they had been informed verbally".

55 We note that Chow's affidavit and oral evidence did not touch on the issue of outstation allowances or the Bontech Agreement at all. The cross-examination of Chow focused on allegations of his breach of directors' duties arising from other acts including employee-poaching and diversion of business from the Company which were not related to the Bontech Agreement. However, on the basis of Oh's and Agnes' evidence, we find it likely that Chow knew about the Bontech Agreement and its purpose.

56 The Appellant also singled out one other director, Ng, as someone having knowledge of the Bontech Agreement and Payments. Ng joined the Company as an executive director at the same time as Chow, and remained in this position until April 2007. The only evidence of Ng's knowledge of the Bontech Agreement and the Payments was the Appellant's mention of him in the above-cited minutes of the AC Meeting (see [54] above). However, Ng's affidavit did not touch on the Bontech Agreement and the Payments at all, and he was not called as a witness. We find that the evidence is wholly insufficient to show that Ng knew of, let alone positively consented to, the signing of the Bontech Agreement and the making of the Payments.

57 The Appellant argued that the other directors such as the former CEO (Quek), the chairman of the remuneration committee (Teo Seng Chee) and the directors who signed off on the RC Resolution (one Tan Boon Tiong and one Lee Mun Hooi), and the directors previously based in Shanghai (Lau and Sze), all knew about the purpose of the outstation allowance arrangement and by virtue of that, knew about the Bontech Agreement and the Payments which followed it. However, no evidence has been adduced to establish such a link. The Appellant also conceded that there was no evidence that another director, one Petrus Huang, knew about the Bontech Agreement and the Payments or even the outstation allowance arrangement.

58 On a review of the evidence, we are therefore unable to conclude that the Company, either in the form of a decision of the directors in a board meeting or by unanimous consent, authorised the Appellant's acts.

59 Another general principle of company law is that directors may be released from their obligations

to the company by unanimous, or at the very least majority agreement of the *shareholders* (see *Walter Woon* at paras 9.18–9.22). In *Bamford and another v Bamford and others* [1970] Ch 212, the English Court of Appeal held (at 237H–238B) that:

> … It is trite law, I had thought, that if directors do acts, as they do every day, especially in private companies, which, perhaps because there is no quorum, or because their appointment was defective, or because sometimes there are no directors properly appointed at all, or because they are actuated by improper motives, … such directors can, by making a full and frank disclosure and calling together the general body of the shareholders, obtain absolution and forgiveness of their sins; and provided the acts are not ultra vires the company as a whole everything will go on as if it had been done all right from the beginning. I cannot believe that that is not a commonplace of company law. It is done every day. Of course, if the majority of the general meeting will not forgive and approve, the directors must pay for it.

60 The Supreme Court of South Australia in *Pascoe Ltd (in liq) v Lucas* (1999) 33 ACSR 357 also explained (at [263]–[264]) that while the management of the company is vested in the directors and not the shareholders, the shareholders:

> … are entitled to approve or ratify the actions of those who have the responsibility for the management. …
>
> Where, as in this case, the directors have entered into a transaction the unanimous vote of the shareholders of the company, if passed before the transaction can amount to an authorisation and, if passed after the transaction, can amount to a validation…

61 However, the Appellant cannot avail himself of this general principle of company law because there is simply no evidence at all that the shareholders of the Company had given any form of consent to the Bontech Agreement.

62 There is also nothing in the articles of association of the Company which provides for release of liability of directors to be effected through any other means. Therefore, the primary rules of attribution do not apply in this case and it cannot be said that the Company had authorised the Appellant's breach of his duties.

Attribution of knowledge and actions for the purpose of raising the defence of ex turpi causa non oritur actio

63 The maxim *ex turpi causa non oritur actio* is a principle of public policy, which was explained by Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341 at 343:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* … there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault,

potior est conditio defendentis.

64 The *ex turpi causa* rule operates as a defence to a claim only because the court as a matter of public policy will not involve itself in a dispute between parties where both sides are equally tainted by the same wrong, with the defendant benefitting as a result. To use an example by Lord Walker in *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] 1 AC 1391 ("*Stone & Rolls*") (at [187]), "[t]wo highwaymen may be partners in crime but neither can sue the other for an account".

65 In the present case, the Appellant's argument that the knowledge of Ng, Chow, and himself as the "directing mind and will" of the Company should be attributed to the Company suggests that the Company was one of two "highwaymen" involved in the wrongful act, such that the court should not assist the Company in its claims against the Appellant. At the heart of the argument is how attribution of knowledge to the Company operates in such a scenario.

66 Any analysis must begin from identifying the applicable rules of attribution in establishing an *ex turpi causa* defence. The general rules of attribution (see [48] above) do not apply in relation to establishing an *ex turpi causa* defence. As elaborated upon by the House of Lords in *Stone & Rolls* at [27], after referring to a number of authorities, the defence of *ex turpi causa* "will only apply where the claimant was personally at fault and thus where his responsibility for wrongdoing was primary rather than vicarious". Therefore, the attribution of liability to the Company via principles of agency and vicarious liability are not relevant here since the Company itself must be responsible for the wrong. The primary rules of attribution also do not apply in order for the knowledge of Ng, Chow, and the Appellant to be attributed to the Company since there is no evidence that the Company's constitution provides for this, or that general company law allows the knowledge of a few directors to constitute that of the company's. The Appellant must therefore rely on a special rule of attribution for the knowledge of Ng, Chow and the Appellant to be attributed to the Company.

67 How such a special rule of attribution might be established was examined by Lord Hoffmann in *Meridian* (at 507):

> … In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy. [emphasis in original]

The special rule of attribution is therefore *context-specific* and the content of any such rule should be determined based on the language and purpose of the substantive law upon which potential liability is to be established (see also Eilis Ferran, "Corporate Attribution and the Directing Mind and Will" (2011) 127 LQR 239 at p 250).

68 In this regard, we refer to the following statement of Mummery LJ in *Morris and others v Bank of India* [2005] 2 BCLC 328 at [114], where he sought to explain why, unlike a third party suit against the company, the principle of *ex turpi causa* might not apply where a company sued its directors or employees for breach of duties:

> Clearly there are some circumstances in which an individual's knowledge of fraud cannot and should not be attributed to a company. The classic case is where the company is itself the target of an agent's or employee's dishonesty. In general it would not be sensible or realistic to attribute knowledge to the company concerned, if attribution had the effect of defeating the right of the

company to recover from a dishonest agent or employee or from a third party. …

69 The English Court of Appeal decision in *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2014] Ch 52 ("*Bilta*") is very much on point with the present case. There, the first claimant was a company incorporated in England which brought various actions against its former directors and their fellow conspirators for defrauding the company. Some of the defendants sought orders for the claims to be summarily dismissed on the ground of, amongst other things, *ex turpi causa*. Patten LJ, delivering the lead judgment, held that there could be no attribution of the unlawful conduct of its directors to the company such that the *ex turpi causa* defence was engaged. More importantly, Patten LJ highlighted, along the same vein as Mummery LJ, the difference between cases where knowledge was attributed to the company from its directors for the purpose of a third party victim bringing a claim against the company itself and cases which concerned the company as the victim bringing an action against its directors for breach of duty (*Bilta* at [34]–[35]):

> ... As between the company and the defrauded third party, the former is not to be treated as a victim of the wrongdoing on which the third party sues but one of the perpetrators. The consequences of liability are therefore insufficient to prevent the actions of the agent being treated as those of the company. The interests of the third party who is the intended victim of the unlawful conduct take priority over the loss which the company will suffer through the actions of its own directors.
>
> But, in a different context, the position of the company as victim ought to be paramount. Although the loss caused to the company by its director's conduct will be no answer to the claim against the company by the injured third party, it will and ought to have very different consequences when the company seeks to recover from the director the loss which it has suffered through his actions. In such cases the company will itself be seeking compensation by an award of damages or equitable compensation for a breach of the fiduciary duty which the director or agent owes to the company. As between it and the director, it is the victim of a legal wrong. To allow the defendant to defeat that claim by seeking to attribute to the company the unlawful conduct for which he is responsible so as to make it the company's own conduct as well would be to allow the defaulting director to rely on his own breach of duty to defeat the operation of the provisions of sections 172 and 239 of the Companies Act whose very purpose is to protect the company against unlawful breaches of duty of this kind. For this purpose and (it should be stressed) in this context, it ought therefore not to matter whether the loss which the company seeks to recover arises out of the fraudulent conduct of its directors towards a third party … or out of fraudulent conduct directed at the company itself …

70 We agree with the distinction drawn by Mummery and Patten LJJ in the cases above that while a company should be bound by the improper acts of the directors at the suit of an innocent third party, that rule should not apply where the suit is at the instance of the company itself against the directors for their breach of duties. As stated in [44] above, the Appellant was not acting in the interests of the Company when he entered into the Bontech 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. Moreover, we would underscore that the Appellant was not just following a wrong practice initiated by his predecessor; he continued with it under a new false garb.

71 Therefore, in the circumstances of this case, there is no special rule of attribution applicable where it could be said that the Company itself knew of or had committed the wrongful acts for the purpose of establishing an *ex turpi causa* defence. We would reiterate 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: see also *Belmont Finance Corporation Ltd v Williams Furniture Ltd and others* [1979] Ch 250.

Conclusion

72 For the reasons stated above, we find that the Appellant did not act in the interests of the Company, and was in breach of his fiduciary duties. The Appellant also cannot rely on the defence that his acts were authorised by the Company such that he was released from liability or on the defence of *ex turpi causa*.

73 Accordingly, we dismiss the appeal. Parties are to make written submission on costs (not to exceed ten pages) within two weeks from the date hereof.