

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2021] SGHC 222

Suit No 881 of 2020

Between

AMG Global Investments &
Holdings Pte Ltd (in
Liquidation)

... Plaintiff

And

- (1) Ong Kee Ming Richard
- (2) Koh Ting Giap

... Defendants

JUDGMENT

[Companies] — [Directors] — [Duties] — [Companies Act s 145(5)]
[Companies] — [Directors] — [Duties] — [Companies Act s 157]
[Companies] — [Directors] — [Remuneration] — [Companies Act s 169]
[Companies] — [Directors] — [Liabilities] — [Companies Act s 391]
[Trusts] — [Accessory liability] — [Dishonest assistance]
[Trusts] — [Recipient liability] — [Knowing receipt]

TABLE OF CONTENTS

INTRODUCTION.....	1
FACTS.....	2
THE PARTIES	2
BACKGROUND TO THE DISPUTE	3
PROCEDURAL HISTORY.....	8
THE PARTIES' CASES.....	9
ISSUES TO BE DETERMINED	13
ISSUE 1: THE DUTIES OF A DIRECTOR.....	14
ISSUE 2: THE ELEMENTS OF KNOWING RECEIPT	15
ISSUE 3: MR ONG'S MENTAL FITNESS	16
ISSUE 4: MR KOH'S CAPITAL OR LOAN CONTRIBUTIONS.....	18
ISSUE 5: MR ONG'S LIABILITY	20
CASH WITHDRAWAL OF US\$11,216.75 ON 25 AUGUST 2017.....	21
PAYMENT OF US\$22,556.39 ON 25 AUGUST 2017 TO ORO TRADING PTE LTD	21
PAYMENT OF US\$9,398.50 ON 26 AUGUST 2017 TO MR LIM CHIN KENG	22
PAYMENT OF US\$22,142.86 ON 26 AUGUST 2017 TO Ms CHEN MEI QI.....	22
CASH WITHDRAWAL OF US\$20,000 ON 26 AUGUST 2017	23
PAYMENT OF US\$149,398.22 ON 28 AUGUST 2017 TO MR ABDUL RAZEED.....	23

PAYMENT OF US\$74,699.11 ON 28 AUGUST 2017 TO MR ONG	24
CASH WITHDRAWAL OF US\$112,666.38 ON 28 AUGUST 2017	25
PAYMENT OF US\$5,000 ON 28 AUGUST 2017 TO MR ADANUTY.....	26
PAYMENTS TALLING US\$181,119.92 ON 29 AUGUST 2017 AND 5 SEPTEMBER 2017 TO SABRE GLOBAL PTE LTD	26
PAYMENT OF US\$75,000 ON 29 AUGUST 2017 TO MR MANU	27
PAYMENT OF US\$100,000 ON 29 AUGUST 2017 TO THREE QUALITY SERVICES LIMITED	27
PAYMENTS TALLING US\$450,000 ON 5 SEPTEMBER 2017 AND 21 SEPTEMBER 2017 TO MR KEVIN ANTHONY GRIFFIN JR	28
PAYMENT OF US\$143,000 ON 5 SEPTEMBER 2017 TO WHITE LOTUS COSMETICS LIMITED	28
PAYMENT OF US\$150,000 ON 6 SEPTEMBER 2017 TO QUALITY PRINTERS PTE LTD	29
PAYMENT OF US\$37,458.77 ON 21 SEPTEMBER 2017 TO MR KOH.....	29
FACILITY FROM AND CHARGE OVER ACCOUNT GRANTED TO STANDARD CHARTERED BANK	30
COMPANIES ACT S 145(5)	30
CONCLUSION ON MR ONG’S LIABILITY	31
ISSUE 6: MR KOH’S LIABILITY	32
TWELVE CASH WITHDRAWALS OR CASH CHEQUES TALLING US\$148,064.97	35
PAYMENT OF US\$37,247.43 ON 29 SEPTEMBER 2017 TO MR KOH	35
PAYMENT OF US\$10,000 ON 2 OCTOBER 2017 TO UNIROYAL COMMUNICATIONS PTE LTD	35
PAYMENT OF US\$11,000 ON 2 OCTOBER 2017 TO MS CHUA PAIR SHEN	36
PAYMENT OF US\$11,500 ON 3 OCTOBER 2017 TO MR SHUAN JARMEN.....	36

PAYMENT OF US\$3,700 ON 11 OCTOBER 2017 TO MS CHRISTINA MARIE NYANMANI.....	36
PAYMENT OF US\$1,370 TO MR NG WAI LOON.....	36
PAYMENT OF US\$1,850 TO MR ABDUL RAZEED.....	37
PRIOR PAYMENT OF US\$37,458.77 TO MR KOH	37
FACILITY FROM AND CHARGE OVER ACCOUNT GRANTED TO STANDARD CHARTERED BANK	38
CONCLUSION ON MR KOH’S LIABILITY	39
ISSUE 7: COMPANIES ACT S 391.....	39
CONCLUSION.....	41

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AMG Global Investments & Holdings Pte Ltd (in Liquidation)
v
Ong Kee Ming Richard and another

[2021] SGHC 222

General Division of the High Court — Suit No 881 of 2020
Philip Jeyaretnam JC
23–25 June, 6 August 2021

28 September 2021

Judgment reserved.

Philip Jeyaretnam JC:

Introduction

1 For a decade, the defendants had wished that their fellow director would finally live up to his boast of being able to bring in a big deal. The second defendant gave up on waiting and left the plaintiff company. Unfortunately for the first defendant, his wish came true two years later, when their colleague finally secured his long-anticipated big deal, and millions flowed into the plaintiff company's account. The company seemed set to soar. The first defendant signed off on a series of withdrawals, before suffering a nervous collapse and resigning from his directorship. The second defendant returned as the required locally resident director. The withdrawals continued, and eventually the plaintiff company was wound up on the application of the counterparty to that big deal.

2 The liquidator has brought this action against the defendants for having authorised or allowed the withdrawals, which, according to the liquidator, the defendants failed to verify or even question, and were not in the interests of the plaintiff company.

Facts

The parties

3 The plaintiff is AMG Global Investments & Holdings Pte Ltd (“AMG”), a company incorporated in Singapore with the objects of trading in metals and providing financial services.¹

4 The plaintiff was wound up on 9 March 2018, based on an unsatisfied statutory demand dated 22 November 2017 in the amount of US\$2,145,000.² It is Mr Abuthahir s/o Abdul Gafoor (the “Liquidator”) of AAG Corporate Advisory Pte Ltd who has brought this action.³

5 The first defendant is Mr Ong Kee Ming Richard (“Mr Ong”), a Singapore citizen who was a director of AMG from 13 September 2006 to 25 September 2017.⁴ The second defendant is Mr Koh Ting Giap (“Mr Koh”), a Singapore citizen who was a director of AMG first from 13 September 2006 to 10 January 2014, and again from 25 September 2017 until AMG was wound

¹ Mr Abuthahir s/o Abdul Gafoor’s affidavit of evidence-in-chief (“Mr Abuthahir’s AEIC”) at p 80.

² Mr Abuthahir’s AEIC at paras 3 and 5 and pp 75–76 and 84–85.

³ Statement of Claim (“SOC”) at para 3.

⁴ SOC at para 4.

up.⁵ The petitioning creditor was Food & Beverage Cap Co Ltd (“F&BCo”), a company incorporated in Thailand.⁶

6 There was one other director, an Indian national, Mr Manu Poovannunilkunnathil Kuttappan (“Mr Manu”), who was a director from 18 October 2007 until AMG was wound up.⁷ The Liquidator does not know where he is.⁸

7 Mr Manu and Mr Ong were the joint signatories to AMG’s account with Standard Chartered Bank (Singapore) Limited (“SCB” and the “SCB Account”) during the period 23 August 2017 to 21 September 2017,⁹ with Mr Manu becoming the sole signatory from about 26 September 2017.¹⁰

Background to the dispute

8 From October 2007 onwards, Mr Manu, Mr Ong and Mr Koh were directors of AMG together.¹¹ For many years, AMG did very little business.¹² It does appear to have incurred expenses, including rental of premises for some period.¹³ Mr Manu talked big about potential deals but these did not

⁵ SOC at para 5.

⁶ Mr Abuthahir’s AEIC at para 5.

⁷ SOC at para 6.

⁸ Mr Abuthahir’s AEIC at para 59.

⁹ Mr Abuthahir’s AEIC at para 8.

¹⁰ Mr Abuthahir’s AEIC at para 9.

¹¹ Mr Abuthahir’s AEIC at paras 6–7.

¹² Mr Koh Ting Giap’s affidavit of evidence-in-chief (“Mr Koh’s AEIC”) at para 3.

¹³ Mr Koh’s AEIC at para 4; Bundle of Documents & Affidavits of Evidence-in-Chief Vol 2 (“2BOD”) 801–804.

materialise.¹⁴ Mr Koh left AMG in early 2014 for this reason,¹⁵ and Mr Manu and Mr Ong continued as directors. Unexpectedly, for Mr Ong at least, Mr Manu suddenly secured a deal with F&BCo which resulted in the deposit of US\$2,764,104.53 into the SCB Account on 25 August 2017.¹⁶ Prior to a small deposit of US\$7.22 into the SCB Account on 23 August 2017, the account balance had been zero.¹⁷

9 The deal AMG did with F&BCo is unusual. F&BCo apparently requested that AMG receive an irrevocable confirmed documentary letter of credit (the “DLC”) in the sum of US\$2,860,000 issued by Kasikornbank Public Company Limited of Bangkok, Thailand (“Kasikornbank”) pursuant to a discounting/monetizing agreement and memorandum of understanding dated 21 June 2017 between AMG and F&BCo (the “MOU”).¹⁸ Under the terms of the MOU, AMG was to pay 75% of the value back to F&BCo – *ie*, the sum of US\$2,145,000 – within three business days.¹⁹ A further 5% of the value, namely US\$143,000, was to be paid to White Lotus Cosmetics Limited (“White Lotus”), described as a service fee in the MOU.²⁰ The balance 20% of the value – *ie*, US\$572,000 – was “non-recourse payment for AMG”.²¹

¹⁴ Mr Ong’s Defence at para 32; Mr Koh’s AEIC at para 5; Transcript, 23 June 2021, p 48 ll 15–18.

¹⁵ Mr Koh’s AEIC at para 5.

¹⁶ Mr Ong’s Defence at paras 15–17; Mr Abuthahir’s AEIC at para 35(b) and p 237.

¹⁷ Mr Abuthahir’s AEIC at paras 35(a) and (b) and p 237.

¹⁸ Bundle of Cause Papers in HC/CWU 25/2018 & HC/OS 1085/2018 (“CWU BCP”) 17–39.

¹⁹ CWU BCP 18 at cl A and E.

²⁰ CWU BCP 18 at cl B.

²¹ CWU BCP 18 at cl C.

10 A documentary letter of credit is an instrument which facilitates the sale of goods. It is a contract by which an issuing bank agrees upon the application of the buyer to pay the seller of goods upon presentation of specified documents evidencing that the goods have been shipped by the seller to the buyer (usually internationally). On the expiry of a specified period, usually after he receives the goods, the buyer pays the issuing bank. The issuing bank also charges the buyer a fee for this facility. This arrangement, which underpinned the development of modern cross-border commerce, typically has these three participants of buyer, seller and issuing bank, the last of whom may appoint another bank to negotiate the presentation of documents for payment in the country where the seller is located.

11 In more recent times, a fourth participant is sometimes added, and plays a purely financing role. This fourth participant discounts or monetizes the documentary letter of credit by paying the seller an agreed percentage of the face value of the letter of credit before the presentation of documents by the buyer to the issuing bank. He is known as the discountor or monetizer. The monetizer would then receive payment from the issuing bank in place of the seller. This allows the seller to receive earlier in time a substantial part of the payment. The monetizer's reward is the difference between his discounted payment to the seller and the face value subsequently paid by the buyer via the negotiating and issuing banks.

12 Under the arrangement between AMG and F&BCo, AMG was, at least on paper, the seller of 1,000 metric tons of aluminium sheets to F&BCo and would receive its payment via the DLC issued by Kasikornbank.²² However,

²² CWU BCP 162 at para 7.

under the MOU, AMG also took on the role of discounter or monetizer, blending that role with its other role of seller.²³

13 Under the terms of the arrangement between AMG and F&BCo, AMG retained 20% of the sale price (*ie*, US\$572,000), as its “non-recourse payment”. The balance 80% of what flowed from Kasikornbank to AMG was to be paid to White Lotus (5%) and F&BCo (75%). Ultimately, F&BCo would have to pay Kasikornbank the full face value of the DLC (and any associated interest or other fees applicable under its facility with Kasikornbank, which was not before me). AMG’s counsel confirmed that this was the structure of the arrangement between AMG and F&BCo, while simultaneously asserting from the Bar that these terms were known to Kasikornbank.²⁴ I consider it more likely, however, that this was a transaction primarily intended to facilitate the flow of money, and am not persuaded and do not make any finding that its true nature was known to Kasikornbank or SCB.

14 Indeed, the only logical inference is that Mr Manu on behalf of AMG presented false delivery documents in order to receive payment of US\$2,860,000 from Kasikornbank via the negotiating bank (*ie*, SCB). Had Mr Manu then caused AMG to perform its role under the MOU of paying 75% to F&BCo and 5% to White Lotus, AMG would have retained the balance 20% making a profit of US\$572,000.

15 AMG did not supply F&BCo with the 1,000 metric tons of aluminium sheets²⁵ (although, as I have said, it must have presented purported delivery

²³ CWU BCP 18.

²⁴ Transcript, 24 June 2021 p 102 ln 16 to p 105 ln 19.

²⁵ CWU BCP 166 at para 18.

documents to Kasikornbank in order to obtain payment). Neither did AMG pay the agreed-upon US\$2,145,000 to F&BCo. F&BCo opted to pursue the payment of the US\$2,145,000 through the issue of the statutory demand on 22 November 2017.²⁶

16 There is an additional background aspect that it is helpful to sketch, namely AMG’s shareholding over the years. The full picture was not provided by parties, but a rough outline emerges. First, as a result of three allotments taking place in September and October 2006, Mr Ong originally held 100,000 shares,²⁷ while Mr Koh was the registered owner of 1,080,000 shares, of which 1,079,996 shares were allotted to Mr Koh as a nominee holding on trust for a company called Weeds Natural Remedies Pte Ltd (“Weeds”), in consideration of the provision by Weeds of certain formulae for natural health supplements and an eight-year licence to exclusive use of certain registered trade marks.²⁸ Lastly, 100,000 shares were held by a third person, who has since ceased to have any association with AMG.²⁹

17 Mr Ong gave no clear evidence of what became of his shareholding, but a directors’ resolution dated 21 September 2017 shows that at the time, 640,000 shares were registered in his name.³⁰ As for Mr Koh, although his evidence was that he had entrusted all his shares to Mr Ong when he left AMG in 2014,³¹ a director’s resolution dated 25 September 2017 records a transfer of 640,000

²⁶ CWU BCP 4–5.

²⁷ 2BOD 767 and 774.

²⁸ 2BOD 770–771.

²⁹ 2BOD 767 and 774.

³⁰ 2BOD 777.

³¹ Transcript, 25 June 2021, p 46 ln 23 to p 47 ln 21.

shares from him to Mr Manu.³² What is clear is that by 23 January 2018, at least, Mr Manu had become the 100% owner of AMG.³³

18 A third point is also material by way of background. AMG seems to have had no assets other than the balance in the SCB Account.³⁴ Nor does it seem to have had any business that might be the source of revenue.³⁵ The significance of this is that once the balance in the SCB Account fell below the US\$2,145,000 AMG owed to F&BCo, AMG would no longer have been able to pay that debt, and would have been insolvent. AMG reached this state on or about 29 August 2017.³⁶ Further large payments and withdrawals continued to take place after that.³⁷

Procedural history

19 While AMG is represented, both Mr Ong and Mr Koh are litigants-in-person. At the start of trial, Mr Ong had not filed any affidavit of evidence-in-chief. I nonetheless allowed him to give evidence, notwithstanding AMG's objection. Mr Ong's decision to give evidence followed my explanation to him that only statements made by him in the witness box would be relied on by me, but that if he gave evidence he would be subject to cross-examination. I considered my intervention to be necessary to ensure a just and fair trial, but I remained mindful that any leeway given to the defendants should not mean that

³² 2BOD 776.

³³ Mr Abuthahir's AEIC at p 81.

³⁴ Mr Abuthahir's AEIC at para 28.

³⁵ Mr Ong's Defence at para 32; Mr Koh's AEIC at para 5.

³⁶ Mr Abuthahir's AEIC at p 237.

³⁷ Mr Abuthahir's AEIC at pp 237–244.

they could act without regard to the court's rules and procedures. In this case, I found that, upon my providing the defendants with some explanation of the process, both acted responsibly and respectfully. I also sought to ensure – and was satisfied – that the plaintiff was not prejudiced in its conduct of the case by any indulgence given to the defendants as litigants-in-person.

The parties' cases

20 AMG's case is that Mr Ong breached his director's duties in respect of the payments made out of the SCB Account in the period 25 August 2017 to 21 September 2017,³⁸ while Mr Koh breached his director's duties in respect of payments made out of the SCB Account in the period 28 September 2017 to 2 July 2018.³⁹ AMG says that none of these payments provided commercial or other benefit, whether actual or apparent, to the company, and that the defendants did not check or verify the transactions at all.⁴⁰

21 AMG has also pleaded knowing receipt against Mr Ong in respect of US\$74,699.11 and against Mr Koh in respect of US\$74,706.20.⁴¹ AMG also included dishonest assistance in its closing submissions,⁴² although this was not pleaded. However, both are forms of accessory liability where the wrongdoer has either assisted in another's breach of trust or received assets of a trust transferred by the trustee to him in breach of trust. In this case, both the defendants were directors of AMG. Consequently, both owed fiduciary duties

³⁸ SOC at para 11.

³⁹ SOC at para 19.

⁴⁰ SOC at paras 11 and 19.

⁴¹ SOC at paras 16 and 24.

⁴² AMG's closing submissions at paras 29(f) and 151–168.

to AMG. Thus, if they dishonestly assisted Mr Manu in a breach of his fiduciary duty, they would have primary liability for breach of their own fiduciary duty to AMG. Similarly, if they knowingly received assets of AMG under circumstances where it was unconscionable for them to retain the benefit of those assets, they would, as directors, be liable for unauthorised self-dealing with those assets. The one exception for which knowing receipt is relevant is Mr Koh's receipt of US\$37,458.77 prior to his becoming a director, which was the first transaction in knowing receipt pleaded against him.⁴³

22 AMG called as witnesses only the Liquidator and his assistant, Ms Yessica Budiman. Naturally, neither had any personal knowledge of the events in question and relied on documents in AMG's possession or obtained by them from SCB.

23 Mr Ong raised a general defence that he was not in a fit mental state during some or all of this period.⁴⁴ He said Mr Manu took advantage of his frailty to manipulate and oppress him.⁴⁵ In relation to some of the payments, he contended that they were valid payments for the benefit of the company.⁴⁶ In response to AMG's lawyers' letter of demand dated 21 February 2020,⁴⁷ he set out the gist of his defence in the second paragraph of his letter dated 2 March 2020:⁴⁸

⁴³ SOC at para 19(a).

⁴⁴ Mr Ong's Defence at para 7.

⁴⁵ Mr Ong's Defence at paras 8, 11 and 13.

⁴⁶ Mr Ong's Defence at paras 23–25.

⁴⁷ Mr Abuthahir's AEIC at pp 337–340.

⁴⁸ Mr Abuthahir's AEIC at pp 341–342.

During the time of my alleged breach of duties, I was in a poor health, both physically and mentally. Mr Manu was a friend and business partner of mine for many years and I trusted that he would conduct the business and handle the account of AMG Global. He did not want me to interfere and told me to let him handle everything as he was the one who brought in the business and money for AMG Global and knew how best to run it. On the occasions that I asked Mr Manu what certain documents or payments were for, he would say that they were legitimate business payments. As he was aware of my weak health, he would intimidate me by raising his voice at me and insisting that I counter-sign as he instructed. I am sure that the bank officers who attended to us will recall witnessing my poor mental state and Mr Manu's pressure tactics. As I was unwell and intimidated by Mr Manu, I relied on Mr Manu's representation that they are valid payments for the business and that he would account for it and do the account records.

24 Mr Koh raised a general defence that he had provided (through Weeds) AMG's original business involving health supplement products and further was owed \$814,000 by AMG.⁴⁹ He said he had lent this money to AMG over the years for various expenses, including rental and renovation costs.⁵⁰ It was with a view to being repaid some of his prior loans that he re-joined the company as the requisite locally resident director.⁵¹ He gave Mr Manu a free hand because by then Mr Manu was the sole signatory and shareholder of AMG.⁵² He also raised specific defences in respect of some of the payments made by AMG during the relevant period.⁵³ The nub of his defence was set out in his affidavit of evidence-in-chief, with the years as corrected by him when he commenced his evidence:⁵⁴

⁴⁹ Mr Koh's closing submissions at paras A1–A2.

⁵⁰ Mr Koh's closing submissions at paras C1–C4.

⁵¹ Mr Koh's closing submissions at para F4.

⁵² Mr Koh's closing submissions at para G4.

⁵³ Mr Koh's closing submissions at paras G1–G2.

⁵⁴ Mr Koh's AEIC at paras 5 and 6.

5. As Mr. Manu did not bring in any business and funds since 2006, I left AMG around 2014 in order to focus on my own transactions as I did not have time to keep in close touch with Mr. Manu and AMG's business. The understandings and conditions with Mr. Manu were for AMG to pay back my loan whenever Mr. Manu managed to bring in funds despite I left AMG. I rejoined AMG upon request from Mr. Manu in [2017]. Mr. Manu told me that he monetized a Letter of Credit and Mr. Richard Ong was not co-operating with him such that he wanted me to be the local Director for AMG. However he wanted to be the 100% shareholder as well as the sole signatory of the AMG bank account and continued to be the CEO so that he could run AMG's business better as the main decision maker. I raised my concern on my Director's responsibility and Mr Manu told me that he would take full responsibility of all AMG's matters as he is also the Director/CEO of AMG as well as the sole shareholder and bank account signatory. As the CEO of AMG, Mr Manu had full authority to run AMG's business as well as the responsibility. Despite this, I did mention to Mr. Manu that all the company business needed to be run in proper order as I did not want to get into any trouble and Mr. Manu gave me his commitment. Maintaining AMG in proper order was also in line with the expectation to cater for more business to come in. Other than helping Mr. Manu with AMG's business, I also wanted AMG to pay back to me on my loan. Mr. Manu told me that he could only afford to pay me two payments of 50,000 SGD each as partial repayment of my loan to AMG. I asked Mr. Manu for more payments as I knew that the total monetized sum was around 3 million dollars. However, Mr. Manu told me that he already had payment schedule with commitments to various parties before I re-joined AMG. But he promised that he would pay more and possibly settled the full remaining amount when the next fund comes in.

6. I did not hold any share of AMG when I rejoined in [2017] and only served as local Director as per Mr. Manu's terms. Mr. Manu, as the CEO, was the sole signatory of the AMG bank accounts and he told me that he would be fully responsible for all AMG's business and matters. Only Mr Manu knew all the AMG's business contacts and he did all the business communication with those business contacts. Despite this, I met Mr. Manu very frequently to catch up on AMG's business as well as contributed my input on those business that I have knowledge. I learnt that part of the monetized proceeds needed to be paid back to the issuer of the Letter of Credit. However as most of the decisions on the distribution of fund already made before I re-joined according to what Mr. Manu told me when I discussed with him, I was not able to cause changes in these already made decisions before I joined.

I did all I could to try to talk to Mr. Manu to ensure the proper handling of the funds as I did not want AMG and the Directors to get into trouble. I also wanted to get back the rest of all my loan to AMG. As such there is no doubt on my great effort in trying to work with Mr. Manu to handle AMG's business and funds in proper order, both from AMG as well as my own personal interest.

25 I also informed parties that I intended to consider the question whether Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") s 391 might apply to one or both defendants so as to excuse them from some or all of their liability and invited them to address me on this question.⁵⁵ While neither defendant had specifically invoked this section, I considered that in substance much of their defences was that they had acted honestly and so should be excused. I therefore felt that this was a point which the court should consider of its own motion, with notice to the parties.

Issues to be determined

26 I will deal with the issues raised in the following order:

- (a) The duties of a director in respect of payments made by the company;
- (b) The elements of knowing receipt;
- (c) Whether Mr Ong was in a fit mental state at the relevant time and if so what the impact of this is on his potential liability;
- (d) Whether Mr Koh had contributed capital or made loans to AMG and if so what the impact of this is on his potential liability;

⁵⁵ Transcript, 23 June 2021, p 34 ln 13 to p 35 ln 5.

- (e) Whether Mr Ong was in breach of duty in relation to the specific payments claimed against him;
- (f) Whether Mr Koh was in breach of duty in relation to the specific payments claimed against him, or liable for knowing receipt in relation to the monies paid to him before he re-joined as a director; and
- (g) Whether either of them should be excused from liability under Companies Act s 391.

Issue 1: The duties of a director

27 AMG has correctly identified and relied on the principal duties of a director in relation to transactions of the company. These are:

- (a) To act *bona fide* in the interests of the company;
- (b) To act for a proper corporate purpose;
- (c) To avoid placing oneself in a situation where one's interest conflicts with one's duty; and
- (d) To exercise reasonable skill and care.

28 AMG relies both on the general law concerning directors' duties as well as the provisions of Companies Act s 157.

29 In short, a director who authorises a payment to be made by the company must believe that the payment is for a proper purpose of the company. In forming that belief, he needs to take reasonable steps to understand the transaction, and to have sight of supporting documentation. What those steps

should be will depend on the circumstances, including the size of the transaction. A director is entitled to rely on information provided to him by others in the company, including a fellow director, so long as he does so both honestly and reasonably. He is also entitled to rely on such system of checks as has been instituted within the company. At the same time, he must keep an enquiring mind. If he turns a blind eye to suspicious circumstances, then he has not acted honestly and reasonably.

30 This matter concerns a small company, where at the material times there were only two directors: first Mr Ong and Mr Manu, and then Mr Manu and Mr Koh. There was no system involving staff checking or documenting the purpose of payments. In these circumstances, the enquiry reduces into whether they honestly believed the payments were for proper corporate purposes and could reasonably rely on what Mr Manu said about them in forming any such belief.

Issue 2: The elements of knowing receipt

31 The elements of knowing receipt are well-established: see, for example, the Court of Appeal decision in *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 at [23]. In the context of a company, they may be stated as follows:

- (a) There has been a disposal of the company's assets in breach of fiduciary duty.
- (b) The defendant has beneficially received that asset (or an asset traceable to the company's assets).

- (c) The defendant knew that his receipt is traceable to a breach of fiduciary duty, such that it is unconscionable for him to retain the asset.

Issue 3: Mr Ong's mental fitness

32 Mr Ong produced a memo from Clementi Polyclinic dated 26 February 2020 which recorded that he had previously visited the clinic in September 2017 and been referred to the National University Hospital “to investigate a possible psychosis episode”.⁵⁶ The memo also recorded that “[h]e was later seen by the psychiatric team in NUH with impression psychotic depression”.⁵⁷ After checking with his wife, he testified that he was warded at the Institute of Mental Health (“IMH”) for three weeks from 15 October 2017.⁵⁸ He did not produce any document to support this fact, but it was not contested by AMG’s counsel, who instead took the position that as Mr Ong was warded only about three weeks after his resignation from his directorship it had little or no bearing on his responsibility for the withdrawals made while he was a director.⁵⁹

33 I have no doubt that Mr Ong was stressed to the point of mental collapse by the demands placed on him by Mr Manu. I accept that Mr Manu shouted at him from time to time, and psychologically pressured him to comply. There has been no complaint of physical intimidation or any use of violence on him.⁶⁰

⁵⁶ 2BOD 796.

⁵⁷ 2BOD 796.

⁵⁸ Transcript, 25 June 2021, p 98.

⁵⁹ AMG’s closing submissions at para 225(b).

⁶⁰ Transcript, 24 June 2021, p 86 ln 7 to p 87 ln 3.

34 However, I find that in terms of cause and effect, it was not poor mental health that made him agree to sign off on withdrawals and payments; instead, it was his realisation that he had signed off on withdrawals and payments which were not for proper purposes of the company and Mr Manu's continued pressure on him to sign off on further withdrawals and payments that caused him to suffer a mental collapse. When exactly that collapse occurred is unclear, but his admission to IMH only occurred about three weeks after he had ceased to be a director. He did apparently attend Clementi Polyclinic in September 2017, but it is not clear whether this was before the last payment he signed off on, which was on 21 September 2017, or only after that.

35 I consider it significant that Mr Ong was in a fit enough state of mind on or about 11 August 2017 to ask for and obtain from Mr Manu a handwritten confirmation that Mr Manu took full responsibility for the payments made from the SCB Account as well as the procurement and supply of the goods mentioned in the DLC.⁶¹ This was an effective way of ensuring that he could seek recourse from Mr Manu should he be held liable to anyone in relation to those payments. It shows that he understood his potential liability and the importance of taking steps to protect himself. What Mr Manu's confirmation of his own full responsibility does not do, however, is displace or otherwise avoid Mr Ong's own responsibility to AMG as a director.

36 I conclude that Mr Ong fully understood his actions while a director of AMG and cannot be excused from liability for those actions by virtue of any alleged mental infirmity.

⁶¹ 2BOD 790.

37 Mr Ong also raised this issue in the context of allegations of duress and deceit against Mr Manu.⁶² AMG points out that insofar as Mr Manu applied pressure on Mr Ong or did not tell him the true purpose of the payments and withdrawals, Mr Manu was not acting on behalf of AMG.⁶³ It was Mr Ong's duty to AMG to resist such pressure and check on the purpose of the payments and withdrawals that Mr Manu asked him to countersign. Hence, whether Mr Manu applied pressure or deceived Mr Ong falls to be considered in relation to each withdrawal or payment and may have a bearing on whether Mr Ong acted honestly and reasonably.

Issue 4: Mr Koh's capital or loan contributions

38 Mr Koh relied on Weeds' having provided AMG with its original business, *ie*, its health supplement formulae and a license for certain registered trade marks.⁶⁴ Mr Koh testified that Weeds was his company, and so this contribution was effectively his.⁶⁵ However, even assuming that to be the case, Weeds' or Mr Koh's contribution took the form of equity capital.⁶⁶ AMG was under no obligation to him in respect of his holding shares in AMG. It would only have been through a process of liquidation that he could look for the return of his capital. Indeed, with his transfer to Mr Manu of his remaining 640,000 shares on 25 September 2017, he ceased to be a shareholder of AMG.

⁶² Mr Ong's Defence at para 30.

⁶³ AMG's closing submissions at para 218.

⁶⁴ Mr Koh's closing submissions at para B1.

⁶⁵ Transcript, 25 June 2021, p 30 ln 29–32.

⁶⁶ 2BOD 770–771.

39 Mr Koh also relied on loans that he said AMG was obliged to repay him.⁶⁷ Mr Koh referred to his email dated 13 June 2009 to Mr Manu which recorded his contribution as:⁶⁸

Koh: Total cash plus loan plus office expenses plus office renovation = 205 + 85 + 315 + 300 = 905 k

40 Similar but not identical figures were provided by Mr Koh in an email to Mr Ong dated 28 July 2009, namely:⁶⁹

So the total cash/liability from my part is: \$614K (205+94+315, cash+loan+office rental expenses respectively). ...

41 AMG contends that Mr Koh had not proven that he had made these loans to or spent money on AMG's behalf.⁷⁰ AMG's main point is that if Mr Koh was owed money, he would not have left AMG in January 2014, when he says he gave up his shareholding as well.⁷¹ I do not accept this point. As AMG had not been a success at all, he may well have simply given it up as a venture gone bad, without waiving any debt he was owed.

42 I accept that Mr Koh had indeed lent some money to AMG and incurred expenses on AMG's behalf, as evidenced by his emails to Mr Manu and Mr Ong respectively, sent long before these proceedings commenced. I find that Mr Koh's conduct in 2017 is consistent with and supports his belief that AMG owed him a substantial sum of money. However, as he did not provide receipts or other records it is not possible to make a finding of the exact amount.

⁶⁷ Mr Koh's closing submissions at paras C1–C5.

⁶⁸ 2BOD 802.

⁶⁹ 2BOD 803.

⁷⁰ AMG's closing submissions at para 250; AMG's reply submissions at paras 44–48.

⁷¹ AMG's reply submissions at para 45.

43 AMG has not raised any contention concerning the possible expiry of any limitation period. I have considered the point nonetheless. The expiry of any limitation period only bars the seeking of a remedy through legal proceedings and does not extinguish the underlying debt. Hence, even if any action was statute-barred, it remained reasonable for Mr Koh to seek to have the debt repaid.

44 I accept that when Mr Koh agreed to re-join AMG it was at least in part because, now that AMG had funds, he believed that he was entitled to be paid back his past expenditure in relation to AMG. However, that he was owed money by AMG did not relieve him of his duties as a director of AMG.

Issue 5: Mr Ong's liability

45 There were nineteen withdrawals from the SCB Account that Mr Ong countersigned as joint signatory.⁷² In addition, Mr Ong signed a security agreement in relation to a facility granted by SCB to AMG.⁷³ AMG claims against him in respect of all of them.⁷⁴ In my view, Mr Ong initially believed that Mr Manu was following up on his sudden success and reasonably relied on what Mr Manu told him. From his past dealings with Mr Manu he had no reason to believe him to be dishonest. I consider that Mr Ong himself is an honest man who tried to do the right thing in terms of AMG. However, at some point he began to suspect and eventually realised that Mr Manu was probably stripping AMG of funds. He quarrelled with Mr Manu repeatedly and tried to avoid going to the bank when summoned, but unfortunately took the path of least resistance

⁷² Mr Abuthahir's AEIC at pp 250–302.

⁷³ Mr Abuthahir's AEIC at p 563.

⁷⁴ AMG's closing submissions at paras 22–23 and 26–27.

and reluctantly countersigned on withdrawals or payments. He wanted to resign and it is obvious that he felt under considerable pressure and mental strain. The question for the court is at which point Mr Ong understood or ought to have understood that the payments were not for proper purposes of AMG, and yet nonetheless countersigned them. I will now consider each of the payments and withdrawals in turn.

Cash withdrawal of US\$11,216.75 on 25 August 2017

46 This withdrawal of cash was for Mr Manu's personal expenses.⁷⁵ Cross-examination of Mr Ong elicited his concession that it did not benefit AMG,⁷⁶ and that he did not obtain from Mr Manu an explanation of or supporting documents for the expenses.⁷⁷

47 However, given that this took place shortly after Mr Manu successfully brought substantial funds to AMG, I accept that Mr Ong at the time thought it was a legitimate payment. I therefore do not allow this claim.

Payment of US\$22,556.39 on 25 August 2017 to ORO Trading Pte Ltd

48 This payment was made on Mr Manu's representation that it was to repay a deposit of S\$31,000.00 paid by ORO Trading Pte Ltd to AMG for a failed gold trade in December 2015/January 2016.⁷⁸ Mr Ong signed off on this without knowing if the sum was accurate or much about the transaction.⁷⁹

⁷⁵ Transcript, 24 June 2021, p 42 ln 17 to p 43 ln 18.

⁷⁶ Transcript, 24 June 2021, p 47 ln 8–10.

⁷⁷ Transcript, 24 June 2021, p 43 ln 21–26 and p 44 ln 1–6.

⁷⁸ Transcript, 24 June 2021, p 54 ln 17 to p 56 ln 17; Mr Abuthahir's AEIC at para 61(c).

⁷⁹ Transcript, 24 June 2021, p 55 ln 17–23.

Nonetheless, there was nothing implausible about Mr Manu having involved AMG in gold trades, given that its stated business was trading in metals. ORO Trading Pte Ltd had instructed the issue of a lawyer's letter to AMG dated 17 January 2017 demanding return of the deposit.⁸⁰ I accept that at that time Mr Ong thought it was legitimate. I do not allow this claim.

Payment of US\$9,398.50 on 26 August 2017 to Mr Lim Chin Keng

49 This was for payment of air tickets for Mr Manu to travel to Africa and India, purportedly on AMG's business.⁸¹ Mr Ong did not see any supporting documents, and while he believed that Mr Manu did indeed fly to Africa and India he could not be sure.⁸² He testified that Mr Manu did call him from Africa.⁸³ Again, at this stage, Mr Ong was entitled to take Mr Manu's representation at face value. Plainly, for Mr Manu to secure business, it was reasonable for him to travel. I do not allow this claim.

Payment of US\$22,142.86 on 26 August 2017 to Ms Chen Mei Qi

50 Mr Manu told Mr Ong that this payment was to repay Ms Chen for a personal loan to Mr Manu.⁸⁴ Mr Ong again did not ask for supporting documents.⁸⁵

⁸⁰ Mr Abuthahir's AEIC at pp 393–394.

⁸¹ Transcript, 24 June 2021, p 48 ln 11 to p 49 l 2 and p 51 ln 19–22.

⁸² Transcript, 24 June 2021, p 49 ln 3 to p 50 ln 3.

⁸³ Transcript, 24 June 2021, p 52 ln 14–17.

⁸⁴ Transcript, 24 June 2021, p 57 ln 27 to p 58 ln 1.

⁸⁵ Transcript, 24 June 2021, p 60 ln 16–17.

51 In my view, while Mr Ong started to have concerns, at this stage he was still reasonably relying on Mr Manu's assurances, which no doubt extended to representations that these transactions would in due course be accounted for and regularised. I do not allow this claim.

Cash withdrawal of US\$20,000 on 26 August 2017

52 This further cash withdrawal of US\$20,000 was not explained by Mr Manu to Mr Ong,⁸⁶ who again seems to have simply taken Mr Manu's word that this payment was required in the interests of AMG.

53 In my view, this cash withdrawal likely caused Mr Ong concern and the question is whether it was still reasonable for him to rely on Mr Manu's word. This is a question that must be answered in context, and without hindsight. Mr Ong cannot be taken to have known that Mr Manu would continue to make large withdrawals. At this time, in the context of what must have appeared to Mr Ong to have been Mr Manu's success in bringing in such a big deal, I accept that Mr Ong reasonably believed it was legitimate.

54 I accept that Mr Ong would have expected that the use of this money would be accounted for and documented in due course.

Payment of US\$149,398.22 on 28 August 2017 to Mr Abdul Razeed

55 Having reviewed Mr Ong's testimony and the documentary evidence, I consider that this payment marks a turning point in Mr Ong's state of mind, and that from this date onwards he fully understood that Mr Manu was acting illegitimately.

⁸⁶ Transcript, 24 June 2021, p 61 ln 4–27.

56 Mr Ong testified that he objected to this transaction and told Mr Manu that he wanted to step down as a director:⁸⁷

... I said I want to leave the company, he said, 'No, no, no, at this moment, you don't go...' I said, 'Bring any of your friends to come in'.

57 He also testified that he told Mr Manu that he "[did not] want to keep on signing this, because the payment involved is too big already".⁸⁸ This evidence shows that as of this date Mr Ong at least suspected that the payment Mr Manu was asking him to sign off on was not legitimate. Nonetheless, rather than protecting the interests of AMG, he signed off on this payment.

58 I hold that Mr Ong was in breach of his fiduciary duty in relation to this payment.

Payment of US\$74,699.11 on 28 August 2017 to Mr Ong

59 It appears that this money was paid to Mr Ong for his services as a director.⁸⁹ Mr Ong's testimony was to the effect that he reasonably believed that he was entitled to be remunerated for his work for AMG, including in respect of past years' service.⁹⁰

60 AMG relied on Companies Act s 169 for the proposition that the remuneration of directors must be approved by "a resolution that is not related to other matters".⁹¹ It remains arguable that, in a proper case, where all the

⁸⁷ Transcript, 24 June 2021, p 67 ln 28–30.

⁸⁸ Transcript, 24 June 2021, p 68 ln 5–6.

⁸⁹ Transcript, 25 June 2021, p 1 ln 30 to p 2 ln 3; Mr Abuthahir's AEIC at p 279.

⁹⁰ Transcript, 25 June 2021, p 6 ln 21–28.

⁹¹ AMG's reply submissions at para 17(c).

shareholders have had a meeting of minds concerning reasonable remuneration of directors, and the company is solvent, the absence of a shareholders' resolution compliant with Companies Act s 169 would not make the remuneration unauthorised. This would be an application of the principle that shareholders may proceed on the basis of informal assent, if unanimous (see *Re Duomatic Ltd* [1969] 2 Ch 365; *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [25]).

61 This however is not such a proper case. No basis was offered for the calculation of the remuneration. Nor was any period stipulated. I also add that it was the next day that AMG became insolvent, and I infer that Mr Manu certainly understood that AMG was approaching insolvency while Mr Ong ought reasonably to have done so. Accordingly, Mr Manu and Mr Ong were obliged to consider the interests of creditors when making this decision. I am unable to find that the reasonableness of the remuneration was properly considered by the directors. I also find that the real purpose of this payment was an attempt by Mr Manu to secure Mr Ong's cooperation in his scheme, a scheme that was manifestly not in AMG's interests. I find that Mr Ong ought reasonably to have understood this to be the case. Accordingly, I hold this payment was improper and not duly authorised.

Cash withdrawal of US\$112,666.38 on 28 August 2017

62 This was a very large and wholly unexplained cash withdrawal, which Mr Ong admitted did not benefit AMG.⁹² I hold that in signing off on this withdrawal, he was in breach of his fiduciary duty.

⁹² Transcript, 24 June 2021, p 63 ln 5 to p 64 ln 9.

Payment of US\$5,000 on 28 August 2017 to Mr Adanuty

63 While this is a relatively small amount, by this stage Mr Ong understood that he could not simply rely on Mr Manu's word. Mr Ong pleaded that this payment was intended to repay a personal loan of Mr Manu's,⁹³ and could not explain how this might have been to AMG's benefit.⁹⁴ He should not have signed off on it, and I hold that it was a breach of fiduciary duty for him to do so.

Payments totalling US\$181,119.92 on 29 August 2017 and 5 September 2017 to Sabre Global Pte Ltd

64 Three payments were made to Sabre Global Pte Ltd. The first two, both on 29 August 2017, were stated in their transfer application forms to be made in respect of consultancy fees,⁹⁵ but for the third, on 5 September 2017, no reason was provided.⁹⁶ By this stage, after the large unexplained withdrawals on the previous day, 28 August 2017, I find that Mr Ong now understood that Mr Manu was taking money out of AMG for his own and not AMG's purposes. Indeed, he testified that he told Mr Manu he did not know what the payment was for and wanted to resign.⁹⁷ Mr Ong's fiduciary duty required him to be satisfied that any particular payment was truly for AMG's purposes before signing off. Yet he signed off on these payments without being so satisfied. I hold that Mr Ong was in breach of fiduciary duty in respect of these payments.

⁹³ Mr Ong's Defence at para 24(iv).

⁹⁴ Transcript, 24 June 2021, p 70 ln 1–9.

⁹⁵ Mr Abuthahir's AEIC at pp 264 and 269.

⁹⁶ Mr Abuthahir's AEIC at p 322.

⁹⁷ Transcript, 24 June 2021 p70 ln 26–30.

Payment of US\$75,000 on 29 August 2017 to Mr Manu

65 This payment to Mr Manu was purportedly remuneration to past directors’ fees.⁹⁸ Yet, Mr Ong did not offer any basis for this figure, such as the period or rate by which it was calculated, citing only Mr Manu’s word.⁹⁹ There was no shareholders’ resolution.¹⁰⁰ Following the earlier large and unexplained withdrawals, Mr Ong should have been wary of this transfer of money to Mr Manu. Indeed, Mr Ong in his defence noted that he was “reluctant” to countersign on this transfer.¹⁰¹ Yet he did so anyway, in breach of his fiduciary duty. I allow this claim.

Payment of US\$100,000 on 29 August 2017 to Three Quality Services Limited

66 The purported purpose of this payment was to pay consultancy fees.¹⁰² I do not accept that Mr Ong thought that this was the real reason for the payment. There was nothing given to him to evidence the supply of consultancy services at all, let alone in such a large amount.¹⁰³ His signing off on this payment was a breach of fiduciary duty. I allow this claim.

⁹⁸ Mr Ong’s Defence at para 26.

⁹⁹ Mr Ong’s Defence at para 26.

¹⁰⁰ Mr Abuthahir’s AEIC at para 61(j).

¹⁰¹ Mr Ong’s Defence at para 27.

¹⁰² Mr Abuthahir’s AEIC at p 271.

¹⁰³ Transcript, 24 June 2021, p 79 ln 12–16.

Payments totalling US\$450,000 on 5 September 2017 and 21 September 2017 to Mr Kevin Anthony Griffin Jr

67 The transfer application forms for these payments purport to relate to the supply of aluminium,¹⁰⁴ but no documents were shown to Mr Ong to evidence this.¹⁰⁵ He said in evidence that he questioned Mr Manu about it.¹⁰⁶ The payee was apparently once a director of AMG as well.¹⁰⁷ However, Mr Manu gave him no reason,¹⁰⁸ and yet he still signed off on it. At the bank he tried to walk away, but returned when Mr Manu called to him.¹⁰⁹ I find that Mr Ong knew and understood that these payments were not for proper purposes of AMG. Mr Ong signed off on them in breach of his fiduciary duty. I allow this claim.

Payment of US\$143,000 on 5 September 2017 to White Lotus Cosmetics Limited

68 AMG's counsel only asked a few questions about this payment.¹¹⁰ As with many of the other payments, Mr Ong knew little about it and relied on Mr Manu.¹¹¹ However, in this case the payment matches in amount and payee the payment to the consultant stipulated in the MOU.¹¹² I find that it was the contractually stipulated payment under the MOU. I do not allow this claim.

¹⁰⁴ Mr Abuthahir's AEIC at pp 289 and 296.

¹⁰⁵ Transcript, 24 June 2021, p 84 ln 26 to p 85 ln 1.

¹⁰⁶ Transcript, 24 June 2021, p 79 ln 28.

¹⁰⁷ Transcript, 24 June 2021, p 79 ln 32 to p 80 ln 14.

¹⁰⁸ Transcript, 24 June 2021, p 80 ln 17–29.

¹⁰⁹ Transcript, 24 June 2021, p 81 ln 4–8 and p 87 ln 16–18.

¹¹⁰ Transcript, 24 June 2021, p 101 ln 1–13.

¹¹¹ Transcript, 24 June 2021, p 101 ln 6–8.

¹¹² CWU BCP 18.

Payment of US\$150,000 on 6 September 2017 to Quality Printers Pte Ltd

69 Mr Ong accepted that he did not know who Quality Printers Pte Ltd were or what the transaction was about.¹¹³ The Liquidator corresponded with Quality Printers Pte Ltd, and Quality Printers Pte Ltd replied that the payment was for the provision of transport services.¹¹⁴ During cross-examination, AMG's counsel pointed out to Mr Ong the absurdity of this arrangement, given that AMG had no staff, and Mr Ong agreed that the payment should not have been made.¹¹⁵ I agree, and find that Mr Ong was in breach of his fiduciary duty in respect of this payment. I allow this claim.

Payment of US\$37,458.77 on 21 September 2017 to Mr Koh

70 This payment was the first half of Mr Koh's intended remuneration of US\$75,000.00 as a director. Mr Ong said it was negotiated between Mr Manu and Mr Koh and did not know its purpose.¹¹⁶ Mr Ong was not very clear in his evidence, but it does seem that Mr Ong was quite desperate for Mr Koh to replace him as a director and so was ready to sign off on whatever amount Mr Manu negotiated with Mr Koh. However, I accept that repayment of a loan made previously to the company in order to have the lender re-join the company as a director is not in and of itself a breach of fiduciary duty. Mr Koh had resigned from AMG previously, but had been a director for a long time before his resignation. Mr Ong of course knew this, and also knew that Mr Koh had lent money to AMG, as evidenced by Mr Koh's email to Mr Ong dated 28 July 2009,

¹¹³ Transcript, 24 June 2021, p 88 ln 8-13.

¹¹⁴ Mr Abuthahir's AEIC at para 61(n).

¹¹⁵ Transcript, 24 June 2021, p 89 ln 13 to p 90 ln 10.

¹¹⁶ Transcript, 25 June 2021, p 4 l 26 to p 5 l 4.

referred to at [40] above. I do not find that Mr Ong knew of any bargain struck between Mr Manu and Mr Koh which would have rendered his acquiescence dishonest or unreasonable. I do not allow this claim against Mr Ong.

Facility from and charge over account granted to Standard Chartered Bank

71 Together with Mr Manu, Mr Ong signed the necessary documents with SCB to establish a facility, secured against a fixed deposit of US\$1,000,000.¹¹⁷ It is true that he did not give much thought concerning why AMG needed such a facility.¹¹⁸ Nonetheless, I hold that he reasonably believed Mr Manu's representations that such a facility was in the interests of AMG. Logically, having a credit line would be beneficial to AMG's trading, and Mr Ong honestly thought that Mr Manu had secured a valuable deal for AMG and had renewed confidence that Mr Manu could secure new deals for AMG. Mr Ong would have envisaged the use of this facility in connection with such deals. It cannot be said that this was not a genuine transaction with a substantial bank. The administrative fee and interest rate were reasonable. The alleged misuse of the facility to pay a sum of US\$744,000.00 to Smart Recycling Pte Ltd only occurred on or about 9 November 2017, more than a month after Mr Ong left AMG. I do not allow this claim against Mr Ong.

Companies Act s 145(5)

72 Mr Ong alluded in his evidence to his understanding that despite his growing concerns over the payments from the SCB account and his desire to resign his directorship in AMG, he could not do so as he was the "only

¹¹⁷ Mr Abuthahir's AEIC at p 563.

¹¹⁸ Transcript, 24 June 2021, p 95 ln 11–19.

Singapore director”.¹¹⁹ I take this as a reference to Companies Act s 145(5), which stipulates that:

Notwithstanding anything in this Act or in the constitution of the company, or in any agreement with the company, a director of a company shall not resign or vacate his office unless there is remaining in the company at least one director who is ordinarily resident in Singapore; and any purported resignation or vacation of office in breach of this subsection shall be deemed to be invalid.

73 I accept that the effect of this section was such that Mr Ong could not resign unilaterally, as that would have left AMG without any other director ordinarily resident in Singapore, the only other director at the time being Mr Manu. This, however, does not absolve Mr Ong of liability. While he remained in office, he was subject to the duties of a director. These he breached, even though he could have and should have refused to countersign the payments and withdrawals. His signature was required by SCB to mandate such payments and withdrawals. Indeed, it was when he finally made up his mind to refuse to sign that he was able to extricate himself from the situation, by forcing Mr Manu to seek a replacement director in Mr Koh.¹²⁰

Conclusion on Mr Ong’s liability

74 I have allowed a total of US\$1,297,883.63 of the claims made by AMG against Mr Ong. I also award interest on this sum at the usual rate of 5.33% from the date of writ to the date of judgment.

¹¹⁹ Transcript, 23 June 2021, p 49 ln 16–19.

¹²⁰ Transcript, 23 June 2021, p 49 ln 19–24.

Issue 6: Mr Koh's liability

75 As far as Mr Koh is concerned, AMG claims in respect of nineteen withdrawals made from the SCB Account while he was a director. In addition, AMG claims a payment made to Mr Koh prior to his re-joining as a director, and also makes a claim in relation to the facility obtained from SCB.¹²¹

76 Unlike Mr Ong, Mr Koh was not a joint signatory to the SCB Account. Instead, together with Mr Manu he signed a directors' resolution dated 26 September 2017 authorising Mr Manu to be the sole signatory.¹²² AMG contends that this was itself a breach of his duty as a director because it removed "the sole checking mechanism that is the joint signatory".¹²³

77 Mr Koh contended that this board resolution was made reasonably and honestly, because after all Mr Manu had brought in the deal by himself, and giving him sole authority would enable him to build on that deal and bring in more business more quickly.¹²⁴

78 I do not accept this explanation from Mr Koh. I find that he was focused on recovering from AMG some of what he considered was owed to him, and that this was why he agreed to become the required locally resident director of AMG. As he admitted in cross-examination, when Mr Manu invited him back to the company, he "took the opportunity to---to try to get back some of [his]

¹²¹ AMG's closing submissions at paras 24–27.

¹²² Mr Abuthahir's AEIC at pp 578–579.

¹²³ AMG's closing submissions at para 69.

¹²⁴ Mr Koh's reply submissions at paras 9–10.

loans”.¹²⁵ However, as a director he was under a fiduciary duty of loyalty to AMG that included the duty to safeguard its assets. He consciously decided not to act as a check on Mr Manu. He did not institute any other system of checks or safeguards. In fact, I find that he understood at the least that there was a real risk that Mr Manu would make use of AMG’s funds for his own and not AMG’s purposes. The basis for this finding arises from the circumstances of his own return to AMG: during cross-examination by AMG’s counsel, he said he was invited by Mr Manu to re-join because “Mr Ong didn’t cooperate properly”.¹²⁶ When Mr Ong cross-examined him thereafter and asked him to elaborate, Mr Koh answered:¹²⁷

Okay, yah, just now I---Mr Manu did say that you---you don’t want to sign those cheques and you have made---made jobs very difficult for him and all that. That was---that was---that was the main---main reason why he say he---he---he don’t want---make him very difficult to do---do business. He did mention that you---you made the signing very difficult when---when you sometimes don’t---when he called you and all that, then he---you disappear, you don’t want to present and all that. So he---he was angry so---so---so that’s why he talk to me, okay.

79 Mr Koh therefore knew that Mr Ong was resigning from his directorship precisely because he did not agree to at least some of the payments or withdrawals that Mr Manu wanted him to countersign. Mr Koh does not seem to have asked Mr Ong at the time why he had been reluctant to countersign some payments or withdrawals. This is surprising given that they had known each other for so long. Hearing what Mr Manu had to say was enough to put him on notice that something was amiss in Mr Manu’s conduct. Mr Koh’s not following

¹²⁵ Transcript, 25 June 2021, p 85 ln 12–14.

¹²⁶ Transcript, 25 June 2021, p 72 ln 12.

¹²⁷ Transcript, 25 June 2021, p 96 ln 6–13.

up with Mr Ong about this was an instance of turning a blind eye – choosing not to speak to Mr Ong in case he was told something he did not want to hear about Mr Manu’s conduct. Instead of acting as a check on Mr Manu, he preferred to give Mr Manu a free rein, perhaps mistakenly believing that he was protected by the resolution he signed authorising Mr Manu to be the sole signatory. In making this Faustian pact with Mr Manu, he preferred his own interests (in having Mr Manu agree to repay his loan to AMG) to those of AMG (in having its assets used only for proper purposes of AMG). Consequently, Mr Koh is liable to AMG for those withdrawals or payments made by Mr Manu which were not for AMG’s purposes or in AMG’s interests, during the period that he was a director.

80 In addition, once a company is approaching insolvency, a director must consider the interests of creditors (see *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo and others* [2004] 1 SLR(R) 434 at [13]–[16]). AMG’s counsel did not put to Mr Koh that he knew or ought to have known that AMG was insolvent. Nonetheless, any incoming director should acquaint himself with the financial position of the company. Mr Koh also confirmed in evidence that his role as director included the accounts.¹²⁸ It must have been obvious to him that AMG was insolvent. This answers Mr Koh’s argument that it was reasonable for him to give Mr Manu free rein as Mr Manu was by then the 100% owner of AMG. In AMG’s case, it had no business income and so, once the amount in the SCB Account had reduced to less than the US\$2,145,000 owed to F&BCo, every subsequent withdrawal or payment was correspondingly reducing the amount that F&BCo could receive.

¹²⁸ Transcript, 25 June 2021, p 32 ln 22–27.

81 I now consider those withdrawals and payments.

Twelve cash withdrawals or cash cheques totalling US\$148,064.97

82 There appears to have been no documentation of the purpose of these withdrawals and cash cheques, and I find that they were not for AMG's purposes or in AMG's interests. These withdrawals and payments were a depletion of AMG's funds and a loss to it. This loss flowed from Mr Koh's breach of duty in allowing Mr Manu to operate the SCB account without any check or safeguard. I allow this claim.

Payment of US\$37,247.43 on 29 September 2017 to Mr Koh

83 Mr Koh justified this payment as a part repayment of his loan to AMG.¹²⁹ I have accepted that he believed that AMG owed him substantial money. However, this payment is tainted because it was made in return for his breach of fiduciary duty in agreeing not to check on Mr Manu when he knew of Mr Ong's disagreements with Mr Manu concerning withdrawals and payments.

84 I allow this claim.

Payment of US\$10,000 on 2 October 2017 to Uniroyal Communications Pte Ltd

85 AMG has established that there were no supporting documents for this payment and its purpose is unknown.¹³⁰ I allow this claim.

¹²⁹ Transcript, 25 June 2021, p 85 ln 7–14 and p 86 ln 29 to p 87 ln 7.

¹³⁰ Mr Abuthahir's AEIC at para 68(c).

Payment of US\$11,000 on 2 October 2017 to Ms Chua Pair Shen

86 The Liquidator corresponded with Mrs Chua concerning this payment.¹³¹ In response, Ms Chua provided an acknowledgement signed by Mr Manu dated 3 August 2017 purporting to acknowledge that he had received S\$15,000 as a loan to AMG.¹³² It does not appear that AMG received the benefit of any loan. It stretches credulity that AMG would have sought such a loan given how much cash it had at the time. I find that there was no legitimate transaction and allow this claim.

Payment of US\$11,500 on 3 October 2017 to Mr Shuan Jarmen

87 AMG has established that there were no supporting documents for this payment and its purpose is unknown.¹³³ I allow this claim.

Payment of US\$3,700 on 11 October 2017 to Ms Christina Marie Nyanmani

88 AMG has established that there were no supporting documents for this payment and its purpose is unknown.¹³⁴ I allow this claim.

Payment of US\$1,370 to Mr Ng Wai Loon

89 AMG has established that there were no supporting documents for this payment and its purpose is unknown.¹³⁵ I allow this claim.

¹³¹ Mr Abuthahir's AEIC at para 68(d).

¹³² Mr Abuthahir's AEIC at p 431.

¹³³ Mr Abuthahir's AEIC at para 68(e).

¹³⁴ Mr Abuthahir's AEIC at para 68(f).

¹³⁵ Mr Abuthahir's AEIC at para 68(g).

Payment of US\$1,850 to Mr Abdul Razeed

90 AMG has established that there were no supporting documents for this payment and its purpose is unknown.¹³⁶ I allow this claim.

Prior payment of US\$37,458.77 to Mr Koh

91 Mr Koh’s evidence was that this payment was made to him because he “took advantage of putting the condition to Mr Manu to commit to return some of the loan to me before I can join”.¹³⁷

92 In and of itself, there is nothing wrong in a director bargaining for remuneration, or as in this case repayment of a loan, in return for joining or re-joining a board. A director is generally entitled to consider his own interests subject to disclosure and recusal. What was wrong on Mr Koh’s part was that the reason why his return to the board was desired by Mr Manu was his promise, express or implied, that he would not check on Mr Manu and would sign a resolution to make Mr Manu the sole signatory in relation to SCB, a promise given when he already knew of Mr Ong’s disagreements with Mr Manu concerning payments and withdrawals. Mr Koh would have suspected that Mr Manu was not intending to act in AMG’s interests and had the intention to strip it of assets. He chose to facilitate Mr Manu’s scheme while attempting to turn a blind eye to it.

93 It was a breach of fiduciary duty on Mr Manu’s part to use AMG’s funds to further his own scheme to strip AMG of its assets. Mr Koh was a party to this bargain and so knew and understood that he was receiving the money because

¹³⁶ Mr Abuthahir’s AEIC at para 68(h).

¹³⁷ Transcript, 25 June 2021, p 86 ln 3–4.

of and flowing from Mr Manu's breach of fiduciary duty. Accordingly, he is liable in knowing receipt.

Facility from and charge over account granted to Standard Chartered Bank

94 AMG claims against Mr Koh for the alleged misuse of the facility to pay a sum of US\$744,000.00 to Smart Recycling Pte Ltd on or about 9 November 2017,¹³⁸ after Mr Koh became a director of AMG. Mr Manu was able to give this instruction by himself to SCB because of the change effected by the resolution that Mr Koh had signed on 26 September 2017 authorising Mr Manu as sole signatory in relation to all the banking facilities with SCB.¹³⁹

95 Mr Manu apparently tendered an invoice¹⁴⁰ and a delivery order¹⁴¹ from Smart Recycling Pte Ltd to SCB in order to drawdown on the facility. However, there does not appear to have been any actual underlying transaction between AMG and Smart Recycling.¹⁴² I accept that this was not a legitimate transaction and therefore allow this claim against Mr Koh.

96 AMG also claims the administrative fee of US\$1,011.21 and interest of US\$10,879.76 accrued under the facility. I do not allow the claim for the administrative fee as the facility was already in place prior to Mr Koh rejoining the board, and in any case, as discussed at [71] above, I do not consider that setting up the facility was itself a breach of fiduciary duty or that the

¹³⁸ AMG's closing submissions at para 59(o).

¹³⁹ Mr Abuthahir's AEIC at pp 578–579.

¹⁴⁰ Mr Abuthahir's AEIC at p 601.

¹⁴¹ Mr Abuthahir's AEIC at p 602.

¹⁴² AMG's closing submissions at para 59(n).

administrative fee was unreasonable. However, the interest that accrued on the illegitimate drawdown on the facility is a loss that flows from Mr Koh's giving Mr Manu free rein to instruct drawdowns on the facility, and he is liable for it just as much as he is liable for the amount drawn down to pay Smart Recycling Pte Ltd.

Conclusion on Mr Koh's liability

97 I have allowed a total of US\$1,017,070.93 of the claims made by AMG against Mr Ong. I also award interest on this sum at the usual rate of 5.33% from the date of writ to the date of judgment.

Issue 7: Companies Act s 391

98 Companies Act s 391 provides:

If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.

99 As I have noted at [25] above, I considered it important to consider this section notwithstanding that the defendants did not plead it. It seemed to me that the gist of their defence was that they had acted honestly and reasonably and should be fairly excused from any breach of duty committed by them. I raised it at the start of the trial so that AMG could lead evidence on it if felt necessary or desirable, as well as question the defendants should they choose to give evidence. My doing so does not derogate from my view expressed in *OOPA Pte Ltd v Bui Sy Phong* [2021] SGHC 142 at [62] where I opined that "it is good

practice for a defendant to plead in his defence his intention to seek relief under this section”. This is because the defendants are litigants-in-person and that is material to why I took the course that I did in this case. The court should not guide a litigant-in-person to the prejudice of the opposing party; nonetheless, where that person is grasping for a legal argument that is not quite articulated, the court may give voice to it and offer the other party an opportunity for rebuttal.

100 However, having considered the evidence carefully I find that Mr Ong has failed to establish that he acted reasonably, and that Mr Koh has failed to establish that he acted either honestly or reasonably. Hence, I do not go on to consider whether either should be fairly excused of any breach of duty.

101 In the case of Mr Ong, while I have considerable sympathy for his predicament, a reasonable person in his position would not have given in to Mr Manu’s pressure. Unfortunately, conduct that is understandable given the frailty of human nature may yet not be reasonable in law, considered objectively. In this case, Mr Ong could and should have refused to countersign once he understood that Mr Manu was not engaging in legitimate business on behalf of AMG, *ie*, from 28 August 2017 onwards. To countersign under such circumstances was not reasonable.

102 As for Mr Koh, not only did he behave unreasonably in resolving to give Mr Manu a free rein when he knew that Mr Ong had left precisely because of disagreements over the purpose of payments and withdrawals that Mr Manu wished to make, he also failed to act honestly. He allowed his desire to be repaid some of what he believed AMG to owe him to override his duty to protect AMG’s assets. While there is nothing wrong with someone refusing to join or

re-join the board of a company unless he is repaid a loan that he made to the company, it is not permissible to agree in return for such repayment that upon being appointed a director one will not check on a fellow director's conduct. This is especially so in circumstances where the company is obviously insolvent.

Conclusion

103 I allow AMG's claims against Mr Ong in the sum of US\$1,297,883.63 and against Mr Koh in the sum of US\$1,017,070.93. I award interest on these sums at the usual rate of 5.33% pursuant to Civil Law Act (Cap 43, 1999 Rev Ed) s 12 from the date of the writ to the date of judgment.

104 I will hear parties on costs.

Philip Jeyaretnam
Judicial Commissioner

Yeo Teng Yung Christopher and Lavan Vickneson (Legal Solutions
LLC) for the plaintiff;
The first and second defendants in person.
