IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 40

Civil Appeal No 94 of 2016

Between

(1) Goh Chan Peng
(2) Lee Bee Lan
(3) Wyser International Ltd
(4) Wyser Capital Ltd

… *Appellants*

And

(1) Beyonics Technology Ltd
(2) Beyonics International Pte Ltd

… *Respondents*

Civil Appeal No 98 of 2016

Between

Beyonics Technology Ltd

… *Appellant*

And

Goh Chan Peng

… *Respondent*

In the matter of Suit No 672 of 2013

Between

(1) Beyonics Technology Ltd
(2) Beyonics International Pte Ltd

… *Plaintiffs*

And

(1) Goh Chan Peng
(2) Lee Bee Lan
(3) Wyser International Ltd
(4) Wyser Capital Ltd

… *Defendants*

JUDGMENT

[Companies] — [Directors] — [Duties]
[Employment Law] — [Contract of service] — [Termination]

Goh Chan Peng and others
v
Beyonics Technology Ltd and another and another appeal

[2017] SGCA 40

Court of Appeal — Civil Appeals Nos 94 and 98 of 2016
Chao Hick Tin JA, Andrew Pang Boon Leong JA, Judith Prakash JA
27 February 2017

27 June 2017 Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

Introduction

1 The two appeals before us arise out of a situation which, unfortunately, is not uncommon in business circles in Singapore. The plaintiffs in the court below brought an action against their former director and chief executive officer and two companies which he had set up. The allegations involved breach of fiduciary duties, diversion of business and wrongful claims for expenses made by the former director. The plaintiffs also sought to claw back part of the salary that they had paid the director.

2 The High Court Judge ("the Judge") found in favour of the plaintiffs. In her judgment, *Beyonics Technology Ltd and another v Goh Chan Peng and*

others [2016] SGHC 120 ("the Judgment"), she awarded the first plaintiff its claim for loss of profits due to the diversion of the business to a competitor ("Diversion Loss") as well as its claim for loss of profits in relation to the loss of future business with a key client ("Total Loss"). The second plaintiff's claims for the return of unjustified expenses and salary received by the former director were also allowed. The erstwhile defendants' dissatisfaction with those findings led to the lodging of Civil Appeal No 94 of 2016 ("CA 94"). The other appeal, Civil Appeal 98 of 2016 ("CA 98"), is a cross-appeal by the former first plaintiff seeking an increase in the quantification of the Total Loss.

Background

3 The facts are lengthy and are well set out in the Judgment. What follows is a summary, taken mainly from the Judgment.

The parties

4 The named appellants in CA 94 are Mr Goh Chan Peng ("Mr Goh"), his wife, Mdm Lee Bee Lan, and two corporate entities set up in the British Virgin Islands by Mr Goh: Wyser International Ltd ("Wyser-I") and Wyser Capital Ltd. Mr Goh and Wyser-I are the substantive appellants who seek to overturn the orders that the Judge made against them. At all material times, Mr Goh was the beneficial owner of Wyser-I and Wyser Capital Ltd.

5 The law suit arose out of Mr Goh's employment in what is known as the "Beyonics Group". The Beyonics Group comprises Beyonics Technology Ltd ("BTL"), a company incorporated in Singapore, and its subsidiaries. A number of these subsidiaries played a part in the story, but at this stage, we need mention only Beyonics International Pte Ltd ("Beyonics-I"), another Singapore

company, and Beyonics Asia Pacific Limited ("BAP"), a company incorporated in Mauritius. BTL and Beyonics-I were the plaintiffs in the action and are the respondents in CA 94. It is BTL that is the appellant in CA 98.

6 The Beyonics Group has a precision engineering division ("the PE Division") of which BAP was a part. The PE Division manufactured baseplates, a key component of hard disk drives, and supplied them to Seagate Technology International ("Seagate"). As a leading manufacturer of hard disk drives, Seagate had been an important customer of the PE Division from 1987. The revenue from contracts with Seagate was recognised in the accounts of BAP.

7 The Beyonics Group faced competition in the precision engineering business. Among the competitors were two South Korean companies, Nedec Co Ltd ("Nedec") and Kodec Co Ltd ("Kodec"). These companies with their associates (collectively "the NedKo Group") also manufactured baseplates.

8 From 1 May 2000 up to 9 January 2013, when he tendered his resignation, Mr Goh was a director and the chief executive officer ("CEO") of both BTL and Beyonics-I, as well as the CEO of the Beyonics Group as a whole. The main charge that the Beyonics Group made against Mr Goh in the litigation below was that between 2011 and 2012, he wrongfully diverted their baseplate business with Seagate to the NedKo Group.

Key events up to end 2012

Manufacturing of baseplates for Seagate

9 There are two main stages in the manufacture of baseplates. The First Stage involves various processes and results in the production of an "e-coated baseplate". In the Second Stage, the e-coated baseplate is worked on and

machined and turned into the finished baseplate. Prior to October 2011, the Beyonics Group, acting through various subsidiaries, in particular companies in China and Thailand, carried out both stages of the work of manufacturing baseplates and supplied its finished baseplates to Seagate. Seagate had various programmes for its baseplates and to be able to supply baseplates to it, a supplier had to undergo a qualification process and learn how to implement the programmes. The Beyonics Group was qualified to perform both the First and Second Stage Work for numerous Seagate baseplate programmes. Amongst these was a programme known as the "Brinks 2H programme".

10 Disaster struck in October 2011. Due to severe flooding in Thailand, the facilities of many hard disk manufacturers in Thailand were destroyed. A Thai factory belonging to the Beyonics Group was among those that had to be shut down. Due to this disruption in supply, Seagate was anxious to secure capacity from its baseplate suppliers and this set the stage for the involvement of the NedKo Group in the manufacturing process for Seagate that had been hitherto accomplished entirely by the Beyonics Group.

11 On 24 November 2011, Seagate approved of a collaboration between the Beyonics Group and the NedKo Group ("the B-N Alliance") at a meeting attended by Mr Goh on behalf of the Beyonics Group, one Mr Tae Sung Lee ("Tony Lee"), the chief financial officer and managing director of the NedKo Group, and one Mr Billy Chua ("Billy Chua"), a senior employee of Seagate. The B-N Alliance was formalised in a contract dated 10 January 2012 between BAP and a NedKo Group subsidiary, LND ("the BAP-LND Contract"). It was agreed that for Seagate's Brinks 2H programme, BTEC, the Beyonics Group's subsidiary in China, would complete the First Stage Work and supply e-coated baseplates to LND. LND would then perform the Second Stage Work and sell

the finished baseplates to Seagate. Pursuant to this arrangement, between January 2012 and January 2013, the Beyonics Group supplied more than eight million e-coated baseplates to LND for finishing instead of finishing the baseplates itself.

12 Exactly what transpired that led to the B-N Alliance was heavily disputed in the proceedings below. The Judge's factual findings were that Seagate initiated the collaboration by proposing the B-N Alliance, but Mr Goh was "instrumental" in the process leading to the approval of the B-N Alliance by Seagate (Judgment at [44]). The Judge found (at [65]) that while Seagate might have initiated the concept and provided the final approval, Mr Goh, together with the NedKo Group convinced Seagate to adopt this course which made the NedKo Group a supplier of baseplates for Seagate. The Judge recounted the following:

(a) Late June 2011: At his own request, Mr Goh was introduced to Stephen Hwang, CEO of the NedKo Group, who indicated that he wanted to discuss doing business with Seagate.

(b) 4 to 7 September 2011: Stephen Hwang and Tony Lee visited factories belonging to the Beyonics Group in Thailand and Malaysia. E-mails exchanged after this visits revealed that Mr Goh had given advice on surviving in the hard disk drive business and had agreed to provide the NedKo Group with certain data and information on the Beyonics PE Division.

(c) 30 September 2011: Stephen Hwang extended an invitation to Mr Goh to visit LND, which the latter accepted.

(d) 4 October 2011: Tony Lee wrote to Mr Goh expressing appreciation for Mr Goh's intended visit to the NedKo factories on about 10 November 2011 which he saw as an opportunity for parties to engage in "further talks for co-operation and collaboration".

(e) After the Thai floods in October 2011, Seagate indicated it preferred to depend on *existing* suppliers. The NedKo Group was not qualified and did not automatically qualify to supply baseplates to Seagate.

(f) Around mid-October 2011: In communications with Seagate, Mr Goh under-represented the Beyonics Group's capacity to produce baseplates and showed little commitment and willingness to support Seagate; Mr Goh informed Billy Chua that the Beyonics Group was only able to continue with the supply of three million Brinks 2H baseplates per quarter despite Billy Chua having indicated that he required a commitment for more than four million baseplates per quarter. The Beyonics Group's production capacity at that time was a matter that the parties disputed before the Judge.

(g) 24 October 2011: Billy Chua e-mailed Tony Lee to ask whether the NedKo Group wished to participate in Seagate's baseplate production programme and thereafter discussed the Brinks 2H programme over the telephone. In the same conversation, the idea of a potential partnership between the NedKo Group and another baseplate supplier was discussed.

(h) 25 October 2011: Tony Lee e-mailed Billy Chua and stated the NedKo Group's preference to perform Second Stage Work and asked if

it should obtain e-coated baseplates from the Beyonics Group or another supplier. Billy Chua replied on the same day and agreed to meet Tony Lee in Singapore on 27 October 2011.

(i) 26 October 2011: Tony Lee e-mailed Mr Goh to inform him about his forthcoming meeting with Seagate on 27 October 2011, and stated that the issues to be discussed might include a "'[j]oint operation' of your Changsu (*sic*) factory" and asked to meet Mr Goh on 28 October 2011. Although Mr Goh insisted at trial that he had no clue what the "joint operation" meant, Tony Lee testified that it referred to the proposal for the Beyonics Group to supply e-coated baseplates to the NedKo Group. Mr Goh had also simply replied to Tony Lee's e-mail to agree to meeting on 28 October 2011, without asking him to clarify what the "joint operation" meant. The Judge inferred from these e-mails that Mr Goh had spoken to Tony Lee about the proposed B-N Alliance *before* Tony Lee's e-mail to him on 26 October 2011 (Judgment at [55]).

(j) 27 October 2011: Ten minutes before Seagate was to meet Tony Lee for the first time, Mr Goh (knowing that the meeting was due to commence and that the NedKo Group was keen to do business with Seagate) sent an e-mail to Billy Chua claiming that "… due to having major losses in PE division; our investment is limited and we could only exercise limited investment strategy to help the current demand faced by our customers". After the meeting, Billy Chua sent Tony Lee the minutes of the meeting, which reflected that Seagate had agreed to a partnership between the Beyonics Group and the NedKo Group and stated that Billy Chua had earlier spoken to Mr Goh who had "no objection", indicating that Mr Goh knew about Seagate's proposal

well *before* the 27 October 2011 meeting and not after it as Mr Goh insisted in court.

(k) 28 October 2011: Mr Goh and Tony Lee met, and agreed to the proposed alliance, even though the parties had not discussed key terms such as pricing.

(l) 10 November 2011: Mr Goh visited LND's factory. The B-N Alliance was discussed during the visit. Tony Lee also testified that Mr Goh then suggested making improvements to enable the NedKo Group to achieve the necessary qualification to do Second Stage Work for Seagate. During the discussion, Tony Lee suggested that Mr Goh be compensated for his consultancy services to the NedKo Group.

(m) 18 November 2011: Mr Goh met Seagate concerning the B-N Alliance, and presented slides ("the November 2011 Slides") that pushed for the alliance (with a slide titled "Why Beyonics/Kodec/Nedec Team" giving various reasons including that of "Complementary Engineering capabilities") as well as for a US$2.5m grant from Seagate for the NedKo Group. At the same meeting, he indicated that the PE Division of the Beyonics Group faced a shortage of machines and equipment.

(n) 24 November 2011: Seagate confirmed the B-N Alliance in a meeting between representatives of Seagate, the Beyonics Group and the NedKo Group at the Seagate office.

(o) 10 January 2012: The BAP-LND Contract formalised the B-N Alliance.

The Seagate Grant

13 The Judge also found (at [69] of the Judgment) that it was Mr Goh who initiated the idea of procuring a grant from Seagate, strategised on how to secure it and assisted the NedKo Group in obtaining it. The grant, in the sum of US$2.5m, was to cover the NedKo Group's "new tooling expenses" needed to manufacture baseplates for Seagate. At the meeting on 18 November 2011, Mr Goh used the presentation slides to push for this grant.

The Wyser Agreements

14 On 5 April 2012, Mr Goh signed two agreements on behalf of Wyser-I. Collectively referred to as "the Wyser Agreements", the first agreement was between Wyser-I and Kodec and the other was between Wyser-I and Nedec. Both agreements were backdated to 24 November 2011. They provided for payments to be made to Wyser-I.

15 Mr Goh's position was that these payments were for consultancy services, whilst BTL alleged that they were essentially bribes. The First Wyser Agreement provided for payment by Kodec of US$0.02 per e-coated baseplate for "monthly sales and management support service" as part of Wyser-I's assistance in securing "6 million baseplates capacity business … for the Seagate Brink 2H program". The Second Wyser Agreement provided for a payment of US$500,000 by Nedec for Wyser-I's assistance in "securing a US$2.5 million … grant … funded by Seagate". By a third agreement, which was apparently not signed, US$300,000 of this US$500,000 payable under the Second Wyser Agreement was to be transferred to Stephen Hwang.

16 Mr Goh did not dispute that he had received US$200,000 under the Second Wyser Agreement. As for payment under the First Wyser Agreement, BTL alleged that Mr Goh must have received a total of US$166,544.02 through Wyser-I based on the 8,327,701 e-coated baseplates that were shipped from the Beyonics Group to the NedKo Group from January 2012 to January 2013. Mr Goh's position was that because some of these baseplates were subsequently rejected, Wyser-I received only about US$88,000 under the First Wyser Agreement. The Judge found it unbelievable that about 50% of the baseplates would have been rejected and, since Mr Goh accepted that 8,327,701 e-coated baseplates had been supplied, held (at [188] of the Judgment) that Wyser-I must have received US$166,544.02 as contended by BTL.

Sale of PE Division

17 In early October 2011, the Beyonics Group was considering the possibility of divesting itself of the PE Division, primarily by selling BTEC, the Chinese subsidiary that manufactured baseplates. The evidence indicated that Mr Goh favoured the NedKo Group as a possible purchaser of BTEC. In an e-mail dated 20 February 2012, Tony Lee confirmed that Mr Goh had promised earlier that the NedKo Group would be regarded as a "top priority as agreed". In another e-mail, dated 30 March 2012, Mr Goh promised Tony Lee the right of first refusal with regard to the sale of BTEC. In fact, on 3 January 2012, he had quoted a "friend price" of US$40m to Tony Lee. This quotation was made without the knowledge of the other directors of BTL and the price offered was considerably below the figure of US$50m that the Beyonics Group had asked from another interested buyer. Eventually, BTEC was not sold to the NedKo Group. Mr Goh's behaviour in this connection did not result in any loss to the Beyonics Group but it threw a light on his relationship with the NedKo Group.

Events from January 2013 onwards

18 Various disagreements having arisen between Mr Goh and the other directors of the Beyonics Group, it was eventually agreed that Mr Goh would tender his resignation on 9 January 2013 and would step down from his positions in the Group forthwith. It was further agreed that he was to continue receiving his monthly salary until 30 April 2013. Beyonics-I paid Mr Goh salary of $45,900 for the period from 10 January 2013 to 30 April 2013.

19 From 2012, the Beyonics Group's sale to Seagate declined steadily. Eventually, it was terminated as a supplier to Seagate. By the end of its financial year 2014, the Beyonics Group had lost all its Seagate business in respect of the manufacturing of baseplates. The Beyonics Group blamed Mr Goh for this loss.

The case below

The plaintiffs' claims below

20 Separate claims against Mr Goh and the other defendants were made by BTL and Beyonics-I. BTL had several causes of action. First, it claimed that Mr Goh had been in breach of his contractual, statutory and fiduciary duties to the Beyonics Group in that:

(a) He had secured the B-N Alliance and entered into the BAP-LND Contract, which formalised the alliance, and had thereby effected a diversion of business in relation to the Second Stage Work for Brinks 2H baseplates away from the Beyonics Group.

(b) He had procured the Seagate grant for the NedKo Group which assisted it in boosting its technical capabilities and had helped it grow as a supplier of baseplates to Seagate.

(c) He had received payment from the NedKo Group through the Wyser Agreements for diverting the baseplate manufacture business away from the Beyonics Group and for procuring the Seagate grant.

(d) He had also facilitated the NedKo Group in its competition with the Beyonics Group with the intention of allowing the NedKo Group to supplant the Beyonics Group in relation to the supply of baseplates to Seagate.

21 The second claim made by BTL was that Wyser-I dishonestly assisted Mr Goh's breaches of fiduciary duty and/or knowingly received payment under the Wyser Agreements. BTL's third claim was that Mr Goh, Wyser-I and the NedKo Group conspired by unlawful means to injure BTL and its subsidiaries. BTL claimed equitable compensation for its loss of profit which it described in two ways: first, as a diversion loss because of the diversion of Second Stage Work to the NedKo Group and, second, as a total loss of profits because of the loss of future baseplate business from Seagate.

22 The claim made by Beyonics-I was against Mr Goh alone. It alleged that in breach of his duties he had caused or instructed staff members to make unjustified expense claims against its account. It claimed repayment of those amounts. Secondly, it claimed to be entitled to recover unjustified salary of $45,900 which it had paid Mr Goh post his resignation in ignorance of his various breaches of duty which he had not disclosed, as he should have done.

The decision below

23 The Judge held that Mr Goh had breached his fiduciary duties to BTL. He had failed to act honestly and *bona fide* in the best interests of BTL as he

under-represented the Beyonics Group's capacity to Seagate and readily endorsed the B-N Alliance essentially to divert the Second Stage Work to the NedKo Group (Judgment at [124]–[125]). The court found that the Beyonics Group had sufficient capacity to carry out the Second Stage Work that was diverted. Mr Goh also facilitated the Nedko Group's business with Seagate and gave it preferential treatment in the proposed sale of BTEC (Judgment at [85]–[89]). His assistance to the NedKo Group went beyond what was required to implement the B-N Alliance (Judgment at [77]–[84], [90]). The culmination of Mr Goh's actions was that Seagate was given the impression that the Beyonics Group was not committed to the business with Seagate in the critical period after the Thai floods, while the NedKo Group was more than ready to supply Seagate (Judgment at [125]). Hence, Mr Goh's misconduct not only led to the Diversion Loss (Judgment at [138]), but also to the Total Loss as his breaches resulted in the Beyonics Group being eliminated as a Seagate supplier earlier than it would have been had Mr Goh acted properly (Judgment at [150]–[154]).

24 In addition, Mr Goh also breached the no-conflict and no-profit rules by accepting payments under the Wyser Agreements. The court characterised these as bribes (Judgment at [76], [127]). These payments created a conflict between his duty to BTL and his personal interests. His actions in developing his personal relationship with the NedKo Group also conflicted with his duty to BTL (Judgment at [48], [126]). Mr Goh had, further, breached his duty to disclose his wrongdoing to the Beyonics Group. In fact, he hid his correspondence with the NedKo Group by deleting a large number of incriminating e-mails which had to be recovered by digital forensics (Judgment at [128]). The court also found Mr Goh to be an unreliable witness who gave inconsistent evidence (Judgment at [180]).

25 In relation to Beyonics-I's claim against Mr Goh for various unjustified expenses and salary of S$45,900 paid out after 9 January 2013, this was also held to be made out (Judgment at [165]–[177]). Regarding the expenses, the court shifted the evidential burden to Mr Goh and found his explanation for the various questionable expenses to be bare assertions unsupported by evidence. The Judge concluded that the expenses were unjustified as they were incurred for Mr Goh's personal benefit and/or that of his family members (Judgment at [175]). As for the dispute over salary paid to Mr Goh after he resigned, the court held that it was unjustified and should be repaid to Beyonics-I based on the principle that no reasonable employer would agree to continue to pay the fiduciary salary when faced with knowledge of the fiduciary's breach of duties and lack of good faith. Mr Goh's counterclaim for outstanding salary was thus dismissed (Judgment at [177]).

26 The court granted judgment to BTL against Mr Goh and Wyser-I jointly and severally for payments under the Wyser Agreement as well as the Diversion Loss (Judgment at [225]). As for Beyonics-I, the court granted it judgment against Mr Goh for the unjustified expenses and unjustified salary (Judgment at [226]).

27 Lastly, judgment was granted to BTL against Mr Goh for the Total Loss, quantified at US$4,793,591 (Judgment at [225]). This figure was reached after the court preferred the overall methodology of the plaintiffs' accounting expert (Mr Iyer) to that of Mr Kon, the defendants' expert (Judgment at [191]–[192], [220]–[221]). However, the court held that the five-year period claimed for the Total Loss was not justifiable as there was evidence indicating that, in any case, Seagate would have ended its relationship with the Beyonics Group sooner or

later. In the view of the Judge, a period of two and a half years was a more reasonable period in the circumstances (Judgment at [222]–[223]).

28 In CA 94, Mr Goh and Wyser-I have appealed against all the orders made against them whilst in CA 98, BTL's appeal is against the quantification of the Total Loss on a two and a half-year basis instead of on a five-year basis.

The appeal

Summary of the parties' submissions

29 Mr Goh and Wyser-I's appeal in CA 94 hinges on the following contentions:

(a) There is no basis for the finding that Mr Goh did not act honestly or *bona fide* in the best interests of BTL as the court below made a fundamental error of law in approaching the question purely from an objective standpoint and hence sidestepped the critical question of what Mr Goh *subjectively* believed.

(b) The payments made to Mr Goh under the Wyser Agreements were not secret profits that had to be disclosed as there was no evidence that these payments were made to Mr Goh *because* he was a director of BTL.

(c) In any event, even if Mr Goh had breached any of his duties, he had acted honestly and reasonably and thus ought to be relieved from any liability, applying the defence under s 391 of the Companies Act (Cap 50, 2006 Rev Ed).

(d) BTL has no standing or right to recover the Diversion Loss and Total Loss as these losses were suffered by BAP since the revenue from the contracts with Seagate was recognised in BAP's accounts.

(e) The finding that the various expenses were unjustified was wrong since it was Beyonics-I that had the burden of proof. The court below had erred by placing the onus on Mr Goh to show that the expenses were legitimate.

(f) As for the salary paid out after Mr Goh's Notice of Resignation, it was the subject of an agreement for good consideration and hence was not recoverable.

30 The respondents' key submissions in response in CA 94 are as follows:

(a) The test in respect of the duty to act *bona fide* in the best interests of the company is both objective and subjective. Mr Goh's focus on his subjective belief underplays the importance of the objective element in the test.

(b) The payments made under the Wyser Agreements were bribes and, in any case, to be objectionable it was sufficient that the payments were received by Mr Goh within the scope of his fiduciary office; they need not have been paid to him in his official capacity as director.

(c) The defence of reflective loss was not pleaded and this is fatal. In any event, no reflective loss is being claimed as the computation of the Diversion Loss and Total Loss was not based on losses suffered by subsidiaries, but on losses suffered by BTL.

(d) The expenses that were impugned were rightly held to be unjustified. They indicated Mr Goh's cavalier attitude towards spending corporate funds. The evidentiary burden had shifted to Mr Goh, whose evidence and bare assertions on this issue demonstrated his lack of credibility.

(e) Beyonics-I would not have agreed to pay Mr Goh salary after his resignation if it had known of his breaches. Mr Goh's breach of his duty to disclose his wrongdoing amounted to a misrepresentation of the true state of affairs.

31 As for CA 98, BTL submits that the court below was not entitled to substitute an expert opinion with its own view on a matter outside the learning of the court. Having accepted BTL's expert's methodology over that of the other expert, the court should also have accepted his estimated period of loss of five years as well. In any event, the period of loss should not have been determined by reference to post-breach events. In response, Mr Goh submits that there is no basis to disturb the quantification of Total Loss as (a) the court could form its own view on what was a reasonable period of loss; and (b) the period of loss of two and a half years was reasonable based on the relevant material before the court, which showed the deteriorating market conditions that led to Seagate's decision to consolidate its supplier base.

The issues

32 As such, the issues to be determined in CA 94 are:

(a) First, whether Mr Goh breached his fiduciary duties owed as director to BTL;

(b) Second, whether the Wyser payments were objectionable and had to be disgorged;

(c) Third, whether Mr Goh has any defence under s 391 of the Companies Act;

(d) Fourth, whether BTL was entitled to claim the Diversion Loss and the Total Loss;

(e) Fifth, whether Mr Goh misapplied the funds of Beyonics-I in relation to various expense claims; and

(f) Lastly, whether Beyonics-I could recover the salary it paid to Mr Goh after his Notice of Resignation.

33 The sole issue in CA 98 relates to the quantification of the Total Loss.

Issues in CA 94

Did the court below err in finding Mr Goh to be in breach of duty?

34 Mr Goh's key criticisms of the findings below that he breached the duty to act in the best interests of BTL are that: (a) the court "sidestepped the critical question of what Mr Goh subjectively believed"; and, related to this, that (b) the court erred by focusing and relying on information and documents not available to Mr Goh at the time he formed his views and took the steps he did. Mr Goh's contention is that the test of whether a director has acted honestly and *bona fide* in the best interests of the company is partly objective and partly subjective.

35 Indeed, there are both subjective and objective elements in the test. The subjective element lies in the court's consideration as to whether a director had

exercised his discretion *bona fide* in what he considered (and not what the court considers) is in the interests of the company: *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306, as accepted by this court in *Cheong Kim Hock v Lin Securities (Pte) (in liquidation)* [1992] 1 SLR(R) 497 at [26] and in *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 ("*Ho Kang Peng*") at [37]. Thus, a court will be slow to interfere with commercial decisions made honestly but which, on hindsight, were financially detrimental to the company.

36 The objective element in the test relates to the court's supervision over directors who claim to have been genuinely acting to promote the company's interests even though, objectively, the transactions were not in the company's interests. The subjective belief of the directors cannot determine the issue: the court has to assess 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. This is the test set out in *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] 1 Ch 62 (at 74) and it has been applied here since adopted by this court in *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 (at [28]). Thus, "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": *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ("*Walter Woon*") at para 8.36, referred to in *Ho Kang Peng* at [38]. It is thus observed at *Walter Woon* at para 8.36 that in practice the courts often apply a more objective test although the test is theoretically subjective.

37 Having considered the judgment and the evidence, we are of the view that the Judge did not misapply the test when considering Mr Goh's actions and the allegations made against him. For the reasons given below, in our judgment, the finding that Mr Goh acted in breach of his duties to BTL and the Beyonics Group was amply supported by the evidence.

(1) Mr Goh did not act *bona fide* in the best interests of BTL

38 Mr Goh's arguments on what his subjective belief was ultimately fall flat as (a) Mr Goh's actions were not in BTL's best interests from an objective point of view, thus an inference could be drawn that he was not acting honestly; (b) his actions were tainted by his receipt of payments under the Wyser Agreements; and (c) his inconsistent and evasive evidence and inadequate explanations in relation to his deletion of incriminating e-mails from the computers he used during his employment with the Beyonics Group (recovered through digital forensics) do not support an inference that he was acting honestly.

(2) Mr Goh's actions were, objectively, not in BTL's best interests

39 Whether Mr Goh's actions were objectively in BTL's interests entails looking at these questions:

(a) With regard to the alleged diversion of business to the NedKo Group, could the Beyonics Group have handled all the business itself instead?

(b) Were Mr Goh's actions in assisting the NedKo Group to procure the Seagate grant, facilitating the NedKo Group's business with Seagate

by helping it develop its capacity to carry out the First and Second Stage Work, and in supporting the B-N Alliance, in the interests of BTL?

(c) Were Mr Goh's actions in relation to the sale of BTEC objectively defensible?

40 The first question concerns the production capacity of the Beyonics Group (in particular, BTEC) at the material time. This is relevant as Mr Goh contended that the B-N Alliance was for the benefit of the Beyonics Group as BTEC had already maximised its production and could not have undertaken both the First and Second Stage Work. The Judge noted that this factual assertion in relation to production capacity was not pleaded in the Amended Defence (Judgment at [97]). On this point, it would seem that Mr Goh's contentions on appeal are based on his submission that the court below was wrong to focus on an objective inquiry as opposed to a subjective one regarding his state of knowledge at the material time. In any event, Mr Goh's submissions on this point do not adequately address or refute the court's finding that BTEC at the material time had the capacity to perform the Second Stage Work that was diverted to the NedKo Group under the B-N Alliance. The court below reached this conclusion by assessing the objective evidence before it. It assessed four documents created around that time (the Changshu Capacity Matrix, BDA Memo, PE Memo and Draft Capacity Analysis) regarding BTEC's production capacity and a series of e-mails from Tony Lee to Mr Goh from 11 to 17 November 2011 ("the What-If Analysis E-mails"). It also considered evidence that at all material times BTEC had spare Computer Numerical Control ("CNC") machines (used in Second Stage Work) that could have been utilised to produce baseplates for Seagate. Additionally, the court was impressed by the fact that BTEC could have increased production capacity by

ramping up the number of production days and making some level of investment into other equipment (Judgment at [99]–[120]).

41 Mr Goh seeks to rely on the Changshu Capacity Matrix and the BDA Memo, instead of the PE Memo that the court below preferred. But he fails to address the court's conclusion that the Changshu Capacity Matrix did not reflect the maximum production capacity as the calculations therein did not include 66 unused spare CNC machines (Mr Goh merely asserts that this was "contrived and unbelievable") and that the BDA Memo presented figures that were meant to be conservative as it was intended to be a document for the sale of BTEC (nothing was said on this).

42 As for his contention that the court relied on material not available to Mr Goh at the time when he formed his views and took the steps he did, this seems a disingenuous and contradictory argument. It is noted that, on the one hand, Mr Goh argues that the PE Memo is dated 23 November 2011 which was five days (and only five days) after Mr Goh's meeting with Seagate on 18 November 2011, and therefore does not show Mr Goh's state of knowledge at the time of the under-representation on 18 November 2011. On the other hand, Mr Goh is seeking at the same time to convince this court that his subjective understanding on 18 November 2011 is corroborated by the BDA Memo dated July 2012 and the Changshu Capacity Matrix which was sent out by Tony Lee on 7 June 2012. These latter documents are dated at least *seven months after* the 18 November 2011 meeting.

43 As for the What-If Analysis E-mails, the Judge rightly concluded that these should not be relied to establish that there was a lack of capacity on the part of BTEC or what BTEC really required for production purposes since these

e-mails were prepared to assist the Beyonics Group obtain funding from Seagate when they met the latter on 18 November 2011. The e-mails thus reflected the Group's "wish-list" for a full range of equipment and investment instead of the minimum that it needed (and actually had). This is supported by the instructions Mr Goh gave that triggered the chain of e-mails. He told Mr Lee Leong Hua ("LH Lee"), the general manager of BTEC, to "do the calculation, thinking, and I want to have a discussion at 5pm. Next week, Seagate holing [*sic*] EBR again, *I need to ask for money and increase of price*, and I need to give them proposal" [emphasis added]. A perusal of the What-If Analysis E-mails and the contents of the November 2011 Slides makes it apparent that Mr Goh had planned to push for additional funding from Seagate at the 18 November meeting with the pricing and investment proposals in the slides. The November 2011 Slides themselves were sent out by Mr Goh to Seagate on 16 November 2011 in an e-mail where Mr Goh stated that his "proposal is very minimal cost outlay with good supply going forward". It is significant that the November 2011 Slides were prepared to push for funding as well as to pitch for the B-N Alliance. It would not have promoted the cause of the B-N Alliance had the Slides indicated that the Beyonics Group by itself had sufficient equipment and resources to undertake the production without the aid of the NedKo Group.

44 As for the sufficiency of CNC machines, the substantial number of spare CNC machines in BTEC's factory is not disputed. Instead, Mr Goh merely rehashes two arguments regarding how unutilised CNC machines did not mean that there was spare production capacity (based on the washing capacity of washing lines and manpower shortages) that the court below had dealt with. The strongest point Mr Goh puts forth relates to manpower as being a constraint on production. There were production reports that recorded "manpower shortages" in March, May and August 2012 that the court below did not address in the

Judgment. However, LH Lee did explain in cross-examination that these were not critical: in March, overall actual output was higher than overall planned output for all programmes, thereby negating any "manpower shortage" that was observed in the separate Mariner 3D and Mars 1D programmes (and not the Brinks 2H programme); in May, the manpower shortage arose "for one week itself only" and was not critical for BTEC's operation; and in August, the production report that was shown to LH Lee at trial did not actually indicate any "manpower shortage" (unlike what is claimed in Mr Goh's submissions). Instead, this production report was used to question LH Lee on a low overall production output across the various programmes. In any case, the "manpower shortages" observed in production reports arose from what happened at the plant as opposed to what was already planned for that week, and the references in these weekly reports did not undermine BH Lee's unchallenged evidence in his affidavit of evidence-in-chief ("AEIC") that manpower could be increased easily as employees could be recruited in one to two weeks and trained to operate the relevant machines in under four hours. Thus, these points relating to manpower as a production constraint do not justify a reversal of the Judge's finding that BTEC did have sufficient production capacity.

45 As for the second question, even if we were to take Mr Goh's case at its highest and assume that BTEC, in Mr Goh's subjective view in November 2011, did not have sufficient production capacity, it is clear that Mr Goh went beyond what was necessary to effect and facilitate the B-N Alliance. Objectively, Mr Goh's attempt to explain his visits to the NedKo Group as an example of the industry practice of companies supporting each other with small favours and that he was merely being generally helpful so that BTEC could reap the rewards of a good relationship with the NedKo Group under the B-N Alliance is not convincing. First, Mr Goh had offered Tony Lee information on the

PE Division, arranged factory visits and given advice on surviving in the hard disk drive business to the NedKo Group in September 2011. All this happened at an early stage, *before* the Thai floods that precipitated the need for the B-N Alliance. Second, Mr Goh's acceptance of payment for "consultancy services" allegedly rendered under the Wyser Agreements contradicted his reliance on industry practice. Third, Mr Goh's suggestion that the NedKo Group apply for the Seagate Grant and his assistance in procuring it are clearly beyond the realm of innocent small favours and being generally helpful to cultivate good relationships with other industry players. Mr Goh strategised how to secure the grant and received US$200,000 for this effort under the Second Wyser Agreement. Fourth, Mr Goh was also involved in and assisted the NedKo Group in its efforts to develop its e-coating plant so as to enable that Group to eventually be qualified for *First Stage* Work. This was beyond the remit of the B-N Alliance under which the NedKo Group undertook to perform only *Second Stage* Work. Objectively, Mr Goh's actions clearly put the interests of NedKo Group and himself above those of BTL and the Beyonics Group. This was done at a critical time when it was in the Beyonics Group's interest to secure the trust of Seagate, its key client, and to assure Seagate of its commitment to the business.

46 As for the third question concerning the circumstances surrounding the sale of BTEC, objectively Mr Goh's behaviour was also questionable and did not seem to be in BTL's interests. He went against the wishes of the other directors of BTL, was clearly favouring the NedKo Group, and unjustifiably did not want an independent agent appointed to facilitate the sale (which would have promoted transparency and ensured an independent, consistent and coordinated approach in negotiations). Unknown to the other directors of BTL, Mr Goh was also involved in extensive discussions with Tony Lee on how the

NedKo Group could obtain financing to acquire BTEC. Mr Goh's breaches in relation to the sale of BTEC were not so much that he was pushing for the NedKo Group to be the buyer of BTEC or that he did not achieve the best price for the potential acquisition, but that he clearly favoured a company that he had accepted secret payments from and that he was in extensive and secret discussions with.

(3) Mr Goh's actions were tainted by his receipt of bribes

47 In any event, Mr Goh's actions were tainted by his receipt of payments under the Wyser Agreements for his assistance to the NedKo Group. The Wyser Agreements clearly breach the no-conflict rule which obliges a fiduciary to avoid situations where his personal interests conflict with or may conflict with those of the company whose interests he is bound to protect, such that there is a risk he may prefer his interests over those of the company. Where a director is found to have placed himself in a position of conflict of interest, *he will not be permitted to assert that his action was* bona fide *or thought to be in the interests of the company*: *Walter Woon* at para 8.44; *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957 ("*Nordic International*") at [53].

48 The present case presents a conflict of interest situation where Mr Goh clearly preferred his personal interests and those of the NedKo Group over those of BTL. For his active role in the B-N Alliance that the First Wyser Agreement expressly alluded to, Mr Goh was financially rewarded. These payments taint all of Mr Goh's actions. Because they were made, any assertion by Mr Goh that he had an honest belief that he was acting in the best interests of BTL is highly suspect. A financial incentive to assist a competitor in the same industry is not compatible with such a belief. In any event, the law is strict on this point and Mr Goh is not permitted to assert that his actions were *bona fide* in the interests

of BTL since he acted to further his own interests. Herein lies the overlap between the no-conflict rule and a director's duty to act in the best interests of the company: when a director makes his own interests paramount, invariably he will not be acting in the best interests of his company: *Walter Woon* at para 8.39, cited in *Nordic International* at [56].

49 Thus, even if it was reasonable to accept that Mr Goh had believed that the Beyonics Group had insufficient production capacity to meet Seagate's requirements, his actions in procuring and facilitating the B-N Alliance were tainted by his opportunity to profit from this personally through the Wyser Agreements such that Mr Goh cannot be said to have been acting in the best interests of his company.

(4) Mr Goh's inconsistency and evasiveness

50 Further, at trial, the Judge observed that Mr Goh was an "unreliable witness" who was inconsistent, evasive and "provided answers which were implausible" (Judgment at [180]). Mr Goh's evidence even directly contradicted the evidence of Tony Lee and Billy Chua. This finding, along with the fact that Mr Goh has not satisfactorily explained why he had deleted a large number of incriminating e-mails with the NedKo Group, does not support an inference that Mr Goh believed that he had acted honestly.

How should the payments received under the Wyser Agreements be characterised?

51 The no-profit rule obliges a director not to retain any profit which he has made through the use of the company's property, information or opportunities to which he has access by virtue of being a director, unless he has the fully informed consent of the company. The rule is a strict one and liability to account

arises simply because profits are made: *Nordic International* at [54]. The no-profit rule can be seen as a particular application of the no-conflict rule, that a fiduciary may not obtain profit in connection with his position without the informed consent of the person he is duty-bound to protect: *Walter Woon* at para 8.38. A company may, however, validly release a director from his fiduciary duty by agreement, through either full and frank disclosure of all material facts to the members and/or subsequent ratification of the director's actions: *Lim Suat Hua v Singapore HealthPartners Pte Ltd* [2012] 2 SLR 805 ("*Lim Suat Hua*") at [93], citing *New Zealand Netherlands Society "Oranje" Incorporated v Kuys* [1973] 2 All ER 1222.

52 Mr Goh's appeal on this point raises four arguments: (a) the payments under the Wyser Agreements were not bribes, but were for "consultancy services"; (b) the payments did not breach the no-profit rule as they were not made to him *qua* director of BTL; (c) Mr Goh had informed the chairman of BTL's board of directors that he may be entering into consultancy agreements with the NedKo Group; and (d) the Wyser Agreements did not breach the no-conflict rule as his consultancy services and assistance under them were in the best interests of BTL because they ensured "correlation" between the plants in the B-N Alliance. In our judgement, none of these points is meritorious.

53 First, the wording of the First Wyser Agreement that ties the amount payable thereunder to the number of e-coated baseplates supplied and refers to this as a "sales and management support fee" speaks for itself. The Wyser Agreements do not mention the provision of "consultancy services" at all. Instead, they both refer to Mr Goh's assistance in securing business with Seagate for the Brinks 2H programme and to his assistance in procuring the Seagate Grant. It should be noted that if Mr Goh had, as he insisted at trial,

indeed done little to assist the Nedko Group to obtain the Seagate grant, the net payment of US$200,000 under the Second Wyser Agreement would have been a vast overpayment for his efforts. The disparity between the services ostensibly rendered and the fee paid makes Mr Goh's assertion that he was a consultant only completely unbelievable. In our view, these payments were rightly characterised as bribes and were not payment for "consultancy services". The secretive and suspicious behaviour of the various parties with regard to this arrangement also points to its illicit nature. When one Mila Hwang from the NedKo Group mistakenly sent an e-mail concerning the Wyser Agreements to the Beyonics Group, she subsequently attempted to cover up her mistake by lying that "Wyser" was the NedKo Group's agent for Western Digital, a competitor of Seagate. Mr Goh's intent to keep this arrangement concealed was also evinced by his instruction to Tony Lee to send the Wyser Agreements to his residential address, to which Tony Lee replied that he would "hand carry the document".

54 Second, Mr Goh misrepresents the law; payments that flout the no-profit rule need not strictly flow to the fiduciary *qua* director. Instead, the profit merely has to be obtained *in connection* with his position as a director (*Lim Suat Hua* at [90]) or "by reason or in virtue of the fiduciary office" (*Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at para 7-041). The opportunity to make the secret profit came to Mr Goh because he was the CEO of the Beyonics Group and could act to bring the B-N Alliance into existence and persuade Seagate to give the grant to the NedKo Group. It was in his capacity as director and CEO of BTL that he met Seagate and presented the November 2011 Slides that pushed for both the B-N Alliance and the Seagate grant. It was because of his position in BTL that he was invited to visit LND where he was able to discuss the B-N Alliance with Tony Lee. It was

not coincidental that it was during that visit that Tony Lee proposed that Mr Goh be compensated for his "consultancy services".

55 Third, there was no full disclosure to and informed consent from the *company*. The information that Mr Goh gave to the chairman of BTL, one Mr Chay, was clearly lacking in detail; all that Mr Goh claims he had conveyed was that he might be entering into consultancy agreements with the NedKo Group. He supplied no details of the services to be rendered. Nor did Mr Goh disclose that payment for the services would be made to him personally. Mr Goh admitted during trial that these details were not disclosed:

> Q: … so did Mr Chay subsequently approve the amounts that you were going to collect, the 2 cents per baseplate commission plus the net amount of US$200,000?
>
> A: First of all, *Mr Chay doesn't know the detail. I just tell him I provide consultancy.*
>
> Q: So in Mr Chay's mind it is possible he thinks you are doing this for free, right?
>
> A: Mr Chay know that I don't do thing for free.
>
> …
>
> Q: Isn't it possible in Mr Chay's mind that if you are to provide consultancy services, as CEO of Beyonics Group you might actually perhaps issue an invoice to [Nedko] Group for the services rendered by you?
>
> A: Could be.
>
> Q: Could be, yes. *But you never made clear with Mr Chay, right*?
>
> A: *That's correct.*
>
> Q: That the money goes straight into your pocket.
>
> A: Yes.
>
> [emphasis added]

Further, the disclosure, even if full, would not release Mr Goh from his obligations to the company: Mr Chay did not constitute the board of directors, and there was no evidence that Mr Chay conveyed what scant information he obtained from Mr Goh on such consultancy services to the other directors.

56 Lastly, if the work done pursuant to the Wyser Agreements was indeed in the best interests of the Beyonics Group as Mr Goh asserts, all the more the no-conflict and the no-profit rules would be engaged. In that case, Mr Goh's receipt of payments under the Wyser Agreements would be tantamount to obtaining profits secretly. The applicable principle is that if a director accepts payment "in consideration for acting in a certain way in relation to the company's affairs, he will clearly be in breach of his fiduciary duty": *Walter Woon* at para 8.45(3). This point rebuts Mr Goh's argument that he was not acting *qua* director under the Wyser Agreements. If Mr Goh was facilitating the B-N Alliance in order to promote BTL's interests, the fact that he was being paid by the NedKo Group to do so means that those payments were in consideration of his acting in a certain way in relation to BTL's affairs. Notwithstanding that the actions promoted BTL's interests, the no-conflict and no-profit rules would still be engaged.

57 Thus, the payments made under the Wyser Agreements were rightly characterised as bribes or secret commissions to Mr Goh that resulted in a situation where Mr Goh's duty of loyalty to BTL was compromised. These payments were unauthorised commissions obtained by Mr Goh as a result of his fiduciary position. Strictly, it is even unnecessary to show a conflict between duty and interest as the *fact of the bribe is sufficient*: *Snell's Equity* at para 7-047. The orders made by the Judge that Mr Goh and Wyser-I are jointly

and severally liable to pay BTL the sums of US$200,000 and US$166,554.02 received under the Wyser Agreements must stand.

Is there a defence under s 391 Companies Act?

58 Section 391 of the Companies Act gives the court discretion to grant relief to an errant director by providing that:

> **Power to grant relief**
>
> 391.—(1) 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.
>
> (1A) For the avoidance of doubt and without prejudice to the generality of subsection (1), "liability" includes the liability of a person to whom this section applies to account for profits made or received.
>
> [emphasis added]

59 Mr Goh invokes this section in his aid but his submissions on the point merely state that the court below erred in refusing to apply s 391 without giving any reason or elaboration whatsoever. Given the affirmation above of the Judge's findings in relation to Mr Goh's breaches of the duty to act *bona fide* in the interests of BTL and his duty of loyalty, there is no merit in any claim that Mr Goh acted honestly or reasonably, or that it is fair in the circumstances of the case that he should be excused for his breaches which were many and egregious.

Is there a legal basis to support the Total Loss and Diversion Loss claims put up by BTL?

60 The third issue in CA 94 relates to the nature of the claims put forward by BTL against Mr Goh. Before us, Mr Goh's position is that since, as BTL acknowledged, BAP was the party that invoiced Seagate for the finished baseplates and received payment from it, there was no basis on which BTL could claim any loss of profit. BTL responds that Mr Goh is trying, wrongfully, to characterise BTL's claims as claims for reflective loss and he is not entitled to do so as no such defence was pleaded. We need, therefore, to consider the pleadings.

61 The amended statement of claim filed by BTL in the action below pleaded at para 4 that the revenue from the contracts with Seagate was recognised in the accounts of BAP, a wholly-owned subsidiary of BTL and part of the PE Division. In paras 21 to 33, BTL set out particulars of Mr Goh's conduct which resulted in the diversion of business to the NedKo Group and the build-up of the Nedko Group's competitive ability. Then in para 34, BTL set out its claim as follows:

> 34. By reason of the matters set out in paragraphs [*sic*] 33 herein, [BTL] has suffered loss and damage.
>
> **PARTICULARS**
>
> (a) Loss of profits as a result of the Diversion.
>
> (b) Loss of profits resulting from loss of future business from Seagate with regard to the supply of baseplates for Seagate HDDs.

62 In the joint defence filed by Mr Goh and his co-defendants, para 1 contained an assertion that the statement of claim disclosed no reasonable cause of action and was otherwise an abuse of process of the court. After denying

various allegations in the statement of claim, the defendants by para 24 specifically denied paras 33 and 34 of the statement of claim.

63 As we read the two sets of pleadings against each other, it appears clear to us that by the statement of claim BTL was asserting that it, directly, had suffered two types of loss of profits as a result of Mr Goh's actions in relation to the NedKo Group. The first was the immediate profits that were lost because of the BAP-LND Contract which resulted in the Second Stage Work for baseplates moving from BTEC to LND. This is what BTL referred to as "the Diversion" in para 34(a) of the statement of claim. The second was the loss of future profits from contracts with Seagate because Mr Goh facilitated the growth of the capacity and capability of the NedKo Group as a competitor to the Beyonics Group. This was the future loss referred to in para 34(b) of the statement of claim. Turning to the defence, the effect of para 24 thereof was that the defendants clearly denied that Mr Goh's actions caused BTL to suffer either type of loss of profit.

64 We agree with BTL that there was no plea in the statement of claim that BTL's loss was a reflective loss. Our agreement on the point does not mean, however, that we accept BTL's submission that Mr Goh's objection to its claims was that they were for reflective loss. That was not so. Mr Goh's pleading was simply that BTL had not suffered the losses it had claimed and that it had no reasonable cause of action. We see no difficulty at all with such a pleading. What it meant was that BTL had the onus of proving, both in law and in fact, the losses it claimed and that it was open to Mr Goh to submit that BTL was not entitled to make this claim either as a matter of law or as a matter of fact or both.

65 BTL, however, has from the time of the trial taken the position that, due a deficiency in the pleading of the defence, Mr Goh is not entitled to argue that the losses that BTL claims were not incurred by it but rather by BAP. What happened below is dealt with at [34]–[37] of the Judgment. The Judge noted (at [34]) Mr Goh's submissions that:

> (a) in view of BTL's express admission in the amended statement of claim that the revenue from the baseplate contracts was recognised in the accounts of BAP, BAP rather than BTL should be the proper party to claim any damages or loss of profits arising from Mr Goh's breaches;
>
> (b) it would be erroneous at law to equate a loss of profits incurred by BAP with a loss of profits incurred by BTL; and
>
> (c) at best, BTL would have a claim for loss of dividends flowing from BAP to BTL. However, there was no quantification for such a loss and therefore BTL's claims against Mr Goh must fail.

66 The Judge rejected the submissions. She held (at [35]) that a defence that BAP, and not BTL, was the proper party should be specifically pleaded, as it was clearly intended to render BTL's claim unsustainable. Alternatively, it should have been pleaded because it was a matter which if not specifically pleaded might take BTL by surprise. Secondly, the point was not in any of the AEICs and was alluded to only once during the cross-examination of BTL's witnesses. The Judge stated that when the questioning on this point was objected to by BTL's counsel it was dropped and not resumed. Thirdly, the Judge held (at [37]) that the defence was substantively flawed because BTL's claims were for its own losses as the holding company of all the subsidiaries in the PE Division. In this regard, [37] of the Judgment states:

> … [BTL] did not seek to equate the losses of BAP with its own losses, as the Defendants claim. As will be seen at [192] onwards, in computing the alleged losses, [BTL] relied on financial information on a consolidated basis, and did so from the perspective of [BTL] (and not its subsidiaries). There is nothing to show that [BTL] is not in the position to direct and control the application of the cash and profits of its subsidiaries, including BAP. Therefore, I find that [BTL] is able to pursue the claims.

67 With due respect, we do not agree with the Judge's conclusions and her reasons. In our judgment, the law does not permit profits earned by BAP to be attributed to its holding company BTL so as to entitle BTL to sue for such profits.

68 First, we deal with the pleading point. As we have shown above, the question whether Mr Goh's wrongful acts had caused BTL itself to suffer any loss was put squarely before the court by reason of the defendants' pleadings. It was not necessary to plead that the entity entitled to recover from Mr Goh was BAP. The defendants' denial that BTL had a reasonable cause of action and the further denial that it had suffered any loss was sufficient to put BTL on notice that it had to prove its cause of action and its losses. As BTL chose to assert that it had sustained loss of profits, it had to prove that those losses were directly sustained.

69 We also take a different view of whether counsel for Mr Goh had dropped this point during the course of the proceedings. It appears to us that he did not do so despite the objections of BTL's lawyer. The point of whether BTL was entitled to claim the loss of profits that was actually suffered by BAP was raised not only with BTL's director, Mr Shaw, but also during the cross-examination of BTL's expert, Mr Iyer. The point was also made in the closing submissions. It should be noted that the evidence given by both Mr Shaw and

Mr Iyer was that the Beyonics Group had suffered a loss "on a consolidated basis". Mr Iyer accepted, during cross-examination, that the Diversion Loss and the Total Loss that he had calculated (approximately US$3m and US$10.1m respectively) were losses suffered by BAP. He said that such profits could have been remitted upwards to BTL in the form of dividends or other tax efficient methods but accepted that the workings in his expert report did not address how the profits earned by BAP would have been remitted to BTL. He conceded that he had calculated the Diversion Loss and Total Loss from a "group perspective" and as losses in the consolidated accounts. There was no evidence from Mr Shaw or Mr Iyer of any loss of profits suffered by BTL itself as a result of the diversion of the Seagate business.

70 The third point is the most important point. It appears from [37] of the Judgment that the Judge considered that the holding company in a group of companies could claim for loss suffered by a subsidiary in the group because as a holding company it was in a position to direct and control the application of the cash and profits of its subsidiaries. This, however, is not the law.

71 The well-established doctrine that each incorporated entity is a separate legal entity with separate legal rights and liabilities applies as much to companies within an ownership group as it does to companies that are unrelated to each other. As stated by Sundaresh Menon JC (as he then was) in *Public Prosecutor v Lew Syn Pau and another* [2006] 4 SLR(R) 210 ("*Lew Syn Pau*"), at [212], the doctrine of separate legal personality is not displaced simply by virtue of the fact that the companies in question are, as members of a group, organised as a single economic unit. Thus, between a parent or holding company and its subsidiary, the rights and assets of the related companies are treated as belonging to each discrete company, distinct from those of the other company.

Further, in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 ("*Manuchar Steel*"), Lee Kim Shin JC observed at [101] that the single economic entity concept was not recognised by Singapore law or by the common law generally. This being the case, it is incorrect to say that BAP's loss of profits that were booked in BAP's accounts could be considered to be the loss of profits of its holding company, BTL, simply because consolidated accounts were prepared for the whole Beyonics Group.

72 To amplify, Menon JC in *Lew Syn Pau* stated at [204] that "reliance upon the fact of *control* and of *consolidation of group accounts* is misplaced if it is thereby sought to be suggested that the doctrine of separate legal personality is something displaced in a group setting" [emphasis added]. Consolidated financial statements are required by financial reporting standards when an entity controls one or more other entities (see Financial Report Standard 110 on Consolidated Financial Statements as issued by the Accounting Standards Council Singapore, a standard which applies to BTL). The mere fact that accounts are consolidated on a group basis for reporting purposes does not detract from the reality that the profits (and losses) of each separate company are still that company's own profits and losses.

73 Another argument made and accepted below for treating the Diversion and Total Losses as BTL's rather than BAP's is that the Beyonics Group's business with Seagate was conducted on a "collective nature", where billing for baseplates sold was done by several subsidiaries. This cannot be accepted. Although the business of BTL as the holding company was, in practical terms, wholly comprised of the businesses of its subsidiaries and it was in a position to control and direct the profits of its subsidiaries, the reference to the "collective nature" of the Beyonics Group's business with Seagate where "different

subsidiaries were contracting parties at different points in time for different types of baseplates, and it was BTL that had control over these wholly owned subsidiaries" is clearly an invocation of the single economic entity concept which Singapore law does not recognise.

74 The Beyonics Group organised its business with Seagate in such a manner that whichever member of the PE Division carried out the manufacturing of baseplates, the finished product was billed for by BAP. BAP was the company which contracted with Seagate for the supply of baseplates and then sub-contracted the actual manufacture out to other subsidiaries in the Group. When the manufacturers finished the baseplates and sent them to Seagate, the invoicing was done in the name of BAP. In turn, Seagate paid BAP and all the revenue was booked in BAP's accounts. BAP then had the responsibility of paying the manufacturing subsidiaries for the work they had done. Accordingly, the entity that was no longer able to bill Seagate or receive payment from it, first because of the Diversion and later because of the termination of the business altogether, was BAP not BTL.

75 It was BAP that suffered the Diversion Loss and the Total Loss and these losses could not legally be transformed into BTL's losses whether by the preparation of consolidated accounts or in any other way. Accordingly, the Judge erred in awarding BTL damages based on such losses and Mr Goh's appeal on this point must be allowed. While this result may seem harsh to BTL given the egregious nature of the breaches by Mr Goh, the alternative – which would be to recognise the single economic entity concept – would be contrary to both principle and authority. It would critically undermine the doctrine of separate legal personality which is the bedrock of company law not just in Singapore but also throughout the common law world. The single economic

entity concept is also difficult to reconcile with the restricted approach to the piercing of the corporate veil which is a feature of the common law (see *Manuchar Steel* at [96]). Generally, piercing the veil is justified by abuse of the corporate form or if it is necessary for the veil to be lifted to give effect to a legislative provision (see *Walter Woon* at para 2.84); but neither situation exists here. BTL was not a wrongdoer. Hence, we cannot ignore the separate legal existence of BAP and BTL much though we deplore Mr Goh's conduct.

Were the impugned expenses improperly claimed?

76 We now turn to deal with the appeal in respect of the expense claims that Mr Goh was ordered to repay Beyonics-I. In the court below, Beyonics-I claimed that Mr Goh had caused or instructed members of its staff to make unjustified expense claims and that as these instructions were given in breach of fiduciary duty, it was entitled to recover the amounts expended from him. The Judge accepted Beyonics-I's submissions and ordered Mr Goh to return the following:

(a) $99,598.80 for wine purchases made between June 2006 and December 2012;

(b) HK$38,400 spent on a piece of medical equipment known as an impulse massager in May 2012;

(c) $1,464.65 spent on course fees for courses attended by Mr Goh's daughter between July and December 2011;

(d) $8,225 being the balance of $10,329 paid from petty cash for treatments administered to Mr Goh by a Japanese practitioner of

alternative healthcare during the period from 26 July 2012 to 2 January 2013;

(e) $1,679 being the cost of a camera lens purchased on 2 November 2012; and

(f) $16,000 being the cost of ten fountain pens purchased on 7 December 2011.

77 Mr Goh submits, and we agree, that the relevant test in relation to the validity of commercial transactions entered into by directors who owe a duty as fiduciaries to companies is the three-part one stated by Eve J in *Re Lee, Behrens & Co Ltd* [1932] 2 Ch 46 ("*Lee Behrens*") at 51 and adopted in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others* [2010] SGHC 163 at [165]–[166]:

(a) Is the transaction reasonably incidental to the carrying on of the company's business?

(b) Is it a *bona fide* transaction?

(c) Is it done for the benefit and to promote the prosperity of the company?

78 Mr Goh submits that the Judge applied the wrong test in assessing the validity of the expense claims. We disagree. Although the Judge did not refer explicitly to the *Lee Behrens* test in the Judgment, she had clearly approached the inquiry with these considerations in mind before concluding that the various expense claims were unjustified. In her decision, the Judge had considered whether the transactions were relevant to the business and whether they had

been incurred for the benefit of Beyonics-I before reaching her findings that they were entered into for Mr Goh's personal benefit and/or that of members of his family (Judgment at [175]).

79 In relation to Mr Goh's further submission that the Judge had wrongly placed the onus on Mr Goh to show that the expense claims were legitimate, this is a non-starter. From the Judgment (at [165]–[175]), it is apparent that the Judge considered that only the *evidential* burden had shifted to Mr Goh and had concluded after assessing the evidence that the various expenses were unjustified. The *legal* burden of proof remained with Beyonics-I. Choo Han Teck J's comments at [6] of *John While Springs (S) Pte Ltd v Goh Sai Chuah Justin and others* [2004] 3 SLR(R) 596 ("*John While Springs*") on the shifting of the evidential burden in such cases is instructive:

> … when a plaintiff seeks to prove that a defendant is in breach of a fiduciary duty, *the burden of proof lies with the plaintiff, but equity may accept a lower standard of proof sufficient to require a shifting of the evidential burden to the defendant.* This is nothing more than stating the *plain application of the court's discretion as to when it thinks that sufficient evidence had been led so as to require a rebuttal or reply.* When all the shifting is done, the court will assess the evidence in its entirety. That is to say that it will look at the nature of the evidence; to all that had been written or said, and all that had not been said, and determine the weight to be given to the sum and its parts. Thereafter, the big question, "Has the plaintiff or defendant as the case may be, proved his case on a balance of probabilities?" may be answered.
>
> [emphasis added]

80 Having considered the various expenses that Beyonics-I sought to recover, we agree with the Judge that the following expenses were, clearly, not reasonably incidental to the carrying on of the business of Beyonics-I, were not *bona fide* transactions and were not incurred for its benefit:

(a) *Medical equipment – HK$38,400*: (i) there is no evidence that the impulse messenger was relevant to the business at all, with no research or paperwork to indicate that it was bought for research and development purposes; and (ii) Mr Goh admitted that the equipment was sometimes in his room and that he had used it.

(b) *Course fees for Mr Goh's daughter – $1,464.65*: (i) Mr Goh's daughter attended courses on interpersonal communication skills and on financial statements at the company's expense during two short stints of *temporary* employment with it; and (ii) Mr Goh could not demonstrate how the courses were directly relevant to the work his daughter handled for the company.

(c) *Payments for alternative healthcare – $8,225.00*: Mr Goh's argument that the electro-acupuncture treatment by a *Japanese* physician was an allowable expense is a highly technical one that is not convincing. The Human Resources Manual of the Beyonics Group deals with employee medical expenses and sets out a list of such expenses that the Group will not pay for. Among these is "Expenses for treatment rendered by Chinese physician". Mr Goh argues that since his treatment was a Japanese one the cost could be reclaimed. This is hair-splitting. Mr Shaw's evidence was that the Group only covered conventional medical treatments and any type of traditional or alternative treatment had to be self-funded. This policy is amply reflected in the Manual which makes it clear that even hospitalisation and surgical expenses can only be recovered when recommended by a company appointed doctor or by a legally registered physician. By Mr Goh's strained reasoning,

all alternative healthcare expenses, as long as they were not provided by traditional Chinese physicians, would be reimbursable.

(d) *Camera lens – $1,679.00*: it is fatal to Mr Goh's stand on this item that (i) Mr Goh did not keep the camera and lens in the office and only returned them on 30 April 2013 (four months after he resigned); and that (ii) no evidence of Mr Goh's claim that the lens was purchased to conduct studies and also used for corporate marketing purposes was adduced.

81 As for the fountain pens ($16,000) and wine purchases ($99,598.80 unaccounted for), it is less clear that these transactions were not *bona fide*. The evidential burden, however, was plainly on Mr Goh, considering the exorbitant amount of money spent on these items that were not directly relevant to the Beyonics Group's various businesses which did not involve the manufacture or sale of liquor or writing implements.

82 Regarding the bottles of wine, they were purchased over a period of approximately seven years and Mr Goh's explanation for the purchases is not inherently unbelievable. He stated that the bottles were either given to customers or used for internal and external company functions for the Beyonics Group's employees, business associates and suppliers. For the plaintiffs to insist on a proper accounting process for the consumption of wine may be belated. Beyonics-I should have put in place such a system much earlier. Although the wine is indeed unaccounted for, Beyonics-I did not produce any positive evidence that Mr Goh had misappropriated the wine. Considering the fact that there were records of wine consumed at a company event in 2007, it is not

unlikely that the unaccounted for wine may have also been consumed at similar company functions. What tells against Mr Goh however are the following:

(a) he was the CEO of the Group during the whole period when the wine was purchased and it was well within his remit to ensure proper records were kept of the functions the wine was purchased for so that this problem would not have arisen at all;

(b) the exorbitant amount spent on wine during the period: it comes to an average of $1,290 per month during the seven-year period and this seems excessive for a manufacturing company; and

(c) the fact that Mr Goh had refused to cooperate with an internal investigation on this matter.

83 On balance, Mr Goh has not convinced us that the Judge was wrong in holding that the purchase of the wine was an unjustified expense.

84 As for the fountain pens, *prima facie*, Mr Goh's explanation was reasonable. Purchasing gifts to reward long-serving members of the staff or departing directors would not flout the *Lee Behrens* test and can be said to be for the benefit of the company as an incentive to employees and a sign of appreciation for directors. Perhaps Mr Goh should be charged for the one fountain pen he received out of the five pens that he claimed were meant to be given to *previous* directors of the board (while he had actually remained) but to do so would, in our view, be petty and offend the *de minimis* principle. Accordingly in this respect, and on this item alone, we disagree with the Judge's finding and hold that Mr Goh does not have to pay the back the cost of the fountain pens.

Can Mr Goh's salary for the period after his resignation be reclaimed?

85 Mr Goh's employment agreement with Beyonics-I dated 31 August 2005 contained a contractual notice provision providing for a contractual right to terminate employment with six months' notice:

> Either party may terminate this employment by giving the other party six months written notice.

86 On 9 January 2013, Mr Goh tendered his Notice of Resignation, giving notice of his resignation as an employee "with effect from 30 April 2013". The notice also confirmed that payment of his salary up to 30 April 2013 and reimbursement of all approved expenses would be full and final satisfaction of any claims he had against Beyonics-I, and that Beyonics-I had agreed to waive the contractual requirement that he serve out his full notice period. A total of $45,900 was paid to Mr Goh as salary from 10 January to 31 March 2013. The Judge found that the post-resignation salary payment was unjustified and should be repaid to Beyonics-I. Her reason, based on *John While Springs* at [7], was that no reasonable employer would continue to pay a fiduciary salary when faced with knowledge of the fiduciary's breach of duties and lack of good faith.

87 With respect, we do not agree that *John While Springs* supported the Judge's finding on this issue. In *John While Springs*, Choo Han Teck J allowed the plaintiffs to reclaim bonus payments paid to their ex-employee who had breached his fiduciary duty on the basis that "[n]o reasonable employer would have offered a bonus to a cheating employee, or one who was in breach of his fiduciary duty as was the case here". However, the present case can be distinguished on the facts. Unlike a bonus that is "generally a payment fashioned as a reward as well as an incentive" (*John While Springs* at [7]), salaries paid after resignation are generally contractually due to the employee. In such

situations, payments of salary after resignation are not gestures of goodwill, but would be the employee's contractual entitlement. In *Schonk Atonius Martinus Mattheus and another v Enholco Pte Ltd and another appeal* [2016] 2 SLR 881 ("*Schonk*"), this court held that an employer may not use an employee's breach of fiduciary duties to justify withholding payment of salary that that employee is entitled to. Instead, the employer would only be entitled to make a deduction from the employee's salary in respect of such losses as the employer can prove that it has suffered by reason of the employee's breach (*Schonk* at [15]). The employee in breach in *Schonk* was held to have been entitled as a matter of law to his salary for so long as he was working and, in the particular circumstances of that case, regarded himself as an employee. In the present case, if Mr Goh had a legal entitlement to the salary he was paid for the period after he served notice of resignation, his breaches of fiduciary duties would not take that entitlement away from him. Accordingly, those breaches cannot, in themselves, support a claim for reimbursement of the amount paid.

88 There is, however, another way in which the Judge's order that Mr Goh repay the salary he received can be justified. To abridge a contractual period of notice, mutual agreement between the parties to a contract of employment is required: see *Halsbury's Laws of Singapore* (LexisNexis Singapore, 2017 Reissue) ("*Halsbury's*") vol 9 at para 100.190. Although Mr Goh's Notice of Resignation was signed only by him, it purports to evince such a mutual agreement to abridge the six months' contractual period of notice to about three and a half months (from 10 January to 30 April 2013). The issue that arises is whether this was a valid agreement supported by consideration. Mr Goh argues that he provided consideration in the form of his accepting a lower amount in lieu of full notice (which would have been six months' worth of salary) and by giving up any claim against the company.

89 It is trite that a detriment incurred by the promisee (at the request of the promisor) may constitute consideration. This rule does not apply here, however. First, Mr Goh was not as a matter of law entitled to salary in lieu of notice either contractually by express provision or under common law; and second, the abridgment of the contractual notice period was requested by *Mr Goh himself* and not by Beyonics-I.

90 An employer is entitled to terminate a contract of employment by payment of salary in lieu of notice, even where the contract is silent on this and also arguably where it is expressly provided that it is terminable by notice. However, it seems that the employee is, under common law, *not entitled* to terminate the contract of employment by payment of salary in lieu of notice (see *Halsbury's* vol 9 at para 100.195, citing *Heron, Gethin-Jones & Liow v John Chong* [1963] MLJ 310 at 313 *per* Wee Chong Jin CJ, where this court held that implying a term to enable an employee to terminate his employment by paying salary in lieu of giving and serving the required notice was not necessary to give the employment contract business efficacy). Here, Mr Goh was the one who sought an abridgment of his contractual notice period. The company simply agreed to his request. Thus there was no issue of any consideration being provided by Mr Goh. If the company had wanted him to leave early and forgo the salary which he could otherwise have earned during the six-month notice period, then Mr Goh's acceptance of three-and-a-half months of salary would have been good consideration for the abridgement agreement.

91 Mr Goh's submission that he gave good consideration by giving up any and all claims that he may have had against Beyonics-I is also flawed. Although such forbearance can constitute sufficient consideration (*Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at [71]), on the facts it cannot be surmised that there

was a request from Beyonics-I that Mr Goh forbear from suing it. In *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250, this court found on the facts that there was no implied request from the appellants for the respondent to forbear to sue them and thus held (at [22]) that there was no consideration in form of a forbearance to sue.

92 We hold therefore that the claim that Mr Goh should repay $49,500 was justified because it was money paid under a contract not supported by consideration. On this basis, the unjustified salary claim was rightly allowed by the Judge, albeit her reason for doing so was different.

Issue in CA 98

93 As we have decided above that BTL was not entitled to claim the Diversion Loss and the Total Loss from Mr Goh, we need not deal with BTL's cross-appeal on the issue of whether the Judge had correctly quantified the Total Loss.

Conclusion

94 For the reasons given above, we allow CA 94 in part. We set aside the order below that Mr Goh and Wyser-I jointly and severally pay US$2,970,559 to BTL for the Diversion Loss. We also set aside the order below that Mr Goh pay BTL US$4,793,591 for the Total Loss. In respect of Beyonics-I, we confirm the payment orders made against Mr Goh below, save that the sum of $126,967.45 representing the unjustified expenses shall be reduced to $110,967.45 due to the deduction of the $16,000 spent on the fountain pens. Apart from the foregoing, we dismiss the appeal.

95 As the claims for loss of profits have not been allowed, we order the respondents in CA 94 to remove the caveats that they have lodged against the property of the appellants in the same appeal. In view of Mr Goh's egregious breaches of fiduciary duty which resulted in substantial loss to the Beyonics Group, a Group whose interests he had a duty to protect and promote, however, we are not inclined to make any order for damages in favour of any of the appellants.

96 We dismiss CA 98.

97 As for costs, since the appellants in CA 94 have been only partially successful and CA 98 has failed, parties shall make written submissions on costs (limited to ten pages each) within two weeks of the date hereof.

Chao Hick Tin	Andrew Phang Boon Leong	Judith Prakash
Judge of Appeal	Judge of Appeal	Judge of Appeal

Davinder Singh SC, Jaikanth Shankar, Chan Yong Wei and John Lo (Drew & Napier LLC) for the appellants in CA 94/2016 and respondent in CA 98/2016;
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